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# INTERNATIONAL LAW AND THE RULE OF LAW

It is a very great honour to have this biennial lecture series instituted in my name at my Law School. Adelaide is still home despite years of wandering, and this Law School is and always will be my home Law School, where I learnt the subject under such lecturers as Horst Lücke, John Keeler, David St Leger Kelly, Michael Trebilcock, DP O'Connell, Brent Fisse, Ivan Shearer, Andrew Wells and John Finnis, and with tutors such as the young John Doyle and the young Bruce Debelle. It is the Law School where I first tried to teach, and was at least taught how to think for myself and how to examine others by friends and colleagues such as Michael Detmold. When I was a tram conductor in the summer vacation I once sold a ticket to a sandalled John Bray on his way to the beach; and Roma Mitchell was a new figure on the bench, all grace and determination.

It is tempting to imagine that there were giants in those days. But Australians to this day continue to reach the highest standards of legal education, legal scholarship and legal professionalism. People at Cambridge often ask why so many good lawyers come from Australian law schools, and why so many Australians hold chairs or other positions at Cambridge and Oxford. Actually they ask this question specifically about professors from Adelaide, and they also mutter about the need for affirmative action for non-Australians. They ask similar questions about international lawyers — why so many of them have come from places such as Adelaide, or at least have sojourned here. (O'Connell of course was not a native; he was only here for 30 years.) And this is not just a story of old times and old timers — the standards are maintained and enhanced by scholars such as Hilary Charlesworth and Judith Gardam. We are fortunate in the standard of our legal academies, and they are revealed when people like Ninian Stephen or Anthony Mason or Gavan Griffith preside over international arbitral tribunals, or when others like Elizabeth Evatt or Ivan Shearer serve as members of the United Nations Human Rights Committee. We should do everything we can to maintain both the standard of our law schools and the comprehensive vision of good lawyering which is the mark of our best graduates, students who, year in and year out, it is such a pleasure to teach at postgraduate level at Cambridge.

I said 'a comprehensive vision' of law and lawyering. I do not mean just an international vision, a vision that the international is, as it were, somewhere else —

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that it is over there, not here, that we have to get on another plane to find it. We all act locally, albeit in different localities, but if we are to make sense of our world we must all think globally — not only in relation to the environment but also in relation to business, the professions, interpersonal relations and fundamental values of justice and coexistence. It is of such a fundamental value that I speak today, a value that developed locally, the value of the rule of law, and which, I will argue, must be instituted globally if we are to have a secure future.

## I

In his study of the class-based enforcement of the eighteenth century criminal law, the Marxist historian E P Thompson describes the rule of law as 'an unqualified human good'.[1] This is a surprising description in its context, a context of class legislation enforced by severe sanctions against the poor. Yet according to Thompson the rule of law imposed at least some process constraints on the powerful, despite the repressive aims of the Black Acts.

If it is a 'human good', the rule of law is at the same time a particularly legal, formal virtue, a virtue that legal systems should have and may have. As Joseph Raz notes, it is not a summary of all the general qualities to which a legal system should aspire; it is not a synonym for general justice, still less for democratic values.[2] For present purposes I will take as the core of the rule of law the main elements he identifies: first, the absence of arbitrary power; second, general non-retrospectivity; third, the subjection of government to general laws, whatever their content; fourth, the independence of the judiciary, which must be 'established by law'.

Lon Fuller, like Michael Detmold a seeker for the unity of law and morality, has argued that the rule of law is a necessary internal virtue of any functioning legal system, something a legal system has to have even to exist.[3] But, if true at all, this is true only to a very limited extent. In fact there are legal systems in the world where the rule of law does not prevail, yet there is law. We can talk without contradiction of (say) Turkmenistan law even though that law consists largely of permissions to the powerful and prohibitions on the weak, and even though the taps

1 E P Thompson, *Whigs and Hunters: The Origins of the Black Act* (1977) 266.

2 Joseph Raz, 'The Rule of Law and its Virtue' in J Raz (ed), *The Authority of Law: Essays on Law and Morality* (1979) 210, 211. See also D Dyzenhaus (ed), *Recrafting the Rule of Law: the Limits of Legal Order* (1999); T R S Allen, *Constitutional Justice. A Liberal Theory of the Rule of Law* (2001); Paul Craig, 'Formal and Substantive Conceptions of the Rule of Law: An Analytical Framework' [1997] *Public Law* 467.

3 Lon L Fuller, *The Morality of Law* (1973); Michael J Detmold, *The Unity of Law and Morality: A Refutation of Legal Positivism* (1984). See also the debate between Kramer & Simmonds in [2004] *Cambridge Law Journal* 65, 98.

of that law may be turned on and off at will by the Turkmenbashi. And this is not just a case of lesser non-Western breeds without the rule of law (for Kipling the lesser breeds were the Germans[4]). One of the most fascinating periods of English legal history is the seventeenth century, when the rule of law struggled into existence. Historians have told the real story of one of the key episodes in that struggle, the case of *Prohibitions del Roy*. As reported by Coke CJ, he was the victorious protagonist; the reality may have been somewhat different, but it was Coke's report that prevailed in the end, not the arbitrary power of James I to stop the due process of the law by prohibition.[5]

It was no doubt this historical connection between the rule of law in England and the jurisdiction of the common law courts that influenced AV Dicey's thoroughly parochial but once widely influential articulation of the rule of law.[6] His identification of the rule of law with the paramountcy of what he called the 'ordinary courts' may be understandable. But it was clearly mistaken. We no longer accept parochial versions of the rule of law, and we can accept that the elements of the rule of law defined above can be satisfied in different ways in different systems — by a separate system of *droit administratif* applied by separate administrative courts, as in most of Europe, or by administrative law applied by the ordinary courts as part of their general jurisdiction, as in the common law tradition. But when we turn to international law,[7] there is an initial doubt whether the cardinal legal virtue of the rule of law can be looked for even in principle; whether we would see it as a virtue if we were to find it among the ignorant armies of governments clashing by night,[8] or whether we should even expect it to be at play as between the billiard balls of states which traditionally have been the only and still are the major subjects of international law. So we might say that the rule of law is a singularly domestic or internal virtue, one for home consumption only, that what international law is and what it tries to do does not and cannot engage the values of the rule of law.

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4 Rudyard Kipling, 'Recessional' (1897) in *The Oxford Dictionary of Quotations* (1999) 440; G Orwell, 'Rudyard Kipling' in *Dickens, Dali & Others* (1946) 141.

5 *Prohibitions del Roy* (1607) 12 Co Rep 63; Roland G Usher, 'James I and Sir Edward Coke' (1903) 18 *English Historical Review* 664.

6 A V Dicey, *Introduction to the Study of the Law of the Constitution* (1st ed, 1885; 10th ed 1959), Ch IV.

7 Surprisingly there is only a limited literature. See Sir Arthur Watts, 'The International Rule of Law' (1992) 36 *German Yearbook of International Law* 5 and works there cited. See also Michael Byers (ed), *The Role of Law in International Politics: Essays in International Relations and International Law* (2000); Ian Brownlie, *The Rule of Law in International Affairs* (1998); Andrea Bianchi, 'Ad-hocism and the Rule of Law' (2002) 13 *European Journal of International Law* 263.

8 Cf Matthew Arnold, 'Dover Beach' (1867) in *The Oxford Dictionary of Quotations* (1999) 26.

Of course, one way of addressing this issue is to redefine international law as a coalition of the virtuous or the like-minded, for example to redefine the state under international law as the democratic state or the state which observes human rights or the *Rechtstaat*. Under this strategy (which as far as I know has never been espoused by some one who was not a national of a virtuous state), international law continues to be — what some thought it was in the later nineteenth century — the law of and between self-proclaimed civilised States only, with lesser breeds outside; and there is surely no difficulty in externalising the domestic virtues of the elect. But whether that view of international law ever prevailed — and I should recall here the distinguished opposition to it of the United States delegation at the Congress of Berlin in 1885 — it is unacceptable today. It is of the essence of international law that it is universal. We are struggling to the point where there are treaties to which every state in the world without exception are parties — let us not engage in the error of exclusivity by reference to some sub-set of so-called liberal values and some sub-set of so-called liberal states. If we were to succumb to this strategy, then we would have the paradox of treaties such as the United Nations Convention on the Rights of the Child to which there are many more states parties than there are states in the world.[9] (There are 194 states in the world, 192 of which are parties to that Convention; only the United States and Somalia are not.) There would be a further risk of reintroducing colonialism in another guise. To conclude, the struggle of civilisations, in international legal terms, is contained within international law; it is not set against it by any principle of exclusion or subordination.

A second way around the difficulty of asking whether international law can be expected to embody the rule of law is by stipulation. According to some, not least Hersch Lauterpacht, international law is simply assumed to be modeled on analogies with internal law, in particular private law analogies. On this view treaties are contracts, state responsibility expresses the law of torts, states are proprietors, and so on. For Lauterpacht, international law was only worthy of being called law as it approximated to private or civil law within states.[10] Now we are all lawyers first, before we specialise in international law or whatever else; and we naturally use analogies and examples drawn from our legal education and experience. In practice we cannot exclude analogies; the question is rather one of identifying the better or more apt analogy. For example, is international law more like private law or public law?[11] Analogising treaties to contracts assumes we have

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9 Convention on the Rights of the Child, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990).

10 See Hersch Lauterpacht, *The Function of Law in the International Community* (1933) esp 432.

11 As Brownlie points out, public law constraints on governments 'are immanent and not external': Ian Brownlie, 'The Reality and Efficacy of International Law' (1981) 52 *British Year Book of International Law* 1, 2.

a unitary view of contracts, which is not necessarily so even at the domestic level. To take another example, is the right to invoke state responsibility more like a cause of action in private law or standing in the public interest — or some combination of the two?[12]

So stipulating similarities to national or internal law is question begging and unsatisfactory. It is also unrealistic, and by 'unrealistic' I do not mean in the sense of the so-called realist school of international relations; I mean that it does not reflect reality. Despite the intensification of legal relations that has occurred since Lauterpacht wrote, international law looks very little like private or civil law. Another approach is required. It is better to ask what it is that international law now does or claims to do, and then to ask whether this range of tasks entails or requires the values of the rule of law as I have identified them. Or are these values still extraneous to the real hard business of international law, like an accidental tourist at a diplomatic conference?

At a time when most of international law consisted of laying down the boundary conditions for state conflict and coexistence — for example, the laws of war (war as a state prerogative), peace treaties (valid even if coerced), boundaries (based on effective domination, not consent), immunities of representatives (absolute)—one could argue that international law was a law for the gaps between states, and that domestic virtues were not called for. Under that Hobbesian vision, war was the ultimate form of arbitration; and Grotius was not very different, except perhaps in his orientation: the wars he saw were fought on a continent, not an island. It is indicative that, although Grotius had virtually no conception of international institutions, including international courts, when international arbitration subsequently developed it was not done on the analogy of national judges and courts. Rather, judges were substitutes for the states parties to the conflict; they were umpires between belligerents, not officers of justice exercising a distinct judicial power.

Now boundary drawing and similar billiard-ball activities are not to be despised; they still give rise to conflict and even war, and the settling of land and maritime boundaries is still a major part of the work of the International Court of Justice. But many major conflicts now arise from conflicts as to the distribution of wealth or power within states, and boundary drawing is only a small fraction of the range of modern international law. International law is concerned increasingly with matters internal to the state — human rights, the environment, investment protection, criminal law, intellectual property, the conditions of free trade in terms of the WTO,

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12 See ILC Articles on Responsibility of States for Internationally Wrongful Acts, annexed to GA Res 54/83, 12 December 2001, arts 42, 48, in James Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries* (2002) 254–60, 276–80.

the control of civil conflict and so on. Indeed it is not too much to say that in many of these areas the role of international law is to reinforce, and on occasions to institute, the rule of law internally. For example, in an investment protection dispute between a Singapore company and Myanmar, or between a Canadian company and the United States, if the applicable law is international law, the criterion of liability is a set of standards more or less indistinguishable from the standards of the rule of law — absence of arbitrary conduct, judicial independence, non-retrospectivity.[13] As a Chamber of the International Court put it in the *ELSI* case,

> the fact that an act of a public authority may have been unlawful in municipal law does not necessarily mean that that act was unlawful in international law… Nor does it follow from a finding by a municipal court that an act was unjustified, or unreasonable, or arbitrary, that that act is necessarily to be classed as arbitrary in international law, though the qualification given to the impugned act by a municipal authority may well be a valuable indication.[14]

In international law, the Court said, arbitrariness was to be defined not as a breach of a rule of law but as inconsistency with the rule of law.

So the question we need to ask is whether in engaging in this broader range of activities, international law itself should observe the standards it sets for national systems. Or is it substantially exempt from them, embodying the idea that the rule of law is a virtue for national systems which international law can enforce without having to comply with it itself. The United States these days appears to apply the policy: international law for others and not for itself. Does international law apply the policy: the rule of law for others and not for itself?

A positive answer to that question appears to have been given by the ICTY in the *Tadic* case.[15] The issue there was whether the ICTY itself was 'established by law' within the meaning of Article 14 of the ICCPR, so that the international trial of *Tadic* was in accordance with international human rights standards. In response the ICTY appeared to say that there was no problem — these standards are set for national, not international courts. It said:

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13 See, eg, *Mondev International Ltd v United States of America* (ICSID Case No ARB(AF)/99/2), Award of 11 October 2002, (2003) 42 ILM 85; *Yaung Chi Oo Trading Pte Ltd v Government of the Union of Myanmar* (ASEAN Case No ARB 01/1), Final Award, 31 March 2003, (2003) 42 ILM 540.

14 *Case Concerning Elettronica Sicula SpA (ELSI) (United States v Italy)* 20 July 1989, (1991) 84 ILR312, 380.

15 *Prosecutor* v *Tadic* (Jurisdiction), Appeals Chamber, 2 October 1995, (1997) 105 ILR 453, discussed by James Crawford, 'The Drafting of the Rome Statute' in Philippe Sands (ed), *From Nuremberg to The Hague* (2003) 129–33.

> the principle that a tribunal must be established by law... is a general principle of law imposing an international obligation which only applies to the administration of criminal justice in a municipal setting.[16]

And there is a difficulty, because so many of the international arrangements we have are jerry-built, ad hoc; they have evolved from earlier experience and are adapted, unsystematically and often hurriedly, to new uses. So we have ad hoc judges, international criminal courts for Yugoslavia and Rwanda established by Security Council resolutions, Human Rights Committees composed of executive officials and law professors reviewing the decisions of Supreme Courts, and so on. We can trace the history that produced such compromises; they may even be functional, but they are at best approximations to constitutional values.

Despite all this, in principle I believe that we cannot accept what the ICTY seemed to say in *Tadic*, that international institutions including judicial institutions are in principle exempt from international standards. Such a position is indefensible in the long term, even if it were morally acceptable. In the long run national systems founded on the rule of law cannot tolerate review by international systems not so founded, especially as to otherwise internal matters. The better approach is a second set of reasons given by the ICTY in *Tadic*, which interprets the requirements of the rule of law at the international level so as to ensure at least substantial compliance with the underlying values — bearing in mind the need for such bodies as the ICTY on an emergency basis.[17]

This second line of analysis would have been a basis for the trial of Tadic to go ahead, without saying that international courts do not have to comply with the international law standard for courts generally. (By the way Tadic got 25 years imprisonment, later reduced to 20 years by the Appeals Chamber.[18]) But there is a real question whether even the doctrine of approximation is enough for a criminal court. Whatever ad hocery we might tolerate in the civil law, in the field of criminal law there is a serious problem with ad hoc courts, and it was this factor which gave such impetus to the movement for an International Criminal Court created by multilateral treaty. To borrow a phrase from Oscar Wilde, to have one ad hoc criminal court was perhaps understandable; to have two looked like carelessness.[19] Rule of law concerns were a major factor for many governments who supported the Rome Statute and the creation of the International Criminal Court — a process in which Australia played a distinguished role.

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16 *Prosecutor* v *Tadic* (Jurisdiction), Appeals Chamber, 2 October 1995, (1997) 105 ILR 453, 472–3.

17 Ibid 472–3.

18 *Prosecutor* v *Tadic* (Revision of Sentence), Appeals Chamber, 26 January 2000, (2003) 124 ILR 213.

19 Oscar Wilde, 'The Importance of Being Earnest' (1895) in *The Oxford Dictionary of Quotations* (1999) 817.

Consistent with this approach, it is better to see the present system of public order at the international level not as a hierarchy of international executive power masquerading as law and prevailing over national systems — the Vattelian system that Philip Allott lacerates in his work[20] — but as an interpenetration of legal orders each with its own internal rules of hierarchy, each acknowledging the existence and validity of the other. This is obviously not a monistic vision, but nor is it strictly dualistic either; it has elements of D P O'Connell's view of harmonisation, as he used to teach it in Adelaide.[21] It does not imply the federalisation of international relations, but it acknowledges the existence of a spectrum of relations between legal orders at a time of increasing interdependence.

So we end by affirming the need for the rule of law as a virtue at the international level, at least to the extent that international law approximates a system of public order between states as legal orders in their own right, or to the extent that it performs tasks of adjudication, assessment or review of domestic decision-making in areas or matters in which international law itself prescribes compliance with the rule of law. But we need to bear in mind that the application of the basic value of the rule of law at the international level is conditioned by certain facts of life, notably the absence of legislative power such as exists in internal legal systems, and the correlative need for many decisions to be made by consensus if they are to be made at all.

## II

Earlier I identified four basic values as associated with the rule of law: absence of arbitrary power; the general non-retrospectivity of the laws; the subjection of government to general laws, whatever their content; and the independence of the judiciary which must be 'established by law'. How does international law fare with regard to each of these elements? Time does not permit more than generalisations and brief comments, but let me take them one by one.

First, as to absence of arbitrary power, there are serious practical difficulties. It may be that decisions of the Security Council are subject to the authority of the Charter, but the fact is that there is no regular institutional means for bringing Charter constraints to bear on the Security Council. In recent times the Council has apparently delimited maritime territory, decisively determined the outcome of judicial proceedings, dealt prejudicially with issues that were before the International Court, and established international criminal tribunals. Another even more serious practical issue concerns the policy of the United States towards the Security Council, epitomised by the Iraq crisis: at one moment the Security Council

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20 Philip Allott, *Eunomia: New Order for a New World* (1990).

21 D P O'Connell, *International Law* (2nd ed, 1970) Vol 1, 43–6.

is used as a legitimating mechanism (with real consequences for governments and in the forum of public opinion); at another, its authority is ignored and even traduced. In these contexts the rule of law is insecure and precarious indeed.

Against this one must set the virtual universality of the United Nations and the extreme character of many of the situations with which the Security Council has to deal. If we are growing into the rule of law at the international level, it is not surprising that this may be happening slowly and in some fields more than others. Even nationally, the area of national security has only slowly and more recently succumbed to the principle of judicial scrutiny, and only to a certain extent.

Turning to the second area, that of general non-retrospectivity, international law now has a fairly well developed set of techniques aiming to deal with the question of non-retrospectivity, both in relation to treaties and customary or general international law. Specific problems may arise with retrospectivity in the criminal law, but these are not different in kind from those that arise, for example, in common law systems. The European Court of Human Rights has dealt, in a rather subtle way, with the non-retrospectivity issue in domestic criminal law, and at the international level it may at least be presumed that the articulations of crimes in the Tribunal Statutes and those annexed to the Rome Statute reflect general international law — in which case there is no problem of unjustified retrospectivity.

As to the third element, the subjection of government to general laws, whatever their content, international law applies in principle to all States, and purports to do so on a basis of equality; in a number of respects a sophisticated notion of what it is to be equal under the law has been applied, both to States as subjects and to individuals and groups. The real rule of law problems here concern de facto powers — opposition groups, guerrilla forces controlling territory, etc. These are old problems but they continue to recur, for example, in West Africa; here the absence of the rule of law within is barely compensated for by the imposition of international law from outside.

The fourth element for our purposes is the independence of the judiciary that must be 'established by law'. Here progress is being made at the institutional level; the International Court has been developing its procedures to resolve particular issues of independence, for example. But a large proportion of international judicial or arbitral decisions are made by ad hoc panels, and this presents at least the image of selectivity and of arbitrariness.

At a fundamental level, the basic international law rule of consent to jurisdiction has been repeatedly affirmed, but progress has been made, in particular with the Dispute Settlement Body of the WTO and to a lesser extent with Part XV of the

United Nations Convention on the Law of the Sea.[22]. It is still utopian to suggest that the basic international law rule of consent is breaking down, but at least *de facto* it is now much more common that some international instance exists than it used to be. Indeed in some cases the problem may not be an absence but a plurality of forums, and international law is only at an early stage of trying to sort out the resulting conflicts.[23]

The record is evidently a mixed one. We may seem to be notionally still at the beginning of the English seventeenth century rather than the end. But as we have seen it is a mistake to think of the rule of law in English or even Anglophone terms, and the struggle is being fought mostly by other and mostly more subtle means.

How does this affect international lawyers who engage in the practice of their subject, in whatever forums? Julius Stone, who was Challis Professor of International Law at Sydney for more than 30 years, referred to the idea of enclaves of justice, islands in which general legal values could have their influence;[24] and it seems that still we have only enclaves of the rule of law in international affairs. Here we come to what Raz calls the politics of the rule of law, which is also a question of personal commitment.[25] We have to be fully aware of the differences between domestic and international contexts — but also of the relativity of that distinction.

So let me end with a profession of values. I believe that international lawyers must continue to strive for the rule of law as our fundamental goal. This may not be because it is a condition of our functioning at all — the existence of international law is less a question of choice than some may think — but because, having regard to the tasks now irrevocably set for it, it has vital tasks to perform, and will not otherwise be acceptable to free peoples.

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22 Convention on the Law of the Sea, opened for signature 10 December 1982, 1833 UNTS 3 (entered into force 16 November 1994).

23 See Yuval Shany, *The Competing Jurisdictions of International Courts and Tribunals* (2003).

24 Julius Stone, 'Approaches to the Notion of International Justice', in Richard A Falk and Cyril E Black (eds), *The Future of the International Legal Order: Retrospect and Prospect* (1969) Vol 1, 372, 436–7, discussed in James Crawford, 'Realism, Scepticism and the Future World Order: Some Thoughts on Julius Stone's Contribution to International Law' (1991) 13 *Sydney Law Review* 475.

25 Joseph Raz, 'The Politics of the Rule of Law' in J Raz, *Ethics in the Public Domain: Essays in the Morality of Law and Politics* (1994) 354.