What is the International Rule of Law?

“… the rule of law in the international order is, to a considerable extent at least, the domestic rule of law writ large.”

“… analysis of the role of the Rule of Law as applied at the international level requires a reconceptualization of the principle in such a way as to take account of systemic differences between the domestic and international legal order.”

Few would dispute the desirability of establishing and maintaining the rule of law across the globe. Finding common agreement on the precise meaning of this concept, however, is less easy to achieve. Frequently invoked and promoted in the discourse of legal practitioners, lawmakers, and development experts alike, the semantic content of the term “rule of law” is not a constant but instead depends upon who uses it and to what purpose.

Extending the notion of the rule of law beyond its habitual domestic context and into an international one further complicates the search for broad agreement on its definition. This is clear from the quotations beginning this section, which presume different relationships between the domestic and international legal orders. This difficulty also became immediately apparent as BIIJ 2010 participants began their first session, devoted to sketching out the broad outlines of the “international rule of law.”

The launching point for this exercise was a comparison between the rule of law at the domestic and international levels. There was general consensus about essential elements that belong to both, including equality before the law, strict observance of due process, and judicial independence. Several participants offered what they personally viewed as the central tenets of the rule of law. “Whether at the domestic or international level, sovereignty over arbitrariness is the essential meaning of the rule of law,” declared a criminal judge. “The rule of law means that no one is above the law, including the authorities,” said a judge from a human rights court. Furthermore, he continued, “The law to which everyone submits cannot be an oppressive law but one that protects human rights.”

It was suggested that the principles that emerged from the Conference on the Human Dimension of the Commission on Security and Cooperation in Europe, convened in Copenhagen at the end of the Cold War era, provide a good elaboration of the rule of law at the domestic level (see excerpt on p. 12-13). These principles “represent the international standards we expect states to apply,” declared a participant, although another cautioned that they represent “more a blueprint than a reality.” Central to the so-called “Copenhagen Principles” are basic human rights guarantees in addition to procedural ones. The United Nations (UN) also employs a definition that encompasses both kinds of guarantees.

Not all BIIJ participants accepted, however, that the rule of law concept should cover both kinds of guarantees. One judge felt strongly that individual rights are essentially procedural rights, adding, “I find it hard to conceive of a substantive application of the principles of the rule of law that has any...”
meaning without procedural rules.” Another judge concurred, pointing out that in certain countries during the Soviet era, the laws were “perfectly done” and included extensive human rights protections. “But the laws were not applied, or they were applied arbitrarily,” which resulted in an overall absence of the rule of law.

The converse situation was also noted, one where existing domestic laws were strictly observed but flawed from a human rights perspective. This was the case in both Nazi Germany and apartheid South Africa, where the systematic disenfranchisement of certain minorities was based on duly enacted laws that were, nevertheless, unjust. In the same light, one participant brought up the infamous mid-19th century Dred Scott decision of the United States Supreme Court, which ruled that slaves and former slaves were not citizens and, as such, could not pursue a lawsuit in federal court where jurisdiction was based on the parties being citizens of different states. Dred Scott was viewed as the “property” of his “owner.” The participant described this as “the worst decision ever penned by any judge in any country in any era.”

While all participants seemed to agree that procedural principles of the rule of law are critical – that “they undergird all substantive principles,” as one judge expressed it – most also felt that a proper conceptualization of the rule of law necessarily includes both kinds of principles. The rule of law is much more than “rule by the laws,” asserted one judge, the former being both broader and deeper. Participants suggested that human dignity is the foundation of both the substantive and procedural aspects of the rule of law.

Participants also concurred in a general way that there already exists a rule of law at the international level, at least in an emergent form. However, it was pointed out that there are important differences between the international and domestic levels that need to be acknowledged. The separation of powers, for example, is often indicated as a crucial element in the domestic rule of law. But where does this element fit into the international context? There is an international judiciary, of course, of which the BIJJ participants are themselves representatives. But from what exactly does this judiciary need to maintain separation in order to uphold the rule of law? There is no international legislature, strictly speaking, although there is a body of international law, composed of international treaties and customary international law. One participant argued that the appearance that international decision-making is a kind of lawmaking may lead to conservatism on the part of international judges. This is because they wish to avoid the appearance of overreaching their authority to interpret the law in the absence of a lawmaking branch that can respond to judicial determinations.

What, then, about an executive branch in the international sphere? It was suggested that the Security Council acts as the executive for courts that operate under the aegis of the United Nations, as do States Parties or parent political bodies for various other courts. Several criminal judges noted that their courts sometimes feel inappropriate pressure from their executives to complete trials in the shortest time possible, regardless of concerns for due process. Another criminal judge questioned the independence of his own court, due to its financial dependence on certain donor states. “When our president or prosecutor has traveled to all capitals to beg for money, will their answer depend on the issuance of an indictment and its content?” he wondered aloud. The entities holding a court’s purse strings, in other words, may act as another kind of executive power, one that may overstep its role.

These comments suggest that the freedom to exercise the judicial function as judges see fit, along with guarantees of independence for prosecutors and other organs of their institutions from outside entities, are critical parts of what participants see as the rule of law in the international sphere. Their concerns about interference and influence by
external forces recalled discussions that have taken place during past sessions of the BIIJ in relation to the politicization of international justice.⁶

There are other differences between the domestic and international rule of law, in addition to those related to the separation of powers. The international rule of law, for example, must deal with issues not found at the domestic level, such as interstate trade, warfare, and territorial disputes, pointed out one judge. The “content” of the international rule of law is also less clear than that of the rule of law at the level of a single state. One judge suggested that it is important that the basis of the international rule of law represent “the lowest common denominator,” that is, just those essential values that can be shared by populations across the globe. Attitudes toward the death penalty provide an interesting case in point. A number of states resist its prohibition by international law, although some have been forced to acquiesce through their membership in a regional entity with its own human rights convention.⁷ Participants wondered about the role of the international community in imposing such a ban across the globe, given that many states still view the death penalty as an appropriate punishment in some circumstances. One judge pointed out that while it is important that the international rule of law have substance, this does not mean that all substantive issues should be included under its protective rubric. This runs counter to the increasing tendency, described by another participant, to view the rule of law as “embodying all good things.”

Very importantly, it was observed that international law has evolved considerably beyond the traditional “law of nations” to encompass norms applicable directly to individuals. Indeed, the international protection of human rights has served to unify formerly discrete spheres of law, as national courts become active interpreters and enforcers of the individual rights enumerated in various international conventions.⁸ There is clearly, one judge declared, a “synergistic relationship” between the rule of law at the domestic and international levels.

This nexus of issues pertaining to the rule of law – procedural vs. substantive, domestic vs. international, and state-focused vs. individual-focused – are subtly interconnected. Judge Hisashi Owada sought to clarify these relationships in a 2009 article in which he described the evolution that international law has undergone over the past decades.⁹ The increasingly prominent place of human rights in the international legal order has brought with it a shift of focus from the state to the individual as a subject of international law, as well as a new emphasis on a rule of law that transcends national boundaries. He writes that “these developments place further legal constraints on the conduct of sovereign states in the international community; they also prescribe international norms to guarantee an international standard of justice that is substantive in character, stretching the rule of law beyond its narrower, more formalistic aspects.”¹⁰ The international rule of law can only achieve its objectives, he asserts, if it incorporates “certain basic universal values” as well as “traditional formal aspects, such as the supremacy of the law, equality before the law, and the existence of independent monitoring systems.”¹¹

These discussions about the nature of the international rule of law set the stage for BIIJ 2010 participants to address a number of related topics in the following sessions. Despite some variation in personal interpretations of the term, it was clear that all participants are engaged, through their judicial work and institution building, in the progressive development and recognition of a rule of law that can establish desirable legal norms and practices across the globe.
(1) The participating States express their conviction that the protection and promotion of human rights and fundamental freedoms is one of the basic purposes of government, and reaffirm that the recognition of these rights and freedoms constitutes the foundation of freedom, justice and peace.

(2) They are determined to support and advance those principles of justice which form the basis of the rule of law. They consider that the rule of law does not mean merely a formal legality which assures regularity and consistency in the achievement and enforcement of democratic order, but justice based on the recognition and full acceptance of the supreme value of the human personality and guaranteed by institutions providing a framework for its fullest expression.

(3) They reaffirm that democracy is an inherent element of the rule of law. They recognize the importance of pluralism with regard to political organizations.

(4) They confirm that they will respect each other’s right freely to choose and develop, in accordance with international human rights standards, their political, social, economic and cultural systems. In exercising this right, they will ensure that their laws, regulations, practices and policies conform with their obligations under international law and are brought into harmony with the provisions of the Declaration on Principles and other CSCE commitments.

(5) They solemnly declare that among those elements of justice which are essential to the full expression of the inherent dignity and of the equal and inalienable rights of all human beings are the following:

(5.1) - free elections that will be held at reasonable intervals by secret ballot or by equivalent free voting procedure, under conditions which ensure in practice the free expression of the opinion of the electors in the choice of their representatives;

(5.2) - a form of government that is representative in character, in which the executive is accountable to the elected legislature or the electorate;

(5.3) - the duty of the government and public authorities to comply with the constitution and to act in a manner consistent with law;

(5.4) - a clear separation between the State and political parties; in particular, political parties will not be merged with the State;

(5.5) - the activity of the government and the administration as well as that of the judiciary will be exercised in accordance with the system established by law. Respect for that system must be ensured;

(5.6) - military forces and the police will be under the control of, and accountable to, the civil authorities;

(5.7) - human rights and fundamental freedoms will be guaranteed by law and in accordance with their obligations under international law;

1. The full text may be found at http://www.osce.org/odihr/elections/14304.
(5.8) - legislation, adopted at the end of a public procedure, and regulations will be published, that being the condition for their applicability. Those texts will be accessible to everyone;

(5.9) - all persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law will prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground;

(5.10) - everyone will have an effective means of redress against administrative decisions, so as to guarantee respect for fundamental rights and ensure legal integrity;

(5.11) - administrative decisions against a person must be fully justifiable and must as a rule indicate the usual remedies available;

(5.12) - the independence of judges and the impartial operation of the public judicial service will be ensured;

(5.13) - the independence of legal practitioners will be recognized and protected, in particular as regards conditions for recruitment and practice;

(5.14) - the rules relating to criminal procedure will contain a clear definition of powers in relation to prosecution and the measures preceding and accompanying prosecution;

(5.15) - any person arrested or detained on a criminal charge will have the right, so that the lawfulness of his arrest or detention can be decided, to be brought promptly before a judge or other officer authorized by law to exercise this function;

(5.16) - in the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone will be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law;

(5.17) - any person prosecuted will have the right to defend himself in person or through prompt legal assistance of his own choosing or, if he does not have sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;

(5.18) - no one will be charged with, tried for or convicted of any criminal offence unless the offence is provided for by a law which defines the elements of the offence with clarity and precision;

(5.19) - everyone will be presumed innocent until proved guilty according to law.
Notes


3. See the UN definition in BIJ 2010 keynote address, p. 53.


7. This is the situation with the Russian Federation and the Council of Europe.

8. Supra note 3, p 117.


10. Ibid. p. 195.

11. Ibid. p. 196.