

Article VI Forum
Securing the Future: Strengthening the Non-Proliferation Treaty

A consultation of like-minded States
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Panel on Legal Requirements to Achieve Non-Proliferation and Disarmament

“Reflections on the Rule of Law and Disarmament”

by

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Distinguished participants,

In a few moments, you will have the pleasure of listening to Dr John Burroughs. I do hope that you have had the opportunity of studying his Briefing Paper “The Legal Framework for Non-Use and Elimination of Nuclear Weapons”. It will be interesting to hear him develop further his thoughts on this topic.

I have been invited here not because I am an expert on disarmament – I am certainly not. The reason that I was asked to participate on this occasion was, I believe, because I would approach the topic of this panel from a slightly different angle than my co-panelist. I have therefore chosen to share with you my personal “Reflections on the Rule of Law and Disarmament”.

My background is not in diplomacy or in public international law. On the contrary, I have deep roots in the judiciary of my own country, Sweden, and later in the Ministry of Justice dealing with legislative work in many fields, including human rights and constitutional law.

It was really not until 1984 that I became more deeply involved with public international law. In that year, I was appointed Under-Secretary for Legal Affairs in the Ministry for Foreign Affairs in Sweden. After nine years in that position, I had the honour of serving the United Nations as its Legal Counsel between March 1994 and March 2004.

A first observation is that those who are trained in the judiciary at the national level often have a rather skeptical view of international law. Could one really look to instruments adopted by international organs, often phrased in a rather general or even ambiguous manner in foreign languages and translated into one’s own? Is it rather not one’s duty to base judgments on laws enacted by the national parliament consisting of elected representatives of one’s own people?

Gradually, I came to change my mind. I realized, drawing upon experiences from the history of my own country that the horizons must be widened. The thirteen Law Rolls of the Swedish counties, codified in the 13th century, soon became inadequate to serve their purpose; people's ability to communicate had made the country shrink. So, already in the 14th century the King saw fit to promulgate a Land Law for the whole Realm.

If we transfer this scenario to the global level in present day society, we must realize that we are now all neighbours. Means of communications can take us around the globe within a few hours. Within a fraction of a second information can be sent to the other side of the globe. Before leaving his or her office for the day, an employer somewhere in the world can engage people on a different continent to perform work that will be delivered in the employer's office in the following morning.

Gradually, governments have come to realize that they must cooperate to create a legal order under which human beings can live in peace and dignity.

This was one of the purposes when the United Nations was created in 1945. This was the idea when the Universal Declaration on Human Rights was adopted in 1948 and when the two Covenants were adopted in 1966. This was also the idea when States started negotiating treaties to achieve disarmament.

In addition to customary international law the world community now has a treaty based international legal framework of enormous breadth. The Secretary-General of the United Nations on his own is the depository of more than 500 multilateral treaties, all accessible via the Internet. Today, the UN Treaty Database receives more than 2 million hits per month when people seek information from the register.

Consequently, the scenario is set for the rule of law both at the national and the international level. As a matter of fact, the idea of the rule of law runs like a scarlet thread through the Charter of the United Nations. And, basically, international law is respected in most cases; States realize that it is necessary to cooperate.

It is when we enter the field of national security that the problems present themselves.

Taking up my position in the UN Secretariat in March 1994, I became deeply involved in providing legal advice to the many peacekeeping missions in different locations in the world. As a matter of fact, in those days we had some 85,000 Blue Helmets, men and women, in various operations.

Looking at the root causes of the conflicts that had prompted the United Nations to dispatch these missions, I realized that there was a common denominator. Human rights were violated and there was no rule of law at the national level.

Over the years, I have become more and more convinced that until societies around the world are administered under the rule of law there will always be a potential threat to international peace and security. This is not to say that there are no problems in countries where there is a system operating under laws enacted by a popularly elected parliament. There surely are. But the risk that such countries threaten international peace and security is less.

Obviously, the modern State under the rule of law can only exist in a democracy. So, here we have our first dilemma. Many Member States of the United Nations are not democracies. Until they are, they constitute threats to international peace and security.

These days, there is much talk about reforming the United Nations. And surely, the United Nations needs reforming. Have we ever experienced an organization that is not in need of reform? But the real need for reform is not so much within the UN; the real need for reform is in its Member States. The criticism directed against the Organization is often a method of diverting criticism that should actually be directed against the Member States themselves.

There is much to be said about the need for establishing the rule of law at the national level in States around the world. However, in this context I would like to focus on two aspects.

The first aspect is that the lack of rule of law constitutes a potential threat to the world community. By definition, human rights risk being violated in countries where there is no rule of law. And by definition, this threatens international peace and security.

The second aspect is that a State that cannot provide for the rule of law will most probably not be able to fulfil the obligations that the same State has undertaken by ratifying various conventions and other treaties. The same applies to the ability of such a State to deliver what is required under a Security Council resolution for the purpose of suppressing terrorism and the spreading of weapons of mass destruction.

The point I want to make by raising these issues is that in discussing the legal requirements to achieve non-proliferation and disarmament it is necessary to broaden the perspective to see whether States can actually deliver what is expected from them.

Yes, surely, it is of utmost importance to analyze the obligations that flow from existing treaties and draw conclusions from the 1996 Advisory or Opinion by the International Court of Justice. But at the same time one must not lose sight of the fact that one cannot invoke effectively those obligations if they end up in a legal vacuum at the national level.

Let us now look at the first situation that I intended to raise: a State that cannot provide for the rule of law poses a threat to the world community.

What should be clear to anyone who gives thought to world governance is the following:

- Rule of law is necessary to create a society in which human beings can live in dignity with their human rights protected;
- Rule of law as it is understood today can only exist in a democracy;
- There is a direct correlation between the rule of law and a State's ability to attract foreign and domestic investments, to address poverty and to protect the environment;
- There is a need for a coordinated, coherent and integrated approach to post-conflict peacebuilding and reconciliation in order to achieve sustainable peace;
- To enhance the rule of law in post conflict societies, it is necessary to assist countries emerging from conflict. I recall in this context that the United

Nations General Assembly has decided to establish a Peacebuilding Commission to assist in this respect.

The question is, however, if one should not more actively and systematically engage in enhancing the rule of law in general. This applies, in particular, to countries that need assistance before a conflict erupts; every country falling short in this respect is a potential source of conflict that eventually can threaten international peace and security. When the Blue Helmets have to be called in, we are addressing the symptoms of what is wrong. Conflicts invariably are caused by the absence of the rule of law and lack of protection of human rights.

Therefore, States should make a determined effort to systematically address this deficiency.

The latest developments within the United Nations appear in the 2005 Summit resolution. In this resolution Member States:

- Recommit themselves to actively protect and promote all human rights, the rule of law and democracy, see [Annex 1](#);
- Decide to establish a Peacebuilding Commission,¹ and
- Support the idea of establishing a rule of law assistance unit within the Secretariat.²

You may ask: what is then needed to establish a society under the rule of law? I would suggest that four elements are needed: democracy; proper legislation; institutions – administrative as well as judicial – to administer the law; and, most importantly, individual civil servants and other officials, including judges, with the necessary integrity to handle this administration.

You would immediately realize that these elements are not instituted overnight. Democracy, in particular, will take time to develop in many countries. A determined and structured approach is needed in order to make a difference here.

Regretfully, efforts must also be undertaken to restore the rule of law in societies that have gone astray, a source of great disappointment and concern to many, not only in the legal community. I will revert to this issue in a moment.

The question is: who can contribute to this work and what can be done? One major obstacle is of course that introducing a system under the rule of law would mean that some governments that are presently in power would be ousted. Therefore, there is a major threshold to climb in many countries.

But all this tends to be lofty words, unless one takes a practical and down to earth approach. A concerted effort is necessary. And there are many that should join in this effort. The United Nations system is already providing some legal technical assistance. But there are many others who do this too, including regional organizations, like the European Union, singular member states, non-governmental organizations and so forth.

¹ GA/RES/60/1, para. 97.

² GA/RES/60/1, para. 134 (e).

This is fine. But now it is the time to take a more systematic approach. I have raised this matter with the Secretary-General of the United Nations, who is presently charged with providing a report to the General Assembly on the establishment of a rule of law assistance unit within UN Secretariat. I have also discussed this with colleagues in the World Bank; the Bank provides quite extensive information about the rule of law status in certain fields in many countries.

The matter is presently discussed within the International Bar Association, the American Bar Association and other organizations. A Global Rule of Law Movement is under way at the initiative of those organizations. I cannot miss an opportunity like the present to mention this endeavour and ask for your wholehearted support.

A first step to be taken in this context should be to assess the rule of law status in individual Member States. This step is important, and it is really not very different from what is done in other fields, like medicine, environment, human rights, etc. Another example is the work done by Transparency International in relation to corruption.³

You would immediately say that to make these kinds of assessments is a sensitive matter. True! But there must be some meaning in the commitments to the rule of law in the 2005 Summit resolution. If these commitments are not just empty words, Member States should be prepared to subject themselves to a close scrutiny of what their rule of law status is and be prepared to accept assistance where such is required.

Based on assessments of this kind it would be fairly easy to determine what legal technical assistance should be offered. Three questions should be borne in mind: is assistance welcome, who should provide it, and when should it be provided?

In this work, it is also crucial to engage the general public and the legal profession at the national level. At the same time it is necessary to go from generalities to specifics – to create assistance projects. The only possible way to proceed is namely to address the rule of law deficit through projects that are realistic and that can be effectively absorbed at the receiving end.

First, the need for assistance should be identified. In some cases the need is obvious, at least to an outside observer. But this exercise might nevertheless be complex. In particular, it is important that the proper measures are identified and that guidance is sought from a system that is reasonably compatible to the one in which the measures are to be introduced. As a matter of fact, in some cases there might be a need for assistance even to identify what assistance should be given!

That being done, it is necessary to find the persons who have the knowledge to do the job. They must be able to communicate with those they assist so that language does not become an unnecessary obstacle. In this exercise one would most probably discover the systemic issues just mentioned in the context of the needs analysis.

If these elements can be identified and presented as a well structured, credible and useful project, then there would be good auspices for raising the money needed. If so, a project is created! And if more projects could be identified, there might be more funds forthcoming.

³ <http://www.transparency.org/>

With respect to the assistance needed, it should be noted that this is not only a question of drafting legislation but also to provide assistance with respect to institution-building and training and similar capacity-building.

When we come to the question of funding, it would be helpful to identify more clearly those who are interested in funding projects. Funding is today provided both by governments and international organizations. Substantial funding is also provided by private entities, in particular by foundations. More funds would probably be forthcoming if additional credible and cost-effective projects could be identified. As is often observed, a safe legal environment generates investments, both foreign and domestic.

What about Official Development Assistance (ODA), you may ask. In my view, more of ODA should be directed to this kind of activity. As recognized by the General Assembly, good governance and the rule of law are essential for sustained economic growth, sustainable development and the eradication of poverty and hunger.⁴ If a legally safe environment is created, many of the other efforts that are presently funded by ODA would be achieved by private initiatives.

In this context it should also be borne in mind that a rule of law system with all its components – rules, institutions, personnel, logistics, etc. – is a major investment in any country. Where it exists, it has taken years and generations to develop. For someone with a deeper insight into the functioning of a rule of law system it is clear that it represents an investment similar to what is needed to establish other types of infrastructure in a country, like roads, railways, harbours, the electric grid, and the like.

Let me now address the second situation that I intended to raise: a State that cannot provide for the rule of law will most probably not be able to fulfil the obligations that the same state has undertaken by ratifying various conventions and treaties.

Here I can be brief. To someone dealing with the UN treaty system it is obvious that many Member States simply do not have the resources to fully comply with their international obligations. One particular peculiarity that I witnessed was developing countries ratifying a complex treaty almost directly upon its adoption when I knew that a country with a more sophisticated legal system would need at least a year or two for such an exercise. So, what would be the value of such a speedy ratification?

In other cases, national authorities refuse to recognize and respect their obligations under international law, even where the State has voluntarily subscribed to the relevant treaties. This is a situation that we should be looking at specifically in our consultations.

However, in many cases national authorities simply lack the necessary expertise or resources to ensure that their obligations are properly implemented and applied.⁵ This is something to be borne in mind, when we assess to what extent States comply

⁴ GA/RES/60/1, para. 11.

⁵ Report of the Secretary-General on the work of the Organization, Supplement No.1 (A/55/1), para. 278.

with their international commitments. This problem should also be discussed in relation to resolutions adopted by the Security Council in the fight against terrorism.

One interesting question here is to what extent States are able to deliver what is expected from them under Security Council resolution 1540 (2004) on non-proliferation of weapons of mass destruction, i.e. the resolution designed to prevent such weapons from getting into the hands of terrorists.

The conclusion to be drawn here is that sophisticated analyses of international legal commitments may be interesting, but when push comes to shove States may simply not be able to deliver. This may in turn cause other States to behave as they please in spite of the commitments that they have made.

The most serious consequence of this situation is that a general distrust might spread that also affects States that are fully developed and in a position to abide by their international commitments. We can see the effects of this latter phenomenon in the so-called "war against terrorism". The mere forging of this misnomer was a grave mistake. It has confused the concepts of international humanitarian law and has resulted in human rights violations. In short, it was a disservice to the world community!

The deliberations in this Forum should be non confrontational. Let me assure you that I certainly do not wish to create an atmosphere of confrontation by raising these issues. But it would be dishonest not to mention the dilemma that I have just pointed to.

I am fully aware that you are focusing on a very special question in these consultations. However, I feel obliged to draw your attention to the fact that there is a very important connection between your topic and a more overriding issue here.

It is all good and well that treaties in the field of disarmament are negotiated, adopted and ratified. But as long as there are States that do not operate under the rule of law they create risks that other States cannot and will not ignore.

Therefore, no matter what treaties are adopted and no matter what undertakings are made, the world community is still far from what needs to be achieved in the field of disarmament. General disarmament will not be accomplished unless an atmosphere of trust is created. And this can only happen if the rule of law is established both at the national and the international level.

Irrespective of this, States should of course be held accountable under their present obligations. We have to work from both ends. I have approached the problem from one end. I am convinced that we will now hear Dr. Burroughs approaching it from the other.

The point that I want to make is that every effort should be made to engage in a global rule of law movement. In the final analysis, this is the road that could lead to the elimination of nuclear arms and to a more general disarmament.

Someone might say: is he not simply stating the obvious?

My immediate response would be: then it is high time to do the obvious!

Someone else might say: but does all of this apply to the countries that we are focusing on?

My reply would be: it does! The varnish of civilization is thin. We all know what happened in this part of the world only 60-70 years ago. By the standards of humankind this is a short time.

If we think ahead 60-70 years, there will be dramatic changes. One thing we should bear in mind is that the geopolitical center of the globe might by then very well be in China and India.

Now someone else might observe: what he is suggesting is too slow a process. Do we really have time to wait for all this to be achieved?

The answer is that there is a short-term perspective and a long-term perspective. We must work in both. As I see it, it is crucial that we also start working systematically and with determination in the long-term perspective because in the end the only way to achieve disarmament, including the abolition of nuclear weapons, is through the rule of law.

Thank you for your attention!

Paragraphs 11, 16, 21, 24 (b), 25 (a), 119 and 134 of General Assembly resolution A/RES/60/1 (emphasis by me):

11. We acknowledge that good governance and the **rule of law** at the national and international levels are essential for sustained economic growth, sustainable development and the eradication of poverty and hunger.

16. We therefore resolve to create a more peaceful, prosperous and democratic world and to undertake concrete measures to continue finding ways to implement the outcome of the Millennium Summit and the other major United Nations conferences and summits so as to provide multilateral solutions to problems in the four following areas:

- Development
- Peace and collective security
- Human rights and the **rule of law**
- Strengthening of the United Nations

21. We further reaffirm our commitment to sound policies, good governance at all levels and the **rule of law**, and to mobilize domestic resources, attract international flows, promote international trade as an engine for development and increase international financial and technical cooperation for development, sustainable debt financing and external debt relief and to enhance the coherence and consistency of the international monetary, financial and trading systems.

24 (b) To reaffirm that good governance is essential for sustainable development; that sound economic policies, solid democratic institutions responsive to the needs of the people and improved infrastructure are the basis for sustained economic growth, poverty eradication and employment creation; and that freedom, peace and security, domestic stability, respect for human rights, including the right to development, the **rule of law**, gender equality and market-oriented policies and an overall commitment to just and democratic societies are also essential and mutually reinforcing;

25 (a) We continue to support efforts by developing countries and countries with economies in transition to create a domestic environment conducive to attracting investments through, inter alia, achieving a transparent, stable and predictable investment climate with proper contract enforcement and respect for property rights and the **rule of law** and pursuing appropriate policy and regulatory frameworks that encourage business formation;

119. We recommit ourselves to actively protecting and promoting all human rights, the **rule of law** and democracy and recognize that they are interlinked and mutually reinforcing and that they belong to the universal and indivisible core values and principles of the United Nations, and call upon all parts of the United Nations to promote human rights and fundamental freedoms in accordance with their mandates.

Rule of law [Note: This title appears in the resolution]

134. Recognizing the need for universal adherence to and implementation of the **rule of law** at both the national and international levels, we:

- (a) Reaffirm our commitment to the purposes and principles of the Charter and international law and to an international order based on the **rule of law** and international law, which is essential for peaceful coexistence and cooperation among States;
- (b) Support the annual treaty event;
- (c) Encourage States that have not yet done so to consider becoming parties to all treaties that relate to the protection of civilians;
- (d) Call upon States to continue their efforts to eradicate policies and practices that discriminate against women and to adopt laws and promote practices that protect the rights of women and promote gender equality;
- (e) Support the idea of establishing a **rule of law** assistance unit within the Secretariat, in accordance with existing relevant procedures, subject to a report by the Secretary-General to the General Assembly, so as to strengthen United Nations activities to promote the **rule of law**, including through technical assistance and capacity-building;
- (f) Recognize the important role of the International Court of Justice, the principal judicial organ of the United Nations, in adjudicating disputes among States and the value of its work, call upon States that have not yet done so to consider accepting the jurisdiction of the Court in accordance with its Statute and consider means of strengthening the Court's work, including by supporting the Secretary-General's Trust Fund to Assist States in the Settlement of Disputes through the International Court of Justice on a voluntary basis.