

COUNCIL *on* FOREIGN RELATIONS

International Institutions and Global Governance Program

POLICY INNOVATION MEMORANDUM NO. 26

Date: October 2, 2012
From: Mark P. Lagon
Re: A Global Trust for Rule of Law

The rule of law is critical for people to have a meaningful opportunity to thrive. Still, for billions of people around the world today, the rule of law exists on paper but not in practice. Even though a theme for the United Nations General Assembly High-Level Panel in fall 2012 is rule of law, various UN programs devoted to rule of law have not had a transformative impact. Traditional intergovernmental institutions will never offer enough to achieve systemic change. To supplement them and achieve what they alone cannot, the United States should take the lead to forge a more nimble partnership with public, private, and nonprofit sectors and establish a Global Trust for Rule of Law (“Global Trust”). Similar to the Global Fund to Fight AIDS, Tuberculosis and Malaria (“Global Fund”), a diverse board of donor states, philanthropists, rule of law experts, and civil society representatives would run this Global Trust. Its purpose would be to build developing nations’ capacity to implement rule of law and unleash the potential of marginalized groups worldwide, promoting not only human dignity but, crucially, global economic growth.

THE PROBLEM

“Rule of law” consists of procedures giving all people in a society meaningful access to justice, unimpeded by corruption or discrimination. It is needed not only for people to enjoy basic liberties, but most important to fully tap their capabilities to flourish economically. Consider how much more of an economic miracle India could be if disadvantaged castes enjoyed full access to justice, instead of facing discrimination and even bonded labor. So too would Arab nations be more economically dynamic (and stable)—on a broader foundation than fossil fuel resources—if they did not discriminate against women as workers and entrepreneurs. Moreover, establishing a trustworthy, predictable legal context is a magnet for increased foreign investment. For all these reasons, rule of law will galvanize a society’s economic growth.

Numerous laws and treaties have been adopted guaranteeing rights. Yet developing countries need international help to *implement* rule of law. The world’s preeminent “human rights” institutions do not focus on rule of law. The UN Human

Rights Council has only a limited capacity-building mandate, the International Criminal Court (ICC) focuses on accountability *after* atrocities have been committed, and the European Court of Human Rights does not address the absence of fundamental legal or law enforcement institutions within states. Over forty UN entities working in 110 nations on programs dedicated to rule of law in the past twenty years have not yielded systemic change. Nor have those of the World Bank and other international financial institutions acting alone. Because private sector and civil society assets will never be *fully* integrated into efforts of traditional institutions beholden to member states and their lowest-common-denominator agendas, a quantum leap in rule of law requires mobilizing other important partners.

TIME FOR A GLOBAL TRUST

Leveraging the respective capabilities of developed and developing countries, international institutions, nongovernmental organizations (NGOs), and private sector actors, a new Global Trust for Rule of Law could spur that leap. Its primary function would be to provide grants and technical advice to NGOs and governments dedicated to enlarging access to legal rights and rule of law capacity where both are weak. It should be a cooperative partnership helping nations asking for help. Among other activities, it would support projects to train lawyers or prosecutors, help citizens gain access to justice institutions, and spread public awareness about corruption. Labeling this entity a “trust” would evoke not only a fund but the very confidence in rule of law that societies need to develop both politically and economically.

Governments and multilateral institutions offer convening power and seed money as partners. With a huge stake in predictable rule of law, businesses must also be integral partners, and they will motivate states to seek the Global Trust’s help given the prospect of increased business investment. An alliance solely of NGOs would raise as many suspicions from illiberal governments about outside meddling as would these other actors, without the benefits they offer.

While the UN is insufficient as an implementer, it can provide a Global Trust legitimacy in the eyes of Egypt, China, and others through its definition of rule of law based on procedural consistency and judicial independence rather than necessarily Western-style democracy. The UN secretary-general’s report *Delivering Justice* establishes: “The United Nations defines the rule of law as a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated. . . . It requires . . . legal certainty, avoidance of arbitrariness and procedural and legal transparency.”

The Global Trust should draw lessons from two models: the Global Fund and the UN Democracy Fund (UNDEF). The Global Fund demonstrates the value of mobilizing the resources and comparative advantages of foundations and the private sector, rather than giving lead responsibility to a single UN entity with vested interests (in this case, the World Health Organization, or WHO). Likewise, the lesser-known UNDEF shows the importance of a framework insulating budgets from the narrow priorities of member states, while still offering the legitimacy of a highly respected body. Most important, UNDEF evinces the wisdom of supporting nimble non-UN implementers and civil society organizations, which are guaranteed a role in at least 85 percent of its grants. Scaling up this model, the Global Trust should prioritize civil society actors, concentrating its work in nations where governments welcome its help and where progress will be most likely.

Structurally, the Global Trust should also mirror the Global Fund and UNDEF. It would have an autonomous governing board composed of representatives from developed and developing countries, the UN and international financial institutions, NGOs, relevant foundations, representatives of the private sector, and civil society institutions. A regional representation allotment would allay concerns about a Western bias. Funding from and decision-making influence of any single donor—including the United States—would be limited (e.g., a 10 percent ceiling), with no veto power for any board member. A technical committee of experts across cultures charged with evaluating grant applications would report to the board.

Like those of the Global Fund and UNDEF, Global Trust grants would be performance based and disbursed in stages once benchmarks are met. To avoid the kinds of corruption and misappropriation charges that have dogged the Global Fund, the Global Trust's board would need to appoint the strongest of inspectors general to ensure grants are properly appropriated and projects are proceeding on time and within budget limits. In a trust designed to fight corruption and impunity, accountability will be essential to its credibility.

The many potential grantees might include, for example, the Bachpan Bachao Andolan group in India, which champions children's freedom from onerous labor. Another might be the American Bar Association's Rule of Law Initiative. This program trains justice sector professionals, helps local institutions that provide pro bono legal assistance to the poor in some fifty countries, and supports government-civil society partnerships in developing countries with high corruption, such as Nepal and El Salvador.

BUILDING BACKING FOR A GLOBAL TRUST

With other powers and private actors unlikely to do so, the United States should broker consensus on structures and provide seed funding for a Global Trust. It should cohost a meeting with a major rising power—such as Brazil, Indonesia, or Turkey—based on the latter's desire to be a leader and model.

There will be governments, even democratic ones, loath to let the Global Trust give grants to organizations within their borders. These skeptical states can be convinced *this* partnership is premised on helping the disadvantaged and unleashing economic potential (not ousting governments). A procedural definition of rule of law and limits on any actor's donations and influence will demonstrate that the Global Trust cannot be a Trojan horse for U.S. parochial aims. Reluctant states may come to cooperate as they observe successes where states welcome the Global Trust's help.

The amount of seed money needed to get the effort up and running would be relatively modest—perhaps as low as \$140 million (the amount given to the State Department's bilateral "democracy fund" last year). Based on the experience of the Global Fund—with which donors have repeatedly employed a wait-and-see-what-the-United-States-gives strategy—a significant initial pledge by the United States would be critical in leveraging other resources.

Given the difficult budgetary environment and skepticism of foreign aid in the United States and Europe, will legislatures support this initiative? There may be greater flexibility for developed countries to provide seed money than conventional wisdom suggests. Since the financial crisis, U.S. pledges to the Global Fund have actually increased. Likewise, in March 2012, cash-strapped Japan offered \$340 million to the Global Fund, its largest donation ever. To be sure, the White House will need to persuade Congress that an investment in the Global Trust would have an enormous multiplier effect in prosperity, pluralism, and peace, compared to dollars spent elsewhere. And it would.

CONCLUSION

Weak rule of law in the developing world deprives countless people of legal rights and, hence, an opportunity to thrive economically. A Global Trust for Rule of Law could begin to close the gap between rights that exist on paper and those that can actually be enjoyed. Drawing on the Global Fund and UNDEF as models of best practices and effective partnerships, a Global Trust, autonomous of any one state or the UN, would cultivate rule of law capacity-building projects in Latin America, sub-Saharan Africa, and other developing regions by supporting deserving proposals from states and civil societies. It would quickly become a nimble catalyst to build trust in access to justice and economic opportunity in those societies. So too would it inexorably accelerate global economic growth. Investing in such a trust would be a high-value bargain.

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