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THIS ISSUE INCLUDES CONTRIBUTIONS BY

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The New Zealand Centre for Public Law was established in 1996 by the Victoria University of Wellington Council with the funding assistance of the VUW Foundation. Its aims are to stimulate awareness of and interest in public law issues, to provide a forum for discussion of these issues and to foster and promote research in public law. To these ends, the Centre organises a year-round programme of conferences, public seminars and lectures, workshops, distinguished visitors and research projects. It also publishes a series of occasional papers.

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INTERNATIONAL ORGANISATIONS AND THE RULE OF LAW

José E Alvarez*

In the wake of numerous examples of malfeasance by international organisations, including by those of the United Nations system, there is widespread agreement that such institutions, commonly engaged in promoting the rule of law, need themselves to be 'accountable' under the rule of law. This article canvasses and critiques common prescriptions for achieving IO responsibility under the rule of law, emphasizing the need to avoid mistaken transcriptions of the national rule of law. It argues that holding IOs, such as the United Nations Security Council, to rule of law standards requires making more circumspect national law analogies. Insisting on perfecting the international rule of law by drawing on the national rule of law may not produce the progressive results intended.

The subject of the Symposium – whether and how international organisations (IOs) should be subject to the rule of law – is evergreen. Consider three incidents over the course of 2015.

Incident One

According to press reports, on 6 October 2015, United States federal agents arrested John Ashe, the 68th President of the United Nations General Assembly on charges of accepting more than $1.3 million in bribes from Chinese business executives in exchange for supporting the construction of a building in Macau to host United Nations meetings.[1] Preet Bharara, the United States district attorney for the Southern District of New York, accused Ashe, a former ambassador to the United Nations from Antigua and Barbuda, of having "sold himself and the global institution he led".[2] He described Ashe and the other associates in the alleged scheme who were arrested separately, as having been

* Herbert and Rose Rubin Professor of International Law, New York University School of Law. This article expands on a keynote address delivered at the "International Organisations and the Rule of Law: Perils and Promise" Symposium (Victoria University of Wellington, 7 December 2015). The author thanks the participants at the Symposium, as well as anonymous reviewers of this Journal, for their many thoughtful comments. All remaining errors remain, of course, the fault of the author.

1 Colum Lynch "US Accuses Former UN General Assembly President of Corruption" *Foreign Policy* (online ed, Washington DC, 6 October 2015).

2 Lynch, above n 1.

"[u]nited in greed" and forming "a corrupt alliance of business and government [and] converting the UN into a platform for profit".[3] Ashe was alleged to have accepted laundered funds to influence his recommendations to Secretary-General Ban Ki-Moon to build the conference centre.

Incident Two

For much of 2015, according to press reports, the United Nations' Office of Internal Oversight Services, the entity responsible for preventing fraud and waste in an organisation that spends billions of dollars each year on peacekeeping missions in fragile countries around the world, was racked with internal conflicts.[4] The confrontation involved a difference of opinion between the office's director of investigations, Michael Stefanovic, and the Canadian director of the office, Carman Lapointe. Their disagreement reportedly threatened the effectiveness of the United Nations' internal watchdog unit. Mr Stefanovic had urged United Nations officials to investigate Ms Lapointe for seeking to punish a whistleblower who had exposed the sexual exploitation of children by French troops in the Central African Republic (CAR).[5] Mr Stefanovic's complaint against his boss, leaked to the press, had drawn the support of a whistleblowers' support group and had persuaded Ban Ki Moon to establish a blue ribbon panel in June 2015 to review the United Nations' response.[6] Following that review, the United Nations' top official in the CAR and the Deputy High Commissioner for Human Rights resigned. The press report canvassed examples of the Office of Internal Investigations' failures to encourage the prosecution of other sex crimes committed in the course of peacekeeping, quoted the Obama Administration's "deep concern for the apparent dysfunction that is going on in the UN's investigations division", and included the following mea culpa from the United Nations Secretary-General: "I cannot put into words how anguished, angered and ashamed I am by recurrent reports over the years of sexual exploitation and abuse by UN forces … [it is a] cancer in our system".[7]

Incident Three

In January 2015, a New York District Judge issued a decision in *Georges v United Nations*, involving a class action for tort claims against the United Nations based on allegations that the United Nations' 1000 person force from Nepal was responsible for a sudden epidemic of cholera in Haiti (a country that had not had cholera for 350 years) in 2010, killing over 8,000 Haitians and making

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3 Lynch, above n 1.

4 Colum Lynch "The UN's Investigation Wars" *Foreign Policy* (online ed, Washington DC, 26 August 2015).

5 Lynch, above n 4. For a discussion of the underlying peacekeeping scandal involving the CAR, see Róisín Burke "Central African Republic Peacekeeper Sexual Crimes, Institutional Failings: Addressing the Accountability Gap" (2016) 14 NZJPIL 95.

6 Lynch, above n 4. Also see Burke, above n 5.

7 Lynch, above n 4.

another 600,000 ill.[8] Despite credible evidence that the United Nations peacekeeping troops had negligently discharged raw untreated sewage from their base camp into a tributary that flows into the Artibonite River, the main source of drinking water in Haiti, and that the cholera strain in Haiti was a nearly perfect DNA match to a cholera strain outbreak that had occurred in Nepal prior to the troops' departure to Haiti, the United States judge dismissed the suit on the basis of the United Nations' absolute immunity under the General Convention on Privileges and Immunities.[9] The judge relied on prior United States precedent that had repeatedly upheld the United Nations' absolute immunity from suit in national courts.[10] That ruling could well have cited other comparable decisions issued by other courts that have also affirmed the United Nations' absolute immunity, even in the face of serious allegations of United Nations malfeasance, including claims that the organisation's actions (or inactions) in Srebrenica amounted to complicity in ethnic cleansing in violation of jus cogens.[11]

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In these and other instances the United Nations has successfully deflected its legal responsibilities by, among other things, blaming others. With respect to incident one, it has suggested that the problem lies not with the organisation itself but with the unauthorised actions of a corrupt foreign government official, who happened to be President of the General Assembly and allegedly abused his position and influence. Incident two, like others involving sexual exploitation by United Nations peacekeepers, can be blamed on the soldiers who commit such crimes and their countries of origin who fail to punish them. With respect to incident three, the United Nations Independent Panel of Experts on the Cholera

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8 *Georges v United Nations* 84 F Supp 3d 246 (SD NY 2015). For a succinct account of the nature of the complaint, written by the attorney responsible for bringing the class action, see Ira Kurzban, Beatrice Lindstrom and Shannon Jonsson "UN Accountability for Haiti's Cholera Epidemic" (3 April 2014) AJIL Unbound <www.asil.org>. For a detailed report, see Transnational Development Clinic, Global Health Justice Partnership and L'Association Haïtienne de Droit de l'Environnement "Peacekeeping Without Accountability: The United Nations' Responsibility for the Haitian Cholera Epidemic" (15 October 2013) Yale Law School <www.law.yale.edu>.

9 See *Georges v United Nations*, above n 8, at 253. Judge Oetken relied on the Convention on Privileges and Immunities: Convention on Privileges and Immunities of the United Nations 1 UNTS 15 (opened for signature 14 December 1946, entered into force 14 September 1946), art 2(2).

10 See *Georges v United Nations*, above n 8. See also *Brzak v United Nations* 597 F 3d 107 (2d Cir 2010). However, the District Court's ruling in *Georges v United Nations* is now on appeal and, much to the surprise of many knowledgeable observers, the appeals panel granted an oral hearing. For a summary of the appeal, see Kristen Boon "Appeal Launched in Haiti Cholera Case" (5 June 2015) Opinio Juris <www.opiniojuris.org>. For a transcript of that hearing, held on 1 March 2016, see "Unofficial Transcript from Oral Argument in *Georges v United Nations*, 15-455, before the Second Circuit Court of Appeals, March 1, 2016" (2016) Opinio Juris <www.opiniojuris.org>. At the time of writing, the appeals decision remains pending.

11 See Guido den Dekker and Jessica Schechinger "The Immunity of the United Nations before the Dutch Courts Revisited" (4 June 2010) The Hague Justice Portal <www.haguejusticeportal.net>.

Outbreak in Haiti's initial response to the cholera epidemic concluded that given Haiti's inadequate infrastructure and its recent earthquake, that epidemic stemmed from a "confluence" of circumstances.[12] It was also suggested that if untreated sewage from the peacekeepers' base camp was in fact discharged into Haiti's main river, the private contractor hired by the United Nations to inspect these facilities was to blame. A reasonable reading of the United Nations' response in that case was that, in the view of the organisation, it was Haiti's fault if its weak infrastructure could not handle the contamination of the country's main source of drinking water.

These instances, involving national crimes (incident one), national and international crimes (incident two), and what may have been gross negligence (incident three), are only select examples (among many that could be cited) where IOs have been accused of hurting the very people that they are supposed to be assisting. In many of these cases, such as those involving United Nations peacekeepers, the harms resulted, ironically enough, in the course of action to promote, secure, or establish the rule of law. Indeed, the harms caused by the United Nations and other international Organisations tend to fall on the populations of fragile rule of law nations. For many, including commentators at the Symposium, this makes the absence of accountability in such cases a particularly stark rebuke to these organisations' rhetorical support for the rule of law. That oft-stated rhetoric is suggested by the words of former United Nations Secretary-General Kofi Annan:[13]

> [The rule of law] refers to 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, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency.

Annan's definition of the rule of law owes much to the work of well-known scholars such as Tom Bingham, Lon Fuller, and Jeremy Waldron who have done much to clarify the general contours of the (national) rule of law.[14] It also echoes the work of presenters at the Symposium.

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12 José Alvarez "The United Nations in the Time of Cholera" (4 April 2014) AJIL Unbound <www.asil.org>. Alvarez cites EDS Lantagne "Final Report of the Independent Panel of Experts on the Cholera Outbreak in Haiti" (24 October 2010) United Nations <www.un.org> at 29.

13 Kofi Annan *Rule of Law and Transitional Justice in Conflict and Post-conflict Societies* S/2004/616 (2004) at [6].

14 See for example Tom Bingham *The Rule of Law* (Penguin Books, London, 2010); Lon Fuller *The Morality of Law* (Yale University Press, Connecticut, 1964); and Jeremy Waldron "The Concept and the Rule of Law" (2008) 43 Ga L Rev 1. For a recent summary of such work, discussing formal, procedural and substantive

To be sure, to paraphrase Brian Tamanha, while everyone is for the rule of law, this is made easier by the absence of a single definition of what it actually is, varying views about when it is relevant and to whom, and by the ever present (and sometimes hypocritical) tendency we have to apply whatever we think it is to others but not to ourselves.[15] This hypocrisy extends, of course, to nation states themselves whose rhetorical support for the rule of law invariably exceeds their compliance with it. Annan, in the quotation above, clearly draws on how the rule of law has been developed within nation states. He seems to presume that the national rule of law can be exported and made to apply internationally and to IOs in particular.

These are contestable propositions. As Carolyn Evans' article demonstrates, despite 250 Security Council resolutions since 1996 that mention the term 'rule of law' and 200 Council resolutions that mention 'accountability', there is no general consensus about what either term means at the international level.[16] The Charter of the United Nations contains neither any requirements that the organisation respect the rule of law, nor any provisions indicating that it applies to United Nations organs. Other IO charters are similarly silent. Apart from the absence of explicit provision, IO charters do not make the application of the rule of law, whatever that means, easy. Although we know that United Nations organs cannot violate the principles and purposes of the Charter, these are so expansive that concrete limitations are difficult to discern from them.[17] IO charters do not come with express limits on the scope of delegated powers that can be given to subsidiary organs, do not usually evince separation of powers principles that permit one organ to check another, and only rarely provide for methods for authoritative interpretation (other than subsequent practice backed by acquiescence or lack of objection).[18] Neither the Charter of the United Nations nor other IO constitutions come with bills of rights for individuals, or clear limits on the power of charter organs with respect to the remaining, undelegated or residual sovereign powers of states. Indeed, art 2(7) of the Charter of the United Nations seems to avoid suggesting that sovereigns have a legal right to be protected from

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approaches to defining the rule of law, see Robert McCorquodale "Defining the International Rule of Law: Defying Gravity?" (2016) 65 ICLQ 277 at 279–284.

15 See Brian Tamanha "The History and Elements of the Rule of Law" (2012) Sing JLS 232.

16 See Carolyn M Evans "Finding Obligation: Foundation for a More Accountable Security Council" (2016) 14 NZJPIL 127 at 128.

17 See Charter of the United Nations, art 24(2): "In discharging these duties the Security Council shall act in accordance with the Purposes and Principles of the United Nations."

18 See José Alvarez "Governing the World: International Organizations as Lawmakers" (2008) 31 Suffolk Transnatl L Rev 591.

United Nations interference with their domestic jurisdiction, as compared to the Covenant of the League of Nations.[19]

Given these realities, perhaps the rule of law is invoked as often as it is, including by United Nations organs like the Security Council and Secretaries General, because United Nations bureaucrats and members find its meaning as adaptable (and therefore user friendly) as the term 'terrorism'. As Evans indicates, a contributing factor may be the disagreements that already exist with respect to the meaning of rule of law at the national level.[20] As is well known, there are advocates for 'thick' or 'thin' definitions of the international rule of law which mirror comparable debates for the national rule of law that go back centuries.[21] But the commentators at the Symposium do not segregate themselves into competing (and familiar) rule of law camps. The Symposium papers presented do not revisit well-worn debates between, for example, Lon Fuller's eight rule of law qualities (generality, wide promulgation, prospective application, clarity, non-contradiction, the imposition of reasonable and not impossible demands, constancy, and congruence between the written law and its enforcement) and Waldron's additional criteria for the rule of law (focusing on fair procedures in the governmental exercise of power).[22] On the contrary, the Symposium papers largely agree on the terms of reference.

Tom Bingham's simple enumeration of the basic elements of the rule of law, broadly consistent with Annan's definition, would not draw significant opposition from the commentators here. According to Bingham's well-received book, the rule of law requires:[23]

(1) equality (that is, the equal application of the law);

(2) publicity (entitlement to rules that are accessible, intelligible, clear and predictable, and publicly administered by courts);

(3) legally bound discretion;

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19 Compare Charter of the United Nations, art 2(7): "Nothing … shall authorize the UN to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII." to the League of Nations Covenant, art 15(8): "If the dispute between the parties is claimed by one of them, and is found by the Council, to arise out of a matter *which by international law* is solely within the domestic jurisdiction of that party, the Council shall so report, and shall make no recommendation as to its settlement." (Emphasis added). To this extent, the Charter of the United Nations might be seen as a retrograde step from the preceding Covenant.

20 See Evans, above n 16.

21 See for example Brian Tamanaha "A Concise Guide to the Rule of Law" (2007) 82 St John's University Legal Studies Research Paper Series 1.

22 Compare Fuller, above n 14, and Waldron, above n 14.

23 Bingham, above n 14.

(4) the good faith exercise of power in accordance with purpose for which powers were conferred, without exceeding the limits of such powers;

(5) protection of fundamental human rights (including *nullen crimen sine lege*, the right to fair trial, and to liberty, security, and property); and

(6) access to other means to resolve civil disputes without prohibitive cost or delay.

The commentators at the Symposium presume that adhering to these qualities, or to most of them most of the time, matters. All seem to be on the same page in concluding that the rule of law is not just Judith Shklar's "ruling-class chatter".[24] The commentators here largely avoid definitional debates and proceed directly to prescription: that is, to make proposals for fulfilling the essential elements of the rule of law at the international level.

Most of the commentators here presume that rule of law reforms are needed because IOs do not satisfy all of these qualities all (or even most) of the time. They are correct that examples of how IOs fall short on Bingham's qualities are easier to enumerate than examples of their fidelity with them. Equality before the law, Bingham's first element, is respected procedurally before international courts like the International Court of Justice (ICJ), but it is not a quality that we associate, for example, with the voting procedures of the Security Council or the operation of the boards of the World Bank or the International Monetary Fund (IMF).[25] As Alison Duxbury's paper at this conference implies, horizontal equity among states, according each state equal power, is not (outside of the general assemblies of IO subject to one state, one vote) a quality uniformly associated even with respect to IOs that aspire to universal membership.[26] Indeed, as she points out, the field of the study of institutions is itself skewed along North and South lines.[27] More importantly, as critical scholars like Tony Anghie and BS Chimni have argued, a great deal of hard and soft law promulgated by global

24 Judith Shklar "Political Theory and the Rule of Law" in AC Hutchinson and Patrick Monahan (eds) *The Rules of Law: Ideal or Ideology* (The University of Chicago Press, Chicago, 1987) 21 at 21.

25 Or how the heads of those respective institutions are selected and by whom. Indeed, the debate at the United Nations at this writing is merely whether the General Assembly will be given more than one potential candidate to succeed Ban Ki Moon to approve.

26 Alison Duxbury "Is International Law Universal?" (paper presented at "International Organisations and the Rule of Law: Perils and Promise" Symposium, Victoria University of Wellington, 7 December 2015).

27 See Duxbury, above n 26.

governance institutions takes the form of exports from countries that are already in compliance with their terms to countries of the Global South who bear the brunt of adapting to new regulatory requirements.[28]

Nor do IOs uniformly respect Bingham's elements two or three: publicity and legally bound discretion. Many have criticised the Security Council's notorious lack of transparency, as well as its remarkably open-ended discretion, which seems immune to legal limits susceptible to judicial demarcation.[29] Nor is the Security Council the only entity with such evident rule of law flaws. Most of what IOs do remains impervious to binding judicial examination, despite the proliferation of international courts. Residents of Argentina, for example, were not privy to the IMF negotiations that led to arrangements that at least some suggest helped lead to their country's 2001 economic crash.[30] Indeed, the IMF's lack of transparency later on made it difficult to examine who was at fault, the government or the IMF, for that disaster.[31] As is well known, the IMF's day-to-day decisions on the scope of its authority residing in that body's Executive Board and its General Counsel, including the scope of its authority to impose constraining forms of conditionality, are not subject to a judicial check within that organisation.[32]

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28 See Antony Anghie *Imperialism, Sovereignty, and the Making of International Law* (Cambridge University Press, Cambridge, 2007); and BS Chimni "Capitalism, Imperialism, and International Law in the Twenty-First Century" (2012) 14 Oregon Rev of Int'l L 17. For an interesting account of the forms of contestation generated by these and other IO efforts, see Balakrishnan Rajagopal *International Law from Below: Development, Social Movements and Third World Resistance* (Cambridge University Press, Cambridge, 2003).

29 For a general survey of possible constraints on the Security Council, see James Crawford *Chance, Order, Change: The Course of International Law* (Brill Academic Publishers, Boston, 2014) at 435: Crawford's answer to whether the ICJ can serve to engage in the judicial review of the Council is generally negative. He notes that:

> There is an almost total lack of institutional means for implementing the principle of the rule of law on the part of individual member States. Rights conferred on States by the system of which the Charter is part cannot, apparently, be vindicated against the Security Council by means other than persuasion or civil disobedience.

30 For the IMF's own account of the reasons for the Argentine economic crisis, see "Lessons from the Crisis in Argentina" (8 October 2003) International Monetary Fund <www.imf.org>.

31 Indeed, this question has now been the subject of considerable conflicting expert opinions filed in the International Centre for Settlement of Investment Disputes (ICSID). See for example *LG&E Energy Corp v Argentine Republic (Decision on Liability)* (2006) ICSID Case No ARB/02/1.

32 For an attempt to challenge the scope of this authority based on a narrow reading of the IMF's Articles of Agreement, see Daniel Kalderimis "IMF Conditionality as Investment Regulation: A Theoretical Analysis"(2004) 13 S & LS 103. There is a substantial critical literature with respect to international financial institutions' engagement with human rights: see for example Mac Darrow Between *Light and Shadow: The World Bank, The International Monetary Fund and International Human Rights Law* (Hart, Oxford, 2003). Indeed, such criticism and its connection to accountability, generated pressures to establish the World Bank's

Moreover, even when international lawyers have turned to international courts or other forms of formal adjudication, such as arbitration, these mechanisms themselves have been criticised for rule of law failings, including the absence of transparency or accessibility.[33] While, as Amelia Keene's article points out, the ICJ's advisory jurisdiction is a bit more open to participation by states and non-state actors that may be affected by the court's opinions, the same cannot be said with respect to that Court's contentious jurisdiction, for example.[34] Despite a trend towards the greater acceptance of amicus briefs in most, but not all, of the 24 permanent international courts or tribunals now operating, access to those bodies is not open to allcomers on an equal basis.[35] The accessibility of such courts is also subject to other barriers: the small, elite, male and decidedly European and American invisible college of repeat lawyers before courts like the ICJ belie their universalist (and rule of law) aspirations.

There is also considerable room to question whether IOs that have seen remarkable mission creep (that is, most of them) comply with Bingham's fourth element: functionalist limits on delegation of powers. Thanks in part to inhouse counsel who often issue empowering office opinions, a precedent set by Wilfred Jenks at the International Labour Organisation (ILO), IO constitutions have been, as Guy Sinclair notes, "dynamically interpreted" to permit their officials to do what they want.[36] Reliance on a combination of teleological charter interpretation, the concept of implied powers, a presumption of legality, the principle of effectiveness, and the legitimacy of subsequent institutional practice has enabled the ILO to transform itself into a technical assistance agency; the International Civil Aviation Organisation (ICAO) and the World Health Organisation (WHO) to become institutional bulwarks against intentional terrorist threats to safe air travel or global health respectively; the IMF to change from fixer of fixed exchange rates to decider of desirable macro-economic policies generally; the

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Inspection Panel process: see for example S Schlemmer-Schulte "The World Bank Inspection Panel: A Record of the First International Accountability Mechanism and its Role for Human Rights" (1998) 6 Human Rights Brief 279.

33 See for example Benedict Kingsbury and SW Schill "Investor-State Arbitration as Governance: Fair and Equitable Treatment, Proportionality, and the Emerging Global Administrative Law" (2 September 2009) Social Science Research Network <www.ssrn.com>. Kingsbury and Schill critique investor state arbitration along these lines. Indeed, one commentator at the Symposium contended that even a final ICJ judgment can be an ultra vires act: see Dai Tamada "Ultra Vires Judgments of the ICJ: Issues with Legal Exclusion" (paper presented at "International Organisations and the Rule of Law: Perils and Promise" Symposium, Victoria University of Wellington, 7 December 2015).

34 Amelia Keene "The Forgotten Potential of the Advisory Jurisdictions of International Courts and Tribunals as a Check on the Actions of International Organisations" (2016) 14 NZJPIL 65.

35 See Luigi Crema "Testing Amici Curiae in International Law: Rules and Practice" (2012) 22 Ital Yrbk Intl L 91.

36 Guy Sinclair "The Common Law Constitutional Vision of C Wilfred Jenks" (paper presented at "International Organisations and the Rule of Law: Perils and Promise" Symposium, Victoria University of Wellington, 7 December 2015).

World Bank to become a tool for good governance writ large and not mere funder of infrastructure projects; and the Security Council to treat its police powers as a licence to establish boundary demarcation and smart sanctions bodies, claims commissions to resolve environmental disputes, and international criminal courts, among other things.[37] Rule of law doubts emerge from all of this institutional creativity.

As Anna Hood's paper at this conference suggests, many doubt whether the Security Council's apparent rewriting of "breaches of the international peace" to mean "breaches of human security" is in conformity with Bingham's second, third, or fourth rule of law elements.[38] Of course, the European Court of Justice's *Kadi* rulings put the Security Council's compliance with Bingham's fifth element, the protection of human rights, under harsh scrutiny.[39] The challenge posed by the Council's 'smart' sanctions on individuals remains, even if these are seen as not equivalent to criminal sanctions but more like civil penalties; even a civil sanction imposed without access to a fair, accessible process for redress does not seem to comply with Bingham's sixth rule of law requisite.[40] The Council's belated responses to judicial challenges – namely accepting the possibility of Council delisting, and the establishment of an ombudsperson mechanism procedure to recommend delisting those identified by the Al-Qaida (and now Islamic State of Iraq and the Levant (ISIL)) sanctions committee – may not fully satisfy Bingham's expectations of a fair procedure. These procedures do not, after all, bind the Council to delist anyone.[41] Of course, even if the ombudsperson office were fully responsive to the rule of law, that does nothing to satisfy rule of law expectations for the 16 other Council sanctions programmes which lack even that mechanism.

It is also ironic that international institutions specifically designed to protect fundamental human rights – international criminal courts – may themselves be violating the principle of legality that is an important part of Bingham's fifth element. There are serious questions about whether some of our international criminal courts fully respect the *nullem crimen sine lege* principle. Justice Robertson, dissenting in the Tribunal of Sierra Leone's conviction of Norman that was based on the proposition

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37 See Alvarez, above n 18, at 169–268. See also Jacob Cogan "Stabilization and the Expanding Scope of the Security Council's Work" (2015) 109 AJIL 324.

38 Anna Hood "The Role of Law in the United Nations Security Council's Chapter VII" (paper presented at "International Organisations and the Rule of Law: Perils and Promise" Symposium, Victoria University of Wellington, 7 December 2015).

39 See Joined Cases C-402 and C-415/05P *Kadi and Al Barakaat International Foundation v Council of the European Union* [2008] ECR I-6352 [*Kadi I*']; and Joined Cases C-584/10P, C-593/10P and C-595/10P *European Commission and Others v Kadi* [2013] ECR 00000 [*Kadi II*].

40 See Duxbury, above n 26.

41 For a description of the ombudsperson innovation, see Grant Willis "Security Council Targeted Sanctions, Due Process and the 1267 Ombudsperson" (2011) 42 Geo J Intl L 673.

that enlistment of child soldiers was a crime back in 1996, certainly thought that his co-judges violated that fundamental principle of legality.[42] Others have criticised as radical and lawless the Special Tribunal for Lebanon's remarkable finding, in 2011, that customary international law recognises the crime of 'terrorism' and also permits prosecutions based on conducting a "joint criminal enterprise".[43]

Tan Hsien-Li's complaint at the Symposium about ASEAN countries' lack of compliance with ASEAN edicts reminds us that much of international law remains ineffective, despite the assumption that the rule of law requires national law to be minimally effective.[44] By contrast, it has never been clear whether Louis Henkin was right or just optimistic when he asserted that "almost all states comply with almost all international law rules most of the time."[45] Nor has it ever been clear that, even if he were correct, the international rules that fail to secure compliance – from the duty to avoid the use of force to the duty not to target civilians in war – loom so large that it seems petty to point out that, for example, states do manage to comply with less significant obligations, such as their duty to maintain most of their export tariffs at the levels promised to the WTO. It may be true, in short, that states comply with those rules that comport with their short term interests, but not with far more important rules that threaten their deepest interests.[46]

Bingham's six rule of law qualities were not only deployed at the Symposium to describe the current rule of law failings of IOs. They were also used as the basis for prescriptions going forward. Thus, Alison Duxbury, working within the traditional frame of institutional practice laid out by the International Law Commission (ILC) in its commentaries to its Draft Articles on the Responsibility of International Organisations (DARIO), worries that the practice is insufficiently responsive to IOs outside the West and North; her project seeks to make the ILC's DARIO more respectful of Bingham's

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42 *Prosecutor v Norman (Decision on Preliminary Motion Based on Lack of Jurisdiction)* SCSL Appeals Chamber SCSL-2004-14-AR72(E), 31 May 2004, at 7413 per Robertson J dissenting. It is also noteworthy that the majority in the *Norman* case relies on IO generated evidence for its controversial conclusion that the international crime of enlisting child soldiers predates the conclusion or entry into force of the Rome Statute. This connects to the criticism, noted infra, that IOs produce forms of soft law that is inconsistent with the rule of law's insistence on the clarity (and pedigree) of rules of law.

43 Ben Saul "Legislating from a Radical Hague: The United Nations Special Tribunal for Lebanon Invents an International Crime of Transnational Terrorism" (2011) 24 LJIL 677 at 677–678.

44 Tan Hsien-Li "Reputation Risks in the Post-Charter ASEAN: Rules-based Reformation or Rhetorical Repetition" (paper presented at "International Organisations and the Rule of Law: Perils and Promise" Symposium, Victoria University of Wellington, 7 December 2015).

45 Louis Henkin *How Nations Behave: Law and Foreign Policy* (2nd ed, Columbia University Press, New York City, 1979).

46 It may also be true that the international legal system's approach to securing 'compliance' with its rules is so distinct that arguments over the level of compliance entirely miss the point. See Robert Howse and Ruti Teitel "Beyond Compliance: Rethinking Why International Law Really Matters" (13 February 2010) Social Science Research Network <www.ssrn.com>.

demand for equality before the law.[47] As noted, Tan urges ASEAN to respect Bingham's insistence on clarity and to remember that the rule of law is about binding rules, not political or moral standards.[48] Tan seeks ASEAN rules that, consistent with the teachings of Lon Fuller, are relatively constant and predictable, allowing stakeholders to know what the law prohibits, permits, or requires, and, for these reasons, generate greater congruence between what is written and what is enforced or exists.[49] Amelia Keene's article focuses on the need to have the law publicly administered by courts, a point that is also fundamental to Waldron's conception of the rule of law which emphasises the need for hearings by an impartial tribunal with legally trained and independent juridical officers who can be counted on to apply the law in good faith.[50] Her paper argues that the advisory jurisdiction of international courts can serve as a check on the actions of IOs. Treasa Dunworth also revisits Bingham's second element with respect to civil society's role in disarmament regimes.[51] Anna Hood, concerned principally with Bingham's third element, explores the ways that the Security Council has used law and opens up a space for a discussion about the desirability of the Council recognising limits on its discretion by explicitly giving voice to those limits.[52] These authors want to make Council legislation and disarmament regimes more accessible, intelligible, clear, and predictable.

Dai Tamada asks whether and how international courts like the ICJ exercise legally bound discretion, and what precisely the remedy is if they do not.[53] Few international lawyers are likely to agree with his controversial contention that those subjected to "illegal" ICJ rulings can ignore them despite the explicit terms of the Charter of the United Nations and the ICJ's Statute indicating that ICJ's decisions are binding. For his part, Guy Sinclair points to the constitutionalist vision of C Wilfred Jenks precisely because, he suggests, international lawyers continue to want to secure it. Sinclair contends that the good faith exercise of IO power, embraced by Bingham's rule of law elements, is the very essence of constitutionalism.[54] Roisin Burke directs her efforts to overcoming the jurisdictional immunities and other problems that prevent the United Nations from affording adequate

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47 See Duxbury, above n 26. Duxbury relies on the Draft articles on the responsibility of international organisations, with commentaries, released by the International Law Commission, in 2011.

48 Compare Fuller, above n 14, to Tan, above n 44.

49 See Tan, above n 44.

50 See Keene, above n 34.

51 Treasa Dunworth "Accountability of International Organisations: The Potential Role NGOs in the Work of Disarmament Bodies" (2016) 14 NZJPIL 45.

52 See Hood, above n 38.

53 See Tamada, above n 33.

54 See Sinclair, above n 36.

recompense or remedy to individuals harmed by United Nations peacekeepers. Her goals are consistent with Bingham's fifth and sixth elements.[55]

None of the papers presented suggest that it is a simple matter to transfer the concept of rule of law from domestic or national systems to IOs. Keene acknowledges, on the contrary, that the enterprise is "fraught with questions" – even though she contends that the rule of law is equally applicable to states and to IOs at the international level.[56] She wisely reminds us that what the rule of law is turns in part on whom it is directed at protecting. What the right rule of law mechanisms are may depend on whether we are seeking to protect the rights of states, the rights of individuals, or the credibility or legitimacy of IOs. Given this, we should not be surprised that there is considerable ambiguity about what it means for IOs to be "accountable". As Carolyn Evans notes, the political scientists Ruth Grant and Robert Keohane identify no less than seven accountability mechanisms for IOs, including the Security Council.[57] Grant and Keohane's seven mechanisms (hierarchical, supervisory, fiscal, legal, market, peer, and public reputational) advance distinct conceptions of accountability.[58]

These seven accountability tools are directed at distinct persons or entities and respond to demands by distinct groups or interests. It is one thing to say that the World Bank or the IMF is accountable to the United States Secretary of the Treasury (through the executive board's control over their senior officials) or to the United States Congress (through the latter's assertion of its power over the organisation's purse strings). It is quite another to make these institutions (or their executive boards or distinct major contributors to their respective budgets) accountable to the poor or indigenous peoples affected by either the Bank's infrastructure projects or the macroeconomic conditions imposed under the IMF's structural adjustment loans. It is one thing to say that a World Bank official is answerable to the supervisory authority of the President of the Bank, and quite another to demand that that official directly answer the complaints of non-governmental organisations (NGOs). As is clear with respect to the dilemmas posed by the claim that United Nations peacekeepers spread cholera in Haiti, it is one thing to say that IOs are accountable to governments, and quite another to expect them to respond directly to persons inside states, including to lawyers hired to represent the claims of victims of IOs.

Grant and Keohane usefully remind us that states, and not only IOs, often fail to comply with the rule of law but their optimistic conclusion that given the number of accountability mechanisms, IOs

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55 See Burke, above n 5.

56 See Keene, above n 34.

57 See Evans, above n 16, citing Ruth Grant and Robert Keohane "Accountability and Abuses of Power in World Politics" (2005) 99 Am Polit Sci Rev 29.

58 Grant and Keohane, above n 57 at 36.

are actually more accountable than either states or NGOs needs to be taken with a grain of salt.[59] This assertion is not likely to satisfy those who seek legal accountability and find that route blocked when it comes to access to a judicial forum to provide financial recompense. Grant and Keohane's optimistic conclusion also relegates to second order importance the fact that all seven of their touted accountability mechanisms are skewed heavily in favour of state power and that such states can prove only too adept at exporting their own rule of law deficiencies (as with respect to the handling of the rights of alleged terrorists) to others through international mechanisms (including the Security Council or other agents, such as the Financial Action Task Force).They say little about the fact that powerful states have inordinate influence on selecting the IO officials who exercise hierarchical supervision, dominate the bodies (like executive boards) who exercise supervisory supervision, supply most of the funds that enable fiscal constraints, are usually the home states of the market actors with enforcement power, tend to dominate the peers that inspire the mobilisation of inter-IO shame, and are frequently the home states of potentially critical (and well endowed) NGOs. Powerful states, in short, can easily control or distort all seven accountability mechanisms. For this reason alone, these mechanisms are not likely to satisfy those looking for equity in the treatment of IO member states in accordance with Bingham's demand that the rule of law should have equal application. This is especially problematic to the extent that the efforts of IOs to promote the rule of law, from the actions of peacekeepers to the targets of the Council's counterterrorism sanctions, usually involve weak or fragile states where nearly all of the victims of IOs live and where their accountability failings come home to roost.

Despite general agreement on the elements of the rule of law at the Symposium, tensions abound in defining 'accountability' and how to deploy the rule of law to advance it. Carolyn Evans' article raises many of the important questions.[60] Does accountability mean representativeness (as in the Security Council's evident lack of it)? Is it, in short, the product of IOs' democratic deficits? Or does accountability mean preventing arbitrary exercises of power? If so, should we insist, as do Global Administrative Law (GAL) scholars, that IOs, like national administrative agencies in rule of law states, be fully transparent, encourage ever greater access and participation (particularly to international civil society), enhance their reason giving, and establish forums for correction in the form of appellate review?[61]

Comparable tensions emerge for Treasa Dunworth when she examines whether and how civil society involvement might render disarmament regimes 'accountable'.[62] Dunworth highlights the

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59 Above n 57.

60 See Evans, above n 16.

61 Some of the prescriptions presented at the conference might be seen as applications of the GAL project. See for example Evan's emphasis on lack of public deliberation of Council resolutions (above n 16), the lack of robust legal explanation, or Keene's suggestions for forms of advisory judicial review (above n 34).

62 See Dunworth, above n 51.

conflict between conceptions of accountability that rely on representativeness (and embrace the participation of NGOs, for example) and those that emphasise other elements of the Global Administration Law (GAL) recipe book. Is the problem, in short, with 'global legislation' like the Security Council's Resolution 1373 (which laundered the USA PATRIOT Act's tools for counterterrorist money laundering by exporting it to the world) or Security Council Resolution 1540 (doing much the same for weapons of mass destruction) the fact that the Council is unrepresentative and is being used as a laundering tool for "hegemonic international law", or is the problem the lack of open deliberation or reason giving in the adoption of these resolutions?[63]

Given these fundamental debates about what it means to be accountable, it is understandable that we have opposing views about whether the glass is half empty or half full. Most of the Symposium papers appear to be arguing that different conceptions of accountability are not inherently incompatible and that there is hope for making IOs more responsible under the rule of law. The articles by Keene, Evans and Dunworth are optimistic that perhaps representativeness – the value of democracy – along with reforms to enhance transparency, participation, reason giving, and review can together improve matters.[64] The argument is that the pragmatic pursuit of all of these in unison will enable better (or at least more effective) law. Dunworth argues that the increased participation of NGOs may bring the benefits of expertise, a rationale that has long been offered by advocates of greater involvement of international civil society, such as Steve Charnovitz, with respect to the WTO.[65] Some assume a virtuous circle whereby enhanced transparency and participation lead to better reason-giving, corrective action and possibly better enforcement, as when NGOs mobilise shame against states to enforce the efficacy of the ILO or human rights regimes. Commentators express hope that attempts by Council members or by ICJ judges to explain the legalities behind the Security Council's efforts can enhance that body's fidelity to law.

This happy progress narrative is challengeable. There are palpable tensions among rival accountability recipes, and choices need to be made as to desirable routes going forward. A more 'representative' Security Council – one that exceeds 25 members, spreads the veto to additional members, or anticipates block actions by its elected members to resist the desires of the P5 – may be even more paralysed and even less able to respond to rule of law calamities as grave as those now facing Syria. Those urging the route of greater transparency need to consider the fact that transparency and diplomacy rarely go together well. It is doubtful that we would have reached the point today where over 50 per cent of the Security Council's resolutions each year are adopted under Chapter VII

63 José Alvarez "Hegemonic International Law Revisited" (2003) 97 AJIL 873 at 873. See also for example Dunworth, above n 51.

64 See Evans, above n 16; Keene, above n 34; and Dunworth, above n 51.

65 See Dunworth, above n 51. See also Steve Charnovitz, "Opening the WTO to Nongovernmental Interests" (2000) 24 Fordham Intl LJ 173.

but for that body's resort to non-public deliberations.[66] Diplomatic breakthroughs as distinct as the Iran Deal to the negotiation of the Trans Pacific Partnership would probably not have emerged if the underlying negotiations had been subjected to the glare of media that some academics and members of civil society demand, or to the kind of notice and comment procedures that some GAL scholars would recommend. Neither of these breakthroughs are, in short, comparable to an ordinary administrative ruling issued by a domestic executive agency. The wisdom of GAL prescriptions to enhance the rule of law is dubious if one is not fully convinced that universal administrative law actually exists, that all nations have a unitary vision of what legitimate rule making is, or that domestic analogies to national administrative law can be exported to the international level without serious modification.

It is doubtful that Security Council resolutions or accompanying Presidential Statements that elaborate on the legal powers of the Council, on the exact nature of the precedent being set, or on how the Council's actions comport with the text of Charter would be positive steps. Do international lawyers really want a political body like the Security Council to clarify (and thereof potentially bind itself) to a sweeping definition of what exactly is a 'threat to the peace'? Do we want that quintessentially political organ to declare that, as a legal matter, such threats now include threats to 'human security', and perhaps even attempt to define the latter? Should the Council choose to pass a Chapter VII resolution in response to the next computer hacking of Sony Pictures, do we really want a fully reasoned legal justification by the Council that 'clarifies' the now contested norms on what constitutes cyber force and legal responses to these? Whom do we want to license to develop the contours of international cyber law: the Security Council, private organizations like ICANN, or states themselves through their interactions (state practice and opinio juris)?

Critical scholars like Martti Koskenniemi posit that, given the Security Council's self-evident built-in inequalities and de facto subservience to P-5 (and sometimes just P-1), it is absurd to treat it as a global legislator or to argue that, with some tinkering or procedural reforms, that body can be both agent of and subject to the rule of law.[67] Talk of Council 'accountability' is, to Koskenniemi, an example of utopian legalism at its worst: a disreputable or at least naïve effort to put legal garb on political pragmatism that needs to be seen as the international lawyer's equivalent of putting lipstick on a pig.[68] He and others argue that it is preferable to continue to treat Security Council resolutions as the political decisions that they in fact are, thereby exposing that body (or the P-5) to the de-legitimation or contestation that emerges when political actors fall short of satisfying the political expectations that they encourage. For these critics, it is not useful to pretend that the Council – an

66 Loraine Sievers and Sam Daws *The Procedure of the UN Security Council* (4th ed, Oxford University Press, Oxford, 2014) at 389–392. Sievers and Daws note that that the Council adopted 43 Chapter VII resolutions during 1946 and 1989, compared to 558 resolutions between 1990 and 2013.

67 See Martti Koskenniemi "International Legislation Today: Limits and Possibilities" (2005) 23 Wis Intl LJ 61.

68 Koskenniemi, above n 67, at 84.

organ purposely designed to produce ad hoc responses to threats to world peace only when it manages to find nine votes – is either a (representative) legislature or a court designed to issue carefully articulated legal reasons for its actions. On this view, neither the international rule of law nor the law of the Charter is enhanced by legalising the Council's fundamentally political determinations of when or how to respond.

Recognising this reality is not tantamount to concluding that the Council is unbound by law. As is further addressed below, even in rule of law states, after all, many aspects of governance, even constitutional determinations, are not subject to judicial clarification. Of course, there is also a pragmatic reason to avoid the further legalisation of the Council: some would argue that it is detrimental to world order to constrain the Council's exceedingly flexible Charter powers. Political realists and pragmatists might contend that the Council should not face only two overly stark choices: establishing a legally relevant precedent, or acting illegally.

Debates about how IOs can be made accountable or subject to the rule of law also involve competing views on the value of lawyers. Would demanding that the Council or its members provide legal explanations for Council actions really make that body's resolutions more legitimate, or would it merely accord a more prominent role to certain 'hot' lawyers who are willing to say yes to their political clients (like those who wrote the torture memos for the Bush Administration or the legality of drone memos for the Obama Administration)?[69] Are we confident that international lawyers share a sufficiently developed (and uniform) code of professional ethics that make their advice preferable (or more credible) than any on offer from political advisers?

The utility of the ICJ might be questioned on similar grounds. The assumption that more judicial consideration is always more desirable than less could do with more empirical testing. It is not clear that progressive results emerge when we task international judges with explaining what a 'threat to the peace' is, or with telling us what the Security Council is licensed to do in response to one. Consider the impact of the ICJ's jurisdictional opinion in the Lockerbie cases or that of the International Criminal Tribunal for the former Yugoslavia (ICTY)'s jurisdictional ruling in *Tadić*. In *Lockerbie*, the ICJ suggested that once the Council crosses the Charter of the United Nations' Chapter VII line and renders a binding decision, its actions cannot be questioned even when there is a plausible contention that the Council is trumping the extradition or transfer provisions of the Montreal Convention.[70] As

69 See Antonio Cassese *Five Masters of International Law: Conversations with RJ Dupuy, E Jiménez de Arechaga, R Jennings, L Henkin and O Schachter* (Hart Publishing, Oxford, 2011). Cassese quotes Schachter's recounting of the question posed to him by Fiorello La Guardia, the colourful mayor of New York City. Sir Kenneth Keith addresses the same point in his John Dugard Lecture. See Kenneth Keith "The International Rule of Law" (2015) 28 LJIL 403. Keith discusses the importance of the personal qualities of lawyers and the lessons of those who wrote the infamous United States legal memoranda authorising torture.

70 See for example Crawford, above n 29, at 429–431.

Michael Reisman has argued, this ruling ties the hands of the Council when it wants to take legally binding action short of Chapter VII.[71] In addition, several of the ICJ judges in that case and all of the ICTY's judges in the *Tadić* case on appeal were adamant that, at the very least, the Security Council's determination of what is a 'threat to the peace' cannot be subject to judicial second guessing.[72] As a result of these two rare instances when the Council's actions were subjected to de facto judicial review, we now have two precedents establishing that the Council, when it acts under Chapter VII, can compel the extradition of criminal suspects and can establish an independent court (albeit one that respects the rights of criminal defendants). Not all would agree that either of these conclusions is desirable from the standpoint of the rule of law, but it is clear that we have (in part) international courts to thank for legitimising this deferential view of the Council's implied powers.

If, as Koskenniemi and others argue, it is not a good idea to treat the Security Council as the world's legislature, do we really want ICJ judges to pretend to be the world's judicial branch, even when that body was never given the authority to engage in judicial review over the Council?[73] Is the ICJ not just one of many places where states, when they so choose, take select disputes to be resolved in the narrowest possible fashion? Are we really ready to ask that Court to transform its advisory jurisdiction into a check on international organisations, whether or not we like its responses and even if other international (or national) courts were to opine otherwise?[74] Consider the views of Judge Oda whose refusal to answer the WHO's request for an advisory opinion on the legality of nuclear weapons turned in part on his contention that the Court delegitimises itself, as well as international law, when it answers "abstract" questions instead of spending its time resolving actual disputes.[75] Judge Oda raises some discomforting issues for international lawyers who believe that more judicially produced law is always better than less, even when the questions posed to the Court and the answers it gives are as open-ended as those in the Nuclear Weapons and Kosovo instances. It is doubtful whether the international rule of law was truly advanced by advisory opinions that, as in these two instances,

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71 WM Reisman "The Constitutional Crisis in the United Nations" (1993) 87 AJIL 83 at 89–90.

72 See *Prosecutor v Tadić (Judgment)* ICTY Appeals Chamber IT-94-1, 27 February 2001. See also Reisman, above n 71, with respect to the ICJ. For an analysis of the jurisdictional decision in *Tadić*, see JE Alvarez "Nuremburg Revisited: The Tadić Case" (1996) 7 EJIL 245.

73 For a view that seems favourably inclined to having the ICJ seize such opportunities when these present themselves in contentious cases, Thomas Franck especially notes that the separate opinion by Judge Shahabuddeen speculated about whether there were any limits on the Council's powers of appreciation, as well as Judge Weeramantry's dissent which was sceptical of the proposition that the SC could discharge its "variegated functions free of all limitations". Thomas Franck "The 'Powers of Appreciation': Who is the Ultimate Guardian of UN Legality?" (1992) 86 AJIL 519 at 522. See also José Alvarez "Judging the Security Council" (1996) 90 AJIL 1.

74 Contrast Keene, above n 34.

75 *Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion)* [1996] ICJ Rep 66 at 89 per Judge Oda (dissenting).

awkwardly straddle the line between the need to fill international law's many gaps and the injunction not to render a ruling of *non liquet*. Indeed, as Judge Simma's separate opinion in the Kosovo instance suggests, the majority's response to the General Assembly's request for clarification of Kosovo's Declaration of Independence may have delegitimised the Court itself.[76] Those urging that the ICJ's judges (or those in any of the other standing permanent international courts) should assume the mantle of Ronald Dworkin's Herculean judges charged with making public policy through judicial review of IOs need to consider, soberly, Dworkin's interlocutors. They need to consider in particular the counter that even national courts, many of which enjoy greater legitimacy than our generally more fragile international courts, risk much when they assume to take such powers away from those directly charged with law making.[77]

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Sometime ago, intrigued by the topic for the Symposium, I asked my New York University colleague, Jeremy Waldron, perhaps the world's foremost authority on both the rule of law and the propriety of judicial action, to consider these issues. His response, a keynote address on "The UN Charter and the Rule of Law", drew on John Locke's comparison of the rule of law in an absolute monarchy to "farmyard justice".[78] Locke had argued that the rule of law would be a mockery if it resembles a system consisting only of rules established by a farmer to keep his animals from hurting each other but which does not include rules applying to the farmer himself. He contended that while law provides the animals with a measure of security from harms by other animals in that instance, it did not provide them with any security from the far greater powers that could be exercised by the farmer, who could kill any of them with impunity. Locke argued that such a legal system provides, in essence, protection from polecats or foxes, while leaving the animals free to be devoured by lions.[79] Waldron argued that if one seeks genuine rule of law on the international plane, one needs to go beyond "farmyard justice" to provide a measure of protection from those who play the role of the farmer, including IOs.[80]

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76 See *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo (Advisory Opinion)* [2010] ICJ Rep 403.

77 See for example Jeremy Waldron "The Core of the Case Against Judicial Review" (2006) 115 Yale LJ 1346. While Waldron was, of course, writing in defence of national legislatures, the absence of a single such entity at the international level does not answer his core contention that adjudicators put their own legitimacy on the line when they assume the role of law-makers.

78 Jeremy Waldron, Professor at New York University School of Law "The UN Charter and the Rule of Law" (The Pre and Post UN Charter Order Keynote address, New York University School of Law, New York City, 1 November 2015). Waldron drew on John Locke *Second Treatise of Government* (1689).

79 See Locke, above n 78.

80 Waldron, above n 78.

Waldron accepted that Locke's analogy was "far from perfect" as applied to the United Nations since:[81]

> … international institutions … don't have the power over nation-states that is in any way analogous to the overwhelming and fearsome power that the sovereign state has over the individual. There isn't the same lion, or … the same farmer … national sovereigns are not vulnerable to international institutions in the way that individual men and women are vulnerable to national institutions.

For these reasons, he argued that it is simply "good policy" for the United Nations to set an "example" to others.[82] He tentatively suggested that, for example, the discretion of the Security Council "should be made in relation to the Rule of Law in the same way as it is made at the national level".[83] But he became far more emphatic about the need to respect the rule of law where IOs have a direct impact on individuals (as when United Nations peacekeepers inflict harm), and he ended his lecture by challenging the United Nations' "shabby" recourse to legalisms to escape its accountability in the Haiti cholera case.[84]

While it is easy to agree with Waldron's core premises, it is important to remember that there are many instances where IOs have seized or have been delegated considerable power over states. There are many cases where IO governance activities approximate the power that governments have over their citizens: where, in short, IOs are comparable to Locke's farmers or lions. The intrusive powers of IOs on sovereigns in the modern world justify all the attention that scholars devote to making IOs more subject to law.

The 'good governance' efforts of the IMF, for example, include the imposition of conditions under structural adjustment loans that purport to affect many of the most critical economic issues facing nations that seek its assistance. Critics of these efforts argue that the IMF's decisions have sometimes done more harm than good or that, in some cases, the joint action of the IMF and governments anxious to seek its largesse have provoked or aggravated disastrous economic crises.[85] Some charge that, irrespective of the quality of the IMF's economic advice, the consequences of conditionality are that certain core issues are removed from domestic electoral processes, thereby absolving governments, even in democracies, of accountability or responsibility.[86] Of course, within the United Nations, few need to be reminded of the considerable powers deployed by that body's Security Council since the

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81 Waldron, above n 78.

82 Waldron, above n 78.

83 Waldron, above n 78.

84 Waldron, above n 78.

85 See nn 29 and 30.

86 See for example Devesh Kapur and Moisés Naím "The IMF and Democratic Governance" (2005) 16 J Democr 89.

end of the Cold War. The Council's actions – including its authorisation of the military occupation of Iraq after the 2003 Gulf War, its supervision of elections around the globe, and its resort to the use of force in places like Libya – have affected, for better or worse, the lives of millions.

Starting with the end of the Cold War, United Nations peacekeeping in particular has slowly transformed itself from a tool to keep the armies of two states at bay into far more complex peace operations seeking to transform the internal governance of states. United Nations reports have documented the new 'rule of law paradigm' involving ever greater commitments to and mainstreaming of United Nations efforts designed to promote judicial reform, constitutional reform, general law reform, improvements in public administration, greater legal awareness of and access to justice, law enforcement reforms and changes to detention or prison policies.[87] Many have now documented how, since 1989, these rule of law forms of assistance have moved from the margins of peace operations to their core. The numbers speak for themselves. Over the 1989–2010 period, the number of United Nations peace operations containing rule of law assistance went from more than half of such operations (from 1989–1999), to a large majority (19 out of 24, after 2000), to the point where, from 2008–2010, all peace operations in Africa involved one or more rule of law forms of assistance.[88] According to the 2009 Secretary-General's Report, rule of law programming involved 120 member states from every region and in at least 50 of those states there were a minimum of three United Nations entities involved.[89] The United Nations now sees itself as an institution whose object and purpose is, at least in part, to strengthen 'weak' rule of law states. As the General Assembly put it, the organisation sees human rights, the rule of law, and democracy as "interlinked and mutually reinforcing and that they belong to the universal and indivisible core values and principles of the

87 See for example *Report of the Secretary-General – Strengthening and Coordinating United Nations Rule of Law Activities* LXIII, A/63/150 (2008). As this and other UN reports indicate, specific rule of law activities of the organisation have included constitution-making activities in Nepal, Ecuador, and Bolivia; development of national laws intended to incorporate international law (such as children's rights in Egypt, Nigeria, and Uruguay or international trade law in eight countries); efforts to regulate police and defence forces (as within the Ministry of Defense and Security in Timor-Leste); reforms to the ministries of justice in Palestine, Colombia, Kosovo, Liberia, Sierra Leone, and Sri Lanka); attempts to encourage arbitration in Cambodia; or transitional justice mechanisms in some 25 countries. See also Report of the Secretary-General – Annual Report on Strengthening and Coordinating United Nations Rule of Law Activities LXIV, A/64/298 (2009) ('2009 Secretary-General Report').

88 Richard Sannerholm "Looking Back, Moving Forward: UN Peace Operations and Rule of Law Assistance in Africa, 1989-2010" (2012) 4 HJRL 359. This dataset covered 36 United Nations peace operations. According to the study, during the 1989–2010 period, a majority of United Nations personnel (57 per cent) engaged in rule of law assistance in Africa. For a listing of the mandates of Security Council authorised peace operations from 1945–2003, also indicating the steady rise in rule of law mandates, see DM Malone (ed) *The UN Security Council: From the Cold War to the 21st Century* (Lynne Rienner Publishers, Colorado, 2004).

89 2009 Secretary-General Report, above n 87, at [3].

United Nations".[90] Consistent with the post-WWII vision for the organisation as establishing a collective security umbrella to protect the Westphalian system, the United Nations' rule of law efforts are seen as helping to strengthen and stabilise the enjoyment of sovereignty.[91]

In all these instances and in others where IOs have sought to stabilise states in the image of rule of law states, it is not absurd to compare these organisations to all powerful farmers that exercise considerable power over those that have come to rely on them and give them sustenance. In some instances, from Namibia to Kosovo, the United Nations has, in effect, become the sovereign at least for a time. In others – Haiti comes readily to mind – decades of United Nations peacekeeping and NGO interventions have turned that country into a species of international protectorate. Many in Haiti associate the United Nations with the government; some even speak of a United Nations occupied state.[92] In these and other places where the United Nations itself prides itself on spreading the benefits of the rule of law, it is expected that the rule of law should perforce apply to its applier, not out of United Nations benevolence or the need to set an example, but as a matter of legal necessity and principle. As has been suggested by a former Secretary-General, the rule of law must apply to any institution that seeks to promote it.[93] These reciprocity-based expectations are built into any rule of law conception worthy of the name. It is certainly built into Bingham's expectations that the rule of law requires rulers who are themselves subject to it.

Expectations that the United Nations and other IOs which exercise forms of global governance need themselves to conform to the rule of law are not limited to instances where these organisations directly harm individuals, as where a United Nations peacekeeper rapes or spreads cholera. The

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90 *The Rule of Law at the National and International Levels* GA Res 64/116, LXIV A/Res/64/116 (2010) at 1.

91 See for example Cogan, above n 37, discussing the contemporary role of the Security Council. This explains why the Security Council, originally charged with protecting states from each other and now, increasingly, with 'weak' states with weak or nonexistent institutions, passed 69 resolutions from 1998 to2006 which refer to the 'rule of law'. See also Jeremy Farrall *United Nations Sanctions and the Rule of Law* (Cambridge University Press, Cambridge, 2007). At the same time, the rule of law has become a vehicle of a wide range of interventionist practices that reconfigures sovereigns while empowering IOs; see for example Barbara Delcourt "The Rule of Law as a Vehicle for Intervention" (2015) 9 Journal of Intervention and Statebuilding 471.

92 See for example Greg Grandin and Keane Bhatt "10 Reasons Why the UN Occupation of Haiti Must End" *The Nation* (online ed, New York City, 26 September 2011).

93 Annan, above n 13. See also General Assembly Resolution 64/116, above n 90, at 2:

> Reaffirming that … the promotion of and respect for the rule of law at the national and international levels, as well as justice and good governance, should guide the activities of the United Nations and of its Member States … calls upon the United Nations system to systematically address … aspects of the rule of law in relevant activities, recognizing the importance of the rule of law to virtually all areas of UN engagement.

legitimacy of the United Nations' rule of law paradigm for taking action rests, in large part, on whether it satisfies rule of law expectations with respect to its own behaviour and operations.

When, for example, the Security Council makes rules intended to be implemented as national law by all states, we are entitled to ask, as commentators at the Symposium do, for its legal bona fides.[94] When the same body deploys a power conferred by a treaty, the Rome Statute, to enable an international court to exercise criminal jurisdiction over individuals where none previously existed, as the Council has now done with respect to Sudan and Libya, we are entitled to demand where it gets the legal power to remove from that jurisdiction nationals from non-Rome Party states (including nationals from four of the P-5), why it can legally restrict that Court's temporal jurisdiction in ways that (perhaps coincidentally) avoid embarrassing some of the P-5 who may have previously aided and abetted crimes committed by the Qaddafi regime, why the Council can ignore the Rome Statute's demand that Council referrals be paid for by the United Nations, and why it can choose to ignore subsequent pleas by that court's prosecutor for Council enforcement actions.[95]

While it is admittedly difficult to articulate the precise legal limits that the Council may be subject to when it exercises its newly acquired power to refer situations to the International Criminal Court (ICC), the rule of law demands some explanation for the legal basis of the limits the Council has imposed on its referrals. While, as noted, some ICJ and ICTY judges have suggested that the Council's initial determinations of 'threat to the peace' may not be subject to judicial delimitation,[96] that is not the same thing as suggesting that the Security Council is unbound by law, that these matters pose what United States courts treat as non-justifiable 'political questions', or that the precise way that the Council chooses to act on these threats may not be examined by any national or international court.[97] It is extremely likely that at some point aspects of the Council's referrals to the ICC will indeed be scrutinised, at least by the ICC's judges, since lawyers for criminal defendants from either Sudan or Libya will have every incentive to do so.

At the same time, addressing rule of law challenges will require more than cutting and pasting national rule of law elements. Extreme care will be needed to avoid drawing erroneous conclusions based on national law analogies grounded in how the rule of law works within states. Bingham's six rule of law elements were directed at resolving the tensions between a state and its people; they were designed to protect individuals from state abuse, not the abuse of states inter se or the potential for

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94 See for example *United Nations Security Council Resolution 1373* SC Res 1373, S/RES/1373 (2001), and *United Nations Security Council Resolution 1540* SC Res 1540, S/RES/1540 (2004), which deal with the threats posed by terrorism and weapons of mass destruction respectively.

95 See *United Nations Security Council Resolution 1593* SC Res 1593, S/RES/1593 (2005); and *United Nations Security Council Resolution 1973* SC Res 1973, S/RES/1973 (2011).

96 See Reisman, above n 71; and the commentary above n 73.

97 See Alvarez, above n 73.

IOs to abuse states or individuals within them. As Waldron has argued, we should not presume that the rule of law exists to protect governments' freedom to act; we should not readily presume that the international rule of law benefits nations or governments as opposed to persons within them.[98] In appropriate circumstances, the international rule of law might anticipate or even require states to be treated differently from each other. It may require ambiguity as to the precision of its rules or degree of binding authority. It may demand opaque forms of promulgation. It may legitimately operate (as it often does) without the engagement of a court capable of issuing a binding judgment.

The many examples of alleged IO rule of law failings canvassed above may be, on closer inspection, central to how IOs operate, inevitable, and even desirable. Tan's examples of "soft" ASEAN law are but the tip of a very large iceberg.[99] Courses on the law produced by international organisations are largely about law-making that resists the strictures of legal positivism. Much of IO law reflects a spectrum of legally binding authority, not the on-off switch usually associated with both legal positivism and Bingham's (national) rule of law.[100] Examples include Security Council or General Assembly resolutions or parts of them that are strategically ambiguous with respect to whether these are intended to be either legally binding decisions[101] or reflective of customary international law;[102] financial regulations contained in informal accords;[103] ICAO's Standards and Recommended Practices;[104] the World Bank's Guidelines or operational policies;[105] the "views" or "general comments" issued by human rights treaty bodies;[106] non-treaty products issued by the

98 See Jeremy Waldron "Are Sovereigns Entitled to the Benefit of the International Rule of Law?" (2011) 22 EJIL 315, and Jeremy Waldron "The Rule of International Law" (2006) 30 Harv JL & Pub Poly 15.

99 See Tan, above n 44.

100 See Alvarez, above n 18.

101 For example, Resolution 2249 calls upon "Member States that have the capacity to do so to take all necessary measures" against ISIL, without invoking Chapter VII: *United Nations Security Council Resolution 2249* SC Res 2249, S/RES/2249 (2015) at [5].

102 Compare Resolution 2178, which suggests that terrorism in all its forms constitutes an international crime, to Saul, who notes an absence of evidence for any such customary crime: *United Nations Security Council Resolution 2148* SC Res 2148, S/RES/2148 (2014); Saul, above n 43.

103 See for example Chris Brummer *Soft Law and the Global Financial System: Rule Making in the 21st Century* (1st ed, Cambridge University Press, Cambridge, 2011).

104 Alvarez, above n 18, at 223–224.

105 Alvarez, above n 18, at 235–241.

106 See André Nollkaemper and Rosanne van Alebeek "The Legal Status of Decisions by Human Rights Treaty Bodies in National Law" in Helen Keller and Geir Ulfstein (eds) *UN Human Rights Treaty Bodies* (Cambridge University Press, Cambridge, 2015) 356.

ILC;[107] determinations made by committees of the parties (COPs) or meetings of the parties (MOPs);[108] or opinions issued by the general counsels of IOs.[109] These and many other examples of 'informal international law-making' may reflect a growing frustration with the shackles imposed by traditional art 38 sources of law, including those sources' State-centricity.[110] Whatever the cause, these departures from positivism often involve alternatives to formal interstate organisations, including those of the United Nations system. Self-identified 'public law scholars' are now examining in addition to the products of IOs, the rules produced by non-governmental institutions like the International Corporation for Assigned Names and Numbers (ICANN) to govern the internet; networks of government regulators like the central bankers of the Basle Committee, or multinational corporations (MNCs)that establish corporate codes of conduct.[111]

The category of 'public international law' is today under contestation. As noted, some public law scholars contend that many forms of global governance, particularly by non-state actors or involving them as participants, should be considered forms of global administrative law (GAL), while others would prefer the label 'international public law'.[112] Positivist critics counter that absent a revised list of the sources of international law, going beyond those now identified in art 38 of the ICJ's Statute, the domain of public international law remains indeterminate.[113] Should international public law include, for example, Pope Francis' Encyclical on Climate Change as much as the International Finance Corporation's (IFC) annually updated rule of law indicators?[114] There is some irony in the

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107 For examples see Sean Murphy "Identification of Customary International Law and Other Topics: The Sixty-Seventh Session of the International Law Commission" (2015) 109 AJIL 822.

108 Alvarez, above n 18, at 316–331.

109 See Sinclair, above n 36.

110 See for example Joost Pauwelyn, Ramses Wessel and Jan Wouters "When Structures Become Shackles: Stagnation and Dynamics in International Lawmaking" 25 EJIL 733. See also Joost Pauwelyn, Ramses Wessel and Jan Wouters (eds) *Informal International Lawmaking* (Oxford University Press, Oxford, 2012).

111 See for example Armin von Bodandy and others (eds) *The Exercise of Public Authority by International Institutions: Advancing International Institutional Law* (Springer, New York City, 2009).

112 Stefan Kadelbach "From Public International Law to International Public Law: A Comment on the 'Public Authority' of International Institutions and the 'Publicness' of their Law" in von Bodandy et al, above n 111, at 33.

113 Some, including d'Aspremont, express hope for a counter-trend ("resilient formal law-ascertainment") to displace that of 'deformalisation' of international law. Jean d'Aspremont *Epistemic Forces in International Law: Foundational Doctrines and Techniques of International Legal Argumentation* (Edward Elgar Publishing, Cheltenham, 2015) at 109.

114 Some GAL scholars argue that given the standard-setting or regulatory impact of the IFC's indicators, for example, these generate rule of law expectations for enhanced transparency, participation, reason giving and review. See for example Kevin Davis, Angelina Fisher, Benedict Kingsbury, and SE Merry (eds) *Governance by Indicators: Global Power Through Classification and Rankings* (Oxford University Press, Oxford, 2012).

contention that the IFC's measures of rule of law adherence – which no one claims have the pedigree of art 38 sources of law, are not subject to adjudication by courts, and which Bingham would accordingly find hard to classify as 'law' at all – should be judged by rule of law criteria.

Debates about what public international law actually is complicate the picture for those seeking to improve it or the international rule of law. On closer inspection, it is not clear that the international rule of law can or should be judged by Bingham's six fold criteria, including the need for clear lines demarcating legally binding law from mere soft norms. Contrary to some of the prescriptions for rule of law reforms made by some at the Symposium, it is not clear that the need for clarity within the rule of law should preclude the Security Council from adopting legally ambiguous resolutions that fail to indicate definitively their status under the accepted sources of legal obligation, that is, resolutions that do not indicate which of their provisions are legally binding as Charter decisions, which are intended to fill legal gaps in the interpretation of the Charter of the United Nations, or which might be otherwise binding as general principles of law. For those who favour any action that postpones the day when Iran possesses nuclear weapons, it would not have been a good idea to force the Security Council or its members to explain its actions in implementing the Iran Deal through the Security Council's Resolution 2231.[115] Although the 'snap back' provisions in Resolution 2231, which enable any one of seven nations involved in the Iran Deal to terminate key provisions of that resolution and reinstate the Council's old sanctions against Iran, merit a thorough assessment of their consistency with the Charter's voting rules, few would have delayed securing the Iran Deal to secure clarity.[116] Similarly, reasonable people, even lawyers, surely differ on whether it would have been a good idea to postpone any enforcement action on ISIL until the members of the Council can resolve their differences on whether Chapter VII should be specifically invoked to clarify the legal obligations they are imposing on states.[117]

Efforts to clarify the legal status of legally ambiguous IO products could diminish, not enhance, the effectiveness of law at the international level. It would likely weaken the law of nations if:

- the innovations (and implied powers) of COPs and MOPs under certain treaties were trimmed in favour of old-fashioned (and probably less dynamically interpreted) treaties;[118]

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115 See *United Nations Security Council Resolution 2231* S Res 2231, S/RES/2231 (2015). For consideration of the unresolved legal issues raised by that resolution, see Jean Galbraith "Ending Security Council Resolutions" (2015) 109 AJIL 806.

116 See Security Council Resolution 2231, above n 115.

117 Compare Security Council Resolution 2249, above n 101.

118 See Robin Churchill and Geir Ulfstein "Autonomous Institutional Arrangements in Multilateral Environmental Assessments: A Little-Noticed Phenomenon in International Law" (2000) 94 AJIL 623.

- scholars and courts, national and international, were persuaded that they ought to ignore General Assembly resolutions with respect to the interpretation of the Charter or customary international law (CIL) because these were only hortatory;[119]
- international financial institutions were told to make clear which of their internal rules were equivalent to legally binding treaty obligations;
- ICAO was directed to stop its awkward charade of pretending that states can merely opt out of SARPs and make all of its aviation standards legally binding (as was the case under the predecessor treaty regime for aviation law);[120] or
- national courts were convinced that they should ignore the non-binding views of human rights treaty bodies, ILO adjudicative mechanisms, or the merely advisory opinions of the ICJ.[121]

Similarly, it seems counterproductive to urge, in the name of clarity, legal secretariats of IOs not to issue legal opinions merely because these are not formally authoritative under IO charters. And, despite the many criticisms of the ILC's frequent turn to shortcuts to multilateral treaty making, a number of international legal regimes, from the rules governing watercourses to those addressing state responsibility, would be severely diminished but for the ILC's recent resorts to soft guidelines or other alternatives to treaties.[122]

Wrong-headed efforts to 'improve' the international rule of law grounded in the general expectations held for the national rule of law would severely impoverish the pragmatic compromises on which IO law (and much of contemporary international law) is built. It may also prematurely cut off the inter-forum dialogues and forms of contestation (as between national and international courts and IOs) essential to the evolution and maturation of international legal regimes.[123] Some ostensible

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119 As was once proposed by strict positivists who espoused a strict view of the requirements of state practice and opinio juris and disparaged the impact of General Assembly resolutions on either. See for example GM Danilenko "Law-Making in the International Community" (Brill Publishers, Leiden, 2000) at 75–129.

120 Contrast Buergenthal, who concludes that the legislative scheme of ICAO's Convention, whereby SARPs are not formally binding, is an improvement over the preceding Paris Convention's reliance on binding standards. Thomas Buergenthal *Law-Making in the International Civil Aviation Organization* (Syracuse University Press, Syracuse, 1969) at 110–122.

121 Contrast to Klabbers, who defines the need for expressly binding commitments and traditional sources of international law: Jan Klabbers "International Courts and Informal International Law" in Pauwelyn, Wessel and Wouters *Informal International Lawmaking*, above n 110, at 219.

122 See Murphy, above n 107. For a generally positive assessment of the ILC's resort to treaty alternatives, see Santiago Villalpando "Codification Light: a New Trend in the Codification of International Law at the UN" (2013) 2 Brazilian Yearbook Intl L 117.

123 See Machiko Kanetake and André Nollkaemper (eds) *The Rule of Law at the National and International Levels: Contestation and Deference* (Hart Publishing, Oxford, 2016).

rule of law improvements may, moreover, reduce the level of state compliance with IO rules. Some soft (or informal) IO generated law might be more effective in terms of generating successful efforts at the state level to implement it than some invocations of hard law.[124] Compare, for example, the levels of compliance generated under the Tobacco Framework Convention, even though many of the concrete obligations it imposes on states take the form of soft guidelines, as opposed to the WHO's difficulties with securing members' compliance with that organisation's legally binding International Health Regulations.[125] While IOs' growing reliance on informal forms of international law making may sometimes stem from their members' reluctance to comply with harder or more formally enforceable rules, that is not always the case. Indeed, there is a growing scholarship urging 'managerial' approaches to encouraging compliance.[126]

These realities suggest that analogies to the requisites of the national rule of law, while inescapable, should be deployed with great care.[127] Those seeking to improve the international rule of law should reach for those pockets of national legal practice or regulation that most resemble IO practices. These would include those parts of the national rule of law that most resemble international legal regimes insofar as they also do not rely on formal forms of judicial review.

At least since the ICJ's advisory opinion in *Certain Expenses*,[128] in which the ICJ judges opined that the subsequent practice of United Nations organs could be treated as the functional equivalent of subsequent practice of the parties for purposes of Charter interpretation, the institutional practice of

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124 See for example Buergenthal and footnote text (discussing ICAO's SARPs) in above n 120. See also Brummer, above n 103.

125 It would appear, based on the respective assessments made by the WHO, that more states are in compliance with some of the guidelines issued under the WHO's Framework Convention on Tobacco Control than they are with respect to their legal duties to implement their core health capacities under Compare FCTC International Health Regulations. See "2014 Global Progress Report on Implementation of the WHO Framework Convention on Tobacco Control" (2015) World Health Organization <www.who.int>. See also "Summary of States Parties 2012 Report on IHR Core Capacity Implementation" (2014) World Health Organization <www.who.int>.

126 Much of the literature praises the flexibility and adaptability of informal law and its tools for 'enforcement'. See for example Alvarez, above n 18, at 326–327. Goodman and Junks also identify mechanisms of the law's social influence, including the impact of mimicry, status maximisation, prestige and identification: Ryan Goodman and Derek Jinks *Socializing States: Promoting Human Rights through International Law* (Oxford University Press, Oxford, 2013).

127 Others have expressed the same caution. See for example Simon Chesterman "An International Rule of Law?" (2008) 56 Am J Comp L 331.

128 *Certain Expenses of the United Nations (Article 17, Paragraph 2 of the Charter) (Advisory Opinion)* [1962] ICJ Rep 151.

IO organs has proven crucial to the evolving interpretation of IO charters.[129] Such institutional practice is not, as is well known, usually subject to formal judicial review by, for example, the ICJ. Instead, the prevailing interpretative consensus on the meaning of IO charters results from a complex process involving the interaction of resolutions issued by IO organs, the occasional ICJ advisory opinion concerning the authority of IO organs, and the (frequently reactive) practice of the Secretariat backed by opinions issued by the IOs' general counsel.[130] Time and again this has been the route for important breakthroughs in, for example, the interpretation the Charter of the United Nations, even though none of these underlying elements are, in of themselves, authoritative or binding. At the same time, the risk that reliance on institutional practice is unduly self-judging and leads to organisations unfettered by law, leads some at the Symposium to reach, predictably, for judicial review as a rule of law fix.

The premise that only the judiciary can supply the needed rule of law check on government officials' exercise of power merits re-examination. A careful look at some pockets of national law indicates that reliance on institutional practice can itself constitute a form of legal constraint. There is some basis to think that the subsequent practice of IOs may not be just constitutive of IO law but may be constitutive of the international rule of law. Resort to institutional practice without ready recourse to judicial checks may, in short, exhibit some normatively constraining features.

A national analogue to IO institutional practice is presidential or executive branch practice. Particularly with respect to foreign affairs under the United States Constitution, the practice of the United States President, for example, is rarely the subject of judicial review and when it is examined, it is often judged for consistency with prior presidential practice. Scholars like Curtis Bradley and Trevor Morrison have noted that the United States Supreme Court has recognised that the way in which the government or the President operates over time can provide a "constitutional 'gloss"' on the scope of presidential power.[131] The United States Supreme Court recognised this, for example, in its famous *Youngstown Sheet & Tube Co v Sawyer* ruling wherein Justice Frankfurter noted the legal significance of a "systemic, unbroken, executive practice long pursued to the knowledge of Congress and never before questioned".[132] Historically, United States courts rarely intervene with respect to the

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129 See generally Georg Nolte *Third Report on Subsequent Agreements and Subsequent Practice in Relation to the Interpretation of Treaties* LXVII A/CN4/683 (2015). See also Alvarez, above n 18, at 87–100.

130 For examples, Sinclair examines case studies of the evolution of United Nations peacekeeping, technical assistance at the ILO, and the World Bank's turn to governance as involving informal charter amendment in all three organisations: Guy Sinclair *To Reform the World: The Legal Powers of International Organizations and the Making of Modern States* (Oxford University Press, Oxford) (forthcoming).

131 Curtis Bradley and Trevor Morrison "Presidential Power, Historical Practice, and Legal Constraint" (2013) 113 Colum L Rev 1097 at 1098.

132 Bradley and Morrison, above n 131, at 1104. Bradley and Morrison quote Frankfurter J in the *Youngstown* decision. See *Youngstown Sheet & Tube Co v Sawyer* 343 US 579 (1952) at 610–611.

exercise of the President's foreign affairs powers, and when they do they often accord significant deference to patterns of government practice, even if the actual executive action in question is not ultimately sustained.[133] This means that in the United States, as within the United Nations with respect to its Charter, a pattern of institutional practice can be constitutive of de facto constitutional law.[134]

Bradley and Morrison contend that this kind of customary law is an important way that the power of the United States executive is constrained. They posit it as a reason for rejecting the contention that the President is unbound by law or that he or she is merely politically accountable.[135] They argue that in the absence of judicial review, the constraints on the ostensible "imperial" United States Presidency are imposed by legal discourse itself, including the legal justifications for executive action proffered by the Office of the General Counsel.[136] They acknowledge, as has Sir Kenneth Keith, that much turns on the ethics and legal capacity of the executive's lawyers.[137] They accept the premise that such legal justifications must be open to view and scrutiny and that the relative perceived strengths of legal arguments and their bases matter, but, crucially, they contend that legal discourse that relies on prior institutional practice (and the practice of other executive offices) to which the government as a whole has deferred can be an effective legal constraint on executive discretion.[138] They posit that United States presidents or their lawyers tend not to make legal arguments that are, objectively, weak and that when only weak arguments would justify a particular course of action, that course may not be pursued.

Bradley and Morrison contend that it is important to place any institutional or executive practice in context, to see if there was really any opportunity for others in the institution to object, so that reliance on practice does not become a tautology comparable to President Nixon's infamous claim that "when the President does it, that means that it is not illegal".[139] They argue that legal discourse within the executive branch is more likely to be a real constraint when the relevant actors have

133 Bradley and Morrison, above n 131, at 1103–1111.

134 Goldsmith and Levinson undertake a more general comparison of the basic structures of constitutional law and international law. See Jack Goldsmith and Daryl Levinson "Law for States: International Law, Constitutional Law, Public Law" (2009) 122 Harv L Rev 1791.

135 Bradley and Morrison, above n 131, at 1112–1114.

136 At 1121–1128.

137 Bradley and Morrison, above n 131, at 1132–1145. See also Keith, above n 69.

138 Bradley and Morrison, above n 131, at 1140–1145.

139 Bradley and Morrison, above n 131, at 1121, quoting Interview with Richard Nixon, President of the United States of America (David Frost, New York Times, 20 May 1977) at 4.

internalised the normative force of a legal rule or of the prior practice; they argue that this is more probable when lawyers play an important role in interpreting and applying it.[140]

As applied to the Security Council, these insights suggest that legal constraints on the Council are most likely to be most effective when lawyers are consulted. These recommendations reflect the view, which Bradley and Morrison endorse, that the more lawyers are involved, and the more their shared set of norms about what constitutes a good argument prevails, the more likely that a virtuous circle of law compliance emerges.[141]

There is much more in Bradley and Morrison's examination of United States executive practice of potential interest to those interested in the topic of the Symposium. They argue, for example, that the frequent lack of formal enforcement or sanctions mechanisms (including the absence of judicial review) is not fatal to the constraining power of institutional practice.[142] Forms of enforcement can be, they contend, informal.[143] This would presumably include those methods that are most visible with respect to IOs, namely public shaming, sovereign and NGO backlash, and public disapproval. Bradley and Morrison's conclusions on the relative merits of judicial review are particularly pertinent to international regimes. "What makes a convention nonlegal", they write:[144]

> … is not simply the unwillingness of courts to enforce it. Rather, it is that members of the relevant community do not understand its breach to be a violation of the law …

They argue that even the hypocritical recourse to the rule of law has a "civilizing force" since the public invocation of legal principle can create pressure for respect for it.[145] In a companion article, Morrison and Bradley consider the impact of executive practice on legitimate expectations; its appeal to judges looking for predictability, consistency and efficiency or to those looking to avoid accusations of judicial activism; its broader connections to common law constitutionalism and adaptability to changing circumstances; its strong connection to presumptions of legality; its connections to appeals

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140 At 1124–26. This is broadly consistent with Anna Hood's prescriptions: see Hood, above n 38.

141 For comparable arguments involving the Security Council, see Ian Johnstone "Security Council Deliberations: The Power of the Better Argument" (2003) 14 EJIL 437. Johnstone also discusses the power of 'reasoned discourse' in IOs. See also Ian Johnstone *The Power of Deliberation: International Law, Politics and Organizations* (Oxford University Press, Oxford, 2011).

142 At 1126.

143 Bradley and Morrison, above n 131, at 1127.

144 At 1129.

145 At 1143, quoting John Elster "Strategic Uses of Argument" in Kenneth Arrow and others (eds) *Barriers for Conflict Resolution* (WW Norton, New York City, 1995).

to expertise; and its capacity to correct a practice that has proven unworkable.[146] They also indicate some limits on the impact of institutional practice that also have interesting parallels to those that operate within the United Nations system: namely that executive or institutional practice generally does not prevail against the explicit words of the constitution.[147]

This account may resonate for those who examine the ways the United Nations (and other IOs) now repeatedly invoke the values of the rule of law, including, as noted, in General Assembly resolutions and statements by the United Nations Secretary-General. If Morrison and Bradley are right, such rhetorical support may have normative consequences, even if some of those who voice support for the rule of law are not genuine supporters of the concept. Students of, for example, the Security Council's ongoing efforts to recalibrate the balance between human rights and its counterterrorism actions since 9/11 may find Bradley's and Morrison's arguments of considerable interest. Although the Council's attempts to respond to the *Kadi*-line of decisions criticising the impact of its counterterrorism sanctions on individuals continue to fall short of the European Court of Justice's insistence on some form of judicial process for those on whom the Council imposes smart sanctions, relevant Council resolutions now routinely affirm the need to adhere to both human rights and international humanitarian standards and such issues are reportedly taken into account in those delisting procedures that the Council now applies as well as by the United Nations ombudsperson office operating under one Security Council Sanctions Committee.[148] Significantly, the Security Council has not attempted to take specific exception to human rights or international humanitarian law in the course of its work. Particularly in the wake of internal and external human rights criticisms, the Council has not claimed to be simply exempt from the admittedly vague human rights obligations contained in the Charter. The relevant institutional practice of the Council has, accordingly, led to a presumptive canon of interpretation: all Council resolutions should, absent any specific exception from fundamental human rights on their face, be interpreted and implemented by states in ways that do not violate such rights.[149]

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146 Curtis Bradley and Trevor Morrison "Historical Gloss and the Separation of Powers" (2012) 126 Harv L Rev 411.

147 At 431. This was affirmed by the ICJ. See *Competence of the General Assembly for the Admission of a State to the United Nations (Advisory Opinion)* [1950] ICJ Rep 4. The majority affirms the need for a Security Council recommendation with respect to admission to United Nations membership prior to a decision by the General Assembly because of the clear text of art 4(2). See also *Conditions of Admission of a State to Membership in the United Nations (Advisory Opinion)* [1948] ICJ Rep 57 at 11: "The political character of an organ cannot release it from the observance of the treaty provisions established by the Charter".

148 See Erika de Wet "From Kadi to Nada: Judicial Techniques Favoring Human Rights Over United Nations Security Council Sanctions" (2013) 12 Chinese JIL 787.

149 See de Wet, above n 148.

Consideration of the possible relevance of United States executive practice to the practices of IOs illustrates the broader point that those seeking to establish the international rule of law cannot just draw from the general domestic practices of rule of law states, but need to be more nuanced about what parts of national law may be relevant.[150] Such nuance and care are also called for when searching for guidance on ways to hold IOs legally accountable when they directly harm individuals (as in the case of United Nations peacekeepers). While it is easy to agree with Waldron that the United Nations and contributors to peacekeeping forces need to be held legally accountable for both their torts and their crimes, the forms of such accountability need not replicate those that we traditionally associate with the national rule of law. We think of legal accountability under national law as requiring, under Bingham's elements five and six, either a fair criminal trial or a judicial proceeding leading to civil damages that fully compensates those harmed by state action or inactions. The hurdles to securing either at the international level even when individuals are directly harmed by United Nations peacekeepers are ably canvassed by Burke's article.[151] As Burke indicates, something – the lack of forum, the lack of standing or jurisdiction, the existence of immunity, the absence of attachable funds – usually precludes successful claims against the United Nations in national or international courts, even when these involve sexual abuse or gross negligence.[152] Although some European courts have, relying on the European Convention of Human Rights or some national constitutions, punctured the immunities of some IOs if these fail to provide an effective remedy to individuals they have harmed, that contention has not yet proven successful when it is up against the absolute immunity enjoyed by the United Nations under the General Convention on Privileges and Immunities.[153]

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150 It also means, as noted, that nuance is needed with respect to which elements of the (national) rule of law can be exported to international legal regimes. Sir Kenneth Keith, for example, examines only three rule of law qualities in his consideration of the international rule of law: see Keith, above n 69. See also McCorquodale, above n 14, who emphasises the need for a predictable and clear legal order, equality of application, settlement of disputes before an independent body and access to justice to protect human rights.

151 See Burke, above n 5. Of course, we have not yet seen any evidence that the Security Council might be tempted to refer situations involving the actions by peacekeepers that might be considered war crimes to the ICC for prosecution, even though the Council was at a prior point shamed into abandoning an earlier grant of ICC immunity to certain United Nations peacekeepers. The 12 month exemptions from ICC jurisdiction contained in Security Council Resolution 1422 and Security Council Resolution 1487were not renewed after considerable criticism. *United Nations Security Council Resolution 1422* SC Res 1422, S/RES/1422 (2002) at [2]; and *United Nations Security Council Resolution 1487* SC Res 1487 SC Res 1487, S/RES/1487 (2003) at [2].

152 See Burke, above n 5. See also Kristen Boon "The United Nations as a Good Samaritan: Immunity and Responsibility" (2016) 16 CJIL 341, and Bruce Rashkow "Remedies for Harm Caused by UN Peacekeepers" (2 April 2014) AJIL Unbound <www.asil.org>.

153 Convention on the Privileges and Immunities of the United Nations (opened for signature 13 February 1946, entered into force 17 September 1946), art 2(2):

The ongoing efforts of groups of Haiti claimants who, as noted above, are seeking to make the United Nations accountable in the wake of a cholera epidemic allegedly caused by the arrival of Nepalese peacekeepers provide an instructive case study. Those class action claimants urged the United States court to interpret the absolute immunity accorded to the United Nations under treaty in light of another provision in the same treaty which provides that:[154]

> The United Nations shall make provisions for appropriate modes of settlement of:
>
> (a) Disputes arising out of contracts or other disputes of a private law character to which the United Nations is a party; and
> (b) Disputes involving any official of the United Nations who by reason of his official position enjoys immunity, if immunity has not been waived by the Secretary-General.

The broader argumentative frame was that organisational immunity should be conditioned on the human right to an effective remedy recognised by customary international law as well as relevant human rights treaties.[155] The Haiti claimants also argued that enabling them to sue the United Nations was consistent with the obligations undertaken by the United Nations under the Status of Forces Agreement authorising the Haiti peacekeeping mission, MINUSTAH (*Mission des Nations Unies pour la stabilisation en Haïti*). Under that agreement, while MINUSTAH enjoys privileges and immunities under the General Convention of Privileges and Immunities, that mission must "respect all local laws and regulations" and take all appropriate measures to ensure observance of these.[156]

> The United Nations, its property and assets wherever located and by whomsoever held, shall enjoy immunity from every form of legal process except insofar as in any particular case it has expressly waived its immunity. It is, however, understood that no waiver of immunity shall extend to any measure of execution.

For a thorough assessment of how national courts have treated the immunities of international organisations, see August Reinisch *International Organizations Before National Courts* (Cambridge University Press, Cambridge, 2000). Compare *Georges v United Nations*, above n 8; to Stephen Hertz "International Organization in U.S. Courts: Reconsidering the Anachronism of Absolute Immunity" (2007) 31 Suffolk Transnatl L Rev 471.

154 See Convention on the Privileges and Immunities of the United Nations, above n 153, art 7(29). See also Boon, above n 10; and Boon, above n 151, at 353–355.

155 See for example *Universal Declaration of Human Rights* GA Res 217, III (1948), art 10: "Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him."; and European Convention on Human Rights 213 UNTS 221 (opened for signature 4 November 1950, entered into force 3 September 1953), art 6: "In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law."

156 Agreement Between the United Nations and the Government of Haiti Concerning the Status of the United Nations Operation in Haiti 2271 UNTS 251 (9 July 2004), arts 3 and 5.

Significantly, this includes a duty to cooperate with respect to sanitary measures and control of communicable diseases.[157]

The Haiti complainants faced a formidable hurdle, however. Under the Status of Forces Agreement, "third party claims for property loss or damage and personal injury, illness or death arising from or directly attributed to MINUSTAH, except those arising from operational necessity, which cannot be settled through UN internal procedures shall be settled" by the procedure contained in that agreement.[158] The agreement further provides that:[159]

> … any dispute or claim of a private law character, not arising from operational necessity … over which Haiti courts do not have jurisdiction … shall be settled by a standing claims commission to be established for this purpose.

The envisioned commission would have one member to be appointed by the Secretary-General, one by the Haitian government, and a chair jointly appointed by the Secretary-General and that government.[160] There are, of course, a number of rationales for the compromises struck in United Nations Status of Forces Agreements. These arrangements need to calibrate the rights and responsibilities of a triad of interests: the United Nations (which needs to avoid exposure to potentially biased national courts, the appearance of being subject to the control of host states, and the potential for damage awards that could bankrupt the organisation), troop-contributing states (that need to be persuaded that participating in peacekeeping remains worthwhile and will not expose them to unwarranted liabilities), and host states like Haiti (with a presumptive interest in protecting their populations and the efficacy of their laws). It makes sense that the Status of Forces Agreements simultaneously strive to protect the organisation from the jurisdiction of local courts and host states from liability for the acts undertaken by the organisation, while also providing alternative means for handling the private law claims by host state nationals. A national court ruling puncturing the United Nations' immunity and permitting tort suits against the organisation to proceed in local courts, on the other hand, threatens the independence of the organisation, exposes it to potentially devastating financial liability, and may undermine the willingness of states to participate in future peacekeeping.[161]

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157 Article 23.

158 Article 54.

159 Article 55.

160 Article 55.

161 Boon for example discusses the hazards of removing the United Nations' immunity in the Haiti cholera case: see Boon, above n 152, at 370–374.

The Haiti complainants took their claim to the United States courts because the anticipated alternative means for settling private law claims did not emerge. After the United Nations' determination that the claims were not receivable, the Haiti government did not request the establishment of the envisioned Claims Settlement Commission; indeed no such Commission had ever been established even though provisions comparable to art 55 had long been included in prior United Nations Status of Forces agreements.[162] The Commission remedy relies on a government's willingness to pursue the claims of its nationals against the organisation. Without that backing, those harmed by United Nations need to rely on the benevolence of the United Nations which, by tradition, quietly settles such private law claims on its own terms without interference from third party judges or arbitrators.[163] In this case, no such benevolence (has yet) emerged. Instead, fifteen months after a group of Haitian victims had initially approached the United Nations in the wake of the cholera epidemic, they received a short letter from then United Nations General Counsel indicating that:[164]

> … consideration of these claims would necessarily include a review of political and policy matters. Accordingly, these claims are not receivable pursuant to Section 29 of the Convention on the Privileges and Immunities of the UN …

As noted at the outset of this article, the United States Trial Court dismissed the Haitians' class action complaint. While that ruling remains on appeal, a glaring gap in the prospects for United Nations accountability remains exposed to view, and considerable criticism. Reliance on victims' governments to pursue a United Nations remedy does not work well when what Waldron would call the farmer or lion is in effect so beholden to the United Nations for its largesse (and perhaps its continued hold on power) that the effective farmer is the United Nations itself.[165]

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162 See Letter from Pedro Medrano (Assistant Secretary-General and Senior Coordinator for Cholera Response, United Nations) to Leilani Farha (Special Rapporteur, Office of the United Nations High Commissioner for Human Rights) and others regarding the cholera outbreak in Haiti since 2010 (25 November 2014); written in response to Letter from Leilani Farha (Special Rapporteur, Office of the United Nations High Commissioner for Human Rights) and others to Pedro Medrano (Assistant Secretary-General and Senior Coordinator for Cholera Response, United Nations) regarding the cholera outbreak in Haiti since 2010 (25 September 2014).

163 But in one case that resembles the facts underlying the Haiti cholera case, the United Nations' responsibility was the subject of a human rights advisory panel that is part of the United Nations Interim Administration Mission in Kosovo. See Rick Gladstone "Roma Poisoned for Years at UN Camps in Kosovo May be Compensated" *New York Times* (New York City, 7 April 2016) at A4.

164 Letter from Patricia O'Brien (United Nations Under-Secretary General for Legal Affairs) to Brian Concannon (Director of the Institute for Justice & Democracy in Haiti) regarding the cholera outbreak in Haiti since 2010 (21 February 2013).

165 For example Pillinger, Hurd and Barnett enumerate the remedies that were available to the government of Haiti and speculating on the many reasons why that weak state was "unlikely to bite the hand that meagerly

But is it appropriate to expect that those harmed by the action of the United Nations in this case should be able to pursue the considerable class action remedies and damages available under United States law? Some, like Richard Stewart, adopt a more open-ended definition of international legal accountability. Stewart argues that such accountability demands:[166]

> … the ex post calling by an account holder of an accounter to justify his prior conduct, and the authority and ability of the account holder to provide some form of sanction or other remedy for deficient performance.

On this view, the legal accountability assured under the international rule of law is satisfied with a mechanism that evaluates the conduct of the tortfeasor and accords its victim an appropriate remedy.[167] Stewart's fluid conception of legal accountability takes into account the triadic concerns embedded in the United Nations Status of Forces Agreements. It is also consistent with the diverse approaches to legal accountability taken at both the national and international levels. It recognises that, in some cases, even rule of law states have not provided full compensation to all victims for injuries suffered in their national courts. While this may occur because of rule of law failures, it may happen, more legitimately, when, for example, the amounts at stake or other circumstances make full recompense unworkable, as suggested by judicial rulings rendered in the course of class actions on behalf of voluminous asbestos victims.[168] The sheer volume of victims and need for more expeditious responses (particularly in light of the age of some victims) may also lead to alternatives to judicial actions, as occurred in response to Holocaust era claims.[169]

Of course, at the international level, alternatives to full compensatory reparations issued by courts are the norm, not the exception. Most instances of alleged international wrongful acts have been and continue to be resolved diplomatically at the inter-state level or through other non-judicial remedies

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feeds it": Mara Pillinger, Ian Hurd and Michael Barnett "How to Get Away with Cholera: The UN, Haiti, and International Law" (2016) 14 Perspectives on Politics 70 at 75–76.

166 Richard Stewart "Remedying Disregard in Global Regulatory Governance: Accountability, Participation, and Responsiveness" (2014) 108 AJIL 211 at 246.

167 Stewart, above n 166, at 248.

168 For example Michelle White surveys judicial and regulatory approaches in a number of jurisdictions. See Michelle White "Asbestos and the Future of Mass Torts" (2004) 18 J Econ Perspect 183.

169 For an example, see the German Foundation Agreement discussed in *American Insurance Association v Garamendi* 539 US 396 (2003).

enumerated under art 33 of the Charter of the United Nations.[170] Even when states have resorted to forms of arbitrations or arbitral commissions, these have rarely awarded the prompt, adequate, and effective compensation that is arguably the standard for government takings of property.[171] Much more common have been arbitral mechanisms that deploy the full range of remedies anticipated under the Articles of State Responsibility, from mere acknowledgement to apology to less than fully compensable damages.[172] Moreover, even when states have established international courts, these may have required court ordered diplomatic efforts prior to considering such awards.[173] It is overly simple to see all of these as pragmatic compromises or outright rule of law failings instead of essential dimensions of the international rule of law. It is instructive to keep Stewart's fluid view of legal accountability in mind when we look at the merits of the mechanisms for IO accountability that now exist, including the World Bank's Inspection Panels, the United Nations' Administrative Tribunal, the United Nations Mission in Kosovo (UNMIK), Human Rights Advisory Panel for Kosovo, the World

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170 Charter of the United Nations, art 33. This results in part from the fact that despite the proliferation of international courts, states are still generally reluctant to include forms of compulsory dispute resolution in their treaties or to seek recourse to these even when these are included. It may also be the product of the number of actors, private and public, that may be deemed to share responsibility. For the difficulties engendered by forms of shared responsibility and responses to it, see for example Andre Nollkaemper and Dov Jacobs "Shared Responsibility in International Law: A Conceptual Framework" (2013) 34 Mich J Intl L 359; Sorcha MacLeod "Private Security Companies and Shared Responsibility: The Turn to Multistakeholder Standard-Setting and Monitoring through Self-Regulation-'Plus'" (2015) 62 NILR 119; Laurence Boisson de Chazournes "United in Joy and Sorrow: Some Considerations of Responsibility Issues Under Partnerships Among International Financial Institutions" in Mauricio Ragazzi (ed) *Responsibility of International Organizations* (Martinus Nijhoff, Leiden, 2013) 211.

171 Indeed, a prominent scholar of United States property law has argued that genuinely full compensation, designed to redress the full impact of state action on the injured party, does not occur even under the takings clause of the United States Constitution, much less investor-state claimants in ICSID. Thomas Merrill "Incomplete Compensation for Takings" (2002) 11 NYU Envtl LJ 110.

172 James Crawford *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries* (Cambridge University Press, Cambridge, 2002) at 192–241 (articles 28–39 and commentaries).

173 Many have noted that, historically, regional human rights courts have not sought to provide human rights victims with monetary compensation the responds to the harms they have suffered. Dinah Shelton argues, for example, that getting states to rectify their human rights violations, rather than compensation, should continue to be the main objective of remedies. See Dinah Shelton "Remedies in International Human Rights Law" (2005) Social Science Research Network <www.ssrn.com>. Of course, the global system for the judicial resolution of disputes, the WTO's Dispute Settlement System, provides no such compensatory remedy but, like human rights mechanisms generally, seek to deter states from continuing to violate the law. Moreover, even when international courts consider an award for damages, they may require the state parties before them to first seek to negotiate the level of compensation and only have recourse to the court should their negotiations fail. See for example *Certain Activities carried out by Nicaragua in the Border Area (Costa Rica v Nicaragua) (Merit)* [2015] ICJ Rep 1 at 54–55.

Bank's anti-corruption regime, and, of course, the Office of the Ombudsperson to the ISIL (Da'esh) and Al-Qaida Sanctions Committee.[174]

It is worth considering seriously the justifications offered by, for instance, Judge Kimberly Prost, the former ombudsperson charged with recommending the delisting of persons identified by the Security Council under its Al-Qaida sanctions programme. By the time she left office, Judge Prost had delisted a considerable number of persons from the Al-Qaida sanctions list, even though her non-binding recommendations did not have the force of law and did not compel the Council to obey. As Judge Prost notes, when she began her service, no courts had addressed "how to define fair process in the unique context of Security Council sanctions".[175] According to Prost:[176]

> Fair process is always contextual. The rights of individuals in a criminal case are very different from their rights in an administrative case, even domestically. And as between legal systems, the content and contours of fair process can vary significantly.

Prost interpreted the mandate to provide a fair process to embrace five elements:[177]

> First, the Petitioners must know the case against them as far as possible. Secondly, they must have an opportunity to answer that case and to be heard by the decision-maker. Thirdly, there must be some form of independent review.

To Prost, these requirements do not require traditional judicial review; on the contrary, "other forms of objective review" are sufficient, provided these provide "an effective and independent assessment".[178]

The fourth requirement is a reasoned opinion of whether or not to delist and the final requisite is that the entire process be otherwise fair and timely.[179]

We need not resolve here whether Prost's five elements of fair process or the ruling in *Kadi II*, affirming the need for full scale judicial review for individuals put on Council counter-sanctions lists,

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174 Boon for example discusses some of the ways (apart from waiving its immunity before national courts) whereby the United Nations has provided the "alternative means" for settling private law claims under art 29 of the Convention on Privileges and Immunities. See Boon, above n 152, at 375–377.

175 Kimberly Prost "The Office of the Ombudsperson: a Case for Fair Process" United Nations <www.un.org> at 1. See also Kimberly Prost, Ombudsperson to the United Nations Security Council's Al-Qaida and Taliban Sanctions Committee "Remarks by Kimberly Prost" (49th Meeting of the Committee of Legal Advisers on Public International Law of the Council of Europe, Strasbourg, 20 March 2015).

176 Prost "The Office of the Ombudsperson: a Case for Fair Process", above n 175, at 1.

177 At 1.

178 At 1.

179 At 1.

is the most consistent with the rule of law.[180] If one thinks that what the Security Council does with respect to its 'smart sanctions' is tantamount to inflicting a criminal penalty, nothing short of providing the extensive due process guarantees due a criminal defendant under the International Covenant for Civil and Political Right's art 14 will do.[181] This is consistent with the conclusion reached by the majority of the ICJ in the consular notification series of cases which ultimately ruled that United States courts should grant "judicial reconsideration and review" to those it holds on death row who did not have the benefit of consulting with their consulates prior to trial and sentencing.[182] But those who would defend Prost's contextual view of what fair process means in the context of the Council would note that these ICJ rulings address remedies for persons facing the death penalty whose rights had been infringed; the ICJ was not addressing, as was Prost, the plight of those have been denied their passports or full access to their bank accounts.

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So how should we fix the accountability failings suggested by the three incidents with which this article began?

Determining what the international rule of law should demand of the Security Council with respect to its sanctions procedures, of the United Nations Secretariat or General Assembly when it faces charges of corruption, or of the United Nations generally when its peacekeepers are charged with national or international crimes or gross negligence is not just a question of the application of first principles. We can demand that IOs abide by the rule of law and still acknowledge that the legal accountability of states and IOs requires deployment of the full range of avenues identified in Chapter VI of the Charter of the United Nations, including its art 33. Even in a world with proliferating international tribunals, it remains rare for states (and perforce IOs) accused of international wrongful acts to be hauled before a court, found liable, and compelled to pay full compensatory damages to injured parties. Even when international adjudicators are involved in such disputes, they often insist upon inter-state negotiations or diplomacy prior to issuing orders requiring compensation.[183]

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180 For a thorough engagement with this issue, see Devika Hovell "Due Process in the United Nations" (2016) 110 AJIL (forthcoming). For an argument that legalism or legalisation is responsible for the absence of accountability in the Haiti cholera case, see Pillinger, Hurd and Barnett, above n 165, at 76–79. Pillinger, Hurd and Barnett contend that the turn to law precludes political considerations, privileges the power of the United Nations over individuals, and prioritises law over normative or ethical concerns.

181 International Covenant on Civil and Political Rights 999 UNTS 171 (opened for signature 16 December 1966, entered into force 23 March 1976), art 14.

182 See *Avena and Other Mexican Nationals (Mexico v United States) (Merits)* [2004] ICJ Rep 12.

183 See for example *Nicaragua v Costa Rica*, above n 173. This is certainly the case in the WTO's Dispute Settlement System. See art 22(2) of the Understanding on Rules and Procedures Governing the Settlement of Disputes, annex 2 to the Marrakesh Agreement Establishing the World Trade Organization 1867 UNTS 31874 (opened for signature 15 April 1994, entered into force 1 January 1995), (1994) 33 ILM 1125 [DSU]. Note

These realities should affect prescriptions for securing IOs' compliance with law. International rule of law fixes should take into full account the special features of the existing international legal system, including, as noted, its reliance on contested, iterative interactions among diverse political and legal forums.[184] Those arguing that the rule of law requires the Security Council to replace its ombudsperson mechanism with a full scale international court to implement its smart sanctions need to consider whether this is the best prescription, as opposed to, for example, insisting that an ombudsperson procedure of some kind apply to all Security Council sanctions committees and not just to those sanctions committees that deal with ISIL and Al-Qaida.[185]

Sober reflection on whether a full scale judicial process is truly needed is a good idea not only because insistence on the perfect rule of law ideal may be the enemy of the good. It is a good idea because nuance is needed when examining what the national rule of law truly requires and when exporting national rule of law recipes to the international realm. It is also a good idea because, as McCorquodale has recently reminded us, compliance with the rule of law, at the national or international levels, is a matter of degree.[186] As he suggests, no one, including rule of law democracies famed for the rule of law, fully complies with the rule of law ideal; compliance with the rule of law is a work in progress at both national and international levels.[187] In both, the rule of law – including access to impartial remedies of whatever kind – is more likely available to those with power and access to resources. At both levels, access to justice and compliance with the rule of law more generally is likely to be the product of recursive interactions between legal and political actors, what some scholars have labelled as praxis or as forms of contestations and deference.[188]

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also the WTO's expressed preference for rectification over compensation or the suspension of concessions under the DSU, art 22(1).

184 See Kanetake and Nollkaemper, above n 123.

185 For a rich set of reform proposals for Council sanctions committees, see Farrall, above n 91.

186 McCorquodale, above n 14, at 290–291.

187 At 290–291.

188 See generally Friedrich Kratochwil *The Status of Law in World Society: Mediations on the Role and Rule of Law* (Cambridge University Press, Cambridge, 2014), in which Kratochwil stresses the importance of seeing how practical reasoning leads to actions (decisions), which in turn affect future practical reasoning, thereby producing knowledge in the form of praxis. See also Kanetake and Nollkaemper, above n 123, discussing the interactions between the national and international rule of law in the forms of contestations and deference. Even the recourse to international courts does not eliminate the dynamic of praxis or reduce the possibility of contestations or deference. See for example Laurence Boisson de Chazournes :After 'The Court Rose': The Rise of Diplomatic Means to Implement the Pronouncements of the International Court of Justice" (2012) 11 The Law & Practice of International Courts and Tribunals 1, where the author discusses diplomatic initiatives taken to secure implementation of the ICJ's pronouncements.

Consider, once again, the Haiti cholera case. Those class actions now pending in United States courts have not achieved, to be sure, legal accountability. They have, however, embarrassed the United Nations, kept the issue alive, and helped to preserve the evidence (particularly from victims) that would be needed if any form of recompense is ultimately pursued outside of United States courts. Those actions, and continued NGO pressure, are provoking reactions in other parts of the United Nations system. As might be expected, these involve entities or persons who, unlike United States judges, enjoy no legally binding powers and have recourse to no judicial sanction. They include four United Nations human rights experts who have sent a joint public letter of complaint urging action on the Haiti cholera case, namely the United Nations Special Rapporteur on the Right to Adequate Standard of Living and Non-Discrimination, the independent expert on the situation of human rights in Haiti, the United Nations Special Rapporteur on the Right of Everyone to Enjoyment of the Highest Attainable Standard of Physical and Mental Health, and the United Nations Special Rapporteur on the Human Right to Safe Drinking Water.[189] Their complaint generated, in turn, a 33 page response from Pedro Medrano, the Assistant Secretary-General in charge of the United Nations' response to the Haiti cholera situation.[190] Medrano's letter is the most extensive United Nations accounting that the victims of that disaster have yet received and it includes the United Nations' most elaborate effort to legally justify its original two sentence response about why the Haiti cholera victims' claims were not receivable.[191] Much as the United Nations would like to think that the matter is now closed, this letter is not likely to be the end of the story. An expert workshop has since been convened at London's Chatham House. That workshop, operating under the purposely opaque Chatham House rules, reportedly involved some key players in the Haiti cholera debacle and discussed possible diplomatic ways forward.

A diplomatic resolution of the Haiti case that is consistent with the traditional remedies under the Articles of State Responsibility would likely involve an acknowledgement by the United Nations of its responsibility, the organisation's commitment to secure the construction of water and sanitation infrastructure to control and eliminate further outbreaks of cholera, and some form of recompense, broadly consistent with those awarded under human rights regimes, to the Haiti victims and their families. Such a diplomatic solution, outside of a class action for tort in United States courts but under its shadow, would probably satisfy Stewart's conception of legal accountability and may go some way towards fulfilling Bingham's sixth rule of law element. Were that diplomatic outcome to emerge, it would be yet one more instance in which progress on the accountability of IOs is achieved through

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189 Letter from Farha, above n 162.

190 See Letter from Medrano, above n 162; and Letter from Farha, above n 162.

191 Letter from Medrano, above n 162, at 86–94. For a thorough critique of the contention that the cholera claims were not private law claims, see Frédéric Mégret "La responsabilite des Nations Unies aux temps du cholera" (2013) 47 Belgian Rev Intl L 161 (translation: "United Nations Responsibility in the Time of Cholera"). See also Boon, above n 152, at 353–361.

the combination of the application of the diverse accountability mechanisms outlined by Keohane and Grant and their interaction over time.[192] Such an outcome would avoid the adverse consequences of a precedent setting national court ruling whose long-term consequences could be more threatening to the international rule of law.[193]

As this suggests, some proposed rule of law fixes to secure IO accountability, however well intentioned, can do more harm than good. Consider a fix for the Security Council that has been widely endorsed. Former United Nations General Counsel, Hans Corell, has proposed that the Permanent Members of the Council set an example for scrupulously adhering to the law by proclaiming their mutual commitment "to make use of our veto power … only if our most serious and direct national interests are affected", explain when vetoes are deployed, and pledge to:[194]

> … take forceful action to intervene in situations when international peace and security are threatened by governments that seriously violate human rights or fail to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity or when otherwise the responsibility to protect is engaged.

Corell proposes, in the spirit of Waldron's suggestion that the United Nations set a good example with respect to the rule of law,[195] that the Security Council bind itself to the mast and force itself to act when the Responsibility to Protect (R2P) is triggered. His proposal combines the progressive international lawyer's best intentions and Bingham's requirement that any law worthy of the name needs to avoid selective application. It is consistent with the goals of humanitarian proponents of R2P. Who could ask for anything more?

Gerry Simpson suggests one response that is not likely to sit well with those who organised and participated at the Symposium but that is nonetheless a useful warning against rule of law hubris:[196]

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192 See Grant and Keohane, above n 57. Recursive interactions involving a number of political actors explain the establishment and evolution of the Security Council's ombudsperson procedure: see Katalin Tünde Huber and Alejandro Rodiles "An Ombudsperson in the United Nations Security Council: a Paradigm Shift?" (2012) Décimo Aniversario, Anuario Mexicano de Derecho Internacional 107. For an example of the evolution of World Bank procedures over time to provide stronger protections to those affected by the Bank's efforts to counter corruption, see Laurence Boisson de Chazournes and Edouard Fromageau "Balancing the Scales: The World Bank Sanctions Process and Access to Remedies" (2012) 23 EJIL 963; and Anne-Marie Leroy and Frank Fariello *The World Bank Group Sanctions Process and Its Recent Reforms* (World Bank Study, 2012).

193 See above n 161.

194 Hans Corell "Corell Draft Declaration for Consideration by the Permanent Members of the Security Council" (2012) International Judicial Monitor <www.judicialmonitor.org>.

195 See Waldron, above n 78.

196 Gerry Simpson "Strengthening the rule of law through the United Nations Security Council" (Australian National University, Working Paper 5.4, October 2012) at 9.

> In the abstract, the rule of law, for all its virtues in a stable, liberal democracy, is a form of rule that is likely to favour entrenched elites over resistance groups, vested interests carrying out lawful activity over civil disobedience, official actors over unofficial actors and property owners over protestors. In the international system, where the distribution of power, goods and advantage is so vastly, indefensibly and asymmetrically skewed, where the law is largely written by and on behalf of a powerful minority of states and where institutions are funded by, established at the behest or instigation of (or, at least, with the tacit approval of) and, often, directed by sovereign elites, it is little wonder that the rule of law is regarded either as illusory and distant (in its radical guise) or concrete and violent (in its existing instantiation). China Mieville … reminds us that … 'death, destruction, poverty, torture: this *is* the rule of law'.

For those attuned to the debacle that has emerged in the wake of the Council's most recent invocation of R2P, namely its Resolution 1973 authorising the use of force with respect to Libya, Corell's proposed declaration, whether or not consistent with one's view of what the international rule of law demands, is not a good idea.[197] The examples of 'death, destruction, poverty, and torture' now perpetrated on Libyan soil warn us about the risks that accompany efforts to 'perfect' the rule of law in a context as politically skewed as the Security Council.[198] Requiring that body to kill in the name of the rule of law will probably not advance the international rule of law.

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197 *Libya* SC Res 1973, S/Res/1973 (2011).

198 Alan Kuperman for example argues that the NATO intervention caused more humanitarian harm than good. See Alan Kuperman "A Model Humanitarian Intervention? Reassessing NATO's Libya Campaign" (2013) 38 Int Security 105.