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SIMON CHESTERMAN*

An International Rule of Law?

The rule of law is almost universally supported at the national and international level. The extraordinary support for the rule of law in theory, however, is possible only because of widely divergent views of what it means in practice. Disparate national traditions posed few problems while operating in parallel, but efforts to promote the rule of law through international organizations have necessitated a reassessment of this pluralism. This article proposes a core definition of the rule of law as a political ideal and argues that its applicability to the international level will depend on that ideal being seen as a means rather than an end, as serving a function rather than defining a status. Such a vision of the rule of law more accurately reflects the development of the rule of law in national jurisdictions and appropriately highlights the political work that must be done if power is to be channeled through law.

INTRODUCTION

> We ought to expose the shams and inequities which may be concealed beneath the law. But the rule of law itself, the imposing of effective inhibitions upon power and the defense of the citizen from power's all-intrusive claims, seems to me to be an unqualified human good.

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E.P. Thompson[1]

> It would not be very difficult to show that the phrase "the Rule of Law" has become meaningless thanks to ideological abuse and general over-use. It may well have become just another one of those self-congratulatory rhetorical devices that grace the utterances of Anglo-American politicians. No intellectual effort need therefore be wasted on this bit of ruling-class chatter.

Judith Shklar[2]

What, if anything, is meant by terms such as "the international rule of law"? At the United Nations World Summit in 2005, Member States unanimously recognized the need for "universal adherence to and implementation of the rule of law at both the national and international levels" and reaffirmed their commitment to "an international order based on the rule of law and international law."[3] The rule of law has been embraced across the political spectrum: on the right, Friedrich Hayek placed it at the heart of development policy;[4] on the left, the Marxist historian E.P. Thompson called it an "unqualified human good."[5] It is a term endorsed by both the World Social Forum and the World Bank.

Such a high degree of consensus on the virtues of the rule of law is possible only because of dissensus as to its meaning. At times the term is used as if synonymous with "law" or legality; on other occasions it appears to import broader notions of justice. In

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[1] E.P. THOMPSON, WHIGS AND HUNTERS: THE ORIGIN OF THE BLACK ACT 266 (1977).

[2] Judith Shklar, *Political Theory and the Rule of Law*, *in* THE RULE OF LAW: IDEAL OR IDEOLOGY 1, 1 (Allan C. Hutchinson & Patrick Monahan eds., 1987).

[3] 2005 World Summit Outcome Document, U.N. Doc. A/RES/60/1 (Sept. 16, 2005), *available at* http://www.un.org/summit2005, para. 134.

[4] FRIEDRICH HAYEK, THE CONSTITUTION OF LIBERTY 220-33 (1960).

[5] THOMPSON, *supra* note 1, at 266. Prominent challenges to the rule of law have, of course, been offered by other Marxist scholars, critical legal theorists, feminist theorists, critical race theorists, queer theorists, and others. In particular the notion of sameness is seen as reifying biases and positions of privilege. Against this, as Thompson argued, even if the rule of law serves an ideological function it must promote values that are, in fact, valuable, and capable of being at least partially realized. *See* JEREMY WALDRON, THE LAW 21-25 (1990). For an examination of criticisms of Thompson, see Daniel H. Cole, *"An Unqualified Human Good": E.P. Thompson and the Rule of Law*, 28 JOURNAL OF LAW AND SOCIETY 177 (2001).

still other contexts it refers neither to rules nor to their implementation but to a kind of political ideal for a society as a whole. This article will briefly survey its evolution in discrete cultural traditions before exploring these formal, substantive, and functional conceptions of the rule of law.[6] It will then turn to how the rule of law at the national level has been implemented through international organizations, and the extent to which those international organizations have internalized the rule of law in their own procedures. It will conclude with an examination of what may be signified by terms such as "the international rule of law" or "the rule of international law."

To conceive of the rule of law in a manner coherent across the many contexts in which it is invoked requires a formal, minimalist understanding that does not seek to include substantive political outcomes—democracy, promoting certain human rights, redistributive justice or laissez-faire capitalism, and so on—in its definition. These outcomes are more properly sought in the political realm.[7] Nevertheless, examination of the functional manner in which the rule of law is deployed in international forums suggests important qualifications on how the rule of law may be adapted as a meaningful concept at the international level. In other words, agreement on the *meaning* of rule of law requires a formal conception of its content, but how that content is applied to international law—where the primary challenge is not the vertical relationship of subjects to a sovereign, but the horizontal relationship of subjects to other subjects—requires a functionalist understanding of its *use*.[8]

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[6] *Cf.* Matthew Stephenson, The Rule of Law as a Goal of Development Policy (World Bank, Washington, DC, 2001), http://www1.worldbank.org/publicsector/legal/ruleoflaw2.htm.

[7] *Cf.* Joseph Raz, *The Politics of the Rule of Law*, 3 RATIO JURIS 331 (1990).

[8] *Cf.* Souren Teghrarian, *Wittgenstein, Kripke and the "Paradox" of Meaning, in* WITTGENSTEIN AND CONTEMPORARY PHILOSOPHY 187-202 (Souren Teghrarian & Anthony Serafini eds., 1992); Bede Rundle, WITTGENSTEIN AND CONTEMPORARY PHILOSOPHY OF LANGUAGE (1990) (problematizing the glib rendering of Wittgenstein's philosophy of language as "ask not for the meaning, but the use").

I. EVOLUTION OF THE RULE OF LAW AT THE NATIONAL LEVEL

The early history of the rule of law is frequently conflated with the history of law itself. The Code of Hammurabi, promulgated by the king of Babylon around 1760 BC, was one of the first sets of written laws; the fact that it was inscribed in stone and made publicly available was a significant advance toward a legal system.[9] Yet few would argue that Babylon was governed according to the rule of law in any modern sense. That modern conception may be understood at its most basic by a distinction from the "rule of man," implying power exercised at the whim of an absolute ruler, and from "rule *by* law," whereby a ruler consents to exercise power in a non-arbitrary fashion. In neither case is the ruler him- or herself bound by law in any meaningful sense.

Plato held in the *Republic* that the best form of government was rule by a philosopher king, but allowed that rule by law was a second option warranted by the practical difficulties of locating an individual with the appropriate qualities to reign.[10] Aristotle surveyed various Greek constitutions before concluding in *The Politics* that "the rule of law" was preferable to that of any individual,[11] a position later quoted by John Adams on the eve of the American Revolution as the definition of a republic: that it is "a government of laws, and not of men."[12]

Throughout this early period, however, law continued to be seen largely as a means by which to rule rather than a constraint on the ruler as such. Despite occasional

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[9] H.-DIETER VIEL, THE COMPLETE CODE OF HAMMURABI (2005).

[10] PLATO, THE REPUBLIC (Benjamin Jowett trans., Clarendon Press 1892) (360 BC). By *The Laws*, Plato endorsed a stronger position: "Where the law is subject to some other authority and has none of its own, the collapse of the state, in my view, is not far off; but if law is the master of the government and the government is its slave, then the situation is full of promise and men enjoy all the blessings that the gods shower on a state." PLATO, THE LAWS 715d (Trevor J. Saunders trans., Penguin 1970) (360 BC).

[11] ARISTOTLE, THE POLITICS (Benjamin Jowett trans., Nuvision (2004) (350 BC), III.16.

[12] John Adams, Novanglus No. 7 (Jan. 1775), *available at* http://douglassarchives.org/adam_a50.htm.

doctrinal assertions to the contrary, the development of norms and institutions that might actually bind the sovereign took some centuries.

A. The Anglo-American Tradition

The rule of law took root in England in theory before it did in practice. Though the 1215 Magna Carta established some limits on the exercise of power by the king with respect to the liberties of freemen,[13] it was not until the seventeenth century that the notion of the king himself being subject to law began to be taken seriously. In an extraordinary exchange with James I in 1607, Sir Edward Coke, Lord Chief Justice of the Common Pleas, rebuffed the King's argument that he could withdraw cases from the judiciary and decide them himself: the King ought not to be subject to man, Coke argued, quoting Bracton, but subject to God and the law.[14] Due in large part to such impertinence Coke was later dismissed from the bench, but returned to the legislature where he played a role in drafting the 1628 Petition of Right, also seeking to limit the prerogatives of the Crown.[15]

In the 1644 publication *Lex, Rex,* Scottish theologian Samuel Rutherford outlined a more general theory of limited government, including concepts such as the separation of powers—his book was burned and he was cited for treason, dying before

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[13] Article 29 of the Magna Carta (1215) provided that "No Freeman shall be taken, or imprisoned, or be disseised of his Freehold, or Liberties, or free Customs, or be outlawed, or exiled or any otherwise destroyed; nor will we pass upon him, nor condemn him, but by lawful Judgment of his Peers, or by the Law of the Land. We will sell to no man, we will not deny or defer to any man either Justice or Right." *Available at* http://www.yale.edu/lawweb/avalon/medieval/magframe.htm.

[14] *Prohibitions del Roy* (1607) 12 Co Rep 63, 64-65; 77 ER 1342, 1343, *quoting* HENRY DE BRACTON, DE LEGIBUS ET CONSUETUDINIBUS ANGLIAE f. 5 b (c1250) ("Ipse autem rex, non debet esse sub homine sed sub Deo et sub lege, quia lex facit regem.").

[15] *See generally* LAW, LIBERTY, AND PARLIAMENT: SELECTED ESSAYS ON THE WRITINGS OF SIR EDWARD COKE (Allen D. Boyer ed., 2004); JOHN PHILLIP REID, RULE OF LAW: THE JURISPRUDENCE OF LIBERTY IN THE SEVENTEENTH AND EIGHTEENTH CENTURIES (2004).

he could be tried.[16] A more acceptable position was that of Thomas Hobbes' *Leviathan* (1651), who argued that the rule of law, even in the limited sense of government being founded on a rule or set of precepts, was logically impossible. To be subject to the law, Hobbes argued, a sovereign must subject himself to a greater power. This implies some other sovereign who is free of the law unless subject to another sovereign and so on.[17]

It took a civil war, the beheading of one monarch, and the overthrow and exile of a second before the Bill of Rights Act was adopted in 1689.[18] This provided, among other things, that it was "illegal" for the sovereign to suspend or dispense with laws, to establish his own courts, or to impose taxes without parliamentary approval. It also provided that election of members of parliament should be free, and that parliamentary proceedings should be subject only to parliamentary scrutiny.[19] The monarchy remained powerful and institutions supporting the rule of law weak, however—judges were given security of tenure only in 1701;[20] deprivation of trial by jury was one of the abuses cited in the American Declaration of Independence in 1776;[21] Bills of Attainder were

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[16] SAMUEL RUTHERFORD, LEX, REX, OR THE LAW AND THE PRINCE: A DISPUTE FOR THE JUST PREROGATIVE OF KING AND PEOPLE (Hess 1998) (1644).

[17] THOMAS HOBBES, LEVIATHAN (Dent 1914) (1651), ch 29, para. 9. Hobbes does, however, note in the same passage that "sovereigns are all subject to the laws of nature, because such laws be divine and cannot by any man or Commonwealth be abrogated." For an argument that Hobbes has been misinterpreted with respect to the rule of law, see David Dyzenhaus, *Hobbes and the Legitimacy of Law*, 20 LAW AND PHILOSOPHY 461 (2001).

[18] An Act Declaring the Rights and Liberties of the Subject and Settling the Succession of the Crown 1689 (Engl.) ("Bill of Rights 1689"). Charles I was executed in 1649 during the English Civil War (1642-51). Charles II eventually regained the throne and died in 1685. James II succeeded him but was driven into exile during the Glorious Revolution of 1688. Before William and Mary were affirmed as rulers in 1689, they affirmed a Declaration of Right that was subsequently embodied in the Bill of Rights Act.

[19] *Id.*

[20] The 1701 Act of Settlement provided, among other things, that judges enjoyed tenure during good behavior rather than at the pleasure of the Crown. For a modern discussion, see THE RULE OF LAW (Cheryl Saunders & Katherine Le Roy eds., 2003) (discussing responses to a 1992 decision by the Victorian Parliament in Australia to abolish the Accident Compensation Tribunal and revoke the appointments and commissions of its members).

[21] Declaration of Independence 1776.

abolished only in 1870.[22] Political participation in Britain remained deeply flawed through the nineteenth century: the Reform Act of 1832 abolished infamous rotten boroughs such as Old Sarum, which elected two members to the House of Commons despite having only eleven voters (none of whom was a resident), but the franchise became universal only in 1928.[23]

In the face of this inconstant practice, the modern conception of the rule of law in the Anglo-American tradition is frequently tied to the British constitutional scholar A.V. Dicey, writing in 1885, who referred to it also as the "supremacy of law."[24] His three-point definition is frequently quoted:

> We mean, in the first place, that no man is punishable or can be lawfully made to suffer in body or goods except for a distinct breach of law established in the ordinary legal manner before the ordinary Courts of the land . . . .
>
> We mean in the second place . . . not only that with us no man is above the law, but (what is a different thing) that here every man, whatever be his rank or condition, is subject to the ordinary law of the realm and amenable to the jurisdiction of the ordinary tribunals . . . .
>
> [Thirdly,] the constitution is pervaded by the rule of law on the ground that the general principles of the constitution (as for example the right to personal liberty, or the right of public meeting) are with us the result of judicial decisions determining the rights of private persons in particular cases brought before the Courts.[25]

Dicey's three aspects of the rule of law—regulating government power, implying equality before the law, and privileging judicial process—are commonly regarded as basic requirements of a formal understanding of the rule of law.

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[22] Forfeiture Act of 1870 (U.K.). The procedure does not appear to have been used in the nineteenth century, however, with the last such bill passed in 1798 against the Irish rebel Lord Fitzgerald. *Cf.* U.S. CONST. art. I, § 9, cl. 3; U.S. CONST. art. I, § 10, cl. 1. *See* Akhil Reed Amar, *Attainder and Amendment 2: Romer's Rightness*, 95 MICH. L. REV. 203 (1996).

[23] Equal Franchise Act 1928.

[24] A.V. DICEY, LECTURES INTRODUCTORY TO THE STUDY OF THE LAW OF THE CONSTITUTION 171 (Macmillan 1st ed. 1885).

[25] *Id.*, 172, 177-78, 208.

B. Continental Europe

Continental European jurists developed a slightly different understanding of the role law plays in ordering society, placing less emphasis on judicial process than on the nature of the State.[26] This is reflected in the terms commonly used for "rule of law"—*Rechtsstaat*, *État de droit*, *stato di diritto*, *estado de derecho*, and so on.[27] An important substantive distinction was the role of constitutionalism: whereas Britain never developed a written constitution, in Europe the establishment of a basic law that constrained government came to be seen as axiomatic.[28] This distinction lives on in the different approaches to legal interpretation epitomized by common law precedent-based argument, and civil law doctrinal analysis. It also survives in the relative weight accorded to fundamental rights in civil law as opposed to common law countries, with the United States being a prominent exception.[29]

German scholars typically trace the origins of the *Rechtsstaat* (the law-based State, or constitutional State) to Kant.[30] Robert von Mohl developed the idea in the 1820s, contrasting it with the aristocratic police State.[31] For Hans Kelsen, one of the most influential scholars of twentieth century legal positivism, the rule of law and the

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[26] Dicey himself noted that his third aspect of the rule of law was somewhat specific to England. *Id.* 208.

[27] There are occasional exceptions to such translations. *See, e.g.*, the translation of "rule of law" as "*le rétablissement de l'ordre*" in S.C. Res. 1040 (Jan. 29, 1996), *infra* note 91. In Canada, the Charter of Rights and Freedoms translates "rule of law" as "*la primauté du droit*." Constitution Act 1982 (Can.), Part I, preamble. I am grateful to Gary F. Bell for bringing the latter to my attention.

[28] Dicey wrote that "whereas under many foreign constitutions the rights of individuals flow, or appear to flow, from the articles of the constitution, in England the law of the constitution is the result not the source of the rights of individuals." DICEY, *supra* note 24, at 294.

[29] The United States, however, retains the prominent role of the judiciary, epitomized in the landmark decision of *Marbury v. Madison*, in which Chief Justice Marshall insisted that "it is, emphatically, the province of the judicial department to say what the law is." 6 US (1 Cranch) 137 (1803).

[30] *See, e.g.*, IMMANUEL KANT, THE METAPHYSICAL ELEMENTS OF JUSTICE: PART I OF THE METAPHYSICS OF MORALS (John Ladd trans., Bobbs-Merrill 1965) (1797).

[31] ROBERT VON MOHL, DAS STAATSRECHT DES KÖNIGREICHS WÜRTTEMBERG (Tubingen, Laupp. 1829).

State were essentially synonymous.[32] The extent to which the concept of *Rechtsstaat* embodies both substantive aspects, such as the requirement that the State be based on reason, as well as formal requirements of legality, is a recurrent debate in the literature with the slide towards National Socialism providing a troubling political backdrop.[33] (Nazi Germany is the most prominent example of a State in which the rule of law was used for pernicious ends, but far from the only one. Apartheid South Africa was another such "wicked" legal system[34]—a list to which some might add certain aspects of the U.S. legal response to the global war on terror.[35])

Though the French concept of *État de droit* was originally derived from the German *Rechtsstaat*,[36] ideas now centrally connected to the rule of law predate this nineteenth century translation. Montesquieu's *L'esprit des lois*, anonymously published in 1748, advocated constitutionalism, the separation of powers,[37] and basic civil liberties.[38] Rousseau's *Social Contract* (1762) also affirmed the supremacy of law, but in the form of legislation as the expression of the popular will and therefore not subject

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[32] HANS KELSEN, PURE THEORY OF LAW 318-19 (Max Knight trans., University of California Press 2d ed. 1967) (1960).

[33] *See generally* Otto Kirchheimer, *The Rechtsstaat as Magic Wall*, *in* POLITICS, LAW, AND SOCIAL CHANGE: SELECTED ESSAYS OF OTTO KIRCHHEIMER 429 (Frederic S. Burin & Kurt L. Shell eds., 1969); Jacques-Yvan Morin, *The Rule of Law and the Rechtsstaat Concept: A Comparison*, *in* FEDERALISM-IN-THE-MAKING: CONTEMPORARY CANADIAN AND GERMAN CONSTITUTIONALISM, NATIONAL AND TRANSNATIONAL 60 (Edward Mcwhinney et al. eds., 1992); Rainer Grote, *Rule of Law, Rechtsstaat, and 'Etat de droit'*, *in* CONSTITUTIONALISM, UNIVERSALISM AND DEMOCRACY: A COMPARATIVE ANALYSIS 269 (Christian Starck ed., 1999); N.W. Barber, *The Rechtsstaat and the Rule of Law*, 53 U. TORONTO L.J. 443 (2003) (reviewing WEIMAR: A JURISPRUDENCE OF CRISIS (Arthur Jacobson & Bernhard Schlink eds., 2000) and focusing on translation of *Rechtsstaat* as "rule of law").

[34] DAVID DYZENHAUS, HARD CASES IN WICKED LEGAL SYSTEMS: SOUTH AFRICAN LAW IN THE PERSPECTIVE OF LEGAL PHILOSOPHY (1991).

[35] *See* Simon Chesterman, *Secrets and Lies: Intelligence Activities and the Rule of Law in Times of Crisis*, 28 MICH. J. INT'L L. 553 (2007).

[36] JACQUES CHEVALLIER, L'ÉTAT DE DROIT 11 (3rd ed. 1999).

[37] CHARLES DE SECONDAT MONTESQUIEU, THE SPIRIT OF THE LAWS (Anne M. Cohler, Basia Carolyn Miller, & Harold Samuel Stone trans., Cambridge University Press 1989) (1748), bk. XI, ch, 6 (drawing lessons from the English experience).

[38] *Id.*, bk. XIX, ch. 27.

to any form of limitation.[39] Thus the 1789 Declaration of the Rights of Man laid crucial foundations for the emergence of human rights more generally, but it was only in 1971 that the Conseil Constitutionnel for the first time invalidated a French law for infringing one of those rights.[40]

C. Other Approaches

Though colonialism served to export European law across the various empires to varying degrees, the emergence of laws regulating governmental powers was not, of course, confined to Europe. This was not always well understood. Montesquieu, for example, wrote at length about China as a despotic regime under an emperor with absolute power, regulated not by law but rites that shaped the relationship between emperor and subject, father and son.[41] This overlooked the presence of legal codes dating at least as far back as the sixth century BC,[42] but is suggestive of the traditional tension between Confucianism and Legalism that emerged between the eighth and the third centuries BC. Confucians held that society should be organized around *li* (rites, or rules of propriety) and that to rely on law was to admit to a failure of virtue. Legalists sought to use *fa* (norms, or law) to regulate society through the possibility of punishment. These debates resonate with the discussion of early Greek approaches described above[43] and may be roughly compared to "rule of man" and "rule by law."[44]

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[39] JEAN-JACQUES ROUSSEAU, THE SOCIAL CONTRACT (G.D.H. Cole trans., Dent 1990) (1762).

[40] Conseil Constitutionnel Decision of July 16, 1971 (1972) D.S.Jur. 685, (1971) J.C.P. III No. 16832 (parliamentary law held unconstitutional as violation of fundamental right to freedom of association). The French constitutional scholar Jean Rivero refers to this case as the French *Marbury v. Madison*, though this perhaps understates the significance of the Conseil d'État in checking the power of the executive. *See* Richard J. Cummins, *Constitutional Protection of Civil Liberties in France*, 33 AM. J. COMP. L. 721, 724-26 (1985).

[41] MONTESQUIEU, *supra* note 37, bk. VIII, ch. 21.

[42] YONGPING LIU, ORIGINS OF CHINESE LAW: PENAL AND ADMINISTRATIVE LAW IN ITS EARLY DEVELOPMENT 128 (1998).

[43] *See supra* note 10 and accompanying text.

As to the possibility of holding the governing authority itself to account, the legitimacy of imperial rule in China was defended, from the eleventh century BC Zhou Dynasty onwards, by reference to the Mandate of Heaven (*tianming*). This held that a just emperor's rule would be blessed, but that an unwise ruler would lose Heaven's favor so that the mandate will pass to someone else. Interesting echoes can be found in the *Second Treatise* of John Locke, written before but updated and published after the Glorious Revolution and the Bill of Rights Act 1689, where he held that the prerogative powers of a sovereign were not subject to review by earthly powers but only by an "appeal to Heaven."[45] As in the case of the Mandate of Heaven, this ultimate sanction embodies a somewhat circular logic: the illegitimacy of a ruler is proved by the fact of his or her being deposed.[46]

In the Arab world, the Code of Hammurabi preceded a rich tradition of Islamic law. Though founded on revelation and scripture rather than secular authority, this tradition embraced a notion of supremacy of law—application of the law to the ruler as well as the ruled, and the independent interpretation of law by scholars—far earlier than

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[44] Albert H.Y. Chen, *Toward a Legal Enlightenment: Discussion in Contemporary China on the Rule of Law*, 17 UCLA PAC. BASIN L.J. 125, 129 (2000); *cf.* LIANG CHI-CHAO [LIANG QICHAO], HISTORY OF CHINESE POLITICAL THOUGHT DURING THE EARLY TSIN PERIOD (Harcourt Brace 1930) (1922) (comparing them to "rule of man" and "rule *of* law"). *See generally* RANDALL PEERENBOOM, CHINA'S LONG MARCH TOWARD RULE OF LAW 27-54 (2002) (discussing evolution of the rule of law in China). *Cf.* Li-Ann Thio, *Lex Rex or Rex Lex? Competing Conceptions of the Rule of Law in Singapore*, 20 UCLA PAC. BASIN L.J. 1 (2002) (discussing the rule of law in Singapore).

[45] JOHN LOCKE, TWO TREATISES OF GOVERNMENT (Cambridge University Press 1988) (1690), vol. 2, § 168.

[46] *Id.*, vol. 2, § 168 ("And therefore, tho' the *People* cannot be *Judge*, so as to have, by the Constitution of that Society, any Superiour power, to determine and give effective Sentence in the case; yet they have, by a Law antecedent and paramount to all positive Laws of men, reserv'd that ultimate Determination to themselves, which belongs to all Mankind, where there lies no Appeal on Earth, *viz*. to judge, whether they have just Cause to make their Appeal to Heaven. And this Judgment they cannot part with, it being out of a Man's power so to submit himself to another, as to give him a liberty to destroy him; God and Nature never allowing a Man so to abandon himself, as to neglect his own preservation: And since he cannot take away his own Life, neither can he give another power to take it. Nor let any one think, this lays a perpetual foundation for Disorder; for this operates not, till the Inconvenience is so great, that the majority feel it, and are weary of it, and find a necessity to have it amended. But this the Executive Power, or wise Princes, never need come in the danger of: And 'tis the thing, of all others, they have most need to avoid, as of all others the most perilous.").

its European counterparts. As with the early moves towards the rule of law in Europe, however, theory was not always matched by practice.[47] The term "rule of law" itself does not translate directly into modern Arabic. A common approximation is *siyadat al-qanun*. Literally translated this means "sovereignty of law," a concept more akin to the notion of rule by law.[48] Many developing and post-colonial States have also embraced law as a means to augment centralized authority rather than to restrain it. Promotion of the rule of law in such States by Western officials has thus sometimes been seen by those officials as a means of advancing human rights and liberal democracy, while their counterparts have seen it as a means of making government more efficient and therefore supporting the legitimacy of the State.[49]

D. A Core Definition

The content of the term "rule of law," then, remains contested across both time and geography. Analysis of its content often begins by parsing out formal and substantive understandings.[50] Those theories that emphasize the formal aspects describe instrumental limitations on the exercise of State authority; they tend to be minimalist, positivist, and are often referred to as "thin" theories—distinguishing them from the

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[47] *See generally* M. Cherif Bassiouni & Gamal M. Badr, *The Shari'ah: Sources, Interpretation, and Rule-Making*, 1 UCLA J. ISLAMIC & NEAR E. L. 135, 137 (2002) (describing supremacy of the law in Islamic tradition); Susanna Dokupil, *The Separation of Mosque and State: Islam and Democracy in Modern Turkey*, 105 W. VA. L. REV. 53 (2002); Muhamad Mugraby, *Some Impediments to the Rule of Law* 26 FORDHAM INT'L L.J. 771, 777-78 (2003) (arguing that Islamic law is incompatible with equality before the law); MOHAMMAD HASHIM KAMALI, PRINCIPLES OF ISLAMIC JURISPRUDENCE (3rd ed. 2003); Chibli Mallat, *From Islamic to Middle Eastern Law: A Restatement of the Field (Part II)*, 52 AM. J. COMP. L. 209 (2004).

[48] *See generally* NATHAN J. BROWN, THE RULE OF LAW IN THE ARAB WORLD: COURTS IN EGYPT AND THE GULF (1997).

[49] John Stuart Blackton, *Democracy Lite: Arab Judicial Reform*, 1(4) ARAB REFORM BULLETIN (Oct. 2003), *available at* http://www.carnegieendowment.org/ArabReform. *See also* Yash Ghai, *The Rule of Law, Legitimacy, and Governance*, 14 INT'L J. SOC. L. 179 (1986) (discussing the rule of law in East Africa).

[50] *See* Paul Craig, *Formal and Substantive Conceptions of the Rule of Law: An Analytical Framework*, PUBLIC LAW 467 (Autumn 1997).

"thick" theories that incorporate substantive notions of justice.[51] The latter conceive the rule of law more broadly as a set of ideals, whether understood in terms of protection of human rights, specific forms of organized government, or particular economic arrangements such as free market capitalism.[52] Ronald Dworkin has referred to the two conceptions as the "rule-book" model and a "rights" model, respectively;[53] Judith Shklar as models of institutional restraint and the "rule of reason."[54] David Dyzenhaus casts theorists of the first school, including Shklar, as democratic positivists and those of the second, including Dworkin, as liberal anti-positivists.[55]

Such categories are far from stable. Substantive theories are typically built on the back of formal ones, and any "thin" theory must necessarily exist within a political context.[56] Indeed, a common critique of those who claim to articulate "thin" theories is that substantive elements have been included by stealth.[57] The problem with articulating

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[51] *See, e.g.,* Randall Peerenboom, *Varieties of Rule of Law, in* ASIAN DISCOURSES OF RULE OF LAW: THEORIES AND IMPLEMENTATION OF RULE OF LAW IN TWELVE ASIAN COUNTRIES, FRANCE AND THE US 1 (Randall Peerenboom ed., 2004). *Cf.* FRIEDRICH HAYEK, THE ROAD TO SERFDOM 72-87 (1944); JOHN RAWLS, A THEORY OF JUSTICE 235-43 (1972).

[52] *See, e.g.,* W. IVOR JENNINGS, THE LAW AND THE CONSTITUTION 47 (University of London Press 4th ed. 1952) (1933) ("The doctrine involves some considerable limitation on the powers of every political authority, except possibly (for this is open to dispute) those of a representative legislature. Indeed it contains . . . something more, though it is not capable of precise definition. It is an attitude, an expression of liberal and democratic principles, in themselves vague when it is sought to analyse them, but clear enough in their results."); HAYEK, *supra* note 51, at 72 (the rule of law "means that a government in all its actions is bound by rules fixed and announced beforehand—rules which make it possible to foresee with fair certainty how the authority will use its coercive powers in given circumstances and to plan one's individual affairs on the basis of this knowledge"); Hans Corell, *A Challenge to the United Nations and the World: Developing the Rule of Law*, 18 TEMP. INT'L & COMP. L.J. 391 (2004) (speech by the former U.N. Legal Counsel stating that the rule of law requires both democracy and compliance with human rights).

[53] RONALD DWORKIN, A MATTER OF PRINCIPLE 11-13 (1985).

[54] Shklar, *supra* note 2, at 1-2.

[55] David Dyzenhaus, *Recrafting the Rule of Law, in* RECRAFTING THE RULE OF LAW: THE LIMITS OF LEGAL ORDER 1, 2 (David Dyzenhaus ed., 1999).

[56] Peerenboom, *supra* note 51, at 6.

[57] Richard H. Fallon, Jr., *"The Rule of Law" as a Concept in Constitutional Discourse*, 97 COLUM. L. REV. 1, 54, n.260 (1997).

a "thick" or substantive theory, by contrast, is that it may imply defense of a complete social philosophy and render the rule of law no longer meaningful in its own right.[58]

A third way of considering the rule of law, suggested by the approach here of examining its international context, is to look at the function that the rule of law is intended to serve in a society. Rule of law promotion, discussed in the next section, tends to be presented as a form of technical assistance. On its face, this resembles a formal theory looking to the architecture of a legal system rather than the content of its laws. Yet closer examination reveals that rule of law assistance is supported because of perceived outcomes it may achieve in the recipient community: in addition to promoting human rights and providing a stable foundation for economic development, it has also been used to establish non-violent mechanisms for resolving political disputes.[59] This is incompatible with most substantive theories of the rule of law, however, as those most actively involved in promotion of the rule of law—U.N. officials, donor governments, non-governmental organizations, external advisers, and so on—are outside the legal system in question and, almost literally, above the law. As we shall see, this has troubling implications for the idea of an "international rule of law."

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[58] JOSEPH RAZ, THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY 210-11 (1979) (criticizing, among others, the International Commission on Jurists' 1959 Delhi Declaration, in which the rule of law was said to require "not only the recognition of . . . civil and political rights but also the establishment of the social, economic, educational and cultural conditions which are essential to the full development of [one's] personality"). *Cf.* Arthur L. Goodhart, *The Rule of Law and Absolute Sovereignty*, 106 U. PA. L. REV. 943, 943-44 (1958) (warning against confusion of concepts of democracy, fundamental rights, and the rule of law).

[59] As Jeremy Waldron has argued, even within a given community the rule of law acknowledges a plurality of views: JEREMY WALDRON, THE DIGNITY OF LEGISLATION 37 (1999) ("the Rule of Law is not simply the principle that officials and citizens should apply and obey the law even when it disserves their own interests. It is the principle that an official or citizen should do this even when the law is—in their confident opinion—unjust, morally wrong, or misguided as a matter of policy. For the enactment of the measure in question is evidence of the existence of a view concerning its justice, morality, or desirability which is different from their own; *someone* must have been in favor of the law or thought it is a good idea. In other words, the law's existence, together with the individual's own opinion, is evidence of *moral disagreement* in the community on the underlying issue.").

For present purposes, a definition that is applicable and acceptable across cultures and political systems will necessarily be a formal one. This is consistent with *how* the rule of law is articulated in international forums, but not necessarily *why*. The latter question may incorporate aspects of the substantive and functional understandings of the rule of law, but these may be distinguished from the basic norms, institutions, and procedures implied by the term itself.

That being said, what we might term a core definition of the rule of law as it has evolved over time appears to have three elements:

- First, the power of the State may not be exercised arbitrarily. This incorporates the rejection of "rule of man," but does not require that State power be exercised for any particular purpose. It does, however, require that laws be prospective, accessible, and clear.

- Secondly, the law must apply also to the sovereign and instruments of the State, with an independent institution such as a judiciary to apply the law to specific cases. This implies a distinction from "rule by law."

- Thirdly, the law must apply to all persons equally, offering equal protection without prejudicial discrimination. The law should be of general application and consistent implementation; it should be capable of being obeyed. This presumes that the rule of law is more than simply "law in the books" and that these principles also apply to "law in action."[60]

These elements of the core definition may be summarized as a government of laws, the supremacy of the law, and equality before the law.[61]

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[60] Roscoe Pound, *Law in Books and Law in Action*, 44 AM. L. REV. 12 (1910).

[61] *Cf.* A. W. BRADLEY & K. D. EWING, CONSTITUTIONAL AND ADMINISTRATIVE LAW 105 (12th ed. 1997) ("First, the rule of law expresses a preference for law and order within a community rather than anarchy, warfare and strife. In this sense, the rule of law is a philosophical view of the society which is linked with basic democratic notions. Secondly, the rule of law expresses a legal doctrine of fundamental importance, namely that government must be conducted according to law, and that in disputed cases what the law

II. PROMOTION OF THE RULE OF LAW THROUGH INTERNATIONAL FORUMS

Having adopted a core definition of the rule of law, reflecting what one hopes is a broad understanding of its content, it is possible now to explore the ways in which the domestic rule of law has been used in international forums. This examination of the manner in which the rule of law is deployed will help elaborate how and why the concept may apply to the international level itself.

Through treaties and international organizations, the rule of law has been promoted at the international level for all the functional reasons described earlier: human rights treaties have advocated the rule of law as the foundation of a rights-respecting State; development actors, including donor States, have promoted the rule of law as essential for economic growth; and more recently security actors, notably the U.N. Security Council, have promoted the rule of law as a form of conflict resolution.

It is important to distinguish promotion of the rule of law in the sense used here from specific action to deal with past incidents. "Transitional justice," for example, is frequently used to refer to both prosecution of war criminals and the establishment of a legal system, but it is typically the former that receives the most attention and resources. Demonstrating that leaders who violate the law may themselves be prosecuted is an

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requires is declared by judicial decision. Thirdly, the rule of law should provide in matters both of substance (for example, whether the government should have power to detain citizens without trial) and of procedure (for example, the presumption of innocence in criminal trials, and the independence of the judiciary)."); Peerenboom, *supra* note 51, at 2. *See also* LON L. FULLER, THE MORALITY OF LAW 33-95 (1964) (citing generality, publicity, prospectivity, intelligibility, consistency, practicability, constancy, and congruence as the "internal morality of law"); RAZ, *supra* note 58, at 212-14; Fallon, *supra* note 57, at 8-9; The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies (Report of the Secretary-General), U.N. Doc. S/2004/616 (Aug. 3, 2004), *available at* http://documents.un.org, para. 6 (defining the rule of law as "a concept at the very heart of the Organization's mission. It 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.").

important part of the core definition outlined earlier, but if accountability depends on the massive international presence that may follow a crisis then it may be seen as the exception rather than the norm. Episodic prosecutions when outside political will and resources are available may do little to establish sustainable institutions.[62]

Similarly, terms such as "human rights" are used in multiple senses in this context. Certain human rights concerning the right to life and freedom of the person, for example, might be seen as essential aspects of a government of laws; non-discrimination may similarly be seen as an essential aspect of equality before the law. Inclusion of such specific rights, however, is distinct from the manner in which the rule of law is argued to be a tool for promoting human rights more generally. It is the latter sense that is intended here.[63]

To be clear, the fact that the rule of law is used to promote what some include within a substantive conception of the rule of law should not be confused with a reversion here to such a substantive understanding. Rather, the rule of law is best understood in the core sense outlined earlier and then examined with reference to the various purposes (including the achievement of specific political ends) to which it is put.

A. Human Rights

The preamble to the 1948 Universal Declaration of Human Rights states that "it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law."[64] The Declaration goes on to enumerate specific rights such as prohibiting

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[62] *See* Simon Chesterman, *Ownership in Theory and in Practice: Transfer of Authority in UN State-Building Operations*, 1(1) J. INTERVENTION & STATE-BUILDING 3 (2007).

[63] One might also argue that the rule of law is only possible with a certain level of economic development, or basic peace and security within a territory.

[64] Universal Declaration of Human Rights, GA Res 217A(III) (1948), U.N. Doc. A/810 (1948), preamble.

arbitrary deprivation of liberty,[65] requiring fair trials by independent and impartial tribunals,[66] and protecting equality before the law.[67] These protections broadly correspond to the three aspects of the core definition adopted here, with the qualification that independence of the judiciary is only part of what is implied by supremacy of the law. The rule of law as protected under the Universal Declaration is thus open to an interpretation that is more consonant with what has been described earlier as rule *by* law.[68]

With varying degrees of specificity—in particular concerning the requirements of a fair trial and prohibited forms of discrimination—the Universal Declaration is consistent with most subsequent general human rights treaties.[69] Other documents provide guidelines on compliance, including codes of conduct for law enforcement officials,[70] principles on the independence of the judiciary,[71] as well as more elaborate regimes on specific types of discrimination.[72]

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[65] *Id.*, arts. 3, 8, 9, 12, 29(2).

[66] *Id.*, arts. 10, 11.

[67] *Id.*, arts. 6, 7.

[68] *Supra* note 9 and accompanying text. On the relationship between human rights and the rule of law, *see generally* Randall Peerenboom, *Human Rights and Rule of Law: What's the Relationship?*, 36 GEORGETOWN INT'L L. REV. 809 (2005).

[69] *See, e.g.*, International Covenant on Civil and Political Rights, Dec. 16, 1966 (*in force* Mar. 23, 1976), 999 UNTS 171; [European] Convention for the Protection of Human Rights and Fundamental Freedoms, done at Rome, Nov. 4, 1950 (*in force* Sept. 3, 1953), 213 UNTS 222; American Convention on Human Rights, Nov. 22, 1969 (*in force* July 18, 1978), 1144 UNTS 123, *available at* http://www1.umn.edu/humanrts/oasinstr/zoas3con.htm; African [Banjul] Charter on Human and Peoples' Rights, June 27, 1981 (*in force* Oct. 21, 1986), 21 ILM 58.

[70] Code of Conduct for Law Enforcement Officials, GA Res 34/169, U.N. Doc. A/34/46, Annex (1979).

[71] Basic Principles on the Independence of the Judiciary, U.N. Doc. A/CONF.121/22/Rev.1 (1985).

[72] *See, e.g.*, International Convention on the Elimination of All Forms of Racial Discrimination, Dec. 21, 1965 (*in force* Jan. 4, 1969), 660 UNTS 195, *available at* http://www1.umn.edu/humanrts/instree/d1cerd.htm; Convention on the Elimination of All Forms of Discrimination Against Women, Dec. 18, 1979 (*in force* Sept. 3, 1981), U.N. Doc A/34/46, *available at* http://www1.umn.edu/humanrts/instree/e1cedaw.htm.

The 1993 Vienna World Conference on Human Rights recommended that the United Nations should offer technical and financial assistance upon request to "national projects in reforming penal and correctional establishments, education and training of lawyers, judges and security forces in human rights, and any other sphere of activity relevant to the good functioning of the rule of law."[73] This was endorsed in a series of General Assembly resolutions, each citing the rule of law as "an essential factor in the protection of human rights."[74]

Again, this might be seen as consistent with rule by law, though some advances have been made through human rights jurisprudence concerning the right to an effective remedy,[75] which has recently been the subject of a new set of basic principles.[76] In addition, at least since the 1999 *Pinochet* case,[77] the extent of head of State immunity has been substantially reduced. This has been complemented by the rise of international criminal law.

B. Development

As indicated earlier, the rule of law has long been seen as a vehicle for promoting economic development.[78] In the 1960s, the U.S. Agency for International

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[73] Vienna Declaration and Programme of Action, U.N. Doc A/CONF.157/24 (1993), Part I, ch. III, sect. II, para. 69.

[74] G.A. Res. 48/132 (1993), preamble. *See also* G.A. Res. 48/132 (1993); G.A. Res. 49/194 (1994); G.A. Res. 50/179 (1995); G.A. Res. 51/96 (1996); G.A. Res. 52/125 (1997); G.A. Res. 53/142 (1998); G.A. Res. 55/99 (2000); G.A. Res. 55/99 (2000); G.A. Res. 57/221 (2002). Cf G.A. Res. 61/39 (2006) (on "the rule of law at the national and international levels").

[75] *See, e.g.,* Castillo Páez v. Peru (1997), 34 Inter-Am. Ct. H.R. (ser. C.) (1997), paras. 82, 83.

[76] Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, GA Res 60/147, U.N. Doc. A/RES/60/147 (Dec. 16, 2005), *available at* http://www1.umn.edu/humanrts/instree/res60-147.html.

[77] R v. Bow Street Metropolitan Stipendiary Magistrate, *ex parte* Pinochet Ugarte (H.L., 1999), 2 W.L.R. 827 (1999).

[78] For an early link between the rule of law, the free market, and economic prosperity, see ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS 15 (University of Chicago

Development, the Ford Foundation, and other private American donors began an ambitious program to reform the laws and judicial institutions of countries in Africa, Asia, and Latin America. The "law and development" movement, steeped in dependency theory, generated hundred of reports and articles—yet a decade later leading academic participants and a former official at the Ford Foundation declared it a failure.[79] Criticisms included the program's over-reliance on exporting certain aspects of the U.S. legal system, notably strategic litigation and activist judges, that were incompatible with the target countries.[80] Later assessments have been less negative, however, noting that law reform projects take many years to bear fruit and that the rise and fall of the movement may have been more connected to U.S. domestic political issues in the period 1965-1975 than with programs on the ground in developing countries.[81]

Subsequent efforts have focused less on exporting a specific national model, but continue to assume a close relationship between the rule of law and economic development.[82] One of the difficulties has been in coming up with objective criteria to

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Press 1976) (1776). *See also* Kristen E. Boon, *"Open for Business": International Financial Institutions, Post-Conflict Economic Reform, and the Rule of Law*, 39 N.Y.U. J. INT'L L. & POL. 513 (2007).

[79] David M. Trubek & Marc Galanter, *Scholars in Self-Estrangement: Some Reflections on the Crisis in Law and Development*, 4 WIS. L. REV. 1062 (1974); John. H. Merryman, *Comparative Law and Social Change: On the Origins, Style, Decline & Revival of the Law and Development Movement*, 25 AM. J. COMP. L. 457 (1977); JAMES GARDNER, LEGAL IMPERIALISM: AMERICAN LAWYERS AND FOREIGN AID IN LATIN AMERICA (1980).

[80] *See, e.g.*, JOHN HENRY MERRYMAN ET AL., LAW AND SOCIAL CHANGE IN MEDITERRANEAN EUROPE AND LATIN AMERICA: A HANDBOOK OF LEGAL INDICATORS FOR COMPARATIVE STUDY 18 (1979) (describing it as "ineffectual, if not harmful, as technical assistance and peripheral as scholarship"). For an early warning of this, *see* Thomas M. Franck, *The New Development: Can American Law and Legal Institutions Help Developing Countries?*, 3 WIS. L. REV. 767 (1972).

[81] Brian Z. Tamanaha, *The Lessons of Law-and-Development Studies*, 89 AM. J. INT'L L. 470, 472-73 (1995); MANY ROADS TO JUSTICE: THE LAW-RELATED WORK OF FORD FOUNDATION GRANTEES AROUND THE WORLD (Mary McClymont & Stephen Golub eds., 2000).

[82] Critics argue that this approach focuses exclusively on using the rule of law to limit interference with the market, rather than providing public goods. *See, e.g.*, Frank Upham, Mythmaking in the Rule of Law Orthodoxy (Carnegie Endowment for International Peace, Washington, DC, Rule of Law Series, Working Paper No. 30, 2002), *available at* http://www.carnegieendowment.org/files/wp30.pdf; Kevin E. Davis, *What Can the Rule of Law Variable Tell Us About Rule of Law Reforms?*, 26 MICH. J. INT'L L. 141

measure the rule of law. The 1992 Human Development Report, issued by the U.N. Development Program, suggested five possible indicators: fair and public hearings in criminal cases; a competent, independent, and impartial judiciary; the availability of legal counsel; provision for review of convictions in criminal cases; and whether government officials or pro-government forces are prosecuted when they violate the rights and freedoms of other persons.[83] The World Bank has defined rule of law for these purposes as "the extent to which agents have confidence in and abide by the rules of society, and in particular the quality of contract enforcement, the police, and the courts, as well as the likelihood of crime and violence" and uses aggregate indicators from a basket of other sources to measure the rule of law in more than 200 countries and territories.[84]

From around 1997, the development community began using the more general term "good governance" to refer to a set of activities that embraced participation, transparency, and accountability in government—specifically including the rule of law.[85] The term "governance" itself had emerged within the development discourse in the 1990s as a means of expanding the prescriptions of donors to embrace not merely projects and structural adjustment but government policies. Though intergovernmental organizations like the World Bank and the International Monetary Fund are technically constrained from referring to political processes as such, "governance" provides a convenient euphemism for precisely that.[86]

(2004); Joel M. Ngugi, *Policing Neo-Liberal Reforms: The Rule of Law as an Enabling and Restrictive Discourse*, 26 U. PA. J. INT'L ECON. L. 513 (2005).

[83] U.N. Development Programme, Human Development Report 1992: Global Dimensions of Human Development (UNDP, New York, 1992), *available at* http://hdr.undp.org/reports, 31.

[84] World Bank, A Decade of Measuring the Quality of Governance: Governance Matters 2006 (World Bank, Washington, DC, 2006), *available at* http://www.worldbank.org, 3. On a scale from -2.5 to +2.5, the 2005 statistics range from Somalia (-2.36) to Iceland (+2.10). *See* statistics *available at* http://info.worldbank.org/governance/kkz2005/indicator_report.asp?indicatorid=5.

[85] U.N. Development Programme, Governance for Sustainable Human Development (UNDP, New York, Jan. 1997), *available at* http://magnet.undp.org/policy.

[86] Goran Hyden, *Governance and the Reconstitution of Political Order*, *in* STATE, CONFLICT AND DEMOCRACY IN AFRICA 179 (Richard Joseph ed., 1999). For a discussion of various efforts to measure

Developing States themselves have embraced the rule of law, acknowledging in the 2005 World Summit Outcome Document that "good governance and the rule of law at the national and international levels are essential for sustained economic growth, sustainable development and the eradication of poverty and hunger."[87]

C. Peace and Security

The U.N. Charter refers to domestic law only in the context of trust territories, the last of which became independent in 1994.[88] Article 2(7) of the Charter specifically excludes matters "essentially within the domestic jurisdiction" from U.N. interference, except when the Security Council exercises its coercive powers to maintain international peace and security under Chapter VII. Since the mid-1990s, these powers have increasingly been used to support, supplant, or replace domestic legal systems.

Apart from a preambular reference in relation to the deterioration of law and order in the Congo in 1961,[89] the Council first used the words "rule of law" in the operative paragraph of resolution 1040 (1996), where it expressed its support for the Secretary-General's efforts to promote "national reconciliation, democracy, security and the rule of law in Burundi."[90] (It is noteworthy that the French text rendered rule of law as "*le rétablissement de l'ordre*."[91]) Many peace operations have subsequently had

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the rule of law, *see* Gerardo L. Munck, Measures of Democracy, Governance and Rule of Law: An Overview of Cross-National Data Sets (World Bank, Washington, DC, Understanding Growth and Freedom from the Bottom Up Workshop, July 15-17, 2003), *available at* http://siteresources.worldbank.org/INTMOVOUTPOV/Resources/2104215-1148063363276/071503_Munck.pdf.

[87] World Summit Outcome Document, *supra* note 3, para. 11. *See also* para. 21, 24(b).

[88] U.N. Charter, art. 84.

[89] S.C. Res. 161B (Feb. 21, 1961), preamble ("*Noting with deep regret and concern* the systematic violations of human rights and fundamental freedoms and the general absence of the rule of law in the Congo"; the relevant French text was "*l'absence générale de légalité au Congo*").

[90] S.C. Res. 1040 (Jan. 29, 1996), para. 2.

[91] "The reestablishment of order." S.C. Res. 1040 (Jan. 29, 1996), para. 2 (French text available at documents.un.org).

important rule of law components, such as those in Guatemala (1997),[92] Liberia (2003—),[93] Côte d'Ivoire (2004—),[94] Haiti (2004—),[95] and the Democratic Republic of the Congo (2007—).[96] The mandates for such missions tend to be broad, calling for the "re-establishment" or "restoration and maintenance" of the rule of law, without formally articulating what this might entail. In practice, the dominant activities have tended to be training of personnel, assisting institution-building, advising on law reform issues, and monitoring, with the emphasis on criminal law processes.[97] Less attention has been paid, for example, to land law.[98]

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[92] U.N. Verification Mission in Guatemala (MINUGUA).

[93] U.N. Mission in Liberia (UNMIL).

[94] S.C. Res. 1528 (Feb. 27, 2004), para. 6(q) (authorizing the U.N. Operation in Côte d'Ivoire (UNOCI) to "assist the Government of National Reconciliation in conjunction with ECOWAS and other international organizations in re-establishing the authority of the judiciary and the rule of law throughout Côte d'Ivoire").

[95] S.C. Res. 1542 (Apr. 30, 2004), para. 7(I)(d) (authorizing the U.N. Stabilization Mission in Haiti (MINUSTAH) "to assist with the restoration and maintenance of the rule of law, public safety and public order in Haiti through the provision inter alia of operational support to the Haitian National Police and the Haitian Coast Guard, as well as with their institutional strengthening, including the re-establishment of the corrections system"). The U.N. Observer Mission in El Salvador (ONUSAL, 1991-1995) had a rule of law component within its human rights division.

[96] S.C. Res. 1756 (May 15, 2007), para. 3 ("decid[ing] that the U.N. Organization Mission in the Democratic Republic of the Congo (MONUC) "will also have the mandate, in close cooperation with the Congolese authorities, the United Nations country team and donors, to support the strengthening of democratic institutions and the rule of law in the Democratic Republic of the Congo and, to that end, to: . . . (c) Assist in the promotion and protection of human rights, with particular attention to women, children and vulnerable persons, investigate human rights violations with a view to putting an end to impunity, assist in the development and implementation of a transitional justice strategy, and cooperate in national and international efforts to bring to justice perpetrators of grave violations of human rights and international humanitarian law; . . . (e) Assist in the establishment of a secure and peaceful environment for the holding of free and transparent elections; (f) Contribute to the promotion of good governance and respect for the principle of accountability").

[97] Vivienne O'Connor, *Rule of Law and Human Rights Protections Through Criminal Law Reform: Model Codes for Post-conflict Criminal Justice*, 13(4) INT'L PEACEKEEPING 517 (2006).

[98] Daniel Fitzpatrick, Land Policy in Post-Conflict Circumstances: Some Lessons from East Timor (Evaluation and Policy Analysis Unit, United Nations High Commissioner for Refugees, Geneva, Working Paper No. 58, Feb. 2002), *available at* http://www.unhcr.ch/cgi-bin/texis/vtx/research/opendoc.pdf?tbl=RESEARCH&id=3c8399e14.

In two situations, Kosovo (1999—)[99] and East Timor/Timor-Leste (1999-2002),[100] the United Nations has had direct responsibility for the administration of justice, including control of police and prison services. Similar powers were exercised in Bosnia and Herzegovina through the Office of the High Representative from 1996.[101] Though created as temporary operations, each was challenged on the extent to which the rule of law applied to international officials who enjoyed personal or functional immunity from legal process, were unaccountable to the local population through any kind of political process, and who exercised "all legislative and executive authority . . . including the administration of the judiciary."[102] Such powers, recalling the provisions of military occupation, became harder to justify as months became years and the disjunction between what international officials said and what they did continued.[103]

In addition to supporting or supplanting domestic rule of law institutions, the Security Council has created international criminal tribunals to replace domestic processes for trials arising from the former Yugoslavia (1991—)[104] and Rwanda (1994).[105] These tribunals were explicitly created as part of an effort to bring peace to

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[99] U.N. Interim Administration Mission in Kosovo (UNMIK).

[100] U.N. Transitional Administration in East Timor (UNTAET).

[101] *See generally* SIMON CHESTERMAN, YOU, THE PEOPLE: THE UNITED NATIONS, TRANSITIONAL ADMINISTRATION, AND STATE-BUILDING 154-82 (2004).

[102] UNMIK Regulation 1999/1 (July 25, 1999), On the Authority of the Interim Administration in Kosovo, § 1.

[103] *See, e.g.,* Ombudsperson Institution in Kosovo, Second Annual Report 2001-2002 (July 10, 2002), *available at* http://www.ombudspersonkosovo.org (noting that "UNMIK is not structured according to democratic principles, does not function in accordance with the rule of law, and does not respect important international human rights norms. The people of Kosovo are therefore deprived of protection of their basic rights and freedoms three years after the end of the conflict by the very entity set up to guarantee them.").

[104] S.C. Res. 827 (1993). Unlike the International Criminal Tribunal for Rwanda, which has jurisdiction over incidents within the period Jan. 1-Dec. 31, 1994, the International Criminal Tribunal for the former Yugoslavia has jurisdiction to prosecute persons responsible for crimes committed "since 1991." Statute of the International Criminal Tribunal for the former Yugoslavia, S.C. Res. 827 (1993), Annex, art. 1. Though no formal end to this temporal jurisdiction has been defined, in practice it is likely to be 1999, given the decision to cease new prosecutions.

[105] S.C. Res. 955 (1994).

war-torn territories, though they have been criticized for spending significant resources in order to prosecute few individuals with little lasting impact on the judicial institutions of the territory concerned. Hybrid tribunals, such as the Special Court for Sierra Leone[106] and the Extraordinary Chambers in the Courts of Cambodia,[107] were intended to blend international supervision with development of national capacity but have had limited success.

The International Criminal Court (I.C.C.) exercises complementary rather than primary jurisdiction:[108] this may encourage national prosecution where possible, suggesting a desire to bolster national courts as well as protect State sovereignty. Nevertheless, the Security Council retains the power to defer prosecutions for a renewable period of one year.[109] This reflects ongoing tension between the international interest in promoting justice or securing peace.[110]

III. THE RULE OF LAW WITHIN INTERNATIONAL ORGANIZATIONS

Though the rule of law has been promoted strongly through international forums, it has been less clear what relevance it has to the conduct of international affairs

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[106] Agreement Between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone, completed at Freetown, Jan. 16, 2002.

[107] Agreement Between the United Nations and the Royal Government of Cambodia Concerning the Prosecution Under Cambodian Law of Crimes Committed During the Period of Democratic Kampuchea, completed at Phnom Penh, June 6, 2003, *available at* http://www.eccc.gov.kh.

[108] Statute of the International Criminal Court (Rome Statute), U.N. Doc. A/Conf.183/9 (July 17, 1998), *available at* http://www.icc-cpi.int/library/about/officialjournal/Rome_Statute_120704-EN.pdf, art. 1.

[109] *Id.*, art. 16. *See generally* Morten Bergsmo & Jelena Pejic, *Article 16: Deferral of Investigation or Prosecution*, *in* COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT 373 (Otto Triffterer ed., 1999); Luigi Condorelli & Santiago Villalpando, *Referral and Deferral by the Security Council*, *in* 1 THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT : A COMMENTARY 627 (Antonio Cassese et al. eds., 2002); Carsten Stahn, *The Ambiguities of Security Council Resolution 1422 (2002)*, 4 EUROPEAN J. INT'L L. 1 (2002).

[110] Simon Chesterman, *No Justice Without Peace? International Criminal Law and the Decision to Prosecute*, *in* CIVILIANS IN WAR 145 (Simon Chesterman ed., 2001).

itself. This is in part because, as we have seen, the historic challenge for the rule of law has been its relationship to the sovereign. In a domestic legal order, the sovereign exists in a vertical hierarchy with other subjects of law; at the international level, sovereignty tends to be conceived of as remaining with States, at least nominally existing in a horizontal plane of sovereign equality. This section considers how the rule of law might apply to the internal operations of organizations constituted by those States, before turning in the following section to the rule of law as it would apply to States and other actors on the international plane more generally.

A. The United Nations

The United Nations is a creature of treaty. Its legal personality was recognized in the 1949 *Reparations* advisory opinion of the International Court of Justice (I.C.J.) as implicit in the decision of fifty States to create the organization;[111] today that intention to create legal personality is often included explicitly in the text of a treaty.[112]

Referring back to the core definition of the rule of law,[113] the United Nations operates through legal mechanisms, though these are not always free from arbitrariness. Here a distinction must be made between the exercise of discretion formally provided for in the constituent document of the organization and the arbitrary exercise of the powers that it grants. Both may be illustrated by actions of the Security Council. Originally designed as an archetypically political body, it is entirely proper that members of the Council should determine whether, for example, to send peacekeepers to a specific crisis. The moves from 1999 to use targeted sanctions to limit financing of terrorist operations, by contrast, have been criticized for the manner in which individuals may be listed and have their assets frozen without either transparency or the

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[111] Reparation for Injuries Suffered in the Service of the United Nations (Advisory Opinion, 1949) I.C.J. Rep. 174 (1949).

[112] *See, e.g.,* Rome Statute, *supra* note 108, art. 4(1) ("The Court shall have international legal personality.").

[113] *See supra* note 61 and accompanying text.

possibility of formal review.[114] In 2005, Member States called upon the Security Council to adopt "fair and clear procedures" for listing and delisting;[115] this led to the creation of a focal point within the U.N. Secretariat to receive requests for delisting, but left the decision to unfreeze assets at the absolute discretion of the members of the Council.[116] Such concerns may be contrasted with the elaborate protections established when the Council created the International Criminal Tribunals for the former Yugoslavia and Rwanda.[117]

On the question of applying the law to the United Nations itself,[118] there is a surprising degree of uncertainty as to whether the organization is bound by, for example, the human rights treaties for which it has been the primary vehicle. The United Nations is not a party to the human rights treaties negotiated under its auspices or monitored through its agencies. In part this reflects the traditional view that only States properly enter into such treaties, a view based on the understanding that it is primarily States that violate or protect human rights. As the United Nations has assumed State-like functions, however—including administrations that ran entire territories—the question of whether the United Nations is required to abide by basic human rights standards has become more pressing. In a series of cases arising from the use of targeted

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[114] *See* Simon Chesterman, *The Spy Who Came In from the Cold War: Intelligence and International Law*, 27 MICH. J. INT'L L. 1071, 1109-20 (2006) and sources there cited.

[115] World Summit Outcome Document, *supra* note 3, para. 109.

[116] S.C. Res. 1730 (Dec. 19, 2006), Annex. Decisions by the committee administering the sanctions are by consensus; in the absence of consensus a matter may be referred to the Council proper, where the veto power of the permanent five members would apply. *See* Security Council Committee Established Pursuant to Resolution 1267 (1999) Concerning Al-Qaida and the Taliban and Associated Individuals and Entities, Guidelines of the Committee for the Conduct of Its Work (as amended) (New York, Nov. 7, 2002), *available at* http://www.un.org/Docs/sc/committees/1267/1267_guidelines.pdf.

[117] Chesterman, *supra* note 114, at 1113.

[118] For disputes within the organization, the U.N. Administrative Tribunal (UNAT) was established by the General Assembly through resolution 351A(IV) (1949). It is an independent organ competent to hear and pass judgment upon applications alleging non-observance of contracts or terms of employment by staff members of the U.N. Secretariat. *See, e.g., Qiu, Zhou, and Yao v. Secretary-General of the United Nations* (United Nations Administrative Tribunal Judgement No. 482, May 25, 1990), U.N. Doc. AT/DEC/482 (1990) (The Chinese Translators Case).

financial sanctions, the European Court of First Instance has held that Security Council decisions, by virtue of the U.N. Charter's primacy clause in Article 103, are constrained only by norms of *jus cogens*.[119] This is one of only a few cases in which a tribunal has reviewed, even indirectly, the validity of Council action.[120]

Similarly, in 1952 a committee of the American Society of International Law expressed doubts that international humanitarian law was fully applicable to U.N. forces, concluding that the United Nations should "select such of the laws of war as may seem to fit its purposes."[121] It has been assumed by most writers that States involved in U.N.-authorized enforcement actions nevertheless remain bound by their individual obligations under the *jus in bello*.[122] This would be true for actions authorized by the U.N. Security Council, but it would be less clear if the Council deployed forces made available to it under Article 43 agreements—a hypothetical

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[119] Ahmed Ali Yusuf and Al Barakaat International Foundation v. Council of the European Union and Commission of the European Communities (Court of First Instance of the European Communities, Case T-306/01, Sept. 21, 2005) (2005), *available at* http://curia.eu.int, para. 277 ("the Court is empowered to check, indirectly, the lawfulness of the resolutions of the Security Council in question with regard to *jus cogens*, understood as a body of higher rules of public international law binding on all subjects of international law, including the bodies of the United Nations, and from which no derogation is possible"). *See also* Yassin Abdullah Kadi v. Council of the European Union and Commission of the European Communities (Court of First Instance of the European Communities, Case T-315/01, Sept. 21, 2005) (2005), *available at* http://curia.eu.int; Faraj Hassan v. Council of the European Union and Commission of the European Communities (Court of First Instance of the European Communities, Case T 49/04, July 12, 2006) (2006), *available at* http://curia.eu.int; Chafiq Ayadi v. Council of the European Union (Court of First Instance of the European Communities, Case T-253/02, July 12, 2006) (2006), *available at* http://curia.eu.int.

[120] *See also* Legal Consequences for States of the Continued Presence of South Africa in Namibia (South-West Africa) Notwithstanding Security Council Resolution 276 (1970) (Advisory Opinion, 1971) I.C.J. Rep. 16, 54 (1971), para. 118 (referring to "a situation which the Court has found to have been *validly* declared illegal" by the Security Council (emphasis added)); Prosecutor v. Tadic (ICTY Appeals Chamber, Appeal on Jurisdiction, Oct. 2, 1995) Case No. IT-94-1-AR72 (1995), *available at* http://www.un.org/icty, paras. 28-30 ("neither the text nor the spirit of the Charter conceives of the Security Council as *legibus solutus* (unbound by law)").

[121] William J. Bivens et al., *Report of Committee on the Study of the Legal Problems of the United Nations, Should the Laws of War Apply to United Nations Enforcement Action?*, 46 AMERICAN SOCIETY OF INTERNATIONAL LAW PROCEEDINGS 216, 220 (1952).

[122] DEREK W. BOWETT, UNITED NATIONS FORCES: A LEGAL STUDY OF UNITED NATIONS PRACTICE 503-06 (1964).

proposition since no such agreements have been concluded.[123] Remaining doubts about the applicability of international humanitarian law to the United Nations have been removed by the issuance of an administrative order by the Secretary-General.[124]

The United Nations lacks a formal process to establish the *vires* of its organs as the question of interpreting the Charter powers of each was quite consciously left to the organs themselves.[125] The I.C.J. does not exercise the functions of a constitutional court, though an organ may choose to submit a relevant question to it for an advisory opinion.[126] In the *Lockerbie* case, a direct clash loomed between the Security Council and the Court when both were seized of issues arising from the bombing of Pan Am Flight 103 on December 21, 1988 over Lockerbie, in Scotland. The Court declined to rule on the merits in provisional measures and preliminary objections proceedings in 1992 and 1998, but even as it affirmed the discretion of the Security Council the Court implicitly asserted its own power to determine the limits of that discretion.[127] The case

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[123] *See* Julianne Peck, *The U.N. and the Laws of War: How Can the World's Peacekeepers Be Held Accountable?*, 21 SYRACUSE J. INT'L L. & COM. 283 (1995); Christopher Greenwood, *Protection of Peacekeepers: The Legal Regime*, 7 DUKE J. COMP. & INT'L L. 185 (1996); Brian D. Tittemore, *Belligerents in Blue Helmets: Applying International Humanitarian Law to United Nations Peace Operations*, 33 STAN. J. INT'L L. 61 (1997).

[124] Secretary-General's Bulletin: Observance by United Nations Forces of International Humanitarian Law, U.N. Doc. ST/SGB/1999/13 (Aug. 6, 1999), *available at* http://www.un.org/Docs/journal/asp/ws.asp?m=ST/SGB/1999/13. *See also* Conditions of Application of Humanitarian Rules of Armed Conflict to Hostilities in Which United Nations Forces May Be Engaged (1971 Zagreb Resolution) (Institut de Droit international, Zagreb, First Commission, Rapporteur: Mr. Paul de Visscher, Sept. 3, 1971), *available at* http://www.idi-iil.org/idiE/resolutionsE/1971_zag_03_en.pdf.

[125] Statement of Committee IV/2 of the San Francisco Conference, Report of Committee IV/2 of the United Nations Conference on International Organization, San Francisco, June 12, 1945, UNCIO Doc. 933, IV/2/42(2), p.7; 13 UNCIO Documents, 703, at 709-10.

[126] U.N. Charter, art. 96.

[127] Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libya v. U.S.) (International Court of Justice, Request for the Indication of Provisional Measures, Apr. 14, 1992) (1992), *available at* http://www.icj-cij.org; Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libya v. U.S.) (International Court of Justice, Preliminary Objections, Feb. 27, 1998) (1998), *available at* http://www.icj-cij.org.

has been likened to *Marbury v. Madison*[128] in which the U.S. Supreme Court asserted the ultimate power to determine whether the political branch had acted constitutionally—though this is premised on a reading that focuses more on what the Court did *not* say rather than what it did.[129]

Turning to the notion of equality before the law, the United Nations is based upon the principle of the sovereign equality of its members,[130] though the structure of the Security Council establishes that some—with permanent positions on the Council and a veto over its decisions—are more equal than others. This has been an issue in the context of quasi-legislative resolutions adopted by the Council on matters such as counter-terrorism and proliferation of weapons of mass destruction.[131] Criticisms that such resolutions inappropriately use what may be understood as the Council's "emergency" powers under Chapter VII[132] to establish abstract rules of general application stress either the limits on the Council's powers under the Charter or its relative legitimacy as opposed to, say, the General Assembly. The former argument draws upon rule-of-law-type arguments to constrain the powers of the Council; the latter appears to assume that the General Assembly is more "democratic" than the Council and therefore more legitimate, both dubious assumptions.[133]

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[128] Marbury v. Madison (1803), 5 US (1 Cranch) 137 (1803).

[129] Thomas M. Franck, *The "Powers of Application": Who Is the Ultimate Guardian of UN Legality?*, 86 AM. J. INT'L L. 83 (1992).

[130] U.N. Charter, art. 2(1).

[131] *See, e.g.*, S.C. Res. 1368 (2001); S.C. Res. 1373 (2001); S.C. Res. 1540 (2004); S.C. Res. 1566 (2004). For commentary and critique, see José Alvarez, *Hegemonic International Law Revisited*, 97 AM. J. INT'L L. 873 (2003); Stefan A. Talmon, *The Security Council as World Legislature*, 99 AM. J. INT'L L. 175 (2005).

[132] *See generally* Jared Schott, *Chapter VII as Exception: Security Council Action and the Regulative Ideal of Emergency*, NW. U. J. INT'L HUM. RTS. (forthcoming).

[133] Talmon, *supra* note 131, at 179.

B. Other International Organizations

It is questionable whether the United Nations may properly be said to embody the rule of law in a meaningful way, in large part due to the peace and security powers given to or asserted by its Security Council and the unusual relationship to other international legal regimes due to Article 103 of the U.N. Charter. Other institutions created to foster economic development or protect human rights tend to be more constrained by rules in the exercise of their delegated authority.

The World Trade Organization (WTO), for example, was established by treaty in 1995 with rules, institutions, and procedures for the liberalization of trade.[134] In the human rights sphere the various treaty bodies have jurisdiction limited by the consent of States but generally operate in accordance with a clear normative regime, with independent institutions to determine compliance with the law and process guarantees. The I.C.C., to pick a prominent recent creation, is established as a legal person constrained by its statute. It has an elaborate, independent procedure for the determination of compliance with that statute and protections of the procedural rights of persons brought before it.[135] Both organizations operate through laws and are bound by them.

The limits of such analysis, however, are that the WTO, the I.C.C., and indeed the United Nations, do not exist as autonomous and complete jurisdictions in a manner comparable to the national legal systems that gave rise to the concept of rule of law. Though analogies may be made, examination of such institutions in isolation begs the larger question of whether the rule of law is a coherent concept at the international or, perhaps, global level.

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[134] *See* Joseph H.H. Weiler, *The Rule of Lawyers and the Ethos of Diplomats: Reflections on the Internal and External Legitimacy of WTO Dispute Settlement*, 35(2) J. WORLD TRADE 191 (2001).

[135] Rome Statute, *supra* note 108.

IV. AN INTERNATIONAL RULE OF LAW?

What, then, might the rule of law mean at the international level?[136] It is helpful here to distinguish between three possible meanings. First, the "international rule of law" may be understood as the application of rule of law principles to relations between States and other subjects of international law. Secondly, the "rule of international law" could privilege international law over national law, establishing, for example, the primacy of human rights covenants over domestic legal arrangements. Thirdly, a "global rule of law" might denote the emergence of a normative regime that touches individuals directly without formal mediation through existing national institutions.

The first sense is how the rule of law is typically understood in this context and as it will be applied here.[137] The second may be relevant to certain regional organizations, notably the European Union, but such regimes are exceptional and, with the aggregation of power, resemble State-like institutions rather than international

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[136] Iraq provides an interesting example of both hope and despair for the idea as a rhetorical device. In 1990, during the lead up to the expulsion of Iraq from Kuwait, U.S. President George H.W. Bush asserted that the end of the Cold War had made possible a world in which "the rule of law would supplant the rule of the jungle." George H.W. Bush, *Address Before a Joint Session of the Congress on the Persian Gulf Crisis and the Federal Budget Deficit* (Washington, DC, Sept. 11, 1990), http://millercenter.virginia.edu/scripps/diglibrary/prezspeeches/ghbush/ghb_1990_0911.html. Following the 2003 invasion of Iraq, which took place without a Security Council authorization, U.N. Secretary-General Kofi Annan observed that the Organization had reached a "fork in the road," when the rules drawn up in 1945 to govern international behavior might have to be rethought: "And we must not shy away from questions about the adequacy, and effectiveness, of the rules and instruments at our disposal." Kofi A. Annan, Address to the General Assembly (United Nations, New York, Sept. 23, 2003), http://www.un.org/webcast/ga/58/statements/sg2eng030923.htm.

[137] For an early discussion along these lines, see William W. Bishop, *The International Rule of Law*, 59 MICH. L. REV. 553 (1961) (stating that the concept "includes reliance on law as opposed to arbitrary power in international relations; the substitution of settlement by law for settlement by force; and the realization that law can and should be used as an instrumentality for the cooperative international furtherance of social aims, in such fashion as to preserve and promote the values of freedom and human dignity for individuals"). *See also* BRIAN Z. TAMANAHA, ON THE RULE OF LAW: HISTORY, POLITICS, THEORY 127-36 (2004).

organizations in the strict sense of the word.[138] The third approach accurately reflects the rise of quasi-administrative regimes that fall outside traditional domestic and international legal categories, but remains at an early stage of development.[139] It is possible that justice will one day be sought through global law, but at the present time it is most likely to be pursued through the global organization of well-ordered States.

Though the U.N. Charter has been compared to a kind of constitution for the modern international order,[140] its language concerning international law is hortatory rather than declaratory. The preamble expresses determination "*to establish conditions* under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained";[141] its principles include peaceful resolution of disputes that may threaten the peace "in conformity with the principles of justice and international law"—though the latter phrase does not qualify the related goal of suppressing breaches and preventing or removing threats.[142] An important role of the General Assembly is "encouraging the progressive development of international law and its codification."[143]

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[138] *Cf.* Mattias Kumm, *International Law Before National Courts: The International Rule of Law and the Limits of the Internationalist Model*, 44 VA. J. INT'L L. 19 (2003) (describing and critiquing the "internationalist" position on direct application of international law). One might argue that such a conception also embraces certain aspects of international economic law, though the dominance of regional or international rules tends to be through domestic incorporation rather than wholesale abdication of the privileges of sovereignty.

[139] *See* Benedict Kingsbury et al., *The Emergence of Global Administrative Law*, 68 LAW & CONTEMP. PROBS. 15 (2005); Simon Chesterman, *Globalization Rules: Accountability, Power, and the Prospects for Global Administrative Law*, 14 GLOBAL GOVERNANCE (forthcoming, 2008).

[140] Thomas M. Franck, *Is the UN Charter a Constitution?*, *in* VERHANDELN FÜR DEN FRIEDEN—NEGOTIATING FOR PEACE: LIBER AMICORUM TONO EITEL 95 (Jochen Abr Frowein et al. eds., 2003). *Cf.* Mattias Kumm, *The Legitimacy of International Law: A Constitutionalist Framework of Analysis*, 15 EUROPEAN J. INT'L L. 907, 930 (2004) (developing a constitutionalist model for international law but contrasting this with specific claims that the U.N. Charter, for example, serves as that constitution).

[141] U.N. Charter, preamble (emphasis added). *See* TERRY NARDIN, LAW, MORALITY, AND THE RELATIONS OF STATES 106 (1983) (arguing that reference to both law and justice is either redundant if the terms are synonymous, or revolutionary if they are in tension).

[142] U.N. Charter, art. 1(1).

[143] U.N. Charter, art. 13(1)(a).

Similarly, documents such as the Declaration on Friendly Relations refer to the "promotion of the rule of law among nations."[144] Thirty years later, in the Millennium Declaration, Member States resolved to "strengthen respect for the rule of law in international as in national affairs and, in particular, to ensure compliance by Member States with the decisions of the International Court of Justice, in compliance with the Charter of the United Nations, in cases to which they are parties."[145]

These cautious endorsements of the rule of law reflect the primitive nature of international law as a legal system. If the rule of law is understood in the core, formal sense used here, it might be questioned whether the process of international rule-making can itself be said to be governed by laws.[146] Those judicial institutions that exist are limited to essentially voluntary jurisdiction,[147] and sovereign equality may be the founding myth of the international legal order but remains a myth nonetheless.[148] Such

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[144] Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations (Declaration on Friendly Relations), 25 GAOR, Supp (No 28), U.N. Doc. A/5217 (1970), preamble.

[145] Millennium Declaration, GA Res 55/2, U.N. Doc. A/RES/55/2 (2000), *available at* http://www.un.org/millennium/declaration/ares552e.htm, para. 9.

[146] H.L.A. HART, THE CONCEPT OF LAW 213-37 (2d ed. 1994) (concluding that international law constitutes a set of rules but not a system of law, as it lacks a basic norm providing general criteria of validity for other norms within that system).

[147] *See, e.g.,* Statute of the International Court of Justice, art. 36.

[148] Sovereign equality in its traditional conception made sense when most laws were derived from natural law; as the consent-based notion of international law evolved and positivism took hold, it came to be understood literally as the consent of each and every State to general norms rather than the presumed universal applicability of certain rules to all. (There are rare examples of norms being imposed against the will of persistent objector States, such as the prohibition of apartheid over the objections of South Africa and the U.N. Charter provisions on the applicability of its peace and security provisions to non-members: U.N. Charter, art 2(6).) This was only possible because for centuries international law tended to avoid the hardest questions that might undermine the principle: on the one hand, by not attempting to regulate such areas of activity as recourse to war; on the other, by excluding from consideration relations with those deemed outside the law, such as those subject to colonialism. Assumptions today that international law meaningfully constrains States even in the use of force and sets the smallest and poorest States on an equal footing with the largest and richest has led some—typically the larger and richer—to question whether freedom from jurisdiction and consent in law-making processes should continue to apply equally to all. *See* Michel Cosnard, *Sovereign Equality: "The Wimbledon Sails On," in* UNITED STATES HEGEMONY AND THE FOUNDATIONS OF INTERNATIONAL LAW 117 (Michael Byers & Georg Nolte eds.,

an account might conclude that there is presently no such thing as the international rule of law, or at least that international law has yet to achieve a certain normative or institutional threshold to justify use of the term.[149] This may in turn be understood as a subset of the larger ongoing debates over whether international law is "law" in any strict sense of the word, a largely sterile inquiry due to the dearth of strong theories of international law and the abundance of practice accepting its legality nonetheless.[150]

The problem is the uncritical assumption that domestic legal principles can be translated directly to the international sphere. As Martti Koskenniemi has shown, since at least the middle of the eighteenth century, jurists have included the rule of law among these principles.[151] This fails to take account of structural differences between

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2003); Nico Krisch, *More Equal than the Rest? Hierarchy, Equality and US Predominance in International Law*, *in* UNITED STATES HEGEMONY AND THE FOUNDATIONS OF INTERNATIONAL LAW 135 (Michael Byers & Georg Nolte eds., 2003).

[149] Indeed, the president of the I.C.J. herself concluded as much: Rosalyn Higgins, The I.C.J. and the Rule of Law (speech at the United Nations University, Apr. 11, 2007), http://www.unu.edu/events/files/2007/20070411_Higgins_speech.pdf. Judge Higgins cited Dicey's definition of the rule of law and then considered its application to the international level:

> How then, in this national model, should an "international rule of law" look? First, there should be an executive reflecting popular choice, taking non-arbitrary decisions applicable to all, for the most part judicially-reviewable for constitutionality, laws known to all, applied equally to all, and independent courts to resolve legal disputes and to hold accountable violations of criminal law, itself applying the governing legal rules in a consistent manner.
>
> One has only to state this set of propositions to see the problems.

[150] Dicey, for example, suggested that international law consisted of "rules of public ethics, which are miscalled international law." DICEY, *supra* note 24, at 23. International law has long endured a tension between the realist understanding of law as an instrument of policy and the legalist view of law as a constraint on policy. It is possible to distinguish further between the political realist critique that the rule of law cannot be achieved internationally because the institutions necessary to make and enforce law do not exist at that level, and the legal realist critique that the rule of law is conceptually impossible because law is always an instrument of policy at any level. *See* Terry Nardin, *Theorizing the International Rule of Law*, 12-14 (forthcoming). *See also* Benedict Kingsbury, *The Concept of Compliance as a Function of Competing Conceptions of International Law*, 19 MICH. J. INT'L L. 345 (1998) (exploring the relationship between analyses of compliance with international law and theories of law).

[151] Martti Koskenniemi, *The Politics of International Law*, 1 EUROPEAN J. INT'L L. 4 (1990). *See, e.g.*, ROUSSEAU, *surpa* note 39, bk. I, ch. 7 (discussing sovereigns entering into compacts with one another); LOCKE, *supra* note 45, vol. 2, § 183 (comparing commonwealths in a state of nature to individuals);

international law and domestic law—the horizontal organization of sovereign and quasi-sovereign entities as opposed to the vertical hierarchy of subjects under a sovereign—but also of the historical and political context within which the rule of law was developed.

That history of the rule of law is a tale of kings and judges, of revolutions and bills of rights. One might conceive the creation of the League of Nations and the United Nations in such a context, but a more persuasive account can be made of the modern political context within which the rule of law is promoted: as a tool with which to protect human rights, promote development, and sustain peace. This functionalist understanding of how and why the rule of law is *used*—as distinct from the formal understanding of what it *means*—matches more closely the manner in which the rule of law is articulated at the international level; it also offers some suggestions as to how the core definition used here may apply to the international legal system.

The first aspect, government of laws, requires non-arbitrariness in the exercise of power.[152] This is embodied in the foundational concept of *pacta sunt servanda*,[153] but is also evident in efforts to establish international protections for human rights, formal regimes to govern international trade, and international security institutions such as the Security Council. Moves towards the rule of law in this area include the further codification of the content of international law as well as the manner in which it is created; rule of law concepts such as clarity are undermined by fragmentation of the legal order[154] and assertions that legally indeterminate categories of "legitimacy" exist alongside determinations of legality.[155]

EDWIN DEWITT DICKINSON, THE EQUALITY OF STATES IN INTERNATIONAL LAW 29-31 (1920) (discussing analogy between States and natural persons).

[152] *See* Jeremy Waldron, *The Rule of Law in Contemporary Liberal Theory*, 2 RATIO JURIS 79, 82-84 (1989) (discussing the relationship between the rule of law and arbitrariness).

[153] Agreements are to be kept.

[154] *See Symposium: The Proliferation of International Tribunals: Piecing together the Puzzle*, 31 N.Y.U. J. INT'L L. & POL. 679 (1999); Martti Koskenniemi & Päivi Leino, *Fragmentation of International Law. Postmodern Anxieties?*, 15 LEIDEN J. INT'L L. 553 (2002); ANDREAS ZIMMERMANN & REINER

The second aspect, supremacy of the law, distinguishes the rule of law from rule *by* law. This distinction is less applicable to the international legal system, however, where the primary question is not the relationship between subject and sovereign but between subject and subject. In such a regime the relevance of concepts such as separation of powers is less important than the possibility of determinative answers to legal questions. Rule of law advances would include greater acceptance of the compulsory jurisdiction of the I.C.J. and other independent tribunals, and confirmation that international law applies to international organizations in general and to the U.N. Security Council in particular.

The third aspect of the core definition, equality before the law, raises the question of who the true subject of law is. Equality of individual human beings before the law is a formal constraint on the exercise of public power by State institutions; it has a very different meaning in the context of sovereign equality of States.[156] The individual's relationship to the State is defined by its coerciveness: one does not normally choose the State to the laws of which one is subject. Legal systems frequently treat juridical persons, such as corporations, differently from natural persons; it therefore seems unnecessary to overemphasize the formal equality of States as such. Steps towards an international rule of law in this area would include more general and consistent application of international law to States and other entities; it might also entail amelioration of structural irregularities such as the veto power over Security Council decisions presently enjoyed by the victors of the Second World War.

HOFFMANN, UNITY AND DIVERSITY OF INTERNATIONAL LAW (2006); Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law (Report of the Study Group of the International Law Commission), U.N. Doc. A/CN.4/L.682 (Apr. 13, 2006), *available at* http://documents.un.org.

[155] *See, e.g.*, INDEPENDENT INTERNATIONAL COMMISSION ON KOSOVO, THE KOSOVO REPORT 4 (2000) (finding the 1999 Kosovo intervention "illegal but legitimate"). For a more considered view of the role legitimacy plays in international affairs, see THOMAS M. FRANCK, THE POWER OF LEGITIMACY AMONG NATIONS (1990). *See also* Simon Chesterman, *Legality Versus Legitimacy: Humanitarian Intervention, the Security Council, and the Rule of Law*, 33 SECURITY DIALOGUE 293 (2002).

[156] *Supra* note 148.

These are all, in essence, political challenges. Recognizing the rule of law as a political ideal at the international level, rather than asserting it as a normative reality, properly locates the conduct of most of international affairs in the political rather than the strictly legal sphere. Over time this may change, but in the efforts to achieve human rights, development, and peace, the international rule of law presently offers a means rather than an end.[157]

V. CONCLUSION

The rule of law, as Judith Shklar ultimately acknowledged in her provocative chapter on the topic, is more than mere ruling class chatter.[158] But assertions that the rule of law is a meaningful concept at the international level depend on a coherent meaning at the national level, and the applicability of the term to power relations between States as well as within them. Neither should be taken for granted.

Through examining the evolution of the term, this article has sought to establish a core definition of "rule of law" that properly reflects what is distinctive about the term and is applicable across cultures. The price of clarity is abandoning the additional role that the rule of law sometimes plays as a Trojan horse to import other political goals such as democracy, human rights, and specific economic policies. It is a price worth paying, however, as these substantive goals may properly be seen as distinct from the rule of law—folding them into its robes reduces it to a rhetorical device at best, a disingenuous ideological tool at worst. In this core sense the rule of law reflects the history of efforts to restrain sovereign power that continue in many States today,

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[157] *Cf.* MARTTI KOSKENNIEMI, FROM APOLOGIA TO UTOPIA: THE STRUCTURE OF INTERNATIONAL LEGAL ARGUMENT (1989); Thomas Nagel, *The Problem of Global Justice*, 33(2) PHILOSOPHY & PUBLIC AFFAIRS 113 (2005).

[158] *See supra* note 2.

including some established liberal democracies confronting what the modern sovereign claims are emergencies requiring ever-greater claims to executive authority.[159]

At the international level anything resembling even this limited idea of the rule of law remains an aspiration. Yet seeing the rule of law as a means rather than an end, as serving a function rather than defining a status, more accurately reflects how the rule of law developed and has been imported or imposed around the world. And for international law, this understanding appropriately highlights the political work that must be done if power is to be channeled through law.

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[159] *See, e.g.*, DAVID DYZENHAUS, THE CONSTITUTION OF LAW (2006); OREN GROSS, LAW IN TIMES OF CRISIS: EMERGENCY POWERS IN THEORY AND PRACTICE (2006).