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rules on minorities, some general international principles concerning the rights and duties of all minorities have developed.[9]

First of all, minorities have the right to existence although many instruments dealing with minorities do not mention this right. The UN Assembly General started the text of the 1992 Declaration on Minority Rights by confirming this essential right of minorities.

Extremely important is the right of every person to determine its belonging to a specific ethnic, religious or linguistic minority; this decision must not have any negative consequence for this person.

All the persons belonging to minorities must have the right to citizenship of the State where they live, under the same conditions as all other persons living in that State. In all other fields of life persons belonging to minorities must be treated equally as all other citizens. Any act of propaganda or discriminatory practice in regard of the members of minorities must be considered as a criminal act.

Minorities have the right to establish associations the purpose of which is the preservation of their religious or ethnic specificity. Their members must have the right to use their language in private as well as public life. States have to make possible for the members of minorities to learn their language and to organize school systems in minority languages, and the minorities themselves have the right to organize the instruction of their language.

On the other hand, it is a duty of minorities and their members not to act against the integrity and political independence of the State in which they live. Unfortunately, this is one of the rules that many minorities do not abide by.

[9] B. Vukas, General International Law and the Protection of Minorities, 8 Revue de droit de l'homme, 1975, pp. 41-49; Opća i posebna međunarodna zaštita manjina, 53 Zbornik Pravnog fakulteta u Zagrebu, No. 2, 2003, pp. 291-307, ad pp. 305-306.

PUBLIC INTERNATIONAL LAW AND THE IDEA OF THE RULE OF LAW

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"the rule of law is more easily invoked than understood"[1]

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The present contribution deals with the international, not the domestic rule of law. Nor does it refer in any detail to international efforts to promote the domestic rule of law. Instead, the aim is to examine the relationship between public international law and the idea (or ideal) of the rule of law. After some introductory remarks, the uncertainties surrounding the rule of law at the national level are briefly discussed. The next section deals with the international

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I wish to thank Eran Sthoeger for his valuable assistance.

[1] A. Watts, "The International Rule of Law", 36 *German Year Book of International Law* 15 (1993). In his recent book *The Rule of Law* (2010) (at p. vii), Lord Bingham wrote in similar vein: "I chose as my subject: 'The Rule of Law'. I did so because the expression was constantly on people's lips, I was not quite sure what it meant, and I was not sure that all those who used the expression knew what they meant either, or meant the same thing."

rule of law, including within the United Nations. This leads to a consideration of the relationship between international law and the idea of the rule of law, and some brief conclusions.

INTRODUCTORY

The difficulty of transposing domestic constitutional concepts to the international level is an issue that goes wider than the rule of law. Notwithstanding the importance of domestic law analogies for the development of public international law,[2] it should be borne in mind that public international law is quite different from any national legal system. The international community is radically different from the community within the State. While international law may have things to learn from national legal systems, national laws do not provide a model for international law. Short of the introduction of a 'world government', the international legal system cannot aspire to become the same as a national legal system. It has no constitution, no separation between legislative, executive and judicial functions, no supreme court.[3] The Appeals Chamber of the Yugoslav Tribunal rightly referred to a flawed domestic analogy, pointing out that

> "the international community lacks any central government with the attendant separation of powers and checks and balances", and warned that "the transposition onto the international community of legal institutions, constructs or approaches prevailing in national law may be a source of great confusion and misapprehension".[4]

[2] H. Lauterpacht, *Private Law Sources and Analogies of International Law (with Special Reference to International Arbitration)* (1927).

[3] M. Wood, "'Constitutionalization' of International Law: A Sceptical Voice", in: K. H. Kaikabad, M. Bohlinder (eds.), *International Law and Power. Perspectives on Legal Order and Justice. Essays in Honour of Colin Warbrick* 85 (2009); J. Kammerhofer, "Constitutionalism and the myth of practical reason. Kelsenian responses to methodological confusion", 23 *Leiden Journal of International Law* 723 (2010). Some commentators assume a different perspective, with little basis in State practice. For a recent example, see A. Nollkaemper, *National Courts and the International Rule of Law* (2011), who takes as a starting point for his thesis "that the core elements of the rule of law that are broadly accepted domestically likewise should be pursued in international affairs" (p. 2).

[4] *Prosecutor v. Blaskić* case (Case No. IT-95-14/1), Appeals Chamber Judgment of 29 October 1997 on the request of the Republic of Croatia for review of the decision of Trial Chamber II of 18 July 1997, para. 40. Lord McNair in his Separate Opinion in the *International Status of South-West Africa* Advisory Opinion said: "International law has recruited and continues to recruit many of its rules and institutions from private systems of law. Article 38 (1) (c) of the Statute of the Court bears witness that this process is still active, and it will be noted that this article authorizes the Court to "apply .... (c) the general principles of law recognized by civilized nations". The way in which international law borrows from this source is not by means of importing private law institutions "lock, stock and barrel", ready-made and fully equipped with a set of rules. It would be difficult to reconcile such a process with the application of "the general principles of law"" (*I.C.J. Reports 1950*, p. 148). See also S. Chesterman, "Rule of Law", in: R. Wolfrum (ed.), *Max Planck Encyclopedia of Public International Law*, online, para. 41.

'Legalization' does not have obvious benefits in international affairs; indeed, it is arguably less appropriate at that level than at the national level. Rule by judges, by lawyers, is not self-evidently a good thing. As reflected in Article 38.1 of the Statute of the International Court of Justice, it is chiefly States that make international law, not judges, whether national or international.

There is growing literature on the rule of law at the international level, both in general[5] and with reference to particular bodies, such as the Security Council.[6] But, there is little understanding or agreement about the meaning of the term, or its relevance to the discipline of international law. The fact that other expressions are used, such as 'rule of law at the international level', and 'rule of law in international relations/affairs', and that it is variously referred to as a 'principle', 'concept', or 'notion', may reflect hesitations about the use of the term 'rule of law' in an international context. Sometimes reference is made to a 'rules-based international order', another obscure expression.[7] Some have recently

[5] H. Lauterpacht, *The Function of Law in the International Community* (1933); J. L. Brierly, "The Rule of Law in International Society", 7 *Nordisk Tidsskrift for International Ret* 3 (1936); G. Schwarzenberger, "The Rule of Law and the Disintegration of the International Society", 33 *AJIL* 56 (1939); G. Fitzmaurice, "The General Principles of International Law considered from the Standpoint of the Rule of Law", 92 *RdC* 85 (1957-II); W. Bishop, "The International Rule of Law", 59 *Michigan Law Review* 553 (1961); J. Stone, *The International Court and World Crisis* (1962), Chapter 1; W. Jenks, *The Prospect of International Adjudication* (1964), Chapter 14; A. V. W. Thomas, A. J. Thomas, *A World Rule of Law: Prospects and Problems* (1975); A. Watts, *supra* note 1; I. Brownlie, "The Rule of Law in International Affairs", *International Law at the Fiftieth Anniversary of the United Nations* 213 (1998); T. Nardin, "The Rule of Law in International Relations", 5 *International Legal Theory* 2 (1999); M. Byers (ed.), *The Role of Law in International Politics: Essays in International Relations and International Law* (2000); H. Corell, "The Visible College of International Law: "Towards the Rule of Law in International Relations", *Proceedings ASIL* 262 (2001); A. Bianchi, "Adhocism and the Rule of Law", 13 *EJIL* 263 (2002); B. Simpson, "The Rule of Law in International Affairs", 125 *Proceedings of the British Academy* 211 (2003); J. Murphy, *The United States and the Rule of Law in International Affairs* (2004); J. Crawford, "International Law and the Rule of Law", 24 *Adelaide Law Review* 3 (2003); M. Kumm, "International Law in National Courts: The International Rule of Law and the Limits of the Internationalist Model", 4 *Virginia Journal of International Law* 19 (2003); P. Allott, *Towards the International Rule of Law: Essays in Integrated Constitutional Theory* (2005); S. Zifcak, *Globalisation and the Rule of Law* (2005); B. Zangl, "Is There an Emerging Rule of Law?", 13 *European Review* 73 (2005); S. Chesterman, *supra* note 4; G. Ferreira, A. Ferreira-Snyman, "The Constitutionalisation of Public International Law and the Creation of an International Rule of Law: Taking Stock", 33 *South African Yearbook of International Law* 147 (2008); R. Higgins, "The Rule of Law: Some Sceptical Thoughts", in: R. Higgins, *Themes & Theories. Selected Essays, Speeches, and Writings in International Law* 1330 (2009); H. Owada, "The Rule of Law in a Globalizing World – An Asian Perspective", 8 *Washington University Global Studies Law Review* 187 (2009); G. Palombella, "The Rule of Law beyond the State: Failures, Promises and Theory", 7 *International Journal of Constitutional Law* 442 (2009); P. Sands, B. Ghrálaigh, "Towards an International Rule of Law?", in: M. Andenas, D. Fairgrieve (eds.), *Tom Bingham and the Transformation of the Law: a Liber Amicorum* 461 (2009); S. Beaulac, "The Rule of Law in International Law Today", in: G. Palombella, N Walker (eds.), *Relocating the Rule of Law* 197 (2009); F. de Londras, "Dualism, Domestic Courts and the Rule of International Law", in: M. Sellers, T. Tomaszewski (eds.), *The Rule of Law in Comparative Perspective* 217 (2010); Société Française pour le Droit International (SFDI), L'Etat de droit en droit international - Colloque de Bruxelles (2009); Tom Bingham, *The Rule of Law* (2010), Chapter 10; R. McCorquodale (ed.), *The Rule of Law in International and Comparative Context* (2010); A. Nollkaemper, *supra* note 3; S. Jayakumar, 'The Importance and Meaning of the Rule of Law', *UN Audiovisual Library of International Law* (forthcoming).

[6] K. Manusama, *The United Nations Security Council in the Post-Cold War Era: Applying the Principle of Legality* (2005); J. Farrall, *United Nations Sanctions and the Rule of Law* (2007).

[7] Sweden, speaking on behalf of the European Union and eight other States, recently used the two terms together, stating that "a rules-based international order founded on respect for the rule of law was an essential prerequisite for relations among States and for peaceful cooperation and coexistence", see A/C.6/64/SR.8. For another recent use of the term, see *Human Rights and Democracy: The 2010 Foreign and Commonwealth Office Report* (Cm 8017), Section V of which is entitled 'Working Through a Rules-based International System'. Perhaps the term is borrowed from other disciplines (e.g., 'rules-based v 'principles-based' accountancy).

begun to refer to 'the rule of law in its national, international and institutional aspects', the last term apparently aimed principally at the Security Council. Often concepts that may form part of the rule of law, such as the 'principle of legality', are often discussed without reference to 'rule of law' as such. The need for clearer understanding is apparent from the Secretary-General's 2010 annual report on 'Strengthening and coordinating United Nations rule of law activities', in which he says:

> "The Organization is refining its understanding of the rule of law at the international level, and recent attention to its importance by the General Assembly and the Security Council is most timely and welcome."[8]

It should be noted that the rule of law is not just – or even primarily – a matter for lawyers. It is at least as much the concern of policy makers and political scientists. Indeed, one may well ask whether in legal terms there is such a thing as the international rule of law as distinct from the rules of international law. That such a distinction exists, at least on some level, is suggested by separate references to the rule of law and to international law in some international instruments and statements.[9]

It is helpful to distinguish between, on the one hand, the rule of law at the national level, its traditional realm, where it refers to certain desired qualities in national legal systems or their supranational equivalents, such as the European Union legal order[10], and, on the other hand, the rule of law at the international level[11] ('national rule of law' and 'international rule of law'[12]). The first refers to domestic law, the second to public international law. At the same time, there is, as the Secretary-General emphasised, a 'critical interface between international and national rule of law', at least as regards 'the domestic implementation of international norms and standards'.[13] Domestic implementation is part of the national rule of law, though it clearly has an impact on the international rule of law.

[8] A/65/318, para. 2. The Republic of Slovenia is one of 10 States whose views are reproduced in the annex to this report.

[9] E.g., S/PRST/2010/11.

[10] Art. 2 Treaty on European Union (TEU) reads: "The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States..."

[11] Watts, *supra* note 1, at 16-21.

[12] The UN tends to use the expressions 'the rule of law at the national level' and 'the rule of law at the international level', which have perhaps broader meanings. For example, in the 2010 annual report virtually all of the section entitled 'Fostering the rule of law at the international level' concerned international efforts to foster the national rule of law in areas covered by international law, such as human rights, international crimes, labour standards, private international law, and disarmament: A/65/318, paras. 12-23.

[13] A/65/318, para. 96.

UNCERTAINTIES SURROUNDING THE DOMESTIC RULE OF LAW

The term 'rule of law' is usually applied in the context of domestic legal systems.[14] It has no clear meaning even within a single country, even in Dicey's homeland.[15] It is "an exceedingly elusive notion" giving rise to a "rampant divergence of understandings".[16]

There are two broad approaches to the meaning of the term at the national level, often referred to as a formal approach and a substantive one.[17] The formal approach refers primarily to procedural requirements; the substantive approach includes also the quality of the law (conformity with human rights etc.). Kelsen was a staunch supporter of the first.[18] The second is exemplified by a resolution adopted by the Council of the International Bar Association in October 2009.[19]

The term 'rule of law' is usually attributed to Dicey, who actually referred to "the supremacy or the rule of law".[20] Yet the relevant chapter in a leading work on British constitutional law describes Dicey's views as being 'based on many assumptions about the British system of government that no longer apply'. The chapter then proceeds to consider the rule of law and its implications today under three aspects: (i) 'statements of the rule of law embody a preference for orderly life within an organised community, rather than a situation of anarchy or strife in which there is no security for persons, their well-being or their possessions'; (ii) 'the rule of law expressed the fundamental principle that government must

[14] Until recently, it hardly arose in the context of international law. There is no entry for 'rule of law' in the index to *Oppenheim's International Law* (9th ed., 1992) or V. Lowe, *International Law* (2007). In I. Brownlie, *Principles of Public International Law* (7th ed., 2009) the single entry directs you to a brief philippic on the political bias of those who established international criminal courts and tribunals.

[15] As was said in a 2007 report, "the general point of departure is that there is no uniform conception of the rule of law; it is used to define a number of concepts, it is tied to a variety of aims and it operates at different levels." (Hague Institute for the Internationalization of Law (HiiL), *Rule of Law Inventory Report, A note on the background*, 2007). Such comparative studies as have been done demonstrate the wide range of differing understandings of the notion and practices in its implementation: see, for example, the World Justice Project Rule of Law Index 2010, which is composed of 10 factors and 49 sub-factors.

[16] Brian Z. Tamanaha, *On the Rule of Law* (2004), p. 9.

[17] Brian Z. Tamanaha, "The Rule of Law for Everyone?", 55 *Current Legal Problems* 93 (2002); P. Craig, "Formal and Substantive Conceptions of the Rule of Law: An Analytical Framework", [1997] *Public Law* 467. For the formal approach, see J. Raz, "The Rule of Law and its Virtue", in *The Authority of Law* 211 (1979). It is unclear in which sense the term is used in section 1 of the Constitutional Reform Act 2005 (c.4), which provides that "[t]his Act does not adversely affect (a) the existing constitutional principle of the rule of law, or (b) the Lord Chancellor's existing constitutional role in relation to that principle." Section 17 provides that the Lord Chancellor shall swear to 'uphold the rule of law'. The Explanatory Note gives nothing away. One might ask how far these provisions are themselves consistent with the rule of law.

[18] See, for example, H. Kelsen, *Introduction to the Problems of Legal Theory* 104-106 (1993); H. Kelsen, *Pure Theory of Law* 312-313 (1967).

[19] See *Resolution of the Council of the International Bar Association of October 8, 2009, on the Commentary on Rule of Law Resolution (2005)*, available at http://www.ibanet.org/Document/Default.aspx?DocumentUid=9925C6FD-5804-407F-9D39-ECB9D6A8B9D4

[20] A. V. Dicey, *An Introduction to the Study of the Law of the Constitution* 180 (8th ed., 1923). For more on Dicey's view on "the supremacy of the rule of law", see generally, at 179-201.

be conducted according to law and that in disputed cases what the law requires is declared by judicial decision'; and (iii) 'the rule of law refers to a rich body of opinion on matters such as the powers that the state should or should not have ..., the procedures to be followed when action is taken by the state ..., and the values inherent in a system of justice.' It will be seen that these are essentially policy matters. For example, the third point is discussed under the heading 'The rule of law is a broad doctrine affecting the making of new law'. The chapter goes on to suggest that '[t]he rule of law movement has broadened to include social and economic goals which lie far beyond the typical values associated with the courts, legal process and the legal profession.' It concludes by saying that '[i]t is not possible to formulate a simple and clear-cut statement of the rule of law as a broad political doctrine.'[21]

In a lecture delivered in 2006[22] Lord Bingham made a valiant effort to be more specific, and he elaborated this in a book published in 2010.[23] Bingham first suggested that the core of the principle of the rule of law was "that all persons and authorities within the state, whether public or private, should be bound by and entitled to the benefit of laws publicly and prospectively promulgated and publicly administered by the courts."[24] He then proceeded to "go behind the very general principle" to 'try and identify what the rule of law really means to us, here and now".[25] He identified eight principles, the last of which (in what otherwise is devoted exclusively to the domestic rule of law) asserted that 'the principle of the rule of law requires compliance by the state with its obligations under international law.[26]

In his 2006 lecture, Bingham's sub-rule (viii) seemed to pick up the expression in section 1 of the United Kingdom's Constitutional Reform Act 2005 (c. 4) - 'the existing constitutional principle of the rule of law',[27] which might – but only might - suggest that he viewed that expression in the Act as encompassing the requirement of compliance by the State with its obligations under international law. This in turn might have implied the potential for judicial review of Government acts or omissions against the whole range of the United Kingdom's international obligations, whether under treaties or customary international law, whether incorporated by statute or common law or not. That is not, however, the

[21] A. Bradley, K. Ewing, *Constitutional & Administrative Law* (15th ed., 2011), ch. 6.
[22] Lord Bingham, "The Rule of Law", 66 *Cambridge Law Journal* 67 (2007).
[23] Tom Bingham, *supra* note 1.
[24] Lord Bingham, *supra* note 22, at 69. He accepted that this statement could not be applied without exception or qualification.
[25] Tom Bingham, *supra note* 1, at 37.
[26] *Ibid.*, at 81 and Chapter 10. In the book, this principle was reformulated to read: 'The rule of law requires compliance by the state with its obligations in international law as in national law' (at 110). Chapter 10, entitled 'The Rule of Law in the International Legal Order', is based on Bingham's Grotius Lecture delivered on 17 November 2008; Chapter 10 is also reprinted as Chapter 1 of R. McCorquodale (ed.), *supra* note 5.
[27] See note 17 above. For references to the rule of law in the constitutions of British overseas territories, see I. Hendry, S. Dickson, *British Overseas Territories Law* 33 (2011).

position adopted by the English courts.[28] To the extent that it was put forward in the context of English law, sub-rule (viii) seems to conflate the national and the international rule of law in a manner that is at odds with the common law's dualist approach.[29] In any event, in his 2008 Grotius lecture (as reproduced in Chapter 10 of his 2010 book), Bingham discussed a differently framed principle ('The rule of law requires compliance by the state with its obligations in international law as in national law') and did so exclusively in terms of the rule of law at the international level, without reference to the constitutional principle of the rule of law.

THE INTERNATIONAL RULE OF LAW, INCLUDING WITHIN THE UNITED NATIONS

As we have seen, the term 'rule of law'[30] has no fixed meaning, even at the national level. At the international level it is often used loosely and with a wide range of meanings. *First*, politicians, diplomats and international organs frequently proclaim their commitment the rule of law in international affairs. This is usually little more than political rhetoric, indicating that States should comply with the rules of international law by which they are bound.[31] Watts put it well: the distinction between the rules of law and the rule of law, he said,

> "is often blurred by those who, in responding to some international incident by calling for the rule of law to be upheld, are in reality often doing no more than calling for compliance with international law."[32]

[28] See R. O'Keefe, "The Doctrine of Incorporation Revisited", 79 *British Year Book of International Law* 7 (2008); *Halsbury's Laws of England* (5th ed., 2010), Vol. 61 (International Relations Law), para. 12. Inclusion of sub-rule (viii) enabled Bingham to expound his views on Iraq, drawing upon G. Marston, "Armed Intervention in the 1956 Suez Canal Crisis: The Legal Advice tendered to the British Government", 37 *International and Comparative Law Quarterly* 773 (1988).
[29] See *Halsbury's Laws of England*, *supra* note 28, volume 61, paras. 12-25. For a context in which Ministers (and civil servants) are expressly said to be under a duty to comply with international law: see the references to 'the overarching duty on Ministers to comply with the law including international law and treaty obligations' in the Ministerial Code (the latest version of which was issued on 21 May 2010), para. 1.2; the Civil Service Code; and the Diplomatic Service Code. See F. Berman, "The Role of the International Lawyer in the Making of Foreign Policy", in C. Wickremasinghe (ed.), *The International Lawyer as Practitioner* (2000), at 5-7.
[30] In other languages there is often no exact equivalent to the term 'rule of law'. French, "l'État de droit"/"la prééminence du droit"; Spanish, "el Estado de derecho"; German, "der Rechtsstaat" do not necessarily have the same meaning and are often not translated (for example, in the English translation of Kelson's *Pure Theory of Law* it remains 'Rechtsstaat'. The German term in particular hints at the inappropriateness of the concept at the international level, absent world government. For the possible significance of the UN usage with a lower case 'E' in French and Spanish, see See P. Bodeau-Livinec, S. Villalpando, "La promotion de l' "état de droit" dans la pratique des Nations Unies", SFDI 2009 *supra* note 5, p. 81.
[31] This also appears to be the sense of the currently fashionable term, "rule[s]-based" international society. See also GA res. 44/23 of 17 November 1989 (proclaiming the Decade of International Law); and the many references to rule of law in the 2005 Summit Outcome: GA res. 60/1 (see below, *infra* note 70). Among the numerous reference by States, see for example, those during the Security Council open debate in June 2010: "For the United Kingdom, the rule of law is at the heart of its foreign policy", S/PV.6347, p. 18; "Respect for the rule of law ... remains at the very core of Germany's foreign policy", S/PV.6347 (Resumption 1), p. 19; see also comments in A/C.6/64/SR.9 (14 October 2009) by Senegal (para. 2), Laos (para. 6), India (para. 22), Azerbaijan (para. 44), Botswana (para. 39), Bangladesh (paras. 50-51), Kuwait (paras. 60-61), Tanzania (para. 62), and Venezuela (para. 94).
[32] Watts *supra* note 1, at p. 16.

Second, the term is sometimes used as a label to describe activities in the legal field, especially those aimed at encouraging the greater use of international dispute settlement mechanisms or international criminal tribunals.[33] *Third*, reference is made to the rule of law as an often rather unpersuasive argument for change in the rules of international law, or for a particular interpretation thereof. *Fourth*, recourse may be had to the rule of law as an argument as to why the current rules of international law must be such and such – also unpersuasive, because there is little or nothing in State practice to support the creation of such rules of international law based on a rule-of-law concept. It is simply not a consideration for most States most of the time. And *fifth* (common nowadays within the United Nations and other international organizations), the term is used to refer to international assistance to national rule of law, particularly in conflict and post-conflict situations.[34] The national rule of law is what was in mind when the Universal Declaration of Human Rights, adopted by the General Assembly on 10 December 1948, proclaimed (in words that have a particular echo today) 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".[35]

A further meaning, not dealt with in this contribution, is the need for international courts and tribunals to respect rule-of-law principles such as the need to uphold the principle of the equality of the parties.[36]

In the chapter entitled 'The Rule of Law in the International Legal Order' in his book on the rule of law, published in 2010, Bingham concluded that:

> "If the daunting challenges now facing the world are to be overcome, it must be in important part through the medium of rules, internationally agreed, internationally implemented and, if necessary, internationally enforced. That is what the rule of law requires in the international order."[37]

If this is what one means by the international rule of law, then recent years have seen important advances:

[33] See, for example, S/PRST/2010/11 of 29 June 2010. See also comments made in A/C.6/64/SR.9 by Mexico (para. 9), Chile (para. 18), Azerbaijan (para. 47), Bangladesh (paras. 52-53), Japan (para. 67), Pakistan (para. 82), and Albania (para. 88).

[34] See comments made in A/C.6/64/SR.9 by Pakistan (para. 81), India (para. 22), and Mexico (para. 11).

[35] GA res. 217A (III), preamble (in French, 'un régime de droit'). The European Convention for the Protection of Human Rights and Fundamental Freedoms of 1950 refers in its preamble to 'European countries which are like-minded and have a common heritage of political traditions, ideals, freedom and the rule of law' (in French, 'prééminence de droit').

[36] As the Permanent Court of International Justice said in *Eastern Carelia*, "[t]he Court, being a Court of Justice, cannot, even in giving advisory opinions, depart from the essential rules guiding their activity as a Court" (*P.C.I.J. Ser. B No 5*, p.8). See also the ICTY Appeals Chamber decision of 2 October 1995 in *Tadić*: an international criminal court "ought to be rooted in the rule of law and offer all guarantees embodied in the relevant international instruments" (para. 42).

[37] Bingham, *supra* note 1, p. 129.

- A great expansion in the scope and detail of 'rules, internationally agreed upon', in many fields, including international human rights law, international criminal law[38], international environmental law, and international trade law.

- These rules are being increasingly effectively 'internationally implemented', i.e., being given effect collectively, not least through international institutions.

- The extent to which rules of international law are 'if necessary, internationally enforced' remains patchy. Here, too, there have been advances, for example in the increased activity of the Security Council and of international courts and tribunals, including international criminal tribunals. But Watts's cautionary words, written as long ago as 1993, are worth recalling:

"the balance between international order and the international rule of law can be difficult to maintain. The former may call for a State to take unilateral action but the latter cannot condone it. A self-appointed 'policeman' State , acting to uphold its own assessment of the law and of the interests of the community (especially when the community, as represented by the United Nations, has itself failed to agree on what the community interest requires), is a dangerous instrument for upholding international law and is in principle antithetical to the international rule of law. It is no longer acceptable to the international community as a whole. The danger of abuse is manifest, and with it the danger of encouraging arbitrary action; and States believing that they act to protect the interests of the international community cannot always be relied upon to be truly altruistic. However firm may be the conviction of the 'policeman' State that its actions are politically right and legally justified, that assessment may not necessarily be widely shared."[39]

Do those who invoke the international rule of law have in mind more than Bingham's modest conclusion? Watts's concern with respect to the unilateral enforcement of international law highlights the interconnections between the rule of law at the international level and the rules of international law, but also demonstrates their divergence. Watts sought to discern 'the elements which are necessary if the rule of law is to obtain in the international community'.[40] His list is fourfold: completeness and certainty of the law[41]; equality before the law[42]; absence of arbitrary power[43]; and effective application of the law,[44] the fourth of which he

[38] R. Cryer, H. Friman, D. Robinson, E. Wilmshurst, *An Introduction to International Criminal Law and Procedure* (2nd ed., 2010).

[39] Watts, *supra* note 1, at 44.

[40] *Ibid.*, at 26.

subdivided into three headings (judicial settlement; enforcement; and application in practice.[45]). He thought the international system fell short of the rule of law, particularly in respect of the fourth of these elements, effective application of the law. May the term sometime be intended to refer to certain policy prescriptions as to the quality of the law? When it is, these are statements of policy, rather than of law.

Within the United Nations and other international organizations, the term 'rule of law', a term that does not appear in the Charter, is a useful rhetorical banner under which it to gather many important initiatives. As a result, it has become something of a portmanteau expression. Depending on context, it may refer to the following issues:

a) "The codification and progressive development of international law, the implementation of international legal obligations and compliance with those obligations whether they arise from treaties or from customary international law."[46] "The principle that all individuals and entities, including States, are accountable to the law lies at the heart of the rule of law. Responsibility of all subjects for fulfilling their obligations is thus essential to any concept of the rule of law at the international level."[47] There is need for clarity in the rules of international law and the development of rules in fields where they are currently lacking or inadequate.[48] And States and other international actors should comply with the rules of international law by which they are bound. This in turn requires adequate procedures for implementation and enforcement of international law, including through the peaceful settlement of disputes, greater acceptance of the jurisdiction of existing international courts and tribunals,[49] and the fight against impunity for violations of the core crimes under international criminal law.[50]

b) The need for 'good governance' in international institutions, including as some would see it the desirability of transposing domestic 'rule of law'

[41] *Ibid.*, 26-30.
[42] *Ibid.*, 30-32.
[43] *Ibid.*, 32-35.
[44] *Ibid.*, 25-41.
[45] By which he meant "the overwhelming tendency of States in their day-to-day dealings with other States to apply and abide by international law", see *ibid.*, 41.
[46] A/65/318, para. 11.
[47] *Ibid.*, para. 24.
[48] See, for example, the comments made by the US in A/C.6/64/SR.9.
[49] Liechtenstein called for concrete efforts to encourage States to consider accepting the ICJ's jurisdiction (A/C.6/64/SR.8, para. 28). Norway recalled in that connection the efforts of the Council of Europe's Committee of Legal Advisers on Public International Law (A/C.6/64/SR.8, para. 51).
[50] See, for example, comments made in A/C.6/64/SR.9, by Pakistan (para. 82), Chile (para. 19) and Azerbaijan (paras. 47-48).

notions to the international level, especially where the rights of individuals are affected. Sometimes it is referred to as the 'institutional' aspect of the rule of law, as though it were something aside from the national and international aspects. This is an ongoing debate. The Secretary-General has recently written:

"At the core of these debates is the question of whether international human rights standards bind the actions of the Organization where individual rights are directly affected. The evolution of international law has led to more and more rights being vested directly in the individual. Yet, the Organization has not evolved at the same pace. The time has come to align the law applicable to the United Nations with developments in international human rights law."[51]

c) The need to ensure a degree of 'rule of law' domestically, in conflict and post-conflict situations and throughout the world, and UN efforts to that end ('rule of law assistance').[52]

Of these, points a) and b) concern the international rule of law. Point c), on the other hand, concerns the national rule of law; much of the UN's rule-of-law activity is in this field.[53]

United Nations engagement with the rule of law goes back a long way, to the Charter itself, especially its references to international law, the peaceful settlement of disputes,[54] and human rights.[55] The United Nations work in these fields is well-known. The focus of the present contribution is on those occasions, mainly over the last six or seven years, when various UN organs, in particular the Secretary-General, the General Assembly and the Security Council have invoked the concept of 'the rule of law' as such and by name.

In response to a 2003 Security Council debate on the rule of law,[56] the *Secretary-General* published the first report on the rule of law and transitional

[51] A/65/318, para. 94.
[52] See in particular the UN Secretary-General's guidance note on the UN approach to rule of law assistance, which contains guiding principles and a framework for strengthening the rule of law in line with national strategies and plans: A/63/226, paras. 17-21.
[53] See, for example, UNDP (Global Rule of Law Programme); the Peacebuilding Commission; and the Rule of Law Coordination and Resource Group, formed within the Secretariat in 2007 'to ensure effective and coherent United Nations rule of law efforts'. The Group's Joint Strategic Plan for 2009-2011, issued in February 2009, focuses on UN assistance to States for domestic rule-of-law areas. For a critical view, see S. Humphreys, *Theatre of the Rule of Law: transnational legal intervention in theory and practice* (2010).
[54] UN Charter, preamble, Arts. 1 and 13.1(a). Speakers on the 'rule of law' sometimes distort the relevant Charter provisions, perhaps reading into it what they wish to see. For example, it is not an accurate reflection of the Charter, Art. 1.1 to say the Security Council has a 'special responsibility to maintain international peace and security in conformity with the principles of justice and international law under the Charter': S/PV. 6347, p. 3. Nor is there, at least in law, a 'fundamental principle that the Organization must act in accordance with fundamental standards of human rights in its own activities, operations and practices' (*ibid.*).
[55] UN Charter, Art. 2.3 and Chapter VI.
[56] UN Charter, Arts. 1 and 55.

justice in conflict and post-conflict societies in August 2004[57], for consideration at a further Security Council debate in October 2004. It contained a first attempt to articulate a common 'definition' of the rule of law for UN purposes:

> "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."

This 'definition' has been given considerable weight within the United Nation because it was the first time that the various departments came to a common understanding. The rule of law is defined broadly as an end state, a principle of governance. It adopts a substantive approach, covering both procedural elements (i.e., accountability to laws that are publicly promulgated, equally enforced and independently adjudicated) and substantive requirements - namely that the law is consistent with international human rights law.

The 2004 Secretary-General's report also asked his Executive Committee on Peace and Security for proposals to enhance United Nations system arrangements for supporting the rule of law and transitional justice in conflict and post-conflict societies. This request reflected the fact that despite its years of engagement in rule of law in the field, the United Nations lacked a centre of expertise to ensure sustainable, institutional learning and core capacity at the Headquarters level. Based on the recommendations of the High-level Panel on Threats, Challenges and Change, the Secretary-General indicated an intention to create a dedicated rule of law assistance unit in the proposed Peacebuilding Support Office, to assist national efforts to re-establish the rule of law in conflict and post-conflict societies.[58]

At the 2005 World Summit, Heads of States and Governments supported the establishment of a rule of law assistance unit within the Secretariat, subject to a report by the Secretary-General to the General Assembly, so as to strengthen the United Nations activities to promote the rule of law, including through technical assistance and capacity building.[59]

At its 2006 session, the General Assembly further urged the Secretary-General "as a matter of priority to submit the report on the establishment of a rule of law assistance unit within the Secretariat, in conformity with paragraph 134(*e*) of the

[57] See S/PV.4833 and the subsequent Presidential statement, S/PRST/2003/15; S/PV.4835. See P. Bodeau-Livinec, S. Villalpando, "La promotion de l' "état de droit" dans la pratique des Nations Unies", SFDI 2009 *supra* note 5, p. 81.
[58] S/2004/616.
[59] A/59/2005, para. 137.

2005 World Summit Outcome".[60] This was followed by suggestions from Member States, including from a group of twenty-four Permanent Representatives in New York known informally as the 'Friends of Rule of Law', including States from all regional groups. The Secretary-General submitted a report to the General Assembly and the Security Council in December 2006 entitled *Uniting Our Strengths: Enhancing United Nations support to the rule of law*.[61] To address issues of coordination and coherence, the report announced the establishment of the Rule of Law Coordination and Resource Group, chaired by the Deputy Secretary-General, and the Rule of Law Unit to support this arrangement. The Unit reports to the Deputy Secretary-General as Chair of the Group, and works to ensure that the Group has an overall perspective across all the various UN entities engaged in rule of law assistance.

The Rule of Law Coordination and Resource Group comprises the principals of nine lead UN departments and agencies – the Department for Peacekeeping Operations (DPKO), the Department for Political Affairs (DPA), the Office of the High Commissioner for Human Rights (OHCHR), the Office of Legal Affairs (OLA), the United Nations Development Programme (UNDP), the United Nations Children's Fund (UNICEF), the United Nations Entity for Gender Equality and the Empowerment of Women (UN Women), the United High Commissioner for Refugees (UNHCR) and the United Nations Office for Drugs and Crime (UNODC) - to help coordinate system-wide attention for the rule of law, and to ensure quality and policy coherence at the senior level. While this Group does not represent all UN entities involved in rule of law promotion, these departments and agencies are considered to be the most engaged in rule of law activities at the international and national levels, and therefore most relevant to coordination efforts and best placed to make UN system-wide policy on the issues. The Group is an interagency mechanism that works with the support of the Rule of Law Unit.[62] To be an effective umbrella for rule of law work across the UN system, the Group and the Unit are not focused solely on rule of law in conflict and post-conflict contexts. As such, the Unit is not attached to the Peacebuilding Support Office as was recommended in the High-level Panel. It is located in the Executive Office of the Secretary-General.

Following his report in 2004[63], the Secretary-General has issued a number of additional reports specifically dealing with the rule of law: in 2006[64]; 2008[65]; 2009[66]; and 2010[67]. Much of the material in these reports relates to UN support for the national rule of law (rule of law assistance).

[60] A/RES/60/1, para. 134(*e*).
[61] A/RES/61/39.
[62] A/61/636—S/2006-980.
[63] http://www.unrol.org/article.aspx?article_id=7.
[64] The rule of law and transitional justice in conflict and post-conflict societies (S/2004/616).
[65] Uniting our strengths: enhancing United Nations support for the rule of law (A/61/636-S/2006/980 and Corr.1).
[66] Strengthening and coordinating United Nations rule of law activities (A/63/226).
[67] Annual Report on strengthening and coordinating United Nations rule of law activities (A/64/298).

The *General Assembly* has been similarly active in the rule-of-law field.[68] For example, its 2005 World Summit Outcome resolution has numerous references to the rule of law:[69]

> "*Recognizing* the need for universal adherence to and implementation of the rule of law at both the national and international levels, we [the Heads of State and Government]
> *(a)* Reaffirm our commitment to the purposes and principles of the Charter and international law and to an international order based on the rule of law and international law...."[70]

Other important General Assembly resolutions referring to the rule of law include the 1948 Universal Declaration of Human Rights,[71] 1970 Friendly Relations Declaration,[72] and the 2000 Millennium Declaration.[73]

On the initiative by Liechtenstein and Mexico,[74] the General Assembly in resolution 61/39 of 4 December 2006 decided to include the topic "The rule of law at the national and international levels" in the provisional agenda of its sixty-second session, and recommended that each year the Sixth Committee choose one or two sub-topics for focused discussion. The annual resolutions under this item refer to the Assembly's 'solemn commitment to an international order based on the rule of law and international law'.[75] During the sixty-second session, several suggestions were made for concrete sub-topics that could be chosen to facilitate a focused discussion of the agenda item. But General Assembly resolution 62/70 of 6 December 2007 left the matter open. It was only in 2008 that the General Assembly set forth sub-topics for the next three sessions. In paragraph 10 of resolution 63/128, the Assembly decided to –

> "include in the provisional agenda of its sixty-fourth session the item entitled "The rule of law at the national and international levels", and invites Member States to focus their comments in future Sixth Committee debates on the sub-topics "Promoting the rule of law at the international level" (sixty-fourth session), "Laws and practices of Member States in implementing international law" (sixty-fifth session), and "Rule of law and transitional justice in conflict and post-conflict situations" (sixty-sixth session), without prejudice to the consideration of the item as a whole."

[68] Second Annual Report on strengthening and coordinating United Nations rule of law activities (A/65/318).
[69] There is due to be a high-level meeting of the General Assembly during its sixty-seventh session in 2012.
[70] GA res. 60/1 of 16 September 2005, Most of the references address the rule of law at the national level (paras. 16, 21, 24(*b*), 25(*a*), 119, 134 (*d*) and (*e*)). References to the rule of law at the international level are confined to paras. 11 and 134 (*a*), (*b*) and (*f*).
[71] *Ibid.*, para. 134.
[72] Universal Declaration of Human Rights, GA Res. 217 (III), UN GAOR, 3d Sess., Supp. No. 13, UN Doc. A/810 (1948).
[73] Preamble, "promotion of the rule of law among nations".
[74] GA res. 55/2 of 8 September 2000, para.5, in which Member States resolved "to strengthen respect for the rule of law in international as well as in national affairs and, in particular, to ensure compliance by Member States with the decisions of the International Court of Justice ...".
[75] A/61/142.

The Sixth Committee reached the following understanding in connection with this paragraph. As regards the sub-item on "Promoting the rule of law at the international level":

> "Delegates may wish to comment on issues such as strengthening an international system based on the rule of law, the role of the United Nations, including the International Court of Justice, in the peaceful settlement of disputes, promoting respect for the purposes and principles of the Charter of the United Nations, other international dispute resolution mechanisms etc."[76].

The Sixth Committee debate at the sixty-fourth session (2009) focused on the rule of law at the international level, and extended over two meetings.[77] It was in very general terms. No one seems to have attempted to analyse the rule of law at the international level, with the notable exception of the representative of South Africa. He began by saying that "from one perspective, the rule of law simply referred to compliance with obligations under international law, whether flowing from treaty or from customary law."[78] He continued, "[F]rom another perspective, compliance with international law was not in itself sufficient. The content of the international law to be complied with must itself be fair, in both its substantive and procedural dimensions, in order to ensure the legitimacy of the law."[79]

At the sixty-fifth session in 2010 the subject was "Laws and practices of Member States in implementing international law".[80] It was agreed that there would be a high-level meeting of the General Assembly on the rule of law during the high-level segment of the sixty-seventh session of the General Assembly.[81] In preparation for the high-level meeting, the General Assembly held an informal interactive thematic debate on the rule of law on 11 April 2011.[82] Ernest Petrič was a round table panellist at this meeting.

The *International Law Commission*'s responses to the Assembly's repeated invitation to comment on its current role in promoting the rule of law[83] (in the

[76] GA res. 61/39 of 4 December 2006; GA res. 62/70 of 6 December 2007; GA res. 63/128 of 11 December 2008; GA res. 64/116 of 16 December 2009; GA res. 65/32 of 6 December 2010. For an earlier GA item (dealt with in the Third Committee between 1993 and 2004), see 'Strengthening the rule of law': GA res. 48/132 of 20 December 1993 and subsequent resolutions.
[77] A/C.6/63/L.23.
[78] A/C.6/64/SR.8 (14 October 2009), A/C.6/64/SR.9 (14 October 2009).
[79] A/C.6/64/SR.8, para. 73.
[80] *Ibid.*, para. 75.
[81] GA res. 65/32 of 6 December 2011.
[82] *Ibid.*, para. 13.
[83] GA/11069, 11 April 2011.

context of the Sixth Committee item) suggests that the Commission's concept of the rule of law is a rather formal one, though not without some reference to the quality of the rules of international law. For example, in 2008 the Commission emphasised that it -

> "promotes the rule of law in international relations by applying generally accepted methods for the identification of the law ... the Commission presupposes that the rule of law requires States, international organizations and other international entities to conduct their affairs with full deference to the law. ... At the international level the rule of law also requires sensitivity to the content of particular rules. ... draft rules that balance different interests promote the rule of law by encouraging order, clarity and consistency in international relations. ... Where the Commission promotes rules that uphold concepts such as fairness, security, and justice for individuals without limiting the proper authority of the State, it assists the development of the rule of law. ... the rule of law constitutes the essence of the Commission, for its basic mission is to guide the development and formulation of the law."[84]

The *Security Council*'s role in relation to the rule of law is in principle limited to the peace and security field, as was reflected in the formulation of the agenda item for a 2010 debate, 'The promotion and strengthening of the rule of law in the maintenance of international peace and security.' But given a broad interpretation of international peace and security, this hardly imposes limits on its potential for action.

The first occasion on which the Council used the term 'rule of law' was in relation to the Congo in 1961[85]. It next appeared in 1996,[86] and today features in many of the Council's resolutions and Presidential statements, in various contexts. In addition, the Security Council has held a series of thematic debates focusing specifically on the rule of law (22 June 2004[87]; 6 October 2004[88]; 22 June 2006[89]; and 29 June 2010[90]). On the last occasion, the Security Council held an open debate on 'The promotion and strengthening of the rule of law in the maintenance of international peace and security'. Taking part were the Deputy Secretary-General,

[84] ILC Report 2008 (A/63/10), paras. 341-346; ILC Report 2009 (A/64/10), para. 231; ILC Report 2010 (A/65/10), paras. 389-393; ILC Report 2011 (A/66/10), paras. 392-398.

[85] ILC Report 2008 (A/63/10), paras. 342-346. In 2010, the Commission repeated much of this, adding (after noting the Security Council Presidential statement of 29 June 2010), that "[t]he Commission also is committed to the peaceful settlement of disputes and actively supports that Member States settle their disputes by peaceful means": ILC Report 2010 (A/65/10), paras. 391. Also in 2010, the Commission, for the first time, held a general discussion on the peaceful settlements of disputes (in connection with a Secretariat Note entitled 'Settlement of disputes clauses'): ILC Report 2010 (A/65/10), para. 388.

[86] Security Council Res. 161B of 21 February 1961 referred to 'the general absence of the rule of law in the Congo'.

[87] Security Council Res. 1040 (1996) of 29 January 1996, expressing support for the Secretary-General's efforts to promote the rule of law in Burundi.

[88] S/PV.5474 and S/PV.5474 (Resumption 1).

[89] S/PV.5052 and S/PV.5052 (Resumption 1).

[90] S/PRST/2006/28.

the Legal Counsel, the fifteen members of the Council, 18 other States, and the European Union. Most speakers followed the suggestions in a 'concept note' prepared by Mexico as President of the Council[91] which covered three issues: the promotion of the rule of law in conflict and post-conflict situations; international justice and the peaceful settlement of disputes; and the efficiency and credibility of sanctions regimes. The debate concluded with a Presidential statement (dealing mainly with traditional issues of public international law), in which the Council "reaffirme[d] its commitment to the Charter and to international law, and to an international order based on the rule of law and international law" and went on to emphasize "the key role of the International Court of Justice, the principal judicial organ of the United Nations, in adjudicating disputes among States and the value of its work" and called upon States that had not yet done so to consider accepting the jurisdiction of the Court in accordance with its Statute. It further called upon States "to resort also to other dispute settlement mechanisms, including international and regional courts and tribunals which offer States the possibility of settling their disputes peacefully, thus contributing to the prevention or settlement of conflict."[92]

It is sometimes emphasised that the Security Council itself must respect and comply with international law. The representative of Norway in the Sixth Committee's 2009 debate said, "[i]t is also vital that international organizations should respect the rule of law. The United Nations and the Security Council should set an example by scrupulously adhering to the Charter and international law."[93] Quite what it means in this context to 'adhere to' international law is unclear. In fact, the Security Council has the power, under Article 103 of the Charter, to set aside international obligations, and regularly does so in its action to maintain and restore international peace and security. Examples include setting aside obligations in the field of international trade when adopting sanctions and overriding restrictions placed upon occupying Powers under international humanitarian law in post-conflict situations.[94] On the other hand, just as Watts warned of unilateral state action in the name of the international order and international law as a notion potentially endangering the rule of law[95], it can be argued, on policy grounds, that the Council should strive to maintain peace and security while upholding certain standards of conduct and minimizing the use – to the extent possible – of its powers under Article 103.[96] In addition, it is self-evident that international organizations, including the United Nations acting through its organ, the Security Council, must comply with the rules of law that are binding upon them. But to

[91] S/PV.6347 and S/PV.6347 (Resumption 1).

[92] Mexico being the chief exception, focusing entirely on the Council and public international law. One or two others used the debate to raise situations or disputes of particular concern to them.

[93] S/PRST/2010/11.

[94] S/C.6/SR.8, para. 53.

[95] For example, Security Council resolution 1483 (2003).

[96] See above, paragraph 10.

say this begs the question: by which rules of international law are international organizations bound? For the most part they are not parties to many treaties, including the main 'law-making' treaties. Nor is it well established to what extent international organizations are bound by customary international law, even when customary international law is clear (and in certain fields, including human rights, it is not as clear as some appear to think).

A question of current importance for the Security Council is the need for fair and clear procedures for 'targeted' sanctions, while maintaining the effectiveness of sanctions. It has been argued with some emphasis that 'rule-of-law' concepts must be applied.[97] National (and European Union courts) have expressed grave concerns. But at the end of the day this is a policy preference. It may well be good to apply certain national or regional notions of the rule of law to the delisting of persons subject to targeted sanctions,[98] but this is a matter of policy rather than a legal requirement under international law.

Before concluding this brief survey of UN approaches to the international rule of law, it should be noted that the *International Court of Justice* has not often referred to the rule of law. In *Libya/Malta*, the Court said that "the justice of which equity is an emanation, is not abstract justice but justice according to the rule of law; which is to say that its application should display consistency and a degree of predictability; even though it looks with particularity to the peculiar circumstances of an instant case, it also looks beyond it to principles of more general application".[99] In the *Asylum* case, the Court contrasted arbitrary proceedings initiated by a State against an individual with the rule of law when it stated that "[i]n principle, therefore, asylum cannot be opposed to the operation of justice. An exception to this rule can occur only if, in the guise of justice, arbitrary action is substituted for the rule of law. Such would be the case if the administration of justice were corrupted by measures clearly prompted by political aims."[100] The Court reiterated this point in *ELSI*, opining that "[a]rbitrariness is not so much something opposed to a rule of law, as something opposed to the rule of law... It is a wilful disregard of due process of law, an act which shocks, or at least surprises, a sense of juridical propriety."[101]

[97] See, for example, the suggestions in the paper entitled *The UN Security Council and the Rule of Law: The Role of the Security Council in Strengthening a Rules-based International System, Final Report and Recommendations from the Austrian Initiative, 2004-2008* (Letter dated 18 April 2008 from the Permanent Representative of Austria to the United Nations addressed to the Secretary-General, A/63/69-S/2008/270, annex), recommendations 10-14.

[98] See, for example, *ibid*, paras. 41-47 and the accompanying recommendations 15-17. For a more tentative approach, see Bodeau-Livinec, Villalpando, *supra* note 57, at pp. 99-100.

[99] *Ibid.*

[100] *Continental Shelf (Libyan Arab Jamahiriya/Malta, Judgment, I.C.J. Reports 1985*, p. 13 at p. 39, para. 45.

[101] *Colombian-Peruvian asylum case, Judgment of November 20th, 1950, I.C.J. Reports 1950*, p. 266, at p. 284

THE RELATIONSHIP BETWEEN INTERNATIONAL LAW AND THE IDEA OF THE RULE OF LAW: CONCLUSIONS

To ask how useful a concept the rule of law is at the international level is not in any way to question its importance in a domestic setting,[102] or the importance of international efforts to enhance the domestic rule of law around the world.[103] It may be concluded that the 'problem' with the rule of law at the international level is not with the concept as such, which has a significant if secondary role in relation to international law, but with the all too frequent misuse of the term. It might be preferable (but the suggestion no doubt comes too late) if the expression 'rule of law' were generally avoided at the international level, as being vague and misleading. But perhaps its use could be confined to two contexts where it undoubtedly has a useful meaning. First, to encapsulate the important and not invariably self-evident proposition that States and other international actors should comply with the rules of international law by which they are bound; and second, to refer to the need to ensure a degree of 'rule of law' domestically, in post-conflict situations and throughout the world.

Can there be the rule of law where rules of law, and even the processes for identifying rules of law, are unclear? Is it contrary to the rule of law if no court has jurisdiction to resolve a dispute? Is it contrary to the rule of law if no means for enforcing the law exists in a particular case? The answers are not clear-cut. Even in the context of national law, the answers are relative. Rules are more or less clear. Just because a rule is unclear does not mean it is not law. A court is not always available, and when available is not always accessible. Enforcement may be patchy.

In the case of international law, these deficiencies are even more apparent and the answers even more relative. It could hardly be otherwise. Let us suppose that a rule of international law (for example, the law on the use of force) were deemed so unclear that it fell foul of some applicable 'rule of law' standard. To conclude, as a result, that it was no longer to be applied as law would hardly be compatible with the rule of law.

When used with reference to international law, does the term 'rule of law' mean anything more than that international law should be obeyed? Probably not a great deal more. But that is already much – perhaps more than we should expect, having regard to how States behave in practice. It is fundamental to the rule of law at the international level that there be a reasonable level of compliance with international law.

[102] *Electronica Sicula S.p.A (ELSI), Judgment,I.C.J. Reports 1989*, p. 15, at p. 76, para. 128.

[103] The importance of the rule of law domestically has been enhanced recently in the United Kingdom by the establishment of the Bingham Centre for the Rule of Law within the British Institute of International and Comparative Law. See also the *Hague Journal on the Rule of Law* (first issue 2009). The Hague Institute for the Internationalisation of Law has published a Rule of Law Bibliography: Books, Articles and Chapters in Edited Volumes.

It is possible to reach the following conclusions on the relationship between international law and the idea of the rule of law:

(a) The idea of the rule of law, in its formal aspects, may be applied to international law as it applies to national legal systems.
(b) In specific terms, and essentially as a policy matter,[104] one may judge the rules of international law by formal rule-of-law tests in various ways, including the following:
    (i) Rules of international law should promote order, clarity and consistency in international relations. The aim should be the consistent and transparent application of clear rules. Yet international lawyers, more so than their domestic colleagues, seem to delight in disputing the content of the law.
    (ii) Rules of international law should uphold concepts such as fairness, security and justice for individuals, without limiting the proper authority of the State.[105]
(c) Substantive approaches to the rule of law at the domestic level are unlikely to apply to international law, which has its own basic concepts, such as the supremacy of the United Nations Charter,[106] *pacta sunt servanda* and *jus cogens*, that may serve a similar function.
(d) If the rule of law is to play a useful role at the international level, those who use the term -- at least if they are lawyers – should consider carefully before they deploy it, and should have a clear idea in what sense they are using it.

[104] Such as those of the International Commission of Jurists (whose 1959 New Delhi Declaration was seminal), the International Bar Association and the World Justice Project, as well as those of the UN itself.
[105] Cf. S. Chesterman, *supra* note 4, para. 46.
[106] These formulations are taken from the International Law Commission, cited at *supra* note 85.
[107] Art. 103.

AN ANSWER TO ONE CRUCIAL QUESTION OF HUMAN RIGHTS

AN EPISTEMOLOGICAL EXCURSUS INFORMING *JALLOH V. GERMANY* AND *GÄFGEN V. GERMANY* CASES[1] AT THE EUROPEAN COURT OF HUMAN RIGHTS

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* * *

INTRODUCTION

The imposition of suffering with the purpose of extracting a confession or other information is traditionally regarded as an issue in itself, a problem with its own nature and causes. If at all, then the writers tend to explain its origins in terms of the formal evidentiary standards, i.e. how much proof, defined in advance, is required for conviction.[2] However, the structural source of torture as a procedural device does not lie in this or that partial evidentiary requirement. After all, what is the cause of the earliest formal proof rules in Continental Europe? Why has torture never flourished in an adversary system? Why do we intuitively connect it with the inquisitorial system? All these questions are left unanswered; the student instead is bombarded with irrelevant legalisms.

Torture is a systemic by-product of criminal procedure, where the power of hypothesis-formation and testing is paired with the direct physical power over the defendant.

Pogačnik, M. and others (ed.): Challenges of Contemporary International Law and International Relations- Liber Amicorum in Honour of Ernest Petrič, p. 451-463

[1] See: *Jalloh v. Germany* [GC], no. 54810/00, ECHR 2006-IX; and *Gäfgen v. Germany* [GC], no. 22978/05, 1 June 2010.
[2] See J.H. Langbein, TORTURE AND THE LAW OF PROOF: EUROPE AND ENGLAND IN THE ANCIEN REGIME (1977); M. Damaška, *The Death of Legal Torture*, 87 Yale Law Journal 860 (1978).