

# The international rule of law and the domestic analogy

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**Abstract:** A surge in academic interest in the interaction of international law with international politics has recently raised the profile of the rule of law in global politics. The idea of an ‘international rule of law’ is central to many accounts of international order, and to both political science and legal scholarship. Despite its popularity, the concept is rarely defined or examined. This article considers the theory and practice of the international rule of law. It shows first that the international rule of law cannot be deduced from the conventional Anglo-American version of the rule of law in domestic legal theory, as sketched by Joseph Raz and others. It then considers two competing versions of a distinctly international concept of the rule of law, one based on a positivist theory of compliance and the other on a structurationist theory of practice. The former is more common in legal and political scholarship but the latter accounts better for the political power of international law in relation to states.

**Keywords:** compliance; international rule of law; international theory; legal theory; rule of law

The idea that international politics should take place within a framework of law is widely taken for granted among scholars and policymakers, and along with it a commitment to the international rule of law is almost universal. A ‘rules-based international order’ is commonly assumed as both a descriptive fact about the world and a normative goal to be pursued. John H Jackson expresses a typical view both about the progress of rules and their position as replacements for power politics: ‘to a large degree the history of civilization may be described as a gradual evolution from a power oriented approach, in the state of nature, towards a rule oriented approach’.<sup>1</sup> Debates among social scientists and legal scholars over the

<sup>1</sup> JH Jackson, *Restructuring the GATT System* (1990) cited in JL Dunoff, ‘The Politics of International Constitutions: The Curious Case of the World Trade Organization’ in JL Dunoff and JP Trachtman (eds), *Ruling the World? Constitutionalism, International Law, and Global Governance* (Cambridge University Press, Cambridge, 2009) 185.

effects of international rules and law take place largely within the intellectual and political confines of this shared commitment, as do policy debates about the wisdom of particular pieces of international ‘global governance’.<sup>2</sup> Rather than take them as given, I examine directly the content, politics, and implications of these commitments. I find that the conventional assumptions about the international rule of law are conceptually inconsistent and empirically unrealistic. In their place, I explore the ubiquitous practice of using international law to justify state behaviour, and suggest that this practice constitutes the international rule of law. My account rests on an explicitly instrumental view of international law and an overt connection between international law and power politics – these are usually taken by scholars of international law to be anathema to the international rule of law, but I show how that they should instead be understood as central to it.

The rule of law is central to both the conception of the modern state and to the study of international law and international politics.<sup>3</sup> The two versions of the rule of law, domestic and international, were invented as solutions to very different problems. In domestic society, the rule of law addresses the problem of centralised authority. It is meant to place limits on the exercise of state power and to create a stable set of known rules that apply equally to all citizens. In international affairs, the rule of law is a response to the absence of such centralised authority – and to the externalities, inefficiencies, and other implications of the formally decentralised and

<sup>2</sup> Among international relations scholars, it is widely held that international order rests on a scaffolding of international rules that create incentives, shape interests, and guide expectations for states. This is common across schools of thought, and includes liberalism in its various forms, the English School and international society theorists, and many constructivists. The main dissenters from this consensus are materialist realists and Marxists, who in their different ways see international order as following from the internal pressures generated by military stockpiles or social forces respectively. On liberal order, see GJ Ikenberry, *Liberal Leviathan: The Origins, Crisis, and Transformation of the American World Order* (Princeton University Press, Princeton, NJ, 2011). On English School, see H Bull, *The Anarchical Society: A Study in World Order* (Columbia University Press, New York, NY, 1977). On constructivist rules-based order, see FV Kratochwil, *The Status of Law in World Society: Meditations on the Role and Rule of Law* (Cambridge University Press, Cambridge, 2014) and FV Kratochwil, *Rules, Norms, and Decisions: On the Conditions of Practical and Legal Reasoning in International Relations and Domestic Affairs* (Cambridge University Press, Cambridge, 1989). On materialist realism and Marxism, see SG Brooks and WC Wohlforth, *World Out of Balance: International Relations and the Challenge of American Primacy* (Princeton University Press, Princeton, NJ, 2008) and M Hardt and A Negri, *Empire* (Harvard University Press, Cambridge, MA, 2000).

<sup>3</sup> For instance JL Dunoff and MA Pollack (eds), *Interdisciplinary Perspectives on International Law and International Relations: The State of the Art* (Cambridge University Press, Cambridge, 2012); in a policy-setting: R Brooks, ‘10 Ways to Fix the Drone War’ *Foreign Policy* online, 11 April 2013, at <<http://atfp.co/110QXyK>> and PL Bergen and D Rothenberg (eds), *Drone Wars: Transforming Conflict, Law, and Policy* (Cambridge University Press, Cambridge, 2014).

atomised arrangement of authority that is characteristic of the sovereign state system.<sup>4</sup> Interstate relations therefore rest on a different model of the relation between agents and law. Some elements which are essential to the domestic rule of law (for instance, a certain kind of control over political authority) do not translate well to the international setting. But others (such as the legitimacy of transferring obligations via consent) are better suited to the international than to the domestic realm – international actors (i.e. states) make very explicit acts of consent to binding legal instruments, while domestic social-contract theory has endless trouble specifying how or when individuals give consent to their state.

Despite these differences, the two versions are commonly united by a shared commitment to a liberal normative view of politics and society, specifically: that the rule of law naturally generates valuable goods which are under-supplied in the absence of the rule of law; that the rule of law is an alternative to the arbitrary exercise of power; and that the ultimate product of a rule-of-law system is the choice by the law's subjects to *comply* with the rules.

This article sets out these assumptions and then shows that none of them accords with how the international rule of law works in practice. Instead, I argue that the study of international law should examine how law is used as a resource to explain, justify, and understand foreign policy. It is in the effort to fit state policy within international law that international law shows its power and reveals itself to be something like the constitutional structure of world politics.<sup>5</sup> The international rule of law exists in the expectation that states should explain their external policies in terms of compliance with international law. In the public diplomacy of states this is a constant: governments justify their actions as consistent with their legal obligations. This practice of justification, and its expectation on the part of others, is 'the international rule of law'.

This view of international law and politics leads to three implications for IR/IL scholarship. First, it affirms an instrumental model of international law in which law is a tool or resource that actors use in the pursuit of their goals. Second, and contrary to Goldsmith, Posner, and others, it implies that international law is a powerful influence on state decisions – just as the availability of a legal justification increases an actor's power, it follows

<sup>4</sup> The functional importance of international rules that reduce the inefficiencies of the interstate system is a common theme in liberal philosophy, including in I Kant, *To Perpetual Peace: A Philosophic Sketch*, trans T Humphrey in *Perpetual Peace and Other Essays* (Hackett, Indianapolis, IN, 1983); see also Bull (n 2).

<sup>5</sup> In this characterisation I mean 'constitutional' in the sense of a hierarchically superior set of rules that order political relations and either validate or make possible primary, regulative rules on conduct. See Section III below.

that the failure to find a justification must equally constitute a limit on that power. Having law with which to legitimate state policy enhances state power. This contradicts the naive realist view that state power trumps law. Finally, the fact that international law gets its power and meaning from being *used* in the practice of states implies a structurationist rather than positivist research method for the emerging interdisciplinary field at the boundary between international law and international politics.

The scope of this article is limited to public international law – that is, the formal apparatus of legal obligation binding on governments in their interactions with each other, and in particular those aspects of the international legal system for which there is no institutional capacity for authoritative and compulsory binding adjudication.<sup>6</sup> I therefore set aside a number of features which might fall under a broader concept of legal resources, including soft law, norms, and non-state actors, and I also concentrate on instances where no arbitral body is available to issue decisive rulings that define compliance and non-compliance with the law. This describes the classical ambit of the international rule of law and its ambition to fit global politics within a frame of law.

## I. The domestic theory of the rule of law

The rule of law is a form of social order, a mode of organising the relationships of authority that exist among potentially competing social institutions including legal institutions, government, leaders, and citizens. It refers to a social system in which stable rules exist which are binding on the citizens and the government alike, with the overall objective to ‘prevent the misuse and abuse of political power’.<sup>7</sup> This can be understood and institutionalised in a variety of ways, leading to vigorous debates in political philosophy, sociology, legal theory, and comparative politics about what it is and where it exists or doesn’t.<sup>8</sup>

<sup>6</sup> See KW Abbott and D Snidal, ‘Hard and Soft Law in International Governance’ (2000) 54 *International Organization* 421; and E Hafner-Burton, DG Victor and Y Lupu, ‘Political Science Research on International Law: The State of the Field’ (2012) 106 *American Journal of International Law* 47.

<sup>7</sup> JM Farrall, *United Nations Sanctions and the Rule of Law* (Cambridge University Press, Cambridge, 2007) 39. Also, R Brooks, ‘All the Pentagon’s Lawyers’, *Foreign Policy* online, 29 August 2012.

<sup>8</sup> In this large literature, see inter alia: B Tamanaha, *On the Rule of Law: History, Politics, Theory* (Cambridge University Press, Cambridge, 2004); J Raz, ‘The Rule of Law and its Virtue’ (1977) 93 *The Law Quarterly Review* 198; T Bingham, *The Rule of Law* (Penguin, London, 2001); T Ginsburg and T Moustafa (eds), *Rule by Law: The Politics of Courts in Authoritarian Regimes* (Cambridge University Press, Cambridge, 2008).

From these debates, a conventional core is often identified that centres on three essential requirements:

- 1) that society should be governed by stable, public, and certain rules;
- 2) that these rules should apply equally to the governed and to the rulers; and
- 3) that these rules should be applied equally and dispassionately across cases and people.

These three appear in various ways in the scholarship of legal philosophers. Brian Tamanaha labels them ‘formal legality’, ‘government limited by law’ and ‘rule of law, not man’.<sup>9</sup> Simon Chesterman, following AV Dicey, sees the three as ‘regulating government power, implying equality before the law, and privileging judicial process’.<sup>10</sup> Lon Fuller expands his list to eight principles of the ‘internal morality of law’.<sup>11</sup> The World Justice Project Rule of Law Index sees them as four.<sup>12</sup> The differences are minor because there is a great deal of overlap in the core propositions: 1) stable public rules that are 2) applied equally among citizens and 3) equally between citizens and the government. The three components are more than procedural requirements: they require a substantive commitment to dividing political power in a certain way. But they fall short of constituting a full theory of society because they provide only a framework in which other goals are pursued, not the goals themselves. I examine each in its domestic setting before turning to how they do or do not translate to the interstate context.

### *Public, stable rules*

Formal legality describes the sense in which rules must be made such that individuals can distinguish between legal and illegal actions. The rules must be clear and public, they must be forward-looking, they must be written in language that is sufficiently specific and yet be designed for general categories of behaviour rather than particular incidents. A functionalist case for formal legality rests on the argument that law can only be a useful guide for individual behaviour if the citizen can be reasonably confident

<sup>9</sup> Tamanaha (n 8) ch 9.

<sup>10</sup> S Chesterman, ‘An International Rule of Law?’ (2008) 56 *American Journal of Comparative Law* 331, 337. Hayek provides a similar list, with the important addition of a substantive list of rights without which he believes the rule of law cannot exist; see F Hayek, *The Constitution of Liberty* (Routledge, Abingdon, 1960).

<sup>11</sup> L Fuller, *Morality of Law* (Yale University Press, New Haven, CT, 1969). Also C Murphy, ‘Lon Fuller and the Moral Value of the Rule of Law’ (2005) 24 *Law and Philosophy* 239; J Brunnée and SJ Toope, *Legitimacy and Legality in International Law: An Interactional Account* (Cambridge University Press, Cambridge, 2010).

<sup>12</sup> World Justice Project ‘Rule of Law Index’ at <<http://www.worldjusticeproject.org/rule-of-law-index/>>.

that she or he knows what is lawful and what is not. Unless the rules are public, prospective, and somewhat stable, the citizen cannot meaningfully take them into account when acting. As Raz says, ‘the law should be such that people will be able to be guided by it ... . The law must be capable of being obeyed ... . It must be such that they can find out what it is and act on it.’<sup>13</sup> This underpins Hayek’s point that predictability in the law is essential for its contribution to human liberty.<sup>14</sup> The ability to differentiate the lawful from the unlawful undergirds law’s capacity to influence decisions, to organise society, and to predict general patterns of mass behaviour.

The goal of fixed and known rules is in perpetual tension with the possibility of making changes in the law. Law should be stable, but must be also open to change and amendment – thus, for instance, when Joseph Raz discusses the stability of the law, he couches it as ‘*relative stability*’.<sup>15</sup> This is managed in the theory of the rule of law by constructing non-trivial institutional requirements that govern the process for changing laws: Parliamentary approval, for instance, or a plebiscite. These are distinct from rules designed to prevent the government from taking certain substantive decisions, as might be controlled by a constitution or a bill of rights which make it impossible for the state to seek certain ends. The procedural rules on law-making exist to make it more difficult for the state to change existing law, but their existence in some form is necessary to accommodate the possibility of change. They reconcile the government’s authority to make and remake rules with the rule-of-law requirement that rules be (relatively) fixed. Of course, this generates the very real danger that the capacity of the government to change the law will undo the benefits thought to come from ‘relatively’ stable law in the first place, and as a consequence it leads to the second component of the rule of law: subordination of the government itself to the body of law.

### *Government limited by laws*

Knowability and stability of the law is not enough for the rule of law. The doctrine of the rule of law also insists on certain forms of equality. One of these is represented by what Tamanaha calls ‘government limited by law’, which is the requirement ‘the state and its officials are limited by the law’ just as are regular citizens.<sup>16</sup> (The second is described below

<sup>13</sup> Raz (n 8) 198.

<sup>14</sup> F Hayek, *The Political Ideal of the Rule of Law* (1955) cited in L Greenfell, *Promoting the Rule of Law in Post-Conflict Societies* (Cambridge University Press, Cambridge, 2013) 69.

<sup>15</sup> J Raz (n 8) 198 (emphasis in original).

<sup>16</sup> Tamanaha (n 8) 114.

as equality of application across cases.) The law is binding on all citizens, and all operate in the context of the law. In Dicey's words, this means 'not only that with us no man is above the law, but ... 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'.<sup>17</sup> This is the idea at the heart of Karen Alter's suggestion that 'diminishing the absolute power of governments is, of course, the objective of the rule of law'.<sup>18</sup> This provision subordinates the government to the law and equalises individuals and government as subjects of the law. Its absence in a legal system is often described as 'rule by law', in which 'authoritarian rulers ... capitalize on the regime-supporting roles that courts perform while minimizing their utility to the political opposition'.<sup>19</sup> As we shall see below, the application of this aspect of the rule of law to the international context is problematic due to the very different nature of governance in the interstate realm.

### *Rules applied consistently across cases*

Finally, the rule of law requires that the law be applied across cases in a particular manner – that judges and government officials follow or apply the relevant body of rules to the situation before them in accordance with laws (or norms) of procedure.<sup>20</sup> This is usually seen as being in distinction to the arbitrary exercise of power of some individuals over others, or to decisions taken based on the particular character or identity of the parties. As Raz has noted, this does not prevent laws that treat different groups or people unequally – such as guaranteeing rights to landowners that are not given to others.<sup>21</sup> Inequalities created by law are common, perhaps inevitable.<sup>22</sup> The rule of law requires only that the terms and categories created by law be applied equally across the cases to which they apply. This element of the concept produces the independent judiciary. Courts, 'with the duty of applying the law to cases brought before them and whose judgments and conclusions as to the legal merits of those cases are final',<sup>23</sup> are a device to implement the dispassionate adjudication of disputes arising

<sup>17</sup> AV Dicey, *An Introduction to the Study of the Law* (1885/1945) cited in Bingham (n 8) 4.

<sup>18</sup> K Alter, *The New Terrain of International Law: Court, Politics, Rights* (Princeton University Press, Princeton, NJ, 2013) 340.

<sup>19</sup> T Moustafa and T Ginsburg, 'Introduction: The Function of Courts in Authoritarian Politics' in Ginsburg and Moustafa (n 8).

<sup>20</sup> Tamanaha (n 8) 126.

<sup>21</sup> Raz (n 8) 200.

<sup>22</sup> P Cane, *Responsibility in Law and Morality* (Hart, Oxford, 2002); S Veitch, *Law and Irresponsibility: On the Legitimation of Human Suffering* (Routledge, Abingdon, 2007).

<sup>23</sup> J Raz (n 8) 201.



in and from law. Other institutions may well serve this purpose as well, or instead, but the independent judiciary is its leading institutional form in domestic societies today.

These three elements combine to constitute a conventional account of the rule of law as an amalgamated concept.<sup>24</sup> Its various components represent answers to different political problems and come from distinct historical processes of contestation.<sup>25</sup> These can be combined in different ways, giving rise to the comparative study of legal systems within the rule-of-law family. They are nevertheless usually seen as mutually reinforcing and as constituting together a distinct and coherent mode of governance, law, and society. It is this form of society that is often taken to characterise a ‘normal,’ modern state: this is the system that the historian Paul Johnson calls ‘the greatest public achievement of the second millennium’;<sup>26</sup> and that the United Nations and others strive to create in post-conflict societies and elsewhere;<sup>27</sup> and that conservatives see themselves as defending against the ‘creeping instrumentalism’ of law unmoored from a consensus over the common good.<sup>28</sup>

Two important consequences are often said to follow from this bundle and these give it its normative appeal: first, it may generate the obligation on individuals to obey the law, thus producing stability and social quiescence; and second, it may contribute to valuable substantive social outcomes, such as respect for individual rights and private property, and lower levels of government corruption.

On the first, the rule of law is sometimes said to be the source of citizens’ obligation to follow the law. This obligation can be identified as simultaneously a legal obligation, a political obligation, and a moral obligation. People are required to obey the law as a matter of law (that is, it is *binding*), and they are politically forced to obey (even accepting that some degree of non-compliance as unavoidable), and they are morally obligated to the extent that the rule-of-law criteria produce an ethical imperative – if the rules were produced legitimately, it is said, there is a

<sup>24</sup> JP McCormick, ‘Identifying or Exploiting the Paradoxes of Constitutional Democracy: An Introduction to Carl Schmitt’s *Legality and Legitimacy*’ in C Schmitt, *Legality and Legitimacy* trans J Seitzer (Duke University Press, Durham, VT, 2004).

<sup>25</sup> See Bingham’s historical narrative in *The Rule of Law* (n 8).

<sup>26</sup> P Johnson, *The Wall Street Journal*, 10 March 1999.

<sup>27</sup> See the UN Rule of Law project at <www.unrol.org>. Also T Carothers (ed), *Promoting the Rule of Law Abroad: In Search of Knowledge* (Carnegie Endowment for International Peace, New York, NY, 2006) and JM Farrell, *United Nations Sanctions and the Rule of Law* (Cambridge University Press, Cambridge, 2007).

<sup>28</sup> B Tamanaha, *Law as a Means to an End: The Threat to the Rule of Law* (Cambridge University Press, Cambridge, 2006) 2 and ch 12.



moral obligation on the individual to comply.<sup>29</sup> Taken together, they lead to Raz's conclusion that 'people should obey the law and be ruled by it'.<sup>30</sup> The rule of law is thus intrinsically linked to the idea of compliance on the part of the subjects and with a particular theory of social order and modern governance. In a society organised by the rule of law, one is expected to comply with the rules and one should be able to trust that others will generally comply with the rules. This gives order and predictability to society and marks one kind of transformation from the state of nature to society.

The second effect that follows from the rule-of-law society relates to substantive outcomes: various good things are assumed to follow from having the legal-political arrangement described above. These might include respect for human rights and dignity, a free press, anti-corruption, private property and transactions, individual autonomy, the capacity to plan in advance, and more. These outcomes give the rule of law its political appeal, since it is often thought that it represents an institutional arrangement that is more likely to produce a good society than are other alternative arrangements. This is what Lon Fuller sought to capture with the claim that the rule of law has an 'affinity with the good'.<sup>31</sup>

The relation between the rule of law and these substantive goals provides the basis for a key schism in the rule-of-law literature, between a thick and a thin version. In this article, I emphasise the rule of law in 'thin', institutional/procedural terms, as a set of rules and practices that organise a society. A competing view takes the position that a rule-of-law system cannot exist unless it is substantively devoted to goals like human rights, equality, or justice. This is a 'substantive' or 'thick' approach to the rule of law, and requires that the rules enshrine particular social ends, such as equality or liberty or justice. It arises in the form of a complaint that the 'thin' conception does not clearly rule out social evils (such as Nazism or torture) if these are permitted or required under the prevailing legal instruments. The thick version makes this conceptually impossible by marrying the idea of the rule of law to a substantive theory of social goods, so that a regime that fails to respect human rights (for instance) can at best be described as performing 'rule by law' but cannot be described as 'rule of law'.<sup>32</sup> In the language of global constitutionalism, this is akin to

<sup>29</sup> For instance, A Buchanan, *Justice, Legitimacy, and Self-Determination: Moral Foundations for International Law* (Oxford University Press, New York, NY, 2007). For empirical connections between legitimacy and law, see TR Tyler, *Why People Obey the Law* (Princeton University Press, Princeton, NJ, 2006). Also R Dworkin, *Law's Empire* (Belknap, Cambridge, MA, 1986).

<sup>30</sup> Raz (n 8) 196.

<sup>31</sup> L Fuller (1975) cited in Tamanaha (n 8) 95.

<sup>32</sup> Compare Tamanaha (n 8) ch 7 and the Introduction to Ginsburg and Moustafa (n 8).

suggesting that there exists a set of fundamental global norms – perhaps individual rights, or the regulation of warfare – that have constitutional status and against which formal laws can be judged for their constitutionality or lack thereof.<sup>33</sup> This view is common among scholars of world politics and law – it opens the door to the possibility (on the one hand) that states might sometimes rightly break international law to achieve these more important goals and (on the other) that some acts are inherently unlawful if they violate these norms.<sup>34</sup>

Arguing against this thick view, Joseph Raz warns that it is a mistake to equate ‘the rule of law with the rule of the *good* law’.<sup>35</sup> He is critical of the tendency to mix the theory of the rule of law with theories of substantive social and political goods, a tendency which is widespread among scholars and policymakers in international law and politics. For instance, the UN Secretary-General in 2004 defined the rule of law as ‘a principle of governance in which all persons ... are accountable to laws that are [among other things] consistent with international human rights norms and standards’.<sup>36</sup> A commitment to human rights norms is thereby defined into the very concept of the rule of law. Similarly, Tom Bingham explains the contribution made by the rule of law by describing society as it would exist in its absence. He says ‘the hallmarks of a regime which flouts the rule of law are, alas, all too familiar: the midnight knock on the door, the sudden disappearance, the show trial, the subjection of prisoners to genetic experiment, the confession extracted by torture, the gulag and the concentration camp, the gas chamber, the practice of genocide or ethnic cleansing, the waging of aggressive war. The list is endless.’<sup>37</sup> To produce this list, Bingham assumes that the things he finds abhorrent are illegal,

<sup>33</sup> These themes are raised in A Wiener, AF Lang, J Tully, MP Maduro and M Kumm ‘Global Constitutionalism: Human Rights, Democracy and the Rule of Law’ (2012) 1 *Global Constitutionalism* 1.

<sup>34</sup> On the first, see for instance TM Franck, ‘What, Eat the Cabin Boy? Uses of Force That Are Illegal but Justifiable’ in Franck, *Recourse to Force: State Action against Threats and Armed Attacks* (Cambridge University Press, Cambridge, 2002) and B Simma, ‘NATO, the UN and the Use of Force: Legal Aspects’ (1999) 10 *European Journal of International Law* 1. On the second, see the literature on *jus cogens* including E de Wet, ‘The Prohibition of Torture as an International Norm of *jus cogens* and Its Implications for National and Customary Law’ (2004) 15(1) *European Journal of International Law* 97, and on Carl Schmitt’s ‘community will’ in Schmitt (n 24).

<sup>35</sup> Raz (n 8) 209 (emphasis added). Michel Rosenfeld observes that the requirements of the rule of law and democracy can conflict; see M Rosenfeld ‘The Rule of Law and the Legitimacy of Constitutional Democracy’ (2001) 74 *Southern California Law Review* 1307.

<sup>36</sup> Report of the Secretary General on ‘The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies’, S/2004/616, para 6.

<sup>37</sup> Bingham (n 8) 9.

with the result that a perfectly faithful adherence to the rule of law will lead to a world in which these things do not happen. He constructs a model of the rule of law in which *non-compliance* with the law is the problem that needs addressing in the pursuit of greater human welfare. Compliance with the law is therefore the path to social goods, and non-compliance is a problem in search of a remedy.

I adopt a thin, formalist model of the rule of law here. This is agnostic about whether important social goods *follow from* the rule of law, but it insists that they cannot be constitutive of its existence. The ‘thick’ substantive model assumes too much: it suggests that the question to ask about a legal system is how well it institutionalises a particular set of goals. Not only does this subordinate the rule of law to a prior theory of what those goals are (and presumes prior agreement on that theory) but it also makes it hard to ask questions about how a legal system is different from other kinds of governance or morality or politics. A great deal of interesting politics takes place when the demands of the legal system do not map perfectly onto either individual interests or personal morality. The substantive approach presumes that justice and law align neatly with each other. But there are important phenomena to be studied in the instances and ways that they do not. International treaties are at best imperfect vehicles for justice, and at worst they may be complicit in giving governments impunity from responsibility for atrocities.<sup>38</sup> In such a world, even perfect compliance with one’s legal obligations goes not guarantee that one’s actions will be just, for the simple fact that the laws do not naturally or automatically reflect the demands of justice.

Can a society embody the three components of the rule of law but *not* protect (for instance) individual human rights? This is both an empirical and a conceptual question. Conceptually, it asks if such a place deserves to be called a ‘rule of law society’. This is a question about the definition of the rule of law, and many would deny such a place that label. Empirically, it asks whether the rule-of-law institutions (properly understood and instituted) necessarily lead to respect for individual human rights. The thin position on the rule of law takes law to exist in the rules and practices of a particular kind of governance and in the structure that upholds them. It presumes that this has interesting political causes and consequences, some of which may be related to achieving justice or other social goods. But not necessarily.

In this section, I have sketched what I take to be a conventional account of the rule of law as it is commonly applied in domestic legal theory, taking a formalist or ‘thin’ position as opposed to a substantive or ‘thick’ view of

<sup>38</sup> Veitch (n 22).

its essential components. In the next section, I consider the problems that arise when each of these components is brought to bear on the international setting of interstate relations. None can be directly translated to international affairs. The rule of law for world politics therefore must rest on foundations unique to the arrangement of political power and institutions that exist in the international domain.

## II. The domestic rule of law in the international system

The three components of the domestic rule of law encounter difficulties when applied to the international setting, each for its own reasons, and this section examines these difficulties. My goal is not to argue against the international rule of law in general. Rather, I show why the international version of the rule of law cannot be simply inferred from the domestic version. The domestic and international variants developed separately, in response to different political needs and challenges and they are premised on different arrangements of political power.

### *Public, Stable Laws?*

The first component of the domestic rule of law (that is, that rules be public and stable and forward-looking) has a simple international analogue in the form of the interstate treaty, and more generally in the codification movement from the nineteenth century through to the post-WWII period. The rise of legal positivism in international law, characterised by the belief that state consent is the ultimate source of legal obligation, produced a strong motivation for explicit treaties on a range of subjects, making the treaty the pre-eminent legal instrument. This roughly overlaps with what Koskenniemi has called the ‘heroic period’ for international law from 1870 to 1960.<sup>39</sup>

Treaties are thought to be valuable because they incorporate both the fixity that is presumed to be required for the rule of law and the consent of the subjects (i.e. states) through ratification by domestic political institutions. These two values are promoted by the legal positivist school into the very definition of international law: in the well-known words of the Permanent Court of International Justice in the *Lotus* case ‘International law governs relations between independent States. The rules of law binding upon States

<sup>39</sup> M Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870–1960* (Cambridge University Press, Cambridge, 2001) and M Koskenniemi, ‘The Advantage of Treaties: International Law in the Enlightenment’ (2009) 13 *The Edinburgh Law Review* 27.

therefore emanate from their own free will.<sup>40</sup> Consent to a formal text is, for Reinold and Zürn, the most direct means by which international law can achieve its ‘core objective’, which they summarise as to ‘stabilize actors’ normative expectations in an otherwise volatile world and shield them from ... the vicissitudes of politics’.<sup>41</sup> To do so, it is required ‘that legal rules display certain features, such as transparency, clarity, non-retroactivity, etc’.<sup>42</sup> Treaties are widely assumed to embody these characteristics and therefore the codification of international law is often equated with its ‘progressive development’.<sup>43</sup>

The codification of international law can now be seen as a central project of twentieth-century international relations. From the opening decades of the twentieth century, it is evident in the Covenant of the League of Nations (which demanded ‘a scrupulous respect for all treaty obligations’), and in Woodrow Wilson’s Fourteen Points (whose first principle is ‘1. Open covenants, openly arrived at ...’), and in the League’s Committee of Experts for the Progressive Codification of International Law and its 1930 Conference on Codification. Mid-century, the United Nations was founded with a commitment to ‘the progressive development of international law and its codification’ through the General Assembly (UN Charter, Article 13). This mandate produced the International Law Commission (ILC), which took over from the League’s Committee of Experts in 1947, as a permanent body of international-legal professionals committed to expanding the scope of international law. In the words of the ILC Constitution, its goal is to advance ‘the more precise formulation and systematization of rules of international law’ and ‘the preparation of draft conventions on subjects which have not yet been regulated by international law’.<sup>44</sup> The codification movement sees it as a success that the number of interstate treaties has grown exponentially. ‘Treaties,’ said the UN Secretary-General recently, ‘are a critical foundation to the rule of law.’<sup>45</sup>

The drive for codified law can be understood as the operationalisation of the first piece of the rule-of-law ideology: the requirement for clear and

<sup>40</sup> *The Case of the S.S. ‘Lotus’ (France v Turkey)*, Judgment of 7 September 1927, PCIJ Series A, No 10, at 18.

<sup>41</sup> T Reinold and M Zürn, ‘The Rule of Law and the “Rules about the Rules”’ (2012) Rule of Law Center Colloquium working paper, WZB, 9 July, 1.

<sup>42</sup> *Ibid* 12.

<sup>43</sup> See, for instance, the UN Charter, and United Nations, ‘The Role of the United Nations in International Law’ United Nations Fact Sheet #2 on Strengthening the Rule of Law (2012) at <[http://treaties.un.org/doc/source/events/2012/Press\\_kit/fact\\_sheet\\_2\\_english.pdf](http://treaties.un.org/doc/source/events/2012/Press_kit/fact_sheet_2_english.pdf)>.

<sup>44</sup> UN General Assembly Resolution 174, 1947, A/RES/174(II).

<sup>45</sup> Secretary-General’s Letter to Heads of State and Government, 9 May 2012, available at <<http://bit.ly/QFvrcF>>.

stable rules. Explicit well-written law is believed to make a particularly powerful contribution to international order. This is reflected in the modern ‘legalisation’ project among scholars of law and political science: Goldstein, Kahler, Keohane and Slaughter suggest that ‘fully legalized institutions bind states through law: their behavior is subject to scrutiny under general rules, procedures, and discourse of international law and, often, domestic law. Legalized institutions also demonstrate a high degree of precision, meaning that their rules unambiguously define the conduct they require, authorize, or proscribe.’<sup>46</sup> The stability and clarity of the rules are essential in the ‘move to law’ that these authors identify. These are the qualities that Thomas Franck identified as constituting the ‘determinacy’ of a rule: ‘that which makes its message clear’.<sup>47</sup> And while ‘some degree of indeterminacy is inevitable in any body of rules ... indeterminacy also has its costs, which are paid in the coin of legitimacy’.<sup>48</sup> ‘Indeterminate normative standards make it harder to know what is expected.’<sup>49</sup> ‘The more determinate a standard, the most difficult it is to justify non-compliance.’<sup>50</sup> Legalisation changes the calculations of actors because it specifies whether an action is permitted or not. It therefore gives others a standard by which to judge the state as compliant or not, and gives a basis for states’ reputations regarding rule-following and rule-breaking. Clarity and stability are the essence of international law.

Against all of this scholarship is the fact that individual states have the capacity to change the legal status of their behaviour – from illegal to legal, from violation to compliance – by the exercise of their legal and political agency. This is unthinkable in the classic domestic rule of law where the legality of an act is set by the state not the actor. States themselves choose which obligations will apply to them, and they choose as individuals. This does not negate the international rule of law – instead it signals that the relationship between codification and the rule of law is different in the international context than it is in the domestic. A clear rule does not mean a clear obligation, and the presence of an obligation does not mean there is consensus over the meaning of compliance.

This is an implication that follows from the often noted fact that sovereign states are both the authors and the subjects of international law,

<sup>46</sup> J Goldstein, M Kahler, RO Keohane and AM Slaughter, ‘Introduction: Legalization and World Politics’ (2000) 54 *International Organization* 385, 387.

<sup>47</sup> T Franck, *The Power of Legitimacy among Nations* (Oxford University Press, Oxford, 1990) 52.

<sup>48</sup> *Ibid* 53.

<sup>49</sup> *Ibid*.

<sup>50</sup> *Ibid* 54.

and from the emphasis on consent that is the heart of legal positivism.<sup>51</sup> The existence of a treaty does not imply an obligation on the part of a state – codified rules of international law wait on state consent. The curious status of unratified treaties reflects the fact that it is state consent to the treaty, rather than the treaty itself, that is legally binding.<sup>52</sup> This is different in the domestic version where a law on the books is by definition compelling on citizens (and on their government). The residual autonomy of sovereign states means that they can tailor their legal obligations to suit their needs and interests: states decline to sign or ratify treaties they disagree with, and they write reservations and understandings which limit or explain their obligations under the treaties that they do ratify. They exit treaties that come to impinge on their decisions in ways that they dislike.<sup>53</sup> Each state constructs its own set of legal obligations and fine-tunes it through reservations. Domestic legal subjects cannot do this.

This is evident in the North Korea's withdrawal from the Nuclear Nonproliferation Treaty (NPT) in 2003. As a non-nuclear weapon member of the NPT, North Korea's nuclear programme in the 1990s was a clear violation of international law. In 2003, it withdrew from the treaty following the required three-month notification period. In doing so, it ended its obligations to the treaty. (It may still be in violation of other international obligations with respect to its behaviour, including Security Council resolutions binding through the UN Charter.) Canada made a similar move in 1994 when it revised its optional-clause declaration to the International Court of Justice (Article 36(2)). Canada had embarked on an activist position toward protecting North Atlantic fish stocks, and to pre-empt any case before the ICJ for its behaviour it revised its optional-clause declaration to exclude any 'dispute arising out of or concerning conservation and management measures taken by Canada with respect to vessels fishing in the NAFO [Northwest Atlantic Fisheries Organization] Regulatory Area'.<sup>54</sup> With that, its conduct it removed the possibility of being found to be in violation of its obligations, and its position was affirmed shortly thereafter by the ICJ in the *Etsai* case.<sup>55</sup>

<sup>51</sup> J Klabbers, *An Introduction to International Institutional Law* (Cambridge University Press, Cambridge, 2002) ch 1.

<sup>52</sup> CA Bradley, 'Unratified Treaties, Domestic Politics, and the U.S. Constitution' (2007) 48 *Harvard International Law Journal* 307.

<sup>53</sup> LR Helfer, 'Exiting Treaties' (2005) 91 *Virginia Law Review* 1579.

<sup>54</sup> Cited in I Hurd, *International Organizations: Politics, Law, Practice* (2nd edn, Cambridge University Press, Cambridge, 2013) 197.

<sup>55</sup> CJ Tams, 'Current Developments: Jurisprudence of the International Court of Justice (Case Note: Fisheries Jurisdiction (Spain v Canada) Judgment of 4 December 1998)' (2009) <[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1413823](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1413823)>.



As a consequence, one cannot ask what international law is on a given topic and expect an answer that is generalisable across states. Instead, one must ask what the law is *for a given state*, and perhaps even *in relation to a specific other state*, and then look for the answer in the treaties, protocols, and custom that apply to that interstate relationship. For instance, the legal obligations taken on by Australia under the International Convention on the Regulation of Whaling (ICRW) are different than those taken on by Iceland (which has formally objected to certain provisions of the treaty), and both are different from the laws that apply to Turkey (which has not signed the Convention). The same act – for instance, taking a whale on the high seas in the Southern Ocean – has a different legal status depending on which of these states committed it. It is a violation of international law for Australia to permit an Australian vessel to hunt whales. It is not a violation for Iceland to allow Icelandic ships to do the same.<sup>56</sup> Turkey, because it has not signed the treaty, has an unlimited right to hunt whales.<sup>57</sup>

Much of international law is devoted to managing the degrees of freedom that states enjoy in tailoring their legal obligations. This includes the Vienna Convention on the Law of Treaties and its rules on denunciation of and withdrawing from treaties, adding or changing reservations, fundamental changes in circumstances, obligations and government succession, the relation of subsequent treaties to prior treaties on the same subject, etc.<sup>58</sup> These rules limit how states might use the autonomy that they possess to redefine their legal obligations – but they do not eliminate the autonomy of states to remove themselves from unwelcome legal constraints.<sup>59</sup>

In the domestic setting, Joseph Raz says ‘the rule of law is often rightly contrasted with arbitrary power. A government subjected to the rule of law is prevented from changing the law retroactively or abruptly or secretly whenever this would suit its purposes.’<sup>60</sup> In the interstate setting, this goal of a unified set of public rules that applies to all subjects cannot be achieved or even approximated because states retain the authority to accept, reject, or modify their legal obligations through treaty accession, reservations, and persistent objections. Each state could potentially have a unique set of

<sup>56</sup> Though several states have challenged the legality of Iceland’s position, and so the legal issue at the heart of this example is contested. See the details of objection and counter-objection contained in the Schedule to the ICRW at <<http://www.iwcoffice.org/commission/schedule.htm>>.

<sup>57</sup> This is true with respect to the ICRW. There can be other limits in other treaties to which Turkey is a party, including CITES which regulates the international trade in some whale parts.

<sup>58</sup> <[http://untreaty.un.org/ilc/texts/instruments/english/conventions/1\\_1\\_1969.pdf](http://untreaty.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf)>.

<sup>59</sup> See *inter alia* LR Helfer, ‘Exiting Treaties’ (2005) 91 *Virginia Law Review* 1579.

<sup>60</sup> Raz (n 8) 203.

legal obligations.<sup>61</sup> This is manifest in the nuanced way in which the UN Millennium Development Goals describe the commitment to the international rule of law: it says ‘We resolve therefore ... to strengthen respect for the rule of law in international as well as 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.’<sup>62</sup> The UN cannot make a straightforward claim that states should comply with all international law. Only that subset of law chosen by the state itself is binding. It is not an artefact of ‘insufficient’ progress toward an idealised version of the domestic rule of law – it is an essential implication of the institutional foundations of international law, and therefore is an insurmountable obstacle for the liberal project of applying the domestic rule-of-law model to international affairs.

In sum, the international legal system cannot satisfy the standard expectation in a rule-of-law society that law be clear and stable and known in advance. No matter how clearly it is written, it cannot indicate whether an action is legal or illegal independent of the identity of the actor-state in question. Because states are free to tailor their commitments to suit their needs and interests, the bundle of laws that attach to each state are unique to that state and the legality of an act may not be determinable as a general matter. What it means to ‘comply’ with international law depends on who is doing it, and what that state has done and said about the rule in the past and what it might do and say in the present case. The same act may be legal when committed by one state but illegal when committed by another; it may be legal when committed toward one state but illegal toward another. The legality of an act is endogenous to the choices of the state in question, rather than independent of it as it is in the domestic setting.

### *Government limited by law?*

The second component of the domestic rule of law is the requirement that law apply to the government as well as to the citizens. This is a solution to the problem of despotic leaders. It implies that the legal system should be an instrument for limiting the government’s authority over citizens and perhaps subjecting it to the will of the people, somehow defined. It can be seen as preserving the autonomy of the legal sphere from the political,<sup>63</sup>

<sup>61</sup> *Jus cogens* rules may constitute an exception to this rule as the concept implies universality. See K Hossain, ‘The Concept of Jus Cogens and the Obligation under the UN Charter’ (2005) 3 *Santa Clara Journal of International Law* 72–98.

<sup>62</sup> A/RES/55/2, II/9.

<sup>63</sup> Reinold and Zürn (n 41) 12.

or as ensuring that law is superordinate over government,<sup>64</sup> or as protecting individuals from the state.<sup>65</sup>

The international analogue to this is difficult to find: if the international rule of law is understood with reference to how the government is made accountable under law, then what is the international ‘government’?

The most popular answer may be to say that there is none, on the theory that the interstate political space is missing the central political institution and is therefore an anarchy in a very specific sense. This accords the standard model of ‘international anarchy’ that is represented in international relations theory in various forms by Kenneth Waltz, Hedley Bull, Alexander Wendt, and others. This is the ‘anarchy problematique’.<sup>66</sup> It is the premise of much international theory scholarship and suggests that the fundamental difference between domestic society and international society is the presence of government in the former and its absence in the latter.

This framing of the problem of international law may be sustainable if one takes the narrowest view of what constitutes ‘government’ – a centralised, authoritative, coercive institution kept in power by the twin forces of legitimacy and coercion. The institution of state sovereignty presumes that such a world government does not exist, and therefore the distinctive features of international law are often seen as a result of the attempts by states to manage their relations of interdependence in its absence.<sup>67</sup> This is the thought behind Kant’s Second Article for Perpetual Peace: ‘As nations, peoples can be regarded as single individuals who injure one another through their close proximity while living in the state of nature ... For the sake of its own security, each nation can and should demand that the others enter into a contract resembling the civil one and guaranteeing the rights of each.’<sup>68</sup>

However, most scholars no longer subscribe to this absolutist view of international anarchy. Across the range of IR theory perspectives, it is widely accepted that various forms and degrees of governance exist in the interstate system and as a consequence scholarship has turned to examine the extent to which the functions of governance are performed in international

<sup>64</sup> Raz (n 8) 203.

<sup>65</sup> FA Hayek, *The Road to Serfdom* (University of Chicago Press, Chicago, IL, 1994).

<sup>66</sup> K Waltz, *Theory of International Politics* (Addison-Wesley, Reading, MA, 1979); Bull *The Anarchical Society: A Study in World Order* (3rd edn, Columbia University Press, New York, NY, 2002); A Wendt, *Social Theory of International Politics* (Cambridge University Press, Cambridge 1999). The ‘anarchy problematique’ is from RK Ashley, ‘Untying the Sovereign State: A Double Reading of the Anarchy Problematique’ (1988) 17 *Millennium* 227.

<sup>67</sup> See the classic framing in RO Keohane, *After Hegemony: Cooperation and Discord in the World Political Economy* (Princeton University Press, Princeton, NJ, 1984).

<sup>68</sup> I Kant, *To Perpetual Peace: A Philosophic Sketch*, 1795, section 354, trans T Humphrey in *Perpetual Peace and Other Essays* (Hackett, Indianapolis, IN, 1983).

society by agents other than states as understood in classical public international law. These might include quasi-public regulation by private actors,<sup>69</sup> contracts or coordination among legal equals,<sup>70</sup> Great Power leadership or dominion,<sup>71</sup> pooled sovereignty organisations,<sup>72</sup> transnational class factions,<sup>73</sup> and other legitimated international institutions.<sup>74</sup> While none of these meet a formalist's definition of 'government', they provide evidence of disaggregated governance among states and sometimes exercise great influence over the processes of international (and perhaps domestic) life. Harold Koh suggests that we should think of state sovereignty in terms of the functions performed by a sovereign (rather than the centralised bureaucracy that often houses those functions), in which case these diverse institutions of international governance might be said to exercise sovereignty.<sup>75</sup> The international system is not an anarchy in the technical sense defined by Waltz, Bull, and others.

It follows therefore that 'governance without government' may exist at the international level,<sup>76</sup> and so the international rule of law may be expected to regulate its institutions. Two possibilities are worth considering as locations for international 'government' which might be regulated by the international rule of law: strong states and the UN system.

First, following Gerry Simpson and others, the international legal system might be seen as granting the most powerful states a governance role over the community of states, and in this case one can ask whether these agents of governance are subordinate to international law. It is often said that certain states (or the Great Powers as a class) have special responsibilities toward the international system, composed of rights and obligations for the maintenance of international order which do not attach to rank-and-file states. Claims about the importance of Great Power leadership, about

<sup>69</sup> T Büthe and W Mattli, *The New Global Rulers: The Privatization of Regulation in the New Economy* (Princeton University Press, Princeton, NJ, 2012).

<sup>70</sup> DA Lake, *Hierarchy in International Relations* (Cornell University Press, Ithaca, CT, 2009).

<sup>71</sup> G Simpson, *Great Powers and Outlaw States: Unequal Sovereigns in the International Legal Order* (Cambridge University Press, Cambridge, 2004).

<sup>72</sup> LW Pauly and E Grande, 'Reconstituting Political Authority: Sovereignty, Effectiveness, and Legitimacy in a Transnational Legal Order' in Grande and Pauly (eds), *Complex Sovereignty: Reconstituting Political Authority in the Twenty-First Century* (University of Toronto Press, Toronto, 2005).

<sup>73</sup> BS Chimni, 'International Institutions Today: An Imperial Global State in the Making' (2004) 15 *European Journal of International Law* 1.

<sup>74</sup> For instance, the UN Security Council: I Hurd, *After Anarchy: Legitimacy and Power in the UN Security Council* (Princeton University Press, Princeton, NJ, 2007).

<sup>75</sup> HH Koh, 'Transnational Public Law Litigation' (1991) 100 *Yale Law Journal* 2347.

<sup>76</sup> The phrase is from JN Rosenau and EO Czempiel, *Governance without Government: Order and Change in World Politics* (Cambridge University Press, Cambridge, 1992).

hegemonic stability, and about collective security all rest on this premise.<sup>77</sup> In this view, Tamanaha's category of 'government limited by law' might be satisfied in the international system by ensuring that the strongest states be bound by international law in their governance of the system. This they certainly are in a formal sense, but it is clear also that they have greater capacity to bear the costs of law-breaking and also greater influence in rule-making, both by dominating diplomacy where rules are negotiated and by the rules of recognition for customary law.

In practice, it is unlikely that the international rule of law can rest on the degree to which the international community or some 'leading' states are bound by the law as it is written. On the contrary, it is common to see customary law as changing due to changes in state practice, especially by the 'leading' state. This is precisely the conventional theory of how customary law develops but it is also evident in relation to treaties. The Security Council practice of treating abstentions by permanent members as something other than a veto arose in this way. This has been the consistent practice since the earliest days of the Council and yet it contradicts the plain meaning of the Charter clause that regulates voting in the Council. The first time the practice was used (in 1946) the irate ambassador from the Soviet Union stormed from the room in protest, but its repeated use and its practical advantages quickly extinguished any controversy.<sup>78</sup> Today, it is widely accepted as an informal revision of the Charter, and was affirmed by the ICJ in a 1971 opinion that rejected South Africa's claim that a resolution against it was illegal because three permanent members had abstained when it was passed.<sup>79</sup>

<sup>77</sup> The literature on the special role of Great Powers, singly or collectively, in generating international order is large and varied. It includes classical writings on great power politics including HJ Morgenthau, *Politics Among Nations* (Knopf, New York, NY, 1967); EH Carr, *The Twenty-Years Crisis 1919–1939* (Macmillan, London, 1939); Bull, *The Anarchical Society* (n 2). It also encompasses significant strands of writing on the needs of US foreign policy such as GJ Ikenberry, *After Victory: Institutions, Strategic Restraint, and the Rebuilding of Order after Major Wars* (Princeton University Press, Princeton, NJ, 2001); B Jones *et al.*, *Power and Responsibility: Building International Order in an Era of Transnational Threats* (Brookings, Washington DC, 2009). A more critical variant sees it as an aspect of hegemony or empire: G Simpson, *Great Powers and Outlaw States: Unequal Sovereigns in the International Legal Order* (Cambridge University Press, Cambridge, 2004); R Foot *et al.*, (eds), *US Hegemony and International Organizations* (Oxford University Press, Oxford, 2003); M Byers and G Nolte, *United States Hegemony and the Foundations of International Law* (Cambridge University Press, Cambridge, 2003); M Hardt and A Negri, *Empire* (Oxford University Press, Oxford, 2000).

<sup>78</sup> SD Bailey, 'New Light on Abstentions in the UN Security Council' (1974) 50 *International Affairs* 554.

<sup>79</sup> South Africa's argument does suggest that the consensus is something short of universal, or at least that there remains an opening for the strategic use of their complaint when it serves their interests. On informal Charter amendments, see I Hurd, 'Security Council Reform: Informal Membership and Practice in B Russett (ed), *The Once and Future Security Council* (St Martin's Press, New York, NY, 1997).

A similar development has underwritten the concept of humanitarian intervention since 1990. The use of force by states is illegal under the UN Charter unless authorised by the Security Council, and no distinction is made in the Charter for war motivated by humanitarian rescue. The development of Responsibility to Protect and other doctrines has arguably legalised humanitarian intervention even without Council approval.<sup>80</sup> The case in favour of the legality of humanitarian intervention rests on recent developments in practice among states, international organisations, and others in favour of the practice. Together, these form the foundation of the argument that a progressive development in the law has taken place so that Council approval is not necessarily a requirement for legal intervention.

In relation to both Security Council abstention and humanitarian intervention, powerful players in world politics decided that the new interpretation was a desirable improvement over the plain language of existing treaties and that as a consequence the new practice should not be considered rule-breaking. This represents the collective legitimisation of violation, ‘constructive non-compliance’, by which apparent violations are transformed into revisions of the law.<sup>81</sup>

One might alternately identify international ‘government’ with the United Nations or another formal international organisation. It would then be normal to ask how that body is limited by international law. This may amount to seeing the UN Charter as the constitution of the international system but it need not go that far.<sup>82</sup> The argument is particularly relevant for the UN Security Council with its decisive governing authority over the member states of the UN under the Charter. Its powers include the right to decide when to use force against member states, the right to act on behalf of all states when taking a decision, and the right to decide on its own sphere of competence. Together, these look very much like the Weberian definition of a state: a centralised agent that holds a monopoly on the legitimate use of force, and the Security Council may be a kind of world government.<sup>83</sup> Moreover, the Council undoubtedly has the authority to make law that is binding on all states, both in relation to specific threats to international peace and security and more generally in its recent ‘legislative’

<sup>80</sup> C Grey, *International Law and the Use of Force* (Oxford University Press, Oxford, 2004); cf Franck, ‘What, Eat the Cabin Boy? Uses for Force That Are Illegal but Justifiable’ (n 34).

<sup>81</sup> I Hurd, ‘The UN Security Council and the International Rule of Law’ (2014) *Chinese Journal of International Politics* 361.

<sup>82</sup> On the constitutional status of the Charter, see MW Doyle ‘The UN Charter: A Global Constitution?’ in Dunoff and Trachtman (n 1).

<sup>83</sup> I Hurd, *After Anarchy: Legitimacy and Power in the UN Security Council* (Princeton University Press, Princeton, NJ, 2007) ch 7.

mode, insisting on certain policies of all states.<sup>84</sup> If the Security Council (or the UN) is a form of international government, then it might follow that the Council or the UN must be situated within a setting of legal rules that limit its autonomy relative to its subjects (presumably: states).

The Council's relationship to international law has long been debated, beginning with the organisation's pre-history at San Francisco in 1945 when the US and others defeated a proposal to explicitly make the Council subordinate to international law all the way to *Kadi* in the Court of Justice of the European Union recently.<sup>85</sup> The UN Charter stakes a clear position on the matter – it affirms that the Council is a political rather than a legal organ and that it responds to 'threats to international peace and security' rather than to violations of international law. Subsequent practice has upheld the view that the Council does not decide legal issues.<sup>86</sup> For instance, Article 24(1) describes the Council as having 'primary responsibility for the maintenance of international peace and security' with no mention of international law, in contrast to the International Court of Justice which is described as the 'principal judicial organ of the United Nations' (Article 92).<sup>87</sup> When the Council does create legal obligations on UN members by using its powers in Chapter VII these must be understood as legal demands regarding political policy choices, rather than settlements of legal disputes themselves.

Whether the Council itself is required to follow international law is an open question. It is clear that it must abide by the Charter, but it is arguable whether the Council is superior or subordinate to the rest of international law. The argument for its superiority comes from the fact that the Charter authorises the Council to impose any solution it desires in response to a threat to international peace and security. It follows that it is not limited by international law in doing so. On this reading, the Council could not

<sup>84</sup> The binding quality of Council decisions is established at the intersection of arts 25 and 39 of the Charter. See also Farrall (n 7). On the Council's move into something resembling global 'legislation' see I Johnstone, 'The UN Security Council as Legislature' in B Cronin and I Hurd (eds), *The UN Security Council and the Politics of International Authority* (Routledge, London, 2008).

<sup>85</sup> On the early days, see RB Russell, *A History of the United Nations Charter: The Role of the United States, 1940–1945* (Brookings, Washington DC, 1958); for later practice, Farrall (n 7); on *Kadi*, C Gearty, 'In Praise of Awkwardness: *Kadi* in the CJEU' (2014) 10(1) *European Constitutional Law Review* 15–27.

<sup>86</sup> On the distinction between legal and political matters in the UN, see R Higgins, *The Development of International Law through the Political Organs of the United Nations* (Oxford University Press, Oxford, 1963); SR Ratner, 'The Security Council and International Law' in DM Malone (ed), *The UN Security Council: From the Cold War to the 21st Century* (Lynne Rienner, Boulder, CO, 2004).

<sup>87</sup> H Kelsen, *The Law of the United Nations* (Lawbook Exchange, Clark, NJ, reprint 2000); Farrall (n 7) ch 1.



(for instance) undertake an enforcement action for any purpose other than ‘to maintain or restore international peace and security’ (Article 39), but it could demand that states seize the assets of foreign governments or foreign nationals in a manner which would normally violate international laws on expropriation. This points to an ‘imperial Council’, in which the Charter authorises the Council to stand above international law.<sup>88</sup> The contrary argument, for its subordination to international law, rests on the view that since it is *constituted* by international law through the treaty process it is therefore in no position to act outside it. The *Kadi II* decision of the CJEU asked but did not answer the key question of whether that court could invalidate a duly passed resolution of the Council that conflicts with European law.

A second-order question concerns whether there exists an international institution with the competence to review the legality of Council actions. The International Court of Justice is the most logical candidate for such a role, though this is in considerable doubt – the ICJ has had several opportunities to exercise judicial review of the Council and it has avoided explicitly claiming that right.<sup>89</sup> Alvarez notes that ‘The World Court [ICJ] has never found any action taken by any UN organ to be illegal in a binding context’ and he suggests that doing so ‘would provoke a political crisis and appears unlikely given the limits on the ICJ’s jurisdiction, as well as gaps in international law’.<sup>90</sup> In both the *Namibia* and *Lockerbie* cases the Court was asked questions which implicated the limits of Council authority but in both it declined to provide a decisive interpretation either way.<sup>91</sup> Judge Schwebel said in the *Lockerbie* case (as summarised by the ICJ):

That raises the question of whether the Court possesses a power of judicial review over Council decisions. In Judge Schwebel’s view, the Court is not generally so empowered ... The Court has more than once disclaimed a

<sup>88</sup> JE Alvarez, ‘Contemporary International Law: An “Empire of Law” or the “Law of Empire”’ (2008) 24(5) *American University International Law Review* 811.

<sup>89</sup> See for instance JE Alvarez, ‘Judging the Security Council’ (1996) 90 *American Journal of International Law* 1.

<sup>90</sup> JE Alvarez, *International Organizations as Law-makers* (Oxford University Press, Oxford, 2005) 71.

<sup>91</sup> *Namibia* ICJ Reports (1971), and discussion in K Hossain, ‘Legality of the Security Council Action: Does the International Court of Justice Move to Take Up the Challenge of Judicial Review?’ (2009) 5(17) *Uluslararası Hukuk ve Politika* 133 at <<http://www.usak.org.tr/dosyalar/dergi/SX55yIGN3p9Urd6lBNqcC9nFBjNVyC.pdf>>. One element of the *Lockerbie* dispute was the claim by Libya that the Council acted *ultra vires* in imposing economic sanctions even after Libya satisfied the obligations under the Montreal Convention on the Suppression of Unlawful Acts against the Safety of Civil Aviation (1971) relating to air terrorism. This provided the Court the opportunity to review the legality of Council’s resolutions 731 and 748.

power of judicial review. The terms of the Charter furnish no shred of support for such power. In fact, they import the contrary, since, if the Court could overrule the Council, it would be it and not the Council which would exercise dispositive and hence primary authority in a sphere in which the Charter accords primary authority to the Council.<sup>92</sup>

This does not lead to the conclusion that international organisations are in general not bound by international law. They very clearly are, with a very small number of possible exceptions: notably, the UN Security Council when acting under Chapter VII of the Charter and the ICJ when deciding a case *ex aequo et bono* under Article 38(2) of the ICJ Statute. Instead, it shows that the domestic ideal of a government subordinated under law does not apply unproblematically to the international context since it presumes answers to a host of deep (and perhaps unanswerable) questions about the nature and location of government or governance at the international level.

### *Rules applied consistently across cases?*

The third element commonly cited in the domestic rule of law is that rules should be applied dispassionately and similarly across similar cases. This suggests that the content of the law should be constant, and be applied constantly, regardless of the identity of the actor. As with the other two elements, this idea meets decisive obstacles in the international realm in that international legal obligations are founded on precisely the opposite principle: that the identity of the state is an essential consideration in assessing the international lawfulness of an act.

At one level, the idea of legal equality is central to the self-understanding of international law in the sense that each sovereign state is said to begin as a legal person with equal rights and obligations to all other states. Article 2(1) of the UN Charter codifies this into what amounts to a legal premise for the interstate system: 'The Organization is based on the principle of the sovereign equality of all its Members.' Equality is enshrined in many other instruments and practices, including the ICJ Statute (Article 35), non-discrimination rules in the World Trade Organization, the law of treaties as embodied in the Vienna Convention on the Law of Treaties, and much more. The legal personality that underlies the existence of a sovereign state is usually understood to be a bundle of rights and obligations that is precisely the same for all states. With all of this weight placed behind sovereign equality, deviations from equality carry the burden of explanation – they stand in need of justification or defence or explanation.

<sup>92</sup> Summary of the Summary of the Judgment of 27 February 1998 at <<http://www.icj-cij.org/docket/index.php?sum=460&p1=3&p2=3&k=82&p3=5&case=88&PHPSESSID=31e7e012b66d5744748863cc574778a3>>.

In practice, however, this expression of sovereign equality moves the international legal–political system *away from* rather than toward the idea of legal equality as imagined in the domestic rule of law. As authors of their own legal obligations, for states the equal application of the law means something different than it does among individuals. First, states' legal rights and obligations diverge as soon as some of them consent to treaties. Each acquires a distinctive portfolio of obligations, with the effect noted above that the lawfulness of a particular act is therefore variable and depends on which state is doing it. Second, the absence of compulsory jurisdiction means that court decisions are equally particularistic, since states possess the negative right to *not* be bound by the legal decisions of others. This is explicit in the ICJ Statute, which says ICJ decisions 'have no binding force except between the parties and in respect of that particular case' (Article 59, Statute of the ICJ). Third, it is obvious that states have unequal influence on making and remaking international rules – the statements, acts, and interests of some count for more in international legalisation, sometimes formally and sometimes informally.<sup>93</sup> This is equally true of customary international law as it is of treaties.<sup>94</sup> And while this is sometimes dismissed as merely a deviation from the ideal of equality, it is in fact well integrated into the practices and institutions of legalisation and legal interpretation – it has been 'normalised' as Simpson and others have shown.

In sum, the international legal system demands in various ways that the legal affairs of states be understood in particularist terms – as the expression of the specific circumstances of the parties involved. It cannot treat legal obligations as consistent across the identities of various states. In many areas of international law, there can be no general answer to the legality of an act: from torture to nuclear research to labour standards, to determine what actions are lawful for a state one must first know what rules it has accepted and what reservations or understandings it has imposed on those acceptances.

States possess more freedom toward particular rules of international law than is compatible with the rule of law as understood in domestic affairs. They have the legal right to accept or reject them, and some practical capacity to redefine them, as they wish. This is particularly striking for

<sup>93</sup> *Inter alia* N Krisch, 'International Law in Times of Hegemony: Unequal Power and the Shaping of the International Legal Order' (2005) 16(3) *European Journal of International Law* 369.

<sup>94</sup> For customary law, state agency is preserved by the persistent objector rule. See DA Coulson, 'How Persistent Must the Persistent Objector Be?' (1986) 61 *Washington Law Review* 957. For a critique of the concept of the persistent objector, see P Dumberry, 'Incoherent and Ineffective: The Concept of the Persistent Objector Revisited' (2010) 59 *International and Comparative Law Quarterly* 779.

strong states, as these are given greater weight in the ongoing interpretation of rules in practice and have greater capacity to write, resist, and enforce rules as they wish. This is not to say that the rules are meaningless.

Each of the three pillars often thought to be essential to the domestic rule of law is contradicted by fundamental elements of the interstate system. Sovereign states do not accept that they are automatically bound by stable, shared rules that are applied equally and dispassionately horizontally across cases and vertically between agents and a ‘government’. As a consequence, it is clear that the international rule of law cannot be deduced from the domestic version.

### III. The international rule of law as constitutional structure?

The particularism of states’ specific legal obligations contrasts with the universalism of the rule-of-law ideology. The tension between fragmentation and unity, which is often seen as bedevilling the development of a coherent international legal system,<sup>95</sup> in fact shows a way forward for thinking about the international rule of law – it neatly separates that which is universal and uncontested and that which is particular and contested. In the conventional account of international law, the former consists of the general expectation that states will act in accordance with international law (i.e. the international rule of law) and the latter contains the actual substantive obligations that apply to them. The latter varies from state to state and is subject to active reconstruction by states through the mechanisms discussed above.<sup>96</sup> The former is essentially unquestioned in world politics today and it is what I identify as the international rule of law. This commitment might be conceived as occupying a constitutional position in the international political system. In conclusion, I develop this insight and show that it helps uncover the hidden politics of the international rule of law, a set of liberal political commitments which depoliticise power relations and are embedded in the conventional ‘legalisation’ project in international relations.<sup>97</sup>

<sup>95</sup> See for instance AL Paulus, ‘The International Legal System as a Constitution’ in Dunoff and Trachtman (n 1).

<sup>96</sup> As Koskenniemi notes, ‘the project of the rule of law cannot be reduced to the fidelity to the purported meaning of particular laws ... what laws mean and the objectives they may appear to have will depend on the judgement of the law-applier’. M Koskenniemi, ‘Constitutionalism as Mindset: Reflections on Kantian Themes about International Law and Globalization’ (2007) 8(1) *Theoretical Inquiries in Law* 9.

<sup>97</sup> See also F Mégret, discussing Koskenniemi’s *From Apology to Utopia* in ‘Thinking about What International Lawyers “Do”’. The Laws of War as a Socio-Legal Field Structured by Apology and Utopia’ in W Werner (ed), *The Law of International Lawyers: Reflections on the Work of Martti Koskenniemi* (2015).

The international rule of law refers to the intellectual and political commitment – Scott calls it an ideology<sup>98</sup> – to the idea that all state behaviour should conform to whatever international legal obligations relate to it and that the result of executing this commitment faithfully is a well-ordered international space. It exists in the widespread belief that states should conduct themselves according to international law, which in practice means that they will use the resources of international law to explain and justify their policies. This is the constitutional meta-norm that makes international diplomacy and politics recognisably contemporary: giving, receiving, and arguing over the legal reasoning that authorises state acts.<sup>99</sup>

The use of international law as a legitimating discourse is pervasive in contemporary international politics. States almost without fail provide public explanations for how their behaviour is consistent with their legal obligations and they routinely use the charge of ‘illegality’ to delegitimize the acts of others which they oppose. This practice, and the expectation that others will engage in it, provides the structure for world politics. Law is the language that states use to understand and explain their acts, goals, and desires and is both internal and external to state interests.

With this role in international affairs, the international rule of law comes to be ‘constitutional’ in world politics in the sense of providing the fundamental rules within which the normal conduct of politics and contestation takes place.<sup>100</sup> By constitutional, I mean the sense in which these rules are in a position of hierarchy over the actors and whatever regulation, legislation, and contracts they might agree upon – they ‘validate posited law’.<sup>101</sup> They are taken for granted, and function as imperative norms<sup>102</sup> which make possible ‘ordinary political contestation and disagreement’;<sup>103</sup> they are constitutive of agents and their choices and so are both constraining and empowering.<sup>104</sup> In my use, international

<sup>98</sup> SV Scott, ‘International Law as Ideology: Theorizing the Relationship between International Law and International Politics’ (1994) 5 *European Journal of International Law* 313.

<sup>99</sup> I Hurd, ‘International Law and the Politics of Diplomacy’ in OJ Sending, V Pouliot and IB Neumann (eds), *Diplomacy and the Making of World Politics* (Cambridge University Press, Cambridge, 2015).

<sup>100</sup> ‘The mode of contestation, that is the way that contestation is displayed in practice, depends on the ... environment where contestation takes place.’ A Wiener, *A Theory of Contestation* (Springer, Berlin, 2014) 1.

<sup>101</sup> M Kumm, AF Lang, J Tully and A Wiener, ‘How Large is the World of Global Constitutionalism’ (2014) 3(1) *Global Constitutionalism* 1, 1.

<sup>102</sup> S Besson, ‘Whose Constitution(s)? International Law, Cosmopolitanism, and Democracy’ in Dunoff and Trachtman (n 1).

<sup>103</sup> Kumm *et al.* (n 101) 1.

<sup>104</sup> Koskenniemi (n 96) 9.

constitutionalism is independent of substantive commitments such as to cosmopolitanism<sup>105</sup> or humanity<sup>106</sup> or democracy,<sup>107</sup> and not dependent on centralised authority,<sup>108</sup> and not implicated in any particular domestic constitutional arrangement.

Taking this approach changes how the relations between international law and international politics should be studied. It abandons the liberal presumption that the rule of law is a neutral, non-political framework for politics and opens up three new lines of inquiry. First, it requires an explicitly instrumental approach to international law.<sup>109</sup> It is normal for all parties to claim to represent the fact of compliance, and they construct arguments in defence of that position using the legal resources of the past, adapted to present needs. Legal resources and categories are used by states to frame their choices, and specifically to legitimate them by showing them to be lawful. These legal justifications are not deliberative procedures in the sense envisioned by theorists of communicative action – they are not based on public reasons or reasoning, and there is no expectation that they will lead to a telos of consensus. They are instead self-interested and instrumental, but based on communal resources of international law with its internal logic and particular structure.<sup>110</sup> States are continually engaged in showing that they are complying with their obligations. They interpret the rules, and interpret their own behaviour, in such a way that the two coincide. This often means stretching the rules in ways that may be controversial, and also implies the inability to take actions for which no resources of justification exist.<sup>111</sup> In other words, law is both constraining and empowering.<sup>112</sup>

<sup>105</sup> A Peters, 'The Merits of Global Constitutionalism' (2009) 16(2) *Indiana Journal of Global Legal Studies* 397, 399.

<sup>106</sup> R Teitel, *Humanity's Law* (Oxford University Press, Oxford, 2011).

<sup>107</sup> Besson (n 102).

<sup>108</sup> JL Dunoff and JP Trachtman, 'A Functional Approach to International Constitutions' in Dunoff and Trachtman (n 1).

<sup>109</sup> I mean 'instrumental' here in Tamanaha's sense of being implicated in the agent's interests, in *On the Rule of Law* (n 8), and not in the sense used by Koskeniemi in 'Constitutionalism as Mindset: Reflections on Kantian Themes about International Law and Globalization' (n 96). Tamanaha warns against instrumentalism, as a nefarious dangerous development, but here I suggest it is elemental to the international legal-political system.

<sup>110</sup> This makes possible a dynamic interaction between legal resources and state interests, as outlined in C Wunderlich, 'Theoretical Approaches in Norm Dynamics' in H Müller and C Wunderlich (eds), *Norm Dynamics in Multilateral Arms Control: Interests, Conflicts, and Justice* (University of Georgia Press, Athens, 2013).

<sup>111</sup> C Taylor, 'To Follow a Rule...' in C Calhoun, E LiPuma, and M Postone (eds), *Bourdieu: Critical Perspectives* (University of Chicago Press, Chicago, IL, 1993).

<sup>112</sup> The 'sceptics' of international law and institutions generally forget the empowering half of this pair. For instance JL Goldsmith and EA Posner, *The Limits of International Law* (Oxford University Press, Oxford, 2006); JJ Mearsheimer, 'The False Promise of International Institutions' (1994/95) 19(3) *International Security* 5.

Second, it undermines the central role often given to the concept of ‘compliance’ in discussions of international law. The conventional approach to international law operationalises laws as independent of the instance of behaviour that they are used to judge; it is fundamentally positivist, in a social-science sense. Jana von Stein defines compliance as ‘the degree to which state behavior conforms to what an agreement prescribes or proscribes’.<sup>113</sup> When states change their policies to conform to a rule, it is taken as evidence that the rule is having an effect, that the state is a good international citizen, and that the international order is well-functioning. But under the approach that I advance here, the political impact of the use of legal justification does not come from the correspondence (or lack thereof) between that justification and an objective measure of compliance; it comes instead from the political process of presenting and contesting the legal justification itself. I take seriously the fact that states routinely construct legal narratives of compliance around their behaviour and these are naturally contested by those who oppose that behaviour. Following insights into the power of justification, these narratives are important political contributions<sup>114</sup> – they are productive, and jurisgenerative, in the process of being fought over.<sup>115</sup> When the core of the rule of law is identified as the use of legal forms in legitimation struggles then the question of whether a state is ‘complying’ with its obligations loses some of its meaning.

Finally, this leads to the inescapable connection between law and power. The ability to provide a legal justification is itself a source of power for states. The inability to do so is disempowering. The utility of legal justification proves its power. This contradicts both the liberal institutionalists, who commonly see legalisation as a means to avoid power politics, and the IR realists, who see law’s utility in the hands of great powers as a reason to pay less attention to legalisation. Both have it wrong. The political appeal of ‘legality’ for states is strongly compelling as it gives states the ability to portray their acts as lawful which brings with it more power. That states value this capacity is evident in the degree to which they strive to justify their acts using the resources of international law, and only by investing in legal justifications can a state get access to their legitimating power.

<sup>113</sup> J von Stein, ‘The Engines of Compliance’ in Dunoff and Pollack (n 3) 478.

<sup>114</sup> For instance, R Forst, *Justification and Critique: Toward a Critical Theory of Politics* (Polity, Malden, MA, 2013).

<sup>115</sup> On the productive and law-producing capacity of justifications in world politics, see S Epstein, *The Power of Words in International Relations: Birth of an Anti-Whaling Discourse* (MIT Press, Cambridge, MA, 2008). On forms of contestation, see N Deitelhoff and L Zimmermann, ‘Things We Lost in the Fire: How Different Types of Contestation Affect the Validity of International Norms’ (2013) PRIF/HFSK Working Paper No 18.



#### IV. Conclusion

The domestic rule of law is an invention that is designed to deal with specific set of governance problems arising from the hierarchical arrangement of political power inside a state. The international rule of law is addressed to a different problem: interdependence among actors, and the externalities and the potential mutual gains that arise when jurisdictions are free to make their own decisions in horizontal space. Of the three pillars of the domestic rule of law, none translates efficiently to the international context. Instead, the practices of states suggest that the rule of law exists in the degree to which states feel the need to account for their policies in terms of international law. This urge appears to be nearly universal and it may qualify as the core norm of contemporary world politics, the only norm of appropriate behaviour that can reasonably be said to be widely internalised by states. Almost without exception, states invest in explanations that situate their behaviour within the law and they promote those aspects of international law that favour their interests. This instrumental use of the law is not a failure of the law, nor is it a problem to be fixed; it is instead the system operating as it was designed. It affirms of the concept of the international rule of law: for these justifications to work, there must already exist a widespread belief in the importance of law, compliance, and the rule of law in general. Without a generalised commitment to the rule of law among states, the legitimating function of claims to compliance would not take place.

This image of the international rule of law leads to very different political conclusions regarding the contribution of international law to 'global order'. It makes impossible the standard view that international law is a neutral framework for resolving interstate disputes and arranging interstate affairs. It works against the separation of legal from political affairs that is characteristic of the liberal approach to international law and politics. It suggests instead that the effort to structure international politics within a set of rules is a substantive political commitment to the content, not just the form, of those rules, that is: to how it distributes power, resources, opportunity, liability, and more.

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