DEFINING THE INTERNATIONAL RULE OF LAW: DEFYING GRAVITY?

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Abstract This article aims to offer a definition of the international rule of law. It does this through clarifying the core objectives of a rule of law and examining whether the international system could include them. It demonstrates that there can be a definition of the international rule of law that can be applied to the international system. This definition of the international rule of law is not dependent on a simplistic application of a national rule of law, as it takes into account the significant differences between national and international legal systems. It seeks to show that the international rule of law is relative, rather than absolute, in its application, is not tied to the operation of the substance of international law itself, and it can apply to states, international organizations and non-state actors. It goes further to show that the international rule of law does exist and can be applied internationally, even if it is not yet fully actualized.

Keywords: definition, international law, international legal system, international rule of law, rule of law, States, United Nations.

> The rule of law is like the law of gravity. It is the rule of law that ensures that our world and our societies remain bound together and that order prevails over chaos. It unites us around common values and anchors us in the common good. But unlike the law of gravity, the rule of law does not arise spontaneously. It must be nourished by the continuing and concerted efforts of real leaders.[1]

The rule of law is not like gravity. Gravity has a hard scientific definition and physics calculation.[2] The definition of gravity attempts to describe something that exists in the real world—across the whole Earth—with its validity

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[1] Secretary-General of the United Nations (UN), UN General Assembly, 67th session, Agenda Item 83, High-Level Meeting on the Rule of Law at the National and International Levels, UN Doc A/67/PV.3 at 2.

[2] See eg I Newton, *Philosophiæ Naturalis Principia Mathematica* (1687) and, more recently, M Sands, R Feynman and R Leighton, *The Feynman Lectures on Physics: Volume I* (2013) available at <http://www.feynmanlectures.caltech.edu/I_07.html>.

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depending upon its explanatory force of the physical world.[3] In contrast, the rule of law seeks to describe and stipulate a set of principles of a system that does not yet exist fully in any location but which is sought to be attained. At an international level, the rule of law is often dismissed as being far distant from any compliance pulling force.[4] So the international rule of law might need to defy gravity[5] to make its principles globally applicable.

The UN Secretary-General made the statement above during the discussion at the United Nations (UN) that led to the adoption of the Declaration on the Rule of Law at the National and International Levels 2012.[6] There were 40 speakers there talking about the rule of law.[7] All were in favour of the rule of law. Most talked about the rule of law within their national legal systems and made passing reference to any international aspect of the rule of law. None set out a clear definition of the international rule of law. As a consequence, despite the 42 well-crafted paragraphs of the Declaration, there is no single clear definition provided of what constitutes the 'international rule of law'. This is consistent with the scholarly literature, which is replete with use of the term 'international rule of law' and yet, as will be shown, there are very few definitions provided.

The lack of a defined international rule of law is often used as a means to undermine the existence of a legitimate international legal system.[8] It can also be an excuse for considering that international law is entirely reliant on politics and lacks a normative basis, with Martti Koskenniemi noting that:

> The fight for an international Rule of Law is a fight against politics, understood as a matter of furthering subjective desires, passions, prejudices and leading into an international anarchy. Though some measure of politics is inevitable (as we commonly assume), it should be constrained by non-political rules.[9]

Indeed, Christian Reus-Smit argues that 'the international rule of law is not merely about the superiority of law but about its constitutive power, that is,

[3] The definition of gravity is still debated, and there are definitions of gravity within quantum mechanics and also a distinct concept of quantum gravity.

[4] See eg T Franck, 'Legitimacy in the International System' 82 AJIL (1988) 705, 706, who considered that the legitimacy of rules exerts a 'compliance pull' on governments which presses towards compliance with international law; see also J Brunnée and S Toope, *Legitimacy and Legality in International Law: An Interactional Account* (CUP 2010).

[5] See 'Defying Gravity' from the musical *Wicked: The Untold Story of the Witches of Oz* (2003) Music and Lyrics by S Schwartz, which include the lyrics: 'I'm defying gravity and you can't pull me down'.

[6] Declaration on the Rule of Law at the National and International Levels 2012 made at the High-Level Meeting on the Rule of Law at the National and International Levels (n 1).

[7] ibid.

[8] See eg T Gemkow and M Zurn, 'Constraining International Authority through the Rule of Law: Legitimatory Potential and Political Dynamics' in M Zurn, A Nollkaemper and R Peerenboom (eds), *Rule of Law Dynamics in an Era of International and Transnational Governance* (CUP 2012) 69, who note that having an international rule of law would contribute to the (otherwise lacking) legitimation of international institutions.

[9] M Koskenniemi, *The Politics of International Law* (Hart 2011) 36.

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the way in which it generates forms of agency, modes of action, strategies of justification and argument, and normative outcomes'.[10] Hence, the clarification of a definition of the rule of law, which demonstrates that it can exist on the international level, is a crucial part of the refutation of international law as being either politics or lacking in normative legality.

This article aims to offer a definition of the international rule of law. It does this through clarifying the core objectives of a rule of law and examining whether the international system could include them. Its aim is to demonstrate that there can be a definition of the international rule of law that can be applied to the international system. This definition of the international rule of law is not dependent on a simplistic application of a national rule of law, as it takes into account the significant differences between national and international legal systems. It seeks to show that the international rule of law is relative, rather than absolute, in its application, is not tied to the operation of the substance of international law itself, and it can apply to states, international organizations and non-state actors. It goes further to show that the international rule of law does exist and can be applied internationally, even if it is not yet fully actualized.

I. NATIONAL RULE OF LAW DEFINITIONS

There are a large number of definitions offered for the rule of law in national systems.[11] The common law tradition centres on the work of Dicey, who identified three aspects of it: the absolute supremacy of the law over government power; equality before the law; and enforcement before the courts.[12] The civil law tradition has generally focused less on the judicial process and more on the nature of the state in the form of the *état de droit, stato di diritto,* and *Rechtsstaat*, or the law-based state.[13] There are other traditions, such as the Indonesian *negara hokum*, as well as within the Arab world.[14]

Yet, even before the concept can be found, there has been difficulty in translating the term 'the rule of law' into other languages. Duncan Fairgrieve has shown that even translation between English and French is far from simple with possibilities including 'règle de droit', 'la primauté de droit' (used in Canada), 'préeminence du droit' (used in the Council of Europe) and

[10] C Reus-Smit, 'International Law and the Mediation of Culture' 28 Ethics & International Affairs (2014) 65, 79.

[11] See eg B Tamanaha, *On the Rule of Law: History, Politics, Theory* (CUP 2004); S Beaulac, 'The Rule of Law in International Law Today' in G Palombella and N Walker (eds), *Relocating the Rule of Law* (Hart 2009) 201; and A Bedner, 'An Elementary Approach to the Rule of Law' 2 HJRL (2010) 48. See also J Chevallier, *L'État de Droit* (5th edn, Montchrestien 2010).

[12] A Dicey, *An Introduction to the Study of the Law of the Constitution* (Macmillan 1885) Pt II. See also J Jowell, 'The Rule of Law' in J Jowell and D Oliver (eds), *The Changing Constitution* (8th edn, OUP 2015).

[13] See eg H Kelsen, *Pure Theory of Law* (2nd edn, University of California Press 1970) and P Costa and D Zolo (eds), *The Rule of Law: History, Theory and Criticism* (Springer 2007).

[14] See N Brown, *The Rule of Law in the Arab World: Courts in Egypt and the Gulf* (CUP 1997).

'Etat de Droit' (or law governed state), with the latter he considers being closest to the common law meaning.[15] These translation difficulties are increased outside the European world.[16]

The Council of Europe, in which there are 47 Member states from across Europe (including Russia), undertook a close analysis of the 'rule of law' across many legal traditions. In its Report on the Rule of Law,[17] the European Commission for Democracy through Law (known as the Venice Commission), discerned the following elements of a rule of law:

- Legality, including a transparent, accountable and democratic process for enacting law;
- Legal certainty;
- Prohibition of arbitrariness;
- Access to justice before independent and impartial courts, including judicial review of administrative acts;
- Respect for human rights; and
- Non-discrimination and equality before the law.[18]

Similarly, the great British jurist, Tom Bingham, crafted an incisive definition with eight sub-rules or principles:[19]

- The law must be accessible and, so far as possible, be intelligible, clear and predictable;
- Questions of legal right and liability should ordinarily be resolved by application of the law and not by the exercise of discretion;
- The law should apply equally to all, except to the extent that objective differences justify differentiation;
- Ministers and public officers at all levels must exercise the powers conferred on them in good faith, fairly, for the purpose for which the powers were conferred, and without exceeding the limits of such powers and not unreasonably;
- The law must afford adequate protection of human rights;
- Means must be provided for resolving, without prohibitive cost or inordinate delay, bona fide civil disputes which the parties themselves are unable to resolve;

[15] D Fairgrieve, 'Etat De Droit and Rule of Law: Comparing Concepts' (2016, forthcoming) PL.

[16] See C Bassiouni and G Badr, 'The Shari'ah: Sources, Interpretation and Rule Making' (2002) 1 UCLA Journal of Islamic and Near Eastern Law 135, who note that modern Arabic translates the 'rule of law' as *siyadar alqanun*, meaning a 'sovereignty of law'. My experience in other states has been a variety of definitions, with, for example, the Russians often translating the rule of law as *verkhovenstvo zakona*, being 'rule of the statutes'.

[17] European Commission for Democracy through Law (Venice Commission), Report on the Rule of Law, adopted at its 86th plenary session (Venice, March 2011), <http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2011)003rev-e>.

[18] ibid, para 41. In reaching this definition, they relied heavily on the work of Tom Bingham, referred to below.

[19] T Bingham, *The Rule of Law* (Penguin 2010).

- Judicial and other adjudicative procedures must be fair and independent; and
- There must be compliance by the state with its international law obligations.[20]

He expressed the concept of the rule of law succinctly as:

> [The rule of law means that] all persons and authorities within a state, whether public or private, should be bound by and entitled to the benefit of laws publicly made, taking effect (generally) in the future and publicly administered in the courts.[21]

It has also been argued that the rule of law is a 'meta-principle' as an organizational paradigm of constitutional law.[22]

These concepts of the rule of law tend to have been broken down by many scholars into definitional approaches: formal and substantive approaches; or formal, procedural and substantive approaches. Though, as Brian Tamanaha notes:

> The basic distinction can be summarized thus: formal theories focus on the proper sources and form of legality, while substantive theories also include requirements about the content of the law (usually that it must comport with justice or moral principle). While the distinction is informative, it should not be taken as strict – the formal versions have substantive implications and the substantive versions incorporate formal requirements.[23]

Formal approaches to the rule of law include accessibility, predictability, publicity, and generality of law or what is sometimes called 'legality'.[24] An example of this approach is Joseph Raz, who considers that '[t]he rule of law means literally what it says: the rule by laws. Taken in its broadest sense this means that people should obey the law and be ruled by it'.[25] Yet legality does not mean that there can be no discretion at all by a decision-maker, as Jeffrey Jowell (when considering this element of the rule of law) notes:

> At its most fundamental, the Rule of Law requires everyone to comply with the law … . Legality contains two features: First[ly] the law must be followed … [and] [s]econdly, in as far as legality addresses the actions of public officials, it requires that they act within the powers that have been conferred on them. All decisions and acts of public officials should generally therefore be legally authorized. The

[20] ibid, ch 3–10.

[21] ibid 8.

[22] L Pech, 'The Rule of Law as a Constitutional Principle of the European Union', Jean Monnet Working Paper 04/09 (NYU 2009) 42.

[23] Tamanaha, *On the Rule of Law* (n 11) 92. See also R Peerenboom, 'Varieties of the Rule of Law' in R Peerenboom (ed), *Asian Discourses of Rule of Law* (Routledge Curzon 2004) 5–6 and H Charlesworth, 'Comment' 24 AdelLRev (2003) 13, who notes that the procedural definition contains some inherent assumptions about substance.

[24] See L Fuller, *The Morality of Law* (Yale University Press 1964) esp ch 2.

[25] J Raz, 'The Rule of Law and its Virtue' in J Raz, *The Authority of Law: Essays on Law and Morality* (Clarendon Press 1979) 210.

> modern view … is that discretionary power is not wholly inimical to the notion of legality, but that discretion must be exercised within the scope of legality – in accordance with the purposes and objects of the power conferred on the decision-maker, and not in a way that is capricious.[26]

The *procedural* approach to the rule of law adds to the formal approach by requiring that the rule of law includes a means to resolve disputes and that the dispute mechanisms are governed by independent and impartial judges.[27] These two approaches are summarized by Jeremy Waldron as defining the rule of law as being the legal constraints on those in authority, clarity and predictability of laws, independent courts and legal equality.[28]

Those who adopt a *substantive* approach to the rule of law include the protection of human rights in it on the basis that the rule of law must adhere to principles of justice.[29] Ronald Dworkin, compared the formal or 'rule book' definition of the rule of law to a 'rights' concept of the rule of law:

> I shall call the second conception of the rule of law the 'rights' conception. It is in several ways more ambitious than the rule book conception. It assumes that citizens have moral rights and duties with respect to one another, and political rights against the state as a whole. It insists that these moral and political rights be recognized in positive law, so that they may be enforced upon the demand of individual citizens through courts or other judicial institutions of the familiar type, so far as this is practicable. The rule of law on this conception is the ideal of rule by an accurate public conception of individual rights. It does not distinguish, as the rule book conception does, between the rule of law and substantive justice; on the contrary it requires, as a part of the ideal of law, that the rules in the rule book capture and enforce moral rights.[30]

However, it is not clear which human rights would be included in the rule of law. Most substantive approaches would include the right to a fair trial within the definition, as being an implied part of the procedural approaches, and linked to the independence of the judiciary. As the Venice Commission explained:

> Everyone should be able to challenge governmental actions and decisions adverse to their rights or interests. Prohibitions of such challenge violate the rule of law … . It is vital that the judiciary has power to determine which laws are applicable and valid in the case, to resolve issues of fact, and to apply the law to the facts, in accordance with an appropriate, that is to say, sufficiently transparent and predictable, interpretative methodology. The judiciary must be independent and

[26] Jowell 'The Rule of Law' (n 12).

[27] See the discussion in eg Tamanaha (n 11) and S Beaulac, 'The Rule of Law in International Law Today' (n 11) 201.

[28] J Waldron, 'Are Sovereigns Entitled to the Benefit of the International Rule of Law?' (2011) 22 EJIL 315, 316–17.

[29] Some would include democracy as part of the substantive approach to rule of law. However, democracy is only a procedure, in which unjust laws can be made, and is not part of the rule of law—see Bedner (n 11) 62.

[30] R Dworkin, *A Matter of Principle* (Harvard University Press 1985) 11–12.

> impartial … . There has to be a fair and open hearing, and a reasonable period within which the case is heard and decided.[31]

Other relevant human rights for procedural aspects would include the right to liberty, being the right not to be arbitrarily detained, and the rights of equality and non-discrimination focus on legal issues affecting equality, liberty and adjudication.[32]

There are, though, a range of other human rights—civil, political, economic, social, cultural and collective—that might be considered to be included in a rule of law. Indeed, Adriaan Bedner notes that it could be argued that 'other parts of the rule of law can only function effectively if social rights [such as the right to education] are fulfilled and therefore the rule of law definition makes little sense for the poor and disadvantaged'.[33] While a discussion on this issue is outside the scope of this paper, in my view to include all human rights in the rule of law would blur the difference between the rule of law and human rights, when they are distinct ideas.[34] This is confirmed in the Preamble to the Declaration on the Rule of Law, which makes clear a distinction between the rule of law and all human rights: '[We] reaffirm our commitment to the rule of law and its *fundamental importance for* … the further development of the three main pillars upon which the United Nations is built: international peace and security, *human rights* and development.'[35]

It is the link between the other human rights and the rule of law that is key to the understanding of the other element of the rule of law: justice. Tom Bingham clarifies this in his comparison with Joseph Raz's approach and his own:

> [Joseph Raz has written:] 'A non-democratic legal system, based on the denial of human rights, on extensive poverty, on racial segregation, sexual inequalities, and religious persecution may, in principle, conform to the requirements of the rule of law better than any of the legal systems of the more enlightened Western democracies … . It will be an immeasurably worse legal system, but it will excel in one respect: in its conformity with the rule of law … . The law may … institute slavery without violating the rule of law' … .
>
> I would roundly reject [Raz's formal or 'thin' definition of the rule of law] in favour of a 'thick' definition [of the rule of law], embracing the protection of

[31] Venice Commission (n 17) para 53. Note also Bingham, *The Rule of Law* (n 19) 91–2: '[t]he right to a fair trial is a cardinal requirement of the rule of law … and that fairness means fairness to both sides … and independence of judicial decision-makers'. See also T Carothers, *Promoting the Rule of Law Abroad* (Carnegie Endowment for International Peace 2006) 4.

[32] P Craig, Paper to the UK House of Lords Select Committee on the Constitution, 6th Report, 2007: <http://www.publications.parliament.uk/pa/ld200607/ldselect/ldconst/151/15115.htm#n183>, notes that 'if we delve beneath the surface of phrases such as liberty and equality then significant differences of view become apparent even amongst those who subscribe to one version or another of liberal belief'. See also T Allan, *Constitutional Justice: A Liberal Theory of the Rule of Law* (OUP 2003).

[33] Bedner (n 11) 66.

[34] Note the views of H Charlesworth, 'Whose Rule? Women and the International Rule of Law' in S Zifcak (ed), *Globalisation and the Rule of Law* (Routledge 2005) 83: the rule of law cannot be objective or determinate and it can 'mask and even exacerbate the injustices to women'.

[35] Declaration on the Rule of Law (n 6) (emphasis added).

> human rights within its scope. A state which savagely represses or persecutes sections of its people cannot in my view be regarded as observing the rule of law, even if the transport of the persecuted minority to the concentration camp or the compulsory exposure of female children on the mountainside is the subject of detailed laws duly enacted and scrupulously observed.[36]

What Bingham is making clear is that in order to protect human rights, access to justice is an essential element of the rule of law. The rule of law enables all human rights to be protected by providing access to remedies for their breach before independent adjudicative procedures. While all human rights are not within the rule of law, no human right could be enforced effectively, or an appropriate remedy provided, without the rule of law. This is part of Bingham's principle that 'the law must afford protection of human rights'. Justice through the protection of human rights is thus a part of the rule of law in addition to equality, liberty and adjudication. This differentiates the rule of law from the rule by law, as having law by itself does not mean that it meets the requirements of a *rule of law*.

All of the concepts of the rule of law examined above, consistently include the following elements: that there is a predictable and clear legal order; there is an equality of application of the law; there is a settlement of disputes before an independent legal body; and access to justice to protect human rights. I will show that these elements can be seen as the objectives of an international rule of law.

II. THE RULE OF LAW BEYOND THE STATE

These definitions of the rule of law have all developed within the national legal systems. The definitions are primarily focussed on constraints or limitations by law of the power of the sovereign state and its agents and functions. As Waldron asks: 'Are ROL [rule of law] concerns applicable in the international realm? Might it not be the case that the absence of an international sovereign makes the ROL unnecessary?'[37] The answer is given by Nick Barber:

> While the rule of law has its origins in a theory concerned with domestic legal orders, there is nothing to prevent it from extending its reach to supranational, or sub-national, legal systems. The rule of law can be presented as a set of qualities that ought to be present in all legal orders.[38]

[36] Bingham, *The Rule of Law* (n 19) 66–7. He is quoting from Raz, *The Authority of Law: Essays on Law and Morality* (n 25) 221. See also the comment by the South African representative at the drafting of the Declaration on the Rule of Law, (n 6) at 6: 'The rule of law constitutes the backbone for the legal protection of human rights. In addition, the rule of law itself must be grounded in human rights. Growing up in South Africa, I experienced how the apartheid regime created a veneer of a rule of law based on legislation that institutionalized injustice and procedures that embodied unfairness. My experience has shown me that rule of law without human rights is only an empty shell'.

[37] Waldron (n 28) 322.

[38] N Barber, 'The Rechtsstaat and the Rule of Law' 53 University of Toronto Law Journal (2003) 443, 452.

The evidence is that the rule of law has been applied beyond the state into the international order. Indeed, there have been many international documents and statements over decades that have addressed the rule of law. For example, the Declaration on Principles of International Law Friendly Relations and Cooperation among states in accordance with the Charter of the United Nations 1970 (which is often seen as clarifying the terms of the UN Charter) referred to the 'paramount importance of the Charter of the United Nations in the promotion of the rule of law among nations'.[39]

UN bodies have been referring to the rule of law in increasing frequency in the last two decades. In matters of collective security, many UN peacekeeping operations have included the restoration or establishment of the rule of law as part of their aims, in the context of the overall purpose of enhancing peace and security.[40] The rule of law is also used by the Security Council in relation to good governance and justice, such as in its supporting of initiatives to improve governance and prevent corruption in Timor-Leste[41] and to protect human rights in post-conflict Iraq.[42] Indeed, one scholar has found that in Security Council resolutions between 1998 and 2006, the phrase 'the rule of law' appeared in at least 69 resolutions.[43]

References to the rule of law also appear in the policies and reports of international financial institutions. For example, according to the World Bank, the practical application of the rule of law means that people in a society 'have confidence in and abide by the rules of society, and in particular the quality of contract enforcement, the police, and the courts, as well as the likelihood of crime and violence'.[44] The Millennium Declaration included as its first objective of 'special significance', strengthening the rule of law.[45] This importance was affirmed at the World Summit 2005 by the statement that good governance and the rule of law were 'essential for sustained economic growth'.[46] The Sustainable Development Goals 2015 have a target to 'promote the rule of law at the national and international levels and ensure equal access to justice for all'.[47] The rule of law is being seen as both an outcome and the means of development for all states. The UN Commission on Legal Empowerment of the Poor noted that 'the rule of

[39] Declaration on Principles of International Law Friendly Relations and Cooperation among states in accordance with the Charter of the United Nations, UN GAOR Res 2625 (XXV) (1970).

[40] See eg Security Council Resolution 152 (2004) (concerning Haiti) and Security Council Resolution 1756 (2007) (concerning the Democratic Republic of Congo).

[41] See eg Security Council Resolution 1599 (28 April 2005) para 3.

[42] See eg Security Council Resolution 1483 (22 May 2003) para 5 and Security Council Resolution 1546 (8 June 2004) para 10.

[43] J Farrall, *United Nations Sanctions and the Rule of Law* (CUP 2007) 22

[44] World Bank, *A Decade of Measuring the Quality of Governance* (2006) 3.

[45] UN Millennium Declaration 2000, UN Doc A/Res/55/2, para 7.

[46] World Summit Outcome, A/RES/60/1 (24 October 2005) para 11.

[47] UN Sustainable Development Goals 2015, included as the 2030 Agenda for Sustainable Development UN Doc A/69/L.85. Access to justice is also included as Goal 16 and Targets 8, 9 and 35.

law is not a mere adornment to development, it is a vital source of progress. It creates an environment in which the full spectrum of human creativity can flourish, and prosperity can be built'.[48]

Despite the large number of statements about the importance of the rule of law, the first time the concept was defined was in 2004, in a report by the then UN Secretary-General. The report stated:

> [The rule of law is] a concept at the very heart of the [UN] Organization's mission. It refers to the principle of governance to which all persons, institutions and entities, public and private, including the state itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness, and procedural and legal transparency.[49]

This sets out a definition that has the elements of transparency, accountability, equality before the law, an independent judiciary and protection of human rights. This definition is used on the UN's dedicated website.[50]

This is an important definition. However, it is a statement about how the rule of law should operate in *national* systems and it is *not* a definition of the rule of law at the global level. It refers to the 'State itself' being accountable within its own system. Similarly, the use of the rule of law in the Security Council resolutions and other documents are essentially looking from a global view about the rule of law in national systems. They demonstrate an international consensus among states that the rule of law should operate in national systems.[51] They are intended to clarify why states should actualize the rule of law in their jurisdictions, as there are consequences for the state if the rule of law is not complied with by the state. For example, issues of good governance, which could be part of the rule of law, may affect the extent to which the state has access to international financial support.[52] This is reiterated in the Declaration on the Rule of Law, where the national

[48] UN Commission on Legal Empowerment of the Poor, *Making the Law Work for Everyone* (UNDP 2008).

[49] Report of the Secretary-General on the Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies, UN Doc S/2004/616 (2004) para 6.

[50] The UN has a Rule of Law Unit and a website on the rule of law: <http://www.unrol.org>.

[51] See also the Statute of the Council of Europe 1949 where, in art 3, each Member state commits itself to accepting the rule of law.

[52] See, though, J Gathii, 'Good Governance as a Counter Insurgency Agenda to Oppositional and Transformative Social Projects in International Law' 5 Buffalo Human Rights Law Review (1999) 107, 121–2 and A Angie, *Imperialism, Sovereignty and the Making of International Law* (CUP 2007) 313–14, who note that the use of 'good governance' can be used to serve the interests of the West and not of other states.

application of the rule of law is repeated, including in matters of justice and national security, judicial system and development.[53]

Accordingly, few of these international statements assist in understanding the extent to which there may be an *international* rule of law and, if so, the elements of which it would or should consist. Nevertheless, there are an increasing number of international statements that indicate that the notion of the rule of law should be applied to the international system. For example, the UN Millennium Declaration 2000 urged states to 'strengthen respect for the rule of law *in international and in national* affairs and in particular to ensure compliance by Member states with the decisions of the International Court of Justice (ICJ), in accordance with the Charter of the United Nations, in cases to which they are parties'.[54] In 2013, in the report on Strengthening and Coordinating United Nations Rule of Law Activities, the international rule of law was given a further definition:

> At the international level, the rule of law accords predictability and legitimacy to the actions of states, strengthens their sovereign equality and underpins the responsibility of a state to all individuals within its territory and subject to its jurisdiction. Full implementation of the obligations set forth in the Charter of the United Nations and in other international instruments, including the international human rights framework, is central to collective efforts to maintain international peace and security, effectively address emerging threats and ensure accountability for international crimes.[55]

In addition, the Declaration on the Rule of Law expressly refers to the international rule of law, and its application to the United Nations:

> We recognize that the rule of law applies to all states equally, and to international organizations, including the United Nations and its principal organs, and that respect for and promotion of the rule of law and justice should guide all of their activities and accord predictability and legitimacy to their actions. We also recognize that all persons, institutions and entities, public and private, including the state itself, are accountable to just, fair and equitable laws and are entitled without any discrimination to equal protection of the law.[56]

This is rationalized in the first paragraph:

> We reaffirm our solemn commitment to the purposes and principles of the Charter of the United Nations, international law and justice, and to an *international order based on the rule of law,* which are indispensable foundations for a more peaceful, prosperous and just world.[57]

[53] Declaration on the Rule of Law (n 6) paras 11, 13 and 34.
[54] UN Millennium Declaration 2000, UN Doc A/Res/55/2 (emphasis added).
[55] Report of the Secretary-General, 'Strengthening and coordinating United Nations rule of law activities', United Nations General Assembly Sixty-Eighth session, A/68/213.
[56] Declaration on the Rule of Law (n 6) para 2.
[57] ibid para 1 (emphasis added).

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Despite the increasing number of references to the international rule of law, there have been surprisingly few scholars who have put forward a clear definition of the international rule of law.

III. ATTEMPTS AT DEFINING THE INTERNATIONAL RULE OF LAW

The most well-known definition of an international rule of law has been put forward by Simon Chesterman.[58] He starts with a view of a national rule of law as having three principles: a government of laws (ie that a state's power may not be exercised arbitrarily); the supremacy of the law; and equality before the law; and he then applies this to the relations between states and other subjects of law, so that the international rule of law must be 'prospective, accessible, and clear'.[59] Thus the international rule of law can be described as requiring the 'avoidance of arbitrariness' and 'procedural and legal transparency'.[60] This is a formalist (or a 'functionalist')[61] approach.

His definition is very much focussed on legality, as 'international law-making processes should … be such as to satisfy some of the requirements associated with the international rule of law and in particular the requirements of clarity, publicity, certainty, transparency and fairness'.[62] In so doing, he draws a distinction between three forms of the rule of law internationally:

> In the first place, the *international rule of law* might be understood as the application of rule of law principles to relations between states and other subjects of international law … Secondly, however, the *rule of international law* could be seen as privileging international law over national law, establishing, for example, the primacy of 'human rights norms and standards' over domestic legal arrangements … Thirdly, a *global rule of law* might denote the emergence of a normative regime that touches individuals directly without formal mediation through existing national institutions.[63]

He dismisses the latter two possible definitions as not allowing a clear, neat clarification as to what is an international rule of law and allowing it to drift into political debate. He goes on to assert:

> The price of clarity is abandoning the additional role that the rule of law sometimes plays as a Trojan horse to import other political goals such as democracy, human rights, and specific economic policies. It is a price worth paying, however, as these substantive goals may properly be seen as distinct

[58] See eg S Chesterman, 'An International Rule of Law' (2008) 56 AmJCompL 331 and also S Chesterman, '"I'll Take Manhattan": The International Rule of Law and the United Nations Security Council' (2009) 1 HJRL 67, where he reasserts his earlier view.

[59] S Chesterman, 'An International Rule of Law' (n 58) 331, 342.

[60] R Brooks, 'Drones and the International Rule of Law' 28 Ethics & International Affairs (2014) 83, 87, commenting on Chesterman's definition.

[61] Chesterman (n 58) 333.

[62] S Besson, 'Sovereignty, International Law and Democracy' (2011) 22 EJIL 373, 385–6.

[63] Chesterman, '"I'll Take Manhattan": (n 58) 67, 68–9 (emphasis original).

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> from the rule of law – folding them into its robes reduces it to a rhetorical device at best, a disingenuous ideological tool at worst.[64]

Chesterman's formalist approach to defining the international rule of law applies one national rule of law approach to the international system (and will suit those states which are resistant to a broader understanding of international legal obligations).

Yet legality by itself does not create an international rule of law. An effective legal order must provide for the enforcement of legal obligations. Merely having law (in whatever form) alone does not make it compliant with a rule of law internationally. As Ian Hurd comments:

> The atomistic nature of the interstate system means that the international version of the concept [of the rule of law] cannot be modelled on the domestic one, but also that it cannot be reduced simply to the obligation on states to comply with their legal obligations.[65]

Indeed, such a formalistic approach to the international rule of law excludes the procedural aspects, found in the definition of the national rule of law, of having a settlement of disputes by law and an independent dispute settlement body. Indeed, one of the core principles of the UN is to settle disputes in a peaceful manner and to resort to judicial or other dispute settlement mechanisms.[66]

The formalistic definition also ignores any elements of justice as part of the international rule of law. This is despite the repeated use of the term 'justice' in the international documents on the international rule of law, such as in the Declaration on the Rule of Law, where 'respect for and promotion of the rule of law and justice should guide all of their activities and accord predictability and legitimacy to their actions'.[67] Of course, justice by itself is a contested term, and has been included as a core element of the international rule of law by the UN in the rather narrow contexts of development and economic growth.[68]

One reason for the lack of definitions of the international rule of law might be that there is a widespread view by scholars that the rule of law cannot exist at the international level.[69] Many writers point out that in the international system there is no one binding court, no one executive or legislature, no separation of powers, and that there is the sovereignty of states (and so no hierarchy of powers), with which to contend, so they conclude that the international rule

[64] Chesterman (n 58) 360.

[65] I Hurd, 'The International Rule of Law: Law and the Limit of Politics' (2014) 28 Ethics & International Affairs 39, 39.

[66] Art 2(3) and art 33(1) UN Charter and the Statute of the International Court of Justice.

[67] Declaration on the Rule of Law (n 6) para 2.

[68] See S Pahuja, *Decolonising International Law* (CUP 2011) 213–33. 'Justice' has also tended to be used to justify particular actions, especially on developing states, in terms of upholding the national rule of law.

[69] See commentary in R Collins, 'The Rule of Law and the Quest for Constitutional Substitutes' 83 Nordic Journal of International Law (2014) 87.

of law cannot exist.[70] For example, James Crawford concludes that only when ICJ has 'clear jurisdiction judicially to review action of all United Nations political agencies, including the Security Council … could the rule of law be said to extend to international political life'.[71]

The problem with this approach is that these writers equate the national rule of law with the international rule of law, and seek to find exactly the same institutional elements in the same way at national and international level.[72] This is a false comparison, especially as in the vast majority of states (including in some democratic industrialized states) these elements do not exist and yet it is accepted that there can be a national rule of law, as seen above.

There is also the criticism by some that if states do not comply with substantive international legal rules then there can be no international rule of law. This approach confuses the international rule of law with the existence of, and compliance with, substantive international law.[73] As Brian Tamanaha notes:

> [T]hat most states (including the powerful and rogue ones) do comply most of the time with international law, except when it really matters to them, even in the absence of the threat of effective institutional sanctions (facing mostly political or economic consequences), was roughly the scenario with respect to sovereigns in the Medieval period when the rule of law tradition took hold. Similar to monarchs under those circumstances, when sovereign states today violate international law, they nonetheless make every effort to construe their action as if consistent with the law, an effort which confirms that the law matters even as it is being circumvented.[74]

This resonates with the view of the ICJ in the *Nicaragua Case* that, where a state justifies its action by reliance on an exception to a law, then that is an affirmation of the existence of the law.[75]

Further, it seems to be assumed by many commentators that the rule of law exists or it does not exist at the international level, and so it is an 'all-or-nothing'

[70] See H Correll, 'A Challenge to the United Nations and the World: Developing the Rule of Law' 18 Temple International and Comparative Law Journal (2004) 399 and R Higgins, 'The Rule of Law: Some Sceptical Thoughts' in R Higgins, *Themes and Theories: Selected Essays, Speeches and Writings in International Law* (OUP 2009). Chesterman (n 58) 361, agrees, noting that '[a]t the international level anything resembling even [his] limited idea of the rule of law remains an aspiration'.

[71] J Crawford and S Marks, 'The Global Democracy Deficit: An Essay in International Law and Its Limits' in D Archibugi, D Held and M Kohler (eds), *Re-Imagining Political Community* (Polity Press 1998) 84, repeated in J Crawford, 'The General Course on Public International Law' (2013) 365 Recueil des Cours 13, ch 13. In the latter, Crawford accepts that the broad discretionary power of the Security Council is not necessarily a problem for the rule of law as the discretion is expressly provided for by the law of the UN Charter.

[72] It is also a false dichotomy to indicate that the rule of law exists only when law and politics are distinct: see Hurd, 'The International Rule of Law: Law and the Limit of Politics' (n 65) 39.

[73] See eg D Dyzenhaus, 'Hobbes on the International Rule of Law' (2014) 28 Ethics & International Affairs 53.

[74] Tamanaha (n 11) 131.

[75] *Nicaragua v US*, ICJ Reports 1986, para 186.

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concept.[76] However, the reality is that the existence of the rule of law is a matter of degree, with all legal systems being on a spectrum with no rule of law at all at one end and a complete actualization of the rule of law at the other. For example, the 'Rule of Law Index', pioneered by the World Justice Project, has sought to measure the *relative* compliance of legal systems throughout the world against the ideals of the rule of law.[77] It is not possible simply to conclude that the failure to meet the ideal elements of the rule of law means that there is no rule of law at all in a particular state.[78] Rather, there are varying degrees of adherence to the rule of law, as perfect adherence is 'an ideal'.[79] This is equally applicable at the international level, where a failure to meet the ideal of an international rule of law through complete actualization of all its elements cannot mean that there is no international rule of law at all.

IV. A NEW DEFINITION OF THE INTERNATIONAL RULE OF LAW

It appears that the definitions of the international rule of law that have been put forward are simply transpositions of the national concept and national institutions of the rule of law to the international system and, in so doing, have defined the international rule of law so narrowly that it is no more than a formal approach to states' international legal obligations. In doing so, scholars have concluded, almost with a collective shrug of acceptance, that the international rule of law cannot exist, and so it becomes almost not worthwhile exploring alternative definitions. While complying with international obligations is part of a national rule of law,[80] the international rule of law should not be confused with the existence of, and compliance with, substantive international law obligations. Given the considerable structural and institutional differences between national legal systems and the international legal system, as indicated above, the application of the concept and definition of the national rule of law to the international system is misconceived.

[76] J Crawford, 'International Law and the Rule of Law' 24 AdelLRev (2003) 3, 4.

[77] Rule of Law Index, World Justice Project, 'Rule of Law Index', available at <http://worldjusticeproject.org/rule-of-law-index>. The creators of this Index define these ideals of the rule of law as constraints on government; absence of corruption; open government; fundamental rights; order and security; regulatory enforcement; civil justice; criminal justice and; informal justice. Each of these factors is determined using a variety of data indicators, which then give the outcome as to what *degree* a state is compliant with the ideal rule of law: JC Botero and A Ponce, 'Measuring the Rule of Law' (2011) <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1966257>.

[78] I Brownlie, *The Rule of Law in International Affairs: International Law at the Fiftieth Anniversary of the United Nations* (Martinus Nijhoff 1998) 14.

[79] Bingham (n 19) 174: 'The concept of the rule of law is not fixed for all time. Some countries do not subscribe to it fully, and some subscribe to it only in name, if that. Even those who subscribe to it find it difficult to apply all its precepts quite all the time … . It remains an ideal, but an ideal worth striving for, in the interest of good government and peace, at home and in the world at large.'

[80] ibid ch 10.

Hence it is inappropriate to use the type of institutions found in most national systems to determine if there is a rule of law in the international system and to seek to find the same procedural aspects of national law in an international rule of law. The rule of law remains about values or meta-principles within a system, and constraints on the use of power, and not just about institutions *per se*.[81] In addition, the international system is no longer comprised of states alone[82] and so the international rule of law should be defined to allow it to encompass the activities of other participants in the system, such as international organizations, corporations and armed groups.[83]

Thus the approach taken in this article is to define the international rule of law in terms of the objectives of a rule of law, and thereby provide a definition appropriate to the distinctive nature of the international system.[84] The definition offered in this article of the international rule of law is a 'thick' one and includes the following elements or objectives: legal order and stability; equality of application of the law; protection of human rights; and the settlement of disputes before an independent legal body. These objectives are consistent with the national law concepts of the rule of law but are not dependent on the national institutions or the structures of the national legal systems.

Indeed, in the 1960s William Bishop recognized that the international rule of law was about the broader concepts and ideals of an international legal order:

> [T]concept [of the international rule of law] includes reliance on law as opposed to arbitrary power in international relations; the substitution of settlement by law for settlement by force; and the realization that law can and should be used as an instrumentality for the cooperative international furtherance of social aims, in such fashion as to preserve and promote the values of freedom and human dignity for individuals.[85]

While the Declaration on the Rule of Law appears to consider that the objectives of the rule of law are predictability and legitimacy, these are really the effects of a rule of law and not its objectives.[86] This was confirmed by Arthur Watts:

[81] See Waldron (n 28).

[82] For a critique of deriving international law solely from state practice, see H Kelsen, *Principles of International Law* (The Lawbook Exchange 1952) 3–5, who stated that to do so would risk destroying 'the autonomous integrity of the legal order'. See also *The Basis of Obligation in International Law and Other Papers by the Late James Leslie Brierly* (Clarendon Press 1958) 66–7. See also the approach of global administrative law, which notes that the strict hierarchy in law-making found in many states does not exist, and so allows consideration of regulatory decision-making as part of law-making: B Kingsbury, N Krisch and R Stewart, 'The Emergence of Global Administrative Law' 68 LCP (2004) 44.

[83] Waldron (n 28) argues that states should not be the objects of protection of the international rule of law. For a full discussion of participation in the international legal system see R McCorquodale, 'An Inclusive International Legal System' 17 LJIL (2004) 477.

[84] These could also be considered to be 'a set of qualities that ought to be present in all legal orders': Barber (n 38) 443, 452.

[85] W Bishop, 'The International Rule of Law' (1961) 59 MichLRev 553.

[86] Declaration on the Rule of Law (n 6) para 2.

> The protection of the interests of all states and the creation of international stability requires that state-to-state relations be subject to a long-term framework [of an international rule of law], which ensures that international law is applied in conformity with principles of justice … [and enables states to have a] stable, safe and predictable world in which they can better pursue their political and economic goals.[87]

This conception is in line with some of the terminology about the rule of law at the international level in international instruments, as set out above, which have tended to consider the rule of law at the international level in terms of order and stability, transparency, good governance, justice and accountability.

Human rights should be part of this definition of the international rule of law. The Universal Declaration of Human Rights (UDHR) provides that 'it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law'.[88] They form part of the values and meta-principles in the international system, as is acknowledged in the purposes of the UN[89] and in international instruments,[90] and, importantly, every state in the world is a party to at least one of the global human rights treaties.[91] Indeed, all states must now report on compliance with the human rights expressed in the UDHR, in addition to the human rights treaties to which they are a party, under the Universal Periodic Review.[92]

The human rights that would be within the rule of law, such as the right to a fair trial, the right to liberty, the right to equality and the right not to be discriminated against—as being procedural rights directly relevant to the rule of law as discussed above - are all in the main global human rights treaties. These are likely to be considered customary international law and so binding on all states, even if there may be differences in application of those rights

[87] A Watts, 'The International Rule of Law' (1993) 36 German Yearbook of International Law 15, 25, 41.

[88] Universal Declaration of Human Rights 1948, Preamble. See also the Preamble to the Declaration on the Rule of Law (n 6): '[We] reaffirm our commitment to the rule of law and its fundamental importance for … the further development of the three main pillars upon which the United Nations is built: international peace and security, human rights and development.'

[89] UN Charter art 1(3), as well as arts 55 and 56. Note B Rajagopal, 'Crossing the Rubicon: Synthesising the Soft International Law of the IMF and Human Rights' (1993) 11 BUIntlLJ 81, 94: 'A reasonable inference would be that the purposes set forth in Article 55 are the raison d'être of any specialised agency created under Article 57 or Article 59. Interpreted in this manner, the IMF [and other UN specialized agencies] is under an obligation to fulfil the human rights purposes set forth in Article 55 of the United Nations Charter.'

[90] Declaration and Programme of Action on Human Rights 1993 (agreed by all states) Part II, para 3: 'The World Conference on Human Rights recognises that relevant specialised agencies … play a vital role in the formulation, promotion and implementation of human rights standards, within their respective mandates, and should take into account the outcome of the World Conference on Human Rights within their fields of competence.'

[91] UN Charter, Preamble and art 1(2), and UN human rights treaty ratification: <http://indicators.ohchr.org/>.

[92] UN Human Rights Council Resolution 5/1, 18 June 2007 (A/HRC/5/21).

within different national legal systems.[93] This does not give these rights any hierarchy in the concept of human rights but merely indicates that they are included directly in the international rule of law. The requirement on states to protect human rights though providing access to a remedy, which is part of the international rule of law, is a standard part of international human rights treaties and would also be seen as being customary international law.[94] It is this element of the international rule of law that enables *all* human rights to be protected through affording access to justice for every human right.

Some of those who are deeply critical of the imperialism of the international legal system, see the need to include human rights within the international rule of law because 'even as [international human rights law] legitimizes the internationalization of property rights and hegemonic interventions, … [i]t holds out the hope that the international legal process can be used to bring a modicum of welfare to long suffering peoples of the third and first worlds'.[95] Indeed, Antony Angie has argued:

> Third World people are left with the task of fighting to create a system of human rights true to the original promise of human rights to protect human dignity, and advance social justice in the face of a hostile state and an inequitable economic system … . I am not arguing that we should dispense with the ideals that inform them – the ideals of 'good governance', the 'rule of law' and 'democracy'. Rather, the attempt here is to contest imperial versions of these ideals, and to seek their extension to all areas of the international system.[96]

The inclusion of human rights within the international rule of law enables different versions of the international legal system to be engaged with and does not impose one fixed (Western) view. After all, human rights should be part of the possible constraints on the use of power in the international system.

These elements or objectives of the international rule of law can apply to all participants in the international system and not just states. As Rosa Brooks notes:

> The international rule of law hinges on the existence of a shared lexicon accepted by states and other actors in the international system … . When such shared interpretations exist, key aspects of the rule of law can be present even in the absence of an international judicial system; state behavior can be reasonably

[93] See art5(3), Declaration on Principles of International Law (n 39); J Charney, 'Universal International Law' (1993) 87 AJIL 529; *Filartiga v Pena-Irala*, 630 F 2d 876 (2d Cir 1980).

[94] See eg art 2(3) of the International Covenant on Civil and Political Rights (ICCPR) and art 2 (1) of the Convention on the Rights of the Child.

[95] B Chimni, 'Third World Approaches to International Law: A Manifesto' in A Anghie *et al.* (eds), *The Third World and International Order: Law Politics and Globalization* (Martinus Nijhoff 2003) 49, 73. See also B Rajagopal, 'Counter-Hegemonic International Law: Rethinking Human Rights and Development as a Third World Strategy' in R Falk, B Rajagopal and J Stevens (eds), *International Law and the Third World: Reshaping Justice* (2008) Third World Quarterly 71, who states that human rights discourse 'can serve as an important tool in developing and strengthening a counter-hegemonic international law'. I am grateful to Penelope Simons for alerting me to this material.

[96] Angie (n 52) 271–2.

> predictable, nonarbitrary, and transparent, and accountability can be possible, albeit mainly through non-judicial mechanisms.[97]

This shared lexicon is one where the principles of a rule of law at the international level—legal order and stability (predictable and transparent); equality of application of the law (non-arbitrary); protection of human rights; and settlement of disputes before an independent legal body (whether judicial or not)—are shared, even if there are disputes about their application. This is a discourse that includes states *and non-states*. The sharing of a discourse of international law and that actions are guided by international law is an important part of the rule of law at an international level.

Indeed, as the concept of global legal pluralism shows, there are a number of different normative systems that operate and interact at the international level, and these are not solely about states.[98] An example of this is found in the area of business and human rights, which is now a part of the international legal discourse.[99] In this area, there is international norm-making by states and by civil society, much of which is soft law but has also led to some hard law, such as the Doha Declaration's revision of the World Trade Organization's Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS).[100] There can be norm-making by corporations, through their codes of conduct across industries, and active engagement in trade and investment law, as well as by states.[101] All three participants—states, corporations and civil society—are acknowledged as having key roles in the creation of norms under the UN Guiding Principles on Business and Human Rights.[102] As Nico Krisch notes, global legal pluralism 'withholds full legitimacy from all of the different levels, does not grant any of them ultimate decision-making capacity and instead establishes equidistance to all of them'.[103] This means that when, for example, a corporation shows transparency, good governance, compliance with human rights and seeks accountability through an international arbitration process (such as through the International Centre for the Settlement of Investment Disputes), then its actions can be considered in international rule

[97] Brooks (n 60) 83, 83. See, more generally, S Ratner, *The Thin Justice of International Law* (OUP 2015).

[98] B de Sousa Santos, *Towards a New Legal Common Sense: Law, Globalization, and Emancipation* (Butterworths 2002) 94. See also P Schiff Berman, *Global Legal Pluralism: A Jurisprudence of Law beyond Borders* (CUP 2012).

[99] United Nations Office of the High Commissioner for Human Rights, 'Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework', (2011) UN Doc HR/PUB/11/04 ('UNGPs').

[100] Doha Declaration, adopted on 14 November 2001: see <http://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_trips_e.htm>. TRIPS is found as Annex IC to Marrakesh Declaration of 15 April 1994: see <http://www.wto.org/english/docs_e/legal_e/27-trips_01_e.htm>.

[101] See R McCorquodale, 'Pluralism, Global Law and Human Rights' (2013) 2 *Global Constitutionalism* 287.

[102] UNGPs (n 99) and J Ruggie, *Just Business* (WW Norton & Co 2013).

[103] N Krisch, *Beyond Constitutionalism* (OUP 2010) 88.

of law terms. This approach is also consistent with the Third World Approaches to International Law (TWAIL) scholars, who seek to reclaim the development of international law away from a few elite states and to reflect the reality of the international community.[104]

Therefore, the definition of the international rule of law comprises legal order and stability, equality of application of the law, the protection of human rights through access to justice, and the settlement of disputes before an independent legal body. The international rule of law is not defined by reference to the national institutional arrangements of some democratic, industrialized states, and it is broad enough to include all the participants in the international system within its scope, and not just states.

Also, as explained above, the issue is not whether the international system does or does not have the rule of law now, the issue is the *extent* to which international rule of law principles are operative and can be operative within the international system. If there are some parts of the international system that comply with elements of the international rule of law and some parts that do not comply, then that is a reflection of the relative compliance with the international rule of law and not about the lack of the international rule of law. The international rule of law, like the national rule of law, is an ideal but one for which it is possible to see elements in operation, albeit not all of them all of the time.

V. APPLYING THE INTERNATIONAL RULE OF LAW DEFINITION

As noted above, the major difficulty for most of those who consider whether the rule of law can apply internationally is that they find that the core institutions of the national rule of law do not exist in the international system. Part of the reason for this is that the substantive operation of international law and the international rule of law can get confused, with problems with compliance with such substantive obligations being seen as the same as problems with the existence of the latter.[105] If the international system was considered in its own terms then the definition of the international rule of law offered in this paper can be applied to it. In order to show the utility of this new definition, I will examine a few instances of the application of the elements of this definition.

Two of the objectives of the international rule of law are *legal order and stability,* and *equality of application*. This is found in the international legal doctrine of *pacta sunt servanda*. This is a part of customary international law binding on all states (and part of *jus cogens* ie a binding constitutional rule of

[104] See P Simons, 'International Law's Invisible Hand and the Future of Corporate Accountability for Violations of Human Rights' (2012) 3 JHRE 5.

[105] See eg D Dyzenhaus, 'Hobbes on the International Rule of Law' (2014) 28 Ethics & International Affairs 53.

international law),[106] which means that states must comply in good faith with legal obligations to which they have consented. The ICJ acknowledged this when it stated that 'the very rule of *pacta sunt servanda* is based on good faith … . One of the basic principles governing the creation and performance of legal obligations, whatever their source, is the principle of good faith'.[107] In particular, if states consent to be bound by a treaty then they are legally bound to the terms of the treaty and, more generally, to the broader aims of the treaty, to which they must comply in good faith.[108] *Pacta sunt servanda* is a doctrine that is independent of the consent of states and so 'there follows, with inescapable logic, the juridical postulate of the obligatory rule of law'.[109] This doctrine benefits all states equally, so that each of them has confidence in reaching legal agreements to secure their own interest and to assist in attaining international legal order and stability.

This doctrine of *pacta sunt servanda* is also applicable to other international participants, such as the entering into binding agreements by non-state actors. For example, on 21 June 2015 the Polisario Front made a unilateral declaration on behalf of the people of Western Sahara that it undertook to apply the Geneva Conventions 1949 and the Additional Protocol I to the armed conflict between it and Morocco.[110] The Polisario Front addressed its unilateral declaration to the Swiss Federal Council, which is the depositary of the Conventions. The Swiss Federal Council accepted this declaration and notified the governments of all the states Parties to the Geneva Conventions, at the same time and in the same way as it does for state's declarations.[111] While this is the first time that the Swiss Federal Council has accepted such a declaration by a non-state actor, it is part of the growing evidence that agreements by non-state actors can be binding in international law.[112]

These examples, illustrate that the objectives of the international rule of law in establishing legal order and stability, and equality in application of the law to

[106] See H Wehberg, 'Pacta Sunt Servanda' 54 AJIL (1959) 775, 782. On the peremptory nature of the principle, see R Kolb, *Peremptory International Law* – Jus Cogens*: A General Inventory* (Hart 2015).

[107] *Nuclear Tests (New Zealand v France)* ICJ Rep 1974, 457, para 49.

[108] B Simmons and D Hopkins, 'The Constraining Power of International Treaties: Theory and Methods' (2005) 99 American Political Science Review 623.

[109] H Lauterpacht, *The Function of Law in the International Community* (Clarendon Press 1933).

[110] See Polisario Front Declaration, 21 June 2015: <http://theirwords.org/media/transfer/doc/declarationofficielle_polisariofront_2015-f426d1a96a4465affd1f87e794374b06.pdf>.

[111] See Swiss Federal Council, Notification to States Parties, 26 June 2015: <https://www.eda.admin.ch/content/dam/eda/fr/documents/topics/aussenpolitik/voelkerrecht/Geneve/150626-GENEVE_en.pdf>. See K Fortin, 'Universal Declaration by Polisario under API Accepted by Swiss Federal Council' at <http://armedgroups-internationallaw.org/2015/09/02/unilateral-declaration-by-polisario-under-api-accepted-by-swiss-federal-council/>.

[112] See A Roberts and S Sivakumaran, 'Lawmaking by Nonstate Actors: Engaging Armed Groups in the Creation of International Humanitarian Law' 37 YaleJIL (2012) 107; C Bell, *On the Law of Peace: Peace Agreements and the Lex Pacificatoria* (OUP 2008); and C Bell and C O'Rourke, 'Peace Agreements or Pieces of Paper? The Impact of UNSC Resolution 1325 on Peace Processes and their Agreements' (2010) 59 ICLQ 941.

participants are found in the international system. This also creates certainty, so that each of these participants has confidence in reaching legal agreements to secure their own interest and to assist in attaining international peace and security.

Another objective of the international rule of law is the *settlement of disputes before an independent legal body*. While, as noted above, some scholars have argued that the lack of compulsory jurisdiction of the ICJ undermines the existence of an international rule of law, such a conclusion is misconceived and rests on a misunderstanding of this objective. A rule of law does not require one court to settle all disputes of all kinds. Two of Tom Bingham's principles make this clear: a rule of law requires that means must be provided *for resolving*, without prohibitive cost or inordinate delay, bona fide civil disputes which the parties themselves are unable to resolve; and judicial *and other adjudicative procedures* must be fair and independent.[113] Thus a rule of law requires that a dispute can be settled before an independent body, which neither needs to be a court (so called) nor by one body with overarching jurisdiction over all matters.

There are now a large number of international courts and tribunals that are deciding cases across a very wide area of international law. For example, the United Nations Convention on the Law of the Sea, which has been ratified by over 150 states, specifically requires that disputes arising under it be settled by one of the methods set out in Part XV, which includes the International Tribunal for the Law of the Sea, the ICJ or an arbitral tribunal.[114] There are also many international and regional human rights dispute settlement bodies,[115] international dispute settlement bodies considering international criminal law[116] and courts and other bodies dealing with matters based on economic issues.[117] There are also many global and regional human rights courts, tribunals and other supervisory bodies.

An example of the operation of the international rule of law is the European Union (EU), which created a 'new order of international law'[118] The Court of Justice of the EU (ECJ) has been clear about the rule of law within the EU:

> It is to be borne in mind that the Community is *based on the rule of law*, inasmuch as neither its Member states nor its institutions can avoid review of the conformity

[113] Bingham (n 19) ch 8.

[114] United Nations Convention on the Law of the Sea, 10 December 1982.

[115] See eg the African Court of Human and Peoples' Rights and the UN Committee on the Rights of the Child.

[116] See eg the International Criminal Court and the International Criminal Tribunal for Rwanda.

[117] See eg the Court of Justice of the European Union and the Court of Justice of the Economic Community of West African States. The World Bank has created an Inspection Panel, which allows those corporations (and others) which believe that they will be affected detrimentally by a project in a state that is to be funded by the World Bank to ask the Panel to investigate their claim, even if the state is opposed to such investigation: World Bank Resolution No 93–6, 1993.

[118] F Jacobs, 'The State of International Economic Law: Re-Thinking Sovereignty in Europe' (2008) 11 JIEL 5.

> of their acts with the basic constitutional charter … [and] *respect for human rights* is a condition of the lawfulness of Community acts, and that measures incompatible with respect for human rights are not acceptable in the Community.[119]

Member states have accepted the power of the ECJ to determine legal issues that bind the states, so that the 'veil of protection that the notion of sovereignty might otherwise provide' is lifted.[120]

The international dispute settlement systems also include non-state participation. For example, international disputes between armed groups and states have been decided by international arbitral tribunals,[121] investment disputes between states and corporations are determined by international arbitration bodies,[122] and the dispute settlement procedures under the World Trade Organization are heavily influenced by the actions of non-state actors.[123]

It is evident that there is now an extensive range of international dispute settlement mechanisms that can operate in a manner that is consistent with the international rule of law. This includes actions by non-state actors. While this does not cover all areas of international law it is not restricted to small 'enclaves' of the rule of law.[124] These mechanisms are undoubtedly a patchwork but it is a patchwork that deals with many of the areas of greatest current activity in the international system.[125]

The activities of the international dispute settlement system are also important as part of the international rule of law in that they help to create a web of discourse about and for international law. Anne-Marie Slaughter explains:

> Transjudicial communication … is nevertheless an important instance of interaction among judicial institutions around the world. Many of these institutions are bound by multiple ties, both formal and informal, but ultimately by none so powerful as a common commitment to the rule of law. The meshing of that commitment, through increasingly direct interaction, is more likely to establish an international rule of law than a single international court. International government requires common formal institutions; international

[119] Case C–402/05 P, *Kadi and Al Barakaat International Foundation v Council and Commission* [2008] ECR I–6351 (*Kadi I*) para 281, 284 (emphasis added). [120] ibid 7.

[121] See eg *Government of Sudan v Sudan Peoples' Liberation Movement/Army* ('Abyei Arbitration') (Arbitration Tribunal 22 July 2009), Permanent Court of Arbitration, <http://www.pca-cpa.org>; and C Lathrop, 'International Decisions' (2010) 108 AJIL 66.

[122] See C McLachlan, L Shore and M Weiniger, *International Investment Arbitration* (OUP 2007) and S Montt, *State Liability in Investment Treaty Arbitration* (Hart 2012).

[123] See eg S Charnovitz, 'Economic and Social Actors in the World Trade Organization' 7 ILSA Journal of International and Comparative Law (2001) 259. See also Angie (n 52) 272, who notes that '[i]t is remarkable, for example, that the [World] Bank and the [International Monetary Fund] are not subject to any "rule of law", in a context when the Bank has continuously extolled the virtues of rule of law and when serious questions have arisen as to whether these institutions are adhering to their constituent documents'. [124] Crawford (n 76) 3, 12.

[125] J Merrills, 'The Globalisation of International Justice' in D Lewis (ed), *Global Governance and the Quest for Justice* (Hart 2006) 89. See also B Zangl, 'Is there an Emerging International Rule of Law' (2005) 13 European Review 73.

> governance is more likely to require communication and coordination among existing institutions. Courts are a fine place to start.[126]

This web of discourse can assist in the compliance-pulling power of international law.[127]

A final example of the application of one of the objectives of the international rule of law is in relation to *human rights*. Human rights remain a central core of the activities of the UN, as seen above, and access to justice for their protection is part of the international rule of law. After all:

> [T]he United Nations assumption of powers akin to those of sovereign states allows the conceptual leap toward a vision of the United Nations as not merely a benign promoter, but as a potential guarantor of human rights in places like Kosovo or East Timor … . Both UNTAET [in East Timor] and UNMIK [in Kosovo] in turn emphatically proclaimed the 'applicability' of human rights standards by stipulating that '[i]n exercising their functions, all persons undertaking public duties or holding public office [in the respective territories] shall observe internationally recognised human rights standards'.[128]

On this basis, the Ombudsperson in Kosovo considered that the UN had created UNMIK as a 'surrogate state [which imposed] all ensuing obligations, including affirmative obligations to secure human rights to everyone within UNMIK's jurisdiction'.[129] There are also an 'abundance of official training manual and courses on the duty of UN personnel to protect and respect human rights [making] it quite clear that the UN itself sees that it, and its personnel, must respect international human rights'.[130] It is, therefore, appropriate to consider that an international organization that is acting with norm-making powers is subject to international human rights law obligations.[131]

[126] A-M Slaughter, 'A Typology of Transjudicial Communication' 29 URichLRev (1994–95) 99, 137. See also A Anghie and B Chimni, 'Third World Approaches to International Law and Individual Responsibility in Internal Conflicts' (2003) 2 ChineseJIL 77, 101.

[127] International law's power can be seen as more than regulatory, as it is constitutive and generates feelings of legal obligation: see Brunnée and Toope, *Legitimacy and Legality in International Law* (n 4).

[128] F Mégret and M Hoffmann, 'The UN as a Human Rights Violator? Some Reflections on the United Nations Changing Human Rights Responsibilities' 25 HumRtsQ (2003) 314, 333–4.

[129] Ombudsperson Institution in Kosovo, Special Report No 2 (27 October 2000): see <www.ombudspersonkosovo.org>.

[130] A Clapham, *Human Rights Obligations of Non-State Actors* (OUP 2006) 127.

[131] The ICJ has stated in *Interpretation of the Agreement of March 25 1951 between the WHO and Egypt*: Advisory Opinion, ICJ Reports 1980, 73 at 89–90: '[i]nternational organisations are subjects of international law and, as such, are bound by any obligations incumbent upon them under general rules of international law'. See the Final Report of the Committee on the Accountability of International Organisations, Report of the Seventy-first International Law Association Conference Berlin 2004, London, 2004, where it is stated (at 20) that 'international organisations are subjects of international law and, as such, are bound by any obligations incumbent upon them under general rules of international law in carrying out their functions and in exercising the powers attributed to them'. See also J Alvarez, *International Organizations as Law-makers* (OUP 2005).

This does not mean human rights are not contested or that the UN system could not be seen as struggling with complying with human rights or that state compliance with their international human rights obligations is not a persistent problem.[132] This is shown in the impact of UN sanctions on human rights.

An instance of this is found in the *Kadi* cases.[133] These concerned whether a decision of the Security Council on sanctions overruled the protection of human rights within the EU. The ECJ's decision that the protection of human rights and the need for judicial protection of individuals within the EU was paramount, despite the Security Council's resolutions, 'implied that deference to the Security Council's authority, and therefore the basis of that authority itself, would depend on the Council's adherence to the value of the rule of law',[134] which includes human rights within it. Another example is the case of *Nada v Switzerland* before the European Court of Human Rights (ECtHR).[135] This case was brought by an Italian national living in an Italian enclave surrounded by Switzerland, whose assets were frozen and who was confined to the enclave for six years due to a travel ban against him by Switzerland due to its implementation of UN sanctions. The ECtHR found a violation of the right to a private and family life and reputation under the European Convention on Human Rights (ECHR). In addition, as the Swiss authorities did not allow for judicial review of their own sanctions laws, and as the UN listing procedure did not provide for an effective remedy, there was a violation of the right to a remedy.[136] Thus the ECtHR indicated that an international rule of law can apply to international organizations. Further, the fact that, in response to the decision in *Kadi,* the Security Council introduced an Ombudsman to deal with human rights issues about sanctions can be seen as an application of the international rule of law.[137] This reinforces the need for inclusion of access to human rights within the international rule of law.

This development in understanding the application of the international rule of law applies also to other non-state actors that violate human rights. The

[132] See eg N White and D Klaasen, *The UN, Human Rights and Post-Conflict Situations* (Manchester University Press 2005); and I Kurzban, B Lindstrom and S Jonsson, 'UN Accountability for Haiti's Cholera Epidemic' (2104) AJIL Unbound: <http://www.asil.org/blogs/un-accountability-haiti%E2%80%99s-cholera-epidemic>.

[133] Case C–402/05 P, *Kadi and Al Barakaat International Foundation v Council and Commission* [2008] ECR I–6351 (*Kadi I*) and Cases C-584/10 P, C-593/10 P and C-595/10 P, *European Commission & the Council of the European Union v Yassin Abdullah Kadi*, [2013] ECR (*Kadi II*).

[134] R Teitel, 'Kosovo to Kadi: Legality and Legitimacy in the Contemporary International Order' 28 Ethics & International Affairs (2014) 105, 108.

[135] *Nada v Switzerland*, App No10593/08, ECtHR Judgment of 12 September 2012.

[136] ibid, paras 211–212. See also E De Wet, 'From Kadi to Nada: Judicial Techniques Favouring Human Rights over United Nations Security Council Sanctions' (2013) ChineseJIL 787.

[137] See M Kanetake, 'The Interferences between the National and International Rule of Law: The Case of UN Targeted Sanctions' 9 IOLR (2012) 267, who notes that it is unclear if this is an application of the international rule of law or a purely political response.

widespread influence of the UN Guiding Principles on Business and Human Rights (UNGPs), discussed above, is an example of the developments in this area. The UNGPs have three aspects (or 'pillars'): the state's duty to protect against human rights abuses by corporations; the corporate responsibility to respect human rights; and the need for more effective access to remedies. The justification for this is stated to be:

> [There is] the state duty to protect because it lies at the very core of the international human rights regime; the corporate responsibility to respect because it is the basic expectation society has of business; and access to remedy, because even the most concerted efforts cannot prevent all abuse … . The three principles form a complementary whole in that each supports the others in achieving sustainable progress.[138]

In terms of state action, the UNGPs require that a state must regulate and control corporations that are incorporated or active in that state in such a way that the corporations do not violate human rights and that the corporations face effective sanctions if they do.[139] There is a deliberate distinction between the state's 'duty' to protect and the corporate 'responsibility' to respect, as the concept of corporate responsibility is that it is 'the legal, social or moral obligations imposed on companies'.[140] This would seem to reinforce the international legal position that corporations do not have any direct international legal obligations in relation to human rights, so corporations cannot be directly responsible for violations of international human rights law.[141]

However, developments arising from the UNGPs have shown that legal obligations are being placed on corporations for violations of international law. These include both national and regional legislation, such as the UK's Modern Slavery Act 2015,[142] the imposition of human rights due diligence by private financial institutions in some circumstances,[143] and specific

[138] Report to the Human Rights Council by the Special Representative of the Secretary-General (SRSG) on the issue of human rights and transnational corporations and other business enterprises, 7 April 2008, UN Doc A/HRC/8/5, para 9.

[139] UNGPs (n 99). See, in particular, Guiding Principles 1–6. On 'violations' by corporations rather than 'abuse', see A Clapham, 'Human Rights Obligations for Non-State-Actors: Where Are We Now?' in F Lafontaine and F Larocque (eds), *Doing Peace the Rights Way: Essays in International Law and Relations in Honour of Louise Arbour* (Intersentia forthcoming).

[140] Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises: Mapping International Standards of Responsibility and Accountability for Corporate Acts, 2007, UN Doc A/HRC/4/35 ('SRSG Report 2007') para 6.

[141] See R McCorquodale 'Non-State Actors and International Human Rights Law' in S Joseph and A McBeth (eds), *Research Handbook on International Human Rights Law* (Edward Elgar 2010) 97.

[142] See also, for example, the EU Directive on the disclosure of non-financial information by certain large companies (European Parliament and Council Directive 2014/95/EU of 22 October 2014).

[143] For example, the finance industry's application of the Equator Principles (on environmental and social impacts of development) being applied to all borrowers and requiring a human rights impact assessment to be provided before financial support will be given; see <http://www.equator-principles.com/index.php/about-ep>.

international codes on some corporations, such as private security contractors.[144] There is also now a range of regulatory activity that indicates that the corporate responsibility to respect human rights is becoming less voluntary,[145] with some movement to craft a treaty specifically on business and human rights.[146]

Therefore, the application of human rights to the operations of the UN and other international organizations, as well as their applicability to non-state actors, are consistent with the human rights objective of the international rule of law. Of course, there are still many areas for which it is difficult to implement these human rights obligations, including to the actions of the UN itself. However, that is due to a lack of effective implementation of the international rule of law and does not mean that an international rule of law cannot exist.

VI. CONCLUSIONS

The rule of law may not be like gravity in that its force is not grounded in any one location but it can certainly be seen beyond the confines of national systems. The existing understandings of the international rule of law either equate it with national law and consequently find that it does not exist, or confuse it with the substantive operation of international law and consider it problematic due to the overt political context. In so doing, they misapply and misunderstand the concept of the international rule of law and its force.

What is offered here is a new definition of the international rule of law. It sets out the objectives or elements of the international rule of law, being to uphold legal order and stability, to provide equality of application of the law, to enable

[144] See the development of the International Code of Conduct for Private Security Companies (ICoC), 9 November 2010 (http://www.icoc-psp.org) and International Code of Conduct Association (ICoCA), Articles of Association (2013) (http://www.icoca.ch/en/articles_of_association). For a discussion see S MacLeod, 'Private Security Companies and Shared Responsibility: The Turn to Multistakeholder Standard-Setting and Monitoring through Self-Regulation-"Plus"' 62 NILR (2015) 119.

[145] For a fuller discussion see R McCorquodale, 'Pluralism, Global Law and Human Rights' (n 101). See also P Simons, 'International Law's Invisible Hand (n 104).

[146] See UNHRC Resolution 26/9, adopted 14 July 2014, A/HRC/26/L.22/Rev.1, and the work of the Open-ended Intergovernmental Working Group on Transnational Corporations and Other Business Enterprises with Respect to Human Rights, <http://www.ohchr.org/EN/HRBodies/HRC/WGTransCorp/Pages/IGWGOnTNC.aspx>. Note the the Special Tribunal for Lebanon has concluded that 'that the current international standards on human rights allow for interpreting the term "person" to include legal entities for the purposes of [contempt of court jurisdiction]' - Special Tribunal for Lebanon, New TV Karma Mohamed Tashin Al Khayat Decision on Interlocutory Appeal Concerning Personal Jurisdiction in Contempt proceedings, STL-14-05/PT/AP/AR126.1, 2 October 2014 at para 60. See also the African Union Protocol to amend the Statute of the African Court of Justice and Human Rights (not yet in force), which adds a criminal chamber to the African Court of Justice and Human Rights, STC/Legal/Min/7(I) Rev. 1, 15 May 2014, esp art 46A.

access to justice for human rights, and to settle disputes before an independent legal body. This definition ensures that it is a rule of law and not a rule by law.

This is a definition that is not limited to the activities of states as it covers other participants in the international system. It can be applied to a wide range of international contexts. The international rule of law is not an all-or-nothing concept but is a relative concept, in which compliance with the international rule of law is measured in terms of the extent to which participants comply with its elements, with the aim of fulfilling them all over time.

While the actualization of the international rule of law is still far from being completed, it is evident that:

> [I]f the daunting challenges now facing the world are to be overcome, it must be through the medium of rules internationally agreed, internationally implemented, and if necessary, internationally enforced.[147]

[147] T Bingham, 'The Rule of Law in the International Order' Grotius Lecture of the British Institute of International and Comparative Law, 18 November 2008, available at <http://www.biicl.org/news/view/-/id/109/>.

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