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The International Rule of Law

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Abstract
The 'rule of law' is a concept at the very heart of the United Nations (UN) mission declared its Secretary-General, Kofi Annan. What does the concept mean internationally? The paper considers its role in international adjudication; in the UN more generally; in terms of the acceptances of the compulsory jurisdiction of the International Court of Justice (ICJ); the difference between thick and thin definitions of the concept; equality before the law; the requirement of clarity and certainty by reference to interpretation of treaties and maritime delimitation; compliance by Governments with international law; and the peaceful settlement of international disputes; and concludes with the importance of personal qualities and professional qualities.

Key words
clarity of the law; equality before the law; international application; rule of law; thin and thick definitions

1. Introduction

'The "rule of law" is a concept at the very heart of the [United Nations] mission.'[1] Those are the words of Kofi Annan, as Secretary-General, in a 2004 Report of the Security Council on the Rule of Law and Transitional Justice in Conflict and Post Conflict Societies.[2] Although that Report refers to the ad hoc criminal tribunals and to the ICC established by Security Council resolutions or treaty, it is primarily concerned with the establishment and strengthening of national legal and justice systems. Those systems are, first, to adhere to established international standards for fairness, due process, and human rights in the administration of justice and, second, to respond to the country's current needs and realities: external models are not to be imposed. In addition to defining 'the rule of law' – I come back to aspects of that definition – the Report also addresses the concepts of 'justice' and 'transitional justice'.[3]

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1 Report of the Secretary-General, The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies, UN Doc. S/2004/616 (2004), at para. 6.

2 Ibid.

3 Ibid., at paras. 5–8.

While I will be giving most attention to the rule of law at the international level, I begin with understandings of it at the national level. That material is much richer and longer lasting. Many trace the concept back to Plato and Aristotle.[4] Cicero, a little later, declared we are all servants of the law so that we may be free.[5] A Harvard Law School version speaks of the wise restraints that make us free.[6] The preamble to the Universal Declaration of Human Rights captures and develops the idea by stating that, '[i]t 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'.[7]

2. The rule of law in international adjudication

The concept of the rule of law was central to the last Advisory Opinion given by the Permanent Court of International Justice (PCIJ) in the *Danzig Legislative Decrees* case.[8] In 1935 the Council of the League of Nations asked the PCIJ for an advisory opinion on the consistency of certain Danzig legislative decrees with the Constitution of the Free City of Danzig – modern day Gdansk. The principal decree under challenge was headed 'Creation of Law by the Application of Penal Laws by Analogy'. The substantive provision was to this effect: 'Article 2. Any person who commits an act … which is deserving of penalty according to the fundamental conceptions of a penal law and sound popular feeling shall be punished ….'[9] It replaced the following: 'Article 2. An act is only punishable if the penalty applicable to it has been prescribed by a law in force before the commission of the act'.[10]

That earlier provision, the Court said

> [g]ives expression to the well-known twofold maxim: *Nullum crimen sine lege*, and *Nulla poena sine lege*. The law alone determines and defines an offence. The law alone decrees the penalty. A penalty cannot be inflicted in a given case if it is not decreed by the law in respect of that case. A penalty decreed by the law for a particular case cannot be inflicted in another case. In other words, criminal laws may not be applied by analogy.[11]

It commented on the new law in this way:

> A system in which the criminal character of an act and the penalty attached to it will be known to the judge alone replaces a system in which this knowledge was equally open to both the judge and the accused. … [A]n individual opinion as to what was the intention which underlay a law, or an individual opinion as to what is condemned

4 See, B. Z. Tamanaha, *On the Rule of Law: History, Politics, Theory* (2004), at 7–10.
5 Cicero, *Pro Cluentio*, C, LIII (from Latin 'Omnes legum servi sumus ut liberi esse possumus'); see also Tamanaha, *supra* note 4, at 11–14.
6 Declaration composed by John MacArthur Maguire and used when conferring degrees at Commencement since the late 1930s.
7 United Nations General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III).
8 *Consistency of Certain Danzig Legislative Decrees with the Constitution of the Free City of Danzig*, PCIJ Advisory Opinion of 4 December 1935, Series A/B No. 65.
9 Ibid., at 45.
10 Ibid.
11 Ibid., at 51.

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> by sound popular feeling, will vary from man to man. Sound popular feeling is a very elusive standard.[12]

The Court turned to matters of principle:

> In the first place it is to be observed that the Constitution endows the Free City with a form of government under which all organs of the State are bound to keep within the confines of the law *(Rechtsstaat*, State governed by the rule of law). In the second place, it is to be noted that the Constitution consists of two parts, the first of which, entitled 'Organization of the State' … concerns the structure of the State, whilst the second lays down inter alia a series of 'Fundamental rights and duties' … The free enjoyment of these rights, within the bounds of the law, constitutes one of the principles of the Constitution of the Free City.[13]

The Court put those fundamental rights in the context of the rights provisions included in 'most of the constitutions drawn up since the beginning of the XIXth century, … designed to … give [the individual] the safeguards which are considered necessary for his protection against the State'.[14] State organs were required to guide themselves by the fundamental rights in the Constitution. Those rights are not all absolute and unrestricted: they might be restricted, but only by law, which in turn

> must itself specify the conditions of such restriction, and, in particular, determine the limit beyond which an act can no longer be justified as an exercise of a fundamental liberty and becomes a punishable offence. It must be possible for the individual to know, beforehand, whether his acts are lawful or liable to punishment.[15]

Here the Court anticipates what has later been referred to as the principle of legality and the wording and interpretation of the European Convention on Human Rights – certain rights may be subject to such limits prescribed by law as are necessary in a democratic society; similar wording is to be found in Charters and Bills of Rights in Canada, New Zealand and Australia.[16]

Several commentators have questioned whether in recent rulings international criminal courts and tribunals have adhered to these strict principles, especially in the context of what the judges have seen as the elaboration or even the progressive development of international criminal law including the extension of the scope of criminal liability.[17] While there is a technical argument to the effect that the treaty statements of principle apply only to national proceedings and not to international ones, I would not like to make that argument to any court I know. In its most recent advisory opinion the ICJ had no difficulty in applying a principle reflected in the

12 Ibid., at 53.
13 Ibid., at 54.
14 Ibid.
15 Ibid., at 57.
16 Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms as amended by Protocols Nos. 11 and 14, 4 November 1950, ETS 5, Arts. 2(3), 8(2), 9(2), 10(2), 11(2); Canadian Charter of Rights and Freedoms, Sec. 1, enacted as part of the Constitution Act 1982, entered into force on 17 April 1982; New Zealand Bill of Rights Act 1990, Public Act 1990 No. 109, assented to 28 August 1990, sec. 5; Victorian Charter of Human Rights and Responsibilities Act 2007, Act No. 43/2006, assented to 25 July 2006, sec. 7; Australian Capital Territory Human Rights Act 2004, A2004–5, commenced at 1 July 2004, sec. 28.
17 See, e.g., *Prosecutor v. Tadić*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Case No. IT-94–1-A, 2 October 1995, paras. 41–48, particularly para. 42 and Judgment, 15 July 1999, paras. 185–234.

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ICCPR and as elaborated by the Human Rights Committee over time to the statute of an international tribunal.[18] I return to my main concern tonight.

3. The international rule of law at the United Nations

Within the UN, the international rule of law has received its greatest attention since 2000 when it appeared in the Millennium Declaration and especially since 2005 when it had a prominent part in the World Summit Outcome.[19] I will come back to the 2000 Declaration later. In 2005 the heads of state and government acknowledged that good governance and the rule of law at the international and national levels are essential for sustained economic growth, sustainable development, and the eradication of poverty and hunger.[20] They expressed their resolve to provide multilateral solutions to problems in four areas – development, peace and collective security, human rights and the rule of law, and strengthening the UN. Under the heading 'Human Rights and the Rule of Law' we read this:

> We recommit ourselves to actively protecting and promoting all human rights, the rule of law and democracy and recognize that they are interlinked and mutually reinforcing and that they belong to the universal and indivisible core values and principles of the United Nations, and call upon all parts of the United Nations to promote human rights and fundamental freedoms in accordance with their mandates.[21]

Under the heading 'Rule of Law' the Summit Outcome continues:

> Recognizing the need for universal adherence to and implementation of the rule of law at both the national and international levels, we:
>
> (a) Reaffirm our commitment to the purposes and principles of the Charter and international law and to an international order based on the rule of law and international law, which is essential for peaceful coexistence and cooperation among States;
>
> (f) Recognize the important role of the International Court of Justice, the principal judicial organ of the United Nations, in adjudicating disputes among States and the value of its work, call upon States that have not yet done so to consider accepting the jurisdiction of the Court in accordance with its Statute and consider means of strengthening the Court's work.[22]

In terms of responses to the recommendation about the acceptance of the jurisdiction of the Court, eight states, three of them members of the G7, have taken that action since October 2005, but the total number of acceptances is only a little over one third of the total UN membership and only one of the P5 has a current acceptance and even it has recently reduced the scope of that acceptance by including a new

18 *Judgment No. 2867 of the Administrative Tribunal of the International Labour Organization upon a Complaint Filed against the International Fund for Agricultural Development*, Advisory Opinion of 1 February 2012, [2012] ICJ Rep. 10, at 27, para. 39.

19 United Nations General Assembly, United Nations Millennium Declaration, UN Doc. A/RES/55/2 (2000), at paras. 9, 30; United Nations General Assembly, 2005 World Summit Outcome, UN Doc. A/Res/60/1 (2005), at paras. 11, 21, 25(a), 134.

20 2005 World Summit Outcome, *supra* note 19, at para. 11.

21 Ibid., at para. 119.

22 Ibid., at para. 134; see also para. 73.

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reservation.[23] By contrast, in 1948 nearly 60 per cent of the membership, including four of the P5, were among the acceptances.[24]

Since 2006, the General Assembly through its Sixth Committee and on the initiative of Liechtenstein and Mexico, assisted by Secretariat reports and national submissions, has debated the rule of law at the national and international levels.[25] A High Level Meeting in 2012 on the topic adopted a lengthy Declaration.[26] The heads of state and government and of delegations reaffirmed their commitment to the rule of law and its fundamental importance for various purposes: the rule of law, they declared, is the foundation of friendly and equitable relations between states and the basis on which just and fair societies are built.

> 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.[27]

The latest resolution in the series beginning in 2006 contains, not for the first time, these preambular paragraphs:

> *Reaffirming* that human rights, the rule of law and democracy are interlinked and mutually reinforcing and that they belong to the universal and indivisible core values and principles of the United Nations,
>
> *Reaffirming also* the need for universal adherence to and implementation of the rule of law at both the national and international levels and its solemn commitment to an international order based on the rule of law and international law, which, together with the principles of justice, is essential for peaceful co-existence and co-operation among States . . .[28]

You may well by now be saying 'so what'? Fine words, we are told, butter no parsnips. Before I get into some practical matters, a few more words from Kofi Annan's 2004 definition. You will recall that, while he was giving major attention to the rule of law at the national level, he saw the concept as being at the very heart of the UN's mission. Moreover, the General Assembly has not, in linking the concept to the three UN pillars of peace and security, development, and human rights, tried to draw any general distinction in relation to its operation at the international and national levels. In that spirit, I will also draw on the 2012 document entitled *Rule of Law: A Guide for Politicians* prepared by the Raoul Wallenberg Institute of Human

23 See generally, International Court of Justice, Declarations Recognizing the Jurisdiction of the Court as Compulsory, available at <http://www.icj-cij.org/jurisdiction/index.php?p1=5&p2=1&p3=3> (accessed 29 January 2015).
24 ICJ Yearbook 1948–1949, at 138–48.
25 For the most recent General Assembly resolution on this topic, see UN General Assembly, The Rule of Law at the National and International Levels, UN Doc. A/RES/69/123 (2014) [hereinafter 'Rule of Law Resolution'].
26 UN General Assembly, Declaration of the High-Level Meeting of the General Assembly on the Rule of Law at the National and International Levels, UN Doc. A/RES/67/1 (2012).
27 Ibid., at para. 2.
28 Rule of Law Resolution, *supra* note 25.

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Rights and Humanitarian Law and the Hague Institute on the Internationalisation of Law[29] and the standards developed by the World Justice Project for the periodic surveys of almost all countries in the world.[30] Always lurking, at least in the mind of the common lawyer, is the understanding provided 130 years ago by A. V. Dicey.[31] It is interesting that the Legal and Constitutional Affairs Division of the Commonwealth Secretariat is now named the Rule of Law Division.[32] The 2012 Guide, in particular, insists that the concept should have the same characteristics at both the national and international levels.[33]

To begin, these various definitions are all in what is referred to as 'thick' terms. The rule of law is not satisfied by having rules of law or a law of rules – a position taken by a number of scholars including Justice Antonin Scalia of the United States Supreme Court.[34] The Danzig Legislative Decrees and their Nuremberg predecessors along with much law enacted in Apartheid South Africa would have satisfied such 'thin' definitions but not the various thick ones. I now list some of the commonly recurring elements of 'thick' definitions.

- all persons, institutions and entities, public and private, are subject to the law and states in particular are subject to international law and bound to comply with it
- that law is to be publicly promulgated
- it is to be clear, certain, and accessible in its terms or at least not arbitrary
- it is to be consistent with international human rights norms and standards
- it is to recognize the principle of equality before the law
- it is to be fairly applied in a transparent way by an independent and impartial judiciary

That is a daunting list. I extract three matters from it and I will have to be selective in respect of each of them.

- the need for clarity and certainty
- the principle of equality before the law, and
- compliance with the law and the availability of independent and impartial courts and tribunals with compulsory jurisdiction to resolve disputes about, and help ensure compliance with, international law.

29 The Raoul Wallenberg Institute of Human Rights and Humanitarian Law and the Hague Institute for the Internationalization of Law, Rule of Law: A Guide for Politicians (2012), available at <http://www.hiil.org/data/sitemanagement/media/Rule-of-Law-a-guide-for-politicians.pdf> (accessed 29 January 2015) [hereinafter 'A Guide for Politicians'].

30 World Justice Project, The WJP Rule of Law Index 2014, available at <http://worldjusticeproject.org/rule-of-law-index> (accessed 29 January 2015).

31 See A. V. Dicey, *Introduction to the Study of the Law of the Constitution* (1885).

32 The Commonwealth, Rule of Law, available at <http://thecommonwealth.org/organisation/rule-law> (accessed 29 January 2015).

33 A Guide for Politicians, *supra* note 29, at 25.

34 A. Scalia, 'The Rule of Law as the Law of Rules', (1989) 56 *University of Chicago Law Review* 1175.

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Those matters have something of an institutional character and I will conclude by referring to the qualities of individuals who carry out the related responsibilities in international legal processes.

4. The need for clarity and certainty in the law

Many contend that international law suffers from a lack of clarity, from endemic uncertainty.[35] It is often compared in that respect, in a negative way, with national law. I cannot begin to make an overall assessment but I can provide a sense based on my teaching, law reform, and judicial experience over the years. My first point, based mainly on my national and international judging experience, is that many, probably most disputes which get to court relate to written texts, to contracts, statutes, constitutions, and treaties. For the most part most of that written law works without it ever getting near a court. Remember Louis Henkin on international law – almost all nations observe almost all principles of international law and almost all of their obligations almost all of the time, a proposition which must be broadly applicable in national contexts as well.[36] Some, maybe much of it is very precise. One example, on the precision of which I have depended greatly, especially in the last nine years, are the Rules of the Air promulgated within the International Civil Aviation Organization (ICAO);[37] another is the international customs tariff which was first elaborated well over a century ago.[38]

When it comes to the interpretation of legal texts there is, as best I can assess, much more certainty in the methods of interpretation and their application than the cynics, national and international, would suggest. Those processes of finding meaning by reading the text, putting it in context and having regard to the purpose and, where appropriate, looking to such matters as the drafting history and subsequent practice, have obtained greater certainty through scholarly, professional, law reform, and legislative, including treaty making, action. That action has occurred at the national as well as the international levels, especially over the last 60 years. Even in difficult cases, the method, the approach provides in many situations broadly accepted conclusions.

But there are areas of international law, which are stated in general, vague or uncertain terms. I will take one in a moment, but first a national parallel. Those in commerce frequently emphasize the need for certainty in the law. They must know where they stand in their various trading and related activities. And indeed much commercial law is precise – due dates for payments and the rates at which tax must be paid, for instance. But much is not. For well over a century companies, sales,

35 See, e.g., J. Goldsmith and D. Levinson, 'Law for States: International Law, Constitutional Law, Public Law', (2009) 122 *Harvard Law Review* 1791, at 1803 (and cites therein).

36 L. Henkin, *How Nations Behave* (1979), at 47.

37 International Civil Aviation Organization, Annex 2 to the Convention on International Civil Aviation: Rules of the Air, (2005), available at <http://www.icao.int/Meetings/anconf12/Document%20Archive/an02_cons[1].pdf> (accessed 29 January 2015).

38 Convention concerning the Creation of an International Union for the Publication of Customs Tariffs, Regulations of Execution, and Final Declarations, signed at Brussels 5 July 1890, entered into force 1 April 1891.

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insolvency, and competition legislation in many national legal systems has used standards not rules – for instance, the 'just and equitable ground' for actions relating to companies, 'fairness and reasonableness' in relation to sales and payments made 'in the ordinary course of business' in insolvency law. Thus in the New Zealand Statute Book the test of 'just and equitable' appears in 54 statutes, including 60 times in the Companies Act and 87 times in the Income Tax Act.

Let me turn to the law of maritime delimitation beyond the territorial sea. In that area, out to 12 miles, a rule, the equidistance rule applies with one possible exception. In the more distant areas the written law provides almost no positive guidance. It calls for an agreement on the basis of international law to achieve an equitable solution.[39] The earliest ICJ ruling in 1969, in the *North Sea Continental Shelf* cases, also presented the law in very broad terms.[40] I recall thinking at that time, as a junior lawyer in the Office of Legal Affairs of the UN Secretariat, that I was glad not to be involved in advising on or applying that law: it was so open-ended. The Court stated two principles – delimitation must be the subject of agreement and the agreement must be arrived at in accordance with equitable principles. It invoked a foundation of general precepts of justice and good faith. The negotiations were to be meaningful and were to take all circumstances into account; the equidistance method, although not a mandatory rule, could be used, but other methods exist and may be employed alone or in combination. In 1969 when that Judgment was given, there was already under way the process which led to the 1982 Convention. On one view that process reduced whatever certainty had been given by the 1969 Judgment. Early in 1982, the Court responded to the request by Tunisia and Libya to rule on their maritime boundary according to equitable principles and the relevant circumstances, as well as the newly accepted trends in the United Nations Convention on the Law of the Sea (UNCLOS).[41] According to Judge Oda, in his dissent, the Judgment appeared simply to suggest 'the principle of non-principle', a criticism he repeated three years later in his dissent in the *Libya/Malta* case.[42] He emphasized that criticism in his introductory discussion of 'misconceptions in the present Judgment', with headings using the words misconstruction, misapplication and maladjustment and, later, misunderstanding.[43] I do not intend to single that judge out. Rather my point is to underline the uncertainty seen by one judge who was a real expert in the law of the sea as both a scholar and a negotiator. And recall the concern of that young lawyer a decade earlier on reading the 1969 Judgment. In the earlier 1982 case Judge Gros added a further point by concluding his dissent in this way:

> For the past ten years or so, States have been less and less inclined to present themselves before the Court; when they have voluntarily chosen to come, the Court must answer

39 1982 United Nations Convention of the Law of the Sea, 1833 UNTS 3, Arts. 74, 83.
40 *North Sea Continental Shelf cases* (*Federal Republic of Germany/Denmark*; *Federal Republic of Germany/Netherlands*), Judgment of 20 February 1969, [1969] ICJ Rep. 3.
41 *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)*, Judgment of 24 February 1982, [1982] ICJ Rep. 18.
42 *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)*, Dissenting Opinion of Judge Oda, [1982] ICJ Rep. 157, at 157, para. 1; *Continental Shelf (Libyan Arab Jamahiriya/Malta)*, Dissenting Opinion of Judge Oda, [1985] ICJ Rep. 123, at 125, para. 1.
43 *Libyan Arab Jamahiriya/Malta*, at paras. 2–30.

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> their request and declare the law, not attempt a conciliation by persuasion which does not belong to the Court's judicial role, as long ago defined by the Court itself.[44]

Those grim forebodings have not been realized; a steady stream of delimitation cases has continued, including four in my time, from the Pacific, the Caribbean, and the Black Sea. Another three have been filed in just the last 16 months. The concerns of Judge Gros and Judge Oda about the lack of principle and failure of reasoning have also not been realized: the Court has adopted robust methods which in practice have led to broadly accepted, indeed largely unanimous, decisions. Further, that body of law was recently applied by the ITLOS, the specialist body established under UNCLOS, in the Bay of Bengal case.[45]

I appreciate that there are other areas of allegedly uncertain law (sometimes made more uncertain by the actions or statements of major states, for instance, in relation to the prohibition on the use of force), but I would urge that, in place of the frequent, sometimes glib, statements about endemic uncertainty, careful attention be given to the reasons which may underlie the general formulations and to the application of such bodies of the law in practice. Relevant national practice may also inform any such assessment.

If time allowed I could say much more about uncertainty and one of its counterparts – the existence in the law of broad or even unfettered powers, for instance, of the Security Council – or that which allegedly results from the proliferation of international courts and tribunals. I will say a little on the Security Council later. On proliferation I simply repeat the point, often neglected, about the existence of national courts in nearly 200 countries, and their many decisions as well as the products of their legislatures. See, for instance, the many cases and statutes cited by the ICJ in the Germany/Italy decision on state immunity and earlier by the ILC in its work on that topic.[46]

5. The principle of equality before the law

My second heading is equality before the law – a principle which is straightforward in some contexts but very difficult in others. The difficulties appear in a series of articles in the *Harvard Law Review* and elsewhere beginning with Peter Westen's paper in that Review in 1982 entitled 'The Empty Idea of Equality'.[47] At about the time that article appeared I faced the complexities of the meaning and application of the principle as a judge of appeal in Western Samoa and the Cook Islands. In the first, the issue was whether the principle incorporated into the Constitution from the Universal Declaration of Human Rights required universal suffrage with the consequence that the electoral law, based on long established Samoan custom, that only the

44 *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)*, Dissenting Opinion of Judge Gros, [1982] ICJ Rep. 143, at 156.

45 *Dispute Concerning the Delimitation of the Maritime Boundary between Bangladesh and Myanmar in the Bay of Bengal (Bangladesh/Myanmar)*, Judgment of 14 March 2012, [2012] ITLOS.

46 *Jurisdictional Immunities of the State (Germany v. Italy: Greece Intervening)*, Judgment of 3 February 2012, [2012] ICJ Rep. 99; International Law Commission, Draft Articles on Jurisdictional Immunities of States and Their Property, with Commentaries (1991), in *Yearbook of the International Law Commission* (1991), Vol. II, Part Two.

47 P. Westen, 'The Empty Idea of Equality',(1985) 95 *Harvard Law Review* 537.

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Matai, the Chiefs, could vote and be candidates in parliamentary elections, would be struck down.[48] In the second, the legislation which was challenged reopened a land title which had been recognized and settled 80 years earlier.[49] That legislation was unique. Did it breach the rights of the recognized owner to equality before the law and the equal protection of the law? The difficulties presented in those cases and elsewhere in national courts were among the factors that persuaded those involved in preparing the New Zealand Bill of Rights to prepare only a narrow prohibition on discrimination on particular grounds including those in the relevant human rights conventions.

But as I said, the principle, in some cases, applies in a straightforward way, particularly in procedural contexts. The equality of parties before a court or tribunal and the related narrowing of the issues to be resolved by it may be of particular value to parties including states of differing power. The ICJ emphasized that aspect of the principle three years ago in the International Fund for Agricultural Development (IFAD) case in which that agency challenged a judgment of the Administrative Tribunal of the International Labour Organization (ILOAT) in favour of a former staff member – a status which the agency challenged, but the tribunal and court confirmed.[50] The Court was able to address the matter of equality before it, by adopting an unusual procedure first used in a comparable case in 1956.[51] It could not, however, correct the inequality in the power to initiate the review process. The Court's opinion may be read as a warning to the relevant agencies about the future viability of that process. As between states, the principle can be seen at work in the phases of the Rainbow Warrior case between New Zealand and France and in many cases, now over 400, before the WTO dispute settlement process, including, if I may mention one, the case between New Zealand and Australia, where the rulings, after decades of obstruction by the Australian authorities, mean that Australians could at last eat splendid New Zealand apples – something that people here and in many other countries had long enjoyed.[52]

That opportunity, to refer to a critical aspect of substantive equality, is not available to many in the developing world. According to World Bank figures, more than one billion people on the planet have less than US$1.25 a day.[53] That level of poverty, even if substantially reduced recently, is one of the many matters being addressed in the preparation of the 2015 document which is to replace the Millennium Declaration adopted in September 2000. It is interesting that that Declaration too gave

48 *In Re the Constitution, Attorney-General v. Olomalu* [1982] WSCA 1 (Judgment, 26 August 1982), 14 VUWLR 275 (1984).

49 *Clarke v. Karika* [1982] CKCA 1; CA Appeal 2.1982 (Judgment, 14 December 1982).

50 *Judgment No. 2867 of the Administrative Tribunal of the International Labour Organization upon a Complaint Filed against the International Fund for Agricultural Development*, Advisory Opinion of 1 February 2012, [2012] ICJ Rep. 10.

51 *Judgments of the Administrative Tribunal of the International Labour Organisation upon Complaints made against the United Nations Educational, Scientific and Cultural Organization*, Advisory Opinion of 23 October 1956, [1956] ICJ Rep. 77.

52 Appellate Report Australia – Measures Affecting the Importation of Apples from New Zealand, adopted 29 November 2010, AB-2010–2, WT/DS367/AB/R 29.

53 World Bank, Global Monitoring Report 2014/2015: Ending Poverty and Sharing Prosperity, at 18, available at <http://www.worldbank.org/content/dam/Worldbank/gmr/gmr2014/GMR_2014_Full_Report.pdf> (accessed 29 January 2015).

considerable emphasis to the rule of law in national and international affairs, with two specific references to the ICJ, and called for the promotion of democracy and the rule of law.[54] While the principal emphasis was of course on development through better education, health care, and other matters, and on poverty eradication, the references to the rule of law recognize that good governance, including good legal systems, is critical for the delivery of those programmes. That recognition is also to be seen in the participation of Helen Clark as Administrator of the United Nations Development Programme in the debate on the adoption of the 2012 Declaration on the Rule of Law and also in meetings of the Assembly of States Parties of the ICC.[55]

That reference to Helen Clark may be seen as justifying a reference to another compatriot, Colin Aikman, and to his address on the adoption in 1948 of the Universal Declaration of Human Rights:

> [W]e regard with particular satisfaction the place which is given in the declaration to social and economic rights. Experience in New Zealand has taught us that the assertion of the right of personal freedom is incomplete unless it is related to the social and economic rights of the common man. There can be no difference of opinion as to the tyranny of privation and want. There is no dictator more terrible than hunger. And we have found in New Zealand that only with social security in its widest sense can the individual reach his full stature.[56]

New Zealanders have long adopted, as best as I can judge, that 'thick' reading of the rule of law.

6. Compliance by governments with international law

My third heading is compliance by governments with international law and the availability of courts and tribunals with compulsory jurisdiction and other agencies to help ensure compliance and to resolve disputes about alleged breaches. In terms of compliance I take one substantive area before going on to institutional matters. The substantive area is international humanitarian law. From the first Geneva Convention adopted over 150 years ago implementation has been a central concern. That Convention required commanders to instruct their troops. Later revisions provided for dissemination of the law and training, legal advisers, protecting powers and substitutes, the role of the ICRC, disciplinary processes, prosecutions, reprisals, meetings of the states parties, inquiry and state responsibility. The 1949 Conference also recommended resort to the ICJ – although many of those states which have accepted the compulsory jurisdiction have excluded disputes arising from, or even during, armed conflict. Among those who had not made such a reservation were the DRC and Uganda, with the consequence that the Court did rule on international humanitarian

54 United Nations General Assembly, United Nations Millennium Declaration, UN Doc. A/RES/55/2 (2000), at paras. 9, 30.

55 United Nations Rule of Law, High-level Meeting on the Rule of Law, 24 September 2012, available at <http://unrol.org/article.aspx?article_id=168> (accessed 29 January 2015); International Criminal Court, Assembly of States Parties holds plenary on complementarity, Press Release 21 November 2012, available at <http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Pages/pr855.aspx>.

56 C. Aikman, 'New Zealand and the Origins of the Universal Declaration', (1999) 29 *Victoria University of Wellington Law Review* 1, at 5.

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law matters in 2005.[57] Consider also the *Pakistan/India POW* case, the *Nicaragua/US* case and the *Oil Platforms* case and rulings of the *Eritrea-Ethiopia* tribunal.[58]

When the Geneva Conventions were last revised between 1974 and 1977 better implementation was a central issue and, at least on paper, improvements were introduced. I mention one – the establishment of the International Humanitarian Fact Finding Commission.[59] Over 70 States have now accepted its competence to enquire into any facts alleged to be a grave breach of the Conventions and Protocol I or other serious breach of it, and to facilitate the restoration of an attitude of respect for those treaties. I have three particular reasons for mentioning the Commission. New Zealand, whose delegation I led at two sessions, along with Sweden, with Hans Blix, as delegation leader, put much effort into establishing a strong institution. The overall result was disappointing. Sovereignty again prevailed and New Zealand abstained on the adoption of the text.

Notwithstanding that vote, the Government nominated me and I was a member for 15 years and for some time its president. We tried on several occasions to have matters, for instance from the Balkans, Colombia, and the Pacific, referred to us. Those efforts, I know, to make my third point, have continued but without success. That is so notwithstanding the General Assembly every two years calling on states to accept the Commission's competence and to make use of it, visits by Commission members to states which have not accepted its competence, and calls at the four yearly conferences of the Red Cross and Red Crescent Movement.Extensive consultations on strengthening compliance with international humanitarian law, led by the Swiss Government and the ICRC, have been under way for some time.[60] Insufficient respect for the rules, they say, is the principal cause of suffering during armed conflicts. But the accounts of those consultations, on my reading, are not encouraging. Sovereignty still seems to have the upper hand. I come now to institutions for peaceful settlement more generally.

7. Institutions for peaceful settlement

In my years in international law, there has been a significant increase in the numbers of international courts and tribunals and their output. So far as the ICJ is concerned, I recall that in 1970 when I submitted to a publisher a manuscript on the Court, the

57 *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgment of 19 December 2005, [2005] ICJ Rep.168.

58 *Trial of Pakistani Prisoners of War, (Pakistan v. India)*, Interim Protection, Order of 13 July 1973, [1973] ICJ Rep. 328; *Military and Paramilitary Activities in an against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgment of 27 June 1986, [1986] ICJ Rep. 14; *Oil Platforms (Islamic Republic of Iran v. United States of America)*, Judgment 6 November 2003, [2003] ICJ Rep. 161; Permanent Court of Arbitration, Eritrea-Ethiopia Claims Commission, available at <http://www.pca-cpa.org/showpage.asp?pag_id=1151> (accessed 2 February 2015).

59 Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, Art. 90; International Humanitarian Fact-Finding Commission, The IHFFC in a Few Words, available at <http://www.ihffc.org/index.asp?page=aboutus_general> (accessed 29 January 2015).

60 International Committee of the Red Cross, Strengthening Compliance with International Humanitarian Law (IHL): The Work of the ICRC and the Swiss Government, available at <https://www.icrc.org/eng/what-we-do/other-activities/development-ihl/strengthening-legal-protection-compliance.htm> (accessed 29 January 2015).

Court had no business at all on its docket. Since the 1980s the volume has increased apace as is the case with a number of other international courts and tribunals. But as another compatriot, Benedict Kingsbury, has reported, this is another area of inequality with major and other powers showing a real reluctance to subject themselves to compulsory jurisdiction, unless, as with the WTO system, they have no option or, as with investment disputes, they see their own (narrow?) interests as being advantaged by the compulsory binding processes.[61]

In the case of the ICJ that reluctance appears in their refusal to file acceptances of the compulsory jurisdiction, their refusal to accept additional protocols for a compulsory settlement of disputes, and their reservations to provisions for compulsory settlement. Those states have not followed the lead of a number of Eastern European states which withdrew reservations or have acceded to human rights treaties without making such reservations. In the late 1980s Grigory Tunkin, the great Soviet international lawyer, indicated that the reasons for some states being cautious about accepting the compulsory jurisdiction of the Court had disappeared: the composition of the Court had changed, the number of uncertainties in international law had greatly reduced and, since 1985, the international climate had radically changed for the better.[62]

8. The importance of personal qualities

I said earlier that in addition to the three matters of uncertainty, equality and compliance, and compulsory jurisdiction I would refer to the qualities of individuals with responsibilities in international legal processes. I have in mind, yet again, Alexander Pope's lines 'O'er forms of government let fools contest, whate'er is best administer'd is best'.[63]

I have particularly in mind John Dugard's service as a scholar and counsel in very difficult and then better times in his home country and in the Netherlands and as international law commissioner, UN Special Rapporteur, and judge ad hoc. Throughout that work he has demonstrated his commitment to principle and to the highest ethical and professional standards. That appears, for instance, from the papers given to the conference in his honour a few years back and the resulting book and special issue of the *Leiden Journal of International Law*.[64]

The roles of those involved in international legal processes are many – as in-house counsel, as negotiators, as nominators of candidates for judicial office, as electors, as advisers to and counsel for states before the International Court and

61 B. Kingsbury, 'International Courts: Uneven Judicialization in Global Order', in J. Crawford and M. Koskenniemi (eds.), *The Cambridge Companion to International Law* (2012).

62 W. E. Butler and V. G. Tunkin (eds.), *The Tunkin Diary and Lectures: The Diary and Collected Lectures of G. I. Tunkin at the Hague Academy of International Law* (2012); see 'Politics, Law and Force in the Interstate System', (1989) 219 *Hague Recueil* 227, 381–2.

63 A. Pope, *An Essay on Man* (1734).

64 T. Skouteris and A. Vermeer-Künzli (eds.), *The Protection of the Individual in International Law: Essays in Honour of John Dugard* (2007); Essays in Honour of John Dugard: The Protection of the Individual in International Law, (2007) 20(4) LJIL 741.

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other international tribunals, as participants in the work of international bodies, as judges and as scholars.

I can touch on only a few aspects. I trust I may be forgiven another, final reference to a compatriot who, as best as I can judge, first engaged closely with international law in 1997 in the context of the ILC's 50th anniversary event in the Sixth Committee that year. Jeremy Waldron speaking of in-house lawyers in the Justice Department and White House, but the proposition is generally applicable, declares that they

> should remember that they are acting for and advising an entity that is not just limited by law but governed by law in its very essence – a nation of laws, not men, in *all* its operations. Their advice should be given with the integrity of the international legal order in mind. Legal advice given in this spirit should not be grudging about legality, treating the rule of law in the international arena as an inconvenience or an envelope to be pushed. Legal advice should certainly not be given in a spirit of studied recklessness or deliberately cultivated obtuseness about the nature and extent of the obligations of international law. Instead, legal advice should be given in a spirit that embraces the importance of the international legal order and the obligatory character of its provisions.[65]

He instanced the advice relating to the applicability of a critical provision of the Geneva Conventions to Taliban and Al Qaeda detainees and relating to torture. They failed, he said

> to defend the integrity of these laws as an order in which America can take its rightful place as a nation, among other nations, under law and subject to the principles of legality. This sort of lawyering entails grave breaches of professional ethics, amounting in some cases to complicity in war crimes.[66]

The positions taken by British lawyers in the *Corfu Channel* case, during the Suez crisis, and in respect of the Iraq war may be brought into this mix, but not by me tonight, although I return to the torture issue at the end. I have nothing to add in respect of the professional responsibility of those acting as nominators, electors, judges, and commentators, to what I said late last year at Chatham House. That leaves me with two matters, the first relating to the Security Council, the second to counsel before the ICJ.

Given the almost unlimited power of the Security Council and the very limited power, if any, of the Court review of its exercise, those involved in Security Council decision-making, it seems to me, have a special responsibility to see that that power is exercised in a principled and fair way. I realize that that sounds naive, but the Council is obliged to act in accordance with the purposes of the UN which include references to justice and international law; further Article 36 of the Charter directs the Council in considering legal disputes to consider recommending to the parties that they come to the Court; and the grand declarations about the application of the rule of law to the UN including statements made by the Security Council also support that position.[67] The responsibilities of the lawyer in this context are comparable to those

65 J. Waldron, 'The Rule of International Law', (2006) 30 *Harvard Journal of Law & Public Policy* 15, at 26.
66 Ibid., at 27.
67 See, e.g., Statement by the President of the Security Council, UN Doc. S/PRST/2014/5 (2014).

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of their counterparts in national jurisdictions advising on the exercise of emergency powers when again the scope of judicial review may well be limited.

In respect of the ethical and professional responsibility of counsel before the ICJ, I have a request. They are appearing before a large court, which is sitting at first and last instance. The Court will often have before it very extensive written pleadings with accompanying evidence – about 8,000 pages on a rough count in the latest case. The request is to take care to include only that evidence which is truly needed, to ensure that there is evidence to support every item in the pleading, to quote the evidence accurately and not to engage in wearisome repetition, in writing or orally. The Court has given some of these directions in its rules and practice, hearings have been shortened, but there is still some distance to go.

I conclude, as I said, with the torture issue. In May 2005, a former Commissioner of the Securities and Exchange Commission, Bevis Longstreth, addressed the American Law Institute about what he saw as a serious decline in professionalism within the corporate bar. He began with an opinion prepared within the Office of Legal Counsel at the Justice Department on standards of conduct under the Convention against Torture. It was signed by Jay Bybee, who had, in the meantime, become a federal appeals judge. He condemns that opinion, concluding this way:

> The issue is one of defining the lawyer's role, be it as government lawyer counselling the president or corporate lawyer counselling the CEO. In service to the client's wishes, the Bybee opinion succeeded. But, measured against the norms of professional conduct – the counsellor's craft of interpreting and applying the new law – the opinion was a gross and abject failure.
>
> In his introduction to *The Torture Papers: The Road to Abu Ghraib*, Anthony Lewis writes that the Bybee opinion (and related papers) "provide a painful insight into how the skills of the lawyer – skills that have done so much to protect Americans in this most legalised of countries – can be used in the cause of evil .... Any lawyer acting for a business must be asked by its officials, from time to time, 'can we do this?' The lawyer understands that the company executives want her to say 'yes'".
>
> In penning this memo, Bybee became a poster boy for the problem I discern in the corporate bar.[68]

Expediency must not be preferred to the values and principles, including the rule of law, underlying our law. The law must be complied with even when the canons roar. The prohibition of torture, for instance, may not be set aside, even in the hope of discovering the truth, for, as was said by an English judge 100 years before the adoption of the Universal Declaration of Human Rights: 'Truth, like other good things, may be loved unwisely – may be pursued too keenly – may cost too much'.[69]

68 B. Longstreth, 'The Corporate Bar as It Appears to a Retired Practitioner' (Speech Before the American Law Institute, 17 May 2005), available at <http://www.ali.org/ali_old/AM05Longstreth.htm#_edn1> (accessed 30 January 2015), citing K. J. Greeberg and J. L. Dratel (eds.), *The Torture Papers: The Road to Abu Ghraib* (2005), at xiii.

69 *Pearse v. Pearse* (1846), 1 De G & Sm 12, at 28.

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