DUE PROCESS IN THE UNITED NATIONS

*By Devika Hovell**

> "For hard it is for high and stately buildings long to stand except they be upholden and staid by most strong shores, and rest upon most sure foundations"
>
> —Jean Bodin, *The Six Books of a Commonweale* (1576)

It has been said of the redemptive quality of procedural reform that it is "about nine parts myth and one part coconut oil."[1] Yet, as the recent history of the United Nations shows, failure to enact adequate procedural reform can have damaging consequences for an organization and its activities. In the targeted-sanctions context, litigation in over thirty national and regional courts over due process deficiencies has had a "significant impact on the regime," placing it "at a legal crossroads."[2] In the peacekeeping context, the United Nations' position that claims in the ongoing Haiti cholera controversy are "not receivable" has been described in extensive and uniformly critical press coverage as the United Nations' "Watergate, except with far fewer consequences for the people responsible."[3] Complacency in the face of allegations of sexual abuse by UN blue helmets led to the unprecedented ousting of a special representative to the secretary-general in the Central African Republic.[4] Economizing on due process standards is proving to be a false economy.

The focus of this article is not to repeat the allegation of due process deficiencies. The "*j'accuse*" moment was seized by a range of academics and practitioners, and has passed. The task now facing international lawyers is more structural. The controversy and transnational discourse surrounding due process reflects that UN decision making is emerging as a new tier of

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[1] Joseph L. Sax, *The (Unhappy) Truth About NEPA*, 26 OKLA. L. REV. 239, 239 (1973).

[2] Thirteenth Report of the Analytical Support and Sanctions Implementation Monitoring Team Submitted Pursuant to Resolution 1989 (2011) Concerning Al-Qaida and Associated Individuals and Entities, para. 19, UN Doc. S/2012/968 (Dec. 31, 2012) [hereinafter Thirteenth Report of the 1267 Monitoring Team]; Eighth Report of the Analytical Support and Sanctions Monitoring Team Pursuant to Resolution 1735 (2006) Concerning Al-Qaida and the Taliban and Associated Individuals and Entities, para. 39, UN Doc. S/2008/324 (May 14, 2008).

[3] Armin Rosen, *How the UN Caused a Massive Cholera Outbreak in Haiti*, BUSINESS INSIDER (Apr. 9, 2015), *at* http://www.businessinsider.com.au/cholera-outbreak-in-haiti-and-the-un-2015-4/; *see also Fault-Lines: Haiti in a Time of Cholera* (Al Jazeera television broadcast Mar. 2, 2015); *United in Immunity: UN in the Dock over Haiti Cholera Outbreak* (France 24 television broadcast Oct. 14, 2014); *The UN Condemns Baby Doc but Exonerates Itself*, ECONOMIST (Mar. 2, 2013), *at* http://www.economist.com/news/americas/21572819-un-condemns-baby-doc-exonerates-itself-double-standards/; *How the UN Caused Haiti's Cholera Crisis—and Won't Be Held Responsible*, ATLANTIC (Feb. 26, 2013), *at* http://www.theatlantic.com/international/archive/2013/02/how-the-un-caused-haitis-cholera-crisis-and-wont-be-held-responsible/273526/.

[4] UN Press Release, Central African Republic: Ban Vows 'Decisive Action' on Allegations of Sexual Abuse by UN Peacekeepers (Aug. 12, 2015), *at* http://www.un.org/apps/news/story.asp?NewsID=51618.

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governance applicable and accountable to a complex, hybrid, global constituency. Yet much normative work still needs to be done in tracing out the full implications of the organization's assumption of "governmental" powers in the international sphere. In terms of applicable procedural standards, the problem is that the normative case for adopting due process safeguards in UN decision making has not adequately been made. Instead, would-be reformers have relied on a presumption that due process is unquestionably "a good thing," and have provided minimal analysis of the form that due process should take or the role that it should play in the UN setting. At the same time, and in the absence of a strong normative argument to do otherwise, the United Nations has rested on its traditional privileges such as primacy or immunity and has resisted outside "interference" in the form of procedural regulation and review.

This article proceeds from the starting point that the intransigence on both sides of the debate is less a product of ideological differences about due process than of (flawed) methodology. In the reform debate, the task of developing a procedural framework applicable to UN decision making has been largely atheoretical. Following the traditional methodology for identifying sources of international law, international lawyers have typically drawn "universally recognized" procedural standards from customary international law or general principles of civilized nations, based on the recognition of such standards in *x* number of treaties or the use of similar principles by *y* number of states. With this orientation, and drawing predominantly on due process guarantees binding on states under international and regional human rights sources, those favoring reform have united around the need for a judicial remedy—an idea that the United Nations has strongly rejected.

This formalistic "one-size-fits-all" approach to due process—in which the only option is to embrace or reject the judicial approach—lacks normative foundation. As any public lawyer will readily identify, while due process rights are recognized by most legal systems, we should not be led into the error of thinking either that the relevant principles are consequently "universal" or that they take the same "judicial" shape in every legal system.[5] In the domestic literature, it is well established that due process is *contextual*: different legal contexts legitimately require different procedural standards and operate according to different principles and values.[6] This contextual character of due process runs contrary to the traditional international law methodology of identifying similar principles from diverse legal systems and then generating what is asserted to be a universally applicable set of norms.

The aim of this article is to develop procedural principles applicable to the United Nations by using a normatively rich rather than formalistic approach. I identify three models of due process, supported by different theories of community, law, and values. In setting out the foundations of a "value-based" approach to the development of due process principles, I focus on two areas in which the choice of procedural framework is both problematic and unresolved: targeted sanctions and the Haiti cholera controversy. In both settings, various procedural frameworks have been proposed and applied, with certain mechanisms put into place by the United Nations itself, others embedded in reform proposals, and still others evolving more organically. Each of the main procedural frameworks will be considered in terms of the due

[5] Carol Harlow, *Global Administrative Law: The Quest for Principles and Values*, 17 EUR. J. INT'L L. 187, 204 (2006).

[6] One of the foremost comparative treatises on due process notes that "there is no general blueprint to follow and the variety of approaches found in statutes is considerable." DENIS J. GALLIGAN, DUE PROCESS AND FAIR PROCEDURES: A STUDY OF ADMINISTRATIVE PROCEDURES 315 (1996).

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process model that each most appropriately advances. The overarching goals of the article are to use a value-based approach to bypass the superficial—and deadlocked—debate centered on forms and remedies, and to expose the underlying choices about conceptions of international community, the role of law, and the appropriate balance between international values.

I. A VALUE-BASED APPROACH: THREE MODELS OF DUE PROCESS

Historically, within domestic legal systems—as within international law—little attention has been paid to the theoretical aspects of procedures. This inattention reflected a sentiment that procedural rules relate "only to the nuts and bolts of legal machinery, whereas central theoretical issues lie elsewhere."[7] In the last few decades, however, the outpouring of writings on due process has made clear that the theoretical dimension of due process is extraordinarily rich. This literature has been virtually untapped in the debate about the application of due process to UN decision making. Instead, due process has typically been discussed in terms of procedural rights, including the (1) right to notice, (2) right to a hearing, (3) right to reasons, (4) right of appeal to an independent tribunal, (5) right of public access to information, and (6) right to a judicial remedy. Yet due process is far more than the sum of its parts. In proposing applicable procedural standards, little consideration has been given to the theoretical foundations or purposes that potentially underlie and unify these various rights. Through my value-based analysis, I demonstrate that due process is more than a set of discrete legal standards; it is a touchstone for how particular legal orders conceive of far larger issues.

Due Process: History, Power, and Legitimacy

Due process has played an important historical role in shaping the structures within which different societies make legal, political, and social decisions. Shifts in governmental authority (and power) from one branch to another have often been matched by widespread procedural reforms. During the eighteenth, nineteenth, and twentieth centuries, the center of gravity of governmental authority shifted from the legislative and judicial to the administrative branches of government across a range of countries, including England, France, and the United States. In many cases, these shifts were accompanied by crises of legitimacy that generally stemmed from concerns about the concentration of governmental authority in the hands of unelected officials and about attempts to insulate that authority from interference by the judiciary. It was largely through the reformation of due process law that these concerns were redressed. The elaboration of due process principles in the United States has been described as the "primary mechanism" for redefining the modern administrative state.[8] Napoleon "rejudicialized" French administrative justice by establishing the Conseil d'état and, later, by giving that body the power of review over administrative decisions. He described these changes as necessary lest "the government . . . fall into scorn."[9] In the United Kingdom, the House of Lords' decision

[7] Gerry Maher, *Natural Justice as Fairness*, *in* THE LEGAL MIND: ESSAYS FOR TONY HONORÉ 104 (Neil MacCormick & Peter Birks eds., 1986).

[8] JERRY MASHAW, DUE PROCESS IN THE ADMINISTRATIVE STATE 1 (1985); Richard Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667, 1717–22 (1975).

[9] PELET DE LA LOZÈRE, OPINIONS DE NAPOLÉON 191 (F. Didot 1833) (translation by author).

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in *Ridge v. Baldwin*,[10] which extended the right of procedural fairness to the exercise of all administrative decisions, has been characterized as the "Magna Carta of natural justice."[11]

The idea that due process has served historically to enhance or restore legitimacy in the wake of shifts in decision-making authority is an interesting one in the present context of UN decisions. The expanding assumption of authority over individuals by international institutions might well represent the next important (and ongoing) shift in governmental authority, this time from the domestic to the international sphere. This shift has sparked concerns similar to those emerging during the rise of the modern administrative state—namely, fears about the exercise of power over individuals by an unaccountable body and about the absence of judicial review. Perceived against the backdrop of other historical shifts in governmental authority, the United Nations' failure to establish adequate due process safeguards regulating its assumption of authority over individuals can be regarded as something of an historical anomaly.

Due Process as "Dialogue"

Though due process has proved a valuable tool in comparable historical contexts, there has been a failure in the international sphere to appreciate how procedural law could potentially contribute to UN decision making. It is often said, and history confirms, that the essential aim of due process is to enhance the legitimacy of decisions.[12] Of course, legitimacy is a broad concept. If the case for procedural reform is to be persuasive, it is necessary to bring the essential contribution of due process into sharper focus.

I argue that due process serves to establish a "peculiar form of dialogue" in decision making.[13] Safeguards associated with due process aim collectively to open up a structured dialogue between decision-making authority and those affected by decisions. Broadly, the aim of this dialogue is to enhance legitimacy. Whether "legitimacy" is described by reference to a Habermasian "worthiness to be recognized,"[14] a Franckian "reference to a community's evolving standards,"[15] or Beetham's requirement that decision-making authority should find its foundation in "beliefs shared by both dominant and subordinate,"[16] the concept of legitimacy envisages a connection between decision-making authority and community values sufficient to ground acceptance of that authority in the relevant community. Due process provides legal standards that serve to establish a dialogue between decision makers and the community affected by decisions, thereby ensuring that decision making takes place in accordance with relevant community values. Setting up this general connection with legitimacy is important

[10] [1964] AC 40.

[11] CARLETON K. ALLEN, LAW AND ORDERS 242 (3d ed. 1965).

[12] JERRY MASHAW, GREED, CHAOS AND GOVERNANCE 108 (1997); Thomas M. Scanlon, *Due Process*, *in* DUE PROCESS 94 (J. Roland Pennock & John W. Chapman eds., 1977); CAROL HARLOW & RICHARD RAWLINGS, LAW AND ADMINISTRATION 621 (3d ed. 2009).

[13] This expression deliberately mimics Fuller's discussion of the related concept of adjudication. *See* Lon Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 364 (1978).

[14] Juergen Habermas, *Legitimation Problems in the Modern State*, *in* COMMUNICATION AND THE EVOLUTION OF SOCIETY 178–79 (Thomas McCarthy trans., 1979).

[15] THOMAS M. FRANCK, FAIRNESS IN INTERNATIONAL LAW AND INSTITUTIONS 26 (1995).

[16] DAVID BEETHAM, THE LEGITIMATION OF POWER 16 (Peter Jones & Albert Weale eds., 1991).

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because it reveals that due process is intricately bound up with conceptions of community, values, and the role of law in achieving these values. The contextual nature of due process arises from the fact that conceptions of community, law, and values will differ from one legal context to another.

Three Models of Due Process

In developing a normatively rich understanding of due process, it is possible to identify distinct schools of thought as to how due process is thought to enhance the legitimacy of decision making. These different approaches are commonly discussed in terms of process values, with scholars differing over the central process value or values that are advanced by procedural frameworks. While these process values are not mutually exclusive and may coexist, it is helpful to examine them separately, which will help to clarify the different ways in which due process is able to contribute to the legitimacy of decisions.[17]

The instrumentalist approach: A model based on accuracy. The classical model of due process contributes to the legitimacy of decision making by seeking to minimize the incidence of error. This model ascribes an instrumental role to due process, regarding it as a mechanism by which to achieve greater *accuracy* in applying substantive law to the facts. The preceding sentence is deliberately qualified: the focus of the instrumentalist model is not on achieving accuracy or truth in decision making per se but on the narrower aim of ensuring that decision makers accurately apply the substantive law in their decisions. Jeremy Bentham, an archetypal positivist, was the original and most influential proponent of the instrumental approach to procedural justice. It is important not to neglect the link between instrumentalism and legal positivism.[18] Essentially, the primary role of procedural law under this model is to make sure that the rules are applied as enacted by the legislature, thus fulfilling the positivist's aim of achieving the accurate and objective implementation of the legislature's will. Of course, under a positivist theory of the rule of law, legitimacy does not emerge merely from the accurate application of law but from a deeper internal acceptance of the authority of the lawmaker to enact the law. The idea is to ensure that unrepresentative bureaucratic decision makers accurately apply the commands of a legitimate source of authority, usually the legislature.[19] The instrumentalist model presupposes the existence of a "legitimately representative lawmaker" in the legal system within which the model applies. The duty to submit to the rules derives from the legitimacy of the whole system rather than from that of any particular command.[20]

A court-based "adjudicatory" framework has historically been considered as best placed to achieve the instrumentalist model's goals. The model imagines a system based on clear and determinate standards, in which decision makers apply those standards rather than their own personal notions of fairness, justice, or appropriateness. The resulting decisions are amenable,

[17] The foundations for these models are outlined in greater detail in DEVIKA HOVELL, THE POWER OF PROCESS (2016).

[18] Another celebrated positivist, H. L. A. Hart, described procedural law as the guarantor of impartiality and objectivity in the application of legal rules. H. L. A. HART, THE CONCEPT OF LAW 156 (1961).

[19] Stewart, *supra* note 8, at 1672, 1698.

[20] Duncan Kennedy, *Legal Formality*, 2 J. LEGAL STUD. 351, 359 (1973).

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in turn, to review by a judicial arbiter to determine whether the decisions can be counted as correct or incorrect.[21]

The dignitarian approach: A model based on interest representation. The quest for accuracy reflected in the instrumentalist approach to due process has more recently come to be overshadowed by a competing approach that recognizes individual dignity as one of the primary contemporary foundations for due process. This model emerged at the domestic level from an increasing sense that the accurate application of legislative standards does not define the "core ideal" of due process.[22] Rather, due process has come to be associated with values such as "basic notions of dignity,"[23] "humaneness,"[24] "autonomy, of controlling the events that affect you . . . and the . . . self-respect that come with it,"[25] and "rights to interchange [expressing] the idea that to be a *person*, rather than a *thing*, is at least to be *consulted* about what is done with one."[26]

There has been much debate about the foundations of this model, which translates into rights the essentially intuitive claims to dignity, self-respect, and autonomy.[27] The obvious approach is to anchor this dignitarian model in the liberal-democratic intellectual tradition, with due process rebranded as a "Kantian injunction."[28] However, Jerry Mashaw's illuminating scholarship has demonstrated the limited determinate value of a dignitarian model of due process derived from liberal theory. He argues that liberal theory is either too strong or too weak in its capacity to safeguard the individual.[29] If individual autonomy is treated as an absolute value, individuals are entitled to demand any process that they deem necessary to the pursuit of their purposes in life. Conversely, on a more social interpretation of liberal theory, individual autonomy is subsumed to the demands of social necessity, and decision making need only be *comprehensible* to the rational individual to avoid the liberal critique.[30]

Taking into account Mashaw's criticism, especially as it relates to the international legal setting—where the role of the individual is already weak—a more satisfactory theoretical framework, in my view, is to situate the dignitarian approach within a pluralist conception of legal and political culture. Such an interpretation of the dignitarian model maintains the connection between due process and autonomy, but adopts a broader, more socially embedded interpretation of autonomy as a concept associated with self-government. On this interpretation autonomy can be understood a form of freedom of association that

[21] Frank I. Michelman, *Formal and Associational Aims in Procedural Due Process*, *in* DUE PROCESS, *supra* note 12, at 130.

[22] Maher, *supra* note 7.

[23] Richard B. Saphire, *Specifying Due Process Values: Toward a More Responsive Approach to Procedural Protection*, 127 U. PA. L. REV. 111, 119 (1978).

[24] Robert Summers, *Evaluating and Improving Legal Processes—a Plea for "Process Values,"* 60 CORNELL L. REV. 1, 23 (1974).

[25] Edward Dauer & Thomas Gilhool, *The Economics of Constitutionalized Repossession*, 47 S. CAL. L. REV. 116, 148–49 (1973).

[26] LAURENCE TRIBE, AMERICAN CONSTITUTIONAL LAW 666 (2d ed. 1988).

[27] Due process scholars have acknowledged the inadequacy of intuition as a normative foundation and have eschewed the value of a natural rights jurisprudence, which has been justly criticized for its intuitive assertions of fundamental fairness. *See* MASHAW, *supra* note 8, at 47, 182.

[28] Edmund Pincoffs, *Due Process, Fraternity and a Kantian Injunction*, *in* DUE PROCESS, *supra* note 12.

[29] MASHAW, *supra* note 8, at 216.

[30] *Id*. at 175–76, 185, 216–17.

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enables individuals to organize themselves voluntarily into groups in order to impress their private preferences on decision makers. Within this framework, due process becomes a mechanism by which to assure "interest representation" of individuals and groups within the broader community, with the purpose of procedure being to involve in decision making all of the persons or groups affected by any decision.[31] The idea is that decision making becomes more like a process of free negotiation or uninhibited bargaining among the various participants; the aim is that the numbers and intensities of preferences will ultimately be reflected in decisions.[32]

The public interest approach: A model based on public accountability. In contrast to the dignitarian model, which encourages a focus on self-interest, the public interest model regards procedural fairness as a mechanism through which to enhance representation of the public interest through decision making. Proponents of this approach, including T. R. S. Allan and Frank Michelman, view due process as a "guarantee of the opportunity for all to play their part in the political process."[33] The model shifts the theoretical foundations away from individual autonomy, as defined in a Kantian or even a pluralist sense, and toward something more representative of social solidarity. From a theoretical perspective, it is underpinned by a "communitarian" mentality that encourages a wider sharing of legal authority; the baseline assumption is that popular consent and the development of shared beliefs can arise only from expansive public deliberation.

The public interest model encourages a "responsive" approach to law and legal system as depicted by scholars such as Philippe Nonet and Philip Selznick (drawing, in turn, upon the writings of Lon Fuller).[34] Underpinning this model is the idea that no legal regime can endure without a foundation in consent. Responsive law borrows much from the experience of democracy but sees "gross legitimation" through majority rule as providing only crude accountability.[35] Rather, the public interest model complements theories of deliberative democracy, emphasizing access to information and active participation in rational discourse as the foundation for political will formation and political agreement.[36] Due process serves as a process for communication and argument under which participants are encouraged to phrase their objections as if they were thinking through what is best for all participants, rather than encouraging self-interested claims. Increased opportunities for participation in decision making strengthen the bonds of rational consent between individuals and decisions, feeding into discourse about the development of a shared body of values, with which decision making should, in turn, accord. Under a public interest model of law, respect for decision-making authority is negotiated, not won by subordination to formal rules. The idea is that the decision maker's claim to authority and legitimacy is enhanced by an acknowledgment that "the law or policy in question has been fairly

[31] Stewart, *supra* note 8, at 1759.

[32] Cass R. Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29, 32–33 (1985–86).

[33] Trevor R. S. Allan, *Procedural Fairness and the Duty of Respect*, 18 OXFORD J. LEGAL STUD. 497, 509 (1998); Michelman, *supra* note 21, at 136.

[34] PHILIPPE NONET & PHILIP SELZNICK, LAW AND SOCIETY IN TRANSITION: TOWARD RESPONSIVE LAW (1978); LON FULLER, THE MORALITY OF LAW (1969).

[35] NONET & SELZNICK, *supra* note 34, at 56.

[36] *See*, *e.g.*, AMY GUTMANN & DENNIS THOMPSON, DEMOCRACY AND DISAGREEMENT (1996); JÜRGEN HABERMAS, BETWEEN FACTS AND NORMS: CONTRIBUTION TO A DISCOURSE THEORY OF LAW AND DEMOCRACY (William Rehg trans., 1996).

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TABLE 1
DIFFERENT MODELS OF DUE PROCESS

	Key process value	Key community participants	Theory of law	Values
Instrumentalist	Accuracy	Lawmakers	Positivist	Value neutral
Dignitarian	Interest representation	Stakeholders	Pluralist	Pluralist interests
Public interest	Public interest	Broad community	Responsive	Universal values

adopted by procedures which enable *all citizens* to exert an influence, however limited in any particular case."[37]

The Value(s) of Due Process

The slow pace of due process reform at the United Nations indicates that influential organs in the international order remain unconvinced of, or potentially uninterested in, the value of such reform. Yet there is little point expecting policy-based subsidiary organs of the Security Council, such as sanctions committees or peacekeeping missions, to adopt due process principles on blind faith. There is a strong need for academic writers to unpack the process values underlying due process law. Such work would demonstrate the link between the legitimacy of such organs and due process, and show the range of beneficial process values that can be promoted by due process. In Table 1 I have summarized the different due process models identified in the preceding discussion. In the next sections, I examine how the three normative models of due process and the underlying process values mesh with the emerging procedural frameworks in two contemporary contexts: the targeted-sanctions regime and Haiti cholera controversy.

II. DUE PROCESS IN SECURITY COUNCIL SANCTIONS DECISION MAKING

In the late 1990s, concern about the devastating humanitarian impact of blanket sanctions against states led to a strategic shift in policy by the Security Council. Beginning in 1997 with the sanctions regime against the National Union for the Total Independence of Angola, the Security Council started targeting sanctions measures against relevant individuals, entities, and products, rather than deploying blanket sanctions against states. When a UN member state proposed that the UN Office of Legal Counsel should be consulted about the policy shift to targeted sanctions, the Security Council replied that "no legal issues" were involved in the listing or delisting of individuals on sanctions blacklists.[38] But the Security Council underestimated the consequences of its assuming decision-making authority over individuals. Paradoxically, a shift in policy engineered to inject greater fairness into the sanctions regime has given rise to nearly two decades of debate about the lack of procedural fairness in sanctions decision making.

[37] Allan, *supra* note 33, at 508 (emphasis added).

[38] This observation was made by Hans Corell during the discussion of "Is the Security Council Bound by Human Rights Law," 103 ASIL PROC. 199 (2009).

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As things stand, the "debate" about due process in the sanctions context has become more like a conversation of the deaf. Seemingly intractably, the debate has become polarized around the need for a court. On the one hand, central to almost every reform proposal is the insistence on including a judicial review mechanism in the sanctions decision-making process.[39] On the other hand, the Security Council continues to oppose any form of judicial review of its decision making.[40] Instead, in 2009, the Security Council created the Office of the Ombudsperson of the Security Council's 1267 Committee (1267 Ombudsperson) to engage in review of sanctions decision making.[41] Significantly, the ombudsperson's mandate extends to only one of the fifteen established targeted-sanctions regimes—namely, the 1267 sanctions regime applicable to Al Qaeda and the Islamic State in Iraq and Levant.[42] This step has been deemed inadequate by (among others) the European Court of Justice (ECJ; now officially the Court of Justice (of the European Union)), European Court of Human Rights (ECHR), UK Supreme Court, and UN special rapporteur on human rights and counter-terrorism. Interestingly, the criticism is based not on the narrow scope of application of the office (to one sanctions regime) but on the concern that the 1267 Ombudsperson is "not a court."[43] Problematically, with academics and critics almost exclusively focused on the need for a court-based process, the Security Council's

[39] *See*, *e.g.*, BARDO FASSBENDER, TARGETED SANCTIONS AND DUE PROCESS, para. 12.12 (2006); Larissa Van den Herik, *The Security Council's Targeted Sanctions Regimes: In Need of Better Protection of the Individual*, 20 LEIDEN J. INT'L LAW 797, 806–07 (2007); INTERNATIONAL COMMISSION OF JURISTS, ASSESSING DAMAGE, URGING ACTION: REPORT OF THE EMINENT JURISTS PANEL ON TERRORISM, COUNTER-TERRORISM AND HUMAN RIGHTS 116–17 (2009); Craig Forcese & Kent Roach, *Limping into the Future: The UN 1267 Terrorism Listing Process at the Crossroads*, 42 GEO. WASH. INT'L L. REV. 217, 265, 275 (2010); Jared Genser & Kate Barth, *When Due Process Concerns Become Dangerous: The Security Council's 1267 Regime and the Need for Reform*, 33 B.C. INT'L & COMP. L. REV. 1, 37 (2010); Erika de Wet, *Human Rights Considerations and the Enforcement of Targeted Sanctions in Europe: The Emergence of Core Standards of Judicial Protection*, *in* SECURING HUMAN RIGHTS?: ACHIEVEMENTS AND CHALLENGES OF THE UN SECURITY COUNCIL 169 (Bardo Fassbender ed., 2011); GUGLIELMO VERDIRAME, THE UN AND HUMAN RIGHTS: WHO GUARDS THE GUARDIANS? (2011); Grant L. Willis, *Security Council Targeted Sanctions, Due Process and the 1267 Ombudsperson*, 42 GEO. J. INT'L LAW 673, 737, 743–45 (2011); Lisa Ginsborg & Martin Scheinin, *You Can't Always Get What You Want: The Kadi II Conundrum and the Security Council 1267 Terrorist Sanctions Regime*, 8 ESSEX HUM. RTS REV. 7, 11–12, 19 (2011).

[40] Thirteenth Report of the 1267 Monitoring Team, *supra* note 2, paras. 15–16, 21; Security Council Report, *Special Research Report: UN Sanctions* 14 (Nov. 25, 2013), *at* http://www.securitycouncilreport.org/special-research-report/un-sanctions.php.

[41] SC Res. 1904 (Dec. 17, 2009). The website for the 1267 Ombudsperson is at https://www.un.org/sc/suborg/en/ombudsperson.

[42] The relevant sanctions regime (created by UN Security Council Resolution 1267 of October 15, 1999, and developed in subsequent resolutions) was initially known as the Al Qaeda and Taliban sanctions regime. In 2011, it was divided into two separate sanctions regimes, with the ombudsperson mandate restricted to the Al Qaeda regime. SC Res. 1998 (June 17, 2011); SC Res. 1999 (June 17, 2011). In 2015, the Al Qaeda regime and ombudsperson mandate were extended to encompass the Islamic State in Iraq and Levant (ISIL). SC Res. 2253 (Dec. 17, 2015).

[43] *See* Joined Cases C-584/10 P, C-593/10 P & C-595/10 P, Comm'n v. Kadi (Eur. Ct. Justice July 18, 2013) (Grand Chamber) [hereinafter Kadi II]; Al-Dulimi v. Switzerland, App. No. 5809/08, para. 119 (Eur. Ct. H.R. Nov. 26, 2013); Nada v. Switzerland, 2012 Eur. Ct. H.R. 1691, paras. 209–14; HM Treasury v. Ahmed, [2010] UKSC 2, paras. 78 (Lord Hope), 149 (Lord Phillips), 181, 185 (Lord Rodger), 239, 248 (Lord Mance); Ben Emmerson (Special Rapporteur), Second Report on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism, paras. 14, 20–21, UN Doc. A/67/396 (Sept. 26, 2012).

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failure to extend the ombudsperson's mandate beyond the Al Qaeda sanctions regime has attracted limited comment, let alone opposition.[44]

In this part, I undertake a value-based analysis of the three procedural frameworks that have emerged in the sanctions context, with a particular focus on the capacity of each framework to achieve the goals of the most relevant due process model. First, I examine the capacity of the "internationalized judicial framework"—the model preferred by courts and commentators—to fulfill the goals of the instrumentalist model. Second, I examine a framework that has emerged more organically as an example of the dignitarian model—notably, the "pluralist judicial framework." Under that framework, domestic and regional courts are increasingly accepting challenges to sanctions decision making under domestic or regional law. Third, I look at the Security Council's nominated option, the 1267 Ombudsperson, and assess its capacity to fulfill the goals of the public interest model of due process. My own conclusion is that, contrary to the views of most international lawyers, a court-based process is not the framework best equipped to enhance legitimacy in the international domain.

Instrumentalist Model: Evaluating the Case for International Judicial Review

We begin by discussing the internationalized judicial or adjudicatory framework, which has been a point of convergence for critics seeking reform in the Security Council sanctions regime. The idea is that sanctions decision making should be subject to judicial review based on standards of international law. This model is the one that a number of domestic and regional courts and tribunals have adopted, recasting themselves as "internationalized" courts that use international law to review Council actions.[45] The clearest example of this approach is the 2005 judgment of the Court of First Instance (CFI) in *Kadi v. Council*, though it is also recognizable in Lord Brown's judgment in *Ahmed* and in the opinions of certain Human Rights Committee members in *Sayadi*.[46]

Recalling the instrumentalist model's focus on greater accuracy, the model appears well positioned to contribute to the legitimacy of Security Council sanctions decision making; the incidence of error has undoubtedly weakened the effectiveness and credibility of the sanctions regime. Yet it is also important to recall that the instrumentalist model and adjudicatory framework that supports it are equipped chiefly to deal with *legal* errors in domestic governmental decision making. In its translation to the Security Council, the model's capacity to enhance legitimacy is disrupted by that setting's unique features. As I will outline, the consequences of adopting an instrumentalist model and the associated internationalized court framework in that setting would be to (1) entrench a narrow conception of community, (2) overplay the role

[44] Consider, for example, the repeated rejection of proposals by the Group of Likeminded States to extend the ombudsperson's mandate. *See* UN Docs. S/PV.7285 (Oct. 23, 2014), S/PV.6964 (May 10, 2013), S/2012/805 (Nov. 9, 2012).

[45] I distinguish here courts that assess Security Council decision making under domestic or regional law, discussed *infra* as examples of the dignitarian model in action.

[46] Case T-315/01, Kadi v. Council, 2005 ECR II-3649 (Court of First Instance); *see also* HM Treasury v. Ahmed, *supra* note 43 (Lord Brown); UN Human Rights Comm., Sayadi v. Belgium, Communication No. 1472/2006, UN Doc. CCPR/C/94/D/1472/2006 (Dec. 29, 2008) (see, in particular, individual opinion (partly dissenting) of Nigel Rodley, Ivan Shearer, and Iulia Antoanella Motoc, and individual opinion (dissenting) of Ruth Wedgewood).

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of law in Security Council decision making, and (3) have a stagnating effect on international values.

Community: Power to the P5. In terms of community, a key problem in applying the instrumentalist model to Security Council sanctions is that it fails to broaden representation in sanctions decision making beyond the scope of lawmakers, and it otherwise positions courts as guardians of the legality of decision making. While these factors might operate to enhance legitimacy in a domestic governmental setting characterized by strong command chains between administrative decision makers, a representative legislature, and an independent judiciary, the model comes unhinged from these sources of legitimacy in the Security Council context.

As discussed above, the primary goal of the instrumentalist model is to advance the will of lawmakers. The implicit assumption underlying the model is that the lawmakers embody the consent of the broader community. By contrast, Security Council decisions are made "without benefit of law-makers representative of the demos these rules purport to affect."[47] Applied to the Security Council, the main achievement of the instrumentalist model would therefore be to ensure the "accurate" application of Security Council resolutions developed by the Council's fifteen members. Far from enhancing legitimacy, such an approach risks being perceived as highly authoritarian from the broader perspective of international society. Rather than working to transform the traditional and increasingly outdated conception of international community, the effect of the instrumentalist model would be to police the traditional gateway of international lawmaking, legitimizing the dominance of the permanent five Council members and downplaying the significance of nonstate actors in international society. The Security Council is becoming increasingly reliant on nonstate actors for cooperation, implementation, and enforcement of its sanctions decisions. If these actors feel sidelined or are otherwise dissatisfied with the Council's decision making, they have shown a capacity to undermine the Council's sanctions regime by facilitating the availability of employment, educational, or travel opportunities, declining to freeze funds, or actively contributing funds to those on sanctions blacklists.[48]

In terms of review of sanctions decision making, those advocating reform see a strong advantage in designating courts as the central procedural actors. Yet, as the brief history of the sanctions regime has shown, this reliance on courts has had undesirable effects, stringing courts between the poles of inert deference and overreaching defiance. Some of the courts taking a deferential approach have emphasized the broad discretion granted to the Security Council under the UN Charter, and have found that the combined operation of Articles 25 and 103 leaves the Council essentially free to take whatever measures it chooses in response to any threat to international peace and security.[49] Other courts have shown deference by taking a narrow

[47] JOSE ALVAREZ, INTERNATIONAL ORGANIZATIONS AS LAW-MAKERS 630 (2005).

[48] *See* Per Cramér, *Recent Swedish Experiences with Targeted UN Sanctions: The Erosion of Trust in the Security Council*, *in* REVIEW OF THE SECURITY COUNCIL BY MEMBER STATES (Erika de Wet & André Nollkaemper eds., 2003); Paul Koring, *Federal Lawyers Argue They Have No Obligation to Bring Abdelrazik Home*, GLOBE & MAIL (May 8, 2009).

[49] See, for example, the decision of the Administrative Appeals Board of the Turkish Council of State in *Kadi v. Prime Ministry*, INT'L L. DOMESTIC CTS. 311 (TR 2007) (Feb. 22, 2007); Sayadi v. Belgium, *supra* note 45, at 27 (joint sep. op. Rodley, Shearer & Antoanella Motoc) (partly dissenting), 30 (diss. op. Wedgwood), 32 (sep. op. Shearer).

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approach to interpreting applicable human rights principles, undercutting the protections otherwise available to individuals and also arguably distorting fundamental human rights principles.[50] The Court of First Instance's judgment in *Kadi* exhibits both approaches. The court identified a "rule of primacy" of international law over municipal law and concluded that it had no power to review the lawfulness of Security Council resolutions under European Union (EU) law.[51] The court did recognize, however, that it needed "to check, indirectly, the lawfulness of the resolutions of the Security Council in question with regard to *jus cogens*."[52] The CFI took an unusually expansive reading of *jus cogens*, essentially putting all human rights within that category, including the right to a fair hearing, the right not to be arbitrarily deprived of property, and the right to an effective remedy.[53] The CFI then took yet another (mis)step, holding the norms in question had not been violated—even though commentators had roundly criticized the UN sanctions regime as directly infringing those human rights standards.[54] It is notable that the influence of the decision has been minimal and that the ECJ subsequently overturned it, as discussed later.

At the other extreme, the instrumentalist model has led some courts to assume a far stronger role in international lawmaking than is normatively justifiable. Though the legal limits on the Security Council in the UN Charter are narrow, they are also not sharply defined. In the domestic legal setting, courts are accustomed to filling gaps left by the legislature; in the international legal setting, the gaps become chasms. Council resolutions are often vague and are not drafted with the level of attention to detail that might be expected with domestic legislation. Courts that take on the substantive task of reviewing such resolutions would inescapably be required to make difficult, largely unguided choices among competing values and, indeed, among competing, and controversial, political, social, and moral responses to threats to international peace and security. For example, the majority of the UK Supreme Court in *Ahmed* took an instrumentalist approach to the interpretation of Security Council Resolution 1373[55] (by contrast, the majority's approach to the interpretation of Resolution 1267 was predominantly dignitarian). The results are a fragmented approach to interpreting the standard of proof supported by Resolution 1373 and, in some instances, a misinterpretation of the Council's intent. Lord Hope held that the "reasonable grounds for suspicion test" adopted in the UK implementing mechanism went beyond the scope of the resolution, though he also acknowledged evidence that that test had the overall support among states and was the standard applied by the Financial Action Task Force.[56] Lord Phillips inserted a requirement into the resolution that the asset-freezing regime applied only to "criminals," though the sanctions regime is

[50] *See* Kadi v. Council, *supra* note 46, paras. 268, 288; Sayadi v. Belgium, *supra* note 46, para. 10.8.

[51] Kadi v. Council, *supra* note 46, paras. 218–25.

[52] *Id.*, paras. 226–31.

[53] *Id.*, paras. 226–29.

[54] *Id.*, paras. 226–30. For criticism of this decision, see Marko Milanovic, *Norm Conflict in International Law: Whither International Law?*, 20 DUKE J. COMP. & INT'L L. 69, 91, 93 (2009); Jan Klabbers, *Setting the Scene*, *in* THE CONSTITUTIONALIZATION OF INTERNATIONAL LAW 1 (Jan Klabbers, Anne Peters & Geir Ulfstein eds., 2009); Christina Eckes, *Judicial Review of European Anti-terrorism Measures—the* Yusuf *and* Kadi *Judgments of the Court of First Instance*, 14 EUR. L.J. 74 (2008); Piet Eeckhout, *Community Terrorism Listings, Fundamental Rights and UN Security Council Resolutions: In Search of the Right Fit*, 3 EUR. CONST. L. REV. 183, 195 (2007); Elizabeth Defeis, *Targeted Sanctions, Human Rights, and the Court of First Instance of the European Community*, 30 FORDHAM INT. L.J. 1449, 1454 (2006).

[55] Sept. 28, 2001.

[56] HM Treasury v. Ahmed, *supra* note 43, paras. 57–61 (Lord Hope).

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widely understood to be preventive rather than punitive.[57] Lord Mance expressed preference for a "balance of probabilities" standard.[58] While the UK Supreme Court's approach was more measured in the subsequent *Youssef* judgment,[59] the problem in *Ahmed* is that the judges, in interpreting the applicable standard of proof, did not seem to be sufficiently guided by the special requirements of the Security Council sanctions regime. Courts should not take it upon themselves to create new aims for international society or to impose on society new basic directives.[60] Judicial activism by a court purporting to act as an unrepresentative and largely uninvited "guardian" of the international legal order threatens to undermine, rather than enhance, the legitimacy and effectiveness of Security Council decision making.

Law: The ambiguity of Security Council law. A second set of problems with the instrumentalist approach stems from the nature and role of law in the Security Council decision making. As discussed above, the instrumentalist model depends for its successful operation upon the existence of clear and determinate standards, in contrast to flexible guiding principles. As Michelman notes (albeit in his critique of the instrumentalist model), "unless there are objective standards in terms of which decisions can be counted correct or incorrect, it is hard to see in what sense we can say that a decision serves to secure to an individual that which is *rightfully* his."[61] The instrumentalist model relies on a conception of law as a logically coherent and roughly complete system of principles and rules, where consistency and predictability are the most important values, and where arbitrary or unpredictable exercises of power are minimized.

By contrast, the Security Council is a deliberately hegemonic institution in which consistency counts for little, and power is always unpredictable. The Council operates in a setting in which discretion, rather than rules, is the gold standard. The scope of legal norms binding the Council are limited, vague, and, to an extent, undecided. They include (according to the least controversial interpretation) the narrow limitations defined by the UN Charter and those few norms that have attained the status of *jus cogens*. Rather than being governed by law, the Council exercises a hybrid of political and legal authority.[62] As noted in the leading commentary to the UN Charter, the Council's role sharply contrasts with that of the International Court of Justice (ICJ): "The ICJ has to decide exclusively on the basis of international law, whereas the [Security Council] has to decide primarily according to political criteria."[63]

The consequence of this broad discretion is significant legal uncertainty. When asked to interpret whether the power granted to states under Security Council Resolution 1730[64] to place a ninety-day hold on a delisting could be renewed indefinitely, the UN Office of Legal

[57] *Id.*, paras. 136–37 (Lord Phillips); *cf. id.*, paras. 165, 170 (Lord Rodger).

[58] *Id.*, paras. 225–31 (Lord Mance).

[59] Youssef v. Secretary of State, [2016] UKSC 3, paras. 48–50 (Lord Carnwath) (with agreement of Lords Neuberger, Mance, Wilson, and Sumption).

[60] JOHN HART ELY, DEMOCRACY AND DISTRUST (1980); Fuller, *supra* note 13, at 392; *see also* Jones v. Ministry of Interior of the Kingdom of Saudi Arabia, [2006] UKHL 26, para. 63.

[61] Michelman, *supra* note 21, at 130.

[62] Rosalyn Higgins, *The Place of International Law in the Settlement of Disputes by the Security Council*, 64 AJIL 1 (1970); Martti Koskenniemi, *The Place of Law in Collective Security*, 17 MICH. J. INT'L L. 455 (1996).

[63] Jost Delbrock, *Functions and Powers: Article 24*, *in* 1 THE CHARTER OF THE UNITED NATIONS: A COMMENTARY 446 (Bruno Simma, Hermann Mosler, Andreas Paulus & Eleni Chaitidou eds., 2002) (citation omitted).

[64] Dec. 19, 2006.

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Affairs responded that a sanctions resolution means "whatever the sanctions committee wants it to."[65]

The instrumentalist model is ill equipped to operate in such a setting. Indeed, in due process theory, it is generally appreciated that, as decision making moves away from rule-based decisions and becomes increasingly discretionary, adjudicatory frameworks may need to give way to more broadly political consultative processes that are focused on representing pluralist interests or on realizing certain goals in the public interest.[66]

Values: Stagnation of international values. The third potential problem with the instrumentalist model is that, in relation to the Security Council, the model lacks any substantive normative dimension. Its concern is to ensure the accurate fulfilment of the substantive law, though it fails to provide any basis for differentiating between acceptable and unacceptable aspects of that law. As is well apparent from the judgments of courts adopting an instrumentalist approach in reviewing sanctions, review based solely on the process value of "legal accuracy" is not sufficient to ensure the legitimacy of sanctions decision making. In both *Ahmed* and *Sayadi*, respectively, the judge and UN Human Rights Committee members who took an instrumentalist approach to sanctions review were forced to present their most damning indictments of the regime in comments subsidiary to the main decision. For example, even though his legal analysis led him to confirm the validity of the 1267 sanctions regime in *Ahmed*, Lord Brown noted that the "draconian nature of the regime imposed under these asset-freezing orders can hardly be over-stated"[67] and that the regime maintained by the UK's Orders in Council was "contrary to fundamental principles of human rights."[68] In *Sayadi*, even though Human Rights Committee members found the Security Council to be immune from review, the Committee introduced this finding by noting that "by operation of the extravagant powers the Security Council has arrogated to itself, . . . the executive branches of 15 Member States . . . simply discard centuries of States' constitutional traditions of providing bulwarks against exorbitant and oppressive executive action."[69]

These nonbinding, or subsidiary, statements made in the broader context of decisions ultimately confirming the legal validity of an impugned regime reinforce the need to develop a procedural model that advances values apart from legal accuracy. The unintended effect of such a procedural framework may be to freeze or crystallize international norms at a particular historical moment and, in the process, to fail to give sufficient credence to emerging perspectives on international legal norms, thereby impeding potential legal progress.[70] The Security Council's interest in its own legitimacy, as well as the international legal order's interest in the same, requires something different from a due process framework in order to function effectively in today's international arena.

[65] Comment by Peter Scott, Director, Sanctions and Transnational Crime Section, Australian Department of Foreign Affairs and Trade, Workshop: The UN Security Council, Sanctions and the Rule of Law, Australian National University, Dec. 14–15, 2011 (notes on file with author).

[66] Nicola Lacey, *The Jurisprudence of Discretion: Escaping the Legal Paradigm*, *in* THE USES OF DISCRETION (Keith Hawkins ed., 1992); D. J. GALLIGAN, DISCRETIONARY POWERS 88, 343 (1986).

[67] HM Treasury v. Ahmed, *supra* note 43, para. 192.

[68] *Id*., para. 203.

[69] Sayadi v. Belgium, *supra* note 45, at 27 (joint sep. op. Rodley, Shearer & Antoanella Motoc) (partly dissenting).

[70] Anthea Roberts, *Comparative International Law? The Role of National Courts in Creating and Enforcing International Law*, 60 INT'L & COMP. L.Q. 57, 73 (2011).

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Dignitarian Model: Evaluating the Role of Domestic and Regional Courts

Because of the glacial pace of due process reform of the Security Council sanctions regime and the Council's continuing refusal to respond to calls for an "internationalized" judicial delisting procedure, an alternative, decentralized judicial framework has emerged, one might say, organically. Faced with increasingly urgent challenges by individuals to the sanctions regime, domestic courts have extended their traditional role as guarantors of individual rights beyond domestic governmental parameters to include that UN regime. In so doing, certain courts have eschewed a traditional international law analysis of the relationship between the Security Council and municipal legal systems, and have enforced *domestic or regional* interpretations of individual rights even when doing so conflicted with Security Council resolutions. Key examples include the ECJ judgments in *Kadi I*[71] and *Kadi II*,[72] the majority decision in *Ahmed*, and the ECHR judgment in *Nada*.[73] In each of these cases, the relevant courts held measures implementing Security Council resolutions were invalid on account of their conflict with fundamental principles of domestic and regional law.

This domestic and regional case law has been a most influential (and long overdue) source of protecting individual rights. The neglected voice of individuals placed on sanctions blacklists has been one of the major sources of criticism against the sanctions regime. The regime is not uncommonly compared to that of Josef K. in Kafka's *The Trial* because it renders individuals "effectively prisoners of the state"[74] and "does not begin to achieve fairness for the person who is listed."[75] The 1267 Monitoring Team found that the sanctions regime's perceived unfairness to individuals has detracted from the regime's credibility and effectiveness among UN member states.[76] The influence of domestic and regional courts has served to vault the individual into a more central position in relation to Security Council decision making.

The expansion of this decentralized adjudicatory framework has an impact beyond the more robust protection of individual rights. As other scholars have noted, the judicial review of Security Council decisions in accordance with domestic and regional standards is advancing a pluralist vision of the international legal order.[77] In line with that scholarship, I argue that these

[71] Joined Cases C-402/05 P & C-415/05 P, Kadi v. Council, [2008] ECR I–6351 (Grand Chamber) [hereinafter Kadi I]; *see also* Kadi v. Comm'n, 2010 ECR II-5177 (General Court).

[72] *Supra* note 43.

[73] HM Treasury v. Ahmed, *supra* note 43; Nada v. Switzerland, *supra* note 43.

[74] A K, M, Q & G v. HM Treasury, [2008] EWCA 1187, para. 114, *quoted with approval in* HM Treasury v. Ahmed, *supra* note 43, paras. 4, 60, and Kadi v. Comm'n, *supra* note 71, para. 149; Abdelrazik v. Minister of Foreign Affairs, [2009] FC 580, para. 53 (Can.). For other critical judicial comment, see HM Treasury v. Ahmed, *supra* note 43, paras. 6 (Lord Hope), 145, 147 (Lord Phillips), 192, 203 (Lord Brown).

[75] A K, M, Q & G v. HM Treasury, *supra* note 74, para. 114 (para. 18 of quoted material).

[76] *See*, *e.g.*, Thirteenth Report of the 1267 Monitoring Team, *supra* note 2, para. 17; Ninth Report of the Analytical Support and Sanctions Monitoring Team, Submitted Pursuant to Resolution 1822 (2008) Concerning Al-Qaida and the Taliban and Associated Individuals and Entities, para. 16, UN Doc. S/2009/245 (May 13, 2009); *see also Special Research Report: UN Sanctions*, *supra* note 40, at 14.

[77] This change has been noted by scholars such as NICO KRISCH, BEYOND CONSTITUTIONALISM: THE PLURALIST STRUCTURE OF POSTNATIONAL LAW (2010), Gráinne de Búrca, *The European Court of Justice and the International Legal Order After* Kadi, 51 HARV. INT'L L.J. 1 (2010), Daniel Halberstam & Eric Stein, *The United Nations, the European Union and the King of Sweden: Economic Sanctions and Individual Rights in a Plural World Order*, 46 COMMON MKT. L. REV. 13 (2009), and Samantha Besson, *European Legal Pluralism After* Kadi, 5 EUR. CONST. L. REV. 237 (2009).

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interventions by domestic courts—described collectively as a "pluralist judicial framework"—can be analyzed in theoretical terms as an example of the dignitarian model. This connection between the pluralist judicial framework and dignitarian model enables us, as we shall see below, to undertake a normatively rich analysis of that framework and to distinguish between "moderate" and "radical" versions of the model. The aim in drawing such distinctions is to (1) discourage an elitist conception of interest representation in the international community, (2) encourage a "dialogue model" of international law, and (3) reinforce the need for domestic courts to seek a balance between domestic and international values.

Community: Trading international community for a "multiplicity of publics." Under a dignitarian model, the main aim of procedural safeguards is to provide individuals with a modicum of dignity, autonomy, and self-respect by enabling affected individuals to state their case and to have that case taken into account in decision making.[78] That is not to say that individuals must always have the opportunity to directly represent their own interests before the decision-making body in question. The structure for interest representation under the dignitarian model is potentially more complex.

As discussed above, the sturdiest theoretical foundations of the dignitarian model rest on a pluralist conception of autonomy that recognizes individuals as self-legislating equals who are able to choose freely where their interests might be represented. In that context, the use of domestic and regional courts is simply a manifestation of that same right—that is, to determine how, where, and by whom their interests should be represented in the international domain. In that domain, individuals need not identify as nationals of a particular state or as members of an amorphous "international community," but can choose between a multiplicity of overlapping and conflicting identities and loyalties, depending upon the situation or issue at hand.[79] This view builds on a pluralist notion of public autonomy and the right of individuals to determine which polity they want to be represented in and by. The impact of the dignitarian model would not therefore be to broaden the scope of the "international community" as such. Under a dignitarian model, individuals caught up in the sanctions regime are less likely to characterize themselves as members of an international community and more likely to characterize themselves as victims of it. The model promotes a pluralist conception of the international legal order, which rejects the idea of a singular constituency known as the "international community" in favor of recognition of a "multiplicity of publics."[80]

Law: A "dialogue model" of international law.[81] Critiques of the role that domestic courts have taken in reviewing sanctions decisions are most commonly framed in terms of the international rule of law. Critics invoke the danger that judicial review by domestic and regional courts will fragment compliance with sanctions (along the borders of national and supranational jurisdictions) and lead to a breakdown in the long-standing notions of hierarchy codified

[78] Stewart, *supra* note 8, at 1684–86, 1712; Pincoffs, *supra* note 28, at 179.

[79] KRISCH, *supra* note 77, at 98.

[80] Nico Krisch, *The Pluralism of Global Administrative Law*, 17 EUR. J. INT'L L. 247 (2006); JOHN DRYZEK, DELIBERATIVE GLOBAL POLITICS: DISCOURSE AND DEMOCRACY IN A DIVIDED WORLD (2006); JAMES BOHMAN, DEMOCRACY ACROSS BORDERS (2007).

[81] On which, see further Devika Hovell, *A Dialogue Model: The Role of the Domestic Judge in Security Council Decision-Making*, 26 LEIDEN J. INT'L L. 579 (2013).

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in Articles 25 and 103 of the UN Charter.[82] The consequences for the Security Council sanctions regime are not insignificant. That regime is uniquely vulnerable insofar as individual states fail to comply. Sanctions measures such as travel bans and asset freezing rely heavily on universal compliance; otherwise, individuals and funds will be channeled through any noncompliant states. A steady stream of regional and domestic cases along the lines of the ECJ's *Kadi II* judgment[83] and the UK Supreme Court's *Ahmed* judgment[84] could see the Security Council sanctions framework collapse under the weight of regional and domestic opposition.[85]

We need to ask, however, whether transplanting rule-of-law concepts to the international legal order is appropriate. While rule-of-law characteristics such as certainty, consistency, and generality of application may be appropriate in more representative legal systems, a pluralist perspective cautions against exaggerating the importance of such qualities, particularly in an unrepresentative system such as the international legal order. In the international sphere, certainty in the application of the law may be a source of friction and instability, especially when it clashes with the strong preferences of nonparticipating actors. The idea that all law must derive its authority from a single source—typically, the domestic legislature—is a distinctly domestic idea. In the international legal system, state organs, international and domestic courts, and (even) academics are imbued with a role in law creation.[86]

In procedural terms, we may need to rethink the traditional conception of the judiciary's role when domestic and regional courts engage in review of international decisions. Lon Fuller recognized the need for judges to be cognizant of the problem of *system*, in the sense that judges must always consider the coherence of the system in which they operate, as well as the powers and limitations of the judiciary as defined within that system.[87] When courts engage in the review of international decisions, they need to be cognizant of their role in the broader international legal system. In relation to that system, domestic and regional courts operate within a more political forum; rather than providing checks and balances, their role is one of providing legal counsel. In particular, when domestic and regional courts engage in review of Security Council decisions, the resulting judgments are relevant not so much because they are binding but because they may prove more broadly persuasive, which will largely depend upon each court's reputation and the perceived quality of its reasoning in any particular case.[88] When a

[82] As the General Court recognized, the necessary consequence of the ECJ decision in *Kadi I* has been "to render that primacy [of Security Council resolutions] ineffective in the Community legal order." Kadi v. Comm'n, *supra* note 71, para. 118.

[83] *Supra* note 43.

[84] *Supra* note 43.

[85] Twelfth Report of the Analytical Support and Sanctions Implementation Monitoring Team, Submitted Pursuant to Resolution 1989 (2011) Concerning Al-Qaida and Associated Individuals and Entities, UN Doc. S/2012/729, para. 33 (Oct. 1, 2012); Richard Barrett, *Al-Qaeda and Taliban Sanctions Threatened*, Oct. 6, 2008, *at* http://www.washingtoninstitute.org/templateC05.php?CID=2935.

[86] Statute of the International Court of Justice, Art. 38(1).

[87] LON FULLER, ANATOMY OF THE LAW 94 (1968).

[88] KRISCH, *supra* note 77, at 12; Benedict Kingsbury, *Weighing Regulatory Rules and Decisions in National Courts*, 2009 ACTA JURIDICA 90; Mayo Moran, *Shifting Boundaries: The Authority of International Law*, *in* NEW PERSPECTIVES ON THE DIVIDE BETWEEN NATIONAL AND INTERNATIONAL LAW 163 (Janne Nijman & Andre Nollkaemper eds., 2007).

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judicial decision resonates with a broader movement for change, it will be influential in motivating reform; when it fails to resonate more broadly, it will be marginalized, be seen as exceptional, and have a limited lawmaking effect.[89] As courts and the Security Council develop a greater understanding of each other's roles, a legal culture may potentially develop in which they see themselves as involved in a dialectical partnership or dialogue, with both working toward an appropriate balance between human rights and international security.[90]

The ECJ's 2008 *Kadi I* decision is a helpful example.[91] As is well known, the ECJ rejected the Court of First Instance's deferential, instrumentalist approach and, in declining to defer to the Security Council, ultimately invalidated the regulation giving effect to the relevant Security Council resolution, which was deemed to violate fundamental rights of the European legal order. At the heart of the decision is the Court's determination that the "EC Treaty [defined] an autonomous legal system which is not to be prejudiced by an international agreement."[92] With a vague reference to the "alleged absolute primacy of the resolutions of the Security Council,"[93] the ECJ declared it was reviewing the lawfulness not of "a resolution adopted by an international body" but of "the Community act intended to give effect to that resolution."[94] In drawing this distinction between the EC implementing measure and its source in a Security Council resolution, the Court found that "any judgment given by the Community judicature deciding that a Community measure intended to give effect to such a resolution is contrary to a higher rule of law in the Community legal order would not entail any challenge to the primacy of that resolution in international law."[95] The Court concluded that the measure under review violated Kadi's rights of defense (including his right to be heard and right to effective judicial protection) and his right to respect for property, and held that the measure must be annulled.[96]

Critics of the decision condemned it as taking the path of "European particularism" and eschewing "engagement in the kind of international dialogue that has generally been presented as one of the EU's strengths as a global actor."[97] But another interpretation is possible. Perhaps the judgment should be appreciated in its political context as more in the nature of an act of open judicial revolt against years of fruitless political dialogue. Türküler Isiksel invites us to see the ECJ's *Kadi I* judgment as "an act of civil disobedience" rendered necessary by the UN Security Council's misapplication of foundational principles of the international order.[98] She argues (and I agree) that the ECJ's dismissal of established international law in *Kadi I* was not lawless unilateralism but the fulfillment of its role in upholding fundamental European, and international, values.[99] Undoubtedly, the effect of the "disruptive" *Kadi I* decision was to

[89] *Cf.* ALAN BOYLE & CHRISTINE CHINKIN, THE MAKING OF INTERNATIONAL LAW 300–01 (2007).

[90] For a depiction of the increasingly dialogic nature of the relationship between courts and legislatures in the domestic human rights context, see Tom Hickman, *Constitutional Dialogue, Constitutional Theories and the Human Rights Act*, PUB. L. 303 (2005), Kent Roach, *Dialogic Judicial Review and Its Critics*, 23 SUP. CT. L. REV. (2d) 49 (2004), and Janet L. Hiebert, *Parliamentary Bills of Rights: An Alternative Model?*, 69 MOD. L. REV. 7 (2006).

[91] Kadi I, *supra* note 71.

[92] *Id.*, para. 316.

[93] *Id.*, para. 305

[94] *Id.*, paras. 286–87

[95] *Id.*, para. 288.

[96] *Id.*

[97] Halberstam & Stein, *supra* note 77, at 72; de Búrca, *supra* note 77.

[98] N. Türküler Isiksel, *Fundamental Rights in the EU After* Kadi *and* Al Barakaat, 16 EUR. L.J. 551 (2010).

[99] *Id.* at 552.

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strengthen the role and relevance of the ECJ,[100] and also paradoxically to heighten the power and influence of the Security Council. The Security Council's measured response to the decision—in particular, the introduction of the 1267 Ombudsperson—served to strengthen the intelligence and legitimacy of decisions made. Yet, from a normative perspective, I argue that the interventionist approach adopted in *Kadi I* is best interpreted as a rare exception.[101] The ECJ's failure to engage in any form of dialogue or negotiation of standards by reference to the broader legal context is justifiable only if this judgment is seen as, in effect, an act of civil disobedience—a response to what had become the overly wide gap between what was legal and what was legitimate, as perceived by those bound by the UN sanctions regime. As we shall see, however, in *Kadi II*, to be discussed in the next section, the ECJ made the mistake of transforming the exception, a justifiable act of rebellion, into the rule.

Values: Reconciling international, regional, and domestic values. The dignitarian model of due process provides the opportunity for a more open and pluralistic dialogue between different values and interests at issue in international decisions. The danger is that such a framework can potentially lead to an overemphasis on powerful "interests" and contribute little to developing a bedrock of shared fundamental values that some regard as an essential component of emerging structures of global governance.[102]

Scholars such as Cass Sunstein and Jenny Steele have criticized pluralist approaches by invoking the contrast between "interests" and "values."[103] The concern is that the Security Council will increasingly be cast as a "broker of interests" rather than as a guardian of the purposes and principles of the UN Charter and international community. The situation is magnified in the Security Council because of the power and wealth differentials and the language and culture barriers that separate the narrow elite from other states.[104] A geographical and socioeconomic bias is evident already in the emerging pluralist adjudicatory framework for reviewing sanctions.[105] Most judicial challenges to the sanctions regime have come from Europe and other advantaged nations, such as Canada and the United States. Smaller states agitating for reform of the sanctions regime have declared that it has been impossible even to get a conversation started on the issue. By contrast, the ECJ's decision in *Kadi I*, which presented the Council with the prospect of noncompliance by a region as influential as the EU, yielded the immediate response of modifying the sanctions regime to include the 1267 Ombudsperson. Arguably, the international legal order should not operate in accordance with principles of market ordering to advance the interests and preferences of the most powerful and organized elites, but should operate, instead, to ensure respect for certain

[100] The constitutional ambition of the decision has been widely remarked on.

[101] Devika Hovell, Kadi: *King-Slayer or King-Maker? The Shifting Allocation of Decision-Making Power Between UN Security Council and Courts*, 79 MOD. L. REV. 147 (2016).

[102] Stephen Gardbaum, *Human Rights and International Constitutionalism*, *in* RULING THE WORLD: CONSTITUTIONALISM, INTERNATIONAL LAW AND GLOBAL GOVERNANCE 249–51, 255–56 (Jeffrey Dunoff & Joel Trachtman eds., 2009); ANDREW HURRELL, ON GLOBAL ORDER: POWER, VALUES AND THE CONSTITUTION OF THE INTERNATIONAL SOCIETY (2007), chs. 3, 4; Erika de Wet, *The International Constitutional Order*, 55 INT'L & COMP. L.Q. 51, 57–61 (2006).

[103] Cass R. Sunstein, *Beyond the Republican Revival*, 97 YALE L.J. 1539 (1988); Jenny Steele, *Participation and Deliberation in Environmental Law: Exploring a Problem-Solving Approach*, 21 OXFORD J. LEGAL STUD. 415 (2001).

[104] KRISCH, *supra* note 77, at 56; *see also* Eyal Benvenisti & George W. Downs, *The Empire's New Clothes: Political Economy and the Fragmentation of International Law*, 60 STAN. L. REV. 595 (2007).

[105] Forcese & Roach, *supra* note 39, at 217, 274.

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fundamental values in international relations, which include substantive principles of equality and nondiscrimination.

In thinking through the application of the dignitarian model of due process to the Security Council, it is appropriate to compare and contrast two versions of the model that have emerged in the case law. In line with pluralist terminology, these could be termed "radical" and "moderate" approaches.[106] Under a radical approach, domestic courts are almost entirely internally or domestically focused, and pay little regard to the overarching framework within which the decision under review was taken. Under a moderate approach, courts assign equal positions to different legal systems, though they see the potential for their coordination in regard to a common set of standards or values.

In *Kadi II*[107] the ECJ took a radical approach, transforming what I have described above as a justifiable act of rebellion in *Kadi I* into an enduring normative approach. The ECJ held that, while Security Council resolutions had primacy at the international level, they became subject to the EU's constitutional guarantees when implemented at the European level. The consequence is that a peculiarly domestic interpretation of due process, developed in international treaties and across domestic legal systems to apply internally within and to states, was applied to Security Council decisions, seemingly without reflection as to the potential need for adjustments.[108] The ECJ reasoned that, in the context of an illegal listing under the UN sanctions regime, the right to "effective judicial protection" entitled "the person concerned to obtain a declaration from a court, by means of a judgment ordering annulment whereby the contested measure is retroactively erased from the legal order."[109] The ECJ made no attempt to evaluate the ombudsperson procedure, the review process established by the Security Council. The 1267 Ombudsperson is not even mentioned in the Court's findings. Instead, the Court merely alludes to the "improvements added," with the abrupt conclusion that "they do not provide to the person . . . listed . . . the guarantee of effective judicial protection."[110] The omission is even more stark when we consider that, by the time the Court finally handed down its decision in *Kadi II* (twelve years after Kadi had initially commenced the action in European courts), Kadi had already been delisted in a nine-month process handled by the 1267 Ombudsperson.

Paradoxically, the right to "effective" judicial protection becomes ineffective when applied to the Security Council sanctions regime. The ECJ interpreted the scope of judicial protection as extending to the power "to ensure that [the decision in question], which affects that person individually, is taken on a sufficiently solid factual basis."[111] The problem is that regional and domestic courts are not always (or perhaps ever) in a position to get access to the information

[106] This "pluralism of pluralisms" draws on literature developed in relation to the EU as a means of theorizing about impact of the EU's conflicting supremacy claims between national and European levels (adapted from KRISCH, *supra* note 77).

[107] *Supra* note 43, para. 134.

[108] Thomas Scanlon has recognized that this form of "due process" is not readily exportable to regimes outside the domestic context; doing so so depends on a minimal commitment to particular domestic institutional arrangements. THOMAS M. SCANLON, *Human Rights as a Neutral Concern*, *in* THE DIFFICULTY OF TOLERANCE: ESSAYS IN POLITICAL PHILOSOPHY 116 (Thomas M. Scanlon ed., 2003).

[109] Kadi II, *supra* note 43, para. 134.

[110] *Id.*, para. 133.

[111] *Id.*, para. 119 (citation omitted).

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upon which the listing is based. The Court expressly places the EU under an obligation to produce "information or evidence . . . relevant to such an examination,"[112] emphasizing that "the secrecy or confidentiality of that information or evidence is no valid objection" before the EU courts. States—in particular, the permanent five members of the Security Council—are highly unlikely to give up information to foreign courts. Yet the ECJ acknowledges that, if it cannot obtain information that supports the listing, it will be forced to annul the relevant sanctions measures. The consequence is that even properly listed persons would be able to have their listings annulled if the relevant Security Council member was unwilling to hand its intelligence to the EU.

A more "moderate" version of the dignitarian model was adopted by the ECJ's advocates-general in the *Kadi* litigation and the majority of the court in the UK Supreme Court *Ahmed* and *Youssef* decisions. Both the advocates general and the judges based their decisions on municipal law, though with a keen eye on the need for coordination between the domestic, regional. and international legal orders as a means of maintaining the coherence and integrity of those separate, but overlapping, domains.

In their opinions, the advocates general encouraged a form of continuing dialogue between legal orders. In *Kadi I*, Advocate General Maduro resolved that "[i]n an increasingly interdependent world, different legal orders will have to endeavour to accommodate each other's jurisdictional claims,"[113] while in *Kadi II*, Advocate General Bot advocated a position of "mutual confidence" and "effective collaboration," arguing that "an effective global fight against terrorism requires confidence and collaboration between the participating international, regional and national institutions, rather than mistrust."[114] Both advocates general favored the application of an equivalence principle such as that applied in the famous *Solange* case,[115] premising respect for the primacy of Security Council resolutions on the condition that Europe's fundamental rights were granted an equivalent degree of protection at the international level. For example, although the ECJ in *Kadi II* did not adopt his opinion, Advocate General Bot paid express attention to the improvements introduced following *Kadi I*, with particular attention to the 1267 Ombudsperson. While emphasizing that the solution was not to give carte blanche to the Security Council, he recognized that the ombudsperson process "reflects a realisation within the United Nations that, despite confidentiality requirements, the listing and delisting procedures must now be implemented on the basis of a sufficient level of information."[116] He identified the problem with vesting regional or domestic institutions with a power of intense scrutiny, recognizing that "excessively high regional or national requirements could, in truth, prove to be counterproductive" if states were "less inclined in future to transmit confidential information to the Sanctions Committee."[117]

[112] *Id.*, para. 120.

[113] Opinion of Advocate General Maduro, Case C-402/05, para. 44 (Jan. 16, 2008).

[114] Opinion of Advocate General Bot, Joined Cases C584/10 P, C593/10 P & C595/10, paras. 85, 113 (Mar. 19, 2013).

[115] BVerfG, May 29, 1974, Internationale Handelsgesellschaft v. Einfuhr-und Vorratstelle für Getreide und Futtermittel, 37 BVERFGE 271, 115, 140–42 (Ger.); BVerfG, Oct. 22, 1986, Wünsche Handelsgesellschaft v. Federal Republic of Germany, 73 BVERFGE 339 (Ger.). See further Antonios Tzanakopoulos, *The* Solange *Argument as a Justification for Disobeying the Security Council in the* Kadi *Judgments*, *in* KADI ON TRIAL: A MULTIFACETED ANALYSIS OF THE KADI JUDGMENT (Matej Avbelj, Filippo Fontanelli & Giuseppe Martinico eds., 2014).

[116] Opinion of Advocate General Bot, *supra* note 114, para. 82.

[117] *Id.*, paras. 82, 84.

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In *Ahmed*, a majority of the UK Supreme Court judges took what could also be termed a moderate dignitarian approach to the 1267 regime—one aimed at maximizing dialogue within and between domestic and international legal orders.[118] The decision was handed down at an awkward juncture: the ECHR's Grand Chamber was still deliberating in the *Al Jedda* case (a case that the judges considered relevant to their decision on the relationship between European Convention rights[119] and Security Council resolutions), and the 1267 Ombudsperson had been established between the hearing of the case and the handing down of the judgment. Though the majority judges clearly felt hamstrung by the House of Lords decision in *Al Jedda* that Security Council resolutions "trumped" European Convention rights,[120] they found that the 1267 regime conflicted with "basic rules that lie at the heart of our democracy," including the right of access to a court.[121] Yet, instead of invalidating the measure implementing the 1267 sanctions regime on that basis, the majority judges instead criticized the implementation of the regime through executive order and held that the measure needed parliamentary approval. In doing so, the majority judges acknowledged the imperative of "full honouring" Security Council obligations,[122] while requiring maximum opportunity for democratic dialogue and debate on the "legitimacy" (a term the court uses throughout the judgment) of Security Council resolutions within the United Kingdom. The court built in a one-month suspension of the quashing order, thereby exhibiting a further desire not to weaken, through its judgment, the United Kingdom's commitment to the UN Charter.

Faced with the contrast between radical and moderate forms of the dignitarian model, I argue that the moderate form is the preferable approach. The focus of courts should be on mechanisms by which to achieve the accommodation between conflicting values and interests in international society, and not on the triumph of one set of institutions or norms over another. Under a radical approach, the choice of frame—domestic, regional, or international—determines the decision. The danger is that each will seek to make its law govern the whole and to transform its preference into the general preference. Law and courts thereby become part of the problem, not the solution. A more flexible, moderate approach that seeks "equivalence" of protection is arguably better equipped to motivate the Security Council to adopt a contextually appropriate set of rights that will strengthen both the Council's effectiveness and the protection of fundamental rights.[123]

The Public Interest Model: Evaluating the Role of the 1267 Ombudsperson

In an effort to address the procedural problems of the sanctions regime, the Security Council has chosen to establish the 1267 Ombudsperson. This framework corresponds most closely to

[118] HM Treasury v. Ahmed, *supra* note 43.

[119] European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, ETS No. 5, 213 UNTS 221.

[120] Al Jedda v. Secretary of State for Defence, [2007] UKHL 58. A possible exception was Lord Mance, who alluded to a presumption (subsequently adopted by the European Court of Human Rights in *Al Jedda*) that measures implementing Security Council resolutions should be subject to "the basic rights of the individual." *Id.*, paras. 247, 249.

[121] HM Treasury v. Ahmed, *supra* note 43, paras. 75–82 (Lord Hope, with agreement of Lords Walker and Hale), 145–56 (Lord Phillips), 178–86 (Lord Rodger, with agreement of Lord Hale).

[122] *Id.*, para. 45 (Lord Hope).

[123] Halberstam & Stein, *supra* note 77, at 24, 27.

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a public interest model of due process. The primary appeal of this model is that it offers a capacity to redress one of the central critiques of the Security Council and the international legal order more generally: the claim that international governance suffers from a "democratic deficit." The Council sanctions regime invites a distilled version of this criticism in that the Council increasingly represents "governance without government,"[124] with the added sting that the Council has greater capacity than the rest of the international order to enforce its (undemocratic) *diktats*.

It is not that the Security Council was ever intended to behave as a democracy. The value of the public interest model lies in its potential to provide an alternative, and arguably more appropriate, analogue of an individual's participation in a democratic political process. A number of scholars have argued that deliberative democracy theory should be applied to the work of the Council, with procedural safeguards identified as the key means for enhancing the representativeness and therefore legitimacy of decision making by international institutions.[125] Ian Johnstone goes so far as to describe the democratic deficit in the Council as "largely procedural in nature."[126]

In the following section, I argue that the 1267 Ombudsperson is superior to internationalized or pluralist judicial frameworks in its capacity to achieve the goals of the public interest model. This claim goes against the grain of current opinion. While the ombudsperson procedure has received strands of support in the reform debate, the scholarly assessment of the office from a due process perspective has been largely critical.[127] The main concern, articulated by the ECHR, ECJ, UK Supreme Court, and UN special rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, among others, is that the ombudsperson is "not a court."[128] Based on the value-based approach outlined in this article, I reach a different conclusion: the ombudsperson is superior to a court process because it offers the most appropriate response to legitimacy gaps in Security Council sanctions decisions. That is not to say that the ombudsperson framework cannot be improved upon. But rather than dismissing the ombudsperson framework as inadequate, those involved in the reform debate, including practitioners, courts, and scholars, should push for the ombudsperson's mandate to be strengthened (thereby promoting the key goals of the public interest

[124] Joseph Weiler, *The Geology of International Law—Governance, Democracy and Legitimacy*, 64 ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT 547, 559–60 (2004).

[125] Benedict Kingsbury, *The Concept of 'Law' in Global Administrative Law*, 20 EUR. J. INT'L L. 23, 48–50 (2009); Daniel Esty, *Good Governance at the Supranational Scale: Globalizing Administrative Law*, 115 YALE L.J. 1490, 1490, 1520, 1522 (2006); de Wet, *supra* note 2, at 74; Allen Buchanan & Robert O. Keohane, *The Legitimacy of Global Governance Institutions*, 20 ETHICS INT'L AFF. 405, 432, 434 (2006); Mattias Kumm, *The Legitimacy of International Law: A Constitutionalist Framework of Analysis*, 15 EUR. J. INT'L L. 907, 924–27 (2004); David Caron, *The Legitimacy of the Collective Authority of the Security Council*, 87 AJIL 552, 561, 576 (1983).

[126] Ian Johnstone, *Legislation and Adjudication in the UN Security Council: Bringing Down the Deliberative Deficit*, 102 AJIL 275, 276 (2008).

[127] DAVID CORTRIGHT & ERIKA DE WET, HUMAN RIGHTS STANDARDS FOR TARGETED SANCTIONS 10 (2010); Vanessa Arslanian, *Great Accountability Should Accompany Great Power: The ECJ and the UN Security Council in Kadi I and II*, 35 B.C. INT'L & COMP. L. REV. 1, 11, 15 (2008); Ginsborg & Scheinin, *supra* note 39, at 11–12, 19; Willis, *supra* note 39, at 745; Forcese & Roach, *supra* note 39, at 219, 264–65, 275; Genser & Bath, *supra* note 39, at 26, 41; Lorraine Finlay, *Between a Rock and a Hard Place: The* Kadi *Decision and Judicial Review of Security Council Resolutions*, 18 TUL. J. INT'L & COMP. L. 477, 481 (2010); Adele Kirschner, *Security Council Resolution 1904 (2009): A Significant Step in the Evolution of the Al Qaida and Taliban Sanctions Regime?*, 70 ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT 585, 602, 604–05 (2010).

[128] See sources cited *supra* note 43.

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model) and for that mandate to be extended beyond the Resolution 1267 sanctions regime, which presently exclusively concerns Al Qaeda and ISIL, to other sanctions regimes.

Community: Access and representation through the ombudsperson process. The public interest model of due process does not reject the classical conception of the international legal order but seeks to regenerate it—in particular, by situating it within a broader, more heterogeneous framework of other legal orders and nonstate entities. While the question of legal responsibility has traditionally been geared toward states, it is increasingly more common to see accountability as owed to a more broadly defined group of stakeholders.[129]

The ombudsperson framework has undoubtedly opened up decision making in important ways. The ombudsperson is far more accessible than courts and has the capacity to travel to the petitioner (rather than the reverse) for face-to-face interviews (or alternatively, to communicate through email and telephone discussions) to ensure that the petitioner's side of the case has been heard. This versatility was apparent in a recent case where the ombudsperson had to rely on the "diligent and extraordinary efforts of officials" in the United Nations and other states to gain access to the petitioner—resources that would not be available to domestic or regional courts.[130]

Another virtue of the ombudsperson process is that the costs and delays are certainly less than for judicial equivalents. While the absence of compulsory legal representation has been criticized,[131] the ombudsperson has argued that the absence of the requirement to be represented by legal counsel actually makes the process more accessible for petitioners.[132] The *Kadi* case, already discussed in some detail, is clear evidence of its expeditiousness. Kadi's twelve-year march through the European courts entailed untold legal costs, culminating in the ECJ's final "non-decision" in terms of its negligible practical effect on Kadi's listing. That process stands in stark contrast to the nine-month ombudsperson process that led to Kadi's delisting—a process that Kadi and his lawyers have praised as a "proper hearing," "formal and probing," that made "an enormous difference to the person involved in the process."[133]

The public interest model not only seeks to improve access for the petitioner but also works to ensure that decision making is representative and inclusive of the international community more generally. As is common in the work of the Security Council, sanctions decisions are usually behind closed doors, with no public record.[134] This "culture of confidentiality" was initially a prized technique; the Sanctions Committee praised its chairman in 2004 for "wisely determin[ing] that much of the work . . . should be performed at informal meetings of the Committee to allow for enough flexibility in convening them and the free exchange of views,

[129] Florian Hoffmann & Frédéric Mégret, *Fostering Human Rights Accountability: An Ombudsperson for the United Nations?*, 11 GLOBAL GOVERNANCE 43, 51 (2005).

[130] Eighth Report of the Office of the Ombudsperson Pursuant to Security Council Resolution 2161, para. 37 (2014), UN Doc. S/2014/553 (2014).

[131] Second Report on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism, *supra* note 43, para. 52.

[132] In fact, petitioners were assisted by legal counsel in twenty-six of the fifty-five cases processed by the ombudsperson to date. Eighth Report of the Office of the Ombudsperson, *supra* note 130, para. 7.

[133] Comments by Guy Martin at "UN Sanctions, Human Rights and the Ombudsperson," meeting at Chatham House, May 17, 2013 (notes on file with author). *See* https://www.chathamhouse.org/events/view/189305.

[134] Between the establishment of the Al Qaeda and Taliban Sanctions Committee in October 1999 and the end of 2014, the 1267 Committee held 45 formal (or public) meetings and 367 informal (or private) consultations, as reported in the *Annual Reports of the 1267 Sanctions Committee* between 2000 and 2014.

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without a record."[135] The committee's lack of transparency has drawn strong criticism, however, and is now widely seen as distracting from the effectiveness and legitimacy of the sanctions regime.

The establishment of the ombudsperson has done more to open up sanctions decision making than any previous reform. The ombudsperson's role is structured to focus on information gathering, consultation, and outreach, and not just with petitioners. In order to help the Sanctions Committee reach its decision in any particular case, the ombudsperson undertakes a four-month period of information gathering (extendable for a further two months if necessary) and a two-month period of engagement, which may include exchanges with the petitioner. As part of her outreach work, she meets regularly with states, intergovernmental organizations, UN bodies, judges of national, regional, and other international courts, prosecutors, private lawyers, academics, and representatives of nongovernmental organizations and civil society.[136] In opening up decision making in this way, the ombudsperson process makes important political space, recognizing the role of nongovernmental organizations, individuals, corporations, and judicial and legislative branches of government (not just the executive).[137] More than court-based processes, the ombudsperson process has the potential to promote democratization by increasing access to information and opening up deliberation to a wider cross-section of the international community.

Law: A contextual and responsive set of legal standards. The ombudsperson framework is not a one-way street in terms of outreach with the broader international community. By opening up the information flow between decision makers and the broader community, the aim is not solely to enhance public awareness about the sanctions regime but also to increase the Security Council's responsiveness to public concerns about decision making, and the values that should underlie it. In this context, the nonjudicial nature of the 1267 Ombudsperson is an advantage. The public interest model's aims of inviting and responding to public opinion do not sit comfortably with the judicial function. As Richard Stewart noted in his enduring critique of a judicially implemented system of interest representation, judicial review was traditionally an instrument for checking governmental power and does not touch on the "affirmative side" of government, which relates to the representation of individuals and interests.[138] In terms of applicable legal principles, the ombudsperson is not confined in the same way as courts to review of the initial decision "frozen in time," as it were. Nor is she restricted to reviewing decisions by using the limited toolkit of binding international legal principles (described under the instrumentalist model) or by applying the potentially divaricating principles of different domestic or regional legal systems (described under the dignitarian model). Instead, she is able to engage in de novo review to consider "whether *today* the continued listing of the individual

[135] Report of the Security Council Committee Established Pursuant to Resolution 1267 (1999) Concerning Al-Qaida and the Taliban and Associated Individuals and Entities Annual Report, at 10, UN Doc. S/2004/1039, annex (Dec. 31, 2004).

[136] *See*, *e.g.*, Third Report of the Office of the Ombudsperson Pursuant to Security Council Resolution 1989, paras. 21–29 (2011), UN Doc. S/2012/49 (2012); Seventh Report of the Office of the Ombudsperson Pursuant to Security Council Resolution 2083, paras. 14–20 (2012), UN Doc. S/2014/73 (2014).

[137] Harold Hongju Koh, *Why Do Nations Obey?*, 106 YALE L.J. 2599 (1997); Mary Ellen O'Connell, *New International Legal Process*, 93 AJIL 334 (1999).

[138] Stewart, *supra* note 8, at 1687.

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or entity is justified based on all of the information now available."[139] Rather than being hamstrung by existing law, either domestic or international, the ombudsperson has been able to develop a standard of review that responds both to the specific aims of sanctions measures (hampering access to resources and encouraging a change of conduct) and to the international framework within which sanctions apply. In these circumstances, she has concluded that it is inappropriate to use criminal standards, although any measure imposed should be "of adequate substance to sustain the serious restrictions imposed on individuals and entities through the application of the sanctions." She was also conscious that the benchmark used could not be premised on the precepts of one particular legal system. The standard settled on is a unique one: "whether there is sufficient information to provide a reasonable and credible basis for the listing."[140]

The criticism that the ombudsperson framework is not judicial is not actually tied to the legal standards that she applies. Rather, it is shorthand for two critiques: first, the ombudsperson's lack of independence from the Security Council (given that the Council can override her report using the "nuclear button" in Security Council Resolution 1989 of 2011), and, second, the report's lack of bindingness upon the Sanctions Committee. Both critiques are exaggerated. Security Council Resolution 1989 strengthens the ombudsperson procedure by building in a "reverse consensus," such that the ombudsperson's recommendation to delist will bind the Sanctions Committee unless, within sixty days, every single member of the committee decides *not* to follow it.[141] Much has been made of the possibility under which any committee member can refer the matter to the Security Council for decision.[142] However, no committee member has done so in the first five years of the office, and the 1267 Monitoring Team has expressed the view that it is "extremely unlikely" that the committee would reject the ombudsperson's recommendation or refer a case to the Security Council unless it was already evident both that at least nine Council members agreed that the ombudsperson's decision was wrong and that no permanent member thought it was right.[143] Moreover, the possibility of Security Council intervention does not distinguish the ombudsperson framework from other *judicial* contexts in the international legal system, including the International Court of Justice and the International Criminal Court.[144] It is not the exception but the norm to build "fire-alarm" controls into instruments establishing international courts, which can be triggered if judges are perceived by states to exceed the limits of their delegated authority. The literature on international adjudication abounds with scholarly recognition of the limits of judicial independence in the global context, with Helfer and Slaughter referring to "constrained

[139] Office of the Ombudsperson, Approach and Standard (n.d.), *at* http://static.un.org/sc/suborg/en/ombudsperson/approach-and-standard (emphasis added).

[140] *Id.*

[141] SC Res. 1989, para. 23 (Jun. 17, 2011).

[142] *Id.*, Annex II, para. 12.

[143] Thirteenth Report of the 1267 Monitoring Team, *supra* note 2, para. 12.

[144] UN Charter, Art. 94(2) (note, in particular, the interpretation in *Medellin v. Texas*, 552 U.S. 491 (2008)); Rome Statute of the International Criminal Court, Art. 16, July 17, 1998, 2187 UNTS 90; *see also* CARLA DEL PONTE & CHUCK SUDETIC, MADAME PROSECUTOR: CONFRONTATIONS WITH HUMANITY'S WORST CRIMINALS AND THE CULTURE OF IMPUNITY 60 (2009).

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independence,"[145] Ginsburg to "bounded discretion,"[146] and Steinberg to the "strategic space" within which courts can operate.[147]

The relevance of the bindingness critique is also open to question. The ombudsperson's power stems not from the bindingness of her decisions but from the capacity of those decisions to exact reputational costs. By creating and supporting the 1267 Ombudsperson, the Council has acted to enhance the legitimacy and effectiveness of its decisions through an appeal not to power politics but to the "court of public opinion." As Johnstone remarks about Security Council decisions, "If the interpretive community of governmental and non-governmental actors casts a negative judgment, the credibility of the Security Council will be undermined and those who must carry out the decisions will be less likely to comply."[148] As such, even if the Council did overturn the ombudsperson's decision, the Council would risk undermining the effectiveness of the sanctions regime. As Buchanan and Keohane have recognized, when an international institution fails to provide public justification for its decisions and when it withholds other information critical to the evaluation of its institutional performance, the institution does not fulfill substantive criteria for legitimacy.[149] In this context the key focus of reforming the ombudsperson process should not be upon its bindingness or independence, but rather on greater transparency. As things stand, the ombudsperson's comprehensive report on any individual case is not made available to interested states, the petitioner, or the public. A critical reform is to provide for public disclosure of reports, with proper measures in place to ensure the protection of confidential material. The goals of the public interest model of due process will be most adequately served when the international community is placed in a position to understand and assess the reasons for the decisions of the Sanctions Committee (and ombudsperson).

Values: Balancing fundamental values of the Security Council and individuals. Some of the most problematic and intransigent divisions in the due process debate have arisen in relation to the conflict between individual due process rights and the confidentiality of intelligence information upon which sanctions decisions are based. On one side of the debate, the Security Council cites confidentiality concerns as the key reason to limit due process protections; it is too complicated to "find[] a way to keep such intelligence, and how it was gathered, confidential."[150] On the other side of the debate, as discussed above in *Kadi II*, the ECJ claimed the power to engage in full review of sanctions decision making and insisted that "the secrecy or confidentiality of that information or evidence is no valid objection" before EU courts.[151]

This deadlock is unsatisfactory. The solution should not be to abandon procedural protections altogether or to impose unrealistic obligations upon the Security Council to release information to domestic or regional agencies (especially since the Council is unlikely to comply with

[145] Laurence Helfer & Anne-Marie Slaughter, *Why States Create International Tribunals: A Response to Professors Posner and Yoo*, 93 CAL. L. REV. 899 (2005).

[146] Tom Ginsburg, *Bounded Judicial Discretion in International Law-Making*, 45 VA. J. INT'L L. 1 (2005).

[147] Richard Steinberg, *Judicial Lawmaking at the WTO: Discursive Constitutional and Political Constraints*, 98 AJIL 247 (2004)*; see also* Yuval Shany, *No Longer a Weak Department of Power? Reflections on the Emergence of a New International Judiciary*, 20 EUR. J. INT'L L. 73 (2009).

[148] Johnstone, *supra* note 126, at 307.

[149] Buchanan & Keohane, *supra* note 125, at 429.

[150] UN Press Release, Press Conference by Security Council President (Feb. 2, 2010) (Ambassador Gérard Araud), *at* http://www.un.org/News/briefings/docs/2010/100202_Araud.doc.htm.

[151] Kadi II, *supra* note 43, para. 125.

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such obligations). While it is well understood that transparency is a desirable institutional value and a core attribute of good governance, secrecy and nondisclosure can also be of value in particular contexts.[152] Nevertheless, most commentators agree that the extent to which information about sanctions decision making has been shielded has been disproportionate. The challenge is to devise imaginative institutional measures that can achieve the most appropriate balance between the individual rights of those placed on sanctions blacklists and the interests of international peace and security.

My own view is that the ombudsperson framework offers the greatest potential for reconciling due process and confidentiality. Although the ombudsperson has described gaining access to classified or confidential information as "one of the key challenges" she faces,[153] she has expressed her confidence that in all cases (with one exception)[154] the petitioners have been provided the reasons for their listing.[155] The ombudsperson is also aware, however, that "this question of access is a critical one for due process,"[156] and she has negotiated a set of procedures with the Security Council that enhance her capacity to access critical information.

Taking these procedures into account, the advantages of the ombudsperson framework over other institutional frameworks are threefold. The first concerns *expertise*—a vital matter since the ombudsperson deals more in "intelligence" than "evidence." With the support of the 1267 Monitoring Team, which is able to provide expert advice that includes analysis of audiovisual material, the ombudsperson is typically in a far better position than courts to assess the credibility of information. The ombudsperson has acknowledged the importance of experience and "institutional memory," developed across the complex matrix of sanctions cases, in enabling her to assess the key questions and issues of concern to the Sanctions Committee.[157] In particular, the ombudsperson has emphasized the value of her personal access to petitioners in the dialogue phase of the process, during which she has the opportunity to ask petitioners to respond to and explain inferences that might be drawn from relevant intelligence, even as she continues to withhold classified material.[158]

The second advantage of the ombudsperson framework is that it provides *access to pressure points*. Although the ombudsperson has no power to compel production of confidential information, she is in a unique position to place pressure on states to provide such information. First, the ombudsperson's request for information is mandated by a Chapter VII Security Council resolution, which (she has confirmed) has proved useful in encouraging states to cooperate with

[152] Elizabeth Fisher, *Transparency and Administrative Law: A Critical Evaluation*, 63 CURRENT LEGAL PROBS. 272, 280 (2010); ANNE-MARIE SLAUGHTER, A NEW WORLD ORDER 220 (2004).

[153] Second Report of the Office of the Ombudsperson Pursuant to Security Council Resolution 1989, para. 26 (2011), UN Doc. S/2011/447 (2011).

[154] In the exceptional case, the ombudsperson has acknowledged that the petitioner was prejudiced as the relevant information was obtained at such a late stage that it could not be disclosed to the petitioner before preparation of the comprehensive report, and has invited comments from the petitioner with a view to deciding whether he meets the threshold for a new petition. Sixth Report of the Office of the Ombudsperson Pursuant to Security Council Resolution 2083, paras. 33–35 (2012), UN Doc. S/2013/452 (2013).

[155] Eighth Report of the Office of the Ombudsperson, *supra* note 130, para. 34.

[156] First Report of the Office of the Ombudsperson Pursuant to Security Council Resolution 1903, para. 33 (2009), UN Doc. S/2011/29 (2011).

[157] Third Report of the Office of the Ombudsperson, *supra* note 136, para. 7; Seventh Report of the Office of the Ombudsperson, *supra* note 136, para. 30.

[158] Some lawyers representing individuals in delisting proceedings have argued that this dialogue sheds little light on the nature of the secret allegations against their clients.

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the ombudsperson.[159] Second, as the ombudsperson has recognized in a recent report, "any lack of detail does not work to the prejudice of the petitioner," as refusal by a state to provide information risks leading to a delisting recommendation because of insufficient evidence.[160] As discussed above, the ombudsperson's decision has a "triggering effect" and can be reversed only if the Sanctions Committee decides by consensus to do so.[161] Third, the ombudsperson is directed to update the 1267 Committee as individual cases progress and to specify "details regarding which States have supplied information."[162] Fourth, the ombudsperson reports biannually directly to the Security Council and, in these reports, typically discusses the level of state cooperation. Through such reports, both the Council and the broader international community are made aware of failures in state cooperation, increasing pressure on states to comply.

The third advantage is the ombudsperson's capacity to *negotiate specific arrangements*. In an innovative practice, the ombudsperson has been entering into specific arrangements with individual states to obtain access to confidential information. The ombudsperson is in a unique position to build up a level of trust with states, both through her ongoing work and through her qualifications. As required by Security Council Resolution 1904, the ombudsperson is appointed by the UN secretary-general in consultation with the Sanctions Committee and must be "an eminent individual of high moral character, impartiality and integrity with high qualifications and experience in relevant fields."[163]

Conclusion

In applying a value-based approach to the procedural challenges of the Security Council sanctions regime, the conclusions are surprising. The internationalized judicial framework, which assesses sanctions decision making in terms of its accuracy in the application of binding law, emerges as the model least likely to enhance legitimacy in decision making. By contrast, 1267 Ombudsperson framework offers the greatest potential to enhance the representativeness and responsiveness of the Security Council sanctions regime. The office's nonjudicial character potentially serves as an advantage offering valuable techniques through which to hold the Security Council to account, while accommodating the Security Council's established practices involving broad discretion, political compromise, and the need for confidentiality. Domestic courts exercising a moderate form of dignitarianism can also play an important role, though their most effective contribution would be less as agents for enforcing international, regional, or domestic law and more through their expert contributions to a broader legal dialogue. To test the value-based approach further, we turn to the other major site of due process controversy involving UN programs: the ongoing failure to remediate claims that UN peacekeepers negligently introduced cholera into Haiti.

[159] SC Res. 1989, *supra* note 141, para. 25; *see also* Third Report of the Office of the Ombudsperson, *supra* note 136, para. 41.

[160] Third Report of the Office of the Ombudsperson, *supra* note 136, para. 42.

[161] SC Res. 1989, *supra* note 141, para. 23.

[162] SC Res. 1904, *supra* note 41, Annex II, para. 4.

[163] SC Res. 1904, *supra* note 41, para. 20.

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III. DUE PROCESS IN A TIME OF CHOLERA

In October 2010, cholera appeared in Haiti for the first time in nearly a century. The contamination triggered an epidemic that has caused the death of almost nine thousand people—close to twice the Ebola death toll in any one country—and the illness of over seven hundred thousand more.[164] Shortly before the outbreak, a new contingent of Nepalese peacekeepers had been deployed to the Mirebelais camp of the UN Stabilization Mission in Haiti (MINUSTAH), located above a tributary of the Arbonite River, one of Haiti's main sources of drinking water. The Independent Panel of Experts appointed by the UN secretary-general noted in 2011 that the bacteria were a "perfect match" with the cholera strain prevalent in Nepal at that time[165] and that sanitation conditions at the MINUSTAH camp were insufficient to prevent contamination of the river system.[166] Two years after the release of their initial report, panel members updated their findings and stated more directly that "the preponderance of the evidence and the weight of the circumstantial evidence does lead to the conclusion that personnel associated with the Mirebalais MINUSTAH facility were the most likely source of introduction of cholera into Haiti."[167]

The initial source of the cholera outbreak is no longer reasonably in question. What remains controversial is the question of UN accountability for its role in the cholera outbreak. Not so long ago, such a crisis might have entered collective memory as an "act of God" or regrettable historical episode defying explanation, responsibility, or redress. But today, "accountability management" is part of the postmortem for any crisis.[168] Societies affected by large-scale crises typically demand that some organization or entity be held responsible and that appropriate lessons be drawn in order to achieve a stable postcrisis equilibrium.[169] The widespread sense is that the UN response to the cholera outbreak has denied Haitian society this opportunity. In the month following the cholera outbreak, the UN spokesperson for MINUSTAH rejected any "objective direct link . . . between the soldiers and the outbreak."[170] In response to the Independent Panel's report, the United Nations declared that the report "does not present any conclusive scientific evidence linking the outbreak to the MINUSTAH peacekeepers or the Mirebalais camp" and that "[a]nyone carrying the relevant strain of the disease in the area could have introduced the bacteria into the river."[171] The secretary-general appointed a task force to

[164] Pan-American Health Organization & World Health Organization, *Cholera in the Americas—Situation Summary* (Oct. 9, 2015), *at* http://www.paho.org/hq/index.php?option=com_docman&task=doc_view&Itemid=270&gid=31956&lang=en.

[165] FINAL REPORT OF THE INDEPENDENT PANEL OF EXPERTS ON THE CHOLERA OUTBREAK IN HAITI 4, 27 (2011), *at* http://www.un.org/News/dh/infocus/haiti/UN-cholera-report-final.pdf.

[166] *Id.* at 23.

[167] Daniele Lantagne, G. Balakrish Nair, Claudio F. Lanata & Alejandro Cravioto, *The Cholera Outbreak in Haiti: Where and How Did It Begin?*, *in* CHOLERA OUTBREAKS 162, 180 (G. Balakrish Nair & Yoshifumi Takeda eds., 2014).

[168] GOVERNING AFTER CRISIS: THE POLITICS OF INVESTIGATION, ACCOUNTABILITY AND LEARNING (Arjen Boin, Allan McConnell & Paul 't Hart eds., 2008).

[169] Sanneke Kuipers & Paul 't Hart, *Accounting for Crises*, *in* THE OXFORD HANDBOOK OF PUBLIC ACCOUNTABILITY 589 (Mark Bovens, Robert E. Goodin & Thomas Schillemans eds., 2014).

[170] William Booth, *UN Troops Assaulted, Blamed for Outbreak*, WASH. POST, Nov. 16, 2010, at A9.

[171] *UN Haiti Cholera Panel Avoids Blaming Peacekeepers*, REUTERS (May 5, 2011).

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"ensure prompt and appropriate follow-up"[172] to the panel's 2011 report, but the first follow-up material did not appear until mid-2014 and then did not mention the question of UN accountability for its role in the cholera outbreak.[173]

In the meantime, nongovernmental organizations have pushed hard for the United Nations to accept responsibility for its role in the crisis. In November 2011, the Boston-based Institute for Justice and Democracy in Haiti, working with lawyers in Haiti, presented a petition to the UN secretary-general on behalf of 5000 individuals.[174] It took fifteen months for the United Nations to respond to the petitioners' legal arguments, which were summarily dismissed in two sentences of a two-page letter as "not receivable"[175] pursuant to Section 29 of the Convention on the Privileges and Immunities of the United Nations[176] (General Convention). In a follow-up letter, the petitioners requested that the United Nations establish a standing claims commission, engage a mediator, or even arrange a meeting to discuss the matter, but the United Nations responded that "there is no basis for such engagement in connection with claims that are not receivable."[177] Since October 2013, three separate class action suits have been filed against the United Nations in U.S. federal courts.[178]

The United Nations' handling of what many see as credible allegations of malfeasance has been described as a "public relations as well as public health disaster."[179] The pervading sense is of an organization stonewalling any inquiry into its accountability.[180] Yet it is also arguable that the quest for accountability has been too narrowly focused. The debate about due process has been confined to its separate legal silos of immunity and human rights, with little authoritative capacity to reconcile the two areas of law, though some authors have wanted to move beyond them.[181] I argue that a value-based approach to due process offers a way to reconcile

[172] UN Press Release, Secretary-General, upon Receiving Experts' Report on Source of Haiti Cholera Outbreak, Announces Intention to Name Follow-up Task Force (May 4, 2011), *at* http://www.un.org/press/en/2011/sgsm13543.doc.htm.

[173] United Nations Follow-Up to the Recommendations of the Independent Panel of Experts on the Cholera Outbreak in Haiti (June 10, 2014), *at* http://www.un.org/News/dh/infocus/haiti/Follow-up-to-Recommendations-of-IPE.pdf.

[174] Institute for Justice and Democracy in Haiti, *Petition for Relief* (Nov. 3, 2011), *at* http://ijdh.org/wordpress/wp-content/uploads/2011/11/englishpetitionREDACTED.pdf.

[175] Letter from Patricia O'Brien, Under Secretary-General for Legal Affairs, to Brian Concannon, Director, Institute for Justice and Democracy in Haiti (Feb. 21, 2013), *at* http://opiniojuris.org/wp-content/uploads/LettertoMr.BrianConcannon.pdf.

[176] Convention on the Privileges and Immunities of the United Nations, Sec. 2, Feb. 13, 1946, 1 UNTS 15 [hereinafter General Convention].

[177] Letter from Patricia O'Brien, Under Secretary-General for Legal Affairs, to Brian Concannon, Director, Institute for Justice and Democracy in Haiti, at 1 (July 5, 2013), *at* http://www.ijdh.org/wp-content/uploads/2013/07/20130705164515.pdf.

[178] Class Action Complaint, Georges v. United Nations, No. 1:13-cv-7146 (S.D.N.Y. filed Oct. 9, 2013), *at* http://www.ijdh.org/wp-content/uploads/2013/10/Cholera-Complaint.pdf; Class Action Complaint, Laventure v. United Nations, No. 14-cv-1611 (E.D.N.Y. filed Mar. 11, 2014), *at* https://assets.documentcloud.org/documents/1073738/140311-laventure-v-un-filed-complaint-2.pdf (case stayed pending Second Circuit decision in *Georges v. United Nations*, Mar. 24, 2015); Class Action Complaint, Petit-Homme Jean-Robert v. United Nations, No. 1:14-cv-01545 (S.D.N.Y. filed Mar. 6, 2014) (case dismissed for lack of subject matter jurisdiction, Jan. 26, 2015).

[179] José Alvarez, *The United Nations in the Time of Cholera*, AJIL UNBOUND (Apr. 4, 2014).

[180] For a dismal example, see the interview with the deputy spokesperson for the UN secretary-general in the documentary *Fault-Lines*, *supra* note 3.

[181] Frédéric Mégret, *La responsabilité des Nations Unies aux temps du cholera*, 47 REVUE BELGE DE DROIT INTERNATIONAL 161 (2013); Alvarez, *supra* note 179.

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these conflicting, yet fundamental, legal spheres. Instead of focusing on the question of which area of law is "supreme" or more "binding," the overarching question is different: what role do we require due process to play in this setting, and which procedural framework is best equipped to achieve it?

Instrumentalist Model: Evaluating the Quest for Legal Responsibility

As in the case of Security Council sanctions, the debate about procedural protections applicable in the Haiti cholera controversy has taken a decidedly instrumentalist turn. In essence, the question of due process has been reduced to a fiercely debated contest over the most accurate interpretation of legal principles relating to UN immunity. Repeated assertions by UN officials that claims are not receivable have been greeted, in turn, by a storm of critical scholarship assessing whether the United Nations has accurately characterized its obligations under the General Convention. I argue that this "instrumentalist bias" in the debate about due process is misplaced and unproductive. In particular, as I will argue below, the instrumentalist approach to formulating procedural safeguards will lead to a narrow debate, which will result in (1) state-centric decisions (2) in accordance with underdeveloped legal standards that (3) comport with a "functionalist" value system that many see as out of date.

Community: Keeping it in the (UN) family. Paradoxically, given present circumstances, cholera was—through the international sanitary conferences convened in the second half of the nineteenth century—one of the early issues to unite the international community.[182] As might be expected, these early conferences were hardly paragons of internationalism; the delegates were drawn predominantly from Europe. Though the disease caused its highest mortality rates outside Europe, the delegates were essentially united in defending Europe itself against "the Oriental plague." Over 150 years later, it still seems that the structures of internationalism are not tuned into the voice of those populations most vulnerable to cholera outbreaks.

Individuals or groups harmed by UN actions generally have few options, and they have even fewer if they are nationals of vulnerable states, such as Haiti, that are dependent on UN assistance. Indeed, the law relating to the responsibility of international organizations does not, in its current incarnation, have much to say at all about an organization's relationship with non-state actors. The International Law Commission's Articles on the Responsibility of International Organizations, adopted in 2011, expressly do not contemplate accountability beyond responsibility to states individually or collectively.[183]

The UN response to victims of the Haiti cholera outbreak reflects that the narrowness of the legal regime for responsibility has become part of the organization's institutional culture. The most extensive discussions of the scope of UN accountability for the Haiti cholera outbreak were not with affected individuals or their legal representatives, but with other UN officials. In September 2014, four UN special rapporteurs addressed a joint letter of allegation to the UN

[182] Valeska Huber, *The Unification of the Globe by Disease? The International Sanitary Conferences on Cholera, 1851–1894*, 49 HIST. J. 453 (2006).

[183] Draft Articles on the Responsibility of International Organizations, with Commentaries, *in* Report of the International Law Commission on the Work of Its Sixty-Third Session, UN GAOR, 66th Sess., Supp. No. 10, at 69, 136–38 (Article 43 and Commentary), 149 (Article 50 and Commentary), UN Doc, A/66/10 (2011) [hereinafter ILC Articles].

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secretary-general.[184] In contrast to the summary denial of liability in the response to the victims' petition discussed above, the letter responding to the UN special rapporteurs spent fifteen pages outlining the scope of UN accountability. Even here, however, the United Nations described its "formal organizational accountability" as extending to "the General Assembly, the Security Council or other relevant intergovernmental bodies," and attributed only secondary relevance to individuals, civil society, or other relevant actors (whose primary significance was described in terms of assisting with fact-finding inquiries).[185]

The "natural forum" through which individuals have traditionally vindicated their rights—namely, domestic courts—is essentially foreclosed in the UN context. At the heart of the regime for UN responsibility is its broad, even absolute, immunity from "every form of legal process."[186] According to a traditional immunity analysis, it is still widely accepted that, whatever immunities other international organizations possess, the combined effect of Article 105 of the UN Charter and Section 2 of the General Convention "unequivocally grants the United Nations absolute immunity without exception."[187] The General Convention and relevant status-of-forces agreement between the United Nations and Haiti (UN-Haiti SOFA) provide for the establishment of a standing claims commission as an alternative mode of dispute settlement,[188] but these agreements can be enforced only by Haiti. Theoretically, under the General Convention, Haiti could request an advisory opinion from the ICJ requesting establishment of a standing claims commission.[189] In practice, however, Haiti is unlikely to proceed along these lines. Certainly, under the former Martelly administration, the Haitian government was not supportive of justice for victims. It had been concerned, instead, to portray Haiti as "open for business," and it remains heavily dependent on UN assistance and foreign aid.[190]

Law: The power and the emptiness of immunity law. The international regime for the responsibility of international organizations is not only state-centric but also steers the question of UN accountability down the path of a positivistic legal analysis. According to the International Law Commission's Articles on the Responsibility of International Organizations, the responsibility of international organizations is to be determined by reference to international law.[191] This orientation generates the highly legalistic debate in which due process questions have been caught in the cross-fire between immunity law and human rights law. The "traditional immunity analysis," adopted by the United Nations and described in the previous section, has been

[184] The letter, dated September 25, 2014, is referenced in Letter from Pedro Medrano, UN Assistant Secretary-General, to Ms. Farha, Mr. Galln, Mr. Pras and Ms. de Albuquerque, para. 1 (Nov. 25, 2014), *at* https://spdb.ohchr.org/hrdb/28th/Haiti_ASG_25.11.14_(3.2014).pdf.

[185] *Id.*, paras. 59, 60.

[186] General Convention, *supra* note 176, Sec. 2.

[187] Brzak v. United Nations, 597 F.3d 107, para. 112 (2d Cir. Mar. 2, 2010); Manderlier v. Organisation des Nations Unies, PASICRISIE BELGE 1966, III, at 103, 45 ILR 446 (Civil Trib. Brussels 1966) (Belg.); Mothers of Srebrenica Ass'n v. Netherlands, paras. 4.3.6, 4.3.14, Sup. Ct. Neth. Apr. 13, 2012, No. 10/04437; Leonardo Díaz-González (Special Rapporteur), Fourth Report on Relations Between States and International Organizations (Second Part of the Topic), paras. 109–10, UN Doc. A/CN.4/424 & Corr. 1.

[188] Agreement Between the United Nations and the Government of Haiti Concerning the Status of the United Nations Operation in Haiti, para. 55, July 9, 2004 [hereinafter UN-Haiti SOFA], *at* http://www.ijdh.org/2004/07/archive/agreement-between-the-united-nations-and-the-government-of-haiti-concerning-the-status-of-the-united-nations-operation-in-haiti/.

[189] General Convention, *supra* note 176, Sec. 30.

[190] *Haiti: Still Waiting for Recovery*, ECONOMIST (Jan. 5, 2013).

[191] Draft Articles on the Responsibility of International Organizations, with Commentaries, *supra* note 183, Art. 5.

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challenged mainly by two lines of legal argument, one based on human rights and one based on what I refer to as functional necessity. The problem in instrumentalist terms is that, while these counterarguments are persuasive in urging the need for law reform, neither reflects existing law. Instead, their primary effect is to emphasize the relative normative emptiness of existing law and the stronghold that international organizations and states continue to have over it.

Certain scholars have proposed a "human rights" approach to restricting immunity and have argued that it is time for a "major evolution" in the regime for immunity of international organizations.[192] This approach to restricting immunity has been developing in legal scholarship,[193] with hints in the ECHR's jurisprudence.[194] The argument finds its strongest legal foundation in Section 29 of the General Convention, in which the United Nations undertakes to "make provisions for appropriate modes of settlement of . . . [d]isputes of a private law character to which the United Nations is a party."[195] Some scholars have argued that fulfillment of the Section 29 undertaking is a condition precedent to UN immunity and that, if the United Nations fails to provide an alternative remedy, immunity should be denied.[196]

It is by virtue of this instrumentalist, human rights approach that Frédéric Mégret has argued that the "pivotal question" in the Haiti cholera dispute is "the characterization of the claim as 'public' or 'private.'"[197] Under the General Convention and the UN-Haiti SOFA, the obligation to provide alternative modes of settlement applies only to disputes "of a private law character." It is for this reason that the United Nations asserts that the claims raise "broad issues of policy" and "could not form the basis of a claim of a private law character."[198] The problem is that, when the public/private divide becomes the operative distinction under an instrumentalist analysis, any court or body asked to make an objective determination of the issue risks engaging in a theater of the absurd. Duncan Kennedy argues that the success of any legal distinction depends on two factors: first, whether it is possible to make the distinction; and second, whether the distinction makes a difference.[199] Arguably, the public/private distinction fails on both counts here. The dichotomy's foundations are unstable and insufficiently understood, even in the civil and Continental system in which it finds its

[192] Emmanuel Gaillard & Isabelle Pingel-Lenuzza, *International Organisations and Immunity from Jurisdiction: To Restrict or to Bypass*, 51 INT'L & COMP. L.Q. 1, 1 (2002).

[193] Rosa Freedman, *UN Immunity or Impunity? A Human Rights Based Challenge*, 25 EUR. J. INT'L L. 239, 245–47 (2014); Cedric Ryngaert, *The Immunity of International Organizations Before Domestic Courts: Recent Trends*, 7 INT'L ORG. L. REV. 121, 148 (2010); Gaillard & Pingel-Lenuzza, *supra* note 192, at 2–3; AUGUST REINISCH, INTERNATIONAL ORGANIZATIONS BEFORE NATIONAL COURTS 366, 393 (2000).

[194] Though the ECHR ultimately upheld the immunity of the European Space Agency in *Waite & Kennedy v. Germany*, App. No. 26083/94, 30 Eur. Ct. H.R. 261 (1999), it held that "a material factor" to be taken into account was "whether the applicants had available to them reasonable alternative means to protect effectively their rights under the [ECHR]." *Id.*, para. 52.

[195] General Convention, *supra* note 176, Sec. 29; *see also* UN-Haiti SOFA, *supra* note 188, para. 55.

[196] Ryngaert, *supra* note 193.

[197] Mégret, *supra* note 181, at 166 (translation by author).

[198] Center for Economic and Policy Research, *Ban Ki-moon Explains to Congress Why the UN Won't Be Held Accountable for Cholera in Haiti* (Feb. 27, 2015) (quoting letter dated Feb. 19, 2015, from the UN secretary-general to members of the U.S. Congress), *at* http://www.cepr.net/blogs/haiti-relief-and-reconstruction-watch/ban-ki-moon-explains-to-congress-why-the-un-wont-be-held-accountable-for-cholera-in-haiti/.

[199] Duncan Kennedy, *The Stages of the Decline of the Public/Private Distinction*, 130 U. PA. L. REV. 1349, 1349 (1982).

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geographical and historical foundations.[200] In relation to the United Nations, it is uncertain whether the distinction refers to the body of law[201] or to the nature of the complainant,[202] conduct,[203] or forum.[204] Much of the legal reasoning on particular claims is buried in the inaccessible "internal jurisprudence of the UN,"[205] and the United Nations' public statements on the matter are difficult to reconcile. In a 1995 report, the secretary-general identified disputes of a private law character to include "claims for compensation submitted by third parties for personal injury or death . . . incurred as a result of acts committed by members of a United Nations peace-keeping operation within the 'mission area' concerned."[206] Conversely, in a 2015 letter to members of the U.S. Congress rejecting the receivability of the Haiti cholera claims, the secretary-general explained that "disputes of a private law character have been understood to be disputes of the type that arise between private parties, such as, claims arising under contracts, claims relating to the use of private property in peacekeeping contexts or claims arising from motor vehicle accidents."[207] The overall impression is that the United Nations' determination that the Haiti cholera dispute is not of a "private law character" amounts to little more than a formalist brush-off, with no firm foundation.

That said, for the time being, the above questions are moot. The human rights analysis has yet to succeed before domestic courts,[208] and although cases such as the ECHR's judgment in *Waite and Kennedy*[209] have been "nibbling away" at the edges of immunity outside the UN context,[210] the argument has yet to take hold.[211] In short, it is still widely accepted under international law that the United Nations enjoys broad, if not absolute, immunity before domestic courts, even when the United Nations fails to provide an alternative remedy.

Another argument for restricting United Nations' immunity looks to the normative foundation for granting immunity to international organizations—namely "functional necessity."

[200] Olivier Beaud, *La distinction entre droit public et droit privé: Un dualisme qui résiste aux critiques*, *in* THE PUBLIC/PRIVATE DIVIDE: UNE ENTENTE ASSEZ CORDIALE? 21 (Mark Freedland & Jean-Bernard Auby eds., 2006).

[201] R. H. Harpignies, *Settlement of Disputes of a Private Law Character to Which the United Nations Is a Party*, 7 REVUE BELGE DE DROIT INTERNATIONAL 451, 453–54 (1971); Chanaka Wickremasinghe & Guglielmo Verdirame, *Responsibility and Liability for Violations of Human Rights in the Course of UN Field Operations*, *in* TORTURE AS TORT 480 (Craig Scott ed., 2001).

[202] DEREK W. BOWETT, UNITED NATIONS FORCES: A LEGAL STUDY 149–50 (1964); MOSHE HIRSCH, THE RESPONSIBILITY OF INTERNATIONAL ORGANIZATIONS TOWARDS THIRD PARTIES: SOME BASIC PRINCIPLES 6, 70 (1995).

[203] Kirsten Schmalenbach, *Third Party Liability of International Organizations*, 10 J. INT'L PEACEKEEPING 33, 42 (2006); Kate Nancy Taylor, *Shifting Demands in International Institutional Accountability*, 2014 NETHERLANDS Y.B. INT'L L. 157, 165–66.

[204] Katarina Lundahl, *The United Nations and the Remedy Gap: The Haiti Cholera Dispute*, 88 DIE FRIEDENS-WARTE 77 (2013).

[205] Mégret, *supra* note 181, at 166 (translation by author).

[206] Report of the Secretary-General, Review of the Efficiency of the Administrative and Financial Functioning of the United Nations, para. 15, UN doc. A/C.5/49/65 (Apr. 24, 1995).

[207] Ban Ki-moon Explains to Congress Why the UN Won't Be Held Accountable for Cholera in Haiti, *supra* note 198.

[208] *See*, *e.g.*, Bisson v. United Nations, No. 06 Civ. 6352 (PAC)(AJP), 2008 U.S. Dist. LEXIS 9723 (S.D.N.Y Feb. 11, 2008).

[209] *Supra* note 194.

[210] Freedman, *supra* note 193, at 241, 245.

[211] Moreover, the ECHR has backed down from the promise of *Waite and Kennedy* in subsequent judgments. *See* Stichting Mothers of Srebrenica v. Netherlands, App. No. 65542/12, para. 139(f) (Eur. Ct. H.R. June 11, 2013).

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According to this analysis, the United Nations should "be entitled to (no more than) what is strictly necessary for the exercise of its functions in the fulfillment of its purposes."[212] This argument is said to be strengthened by Article 105 of the UN Charter (read in conjunction with Article 103), which grants immunity in terms narrower than those in the General Convention and which refers, in particular, to immunities "necessary for the fulfilment of [UN] purposes." This narrow reading is inconsistent, however, with the stated intention of the drafters of the UN Charter, which was to ensure "that no member state may hinder *in any way* the working of the Organization or take any measures the effect of which might be to increase its burdens, financial or other."[213] Even those scholars contemplating a functional-immunity analysis agree that the scope of functional immunity should not, in any event, be left for domestic courts to determine; it is arguably the United Nations' own political organs that should determine the scope of immunity required for the organization to fulfill its functions.[214] Certainly, no court to date has been willing to restrict UN immunity on the basis that the immunity was not functionally necessary.

In sum, the United Nations is on fairly solid legal ground in claiming immunity. Although one might well argue that pressure should be placed upon the United Nations to establish a standing claims commission, the main focus of the reform literature appears to be elsewhere. Indeed, well-intentioned legal scholars keen to push the law forward have engaged in normative overshoot by claiming that a restrictive human rights-based or functional interpretation of UN immunity would justify domestic courts' refusal to recognize UN immunity regarding the Haiti cholera outbreak. The problem is that the instrumentalist approach to due process ultimately leads to something of a legal cul-de-sac. Arguments running against the traditional analysis of immunity may well have some merit and also support desirable institutional values, but they do take into account the realities of current law. International lawyers (all of us!) should avoid fulfilling our satirized tendency of mistaking the many gaps in international law as canvases for the projection of our own personal and institutional desires and ambitions.[215] Invoking fundamental values to justify applying new rules of international law may be a legitimate political tactic, but it should not be advanced as a legal one.[216]

Values: Functionalism is dead! Long live functionalism! The arguments by scholars advocating progressive interpretations of the current law on UN immunity are best construed, and most powerfully advanced, as policy arguments advocating the need for reform. The law relating to UN immunity, created only a year after the organization was founded, has achieved gospel-like status even though the international community has long since abandoned belief in the United

[212] PETER BEKKER, THE LEGAL POSITION OF INTERGOVERNMENTAL ORGANIZATIONS: A FUNCTIONAL NECESSITY ANALYSIS OF THEIR LEGAL STATUS AND IMMUNITIES 39 (1994); *see also* Kristen Boon, *The United Nations as Good Samaritan: Immunity and Responsibility*, 16 CHI. J. INT'L L. (2015); Gaillard & Pingel-Lenuzza, *supra* note 192; C. F. AMERASINGHE, PRINCIPLES OF THE INSTITUTIONAL LAW OF INTERNATIONAL ORGANIZATIONS 316, 318 (2d ed. 2005).

[213] 13 DOCUMENTS OF THE UNITED NATIONS CONFERENCE ON INTERNATIONAL ORGANIZATION 705 (1945) (emphasis added).

[214] Michael Singer, *Jurisdictional Immunity of International Organizations: Human Rights and Functional Necessity Concerns*, 36 VA. J. INT'L L. 53, 108 (1995); Gaillard & Pingel-Lenuzza, *supra* note 192, at 8.

[215] Roger O'Keefe, *Once Upon a Time There Was a Gap* . . . , EJIL: TALK! (Dec. 8, 2010), *at* http://www.ejiltalk.org/once-upon-a-time-there-was-a-gap-. . ./.

[216] Michael Wood, *Do International Organizations Enjoy Immunity Under Customary International Law*, *in* IMMUNITY OF INTERNATIONAL ORGANIZATIONS 29, 59–60 (Niels Blokker & Nico Schrijver eds., 2015).

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Nations as "a kind of secular God for the international community."[217] It is increasingly recognized that international institutions are capable of all manner of missteps, omissions, and sins—including, in some cases, human rights violations.[218] Even if it is not yet reflected in conventional or customary law, it can be forcefully argued that the principle of absolute immunity is an historical anomaly that has outlasted its utility.

The problem with framing the question of UN immunity in terms of existing law is that the mode of framing determines the outcome. By focusing on immunity law for the source and limits of UN accountability, international lawyers risk missing the point; the situation is akin to looking for the keys where the lamp is shining. Immunity law may create a point of intellectual focus but nevertheless sheds little light on the issue of UN accountability. For the United Nations, while immunity remains a crucial guarantor of the United Nations' political and financial independence, the organization needs to look beyond legal boundaries when determining the appropriate scope of its accountability. Public statements that claims against the United Nations in the Haiti cholera dispute are "not receivable," even if technically legally accurate, do little to overcome the widespread impression that the United Nations has done something wrong and that this wrong needs to be in some way addressed. As Jan Klabbers aptly describes it, the Haiti cholera outbreak is ultimately "a remarkable signpost for the poverty of the law."[219]

The Dignitarian Model: Evaluating the Quest for Tortious Liability

The present legal framework governing the international responsibility of international organizations has been described as "leaving individuals out in the cold."[220] In the Haiti cholera context, it is undeniable that the victims of the cholera outbreak have been marginalized. Faced with a UN refusal to establish any internal mechanism, lawyers representing the cholera victims and their families commenced a class action in the Southern District of New York against the United Nations and relevant officials. In the suit, *Georges v. United Nations*, the plaintiff class seeks compensatory and punitive damages to remedy the injuries, including U.S.$2.2 billion that the Haitian government requires to remedy Haiti's waterways, provide adequate sanitation, and eradicate cholera.[221]

The initiation of the tort action on behalf of Haiti cholera victims has received support in the academic literature.[222] Applying a due process analysis, I take a different view. In the following section, I will consider the extent to which tort liability is capable of fulfilling dignitarian aims of due process. In particular, I question (1) whether class actions are an adequate

[217] Alvarez, *supra* note 179.

[218] Vanessa Kent, *Protecting Civilians from UN Peacekeepers and Humanitarian Workers: Sexual Exploitation and Abuse*, *in* UNINTENDED CONSEQUENCES OF PEACEKEEPING OPERATIONS 44, 46 (Chiyuki Aoi, Cedric Coning & Ramesh Thakur eds., 2007); Frédéric Mégret & Florian Hoffmann, *The UN as a Human Rights Violator? Some Reflections on the United Nations Changing Human Rights Responsibilities*, 25 HUM. RTS. Q. 314 (2003).

[219] *Id.*

[220] Armin von Bogdandy & Mateja Steinbrück Platise, *ARIO and Human Rights Protection: Leaving the Individual in the Cold*, 9 INT'L ORG. L. REV. 67 (2012).

[221] Class Action Complaint, Georges v. United Nations, *supra* note 178. In a January 2015 decision, the Southern District upheld the United Nations' absolute immunity under the General Convention, Georges v. United Nations, 84 F.Supp.3d 246 (S.D.N.Y. 2015). The decision has been appealed to the U.S. Court of Appeals for the Second Circuit, though the court has not handed down its decision at the time of writing.

[222] *See*, *e.g.*, Boon, *supra* note 212; Freedman, *supra* note 193.

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mode of interest representation, (2) the effectiveness of tort law as a legal regulator of international organizations, and (3) the appropriateness of applying the corrective justice values underlying tort law to the United Nations.

Community: Constructing community through "class action" in domestic courts. An action in tort is on its face a prototypical example of the dignitarian model of due process. The key significance of handing the problem over to tort litigation is that it *individualizes* the problem. The focus of tort law is squarely on the interpersonal relationship between tortfeasor and victim. A concept of equality underpins tort law, which bases the duty to compensate on the notion that two parties are "juridically equal," such that neither should interfere with the other's freedom to pursue their own projects and purposes.[223]

Yet, when a tort action takes the form of a class action against the United Nations, the interpersonal relationship at the heart of tort liability is challenged in two important respects. First, the defendant is not an individual but the United Nations, an international organization that—far from being in a position of juridical equality—is considered accountable precisely because it is in a position of juridical *in*equality in owing special responsibilities to vulnerable populations. This issue will be dealt with in the next section as an issue of applicable law. Second, the plaintiffs are not individuals but, in the Haiti cholera case, the legal representatives of a class comprising over five thousand individuals "who have been or will be injured or . . . killed by cholera contracted in Haiti on or after October 9, 2010."[224] It is open to question whether a class action of this nature has the potential to enhance the autonomy and interest representation of individuals in international society.

Class actions are commonly regarded as poor vehicles for accountability.[225] The U.S. class action litigation system itself is described as afflicted by accountability problems.[226] Such actions almost invariably come into being through the actions of lawyers, as was the case in the Haiti cholera controversy, and many mass tort claims are only remotely connected with individuals. They are widely known as "lawyer actions," and the individuals represented "often are recruited by class counsel, play no client role whatsoever, and—when deposed to test the adequacy of representation—commonly show no understanding of their litigation."[227] A class action, once created, takes on a significant institutional life of its own, to the extent that individual claimants have limited capacity to exit or opt out of the litigation.[228] Richard Nagareda has repeatedly argued that the modern class action has come to operate as a "decidedly inferior rival" to public lawmaking, in the process of which lawyers appropriate, rather than actualize, each claimant's autonomy over their day in court.[229]

[223] Peter Cane, *Tort Law and Public Functions*, *in* PHILOSOPHICAL FOUNDATIONS OF LAW OF TORTS 148 (John Oberdiek ed., 2014); Stephen Darwall & Julian Darwall, *Civil Recourse as Mutual Accountability*, 39 FLA. ST. U. L. REV. 17 (2012).

[224] Class Action Complaint, Georges v. United Nations, *supra* note 178, at 8.

[225] CAROL HARLOW, STATE LIABILITY: TORT LAW AND BEYOND 50–51 (2004).

[226] John C. Coffee Jr., *Litigation Governance: Taking Accountability Seriously*, 110 COLUM. L. REV. 288, 290 (2010).

[227] Edward Cooper, *The (Cloudy) Future of Class Actions*, 40 ARIZ. L. REV. 923, 927 (1998).

[228] Samuel Issacharoff, *Governance and Legitimacy in the Law of Class Actions*, 1999 SUP. CT. REV. 337, 357.

[229] RICHARD A. NAGAREDA, MASS TORTS IN A WORLD OF SETTLEMENT, at ix–x (2007).

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The point of referring to such literature is not to level accusations at lawyers in the Haiti cholera controversy but to sound a broader note of caution. Lawyers representing cholera victims acknowledge that they have taken the tort action as a mechanism of "last resort."[230] They do not regard the tort litigation as the best approach but see themselves as forced to resort to such litigation as a "nuclear option" advocacy technique. Class actions have been recognized in other contexts as a "useful tin opener" or publicity vehicle for pressure groups and crusading lawyers who hope to open dark, windowless areas of public administration to scrutiny.[231] In working toward a due process model for the United Nations, class action tort litigation should not be regarded as a legally desirable remedy but, at best, as a step in the *political* battle for compensation.

Law: Tort law as global regulator. The implications of the extension of tort law to the UN context are unknown and largely untested. In its study on the accountability of international organizations, the International Law Association acknowledged that the law on responsibility for the tortious acts of peacekeepers is "underdeveloped."[232] Yet arguably, the ILA is getting ahead of itself. An important question remains over *whether* tort liability should have a role in enhancing UN accountability.

At the domestic level, the role of tort law continues to be a subject of active philosophical inquiry.[233] Powerful theories of tort law explain its role in regulating relations between individuals, including, most prominently, the traditional mainstream "corrective justice" account[234] and the economic theory of tort law, which builds in rationales of deterrence and efficiency.[235] Yet even in domestic contexts, the basis for extending tort liability to governmental authorities is in question. Scholars acknowledge no satisfactory theoretical justification has yet been provided for extending tort law to public authorities.[236] Mainstream tort theory is concerned with interpersonal rights, constructed as a form of moral theory; it is not a political theory concerned with the powers and duties of government and the relationship between government and citizen.[237] In considering the extension of tort law to the United Nations, an even wider gulf opens up between the central concerns of tort law and those of the United Nations. Whereas the former is based on equality (corrective justice theory) and the desire to deter risky behavior (economic theory), the latter almost invariably deals with vulnerable populations in

[230] Beatrice Lindstrom, Shannon Jonsson & Gillian Soddard Leatherberry, *Access to Justice for Victims of Cholera in Haiti: Accountability for UN Torts in US Court*, B.U. INT'L L.J. (Nov. 3, 2014), *at* http://www.bu.edu/ilj/2014/11/03/access-to-justice-for-victims-of-cholera-in-haiti-accountability-for-u-n-torts-in-u-s-court/.

[231] For the use of law in campaigning, see CAROL HARLOW & RICHARD RAWLINGS, PRESSURE THROUGH LAW (1992).

[232] INTERNATIONAL LAW ASSOCIATION, ACCOUNTABILITY OF INTERNATIONAL ORGANIZATIONS: FINAL REPORT 21 (2004).

[233] *See*, *e.g.*, PHILOSOPHICAL FOUNDATIONS OF THE LAW OF TORTS, *supra* note 223.

[234] ERNEST J. WEINRIB, THE IDEA OF PRIVATE LAW (1995) (especially chapters 6 and 7); ALLAN BEEVER, REDISCOVERING THE LAW OF NEGLIGENCE (2007); ROBERT STEVENS, TORTS AND RIGHTS (2007); Richard W. Wright, *Substantive Corrective Justice*, 77 IOWA L. REV. 625 (1992).

[235] GUIDO CALABRESI, THE COST OF ACCIDENTS (1970); RICHARD POSNER, ECONOMIC ANALYSIS OF LAW (8th ed. 2014).

[236] Cane, *supra* note 223; Donal Nolan, *Negligence and Human Rights Law: The Case for Separate Development*, 76 MOD. L. REV. 286 (2013); François du Bois, *Human Rights and the Tort Liability of Public Authorities*, 127 LAW Q. REV. 589, 609 (2011); Mark Aronson, *Government Liability in Negligence*, 32 MELB. U. L. REV. 44 (2008); HARLOW, *supra* note 225.

[237] Cane, *supra* note 223, at 149.

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a position of inequality, where risk creates an imperative for, rather than an impediment to, UN action.

Peter Cane has offered an alternative rationale for extending tort liability to the public sphere, and has proposed that the concept of accountability could serve as an attractive theoretical framework.[238] Yet an action for damages in tort has been recognized as a "very poor weapon" for investigating whether public bodies have behaved well or badly.[239] Tort law has been deemed an inefficient regulator and ineffective deterrent in the public arena. Rather than leading to more efficient decision making, the threat of damage claims can build in "decision traps" that render policy and decision making more difficult and less rational, and can have a chilling effect on decision making—with the most likely response being a "greater dose of bureaucratic inertia."[240]

When the aim is to hold a public authority to account, it is arguable that cases should be funneled away from the tort route and be dealt with, instead, under the rubric of human rights. In the eyes of many international lawyers, questions of tort law and human rights law have become merged on account of the U.S. Alien Tort Statute,[241] which funnels an (increasingly narrow) set of human rights claims through a tort process. Yet, in most tort litigation, human rights is a red herring. Though the *Georges* litigation has been praised as presenting "the perfect set of facts for a national court finally to recognise that the UN cannot avoid its human rights obligations by hiding behind the cloak of immunity,"[242] the claim is not a human rights action brought under the Alien Tort Statute but is, instead, a claim in tort.

Tort law is often seen as inferior to human rights as a means of regulating public authorities. Tort and human rights differ markedly in terms of (1) the nature of the central relationship, (2) the duty of care, and (3) the standard of care. As noted earlier, tort law establishes a bipolar relationship between two parties who are regarded as juridically equal. By contrast, the aim of human rights law is less to target negligent individuals than to target *systems* that intrude into the lives of individuals.[243] Because tort law and human rights law were developed to address different relationships, the regimes take different approaches to the duty and standard of care. In tort law, the trend has been to narrow the scope of duties owed by public authorities.[244] By contrast, human rights law goes well beyond prohibiting the infliction of harm and makes public authorities answerable for infringing wide-ranging "positive" duties. The state is seen as bearing special responsibilities regarding those over whom it exercises authority—responsibilities that are different from those

[238] *Id.*

[239] HARLOW, *supra* note 225, at 30.

[240] *Id.* at 26–27.

[241] 28 U.S.C. §1350.

[242] Rosa Freedman & Nicolas Lemay-Hebert, *Towards an Alternative Interpretation of UN Immunity: A Human Rights-Based Approach to the Haiti Cholera Case*, QUESTIONS INT'L L. (July 27, 2015), *at* http://www.qil-qdi.org/towards-an-alternative-interpretation-of-un-immunity-a-human-rights-based-approach-to-the-haiti-cholera-case/.

[243] HARLOW, *supra* note 225, at 17.

[244] In the United States, the Federal Tort Claims Act has been described as "a limited waiver of the United States' sovereign immunity." *See* Paul F. Figley, *Understanding the Federal Tort Claims Act: A Different Metaphor*, 44 TORT TRIAL & INS. PRAC. L.J. 1105, 1106 (2009). In the United Kingdom, judges have adopted a noninterventionist, restrictive approach to establishing duties of care in respect of public bodies. DUNCAN FAIRGRIEVE, STATE LIABILITY IN TORT: A COMPARATIVE LAW STUDY 64 (2003).

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that individuals owe each other.[245] In terms of the standard of care, the test of reasonableness operates in tort to determine the balance between security and freedom between two individuals entitled to pursue their own interests, whereas the proportionality test used in human rights litigation reflects the more complex challenge of balancing the objectives pursued by public authorities against the impact of the associated public actions on individual rights holders.

These differences between tort and human rights law are, of course, not accidental. Tort law is designed to resolve conflicts between individual rights holders, and human rights law is designed to give effect to the "special normative relationship between states and their citizens" and the distributional questions that arise therefrom.[246] That is not to say that public officials or public authorities should never be subject to tort liability. The task is to separate those claims aiming to vindicate rights in exactly the same way as when seeking remedies against private persons, from those in which the individuals involved are aiming to ensure the proper exercise of public functions or to secure a just distribution of society's common resources.[247] In other words, we need to carefully distinguish between claims for corrective justice and those implicating questions of distributive justice.

Values: Corrective or distributive justice? As highlighted above, the benefit of tort liability in dignitarian terms is the capacity of tort law to *individualize* the claim. Yet the problem of vindicating what are essentially public or human rights claims through tort liability is that it ignores the social or public dimension of the claims. The line between corrective and distributive justice is often used by tort lawyers to delineate the province of tort law from forms of resource allocation left more appropriately to political organs. While corrective justice "operates on entitlements without addressing the justice of the underlying distribution,"[248] distributive justice is concerned with the proper distribution of the benefits and burdens that are held in common by all who belong to a community.

The problem with extending class actions and similar legal actions in tort to the UN context is that doing so cannot help but implicate, in deciding upon a remedy, questions of distributive justice. Tort lawyers generally agree that the primary objective of tort law is compensation.[249] Noncompensatory, nonmonetary remedies are exceptional and even controversial.[250] Jane Stapleton has noted that one effect of extending tort law to public authorities has been to channel a disproportionate burden of liability to deep-pocketed secondary actors, such as governmental authorities, thereby straining notions of causation and proximity.[251] Tort law is reimagined as a public-spirited effort to protect vulnerable parties, and as inviting the expansion of tort law beyond its logical boundaries of corrective justice and into the territory of distributive justice.[252]

[245] SANDRA FREDMAN, HUMAN RIGHTS TRANSFORMED: POSITIVE RIGHTS AND POSITIVE DUTIES (2008).

[246] du Bois, *supra* note 236, at 595.

[247] *Id.* at 603.

[248] WEINRIB, *supra* note 234, at 80.

[249] GEORGE P. FLETCHER, TORT LIABILITY FOR HUMAN RIGHTS ABUSES 9 (2008).

[250] Cane, *supra* note 223, at 165.

[251] Jane Stapleton, *Duty of Care: Peripheral Parties and Alternative Opportunities for Deterrence*, 111 LAW Q. REV. 301, 313 (1995).

[252] James J. Spigelman, *Negligence: The Last Outpost of the Welfare State,* 76 AUSTL. L.J. 432 (2002).

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Particular problems emerge when class actions in tort are extended to public authorities possessing scarce resources. In the legal literature on the Haiti cholera controversy, much has been made of the paradox that the chance of getting compensation following a minor traffic accident caused by UN officials would be higher than in the case of UN negligence leading to a cholera outbreak killing almost 9000 individuals and affecting hundreds of thousands of people. The very scale of the injury, however, may sensibly be a factor counting against tort liability. Large tort awards determine not only the amount to be distributed to past victims but, as a consequence, the amount that will no longer be available for the defendant organization to pursue its operations in the future.[253] It has been calculated that the total award to Haiti cholera victims in a successful tort claim would be between U.S.$15 billion and U.S.$36.5 billion.[254] When considered against the total proposed 2016–17 UN biennium budget of U.S.$24.7 billion, the scale of the problem becomes clear.[255] Domestic tort judgments against the United Nations are a drain on scarce resources, threatening to seriously reduce the funds available to achieve UN purposes.

The central task of a domestic judge processing a tort claim is to rectify an injustice that has occurred between the doer and the sufferer of harm. In many class actions for mass torts, the scheme for resolving claims turns into an administrative process implemented by judges, who freely admitted in the context of the asbestos litigation that they were an inefficient surrogate for the state.[256] It would not be a positive development to vest judges with the task via domestic tort claims of weighing up the relative merits of participants in a political community as diverse and underserviced as the international community. Once again, the human rights framework arguably offers a more appropriate set of remedies. Domestic judges have noted that individuals who have suffered at the hands of public authorities are not necessarily primarily motivated by a desire for monetary compensation; they may institute proceedings because they want

> faceless persons in an apparently insensitive, unresponsive and impenetrable bureaucratic labyrinth . . . to acknowledge that something has gone wrong, to provide them with an explanation, an apology and an assurance that steps have been taken to ensure (so far as possible in an imperfect world) that the same mistake will not happen again.[257]

Receiving compensation can play an important role in providing recognition to victims, but it has been argued that damages should be "on the low side," at least by comparison to tort cases.[258] The reasoning is that remedies for human rights violations should correspond not only

[253] The UN secretary-general proposed this rationale for limiting liability in his reports *Administrative and Budgetary Aspects of the Financing of the United Nations Peacekeeping Operations*, UN Doc. A/51/389 (Sept. 20, 1996), and *Agenda Item 140(a): Administrative and Budgetary Aspects of the Financing of the United Nations Peacekeeping Operation*, UN Doc. A/51/903 (May 21, 1997), both of which were cited with approval in General Assembly Resolution 52/247 (July 17, 1998) on limiting third-party liability.

[254] Boon, *supra* note 212, at 371.

[255] This figure represents the "total net budget," including the "regular budget" of U.S.$5.6 billion and "extrabudgetary" expenditures such as support, substantive, and operational activities. Proposed Programme Budget for the Biennium 2016–2017, at 25, UN Doc. A/70/6 (May 15, 2015).

[256] Deborah R. Hensler, *As Time Goes By: Asbestos Litigation After* Amchem *and* Ortiz, 80 TEX. L. REV. 1899, 1904, 1915, 1923 (2002).

[257] R (Bernard) v. Enfield LBC, para. 39, [2002] EWHC (Civ) 2282, *cited in* HARLOW, *supra* note 225, at 120–21.

[258] Harry Woolf, *The Human Rights Act 1998 and Remedies*, *in* JUDICIAL REVIEW IN INTERNATIONAL PERSPECTIVE 429 (Mads Andenas & Duncan Fairgrieve eds., 2000) (cited as authoritative guidance and quoted in LAW

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to the circumstances of the individual victim but, as discussed below, to what would serve the interests of the "wider public who have an interest in the continued funding of a public service."[259]

The Public Interest Model and Haiti Cholera: Evaluating the Quest for Accountability

In contrast to the Security Council's sanctions regime, no procedural framework has been adopted or proposed in response to the Haiti cholera controversy that would fit a public interest model of due process. A stale cache of mechanisms is available for receiving third-party claims. Chief among these mechanisms is the standing claims commission contemplated in the Model Status-of-Forces Agreement for Peace-Keeping Operations[260] (and, indeed, in the UN-Haiti SOFA), though only one standing claims commission has ever been established by the United Nations (to investigate claims against UN Interim Administration Mission in Kosovo forces). Even here, a Human Rights Watch Report concluded that "[f]ew people . . . even knew that the [commission] existed, including the majority of UNMIK staff."[261] More often, claims against UN peacekeepers have been resolved on an ad hoc, rather than systematic, basis; the former head of the UN division that routinely handled third-party claims has asserted that such claims "have usually been amicably resolved—without recourse to arbitration" or have been resolved through local claims review boards.[262] The latter are internal administrative processes that leave the investigation, processing, and final adjudication of claims entirely in UN hands, which raises questions of independence; the United Nations itself has recognized that the organization "may be perceived as acting as a judge in its own case."[263]

Fresh thinking is needed to address the accountability deficit in UN decision making. UN accountability is not synonymous with legal responsibility or tort liability. My discussion in this final section focuses on the values that should underlie any procedural framework. Although no mechanism has been put in place to address the consequences of the Haiti cholera outbreak, the creation of such a mechanism should be considered an urgent priority, both within the United Nations and outside it.

Community: The shift from public to publicness. In a model based on accountability, an obvious question to answer is "accountability to whom?" The answer, far from being obvious in relation to the United Nations, is complex. As Kingsbury and Donaldson have recognized, in determining the accountability of entities operating in the global sphere, identifying a clearly

COMMISSION & SCOTTISH LAW COMMISSION, DAMAGES UNDER THE HUMAN RIGHTS ACT 1998 (LAW COM NO 266; SCOT LAW COM NO 180), para. 4.31 (2000)).

[259] Anufrijeva v. Southwark London Borough Council, [2003] EWCA (Civ) 1406, para. 56 (Lord Woolf, CJ) (citing DAVID SCOREY & TIM EICKE, HUMAN RIGHTS DAMAGES: PRINCIPLES AND PRACTICE, para. A4-036 (2001)).

[260] Model Status-of-Forces Agreement for Peace-Keeping Operations, annex, UN Doc. A/45/594 (1990).

[261] Human Rights Watch, *Better Late Than Never: Enhancing the Accountability of International Institutions in Kosovo* 18 (June 14, 2007), *at* https://www.hrw.org/sites/default/files/reports/kosovo0607web.pdf. See also criticism by the European Commission on Democracy Through Law (Venice Commission), *Opinion on Human Rights in Kosovo: Possible Establishment of Review Mechanisms* 13–14 (2004).

[262] Bruce C. Rashkow, *Immunity of the United Nations: Practice and Challenges*, 10 INT'L ORG. L. REV. 332, 340 (2013); Administrative and Budgetary Aspects of the Financing of the United Nations Peacekeeping Operations, *supra* note 253, paras. 20–25.

[263] Administrative and Budgetary Aspects of the Financing of the United Nations Peacekeeping Operation, *supra* note 253, para. 10.

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defined "public" presents many challenges.[264] The idea that the United Nations is accountable only to the permanent five or to member states (generally) is outdated.[265] Yet, opening up the notion of community to a "multiplicity of publics"—which would accord with a more contemporary conception of international community—presents a danger: any accountability mechanism might well end up with the United Nations beholden to the interests and preferences of the most powerful and organized elites, the most prominent "public" amid a multiplicity of "publics."

Given the disaggregated and unsettled scope of the international community, a more productive approach is to shift attention from "accountability to whom?" to "accountability to what?" It is commonly assumed that accountability processes are founded on a clear agreement about the standards for holding decision makers accountable.[266] When accountability is sought outside democratic states, however, holding decision makers accountable presupposes a process for debating what the relevant standards should be.[267] Buchanan and Keohane criticize a "narrow" form of accountability in global governance in which the standards for accountability cannot be contested.[268] This narrow conception is insufficient because the legitimacy of global governance institutions depends in part upon whether they operate to facilitate ongoing, principled, factually informed deliberation about the standards of accountability.

The public interest model is advantageous because it posits an "ideal-evolving" conception of community.[269] The focus is not so much on the scope of the public as on the scope of public participation that will enable an accountability mechanism developed in the UN context to gauge what is in the "public interest." The important point is that broad participation must be not merely encouraged, but channeled in a way that encourages participants to infuse their claims with a sense of what is good for all, rather than encouraging self-interested claims. It is not enough to surrender the process to an open, pluralist dialogue. Kristina Daugirdas has explored the potential power of "transnational discourse" to achieve accountability through interaction among governments, intergovernmental organizations, nongovernmental organizations, national courts, experts, and stakeholders. Her analysis examines the capacity of such discourse to exact reputational costs.[270] However, for powerless actors who are not, for example, the ECJ in *Kadi*, this form of discourse risks collapsing into a form of weak dignitarianism in which the result is not dialogue but a monologue that falls on deaf ears. Indeed, Daugirdas's conclusions ring hollow in relation to the Haiti cholera outbreak. That is, for all her theorizing,

[264] Benedict Kingsbury & Megan Donaldson, *From Bilateralism to Publicness in International Law*, *in* FROM BILATERALISM TO COMMUNITY INTEREST: ESSAYS IN HONOUR OF BRUNO SIMMA 81 (Ulrich Fastenrath, Rudolf Geiger, Daniel-Erasmus Khan, Andreas Paulus, Sabine von Schorlemer & Christoph Vedder, 2010).

[265] FRANCK, *supra* note 15, at 480.

[266] Elizabeth Fisher, *The European Union in the Age of Accountability*, 24 OXFORD J. LEGAL STUD. 495, 496 (2004).

[267] *Id.* at 510 (discussing CAROL HARLOW, ACCOUNTABILITY IN THE EUROPEAN UNION (2002) and ACCOUNTABILITY AND LEGITIMACY IN THE EUROPEAN UNION (Anthony Arnull & Daniel Wincott eds., 2002).

[268] Buchanan & Keohane, *supra* note 125, at 427.

[269] Ian Johnstone's model of an "interpretive community" as three concentric circles is persuasive. IAN JOHNSTONE, THE POWER OF DELIBERATION: INTERNATIONAL LAW, POLITICS AND ORGANIZATIONS 7, 41 (2011).

[270] Kristina Daugirdas, *Reputation and the Responsibility of International Organizations*, 25 EUR. J. INT'L L. 991 (2015).

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she acknowledges that there "has been no objective or authoritative determination that the UN's conduct in connection with Haiti has violated international law—and there may never be."[271] The United Nations has undoubtedly suffered reputational costs; as was noted in the *New York Times*, local trust in the United Nations has eroded, and animosity toward the organization has at times been palpable.[272] Ultimately, however, the United Nations has proved "too big to f(l)ail," particularly because the vulnerable Haitian population remains reliant on its assistance. The obvious inference is that UN accountability depends on the creation of a designated UN forum able to ensure not only inclusive discourse but—crucially—UN responsiveness.

Law: Account giving, answerability, responsiveness. Accountability has been described as "the ultimate principle for the new age of governance in which the exercise of power has transcended the boundaries of the nation state."[273] In this article, I am interested in accountability not so much as a virtue or attribute of good governance but rather as a process. The challenge is to develop a "vessel for normativity"—a centralized due process mechanism with the capacity to distil appropriate standards responsive to the felt needs of the international public.[274] The model draws on theories of law such as Nonet and Selznick's responsive law,[275] Brunnée and Toope's "interactional theory" of international legal obligation,[276] and Johnstone's "deliberative" model.[277] Each of these complex theories recognizes that influential norms will not emerge in the absence of processes that allow for active participation of relevant social actors. As in each of these theories, participatory decision making is the hallmark of the public interest model of due process. Participation serves as "a source of knowledge, a vehicle of communication, and a foundation for consent," and social pressure serves as an opportunity for self-correction.[278]

Under a public interest model of due process, the challenge is to develop institutional processes that are open and responsive to public participation, through which the public interest can be measured, articulated, and, in turn, exposed to public scrutiny. Certain innovative scholars have already begun the process of inquiry.[279] By way of preliminary contribution, I wish simply to draw out three central elements of an accountability mechanism.[280] First, in order to qualify as "account giving," there must be an information-gathering stage, or *public inquiry*, in the course of which the panel gathers relevant information, including (though by no means limited to) inquiry into the actor's conduct and justifications for that conduct. Second, to build in "answerability," the panel needs to enter a

[271] *Id*. at 1007.

[272] Deborah Sontag, *Global Failures on a Haitian Epidemic*, N.Y. TIMES, Apr. 1, 2012, at A1.

[273] Fisher, *supra* note 266, at 495.

[274] I have borrowed this terminology from Kingsbury & Donaldson, *supra* note 264, at 84.

[275] *See supra* note 34 and accompanying text.

[276] JUTTA BRUNNÉE & STEPHEN J. TOOPE, LEGITIMACY AND LEGALITY IN INTERNATIONAL LAW (2010).

[277] JOHNSTONE, *supra* note 269.

[278] NONET & SELZNICK, *supra* note 34, at 100.

[279] Florian Hoffmann & Frédéric Mégret, *Fostering Human Rights Accountability: An Ombudsperson for the United Nations?*, 11 GLOBAL GOVERNANCE 43 (2005); Nico Schrijver, *Beyond Srebrenica and Haiti: Exploring Alternative Remedies Against the United Nations*, 10 INT'L ORG. L. REV. 588 (2013).

[280] These elements are drawn from the literature on public accountability, including THE OXFORD HANDBOOK OF PUBLIC ACCOUNTABILITY, *supra* note 169, and ANNE DAVIES, ACCOUNTABILITY: A PUBLIC LAW ANALYSIS OF GOVERNMENT BY CONTRACT (2011).

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reasoned, *public judgment*, all things considered, of the actor's conduct. Third, to build in "responsiveness," the panel may decide about consequences of their judgment (as above), including a *fair remedy* if the actor's justification is found inadequate. The challenge for the United Nations is to devise a forum that builds in these elements of public inquiry, public judgment, and fair remedy.

Values: The value of accountability. In discussions of the Haiti cholera outbreak, judicial compensation has been overemphasized as the route to UN accountability. Yet, in scholarship on mass reparations following human rights violations, scholars argue that what is most important is not the level of compensation but the capacity of reparations programs to instill important values such as social solidarity, civic trust, and recognition.[281] Here, we look in further detail at the processes of public inquiry, public judgment, and fair remedy to examine how they might contribute to the realization of these values.

In a society as divided and stratified as the international community, a public inquiry can play an important, if modest, role as a catalyst for greater social solidarity. A public inquiry provides an important opportunity to give concrete expression to the central commitments and values of international society. The role of such an inquiry must be twofold, encompassing both information gathering and engagement. In terms of information gathering, the mechanism must investigate with relevant parties the nature of the United Nations' conduct and also the potential justifications for that conduct. Yet, in addition to seeking direct participation from relevant actors, the mechanism must also remain engaged with the multiple public spheres that coalesce around the United Nations, and through which, opinions are exchanged and elaborated. A body of empirical work establishes that such networks can be the venue for meaningful and knowledgeable deliberation about decision making beyond the level of the nation-state, including in Europe and globally.[282] The task of digesting these viewpoints is not an arduous one and can be indirect. For example, with regard to sanctions, it is a task already routinely carried out by the 1267 Monitoring Team. Through information gathering and engagement, an inquiry becomes a search not for objectively right answers but for "inter-subjective" or collective interpretation of the terms upon which the United Nations should be held accountable.[283]

Another important goal of any accountability mechanism is the formation or restoration of civic trust in the United Nations as an institution. Local trust has been described as the most important capital for any UN peacekeeper.[284] As Louise Arbour and Mac Darrow noted, the "United Nations has an especially high onus to discharge so as to be taken seriously . . . . Its effectiveness in encouraging compliance with human rights norms lies in the balance, as does its very legitimacy."[285] When the United Nations has engaged in unfair or unlawful action that

[281] I draw these values from Pablo de Greiff's broad conception of justice in *Justice and Reparations*, *in* THE HANDBOOK OF REPARATIONS 451 (Pablo de Greiff ed., 2006).

[282] *See*, *e.g.*, Jürgen Habermas, *Why Europe Needs a Constitution*, 11 NEW LEFT REV. 8 (2001); JOHN DRYZEK, DELIBERATIVE DEMOCRACY AND BEYOND: LIBERALS, CRITICS, CONTESTATIONS (2000); James Bohman, *International Regimes and Democratic Governance: Political Equality and Influence in Global Institutions*, 75 INT'L AFF. 499 (1999).

[283] JOHNSTONE, *supra* note 269, at 22.

[284] See sources cited in Tom Dannenbaum, *Translating the Standard of Effective Control into a System of Effective Accountability*, 51 HARV. INT'L L.J. 113, 121 (2010).

[285] Mac Darrow & Louise Arbour, *The Pillar of Glass: Human Rights in the Development Operations of the United Nations*, 103 AJIL 446, 461 (2009).

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TABLE 2
THE IMPACT OF DIFFERENT NORMATIVE MODELS OF DUE PROCESS

	Key process value	Key participants	Theory of international law	Key international value	Key procedural actor
Instrumentalist	Accuracy	Nation-states	Classical positivist	Legal responsibility	Internationalized court
Dignitarian	Interest representation	Stakeholders	Pluralist	Liability	Domestic/regional courts
Public interest	Public interest	International community	Cosmopolitan constitutionalist	Accountability	UN ombudsperson (sanctions)/Reparations Commission (Haiti)

has caused harm to individuals, a public judgment to this effect serves as an acknowledgment of its wrongfulness and as a spur to the United Nations not to repeat such actions. The act of reason giving in such a judgment serves a disciplinary function for both the participants and decision makers in the process in that it increases pressure on participants to justify their claims by reference to the public interest, resulting in a judgment that all subject to it can accept, at least in principle.[286]

When the actor's justification is found to be inadequate by the accountability mechanism, a measure of individual compensation serves as an important recognition of those harmed—not only as members of a group but also as distinct, irreplaceable human beings.[287] That is not to say that the measure of compensation must always be judicial compensation in proportion to harm. As discussed above, that level of compensation can have unfortunate consequences, particularly where the scarcity of resources precludes the simultaneous satisfaction of all the victims' claims and also the needs of other sectors of international society unrelated to the claim. While international law recognizes an individual's right to a remedy for human rights violations,[288] the question of what constitutes an "adequate remedy" must be contextualized.[289] In the UN context, a well-designed reparations program would have numerous advantages over judicial compensation, including lower costs, relaxed standards of evidence, non-adversarial procedures, and the virtual certainty of redress that accompanies administrative reparations programs.[290] Creative solutions are also needed to determine how the United Nations can build capacity to meet such claims in the future.[291]

IV. CONCLUSION

This article invites greater attention to the question of due process in UN decision making—an issue that is of far greater significance than the prosaic terminology of process

[286] Frederick Schauer, *Giving Reasons*, 47 STAN. L. REV. 633, 641, 657 (1995).

[287] de Greiff, *supra* note 281, at 460–61.

[288] Theo Van Boven, *Introductory Note: Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law* (2005), *at* http://legal.un.org/avl/ha/ga_60-147/ga_60-147.html.

[289] Richard Falk, *Reparations, International Law and Global Justice*, *in* THE HANDBOOK OF REPARATIONS, *supra* note 281, at 478, 491. For example, it is clear that most human rights treaties (and indeed, scholarship) recognizing a right to judicial compensation are configured to redress human rights violations on an individualized basis rather than en masse.

[290] de Greiff, *supra* note 281, at 459.

[291] See Falk's suggestions for a UN voluntary fund or "Tobin tax" on activities that pollute the commons. Falk, *supra* note 289, at 498.

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might suggest. Contexts in which the United Nations has assumed decision-making authority affecting individuals are exemplars of an emerging system of international governance. The task of constructing a procedural framework for this new tier of governance represents a far greater theoretical and practical challenge for the international legal order than has so far been acknowledged.

The central tenet of this article is that the task of developing a due process framework has received inadequate theoretical attention. The great majority of proposals for procedural reform have relied on traditional sources of international law to develop a universal set of due process principles drawing on legal safeguards developed for domestic legal settings. The problem with this classical, formalist approach to developing international legal principles is that it overemphasizes a descriptive approach focused on existing state practice over a normative approach focusing on theoretical appeal. The value of the descriptive route is that it focuses on what state practice has been as a means of ensuring that international legal principles correspond to the reality of state conduct.[292] The problem is that state practice on due process has developed within a domestic governmental setting that is discontinuous with the legal and political context of global governance institutions such as the United Nations. Rather than working from practice to theory, the reverse is more appropriate, with the principal aim being to provide strong and enduring theoretical foundations to support UN institutional practice.

In this article, I have discussed three different procedural models that each advances different process values. Applied to the United Nations, it can be seen that these models are supported by different procedural frameworks and lead to different conceptions of international community, international law, and international values. Table 2 summarizes the major implications of the various models. Though I take the position that in both the sanctions and Haiti cholera contexts, the public interest model is best equipped to advance legitimacy, the international legal order continues to evolve, and just what form it should take remains controversial. International lawyers will legitimately differ over the most appropriate procedural model to be used in different contexts. The aim of this article is not to foreclose debate but to stimulate thinking against the backdrop of a value-based understanding of due process.

[292] Anthea Roberts, *Traditional and Modern Approaches to Customary International Law: A Reconciliation*, 95 AJIL 757, 761–64 (2001).

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