



INSTITUTE FOR INTERNATIONAL LAW AND JUSTICE
NEW YORK UNIVERSITY SCHOOL OF LAW

International Law and Justice Working Papers

IILJ Working Paper 2016/4
Global Administrative Law Series

International Organizations and the Rule of Law
(Forthcoming in *The New Zealand Journal of Public and International Law*)

José E. Alvarez
NYU School of Law

Faculty Director: Benedict Kingsbury
Program Director: Angelina Fisher
Institute for International Law and Justice
New York University School of Law
139 MacDougal Street, 3rd Floor
New York, NY 10012
Website: www.iilj.org

Global Administrative Law Project Directors:
Benedict Kingsbury and Richard Stewart

All rights reserved.
No part of this paper may be reproduced in any form
without permission of the author.

ISSN: 1552-6275
© José E. Alvarez

*Working Papers are issued at the responsibility of their authors, and do not
reflect views of NYU, the IILJ, or associated personnel.*

New York University School of Law
New York, NY 10012
U.S.A.



Cite as:
IILJ Working Paper 2016/4
(Global Administrative Law Series)
Finalized 4/28/2016
(www.iilj.org)

International Organizations and the Rule of Law

José E. Alvarez¹

The subject of this symposium—whether and how international organizations (IOs) should be subject to the rule of law—is evergreen. Consider three incidents over the course of 2015.

Incident One

According to press reports, on Oct. 6, 2015, U.S. federal agents arrested John Ashe, the sixty-eighth President of the UN General Assembly on charges of accepting more than \$1.3 million in bribes from Chinese business executives in exchange for supporting the construction of a building in Macau to host UN meetings.² Preet Bharara, the U.S. district attorney for the Southern District of New York, accused Ashe, a former ambassador to the UN from Antigua and Barbuda, of having “sold himself and the global institution he led.”³ He described Ashe and the other associates in the alleged scheme, who were arrested separately, as having been “[u]nited in greed” and forming “a corrupt alliance of business and government [and] converting the U.N. into a platform for profit.”⁴ Ashe was alleged to have accepted laundered funds to influence his recommendations to Secretary-General Ban Ki-Moon to build the conference center.

Incident Two

For much of 2015, according to press reports, the UN’s Office of Internal Oversight Services—the entity responsible for preventing fraud and waste in an organization that spends

¹ Herbert and Rose Rubin Professor of International Law. This is the text of a keynote speech presented at a symposium on “International Organisations and the Rule of Law” at the Victoria University of Wellington Faculty of Law, on December 7, 2015.

² Colum Lynch, *U.S. Accuses Former U.N. General Assembly President of Corruption*, FOREIGN POLICY (Oct. 6, 2015), <http://foreignpolicy.com/2015/10/06/u-s-accuses-former-u-n-general-assembly-president-of-corruption>.

³ *Id.*

⁴ *Id.*

billions of dollars each year on peacekeeping missions in fragile countries around the world—was racked with internal conflicts.⁵ The confrontation involved a difference of opinion between the office’s director of investigations, Mr. Stefanovic, and the Canadian director of the office, Ms. Lapointe. Their disagreement reportedly threatened the effectiveness of the UN’s internal watchdog unit. Mr. Stefanovic had urged UN officials to investigate Ms. Lapointe for seeking to punish a whistleblower who had exposed the sexual exploitation of children by French troops in the Central African Republic (CAR).⁶ Mr. Stefanovic’s complaint against his boss, leaked to the press, had drawn the support of a whistleblowers’ support group and had persuaded Ban Ki Moon to establish a blue ribbon panel in June 2015 to review the UN’s response.⁷ Following that review, the UN’s top official in the CAR and the deputy high commissioner for human rights resigned. The press report canvassed examples of the Office of Internal Investigations’ failures to encourage the prosecution of other sex crimes committed in the course of peacekeeping, quoted the Obama Administration’s “deep concern for the apparent dysfunction that is going on in the UN’s investigations division,” and included the following mea culpa from the UN Secretary-General: “I cannot put into words how anguished, angered and ashamed I am by recurrent reports over the years of sexual exploitation and abuse by UN forces. . . [it is] a cancer in our system.”⁸

Incident Three

⁵ Colum Lynch, *The U.N.’s Investigation Wars*, FOREIGN POLICY (Aug. 26, 2015), <http://foreignpolicy.com/2015/08/26/the-u-n-s-investigation-wars>.

⁶ *Id.* For discussion of the underlying peacekeeping scandal involving the CAR, see Rósín Burke, *Peacekeeping and Sexual Abuses, UN Response—Addressing the Accountability Gap* (paper presented at symposium) (copy on file with author).

⁷ Lynch, *supra* note 5.

⁸ *Id.*

In January 2015, a New York district judge issued a decision in *Georges v. United Nations*, involving a class action for tort claims against the UN based on allegations that the UN's 1000-person force from Nepal was responsible for a sudden epidemic of cholera in Haiti (a country that had not had cholera for 350 years) in 2010, killing over 8000 Haitians and making another 600,000 ill.⁹ Despite credible evidence that the UN peacekeeping troops had discharged raw untreated sewage from their base camp into a tributary that flows into the Artibonite River, the main source of drinking water in Haiti, and that the cholera strain in Haiti was a nearly perfect DNA match to a cholera strain outbreak that had occurred in Nepal prior to the troops' departure to Haiti, the U.S. judge dismissed the suit on the basis of the UN's absolute immunity under the General Convention on Privileges and Immunities.¹⁰ The judge relied on prior U.S. precedents that had repeatedly upheld the UN's absolute immunity from suit in national courts.¹¹ That ruling could well have cited other comparable decisions issued by other courts that have also affirmed the UN's absolute immunity, even in the face of serious allegations of UN malfeasance, including claims that the organization's (in)actions in Srebrenica amounted to complicity in ethnic cleansing in violation of *jus cogens*.¹²

⁹ *Georges v. United Nations*, 84 F. Supp. 3d 246 (S.D.N.Y. Jan. 9, 2015). For a succinct account of nature of the complaint, written by the attorney responsible for bringing the class action, see Ira Kurzban, *UN Accountability for Haiti's Cholera Epidemic*, AM. J. INT'L L. UNBOUND (Apr. 3, 2014), <https://www.asil.org/blogs/un-accountability-haiti%E2%80%99s-cholera-epidemic>. For a detailed report, see Yale Law School, Transnational Development Clinic, *Peacekeeping Without Accountability*, (Oct. 15, 2013), https://www.law.yale.edu/system/files/documents/pdf/Clinics/Haiti_TDC_Final_Report.pdf.

¹⁰ *Georges v. United Nations*, *supra* note 9 (relying on the Convention on Privileges and Immunities of the United Nations which had been adopted by the General Assembly on Feb. 13, 1946 and entered into force with respect to the United States on Apr. 29, 1970) [henceforth Convention on Privileges and Immunities]. See Convention on Privileges and Immunities, 21 U.S.T. 1418, art. II, § 2.

¹¹ *Id.* See, e.g., *Brzak v. United Nations*, 597 F.3d 107 (2d Cir. Mar. 2, 2010). But the district court's ruling in *Georges v. United Nations* is now on appeal; see Kristen Boon, *Appeal Launched in Haiti Cholera Case*, OPINIO JURIS (June 5, 2015), <http://opiniojuris.org/2015/06/05/appeal-launched-in-haiti-cholera-case>. And, much to the surprise of many knowledgeable observers, the appeals panel granted an oral hearing. For a transcript of that hearing, held on Mar. 1, 2016, see http://opiniojuris.org/wp-content/uploads/Georges-et-al.-v.-UN-Oral-Argument_ActiveUS153242982_ActiveUS1-Final.pdf. The appeals decision remains pending.

¹² See Guido den Dekker & Jessica Schechinger, *The Immunity of the United Nations Before the Dutch Courts Revisited*, THE HAGUE JUSTICE PORTAL (June 4, 2010), <http://www.haguejusticeportal.net/index.php?id=11748> (discussing the judgment of the Court of Appeal of The Hague, issued on Mar. 30, 2010, in *Mothers of Srebrenica, et al. v. the State of the Netherlands and United Nations*).

In these and other instances the UN has successfully deflected its legal responsibilities by, among other things, blaming others. With respect to incident one, it has suggested that the problem lies not with the organization itself but with the unauthorized actions of a corrupt foreign government official, who happened to be President of the General Assembly and allegedly abused his position and influence. Incident two, like others involving sexual exploitation by UN peacekeepers, can be blamed on the soldiers who commit such crimes and their countries of origin who fail to punish them. With respect to incident three, the UN's expert panel's initial response to the cholera epidemic concluded that given Haiti's inadequate infrastructure and its recent earthquake, that epidemic stemmed from a "confluence" of circumstances.¹³ (It has also been suggested that if untreated sewage from the peacekeepers' base camp was in fact discharged into Haiti's main river, the fault lies with the private contractor who was charged with inspecting the pipes and other facilities.) A not unreasonable reading of the UN's response in that case was that, in the view of the organization, it was Haiti's fault if its weak infrastructure could not handle the dumping of feces into the country's main source of drinking water.

These instances, involving national crimes (incident one), national and international crimes (incident two), and what may have been gross negligence (incident three), are only select examples (among many that could be cited) where IOs have been accused of hurting the very people that they are supposed to be assisting. In many of these cases, such as those involving UN peacekeepers, the harms resulted, ironically enough, in the course of action to promote, secure, or establish the rule of law. Indeed, the harms caused by the UN and other IOs tend to fall on the populations of fragile rule of law nations. For many, including

¹³ See José Alvarez, *The United Nations in the Time of Cholera*, AM. J. INT'L L. UNBOUND (Apr. 4, 2014), <https://www.asil.org/blogs/united-nations-time-cholera> (quoting the Final Report of the UN's Panel of Independent Experts at 29).

commentators at this symposium, this makes the absence of accountability in such cases a particularly stark rebuke to these organizations' rhetorical support for the rule of law.

That oft-stated rhetoric is suggested by the words of former UN Secretary-General Kofi Annan:

[The rule of law] refers to a principle of governance in which all persons, institutions, and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency.¹⁴

Annan's definition of the rule of law owes much to the work of well-known scholars such as Tom Bingham, Lon Fuller, and Jeremy Waldron;¹⁵ it also echoes those of other presenters at this symposium.

To be sure, to paraphrase Brian Tamanha, while everyone is *for* the rule of law, this is made easier by the absence of a *single* definition of what it actually is, varying views about when it is relevant and to whom, and by the ever present (and sometimes hypocritical) tendency we have to apply whatever we think it is to others but not to ourselves.¹⁶ Annan, in the quotation above, clearly draws on how the rule of law has been developed within nation states. He seems to presume that the national rule of law can be exported and made to apply internationally and to IOs in particular.

¹⁴ Report of the Secretary-General, *Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*, ¶ 6, UN Doc. S/2004/616 (Aug. 3, 2004).

¹⁵ See, e.g., TOM BINGHAM, *THE RULE OF LAW* (2010); LON FULLER, *THE MORALITY OF LAW* (1964); Jeremy Waldron, *The Concept and the Rule of Law*, 43 *GEO. L. REV.* 3 (2008).

¹⁶ See Brian Z. Tamanha, *The History and Elements of the Rule of Law*, *SINGAPORE J. LEGAL STUDIES* 232 (2012).

These are contestable propositions. As Carolyn Evans' paper at this symposium demonstrates, despite 250 Security Council resolutions since 1999 that mention the term "rule of law" and 200 Council resolutions that mention "accountability," there is no general consensus about what either term means at the international level.¹⁷ The UN Charter contains neither any requirements that the organization respect the rule of law, nor any provisions indicating that it applies to UN organs. Other IO charters are similarly silent. Apart from the absence of explicit provision, IO charters do not make the application of the rule of law, whatever that means, easy. Although we know that UN organs cannot violate the principles and purposes of the Charter,¹⁸ these are so expansive that concrete limitations are difficult to discern from them. IO charters do not come with express limits on the scope of delegated powers that can be given to subsidiary organs, do not usually evince separation of powers principles that permit one organ to check another, and only rarely provide for methods for authoritative interpretation other than subsequent practice backed by acquiescence or lack of objection.¹⁹ Neither the UN Charter nor other IO constitutions come with bills of rights that protect the "peoples" of their members, or clear limits on the power of charter organs with respect to the remaining, undelegated, or residual sovereign powers of states. Indeed, Article 2(7) of the UN Charter seems to avoid suggesting that sovereigns have a *legal* right to be protected from UN interference with their domestic jurisdiction, as compared to the Covenant of the League of Nations.²⁰

¹⁷ Carolyn M. Evans, *Finding Obligation: Foundation for a More Accountable Security Council* (presented at this symposium) (copy on file with author).

¹⁸ See UN Charter art. 24(2) ("In discharging these duties the Security Council shall act in accordance with the Purposes and Principles of the United Nations.").

¹⁹ See generally JOSÉ E. ALVAREZ, INTERNATIONAL ORGANIZATIONS AS LAW-MAKERS 74–95 (2005).

²⁰ Compare the text of art. 2(7) of the UN Charter ("Nothing . . . shall authorize the UN to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII.") to the text of art. 15(8) of the League of Nations Covenant ("If the dispute between the parties is claimed by one of them, and is found by the Council, to arise out of a matter *which*

Given these realities, perhaps the rule of law is invoked as often as it is, including by UN organs like the Security Council and UN Secretaries General, because UN bureaucrats and UN members find its meaning as adaptable (and therefore user-friendly) as the term “terrorism.” As Evans indicates, a contributing factor may be the disagreements that already exist with respect to the meaning of rule of law at the national level.²¹ As is well known, there are advocates for “thick” or “thin” definitions of the international rule of law which mirror comparable debates for the national rule of law that go back centuries.²² But the commentators at this symposium do not segregate themselves into competing (and familiar) rule of law camps. The symposium papers presented do not revisit well-worn debates between, for example, Lon Fuller’s eight rule of law qualities (generality, wide promulgation, prospective application, clarity, non-contradiction, the imposition of reasonable and not impossible demands, constancy, congruence between the written law and its enforcement) and Waldron’s additional criteria for the rule of law (focusing on fair procedures in the governmental exercise of power).²³ On the contrary, the symposium papers largely agree on the terms of reference.

Tom Bingham’s simple enumeration of the basic elements of the rule of law, broadly consistent with Annan’s definition, would not draw significant opposition from the commentators here. According to Bingham’s well-received book, the rule of law requires: (1) equality (that is, the equal application of the law); (2) publicity (entitlement to rules that are accessible, intelligible, clear and predictable, and publicly administered by courts); (3) legally

by international law is solely within the domestic jurisdiction of that party, the Council shall so report, and shall make no recommendation as to its settlement.”) (emphasis added). To this extent, the UN Charter might be seen as a retrograde step from the preceding Covenant.

²¹ Evans, *supra* note 17.

²² See, e.g., Brian Tamanaha, *A Concise Guide to the Rule of Law* (St. John’s University, Legal Studies Research Paper Series, Sept. 2007),

<http://www.ruleoflawus.info/The%20Rule/Tamanaha%20Concise%20Guide%20to%20Rule%20of%20Law.pdf>.

²³ Compare FULLER, *supra* note 15 to Waldron, *supra* note 15, at 49–50.

bound discretion; (4) the good faith exercise of power in accordance with purpose for which powers were conferred, without exceeding the limits of such powers; (5) protection of fundamental human rights (including *nullem crimen sine lege*, the right to fair trial, and to liberty, security, and property); and (6) access to other means to resolve civil disputes without prohibitive cost or delay.²⁴

The commentators at this symposium presume that adhering to these qualities—or to most of them most of the time—matters. All seem to be on the same page in concluding that the rule of law is not just Judith Shklar’s “ruling class chatter.”²⁵ The commentators here largely avoid definitional debates and proceed directly to prescription, that is, to make proposals for fulfilling the essential elements of the rule of law at the international level.

Most of the commentators here presume that rule of law reforms are needed because IOs do not satisfy all of these qualities all (or even most) of the time. They are correct that examples of how IOs fall short on Bingham’s qualities are easier to enumerate than examples of their fidelity with them. Equality before the law, Bingham’s first element, is respected procedurally before international courts like the ICJ, but it is not a quality that we associate, for example, with the voting procedures of the Security Council or the operation of the boards of the World Bank or the IMF (or how the heads of those respective institutions are selected and by whom). (Indeed, the debate at the UN at this writing is merely whether the General Assembly will be given more than one potential candidate to succeed Ban Ki Moon to approve.) As Alison Duxbury’s paper at this conference implies, horizontal equity among states, according each state equal power, is not (outside of the general assemblies of IOs subject to one state, one vote) a quality uniformly associated even with respect to IOs that

²⁴ BINGHAM, *supra* note 15.

²⁵ Judith Shklar, *Political Theory and the Rule of Law*, in *THE RULES OF LAW: IDEAL OR IDEOLOGY 1* (Allan C. Hutchinson & Patrick Monahan, eds. 1987).

aspire to universal membership.²⁶ Indeed, as she points out, the field of the study of institutions is itself skewed along North/South lines.²⁷ More importantly, as critical scholars like Tony Anghie and B.S. Chimni have argued, a great deal of the law (hard and soft) promulgated by global governance institutions takes the form of exports from countries that are already in compliance with their terms to countries of the Global South who bear the brunt of adapting to new regulatory requirements.²⁸

Nor do IOs uniformly respect Bingham's elements two or three above: publicity and legally bound discretion. Many have criticized the Security Council's notorious lack of transparency, as well as its remarkably open-ended discretion, which seems immune to legal limits susceptible to judicial demarcation.²⁹ Nor is the Security Council the only entity with such evident rule of law flaws. Most of what IOs do remains imperious to binding judicial examination, despite the proliferation of international courts. Residents of Argentina were not privy to the IMF negotiations that led to arrangements that at least some suggest helped lead to their country's 2001 economic crash.³⁰ Indeed, the IMF's lack of transparency later on made it difficult to examine who was at fault—the government or the IMF—for that

²⁶ Alison Duxbury, *Is International Law Universal?* (presented at this symposium) (copy on file with author).

²⁷ *Id.*

²⁸ ANTHONY ANGHIE, *IMPERIALISM, SOVERNIGNTY, AND THE MAKING OF INTERNATIONAL LAW* (2007); B.S. Chimni, *Capitalism, Imperialism, and International Law in the Twenty-First Century*, 14 OREGON REV. OF INT'L L. 17 (2012). For an interesting account of the forms of contestation generated by these realities, see BALAKRISHNAN RAJAGOPAL, *INTERNATIONAL LAW FROM BELOW: DEVELOPMENT, SOCIAL MOVEMENTS AND THIRD WORLD RESISTANCE* (2003).

²⁹ For a general survey of possible constraints on the Security Council, see JAMES CRAWFORD, *CHANCE, ORDER, CHANGE: THE COURSE OF INTERNATIONAL LAW* 415–438 (2014). Crawford's answer to whether the ICJ can serve to engage in the "judicial review" of the Council is generally negative. He notes that "[t]here is an almost total lack of institutional means for implementing the principle of the rule of law on the part of individual member States. Rights conferred on States by the system of which the Charter is part cannot, apparently, be vindicated against the Security Council by means other than persuasion or civil disobedience." *Id.* at 435.

³⁰ For the IMF's own account of the reasons for the Argentine economic crisis, see IMF, *Lessons from the Crisis in Argentina* (Oct. 8, 2003), <https://www.imf.org/external/np/pdr/lessons/100803.pdf>.

disaster.³¹ Of course, the IMF's day-to-day decisions on the scope of its authority, including its ability to impose sovereign-constraining forms of conditionality, are not subject to a judicial check within that organization.³²

Moreover, even when international lawyers have turned to international courts or other forms of formal adjudication, such as arbitration, these mechanisms themselves have been criticized for rule of law failings, including the absence of transparency or accessibility.³³ While, as Amelia Keene's paper points out, the ICJ's advisory jurisdiction is a bit more open to participation by states and non-state actors that may be affected by the court's opinions, the same cannot be said with respect to that Court's contentious jurisdiction, for example.³⁴ Despite a trend towards the greater acceptance of amicus briefs in most—but not all—of the 24 permanent international courts or tribunals now operating,³⁵ access to those bodies is not open to all comers on an equal basis. The accessibility of such courts is also subject to other barriers; the small, elite, male, and decidedly European and American “invisible college” of repeat lawyers before courts like the ICJ belie their universalist (and rule of law) aspirations.

There is also considerable room to question whether IOs that have seen remarkable mission creep (that is, most of them) comply with Bingham's fourth element: functionalist

³¹ Indeed, that question has now been the subject of considerable conflicting expert opinions filed in ICSID. *See, e.g.,* LG&E Energy Corp. v. Argentine Republic, ICSID Case No. ARB/02/1, Decision on Liability (Oct. 3, 2006).

³² Legal determinations at the IMF reside with the IMF's Executive Board and the IMF's General Counsel. *See generally* Daniel Kalderimis, *IMF Conditionality as Investment Regulation: A Theoretical Analysis*, 13 SOCIAL & LEGAL STUDIES 103 (2004).

³³ *See, e.g.,* Benedict Kingsbury and Stephan Schill, *Investor-State Arbitration as Governance: Fair and Equitable Treatment, Proportionality, and the Emerging Global Administrative Law*, in *EL NUEVO DERECHO ADMINISTRATIVO GLOBAL EN AMÉRICA LATINA* (2009), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1466980 (critiquing investor-state arbitration along these lines). Indeed, as noted *infra*, one commentator at this symposium contends that even a final ICJ judgment can be an *ultra vires* act. Dai Tamada, *Ultra Vires Judgments of the ICJ: Issues with Legal Exclusion* (presented at this symposium) (copy on file with author).

³⁴ Amalia Keene, *The Forgotten Potential of the Advisory Jurisdictions of International Courts as a Check on the Actions of International Organizations* (presented at this symposium) (copy on file with author).

³⁵ *See* Luigi Crema, *Testing Amici Curiae in International Law: Rules and Practice*, 22 ITALIAN YRBK INT'L L. 91 (2012).

limits on delegation of powers. Thanks in part to in-house counsels who often issue empowering office opinions—a precedent set by Wilfred Jenks at the ILO—IO constitutions have been, as Guy Sinclair notes, “dynamically interpreted” to permit their officials to do what they want.³⁶ Reliance on a combination of teleological charter interpretation, the concept of implied powers, a presumption of legality, the principle of effectiveness, and the legitimacy of subsequent institutional practice has enabled: the ILO to transform itself into a technical assistance agency; the ICAO and the WHO to become institutional bulwarks against intentional terrorist threats to safe air travel or global health respectively; the IMF to change from fixer of fixed exchange rates to decider of desirable macro-economic policies generally; the World Bank to become a tool for good governance writ large and not mere funder of infrastructure projects; and the Security Council to treat its police powers as a license to establish boundary demarcation and “smart” sanctions bodies, claims commissions to resolve environmental disputes, and international criminal courts, among other things.³⁷ Rule of law doubts emerge from all of this institutional creativity.

As Anna Hood’s paper at this conference suggests, many doubt whether the Security Council’s apparent rewriting of “breaches of the international peace” to mean “breaches of human security” is in conformity with Bingham’s second, third, or fourth rule of law elements.³⁸ Of course, the European Court of Justice’s Kadi rulings put the Security Council’s compliance with Bingham’s fifth element, the protection of human rights, under harsh scrutiny.³⁹ The challenge posed by the Council’s “smart” sanctions on individuals

³⁶ Guy Fiti Sinclair, *The Common Law Constitutional Vision of C. Wilfred Jenks* (presented at this symposium) (copy on file with author).

³⁷ See ALVAREZ, *supra* note 19, at 169–268. See also Jacob Katz Cogan, *Stabilization and the Expanding Scope of the Security Council’s Work*, 109 AM. J. INT’L L. 324 (2015).

³⁸ Anna Hood, *The Role of Law in the United Nations Security Council’s Chapter VII* (presented at this symposium) (copy on file with author).

³⁹ Joined Cases C-402/05 P and C-415/05 P, *Kadi v. Council* (2008 E.C.R. I-6351) [Kadi I]; Joined Cases C-584/10P, C-593/10P & C-595/10P, *Commission v. Kadi* (Eur. Ct. Justice July 18, 2013) [Kadi II].

remains, even if these are seen as not equivalent to criminal sanctions but more like civil penalties; even a “civil” sanction imposed without access to a fair, accessible process for redress does not seem to comply with Bingham’s sixth rule of law requisite.⁴⁰ The Council’s belated responses to judicial challenges—namely accepting the possibility of Council delisting, and the establishment of an ombudsperson mechanism procedure to recommend delisting those identified by the al-Qaida (and now ISIL) sanctions committee—may not fully satisfy Bingham’s expectations of a fair procedure. These procedures do not, after all, bind the Council to delist anyone.⁴¹ Of course, even if the ombudsperson office were fully responsive to the rule of law, that does nothing to satisfy rule of law expectations for the other 16 Council sanctions programs which lack even that mechanism.

There is also considerable irony in the fact that international institutions specifically designed to protect fundamental human rights—international criminal courts—may themselves be violating the principle of legality that is an important part of Bingham’s fifth element. There are serious questions about whether some of our international criminal courts fully respect the *nullem crimen sine lege* principle. Sir Robertson, dissenting in the Tribunal of Sierra Leone’s conviction of Norman that was based on the proposition that the enlistment of child soldiers was a crime back in 1996, certainly thought that his co-judges violated that fundamental principle of legality.⁴² Others have criticized as radical and lawless the Special Tribunal for Lebanon’s remarkable finding, in 2011, that customary international law

⁴⁰ See *supra* note 25.

⁴¹ For a description of the ombudsperson innovation, see Grant L. Willis, *Security Council Targeted Sanctions, Due Process and the 1267 Ombudsperson*, 42 GEORGETOWN J. INT’L L. 673 (2011).

⁴² Dissenting Opinion, Justice Robertson, *Prosecutor v. Sam Hinga Norman*, Decision on Preliminary Motion Based on Lack of Jurisdiction (Child Recruitment), Case No. SCSL-2004-14-AR72, Judgement of 31 May 2004. It is also noteworthy that the majority in the Norman case, *supra*, relies on IO-generated evidence for its controversial conclusion that the international crime of enlisting child soldiers predates the conclusion or entry into force of the Rome Statute. This connects to the criticism, noted *infra*, that IOs produce forms of “soft law” that is inconsistent with the rule of law’s insistence on the clarity (and pedigree) of rules of law.

recognizes the crime of “terrorism” and also permits prosecutions based on conducting “a joint criminal enterprise.”⁴³

Tan Hsien-Li’s complaint at this symposium about ASEAN countries’ lack of compliance with ASEAN edicts reminds us that much of international law remains ineffective, despite the assumption that the rule of law requires national law to be minimally effective.⁴⁴ By contrast, it has never been clear whether Louis Henkin was right or just optimistic when he asserted that “almost all states comply with almost all international law rules most of the time.”⁴⁵ Nor has it ever been clear that, even if he were correct, the international rules that fail to secure compliance—from the duty to avoid the use of force to the duty not to target civilians in war—loom so large that it seems petty to point out that, for example, states do manage to comply with less significant obligations, such as their duty to maintain most of their export tariffs at the levels promised to the WTO. It may be true, in short, that states comply with those rules that comport with their short term interests, but not with far more important rules that threaten their deepest interests.⁴⁶

Bingham’s six rule of law qualities were deployed at this symposium not only to describe the current rule of law failings of IOs. They were also used as the basis for prescriptions going forward. Thus, Alison Duxbury, working within the traditional frame of institutional practice laid out by the ILC in its commentaries to its Draft Articles on the Responsibility of International Organizations (DARIO), worries that the practice is insufficiently responsive to IOs outside the West and North; her project seeks to make the

⁴³ Ben Saul, *Legislating from a Radical Hague: The United Nations Special Tribunal for Lebanon Invests an International Crime of Transnational Terrorism*, 24 LEIDEN J. INT’L L. 677 (2011).

⁴⁴ Tan Hsien-Li, *Reputation Risks in the Post-Charter ASEAN: Rules-based Reformation or Rhetorical Repetition* (presented at this symposium) (on file with author).

⁴⁵ LOUIS HENKIN, *HOW NATIONS BEHAVE* 47 (2d ed. 1979).

⁴⁶ It may also be true that the international legal system’s approach to securing “compliance” with its rules is so distinct that arguments over the level of compliance entirely miss the point. See Robert L. Howse & Ruti Teitel, *Beyond Compliance: Rethinking Why International Law Really Matters*, 1 GLOBAL POLICY J. 127 (2010).

ILC's DARIO more respectful of Bingham's demand for equality before the law.⁴⁷ As noted, Hsien-Li urges ASEAN to respect Bingham's insistence on clarity and to remember that the rule of law is about *binding* rules, not political or moral standards.⁴⁸ Hsien-Li seeks ASEAN rules that, consistent with the teachings of Lon Fuller, are relatively constant and predictable, allowing stakeholders to know what the law prohibits, permits, or requires, and, for these reasons, generate greater congruence between what is written and what is enforced or exists.⁴⁹ Amelia Keene's paper focuses on the need to have the law publicly administered by courts, a point that is also fundamental to Waldron's conception of the rule of law which emphasizes the need for hearings by an impartial tribunal with legally trained and independent juridical officers who can be counted on to apply the law in good faith.⁵⁰ Her paper argues that the advisory jurisdiction of international courts can serve as a check on the actions of IOs. Treasa Dunworth also revisits Bingham's second element with respect to civil society's role in disarmament regimes.⁵¹ Anna Hood, concerned principally with Bingham's third element, urges the Security Council to do a better job of recognizing the legal limits on its discretion by explicitly giving voice to those limits.⁵² Like Dunworth, she proposes remedies that are more consistent with Bingham's rule of law and with encouraging wider and more genuine participation in law-making. These authors want to make Council legislation and disarmament regimes more accessible, intelligible, clear and predictable.

Dai Tamada dares to ask whether and how international courts like the ICJ exercise legally bound discretion, and what precisely the remedy is if they do not.⁵³ Few international

⁴⁷ Duxbury, *supra* note 26 (relying on the Draft Articles on the Responsibility of International Organizations, with commentaries, released by the International Law Commission, in 2011).

⁴⁸ Compare FULLER, *supra* note 15 to Hsien-Li, *supra* note 44.

⁴⁹ Hsien-Li, *supra* note 44.

⁵⁰ Keene, *supra* note 34.

⁵¹ Dunworth, *infra* note 62.

⁵² Hood, *supra* note 38.

⁵³ Tamada, *supra* note 33.

lawyers are likely to agree with his controversial contention that those subjected to “illegal” ICJ rulings can ignore them despite the explicit terms of the UN Charter and the ICJ’s Statute indicating that ICJ’s decisions are binding. For his part, Guy Sinclair points to the constitutionalist vision of C. Wilfred Jenks precisely because, he suggests, international lawyers continue to want to secure it. He contends that the good faith exercise of IO power, embraced by Bingham’s rule of law elements, is the very essence of constitutionalism.⁵⁴ Roisin Burke directs her efforts to overcoming the jurisdictional immunities and other problems that prevent the UN from affording adequate recompense or remedy to individuals harmed by UN peacekeepers. Her goals are consistent with Bingham’s fifth and sixth elements.⁵⁵

None of the papers presented suggest that it is a simple matter to transport the concept of rule of law from domestic or national systems to IOs. Keene acknowledges, on the contrary, that the enterprise is “fraught with questions”—even though she contends that the rule of law is equally applicable to states and to IOs at the international level.⁵⁶ She wisely reminds us that what the rule of law *is* turns in part on whom it is directed at protecting. What the right rule of law mechanisms are may depend on whether we are seeking to protect the rights of states, the rights of individuals, or the credibility or legitimacy of IOs. Given this, we should not be surprised that there is considerable ambiguity about what it means for IOs to be “accountable.” As Carolyn Evans notes, the political scientists Grant and Keohane identify no less than seven accountability mechanisms for IOs, including the Security Council.⁵⁷

⁵⁴ Sinclair, *supra* note 36.

⁵⁵ Burke, *supra* note 6.

⁵⁶ Keene, *supra* note 34.

⁵⁷ Evans, *supra* note 17 (citing Ruth W. Grant & Robert O. Keohane, *Accountability and Abuses of Power in World Politics*, 99 AMER. POL. SC. REV. 29 (2005)).

Grant and Keohane's seven mechanisms (hierarchical, supervisory, fiscal, legal, market, peer, and public reputational) advance distinct conceptions of accountability.⁵⁸

These seven accountability tools are directed at distinct persons or entities and respond to demands by distinct groups or interests. It is one thing to say that the World Bank or the IMF is accountable to the U.S. Secretary of the Treasury (through the executive board's control over their senior officials) or to the U.S. Congress (through the latter's assertion of its power over the organization's purse strings). It is quite another to make these institutions (or their executive boards or distinct major contributors to their respective budgets) accountable to the poor or indigenous peoples affected by either the Bank's infrastructure projects or the macro-economic conditions imposed under the IMF's structural adjustment loans. It is one thing to say that a World Bank official is "answerable" to the supervisory authority of the President of the Bank, quite another to demand that that official directly answer the complaints of NGOs. As is clear with respect to the dilemmas posed by the claim that UN peacekeepers spread cholera in Haiti, it is one thing to say that IOs are accountable to governments, quite another to expect them to respond directly to persons inside states, including to lawyers hired to represent the claims of victims of IOs.

Readers of Grant and Keohane need to take those authors' optimistic conclusion—that given these mechanisms, IOs are actually more "accountable" than either states or NGOs—with a grain of salt.⁵⁹ This assertion is not likely to satisfy those who seek *legal accountability* and find that route blocked when it comes to access to a judicial forum to provide financial recompense. Grant and Keohane's optimistic conclusion also relegates to second order importance the fact that all seven of their touted accountability mechanisms are

⁵⁸ Grant & Keohane, *supra* note 57.

⁵⁹ *Id.* at 40.

skewed heavily in favor of state power. They say little about the fact that powerful states have inordinate influence on selecting the IO officials who exercise hierarchical supervision, dominate the bodies (like executive boards) who exercise supervisory supervision, supply most of the funds that enable fiscal constraints, are usually the home states of the market actors with enforcement power, tend to dominate the peers that inspire the mobilization of inter-IO shame, and are frequently the home states of potentially critical (and well-endowed) NGOs. Powerful states, in short, can easily control (or distort) all seven accountability mechanisms. For this reason, these mechanisms are not likely to satisfy those looking for equity in the treatment of IO member states in accordance with Bingham’s demand that the rule of law should have equal application. This is especially problematic to the extent that the efforts of IOs to promote the rule of law—from the actions of peacekeepers to the targets of the Council’s counter-terrorism sanctions—usually involve weak or fragile states, where nearly all of the victims of IOs live and where their accountability failings come home to roost.

Despite general agreement on the elements of the rule of law at this symposium, tensions abound in defining “accountability” and how to deploy the rule of law to advance it. Carolyn Evans’s paper raises many of the important questions.⁶⁰ Does accountability mean representativeness (as in the Security Council’s evident lack of it)? Is it, in short, the product of IOs’ democratic deficits? Or does accountability mean preventing arbitrary exercises of power? If so, should we insist, as do Global Administrative Law (GAL) scholars, that IOs, like national administrative agencies in rule of law states, be fully transparent, encourage ever

⁶⁰ Evans, *supra* note 17.

greater access and participation (particularly to international civil society), enhance their reason-giving, and establish forums for correction in the form of appellate review?⁶¹

Comparable tensions emerge for Tresa Dunworth when she examines whether and how civil society involvement might render disarmament regimes “accountable.”⁶² Dunworth highlights the conflict between conceptions of accountability that rely on representativeness (and embrace the participation of NGOs, for example) and those that emphasize other elements of the GAL recipe book. Is the problem, in short, with “global legislation” like the Security Council’s Resolution 1373 (which laundered the U.S. Patriots Act’s tools for counter-terrorist money laundering by exporting it to the world) or Security Council Resolution 1540 (doing much the same for WMDs) the fact that the Council is unrepresentative and is being used as a laundering tool for “hegemonic international law”⁶³ or is the problem the lack of open deliberation or reason giving in the adoption of these resolutions?⁶⁴

Given these fundamental debates about what it means to be accountable, it is understandable that we have opposing views about whether the glass is half empty or half full. Most of the symposium papers appear to be arguing that different conceptions of accountability are not inherently incompatible and that there is hope for making IOs accountable under the rule of law. Papers by Keene, Evans, Dunworth, and Hood are optimistic that perhaps representativeness—the values of democracy—along with reforms to enhance transparency, participation, reason-giving, and review can together improve

⁶¹ Some of the prescriptions presented at the conference might be seen as applications of the GAL project. *See, e.g.*, Evan’s emphasis on lack of public deliberation of Council resolutions (*supra* note 17) or the lack of robust legal explanation or Keene’s suggestions for forms of advisory judicial review (*supra* note 34).

⁶² Tresa Dunworth, *Accountability of International Organisations: Potential Role of Civil Society in the Context of Disarmament Regimes* (presented at this symposium) (copy on file with author).

⁶³ José E. Alvarez, *Hegemonic International Law Revisited*, 97 AM. J. INT’L L. 873 (2003).

⁶⁴ *See, e.g.*, Dunworth, *supra* note 62.

matters.⁶⁵ The argument is that the pragmatic pursuit of all of these in unison will enable better (or at least more effective) law. Dunworth argues that the increased participation of NGOs may bring the benefits of expertise, a rationale that has long been offered by advocates of greater involvement of international civil society such as Steve Charnovitz with respect to the WTO.⁶⁶ Some assume a virtuous circle whereby enhanced transparency and participation lead to better reason-giving, corrective action, and possibly better enforcement, as when NGOs mobilize shame against states to enforce the efficacy of the ILO or human rights regimes. Commentators express hope that attempts by Council members or by ICJ judges to explain the legalities behind the Security Council's efforts can enhance that body's fidelity to law.

This happy progress narrative is challengeable. There are palpable tensions among rival accountability recipes, and choices need to be made as to desirable routes going forward. A more "representative" Security Council—one that exceeds 25 members, spreads the veto to additional members, or anticipates block actions by its elected members to resist the desires of the P-5—may be even more paralyzed and even less able to respond to rule of law calamities as grave as those now facing Syria. Those urging the route of greater transparency need to consider the fact that transparency and diplomacy rarely go together well. It is doubtful that we would have gotten to the point today where over 50 percent of the Security Council's resolutions each year are adopted under Chapter VII but for that body's resort to non-public deliberations.⁶⁷ Diplomatic breakthroughs as distinct as the Iran Deal to the negotiation of the Trans-Pacific Partnership would probably not have emerged if the underlying negotiations

⁶⁵ Evans, *supra* note 17; Keene, *supra* note 34; Dunworth, *supra* note 62; and Hood, *supra* note 38.

⁶⁶ Dunworth, *supra* note 62. See also Steve Charnovitz, *Opening the WTO to Nongovernmental Interests*, 24 FORDHAM INT'L L. J. 173 (2000).

⁶⁷ See LORAINIE SIEVERS & SAM DAWS, *THE PROCEDURE OF THE UN SECURITY COUNCIL* 389–392 (4th ed. 2014) (noting that the Council adopted 43 Chapter VII resolutions in the 1946–1989 period as compared to 558 such resolutions from 1990–2013).

had been subjected to the glare of media that some academics and members of civil society demand, or to the kind of notice and comment procedures that some GAL scholars recommend. Neither of these breakthroughs is, in short, comparable to an ordinary administrative ruling issued by a domestic executive agency. The wisdom of GAL prescriptions to enhance the rule of law is dubious if one is not fully convinced that universal administrative law actually exists, that all nations have a unitary vision of what legitimate rule-making is, or that domestic analogies to national administrative law can be exported to the international level without serious modification.

It is doubtful that Security Council resolutions or accompanying Presidential Statements that elaborate on the legal powers of the Council, on the exact nature of the “precedent” being set, or on how the Council’s actions comport with the text of Charter would be good things. Do international lawyers really want a political body like the Security Council to “clarify” (and thereof potentially bind itself) to a sweeping definition of what exactly is a “threat to the peace”? Do we want that political Council to declare that, as a legal matter, such threats now include threats to “human security”—and perhaps even attempt to define the latter? Should the Council choose to pass a Chapter VII resolution in response to the next computer hacking of Sony Pictures, do we really want a fully-reasoned legal justification by the Council that “clarifies” the now contested norms on cyber-force? Whom do we want to license to help establish the next step in the evolution of international cyber law?

Critical scholars, like Martti Koskenniemi, posit that given the Security Council’s self-evident built-in inequalities and *de facto* subservience to P-5 (and sometimes just P-1), it is absurd to treat it as a global legislator or to argue that, with some tinkering or procedural

reforms, that body can be both agent of and subject to the “rule of law.”⁶⁸ Talk of Council “accountability” is, to Koskenniemi, an example of utopian legalism at its worse: a disreputable or at least naïve effort to put legal garb on political pragmatism that needs to be seen as the international lawyer’s equivalent of putting lipstick on a pig. He and others argue that it is preferable to continue to treat Security Council resolutions as the political decisions that they in fact are, thereby exposing that body (or the P-5) to the de-legitimation/contestation that emerges when political actors fall short of satisfying the political expectations that they encourage. For these critics it is not useful to pretend that the Council—an organ purposely designed to produce ad hoc responses to threats to world peace only when it manages to find nine votes—is either a (representative) legislature or a court designed to issue carefully articulated legal reasons for its actions. On this view, neither the international rule of law nor the law of the Charter order is enhanced by legalizing the Council’s fundamentally political determinations of when or how to respond.

Recognizing this reality is not tantamount to concluding that the Council is “unbound by law.” As is further addressed below, even in rule of law states, after all, many aspects of governance, even constitutional determinations, are not subject to judicial clarification. Of course, there is also a pragmatic reason to avoid the further legalization of the Council: some would argue that it detrimental to world order to constrain the Council’s exceedingly flexible Charter powers. Political realists and pragmatists might contend that the Council should not face only two overly stark choices: establishing a legally relevant precedent or acting illegally.

⁶⁸ See, e.g., Martti Koskenniemi, *International Legislation Today: Limits and Possibilities*, 23 WIS. INT’L L. J. 61 (2005).

Debates about how IOs can be made accountable or subject to the rule of law also involve competing views on the value of lawyers. Would demanding that the Council or its members provide legal explanations for Council actions really make that body's resolutions more legitimate, or would it merely accord a more prominent role to certain "hot" lawyers who are willing to say "yes" to their political clients (like those who wrote the torture memos for the Bush Administration or the legality of drone memos for Obama)?⁶⁹ Are we confident that international lawyers share a sufficiently developed (and uniform) code of professional ethics that makes their advice preferable (or more credible) than any on offer from "political" advisers?

The utility of the ICJ might be questioned on similar grounds. The assumption that more judicial consideration is always more desirable than less could do with more empirical testing. It is not clear that "progressive" results emerge when we task international judges with explaining what is a "threat to the peace" or with telling us what the Security Council is licensed to do in response to one. Consider the impact of the ICJ's jurisdictional opinion in the Lockerbie cases or that of the ICTY's jurisdictional ruling in Tadic. In Lockerbie, the ICJ suggested that once the Council crosses the UN Charter's Chapter VII line and renders a binding decision, its actions cannot be questioned even when there is a plausible contention that the Council is trumping the extradition or transfer provisions of the Montreal Convention.⁷⁰ As Michael Reisman has argued, this ruling ties the hands of the Council when it wants to take legally binding action short of Chapter VII.⁷¹ In addition, several of the ICJ

⁶⁹ See ANTONIO CASSESE, *FIVE MASTERS OF INTERNATIONAL LAW* 226 (2011) (quoting Schachter's recounting of the question posed to him by Fiorello La Guardia, the colorful mayor of New York City). Sir Kenneth Keith addresses the same point in his John Dugard Lecture. Kenneth J. Keith, *The International Rule of Law*, 28 *LEIDEN J. INT'L L.* 403 (2015) (discussing the importance of the "personal qualities" of lawyers and the lessons of those who wrote the infamous U.S. legal memoranda authorizing torture).

⁷⁰ See, e.g., Crawford, *supra* note 29, at 429–431.

⁷¹ Michael Reisman, *The Constitutional Crisis in the UN*, 87 *AM. J. INT'L L.* 83, 89–90 (1993).

judges in that case and all of the ICTY's judges in the Tadić case on appeal were adamant that, at the very least, the Security Council's determination of what is a "threat to the peace" cannot be subject to judicial second guessing.⁷² As a result of these two rare instances when the Council's actions were subjected to *de facto* judicial review, we now have two precedents establishing that the Council, when it acts under Chapter VII, can compel the extradition of criminal suspects and can establish an independent court (albeit one that respects the rights of criminal defendants). Not all would agree that either of these conclusions is desirable from the standpoint of the rule of law, but it is clear that we have (in part) international courts to thank for legitimizing this deferential view of the Council's implied powers.

If, as Koskenniemi and others argue, it is not a good idea to treat the Security Council as the world's legislature, do we really want ICJ judges to pretend to be the world's judicial branch, even when that body was never given the authority to engage in judicial review over the Council?⁷³ Isn't the ICJ just one of many places where states, when they so choose, take select disputes to be resolved in the narrowest possible fashion? Are we really ready to ask that Court to transform its advisory jurisdiction into a "check" on international organizations,⁷⁴ whether or not we like its responses and even if other international (or national) courts were to opine otherwise? Consider the views of Judge Oda whose refusal to answer the WHO's request for an advisory opinion on the legality of nuclear weapons turned in part on his contention that the Court delegitimizes itself, as well as international law, when

⁷² With respect to the ICJ, see *supra* note 70. For an analysis of the jurisdictional decision in Tadić, see José E. Alvarez, *Nuremberg Revisited: The Tadić Case*, 7 EUR. J. INT'L L. 245–264 (1996).

⁷³ For a view that seems favorably inclined to having the ICJ seize such opportunities when these present themselves in contentious cases, see, for example, Thomas M. Franck, *The "Powers of Appreciation": Who is the Ultimate Guardian of UN Legality?*, 86 AM. J. INT'L L. 519 (1992) (noting especially the separate opinion by Judge Shahabuddeen who speculated about whether there were any limits on the Council's powers of appreciation as well as Judge Weeramantry's dissent which was skeptical of the proposition that the SC could discharge its "variegated functions free of all limitations"). See also José E. Alvarez, *Judging the Security Council*, 90 AM. J. INT'L L. 1 (1996).

⁷⁴ *But see* Keene, *supra* note 34.

it answers “abstract” questions instead of spending its time resolving actual disputes.⁷⁵ Judge Oda raises some discomfiting issues for international lawyers who believe that more law and more judicialization are always better than less, even when the questions posed to the Court and the answers given are as abstract as those in the Nuclear Weapons and Kosovo instances. It is doubtful whether the international rule of law was truly advanced by advisory opinions that, as in these two instances, awkwardly straddle the line between the need to fill international law’s many gaps and the injunction not to render a ruling of “*non-liquet*.” Indeed, as Judge Simma’s separate opinion suggests, the majority’s response to the General Assembly’s request for clarification of Kosovo’s Declaration of Independence may have delegitimized the Court itself.⁷⁶ Those urging that the ICJ’s judges (or those in any of the other standing permanent international courts) should assume the mantle of Ronald Dworkin’s Herculean judges charged with making public policy through judicial review of IOs need to consider soberly responses to Dworkin: namely that even national courts, many of which enjoy greater legitimacy than our generally more fragile international courts, risk much when they assume to take such powers away from those directly charged with law-making.⁷⁷

Sometime ago, intrigued by the topic for this symposium, I asked my NYU colleague, Jeremy Waldron, perhaps the world’s foremost authority on both the rule of law and the propriety of judicial action, to consider these issues. His response, a keynote address on “The UN Charter and the Rule of Law,” drew on John Locke’s comparison of the rule of law in an

⁷⁵ Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226 (July 8) (dissenting opinion of Judge Oda).

⁷⁶ Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, 2010 I.C.J. 404 (July 22) (declaration of Judge Simma).

⁷⁷ See, e.g., Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 YALE L. J. 1346 (2006).

absolute monarchy to “farmyard justice.”⁷⁸ Locke had argued that the rule of law would be a mockery if it resembles a system consisting only of rules established by a farmer to keep his animals from hurting each other but which does not include rules applying to the farmer himself. He contended that while law provides the animals with a measure of security from harms by other animals in that instance, it did not provide them with any security from the far greater powers that could be exercised by the farmer, who could kill any of them with impunity. Locke argued that such a legal system provides, in essence, protection from polecats or foxes, while leaving the animals free to be devoured by lions.⁷⁹ Waldron argued that if one seeks genuine rule of law on the international plane, one needs to go beyond “farmyard justice” to provide a measure of protection to those who play the role of the farmer, including IOs.⁸⁰

Waldron accepted that Locke’s analogy was “far from perfect” as applied to the UN since “international institutions . . . don’t have the power over nation-states that is in any way analogous to the overwhelming and fearsome power that the sovereign state has over the individual. There isn’t the same lion, or . . . the same farmer . . . national sovereigns are not vulnerable to international institutions in the way that individual men and women are vulnerable to national institutions.”⁸¹ For these reasons, he argued that it is simply “good policy” for the UN to set an “example” to others.⁸² He tentatively suggested that, for example, the discretion of the Security Council “should be made in relation to the Rule of Law in the same way as it is made at the national level.”⁸³ But he became far more emphatic

⁷⁸ Jeremy Waldron, *The UN Charter and the Rule of Law*, Keynote Address, Nov. 1, 2015, available as a video, <https://www.youtube.com/watch?v=N6Lv3LorWJM>. (Text on file with author.) Waldron drew on JOHN LOCKE, *SECOND TREATISE OF GOVERNMENT*, §93 (1689).

⁷⁹ LOCKE, *supra* note 78.

⁸⁰ Waldron, *supra* note 78.

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Id.*

about the need to respect the rule of law where IOs have a direct impact on individuals (as when UN peacekeepers inflict harm), and he ended his lecture by challenging the UN's "shabby" recourse to legalisms to escape its accountability in the Haiti cholera case.⁸⁴

While it is easy to agree with Waldron's core premises, it is important to remember that there are many instances where IOs have seized or have been delegated considerable power over states. There are many cases where IO governance activities do approximate the power that governments have over their citizens, where, in short, IOs are comparable to Locke's farmers or lions. The sovereign-intrusive powers of IOs in the modern world justify all the attention that scholars, including those who presented their work at this symposium, devote to making IOs more subject to law.

The "good" governance efforts of the IMF, for example, include the imposition of conditions under structural adjustment loans that purport to affect many of the most critical economic issues facing nations that seek its assistance. Critics of these efforts argue that the IMF's decisions have sometimes done more harm than good or that, in some cases, the joint action of the IMF and governments anxious to seek its largess have provoked or aggravated disastrous economic crises.⁸⁵ Some charge that, irrespective of the quality of the IMF's economic advice, the consequences of conditionality are that certain core issues are removed from domestic electoral processes, thereby absolving governments, even in democracies, of accountability or responsibility.⁸⁶ Of course, within the UN, few need to be reminded of the considerable powers deployed by that body's Security Council since the end of the Cold War. The Council's actions—including its authorization of the military occupation of Iraq after the

⁸⁴ *Id.*

⁸⁵ See *supra* at text and notes 30–31.

⁸⁶ See, e.g., Devesh Kapur & Moises Namim, *The IMF and Democracy*, 16 J. DEMOCRACY 89 (2005).

2003 Gulf War, its supervision of elections around the globe, and its resort to the use of force in places like Libya—have affected, for better or worse, the lives of millions.

Starting with the end of the Cold War, UN peacekeeping in particular has slowly transformed itself from a tool to keep the armies of two states at bay into far more complex “peace operations” seeking to transform the internal governance of states. UN reports have documented the new “rule of law” paradigm involving ever greater commitments to and mainstreaming of UN efforts designed to promote judicial reform, constitutional reform, general law reform, the “rule of law” in public administration, greater legal awareness of and access to justice, law enforcement reforms, and changes to detention or prison policies.⁸⁷ Many have now documented how, since 1989, these rule of law forms of assistance have moved from the margins of peace operations to their core. The numbers speak for themselves. Over the 1989–2010 period, the number of UN peace operations containing rule of law assistance went from more than half of such operations (from 1989–1999), to a large majority (19 out of 24, after 2000), to the point where, from 2008–2010, all peace operations in Africa involved one or more rule of law forms of assistance.⁸⁸ According to the 2009 Secretary-General’s Report, rule of law programming involved 120 member states from every

⁸⁷ See, e.g., Report of the Secretary General, *Strengthening and Coordinating United Nations Rule of Law Activities*, U.N. Doc. A/63/226 (Aug. 6, 2008). As this and other UN reports indicate, specific rule of law activities of the organization have included constitution making activities in Nepal, Ecuador, and Bolivia; development of national laws intended to incorporate international law (such as children’s rights in Egypt, Nigeria, and Uruguay or international trade law in eight countries); efforts to regulate police and defense forces (as within the Ministry of Defense and Security in Timor-Leste); reforms to the ministries of justice in Palestine, Colombia, Kosovo, Liberia, Sierra Leone, and Sri Lanka); attempts to encourage arbitration in Cambodia; or transitional justice mechanisms in some 25 countries. See also Report of the Secretary-General, *Annual Report on Strengthening and Coordinating United Nations Rule of Law Activities*, U.N. Doc. S/2004/616 (Aug. 17, 2009). [hereinafter 2009 Secretary-General Report].

⁸⁸ Richard Zaja Sanneholm, *Looking Back, Moving Forward: UN Peace Operations and Rule of Law Assistance in Africa, 1989–2010*, 4 HAGUE J. ON THE RULE OF LAW 359 (2012)(this dataset covered 36 UN peace operations; according to the study, during the 1989–2010 period, a majority of UN personnel, 57%, engaged in rule of law assistance in Africa). For a listing of the mandates of Security Council authorized peace operations from 1945–2003, also indicating the steady rise in rule of law mandates, see THE UN SECURITY COUNCIL FROM THE COLD WAR TO THE 21ST CENTURY (David M. Malone, ed. 2004), Appendix I.

region and in at least 50 of those states there were a minimum of three UN entities involved.⁸⁹ The UN now sees itself as an institution whose object and purpose is, at least in part, to strengthen “weak” rule of law states. As the General Assembly put it, the organization sees human rights, the rule of law, and democracy as “interlinked and mutually reinforcing and that they belong to the universal and indivisible core values and principles of the United Nations.”⁹⁰ Consistent with the post-WWII vision for the organization as establishing a collective security umbrella to protect the Westphalian system, the UN’s rule of law efforts are seen as helping to strengthen and stabilize the enjoyment of sovereignty.⁹¹

In all these instances and in others where IOs have sought to “stabilize” states in the image of “rule of law states,” it is not absurd to compare these organizations to all-powerful farmers that exercise considerable power over those that have come to rely on them and give them sustenance. In some instances, from Namibia to Kosovo, the UN has, in effect, become the sovereign at least for a time. In others—Haiti comes readily to mind—decades of UN peacekeeping and NGO interventions have turned that country into a species of international protectorate. Many in Haiti associate the UN with the government; some even speak of a “UN occupied” state.⁹² In these and other places where the UN itself prides itself on spreading the benefits of the rule of law, it is expected that the rule of law should perforce apply to its applier, not out of UN benevolence or the need to set an example, but as a matter

⁸⁹ 2009 Secretary-General Report, *supra* note 87, at para. 3.

⁹⁰ G.A. Res. 64/116 (Jan. 15, 2010).

⁹¹ See, e.g., Cogan, *supra* note 37 (discussing the contemporary role of the Security Council). This explains why the Security Council, originally charged with protecting states from each other and now, increasingly, with “weak” states with weak or nonexistent institutions, has passed 69 resolutions from 1998–2006 referring to the “rule of law.” See JEREMY MATAM FARRALL, UNITED NATIONS SANCTIONS AND THE RULE OF LAW, app. 3, tbl. A (2007). At the same time, the rule of law has become a vehicle of a wide range of interventionist practices that reconfigures sovereigns while empowering IOs. See, e.g., Barbara Delcourt, *The Rule of Law as a Vehicle for Intervention*, J. OF INTERVENTION & STATEBUILDING (Oct. 12, 2015), <http://www.tandfonline.com/doi/full/10.1080/17502977.2015.1087193> .

⁹² See, e.g., Greg Grandin & Keane Bhatt, *10 Reasons Why the UN Occupation of Haiti Must End*, THE NATION (Sept. 26, 2011), <http://www.thenation.com/article/10-reasons-why-un-occupation-haiti-must-end>.

of legal necessity and principle. As has been suggested by a former Secretary-General, the rule of law must apply to any institution that seeks to promote it.⁹³ These reciprocity-based expectations are built into any rule of law conception worthy of the name. It is certainly built into Bingham's expectations that the rule of law requires rulers who are themselves subject to it.

Expectations that the UN and other IOs which exercise forms of "global governance" need themselves to conform to the rule of law are not limited to instances where these organizations directly harm individuals, as where a UN peacekeeper rapes or spreads cholera. The legitimacy of the UN's rule of law paradigm for taking action rests in large part on whether it satisfies rule of law expectations with respect to its own behavior and operations.

When, for example, the Security Council makes rules intended to be implemented as national law by all states—as it did in Resolutions 1373 and 1540 dealing with the threats posed by terrorism and weapons of mass destruction respectively—we are entitled to ask, as commentators at this symposium do, for its legal bona fides. When the same body deploys a power conferred by a treaty, the Rome Statute, to enable an international court to exercise criminal jurisdiction over individuals where none previously existed—as the Council has now done with respect to Sudan and Libya—we are entitled to demand where it gets the legal power to remove from that jurisdiction nationals from non-Rome Party states (including nationals from four of the P-5), why it can legally restrict that Court's temporal jurisdiction in ways that (coincidentally?) avoids embarrassing some of the P-5 who may have previously aided and abetted crimes committed by the Qaddafi regime, why the Council can ignore the

⁹³ Annan, *supra* note 14. See also G.A. Res. 64/116, *supra* note 90 ("Reaffirming that . . . the promotion of and respect for the rule of law at the national and international levels, as well as justice and good governance, should guide the activities of the United Nations and of its Member States . . ." Calls upon the United Nations system to systematically address . . . aspects of the rule of law in relevant activities, recognizing the importance of the rule of law to virtually all areas of UN engagement.")

Rome Statute's demand that Council referrals be paid for by the UN, and why it can choose to ignore subsequent pleas by that court's prosecutor for Council enforcement actions.⁹⁴

While it is admittedly difficult to articulate the precise legal limits that the Council may be subject to when it exercises its newly acquired power to refer situations to the ICC, the rule of law demands some explanation for the legal basis of the limits the Council has imposed on its referrals. While, as noted, some ICJ and ICTY judges have suggested that the Council's initial determinations of "threat to the peace" may not be subject to judicial delimitation,⁹⁵ that is not the same thing as suggesting that the Security Council is unbound by law, that these matters pose what U.S. courts treat as non-justifiable "political questions," or that the precise way that the Council chooses to act on these threats may not be examined by any national or international court.⁹⁶ It is extremely likely that at some point aspects of the Council's referrals to the ICC will indeed be scrutinized, at least by the ICC's judges, since lawyers for criminal defendants from either Sudan or Libya will have every incentive to do so.

At the same time, addressing rule of law challenges will require more than cutting and pasting national rule of law elements. Extreme care will be needed to avoid drawing erroneous conclusions based on national law analogies grounded in how the rule of law works within states. Bingham's six rule of law elements were directed at resolving the tensions between a state and its people; they were designed to protect individuals from state abuse, not the abuse of states *inter-se* or the potential for IOs to abuse states or individuals within them. As Waldron has argued, we should not presume that the rule of law exists to protect governments' freedom to act; we should not readily presume that the international rule of law

⁹⁴ See S.C. Res. 1593 (Mar. 31, 2005) and S.C. Res. 1973 (Mar. 17, 2011).

⁹⁵ See text and notes 70 and 72 *supra*.

⁹⁶ See generally Alvarez, *supra* note 73.

benefits nations or governments as opposed to persons within them.⁹⁷ In appropriate circumstances, the *international rule of law* might anticipate or even require states to be treated differently from each other. It may require ambiguity as to the precision of its rules or degree of binding authority. It may demand opaque forms of promulgation. It may legitimately operate (as it often does) without the engagement of a court capable of issuing a binding judgment.

The many examples of alleged IO rule of law “failings” canvassed above may be, on closer inspection, central to how IOs operate, inevitable, and even desirable. Hsien-Li’s examples of “soft” ASEAN law⁹⁸ are but the tip of a very large iceberg. Courses on the ‘law’ produced by international organizations are largely about ‘law-making’ that resists the strictures of legal positivism. Much of ‘IO law’ reflects a spectrum of legally binding authority, not the on-off switch usually associated with both legal positivism and Bingham’s (national) rule of law.⁹⁹ Examples include Security Council or General Assembly resolutions or parts of them that are strategically ambiguous with respect to whether these are intended to be either legally binding “decisions”¹⁰⁰ or reflective of customary international law¹⁰¹; financial regulations contained in informal accords;¹⁰² ICAO’s Standards and Recommended Practices;¹⁰³ the World Bank’s Guidelines or operational policies;¹⁰⁴ the “views” or “general

⁹⁷ Jeremy Waldron, *Are Sovereigns Entitled to the Benefit of the International Rule of Law?*, 22 EUR. J. INT’L L. 315 (2011); Jeremy Waldron, *The Rule of International Law*, 30 HARV. J. OF LAW & PUBLIC POLICY 15 (2006).

⁹⁸ Hsien-Li, *supra* note 44.

⁹⁹ See ALVAREZ, *supra* note 19.

¹⁰⁰ See, e.g., S.C. Res. 2249 (Nov. 20, 2015), ¶ 5 (“Calling upon Member States that have the capacity to do so to take all necessary measures” against ISIL, without invoking Chapter VII).

¹⁰¹ Compare S.C. Res. 2178 (Sept. 24, 2014) (suggesting that terrorism in all its forms constitutes an international crime) to Saul, *supra* note 43 (noting the absence of evidence for any such customary crime).

¹⁰² See, e.g., CHRIS BRUMMER, *SOFT LAW AND THE GLOBAL FINANCIAL SYSTEM* (2012).

¹⁰³ See ALVAREZ, *supra* note 19, at 223–224.

¹⁰⁴ *Id.* at 235–241.

comments” issued by human rights treaty bodies;¹⁰⁵ non-treaty products issued by the International Law Commission;¹⁰⁶ determinations made by ‘committees of the parties’ (COPs) or ‘meetings of the parties’ (MOPs);¹⁰⁷ or opinions issued by the general counsels of IOs.¹⁰⁸ These and many other examples of “informal international lawmaking” may reflect a growing frustration with the “shackles” imposed by traditional Article 38 sources of law, including those sources state-centricity.¹⁰⁹ Whatever the cause, these departures from positivism often involve alternatives to formal inter-state organizations, including those of the UN system. Self-identified ‘public law scholars’ are now examining in addition to the products of IOs, the rules produced by non-governmental institutions like ICANN to govern the internet; networks of government regulators like the central bankers of the Basle Committee, or MNCs that establish corporate codes of conduct.¹¹⁰

The category of “public international law” is today under contestation. As noted, some public law scholars contend that many forms of global governance, particularly by non-state actors or involving them as participants, should be considered forms of global administrative law (GAL), while others would prefer the label “international public law.”¹¹¹ Positivist critics counter that absent a revised list of the sources of international law, going beyond those now identified in Article 38 of the ICJ’s Statute, the domain of public

¹⁰⁵ See generally Rosanne Van Alebeek & André Nollkaemper, *The Legal Status of Decisions by Human Rights Treaty Bodies in National Law*, in UN HUMAN RIGHTS TREATY BODIES 356 (2015).

¹⁰⁶ See, e.g., Sean D. Murphy, *Identification of Customary International Law and Other Topics: The Sixty-Seventh Session of the International Law Commission*, 109 AM. J. INT’L L. 822 (2015).

¹⁰⁷ See ALVAREZ, *supra* note 19, at 316–331.

¹⁰⁸ See generally Sinclair, *supra* note 36.

¹⁰⁹ See, e.g., Joost Pauwelyn, Ramses A. Wessel & Jan Wouters, *When Structures Become Shackles: Stagnation and Dynamics in International Lawmaking*, 25 EUR. J. INT’L L. 733 (2014). See also INFORMAL INTERNATIONAL LAWMAKING (J. Pauwelyn et al. eds., 2012).

¹¹⁰ See, e.g., THE EXERCISE OF PUBLIC AUTHORITY BY INTERNATIONAL INSTITUTIONS (Armin von Bodandy et al. eds., 2010).

¹¹¹ Stefan Kadelbach, *From Public International Law to International Public Law: A Comment on the “Public Authority” of International Institutions and the “Publicness” of Their Law*, in von Bodandy et al., *supra* note 110, at 33.

international law remains indeterminate.¹¹² Should international public law include, for example, Pope Frances' Encyclical on Climate Change as much as the International Finance Corporation's (IFC) annually updated rule of law indicators?¹¹³ There is some irony in the contention that the IFC's soft measures of rule of law adherence—which no one claims have the pedigree of Article 38 sources of law, are not subject to adjudication by courts, and which Bingham would accordingly find hard to classify as “law” at all—should be judged by rule of law criteria.

Debates about what public international law actually is complicate the picture for those seeking to improve it or the “international rule of law.” On closer inspection, it is not clear that the *international* rule of law can or should be judged by Bingham's six fold criteria, including the need for clear lines demarcating legally binding law from mere soft norms. Contrary to some of the prescriptions for rule of law reforms made by some at this symposium, it is not clear that the need for clarity within the rule of law should preclude the Security Council from adopting legally ambiguous resolutions that fail to indicate definitively their status under the accepted sources of legal obligation, that is, resolutions that do not indicate which of their provisions are legally binding as Charter “decisions,” which are intended to fill legal gaps in the interpretation of the UN Charter, or which might be otherwise binding as general principles of law. For those who favor any action that postpones the day when Iran possess nuclear weapons, it would not have been a good idea to force the Security Council or its members to explain its actions in implementing the Iran Deal through the

¹¹² See, e.g., JEAN D'ASPREMONT, EPISTEMIC FORCES IN INTERNATIONAL LAW 109 (2015) (expressing hope for a countertrend—“resilient formal law-ascertainment”—to displace that of “deformalization” of international law).

¹¹³ Some GAL scholars argue that given the standard setting or regulatory impact of the IFC's indicators, for example, these generate rule of law expectations for enhanced transparency, participation, reason-giving, and review. See, e.g., GOVERNANCE BY INDICATORS (Kevin E. Davis et al. eds., 2012).

Security Council's Resolution 2231.¹¹⁴ Although the “snap back” provisions in Resolution 2231, which enable any one of seven nations involved in the Iran Deal to terminate key provisions of that resolution and reinstate the Council's old sanctions against Iran, merit a thorough assessment of their consistency with the Charter's voting rules, few would have delayed securing the Iran Deal to secure clarity.¹¹⁵ Similarly, reasonable people, even lawyers, surely differ on whether it would have been a good idea to postpone any enforcement action on ISIL until the members of the Council could resolve their differences on whether or not Chapter VII should be invoked to clarify the legal obligations being imposed on states.¹¹⁶

Efforts to clarify the legal status of legally ambiguous IO products could diminish, not enhance, the effectiveness of law at the international level. It would likely weaken the law of nations if the innovations (and implied powers) of COPs and MOPs under certain treaties were trimmed in favor of old-fashioned (and probably less dynamically interpreted) treaties;¹¹⁷ if scholars and courts, national and international, were convinced to ignore General Assembly resolutions with respect to the interpretation of the Charter or CIL because these were only hortatory;¹¹⁸ if international financial institutions were told to make clear which of their internal rules were equivalent to legally binding treaty obligations; if ICAO was directed to stop its awkward charade of pretending that states can merely opt out of SARPs and make all of its aviation standards legally binding (as was the case under the predecessor treaty

¹¹⁴ S.C. Res. 2231 (July 20, 2015). For consideration of the unresolved legal issues raised by that resolution, see Jean Galbraith, *Ending Security Council Resolutions*, 109 AM. J. INT'L L. 806 (2015).

¹¹⁵ *Id.*

¹¹⁶ Compare S.C. Res. 2249, *supra* note 100.

¹¹⁷ See Robin R. Churchill & Geir Ulfstein, *Autonomous Institutional Arrangements in Multilateral Environmental Assessments: A Little-Noticed Phenomenon in International Law*, 94 AM. J. INT'L L. 623 (2000).

¹¹⁸ As was once proposed by strict positivists who espoused a strict view of the requirements of state practice and *opinio juris* and disparaged the impact of General Assembly resolutions on either. See, e.g., G.M. DANILENKO, LAW-MAKING IN THE INTERNATIONAL COMMUNITY 75-129 (1993).

regime for aviation law);¹¹⁹ or if national courts were convinced that they should ignore the non-binding views of human rights treaty bodies, ILO adjudicative mechanisms, or the merely “advisory” opinions of the ICJ.¹²⁰ Similarly, it seems counterproductive to urge, in the name of clarity, legal secretariats of IOs not to issue legal opinions merely because these are not formally “authoritative” under IO charters. And, despite the many criticisms of the ILC’s frequent turn to “shortcuts” to multilateral treaty-making, a number of international legal regimes—from the rules governing watercourses to those addressing state responsibility—would be severely diminished but for the ILC’s recent resorts to “soft” guidelines or other alternatives to treaties.¹²¹

Wrong-headed efforts to “improve” the international rule of law grounded in the general expectations held for the national rule of law would severely impoverish the pragmatic compromises on which IO law (and much of contemporary international law) is built. It may also prematurely cut off the inter-forum dialogues and forms of contestation (as between national and international courts and IOs) essential to the evolution and maturation of international legal regimes.¹²² Some ostensible rule of law improvements may, moreover, reduce the level of state compliance with IO rules. Some soft (or informal) IO-generated law might be more effective in terms of generating successful efforts at the state level to implement it than some invocations of hard law.¹²³ Compare, for example, the levels of compliance generated under the Tobacco Framework Convention, even though many of the concrete obligations it imposes on states take the form of soft guidelines, as opposed to the

¹¹⁹ *But see* THOMAS BUERGENTHAL, LAW-MAKING IN THE INTERNATIONAL CIVIL AVIATION ORGANIZATION 119-122 (1969) (concluding that the legislative scheme of ICAO’s Convention, whereby SARPs are not formally binding, is an improvement over the preceding Paris Convention’s reliance on binding standards).

¹²⁰ *But see* Jan Klabbers, *International Courts and Informal International Law*, in J. Pauwelyn et al., *supra* note 109, at 219 (defining the need for expressly binding commitments and traditional sources of international law).

¹²¹ *See* Murphy *supra* note 106.

¹²² *See* THE RULE OF LAW AT THE NATIONAL AND INTERNATIONAL LEVELS (Machiko Kanetake & André Nollkaemper eds., 2016).

¹²³ *See, e.g., supra* text and note *supra* 118 (discussing ICAO’s SARPs); BRUMMER, *supra* note 102.

WHO's difficulties with securing members' compliance with that organization's legally binding International Health Regulations.¹²⁴ While IOs' growing reliance on informal forms of international lawmaking may sometimes stem from their members' reluctance to comply with harder or more formally enforceable rules, that is not always the case. Indeed, there is a growing scholarship urging "managerial" approaches to encouraging compliance.¹²⁵

These realities suggest that analogies to the requisites of the national rule of law, while inescapable, should be deployed with great care.¹²⁶ Those seeking to improve the international rule of law should reach for *those pockets of national legal practice or regulation* that most resemble IO practices. These would include those parts of the national rule of law that most resemble international legal regimes insofar as they also do not rely on formal forms of judicial review.

At least since the ICJ's advisory opinion in *Certain Expenses*, in which the ICJ judges opined that the subsequent practice of UN organs could be treated as the functional equivalent of subsequent practice of the parties for purposes of Charter interpretation, the institutional practice of IO organs has proven crucial to the evolving interpretation of IO charters.¹²⁷ Such institutional practice is not, as is well known, usually subject to formal "judicial review" by,

¹²⁴ It would appear, based on the respective assessments made by the WHO, that more states are in compliance with some of the guidelines issued under the WHO's Framework Convention on Tobacco Control than they are with respect to their legal duties to implement their core health capacities under *Compare* FCTC, 2014 Global Progress Report on Implementation of the WHO Framework Convention on Tobacco Control, <http://www.who.int/fctc/reporting/2014globalprogressreport.pdf>, to Summary of States Parties 2013 Report on IHR Core Capacity Implementation, http://www.who.int/ihr/publications/WHO_HSE_GCR_2014.10/en/.

¹²⁵ Much of this literature praises the flexibility and adaptability of informal law and its tools for "enforcement." See, e.g., ALVAREZ, *supra* note 19, at 326–327. See also RYAN GOODMAN & DEREK JINKS, *SOCIALIZING STATES* (2013) (identifying mechanisms of the law's "social influence," including the impact of mimicry, status maximization, prestige, and identification).

¹²⁶ Others have expressed the same caution. See, e.g., Simon Chesterman, *An International Rule of Law*, 56 AM. J. COMP. L. 331 (2008).

¹²⁷ See generally International Law Commission, Third Report on Subsequent Agreements and Subsequent Practice in Relation to the Interpretation of Treaties, A/CN.4/683 (Apr. 7, 2015). See also ALVAREZ, *supra* note 19, at 87–100.

for example, the ICJ. Instead, the prevailing interpretative consensus on the meaning of IO charters results from a complex process involving the interaction of resolutions issued by IO organs, the occasional ICJ advisory opinion concerning the authority of IO organs, and the (frequently reactive) practice of the Secretariat backed by opinions issued by the IOs' general counsel.¹²⁸ Time and again this has been the route for important breakthroughs in, for example, the interpretation of the UN Charter, even though none of these underlying elements are, in of themselves, authoritative or binding. At the same time, the risk that reliance on institutional practice is unduly self-judging and leads to organizations unfettered by law, leads some at this symposium to reach, predictably, for judicial review as a rule of law fix.

The premise that only the judiciary can supply the needed rule of law check on unbridled power merits re-examination. A careful look at some pockets of national law indicates that reliance on institutional practice can itself constitute a form of legal constraint. There is some basis to think that the subsequent practice of IOs may not be just constitutive of IO law but may be constitutive of the international rule of law. Resort to institutional practice without ready recourse to judicial checks may, in short, exhibit some normatively constraining features.

A national analogue to IO institutional practice is presidential or executive branch practice. Particularly with respect to foreign affairs under the U.S. Constitution, the practice of the U.S. President, for example, is rarely the subject of judicial review, and when it is examined, it is often judged for consistency with prior presidential practice. Scholars like Curtis Bradley and Trevor Morrison have noted that the U.S. Supreme Court has recognized that the way in which the government or the President operates over time can provide a

¹²⁸ For examples, see GUY SINCLAIR, *TO REFORM THE WORLD* (forthcoming 2016) (examining case studies of the evolution of UN peacekeeping, technical assistance at the ILO, and the World Bank's turn to "governance" as involving informal charter amendment in all three organizations).

“constitutional gloss” on the scope of presidential power.¹²⁹ The U.S. Supreme Court recognized this, for example, in its famous *Youngstown Steel* ruling wherein Justice Frankfurter noted the legal significance of a “systemic, unbroken, executive practice long pursued to the knowledge of Congress and never before questioned”¹³⁰ Historically, U.S. courts rarely intervene with respect to the exercise of the President’s foreign affairs powers, and when they do they often accord significant deference to patterns of government practice, even if the actual executive action in question is not ultimately sustained.¹³¹ This means that in the U.S., as within the UN with respect to its Charter, a pattern of institutional practice can be constitutive of *de facto* constitutional law.¹³²

Bradley and Morrison contend that this kind of “customary law” is an important way that the power of the U.S. executive is constrained. They posit it as a reason for rejecting the contention that the President is unbound by law or that he or she is merely “politically accountable.”¹³³ They argue that in the absence of judicial review, the constraints on the ostensible “imperial” U.S. Presidency are imposed by legal discourse itself, including the legal justifications for executive action proffered by the Office of the General Counsel.¹³⁴ They acknowledge, as has Sir Kenneth Keith, that much turns on the ethics and legal capacity of the executive’s lawyers.¹³⁵ They accept the premise that such legal justifications must be open to view and scrutiny and that the relative perceived strengths of legal arguments and their bases matter, but, crucially, they contend that legal discourse that relies on prior

¹²⁹ Curtis A. Bradley & Trevor W. Morrison, *Presidential Power, Historical Practice, and Legal Constraint*, 113 COLUMBIA L. REV. 1097 (2013).

¹³⁰ *Id.* at 1104 (quoting *Youngstown Steel*).

¹³¹ *Id.* at 1103–1111.

¹³² For a more general comparison of the basic structures of constitutional law and international law, see Jack Goldsmith & Daryl Levinson, *Law for States: International Law, Constitutional Law, Public Law*, 122 HARV. L. REV. 1791 (2009).

¹³³ Bradley & Morrison, *supra* note 129, at 1112–1114.

¹³⁴ *Id.* at 1121–1128.

¹³⁵ *Id.* at 1132–1145. *See also* Keith, *supra* note 69.

institutional practice (and the practice of other executive offices) to which the government as a whole has deferred can be an effective legal constraint on executive discretion.¹³⁶ They posit that U.S. presidents or their lawyers tend not to make legal arguments that are objectively weak, and that when only weak arguments would justify a particular course of action, that course may not be pursued.

Bradley and Morrison contend that it is important to place any institutional or executive practice in context, to see if there was really any opportunity for others in the institution to object, so that reliance on practice does not become a tautology comparable to President Nixon's infamous claim that "when the President does it, that means that it is not illegal."¹³⁷ They argue that legal discourse within the executive branch is more likely to be a real constraint when the relevant actors have internalized the normative force of a legal rule or of the prior practice; they argue that this is more probable when lawyers play an important role in interpreting and applying it.¹³⁸

As applied to the Security Council, these insights suggest that legal constraints on the Council are most likely to be most effective when lawyers are consulted. This supports those who at this symposium have argued for greater such involvement and more legal argumentation.¹³⁹ These recommendations reflect the view, which Bradley and Morrison endorse, that the more lawyers are involved, and the more their shared set of norms about

¹³⁶ Bradley & Morrison, *supra* note 129, at 1140–1145.

¹³⁷ *Id.* at 1121.

¹³⁸ *Id.* at 1124–1126. This is broadly consistent with rule of law prescriptions urged by Hood. Hood, *supra* note 38.

¹³⁹ Hood, *supra* note 38.

what constitutes a good argument prevails, the more likely that a virtuous circle of law compliance emerges.¹⁴⁰

There is much more in Bradley and Morrison's examination of U.S. executive practice of potential interest to those invested in the topic of this symposium. They argue, for example, that the frequent lack of formal enforcement or sanctions mechanisms (including the absence of judicial review) is not fatal to the constraining power of institutional practice. Forms of enforcement can be, they contend, informal.¹⁴¹ This would presumably include those methods that are most visible with respect to IOs, namely public shaming, sovereign and NGO backlash, and public disapproval. Bradley and Morrison's conclusions on the relative merits of judicial review are particularly pertinent to international regimes. "What makes a convention nonlegal," they write, "is not simply the unwillingness of courts to enforce it. Rather, it is that members of the relevant community do not understand its breach to be a violation of the law"¹⁴² They argue that even the hypocritical recourse to the rule of law has a "civilizing force" since the public invocation of legal principle can create pressure for respect for it.¹⁴³ In a companion article, Morrison and Bradley consider the impact of executive practice on legitimate expectations; its appeal to judges looking for predictably, consistency, and efficiency or to those looking to avoid accusations of judicial activism; its broader connections to common law constitutionalism and adaptability to changing circumstances; its strong connection to presumptions of legality; its connections to appeals to expertise; and its capacity to correct a practice that has proven unworkable.¹⁴⁴

¹⁴⁰ For comparable arguments involving the Security Council, see Ian Johnstone, *Security Council Deliberations: The Power of the Better Argument*, 14 EUR. J. INT'L L. 437 (2003). See also IAN JOHNSTONE, THE POWER OF DELIBERATION (2011) (discussing the power of "reasoned discourse" in IOs).

¹⁴¹ Bradley & Morrison, *supra* note 129, at 1127.

¹⁴² *Id.* at 1129.

¹⁴³ *Id.* at 1143.

¹⁴⁴ Curtis A. Bradley & Trevor W. Morrison, *Historical Gloss and the Separation of Powers*, 126 HARV. L. REV. 411 (2012).

They also indicate some limits on the impact of institutional practice that also have interesting parallels to those that operate within the UN system: namely that executive or institutional practice generally does not prevail against the explicit words of the constitution.¹⁴⁵

This account may resonate for those who examine the ways the UN (and other IOs) now repeatedly invoke the values of the “rule of law,” including, as noted, in General Assembly resolutions and statements by the UN Secretary-General. If Morrison and Bradley are right, such rhetorical support may have normative consequences, even if some of those who voice support for the rule of law are not genuine supporters of the concept. Students of, for example, the Security Council’s ongoing efforts to recalibrate the balance between human rights and its counterterrorism actions since 9/11 may find Bradley’s and Morrison’s arguments of considerable interest. Although the Council’s attempts to respond to the *Kadi*-line of decisions criticizing the impact of its counterterrorism sanctions on individuals continue to fall short of the European Court of Justice’s insistence on some form of judicial process for those on whom the Council imposes smart sanctions, relevant Council resolutions now routinely affirm the need to adhere to both human rights and international humanitarian standards, and such issues are reportedly taken into account in those delisting procedures that the Council now applies as well as by the UN ombudsperson office operating under one Security Council sanctions committee.¹⁴⁶ Significantly, the Security Council has not attempted to take specific exception to human rights or international humanitarian law in the course of its work. Particularly in the wake of internal and external human rights criticisms,

¹⁴⁵ *Id.* at 431. This was affirmed by the ICJ’s majority opinion in *Competence of the General Assembly for the Admission of a State to the United Nations*, 1950 ICJ 4 (affirming the need for a Security Council recommendation with respect to admission to UN membership prior to a decision by the General Assembly because of the clear text of art. 4(2)). *See also* *Conditions of Admission of a State to Membership in the United Nations*, Advisory Opinion, 1948, ICJ 57, para. 64 (“The political character of an organ cannot release it from the observance of the treaty provisions established by the Charter. . .”).

¹⁴⁶ *See generally* Erika de Wet, *From Kadi to Nada: Judicial Techniques Favoring Human Rights Over United Nations Security Council Sanctions*, 12 CHINESE J. INT’L L. 787 (2013).

the Council has not claimed to be simply exempt from the admittedly vague human rights obligations contained in the Charter. The relevant institutional practice of the Council has, accordingly, led to a presumptive canon of interpretation: all Council resolutions should, absent any specific exception from fundamental human rights on their face, be interpreted and implemented by states in ways that do not violate such rights.¹⁴⁷

Consideration of the possible relevance of U.S. executive practice to the practices of IOs illustrates the broader point that those seeking to establish the international rule of law cannot just draw from the general domestic practices of rule of law states but need to be more nuanced about what parts of national law may be relevant.¹⁴⁸ Such nuance and care are also called for when searching for guidance on ways to hold IOs “legally accountable” when they directly harm individuals (as in the case of UN peacekeepers). While it is easy to agree with Waldron that the UN and contributors to peacekeeping forces need to be held legally accountable for both their torts and their crimes, the forms of such accountability need not replicate those that we traditionally associate with the national rule of law. We think of legal accountability under national law as requiring, under Bingham’s elements five and six, either a fair criminal trial or a judicial proceeding leading to civil damages that fully compensates those harmed by state action or inactions. The hurdles to securing either at the international level, even when individuals are directly harmed by UN peacekeepers, are ably canvassed by Burke’s contribution to this symposium.¹⁴⁹ As Burke indicates, something—the lack of forum, the lack of standing or jurisdiction, the existence of immunity, the absence of

¹⁴⁷ *Id.*

¹⁴⁸ It also means, as noted, that nuance is needed with respect to which elements of the (national) rule of law can be exported to international legal regimes. Sir Kenneth Keith, for example, examines only three rule of law qualities in his consideration of the “international rule of law.” Keith, *supra* note 69.

¹⁴⁹ Burke, *supra* note 6. Of course, we have not yet seen any evidence that the Security Council might be tempted to refer situations involving the actions by peacekeepers that might be considered war crimes to the ICC for prosecution, even though the Council was at a prior point shamed into abandoning an earlier grant of ICC immunity to certain UN peacekeepers. The 12 month exemptions from ICC jurisdiction contained in S.C. Res. 1422, ¶ 2 (July 12, 2002) and S.C. Res. 1487, ¶ 2 (June 12, 2003) were not renewed after considerable criticism.

attachable funds—usually precludes successful claims against the UN in national or international courts, even when these involve sexual abuse or gross negligence.¹⁵⁰ Although some European courts have, relying on the European Convention of Human Rights or some national constitutions, punctured the immunities of some IOs if these fail to provide an effective remedy to individuals they have harmed, that contention has not yet proven successful when up against the absolute immunity enjoyed by the UN under the General Convention on Privileges and Immunities.¹⁵¹

The ongoing efforts of groups of Haiti claimants who, as noted above, sought to make the UN accountable in the wake of a cholera epidemic allegedly caused by the arrival of Nepalese peacekeepers provides an instructive case study. Those class action claimants urged the U.S. court to interpret the absolute immunity accorded to the UN under treaty in light of another provision in the same treaty which provides that “[t]he United Nations shall make provisions for appropriate modes of settlement of: (a) Disputes arising out of contracts or other disputes of a private law character to which the United Nations is a party; and (b) Disputes involving any official of the United Nations who by reason of his official position enjoys immunity, if immunity has not been waived by the Secretary-General.”¹⁵² The broader argumentative frame was that organizational immunity should be conditioned on the human right to an effective remedy recognized by customary international law as well as relevant

¹⁵⁰ Burke, *supra* note 6. See also Kristen E. Boon, *The United Nations as Good Samaritan: Immunity and Responsibility*, 16 CHICAGO J. INT’L L. 341 (2016); Bruce Rashkow, *Remedies for Harm Caused by UN Peacekeepers*, AM. J. INT’L L. UNBOUND (Apr. 2, 2014), <https://www.asil.org/blogs/remedies-harm-caused-un-peacekeepers>.

¹⁵¹ Article II, § 2 of the General Convention on the Privileges and Immunities of the United Nations 1946 (“The United Nations, its property and assets wherever located and by whomsoever held, shall enjoy immunity from every form of legal process except insofar as in any particular case it has expressly waived its immunity. It is, however, understood that no waiver of immunity shall extend to any measure of execution.”). For a thorough assessment of how national courts have treated the immunities of international organizations, see AUGUST REINISCH, *INTERNATIONAL ORGANIZATIONS BEFORE NATIONAL COURTS* (2000). See also *Georges v. United Nations*, *supra* note 9.

¹⁵² See General Convention, art. VII, § 29. See Boon, *supra* note 11 and Boon, *supra* note 150, at 353–355.

human rights treaties.¹⁵³ The Haiti claimants also argued that enabling them to sue the UN was consistent with the obligations undertaken by the UN under the Status of Forces Agreement authorizing the Haiti peacekeeping mission, MINUSTAH. Under that agreement, while MINUSTAH enjoys privileges and immunities under the General Convention of Privileges and Immunities, that mission must “respect all local laws and regulations” and take all appropriate measures to ensure observance of these.¹⁵⁴ Significantly, this includes a duty to cooperate with respect to sanitary measures and control of communicable diseases.¹⁵⁵

The Haiti complainants faced a formidable hurdle, however. Under the Status of Forces Agreement, “third party claims for property loss or damage and personal injury, illness or death arising from or directly attributed to MINUSTAD, except those arising from operational necessity, which cannot be settled through UN internal procedures shall be settled” by the procedure contained in that agreement.¹⁵⁶ The agreement further provides that “any dispute or claim of a private law character, not arising from operational necessity . . . over which Haiti courts do not jurisdiction . . . shall be settled by a standing claims commission to be established for this purpose.”¹⁵⁷ The envisioned commission would have one member to be appointed by the Secretary-General, one by the Haitian government, and a chair jointly appointed by the Secretary-General and that government.¹⁵⁸ There are, of course, a number of rationales for the compromises struck in UN Status of Forces Agreements. These arrangements need to calibrate the rights and responsibilities of a triad of interests: the UN

¹⁵³ See, e.g., Universal Declaration of Human Rights, art. 10, GA Res. 217(III), UN Doc. A/810 (1948) (“Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.”); ECHR, art. 6 (“In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.”)

¹⁵⁴ AGREEMENT BETWEEN THE UNITED NATIONS AND THE GOVERNMENT OF HAITI CONCERNING THE STATUS OF UNITED NATIONS OPERATION IN HAITI, arts. 3, 5, Vol. 2271, 1-40460 (July 9, 2004).

¹⁵⁵ *Id.* art. 23.

¹⁵⁶ *Id.* art. 54.

¹⁵⁷ *Id.* art. 55.

¹⁵⁸ *Id.*

(which needs to avoid exposure to potentially biased national courts, the appearance of being subject to the control of host states, and the potential for damage awards that could bankrupt the organization), troop-contributing states (that need to be persuaded that participating in peacekeeping remains worthwhile and will not expose them to unwarranted liabilities), and host states like Haiti (with a presumptive interest in protecting their populations and the efficacy of their laws). It makes sense that the Status of Forces Agreements simultaneously strive to protect the organization from the jurisdiction of local courts and host states from liability for the acts undertaken by the organization, while also providing “alternative means” for handling the private law claims by host state nationals. A national court ruling puncturing the UN’s immunity and permitting tort suits against the organization to proceed in local courts, on the other hand, threatens the independence of the organization, exposes it to potentially devastating financial liability, and may undermine the institution of peacekeeping.¹⁵⁹

The Haiti complainants took their claim to U.S. courts because the anticipated alternative means for settling private law claims did not emerge. After the UN’s determination that the claims were “not receivable,” the Haiti government did not request the establishment of the envisioned Claims Settlement Commission, and indeed no such Commission had ever been established even though provisions comparable to Article 55 had long been included in prior UN Status of Forces agreements.¹⁶⁰ The Commission remedy relies on a government’s willingness to pursue the claims of its nationals against the

¹⁵⁹ See, e.g., Boon, *supra* note 150, at 370–374 (discussing the hazards of removing in the UN’s immunity in the Haiti cholera case).

¹⁶⁰ See Letter from Pedro Medrano, Assistant Sec’y-General, United Nations, to Leilani Farha, Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context, Office of the High Comm’r for Human Rights et al., 26 n. 8 (Nov. 25, 2014). This letter was in response to one sent to Medrano by a number of UN special rapporteurs. Letter, Office of the High Comm’r for Human Rights (Sept. 25, 2014), <http://www.birmingham.ac.uk/Documents/college-social-sciences/government-society/research/2015-12-07-haiti-workshop/background/sr-allegation-letter-2014.pdf>.

organization. Without that backing, those harmed by UN need to rely on the benevolence of the UN which, by tradition, quietly settles such “private law” claims on its own terms without interference from third party judges or arbitrators.¹⁶¹ In this case, no such benevolence (has yet) emerged. Instead, fifteen months after a group of Haitian victims had initially approached the UN in the wake of the cholera epidemic, they received a short letter from then UN General Counsel indicating that “. . . consideration of these claims would necessarily include a review of political and policy matters. Accordingly, these claims are not receivable pursuant to Section 29 of the Convention on the Privileges and Immunities of the UN”¹⁶²

As noted at the outset of this essay, the U.S. trial court dismissed the Haitians’ class action complaint, and while that ruling remains on appeal, a glaring gap in the prospects for UN accountability remains exposed to view, and considerable criticism. Reliance on victims’ governments to pursue a UN remedy does not work well when what Waldron would call the “farmer” or “lion” is in effect so beholden to the UN for its largess (and perhaps its continued hold on power) that the effective “farmer” is the UN itself.¹⁶³

But is it appropriate to expect that those harmed by the action of the UN in this case should be able to pursue the considerable class action remedies and damages available under U.S. law? Some, like Richard Stewart, adopt a more open-ended definition of international legal accountability. Stewart argues that such accountability demands “the *ex post* calling by an account holder of an accounter to justify his prior conduct, and the authority and ability of

¹⁶¹ This may occur even in cases that resemble those in the Haiti case. See, e.g., Rick Gladstone, *Roma Poisoned for Years at U.N. Camps in Kosovo May be Compensated*, N.Y. TIMES, Apr. 8, 2016, at A4 (reporting on the report of a human rights advisory panel that is part of the UN Interim Administration Mission in Kosovo).

¹⁶² Letter from Patricia O’Brien, UN Under-Secretary General for Legal Affairs, to Brian Concannon, Director, Institute for Justice & Democracy in Haiti (Feb. 21, 2013) (copy on file with author).

¹⁶³ See, e.g., Mara Pillinger, Ian Hurd & Michael N. Barnett, *How to Get Away with Cholera: The UN, Haiti, and International Law*, 14 PERSPECTIVES ON POLITICS 70, 75–76 (March 2016) (enumerating the remedies that were available to the government of Haiti and speculating on the many reasons why that weak state was “unlikely to bite the hand that meagerly feeds it”).

the account holder to provide some form of sanction or other remedy for deficient performance.”¹⁶⁴ On this view, the legal accountability assured under the international rule of law is satisfied with a mechanism that evaluates the conduct of the tortfeasor and accords its victim an “appropriate remedy.”¹⁶⁵ Stewart’s fluid conception of legal accountability takes into account the triadic concerns embedded in UN Status of Forces Agreements. It is also consistent with the diverse approaches to legal accountability taken at both the national and international levels. It recognizes that, in some cases, even rule of law states have not demanded full compensation to all victims for injuries suffered. This happens when, for example, the amounts at stake or other circumstances make full recompense unworkable, as suggested by judicial rulings rendered in the course of class actions on behalf of voluminous asbestos victims.¹⁶⁶ The sheer volume of victims may also lead to non-court centered responses, as in response to Holocaust era claims.¹⁶⁷

Of course, at the international level, alternatives to full compensatory reparations issued by courts are the norm, not the exception. Most instances of alleged international wrongful acts have been and continue to be resolved diplomatically at the inter-state level or through other non-judicial remedies enumerated under Article 33 of the UN Charter.¹⁶⁸ Even when states have resorted to forms of arbitrations or arbitral commissions, these have rarely awarded the prompt, adequate, and effective compensation that is arguably the standard for

¹⁶⁴ Richard Stewart, *Remedying Disregard in Global Regulatory Governance: Accountability, Participation, and Responsiveness*, 108 AM. J. INT’L L. 211, at 246(2014).

¹⁶⁵ *Id.* at 248.

¹⁶⁶ See, e.g., Michelle J. White, *Asbestos and the Future of Mass Torts*, 18 J. OF EC. PERSP. 183 (2004) (surveying judicial and regulatory approaches in a number of jurisdictions).

¹⁶⁷ For an example, see German Foundation Agreement discussed in *American Insurance Association v. Garamendi*, 539 U.S. 396 (2003).

¹⁶⁸ UN Charter art. 33. This results in part from the fact that despite the proliferation of international courts, states are still generally reluctant to include forms of compulsory dispute resolution in their treaties or to seek recourse to these even when these are included.

government takings of property.¹⁶⁹ Much more common have been arbitral mechanisms that deploy the full range of remedies anticipated under the Articles of State Responsibility, from mere acknowledgement to apology to less than fully compensable damages.¹⁷⁰ And even when states have established international courts, these may have required court-ordered diplomatic efforts prior to considering such awards.¹⁷¹ It is overly simple to see all of these as pragmatic compromises or outright rule of law “failings” instead of essential dimensions of the international rule of law. It is instructive to keep Stewart’s fluid view of legal accountability in mind when we look at the merits of the mechanisms for IO accountability that now exist, including the World Bank’s Inspection Panels, the UN’s Administrative Tribunal, the UNMIK Human Rights Advisory Panel for Kosovo, the World Bank’s anti-corruption regime, and, of course, the Office of the Ombudsperson to the ISIL (Da’esh) and Al-Qaida Sanctions Committee.¹⁷²

It is worth considering seriously the justifications offered by, for instance, Kimberly Prost, the former ombudsperson charged with recommending the delisting of persons identified by the Security Council under its Al-Qaida sanctions program. By the time she left

¹⁶⁹ Indeed, a prominent scholar of U.S. property law has argued that genuinely full compensation, designed to redress the full impact of state action on the injured party, does not occur even under the takings clause of the U.S. Constitution, much less investor-state claimants in ICSID. Thomas W. Merrill, *Incomplete Compensation for Takings*, 11 NYU ENVIRONMENTAL L. J. 110 (2002).

¹⁷⁰ JAMES CRAWFORD, THE INTERNATIONAL LAW COMMISSION’S ARTICLES ON STATE RESPONSIBILITY 192–241 (articles 28–39 and commentaries).

¹⁷¹ Many have noted that, historically, regional human rights courts have not sought to provide human rights victims with monetary compensation the responds to the harms they have suffered. *See, e.g.*, Dinah Shelton, *Remedies in International Human Rights Law* (GWU Legal Studies Research Paper, No. 2013-56 (2005), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2235195##) (arguing that getting states to rectify their human rights violations, rather than compensation, should continue to be the main objective of remedies). Of course, the global system for the judicial resolution of disputes, the WTO’s Dispute Settlement System, provides no such compensatory remedy but, like human rights mechanisms generally, seek to deter states from continuing to violate the law. Moreover, even when international courts consider an award for damages, they may require the state parties before them to first seek to negotiate the level of compensation and only have recourse to the court should their negotiations fail. *See, e.g.*, *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicar.)*, Judgment (Dec. 16, 2015), ¶¶ 137–144.

¹⁷² *See, e.g.*, Boon, *supra* note 150, at 375–377 (discussing some of the ways, apart from waiving its immunity before national courts, whereby the UN has provided the “alternative means” for settling private law claims under article 29 of the Convention on Privileges and Immunities).

office, Judge Prost had delisted a considerable number of persons from the Al-Qaida sanctions list, even though her non-binding recommendations did not have the force of law and did not compel the Council to obey. As Judge Prost notes, when she began her service, no courts had addressed “how to define fair process in the unique context of Security Council sanctions.”¹⁷³ According to Prost: “fair process is always contextual. The rights of individuals in a criminal case are very different from their rights in an administrative case, even domestically. And as between legal systems, the content and contours of fair process can vary significantly.”¹⁷⁴ Prost interpreted the mandate to provide a fair process to embrace five elements: “[f]irst, the Petitioners must know the case against them as far as possible. Secondly, they must have an opportunity to answer that case and to be heard by the decision-maker. Thirdly, there must be some form of independent review.”¹⁷⁵ To Prost these requirements do not require traditional judicial review; on the contrary, “other forms of objective review” are sufficient provided these provide “an effective and independent assessment.”¹⁷⁶ The fourth requirement is a “reasoned” opinion of whether or not to delist and the final requisite is that the entire process be otherwise fair and timely.¹⁷⁷

We need not resolve here whether Prost’s five elements of fair process or the ruling in *Kadi II*, affirming the need for full scale judicial review for individuals put on Council counter-sanctions lists, is the most meritorious or consistent with the rule of law.¹⁷⁸ If one

¹⁷³Kimberly Prost, The Office of the Ombudsperson: a Case for Fair Process, (undated), https://www.un.org/sc/suborg/sites/www.un.org.sc.suborg/files/fair_process.pdf [henceforth Fair Process]. See also Remarks by Kimberly Prost to the 49th Meeting of the Committee of Legal Advisers on Public International Law of the Council of Europe (Mar. 20, 2015), <https://www.un.org/sc/suborg/sites/www.un.org.sc.suborg/files/cahdi.pdf>.

¹⁷⁴ Fair Process, *supra* note 172.

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

¹⁷⁷ *Id.*

¹⁷⁸ For a thorough engagement with this issue, see Devika Hovell, *Due Process in the United Nations*, 110 AM. J. INT’L L. (forthcoming January 2016). For an argument that “legalism” or “legalization” is responsible for the absence of accountability in the Haiti cholera case, see Pillinger, Hurd & Barnett, *supra* note 161, at 76–79

thinks that what the Security Council does with respect to its “smart” sanctions is tantamount to inflicting a criminal penalty, nothing short of providing the extensive due process guarantees due a criminal defendant under the International Covenant for Civil and Political Right’s Article 14 will do.¹⁷⁹ This is consistent with the conclusion reached by the majority of the ICJ in the consular notification series of cases which ultimately ruled that U.S. courts should grant “judicial reconsideration and review” to those it holds on death row who did not have the benefit of consulting with their consulates prior to trial and sentencing.¹⁸⁰ But those who would defend Prost’s “contextual” view of what fair process means in the context of the Council would note that these ICJ rulings address remedies for persons facing the death penalty whose rights had been infringed; the ICJ was not addressing the plight of those have been denied their passports or full access to their bank accounts as was Prost.

So how should we fix the accountability failings suggested by the three incidents with which this essay began?

Determining what the international rule of law should demand of the Security Council with respect to its sanctions procedures, of the UN secretariat or General Assembly when it faces charges of corruption, or of the UN generally when its peacekeepers are charged with national or international crimes or gross negligence, is not just a question of the application of first principles. We can demand that IOs abide by the rule of law and still acknowledge that the legal accountability of states and IOs requires deployment of the full range of avenues identified in Chapter VI of the UN Charter, including its Article 33. Even in a world with

(contending that the turn to law precludes political considerations, privileges the power of the UN over individuals, and prioritizes law over normative or ethical concerns).

¹⁷⁹ International Covenant on Civil and Political Rights, art. 14, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976) [ICCPR].

¹⁸⁰ Case Concerning Avena and Other Mexican Nationals (Mex. v. U.S.), 2004 I.C.J. 128 (Mar. 31).

proliferating international tribunals, it remains rare for those states (and perforce IOs) accused of international wrongful acts to be hauled before a court, found liable, and forced to pay full compensatory damages to an injured party. And even when international adjudicators are involved in such disputes, they often insist upon inter-state negotiations or diplomacy prior to issuing orders requiring compensation.¹⁸¹

These realities should affect prescriptions for securing IOs' compliance with law. International rule of law fixes should take into full account the special features of the existing international legal system, including, as noted, its reliance on contested, iterative interactions among diverse political and legal forums.¹⁸² Those arguing that the rule of law requires the Security Council to replace its ombudsperson mechanism with a full scale international court to implement its smart sanctions need to consider whether this is the best prescription, as opposed to, for example, insisting that an ombudsperson procedure apply to all Security Council sanctions committees and not just to those sanctions committees that deal with ISIL and Al-Qaida.¹⁸³ Sober reflection on whether a full scale judicial process is truly needed is a good idea not only because insistence on the perfect rule of law ideal may be the enemy of the good. It is a good idea because nuance is needed when examining what the national rule of law truly requires *and* when exporting national rule of law recipes to the international realm.

Consider, once again, the Haiti cholera case. Those class actions now pending in U.S. courts have not achieved, to be sure, legal accountability. They have, however, embarrassed the UN, kept the issue alive, and helped to preserve the evidence that would be needed if any

¹⁸¹ See, e.g., *Costa Rica v. Nicar.*, *supra* note 171. This is certainly the case in the WTO's Dispute Settlement System. See Understanding on Rules and Procedures Governing the Settlement of Disputes, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 33 I.L.M. 1125 (1994) [DSU]. Note also the WTO's expressed preference for rectification over compensation or the suspension of concessions under the DSU's art. 22(1).

¹⁸² KANETAKE & NOLLKAEMPER, *supra* note 122.

¹⁸³ For a rich set of reform proposals for Council sanctions committees, see FARRELL, *supra* note 91.

form of recompense is ultimately pursued outside of U.S. courts. Those actions, and continued NGO pressure, are provoking reactions in other parts of the UN system. As might be expected, these involve entities or persons who, unlike U.S. judges, enjoy no legally binding powers and have recourse to no judicial sanction. They include four UN human rights experts who have sent a joint public letter of complaint urging action on the Haiti cholera case, namely the UN Special Rapporteur on the Right to Adequate Standard of Living and Non-Discrimination, the independent expert on the situation of human rights in Haiti, the UN Special Rapporteur on the Right of Everyone to Enjoyment of the Highest Attainable Standard of Physical and Mental Health, and the UN Special Rapporteur on the Human Right to Safe Drinking Water.¹⁸⁴ Their complaint generated, in turn, a 33-page response from Pedro Medrano, the Assistant Secretary-General in charge of the UN's response to the Haiti cholera situation.¹⁸⁵ Medrano's letter is the most extensive UN accounting that the victims of that disaster have yet received, and it includes the UN's most elaborate effort to legally justify its original two sentence response about why the Haiti cholera victims' claims were "not receivable."¹⁸⁶ And, much as the UN would like to think that the matter is now closed, this letter is not likely to be the end of the story. An expert "workshop" has since been convened at London's Chatham House. That workshop, operating under the purposely opaque Chatham House rules, reportedly involved some key players in the Haiti cholera debacle and discussed possible diplomatic ways forward.

A diplomatic resolution of the Haiti case that is consistent with the traditional remedies under the Articles of State Responsibility would likely involve an acknowledgment

¹⁸⁴ Letter, Office of the High Comm'r for Human Rights, *supra* note 160.

¹⁸⁵ See Letters, *supra* note 160.

¹⁸⁶ Letter from Pedro Medrano, *supra* note 160, ¶¶ 86–94. For a thorough critique of the contention that the cholera claims were not "private law claims," see, for example, Frédéric Mégret, *La responsabilité des Nations Unies aux temps du cholera*, 47 BELGIAN REV. INT'L L. 161 (2013); Boon, *supra* note 150, at 353–361.

by the UN of its responsibility, the organization's commitment to secure the construction of water and sanitation infrastructure to control and eliminate further outbreaks of cholera, and some form of recompense, broadly consistent with those awarded under human rights regimes, to the Haiti victims and their families. Such a diplomatic solution—outside of a class action for tort in U.S. courts—would probably satisfy Stewart's conception of legal accountability and may go some way towards fulfilling Bingham's sixth rule of law element. Were that diplomatic outcome to emerge, it would be yet one more instance in which progress on the accountability of IOs is achieved through the combination of the diverse "accountability" mechanisms outlined by Keohane and Grant and their interaction over time.¹⁸⁷ Such an outcome would avoid the adverse consequences of a precedent-setting national court ruling whose long-term consequences could be more threatening to the international rule of law.¹⁸⁸

As this suggests, some proposed rule of law fixes to secure IO accountability, however well-intentioned, can do more harm than good. Consider a "fix" for the Security Council that has been widely endorsed. Former UN General Counsel, Hans Corell, has proposed that the Permanent Members of the Council set an example for scrupulously adhering to the law by proclaiming their mutual commitment "to make use of our veto power . . . only if our most serious and direct national interests are affected," explain when vetoes are deployed, and pledge to "take forceful action to intervene in situations when international peace and security are threatened by governments that seriously violate human rights or fail to protect their

¹⁸⁷ See generally Grant & Keohane, *supra* note 57, and KATETAKE & NOLLKAEMPER, *supra* note 122. For an example of the evolution of World Bank procedures to accord more due process to those affected, see Laurence Boisson de Chazournes & Edouard Fromageau, *Balancing the Scales: The World Bank Sanctions Process and Access to Remedies*, 23 EUR. J. INT'L L. 963 (2012).

¹⁸⁸ See text accompanying note 159 *supra*.

populations from genocide, war crimes, ethnic cleansing and crimes against humanity or when otherwise the responsibility to protect is engaged.”¹⁸⁹

Corell proposes, in the spirit of Waldron’s suggestion that the UN set a “good example” with respect to the rule of law,¹⁹⁰ that the Security Council bind itself to the mast and force itself to act when the Responsibility to Protect (R2P) is triggered. His proposal combines the progressive international lawyer’s best intentions and Bingham’s requirement that any law worthy of the name needs to avoid selective application. It is consistent with the goals of humanitarian proponents of R2P. Who could ask for anything more?

Gerry Simpson suggests one response that is not likely to sit well with those who organized and participated at this symposium but that is nonetheless a useful warning against rule of law hubris:

In the abstract, the rule of law, for all its virtues in a stable, liberal democracy, is a form of rule that is likely to favour entrenched elites over resistance groups, vested interests carrying out lawful activity over civil disobedience, official actors over unofficial actors and property owners over protestors. In the international system, where the distribution of power, goods and advantage is so vastly, indefensibly and asymmetrically skewed, where the law is largely written by and on behalf of a powerful minority of states and where institutions are funded by, established at the behest or instigation of (or, at least, with the tacit approval of) and, often, directed by sovereign elites, it is little wonder that the rule of law is regarded either as illusory and distant (in its radical guise) or concrete and violent (in its existing instantiation). China Mieville . . . reminds us that . . . “death, destruction, poverty, torture: this *is* the rule of law.”¹⁹¹

For those attuned to the debacle that has emerged in the wake of the Council’s most recent invocation of R2P, namely its Resolution 1973 authorizing the use of force with respect to

¹⁸⁹ Corell Draft Declaration for Consideration by the Permanent Members of the Security Council, INTERNATIONAL JUDICIAL MONITOR (Fall 2012), http://www.judicialmonitor.org/archive_fall2012/draftUNdeclaration.html.

¹⁹⁰ See *supra* note 82.

¹⁹¹ Gerry Simpson, *Strengthening the Rule of Law Through the United Nations Security Council* (Australian National University, Working Paper No. 5.4, June 2012) http://regnet.anu.edu.au/sites/default/files/publications/attachments/2015-05/Simpson_1_0.pdf.

Libya,¹⁹² Corell's proposed declaration, whether or not consistent with one's view of what the international rule of law demands, is not a good idea. The examples of "death, destruction, poverty, and torture" now perpetrated on Libyan soil warn us about the risks that accompany efforts to "perfect" the rule of law in a context as politically skewed as the Security Council.¹⁹³ Requiring that body to kill in the name of the rule of law will probably not advance the international rule of law.

¹⁹² S.C. Res. 1973 (Mar. 17, 2011).

¹⁹³ See, e.g., Alan J. Kuperman, *A Model Humanitarian Intervention? Reassessing NATO's Libya Campaign*, 38 INT'L SECURITY 105 (Summer 2013) (arguing that the NATO intervention caused more humanitarian harm than good).