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An Inquiry into the International Rule of Law

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Abstract

The modern articulation of the constitutional principle of the rule of law is credited to A.V. Dicey, who identified three essential elements of what is generally considered a formal version of the concept. Namely, (1) to be ruled by law, not by discretionary power, (2) to be equal before the law, private individuals as well as government officials, and (3) to be submitted to the general jurisdiction of ordinary courts, the best source of legal protection. The main goal of the paper is to externalise these core values of the rule of law onto the international plane in an attempt to examine how they are found in the essential features of the international legal system, understood in traditional terms (i.e. treaties as normative source, states as legal actors, International Court of Justice as adjudicative body). The strongest claim is at the level of normativity: the conduct of states is ruled by law, i.e. by legal norms providing certainty, predictability and stability. The verdict is also positive as regards the functional dimension, concerning the creation and application of international law. Treaties are promulgated satisfactorily and their publication is adequate; furthermore, international law is now universal in its reach and the fundamental principle of sovereign equality assures that, in most instances, similarly situated states are treated in the same way, that is without discrimination. The institutional level remains problematic, however, in spite of improvements in recent years. The continuing lack of compulsory jurisdiction for the ICJ cannot be ignored, even if most of the states have committed to international adjudication through the optional clause (or the like). There is also a will to open the door to a power of judicial review for the ICJ, which could rule on the legality of the decisions of other UN organs (e.g. Security Council). The independence and impartiality of the ICJ are uncontested, and the judicial process is truly accessible to all states. In terms of effectiveness, the compliance record is outstanding, but the Security Council's discretion for ultimate enforcement of judgments remains a concern. In the end, dwelling upon the immense social power of this terminology, the conclusion suggests the emergence of an international rule of law.

Keywords

International Law - Constitutional Law - Rule of Law - International Legal Theory - Constitutional Legal Theory - Treaty Law - State Sovereignty - International Court of Justice
An Inquiry into the International Rule of Law

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"Unanimity in support of the rule of law is a feat unparalleled in history."
Brian Z. Tamanaha

1. Introduction

In the field of jurisprudence and political theory, the "rule of law" is indeed one of the most powerful words or expressions today. In a sense, it has become an activity in itself, a mental-social phenomenon separate and distinct from reality, which exists and acts within human consciousness. That is to say, through the cognitive process of the human mind, the terminology of "rule of law" has not only represented reality, but it has played a leading part in creating and transforming reality, and thus modelling the shared consciousness of society, including international society, the society of all societies.

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5 This idea of society of all societies is borrowed from the work of Philip Allott; see P. Allott, Eunomia — New Order for a New World (Oxford: Oxford University Press, 1990); and P. Allott, The Health of Nations — Society and Law beyond the State (Cambridge: Cambridge University Press, 2002).
While the various ideas associated to the expression are undoubtedly very old — going as far back as Plato and Aristotle — the emergence of the rule of law as a mighty discursive tool within political and legal circles is relatively recent. The phrase itself was actually coined by 19th century British author Albert Venn Dicey, in his masterpiece *Introduction to the Study of the Law of the Constitution.* It is from this point in time that the paper takes up the rule of law, originally developed at the domestic level, to see how an externalised version of the concept may be reflected onto the international plane.

On the eve of 2000, the author of *The Renaissance: A Short History,* Paul Johnson, referred to the establishment of the rule of law within nation states as "the most important political development of the second millennium." He ventured to predict, in a hopeful conclusion, that the development of a global or international rule of law "is likely to be among the achievements of the third millennium." More prudently, Brian Tamanaha opined that the first project, the rule of law nationally, "remains a work in progress," while the second one, the rule of law internationally, "has only just begun." But it has indeed begun, and not only at the normative level, but also at the functional level and, to a lesser degree, at the institutional level.

The following discussion starts, in Section 2, with a survey of how the rule of law has developed at the domestic law level, focussing on the contributions of legal (as well as political) scholars. Then, in Section 3, the main goal of the paper is to externalise the core values of the rule of law onto the international plane in an attempt to examine how they are found in the essential features of the international legal system. The conclusion comes back to the social power of the international rule of law, a theme common to the papers by Fritz Kratochwil and Neil Walker (though not so much that by Kalypso Nicolaidis and Rachel Kleinfeld), commented upon at the workshop entitled "Relocating the 'Rule of Law.'"

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13 Ibid.
14 Ibid.
15 Ibid.
16 F. Kratochwil, "Has the 'Rule of Law' Become a 'Rule of Lawyers'? — An Inquiry into the Use and Abuse of an Ancient Topos in Contemporary Debates."
17 N. Walker, "The Rule of Law and the EU: Necessity's Mixed Virtue."
18 K. Nicolaidis & R. Kleinfeld, "Can a Post-Colonial Power Export the Rule of Law?" The conference "Relocating the 'Rule of Law.'" was held at the European University Institute, Florence, Italy, on 8-9 June 2007. I acted as a commentator on the panel entitled "The Wider Frontiers of the Rule of Law — European and Global Perspectives."
2. The Rule of Law Defined

Although admittedly a convenient shortcut, starting a discussion on the meaning of the rule of law with its modern articulation by Albert Venn Dicey has little risk of running into strong opposition. His conception is well known and largely accepted; it has also been analysed and criticised from a variety of different angles, thus adding to the credibility of his formulation.

2.1 Dicey's Rule of Law Theory

The British scholar wrote that the rule of law had "three meanings, or may be regarded from three different points of view." First, the expression means "the absolute supremacy or predominance of regular law as opposed to the influence of arbitrary power." He further opined:

We mean, in the first place, that no man is punishable or can be lawfully made to suffer in body or goods except for a distinct breach of law established in the ordinary legal manner before the ordinary courts of the land. In this sense the rule of law is contrasted with every system of government based on the exercise by persons in authority of wide, arbitrary, or discretionary powers of constraint.

The second prong of Dicey's rule of law means "equality before the law, or the equal subjection of all classes to the ordinary law of the law administered by the ordinary law courts." He explicated thus:

We mean, in the second place, when we speak of the "rule of law" as a characteristic of our country, not only that with us no man is above the law, but (what is a different thing) that here every man, whatever be his rank or condition, is subject to the ordinary law of the realm and amenable to the jurisdiction of the ordinary tribunals.

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21 However, one should note that there are a British and an American school of thought on the origin of the rule of law. See L.B. Tremblay, "Two Models of Constitutionalism and the Legitimacy of Law: Dicey or Marshal?" (2006) 6 *Oxford University Commonwealth Law Journal* 77.


24 *Ibid*.


Thirdly, according to Dicey, the rule of law entails that "the law of the constitution [...] are not the source but the consequence of the rights of individuals, as defined and enforced by the courts." This last element is really a "special attribute of English institutions," that is of British constitutionalism. He also wrote:

We may say that the constitution is pervaded by the rule of law on the ground that the general principles of the constitution (as for example the right to personal liberty, or the right of public meeting) are with us the result of judicial decisions determining the rights of private persons in particular cases brought before the courts; whereas under many foreign constitutions the security (such as it is) given to the rights of individuals results, or appears to result, from the general principles of the constitution.

A common misreading of the last element in Dicey's theory is to hold that the rule of law requires the recognition of some minimal substantive rights and freedoms to individuals. As Paul Craig pointed out, however, this "is not what Dicey actually said." Rather, his argument was simply that, providing a society wishes to give protection to individual rights, that is, if and only if there has been a political will to have such legal guarantees, then, one way of doing it is better than another way as far as the rule of law is concerned. Namely, the British common law technique ought to be favoured over the Continental written constitutional document technique. That is to say, judge-made-law individual rights would give more effective protection than bills or charters of rights and freedoms because the latter are easier to abrogate or change by governments. This point is important because "Dicey's third limb of the rule of law is no more substantive than the previous two," as Craig put it. "It no more demands the existence of certain specific substantive rights than do the earlier limbs of his formulation.

2.2 The Critics of the Rule of Law

To recapitulate, for Dicey, the rule of law entails (1) to be ruled by law, not by discretionary power, (2) to be equal before the law, private individuals as well as government officials, and (3) to be submitted to the general jurisdiction of ordinary courts, the best source of legal protection. These core ideas, in one form of another, are found in the scholarship of most modern authors who wrote on the question, be it in legal studies or political science.

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28 Ibid., at 203.
29 Ibid., at 195-196 [footnotes omitted].
30 See, for instance, L.B. Tremblay, supra note 21, at 80: "These passages are open to interpretation. In Dicey's mind, they certainly meant that British judges had been committed to enforce certain basic individual rights against governmental action and decision on the ground that these rights were protected by the 'ordinary law of the land.'"
32 See N.W. Barber, "Must Legalistic Conceptions of the Rule of Law Have a Social Dimension?" (2004), 17 Ratio Juris 474, at 480-481.
33 P. Craig, supra note 31, at 474.
34 Ibid.
35 See J. Stapleton, "Dicey and his Legacy" (1995) 16 History of Political Thought 234; and J. Rose, supra note 8, at 458.
It does not mean, however, that there is any kind of consensus or agreement on the meaning and scope of the rule of law; in fact, the opposite seems to prevail. Some criticisms have been voiced over the years on the vagueness and uncertainly of the concept, with Joseph Raz famously calling the rule of law a mere slogan; borrowing from Walter Gallie, one author suggested it was an "essentially contested concept." Witness also the harsh assessment given by Judith Shklar:

It would not be very difficult to show that the phrase "the Rule of Law" has become meaningless thanks to ideological abuse and general over-use. It may well have become just another one of those self-congratulatory rhetorical devices that grace the public utterances of Anglo-American politicians. No intellectual effort need therefore be wasted on this bit of ruling-class chatter.

Similarly, George Fletcher famously referred to the rule of law as the most puzzling "of all the dreams that drive men and women into the streets."

### 2.3 Categorising the Rule of Law

To create a bit of order in the discourse on the rule of law, some scholars have put the different versions or formulations of the concept into categories or models. Paul Craig suggested to distinguish between the formal conceptions of the rule of law, concerned with how the law is made and its essential attributes (clear, prospective), and the substantive conceptions of the rule of law, concerned with the formal precepts but also with some basic content of the law (justice, morality). Brian Tamanaha picked up this classification and further divided up the formal and substantive models, making the alternative versions go progressively from "thinner" to "thicker" accounts, that is, moving from versions with fewer requirements to more requirements, each subsequent version including the components of the previous ones. Thus starting with the formal conceptions of the rule of law, the thinnest is (1) the "rule-by-law" (law as instrument of government), then (2) "formal legality" (law that is general, prospective, clear, certain), and the thickest of the formal versions adds (3) "democracy" to legality (consent determines content of law); follow the substantive conceptions of the rule of law, which all encompass the formal elements, but refer also to other legal features such as (4) "individuals rights" (property, contract, privacy, autonomy), then a thicker version yet

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36 J. Raz, "The Rule of Law and its Virtue" (first published in (1977) 93 Law Quarterly Review 195), in J. Raz, The Authority of Law: Essays on Law and Morality (Oxford: Clarendon Press, 1979), 210, at 210: "Not uncommonly when a political ideal captures the imagination of large numbers of people its name becomes a slogan used by supporters of ideals which bear little or no relation to the one it originally designated."


41 P. Craig, supra note 31. See also P. Craig, "Constitutional Foundations, the Rule of Law and Supremacy" [2003] Public Law 92.

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includes (5) "rights of dignity and/or justice" and, finally, the thickest of the models of the substantive rule of law, of all versions in fact, entails a dimension of (6) "social welfare" (substantive equality, welfare, preservation of community).  

For the purposes of the paper, which concerns the externalisation of the rule of law, the formal understanding of the concept suffices. In fact, to address legality per se at the international level is already a monumental talk, without also having to inquire on whether the legal rules amount to good law or bad law. Joseph Raz's comments are apposite here:

If the rule of law is the rule of the good law then to explain its nature is to propound a complete social philosophy. But if so the term lacks any useful function. We have no need to be concerted to the rule of law just in order to discover that to believe in it is to believe that good should triumph. The rule of law is a political ideal which a legal system may lack or possess to a greater or lesser degree. That much is common ground. It is also to be insisted that the rule of law is just one of the virtues by which a legal system may be judged and by which it is to be judged.

These remarks apply a fortiori to the present study, which identifies the core features of the rule of law with a view to analysing the situation on the international plane. As well, Robert Summers is right to note that formal conceptions of the rule of law are content-independent, insofar as political neutrality makes it preferable to substantive versions, which is especially the case when one is outside the national realm, I shall add. But having said that, the formal features of the rule of law must be understood broadly, as the classical notion of "formalism" allows us to do, namely as including all the attributes of a thing — here, law — that are so significant to it as to define it.

2.4 Formal Versions of the Rule of Law

Focussing on the formal conceptions of the rule of law, it is useful to examine the work of Friedrich Hayek, who elaborated on the core ideas expressed by Dicey. Hayek's definition of the rule of law, taken from *The Road to Serfdom*, has certainly become one of the most influential one over the years:

"[S]tripped of all technicalities this [the rule of law] means that government in all its actions is bound by rules fixed and announced beforehand — rules which make it possible to foresee with fair certainty how the authority will use its coercive powers in given circumstances, and to plan one's individual affairs on the basis of this knowledge."

As he explained in another book, *The Political Idea of the Rule of Law*, legal systems adhering to the rule law possess three necessary attributes: "the laws must be general, equal and certain."

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42 B.Z. Tamanaha, *supra* note 1, at 91 ff.
A number of scholars in legal studies and political sciences have followed this modest, largely positivist version of the rule of law, advocating limited models that emphasise the formalistic or process-oriented aspects. Lon Fuller, for instance, argues in favour of a system of general rules which are created and applied consistently with procedural justice and fairness. Accordingly, eight conditions must be met: (1) a system of rules, (2) promulgation and publication of the rules, (3) avoidance of retroactive application, (4) clear and intelligible rules, (5) avoidance of contradictory rules, (6) practicable rules, (7) consistency of rules over time, and (8) congruence between official actions and declared rules. Borrowing Jeremy Waldron’s image, this is "a sort of laundry list of features that a healthy legal system should have." A similar enumeration of eight factors essential to the rule of law is given by John Finnis, which all relate to formal aspects of law, that is, to attributes of law that are so significant to law as to define what law is.

Going back to Joseph Raz, he too proposes a list of, yet again, eight elements that ought to be found in a rule of law system. However, they are slightly differently formulated than Fuller's and Finnis', though they considerably overlap the latter lists: (1) all law should be prospective, open and clear, (2) law should be relatively stable, (3) the making of particular laws (particular legal orders) should be guided by open, stable, clear and general rules, (5) the principles of natural justice must be observed, (6) the courts should have review powers over the implementation of the other principles, (7) the courts should be easily accessible, and (8) the discretion of the crime-preventing agencies should not be allowed to pervert the law. This list, Raz further wrote, is merely illustrative and is not meant to be exhaustive. In fact, he opines that all of these factors boil down to one proposition — "in the final analysis the doctrine [of the rule of law] rests on its basic idea that the law should be capable of providing effective guidance." In his more recent writings on the subject, in Ethics in the Public Domain, Raz spoke of the rule of law quite singularly in terms of the "principled faithful application of the law."

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49 Ibid., at 38-39.
50 J. Waldron, supra note 38, at 154.
51 J. Finnis, Natural Law and Natural Rights (Oxford: Clarendon Press, 1980), at 270. For his part, Robert Summers, "The Principles of the Rule of Law" (1999) 74 Notre Dame Law Review 1691, stretches the list to eighteen such formal requirements, though only providing a more detailed account of the same fundamental ideas.
52 For an interesting assessment of Raz’s theory on the rule of law, see Y. Hasebe, "The Rule of Law and Its Predicament" (2004) 17 Ratio Juris 489.
53 J. Raz, supra note 36, at 214-218.
54 Ibid., at 218. See also M.J. Radin, "Reconsidering the Rule of Law" (1989) 69 Boston University Law Review 781, at 785, who writes on the rule of law that: "first, there must be rules; second, those rules must be capable of being followed."
56 Ibid., at 373. He also writes that the main features of a rule of law system is "its insistence on an open, public administration of justice, with reasoned decisions by an independent judiciary, based on publicly promulgated, prospective, principled legislation" (ibid., at 373-374).
At this stage of the discussion, it feels that we have gone full circle, back to Dicey’s core idea that the rule of law “connotes a climate of legality and of legal order.” With a bit more meat on the bones, the three limbs remain (1) the existence of principled normative rules, (2) adequately created and equally applicable to all legal subjects, (3) by accessible courts of general jurisdiction. These characteristics shall now be externalised, as the discussion moves to whether or not they are reflected onto the international plane.

3. The Rule of Law Externalised

First, what do I mean by externalisation? It would be the process by which, according to an internal-external dichotomous structure, a feature or characteristic that exists within the inside set is projected or attributed to circumstances or causes that are present in the outside space. To give an example, let us take the terminology of "sovereignty," a concept that was articulated in modern terms during the 16th century by Jean Bodin. The history of the word sovereignty shows that, in the 18th century, Swiss author Emer de Vattel externalised the main ideas associated with the concept and made sovereignty relevant for the discourse of international law, in fact it became one of its core foundational principles. My goal with the rule of law is admittedly more modest, of course, but the task at hand is to pick up the essential elements of the concept, understood in its formalistic versions, and examine in what ways they may be found in international law. Accordingly, this section assesses (1) the existence of principled legal normativity on the international plane, (2) how these rules are made and are applicable equally to all legal subjects, and (3) the way in which these norms are enforced through adjudicative processes.

A word of caution is in order at this point. Just like sovereignty could only be externalised mutatis mutandis by Emer de Vattel, the present project requires material adjustments to the features of the rule of law in order to take into account the different nature of the international legal order. What are these distinctions between domestic legal systems and the international legal system? Drawing an exhaustive list is both extremely difficult and somewhat futile, a major problem being that there are as many pairs of comparatives as there are jurisdictions in the world. Though no elaboration is possible here, the following categories of distinctions may be offered and should be kept in mind in the process of externalising the rule of law. They relate to the sources of

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58 Literally, "making something external."
law, to legal subjects, and to compliance. To cut to the chase, internationally, there exists no one formal norm-creating authority, states (not individuals) remain the principal legal actors, and there is no ultimate enforcement mechanism (like a police).

3.1 Principled Legal Normativity

In a recent piece on the relationship between international law and domestic law, Mattias Kumm uses a form of externalised rule of law. He too discarded the substantive versions of the concept and concentrated on the narrower understanding, what he suggested is the literal meaning of the expression, namely to rule "by law." It was explained earlier why, like Kumm, I believe that it is the formal rule of law that ought to be externalised on the international plane, keeping in mind that "formalism" refers to the attributes of law that are so significant to it as to define what law is. To be ruled by law at the international level means the following, according to Kumm: "The addressees of international law, states in particular, should obey the law. They should treat it as authoritative and let it guide and constrain their actions." The international rule of law, at minimum, requires some basic legal ordering of affairs within a society, which international society no doubt enjoys.

Today, indeed few people would seriously doubt that there exists a body of norms that enjoy the characteristics, the pedigree of law on the international plane. International law is regarded as true positive law, which forms part of a real legal system, in which "every international situation is capable of being determined as a matter of law," as Robert Jennings and Arthur Watts have explained. The legal determination of such issues occurs, the two British authors further wrote, "either by the application of specific legal rules where they already exist, or by the application of legal rules derived, by the use of known legal techniques, from other legal rules or principles." Albeit put in positivist legal terms, and thus open to possible strong

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66 Ibid., at 22.

67 See supra footnotes 44-45 and accompanying text.

68 M. Kumm, supra note 65, at 22.


71 Ibid.
objections, the following discussion favours a concept of law that is broad enough to include international law.

3.1.1 Certainty, Predictability and Stability

Borrowing not only from Dicey, but also from Hayek and Raz, the rule of law requires that normativity reach a sufficient degree of development to provide for certainty, predictability and stability. These values, however, are not absolute, and some extent of vagueness and uncertainty in law is inevitable in any legal system, be it national or international. At the national level, both the United States and Canada, for instance, have developed so-called "void for vagueness" doctrines that address the need for certainty and predictability in domestic statutes, with standards that allow a good dose of "open texture" in legislative language, to borrow from Hart. One of the rationales invoked for basic requirements of intelligibility is linked to the rule of law, because those who are submitted to law must be able to reasonably assess what their rights and obligations are.

At the international level, the sources of international law are provided for in the Statute of the International Court of Justice, at section 38(1), the principal ones being treaties, customs and general principles of law. Here, a fundamental difference between international and domestic legal systems ought to be mentioned right away, thus justifying a slight adjustment in the required level of certainty in the law. Arthur Watts explained thus:

[I]nternational law has no central legislator, nor any legislative process in the normal (municipal) sense of the term; its norm-creating process is essentially decentralised, and so far as international conferences or meetings within international organisations may produce quasi-legislative texts the outcome represents "legislation" by negotiation and compromise, which is not a process calculated to produce precision and clarity.

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72 See the classic piece by G.L. Williams, "International Law and the Controversy Concerning the Word 'Law'" (1945) 22 British Yearbook of International Law 146. See also A.A. D'Amato, "Is International Law Really 'Law'" (1985) 79 Northwestern University Law Review 1293.

73 Part and parcel of these values is also the idea that the law should be prospective and avoid retroactive applications, which is the general rule in international law as well. The Vienna Convention on the Law of Treaties, 1155 U.N.T.S. 331, entered into force 27 January 1980, at article 28, addresses the matter of non-retroactivity explicitly: "Unless a different intention appears from the treaty or is otherwise established, its provisions do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the treaty with respect to that party."


76 Article 38(1) of the Statute of the International Court of Justice, 1 U.N.T.S. xvi, reads: "The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply: (a) international conventions, whether general or particular, establishing rules expressly recognized by the contesting States; (b) international custom, as evidence of a general practice accepted as law; (c) the general principles of law recognized by civilized nations; (d) subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law."

This being so, the level of certainty, predictability and stability shown by international legal norms, evaluated according to a somewhat lowered standard justified under the international rule of law, are no doubt adequate in a number of different substantive areas. They include international human rights law, international economic law, international labour law, international humanitarian law, international law of the sea, the international law of state responsibility, and international criminal law.


3.1.2 Limiting Discretionary (Arbitrary Power)

This argument finds further support when one recalls that the ideal of the rule of law in regard to the existence of principled legal normativity relates to the need to circumscribe sovereignty which, in its absolute form, may lead to arbitrary power. The issue boils down to how a system can limit or curtail discretionary power of those who hold authority in a society. When transposed onto the international plane, it is sovereignty understood externally that must be addressed through the international rule of law. The definition of external sovereignty given by Arbitrator Huber in the Island of Palmas case thus remains very relevant indeed for the present discussion: "Sovereignty in the relations between states signifies independence. Independence in regard to a portion of the globe is the right to exercise therein, to the exclusion of any other State, the functions of a State."

However, external sovereignty also means that, vis-à-vis the outside world, states have absolute power, unrestricted but for the first ideal of the (international) rule of law, namely the existence of a system of positive law. Judge Anzilotti in the case of Austro-German Customs Union, in a separate opinion, captured this feature well when he spoke of "sovereignty (suprema potestas), or external sovereignty, by which is meant that the State has over it no other authority than that of international law." The sovereign independence of states, that allows for unrestricted assertions of power, must be balanced — and indeed is balanced — by the international rule of law ideal relating to principled legal normativity. Arthur Watts put it as follows:

It is, of course, the case that States on occasion act in breach of the law, and perhaps even sometimes in complete and wilful disregard of the law. [...] What the rule of law requires is that in their international relations States conduct themselves within an essentially legal

vols. (Cambridge: Cambridge University Press, 2005). See also the following website: http://www.icrc.org/eng/ihl


84 The most important source of general international criminal law is now the Rome Statute of the International Criminal Court, 2187 U.N.T.S. 90, entered into force 1 July 2002. See also the following website: http://www.icc-cpi.int/home.html&l=en


86 Austro-German Customs Union case (1931), P.C.I.J., series A/B, no. 41, at 57 [emphasis in original]. See also H. Steinberger, "Sovereignty," in R. Bernhardt (ed.), Encyclopedia of Public International Law, vol. 10, States — Responsibility of States — International Law and Municipal Law (Amsterdam: North-Holland, 1987), 397, at 408: "Sovereignty in the sense of contemporary public international law denotes the basic international legal status of a State that is not subject, within its territorial jurisdiction, to the governmental, executive, legislative, or judicial jurisdiction of a foreign State or to foreign law other than public international law."
framework; it is action which is despotic, capricious, or otherwise unresponsive to legal regulation which is incompatible with the international rule of law.\textsuperscript{87}

Although a detailed empirical demonstration of the argument will have to wait for another day, it may nevertheless be suggested with confidence that the extensive body of international legal rules in many substantive areas, referred to above, does limit and curtail the exercise of discretionary power, as well as arbitrary power, by states in their relations with others.\textsuperscript{88}

3.2 Adequate Creation and Equal Application of Legal Norms

Many international legal scholars, including perhaps Mattias Kumm,\textsuperscript{89} would stop here and acknowledge the "international rule of law" because its one principal ingredient was found. At the normative level, the conduct of states in their relation is "ruled by law," that is by international normativity sufficiently certain, predictable and stable. The minimum exists on the international plane; the first leg of Dicey's rule of law theory. But what about the international rule of law in its functional dimensions? More specifically, how are norms created in the international realm and do they apply equally to all legal subjects?

3.2.1. Promulgation and Publication

The first part of the inquiry, on the creation of law, shall prove easier and thus relatively short; it essentially pertains to the promulgation and publication of written legal norms. To borrow from Joseph Raz, this rule of law value concerns the making of laws, which should be guided by open, stable, clear and general principles.\textsuperscript{90} In the context of domestic law, the subject of study under this heading is legislation — or what is referred to as statute law in common law jurisdictions, as opposed to judge-made-law in caselaw — which is the main domestic source of written legal norms, and the analysis looks at the parliamentary process of legislative enactment.\textsuperscript{91} In the context of international law, the (imperfect) parallel is with treaties, one of the three formal sources of law under section 38(1) of the Statute of the International Court of Justice\textsuperscript{92} and the source of written legal norms on the international plane, as opposed to customs that are the source of international non-written rules (which are, in a sense, judge-made-law).\textsuperscript{93} The general principles of law are of less interest also because, by definition,\textsuperscript{94} they are

\begin{itemize}
\item A. Watts, supra note 77, at 33.
\item Ibid., at 23. See also W. Jenks, The Prospects of International Adjudication (London: Stevens, 1964), at 757.
\item M. Kumm, supra note 65.
\item J. Raz, supra note 36, at 215.
\item In the common law world, the bible on these issues is W. McKay et al. (eds.), Erskine May's Treatise on the Law, Privileges, Proceedings, and Usage of Parliament, 25th ed. (London: LexisNexis, 2004).
\item Supra note 77.
\item For a discussion on the parallels between judge-made-law at the domestic legal and customary international law, see S. Beaulac, "Customary International Law in Domestic Courts: Imbroglio, Lord Denning, Stare Decisis", in C.P.M. Waters (ed.), British and Canadian Perspectives on International Law, (Leiden: Martinus Nijhoff, 2006), 379, at 392.
\item See B. Vitanyi, "Les positions doctrinales concernant le sens de la notion de 'principes généraux de droit reconnus par les nations civilisées'" (1982) 86 Revue générale de droit international public 48.
\end{itemize}
extracted from domestic legal systems (*in foro domestico*) and, accordingly, should be deemed to pursue rule of law values.

Thus focussing on the process by which written normativity is *promulgated* by means of treaties on the international plane, one is struck by the level of sophistication in the applicable rules found in the 1969 *Vienna Convention on the Law of Treaties*. Some 108 states have ratified the *Vienna Convention*, which has been in force since January 1980; even those states that are not conventionally bound by it recognise, for the most part, that the rules found therein do nevertheless apply to them because they constitute also customary international law. In short, it is one of the most universal international instruments, second perhaps only to the *Charter of the United Nations*. In any event, for our purposes, suffice it to say that the *Vienna Convention* provides for all essential aspects of international treaties: conclusion, ratification, reservations application, interpretation, validity, termination, etc. Some might suggest that a good number of states could benefit from having such clear principles regarding the creation of written legal rules in legislation at the domestic level.

With respect to the publication of conventional international law, one must note that transparency has been formally laid down as a guiding principle since 1945 with the *Charter of the United Nations*, whose article 102 provides that only treaties registered with the Secretariat can be opposable within the UN system. This essential requirement is also found in the *Vienna Convention on the Law of Treaties*, article 80(1): "Treaties shall, after their entry into force, be transmitted to the Secretariat of the United Nations for registration or filing and recording, as the case may be, and for publication." They are all published, updated and, nowadays, readily available by means of information technology, in fact, not only the UN, but also domestic legal agencies in many states make treaties easily accessible to the public. With the advent of Internet especially, we have long passed the time described by Arthur Watts in 1993, when "the international collections of treaties, such as the many volumes of the United Nations Treaty series, are not a complete collection of all treaties, and are seldom up-to-date."

### 3.2.2. Universality and Sovereign Equality

Now, the existing system of legal norms based on treaties, as well as on other sources of law such as customs and general principles of law, does it apply equally to all legal subjects? *Equality* is indeed the other functional dimension of the rule of law that must be inquired. One of the distinguishable traits of the international legal order needs to be
recalled here, namely that states continue to be the principal actors on the international plane by virtue of the fact that they have inherent and unrestricted legal personalities (something, of course, that international organisations, corporations and individuals do not have). At the risk of being called overly traditionalist, I limit the discussion to the situation of states and how international law treats them; equality as it relates to non-state actors (although, intuitively, leading to similar conclusions) is a question that shall be examined another time.

One angle to the issue of equality concerns universality, that is whether or not international law has the declared mission to apply to all the states in the world. Not too long ago, international law was, to a very large extent, the public law of Europe, relevant to the states of that continent; everywhere else was basically terra nullius, available for colonisation or other forms of territorial exploitation. This situation has drastically changed of course, with the different phases of decolonisation in Latin America and in Africa up to the early 1970s, and the latest episodes of liberation from Soviet imperialism in Eastern Europe and in many parts of Asia during the 1990s. The membership of the international community is now truly world-wide, therefore making international law fully universal in scope and in reach. There are of course some international legal scholars that love to remind us that international law was born in Europe and that there are, no doubt, continuing biases in favour of Western interests and ideologies. But none of these authors, I submit, would dare question the universality of international law, that its normativity is applicable to all members of the international community.

One primordial value of the rule of law — found in Dicey, Hayek, Raz, as well as others — relates to the need that all legal subjects enjoy equality before the law. In international law, there is a long-standing principle, dating back to the classical legal


scholarship on the subject,\textsuperscript{112} that all states of the international community, although (like human beings) not at all equal in absolute terms,\textsuperscript{113} stand equally within the normative system.\textsuperscript{114} Already in the 18th century, Emer de Vattel wrote the following about the legal equality of states:

Since men are naturally equal, and a perfect equality prevails in their rights and obligations, as equally proceeding from nature — Nations composed of men, and considered as so many free persons living together in a state of nature, are naturally equal, and inherit from nature the same obligations and rights. Power or weakness does not in this respect produce any difference. A dwarf is as much a man as a giant; a small republic is no less a sovereign state than the most powerful kingdom.\textsuperscript{115}

Accordingly, equality of states in international law means that "whatever is lawful for one nation is equally lawful for any other; and whatever is unjustifiable in the one is equally so in the other."\textsuperscript{116}

Since the Charter of the United Nations,\textsuperscript{117} we speak of the sovereign equality of states,\textsuperscript{118} which constitutes one of the seven principles of the organisation found in article 2.\textsuperscript{119} With the Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations,\textsuperscript{120} a General Assembly resolution adopted by the United Nations in 1970, sovereign equality became one of the basic principles of international law. "All States enjoy sovereign equality," it reads; "They have equal rights and duties and are equal members of the international community, notwithstanding differences of an economic, social, political or other nature." In particular, it provides that sovereign

\begin{footnotesize}
\textsuperscript{113} Among other thing, states are grossly unequal in regard to their geography, population, natural resources, climate, as well as political stability, economic wealth and military strength. See also R.W. Tucker, \textit{The Inequality of Nations} (New York: Basic Books, 1977).
\textsuperscript{114} See B. Kingsbury, "Sovereignty and Inequality" (1998) 9 \textit{European Journal of International Law} 599, at 599, who wrote: "Inequality is one of the major subjects of modern social and political inquiry, but it has received minimal consideration as a theoretical topic in the recent literature of international law. While the reluctance formally to confront inequality has many causes, it has been made possible — and encouraged — by the centrality of sovereignty as a normative foundation of international law" [footnotes omitted].
\textsuperscript{117} \textit{Supra} note 98.
\textsuperscript{118} On the origin and the development of the expression "sovereign equality" in international law, see R.A. Klein, \textit{Sovereign Equality Among States: The History of an Idea} (Toronto: Toronto University Press, 1974).
\textsuperscript{119} The other six are the obligation of good faith, peaceful resolution of disputes, prohibition on the use of force, international assistance, adherence of non-UN member states and non-interference with domestic affairs.
\end{footnotesize}
equality means that states are "juridically equal," that is to say, all members of the international community are equal in the eyes of the law.

The meaning of sovereign equality in international law for the purpose of the international rule of law must be explained further. Of course, it cannot mean that all legal norms apply to every state in the same way; some of them may only apply to certain states because of their situations. For instance, landlocked states are not submitted to most of the regime of the 1982 United Nations Convention of the Law of the Sea, without offending whatsoever any equality value. What matters, really, is that no discrimination occurs in the way international normativity applies to states. If you are a coastal state, the legal regime will apply to you as it applies to all the other costal states around the world, whether large or small, whether powerful or weak, whether militarily mighty or pacifist. Arthur Watts explicated thus:

[All States which come within the scope of a rule of law [i.e. international legal norm] must be treated equally in the application of that rule to them. There must, in other words, be uniformity of application of international law and no discrimination between States in their subjection to rules of law [i.e. international legal norms] which in principle apply to them.]

Put in those terms, there is little doubt that the normativity on the international plane applies equally to all states, the main legal subjects. In practice, there might be cases where one wonders if, for instance, the prohibition on the use of force applies in the same ways to a superpower like the United States, an obvious question in relation to the illegal invasion and occupation of Irak. The theory remains clear, however, in that sovereign equality involves that similarly situated states are treated in the same way by international law, without discriminative treatments tolerated by the system.

There is another aspect of sovereign equality of states that should be noted for the present purposes, namely that states are not only equal in how legal norms apply to
them, but they are also equal in how they participate in the creation of international normativity.\footnote{127} With respect to treaties, article 6 of the \textit{Vienna Convention on the Law of Treaties}\footnote{128} provides that: "Every State possesses the capacity to conclude treaties." Also significant, treaty-making conferences generally favour an egalitarian procedure of one-state-one-vote for the negotiation and adoption of treaty texts. Moreover, the systems of reservations, coming into force, modification and termination of treaties, found in the \textit{Vienna Convention}, assume that states participate equally in conventional regimes.\footnote{129} As regards customary international law, a similar reasoning based on the ideal of sovereign equality is adopted.\footnote{130} Indeed, the practice of every state with an interest in the legal issue (see example of the law of the sea, above), as well as their \textit{opinion juris}, are worth as much in the process of determining whether a custom has formed.\footnote{131} This equal role in the formulation of international normativity provides further strength to the claim that the rule of law value relating to equality is reflected onto the international plane.

3.3. Adjudicative Enforcement of Normativity

Here we come to, certainly, the most difficult set of formal values associated to the rule of law in terms of externalisation onto the international plane, namely the presence of courts or tribunals of general jurisdiction which are easily accessible to legal subjects for adjudication of disputes ruled by international normativity. A few distinguishing aspects of the international legal system must be taken into account, with a view to adjusting the terms of inquiry into how these elements are reflected internationally. Relevant again under this heading is the fact that states are the main (though not exclusive anymore) subjects of international law, which explains why the following discussion considers the international judicial enforcement in the traditional sense, that is to say in cases involving disputes between states. In fact, the focus is on the International Court of Justice, "the principal judicial organ of the United Nations," according to section 92 of the \textit{Charter of the United Nations},\footnote{132} and by far the most important in the international legal system. Hence the name "World Court," often used in general media.\footnote{133} Also, it is useful to recall yet another distinctive feature of the international legal system, namely that there is no system of ultimate compliance if...
states refuse to follow judicial decisions. This characteristic, however, must not be overstated, as suggesting that judgments in international law are not binding, for instance. Indeed, they are binding on the parties to the case pursuant to article 94 of the Charter of the United Nations, an aspect that is explored in more detail later.

3.3.1. Court of General Jurisdiction

These preliminary points being made, the analysis proceeds first with the issue of whether international normative adjudication falls within a general jurisdiction. No doubt, there is a judicial structure on the international plane, at the centre (though not the apex) of which is the International Court of Justice, which can deal with all legal disputes between states. The so-called “fragmentation” of international law due to the multiplicity of international adjudicative bodies — from ad hoc arbitrators to the many tribunals created under particular treaties in specialised fields — has caused much ink to flow as of late in international legal circles, the report on the subject by the International Law Commission, led by Martti Koskenniemi, being the latest manifestation. For the present purposes, the risks that the many adjudicative bodies apply international law differently, thus creating "boxes" of normativity or "self-contained regimes," can be ignored. The intuition (the verification of which is beyond the scope of this paper) is that, under the leadership of the International Court of Justice, the dangers of fragmentation are manageable.

135 Supra note 98.
136 See infra footnotes 187-194 and accompanying text.
137 Indeed, there is no hierarchical structure of courts on the international plane and, accordingly, the International Court of Justice, though it is the only court of universal jurisdiction, does not amount to a final court of appeal in any way.
138 On whether there is a judicial system on the international plane, see Y. Shany, The Competing Jurisdictions of International Courts and Tribunals (Oxford: Oxford University Press, 2003), at 104-116.
142 On the theory of "boxes", see M. Koskenniemi, "International Law: Constitutionalism, Managerialism and the Ethos of Legal Education" (2007) 1 European Journal of Legal Studies, www.ejls.eu/; in particular on page 3: "This approach [by specialised international tribunals] suggests that international law comes to us in separate boxes such as 'trade law' and 'environmental law' that may have different principles and objectives that do not apply across the boundaries between such boxes."
In theory, the jurisdiction of the International Court of Justice over contentious matters is plenary, as far as states are concerned. With respect to *ratione personae* jurisdiction, article 34(1) of the *Statute of the International Court of Justice* is clear: "Only states may be parties in cases before the Court." In regard to *ratione materie* jurisdiction, article 36(1) provides: "The jurisdiction of the Court comprises all cases which the parties refer to it and all matters specially provided for in the Charter of the United Nations or in treaties and conventions in force." Under article 65(1) of the *ICJ Statute*, the Court has also jurisdiction to give advisory opinions, in non-contentious matters, a procedure that can be initiated not only by states, but by "whatever body [that] may be authorized by or in accordance with the Charter of the United Nations to make such a request." At first blush, therefore, the jurisdiction of the International Court of Justice seems comprehensive; one may even be tempted to draw an analogy with the inherent jurisdiction of domestic courts.

Of course, this picture is mere illusion, as the jurisdiction of the International Court of Justice is anything but comprehensive, let alone inherent. Indeed, it is well-known that the contentious jurisdiction of the Court depends in all cases on whether or not the states involved have consented to the judicial proceedings. This feature is usually referred to as the lack of compulsory jurisdiction of the International Court of Justice — or any adjudicative body, for that matter — over contentious matters. To put it another way, states cannot be forced to appear before a court or tribunal in order to settle a legal dispute by means of adjudication. This position is explained by the traditional notion of state sovereignty and by the voluntary (a.k.a. consensual) normative theory of international law. At this point of the inquiry, I would agree with Arthur Watts that: "Such a purely consensual basis for the judicial settlement of legal disputes cannot be satisfactory in terms of the rule of law."

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145 *Supra* note 76.


147 See S. Rosenne, *The Law and Practice of the International Court, 1920-2005*, vol. II, Jurisdiction (Leiden & Boston: Martinus Nijhoff, 2006), at 549; "It is an uncontroversial principle of general international law that no State is obliged to submit any dispute with another State or to give an account of itself to any international tribunal."


150 A. Watts, *supra* note 77, at 37.
However, the situation proves to be not so bad given that, in reality, states do not have to consent on a case-by-case basis, every time they are involved in a legal dispute. States can give their consent in advance to the jurisdiction of an adjudicative body in regard to future disputes; with respect to the ICJ, article 36(2) of the Statute of the International Court of Justice\(^ {151}\) provides that states:

[M]ay at any time declare that they recognize as compulsory \textit{ipso facto} and without special agreement, in relation to any other state accepting the same obligation, the jurisdiction of the Court in all legal disputes concerning: (a) the interpretation of a treaty; (b) any question of international law; (c) the existence of any fact which, if established, would constitute a breach of an international obligation; (d) the nature of extent of the reparation to be made for the breach of an international obligation.

It is known as the "optional clause" to the contentious jurisdiction of the International Court of Justice.\(^ {152}\) The element of reciprocity in article 36(2) is reinforced by article 36(3):\(^ {153}\) "The declarations referred to above may be made unconditionally or on condition of reciprocity on the part of several or certain states, or for a certain time."

There are commitments to the same effect found in a number of other treaties, which give in advance the consent of states to the jurisdiction of an international court or tribunal — which may be, actually, the International Court of Justice, or some other specialised adjudicative bodies — to settle legal disputes covered by the conventional regime. These dispute settlement provisions may be optional, leaving to states the option to accept the jurisdiction as cases arise, or they may be mandatory to being a party to the treaty, thus leaving no choice as to whether to submit to the adjudicative body in a particular dispute. This latter situation, as well as those involving the ICJ "optional clause," are the closest one can get to the ideal of \textit{general jurisdiction} on the international plane.\(^ {154}\) Although not a perfect scenario, it goes in the right direction in pursuing the rule of law value pertaining to the enforcement of normativity, especially given the reality of state sovereignty in the international realm.\(^ {155}\)

\(^{151}\) \textit{Supra} note 76.
\(^{154}\) However, see A. Watts, \textit{supra} note 77, at 38, who opines that even in situations where there is a mandatory settlement provision in a treaty, "the dispute settlement obligation does not create a truly compulsory jurisdiction, since it depends on the consent of the State given by its consent to be bound by the treaty."
3.3.2. Judicial Review

Related to the issue of general jurisdiction is whether or not the International Court of Justice has a competence of *judicial review* over the decisions and actions of the other organs of the United Nations system,\(^\text{156}\) including the Security Council.\(^\text{157}\) The power to review the acts of the latter is the more difficult, and quite controversial, question to address; in a sense, however, an affirmative answer would lay the ground to recognise a general competence of international judicial review to the International Court of Justice. This would be a clear gain in terms of the rule of law value relating to the legality of decisions on the international plane, in particular with respect to the matters falling within the competence of the “executive” of the United Nations, that is the Security Council.

It is instructive to go back to 1945, at the time of the adoption of the *Charter of the United Nations*\(^\text{158}\) in San Francisco,\(^\text{159}\) where Belgium suggested establishing a procedure by which disputes between UN organs over the interpretation of the *UN Charter* would be referred to the International Court of Justice, thus giving it a sort of supervisory judicial role.\(^\text{160}\) But the proposal was rejected. In the case of *Certain Expenses*,\(^\text{161}\) the ICJ gave effect to the intention of the constituting authority not to empower it with a judicial review function:

> In the legal systems of States, there is often some procedure for determining the validity of even a legislative or governmental act, but no analogous procedure is to be found in the structure of the United Nations. Proposals made during the drafting of the Charter to place the ultimate authority to interpret the Charter in the International Court of Justice were not accepted.\(^\text{162}\)

In 1971, again, the Court's opinion in the *Namibia* case was to the effect that it "does not possess powers of judicial review or appeal in respect of the decisions taken by the United Nations organs concerned."\(^\text{163}\) In fact, the ICJ has always adopted a sort of presumption of legality in favour of UN organs, which translates into a high degree of judicial deference shown for their decisions. Therefore, save the most fundamental

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\(^{157}\) According to K.H. Kaikobad, *The International Court of Justice and Judicial Review — A Study of the Court's Powers with Respect to Judgments of the ILO and UN Administrative Tribunals* (The Hague, London & Boston: Kluwer Law International, 2000), at 11, judicial review "means the power of a court or a system of courts to examine an act of either a constitutional organ of government, or of a statutory body or official thereof, with a view to determining whether or not the act is consistent with the provisions of the constitution, a statute or statutes or other sources of law and/or whether the said act is void and thus incapable of producing any lawful effect."

\(^{158}\) Supra note 98.


\(^{162}\) *Ibid.*, at 168.

irregularities, there is little (in fact, no) chance that the Court exercises a competence of judicial review, especially with respect to the Security Council.\footnote{This position is the traditional wisdom on the issue which, however, seems to be in the process of reconsideration. In a recent speech given at the London School of Economics, for instance, Judge Rosalyn Higgins, President of the International Court of Justice opined thus:

Are these [Security Council’s] decisions judicially reviewable for non-arbitrariness and for constitutionality? This is one of the great unanswered questions: The International Court of Justice is a main organ of the UN and its principal judicial organ. Whether it may judicially review the decisions of other organs, taken within the field of their allocated competence, is not yet fully determined.\footnote{R. Higgins, "The ICJ, the United Nations System, and the Rule of Law," Speech by the President of the International Court of Justice, London School of Economics, 13 November 2006, at 2, www.lse.ac.uk/collections/LSEPublicLecturesAndEvents/pdf/20061113_Higgins.pdf}

The \textit{Lockerbie} case\footnote{Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie, Provisional Measures (1992), I.C.J. Reports 1992, at 325. The \textit{Lockerbie} case discontinued on 10 September 2003 by Order of the Court (2003), I.C.J. Reports 2003, at 325.} would have provided the opportunity for the Court to address questions of judicial review because Libya was challenging decisions by the Security Council on sanctions in relation to the Pan Am Flight 103 affair. However, the case was withdrawn, leaving these issues to be reconsidered another time. There are more signs now, though, that the International Court of Justice is slowly getting ready to embrace a judicial review function,\footnote{See, for instance, the hopeful (although exaggerated) opinion expressed by K.H. Kaikobad, supra note 157, at 28: "In brief general terms, then, it would not be incorrect to state that the Court, in all the proper conditions and circumstances, will be able, and indeed has had occasion, to review the public acts of international bodies, particularly, but not exclusively, those belonging to the UN family of international organizations."} some even suggesting that it is an emerging general principle of law,\footnote{See E. de Wet, "Judicial Review as an Emerging General Principle of Law and its Implications for the ICJ" (2000) 47 \textit{Netherlands International Law Review} 181. See also M.C.W. Pinto, "Some Thoughts on the International Court of Justice and the Power of Judicial Review," in A. Jayagovind (ed.), \textit{Reflections on Emerging International Law: Essays in Memory of Late Subrata Roy Chowdhury} (Bangalore & Calcutta: National Law School of India University, 2004), 127.} which would be of course most excellent news for the international rule of law.

3.3.3. Independence and Impartiality

Arthur Watts said: "The ability of a State to have recourse to an impartial and independent judicial tribunal openly applying known legal rules in order to determine what the law is and so resolve its legal disputes with another State is fundamental to the existence of the international rule of law."\footnote{A. Watts, \textit{supra} note 77, at 36 [emphasis added].} This part of the inquiry may be kept short, however, because virtually nobody questions these attributes with regard to the
International Court of Justice. Article 2 of the *Statute of the International Court of Justice*, the first provision under the heading "Organization of the Court", provides as follows:

The Court shall be composed of a body of independent judges, elected regardless of their nationality from among persons of high moral character, who possess the qualifications required in their respective countries for appointment to the highest judicial offices, or are jurisconsults of recognized competence in international law.

Judges are elected jointly by the General Assembly and the Security Council of the United Nations, from a list provided by national authorities. Pursuant to article 33 of the *ICJ Statute*, the budget of the Court is voted by the General Assembly, although there is obviously no financial accountability between the two.

Impartiality, for its part, is addressed in article 20 of the *ICJ Statute*, which reads thus: "Every member of the Court shall, before taking up his duties, make a solemn declaration in open court that he will exercise his powers impartially and conscientiously." The issues of incompatibility with outside activities and of previous involvement in other cases are provided for in articles 16 and 17, respectively. With respect to the situation of *ad hoc* judges and their previous or subsequent work as legal agent, the Court has adopted practice statements. An important feature of independence and impartiality is linked to inamovability, essentially how hard it is to remove a judge from office; article 18(1) of the *ICJ Statute* sets the rule: "No member of the Court can be dismissed unless, in the unanimous opinion of the other members, he has ceased to fulfill the required conditions."

Beyond these formal elements found in its constituting documents, the Court and its judges do enjoy a high degree of independence and have demonstrated great impartiality in practice. As the current President of the International Court of Justice, Judge Rosalyn Higgins, have said recently:

JLds [are] nominated nationally but elected by the General Assembly and the Security Council, under terms whereby their conditions of service may not be altered during their tenure. Although the Court reports annually to the General Assembly on its year's work, the judicial decisions are subject to no comment (still less rebuke) by the Assembly or its Members. There is a proper separation of powers, and the Judges of the ICJ are mercifully free of any pressures from their national governments. That the Court applies the law consistently and impartially is doubted nowhere.

Though an obviously biased opinion, it certainly represents the view of the very large majority of states involved in and of people associated with the international justice

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171 Supra note 76.
system. There are the notable exceptions of the United States and Israel, which have shown no praise in recent years for the International Court of Justice; but many suspect that it has to do, certainly more than anything else, with the outcome of cases concerning them. In the long run, however, these isolated critics have little chance of affecting the generally positive account of the ICJ’s independence and impartiality, which are crucial rule of law values to be found internationally.

3.3.4. Accessibility

The courts and tribunals in a legal system must be easily accessible to all — at least to all its legal subjects — something that is now examined with respect to the International Court of Justice. We saw earlier that, except for initiating a request for an advisory opinion, there is no role for legal actors other than states in procedures before the ICJ. In contentious cases, the Court's jurisdiction is indeed strictly limited to inter-state disputes. According to article 35(1) of the Statute of the International Court of Justice, it is open to the states that are parties to this instrument which, in fact, include all the states that are members of the United Nations, as well as non-member states "on conditions to be determined in each case by the General Assembly upon the recommendation of the Security Council." Pursuant to article 35(2) of the ICJ Statute, the Court is even open to states that are not parties to this instrument, on conditions laid down again by the Security Council, although "in no case shall such conditions place the parties in a position of inequality before the Court." There is an obvious effort to assure equal access and equal status to all states that may appear in front of the International Court of Justice, which is indeed in agreement with the spirit of the rule of law as reflected onto the international plane.

3.3.5. Effectiveness

Now, how is it in practice, in reality? Do states follow international law and, in particular, do they submit to the final decision of international adjudicators? In other words, is the international normativity as applied by the international judiciary effective? One recalls what Louis Henkin famously wrote about general compliance with


177 Supra footnote 146 and accompanying text.

178 Supra footnote 145 and accompanying text.

179 Supra note 76.

180 See article 93(1) of the Charter of the United Nations, supra note 98, reads: "All Members of the United Nations are ipso facto parties to the Statute of the International Court of Justice."

181 Ibid., article 93(2).
international law: "It is probably the case that almost all nations observe almost all principles of international law and almost all of their obligations almost all of the time." 182 Although less catchy, Arthur Watts' view is to the same effect: "In practice, the overwhelming tendency of State in their day-to-day dealings with other States is to apply and abide by international law as a normal part of the regular pattern of international affairs." 183

The more important question, insofar as the rule of law value concerning the enforcement of legal norms, is whether or not the decisions by the ICJ, after the full involvement of the international justice system in contentious cases, are followed through by the (loosing) states. Put another way, when push comes to shove, and a state must really choose between ultimate compliance with international normativity as decided through adjudication, does it honour the international rule of law? On this aspect, the remarks made recently by Judge Rosalyn Higgins, President of the ICJ, are most apposite:

Contrary to a widespread misconception, the Court's Judgments are both binding and almost invariably complied with. Out of the 91 contentious cases that the Court has dealt with since 1946, only 4 have in fact presented problems of compliance and, of these, most problems have turned out to be temporary. 184

Indeed, there is a perturbing myth among people interested in the international justice system to the effect that states not only retain a discretionary power to comply with international judicial decisions, but actually use it to reject them. 185 Empirically, this is simply not true. 186

The Charter of the United Nations, 187 at article 94(1), sets out in clear terms the legal obligation to comply with ICJ judgments: "Each Member of the United Nations undertakes to comply with the decision of the International Court of Justice in any case to which it is a party." As Shabtai Rosenne noted, however, the broad language is deceptive in its simplicity: "The undertaking to comply with the decisions of the Court does not indicate in whose favour the undertaking is given," 188 for instance. It might explain the suggestion that the International Court of Justice is "a toothless bulldog." 189

183 A. Watts, supra note 77, at 41.
184 R. Higgins, supra note 165, at 3.
185 Myths may have an extraordinary effect on the shared consciousness of society, including that of the international society. See M.S. Day, The Many Meanings of Myth (Lanham, U.S. & London: University Press of America, 1984); M. Eliade, Aspects du mythe (Paris: Gallimard, 1963); and R. Barthes, "Le mythe, aujourd'hui," in R. Barthes, Mythologies (Paris: Seuil, 1957), 213. See also, very much on point, E. Cassirer, The Myth of the State (New Haven: Yale University Press, 1946), at 45: "Myth is not only far remote from this empirical reality; it is, in a sense, in flagrant contradiction to it. It seems to build up an entirely fantastic world. Nevertheless even myth has a certain 'objective' aspect and a definite objective function. Linguistic symbolism lead to an objectification of sense-impressions; mythical symbolism leads to an objectification of feelings."
187 Supra note 98.
188 S. Rosenne, supra note 159, at 205.
But this is underestimating the complex dynamics between the different organs of the United Nations when it comes to enforcement of judicial decisions.\(^{190}\) Most importantly, article 94(2) of the *Charter of the United Nations*\(^{191}\) provides that:

> If any party to a case fails to perform the obligations incumbent upon it under a judgment rendered by the Court, the other party may have recourse to the Security Council, which may, if it deems necessary, make recommendations or decide upon measures to be taken to give to the judgment.

Of course, it must be acknowledged that the Security Council has discretion in this process of enforcement,\(^{192}\) which makes some say that article 94(2) "should not be overestimated as a means for executing judgments of the ICJ, in particular if 'veto-powers' [i.e. the five permanent members of the Security Council] are concerned."\(^{193}\) It is also true, however, that the full potential of the judicial enforcement provision of the *UN Charter* has not been really tested because, on the ground, judgments of the International Court of Justice are complied with, no questions asked, in almost all instances.\(^{194}\) *De facto*, therefore, this last element of the rule of law value relating to the enforcement of legal norms is undoubtedly reflected in a satisfactory fashion onto the international plane, as regards the principal judicial organ of the UN system.

### 4. Conclusion

To summarise, the foregoing discussion has shown that the formal core values of the rule of law are indeed reflected, to a large extent, into the essential features of the international legal system. One may even be tempted to speak of an emerging "international rule of law,"\(^{195}\) in terms of the externalisation of rule of law values. The strongest claim is at the level of normativity *per se*, where nobody nowadays would doubt that the conduct of states is ruled by law, that is to say by legal norms providing certainty, predictability and stability. The verdict as regards the functional dimension of

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191 supra note 98.


the rule of law, concerning the creation and applicable of international law, is also relatively positive. International written legal norms found in treaties are promulgated satisfactorily and their publication is adequate; furthermore, international law is now universal in its reach and the fundamental principle of sovereign equality assures that, in most cases (or with respect to most issues), similarly situated legal subjects (states) are treated in the same way, that is without discrimination.

However, the institutional level remains problematic for the international rule of law, in spite of improvements in recent years. The continuing lack of compulsory jurisdiction for the International Court of Justice cannot be ignored, even if most of the states have committed to international adjudication through the optional clause (or the like). There is also a will to open the door to a power of judicial review for the ICJ, which could rule on the legality of the decisions of other UN organs, such as the Security Council. No one seriously contests the independence and impartiality of the International Court of Justice, and the judicial process is truly accessible to all states, the principal international legal subjects. In terms of effectiveness, the compliance record is outstanding, but the Security Council's discretion for ultimate enforcement of judgments still offends the international rule of law.

This picture of the situation of the rule of law on the international plane is, of course, flawed. I acknowledge that, in conducting the present analysis, many choices had to be made in order to limit the scope of the inquiry. For instance, treaties were the only source of normativity that was examined in regard to the first set of rule of law values, with adjustment made to take into account the absence of a central norm-creating authority on the international plane. Same limits for the discussion of the creation of legal norms, where international customary law was neglected. The ideal of equality was assessed in relation to the states only, although the modern trend is to recognise an international role for other legal actors, such as individuals. Finally, I only looked at the International Court of Justice to see whether the rule of law values relating to the existence of a judicial system was reflected onto the international plane. Truth be told, the present discussion on the international rule of law is not meant to be comprehensive. But it is a start. In fact, it is a serious effort to examine the situation of international law, understood in traditional terms — treaties as main source, states as principal actors, ICJ as leading court.

By way of conclusive remarks, it is also opportune to bring back the theme of the social power of the expression "rule of law," that is of the "international rule of law." The great success of this social-mental phenomenon has been noted in recent literature in both legal studies and political science.¹⁹⁶ One may get a sense of the popularity of the international rule of law language from the outcome document of the 2005 World Summit, where some 170 heads of state and government met for a high-level plenary meeting at the 60th session of the United Nations General Assembly.¹⁹⁷ The terminology of the "rule of law" is found no less than 12 times, including in the first section on "values and principles," as well as under the headings of development, human rights, and investments. There is even a specific section on the rule of law, in which the states recognise "the need for universal adherence to and implementation of

the rule of law at both the national and international level." Furthermore, it advocates the creation of a rule of law assistance unit within the Secretariat, "so as to strengthen United Nations activities to promote the rule of law, including through technical assistance and capacity-building."

Interestingly, two of the three papers I discussed on the panel entitled "The Wider Frontiers of the Rule of Law — European and Global Perspectives," at the conference "Relocating the 'Rule of Law,'" held at the European University Institute, in Florence, on 8-9 June 2007, invoked the social role plaid by the expression. Neil Walker, for instance, says at the outset of his piece, "The Rule of Law and the EU: Necessity's Mixed Virtue," that he is primarily interested in the social application of the rule of law in the supranational context; he speaks throughout of the use-value of the concept, in particular of five distinct functional dimensions, namely regulation, authorization, instrumentalization, identification, and promotion. In the end, after recalling that the rule of law is far from redundant at the supranational level, especially at the regulatory level, he argues that its other use-values and, in particular its instrumental capacity, may prove extremely relevant for the European Union's constitutional turn.198

Friedrich Kratochwil, for his part, refers to the complex language game of the rule of law (where, at stake, is the speech-act of public authority) and to the rule of law argument in international political discourse in his paper "Has the 'Rule of Law' Become a 'Rule of Lawyers'? — An Inquiry into the Use and Abuse of an Ancient Topos in Contemporary Debates." He starts from the Wittgensteinian notion that the meaning of a concept like the rule of law is not its reference but its use. He opines that, like the language of human rights, the invocation of the rule of law serves as trumps in the discursive strategies to legitimise and de-legitimize particular policies and institutional arrangements. Nobody can be against virtues, right?; a dogmatic feature I also find troubling with the expression "rule of law." Kratochwil's main argument is that the terminology of the rule of law (what he calls the topos of the rule of law) is exported internationally to address entirely different issues than those for which it was originally developed nationally; inter alia, he feels that the "international rule of law" is part of a messianic universalistic project of human rights, about which he has strong reservations.

On the rhetorical front (and on a lighter note to close), Kratochwil ought to be credited for a few outstanding quotes, such as the one where, speaking of the alleged necessity to adjust the meaning of the rule of law in the modern context of the war on terror, he writes this: "one of the fastest ways to nowhere is to get caught in misplaced dichotomies." But as far as the expression "rule of law" is concerned, I venture to say in conclusion that the general consensus is that the international version has got strong semiotic legs and that it is indeed going places.199

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198 Also, on the symbolic effects of political and legal processes, particularly constitutionalisation, see from the same author, N. Walker, "Big 'C' or small 'c'?" (2006) 12 European Law Journal 12.

199 To paraphrase the opening remarks of the cult TV-series of my generation: "To boldly go where no concept has gone before."