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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. Tamanaha¹*

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.² 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.³ 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,⁴ including international society, the society of all societies.⁵

¹ B.Z. Tamanaha, *On the Rule of Law — History, Politics, Theory* (Cambridge: Cambridge University Press, 2004), 3.

² On the role of language, especially in the context of international law, see S. Beaulac, *The Power of Language in the Making of International Law — The Word Sovereignty in Bodin and Vattel and the Myth of Westphalia* (Leiden & Boston: Martinus Nijhoff, 2004).

³ This borrows from the *speech-act theory* of J.L. Austin, *How to do Things with Words* (Oxford: Clarendon Press, 1962).

⁴ On the creation and transformation of human constructed reality through the use of language, see L. Wittgenstein, *Tractatus Logico-Philosophicus* (London: Routledge & Kegan Paul, 1961); and L. Wittgenstein, *Philosophical Investigations* (Oxford: Basil Blackwell, 1958); as well as C.K. Ogden and I.A. Richards, *The Meaning of Meaning — A Study of the Influence of Language upon Thought and of the Science of Symbolism*, 2nd ed. (London: Kegan Paul, 1927).

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 old⁶ — going as far back as Plato and Aristotle⁷ — the emergence of the rule of law as a mighty discursive tool within political and legal circles is relatively recent.⁸ The phrase itself was actually coined by 19th century British author Albert Venn Dicey,⁹ in his masterpiece *Introduction to the Study of the Law of the Constitution*.¹⁰ 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*,¹¹ Paul Johnson, referred to the establishment of the rule of law within nation states as "the most important political development of the second millennium."¹² 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."¹³ More prudently, Brian Tamanaha opined that the first project, the rule of law nationally, "remains a work in progress,"¹⁴ while the second one, the rule of law internationally, "has only just begun."¹⁵ 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 Kratochwil¹⁶ and Neil Walker¹⁷ (though not so much that by Kalypso Nicolaidis and Rachel Kleinfeld¹⁸), commented upon at the workshop entitled "Relocating the 'Rule of Law.'"¹⁹

⁶ See J.N. Shklar, "Political Theory and the Rule of Law", in A.C. Hutchinson & P. Monahan (eds.), *The Rule of Law: Ideal or Ideology* (Toronto: Carswell, 1987), 1.

⁷ Cf. Plato, *The Laws*, trans. by T.J. Saunders (London: Penguin Classics); and Aristotle, *Politics*, trans. by T.A. Sinclair (London: Penguin Classics). See also J. Coleman, *A History of Political Thought: From Ancient Greece to Early Christianity* (Oxford: Blackwell, 2000); and J.W. Jones, *The Law and Legal Theory of the Greeks* (Oxford: Clarendon Press, 1956).

⁸ See J. Rose, "The Rule of Law in the Western World: An Overview" (2004) 35 *Journal of Social Philosophy* 457, at 457.

⁹ See H.W. Arndt, "The Origins of Dicey's Concept of the 'Rule of Law'" (1957) 31 *Australian Law Journal* 117.

¹⁰ A.C. Dicey, *Introduction to the Study of the Law of the Constitution* (London: Macmillan, 1885).

¹¹ P. Johnson, *The Renaissance: A Short History* (New York: Modern Library, 2000).

¹² P. Johnson, "Laying Down the Law — Britain and America led the Way in Establishing Legal Regimes Based on Universal Principles," *Wall Street Journal*, 10 March 1999, A22.

¹³ *Ibid.*

¹⁴ B.Z. Tamanaha, *supra* note 1, at 127.

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?"

¹⁹ 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,²⁰ 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.²¹ His conception is well known and largely accepted; it has also been analysed and criticised from a variety of different angles,²² 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."²³ First, the expression means "the absolute supremacy or predominance of regular law as opposed to the influence of arbitrary power."²⁴ 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.²⁵

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."²⁶ 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.²⁷

²⁰ Similarly, writers on "sovereignty," another immensely powerful yet highly polysemous word, usually begin their historical analysis with an author that is credited to having articulated the modern understanding of the concept, namely Jean Bodin, with his work *Les six Livres de la Republique* (Paris: Jacques du Puys, 1583), translated by R. Knolles, *The Six Bookes of a Commonweale* (London: Impensis G. Bishop, 1606). See also S. Beaulac, "The Social Power of Bodin's 'Sovereignty' and International Law" (2003) 4 *Melbourne Journal of International Law* 1; and S. Beaulac, "Le pouvoir sémiologique du mot 'souveraineté' dans l'œuvre de Bodin" (2003) 16 *International Journal for the Semiotics of Law* 45.

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 Marshall?" (2006) 6 *Oxford University Commonwealth Law Journal* 77.

²² See, *inter alia*, I. Stewart, "Men of Class: Aristotle, Montesquieu and Dicey on 'Separation of Powers' and 'The Rule of Law'" (2004) 4 *Macquarie Law Journal* 187; B.J. Hibbits, "The Politics of Principle: Albert Venn Dicey and the Rule of Law" (1994) 23 *Anglo-American Law Review* 1; P. McAuslan & J.F. McDowney (eds.), *Law, Legitimacy and the Constitution: Essays Marking the Centenary of Dicey's Law of the Constitution* (London: Sweet & Maxwell, 1985), and R.A. Cosgrove, *The Rule of Law: Albert Venn Dicey, Victorian Jurist* (London: Macmillan, 1980).

²³ A.C. Dicey, *Introduction to the Study of the Law of the Constitution*, 10th ed. (London: Macmillan, 1961), at 202.

²⁴ *Ibid.*

²⁵ *Ibid.*, at 188.

²⁶ *Ibid.*, at 202.

²⁷ *Ibid.*, at 193 [footnotes omitted].

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."²⁸ 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.²⁹

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.³⁰ As Paul Craig pointed out, however, this "is not what Dicey actually said."³¹ 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.³² This point is important because "Dicey's third limb of the rule of law is no more substantive than the previous two,"³³ as Craig put it. "It no more demands the existence of certain specific substantive rights than do the earlier limbs of his formulation."³⁴

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 or another, are found in the scholarship of most modern authors who wrote on the question, be it in legal studies or political science.³⁵

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.'"

³¹ P. Craig, "Formal and Substantive Conception of the Rule of Law: An Analytical Framework" [1997] *Public Law* 467, at 473.

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 uncertainty of the concept, with Joseph Raz famously calling the rule of law a mere slogan;³⁶ borrowing from Walter Gallie,³⁷ one author suggested it was an "essentially contested concept."³⁸ 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.³⁹

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."⁴⁰

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).⁴¹ 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

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."

³⁷ G.A. Gallie, "Essentially Contested Concepts" (1955-1956) 56 *Proceedings of the Aristotelian Society* 167.

³⁸ See J. Waldron, "Is the Rule of Law an Essentially Contested Concept (in Florida)?" (2002) 21 *Law and Philosophy* 137. See also F. Lovett, "A Positivist Account of the Rule of Law" (2002) 27 *Law and Social Inquiry* 41, at 63-64, who speaks of the rule of law in terms of the indeterminacy thesis.

³⁹ J.N. Shklar, *supra* note 6, at 1. See also R. Fallon, "'The Rule of Law' as a Concept in Constitutional Discourse" (1997) *Columbia Law Review* 97.

⁴⁰ G.P. Fletcher, *Basic Concepts of Legal Thought* (New York: Oxford University Press, 1996), at 11. See also T.A.O. Endicott, "The Impossibility of the Rule of Law" in T.A.O. Endicott, *Vagueness in Law* (Oxford: Oxford University Press, 2000), 185.

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

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).⁴²

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 task, 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.⁴³

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,⁴⁴ 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.⁴⁵

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.⁴⁶

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."⁴⁷

⁴² B.Z. Tamanaha, *supra* note 1, at 91 *ff.*

⁴³ J. Raz, *supra* note 36, at 211. See also D. Kairys, "Searching for the Rule of Law" (2003) 36 *Suffolk University Law Review* 307.

⁴⁴ See R. Summers "A Formal Theory of the Rule of Law" (1993) 6 *Ratio Juris* 12.

⁴⁵ See M. Stone, "Formalism," in J. Coleman & S. Shapiro (eds.), *The Oxford Handbook of Jurisprudence* (Oxford: Oxford University Press, 2002), 166. See also F. Schauer, "Formalism" (1988) 97 *Yale Law Journal* 509.

⁴⁶ F.A. Hayek, *The Road to Serfdom* (London: Routledge, 1944), at 54.

⁴⁷ F.A. Hayek, *The Political Idea of the Rule of Law* (Cairo: National Bank of Egypt, 1955), at 34.

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.⁴⁸ 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.⁴⁹ Borrowing Jeremy Waldron's image, this is "a sort of laundry list of features that a healthy legal system should have."⁵⁰ 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.⁵¹

Going back to Joseph Raz,⁵² 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.⁵³ 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."⁵⁴ In his more recent writings on the subject, in *Ethics in the Public Domain*,⁵⁵ Raz spoke of the rule of law quite singularly in terms of the "principled faithful application of the law."⁵⁶

* * *

⁴⁸ L. Fuller, *The Morality of Law*, 2nd ed. (New Haven: Yale University Press, 1969).

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."

⁵⁵ J. Raz, *Ethics in the Public Domain — Essays on the Morality of Law and Politics* (Oxford: Clarendon Press, 1994).

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."⁵⁷ 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?⁵⁸ 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.⁵⁹ 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.⁶⁰ 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.⁶¹ 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

⁵⁷ E.C.S. Wade (ed.) in his introduction to the 10th edition of Dicey's *Introduction to the Study of the Law of the Constitution*, *supra* note 23, at cx.

⁵⁸ Literally, "making something external."

⁵⁹ See S. Beaulac, "Bodin, Jean," in J.J. McCusker (ed.), *History of World Trade since 1450*, vol. 1 (Farmington Hills: Thomson-Gale, 2005), 68. See also J. Ziller, "Sovereignty in France: Getting rid of the *Mal de Bodin*," in N. Walker (ed.), *Sovereignty in Transition — Essays in European Law* (Oxford & Portland: Hart Publishing, 2003), 261.

⁶⁰ See S. Beaulac, "Emer de Vattel and the Externalization of Sovereignty" (2003) 5 *Journal of the History of International Law* 237.

⁶¹ On the value of comparative analysis in international legal study, see V.G. Curran, "Dealing in Difference: Comparative Law's Potential for Broadening Legal perspectives" (1998) 46 *American Journal of Comparative Law* 657; R.J. Coombe, "The Cultural Life of Things: Anthropological Approaches to Law and Society in Conditions of Globalization" (1995) 10 *American University Journal of International Law and Policy* 791; and J. Hill, "Comparative Law, Law Reform and Legal Theory" (1989) 9 *Oxford Journal of Legal Studies* 101.

law,⁶² to legal subjects,⁶³ and to compliance.⁶⁴ 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.⁶⁵ 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."⁶⁶ 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.⁶⁷ 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."⁶⁸ 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.⁶⁹ 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,"⁷⁰ 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"⁷¹ Albeit put in positivist legal terms, and thus open to possible strong

⁶² See D.B. Hollis, "Why State Consent Still Matters — Actors, Treaties, and the Changing Sources of International Law" (2005) 23 *Berkeley Journal of International Law* 137; and A.E. Roberts, "Traditional and Modern Approaches to Customary International Law: A Reconciliation" (2001) 95 *American Journal of International Law* 757. See also the highly critical piece by P. Weil, "Towards Relative Normativity in International Law?" (1983) 77 *American Journal of International Law* 413.

⁶³ See the classics by R. Higgins, "Conceptual Thinking about the Individual in International Law" (1978) 24 *New York Law School Law Review* 11; and M.S. Korowicz, "The Problem of the International Personality of Individuals" (1956) 50 *American Journal of International Law* 533.

⁶⁴ See C. Schulte, *Compliance with Decisions of the International Court of Justice* (Oxford & New York: Oxford University Press, 2004); and A. Azar, *L'exécution des décisions de la Cour internationale de justice* (Brussels: Bruylant, 2003).

⁶⁵ M. Kumm, "International Law in National Courts: The International Rule of Law and the Limits of the Internationalist Model" (2003-2004) 44 *Virginia Journal of International Law* 19.

⁶⁶ *Ibid.*, at 22.

⁶⁷ See *supra* footnotes 44-45 and accompanying text.

⁶⁸ M. Kumm, *supra* note 65, at 22.

⁶⁹ See T.M. Franck, *Fairness in International Law and Institutions* (New York: Oxford University Press, 1995), who speaks of the post-ontological era of international law.

⁷⁰ R. Jennings & A. Watts, *Oppenheim's International Law*, vol. 1, 9th ed. (London: Longman, 1992), at 12-13.

⁷¹ *Ibid.*

objections,⁷² 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*.⁷³ 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,⁷⁴ with standards that allow a good dose of "open texture" in legislative language, to borrow from Hart.⁷⁵ 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),⁷⁶ 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.⁷⁷

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."

⁷⁴ On the void for vagueness doctrine in Canada, see S. Beaulac, "Les bases constitutionnelles de la théorie de l'imprécision: partie d'une précaire dynamique globale de la Charte" (1995) 55 *Revue du Barreau* 257.

⁷⁵ H.L.A. Hart, "Positivism and the Separation of Law and Morals" (1957-1958) 71 *Harvard Law Review* 593; and, generally, H.L.A. Hart, *The Concept of Law* (Oxford: Clarendon Press, 1961). See also L. Williams, "Language and the Law" (1945) 61 *Law Quarterly Review* 71.

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."

⁷⁷ A. Watts, "The International Rule of Law" (1993) 36 *German Yearbook of International Law* 15, at 28.

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,⁷⁸ international economic law,⁷⁹ international labour law,⁸⁰ international humanitarian law,⁸¹ international law of the sea,⁸² the international law of state responsibility,⁸³ and international criminal law.⁸⁴

⁷⁸ The main normative sources are relatively clear and readily accessible; the most important ones at the international (non-regional) level are: *International Covenant on Civil and Political Rights*, 999 U.N.T.S. 171, entered into force 23 March 1976; *International Covenant on Economic, Social and Cultural Rights*, 993 U.N.T.S. 3, entered into force 3 January 1976; *International Convention on the Elimination of All Forms of Racial Discrimination*, 660 U.N.T.S. 195, entered into force 4 January 1969; *Convention on the Elimination of All Forms of Discrimination Against Women*, 1249 U.N.T.S. 13, entered into force 3 September 1981; *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, U.N. Doc. A/39/51 (1984), entered into force 26 June 1987; and *Convention on the Rights of the Child*, U.N. Doc. A/44/49 (1989), entered into force 2 September 1990. See also W.A. Schabas & S. Beaulac, *International Human Rights and Canadian Law — Legal Commitment, Implementation and the Charter*, 3rd ed. (Toronto: Thomson Carswell, 2007). See also the following website: <http://www.un.org/rights/>

⁷⁹ At the universal level, it is the World Trade Organization (WTO) regime that provides for the main normative sources of international economic law. The instruments are: *Agreement Establishing the World Trade Organization*, 1867 U.N.T.S. 154, entered into force 1 January 1995; *Agreement on Subsidies and Countervailing Measures*, 1867 U.N.T.S. 14, entered into force 1 January 1995; *Agreement on Trade-Related Investment Measures*, 1868 U.N.T.S. 186, entered into force 1 January 1995; *General Agreement on Tariffs and Trade (GATT 1994)*, 1867 U.N.T.S. 187, entered into force 1 January 1995; *General Agreement on Tariffs and Trade (GATT 1947)*; 55 U.N.T.S. 194, 1 January 1948; *General Agreement on Trade in Services*, 1869 U.N.T.S. 183, entered into force 1 January 1995; and *WTO Agreement on the Application of Sanitary and Phytosanitary Measures*, 1867 U.N.T.S. 493, entered into force 1 January 1995. See also the following website: <http://www.wto.org/>

⁸⁰ The principal institution in the field, the International Labour Organization, has adopted eight so-called fundamental conventions: *Convention Concerning Forced or Compulsory Labour, 1930 (ILO Convention No. 29)*, 39 U.N.T.S. 55, entered into force 1 May 1932; *Convention Concerning Freedom of Association and Protection of the Right to Organise, 1948 (ILO Convention No. 87)*, 68 U.N.T.S. 17, entered into force 4 July 1950; *Convention Concerning the Application of the Principles of the Right to Organise and to Bargain Collectively, 1949 (ILO Convention No. 98)*, 96 U.N.T.S. 257, entered into force 18 July 1951; *Convention Concerning Equal Remuneration for Men and Women for Work of Equal Value, 1951 (ILO Convention No. 100)*, 165 U.N.T.S. 303, entered into force 23 May 1953; *Convention Concerning the Abolition of Forced Labour, 1957 (ILO Convention No. 105)*, 320 U.N.T.S. 291, entered into force 17 January 1959; *Convention Concerning Discrimination in Respect of Employment and Occupation, 1958 (ILO Convention No. 111)*, 363 U.N.T.S. 31, entered into force 15 June 1960; *Convention Concerning Minimum Age for Admission to Employment, 1973 (ILO Convention No. 138)*, 1015 U.N.T.S. 297, entered into force 16 June 1976; *Convention Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour, 1999 (ILO convention No. 182)*, 38 I.L.M. 1207, entered into force 19 November 2000. See also the following website: [http://www.ilo.org/global/lang--en/index.htm](http://www.ilo.org/global/lang-en/index.htm)

⁸¹ Conventional international law in this area is essentially comprised of the four Geneva conventions: *Geneva Convention Relative to the Treatment of Prisoners of War*, 75 U.N.T.S. 135, entered into force 21 October 1950; *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, 75 U.N.T.S. 31, entered into force 21 October 1950; *Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea*, 75 U.N.T.S. 85, entered into force 21 October 1950; *Geneva Convention Relative to the Protection of Civilian Persons in Time of War*, 75 U.N.T.S. 287, entered into force 21 October 1950. Customary international humanitarian law was the object of a detailed study by the International Committee of the Red Cross: J.-M. Henckaerts and L. Doswald-Beck (ed.), *Customary International Humanitarian Law*, 2

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."⁸⁵

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.*"⁸⁶ 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>

⁸² The normative regime has been codified in the 1970s, based on the work of the International Law Commission, in the *United Nations Convention on the Law of the Sea*, 1833 U.N.T.S. 3, entered into force 16 November 1994. See also the following website: <http://www.un.org/Depts/los/index.htm>

⁸³ For the applicable law, see the International Law Commission's *Articles on Responsibility of States for Internationally Wrongful Acts*, 2001 I.L.C. Report, U.N. Doc. A/56/10, endorsed by United Nations General Assembly 56/83, U.N. Doc. A/RES/56/83 (2001). See also the following website: http://www.lcil.cam.ac.uk/projects/state_responsibility_document_collection.php

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>

⁸⁵ *Island of Palmas* case (1928), 2 R.I.A.A. 829, at 838. See also A. Carty, "Sovereignty in International Law: A Concept of Eternal Return," in L. Brace & J. Hoffman (eds.), *Reclaiming Sovereignty* (London and Washington: Pinter, 1997), 101; and H. Wheaton, *History of the Law of Nations in Europe and America — From the Earliest Times to the Treaty of Washington, 1842* (New York: Gould Banks, 1845), at 27.

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: Horth-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.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.⁸⁸

3.2 Adequate Creation and Equal Application of Legal Norms

Many international legal scholars, including perhaps Mattias Kumm,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.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.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*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).⁹³ The general principles of law are of less interest also because, by definition,⁹⁴ they are

⁸⁷ A. Watts, *supra* note 77, at 33.

⁸⁸ *Ibid.*, at 23. See also W. Jenks, *The Prospects of International Adjudication* (London: Stevens, 1964), at 757.

⁸⁹ M. Kumm, *supra* note 65.

⁹⁰ J. Raz, *supra* note 36, at 215.

⁹¹ 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*, 23rd ed. (London: LexisNexis, 2004).

⁹² *Supra* note 77.

⁹³ 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: Imbroglia, Lord Denning, *Stare Decisis*", in C.P.M. Waters (ed.), *British and Canadian Perspectives on International Law*, (Leiden: Martinus Nijhoff, 2006), 379, at 392.

⁹⁴ 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.

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*.⁹⁵ Some 108 states have ratified the *Vienna Convention*,⁹⁶ 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.⁹⁷ In short, it is one of the most universal international instruments, second perhaps only to the *Charter of the United Nations*.⁹⁸ 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.⁹⁹ 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.¹⁰⁰

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*,¹⁰¹ 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*,¹⁰² 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;¹⁰³ in fact, not only the UN, but also domestic legal agencies in many states make treaties easily accessible to the public.¹⁰⁴ 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."¹⁰⁵

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

⁹⁵ *Supra* note 77.

⁹⁶ As of 1 January 2007.

⁹⁷ See M.N. Shaw, *International Law*, 5th ed. (Cambridge: Cambridge University Press, 2003), at 633.

⁹⁸ *Charter of the United Nations*, (not published in the U.N.T.S.) Can. T.S. 1945 No. 7, entered into force 24 October 1945.

⁹⁹ *Supra* note 73.

¹⁰⁰ On the rule of law-related shortcomings at the domestic level in states around the world, see the third instalment of World Bank studies, by D. Kaufmann, A. Kraay & M. Mastruzzi, "Governance Matters III: Governance Indicators for 1996-2002" (2002) *World Bank Policy Research Working Paper* 3106, http://siteresources.worldbank.org/INTWBIGOVANTCOR/Resources/govmatters3_wber.pdf

¹⁰¹ *Supra* note 98.

¹⁰² *Supra* note 73.

¹⁰³ See the following web site: <http://untreaty.un.org/>

¹⁰⁴ For example, in Canada, the following web site: <http://www.treaty-accord.gc.ca/>

¹⁰⁵ A. Watts, *supra* note 77, at 29.

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).¹⁰⁶ 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 conclusions¹⁰⁷) 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;¹⁰⁸ everywhere else was basically *terra nullius*, available for colonisation or other forms of territorial exploitation.¹⁰⁹ 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.¹¹⁰ 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.¹¹¹ 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

¹⁰⁶ The classic judicial pronouncement on these issues of legal personality is the advisory opinion by the International Court of Justice in *Reparation for Injuries Suffered in the Service of the United Nations*, (1949) I.C.J. Reports 174. See also, generally, N. Mugerwa, "Subjects of International Law" in M. Sørensen (ed.), *Manual of Public International Law* (London: Macmillan, 1968), 247.

¹⁰⁷ International human rights instruments, for instance, that benefit individuals within states, they provide for equality before the law: see *Universal Declaration of Human Rights*, G.A. Res. 217 A (III) U.N. Doc. A/810 (1948), at articles 7 and 10; *International Covenant on Civil and Political Rights*, (1976) 999 U.N.T.S. 171, entered into force 23 March 1976, at articles 14(1), 14(3) and 26; *American Convention on Human Rights*, (1979) 1144 U.N.T.S. 123, entered into force 18 July 1978, at article 24.

¹⁰⁸ See A. Orakhelashvili, "The Idea of European International Law" (2006) 17 *European Journal of International Law* 315, at 336-338. See also, generally, W.G. Grewe, *The Epochs of International Law*, new ed. (Berlin & New York: Walter de Gruyter, 2000); and E. Nys, *Les origines du droit international* (Brussels: Castaigne, 1894).

¹⁰⁹ See, generally, R.A. Williams, *The American Indians in Western Legal Thought: The Discourse of Conquest* (New York: Oxford University Press, 1990); C.H. Alexandrowicz, *The European-African Confrontation — A Study in Treaty-Making* (Leiden: Sijthoff, 1973); C.H. Alexandrowicz, *An Introduction to the History of the Law of Nations in the East Indies, 16th, 17th and 18th Centuries* (Oxford: Clarendon Press, 1967); M.F. Lindley, *The Acquisition and Government of Backward Territories in International Law* (London: Longmans, Green, 1926); and J.A. Hobson, *Imperialism: A Study* (New York: Pott, 1902).

¹¹⁰ See, generally, M. Koskenniemi, *The Gentle Civilizer of Nations* (Cambridge: Cambridge University Press).

¹¹¹ See M. Koskenniemi, "International Law in Europe: Between Tradition and Renewal" (2005), 16 *European Journal of International Law* 113; and, generally, A. Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge: Cambridge University Press, 2005).

scholarship on the subject,¹¹² that all states of the international community, although (like human beings) not at all equal in absolute terms,¹¹³ stand equally within the normative system.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.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."¹¹⁶

Since the *Charter of the United Nations*,¹¹⁷ we speak of the *sovereign equality* of states,¹¹⁸ which constitutes one of the seven principles of the organisation found in article 2.¹¹⁹ 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*,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

¹¹² See P.H. Kooijmans, *The Doctrine of the Legal Equality of States: An Inquiry into the Foundations of International Law* (Leyden: Sythoff, 1964).

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, *The Inequality of Nations* (New York: Basic Books, 1977).

¹¹⁴ See B. Kingsbury, "Sovereignty and Inequality" (1998) 9 *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].

¹¹⁵ E. de Vattel, *The Law of Nations; or, Principles of the Law of Nature, applied to the Conduct and Affairs of Nations and Sovereigns*, trans. by J. Chitty (Philadelphia: Johnson Law Booksellers, 1863), at lxii. See the original French version, E. de Vattel, *Le Droit des Gens; ou Principes de la loi naturelle appliqués à la conduite & aux affaires des Nations & des Souverains*, vol. 1 (London: n.b., 1758), at 11.

¹¹⁶ E. de Vattel, *Law of Nations*, *ibid.*; E. de Vattel, *Droit des gens*, *ibid.* Interestingly, J.L. Brierly, *The Law of Nations*, 6th ed. (Oxford: Clarendon Press, 1963), at 37, once wrote about Vattel's doctrine of state equality that it was "a misleading deduction from unsound premises."

¹¹⁷ *Supra* note 98.

¹¹⁸ On the origin and the development of the expression "sovereign equality" in international law, see R.A. Klein, *Sovereign Equality Among States: The History of an Idea* (Toronto: Toronto University Press, 1974).

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.

¹²⁰ *Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations*, G.A. Res. 2625 (XXV), U.N. Doc. A/8028 (1970).

equality means that states are "juridically equal,"¹²¹ 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.¹²² 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.¹²³ For instance, landlocked states are not submitted to most of the regime of the 1982 United Nations *Convention of the Law of the Sea*,¹²⁴ 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 coastal states around the world, whether large or small, whether powerful or weak, whether militarily mighty or pacifist. Arthur Watts explicated thus:

[A]ll 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.¹²⁵

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.¹²⁶ 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

¹²¹ The second part of the article reads as follows: "In particular, sovereign equality includes the following elements: (a) States are judicially equal; (b) Each State enjoys the rights inherent in full sovereignty; (c) Each State has the duty to respect the personality of other States; (d) The territorial integrity and political independence of the State are inviolable; (e) Each State has the right freely to choose and develop its political, social, economic and cultural systems; (f) Each State has the duty to comply fully and in good faith with its international obligations and to live in peace with other States."

¹²² On sovereign equality in general, see B. Fassbender, "Sovereignty and Constitutionalism in International Law," in N. Walker (ed.), *Sovereignty in Transition — Essays in European Law* (Oxford & Portland: Hart Publishing, 2003), 115; R.P. Anand, "Sovereign Equality of States in International Law" (1986) 197 *Recueil des Cours* 9; H. Kelsen, "The Principle of Sovereign Equality of States as a Basis for International Organisation" (1944), 53 *Yale Law Journal* 207; and E. DeWitt Dickinson, *The Equality of States in International Law* (Cambridge, U.S.: Harvard University Press, 1920).

¹²³ A. Watts, *supra* note 77, at 31.

¹²⁴ *Convention on the Law of the Sea*, (1982) 1833. U.N.T.S. 396; entered into force 16 November 1994.

¹²⁵ A. Watts, *supra* note 77, at 31.

¹²⁶ Giving the presidential address to the 2003 Annual Meeting of the American Society of International Law, Anne-Marie Slaughter estimated that eight out of ten international lawyers were of the opinion that the American-led invasion of Irak was illegal. For a few examples of opinions from international legal scholars based in the United States, expressed prior to the invasion in the spring of 2003, see M.E. O'Connell, "The Myth of Preemptive Self-Defense" (2002) *ISIL Talk Force on Terrorism*, www.asil.org/taskforce/oconnell.pdf; and T.M. Franck, "When, If Ever, May States Deploy Military Force Without Prior Security Council Authorization?" (2001) 5 *Washington University Journal of Law and Policy* 51. See also the open letter by a group of over thirty law professors from Canada, "Military Action in Iraq without Security Council Authorization would be Illegal" (2002-2003) 34 *Ottawa Law Review* 1.

them, but they are also equal in how they participate in the creation of international normativity.¹²⁷ With respect to treaties, article 6 of the *Vienna Convention on the Law of Treaties*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 *Vienna Convention*, assume that states participate equally in conventional regimes.¹²⁹ As regards customary international law, a similar reasoning based on the ideal of sovereign equality is adopted.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 *opinion juris*, are worth as much in the process of determining whether a custom has formed.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 *Charter of the United Nations*,¹³² and by far the most important in the international legal system. Hence the name "World Court," often used in general media.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

¹²⁷ See N. Krisch, "More Equal than the Rest? Hierarchy, Equality and US Predominance in International Law", in M. Byers & G. Nolte (eds.), *United States Hegemony and the Foundations of International Law* (Cambridge: Cambridge University Press, 2003), 135.

¹²⁸ *Supra* note 73.

¹²⁹ On reservations, see articles 19-23; on the entry into force, articles 24-25; on modifications, articles 39-41; and on termination, articles 42-45.

¹³⁰ See S. Toope, "Powerful but Unpersuasive? The Role of the USA in the Evolution of Customary International Law", in M. Byers & G. Nolte (eds.), *United States Hegemony and the Foundations of International Law* (Cambridge: Cambridge University Press, 2003), 135; and, generally, M. Byers, *Customs, Power and the Power of Rules — International Relations and Customary International Law* (Cambridge: Cambridge University Press, 1999).

¹³¹ See, generally, M.H. Mendelson, "The Formation of Customary International Law" (1998) 272 *Recueil des Cours* 155.

¹³² *Supra* note 98.

¹³³ See S. Rosenne, *The World Court: What it is and How it Works*, 5th ed. (Dordrecht & Boston: Martinus Nijhoff, 1995).

states refuse to follow judicial decisions.¹³⁴ 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*,¹³⁵ an aspect that is explored in more detail later.¹³⁶

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 apex¹³⁷) of which is the International Court of Justice, which can deal with all legal disputes between states.¹³⁸ 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 fields¹³⁹ — has caused much ink to flow as of late in international legal circles,¹⁴⁰ the report on the subject by the International Law Commission, led by Martti Koskenniemi, being the latest manifestation.¹⁴¹ For the present purposes, the risks that the many adjudicative bodies apply international law differently, thus creating "boxes"¹⁴² of normativity or "self-contained regimes,"¹⁴³ 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.

¹³⁴ See, generally, B. Kingsbury, "The Concept of Compliance as a Function of Competing Conceptions of International Law" (1998), 19 *Michigan Journal of International Law* 345.

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.

¹³⁹ See A. Boyle, "The Proliferation of International Jurisdiction and its Implications for the Court," in D.W. Bowett *et al.* (eds.), *The International Court of Justice: Process, Practice and Procedure* (London: British Institute of International and Comparative Law, 1997), 124.

¹⁴⁰ From the now voluminous literature on the subject, see P.-M. Dupuy, "A Doctrinal Debate in the Globalisation Era: On the 'Fragmentation' of International Law" (2007) 1 *European Journal of Legal Studies*, www.ejls.eu/; R. Huesan-Vinaixa, *L'influence des sources sur l'unité et la fragmentation du droit international* (Brussels, Bruylant, 2006); O. Casanova, *Unity and Pluralism in Public International Law* (Leiden & Boston: Martinus Nijhoff, 2001); as well as the papers found in volume 31, number 4, 1999, of the *New York University Journal of International Law and Politics*, from the symposium "The Proliferation of International Tribunals: Piecing Together the Puzzle," held at New York University Law School in October 1998.

¹⁴¹ International Law Commission, "Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law," Report of the Study Group, 58th Session (2006), Doc. A/CN.4/L.682.

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."

¹⁴³ See B. Simma & D. Pulkowski, "Of Planets and the Universe: Self-Contained Regimes in International Law" (2006) 17 *European Journal of International Law* 483.

In theory, the jurisdiction of the International Court of Justice over contentious matters is plenary, as far as states are concerned.¹⁴⁴ With respect to *ratione personae* jurisdiction, article 34(1) of the *Statute of the International Court of Justice*¹⁴⁵ 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,¹⁴⁶ 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.¹⁴⁷ This feature is usually referred to as the lack of compulsory jurisdiction of the International Court of Justice — or any adjudicative body, for that matter¹⁴⁸ — 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.¹⁴⁹ 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."¹⁵⁰

¹⁴⁴ See R.Y. Jennings, "The Role of the International Court of Justice" (1997) 68 *British Yearbook of International Law* 1; J. Collier, "The International Court of Justice and the Peaceful Settlement of Disputes" in M. Fitzmaurice & V. Lowe, *Fifty Years of the International Court of Justice — Essays in Honour of Sir Robert Jennings* (Cambridge: Cambridge University Press, 1995), 364; L. Gross, "The International Court of Justice: Consideration of Requirements for Enhancing Its Role in the International Legal Order," in L. Gross (ed.), *The Future of the International Court of Justice*, vol. 1 (Dobbs Ferry, U.S.: Oceana Publications, 1976), 22; E.I. Hambro, "Some Observations on the Compulsory Jurisdiction of the International Court of Justice" (1948) 25 *British Yearbook of International Law* 133.

¹⁴⁵ *Supra* note 76.

¹⁴⁶ See P.-O. Savoie, "La CIJ, l'avis consultative et la fonction judiciaire: entre decision et consultation" (2005) 42 *Canadian Yearbook of International Law* 35; D. Akande, "The Competence of International Organizations and the Advisory Jurisdiction of the International Court of Justice" (1998) 9 *European Journal of International Law* 437; and T. Sugihara, "The Advisory Function of the International Court of Justice" (1974) 18 *Japanese Annual of International Law* 23.

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."

¹⁴⁸ See, generally, J. Allain, *A Century of International Adjudication — The Rule of Law and its Limits* (The Hague: T.M.C. Asser Press, 2000).

¹⁴⁹ See S. Rosenne, *supra* note 147, at 549-550. See also the speech by Baron Descamps to the First Hague Peace Conference of 1899, regarding the pacific settlement of international disputes, who referred to "A voluntary system of jurisprudence in origin as well as in jurisdiction, it agrees with the just demands of sovereignty, of which it is only an enlightened exercise." — A. Eyffinger, *The 1899 Peace Conference: 'The Parliament of Man, The Federation of the World'* (The Hague, London & Boston: Kluwer Law International, 1999), at 384.

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 *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 or 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 *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 *Supra* note 76.

¹⁵² See F. Orrego Vicuña, "The Legal Nature of the Optional Clause and the Right of a State to Withdraw a Declaration Accepting the Compulsory Jurisdiction of the International Court of Justice," in N. Ando, E. McWhinney & R. Wolfrum (eds.), *Liber amicorum Judge Shigeru Oda* (The Hague: Kluwer Law International, 2002), 463; and J.G. Merrills, "The Optional Clause Today" (1979) 50 *British Yearbook of International Law* 87.

¹⁵³ See S. Torres Bernádez, "Reciprocity in the System of Compulsory Jurisdiction and in Other Modalities of Contentious Jurisdiction Exercised by the International Court of Justice," in E.G. Bello & B.A. Ajibola (eds.), *Essays in Honour of Judge Taslim Olawale Elias — Contemporary International Law and African Law* (Dordrecht: Martinus Nijhoff, 1992), 291.

¹⁵⁴ However, see A. Watts, *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."

¹⁵⁵ See S. Oda, "The Compulsory Jurisdiction of the ICJ: A Myth? — A Statistical Analysis of Contentious Cases" (2000) 49 *International and Comparative Law Quarterly* 251; and J.J. Quintana, "The Nicaragua Case and the Denunciation of Declarations of Acceptance of the Compulsory Jurisdiction of the International Court of Justice" (1998) 11 *Leiden Journal of International Law* 97.

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,¹⁵⁶ including the Security Council.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*¹⁵⁸ in San Francisco,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.¹⁶⁰ But the proposal was rejected. In the case of *Certain Expenses*,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.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."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

¹⁵⁶ See H.K. Hubbard, "Separation of Powers within the United Nations: A Revised Role for the International Court of Justice" (1985) 38 *Stanford Law Review* 165.

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.

¹⁵⁹ See, generally, S. Rosenne, *The Law and Practice of the International Court, 1920-2005*, vol. I, The Court and the United Nations (Leiden & Boston: Martinus Nijhoff, 2006), at 57-60.

¹⁶⁰ United Nations, *Documents of the United Nations Conference on International Organization (San Francisco Conference, 1945)*, vol. 13 (New York: United Nations Information Organizations, 1946), at 645 & 668.

¹⁶¹ *Certain Expenses of the United Nations (Art. 17, paragraph 2, of the Charter)* (1962) I.C.J. Reports 151.

¹⁶² *Ibid.*, at 168.

¹⁶³ *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, (1971) I.C.J. Reports 16, at 45.

irregularities, there is little (in fact, no) chance that the Court exercises a competence of judicial review, especially with respect to the Security Council.¹⁶⁴

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.¹⁶⁵

The *Lockerbie* case¹⁶⁶ 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,¹⁶⁷ some even suggesting that it is an emerging general principle of law,¹⁶⁸ 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."¹⁶⁹ This part of the inquiry may be kept short, however, because virtually nobody questions these attributes with regard to the

¹⁶⁴ See V. Gowlland-Debbas, "Article 7 UN Charter," in A. Zimmermann, C. Tomuschat & K. Oellers-Frahm (eds.), *The Statute of the International Court of Justice — A Commentary* (Oxford: Oxford University Press, 2006), 79, at 98.

¹⁶⁵ 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

¹⁶⁶ *Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie*, Provisional Measures (1992), I.C.J. Reports 1. The *Lockerbie* case discontinued on 10 September 2003 by Order of the Court (2003), I.C.J. Reports 325.

¹⁶⁷ 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."

¹⁶⁸ See E. de Wet, "Judicial Review as an Emerging General Principle of Law and its Implications for the ICJ" (2000) 47 *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.), *Reflections on Emerging International Law: Essays in Memory of Late Subrata Roy Chowdhury* (Bangalore & Calcutta: National Law School of India University, 2004), 127.

¹⁶⁹ A. Watts, *supra* note 77, at 36 [emphasis added].

International Court of Justice.¹⁷⁰ Article 2 of the *Statute of the International Court of Justice*,¹⁷¹ 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."¹⁷² 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.¹⁷³ 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:

Judges [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.¹⁷⁴

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

¹⁷⁰ See G. Guillaume, *La Cour internationale de Justice à l'aube du XXIème siècle — Le regard d'un juge* (Paris: Pedone, 2003), at 120.

¹⁷¹ *Supra* note 76.

¹⁷² The *Rules of Court*, <http://www.icj-cij.org/documents/>, adopted pursuant to article 30 of the *Statute of the International Court of Justice*, provides for the labelling of this declaration, at article 4: "I solemnly declare that I will perform my duties and exercise my powers as judge honourably, faithfully, impartially and conscientiously." See also, generally, S. Rosenne, *Procedure in the International Court: A Commentary on the 1978 Rules of the International Court of Justice* (Boston: Martinus Nijhoff, 1983).

¹⁷³ See G. Guillaume, "De l'indépendance des membres de la Cour internationale de Justice," in B. Boutros-Ghali (ed.), *Amicorum Discipulorumque Liber — Paix, développement, démocratie*, vol. 1 (Brussels: Bruylant, 1998), 475, at 480-481.

¹⁷⁴ R. Higgins, *supra* note 165, at 3.

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;¹⁷⁵ but many suspect that it has to do, certainly more than anything else, with the outcome of cases concerning them.¹⁷⁶ 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,¹⁷⁷ 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.¹⁷⁸ According to article 35(1) of the *Statute of the International Court of Justice*,¹⁷⁹ 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,¹⁸⁰ 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."¹⁸¹ 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

¹⁷⁵ See S. Williams, "Has International Law Hit the Wall?: An Analysis of International Law in Relation to Israel's Separation Barrier" (2006) 24 *Berkeley Journal of International Law* 192; T. Broude, "The Legitimacy of the ICJ's Advisory Competence in the Shadow of the Wall" (2005) 38 *Israel Law Review* 189; M. Pomerance, "The ICJ's Advisory Jurisdiction and the Crumbling Wall between the Political and the Judicial" (2005) 99 *American Journal of International Law* 26; P.M. Norton, "The Nicaragua Case: Political Questions before the International Court of Justice" (1987) 27 *Virginia Journal of International Law* 459; and R.F. Turner, "Peace and the World Court: A Comment on the Paramilitary Activities Case" (1987) 20 *Vanderbilt Journal of Transnational Law* 53. See also, generally, L.F. Damrosch (ed), *The International Court of Justice at a Crossroads* (Dobbs Ferry, U.S.: Transnational Publishers, 1987).

¹⁷⁶ The cases in question are: *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States)*, (1986) I.C.J. Reports 14; and *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion*, (2004) I.C.J. Reports 172.

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

¹⁸² L. Henkin, *How Nations Behave*, 2nd ed. (New York: Columbia University Press, 1979), at 47.

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."

¹⁸⁶ See C. Paulson, "Compliance with Final Judgments of the International Court of Justice Since 1987" (2004) 98 *American Journal of International Law* 434.

¹⁸⁷ *Supra* note 98.

¹⁸⁸ S. Rosenne, *supra* note 159, at 205.

¹⁸⁹ G.A. Ajibola, "Compliance with Judgments of the International," in M.K. Bulterman & M. Kuijer (eds.), *Compliance with Judgments of International Court — Proceedings of the Symposium Organised in Honour of Professor Henry G. Schermers by Mordenate College and the Department of International Public Law* (The Hague: Martinus Nijhoff, 1996), 9, at 11. See also S.K. Kapoor, "Enforcement of

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

Judgments and Compliance with Advisory Opinions of the International Court of Justice," in R.P. Dhokalia & B.C. Normal (eds.), *International Court in Transition: Essays in Memory of Professor Dharma Pratap* (Allahabad, India: Chugh, 1995), 301, at 302; and M.E. O'Connell, "The Prospects for Enforcing Monetary Judgments of the International Court of Justice: A Study of Nicaragua's Judgment Against the United States" (1990) 30 *Virginia Journal of International Law* 891, at 901.

¹⁹⁰ See M. Al-Qahtani, "The Role of the International Court of Justice in the Enforcement of Its Judicial Decisions" (2002) 15 *Leiden Journal of International Law* 781; E. Kerley, "Ensuring Compliance with Judgments of the International Court of Justice," in L. Gross (ed.), *The Future of the International Court of Justice*, vol. 1 (Dobbs Ferry, U.S.: Oceana Publications, 1976), 276; and O. Schachter, "The Enforcement of International Judicial and Arbitral Awards Decisions" (1960) 53 *American Journal of International Law* 1.

¹⁹¹ *Supra* note 98.

¹⁹² See A. Tanzi, "Problems of Enforcement of Decisions of the International Court of Justice and the Law of the United Nations" (1995) 6 *European Journal of International Law* 539.

¹⁹³ K. Oellers-Frahm, "Article 94 UN Charter," in A. Zimmermann, C. Tomuschat & K. Oellers-Frahm (eds.), *The Statute of the International Court of Justice — A Commentary* (Oxford: Oxford University Press, 2006), 159, at 175.

¹⁹⁴ See S.M. Schwebel, "Commentary: Compliance with Judgments of the International Court of Justice," in M.K. Bulterman & M. Kuijer (eds.), *Compliance with Judgments of International Court — Proceedings of the Symposium Organised in Honour of Professor Henry G. Schermers by Mordenate College and the Department of International Public Law* (The Hague: Martinus Nijhoff, 1996), 39, at 40.

¹⁹⁵ Interestingly, this claim seems not to be novel: see J.-Y. Morin, "L'État de droit: émergence d'un principe du droit international" (1995) 255 *Recueil des Cours* 9.

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

¹⁹⁶ See, for instance, D. Jacobs, "The Rule of International Law" (2006-2007) 30 *Harvard Journal of Law and Public Policy* 15; and B. Zangl, "Is there an Emerging International Rule of Law?" (2005) 13 (suppl. 1) *European Review* 73. See also the Chinese Government's statement on the rule of law at the national and international levels, reported by Duan J. in (2007) 6 *Chinese Journal of International Law* 185.

¹⁹⁷ United Nations, *World Summit Outcome*, G.A. Res. 60/1 (2005), www.un.org/summit2005/

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-legitimise 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

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."