

What's in a Name? The International Rule of Law and the United Nations Charter

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Abstract

In the past twenty years or so, the concept of the rule of law, cherished for centuries as a constitutional principle in a domestic legal context, has attracted much attention from international lawyers and international organizations. In particular, the United Nations has devoted substantial effort and time to studying and defining the international dimension of the concept, to concretizing specific legal consequences, and to applying the concept to its own mandate and work, especially in the area of the maintenance of international peace and security. Against this background, the present article enquires into the relationship between the concept of an international rule of law as advanced by the United Nations and the UN Charter. To what extent can the concept be said to be inherent in the Charter, although the term itself does not appear in its text? Comparing the original design of the Charter with the rule of law as developed by the UN, the article observes a progressive expansion of the concept in several dimensions, but at the same time its persistent vagueness.

I. Introduction

1. This article seeks to shed light on the relationship between the concept of the rule of law and the Charter of the United Nations, adopted in 1945. That relationship, the author believes, is of some interest because for now almost two decades the principal organs of the UN have discussed and relied on the concept and have made a determined effort, in the words of the United Nations Millennium Declaration,

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“to strengthen respect for the rule of law in international as in national affairs”.¹ In that effort, they have constantly referred to the UN Charter although that instrument does not use the term “rule of law”. Is that reference justified, that is, can we say that, while not expressly appearing in the text, the concept is implicitly included in the rules of the Charter? And if there is such an implicit presence of the concept in the founding instrument of the UN, to what extent is the rule of law as promoted by the UN since the Millennium Declaration consistent with the original idea? Does the concept as it is presently understood build on a conception embodied in the Charter, or is it rather something new? And how does it relate to the English common law tradition in which the idea of the rule of law historically originates?

2. In order to answer these questions, this article first turns to the UN Charter, collecting in its articles what can be called traces of the idea of a rule of law (Part II). The results of that quest are modest. In a rather reserved way, the Charter acknowledges, on the one hand, the importance of international law in the relations between States which may be seen as an (albeit thin) expression of a rule of law in international affairs. On the other hand, the Charter includes a commitment to an effective protection of individual human rights by States which the UN shall promote and encourage (Preamble, para.2, and Article 1, para.3). That commitment can be regarded as expression of a rule of law in national affairs (or at the national level).

3. In order to compare this original conception of the Charter with the rule of law as it is today understood by the principal organs of the UN, the article then analyses in some detail the pertinent declarations of the UN General Assembly, in particular the 2005 World Summit Outcome and the Declaration on the Rule of Law at the National and International Levels of 2012 (Part III), and the rule of law in the work of the Security Council (Part IV). The fifth part seeks to draw some conclusions from the preceding analysis. It mainly finds a progressive expansion of the original concept of the rule by the Assembly and, to a lesser extent, the Security Council in several dimensions. First, the present substance of a “rule of law in international affairs” considerably goes beyond the original idea of a “rule of international law”. Second, another expansion relates to the addressees of the concept. While the rule of law of the Charter of 1945 was addressed to States only, the present understanding sees also international organizations, including the UN, as being bound by the concept. Third, as regards the domestic dimension of the rule of law, it today exceeds the obligation of States to observe human rights, and encompasses aspects of the constitutional, administrative and judicial structures of States. However, in the last section of Part V it is explained that, notwithstanding that expansion, the UN concept of a rule of law has remained vague, and that the rule of law as binding on the UN itself so far has only insufficiently been translated into the practice of the Organization, in particular

1 United Nations Millennium Declaration, UN General Assembly Resolution 55/2, 8 September 2000, para.9. See below text accompanying n. 30.

the Security Council. In that regard, the original design of the Charter, with its emphasis on the maintenance of international peace and security, has asserted itself.

4. Having established a persistent indeterminacy of the UN rule of law concept, the article turns to the English common law tradition in which the concept originates (Part VI). This recapitulation of principles generally recognized as together representing the rule of law is not based on the assumption that the UN concept must comply with the English tradition. To the contrary, the UN is free to define and to develop the concept as it thinks best, in the light of its purposes and principles and the present conditions of international affairs. In consideration of “the diversity in the world, and the impassioned disagreement regarding the views of the good life and justice between and among different cultures and civilizations”,² it even seems indispensable for the United Nations to modify and adjust a concept derived from Western tradition to the views and beliefs of non-Western cultures and civilizations. But it is still of interest to compare the common law principles with the present understanding of the concept by the UN, and to apply the standard constituted by those principles to the present state of international law. The article concludes with a voice from the early sixteenth century which reminds us of the long duration of the fight for the rule of law in human relations (Part VII).

II. The rule of law in the UN Charter

5. The text of the Charter of the United Nations of 1945 does not know the term “rule of law”. That, however, does not mean that the concept described by that term is alien to the Charter. “What’s in a name? That which we call a rose / By any other name would smell as sweet”,³ William Shakespeare tells us, and so we may find the concept in the Charter, implicitly or going by a different name.

6. We do not have to search for long. Right at the beginning of the Charter, in the preamble, the Peoples of the United Nations declare to be determined “to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained”.⁴ Justice and respect for international law—is that a different name for the rule of law in international relations? The third paragraph of the preamble draws on the preamble of the Covenant of the League of Nations of 1919 which in relevant parts reads as follows:

The High Contracting Parties,

In order to promote international co-operation and to achieve international peace and security

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- 2 See Sienho Yee, *The Perfect Rule of Law*, in: id., *Towards an International Law of Co-progressiveness* (2004), 41, 46.
 - 3 William Shakespeare, *Romeo and Juliet*, Act II Scene II. See W. Burnett Harvey, *The Challenge of the Rule of Law*, 59 *Michigan Law Review* (1961), 603.
 - 4 UN Charter, preamble, para.3.

[. . .]

by the firm establishment of the understandings of international law as the actual rule of conduct among Governments, and
by the maintenance of justice and a scrupulous respect for all treaty obligations in the dealings of organised peoples with one another,
agree to this Covenant of the League of Nations.⁵

7. In comparison, the Covenant's commitment to international law seems to be stronger than that of the Charter. Expressed in two succeeding paragraphs, it takes up half of the space of the preamble, whereas the Charter merges the respective statements into only one paragraph, of altogether eight paragraphs which open with the word "to". On the other hand, the Covenant sees the respect for international law only as a means to an end, which is the promotion of international cooperation and the achievement of international peace and security. In the Charter, by contrast, the commitment to international law figures equally as one of the several "ends" which the Peoples of the United Nations are determined to accomplish. That particular change was intentional because the South African draft on which the preamble is based still followed the model of the Covenant.⁶ In other words, in the Charter the commitment to international law is equal-ranking with that to international peace and security, human rights, and social progress. To establish conditions under which justice and respect for international law can be maintained is one of the "ends" of the United Nations as proclaimed in the Charter's preamble, while the Covenant only knows of two such ends (international cooperation and international peace and security) which, *inter alia*, shall be promoted by the respect for international law.

8. However, Article 1 of the UN Charter does not confirm the first impression of an upgrading of international law. For here the observance of the rules of international law is not specified as one of the "Purposes of the United Nations". Instead that observance is only mentioned, in paragraph 1, as a means to the end "to maintain

5 Covenant of the League of Nations, preamble, paras.1, 4 and 5. For a commentary and explanation of the drafting history, see Antonios Tzanakopoulos, *Préambule*, in: Robert Kolb (ed.), *Commentaire sur le Pacte de la Société des Nations* (Bruylant 2015), 79-93.

6 "The high contracting parties, *determined* [. . .], *and for these ends* to practice tolerance and to live together in peace with one another as good neighbors, [. . .] By the establishment of conditions under which justice and respect for the obligations of international law and treaties and fundamental human rights and freedoms can be maintained, [. . .] Agree to this Charter of the United Nations." See United States Department of State (ed.), *The United Nations Conference on International Organization: Selected Documents* (United States Government Printing Office 1946), 91.

international peace and security”, just as in the preamble of the League’s Covenant.⁷ On closer examination, the position of international law in Article 1 of the Charter is even weaker than in the Covenant’s preamble because in the latter it is the respect for international law as such which shall contribute to the achievement of international peace and security, while Article 1 of the Charter defines as one of the means to maintain international peace and security “to bring about by peaceful means [. . .] adjustment or settlement of international disputes”, and (only) that adjustment or settlement shall take place “in conformity with the principles of justice and international law”.⁸ The observance of international law is relegated to a secondary role, i.e. a mode of settling international disputes, and what shall be observed is only the “principles” of international law, not the “rules” of international law (or, in the words of the preamble, “the obligations arising from treaties and other sources of international law”). Since thus compliance with international law as such is not a purpose of the United Nations in the meaning of Article 1 of the Charter, it is not a factor to be considered by the General Assembly in the election of non-permanent members of the Security Council in accordance with Article 23, paragraph 1, of the Charter.⁹

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- 7 Chapter I (“Purposes”) of the Dumbarton Oaks Proposals agreed to by the four sponsoring governments of the San Francisco Conference (the Republic of China, the USSR, the UK, and the United States) did not mention international law at all. See *ibid.*, 92. Goodrich and Hambro explained in their commentary that the insertion of the words “in conformity with the principles of justice and international law” at San Francisco was intended to provide a safeguard against the settlement of international questions on the basis of political expediency. “It was intended to avoid such a sacrifice of the rights of smaller nations in the interest of a doubtful peace as was made at Munich [in 1938].” See Leland M. Goodrich and Edvard Hambro, *Charter of the United Nations: Commentary and Documents* (2nd and revised edn., World Peace Foundation 1949), 95.
- 8 As Hans Kelsen noted already in 1946, here “the observance of justice and international law is expressly restricted to a special function of the Organization”. “It is restricted to the bringing about of adjustments or settlement of disputes and situations, not of all disputes or situations, but only of those which might lead to a breach of the peace. Conformity with the principles of justice and international law is not required for other functions of the Organization, especially not for taking ‘effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace,’ the first Purpose of the Organization mentioned in Art. 1, par.1. The phrase, ‘in conformity with the principles of justice and international law,’ was intentionally placed in the second, and not in the first part of this paragraph.” See Hans Kelsen, *The Preamble of the Charter: A Critical Analysis*, 8 *The Journal of Politics* (1946), 134, 155.
- 9 Article 23, paragraph 1, 3rd sentence, of the UN Charter provides that in the election of non-permanent members of the Security Council “due regard” shall be paid “in the first instance, to the contribution of Members of the United Nations to the maintenance of international peace and security *and to the other purposes of the Organization*, and also to equitable geographical distribution”. In the practice of the

9. In Chapter IV of the Charter, entitled “The General Assembly”, international law also does not figure very prominently. The chapter begins with Article 9, yet it appears only in Article 13, after the provisions addressing the powers of the Assembly to consider and to discuss questions relating to the maintenance of international peace and security. Article 13, paragraph 1, then refers to international law as a matter of academic studies, rather remote from the Assembly’s practical functions, and in the context of cooperation of States “in the political field”, which is mentioned in the first place:

The General Assembly shall initiate studies and make recommendations for the purpose of:

- a. promoting international co-operation in the political field and encouraging the progressive development of international law and its codification; [. . .]¹⁰

10. It is in perfect accordance with that modest role accorded to international law in the work of the Assembly that the list of “decisions on important questions” to be made by a two-thirds majority of the members present and voting in Article 18 of the Charter does not include recommendations of the Assembly with respect to international law, adopted under Article 13—different from “recommendations with respect to the maintenance of international peace and security” to which the two-thirds majority rule applies.

11. In the chapters of the Charter about the Security Council and its functions and powers (Chapters V, VI, VII and VIII), the concept of an international order ruled by law is almost completely absent. A trace of it can be detected in Article 33 which, reinforcing the principle pronounced in Article 2, paragraph 3, obliges the parties to a dispute to seek a solution by peaceful means. Judicial settlement is mentioned as one of those means, but only after negotiation, enquiry, mediation, conciliation and arbitration, *i.e.* traditional diplomatic procedures in which considerations of law generally do not play a major role. As Christian Tomuschat noted, “judicial settlement is only one of the many avenues open for peaceful settlement”; and “[n]o State is under an obligation to accept this specific modality of settlement”.¹¹

12. Another trace of the idea of an international rule of law can be found in Article 36 of the Charter, again in Chapter VI, which stipulates that, “[i]n making

General Assembly, the last mentioned criterion has dominated the election process. See Rudolf Geiger, Comment on Art. 23 UN Charter, in: Bruno Simma et al. (eds.), *The Charter of the United Nations: A Commentary* (3rd edn., vol. I, OUP 2012), 751, 755.

10 UN Charter, Art. 13, para.1, lit. a.

11 Christian Tomuschat, Comment on Art. 2, para.3 UN Charter, in: Andreas Zimmermann, Christian Tomuschat et al. (eds.), *The Statute of the International Court of Justice: A Commentary* (2nd edn., OUP 2012), 75, 83.

recommendations under this Article”, that is with respect to the pacific settlement of a particular dispute, “the Security Council should also take into consideration that legal disputes should as a general rule be referred by the parties to the International Court of Justice in accordance with the provisions of the Statute of the Court”. This article could not have been drafted more cautiously: The Council *should* (not shall) take into consideration (that is, think about as a possibility) that legal disputes *should* (not shall) as a general rule (that is to say, there can always be exceptions) be referred by the parties to the ICJ in accordance with the provisions of the ICJ Statute (meaning that the respective parties must have established a basis for the jurisdiction of the Court as provided for in Article 36 of the Statute).

13. A provision inspired by common law notions of due process but very controversial during the negotiations of the Charter is Article 27, paragraph 3, last half sentence, according to which in decisions under Chapter VI and under Article 52, paragraph 3, “a party to a dispute shall abstain from voting”.¹²

14. In Chapter VII, the heart of the powers of the Security Council, and probably the heart of the Charter itself as devised in 1944–45, a reference to international law is made only in Article 51 which emphasizes the existence of an “inherent right of individual or collective self-defence”. Different from the other provisions of the Charter discussed above, international law here is referred to not in order to limit the sphere of action of States but to preserve what was seen and cherished as an established right of sovereign States.

15. The only (albeit brief) chapter of the Charter entirely devoted to international law is Chapter XIV about the International Court of Justice as “the principal judicial organ of the United Nations” (Article 92). However, the reference to “the annexed Statute” of the Court in the same Article includes the well-known limitations of the jurisdiction of the Court which flow from the traditional rule, based on the principle of sovereignty and not called into question by the Charter, that a State’s submission to the jurisdiction of an international court is strictly voluntary. In addition, Article 95 of the Charter expressly says that “[n]othing in the present Charter shall prevent Members of the United Nations from entrusting the solution of their differences to other tribunals”, thus emphasizing that the ICJ does not have a monopoly on judicial settlement.

16. Building on President Woodrow Wilson’s belief in the importance of “open covenants of peace, openly arrived at” (Fourteen Points address of 1918),¹³ and of “open relations between nations” (preamble of the Covenant of the League of Nations), Article 102 of the Charter provides that “[e]very treaty and every international

12 The respective practice of the Council has been inconsistent and uncertain. See Bardo Fassbender, *UN Security Council Reform and the Right of Veto: A Constitutional Perspective* (Kluwer Law International 1998), 190–91.

13 See Address of the President of the United States, delivered at a joint session of the two houses of Congress, 8 January 1918 (Government Printing Office, Washington, D.C., 1918), 5.

agreement entered into by any Member of the United Nations [...] shall as soon as possible be registered with the Secretariat and published by it”, and that “[n]o party to any such treaty or international agreement which has not been registered [...] may invoke that treaty or agreement before any organ of the United Nations”. However, this legal consequence of a non-registration of a treaty or agreement is considerably weaker than that stipulated by Article 18 of the League’s Covenant, namely that “[n]o such treaty or international engagement shall be binding”.

17. The last article to be mentioned in this overview is Article 103, also in the “miscellaneous provisions” chapter of the Charter, according to which “[i]n the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail”. International law which is not in accordance with a rule of the Charter, is the brief but eminent message of this article, must bow to the Charter in case of a conflict.

18. What are the interim findings of our survey of the Charter? We can find, in the text of the Charter, certain expressions of the concept of an international rule of law. But the concept is not spelled out or defined. At the heart of it is the observance of international law by States in their mutual relations, but even this aspect is less prominently enunciated in the Charter than it was in the League of Nations’ Covenant.¹⁴ It is true, the idea that States “shall fulfil in good faith the obligations assumed by them” (Article 2, paragraph 2 of the Charter) is underlying the whole Charter because otherwise the Charter itself, formally adopted as an international treaty, would be without foundation. But that fact is not translated into a more ambitious idea of an international rule of law.

19. The reason for that restraint is the domination of the UN Charter by its principal end “to save succeeding generations from the scourge of war”, expressed in the very first words of the document. The prevention of a war similar to that “which twice in our lifetime has brought untold sorrow to mankind” is the primary goal of the drafters of the Charter in 1944 and 1945, and to this goal everything else is subordinated, including a number of traditional features of international law. In that regard, the wording of the third paragraph of the preamble of the Charter, referred to at the beginning of this article, is telling. The “end” of the United Nations stated there is not justice and respect for international law as such. Rather, the Peoples of the United Nations are said to be determined “*to establish conditions under which* justice and respect for the obligations arising from treaties and other sources of international law can be maintained”.¹⁵ And of those conditions the by far most important one is the absence of war.¹⁶

14 See above text accompanying n. 5.

15 Emphasis added.

16 In the preamble of the Draft Declaration on Rights and Duties of States, adopted by the International Law Commission in 1949, it is stated, *inter alia*, that “a primary

20. The Charter is quite in favour of international relations governed by the rule of law but its primary goal is the prevention of interstate war. To the extent necessary to achieve that goal, law must take second place, just as other values must do. Exactly that is the meaning of Article 103 of the Charter. The instrument does *not* subscribe to the idea expressed in the Latin saying “*Fiat iustitia et pereat mundus*”—Let justice be done, though the world perish.

21. The Charter does not even subscribe to the idea of “peace through law” which was popular in the inter-war period and associated with the institution of the League of Nations.¹⁷ Wilhelm Grewe, a German international lawyer and diplomat, summarized the respective views as follows: “Peace, it was believed, would be secured most effectively by a comprehensive and carefully designed law of war prevention (*Kriegsverhütungsrecht*) combining a compulsory enforcement of the rules of collective security with a prohibition of war and mandatory procedures of peaceful settlement of disputes in the form of arbitration or even judicial decision”.¹⁸ Rightly or wrongly, the drafters of the Charter at least partly attributed the failure of the League to prevent, and then to ward off, the successive aggressions of Japan, Italy, Germany and the Soviet Union to what was to them an illusionary belief in law and legal procedures as a means to maintain world peace.¹⁹ They probably agreed with the sharp criticism of Hans Kelsen’s book *Peace through Law*, that had promoted a compulsory adjudication of international disputes, by an American reviewer: “Dr. Kelsen is a victim of the delusion that law is the creator, rather than the creation, of society. He therefore proposes to build a world order with the greatest of ease by tinkering with the law. [...]”

purpose of the United Nations is to maintain international peace and security, and the reign of law and justice is essential to the realization of this purpose”. See ILC Yearbook 1949, 287. To the drafters of the Charter, that connection was less evident than to the lawyers sitting on the ILC. To the former, the power of the Security Council (that is the combined power of the members of the Council) was by far more essential to the realization of the said purpose than “the reign of law and justice”.

- 17 See Josef L. Kunz, *The Swing of the Pendulum: From Overestimation to Underestimation of International Law*, 44 AJIL (1950), 135, 136, 138: “As far as the attitude toward international law goes, a period of overestimation, so characteristic for the years between the two World Wars, is followed by a period of underestimation. It is, to a great extent, this change of attitude which spells the difference between the League of Nations and the United Nations. [...] Not peace through law, but security through power, became the dominant idea and shaped the thinking as to a new world organization, built upon ‘more realistic bases’ than the League.”
- 18 Wilhelm G. Grewe, *Friede durch Recht?* (Walter de Gruyter, 1985), 20.
- 19 For different explanations of the failure of the League, see, however, James L. Brierly, *The Covenant and the Charter*, 23 BYBIL (1946), 83, 84–85, and Hans J. Morgenthau, *Politics Among Nations: The Struggle for Power and Peace* (Alfred A. Knopf 1948), 373–78.

Peace is a problem of power. When the problem is solved, law will play its customary and useful role within a stable configuration of power relationships. So long as it is unsolved, legalistic formulae will be empty words.”²⁰

22. In a different way, the disappointment in the League was expressed by the Minister of Foreign Affairs of the Republic of China, Dr. T.V. Soong, in his speech in the opening plenary session of the San Francisco Conference:

In the fourteen years of savage warfare since 1931, China has endured every misery that the aggression of a major predatory power can impose. We sought by all means which were then available, in the existing state of international organization, to obtain redress. Inescapably we learned that there was no hope of ultimate safety for any nation without a really effective system of collective security. [. . .] Let us face hard facts. A long effort is required of all of us before an effective rule of law is established in world affairs. We in China know it by bitter experience. The rule of law was to have been defended by the old League of Nations; but it was disregarded, as we learned to our cost, despite the most solemn covenants entered into by would-be defaulters.²¹

23. Broadly speaking, one could say that the Charter favours the rule of law in interstate relations and also in the internal functioning of the United Nations but largely exempts the UN from that rule in the case of a threat to the peace or a breach of the peace. If international law is breached by a State by waging war, the UN shall be able to react effectively in order to restore peace and security, without being bound by the rules of international law in its entirety. In this sense, the Charter establishes different standards of an international rule of law for the behaviour of individual States on the one hand, and the action taken by the United Nations in response to a violation of the rules of the Charter by States on the other hand.

24. However, a different picture emerges when we include in our search for aspects of an international rule of law in the Charter the protection of individual human rights. It is well known that in the preamble of the Charter the commitment to human rights even precedes that to justice and international law:

We the Peoples of the United Nations
determined
[. . .]

20 Frederick L. Schuman, Review of Hans Kelsen, *Peace Through Law* (1944), 39 *American Political Science Review* (1945), 169–70.

21 Address of 26 April 1945. See *The United Nations Conference on International Organization*, above n. 6, 256.

to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small, [. . .].²²

25. Thus, the Charter links the objective of the prevention of war to that of the protection of human rights, and points to several relations of the two objectives: To prevent war means to protect individual rights because in time of war such rights, and “the dignity and worth of the human person”, are always threatened. In other words, it is ultimately because of the rights and the interests of the individual human being that the scourge of war must be ended. Conversely, if human rights in their political, economic and social dimensions are well protected in the several countries, that will reduce the risk of war between those countries. Conditions of stable peace are conducive to an advancement of human rights, and securing human rights will contribute to maintaining international peace.

26. Article 1 of the Charter takes up that idea of a reciprocal reinforcement of peace and human rights: It mentions as the first purpose of the United Nations “to maintain international peace and security”, followed, in paragraph 3, by the purpose “to achieve international co-operation [. . .] in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion”. Article 13 mandates the General Assembly to initiate studies and to make recommendations not only in order to encourage the development of international law but also for the purpose of “assisting in the realization of human rights and fundamental freedoms for all [. . .]”. While here the word “assisting” appears to mean “assisting States”, the language is broader in Article 55, in the chapter on international economic and social cooperation, where it is said that “the United Nations shall promote: [. . .] c. universal respect for, and observance of, human rights and fundamental freedoms for all [. . .]”.²³

27. The commitment of the Charter to the protection of human rights has an international and a national dimension. In the first instance, it is, in the eyes of the drafters, an indispensable element of the new international order built by the Charter. In particular, the protection of human rights is seen as a necessary precondition for the maintenance of international peace. At the same time, that protection is imposed on States as a duty—not yet in detail, not yet in the form of an elaborate bill

22 UN Charter, preamble, para.2.

23 See also Art. 62, para.2 of the UN Charter: “It [the Economic and Social Council] may make recommendations for the purpose of promoting respect for, and observance of, human rights and fundamental freedoms for all”, and Art. 68 of the UN Charter (a commission for the promotion of human rights to be set up by ECOSOC). See further Art. 76, lit. c of the UN Charter (the encouragement of respect for human rights and fundamental freedoms as one of the objectives of the trusteeship system).

of rights, but as a matter of principle. In the words of the Universal Declaration of Human Rights, “Member States have pledged themselves [in the UN Charter] to achieve, in cooperation with the United Nations, the promotion of universal respect for and observance of human rights and fundamental freedoms”.²⁴ By making a demand on the domestic conduct of States, the human rights provisions of the Charter are thus also belonging to a domestic rule of law concept of the Charter—they address, in contemporary UN language, the rule of law in national affairs.

III. The rule of law in declarations adopted by the UN General Assembly

III.A. The Universal Declaration of Human Rights and the “Friendly Relations Declaration”

28. The Universal Declaration of Human Rights, adopted by the UN General Assembly in 1948, was the first step in the implementation of the human rights programme of the Charter. The General Assembly declared, *inter alia*, that “by progressive measures, national and international”, a universal and effective recognition and observance of human rights shall be secured.²⁵

29. It is in the Universal Declaration that the term “rule of law” first appears expressly in an international legal context. The third paragraph of the preamble says that “it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that *human rights should be protected by the rule of law*”.²⁶ It is interesting to note that in this phrase, which alludes to the Declaration of Independence of the United States of 1776, human rights are not understood to be an integral part of the rule of law but as something to be “protected by the rule of law”. In the Universal Declaration, the domestic dimension of the rule of law is dominant because in 1948 the international community of States could not be a possible source of “tyranny and oppression”.

30. A further step was taken by the UN General Assembly in 1970 when it adopted the “Friendly Relations Declaration”. In the preamble of Resolution 2625 (XXV), the Assembly declared to be

[d]eeply convinced that the adoption of the Declaration [. . .] on the occasion of the twenty-fifth anniversary of the United Nations would contribute to the strengthening of world peace and constitute a landmark in the development of international law and of relations among States, in promoting *the rule of law*

24 Universal Declaration of Human Rights, 10 December 1948, UN General Assembly Resolution 217A (III), preamble, para.6.

25 *Ibid.*, last paragraph.

26 Emphasis added.

among nations and particularly the universal application of the principles embodied in the Charter.²⁷

31. In the fourth paragraph of the preamble of the Declaration itself, the General Assembly recalled “the paramount importance of the Charter of the United Nations in the promotion of *the rule of law among nations*”.²⁸ This statement was preceded by a paragraph emphasizing the importance of, *inter alia*, “respect for fundamental human rights” for the maintenance of international peace, and was followed by another paragraph “considering that the faithful observance of the principles of international law concerning friendly relations and co-operation among States, and fulfilment in good faith of the obligations assumed by States, in accordance with the Charter, is of the greatest importance for the maintenance of international peace and security, and for the implementation of the other purposes of the United Nations”.²⁹ In contrast to the Universal Declaration, the emphasis in the Friendly Relations Declaration is on the international dimension of the rule of law, the “rule of law among nations”. The respect for human rights is mainly understood as instrumental to the maintenance of world peace. The same is true for the observance of international law, as defined more closely in the last of the seven principles codified by the General Assembly, namely the “principle that States shall fulfil in good faith the obligations assumed by them in accordance with the Charter”.

III.B. The Millennium Declaration

32. In the United Nations Millennium Declaration, adopted by the UN General Assembly on 8 September 2000, the rule of law is first mentioned in the part on peace, security and disarmament (the second part of the Declaration), in which it is said that no effort will be spared to free peoples from the scourge of war. In the immediately following paragraph, the heads of State and government “resolve therefore: To strengthen respect for *the rule of law in international as in national affairs* and, in particular, to ensure compliance by Member States with the decisions of the International Court of Justice, in compliance with the Charter of the United Nations, in cases to which they are parties”.³⁰

27 UN General Assembly Resolution 2625 (XXV), 24 October 1970, preamble, para.3 (emphasis added).

28 Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations, 24 October 1970, UN General Assembly Resolution 2625 (XXV), Annex, preamble, para.4 (emphasis added).

29 *Ibid.*, para.5.

30 United Nations Millennium Declaration, above n. 1, para.9 (emphasis added).

33. The rule of law appears once more in the Millennium Declaration, namely in its fifth part on human rights, democracy and good governance. Here we find a certain elaboration of the “rule of law in national affairs”: “We will spare no effort to promote democracy and strengthen *the rule of law*, as well as respect for all internationally recognized human rights and fundamental freedoms, including the right to development.”³¹ The context of that statement shows that here the notion of the rule of law is used to describe conditions prevailing in a particular State, and not internationally.

34. In contrast, the term “rule of law in international affairs” is used in the last part of the Declaration, entitled “Strengthening the United Nations”. In order “to make the United Nations a more effective instrument”, Member States resolve “to strengthen the International Court of Justice, in order to ensure justice and the rule of law in international affairs”.³²

III.C. The 2005 World Summit Outcome

35. In the 2005 World Summit Outcome, adopted by the UN General Assembly on 16 September 2005, the notion of “rule of law” is used several times and in different contexts. It first appears in the first part of the document about “values and principles”. In paragraph 11, the heads of State and government declare that they “acknowledge that good governance and *the rule of law at the national and international levels* are essential for sustained economic growth, sustainable development and the eradication of poverty and hunger”.³³ This paragraph is followed by one reaffirming that “gender equality and the promotion and protection of the full enjoyment of all human rights and fundamental freedoms for all are essential to advance development and peace and security”,³⁴ while a commitment to international law is pronounced in earlier paragraphs.³⁵

36. At the end of the first part of the World Summit Outcome, member States “resolve to create a more peaceful, prosperous and democratic world and to undertake concrete measures to continue finding ways to implement the outcome of the Millennium Summit and the other major United Nations conferences and summits so as to provide multilateral solutions to problems in the four following areas:

31 Ibid., para.24 (emphasis added).

32 Ibid., para.30, subpara.4.

33 2005 World Summit Outcome, UN General Assembly Resolution 60/1, 16 September 2005, para.11 (emphasis added).

34 Ibid., para.12.

35 See, in particular, para.2: “We reaffirm our faith in the United Nations and our commitment to the purposes and principles of the Charter of the United Nations and *international law*, which are indispensable foundations of a more peaceful, prosperous and just world, and reiterate our determination to foster strict respect for them.” See also paras.5, 6 and 7.

Development, Peace and collective security, *Human rights and the rule of law*, [and] Strengthening of the United Nations".³⁶

37. In the part addressing issues of development, and more specifically a "global partnership for development", UN Member States reaffirm their "commitment to sound policies, good governance at all levels and *the rule of law*".³⁷ A following paragraph, in the same part, about "domestic resource mobilization", again mentions the rule of law in the context of good governance and sustainable development.³⁸ Respect for the rule of law is then referred to as a means of developing countries and countries with economies in transition "to create a domestic environment conducive to attracting investments".³⁹

38. "Human rights and the rule of law" is one of the four focus areas of the World Summit Outcome. At the beginning of the respective fourth part of the document, Member States recommit themselves "to actively protecting and promoting all human rights, *the rule of law* and democracy and recognize that they are interlinked and mutually reinforcing and that they belong to the universal and indivisible core values and principles of the United Nations".⁴⁰ What stands out here is the conjunction of the rule of law with democracy as a form of government, a connection we already find expressed, albeit cautiously, in Article 21 of the Universal Declaration of Human Rights but not in the Charter of 1945.⁴¹ Democracy seems to be the epitome of "good governance" in paragraphs 11 and 21 of the document ("good governance and the rule of law").⁴²

39. The document's part "Human rights and the rule of law" (paragraphs 119-45) is divided into the sections "Human rights" (paragraphs 121-31), "Internally displaced persons" (paragraph 132), "Refugee protection and assistance" (paragraph 133), "Rule of law" (paragraph 134), "Democracy" (paragraphs 135-37), "Responsibility to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity" (paragraphs 138-140), "Children's rights" (paragraphs 141-42), "Human security" (paragraph 143), and, eventually, "Culture of peace and

36 Ibid., para.16 (emphasis added).

37 Ibid., para.21 (emphasis added).

38 Ibid., para.24 (b).

39 Ibid., para.25 (a).

40 Ibid., para.119.

41 When the Charter was adopted, democracy was conceptually deeply contested between East and West and the emerging "Third World"; it was not a "core value" of the United Nations. The 2005 World Summit Outcome still includes a cautious reservation with regard to the importance of democracy when it says, in para.135, that "while democracies share common features, there is no single model of democracy" and that "it does not belong to any country or region".

42 See above text accompanying n. 33 and 37.

initiatives on dialogue among cultures, civilizations and religions” (paragraphs 144-45). The section entitled “Rule of law” reads as follows:

Recognizing the need for universal adherence to and implementation of *the rule of law at both the national and international levels*, we:

- (a) Reaffirm our commitment to the purposes and principles of the Charter and international law and to *an international order based on the rule of law and international law*, which is essential for peaceful coexistence and cooperation among States;
- (b) Support the annual treaty event;
- (c) Encourage States that have not yet done so to consider becoming parties to all treaties that relate to the protection of civilians;
- (d) Call upon States to continue their efforts to eradicate policies and practices that discriminate against women and to adopt laws and promote practices that protect the rights of women and promote gender equality;
- (e) Support the idea of establishing a rule of law assistance unit within the Secretariat, in accordance with existing relevant procedures, subject to a report by the Secretary-General to the General Assembly, so as to strengthen United Nations activities to promote the rule of law, including through technical assistance and capacity-building;
- (f) Recognize the important role of the International Court of Justice, the principal judicial organ of the United Nations, in adjudicating disputes among States and the value of its work, call upon States that have not yet done so to consider accepting the jurisdiction of the Court in accordance with its Statute and consider means of strengthening the Court’s work, including by supporting the Secretary-General’s Trust Fund to Assist States in the Settlement of Disputes through the International Court of Justice on a voluntary basis.⁴³

40. The phrase “an international order based on *the rule of law and international law*” in lit. *a* of this paragraph suggests that the rule of law and international law are not identical. Is here the rule of law only meant in its domestic dimension? On the other hand, at the beginning of the same paragraph, and also in paragraph 11, the term “the rule of law at both the national and international levels” is used. Lit. *a*, *b*, *c* and *f* of the paragraph mention activities which shall strengthen the rule of law at the international level, whereas lit. *d* and *e* refer to the action of States at the national level.

43 Ibid., para.134.

III.D. The 2012 Declaration on the Rule of Law at the National and International Levels

41. So far the most comprehensive resolution of the UN General Assembly on the rule of law is the “Declaration of the High-level Meeting of the General Assembly on the Rule of Law at the National and International Levels” adopted on 24 September 2012.⁴⁴ In the preamble of the Declaration, the heads of State and government, and heads of delegation reaffirmed their “commitment to the rule of law and its fundamental importance for political dialogue and cooperation among all States and for the further development of the three main pillars upon which the United Nations is built: international peace and security, human rights and development”. In this phrase, similar to the Universal Declaration of Human Rights,⁴⁵ the rule of law is referred to as being beneficial to human rights. The heads of State and government further agreed that “our collective response to the challenges and opportunities arising from the many complex political, social and economic transformations before us must be guided by *the rule of law*, as it is *the foundation of friendly and equitable relations between States and the basis on which just and fair societies are built*”.⁴⁶

42. The 2012 Declaration consists of three main parts. The first part is made up of statements and principles regarding the rule of law in the context of the aims of the United Nations. In the second part, the General Assembly mainly recognizes the positive contributions of other UN organs to the rule of law in all its aspects, while in the third part certain practical measures are mentioned which shall further strengthen the rule of law.

43. In the 2012 Declaration’s first paragraph, we find the term “an international order based on the rule of law”, as adopted from the 2005 World Summit Outcome, but without the addition “and international law”. In the second paragraph, it is

recognize[d] that the rule of law applies to all States equally, *and to international organizations, including the United Nations and its principal organs*, and that respect for and promotion of the rule of law and justice should guide all of their activities and accord predictability and legitimacy to their actions.⁴⁷

44. The same paragraph includes the recognition “that all persons, institutions and entities, public and private, including the State itself, are accountable to just, fair and equitable laws and are entitled without any discrimination to equal protection of the law”.⁴⁸

44 UN General Assembly Resolution 67/1. See also the annual resolutions adopted by the General Assembly on “The rule of law at the national and international levels” since 2006, the latest being Resolution 72/119 of 7 December 2017.

45 See above text accompanying n. 26.

46 Emphasis added.

47 Emphasis added.

48 For analysis, see Edric Selous, *The Rule of Law and the Debate on it in the United Nations*, in: Clemens A. Feinäugle (ed.), *The Rule of Law and Its Application to the*

45. Paragraph 5 of the Declaration repeats the statement of the World Summit Outcome (paragraph 119) that “human rights, the rule of law and democracy are interlinked and mutually reinforcing and that they belong to the universal and indivisible core values and principles of the United Nations”.⁴⁹

46. The following table shows for which other subject matters and policy fields the General Assembly acknowledged, in part I of the 2012 Declaration, an importance and relevance of the rule of law:

para. 3	world peace – principles of the UN Charter
para. 4	settlement of disputes by peaceful means
para. 6	human rights and fundamental freedoms
para. 7	development and right to development
para. 8	sustainable and equitable development
para. 9	States shall refrain from unilateral economic, financial or trade measures
para. 10	the rule of law as a part of national strategies of States
para. 11	national ownership in rule of law activities
para. 12	principle of good governance
para. 13	independence of the (national) judicial system
para. 14	the right of equal access to justice for all
para. 15	importance of informal justice mechanisms
para. 16	women shall fully enjoy the benefits of the rule of law
para. 17	rights of the child
para. 18	conflict prevention, peacekeeping, conflict resolution and peacebuilding
para. 19	national civilian capacity development and institution-building in the aftermath of conflict
para. 20	international humanitarian law
para. 21	transitional justice
para. 22	opposition to impunity
para. 23	role of the International Criminal Court
para. 24	world drug problem and transnational organized crime
para. 25	corruption
para. 26	terrorism in all its forms and manifestations

47. In summary, it can be said that, beginning with the Millennium Declaration, the General Assembly has integrated the notion of the rule of law in its standard vocabulary, and has situated the concept in a particular, and gradually ever broader, context of domestic and international policy fields. It has closely linked the rule of law

United Nations (Nomos and Hart 2016), 13, 25: “The paragraph speaks of the important elements of equality before the law, non-discrimination and accountability, also included in the Secretary-General’s definition [see below text accompanying n. 92]. It does not, however, directly incorporate elements related to human rights, separation of powers, participation in decision-making, and procedural and legal transparency.”

49 See also General Assembly Resolution 72/119 of 7 December 2017, above n. 44, preamble, para.3.

concept with the notions of good governance, democracy, and human rights, without determining these relationships more closely. However, thus far the Assembly has avoided defining the concept.⁵⁰

IV. The rule of law in the work of the Security Council

48. Although the Security Council apparently first mentioned the concept of the rule of law already in 1996, in a resolution concerning Burundi,⁵¹ it seriously started discussing rule of law issues only in 2003 when it held its first thematic debate on the subject, meeting at the ministerial level. The agenda item was called “Justice and the Rule of Law: the United Nations role”.⁵² The presidential statement of 24 September 2003 emphasized the importance of rule of law issues in the context of the protection of civilians in armed conflict, peacekeeping operations, and international criminal justice.⁵³ A year later, the Council discussed the same agenda item⁵⁴ on the basis of a report of the Secretary-General on the rule of law and transitional justice in conflict and post-conflict societies.⁵⁵ In the words of the Secretary-General, the report reviewed “the tools at our disposal to help administer transitional justice and rebuild the rule of law in conflict and post-conflict societies—from national justice systems to the support given by United Nations peace operations; from the International Criminal

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- 50 Early drafts of the 2012 Declaration included the 2004 definition of the Secretary-General (see *infra*, text accompanying n. 92). “However, after considerable negotiations, the Secretary-General’s definition was pared down, with core elements remaining.” See Selous, above n. 48, 25. For a critical analysis of the rule of law in the outcome document of the United Nations summit for the adoption of the post-2015 development agenda, the so-called 2030 Agenda (UN General Assembly Res. 70/1 of 25 September 2015, “Transforming our world: the 2030 Agenda for Sustainable Development”), see Noora Arajärvi, *The Rule of Law in the 2030 Agenda*, 10 *Hague Journal on the Rule of Law* (2018), 187, 214 (deploring a “disappointingly diluted position of the rule of law in the 2030 Agenda”).
- 51 See UN Security Council Res. 1040 of 29 January 1996, para.2: “*The Security Council* [. . .], *Expresses* its fullest support for the efforts of the Secretary-General and others, in support of the Convention of Government, to facilitate a comprehensive political dialogue with the objective of promoting national reconciliation, democracy, security and the rule of law in Burundi”.
- 52 See the records of the meetings of 24 and 30 September 2003, UN Doc. S/PV.4833 and S/PV.4835. For an overview of the work of the Council, see Jeremy Matam Farrall, *United Nations Sanctions and the Rule of Law* (CUP 2007), 18–24, and Selous, above n. 48, 22–24.
- 53 See UN Doc. S/PRST/2003/15 of 24 September 2003, para.1.
- 54 See the records of the meeting of 6 October 2004, UN Doc. S/PV.5052 and S/PV.5052 (Resumption 1). See also the presidential statement of 6 October 2004, UN Doc. S/PRST/2004/34.
- 55 See UN Doc. S/2004/616 of 23 August 2004.

Court to ad hoc international and mixed tribunals and truth commissions; from public-sector vetting to reparations for victims”.⁵⁶

In 2006, the Council held a third open debate on the rule of law, the focus of which was the Council’s particular role in the promotion of international law, including the legal tools applied by the Council in its endeavours to maintain peace and security. The agenda item was entitled “Strengthening international law: rule of law and maintenance of international peace and security”.⁵⁷ A paper prepared by Denmark identified three specific issues for discussion, namely (1) the promotion of rule of law in conflict and post-conflict situations, (2) ending impunity for international crimes, and (3) enhancing the efficiency and credibility of UN sanctions regimes.⁵⁸ The presidential statement issued on 22 June 2006 stayed in the confines of the traditional language of the Council when it reaffirmed the Council’s commitment to international law, the peaceful settlement of disputes, and respect for human rights, and when it reminded States of their obligations to end impunity and to prosecute those responsible for international crimes.⁵⁹

49. At the initiative of Mexico, the next Council debate on the rule of law took place four years later, in June 2010, this time under the newly phrased agenda item “The promotion and strengthening of the rule of law in the maintenance of international peace and security”,⁶⁰ which no longer included the term “international law”. A concept note prepared by Mexico suggested that, taking into account the developments in the Council’s work in recent years, the debate should focus on the following three main topics: (1) the promotion of the rule of law in conflict and post-conflict situations, (2) international justice and the peaceful settlement of disputes (with a focus on the work of the ICJ), and (3) the efficiency and credibility of sanctions regimes.⁶¹ The statement made by the President of the Council on 29 June 2010 repeated much of the 2006 statement, expanding the remarks on the fight against impunity and adding a commitment to the respect for international humanitarian law.⁶²

50. The Council returned to the subject in January 2012⁶³ when it discussed in an open debate the Report of the Secretary-General on the rule of law and transitional

56 See UN Doc. S/PV.5052, 3.

57 See the records of the meeting of 22 June 2006, UN Doc. S/PV.5474 and S/PV.5474 (Resumption 1).

58 See Letter dated 7 June 2006 from the Permanent Representative of Denmark to the UN addressed to the Secretary-General, UN Doc. S/2006/367.

59 See UN Doc. S/PRST/2006/28 of 22 June 2006.

60 See the records of the meeting of 29 June 2010, UN Doc. S/PV.6347 and S/PV.6347 (Resumption 1).

61 See Letter dated 18 June 2010 from the Permanent Representative of Mexico to the UN addressed to the Secretary-General, UN Doc. S/2010/322.

62 See UN Doc. S/PRST/2010/11 of 29 June 2010.

63 See the records of the meeting of 19 January 2012, UN Doc. S/PV.6705 and S/PV.6705 (Resumption 1).

justice in conflict and post-conflict societies.⁶⁴ The central issues of that report were summarized in its paragraph 4:

In conflict and post-conflict societies, the United Nations assists countries in establishing the rule of law by ensuring accountability and reinforcing norms, building confidence in justice and security institutions, and promoting gender equality. The Organization is increasingly focused on emerging threats to the rule of law, such as organized crime and illicit trafficking, and the root causes of conflict, including economic and social justice issues. These efforts are proving to be indispensable to a wider peace and security agenda. Still, Member States and national stakeholders rightfully demand more predictability, accountability and effectiveness in the Organization's activities. Admittedly, greater efforts are needed to ensure a unified approach to the rule of law, address gaps in evidence-based programming and integrate security sector reform into the wider rule of law framework. In addition, more is required to increase levels of national ownership, promote donor coordination and foster political will.⁶⁵

51. Accordingly, the presidential statement of 19 January 2012 added to the topics addressed in the 2006 and 2010 statements remarks about UN rule of law assistance activities in conflict-affected countries, in particular capacity building in justice and security institutions.⁶⁶ According to the statement, the Council emphasized "the importance of the rule of law as one of the key elements of conflict prevention, peace-keeping, conflict resolution and peace building".⁶⁷

52. Another debate under the agenda item "The promotion and strengthening of the rule of law in the maintenance of international peace and security" took place later in the same year, in October 2012, when at the initiative of Guatemala the Council discussed the subject "Peace and justice, with a special focus on the role of the International Criminal Court".⁶⁸ In its concept note, the Guatemalan presidency explained that it wished to encourage a comprehensive discussion, in the Council, of the relationship between the Security Council and the ICC, in order to strengthen their linkages.⁶⁹

64 See UN Doc. S/2011/634 of 12 October 2011 (reissued on 19 December 2011).

65 *Ibid.*, para.4.

66 See UN Doc. S/PRST/2012/1 of 19 January 2012.

67 *Ibid.*, para.6.

68 See the records of the meeting of 17 October 2012, UN Doc. S/PV.6849 and S/PV.6849 (Resumption 1). The debate was not followed by a presidential statement.

69 See Letter dated 1 October 2012 from the Permanent Representative of Guatemala to the UN addressed to the Secretary-General, UN Doc. S/2012/731, paras.5-6.

53. In February 2013, Deputy Secretary-General Jan Eliasson briefed the Council on the subject, providing an interim report on the effectiveness of UN support for the rule of law in conflict and post-conflict situations.⁷⁰ However, the meeting was not open to participation by the wider UN membership, and discussions of the Council members took place in informal consultations.

54. In February 2014, the Security Council took up again the rule of law question,⁷¹ focusing on UN rule of law activities in the context of peacekeeping and peace-building operations and missions. In its concept note, the Lithuanian presidency had recalled that the Council already identified the strengthening of the rule of law institutions as a key part of the mandates it designates for the maintenance of international peace and security.⁷²

Such support is currently included in the mandates of 18 out of 28 Security Council missions and takes on different forms and contexts, including rebuilding police and law enforcement services, [. . .]; ensuring humane and secure prison facilities and deployment of nations' mobile court systems; fighting impunity, particularly through the establishment of transitional justice systems; strengthening legal frameworks by drafting new criminal and criminal procedure codes and legislation on money-laundering and terrorism; reforming areas of civil and administrative law that directly affect key drivers of conflict, including property and land disputes and the administration of natural resources; addressing sexual violence in conflicts; and combating corruption.⁷³

55. Lithuania proposed⁷⁴ that the debate in the Council focus on how rule of law mandates can be made more effective, and how a continuity of rule of law support can be ensured beyond those mandates. The debate could also review findings of the report of the Secretary-General of June 2013 entitled "Measuring the effectiveness of the support provided by the United Nations system for the promotion of the rule of law in conflict and post-conflict situations".⁷⁵

56. The presidential statement of 21 February 2014,⁷⁶ made on behalf of the Council after the 2014 debate, includes, as did the previous statements, remarks

70 See the records of the meeting of 30 January 2013, UN Doc. S/PV.6913.

71 See the records of the meetings of 19 and 21 February 2014, UN Doc. S/PV.7113 and S/PV.7115. No further debate on the rule of law has taken place since.

72 See Letter dated 3 February 2014 from the Permanent Representative of Lithuania to the UN addressed to the Secretary-General, UN Doc. S/2014/75, Annex: Concept note, para.2.

73 Ibid. (names of UN missions omitted).

74 See Letter dated 3 February 2014, above n. 72, para.7.

75 Report of the Secretary-General of 11 June 2013, UN Doc. S/2013/341 (reissued on 5 July 2013).

76 UN Doc. S/PRST/2014/5 of 21 February 2014.

about the importance of international law, the fight against impunity and against transnational organized crime. It also addresses the situation of vulnerable groups affected by armed conflict, in particular women, children and displaced persons, and the problem of sexual exploitation and abuse. However, at the heart of a statement is a long new paragraph with a list of conditions and expectations regarding rule of law activities which are a part of mandates of UN peacekeeping operations and special political missions.⁷⁷

57. Interestingly, the Council did not devote further general discussions to the rule of law issue since the 2014 debate. It might well be possible that a majority of Council members is of the opinion that by now progress can only be achieved by applying the concept to specific subject areas and cases dealt with by the Council. In May 2018, at the initiative of Poland⁷⁸ the Council held an open debate on the subject “Upholding international law within the context of the maintenance of international peace and security”,⁷⁹ thus returning to a more conventional perspective. The day-long debate was very popular, with seventy-four representatives of Member States, observer States and regional organizations taking the floor, but it consisted mainly of well-known general commitments to international law and the principles of the UN Charter on the one hand,⁸⁰ and more specific accusations of violations of that law on the other hand, with many States focusing on situations affecting themselves. Some speakers used the term “rules-based international order”—for instance the representative of Estonia, when he said that “Estonia is committed to promoting respect for international law and the rules-based international order”.⁸¹ Few delegates referred to the concept of the rule of law, an exception being the representative of Liechtenstein: “Those who believe in the rule of law, as we do, are challenged to stand up for the primacy of international law at the heart of the international order.”⁸²

58. In summary, it can be said that the Council, in addressing rule of law issues, started out from a principle of the UN Charter, namely the obligation of States to comply with the rules of international law. The Council then tried to deal in a more

77 Ibid., para.7. See also the presidential statement of 14 May 2018 following the Council’s consideration of the item entitled “United Nations peacekeeping operations”, UN Doc. S/PRST/2018/10.

78 See Letter dated 3 May 2018 from the Permanent Representative of Poland to the UN addressed to the Secretary-General, UN Doc. S/2018/417/Rev.1, Annex: Concept note for the Security Council open debate.

79 See the records of the meeting of 17 May 2018, UN Doc. S/PV.8262.

80 Most of the respective statements corresponded with the principles enunciated in the “Declaration of the Russian Federation and the People’s Republic of China on the Promotion of International Law” adopted in Beijing on 25 June 2016 (www.mid.ru/en/foreign_policy).

81 See UN Doc. S/PV.8262, 35.

82 Ibid., 42.

systematic way with aspects of the concept which had become practical in its own work related to the maintenance of international peace and security, i.e. debates and resolutions with regard to conflict prevention, conflict resolution, peacekeeping, peace building, and sanctions. Generally speaking, the Council's approach has been narrower than that of the General Assembly. It has focused on the international dimension of the rule of law. In particular, the Council did not set forth general expectations in respect of the compatibility of domestic law or domestic public institutions with rule of law demands but emphasized a respective "primary responsibility of national authorities in identifying their priorities and strategies".⁸³ Unlike the General Assembly,⁸⁴ the Council has also refrained from linking the concept of the rule of law to that of democracy.

V. The progressive expansion and persistent vagueness of the UN concept of the rule of law

59. If we compare the development reflected in the official documents of the General Assembly and the Security Council since the Millennium Declaration with the original concept of the rule of law in the UN Charter as described in Part II of this article, we witness a progressive expansion of the meaning of the notion in the context of the UN in several dimensions. This expansion can be said to result from ever broader and more intense activities of the Organization, from the rise of international human rights and, perhaps less obviously, from an increased universal recognition of Western concepts of government in the period following the end of the Cold War (a recognition which, however, gradually declined again in recent years).

60. Firstly, to the founding members of the United Nations the rule of law in international affairs was more or less equivalent to the "rule of international law", that is the faithful observance of international law (both treaty and customary law) by States. In contrast, the (international) rule of law of today has acquired a meaning of its own, transcending international law as a system of binding norms and radiating into various and diverse fields and subject matters. That relative emancipation of the concept of the rule of law from international law in a strict sense is reflected by the formula "an international order based on the rule of law and international law" used in the 2005 World Summit Outcome.⁸⁵

83 See the presidential statement of 2014, above n. 76, para.5.

84 See, e.g., General Assembly Res. 72/119 of 7 December 2017, "The rule of law at the national and international levels", preamble, para.3: "*The General Assembly* [. . .], *Reaffirming* that human rights, the rule of law and democracy are interlinked and mutually reinforcing [. . .].

85 See above text accompanying n. 43.

61. Secondly, another expansion of the meaning of the rule of law in its international dimension has taken place with regard to the addressees of that rule. The rule of law of the original Charter was addressed to States only. It was States which were urged to comply with the rules of international law. The 2012 Declaration on the Rule of Law, however, recognized “that the rule of law applies to all States equally, and to international organizations, including the United Nations and its principal organs”.⁸⁶ That recognition reflects the growth of “international government” (with a direct impact on individuals and the private sector) by the UN and other international organizations in the past decades which resulted in an expectation that these organizations observe, *mutatis mutandis*, the same legal standards as those heeded by States. In particular, in 1945 the United Nations was not seen as a potential violator of individual human rights—the work of the Organization envisaged by the founders was not of a kind that it would give rise to many direct legal contacts between the UN and individual human beings.⁸⁷

62. Thirdly, the 1945 Charter remained silent about the rule of law as a principle or concept of domestic law, regarding the pertinent issues generally as “matters which are essentially within the domestic jurisdiction of any state” in which the United Nations should not intervene (Article 2, para. 7). In the 1946 discussions of the General Assembly and the Security Council about the Franco regime in Spain, “the governmental regime of a state was admitted to be in principle a matter of domestic concern”.⁸⁸

86 Emphasis added. See also Thomas Fitch, *Inventing the Rule of Law for the United Nations*, 12 *Max Planck Yearbook of United Nations Law* (2008), 347.

87 See Leland M. Goodrich, *The United Nations* (Stevens and Sons 1960), 63: “The Charter [...] makes it quite clear that the United Nations is not intended to have the kinds of functions and powers that are commonly vested in states. It has no authority to create rights and duties for individuals, except those persons who may be in its employ. It cannot directly force individuals to serve in its armed forces. It deals generally with the governments of its Members instead of with their citizens.”

88 See Goodrich and Hambro, above n. 7, 115. Nevertheless, in a report of the “Sub-Committee on the Spanish Question” appointed by the Security Council the Franco regime was considered to be a threat to international peace and security and a cause of international friction (UN Doc. S/75 of 1 June 1946, paras.3 and 4). While the members of the Security Council could not agree on the text of a resolution in the matter, the General Assembly adopted a resolution containing specific recommendations (Res. 39(1) of 12 December 1946, “Relations of Members of the United Nations with Spain”). The Assembly recommended, *inter alia*, “that if, within a reasonable time, there is not established a government which derives its authority from the consent of the governed, committed to respect freedom of speech, religion and assembly and to the prompt holding of an election in which the Spanish people, free from force and intimidation and regardless of party, may express their will, the Security Council consider the adequate measures to be taken in order to remedy the situation”.

63. The Charter did, however, say that the UN “shall promote universal respect for, and observance of, human rights and fundamental freedoms for all” (Article 55, lit. *c*), and authorized the Economic and Social Council to make recommendations for the purpose of that promotion (Article 62, para.2). The General Assembly was called up to make recommendations for the purpose of “assisting in the realization of human rights and fundamental freedoms for all” (Article 13, para.1, lit. *b*). Therefore, one can say that the Charter envisaged a future in which human rights and freedoms would be protected by the domestic law of all States or, in other words, that the rule of law at the national level would comprise such protection.

64. In contrast, the UN rule of law concept today embraces the domestic sphere of States. In that sphere, the protection of human rights plays an important role, but the rule of law reaches beyond that protection to features of the constitutional, administrative and judicial structures of a State.

65. However, notwithstanding the impressive expansion of the concept described above, the rule of law advanced by the General Assembly and the Security Council has remained rather vague and indistinctive. As Rosalyn Higgins remarked, “[t]he rule of law has become a catchphrase in efforts to address all kinds of global problems from health pandemics to armed conflicts to poverty to terrorism”.⁸⁹ A principal reason for this is the tendency to combine the concept with other, partly overlapping ideas, notions and principles (like democracy or good governance), many of them being equally unclear, and to apply the concept to almost every area of activity of the UN. Consider, for instance, a statement of the UN Secretariat on its website “United Nations and the Rule of Law”,⁹⁰ introducing a list of seven “thematic areas” in which the rule of law is meant to play a role (International Law, Courts and Tribunals; Human Rights; Transnational Threats; Access to Justice and Rule of Law Institutions; Governance; Private Sector Involvement; Land, Property and Environment):

The rule of law relates to and furthers each of the three pillars of United Nations work: peace and security, development and human rights. These pillars are interlinked and mutually reinforcing. [...] [T]he rule of law and human rights have an indivisible and intrinsic relationship. The rule of law is the vehicle for the promotion and protection of the common normative framework. It

89 See Rosalyn Higgins, *The Rule of Law: Some Sceptical Thoughts*. Lecture Given at the British Institute of International and Comparative Law, 16 October 2007, in: Rosalyn Higgins, *Themes and Theories: Selected Essays, Speeches, and Writings in International Law* (OUP 2009), 1331, 1334. See also Arajärvi, above n. 50, 214: “As the rule of law has grown into a catch-all category, it has lost its normative specificity and become blurred, while at the same time any serious attempt to attach substantive features to it is being met with resistance.” To me, it seems, however, that in the declarations and statements of UN bodies the concept never achieved a “normative specificity” that it could have lost later.

90 (www.un.org/ruleoflaw/).

provides a structure through which the exercise of power is subjected to agreed rules, guaranteeing the protection of all human rights.⁹¹

66. That indeterminacy of the concept corresponds with the reluctance of the principal organs to adopt a consolidated definition of the rule of law as understood by them. In this respect, the organs, and in particular the General Assembly, could have followed Secretary-General Kofi Annan's proposal in his 2004 report "The rule of law and transitional justice in conflict and post-conflict societies":

The "rule of law" is a concept at the very heart of the Organization's mission. It refers to a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency.⁹²

67. To be sure, this is an extensive definition mixing formal and substantial aspects of the concept, with a heavy emphasis on the latter. The philosopher Joseph Raz (who advocates a purely formal conception of the rule of law)⁹³ would criticize it for referring to "just about every political ideal which has found support in any part of the globe", and thus confusing the rule of law with "the rule of the good law".⁹⁴ But at least the Secretary-General tried to gather and record a number of concrete principles associated with the rule of law, and to organize them, prioritizing those mentioned in the second sentence quoted above. But neither the General Assembly nor the

91 See (www.un.org/ruleoflaw/thematic-areas/).

92 The rule of law and transitional justice in conflict and post-conflict societies. Report of the Secretary-General. UN Doc. S/2004/616 of 23 August 2004, para.6.

93 See Joseph Raz, *The Rule of Law and its Virtue*, in: Joseph Raz, *The Authority of Law: Essays on Law and Morality* (OUP 1979), 210-14: "[T]he rule of law is just one of the virtues which a legal system may possess and by which it is to be judged. It is not to be confused with democracy, justice, equality (before the law or otherwise), human rights of any kind or respect for persons or for the dignity of man. [...] The rule of law means literally what it says: the rule of the law. Taken in its broadest sense this means that people should obey the law and be ruled by it. [...] [A]nd [...] if the law is to be obeyed it must be capable of guiding the behaviour of its subjects. [...] It is evident that this conception of the rule of law is a formal one. It says nothing about how the law is to be made: by tyrants, democratic majorities, or any other way. It says nothing about fundamental rights, about equality, or justice."

94 *Ibid.*, 210, 211 (criticizing a similarly broad definition of the doctrine of the rule of law by the International Congress of Jurists meeting in New Delhi in 1959).

Security Council was prepared to accept this or a similar definition, and the Secretaries-General succeeding Kofi Annan returned to the more nebulous language used by the Assembly.⁹⁵

68. One must, however, concede that conceptual ambiguity is not atypical in the work of international diplomacy in general, and of the United Nations in particular.⁹⁶ Every text adopted by the Security Council or the General Assembly is the result of a painstaking negotiation process in the course of which many compromises must be struck. This often leads to overly lengthy texts with repetitive and partly contradictory statements. One must also keep in mind that the resolutions adopted by the Assembly and the Council are texts of a primarily political nature, even if they address legal questions.

69. Of the several dimensions of the expansion of the rule of law discussed above, the idea that the rule of law is binding not only on States but also on international organizations, including the UN,⁹⁷ has so far only insufficiently been translated into the practice of the UN and, in particular, of the Security Council. In that regard, the original design of the Charter has asserted itself. The maintenance of international peace and security remains the primary end of the Organization, and to the extent that this purpose requires it, the rule of law must still take second place. There is still no legal control, let alone judicial review, of the acts of the Security Council, despite their increased impact on individuals. The International Court of Justice still lacks a respective jurisdiction, despite its characterization as “the primary judicial organ of the United Nations” in Article 92 of the Charter. With regard to targeted sanctions, the Security Council has not been prepared to go beyond the very moderate

95 An example is a 2013 report of Secretary-General Ban Ki-moon in which “the rule of law at the international level” is explained as follows: “At the international level, the rule of law accords predictability and legitimacy to the actions of States, strengthens their sovereign equality and underpins the responsibility of a State to all individuals within its territory and subject to its jurisdiction. Full implementation of the obligations set forth in the Charter of the United Nations and in other international instruments, including the international human rights framework, is central to collective efforts to maintain international peace and security, effectively address emerging threats and ensure accountability for international crimes.” See Strengthening and coordinating United Nations rule of law activities. Report of the Secretary-General. UN Doc. A/68/213 of 29 July 2013, para.4.

96 See also a remark by Wolfgang Friedmann about international human rights which also applies to the present issue: “The major obstacle in the way of an effective international charter of human rights is, of course, the attempt to link the nations of the world, in all their diversity of philosophies and practices in the fields of individual, political, social and economic values and standards of government and administration, in an acceptance of common principles. Where this is attempted [. . .] the price to be paid is a vagueness of definitions, which to some extent defeats its purpose.” W. Friedmann, *The Changing Structure of International Law* (Stevens and Sons 1964), 241-42.

97 See text above accompanying n. 86.

Ombudsperson procedure,⁹⁸ and even that it accepted only in 2009 after many years of discussion, and only for one particular sanctions regime (out of presently fourteen regimes⁹⁹).¹⁰⁰ The Council never expressly recognized that it is bound by the international bill of rights promoted by the UN.¹⁰¹ The 2014 presidential statement on the rule of law¹⁰² does not mention targeted sanctions at all, while the 2012 statement only included a repetition of the Council's modest commitment "to ensure that fair and clear procedures exist for placing individuals and entities on sanctions lists and for removing them".¹⁰³ Tellingly, it was the General Assembly and not the Security

98 For a recent evaluation, see Matthew Happold, *United Nations Sanctions and the Rule of Law*, in: Feinäugle, above n. 48, 75, 88-95. See also Farrall, above n. 52, 183-243 ("Strengthening the rule of law"). For the development leading to the establishment of the office of the Ombudsperson, see Bardo Fassbender, *Targeted Sanctions Imposed by the UN Security Council and Due Process Rights: A Study Commissioned by the UN Office of Legal Affairs and Follow-up Action by the United Nations*, 3 *International Organizations Law Review* (2006), 437.

99 See (www.un.org/sc/suborg/en/sanctions/information).

100 The second Ombudsperson appointed by the Secretary-General, Ms. Catherine Marchi-Uhel, left office on 7 August 2017. A new Ombudsperson was only appointed in May 2018, see Letter dated 24 May 2018 from the Secretary-General addressed to the President of the Security Council, UN Doc. S/2018/514 of 31 May 2018. In her letter to the Secretary-General of 10 July 2017 (www.un.org/sc/suborg/en/ombudsperson), Ms. Marchi-Uhel wrote, *inter alia*: "My successor will not have an easy task. Your staff has done its best to put in place informal arrangements which go a long way in guaranteeing the independence of the Office of the Ombudsperson. However, in the last two years, I have observed an increasing intrusion of the [ISIL (Da'esh) and Al-Qaida Sanctions] Committee in a sensitive area for the fairness to petitioners of the Ombudsperson's process. I have witnessed a setback imposed by the Committee concerning the right of petitioners to receive substantive reasons when they are retained on the sanctions list as a result of the Ombudsperson's recommendation. In my opinion, this situation also affects the general credibility of the Ombudsperson mechanism. Such practice lends support to those who consider that, short of a judicial mechanism, full fairness and transparency cannot be guaranteed."

101 See the statement by the Director of the Rule of Law Unit in the Executive Office of the UN Secretary-General, Edric Selous, above n. 48, 24: "The Security Council has been guided by the rule of law in the drafting of resolutions, taking into account the due process rights of those affected by Council measures [. . .]. However, the Council has never acknowledged that the Human Rights framework is binding on the Council or its members in exercising the Council's functions under the UN Charter [. . .]." For an analysis of the different aspects of the relationship between human rights and the Security Council, see also Bardo Fassbender (ed.), *Securing Human Rights? Achievements and Challenges of the UN Security Council* (OUP 2011).

102 See above n. 76.

103 See above n. 66, para.15.

Council which stated “that the rule of law applies to [...] the United Nations and its principal organs”¹⁰⁴—a declaration not so difficult to make for the Assembly whose recommendations rarely raise rule of law concerns.

70. However, it would be wrong to say that the idea of the rule of law is insignificant in the work of the Security Council. Consider the following observations by Thomas Franck:

[C]ollective security operates in a quasi-parliamentary, quasi-executive mode, with discourse which is formally open to public scrutiny but, in practice, carried on primarily in closed sessions. Nevertheless, the process does entail, in effect, the need to persuade almost all fifteen members of the Security Council that action should be taken, that a proposed course of action is the wisest alternative, and that it is both congruent with the Council’s powers under the Charter and consistent with its practice in similar cases. [...] [T]he actions taken will be judged by standards of legitimacy and fairness, and that judgment will affect the capacity of the decisions made to pull the community towards compliance.¹⁰⁵

71. The “standards of legitimacy and fairness” by which the decisions of the Council are judged are not the same as the established standards of the rule of law.¹⁰⁶ But there is a kinship between them. Ultimately, the rule of law too is meant to secure the legitimacy and fairness of decisions. Pathways are different, but the destination is very similar, and it is not so easy to say which way is the “better”.

72. Further, the rule of law as a concept meant to bind the UN is still inadequately safeguarded in the context of UN peacekeeping and peacebuilding operations.¹⁰⁷ Possibilities for individuals who are victims of rights violations, in particular human rights violations, by the personnel of such operations to obtain redress are extremely limited, and generally not effective, the main reasons being the continuing uncertainty about the exact extent to which the UN and its subsidiary organs are bound by international human rights law, uncertainties regarding the attribution of conduct and the allocation of accountability between multiple actors, the far-reaching immunity enjoyed by the UN and the peacekeeping troops, and the lacking efficiency of internal UN dispute settlement mechanisms.

104 See text above accompanying n. 86.

105 Thomas M. Franck, *Fairness in International Law and Institutions* (OUP 1995), 219.

106 See below text accompanying n. 113.

107 For a very good overview, see Anna Helmner, *Human Rights Violations of Peacekeeping Troops: Accountability of the UN and the Relationship to the ECHR* (Bachelor’s Thesis, Örebro Universitet, Sweden, 2016, www.diva-portal.org). See also “Accountability of international organisations for human rights violations”, Report by José María Beneyto, Parliamentary Assembly of the Council of Europe, Doc. 13370 of 17 December 2013 (<http://assembly.coe.int>).

73. It follows from this deficient implementation of the rule of law concept in the activities of the UN itself that the several declarations, resolutions and statements of the UN are mainly appeals or admonitions addressed to States which—apart from the obligation to observe international law and to guarantee individual human rights—have a weak foundation in the UN Charter. Will these appeals and admonitions fare better and be more successful than the innumerable pleas and calls of UN bodies in the past decades that States comply with their international legal and human rights obligations? Or is the rule of law, to borrow language from a famous song by the Eagles, just the “new kid in town”,¹⁰⁸ soon to be replaced by something else coming up in the meeting rooms of the UN?¹⁰⁹

VI. The common law tradition of the rule of law and the present state of international law

74. While thus the rule of law promoted by the United Nations still “suffers from a lack of clarity relating to its legal basis and its content, but also as to the subjects that are purportedly bound by it”,¹¹⁰ the concept originates in the English common law tradition¹¹¹—no matter whether or not it was Professor A.V. Dicey who first used the notion in his book *Lectures Introductory to the Study of the Law of the Constitution* of 1885.¹¹² In that tradition, the rule of law is characterized by a number of principles which inevitably are of relevance for the United Nations concept analysed above.

108 The Eagles, *New Kid in Town*, from the album “Hotel California”, released in 1976.

109 This author agrees with an observation by Rosalyn Higgins: “There is a tendency for the UN to go through phases of finding certain themes fashionable, without really thinking them through.” See Higgins, above n. 89, 1335.

110 See Holger P. Hestermeyer, *A Rights-based Approach to the Rule of Law in International Law*, in: Feinäugle, above n. 48, 131, 146.

111 See, however, for a history of the idea of the rule of law which begins with the classical Greek and Roman authors, Brian Z. Tamanaha, *On the Rule of Law: History, Politics, Theory* (CUP 2004). The importance of religion (not only in Europe but also in India and Islam) for the emergence of the rule of law, and of the Roman Catholic Church for the institutionalization of the concept in Europe, is emphasized by Francis Fukuyama, *The Origins of Political Order: From Prehuman Times to the French Revolution* (Farrar, Straus and Giroux 2011), Part III, 245-317.

112 Macmillan 1885. This first edition was published again by OUP in 2013 (edited by J.W.F. Allison). Later editions were published under the title *Introduction to the Study of the Law of the Constitution*. See Tom Bingham, *The Rule of Law* (Penguin 2010), 3. For an account of Dicey’s concept, its critics and supporters, see Jeffrey Jowell, *The Rule of Law*, in: Jeffrey Jowell, Dawn Oliver and Colm O’Cinneide (eds.), *The Changing Constitution* (8th edn., OUP 2015), 13-37. See also Yee, *The Perfect Rule of Law*, above n. 2, 42-45.

These principles were masterfully summarized by the eminent British judge and jurist Lord Bingham in the following words:

- (1) The law must be accessible and so far as possible intelligible, clear and predictable;
- (2) Questions of legal right and liability should ordinarily be resolved by application of the law and not the exercise of discretion;
- (3) The laws of the land should apply equally to all, save to the extent that objective differences justify differentiation;
- (4) Ministers and public officers at all levels must exercise the powers conferred on them in good faith, fairly, for the purpose of which the powers were conferred, without exceeding the limits of such powers and not unreasonably;
- (5) The law must afford adequate protection of fundamental human rights;
- (6) Means must be provided for resolving, without prohibitive cost or inordinate delay, bona fide civil disputes which the parties themselves are unable to resolve;
- (7) Adjudicative procedures provided by the state should be fair;
- (8) The rule of law requires compliance by the state with its obligations in international law as in national law.¹¹³

113 Bingham, *ibid.*, 37, 48, 55, 60, 66, 85, 90, 110. Compare these principles with those enumerated by Raz, above n. 93, 214-18. For another account of generally accepted “anatomies of the rule of law”, i.e. “elements of legal institutions, rules, and practices, and sometimes achievements, that are seen as adding up to the rule of law”, see Martin Krygier, *Rule of Law*, in: Michel Rosenfeld and András Sajó (eds.), *The Oxford Handbook of Comparative Constitutional Law* (OUP 2012), 233, 235-40. For proposals of definitions of an *international* rule of law, see William W. Bishop, *The International Rule of Law*, 59 *Michigan Law Review* (1961), 553 (“the concept includes reliance on law as opposed to arbitrary power in international relations; the substitution of settlement by law for settlement by force; and the realization that law can and should be used as an instrumentality for the cooperative international furtherance of social aims, in such fashion as to preserve and promote the values of freedom and human dignity for individuals”); James Crawford, *International Law and the Rule of Law*, 24 *Adelaide Law Review* (2003), 3, 10 (“four basic values as associated with the rule of law: absence of arbitrary power; the general non-retrospectivity of the laws; the subjection of government to general laws, whatever their content; and the independence of the judiciary which must be ‘established by law’”); Yee, *The Perfect Rule of Law*, above n. 2, 52 (“The perfect rule of law obtains when law prevails or is complied with simply because it is law. That is to say, law serves as the ultimate reason for voluntary action”); Simon Chesterman, *An International Rule of Law?*, 56 *American Journal of Comparative Law* (2008), 331, 340-42 (suggesting a “core definition” applicable and acceptable across cultures and political systems with the following three elements: “government of laws, the supremacy of the law, and equality before the law”); Kenneth J. Keith, *The International Rule of Law*, 28 *Leiden JIL* (2015), 403, 406-14; and Robert

75. If we compare these principles with the shape the rule of law concept has assumed in the declarations of the UN, the difference is striking: Little of what is enumerated by Lord Bingham as a summary of a centuries-old tradition appears in the work of the UN, with the exception of the fifth and the eighth principles which address human rights and international law. The UN is of course free, and even called upon, to define and to develop the concept as it thinks best,¹¹⁴ but one must wonder whether actually the UN has not in some way captured the name of the concept only—a popular name, and as such not objected to by anybody—while ignoring its established meaning.

76. It is a different issue to compare the standard arising from Lord Bingham's eight principles with the present state of international law. Different conclusions suggest themselves, positive and negative. Lord Bingham pointed to what seemed to him to be “the two most serious deficiencies of the rule of law in the international order”—the first relating to the principle of “law not discretion” (principle 2), and the second to the principle of dispute resolution by courts (principle 6): “The first [deficiency] is the willingness of some states in some circumstances to rewrite the rules to meet the perceived exigencies of the political situation [. . .]. The second is the consensual basis of the jurisdiction of the International Court of Justice.”¹¹⁵ With regard to the second mentioned deficiency, Lord Bingham approvingly quoted Dame Rosalyn Higgins who had said in 2007 that “the absence of a compulsory recourse to the Court [the ICJ] falls short of a recognisable ‘rule of law’ model”.¹¹⁶ In that respect, both authors indeed only echoed Hans Kelsen's writings from before, during and after World War II.¹¹⁷

77. Can we accept the conclusion drawn by Lord Bingham as a fair evaluation of the present condition of the first dimension of the rule of law as it appeared in the rule of law discourse of the UN—the rule of law in the relations between States? Or should we ask, in broader terms: Is today the “respect for the obligations arising from

McCorquodale, *The Rule of Law Internationally*, in: Feinäugle, above n. 48, 51 (the chapter is largely identical with the same author's article *Defining the International Rule of Law: Defying Gravity?*, 65 *International and Comparative Law Quarterly* (2016), 277).

114 See above text accompanying n. 2.

115 Bingham, above n. 112, 128.

116 See Higgins, above n. 89, 1333, quoted in: Bingham, above n. 112, 128.

117 See, e.g., Hans Kelsen, *Peace through Law* (The University of North Carolina Press 1944), 13-14 with footnote *: “As long as it is not possible to remove from the interested States the prerogative to answer the question of law and transfer it once and for all to an impartial authority, namely, an international court, any further progress on the way to the pacification of the world is absolutely excluded. For many years the writer has tried to show that the establishment of a court with compulsory jurisdiction is the first and indispensable step to an effective reform of international relations.”

treaties and other sources of international law” (Preamble of the UN Charter, para.3) by States greater than it was in 1945? Has the UN Charter brought about, or at least contributed to, such a greater respect? We do not have clear answers to those questions, let alone empirical evidence. What we do have is impressions, assumptions and guesses, the most popular of which among international lawyers is Louis Henkin’s statement that “[i]t 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”.¹¹⁸ With good reason, I believe, the American legal theorist Brian Tamanaha offered the following critical comment on that proposition:

While it might be correct that most laws are followed most of the time, the most powerful states, and less powerful states when it matters most to them, nonetheless disregard international law by their leave when they consider it necessary for perceived national interest or to preserve the regime in power.¹¹⁹

78. In any case, in 2018 the general situation does not seem to differ much from that of 1968 when Professor Henkin first made his famous remark, or from the situation of 1945.

79. On a more positive note, however, we can recognize and appreciate the contribution the United Nations has made for more than seven decades to the strengthening and development of international law, and thus to the rule of law in international relations. If we take the essential principles formulated by Lord Bingham¹²⁰ as a benchmark, it cannot be denied that the UN has helped make international law more accessible, intelligible and predictable;¹²¹ that the UN, in accordance with Article 36, paragraph 2 of the Charter, has urged States to resolve legal questions by application of the law and not the exercise of political discretion or arbitrariness; that the UN, in accordance with the principle of sovereign equality of States, has emphasized that the rules of international law apply equally to all States; that the UN has incessantly worked for the protection of fundamental human rights; and that the UN has

118 Louis Henkin, *How Nations Behave: Law and Foreign Policy* (2nd edn., Columbia University Press 1979), 47.

119 Tamanaha, above n. 111, 128.

120 See above text accompanying n. 113.

121 In that respect, one may recall the work of the International Law Commission. For an appraisal of its codification of international law, see, e.g., Herbert W. Briggs, *The International Law Commission* (Cornell University Press 1965); Bertrand G. Ramcharan, *The International Law Commission* (Nijhoff 1977); Ian Sinclair, *The International Law Commission* (Grotius 1987); and United Nations (ed.), *The International Law Commission Fifty Years After: An Evaluation* (United Nations 2000).

provided means for resolving disputes between States, in particular the legal procedures of the International Court of Justice.¹²²

80. And what about the second dimension of the rule of law, the rule of law within States? “The core of the existing principle is”, Lord Bingham succinctly wrote, “that all persons and authorities within the state, whether public or private, should be bound by and entitled to the benefit of laws publicly made, taking effect (generally) in the future and publicly administered in the courts”.¹²³ Is that principle, on a global scale, today better observed than it was in 1945? Or does it hold true for the domestic rule of law that, as Antonio Cassese wrote some years ago about the effectiveness of international human rights law, “[t]he international society is teeming with impressive normative constructs that are not matched by reality and remain magnificent dreams”¹²⁴?

81. As regards the third dimension of the rule of law, the rule of law to be observed by the United Nations, results are mixed. As mentioned before,¹²⁵ the main deficit is the lacking legal control of the Security Council and the lacking capacity of a State or individual burdened with a measure adopted by the Council to bring an action before a court—a deficit, however, which was consciously accepted by the founding members of the UN as a consequence of the decision in favour of a strong Security Council and a priority of the absence of war over considerations of legality.

VII. By way of conclusion: a voice from the past

82. As the very first source of the English term “rule of law”, the Oxford English Dictionary mentions a book in Middle English written around the year 1500.¹²⁶

122 For an earlier, likewise positive appraisal, see Louis Henkin, *International Organization and the Rule of Law*, 23 *International Organization* (1969), 656, 665-66: “The UN [...] has added an important increment to the forces that support observance of international law. While the victims of most violations of international law do not wish to ‘internationalize’ them and other UN Members resist involvement, violations of the law of the Charter surely, and some other important violations probably, come before the Organization, become the business of all UN Members, and inevitably engage them in the controversy. Neither the powerful few nor the mass of the Members can easily refrain from putting their influence behind the observance of law [...]. The existence of the UN also, I believe, affords general protection to the weak against pressures from the strong that were common in an earlier day.”

123 Bingham, above n. 112, 8 and 37.

124 Antonio Cassese, *A Plea for a Global Community Grounded in a Core of Human Rights*, in: Antonio Cassese (ed.), *Realizing Utopia: The Future of International Law* (OUP 2012), 136, 140.

125 See above text following n. 97.

126 Oxford English Dictionary, online edition, “rule of law, n.”, sec. 1 (OED Third Edition, March 2011).

It was the translation, prepared by a Fellow of All Souls College in Oxford called John Blount, of a book written in Latin earlier in the fifteenth century, before 1446, entitled *De Studio Militari*, or *De Militari Officio*. Its author was Nicholas Upton (c.1400–1457). He was a fellow of New College, Oxford, graduated bachelor of civil law, was ordained sub deacon but then entered the service of the fourth earl of Salisbury and fought against the French in Normandy. Having laid aside the sword and taken up his books again, he graduated bachelor of canon law, became a rector and canon of the Anglican Church and eventually precentor of Salisbury Cathedral.¹²⁷

83. Upton's *De Studio Militari* is "a treatise, in four parts, on heraldry and the arts of war, drawing heavily on a tradition of heraldic and legal writing, but also reflecting contemporary concerns".¹²⁸ The fourth part includes the text of the Ordinances (or Statutes) of War made by King Henry V at Mantes in 1419 which apparently were based upon and expanded from the ordinances issued by Richard II at Durham in 1385.¹²⁹ In the preamble of King Henry's Ordinances, the Latin term *juris regula* is used, and it was that term which John Blount translated, roughly eighty years later, into "Rewle of lawe". Here is the respective passage from the *De Studio Militari* in the Latin original and in Blount's Middle English translation:

Ideoque lex & Constitutiones ordinantur, ut appetitus noxius sub Juris regula limitetur, per quam humanum genus ut honeste vivat, alterum non ledat, & Jus suum unicuique tribuat, informatur: Et ut noster exercitus utroque, scilicet, & bellorum & pacis tempore, felice tramite gubernetur: dictumque commune bonum in prosperis conservetur.¹³⁰

And therefore lawes And constitucions be ordeyned be cause the noysome Appetit of man maye be kepte vnder the Rewle of lawe, by the wiche mankinde ys dewly enformed to lyue [live] honestly, to hurt no man, And to geue [give] euery man his owne; And for by cause our hooste¹³¹ maye At bothe tymes, that

127 See Albert F. Pollard, Upton, Nicholas, in: Leslie Stephen and Sidney Lee (eds.), *Dictionary of National Biography* (Smith, Elder and Co. 1885-1900), vol. 58, 39. See also Andrew Brown and Craig Walker, Upton, Nicholas (c.1400–1457), in: *Oxford Dictionary of National Biography* (OUP 2004) (<http://www.oxforddnb.com/view/article/28011>).

128 Brown and Walker, *ibid.*

129 The importance and historical context of these ordinances is discussed by Theodor Meron, *Henry's Wars and Shakespeare's Laws: Perspectives on the Law of War in the Later Middle Ages* (OUP 1993), 144-46.

130 See Francis P. Barnard (ed.), *The Essential Portions of Nicholas Upton's DE STUDIO MILITARI*, before 1446, translated by John Blount (The Clarendon Press 1931), 49.

131 Also hōst(e, ost(e, hoiste, oest: an army.

ys to saye bothe in peace And in war, After good order be Rewlyd [ruled] And gouernyd [governed] And the comon welthe kepte in prosperite.¹³²

84. Written at the end of the Middle Ages, that proposition is astonishingly timeless. It was written by a lawyer and cleric who also had a first-hand experience of war—similar to the authors of the following, the sixteenth century, who we regard as the founding fathers of modern international law. The proposition is of a universal character, speaking of “man” and “mankind” (*humanum genus*) without a spatial or temporal limitation. It is also secular in the sense that the writer is setting his hope not on God but on man-made “laws and constitutions” (*lex & constitutiones*).

85. Notwithstanding the changes in language and style, the drafters of the UN Charter would have subscribed, almost five hundred years later, to Nicholas Upton’s thought: The annoying and hurtful appetite of man for power and gains must be controlled by the rule of law which informs mankind of how to live honestly and peacefully. The fight for the rule of law in human relations is long and never-ending. In that fight, the drafters would have concluded with some satisfaction, the UN Charter has been a significant milestone.

132 See Barnard, above n. 130, 33-34. There is also a more recent edition of Blount’s translation: Craig G. Walker, An edition with introduction and commentary of John Blount’s English translation of Nicholas Upton’s *De Studio Militari*, University of Oxford, Ph.D. thesis 1998 (see record in The British Library’s main catalogue (<http://explore.bl.uk>)).