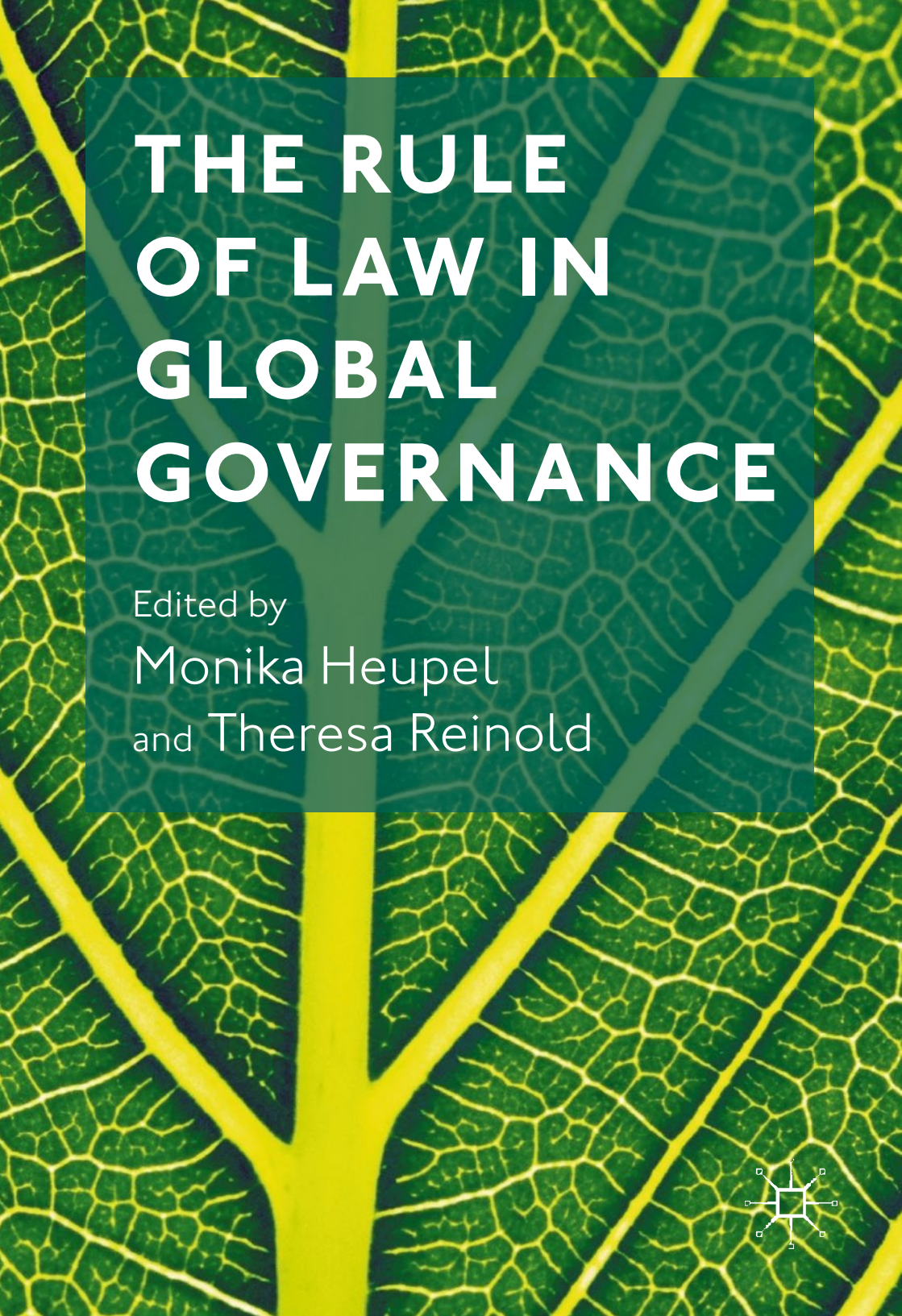
THE RULE OF LAW IN GLOBAL GOVERNANCE
Edited by
Monika Heupel
and Theresa Reinold

The Rule of Law in Global Governance

'The Rule of Law in Global Governance offers an excellent set of essays by a marvelous group of scholars. The volume at the same time conveys the state of the art and pushes the field further with a number of innovative essays. A must for those active in this field.'

– Michael Zürn, WZB Berlin Social Science Center, Germany

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Editors

The Rule of Law in Global Governance

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Bamberg and Leiden, May 2016 Monika Heupel and Theresa Reinold

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Abbreviations

ACLU	American Civil Liberties Union
ACT	Accountability, Coherence and Transparency Group
AI	Amnesty International
ANAB	ANSI-ASQ National Accreditation Board
AU	African Union
BHRRC	Business & Human Rights Resource Centre
BP	British Petroleum
BRIC	Brazil, Russia, India, and China
BVerwGE	The Federal Administrative Court
CFI	Court of First Instance
CJEU	Court of Justice of the EU
COBBES	Codes, Best Practices, Benchmarks, and Standards
COMKFOR	Kosovo Force Commander
CoE	Council of Europe
CTI	Capacity Training International
DCAF	Geneva Centre for the Democratic Control of Armed Forces
DFS	Department of Field Support
DII	Defense Industry Initiative on Business Ethics and Conduct
DPKO	Department of Peacekeeping Operations
DRC	Democratic Republic of the Congo
EAW	European Arrest Warrant
EC	European Community
ECHR	European Court of Human Rights
ECJ	European Court of Justice
ECOSOC	Economic and Social Council
ECOWAS	Economic Community of West African States
ECtHR	European Court for Human Rights

ED	Environmental Department
ERI	Earth Rights International
EU	European Union
EULEX	European Union Rule of Law Mission
GA	United Nations General Assembly
GAL	Global Administrative Law
GATT	General Agreement on Tariffs and Trade
HRF	Human Rights First
IA	International Alert
IAEA	International Atomic Energy Agency
IBRD	International Bank of Reconstruction and Development
ICAO	International Civil Aviation Organization
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICISS	International Commission on Intervention and State Sovereignty
ICJ	International Court of Justice
ICoC	International Code of Conduct for Private Security Service Providers
ICoCA	International Code of Conduct for Private Security Providers' Association
ICRC	International Committee for the Red Cross
ICTY	International Criminal Tribunal for the former Yugoslavia
IDA	International Development Association
IFBEC	International Forum on Business Ethical Conduct
IGOs	International Governmental Organizations
IICK	Independent International Commission on Kosovo
IHL	International Humanitarian Law
IHRL	International Human Rights Law
IL	International Law
ILC	International Law Commission
ILO	International Labor Organization
IOs	International Organizations
IP	Inspection Panel
IR	International Relations
ISO	International Organization for Standardization
KFOR	Kosovo Force
NATO	North Atlantic Treaty Organization
ISAF	International Security Assistance Force
NGOs	Non-Governmental Organizations

NPT	Nuclear Non-Proliferation Treaty
OEA	Office of Environmental Affairs
OHCHR	United Nations Office of the High Commissioner for Human Rights
OIK	Ombudsperson Institution in Kosovo
OLA	Office of Legal Affairs
OMS	Operational Manual Statement
OMPI	Organisation des Modjahedines du Peuple d'Iran
OPM	Operational Policy Memorandum
OSCE	Organisation for Security and Co-operation in Europe
OSPAR	Convention for the Protection of the Marine Environment of the North-East Atlantic
OVG	Higher Administrative Court
P4R	Programs-for-Results
P-5	Permanent Security Council Members
R2P	Responsibility to Protect
RAID	Rights and Accountability in Development
REDs	Regional Environmental Divisions
RELEX	Foreign Relations Counsellors Working Party
Rn2V	Responsibility not to Veto
S-5	Small Five Group
SOP	Standard Operating Procedure
SRSG	Special Representative of the Secretary-General
VCLT	Vienna Convention on the Law of Treaties
WHO	World Health Organization
WTO	World Trade Organization
UIFSA	Uniform Interstate Family Support Act
ULC	Uniform Law Commission
UN	United Nations
UNAMA	United Nations Assistance Mission in Afghanistan
UNCTAD	United Nations Conference on Trade and Development
UNESCO	United Nations Educational, Scientific and Cultural Organization
UNHCR	United Nations High Commissioner for Refugees
UNMIK	United Nations Interim Administration Mission in Kosovo
UNSC	United Nations Security Council
USAID	United States Agency for International Development

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Introduction: The Rule of Law in an Era of Multi-level Governance and Global Legal Pluralism

Theresa Reinold and Monika Heupel

Governance beyond the nation-state is replete with challenges, complexities, and contradictions, and even though both International Relations (IR) and International Law (IL) scholarship have sought to develop conceptual tools in order to grasp this complex reality, there still remain a considerable number of blind spots on each discipline's research agenda. James Rosenau has therefore urged researchers to take the 'contradictions and dialectics of today's world … far more seriously than they have been if the challenges of governance on a global scale are to be rendered more comprehensible' (2000, p. 195). We, as editors of the present volume, do indeed take these 'contradictions and dialectics' very seriously, and have invited a number of scholars from both IR and IL to reflect upon them from one particular angle, namely the rule of law. In the messy world of multi-level governance and global legal pluralism, subjecting political

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actors to the rule of law represents a particular challenge, as the dispersion of authority across different levels of governance and the lack of an overarching framework governing their interactions make the attribution of responsibilities more difficult (Viola 2007, p. 116) and governance failures more likely (Jessop 2004, p. 61). At the same time, however, it has been suggested that it is just these alleged 'weaknesses' of governance beyond the nation-state which could turn out to be its greatest strengths, because the different layers of governance could function as checks on each other, thereby hedging the exercise of political power and strengthening accountability (Krisch 2010, p. 272), as well as contributing to the multi-level protection of human rights (Petersmann 2012, p. 133, 23; see also Cottier and Hertig 2003). Whether or not these generalizations hold will be the subject of this book. It subjects the (often implicit and untested) assumptions about the rule of law implications of multi-level governance and global legal pluralism to closer scrutiny, in order to add substance to a debate that thus far has lacked a solid empirical basis.

This introductory chapter serves to embed the subsequent chapters in the broader context of recent research on multi-level governance and global legal pluralism, both of which have important contributions to make to understand the emergence of the rule of law beyond the nation-state. However, while each of these bodies of literature has important implications for the rule of law in global governance, neither theorists of multi-level governance nor global legal pluralism dwell on this subject.[1] In light of the dearth of interdisciplinary work as well as empirical analyses on the subject, this volume brings together a group of scholars from IR and IL who share an interest in the question of how the interaction of multiple loci of authority affects the emergence of an international rule of law. Considering the complexity of the subject, this book eschews generalized statements about the current state and future development of the rule of law in multi-level governance, but rather focuses on carefully analysing different dimensions of the subject-matter and identifying the ambivalences, tensions and trade-offs between different elements of the concept of the rule of law.

The guiding question of the book is to what extent multi-level governance and global legal pluralism promote or undermine the rule of law within and beyond the nation-state. In order to answer this broad question, we broke it down into three components, or crosscutting themes, which the contributors will address in their respective chapters: First, what are the implications of multi-level governance and legal pluralism

for the *limitation of power*, which is at the heart of the concept of the rule of law? Second, given that multi-level governance and global legal pluralism tend to undermine the *coherence* of international law—which is a critical factor in ensuring the law's autonomy from the influence of politics—does the emergence of multiple loci of authority and the potentially ensuing fragmentation of the international legal order help *dominant actors* to increase their influence on international law? Third, given that multi-level governance and legal pluralism imply the increased reliance on *soft law*, does this shift towards 'relative normativity' (Weil 1983) weaken the rule of law?

The book is divided into two sections that look at these questions through two distinct conceptual lenses. The chapters of the first section inquire into the relationship between multi-level governance/global legal pluralism and *secondary rules* that limit the exercise of power by regulating how law is created, applied, and changed. In the context of multi-level governance and legal pluralism, different secondary rules emerge at different layers of governance. In what way, does this undermine the overall coherence of international law? Moreover, does global legal pluralism enable powerful actors to increase their sway over the making, interpretation, and application of international law, or does it create opportunities for contestation and the limitation of power? These questions will be addressed by Charlotte Ku's and Paul F. Diehl's contribution on effects of secondary rules on international law's primary rules (chapter "The Primary Effects of Secondary Rules: Institutions and Multi-Level Governance"), by Helmut Philipp Aust's contribution on the ways the Vienna Convention on the Law of Treaties shapes the interpretation of international law by domestic courts (chapter "The Rules of Interpretation as Secondary Rules: The Perspective of Domestic Courts"), and by Theresa Reinold's contribution on the implications of the 'responsibility not to veto' concept for the rule of law in multi-level governance (chapter "The UN Security Council and the Politics of Secondary Rule-Making").

The chapters of the second section focus on the issue of *accountability* in the context of multi-level governance and global legal pluralism. These are the contributions by Gisela Hirschmann on the emergence of rule of law standards for international detentions (chapter "Accountability Dynamics and the Emergence of an International Rule of Law for Detentions in Multilateral Peace Operations"), by Monika Heupel on human rights safeguards in international organizations (chapter "Human Rights Protection in International Organizations in the Era of Multi-Level

Governance and Legal Pluralism"), by Magdalena Bexell on the rule of law effects of the *Voluntary Principles on Security and Human Rights* (chapter "Multi-Level Governance and the Rule of International Human Rights Law: The Case of the *Voluntary Principles on Security and Human Rights*"), and by Anna Leander on whitelisting practices in the commercial security sector (chapter "Whitelisting and the Rule of Law: Legal Technologies and Governance in Contemporary Commercial Security"). Accountability in a heterarchical world implies that various types of actors operating at different layers of governance frequently work together to monitor and sanction power holders in order to promote the latters' compliance with certain standards. These standards often take the form of soft law; we therefore inquire into the implications of the involvement of diverse actors and the use of soft law instruments in accountability relationships for the international rule of law. We also scrutinize the role of domestic and regional courts in promoting the rule of law in a world of multi-level governance and legal pluralism.

Multi-level Governance and Global Legal Pluralism: The Disciplinary Divide

Even though there have been calls upon researchers to 'look over the fence to … other disciplines' (Van Kersbergen and van Waarden 2004, p. 144), political scientists continue to study governance 'largely in ignorance of the increased use of the same concept in neighbouring disciplines' (Van Kersbergen and van Waarden 2004, p. 144). In fact, there is hardly any interdisciplinary work that tries to bring together the concepts of multi-level governance and global legal pluralism (but see Isiksel and Thies 2013a). This is regrettable, considering that political scientists and international lawyers have a shared interest in understanding the causal dynamics of governance beyond the nation-state and in appraising its normative implications for democracy, accountability, and the rule of law.

Before we address these issues in more detail, however, let us consider to what extent multi-level governance theories and the literature on legal pluralism intersect, and in what ways they diverge. Both literatures dismiss the notion of a hierarchical ordering of global governance along the lines of the ideal of the centralized nation-state. Instead, these scholars emphasize the heterarchical constitution of global governance, in which governance functions are dispersed across different actors at different levels and in which different normative orders coexist and potentially compete with

each other (Hooghe and Marks 2003; Tamanaha 2008). Nonetheless, there are also important differences. The concept of multi-level governance is primarily concerned with *agents* and their interaction processes—some even argue that structure has no role to play in the multi-level governance approach (Peters and Pierre 2004, p. 84). The literature on legal pluralism, by contrast, even though it does not completely disregard the role of actors in creating and utilizing legal pluralism to further their interests (Barzilai 2008), tends to focus on normative *structures*, on the ways in which these interact, collide, and cross-fertilize one another (see, e.g., Berman 2007). By bringing these two bodies of literature and the disciplines that have spawned them together, this volume proceeds from the assumption that in order to fully grasp the rule of law implications of governance beyond the nation-state, we must take into account agency *as well as* structure, and also the *processes* and causal mechanisms that connect one with the other. Moreover, taking an interdisciplinary perspective allows us to examine both the legal and the political dynamics involved, thus bringing together the conceptual lenses of IR and IL scholarship.

The concept of multi-level governance initially emerged from European integration research, where scholars sought to come up with a new analytical framework in order to grasp the shifts in governance that had occurred in Europe after World War II, and was subsequently extended to the study of other post-Westphalian governance arrangements that defy the hierarchically organized governance structure of the nation-state (see, e.g., Bache and Flinders 2004; Benz 2007; Börzel 1998; Grande 2000; Heinelt et al. 2002; Hooghe 1996; Hooghe and Marks 2001, 2003; Jachtenfuchs and Kohler-Koch 1995; Jordan 1997; Jörges et al. 2000; Marks 1992; Marks et al. 1996; Peters and Pierre 2001; Pierre 2000; Pierson 1996; Sbragia 1992; Scharpf 1988, 1997, 1999, 2001). In multi-level governance, governance is 'dispersed across multiple centres of authority' (Hooghe and Marks 2003, p. 233) which are either situated at different hierarchical levels or fulfil different functional tasks (Hooghe and Marks 2003, p. 236). What emerges, then, is a polyarchy of potentially intersecting sites of authority (Held and McGrew 2002, p. 1). Research on multi-level governance raises important questions about the role of sovereign states in a globalized world, as well as about the causal dynamics underlying the myriad ways in which governance functions have been taken over by a broad array of actors other than central governments—international organizations (IOs), global advocacy networks, transnational enterprises, epistemic communities, and so on.

Students of multi-level governance are usually quick to point out its manifold benefits, which include the internalization of externalities arising from the provision of public goods (Hooghe and Marks 2003), the accommodation of political/cultural/normative diversity (Hooghe and Marks 2003), or the promotion of innovation (Gray 1973), to name just a few. At the same time, a burgeoning literature also addresses the potential pitfalls of multi-level governance, such as the challenges it poses to democracy and accountability (Benner et al. 2004; Benz and Papadopoulos 2006; DeBardeleben and Hurrelmann 2007a; Héritier 1999; Majone 1998; Olsson 2003; Peters and Pierre 2004; Scharpf 1999; Schmitter 2000; Zürn 2004). While the (related) issue of the rule of law implications of polycentricity pops up here and there, it is generally given short shrift. Adrienne Héritier, for instance, makes a promising overture by pointing out that at 'each step of the European policy process … policy-making is characterized by a distrustful and circumspect observation of the mutual policy proposals made by the involved actors. … The mutual distrust signifies an enormous potential for control and a chance to hold actors accountable for individual policy moves' (1999, p. 274). However, Héritier subsequently does not pursue this train of thoughts any further. Neither do the pioneers of multi-level governance research, Liesbet Hooghe and Gary Marks, pay much attention to the rule of law. In their seminal work *Multi-level Governance and European Integration* (2001), they inquire into the 'character, causes, and consequences of multi-level governance' (2001, p. xii). They subsequently list a number of more specific questions which inform the multi-level governance research agenda, including the relationship between multi-level governance and state-building, the question of identities, preferences, and behaviour of the various actors participating in multi-level governance, the consequences of conflicts among these different actors, the causes of variation in cohesion policy, and finally, the implications of multi-level governance for national sovereignty (Hooghe and Marks 2001, p. 1). The rule of law is conspicuously absent from this inquiry into the causes and consequences of multi-level governance. Another leading figure in the field, Arthur Benz, self-consciously notes that multi-level governance researchers have thus far failed to develop a fully fledged theory explaining the genesis, workings, and consequences of systems of multi-level governance (Benz 2004, p. 130). Among the desiderata identified by Benz are the 'possibilities for transparency and control in multilevel structures' (Benz 2004, p. 143).[2] There, thus seems to be an awareness of the importance of subjecting the agents operating in

systems of multi-level governance to the rule of law, yet existing research has thus far failed to address these questions in detail. Take the issue of checks and balances, which is at the heart of the concept of the rule of law. This issue surfaces in many pieces on multi-level governance (see, e.g., DeBardeleben and Hurrelmann 2007b, p. 7; Rosenau 2000, p. 195; Van Kersbergen and van Waarden 2004, p. 160), yet is seldom explored in depth. Rosenau, for instance, observes that global governance 'is increasingly pervaded with checks and balances' which are not formally institutionalized as in the domestic setting and which also vary strongly across regimes and issue-areas (2000, p. 195). Nonetheless, he optimistically argues that 'more often than not they tend to inhibit unrestrained exercises of power and to subject unfair or even criminal practices to the glare of publicity' (2000, p. 195). How exactly these checks and balances operate and to what extent they are successful in subjecting political actors to the rule of law remains an open question. Overall, it seems that multi-level governance theorists tend to take comfort in the aphorism that 'there is safety in numbers', meaning that 'the more pluralistic and crowded the global stage gets' the less can any single actor, or any group of actors, dominate others (Rosenau 2004, p. 46). However, we would be deluding ourselves by believing that the sheer heterogeneity of actors and preferences that comes with the proliferation of governance arrangements will prevent abuses of political power and automatically ensure that the law, not politics, reign supreme. Instead, as we shall argue below, the relationship between multi-level governance and the rule of law is too complex to warrant sweeping conclusions.

Multi-level governance is to political scientists what global legal pluralism is to international lawyers (Avbelj 2006; Barber 2006; Barzilai 2008; Berman 2007, 2012; Burke-White 2004; Casanovas 2001; Craven 2003; de Sousa Santos 2002; Isiksel and Thies 2013a; Kingsbury 1998; Krisch 2006, 2010; Koskenniemi 2005; Michaels 2009; Petersmann 2012; Tamanaha 2008, 2011; Teubner 1997; Twining 2010; Viola 2007; Walker 2008). Definitions of legal pluralism abound; at its most basic level, it designates a situation 'in which multiple legal forms coexist' (Tamanaha 2011, p. 2). The concept of 'semi-autonomous social fields', coined by legal anthropologist Sally Falk Moore, is at the heart of the literature on legal pluralism. A semi-autonomous field 'has rule-making capacities, and the means to induce or coerce compliance; but it is simultaneously set in a larger social matrix which can, and does, affect and invade it' (Moore 1978, p. 55f). Theorists of global legal pluralism have appropriated this

concept and applied it to the post-national realm, 'in which state and non-state, local and global social relations interact, merge and conflict in dynamic and even volatile combinations' (De Sousa Santos 2002, p. 94). The coexistence of multiple layers of governance thus leads to a situation in which acts are simultaneously regulated by different normative orders. Despite these overlaps and potentially ensuing norm conflicts, legal pluralists tend to view the parallel existence of normative orders and loci of authority as normatively desirable, 'both as a source of alternative ideas and as a site for discourse among multiple community affiliations' (Berman 2007, p. 1155).

The literature on legal pluralism tends to focus primarily on ways to manage normative conflict among levels of governance and different legal orders, and, with a few exceptions, does not dwell on the aspect of the limitation of political power specifically, and the rule of law, more generally (Berman 2007, pp. 1190–91). Among the exceptions is Gunther Teubner's work, in which he argues that global legal pluralism entails the absence of both a global constitution and a global *Grundnorm* but at the same time gives rise to the emergence of a law of conflicts for intersystemic clashes (Teubner 1997). Another example is a special issue by Turkuler Isiksel and Anne Thies in the journal *Global Constitutionalism* that addresses some of the implications of global legal pluralism for the rule of law (Isiksel and Thies 2013a). Isiksel and Thies conclude that global legal pluralism may undermine the protection of individual rights but also provides judicial fora that can further the unity of international law by generating common principles and methods of interpretation and by reducing legal uncertainty (Isiksel and Thies 2013b, pp. 157–58).[3] Yet, the special issue focuses on one specific element of the rule of law, that is, the protection of individual rights, and sees itself as a 'starting point for a cross-disciplinary debate' on the issue rather than a conclusive analysis (Isiksel and Thies 2013b, p. 154). Another piece which addresses the rule of law implications of global legal pluralism is Ernst-Ulrich Petersmann's *International Economic Law in the 21st Century. Constitutional Pluralism and Multilevel Governance of Interdependent Public Goods* (2012) which, however, focuses narrowly on global economic governance. Brian Tamanaha's *The Rule of Law and Legal Pluralism in Development* (2011) is equally limited to a particular issue-area. Andreas Føllesdal, Ramses Wessel, and Jan Wouters' *Multilevel Regulation and the EU. The Interplay Between Global, Regional, and National Normative Processes* (2008), by contrast, takes a more comprehensive approach and adopts a perspective similar to ours, even though

they do not focus on the rule of law specifically. The authors also point out that '[t]here is clearly a need for more comprehensive, thorough analysis of multilevel regulation and its ramifications', especially as regards to its implications for democracy, legitimacy, and the rule of law (Wessel and Wouters 2008, p. 47, 41). The most substantial contribution to the topic of the present volume is made by Nico Krisch in his book *Beyond Constitutionalism*, which devotes an entire chapter to pluralism's implications for democracy and the rule of law. Krisch extols pluralism's normative virtues, highlighting that the interaction of different normative orders and authorities could be viewed 'as an accountability mechanism itself' (2010, p. 272)—thus echoing Rosenau's assumption about the safety of large numbers. While Krisch concedes that the heterarchical ordering of authorities in global governance seems to imply that pluralism 'eschews a central element of the Western political tradition—the hope to contain politics through the rule of law' (2010, p. 23)—he claims that these drawbacks are outweighed by the democracy-enhancing effects of legal pluralism. As opposed to constitutionalism, Krisch argues, legal pluralism opens up space for contestation and is better suited to accommodate the diverging political views of the various *demoi* that are affected by global governance (Krisch 2010, p. 282). There is thus a trade-off between democracy and the rule of law, and Krisch seems willing to sacrifice the latter for the former (2010, p. 283). He also notes, however, that his conclusions, drawn on the basis of three case studies, are merely preliminary, and that his book represents 'more of stocktaking than a definitive assessment of the vices and virtues of pluralism as a model of post-national order' (2010, p. 226). More empirical research on this trade-off between different political values, on the ways in which the tension between contestation and legal certainty, between democracy and the rule of law, plays out in the day-to-day operations of global governance is thus necessary, and the present collection of papers seeks to help fill this gap.

A Plea for (Conceptual) Pluralism

In contrast to notions such as democracy and human rights, which continue to be seen as a Western construct in parts of the globe, the rule of law appears to be one of those rare concepts which are cherished across traditional geopolitical and civilizational cleavages. At least, this is what the first-ever thematic United Nations General Assembly debate on the rule of law suggested, which was held in the fall of 2012. At the debate, all

speakers eagerly confirmed their commitment to the rule of law, including such strange bedfellows as Iran, Sudan, Luxemburg, and the International Crisis Group.[4] However, consensus has its price—in this case the price to be paid was conceptual clarity. In political as well as scholarly circles, the rule of law is often treated as a 'lump concept' which accommodates a variety of desirable elements. These include not only legal certainty, consistency, predictability, clarity, and so on but also substantive human rights norms (civil and political and sometimes even economic, social, and cultural rights), and occasionally even procedures for public contestation (for an overview see Tamanaha 2004, pp. 91–113). Some of these elements may directly conflict with one another: While many rule of law theorists emphasize legal certainty, predictability, and determinacy of the law, others view the rule of law as

> a mode of governance that allows people a voice. … It requires that public institutions should sponsor and facilitate reasoned argument in human affairs. But argument can be unsettling and the procedures we cherish often have the effect of undermining the predictability that is emphasized in the formal side of the ideal
>
> (Waldron 2008, p. 7).

The answer to the question of whether multi-level governance and global legal pluralism promote or undermine the rule of law thus partly hinges on the concept of the rule of law one holds: While some identify the rule of law above all with uniformity, legal certainty, and the stabilization of normative expectations, and hence view the coexistence of multiple loci of authority and the potentially ensuing normative conflicts as a threat to the rule of law (see, e.g., Baquero Cruz 2008, p. 414), others stress the limitation of power as an integral component of the rule of law, and thus welcome the checks and balances introduced by a system of multi-level governance (see, e.g., Petersmann 2012, p. 133).

In this introductory chapter, we deliberately avoid taking sides in the debate and instead adopt a very broad understanding of the rule of law, which we define as the general requirement that a community be governed by legal rules, not the whims of men. This allowed the contributors to adopt a more specific definition of the rule of law and discuss the tensions and trade-offs among the different elements of the concept in light of their respective empirical cases. In good pluralist tradition, then, we ultimately agree to disagree. We do not pretend to provide a conclusive answer to the question about the relationship between the rule of law, on the one hand,

and multi-level governance/legal pluralism, on the other. Rather, our goal is to provide detailed empirical analyses of specific cases as well as discussions of some of the core theoretical concepts involved, which, in turn, furnish some of the pieces of the larger puzzle underlying this volume. If we can agree on *something*, it would be on the admonition to students of multi-level governance and legal pluralism to adopt a nuanced understanding of the multifarious relationship between these concepts and the rule of law.

Crosscutting Themes: The Limitation of Power, Coherence, and the Concept of Law

This being said, even the most ardent supporters of theoretical pluralism have a desire for a reassuring modicum of unity in all this diversity; hence the individual contributions to this volume address three crosscutting themes touching upon different dimensions of the concept of the rule of law and their relation to multi-level governance and legal pluralism, namely

- the implications of multi-level governance and legal pluralism for the limitation of power;
- the implications of multi-level governance and legal pluralism for the coherence of international law and, related to this, the opportunities for dominant actors to usurp the law; and
- the implications of multi-level governance and legal pluralism for the choice between hard and soft law.

We will consider each of these themes in turn.

While it is certainly true that multi-level governance and global legal pluralism present a challenge to the unity of international law and legal certainty, they also have the potential to promote another aspiration enshrined in the rule of law ideal, namely the notion of the limitation of power (Koskenniemi 2005).[5] The question of who guards the guardians is a central concern of constitutional lawyers, a concern which—in the domestic sphere—is reflected in the formal separation of powers, in order to avoid the concentration of authority in the hands of a few. Even though globally no such formal separation of powers exists, the dispersion of authority across different loci of governance has the potential to hedge the exercise of political power and promote the accountability of power holders to those affected by their decisions. The relationship between multi-level governance/legal pluralism and the limitation of power will be further explored especially in the chapters written by Magdalena Bexell, Monika Heupel, Charlotte Ku and Paul Diehl, Anna Leander, and Theresa Reinold.

On a related note, how autonomous is the law really from material levers in the international setting, where, according to realists, might always makes right? In how far does the internal logic of the law prevent it from being usurped by the dominant actors in the system? As Martti Koskenniemi points out, legal concepts have 'a degree of autonomy which cannot be explained simply by reducing them to apologies for class interests or ideologies. To understand the law we need to account for this autonomy, the persisting intuition that legal argument somehow follows a logic which is external to lawyers' preferences or those of their social group' (2006, p. 67). Now, what is this internal 'logic' of legal discourse which immunizes the law—at least to a certain degree—against political usurpation? In the rule of law literature, the notion of coherence (MacCormick 1978, 2005) and its variants—integrity (Dworkin 1986), systematicity (Waldron 2008), or consistency (Fuller 1964)—have been identified as accounting for the autonomy of the law from political manoeuvring. The requirement of coherence forces even the most powerful actors to argue within the parameters of collectively accepted norms, and hence functions as a check on political power. Coherentists accordingly reject legal pluralism because it undermines the overall unity, or integrity, of international law (Eleftheriadis 2010) which, in turn, enables powerful states to (ab)use international law to further their own interests. Others, however, argue that legal pluralism does not inevitably produce fragmentation, and instead stress that it fosters interjudicial dialogue and thereby invigorates the 'rules, the institutions, and practices of the international law order' (Burke-White 2004, p. 963). In this volume, especially Helmut Philipp Aust and Theresa Reinold further engage with the concept of coherence, its relationship with political power, and with the question of how much uniformity the rule of law requires in a multi-level governance world.

And finally, regarding the concept of law, considering that much of the governing in global governance is done through norms which lack the status of hard law (Teubner 1997),[6] we must ask whether a norm's formal status actually matters for promoting the rule of law in global governance. It has been observed that '[p]ostnational law is not black and white; it comes in shades of grey' (Krisch 2010, p. 13). The question therefore arises how much 'law' the rule of law actually requires? While legal pluralists believe that the debate about law v. non-law is futile because what matters is not a norm's formal status but whether or not it contributes to maintaining social order (Ehrlich 1975, pp. 455–71), this claim has not gone uncontested. Critics argue that formal legal arrangements are the weapons of the weak against the strong, and that they represent the most effective way of subjecting the politically powerful to the rule of law. They point out that a

> serious problem associated with multi-level governance is that the alleged cosy and consensual nature of this arrangement is in fact a consensus dictated by the stronger players. Formal and legal arrangements are often seen as excessively complicating and rigid frameworks for political decision-making, but one of their virtues is that they … provide the less powerful with formal means of combating the more powerful
>
> (Peters and Pierre 2004, p. 87).

Others stress the benefits of soft law, which include opening the norm-generating process to a host of actors other than states and the possibility of soft law eventually hardening into binding legal commitments over time (Peters 2006, p. 603). Hence, we need to subject these various theoretical claims about whether or not a norm's formal status matters for promoting the rule of law to closer empirical scrutiny—a task which especially the chapters by Magdalena Bexell, Monika Heupel, Gisela Hirschmann, Charlotte Ku and Paul Diehl, as well as Anna Leander seek to accomplish.

Findings

The book concludes that multi-level governance and global legal pluralism have the potential to both promote and undermine the rule of law. On the one hand, in light of the multiplication of actors that can hold power holders to account with regard to both hard and soft law standards, this context helps to *limit the power* of power holders, which is at the heart of the rule of law concept. This is stressed among others by Ku and Diehl who emphasize that multi-level governance and global legal pluralism have empowered actors as diverse as international institutions, sub-national units of national governance and individuals to act as accountability holders. In addition, the tendency of multi-level governance and global legal pluralism to give rise to institutions that mitigate against regime collisions and to entail interjudicial dialogue and jurisgenerative interplay can further the *coherence* of international law, as pointed out, for instance, by Aust in his chapter on the secondary rules established in the Vienna Convention on the Law of Treaties. This coherence, in turn, is believed to shield the law against being usurped by dominant actors, another central tenet of the rule of law. Finally, regarding the sources of law, the increasing significance of *soft law* emphasized by both concepts can be seen as an effective means of ensuring problem-solving and order in global governance especially because soft law agreements are easier to be reached than hard law agreements.

Yet, on the other hand, multi-level governance and global legal pluralism also undermine the international rule of law. Given the difficulty to assign responsibility to power holders in heterarchical systems, power holders frequently escape constraints on their power. This has been shown, for instance, by Heupel who illustrates that states have initially delegated far-reaching competences to the World Bank and the European Union (EU) without attaching reliable accountability mechanisms to the new authorities they created. Moreover, even though multi-level governance and global legal pluralism do have inbuilt dynamics towards assuring coherence, they equally drive fragmentation, which can undermine legal certainty and the ability to enforce the law, thus detracting from the international rule of law. Last but not least, especially the chapters by Hirschmann, Bexell, and Leander on standard setting by and with non-state actors suggest that while soft law has been shown to be beneficial to the rule of law, there are also instances in which hard law would be more beneficial, especially in assuring compliance, which again has negative consequences for the rule of law.

Concluding that multi-level governance and global legal pluralism have the potential to both promote and undermine the rule of law obviously begs the question what the scope conditions are of the two phenomena unfolding beneficial or detrimental effects on the rule of law. We will turn to the issue of scope conditions in the remainder of this chapter, referring explicitly to the volume's crosscutting themes, that is, limitation of power, coherence, and soft law.

Limitation of Power

Regarding the limitation of power, a somewhat counterintuitive overall finding of this volume is that despite there being a diffusion of power holders in multi-level governance *on paper*, de facto the traditional power holders—nation-states, and here specifically powerful Western countries—seem to still be the most critical actors in determining the successes and failures of initiatives aimed at promoting the rule of law in global governance. As the various chapters show, the continuing influence of the nation-state comes in many different guises: In Heupel's chapter, for instance, the intervention of law-makers (prodded into action by civil society) from the World Bank's most powerful member-state, namely the USA, was a necessary condition for tightening the rule of law constraints on the World Bank's operations. In the absence of intervention by the US Congress,

neither the strengthening of the Bank's safeguard policies nor the establishment of the inspection panel would have been possible. Bexell equally concludes that the host state's ability and willingness to sanction human rights abuses is a critical scope condition which determines the effectiveness of voluntary initiatives seeking to hold businesses operating transnationally accountable for human rights violations. Bexell also notes that where the host state lacks the ability to provide political goods such as the rule of law, or where there is no deeply engrained culture of respect for the rule of law (such as in areas of limited statehood), the degree of home state involvement is another critical scope condition for enforcing company compliance with human rights norms. Home states can do so by holding transnationally operating companies based on their territory liable for human rights violations committed abroad. But obviously companies can only be held accountable when their home state's legal system provides for extraterritorial jurisdiction such as in the USA, for instance, where the Alien Tort Claims Act enables US courts to adjudicate human rights violations committed by US enterprises abroad. Hence, in this context, the fit between soft law initiatives aimed at improving the human rights situation in host countries, and hard law enshrined in the legal system of the home state becomes critical—a link which we will discuss later on when reviewing the effects of soft legal norms on the rule of law.

Not only Heupel's and Bexell's chapter emphasize the continuing relevance of the nation-state. Hirschmann also notes that despite certain successes achieved by the pluralist accountability network in regulating detention practices, intervention by a powerful state would have achieved rules with greater bite, and thus increased the rule of law constraints for detention practices. Reinold's chapter equally demonstrates that initiatives aimed at strengthening the rule of law in multi-level governance critically depend on states: First of all, the initiative aimed at establishing a code of conduct for the permanent Security Council members (P-5) was predominantly state-driven; and second, the success of this initiative critically depends on states' identities and preferences, namely the intrinsic motivations of the permanent members to comply with the responsibility not to veto, and/or their reputational concerns in the face of non-compliance with the code.

Generally, a high degree of homogeneity among states in terms of actor preferences and normative outlooks—a rare condition in the pluralist global realm—seems to be a condition that facilitates the limitation of power, as Ku and Diehl point out. In North Atlantic Treaty Organization, for instance, or the EU, that is, settings where the degree of homogeneity is relatively high,

> 'rules requiring unanimity level the playing field more and restrict some of the individual power of member states. Members of those organizations have more shared interests than World Trade Organization (WTO) or other global organizations and therefore it is easier … to construct the rule of the law in the former settings'.

Another finding with regard to role of the state when it comes to the limitation of power is that the 'transnational turn', that is the increasing participation of non-state actors in normmaking and norm implementation, which is characteristic of multi-level governance, is not a sufficient condition for imposing actual limits on power. As Leander's chapter, for instance, shows, the (attempted) cooptation of Non-governmental organizations in whitewashing exercises merely facilitates a smoother operation of power, rather than imposing real constraints on its exercise.

The sobering conclusion for globalization enthusiasts is thus that despite all the talk about moving beyond Westphalia, state strength (here conceptualized as a state's willingness and ability to provide critical public goods, the rule of law being one of them) continues to be a central scope condition determining the successes and failures of initiatives aimed at promoting the rule of law in multi-level governance.

A further common theme running through many of the chapters is the question whether forum shopping in multi-level governance is detrimental or conducive to the limitation of power. While at first glance, forum shopping might seem to undermine the rule of law, Ku and Diehl as well as Heupel demonstrate how the simultaneous availability of multiple fora and access points provided by multi-level governance might actually enhance the leverage of actors seeking to strengthen the rule of law. Ku and Diehl, for instance, see multi-level governance as a system of compensatory mechanisms, where rule of law deficits of one layer of governance might be compensated for by other layers of governance. Heupel also stresses that the multiplicity of access points facilitated the norm entrepreneurship efforts of actors seeking to subject the World Bank to more rigid rule of law constraints. So whether or not forum shopping limits power depends on which actors are in a position to use these various fora, and for which purposes: Actors seeking to avoid accountability will obviously benefit from forum shopping differently than actors seeking to strengthen accountability. Heupel moreover adds a number of scope conditions that determine whether forum shopping strengthens the rule of law or not, such as 'the power of reform oriented actors, the routines that have developed, and the presence of domestic or international scripts that provide inspiration for reform'.

Finally, an additional important finding with regard to the limitation of power is that judicial actors assume an increasingly important role in securing the rule of law in multi-level governance. As especially the chapters by Hirschmann, Heupel, and Bexell demonstrate, courts from Western states, as well as regional courts from the Western world (such as the EU Court of First Instance) proved instrumental in compelling governments or international bodies to bring their behaviour in line with basic rule of law standards. These actors either corrected their behaviour post hoc, or adjusted practices *in anticipation* of court intervention. In Hirschmann's chapter, judicial activism even emerged as a necessary condition without which the rule of law would not have been strengthened. The central role of these courts' jurisprudence also has implications for the debate about soft versus hard law as well, as courts can obviously only base their judgments on justiciable norms of positive law rather than aspirational soft law norms and standards. We will return to this point below.

Coherence

While the chapters in this volume are unequivocal in arguing that increasing judicial activism does contribute to the limitation of power, its consequences for the coherence of international law—another critical dimension of the rule of law in multi-level governance that is of central interest to this volume—are somewhat more ambivalent. Especially when lawmaking power if diffused across a great number of actors with varying interests, multi-level governance and legal pluralism may undermine the coherence of the law, as Ku and Diehl caution.

Aust addresses this point in detail in his chapter on the role of domestic courts, and tentatively identifies judicial culture as a scope condition which determines the extent to which domestic courts strengthen or undermine the coherence of international law. Judicial culture is a complex concept, which includes indicators such as the content of legal education, or a culture of respect for judicial independence. Aust argues, for instance, that making international law a compulsory element of law school curricula would make judges' adherence to international law's secondary rules of interpretation more likely, and thus strengthen the overall coherence of international law, by preventing idiosyncratic or even erroneous interpretations of the law by domestic courts. Ku and Diehl, in turn, do acknowledge that increasing judicial activism and potentially resulting contradictory rulings might undermine the coherence of international

law, yet they believe that in practice, this is seldom the case, given that the 'system has a tendency toward stasis in that courts try to fit new laws within existing norms and frameworks'.

Another factor which potentially contributes to the coherence of the law in a world of legal pluralism are secondary rules of implementation, such as the responsibility not to veto, which, as Reinold demonstrates, can aid IOs in applying primary norms in a more consistent manner. To what extent secondary rules can actually play this role depends on the way in which they are fashioned, that is do these rules increase transparency, do they, for instance, institutionalize reason-giving process, requiring actors to explain their behaviour, especially with a view to its consistency with norms shared by the international community at large? The institutionalization of such a 'right to justification' in multi-level governance would, in turn, increase the coherence of international law, as it would prevent self-serving interpretations and arbitrary applications of primary norms, and instead establish more or less 'objective' standards governing the application of primary norms.

Another scope condition determining the extent to which secondary rules contribute to coherence is their ability to ensure 'some measure of continuity in successive lawmaking, potentially over long time frames', as Ku and Diehl point out. Thus, when secondary rules promote multilateral conferences and treatymaking rather than bilateral or regional agreements, this will add to the coherence of the law, as shown by Ku and Diehl in their discussion of normmaking within the General Agreement on Tariffs and Trade/WTO framework.

Soft Law

Now, regarding the question of soft law—the third core dimension of the debate about the rule of law in multi-level governance and global legal pluralism—is it really true, as Hirschmann states, that 'soft law is better than no law at all'? Like Hirschmann, Ku and Diehl stress above all the positive effects of soft law, which, according to them, facilitates cooperation where otherwise there would be none, because of actors' sensitivity to sovereignty costs and their wariness of 'hard' legal commitments. However, other authors writing for this volume view the role of soft law rather ambivalently. Bexell, for instance, sees soft law rather critically. According to her, the Voluntary Principles have not yet strengthened the rule of law as they help members to avoid accountability. However, in terms of scope conditions, and this is a common theme running through

the chapters, soft law may have a positive effect on the rule of law if there is a fit between soft law and existing hard legal norms. Soft legal norms which are congruent with hard law are obviously a lot likelier to be incorporated into binding commitments than those that contradict hard law, and are justiciable in courts of law. Bexell, for instance, demonstrates that soft law had an actual impact when being incorporated into contracts between companies and security providers or when taken up in court rulings, which must obviously be based on positive law rather than non-justiciable soft law norms. Ku and Diehl uncover a similar tendency of soft law being incorporated into agreements between the World Bank and borrowing states, which, in turn, provides the formerly soft norms with actual bite: 'As agreements with the Bank, they become binding. Thus, soft law becomes a way to fill in gaps or uncertainty in multilateral governance while reinforcing its basic structures and principles'. Hence, one scope condition determining the contribution of soft law to the rule of law in multi-level governance is its fit with hard law.

Another scope condition determining the effectiveness of soft law has to do with the sources of, or motives for, compliance, as Reinold demonstrates in her discussion of a code of conduct for the P-5. Soft law stands a much greater chance of being effective when the sources of compliance are normative rather than utilitarian or coercive, that is when actors' believe in the inherent rightness of a soft norm, and/or when they are highly susceptible to reputational concerns. Actors' motives for compliance, in turn, are closely correlated with the actual content of soft law, as 'true believers' are more likely to commit to soft norms with 'teeth' than actors whose compliance is based on coercion or utilitarian calculations. So the content of soft legal norms obviously matters for understanding under which circumstances soft law is conducive to the rule of law, and under which circumstances it undermines the rule of law, as Leander explores in her study of whitelisting in the security sector. Actors with no intrinsic motivation to follow a norm often resort to soft law as a convenient tool for pre-empting criticism all the while avoiding 'real' constraints upon their behaviour. Leander shows how the nature of whitelists, which list companies whose commitment to human rights is merely aspirational, and which avoid rigid monitoring, fail to strengthen accountability and the rule of law.

In conclusion, the findings of our empirical chapters go beyond confirming the assumption already articulated by others before us that multi-level governance and global legal pluralism have ambivalent effects on the rule of law. Rather, they show how these ambivalent effects play out in different contexts and identify conditions on which multi-level governance

and global legal pluralism may have beneficial rather than detrimental effects on the rule of law. The intuition that motivated this volume, namely to being together IR and IL scholars and encourage them to share their discipline specific expertise, has therefore proven worthwhile. For sure, further research is needed to corroborate and refine the findings of our volume. For instance, our inductive approach to identifying scope conditions regarding the effects of multi-level governance and legal pluralism on the rule of law could now be complemented by a deductive approach based on the analysis of carefully selected case studies. Other avenues for future research could be to look into the implications of global power shifts—for example, the rise of emerging powers with less commitment to the rule of law—or external shocks—that is terrorist attacks in the USA and Western Europe—for the commitment of states, IOs, and transnational actors to uphold the rule of law in global governance. As we have indicated in the beginning of this chapter, research on the rule of law implications of multi-level governance and global legal pluralism is a growing field and scholars have begun to grapple with the pressing analytical and normative questions at hand. Our hope is that our volume gives new impetus to this field and that IR and IL scholars continue to engage with each other to find answers to the questions that are so important to both disciplines.

Notes

1. But see Krisch (2010). In the multi-level governance literature, the question of the rule of law is sometimes raised (though rarely explicitly) in the context of the debate about the 'democratic deficit' of multi-level governance. See, for example, Peters and Pierre (2004).
2. The German original reads as follows: 'Aber die Möglichkeiten der Transparenz und Kontrolle in Mehrebenenstrukturen sind noch viel zu wenig erforscht'.
3. Similarly, Nollkaemper (2009), referring to an internationalized rule of law, argues that international law and institutions can compensate rule of law related shortcomings at the level of national law and institutions, and conversely.
4. United Nations and the Rule of Law. www.unrol.org/article.aspx?article_id=168, date accessed 03 May 2016.
5. On the historical evolution of the separation of powers doctrine, which has been viewed as central to limiting political power in the context of the nation-state, see Riklin (2006).
6. On soft law more generally, see Abbott and Snidal (2000), Shelton (2000).

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Secondary Rules

The Primary Effects of Secondary Rules: Institutions and Multi-level Governance

Charlotte Ku and Paul F. Diehl

Introduction

The concept of human rights predates history with evidence of its existence in many ancient religious texts. Human rights were further enshrined in documents such as the Magna Carta (1215), the English Bill of Rights (1689), the French Declaration of Rights of Man and Citizen (1789), and the Bill of Rights of the US Constitution (1791). Even with these important antecedents, the present normative acceptance and development of international human rights would have been difficult to predict. Political conditions were ripe after World War II for the universal acceptance of this body of law, but it was the institutional and procedural infrastructure left by the League of Nations in fact-finding, reviewing petitions from individuals, and advancing a system of regular reporting and monitoring of member obligations that provided the basis for enactment of human rights

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obligations. These procedures and accompanying institutions are now at the forefront of further developing human rights norms by interpreting the coverage of the human rights covenants and by drawing international attention to specific areas of concern such as sexual violence, torture, and the rights of children. The existence of the United Nations (UN) itself as a lawmaking forum in which first the 1948 Universal Declaration of Human Rights and then the human rights covenants were formulated, debated, and accepted facilitated the development of international human rights as international legal obligation. These are supplemented by regional institutions and other actors, as well as national structures and processes that promote the creation and observation of such obligations.

This brief account of the development of human rights law demonstrates how the 'secondary rules' of international law can play a significant role in the creation and modification of 'primary rules' or those that proscribe or prescribe behaviour in international law. It further shows how these secondary rules have facilitated the diffusion of the power of states to govern even within their own borders. In this chapter, we examine the cumulative effects of secondary rules that have helped to create today's multi-level international legal system and thereby their substantial role in the formation of norms in that system and the shaping of a global legal order.[1]

Many scholars have largely ignored secondary rules as falling outside the legal system or assuming a mostly unimportant role within it. Typical of this is Ellickson (1991), who identified a series of 'rules' that govern social interaction and included among them are *procedural* rules that provide the framework for interaction between actors as well as *remedial* rules that deal with how disputes might be resolved. Nevertheless, Ellickson was largely concerned with rules outside the context of law (the title of his book is *Order Without Law*), and there are a number of differences between purely social norms and those that are endowed with a legal character.

Perhaps most famously, Hart (1994—originally published in 1961) developed the notion of 'secondary rules' to refer to the ways in which primary rules might be 'conclusively ascertained, introduced, eliminated, varied, and the fact of their violation conclusively determined' (1994, p. 94). Yet Hart views secondary rules (his choice of the term 'secondary' is illuminating) as 'parasitic' (1994, p. 81) to the primary ones. As a consequence, secondary rules follow in time the development of primary rules, especially in 'primitive' legal systems (a category in which international law is classified according to Hart). Furthermore, secondary rules are believed to service normative ones, solving the problems of 'uncertainty,' 'stasis,'

and 'inefficiency' inherently found with normative rules. In his view, and in those who adopt Hart's (1994) conception, secondary rules are underdeveloped in international law and in any case insignificant in understanding the operation and underlying values of the international legal system.

We challenge the idea that secondary rules are only reflective of the primary rules as Hart implies. Some secondary rules develop autonomously from specific norms, thereby serving political as well as legal needs (e.g., the creation of an international organization (IO) that also performs monitoring functions). Indeed, in many cases, secondary rules in international law are far more developed than their primary counterparts; for example, we have extensive rules and agreements about treaty formation, but relatively few dealing with the use of force. Furthermore, the subject of this chapter, secondary rules can shape the content of primary rules through their specification of the processes and actors that are used to create such primary rules.[2] The requirement to follow set procedures in order to attain particular levels of authority also serves to change the power dynamics in negotiations, for example, in multilateral treaty-making. Although privileged powers might still hold unequal levels of influence, even decisions of the United Nations Security Council (UNSC) require a majority—the five permanent members alone cannot force a decision even though any single one of the five can block a decision.[3]

Many kinds of secondary rules can have effects on the creation of new normative rules, but in this chapter, we focus on those related to institutions, specifically the rules of IOs that influence the development of international law as well as the ability of courts and other judicial bodies that can influence the specification and interpretation of primary rules. In addition, we also consider additional forums, such as international conferences and negotiating sessions (e.g., General Agreement on Tariffs and Trade [GATT]/World Trade Organization [WTO] 'rounds') in which agreements are drafted. In this way, we concentrate on institutions and processes, recognizing that secondary rules and regimes that lack an institutional structure (e.g., Vienna Convention on Treaties) also affect the content of international law. This varies substantially by governance level and across geographic regions.

We begin our analysis by broadening the traditional conception of secondary rules with our own specification of the international legal system as composed of operating and normative subsystems respectively. We then discuss three sets of mechanisms by which secondary rules influence primary rules, namely by configuring institutional frameworks, enhancing

the credible commitment of new primary rules, and institutions directly or indirectly making normative law. Our conclusions are that secondary rules play important roles in each of these areas. A consistent theme is that the operating system can reduce uncertainty and fill gaps in the existing governance structures. There, secondary rules promote efficiency and coherence in the law. There are, however, instances in which such rules complicate matters, as we note several cases below in which the lawmaking might be stifled and governance not promoted.

The foregoing analysis is primarily theoretical in that a series of propositions about causal relationships involving secondary rules are presented. These are frequently accompanied by sample cases of how the specified processes work. These are not intended as empirical tests of the arguments per se, but rather as illustrative examples. A social scientific assessment is left for future research.

Secondary Rules: A Conceptualization

In our schematic, we extend and modify Hart's conception of secondary rules to what we have referred to as the 'operating system' of international law. Similarly, we use the term 'normative system' to correspond roughly with what Hart and others have called primary rules. For the rest of this chapter, we use the terms operating and normative system as largely synonymous with secondary and primary rules respectively. Below, we offer a summary of our conceptualization (for a full discussion, see Diehl and Ku 2010, Chap. 2).

International law as an operating system considers, in a broad sense, how it sets the general procedures and institutions for the conduct of international relations. As an operating system, international law provides the framework for establishing rules and norms, outlines the parameters of interaction, and provides the procedures and forums for resolving disputes among those taking part in these interactions. In contrast, international law as a normative system provides direction for international relations by identifying the substantive values and goals to be pursued. Whereas the operating system designates the 'structures' (in a loose sense), the normative element gives form to the aspirations and values of the participants of the system. Should a state choose to pursue its interests outside of the operating system, it could do so, but would lose the authority and ready acceptability of actions taken within the framework of the operating system. See, for example, the efforts by the USA to sign so-called Article 98 agreements on a bilateral basis with states around the world to exempt the US military from the jurisdiction of the International Criminal Court (ICC).

These actions likely were more harmful to the international reputation of the USA than effective in slowing the development of the ICC.

The operating system has a number of dimensions or components that are typically covered in international law textbooks but largely unconnected to one another. Secondary rules are generally those embedded within these dimensions. Some of the primary components include the following:

- *Sources of Law*: These include the system rules for defining the process through which law is formed, the criteria for determining when legal obligations exist, and which actors are bound (or not) by that law. This element of the operating system also specifies a hierarchy of different legal sources.
- *Actors*: This dimension includes determining which actors are eligible to have rights and obligations under the law. The operating system also determines how and the degree to which those actors might exercise those rights internationally.
- *Jurisdiction*: These rules define the rights of actors and institutions to deal with legal problems and violations. An important element is defining what problems or situations will be handled through national or regional legal systems as opposed to international forums.
- *Institutions*: These elements create forums and accompanying rules under which treaties and other agreements are drafted; obligations affirmed; and determining how international legal disputes might be heard, interpreted, or decisions enforced.

In this chapter, we focus on the last element, institutions, and how the rules surrounding these entities affect the normative content of international law. Nevertheless, institutional rules also specify which actors can participate and in what ways, as well as affecting other elements of the operating system, and therefore, the emphasis on institutions is not mutually exclusive with respect to the other components of the operating system.

Our conception of an international legal operating system is somewhat different from Hart (1994) and past formulations of secondary rules. For us, the operating system is usually independent of any single norm or regime and, therefore, is greater than the sum of any parts derived from individual norms and regimes. The operating system in many cases, past its origin point, may precede the development of parts of the normative system rather than merely reacting to it. In this conception, the operating system is not a mere servant to the normative system, but the former can actually shape the development of the latter. For example, established

rules on jurisdiction may restrict the development of new normative rules on what kinds of behaviours might be labelled as international crimes. Neither is the operating system as reflective of the normative system as Hart implies secondary rules are. The operating system may develop some of its configurations autonomously from specific norms, thereby serving political as well as legal needs (e.g., the creation of an IO that also performs monitoring functions). In the relatively anarchic world of international relations, we argue that this is more likely than in the domestic legal systems on which Hart primarily based his analysis.

We choose the word normative to describe the directive aspects of international law because this area of law functions to create norms out of particular values or policies. Using a different set of analogies, we could imagine normative processes as quasi-legislative in character by mandating particular values and directing specific changes in state and other actors' behaviours.

Our conception of a normative system is similar to what Hart defines as primary rules that impose duties on actors to perform or abstain from actions. Yet there is an important difference: Hart sees primary rules as the basic building blocks of a legal system, logically and naturally coming before the development of what we define as the operating system components. We see a more developed international legal system in which norms may exist without specific reference to the operating system yet cannot function without using the operating system's mechanisms. Nevertheless, the normative system may remain somewhat autonomous from the operating system and may even lag behind in its development.

Below we discuss the different ways that the operating system can influence the normative system of international law, focusing first on the institutional frameworks in which primary rules are created. This runs contrary to Hart's and other traditional conceptions in which primary rules affect or dictate the configuration of secondary rules; we have addressed that particular causal sequencing elsewhere (see Diehl and Ku 2010, Chap. 3).

Institutional Frameworks and the Parameters of Lawmaking

Although states continue to be the principal lawmaking authorities because of their long-established role, they increasingly work through frameworks created by global and regional institutions. This has, in turn, created international political space for participation by a range of non-state actors. The established role of settings such as the UN General Assembly

(GA) means that debates that are sustained in such organs may themselves ultimately become a part of the lawmaking process. Because of the near universal representation of states in the GA and its established rules of procedure, convenient starting places to raise issues of global concern are the GA, UN-specialized agencies, or UN-sponsored conferences. As Charney (1993, p. 551) concluded, '[t]he augmented role of multilateral forums in devising, launching, refining and promoting general international law has provided the international community with a more formal lawmaking process that is used often.' This lawmaking process is used not only by states, but also by private entities, individuals, non-governmental organizations (NGOs), and other IOs. Thus, the secondary rules on who can participate and the operating system procedures of the institution in question can affect the kinds of legal norms that emerge from these law creating processes. State power, therefore, is not the only dynamic involved today in international lawmaking. The net effect is that the international system might gain legitimacy and expertise in some instances, but this can come at the cost of coherence.

Two examples drawn from the proliferation of international courts and tribunals show how this can happen. One involves the cases addressing the environmental effects of the 'MOX Plant'—(a plutonium recycling facility at Sellafield, UK built in 1993) that Ireland brought against the UK in four separate dispute settlement forums: an Arbitral Tribunal set up under Annex VII of the UN Convention on the Law of the Sea, the Law of the Sea Tribunal, the compulsory dispute settlement procedure under the Convention on the Protection of the Marine Environment of the North-East Atlantic (OSPAR Convention) and the European Court of Justice (ECJ) under the European Community (EC), and Euratom Treaties. The other involves a conflicting interpretation of international law. The Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia (ICTY) disagreed with the finding of the International Court of Justice (ICJ) in the 1986 *Nicaragua* case, that the USA could not be held accountable for actions in a territory not under its 'effective control.' The ICTY decided that 'effective control' was too high a threshold for holding an outside power accountable for domestic unrest and that it was sufficient to hold the power accountable if it exercised 'overall control' over the forces causing the unrest (see International Law Commission, Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, UN Doc A/CN.4/L/682, 13 April 2006).

A central part of the operating system is the specification of the rights and obligations of different kinds of actors—a key element in any legal order. For our purposes here, the key concern is with the institutional rules that designate which actors have what rights to make international law. Traditionally, for international institutions, this has been the exclusive purview of states. Yet over the past several decades, new actors have had input into the treaty-making process or in the case of some IOs have direct power to create law (Alvarez 2002, 2005). Which specific actors and which kinds of actors legitimately participate in lawmaking can have an effect on the final provisions of a treaty or legally binding resolutions. Treaty provisions are the aggregated preferences of those involved in drafting the document and ultimately those who approve it, mediated by the power of those actors. In addition, actors involved in rule creation also provide information that affects the choice of certain sets of provisions over others in the final draft. The presence and influence of NGOs as represented by the Coalition for the ICC in all the preparatory sessions leading up to the Rome Conference that adopted the Statute to establish the ICC gave these organizations the opportunity to shape some of the Statute's provisions. Members of the UN Secretariat who gained expertise through years of staffing the preparatory sessions had similar influence.

To the extent that the operating system allows more and varied actors into the process, there are resulting changes in the normative outcomes. This can make coming to a consensus more difficult, but more likely to have an impact on behaviour when it does occur. For example, the International Labour Organization (ILO) functions in a tripartite structure with representation from governments, workers, and employers provided for in its constitution. The three groups have equal voice in all ILO deliberations, although governments have a larger number of delegates and therefore a larger total number of votes. Each delegate casts one vote whether representing an employers' or workers' group. This contrasts with the more classic structure of the International Civil Aviation Organization (ICAO) where NGOs are invited to participate, but do not take part in the formal governance of the organization as in the case of the ILO.

Even when the operating system restricts participation to states, it privileges subsets of states. Not surprisingly, the operating system rules are weighted in favour of the most powerful states in the international system at any given time. Hegemonic theories imply that the operating system should be consistent with the interests of the leading states, and Raustiala (2005) notes the preferences of powerful states often influence legal form. Treaty rules that recognize the legality of imposed peace agreements, an

exception to the standard invalidity of coerced agreements, is but one example. Powerful states also accrue advantage by virtue of the frequency of participation and strategic position in operating system institutions. This is evident in the WTO. As Shaffer (2004, p. 470) notes:

> 'Not surprisingly, the United States and European Community remain by far the predominant users of the system, and thereby are most likely to advance their interests through the judicial process. As repeat players, the States and European Community strive not only to win individual cases. *They also play for rules.* They attempt to shape judicial interpretation of WTO rules over time.' (Emphasis added)

Exogenous factors (size of markets, powerful interest groups, etc.) determine frequency of WTO usage, but such participation allows users to influence the normative system over time. As new state actors gain wealth, experience, and status, they will enter these arenas as we now see with the increased presence of the BRIC (Brazil, Russia, India, and China) countries in international trade arenas including the WTO. To some extent, this ensures that international law reflects the interests of those whose activities are affected the most, and in that way, rules are more likely to be consistent across domains when the same states exercise power. Nevertheless, such rules serve to enhance, not limit, the power of leading states. In contrast, North Atlantic Treaty Organization (NATO) and European rules requiring unanimity level the playing field more and restrict some of the individual power of member states. Members of those organizations have more shared interests than WTO or other global organizations and therefore it is easier (although not necessarily easy) to construct the rule of the law in the former settings. There might be a trade-off here in that rules that broaden the scope of participation in multi-level governance also lessen the likelihood that consensus and therefore law will emerge.

IOs are not only the forums (see below) for negotiations but also can be participants in lawmaking. Most IOs do not negotiate treaties on the same footing as states. For example, NATO is not permitted to be a party to international humanitarian law agreements. Furthermore, most international agreements concluded by IOs are bilateral and only specify organization activities and legal status (Shaffer 2004). Still, IOs have played increasingly prominent roles in lawmaking. Alvarez (2005, p. 263) explains why this has occurred: 'IO law-making powers have expanded because their agents and organs have been given the benefit of a presumption—itself a creator

of international institutional law—that they can accomplish legally whatever furthers a legitimate organizational purpose.' No organ of an IO has perhaps benefited more from this presumption than the UNSC. These organizational purposes include slowly building track records to curtail certain state behaviours such as colonialism and racial segregation.

Constructivist works emphasize the roles of NGOs and other 'policy entrepreneurs' in norm creation. In recent decades, NGOs have assumed greater roles in the construction of legal agreements, such as the UN Framework Convention for Climate Change. Cakmak (2004) goes so far as to suggest that NGOs have acquired virtual 'sovereign rights' in the process of international human rights lawmaking. In any event, NGOs and related epistemic communities (Keck and Sikkink 1998) influence normative outcomes in several fashions from several different sources of power granted to them in the operating system. The watchful eye of NGOs in the human rights area further helps to keep states on track in the performance of their human rights obligations.

NGOs are sometimes permitted access to the lawmaking process in IOs, and that is their primary gateway to influence the legal process (Charnovitz 2006). For example, employer and business groups are given equal voice with governments in making labour agreements within the ILO (Ku 2007). Occasionally, this is guaranteed formally as in the provisions of Article 71 of the UN Charter: 'The Economic and Social Council may make suitable arrangements for consultation with non-governmental organizations which are concerned with matters within its competence.' Similar provisions exist in Article 70 for specialized agencies, allowing IOs access to the lawmaking processes of other organizations. These provide 'consultative' status for those actors, but do not give them a place at the table. Although Article 71 applies only to Economic and Social Council, the practice has spread throughout the UN system and beyond. Few IOs lack such a process, and although there is yet no legal duty to consult NGOs, there is some movement in that direction (Charnovitz 2006). As a rule of law matter, we can see this development as one to increase transparency and accountability. As a practical matter, it reflects the reality that NGOs may have greater expertise and capacity to act in certain areas than states and governments. In theory, both of these should enhance the performance of international legal governance without necessarily undermining coherence of the legal regimes. In practice, however, if NGOs reflect values and priorities different from other actors in the process, the inclusion of the former could complicate the negotiation and

implementation processes as some states resent or resist NGO influence. See, for example, the proposal supported by Amnesty International that the permanent members of the UNSC should refrain from casting vetoes in matters involving genocide, war crimes, and crimes against humanity.

A stronger legal basis for participation is found in 'observer' status, which may entitle NGOs to admittance and participation to all meetings (Koenig 1991). At other times, the roles of NGOs and other actors in the lawmaking process have evolved gradually and more informally. NGOs are now regularly part of international conferences, including those that draft international agreements. As noted below, they are regularly a part of deliberations in drafting treaties, although they generally do not have voting rights and do not become parties to treaties.

As the operating system has opened its door to NGO (and other actor) participation, those actors have assumed a number of roles and their presence is increasingly felt in lawmaking forums. There were 300 NGOs represented at the 1972 Stockholm Conference on the Environment, but 1,400 at the Rio de Janeiro Environmental Conference 20 years later. First, they play an agenda setting role in bringing topics or issues to the attention of the state members (Aviel 2000). Similarly, transnational networks have arisen to play the same role. Beyond the legal and political space, individuals have grouped to form social networks in the pursuit of specific objectives within that space. The anti-slavery, temperance, and women's suffrage movements are early examples of such networks. This does not assure new norms will be created, but it does mean that some norms would not otherwise be codified, or at least at a particular point in time, without the impetus of NGOs. This is another instance in which multi-level governance diffuses political power in lawmaking.

Second, NGOs can submit statements or make presentations in the course of treaty drafting. One might expect that their greatest influence will occur on more technical matters in which the expertise of the organizations grants greater legitimacy to NGO input. The net result is that normative provisions of a treaty more closely coincide with NGO preferences, as opposed to states and other actors, than would otherwise be the case without their participation because NGOs are more focused on a specific issue area and therefore more able to respond rapidly to opportunities to promote norms in those areas. They might also be involved in the drafting of convention language, either directly or indirectly through alternative operating system structures. For example, Cakmak (2004) notes that NGOs formed the Ad Hoc NGO Group on the Drafting of the Convention on the Rights of the Child and actually

contributed substantive articles to the final convention. Finally, NGOs can submit friends of the court briefs, with such access permitted in almost all international courts but the ICJ (Charnovitz 2006; Shelton 1994).

Perhaps the most notable instance, and certainly the most cited, of NGOs influencing normative treaties concerns the so-called Ottawa Treaty, officially the Ottawa Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction. Rutherford (2000) details the influence of NGOs in all aspects of that treaty. NGOs highlighted the damaging effects of landmines at international conferences as well as outside the operating system through media campaigns. This agenda setting laid the basis for eventual drafting of the landmine ban, despite the opposition of some powerful states, such as the USA.

Technically, any two states can create international legal obligations between themselves, with direct negotiations being the most common forum for this. Yet the most significant treaties and other law (custom, binding resolutions) arise from multilateral interactions in forums whose structures and rules are part of the operating system. Indeed, over half of multilateral treaties are attributable to forums in the UN system (Alvarez 2005). The extent to which secondary rules promote multilateral conferences and treaty-making also increases coherence of international law, in contrast to purely bilateral arrangements or regional governance arrangements, which can create a geographic patchwork of rules and regulations. For example, international rules on refugees are more coherent in application when derived from the 1951 convention on refugees than from European Union (EU) rules and the absence thereof among other regional entities.

Subsystem rules of the international legal operating system have important effects. As rules change within forums, so too will policies (Martin and Simmons 1998); as one moves across forums with different rules, normative outcomes will also change. The practice of using the infrastructure, staff, and know-how of IOs to facilitate treaty making and the number of multilateral treaties that have now been concluded under the auspices of IOs have provided IOs with a stature and possibly even authority that states did not foresee at their founding. Note, also, that most international governmental organizations (IGOs) are actually created by other IGOs (the former are referred to as emanations), and thus forum rules are just as likely to come from IGO bureaucrats as the state members of the originating organization.

There are several ways that characteristics of the operating system with respect to lawmaking forums influence final outcomes in the form of normative treaties. First, such forums determine which kinds of actors may participate and in what fashions; this was discussed above. Expanding the number and roles of actors beyond states diminishes the power of the latter, especially leading states.

Second, every forum carries with it certain norms that condition the expectations and participation of those involved in the treaty drafting. Cook (2004) notes that actors rely on institutional rules and information to develop expectations. Although these elements were developed by the participants in the past, they are not necessarily changed easily and they may be very 'sticky' as they affect future deliberations. Once again, stasis in the system conditions the prospects for and content of change. For example, negotiations on trade under the auspices of GATT/WTO include a series of norms (e.g., major interests, development) that will affect specific provisions of any final treaty (Finlayson and Zacher 1981). In particular, the major interests norm will produce an agreement whose precise subjects and specific provisions will be more closely aligned with the interests of leading states (and others most affected by the treaty) than it will be for other parties, even as the agreement was negotiated in a large multilateral setting. Institutional norms therefore promote coherence by ensuring some measure of continuity in successive lawmaking, potentially over long time frames.

Third, agenda setting power differs across forums, and this influences what issues are possible subjects (or not) for new legal rules. Indeed, those actors most influential in the creation of those forums often have built in such advantages for themselves (Gruber 2005). For example, agenda control will lead to different outcomes when rules are discussed in the WTO versus United Nations Conference on Trade and Development given the powers of different coalitions in those bodies (Shaffer 2005). Some actors are given special rights with an organization in order to set the agenda. For example, Article 99 of the UN Charter gives the Secretary-General power to bring any matter threatening international peace and security to the attention of the UNSC. Agenda setting rules for institutions determine not only the degree of power diffusion but also which set of actors or subset (e.g., leading states) will have the most influence over outcomes.

The institutional arrangements also influence the kinds of provisions that find their way into final drafts of agreements. UN bodies, such as the International Law Commission, include participation from different

states, many of whom may have few direct interests in most provisions. Yet these bodies operate on principles of consensus, even though a treaty will not become binding on any state other than a signatory. Bargaining in such forums produces normative provisions that are necessary to promote that consensus. This could mean that the language of the document is deliberately vague, as are many articles of the Covenant of Civil and Political Rights, so as to facilitate multiple and self-interested interpretations. Coherence might suffer as such agreements depend on executing legislation by national governments to give the law effect. Nevertheless, such action might never occur or do so in a multitude of different ways such that a global or regional agreement results in different or contradictory rules across borders. Even within states, different agencies might be empowered in the interpretation of the rules and thus incoherence can deepen (Ku 2012).

Consensus rules might also produce 'package deals' in which articles or subsections are added to a treaty to secure the support of a certain group of states. For example, the Convention on the Law of the Sea, negotiated at the Third UN Conference on the Law of the Sea, includes guarantees for access to the high seas by landlocked states, a provision designed to secure the support of that set of conference participants. Some forums might include members with only certain preferences or those in a given direction; this may make consensus and therefore an agreement easier. There might be a trade-off between the breadth of membership and the strength of commitment exacted in any agreement (Guzman 2008).

Because where international law is made helps determine what law is made, strategic actors may seek to have law created in certain forums as opposed to other alternatives when such options exist. We usually associate the process of 'forum shopping' with litigants searching for the optimal venue in which to file suit. Yet shifting forums is also applicable earlier in the legal process when actors are seeking to create law (Shaffer 2005). States may further choose forums that provide needed coordination at the international level, but do not require the formality or complexity of a treaty-making or negotiating process. Protection of nuclear materials provides an example of this where International Atomic Energy Agency (IAEA) 'recommendations take up where treaties leave off' (Kellman 2000, p. 487). Recommendations are regarded as less intrusive on sovereignty and do not engage the debates over national security. Soft law can provide the consistency that international agreement and cooperation can provide, but without the burden of international agreement making if

it can be linked to another hard form to ensure compliance and enforcement. An example of this can be found in the use of the World Bank's Operational Standards that can be incorporated into loan and credit agreements negotiated between the Bank and the borrowing state. As agreements with the Bank, they become binding. Thus, soft law becomes a way to fill in gaps or uncertainty in multilateral governance while reinforcing its basic structures and principles.

Some forums are better suited to the interests of certain states than others. With its historically underdeveloped institutions, there is less 'layering' (Thelen 2004) or multiple forums performing similar functions than in domestic politics. In this way, there is less room for contradictory rules and therefore incoherence. Nevertheless, there are still some opportunities for forum shopping and multi-level governance that promotes power concentration. Stiles (2006) provides an excellent illustration, discussing anti-terrorism law and the UN, and by implication how actors may use or abuse the operating system to promote their interests. The GA, through its Sixth Committee, had worked for a number of years on drafting conventions dealing with terrorism. Yet its procedures for operating on consensus and its track record of taking actions, such as trying to carve out exceptions to terrorism norms for national liberation groups, made it an anathema to major power states. Not surprisingly, after the 9/11 attacks, the USA and the UK sought to use the UNSC, a forum much friendlier to their interests and subject to their control, to develop new legal rules on terrorism. The success of efforts to draft rules on terrorism will depend on which forum is privileged and any convention emanating from those two bodies is likely to contain very different normative provisions, and these will not necessarily be convergent or coherent as a result.

In the adoption of the World Health Organization's Framework Convention on Tobacco Control, Crow (2004) notes that by connecting the health issue to the human rights operating system, tobacco control could then avail itself of the established human rights institutions to advance the development of the norm of tobacco control; such institutions include the European Court of Human Rights, the United Nations Human Rights Committee, and the Inter-American Commission and Court of Human Rights. This purposely designed multi-level structure—across issue areas and with a global and regional interface—actually strengthens the ability of international legal rules to regulate behaviour.

Another form of multi-level lawmaking can be seen in efforts to coordinate the implementation of international treaties and conventions at

the sub-national level within states. As former Uniform Law Commission (ULC) Executive Director, William H. Henning has noted, the USA has been a reluctant participant in many private international law conventions because of worries 'that the conventions will upset the appropriate balance between federal and state lawmaking.' (Henning 2011, p. 43). With ULC involvement, this may overcome some of the concerns by having state views present as the USA undertakes the obligation. (The National Conference of Commissioners on Uniform State Laws [commonly referred to as the Uniform Law Commission—ULC] is an organization of legal professionals appointed by their states, the District of Columbia, Puerto Rico, and the US Virgin Islands 'to research, draft and promote enactment of uniform state laws in areas of state law where uniformity is desirable and practical.'): Nevertheless, it also raises the question on whether this is consistent with the US Constitution's Article I, section 10 provision giving the treaty-making power to the federal government. Yet, in Henning's opinion, 'there is nothing in the Constitution that prevents a convention ratified by the United States from being implemented at the state level' (Henning 2011, p. 45). An example of this form of cooperation is seen in US implementation of the 2007 Hague Convention on the International Recovery of Child Support and Other Forms of Maintenance (HCCH 2007). The mode for its implementation in the USA was the Uniform Interstate Family Support Act (UIFSA) promulgated by the ULC in 1992. Because of US government funding tied to state adoption of UIFSA, adoption that included the 2007 Hague Convention was virtually 100 per cent among all US states and territories.

Finally, there is the possibility that the operating system processes that take place within treaty-making forums lead to a redefinition of the interests and values of the treaty makers (Haas 1990). This may involve problem redefinition, such that new laws are created to address concerns that were previously less salient but now are at the forefront. This may not have occurred with respect to United Nations Educational, Scientific and Cultural Organization, which remained stagnant and consequently created few new standards, but is evident in a number of human rights organizations in which rights for women and indigenous peoples were adopted. It can also be the case that actors were transformed by their participation in international forums and thereby created new rules on a variety of issues that would otherwise not have been manifest. These are significant moves towards empowering new elements in the governance domain. Some sub-national institutions, such as certain courts, have functioned in

the public domain, but not at the international level. Others like private networks, trade associations, or NGOs may not have previously had any formal role in the public domain, but do so now in particular specialized areas. These developments result from both hard and soft agreement of an initial group of authorizing parties, but whose practice and operation may extend beyond any single set of circumstances.

In general, secondary rules can set the parameters for lawmaking in terms of which actors participate and in what forums international law is made. Such rules can diffuse the power of decision-making (e.g., diminish the influence of leading states), but in the course of doing so risk undermining the ability of law to be constructed and implemented, thereby jeopardizing multi-level governance; this risk is greatest when the values and preferences of the participating actors are divergent. Nevertheless, secondary rules can fill in gaps and reduce uncertainty when primary rules and governance structures lack direction for international law.

Credible Commitments from Institutions

A second way that the operating system influences the normative system is through clarifying whether credible commitment exists or not. States frequently share a common interest to incorporate a given norm in a treaty, but this is no guarantee that an agreement or one including the norm in question will result. States have reason to fear that other parties will renege on performing actions required in the treaty, and therefore will be reluctant to sign or ratify a treaty without some assurance of compliance. Credible commitment theory has been applied most prominently to agreements that end civil wars, but it has also been an important part of studies of international cooperation in general (Fearon 1998).

With respect to international law, there are certainly numerous reasons, beyond convergent interests, why states agree to treaties. Yet, the existence of compliance institutions, one of the core elements of the operating system, is influential in whether treaty negotiations reach fruition. If states know that existing monitoring mechanisms, courts, or dispute resolution mechanisms exist, they will be more likely to commit to agreements (Downs et al. 1996). The benefits of treaties only accrue to parties if all or most follow the provisions. States will be reluctant to sign and ratify agreements when there is a substantial chance that others will cheat or otherwise fulfil obligations; in those circumstances, the costs of being a party and complying oneself are not counterbalanced or overcome by the

benefits that are supposed to come from other's compliance. For example, if a state knows that others will cheat on a trade agreement, the benefits of lower tariffs or free competition might not be realized, and there is little reason to agree to such an arrangement in the first place. The opposite effect is also possible. States might be reluctant to sign agreements with strong compliance mechanisms, especially those that produce unwanted changes domestically; some human rights treaties are illustrative.

The original purpose of creating institutions, such as tribunals, was to enhance the credibility of commitments by raising the costs of defection (Helfer and Slaughter 2005). Young (1989a, b) notes that compliance mechanisms reduced uncertainty and facilitated rule formation in the environmental area (see more generally, Guzman 2008). In some issue areas (e.g., human rights), however, states may oppose strong monitoring and therefore be reluctant to create new rules in the face of an effective operating system. Broadly, institutions reduce uncertainty, conveying information about the likely effect of new rules (Kriehbiel 1991), whether good or bad for individual state interests.

Proving that the operating system was critical in facilitating a normative agreement is difficult as it requires establishing that the treaty or treaty provision would not have been concluded otherwise except for the operating system rules that facilitated credible commitment. One might speculate that the Nuclear Non-Proliferation Treaty (NPT) might never have been signed had it not been for the presence of the IAEA and its inspections protocol. This is not to say that the IAEA did not need to modify some of those mechanisms or that the organization has proven to be infallible in its duties. Rather, its existence gave underdeveloped and developed states assurance that NPT violations would be detected and that certain other rights (e.g., right to nuclear energy) would be protected. Even more difficult to detect, however, were cases in which agreements did not occur because of operating system deficiencies and therefore are not transparent.

Secondary rules in the operating system vary across negotiation contexts, but their impact will also vary according to issue area and compliance requirements. The influence of the operating system should be less evident in the security realm; with high stakes at risk, states may be reluctant to rely on operating system provisions, as opposed to self-help, mechanisms to ensure compliance with rules such as those in an arms control agreement. Thus, for example, states prefer to rely on their own satellite images and interpretation rather than those of an international agency or are reluctant to make advanced technology and the products

of such surveillance available to IOs. Second, the effect also depends on the utility of less formal mechanisms for compliance. McAdams (1997) argues that the risk of detection is necessary for the emergence of norms, but some norms are virtually self-enforcing. If reciprocity, reputation, and 'habit' (Henkin 1968) are sufficient for compliance, then elements of the operating system might not be necessary. For example, the fear of high costs from reciprocity have kept states from violating provisions on diplomatic immunity and chemical weapons usage, with a few exceptions, despite non-existent or weak monitoring institutions.

Parties could create their own compliance institutions and embed those provisions in the treaty; this is consistent with Hart's (1994) notion that secondary rules follow from primary ones. Yet this does not necessarily occur with great frequency. If existing institutions are suitable for the monitoring tasks, parties to an agreement will likely adopt those rather than create new mechanisms. Relying on existing arrangements is more cost efficient as new bureaucracies need not be created. In addition, there is a reduction in uncertainty in relying on extant institutions as the parties already have experience with how they work as opposed to new rules and structures. In an environment where states are called upon to address many more issues related to the well-being of their own citizens and to justify as well as to account for their conduct, the commitments states now make to fulfil these expectations have also diffused their power and authority to act. If performance is a factor in judging legitimacy, then state performance is now subject to the evaluation of its fellow states as well as potentially international institutions and civil society at local and global levels. This ongoing feedback and assessment, often provided within the framework of an international institution, is a key feature of today's global legal order.

To the extent that secondary rules permit or require a role for multi-level compliance mechanisms, this enhances certainty even in the absence of strong global monitoring mechanisms. For example, human rights mechanisms within the UN system are weak, but regional institutions such as the Inter-American Court of Human Rights include international law writ large and provide a mechanism to insure that obligations are observed. Similarly, national laws that follow from treaty law or are already consistent with new agreements provide a further backstop to compliance concerns stemming from weak secondary rule provisions globally. In addition, multi-level governance evidenced by private actors formally and informally contributing to monitoring also enhances certainty that commitments will be upheld or at least that violators will be exposed. In the areas of human

rights (Simmons 2009) and international environmental law (Dai 2007), NGOs play critical roles in legal monitoring and information provision. In these ways, multi-layered governance provides a web of compliance institutions and processes that supplement secondary rules that are embedded in or indeed absent from international agreements. Nevertheless, the degree to which they contribute to legal certainty and coherence, and therefore to enhancing credible commitment, varies substantially across regions and issue areas.

In general, secondary rules enhance multi-level governance by providing credible commitments of compliance for international agreements. In this way, they act to reduce uncertainty about the implementation of agreements and thereby make states more willing to agree to governance mechanisms. This role is especially salient when the subject matter or terms of the law suggest possible incentives for non-compliance.

Direct and Indirect Lawmaking

Beyond providing the context for lawmaking, institutions can also make law themselves directly and indirectly depending on the operating system. This involves more than empowering particular actors to make laws or allowing certain bodies to craft agreements. It also includes the creation of law as part of the normal procedural functioning of the operating system rather than from statutory authority. The net effects vary, but these processes tend to diffuse power among many actors and risk incoherence or 'turbulence' (Rosenau 1990) if the number and heterogeneity of the actors involved are too great.

In several cases, states have transferred treaty-making authority to supranational entities such as the EU. For example, its member states have given it treaty-making competence with respect to fisheries (Hollis 2005). There are also instances in which the operating system has permitted IOs to construct normative standards. For example, under Article 28 of the 1944 Convention on International Civil Aviation, the ICAO is 'authorized to promulgate international standards in relation to matters such as communications systems, rules of the air, and air traffic control practices as part of a state's obligations under the Convention. Similarly, the World Health Organization has the authority to adopt regulations on various health matters that bind all members except for those that notify their rejection of, or reservations to, the regulations within a set period of time' (Hollis 2005, p. 168). Within policy sectors and when the institution involved

has an exclusive or primary role in lawmaking, this can be desirable and strengthen coherence.

Institutional procedures also directly shape normative content. For example, the institutionalization of arbitration proceedings has implications for the normative development of international investment and commercial law. The practices of these principal arbitration institutions influence the making of contracts, agreements, and treaties by signalling which provisions arbitrators have found consistent with existing international agreements and practice, thereby setting the parameters for the provisions of future agreements; this promotes continuity and coherence across time. As the London Court of International Arbitration notes, 'Ad hoc clauses are frequently either inadequate or overly complex. By incorporating institutional rules into their contracts, the parties have the comfort of a comprehensive and proven set of terms and conditions upon which they can rely, regardless of the seat of the arbitration; minimizing the scope for uncertainty and the opportunity for delaying or wrecking the process' (The London Court of International Arbitration). This might involve precluding certain provisions as well as suggesting to the parties that new elements will be received favourably by arbitration panels. The process involves an interactive cycle of contracts, awards and rulings, and new contracts. The arbitration process is becoming fixed as part of the investment law landscape, 'which in turn has increased the rate of publication of awards and accentuated public aspects of the arbitral process' (Rogers 2005, p. 1004) These, in turn, shape future contracts, arbitrations, and awards.

Indirectly, the actions of international institutions might gradually influence the content of law. Once adopted by institutions, new concepts and practices become part of a specific area of law. Their acceptance, however, also affirms the utility of the modes or pathways used to achieve this recognition. In the case of the 'Responsibility to Protect,' these modes include association with the UN Secretary-General, public input individually or through NGOs, and engagement with experts and those affected by the concept through town meetings, and adoption and codification by UN organs and states themselves. Each such initiative and accretion add both to the normative and operating content of international law and politics. It is not obvious, however, whether such processes necessarily promote coherence (or not), but as these tend to be gradual processes, changes in the law are not rapid and certainty is not gravely threatened in the short run.

Another example of such law creation comes from international tribunals. Traditional operating system rules establish that court decisions can be used

as evidence of custom. Rape as a war crime might have existed under customary law, but its existence was murky. It was only when the crime was recognized by the Yugoslav and Rwandan war crimes tribunals that one might be able to truly say it is international law, especially given (1) rape is rarely if ever mentioned in legal lists of such crimes, and (2) no international court had ever convicted an individual for rape as a component of genocide before this was done by the Rwandan tribunal in *Prosecutor* v. *Akayesu* (1998).

The process of lawmaking sometimes thrusts authority onto adjudicatory bodies, if only out of necessity that comes from uncertainty or gaps in the system. Such is the case with the WTO. Shaffer (2004, p. 470) explains:

> 'The difficulty of amending or interpreting WTO law through the WTO political process enhances the impact of WTO jurisprudence. WTO law requires consensus to modify, resulting in a rigid legislative system, with rule modifications occurring through infrequent negotiating rounds. Because of the complex bargaining process, rules often are drafted in a vague manner, thereby delegating de facto power to the WTO dispute settlement system to effectively make WTO law through interpretation.'

Danner (2006) finds evidence of judicial lawmaking in a number of different courts. Specifically, she notes 'The International Court of Justice has reshaped the law on transboundary resources, including rivers and fish stocks. The Iran-US Claims Tribunal has clarified the international law of unlawful expropriation. Most of these decisions have been subsequently accepted as valid by states, despite their often weak textual or customary law bases' (Danner 2006, pp. 47–8). Yet Danner claims that much of the effect is likely to be manifest in temporary international courts. Her argument is that this is most appropriate as a mechanism for revision of treaties when those agreements are old and no longer reflect current conditions, and there is little prospect for revision any time soon.

Ginsburg (2005) indicates a broader effect, arguing that judicial lawmaking is 'inevitable.' Primarily, he notes that courts and related institutions make laws in several different ways. Judicial decisions have increasingly been used by subsequent courts to guide decisions, even though precedent is not explicitly an established rule (e.g., see Article 59 of the ICJ Statute). The ICJ also can issue advisory opinions, providing another avenue to reinterpret the law or establish new principles. The reach of such advisory opinions can be extensive as is the case with the Court's articulation of a functional basis for understanding the international legal personality of the UN (see International Court of Justice,

Advisory Opinion on the Reparation for Injuries Suffered in the Service of the United Nations, 11 April 1949).

Furthermore, courts have the power to interpret treaties and detect custom. Such judicial lawmaking, however, is not unlimited. In the interpretive work, international institutions fill important gaps in normative development. One example is the General Comment practice of the United Nations Human Rights Committee and the doctrine of the margin of appreciation used by the European Court of Human Rights. As provided by Article 40 of the International Covenant on Civil and Political Rights (ICCPR), the United Nations Human Rights Committee studies the reports submitted by state parties and can issue general comments to promote further compliance and implementation of the Covenant. There have been 34 general comments, including General Comment 32 issued in 2007 that addresses the right to equality before courts and tribunals and the right to a fair trial, and General Comment 29, issued in 2001 that addresses ICCPR Article 4 and derogations during a state emergency. The accepted process of review by the Human Rights Committee has created a new capacity to interpret ICCPR provisions that, over time, is likely to shape the expectations created by those obligations.

When lawmaking occurs by judicial institutions, it clearly diffuses power across different international actors and across different governance levels, as international, regional, and even national courts might be involved. Indeed, national courts sometimes have primacy or first rights for some cases (e.g., war crimes), and thus the international legal system is deliberately multi-level. This also has the potential to make international law less stable and more incoherent in the face of contradictory rulings and law creation (Ku 2012). Nevertheless, in practice, the system has a tendency towards stasis in that courts try to fit new laws within existing norms and frameworks. States can also 'overrule' judicial actions by subsequent contrary action or constrain ('discipline') tribunals who make undesirable law, thereby limiting future judicial lawmaking. At the same time, we can already see the evolving authority that such review processes can now have in assessing state behaviour. International institutions have facilitated the ability of states to solve global problems, but they have also now created a more complex and demanding governing environment within which states operate. International institutions are also not static or isolated organizations, but very much the creatures of their stakeholders and professions. If sufficient support exists, institutions can exceed their expectations. If such professional support fails to exist, institutions are much limited in what they can

do (Alter and Helfer 2010). The study comparing the strong record of the ECJ to the weaker record of the Andean Court of Justice demonstrates this.

In general, judicial institutions, which are a central component of the operating system, can play an important role beyond their traditional role in resolving disputes. They do so directly and indirectly in lawmaking. This tends to occur when there are gaps in the governance structure that courts can fill by reducing uncertainty, promoting efficiency, and often reinforcing existing rules and procedures.

Conclusion

Rosalyn Higgins (1995, p. 1) wrote that international law is 'humdrum stuff' that is 'harnessed to the achievement of common values.' It is the mundane portion of international law that this paper addresses. In the world of global issues and actors, understanding the operating system and the secondary rules it represents is crucial for international law's future development and advancement. It is also important to the development of global governance and some measure of world order. We know that identifying norms without the capacity to implement them does nothing to advance a normative agenda. Worse, it does little to enhance the ability to govern. Understanding norms as part of a legal system that relies on a dynamic operating platform allows more sophisticated and complex analysis of what will work and why. It also provides insight into the realities of governing in a global environment and allows for a higher degree of regulated behaviour on the international level than would focusing on more formal forms of international agreement to regulate.

Understanding the processes and institutions that support the creation of international obligations and standards can help identify the most effective way of addressing a transnational problem. Understanding the humdrum in international law also helps to identify where these functions might be fulfilled by systems other than the international legal one. These may include domestic legal systems (i.e., legislatures and courts and the private sector). Decades ago, Georges Scelle (1932), coined the term *dedoulement fonctionnel* to indicate that when a national official acted to carry out an international obligation, the person carried out the functions of both a national and international official. Scelle was referring to individual actions. Today, we see that in the form of multi-level governance, the actions of regional, national, and even private institutions also facilitate or impede the development of international law. Where international human

rights are embedded in national constitutions, it facilitates the implementation of these rights in the relevant countries. Where institutions such as the US Supreme Court feel constitutionally constrained from giving effect to international legal obligations, they may work to impede. We can, nevertheless, see the reach of the international legal system into the domestic legal system as obligations affect the treatment of individuals and the general responsibilities to the international community even of entities such as multinational corporations. We also see where private actors may be playing regulatory, public monitoring, and reporting roles thereby adding capacity to the international legal system and embedding state and public authorities into a denser and more intricate network of responsibility and accountability.

Whether by strategic interaction, ad hoc accommodation or happenstance, we have now empowered a variety of elements to perform some function in global governance and lawmaking. Some of this was done through international institutions. To the extent that these interactions or arrangements deliver on those governance functions, they acquire performance legitimacy—a standard to which existing governance units, including states, are also held. We therefore now need to understand these new units, their capacities, potential, and shortfalls. Most importantly, we need to understand their connection and relationship to each other and their long-term system-wide effects in the global governance and international law environment. Multi-level governance and legal pluralism have diffused the power of states. They have given power to other units like international institutions, individuals, and sub-national units of government. International institutions played a role in creating this global environment and provided a microcosm to understand the relative roles played by all who are now active in the global political environment. This has not always enhanced the certainty or coherence of international law. Indeed, in our review, we have found that this varies substantially by the number of actors involved, their roles in the legal process, and the legal issues in which they operate. This is a major reason to understand the elements of international law's operating system or its secondary rules as a factor in governance apart from the specific norms that it generates. Understanding these dynamics will be a key to the direction of power, shaping of interests, and operation of a global legal order.

Across the areas examined here, secondary rules contribute positively to global governance when they are able to reduce uncertainty by filling in gaps in the international legal system. These can include providing cred-

ible compliance mechanisms that encourage states to sign and obey agreements, as well as permitting space for judicial institutions to make laws directly or participate indirectly in their creation. There are some exceptions, however, to these positive effects. When secondary rules expand the number of actors involved in lawmaking or promote diverse forums for that purpose, it can result in divergent preferences and values between the actors that prevent consensus or threaten governance operations. There are also instances, most notably in human rights, that strong compliance mechanisms might make states less likely to commit to normative rules or limit that those rules entail.

The effect of secondary rules on the diffusion of power in multi-level governance is more ambiguous. To the extent that such rules allow non-governmental participation in law construction or equality in approving treaty language, then the influence of major power states is diminished. Nevertheless, other forums and rules, such as in the UNSC, reinforce existing power relationships and remain important players in lawmaking and governance. The result is a more complex multi-level and multi-unit governing environment.

Notes

1. A somewhat different and fuller specification of how secondary rules influence primary ones is given in Diehl and Ku (2010, Chap. 5).
2. On how secondary rules of interpretation affect the content of treaty norms, see Aust's chapter in this volume.
3. On the secondary rules governing UNSC decision-making, see Reinold's chapter in this volume.

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The Rules of Interpretation as Secondary Rules: The Perspective of Domestic Courts

Helmut Philipp Aust

Introduction

More than the average domestic legal system, international law has a love–hate relationship with unity and coherence. Whereas other legal systems have learned to cope and actually embrace specialisation and diversification, international lawyers tend to discuss 'problems' such as fragmentation (Study Group of the International Law Commission, Koskenniemi 2006). The ever growing number of specialised regimes

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and fora for the adjudication of claims are, at times, perceived to threaten the unity of the international legal system. In addition to that phenomenon, another growing concern is the use which domestic courts make of international law (e.g., Knop 2000, p. 501). Inevitably, these courts have to deal with questions of international law in a variety of settings. After all, the effectiveness of international law depends to a large degree on its implementation by states. Could it also be the case that what is widely appraised as the growing role of domestic courts in and for international law is another factor for the disintegration of international law? In the light of the overarching themes of this volume, this would raise questions pertaining to the coherence of international law. A divergent practice of domestic courts could thus threaten the uniformity of international law's application and thus be a rather negative force for the rule of law. Or is the practice of domestic courts rather helping to 'bring international law home,' to finally make it more effective and thereby remedy some of the still existing institutional shortcomings at the international level?

These questions are central to the ongoing discussions about the rule of law within and beyond the nation state. The application of international law by domestic courts is a prime example of the enmeshment of various legal orders. Depending on the perspective one takes, one can either conceptualise the relationship between international and domestic legal orders in terms of hierarchy, envisioning a system of multi-level governance where the international takes precedence over the domestic level.[1] Conversely, sceptics of lofty internationalism would probably dispute that international law constraints domestic courts in any meaningful sense (compare Conant 2013, pp. 411–3). Sitting somewhere in the middle, adherents of global legal pluralism would leave questions of hierarchy aside and rather observe how different legal regimes interact and challenge each other, possibly opening up spaces for contestation by marginalised constituencies (compare Krisch 2010, p. 307).

Courts—Uniformity, Diversity, Convergence (Oxford: Oxford University Press) p. 333. Thanks are also due to Monika Heupel, André Nollkaemper, Georg Nolte, Theresa Reinold as well as the other participants at the WZB workshop on the Rule of Law in Global Governance, Berlin, 28 and 29 June 2013 for constructive criticism. The text benefited further from fruitful discussions at the international law seminar of Anna Wyrozumska and Izabela Skomerska at Lodz University, March 2014. Responsibility for any errors or mistakes lies solely with me.

One way to approach these macro-questions is to look at *how* domestic courts actually interpret international law when they have to apply it. International law, unlike most domestic legal systems, has its own rules or principles of interpretation, at least as far as international treaty law is concerned. These rules are set forth by Articles 31–33 of the Vienna Convention on the Law of Treaties (VCLT). These rules, which shall be introduced in a little more detail in due course, belong to the category of the so-called secondary rules of the international legal system (Abi-Saab 2010, p. 104; Nollkaemper 2011a, pp. 224f.; Orakhelashvili 2010). By virtue of this quality, they help to define what constitutes the international legal system, how international rules are to be applied and thus fulfil an important function for the international rule of law. The international rule of law is, of course, itself a contested notion. Different people will understand different things when they invoke it (compare Aust and Nolte 2012). Different visions of the rule of law can be envisaged as a form of concentric circles: in the middle, there is a small inner core of formal requirements which take centre-stage in almost every conception of the rule of law. Surrounding this inner core, one can find ever-bigger and encompassing circles which enrich this formal and narrow (thin) version of the rule of law with substantive standards (thick concepts of the rule of law).[2] Arguably, a reliable and predictable interpretation of the law belongs to the inner core of formality, something to which most visions of the rule of law would subscribe to. Legal certainty is, in this perspective, a key concept of the rule of law and the rules of interpretation fulfil the role to ensure those who have to interpret the law as well as those who are affected by these decisions on interpretation what the outcome of cases will be.

Against this background, this contribution will assess how domestic courts make use of the international rules of interpretation in their judicial practice. To this end, it will first give a brief overview of the international rules of interpretation as they are set forth in the Vienna Convention and discuss their quality as secondary rules of the international legal system. The lead question which will be formulated is what this quality as secondary rules entails for domestic courts, that is, whether there is an obligation on the part of domestic courts to make use of the international rules of interpretation and what such an obligation could entail in practical terms. Subsequently, the chapter will present different ways of how domestic courts make use of the international rules on interpretation. From this discussion, it will emerge that there is considerable diversity in the ways in

which domestic courts rely on these rules. A fourth and final section will assess what this means for the international rule of law. In particular, it will be argued that although it is difficult to identify a meaningful obligation for domestic courts to use the international rules of interpretation, it is in the interest of domestic courts to make use of these rules. From the viewpoint of the international legal system, certain systemic reasons associated with the rule of law also militate for using the international rules of interpretation.

This chapter's methodology is based on an analysis of the applicable rules of international law and their application in selected instances of domestic court practice. The selection of cases cannot lay claim to constitute the basis for a general overview of how domestic courts handle questions of international law. This ambition would go beyond what can be achieved in a single book chapter. Instead, pertinent examples from domestic court practice have been selected in a necessarily subjective manner. They have been identified by virtue of them signalling different approaches towards treaty interpretation by domestic courts. Their presentation does not lay claim to being representative in any way. Rather, they serve as examples of how domestic courts face the challenge of having to apply and interpret international law. This unashamedly subjective selection process does not render them any less relevant. Many international lawyers, including myself, harbour a certain scepticism towards too much reliance on empiricism in the sense that international law could be objectively monitored. An empirical analysis can, of course, make sense with respect to certain issue areas (such as the determination of state practice for the ascertainment of the rules of customary international law). But also in these fields, this process is not a mathematical exercise. Especially with respect to interpretation, one cannot overstate the extent to which this is a culturally sensitive issue which does not lend itself to easy causal analyses in the first place. Therefore, this contribution happily endorses what from the perspective of other disciplines might look like a certain eclecticism. This eclecticism is tamed, at the same time, by its reliance on what international law actually prescribes for the process of its interpretation.

The Rules of Interpretation as Secondary Rules

Before we begin to discuss the practice of domestic courts, some general remarks about the conceptual background need to be made.

The Vienna Rules of Interpretation

Unlike most domestic legal systems, international law sets forth specific rules of interpretation. These rules are found in Articles 31–33 VCLT and apply to treaties which are covered by the regime of the Vienna Convention. In general, it can be said that with respect to treaty interpretation, the Vienna rules enjoy authority beyond the circle of the state parties to the Convention as they are considered to represent customary international law (Gardiner 2012, p. 493). The question of how to interpret international law is one of the most intricate problems of international law and has spurred considerable academic interest in the last few years (Gardiner 2008; Waibel 2011). Articles 31–33 VCLT need to be seen in the greater context of historical trends in international law. In particular, they represent a rupture with previous emanations of international maxims of treaty interpretation such as the *in dubio mitius* principle—according to which limitations of the sovereignty of states need to be interpreted restrictively—or, the possibly converse principle that international rules need to be interpreted effectively, so as to give them the full effect which was *intended* by the parties to the treaty (compare Lauterpacht 1949; Sorel and Eveno 2011, para. 57). The Vienna rules strike a compromise between previous competing doctrinal schools, opting for an objective approach to treaty interpretation which has as its starting point what is set forth in Article 31(1) VCLT: 'A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.'[3] The remainder of Article 31 VCLT then stipulates what constitutes the aforementioned context and what 'shall be taken into account, together with context,' that is any subsequent agreement between the parties and their subsequent practice, insofar as it 'establishes the agreement of the parties' regarding the interpretation of the treaty (Article 31(3)(a) and (b) VCLT) as well as 'any relevant rules of international law applicable in the relations between the parties' (Article 31(3)(c) VCLT).[4] Article 32 VCLT recalls what additional means of interpretation may be adopted if the meaning of a provision is 'ambiguous or obscure' even after recourse to Article 31. Article 32 VCLT does not include a definite list of additional means of interpretation in this regard, but clarifies that one can count among these supplementary means the 'preparatory work of the treaty and the circumstances of its conclusion.' Article 33 VCLT finally provides a guideline for the interpretation of treaties authenticated in more than one language.

As it has been noted in the literature, 'a key to understanding how to use the Vienna rules is grasping that the rules are not a step-by-step formula for producing an irrebuttable interpretation in every case.' (Gardiner 2008, p. 89). Rather, the approach of the International Law Commission (ILC) whose draft was the basis upon which the VCLT was adopted, was to propose a 'single combined operation' according to which 'all the various elements, as they were present in any given case, would be thrown into the crucible, and their interaction would give the legally relevant interpretation.' (UN 1966, pp. 219–20). This crucible-approach also leads to considerable uncertainty. As two commentators have remarked, the 'absence of hierarchy between the different means of interpretation, their malleability, and the multiple ways of combining them, leave the door open to countless variations in this complex operation that constitutes treaty interpretation.' (Sorel and Eveno 2011, para. 8).

Accordingly, despite the aim of the Vienna rules to bring clarity and rationality into the process of interpretation, they are subject to a number of controversies themselves (see Gardiner 2008; Kolb 2006). In any case, they raise the hermeneutical problem of how rules of interpretation can be interpreted. It would not seem to make much sense to apply the Vienna rules of interpretation to an interpretation of the rules themselves—otherwise an infinite regress would come into existence (Klabbers 2003, pp. 270–2). While this hermeneutical problem need not be solved in this chapter, it is important to keep in mind that the Vienna rules can only do so much, that is, that there are important limits to what they can achieve in terms of unifying approaches to treaty interpretation.[5] In fact, what the Vienna rules may do is to guide the interpreter of international law towards certain approaches, towards certain means which can be used in order to establish the meaning of a provision of international treaty law (Gardiner 1995, p. 628). They may thus help to establish what constitutes a legitimate argument in a certain case and what can no longer be advanced as a reasonable case, be it in a forum of judicial dispute settlement, during diplomatic negotiations or more generally in any form of discourse about international law.[6]

The Rules of Interpretation as Secondary Rules

In that respect, the rules of interpretation fulfil an important function for the international rule of law. In a decentralised legal system which lacks a mechanism of compulsory adjudication, it is constantly renegotiated what

constitutes law and how it is to be interpreted. While, of course, certain voices are more influential and important than others, the absence of a central arbiter who can decide what interpretation of the law is actually the correct one makes international law more vulnerable to interpretations which are advanced merely in the interest of power politics, pressure groups and other influences which do not primarily aspire to engage in a faithful interpretation of international law. In this context, it is important to have a common frame of reference which helps to determine how the notoriously difficult process of interpretation is to be approached.

In this respect, the rules of interpretation form part of a larger corpus of the so-called secondary rules of the international legal system. The concept of secondary rules is itself charged with competing views on its theoretical foundation and practical importance.[7] In international law, it is most commonly referred to in the context of the law of state responsibility where the second Special Rapporteur of the ILC on the topic, Roberto Ago, used it in order to distinguish between primary rules which set forth the substantive obligations of states and, in his terminology, the secondary rules of the law of state responsibility which would come into effect once a primary obligation has been breached (Ago 1963, p. 253). The genealogy of this conceptual distinction has not yet been conclusively established. The intuitive assumption is to relate Ago's concept to the work of H.L.A. Hart who is widely credited with having coined this distinction between primary and secondary norms and, more importantly, with having stressed the importance of such a distinction for the existence of a legal system. Secondary norms, according to Hart, are the rules of adjudication, change and recognition (Hart 1994, pp. 79f.). In a wider sense, as Hart remarked, they also cover the general problem of ascertainment of the law—a domain to which the problem of interpretation arguably belongs (Hart 1994, p. 94).[8]

In international law, it has become common to associate more or less all rules that have a specific systemic, yet in terms of substance neutral content, with this category of secondary rules. What is referred to as secondary rules in international law is captured by Daniel Halberstam who, without referring to the concept as such, indicated the importance of 'general rules governing the creation, modification and interpretation of treaties.' (Halberstam 2012, p. 167). In short, these are the 'rules about rules' (Hart 1994, p. 94).[9]

As Thomas Franck has put it, '(i)n both mature domestic communities and in the emergent international community, these secondary rules determine and *legitimate* the processes and primary rules by which a

community regulates itself' (Franck 1995, p. 30). In fact, the role that secondary rules of international law have to play is captured well by the four indicators of legitimacy that Franck has carved out: determinacy, symbolic validation, coherence and adherence (Franck 1995, p. 30). The process of interpretation is the key towards identifying these markers of legitimacy. If interpretation produces indeterminate results, which eschew the necessary symbolic validation of rules, which lead to results which defy the coherence[10] of, if not international law in general, then at least of a specific treaty and which fail to secure a convincing interpretation so as to secure adherence to the norm, it will have missed its ultimate goal. According to Franck's categorisation, it is essentially the criterion of adherence which relates to interpretation: Adherence, he writes,

> 'is the vertical nexus between a single primary rule of obligation … and a pyramid of secondary rules governing the creation, interpretation and application of such rules by the community. The legitimacy of each primary rule depends in part on its relation (adherence) to these secondary rules of process. Primary rules unconnected to secondary rules tend to be mere *ad hoc* reciprocal arrangements'. (Franck 1995, p. 41)

Consequences for Domestic Courts

Hence, the question arises what this entails for domestic courts. Domestic courts are, to an ever growing extent, called upon to apply international law. The application of international law by domestic courts takes place in various settings. Depending on the relationship between international and domestic law, domestic courts will either apply international law directly (as it is the case in monist states such as the Netherlands) or by virtue of some form of domestic incorporation, as it is the case in dualist states such as the UK.[11] Between these two poles, one can find a wide variety of different models which exhibit straits of monism and dualism. In the light of this diversity and the growing enmeshment of various legal orders—some speak of an emerging or already existing global law (e.g., Berman 2012)—the continuing relevance of the distinction between monism and dualism has been called into question (e.g., von Bogdandy 2008, p. 397; Nijman and Nollkaemper 2007).

The discussion about monism, dualism and the potential demise of these categories is a discussion of domestic law in the first place. International law has traditionally been blind towards the internal organisation of the

state and this blindness extended to the way in which states organised themselves in order to comply with their international legal obligations (compare Klabbers 2013, pp. 290–1). From the perspective of the international legal system, the question is not so much how domestic law organises its relationship with international law, but rather how relevant actors at the domestic level develop their institutional ethos towards international law. As Michael Waibel has remarked, 'all treaty interpreters construe treaties against the background of historical, political, and social frames of reference' (Waibel 2016, p. 18). Both under monist and dualist schemes, domestic judges can be more or less open to considerations of international law. Under both systems, they can assume an institutional responsibility towards the international legal system. Conceivably, this may go so far as to lead to a self-understanding of being organs not only of their respective state but also of the international community in a sense close to Georges Scelle's notion of the *dédoublement fonctionnel* where a lower level of governance assumes functions of the higher echelon which lacks a proper institutionalised structure (Scelle 1956). Also under both monist and dualist schemes, domestic judges may, however, develop truly parochial views on the import of international law and treat it as a matter of pure expediency. In this context, Evan Criddle has identified two

> 'competing visions of domestic courts' institutional role in treaty-litigation: One vision suggests that domestic courts take part in an international judicial system when they adjudicate treaty cases and bear a duty to interpret treaties according to internationally accepted standards. Another vision posits the judicial branch as steward of national sovereignty entrusted with the responsibility to safeguard national legal norms and political preferences'. (Criddle 2004, p. 449)

Accordingly, much will depend on the particular judicial culture and outlook towards questions of international law. This culture is shaped by many factors (or what one could call 'scope conditions'). Among these factors, legal education, the set-up of the legal system and the broader political environment all may have a role to play. While it is not possible to establish definite scope conditions in the present contribution a number of assumptions can be formulated. For instance, it is highly plausible that the incorporation of public international law into regular law school curriculums might have a positive effect on the capacities of judges to skilfully interpret norms of international law. Failing that, it might also be conducive to offer training possibilities for judges to compensate for

existing deficits in this regard. Such training need not take the form of top-down learning processes in which a certain vision of international law is hammered into the brains of domestic judges. An attempt to raise the awareness of judges of the specificities of international law as compared to their respective domestic legal system might already be fruitful. All this has to take into account the specific legal culture of a given legal system. In this regard, Achilles Skordas has argued that from the perspectives of systems theory, culture is a memory of the governing system, which includes the legal system: 'Divergence in the interpretation emerges then as a consequence of differentiated legal evolution in various regions and territories' (Skordas 2016, p. 293). The choice of interpretative approach may, in turn, be a useful indicator to gain greater awareness of these factors. In addition, the prevailing political system will inevitably have an impact on the judicial and legal culture. Domestic respect for the rule of law can also help to instil a sensibility for the inherent values of the international rule of law in domestic judges. A culture of judicial independence might favour a neutral approach towards questions of international law, irrespective of whether a given interpretation favours the forum state or not.

Regardless of the model of organisation towards international law that a particular state chooses, the question arises how domestic courts determine what the international obligations of their respective state actually mean. Domestic courts have to face this question irrespective of whether they apply an international agreement directly or whether they have to interpret a domestic statute which is implementing this agreement (see also van Alstine 2009, p. 588). In both scenarios, international law expects from states a certain outcome. What counts is generally the result, not the way in which this result was obtained.[12] In this respect, the rules of interpretation have a paradoxical if not schizophrenic role to play: they are means at the disposal of states and their organs (and thus also domestic courts) in order to reach the right result. At the same time, they have an instrumental character insofar as they are only a means to an end. As long as the respective state manages to comply with its substantive international obligations, it is devoid of practical relevance whether this result was reached by using the internationally accepted methodology of treaty interpretation as set forth by Articles 31–33 VCLT (Wouters and Vidal 2006, p. 6; Waibel 2016, pp. 21–2; Nollkaemper 2016, p. 39).

This can be illustrated by a decision of the Belgian *Cour de Cassation* in a case concerning the interpretation of the Convention on the Contract for the International Carriage of Goods of 19 May 1956.[13] More important than the substantive subject matter of the dispute—the issue concerned the

interpretation of the terms 'wilful misconduct'—is an argument brought forth by the claimant that the Brussels Court of Appeals had disregarded Articles 31–33 VCLT in its determination of what wilful misconduct meant in the context of the Convention. The *Cour de Cassation* turned down the appeal. While the largest parts of the decision concern the establishment of what wilful misconduct means and whether it could have been equated with the Belgian concept of intentional misconduct (*opzet*), the Court also stressed that a violation of the rules of interpretation set forth by Articles 31–33 VCLT alone does not constitute a ground to invalidate a judgement under Belgian law. In particular, the Court remarked that 'la violation des règles d'interprétation des traités ne donne lieu à cassation que si, ce faisant, le traité faisant l'objet de l'interprétation a été violé.'[14] In other words: the Court stressed the character of the Vienna rules of interpretation as a means to an end (see also van Eeckhoutte 2000, paras. 9–11).

Even if we assume for a moment that a state commits an internationally wrongful act because of an erroneous application of Articles 31–33 VCLT, it will most likely not be held responsible independently for this misapplication of the Vienna Convention (Nollkaemper 2016, pp. 38–9). This state of affairs brings up the question what to make of the fact that these provisions on the correct approach to treaty interpretation are themselves part of an international agreement (as well as part of customary international law). Does this mean that there is an obligation upon states and their respective organs to make use of these rules? And to what end would such an obligation exist?

So far, the most sophisticated attempt at explaining this relationship has been made by André Nollkaemper. His discussion of the topic departs from the problem of what happens when national courts 'domesticate' international norms. Do domestic courts start to make up their own idiosyncratic international law? Nollkaemper writes:

> 'A decisive role for maintaining an international quality of a particular norm, and thus for maintaining the connection between an international norm and its domestic manifestations, is played by the applicable secondary rules that define the normative context within which primary norms function and that thereby affect the operation of such primary norms'. (Nollkaemper 2011a, p. 224)

Instead of international norms becoming domestic norms when they enter the domestic legal system, Nollkaemper argues, the better argument would be that the secondary rules of international law 'remain relevant to the corresponding rules at the domestic level.' (Nollkaemper 2011a,

p. 225). In order to further substantiate this position, Nollkaemper makes use of the term 'penumbra,' as coined by US Supreme Court Justice Holmes, thus pointing to an outer area of normative authority. With respect to international law, the secondary rules would belong to this penumbra and would enter the respective domestic legal system as part of the package (Nollkaemper 2011b, pp. 62–4).

This is certainly persuasive insofar as it points to the usefulness of the international rules of interpretation for domestic courts. After all, domestic courts enter an arena which is literally foreign to them when have to apply international law. It is all too easy to misunderstand concepts in international law and apply them in the light of domestic legal traditions, thereby potentially giving them a thrust which is alien to what was agreed upon at the international level. Recourse to the internationally accepted methodology of treaty interpretation could, so it might be presumed, save domestic courts from such embarrassing missteps and guide them towards a faithful application of international law, yielding the correct result of treaty interpretation (see also Iovane 2012, p. 625). But the question remains what this penumbra entails for domestic judges in more concrete terms. Is there an obligation upon domestic courts to make use of the international rules of interpretation? Or is international law indifferent with respect to these methodological questions, leaving them for the individual judges to decide, as long as a justifiable result is reached? And is the penumbra approach not in essence related to a monist outlook on the relationship between international and domestic law? (compare Paulus 2012, p. 7). After all, so the argument would go, dualism is all about the separation of the international rule and its domestic ramifications. So if there is no identity between the rule on the international law and the rule which the domestic judge has to apply, it is a difficult challenge to make the penumbra concept work.

In German judicial practice, there was a longstanding debate on whether international treaties were transformed or incorporated by virtue of the statutory law passed by the *Bundestag* under Article 59(2) of the Basic Law.[15] Transformation would mean that the international agreement was turned into genuine domestic law whereas incorporation referred to a transfer of the international agreement into the domestic realm. The school of transformation would thus emphasise to apply German law, whereas the incorporationists would stress that it was international law which had to be applied by German state organs, including courts. This discussion did not have solely academic relevance. For quite some time, the German Federal Administrative Court did not recognise persecution

by non-state actors to constitute a ground for protection under the 1951 Refugee Convention (Zimmermann and Mahler 2011, para. 298). A key argument not to follow the case law of other jurisdictions which had already shifted their position so as to also allow for protection in cases of persecution by non-state actors was that it was a German statute that the courts had to interpret. Accordingly, there was no room to allow for the consideration of this foreign practice which might have been considered as subsequent practice in the sense of Article 31(3)(b) VCLT.[16]

The Practice of Domestic Courts

Let us now look a bit more closely at the actual practice of domestic courts. So far, we have seen that there is considerable uncertainty regarding the actual meaning and importance of the international rules of interpretation for domestic courts. It is not at all clear whether they are under an obligation to use them or whether they are merely helpful tools which domestic courts might feel inclined to make use of, but would also be entitled to disregard as they see fit. Accordingly, the self-perception of domestic courts may be an indicator to see whether domestic courts consider themselves to be bound by an obligation to make use of the international rules of interpretation. Such an obligation could find its basis both in international and in domestic law. It could either stem directly from the VCLT and corresponding customary international law or it could exist by virtue of the domestic constitution and or accompanying legislation which could direct courts to make use of the international rules of interpretation.

Before we engage in this review, a brief methodological point needs to be made. It is not self-evident that the Vienna rules are only followed by domestic courts if they explicitly refer to them. Not all courts in all domestic legal systems feel compelled to provide a running commentary on their own reasoning. Therefore, it cannot be ruled out that domestic courts follow the Vienna rules, even if they do not cite them. These cases are difficult to assess, however. Where a domestic court does not pronounce itself on its methodology, it is ultimately unclear whether it made use of international rules of interpretation or not. Accordingly, one should not criticise too light-heartedly jurisdictions in which the Vienna rules are not referenced. Non-references may have different motives. Easy cases will consist of domestic court practice which makes explicit its domestic approach to statutory interpretation and transfers it to the interpretation of international agreements. Even then, however, it is possible for

courts to arrive at a correct result. The position of domestic courts on this question therefore need to be assessed carefully, without playing the blame game where non-reference to the Vienna rules is equalled with a form of non-compliance with international law.

Domestic Practice Which Recognises an Obligation to Use the Vienna Rules

There is actually some judicial practice where domestic courts have stated that they are under an obligation to use the international rules of interpretation. For the UK House of Lords, Lord Bingham remarked that it is 'the task of the House … to interpret the 1951 Convention and, having done so, apply it to the facts of the applicant's case. … In interpreting the Convention the House *must* respect articles 31 and 32 of the Vienna Convention on the Law of Treaties 1969.'[17] Turning to the VCLT is, however, a rather recent development in UK courts with *Fothergill v Monarch Airlines* in 1981 being the starting point of this development.[18] The development since this decision has prompted Gardiner to hold that 'endorsement of the Vienna rules … is now unqualified, though their use is not always overt and systematic'(Gardiner 2008, p. 131).

A good example for a domestic court being aware of the existence of the Vienna rules of interpretation and also making use of them in the sense that the ILC had in mind—as the 'single combined operation'—is the *Attorney General v Zaoui* case of the New Zealand Supreme Court. In this decision, which concerned the interpretation of the *non-refoulement* obligation under Article 33(1) of the 1951 Refugee Convention, the court first refers to the customary nature of Articles 31–33 VCLT which would provide for them to be part of the law of New Zealand. Subsequently, the court discusses the plain meaning and purpose of the provision, its context, state practice in its application, relevant applicable rules and finally the drafting history of the provision.[19] Irrespective of whether one agrees with the findings of the court in the concrete case, its approach shows considerable care and attention to an international approach to treaty interpretation. This is all the more noteworthy as the court was in fact interpreting a domestic statute which implemented the Refugee Convention.

The Supreme Court of the Netherlands reasoned in the context of a decision on a bilateral taxation treaty between the Netherlands and Nigeria that the meaning of the word 'reside' in the agreement 'must

be interpreted by reference to the rules of interpretation' of the VCLT.[20] There are, however, also other examples in the case law of the Dutch courts, thus making this statement appear somewhat less categorical than it seems at first sight (see Nollkaemper 2009, pp. 361–2).

In Australia, Justice McHugh of the High Court held in a 1997 judgement that 'treaties are interpreted in accordance with the requirements of the Vienna Convention.'[21] Another interesting example in this regard is Russia where the plenary of the Supreme Court may establish guidelines for lower courts on the application of international law. As William Butler reports, one such decree actually orders the courts to comply with Articles 31–33 VCLT (Butler 2009, p. 418).[22] For other jurisdictions, scholars deduce such an obligation from more general provisions of the respective constitution. With respect to Greece, it is held that '(w)hen interpreting international conventions, the courts follow the international methods of interpretation established by international practice and adopted by the Vienna Convention, Article 31. This is actually a constitutional requirement in the 1975 Constitution' (Yokaris 2011, pp. 254–5). The exact basis of this obligation in the Constitution is somewhat unclear, however, as the author of this quote refers to the general rules on judicial independence and the role of international agreements in the Greek legal order in order to reach his result. In a similar fashion, an obligation to make use of the Vienna rules has also been stipulated for Czech courts (Bělohlávek 2011, p. 200).

Domestic Practice Which Does Not Recognise an Obligation to Use the Vienna Rules

In other states, there is no regular practice of referring to the Vienna Convention, let alone to assume that it is mandatory for domestic courts to make use of the interpretative approach set forth by the VCLT. With respect to Bangladesh, for instance, it has been noted that '(c)ourts do not apply the international rules of treaty interpretation and most judges are not aware of these rules' (Karim and Theunissen 2011, p. 105). More or less the same state of affairs was identified for Ugandan domestic courts (Onoria 2011, p. 602).

In some states, such as Canada, judges apparently refer to the Vienna rules from time to time, but do not always explicitly distinguish between an international and a domestic methodological approach towards interpretation (see Beaulac and Currie 2011, p. 133). A similar picture

has been identified with respect to Israel where direct discussions of the Vienna rules are few and far between (Kretzmer 2009, p. 297; Einhorn 2011, p. 301). Also in Poland, references to the Vienna rules of interpretation appear to be inconsistent (Wyrozumska 2011, p. 475; Garlicki et al. 2009, pp. 387–9).

In post-authoritarian states, the judicial attitude towards treaty interpretation is at times shifting back and forth. An example is the approach of Mexican courts which traditionally relied on the views of the executive when they had to interpret international law.[23] After the transition to democracy in 2000, they began to be more assertive in interpreting international agreements in their own right and came to stipulate an obligation to interpret international agreements according to the VCLT in a ruling in 2002.[24] At the same time, the ruling emphasised that the Vienna rules of interpretation were subject to certain constitutional limitations, in particular, the preeminent importance of the wording of provisions under Article 14(4) of the Constitution. Only two years later, in a case concerning intellectual property rights, the Mexican Supreme Court somewhat nuanced its position and held that the Vienna rules of interpretation had to be 'pondered'; no longer was there mention of an *obligation* to make use of the Vienna rules.[25]

The most well-known example of a domestic legal system which follows its own traditions is arguably the USA. In the USA, the situation is peculiar as the interpretation of international agreements by the domestic judiciary can look back on a long tradition and the development of particular 'canons' of treaty construction precedes the development of the international rules of interpretation. Although there is some judicial practice also by US courts which refers to Articles 31–33 VCLT, this practice is limited to the lower courts which have recourse to the Vienna rules as part of customary international law (Criddle 2004, p. 434). With respect to the US Supreme Court, it has been noted that its recent practice, most prominently in *Abbott* v. *Abbott*, would mark a re-orientation towards an internationalist paradigm of treaty interpretation.[26] Although the VCLT would still not be cited by the court, the way it approached the question of whether an 'international consensus' had emerged on the delineation of rights of access and rights of custody under the Hague Convention on the Civil Aspects of International Child Abduction was seen as reflecting 'not only key elements of the [Vienna] rules but also their intended manner of application' (Gardiner 2008, xliii).

A similar observation can be made with respect to the 2014 decision of the US Supreme Court in *Lozano* v. *Montoya Alvarez*, where Justice Thomas, delivering the opinion of the Court, did not refer to the Vienna rules of interpretation, but nonetheless went to great lengths to explain that the difference between a federal statute and a treaty would impact severely on the choice of method and interpretation. In particular, he wrote that it would be inappropriate to deploy 'background principles' of American law automatically when interpreting a treaty. Rather, referring back to *Olympic Airways* v. *Husain*,[27] he wrote that it was the responsibility of the court 'to read the treaty in a manner "consistent with the *shared* expectations of the contracting parties."'[28]

In general, however, it appears as if most domestic courts do not pay considerable attention to the *determination* of the correct interpretative approach. Only rarely does one come across statements such as the following one by a tribunal from Luxembourg:

> 'the interpretation of an international text obeys its own rules of interpretation that are different to those applicable to the interpretation of a national text. It is necessary to determine the scope of the international convention following autonomous criteria of hermeneutics drawn from said Convention and not from the national law of the contracting States. The interpretation and application of the rule of international law, in case of doubt or ambiguity, must take place with a view to discovering the international, material and uniform content of the articles of the international Convention by reference to its object, its purpose, thus to the intention of the authors of the Convention'.[29]

Although this passage does not refer to the Vienna rules, it displays a considerable openness to the specificities of interpretation of international law and thus signals a rare awareness of the issues which are at stake here. At the same time, this passage reminds us that fidelity to the international rules of interpretation need not necessarily manifest itself in a *citation* of the Vienna rules of interpretation. As long as domestic courts follow the interpretive programme which is set forth by the VCLT, it is immaterial whether or not they make explicit reference to the source of this programme. Apparently, courts in Serbia also follow this approach and, while they do not cite the VCLT, nevertheless interpret international law in accordance with internationally accepted methods (Djajič 2011, p. 535).

While this brief overview does not allow us to draw general conclusions about the approach of domestic courts to treaty interpretation, it

nonetheless allows us to identify that there is no general consensus among domestic judiciaries. It is apparently not the case that a majority of jurisdictions considers that the Vienna rules of interpretation are obligatory. It is also not readily apparent how the potential scope conditions identified above impact on the actual decision of cases. Rather, it seems to be the case that legal culture is an invariably complex and idiosyncratic phenomenon. Different domestic systems blend together various elements of tradition. Approaches towards international law are also not stable over time, as the Mexican example shows. The US example reminds us that open citations of the Vienna rules are not the end of the matter and that specific domestic traditions can be reconciled with the demands of international law even without always openly acknowledging this.

Diversity in Interpretive Approaches and the Rule of Law

In light of the general theme of the volume, the question might be asked what this considerable diversity in the approaches of domestic courts means for the prospects of an international rule of law. Obviously, this will again depend on the vision one has on the rule of law beyond the national level. If one puts an emphasis on a formal vision of the rule of law which puts a premium on legal certainty and overall coherence of the international legal system, diversity in methodological questions might rather come across as a threat. The little 'power' that international law might be said to have would be endangered. If one is more inclined to lean towards a thick and substantive version of the rule of law, this diversity in methodological outlook would rather be a welcome tool for experimentation and contestation (see Frishman and Benvenisti 2016).

For the present author, recourse to the international rules of interpretation has certain identifiable benefits both for domestic courts and the coherence of the international legal system. It is problematic to play different versions of the rule of law off against each other. If we take up the picture of concentric circles again, it is typical for legal systems to gradually develop notions of the rule of law, step by step. Mature legal systems do not give up on the formal core of the rule of law, just because they have added more substantive layers around it. Seen from this perspective, any concept of the rule of law should value highly the notions of legal certainty and reliability, notions to which a predictable and transparent interpretive framework might be conducive.

Does It Matter? The Relevance of the Rules of Interpretation in Light of a Recent Example

At the same time, these benefits need to be seen against the background of the general critique that rules of interpretation will not be able to guide the interpreter to a certain result. One should also be careful not to make too much of mere references to the Vienna rules. Such references, it has been argued, legitimate 'interpretation even if, once the reference is made, the result hardly corresponds to the method announced. … Functioning as a mere guide, Article 31 has become a reference that must be cited, even if it will then be twisted' (Sorel and Eveno 2011, para. 59). In addition, as Gardiner has held, 'there is no obligation on interpreters to provide a running commentary on how they are applying the rules of interpretation as they develop their argument in a particular instance. Hence, absence of reference to particular elements of the Vienna rules does not necessarily mean that they are not being applied' (Gardiner 2011, p. 494).

So why should we nonetheless attach importance to the international rules of interpretation? In the opinion of the present author, decisions on methodology are markers concerning the openness of a given court to 'the international.' Willingness to refer to the international rules of interpretation signals that the interpreter is aware of the different origin of international agreements as opposed to ordinary domestic law. Citing the Vienna rules may thus show that international law is treated with particular care and with due consideration of the specificities of the international legal system. This may well make a difference. Although interpretive practices on the international and domestic levels may well resemble each other in many respects—almost always interpreters will look at the wording of a provision, its context and its object and purpose—other means of interpretation may have a particular role to play in the interpretation of international law. For instance, it is not obvious that recourse to subsequent practice and subsequent agreement of the parties could be easily integrated into domestic interpretive approaches. It also appears as if subsequent practice is a particularly controversial means of interpretation to be used by domestic courts (compare Kadelbach 2013; Wuerth 2013, p. 154). At the very least, it is a severe challenge for domestic courts to handle. A recent example for such problems may be seen in the UK Supreme Court's decision in the *Assange* case.[30] The case concerned a challenge of Mr Assange against his extradition to Sweden on the basis of the European Arrest Warrant (EAW), introduced as a European Union (EU) Framework Decision

under the now defunct former third pillar of cooperation in judicial and penal matters. Both the EU Framework decision as well as implementing UK legislation require that the EAW be issued by a 'judicial authority.' The issue was thus to determine whether a prosecutor qualified as a judicial authority or whether this term referred to courts or judges alone.

This case involved a number of intricate questions concerning EU and UK domestic law which need not interest us here. For the present purposes, it is relevant that the UK Supreme Court relied on subsequent practice as included in Article 31(3)(b) of the Vienna Convention on the Law of Treaties in order to establish the meaning of judicial authority. The concrete reason for following this approach was the finding that a number of EU member states allowed for prosecutorial offices to formulate EAWs which would, according to the judgement by Lord Phillips (President) establish the agreement of the parties with respect to the question if the concept of judicial authority also covered prosecutors: 'The practices of the Member States in relation to those appointed as issuing and executing "judicial authorities" coupled with the comments of the Commission and the Council in relation to these, provide I believe a legitimate guide to the meaning of those two words in the Framework Decision.'[31] This reasoning met with the agreement of a number of other Lordships.[32] Other members of the Supreme Court disagreed and questioned whether the practice was of sufficient density so as to allow it to fall under Article 31(3)(b) VCLT.[33]

The Supreme Court was criticised for considering subsequent practice as a means of interpretation or, more precisely, for applying the VCLT to the interpretation of the EU Framework Decision (Harris and Kakkaiyadi 2013, pp. 117–9). It is indeed unclear and not addressed in the judgements at all on which basis this international agreement finds application. This is particularly noteworthy as the judgement is replete with passages in which the Lords consider the correct interpretational approach towards the EU Framework Decision. In particular, Lord Phillips spends considerable ink in order to underscore the importance of a uniform interpretation and application of the Framework Decision in order not to undermine its object and purpose. The Lords also devote considerable attention to the question of *how* subsequent practice can be established following the criteria of the VCLT. In particular, they discuss the question of the requisite degree of participation in the practice. In other words, the question is brought to the fore that not necessarily all states parties to an instrument need to participate in the practice, but that the agreement can also be established in different ways, by means of acquiescence, for example.

Lady Hale, for instance, writes that '(f)ailure to address minds to an issue is not the same as acquiescence in a particular state of affairs. Subsequent practice does not give support to the respondent's extreme position and there has been no consideration of the principles which might distinguish some prosecutors from others.'[34] Lord Kerr, in contrast, discusses the intricate question whether subsequent practice might still have some probative value even if it does not show universal agreement among the parties.[35]

In essence, the seriousness with which the Lordships discuss the question of subsequent practice supports the view that they apparently considered this to be a decisive issue for the decision of the case. Apparently, they worked on the basis of the assumption that the international rules of interpretation were relevant to the decision of the case. This much becomes clear also from the rebuke with which they turned down another subsequent appeal by Assange against the decision. His counsel had brought up the argument that the issue of subsequent practice had been brought up by surprise and would thus not have been properly addressed by the parties before the court.[36] The court turned down this argument in a note appended to the judgements by referring to the fact that the applicability of the VCLT was expressly put to the Counsel of Assange during the hearings.[37] The case arguably shows that the actual decision of cases can depend on the application of the VCLT rules.

Likewise, the secondary role the *travaux préparatoires* play under Article 32 VCLT may well be at odds with domestic interpretive approaches which may place a greater or lesser emphasis on historical evidence in the interpretation of statutes or the respective constitution. Also the principle of systemic integration as set forth by Article 31(3)(c) VCLT, which requires interpreters to take into account other relevant norms applicable between the parties, poses particular challenges as opposed to contextual/systematic interpretation at the domestic level.[38] Using the Vienna rules of interpretation might therefore signal the awareness of domestic courts that they tread on special ground when they apply international law.

The Self-Interest of Domestic Courts to Use the Vienna Rules

It may also be in the enlightened self-interest of domestic courts to refer to these rules. Decisions of municipal courts may trigger state responsibility if they result in the commission of an internationally wrongful act. This is nothing new and constitutes in fact one of the bases of the system of international responsibility, the category of denial of justice, where a state is held

responsible for the violation of certain minimum standards for the treatment of foreigners (see Paulsson 2005). Today, the capability of domestic courts to bring about liability for wrong decisions is no longer limited to this context but extends to vast fields of international law, ranging from human rights to international economic law. Using the Vienna rules of interpretation will not provide a guarantee to reach the correct result in the application of international law. However, reference to an international framework of interpretation may send the signal that the respective court engaged in a good faith effort to apply international law and to arrive at a legally defendable result. Contrariwise, recourse to a parochial or idiosyncratic methodology will, at the least, make it easier for interested parties to argue against the correctness of a certain judgement in terms of international law. In this respect, one might even say that a domestic approach to the interpretation of international law constitutes a presumption that the result of the argumentative endeavour is open to challenges.

What a difference recourse to the VCLT rules can make can be shown by a case from Germany which concerned the legality of tuition fees at universities under Article 13(2)(c) of the International Covenant on Economic, Social and Cultural Rights of 1966 (ICESCR). This provision stipulates that '(t)he States Parties to the present Covenant recognize that, with a view to achieving the full realization of this right [the right to education], … higher education shall be made equally accessible to all, on the basis of capacity, by every appropriate means, and in particular by the progressive introduction of free education.' Higher education at universities was traditionally free of cost and only in the 2000s did various federal states introduce tuition fees. A case brought against the introduction of these tuition fees first made its way on appeal to the Upper Regional Administrative Court of Münster.[39] The court decided that the introduction of the fees was lawful for a number of reasons. Of interest to us here is the finding that the ICESCR did not apply directly in German law. The court denied the self-executing character of Article 13(2)(c) ICESCR—and more broadly of the Covenant itself—in very general terms. Although it set about quite specifically to determine the meaning and scope of this provision, it did not make use of the Vienna rules of interpretation. Rather, it referred very generally to the character of international law which would often set forth provisions which would not be capable of invocation by individuals.[40] It referred to certain elements of the international approach towards treaty interpretation (such as subsequent practice), yet without systematically explaining why it did so.[41]

The case was then appealed and decided again by the Federal Administrative Court. In its judgement, the highest administrative court essentially reached the same *result* as the Upper Regional Court, yet in a much more systematic manner.[42] It interpreted Article 13(2)(c) ICESCR on the basis of the Vienna rules which it found to govern the exercise of treaty interpretation. It did not base its findings on vague and general assumptions about the character of international law, but rather on a careful examination of the context of the provision, including the subsequent practice of other states parties as well as its object and purpose.[43] If we compare the two judgements, it is apparent that despite the fact that they reach essentially the same result, the latter is much easier to defend in terms of its application of international law. The impact of the former decision may be downplayed by referring to the fact that this judgement was not final and was a matter of an appeals decision. Yet, this does not always happen, and in most cases, it is an open question whether an appeal is procedurally possible or not. Accordingly, also lower courts should not take comfort in the fact that their application of international law might be corrected by higher instances. It is very well possible that their findings may become final and binding on the parties and might also become recognised as the judicial pronouncement on a certain issue coming from a particular jurisdiction. The decision of the Upper Regional Court reminds us that a better entrenchment of public international law in legal education might have prevented the court from some of its embarrassing missteps. International law is merely an elective subject in German law schools.

The Systemic Interest: The Rule of Law and Different Notions of Coherence and Divergence

Finally, there is a systemic interest in domestic courts using the international rules of interpretation. As we have already noted, the quality of international law as being a legal system in the Hartian terms hinges on the existence of not only primary rules which determine the substantive conduct prescribed by international law but also accompanying secondary rules which elucidate the making, application and enforcement of international law. If it is true that domestic courts are the 'natural' judges of international law—as most questions of the application of international first come before them—the systemic qualities of international law are also shaped by their judicial practice (Tzanakopoulos 2011, p. 164). Domestic courts may or may not consider themselves as organs also of

the international community. Yet, from an international perspective, they are such organs insofar as they apply international law. In order to determine how integrated the current international legal system is, the methodological approach of courts is a significant indication. Making use of domestic methodology may distort the application of international law and may therefore contribute to further fragmentation of a system. Already in 1971, Christoph Schreuer remarked that '(t)he tendency of municipal courts to apply the concepts and methods of their own municipal law is probably one of the most important causes of … divergence' (Schreuer 1971, p. 264).

In the general debate about 'fragmentation' there seems to be a growing consensus that fragmentation is not such a bad thing after all. Rather it might also be a representation of the growing specialisation and therefore outreach of international law (Simma 2004, p. 845). The picture is different with respect to the judicial practice of domestic courts, however. Here, we are not concerned with the development of specific regimes developing specific rationalities due to the variety of subject matters involved. Rather, divergence in the application of international law by domestic courts is a real concern for fragmentation, as here the diverging application of one and the same rule of international law is at stake. Different treaty regimes may call for differing degrees of uniformity. Some treaties such as human rights agreement may be more open to divergence in application—such as to allow for 'cultural diversity' or in general to preserve the margin of appreciation of member states—as compared to highly technical regimes which aim at erecting universal and uniform standards in a precise field of cooperation. Irrespective of these differences, the unity of the international legal system is at stake, however, when domestic courts develop idiosyncratic approaches towards treaty interpretation. The unity which is at issue here is not an all-encompassing unity in substantive terms. Such a form of unity is unlikely to emerge at the global level and might also be stifling challenges to prevailing political concepts and structures (see Nollkaemper 2011b, p. 46).[44] If international law should have a role to play in managing these challenges, however, it is vital that some form of common language exists which participants in this challenge can resort to. It is in this domain that the secondary rules of the international legal system have a useful role to play. They allow for cross-fertilisation of domestic judicial practice insofar as they may help to make decision making processes more transparent. They are an invitation to other concerned parties to engage in a dialogue about the soundness and correctness of

particular decisions which is easier if the decisions to be compared rest on some common basis.[45] To paraphrase Benedict Kingsbury, 'unity of understanding and of justification' is needed even in a pluralist environment (Kingsbury 2009, p. 171).

Is this only wishful thinking? After all, the practice of domestic courts as it was briefly sketched in the previous section arguably falls short of this ideal. Nevertheless, in a time when judicial dialogue receives growing attention among scholars of both international and domestic law, there is reason to believe that courts might also engage in a dialogue about methodological questions (Slaughter 2003, p. 241; Benvenisti 2008). For now, it has to be admitted that the current reality of domestic courts' engagement with international law falls short of the ideals sketched in this section. For better or worse, domestic courts may depart from the international methodology set forth by Articles 31–33 VCLT. They are also under no direct obligation to make use of these international rules. However, from a rule of law perspective, there is certainly a preference for domestic courts using an international methodology of interpretation when they apply international treaty law.

Conclusion

It is thus a mixed picture which emerges. Although set forth by the VCLT and corresponding customary international law, it is difficult to envisage an obligation for domestic courts to make use of the international rules of interpretation and, even if such an obligation were to exist, to understand what it would entail in concrete terms.

At the same time, allowing for diversity and experimentation can only work up to a certain degree. If interpretive approaches diverge too much, it will no longer be international law which is brought home, but rather international law which turned into something else when introduced into the diverse domestic legal systems. This would go pretty much against the ultimate end of agreeing on an international agreement. Whereas it might be an unattainable fiction to assume that there can always be only one correct outcome of treaty interpretation, lawmaking by international agreements necessarily rests on this fiction. If the parties would not agree on a certain provision with a view to achieving common standards, the whole exercise of treaty-making would be called into question in the first place. As already mentioned, this does not mean that all interpreters will always have to come to the same result and will have to use the exact

same interpretive methodology. But it is necessary to uphold this fiction in order to make international law work.

Without this fiction, also the ideal of an international rule of law would ring hollow. Legal certainty and predictability are key components of any notion of the rule of law. The rules of interpretation fulfil a central role for the safeguarding of these central tenets. In the view of the present author, they should not be played off against substantive components of the rule of law. Rather, formal and substantive parts of the rule of law complement each other. Without a basis of formal rule of law components, substantive visions of the rule of law collapse into a form of natural justice whose concrete content will necessarily lie in the eye of the beholder.

For domestic courts, it is ultimately a question of the self-understanding they wish to project onto the outside world: do they want to appear as faithful appliers of international law or do they wish to retain a particularist identity which serves to protect domestic concerns? Therefore, it is probably not possible to give a straightforward answer to one of the key questions underlying this volume, that is, whether today's forms of multi-level governance are a positive or rather a negative development for the rule of law. It seems fair to say that they are both. The interdependence between different legal orders introduces new ways and means to make international law more effective. Its growing role in domestic court practice also means that potentially more individuals can actually benefit from international law. This domestic court practice therefore serves an important end, that is, to make international law more efficient. At the same time, the diversity in the practice of interpretation also risks to undermine the basic unity of understanding on which international law as a discrete legal order might be said to rest. It is therefore a deeply ambivalent picture which emerges. This might be nothing more and nothing less than appropriate, however. After all, it would be naive to conceive of today's world as being on the path towards ever more legalisation and constitutionalisation. In 2016, a look around us rather alerts us to the fragile basis on which much of international law rests. This fragility of international law should also give pause to apply it carefully.

At the same time, this ambivalent picture also highlights the need for further research. It might be particularly fruitful for political scientists to look more closely into the possible scope conditions under which domestic courts can meaningful engage with international law.

Notes

1. For a hierarchical understanding of constitutionalization, see Fassbender, B. (2009) *The United Nations Charter as the Constitution of the International Community* (Leiden: Nijhoff), pp. 103–7.
2. For a useful overview of different concepts of the rule of law, see Tamanaha, B. (2004) *On the Rule of Law. History, Politics, Theory* (Cambridge: Cambridge University Press), pp. 91–113.
3. On the compromise character Gardiner, R. (2008) *Treaty Interpretation* (Oxford: Oxford University Press), p. 8.
4. On subsequent practice, see the contributions in Nolte, G. (ed.) (2013) *Treaties and Subsequent Practice* (Oxford: Oxford University Press).
5. For an example of how domestic court practice is shaped by the Vienna rules see, however, Bjorge, E. (2016) '"Contractual" and "Statutory" Treaty Interpretation in Domestic Courts? Convergence around the Vienna Rules' in H.P. Aust and G. Nolte (eds) *The Interpretation of International Law by Domestic Courts*, p. 49.
6. On the legitimating role of Articles 31–33 VCLT, see also von Bogdandy, A. and I. Venzke (2012) 'In Whose Name? An Investigation of International Courts' Public Authority and Its Democratic Justification,' *European Journal of International Law*, 23, 7–41, p. 16.
7. Generally, sceptical about the existence and importance of secondary rules in international law is Linderfalk, U. (2009) 'State Responsibility and the Primary-Secondary Rules Terminology: The Role of Language for an Understanding of the International Legal System,' *Nordic Journal of International Law*, 78, 53–72; see also Orakhelashvili, A. (2006) *Peremptory Norms in International Law* (Oxford: Oxford University Press), p. 80.
8. On the commonalities and differences between law ascertainment and interpretation, see further D'Aspremont, J. (2011) *Formalism and the Sources of International Law—A Theory of the Ascertainment of Legal Rules* (Oxford: Oxford University Press), pp. 157–61.
9. On the different functions secondary rules perform in the international legal system, see Ku and Diehl's chapter in this volume.
10. For a more detailed discussion of the relationship between coherence and the international rule of law, see Reinold's chapter in this volume.
11. For an overview of the different models, see Crawford, J. (2012) *Brownlie's Principles of Public International Law*, 8th edn. (Oxford: Oxford University Press), pp. 48–59.
12. That said, international law also knows the distinction between obligations of conduct and obligations of result, see further Crawford, J. (2002) 'Introduction' in J. Crawford (ed.) *The International Law Commission's Articles on State Responsibility—Introduction, Text and Commentaries*

(Cambridge: Cambridge University Press), pp. 20–22; on the contribution of Roberto Ago and his somewhat idiosyncratic distinction between the two, see further Dupuy, P.-M. (1999) 'Reviewing the Difficulties of Codification: On Ago's Classification of Obligations of Means and Obligations of Result in Relation to State Responsibility,' *European Journal of International Law*, 10, 371–85.

13. Decision of the Court of Cassation, Cassation appeal, No. C.97.0176.N., ILDC 38 (BE 2000), *Cigna Insurance Company of Europe SA-NV v. Transport Nijs BVBA*.
14. *Cigna Insurance Company of Europe SA-NV v. Transport Nijs BVBA*, para. 12.
15. On this debate, see von Arnauld, A. (2012), *Völkerrecht* (Heidelberg: C.F. Müller), para. 499; Sauer, H. (2013), *Staatsrecht III—Auswärtige Gewalt, Bezüge des Grundgesetzes zu Europa- und Völkerrecht*, 2nd edn. (Munich: C.H. Beck), § 6, paras. 9–12.
16. Decisions of the Federal Administrative Court (BVerwGE) 95, 42, at 49; 101, 328, at 332 et seq.; 104, 254, 258. The position of the German courts changed after the incorporation of the European Union (EU) qualification directive into German law, see further Zimmermann, A. and C. Mahler (2011) 'Article 1 A' in A. Zimmermann (ed.) *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol* (Oxford: Oxford University Press), para. 299.
17. *Sepet v. Secretary of State for the Home Department*, [2003] 1 WLR 856, at 861, para. 6.
18. *Fothergill v Monarch Airlines*, [1981] AC 251, see, for instance, Lord Scarman, at 290.
19. Decision of the Supreme Court of New Zealand of 21 June 2005, (2005) NZSC 38; ILDC 81 (NZ 2005), *Attorney General v Zaoui and Inspector-General of Intelligence and Security*, paras. 24 et seq.
20. Judgement of the Supreme Court of the Netherlands of 21 February 2003, BNB (2003) No. 178, LJN No. AF2703, *State Secretary of Finance v X*, reprinted in (2003) *Netherlands Yearbook of International Law*, 36, 475, p. 476.
21. Judgement of the High Court of Australia of 24 February 1997, [1997] HCA 4, *A v Minister of Immigration & Ethnic Affairs*.
22. Referring to Decree No. 5 of the Plenum of the Supreme Court of 10 October 2003.
23. See in greater detail on the development of the Mexican practice, Aust, H.P., A. Rodiles and P. Staubach (2014) 'Unity or Uniformity? Domestic Courts and Treaty Interpretation,' *Leiden Journal of International Law*, 27, 75–112, pp. 92–100; Rodiles, A. (2016) 'The Law and Politics of the *Pro Persona* Principle in Latin America' in H.P. Aust and G. Nolte (eds) *The Interpretation of International Law by Domestic Courts*, pp. 168–71.

24. SCJN, 9a Época, 2a Sala, Semanario Judicial de la Federación y su Gaceta (SJFyG), XVI, 292, Tesis CLXXI/2002 (December 2002).
25. SCJN, Amparo en revisión 237/2002 (2 April 2004).
26. *Abbott* v. *Abbott*, Slip Opinion, 560 U.S. ___ (2010). See further on this case and the development of treaty interpretation by the US Supreme Court Aust, Rodiles and Staubach, 'Unity or Uniformity.'
27. Decision of the Supreme Court of the United States, 540 U.S. 644, 650 (2004), *Olympic Airways* v. *Husain*.
28. Decision of the Supreme Court of the United States, 572 U.S.___ (2014), *Lozano* v. *Montoya Alvarez*, at 9.
29. Decision of the Tribunal d'arrondissement de Luxembourg of 20 December 1985, cited after Kinsch, P. (2011) 'Luxembourg' in D. Shelton (ed.) *International Law and Domestic Legal Systems* (Oxford: Oxford University Press), p. 398.
30. Judgement of the United Kingdom Supreme Court of 30 May 2012, [2012] UKSC 22, *Assange v The Swedish Prosecution Authority*.
31. *Assange v. The Swedish Prosecution Authority*, Lord Phillipps, para. 67.
32. *Assange v. The Swedish Prosecution Authority*, Lord Walker, para. 94; Lord Brown, para. 95.
33. *Assange v. The Swedish Prosecution Authority*, Lady Hale, para. 191; Lord Mance, para. 242.
34. *Assange v. The Swedish Prosecution Authority*, Lady Hale, para. 191.
35. *Assange v. The Swedish Prosecution Authority*, Lord Kerr, para. 109.
36. *Assange v. The Swedish Prosecution Authority*, Note, para. 1.
37. *Assange v. The Swedish Prosecution Authority*, Note, para. 3.
38. On these particular problems, see D'Aspremont, J. (2012) 'The Systemic Integration of International Law by Domestic Courts: Domestic Judges as Architects of the Consistency of the International Legal Order' in O.K. Fauchald and A. Nollkaemper (eds) *The Practice of International and National Courts and the (De-)Fragmentation of International Law* (Oxford: Hart), p. 141.
39. Decision of the Higher Administrative Court (OVG) Münster of 9 October 2007, case No. 15 A 1596/07, Deutsches Verwaltungsblatt 2007, 1442.
40. Decision of the OVG Münster of 9 October 2007, case No. 15 A 1596/07, para. 71.
41. Decision of the OVG Münster of 9 October 2007, case No. 15 A 1596/07, para. 59.
42. Decision of the Federal Administrative Court (BVerwGE) of 29 April 2009, Decision No. 6 C 16/08, BVerwGE 134, 1.
43. Decision of the Federal Administrative Court (BVerwGE) 134, 1, paras. 45 et seq.

44. For a plea for experimentation, see Frishman, O. and Benvenisti, E. (2016) 'National Courts' as well as Reinold, T. (2016) 'Diffusion Theories and the Interpretive Approaches of Domestic Courts' in H.P. Aust and G. Nolte (eds) *The Interpretation of International Law by Domestic Courts*, p. 267, especially with a view to jurisdictions from the 'Global South.'
45. On the potential of judicial dialogue in this context, see Tzanakopoulos, A. (2016) 'Judicial Dialogue as a Means of Interpretation' in H.P. Aust and G. Nolte (eds) *The Interpretation of International Law by Domestic Courts*, p. 72.

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The United Nations Security Council and the Politics of Secondary Rule-Making

Theresa Reinold

Introduction

The United Nations Security Council (UNSC) is widely seen as *the* bastion of power politics in global governance. It enjoys quasi unlimited discretion in its decision-making and cements existing inequalities in world politics by according veto rights to a small elite of powerful states. Hence, the Council clearly provides a hard case for an argument about the emergence of the rule of law in global governance, but as I shall argue in this chapter, even this seemingly unconquerable stronghold of *realpolitik* in global governance has come under pressure to exercise its prerogatives in a more transparent, accountable, and less arbitrary way, and thus use its preponderant position for the pursuit of the common good rather than the particularistic interests of the powerful few. While for a long time, the veto-wielding states felt free to use their veto powers for whatever purposes they deemed legitimate, even if this resulted in a massive loss of human lives, in recent years, pressure on the Permanent Security Council members (P-5) has been mounting to accept certain constraints on the use of the veto; specifically,

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the P-5 were asked not to use their veto to block Council action in cases of mass atrocities. This initiative to constrain the use of the veto has been called 'the responsibility not to veto' (Blätter and Williams 2011), and has emerged as an offshoot of the debate about the responsibility to protect (R2P), according to which the international community has a residual responsibility to act when a state is unwilling or unable to protect the fundamental human rights of its citizens (ICISS 2001).

This chapter explores the genesis and evolution of the responsibility not to veto (Rn2V) and discusses its implications for the rule of law in multi-level governance. Even though the UNSC has the primary responsibility for the maintenance of international peace and security, global security governance is actually a multi-level and multi-actor phenomenon. It involves not only global bodies, such as the UNSC (and possibly also the UN General Assembly [GA] as will be detailed later on), but also regional organizations such as the North Atlantic Treaty Organization (NATO) or the African Union (AU), subregional actors such as the Economic Community of West African States, and, finally, individual states or ad hoc coalitions of the willing which may exercise governing functions as well. The activities of these actors are regulated by multiple, sometimes conflicting sets of norms—the UN Charter's provisions regulating the use of force, for instance, but also regional and subregional organizations' normative frameworks. These different layers of rules are not always in harmony with each other—witness, for instance, Article 4(h) of the AU Constitutive Act, which endows the continental organization with a mandate to intervene militarily in the internal affairs of its Member States—a prerogative which is clearly at odds with the provisions of the UN Charter, according to which the UNSC holds a monopoly on authorizing military interventions that are not covered by the right to self-defence nor based on an invitation issued by the host state.

Building on H.L.A. Hart's distinction between primary and secondary rules, I suggest to conceptualize Rn2V as a secondary rule which aims to ensure a more coherent application of the emerging primary norm (or concept) of R2P. My claim is that secondary rules play a critical role in ensuring the coherence of the law, and that only a law that is viewed as a more or less coherent set of rules, and which is applied in a more or less consistent way, retains its legitimacy and thus ultimately its compliance pull. In order to understand why coherence is so central to the rule of law, one has to take a look at the microfoundations of law and legal

behaviour—after all, law is a product of the human mind and is designed to govern human activity. However, legal scholars have made surprisingly little effort to inquire into the connection between law and the human mind, thus neglecting the thought processes that underlie the creation of law and that are in turn shaped by the law.[1] Most rule of law theorists simply posit that the law, in order to effectively govern human conduct, must present itself to the legal subjects as a more or less 'unified enterprise of governance that one can make sense of' (Waldron 2008, p. 37), yet they do not explain where this seemingly universal human desire for coherence comes from, what contribution coherence makes to promoting the rule of law, and what role incoherence plays in triggering processes of legal change.

In this chapter, I argue that in order to understand the centrality of coherence to the rule of law, one has to understand that human beings, who are at the same time authors and subjects of the law, have an innate desire to reduce cognitive dissonance (Festinger 1957; see also Reinold 2014), and that this tendency towards dissonance reduction explains the emergence of Rn2V and the impact it has had in the political arena. The claim put forward in this chapter is thus that especially in the pluralist and often messy world of multi-level governance, coherence—that is, agreement on the most basic principles underlying world order—makes a positive contribution to consolidating the rule of law on a global scale. The debate about the responsibility to protect has undermined legal certainty as it has triggered the transformation of fundamental pillars of the present global order, namely the institution of sovereignty (hitherto understood as states' rights to do whatever they wanted within their domain reserve) as well as the norms of non-intervention and non-use of force. The international reaction to NATO's intervention in Kosovo in 1999—which was widely seen as illegal yet legitimate (IICK 2000, p. 4)—demonstrated the dissonance between the black letter law of the UN Charter, and the non-legal values held by the international community at large. Technically, a breach of the UN Charter's prohibition on the use of force, NATO's intervention was nonetheless greeted with widespread approval as it was perceived to respond to the moral imperative of rescuing Kosovar civilians. This perceived discrepancy between positive law on the one hand, and moral values on the other hand, in turn, triggered a process of normative change, which manifested itself in the publication of the International Commission on Intervention and State Sovereignty (ICISS) report and the heated debate about the responsibilities of sovereignty that continues to this day.

Processes of normative change—the transformation of sovereignty is a case in point—present a dilemma for the rule of law: Even though the rule of law implies a certain presumption in favour of stability and constancy over time—otherwise the law would not be able to discharge its core function of stabilizing normative expectations—this does not mean that the law can afford to stand still. On the contrary, the rule of law must reconcile the conflicting demands of stability and change, tradition and progress, and predictability and adaptability (Friedman 1960, p. 32). If dissonance arises within a legal system—because its rules are perceived as not 'making sense' (MacCormick 2005, p. 124) in relation to one another or in relation to important non-legal norms—this provides an impetus for legal change. While change in and of itself is not a threat to the rule of law, the absence of agreed-upon procedures providing for an orderly modification of existing law would be. H.L.A. Hart therefore contrasted 'primitive' legal systems with 'advanced' ones, the latter being 'advanced' by virtue of their possession of secondary rules (1961, p. 90ff). These rules provide criteria for determining what the law is, how it can be changed, how norm collisions can be resolved, and how the law is to be implemented. These 'rules about the rules' thus perform vital functions in a legal system because they hedge the exercise of political power and provide for orderly ways to generate and apply legal norms, but also to modify them, if changed political circumstances so require.

Over the decades, international law has evolved a fairly elaborate system of secondary rules, yet some of these rules are strongly contested. Take the rules governing UNSC decision-making enshrined in Article 27(3) of the UN Charter, which provides the permanent members with the right to veto any Council decision on non-procedural matters. Throughout the history of the UN, the P-5 have made ample use of this right, even when Council action was desperately needed—the Council's paralysis in the ongoing crisis in Syria is a case in point. As a result, the Syrian regime—abetted by its protectors on the UNSC—continues to slaughter innocent civilians with impunity, making a mockery of the international rule of law. The veto rights of the P-5 have long been anathema to the 'significant majority of Member States'[2] who believe that this places a small group of powerful states above the law and who have sought to rewrite the secondary rules governing decision-making in the UNSC. In this chapter, I will thus subject this contested process of secondary rule-making to closer scrutiny, and discuss its ramifications for the rule of law in global governance.

The case of Rn2V confirms the overall message of this volume, namely that multi-level governance has both negative and positive consequences for the emergence of the rule of law on a global scale: The responsibility not to veto, especially the variation of this concept proposed by France, would seem to strengthen the rule of law in that it disperses power by multiplying the number of actors involved in decision-making about humanitarian action, thus wrestling the monopoly on decision-making in these situations away from the permanent members of the UNSC. However, since the code of conduct, if implemented, will come in the form of a soft law instrument, that is a non-binding pledge rather than an amendment of the UN Charter, it is rather unlikely to constrain the most hard-headed disciples of *realpolitik* in global governance, that is, Russia and China. Soft law may have an impact on state behaviour either because its addressees comply out of intrinsic motivation, or because of the reputational costs of non-compliance, and the claim made in this chapter is that in light of the man-made humanitarian tragedy in Syria, France, the UK, and possibly also the USA proved susceptible to normative and/or reputational considerations, whereas Russia and China were not, or to a much lesser degree. Hence, soft law's ability to constrain power-holders is somewhat limited in the case study presented in this chapter, because the relevant scope conditions (susceptibility to reputational concerns or norm adherence out of a sense of appropriateness) were not present in the case of two crucial actors. In these 'hard' cases in which geopolitical interests militate against compliance with soft law, non-binding rules of conduct are unlikely to significantly constrain the most powerful players in the international arena when these are not motivated to follow the norm out of intrinsic motivation or out of reputational concerns. Regarding the coherence of the law, the findings from the present case study are more encouraging in that they suggest that secondary rules of implementations such as the responsibility not to veto—if adopted—do indeed strengthen the rule of law, in that they ensure a more consistent, less arbitrary, and more transparent implementation of primary norms which are (re)interpreted in a way that ensures their coherence with the fundamental principles of global governance and international law.

The chapter is structured as follows: Section II reviews the contributions of legal theorists who have discussed the importance of coherence, or dissonance reduction, respectively, for upholding the rule of law. While in the rule of law, literature notions such as integrity, systematicity, and so on figure prominently, legal theorists usually fail to explain why these

concepts are of such paramount importance for the rule of law, thus largely neglecting the psychological dispositions of those who live under the law. In this way, they fail to theorize what happens when this desire for coherence is not met, because they do not sufficiently take into account the basic human desire for dissonance reduction as a driver of legal innovation. Section III illustrates these dynamics of dissonance reduction with a case study on the responsibility not to veto, which demonstrates that secondary rules which are widely perceived to be biased in favour of particularistic interests will be subject to continuing contestation, and that as a result, efforts to realize the global rule of law will be significantly hampered. At the same time, the case of Rn2V shows how Rn2V can contribute to the institutionalization of reason-giving processes and motivate at least some powerful actors on the UNSC—that is, the UK and France—to adopt a more consistent practice of atrocity prevention.

Legal Theory, the Rule of Law, and the Concept of Dissonance Reduction

The need for the law to avoid (or reduce) dissonance figures prominently in the rule of law literature: While there may be differences in nuance, concepts such as 'law as integrity' (Dworkin), 'coherence' (MacCormick), 'systematicity' (Waldron), 'consistency' (Fuller 1963), and so on are all rooted in the same (mostly unacknowledged) fundamental assumption about human nature, namely that there exists a universal human need to perceive the legal rules which structure social life as a set of norms which, when taken together, make sense, in that these rules do not oblige the addressees of the law to pursue mutually inconsistent overall objectives (MacCormick 1978, p. 266). Hence, a philosophy of law which does not take into account 'the defining role of law's aspiration for coherence among the norms that it contains and to the forms of reasoned argumentation that are involved both in maintaining that consistency and in bringing it to bear in the application of norms to particular cases' would be deficient, as Waldron has argued (2008, p. 61).

Coherence theories are thus *en vogue* in legal philosophy (Raz 1994, p. 261), mainly owing to Dworkin's thesis of law as integrity (1986), which inspired a burgeoning scholarly literature on the role of coherence in law and legal reasoning.[3] While Dworkin's writings about law as integrity have been criticized for their ambiguity (Raz 1994, p. 305), they still provide an interesting starting point for a discussion of the role of dissonance reduction

in the development and application of legal rules. According to Dworkin, law as integrity 'demands that the public standards of the community be both made and seen, so far as this is possible, to express a single, coherent scheme of justice and fairness in the right relation. … Integrity … insists that the law … contains not only the narrow explicit content of these decisions but also, more broadly, the scheme of principles necessary to justify them' (1986, pp. 219, 227). Integrity in a Dworkinian sense comprises two distinct principles: Integrity in a legislative sense, 'which asks lawmakers to try to make the total set of laws morally coherent', and integrity in adjudication, 'which instructs that the law be seen as coherent in that way, so far as possible' (Dworkin 1986, p. 176). Dworkin's reference to moral coherence and an overarching 'scheme of principles' suggests that in an assessment of the law's legitimacy, one ought to take into account what Gerald Postema referred to as implicit law, that is the non-legal norms and practices which govern social life, as law is, 'by its very nature … deeply implicated in the practices and conventions of the communities it governs' (Postema 1994, p. 377). Postema argues that we cannot grasp the dynamic character of the law, we cannot understand how the law induces compliance if we fail to take into account this implicit dimension of the law (Postema 1994, p. 361). Hence, law is not a closed and static system which is impervious to extra-legal impetuses, but rather a dynamic social process in which dissonance within a legal system and between legal and moral or political norms provides an impetus for legal change.

In his discussion of law as integrity, Dworkin points out that most people would intuitively reject 'checkerboard' laws that fail to treat like cases alike and introduce arbitrary differences in the treatment of these cases (Dworkin 1986, pp. 179ff). Whence this seemingly universal tendency to regard checkerboard laws as illegitimate? Dworkin merely notes that 'our instincts condemn it' (Dworkin 1986, p. 180), but fails to explain why this is so. MacCormick equally seems to suggest that there is something about the law's drive towards coherence which cannot be explained by cultural factors, that is, factors that differ across legal systems, but that this drive is rooted in certain psychological instincts that are common to all human beings. Coherence in reasoning about the law, MacCormick writes, goes beyond logical consistency in a technical sense. He points out that in every day usage, saying that a particular legal rule is 'logical' is not satisfied merely by non-contradiction among the rule in question and other legal rules, but rather by the requirement that 'the multitudinous rules of a developed legal system should "make sense" when taken together' (1978, p. 152).

In arguing from coherence one thus seeks to 'find a way of making sense of the system as a whole' (MacCormick 1978, p. 152). Any given legal rule must satisfy the test of coherence with the overarching principles or goals of the legal system, that is, the 'general norms whereby its functionaries rationalize the rules which belong to the system in virtue of criteria internally observed' (MacCormick 1978, p. 155). Thus, '[w]orking out the principles of a legal system … involves an attempt to give it coherence in terms of a set of general norms which express justifying and explanatory values of the system. … In this sense, to explicate the principles is to rationalize the rules' (MacCormick 1978, pp. 155, 157).

This drive towards unity of principle, or overall coherence, that is apparently a universally cherished quality of a persuasive legal argument, as MacCormick et al. demonstrated in a large-scale comparative study of legal interpretation (2005, pp. 124ff). The authors had investigated processes of legal interpretation across a considerable range of different legal systems. Despite significant systemic differences, the investigators uncovered a striking similarity in the types of arguments that were considered to be convincing by the relevant audiences. One category of persuasive arguments, they found, is 'systemic' ones, that is those arguments 'that work towards an acceptable understanding of a legal text seen particularly in its context as part of a legal system' (MacCormick 2005, p. 124). Examples of such 'systemic arguments' include arguments from precedent, arguments from analogy, and arguments from general principles. This squares broadly with Jeremy Waldron's requirement of systematicity, that is the requirement that legal norms 'make some sort of sense in relation to one another' (2008, p. 35). This psychological process of 'making sense' of a set of legal rules is what Joseph Raz describes when he points out the difference between the point of view of an observer external to a particular legal system, and the perspective of an insider. While the outsider may regard any given legal system as an incoherent assemblage of norms, and may be objectively justified to do so, the latter cannot possibly do this: 'Adopting the internal point of view means that he regards the norms as valid for him, as guides for his behaviour and judgement. It makes no sense to accept an assemblage of norms as one's own norms unless one regards them as valid and justified, and one cannot regard them as justified unless they form a coherent body' (1994, p. 281).

Put differently, the law's legitimacy depends on avoiding the perception of blatant inconsistencies among the different norms of the legal system and in the system's relationship with its wider normative environment.

In sum then, coherence, or dissonance reduction respectively, is a central component of the rule of law, and the continuing existence of dissonance in the law denotes the law's failure 'to make sense' in the eyes of the legal subjects. Yet even though scholars such as Dworkin seem to assume that there is some kind of fundamental human 'instinct' that favours coherence over 'checkerboard statutes', and even though MacCormick has produced empirical proof of the existence of this fundamental 'instinct' across a range of highly diverse legal systems, they do not inquire into its origins.

Jerome Frank, by contrast, is a legal theorist who has written a seminal treatise on *Law and the Modern Mind* (1963) which challenged the hitherto prevailing conception of the law as a sphere of logic and predictability, arguing instead that legal rules are generated, interpreted, and applied by highly manipulable and fallible human beings. While *Law and the Modern Mind* is primarily devoted to uncovering the psychological factors influencing judicial decisions, Frank's insights have important implications for legal philosophy more generally, because they provide the missing link between human nature and processes of legal change. Frank sees the human tendency to rationalize at the core of legal reasoning:

> 'We cherish the notion that we are grown-up and rational. … When challenged by ourselves or others to justify our positions or our conduct, we manufacture *ex post facto* a host of "principles" which we induce ourselves to believe are conclusions reasoned out by logical processes from actual facts in the actual world. … This practice of making ourselves appear, to ourselves and others, more rational than we are, has been termed "rationalization"'. (1963, p. 32)

Frank considers the practice of law to be 'one of the major arts of rationalization', as lawyers, more than most men and women, 'are compelled to reconcile incompatibles' (Frank 1963, pp. 33f). The desire to rationalize stems from the 'natural' tendency of the human psyche to avoid unstable mental equilibria, that is from its continuous attempts at ridding itself from 'the uncomfortable condition of tension' (Vaihinger, quoted in Frank 1963, p. 174) which arises in situations of cognitive dissonance. Even though Vaihinger—whom Frank quotes here—did not elaborate on this human desire to eliminate dissonance, his reference to a 'natural' tendency implies that the desire to reduce dissonance is a universal characteristic of human thought processes (Vaihinger, quoted in Frank 1963, p. 174).

The strategy of rationalization thus enables human beings to maintain incompatible cognitions and is one of various ways of reducing cognitive

dissonance, which Festinger analyses in his *Theory of Cognitive Dissonance* (1957). Festinger assumes that human beings constantly strive to achieve cognitive consonance, or reduce cognitive dissonance, respectively. The term cognitive dissonance denotes the 'the existence of non-fitting relations among cognitions', the latter being defined as 'any knowledge, opinion, or belief about the environment, about oneself, or about one's behaviour' (Festinger 1957, p. 3). If a situation of cognitive dissonance arises—for instance, when an individual violates an existing legal rule by committing theft—she has several possibilities to eliminate the dissonance between her behaviour and the law: First, she could adjust her own cognitions, admit that her behaviour was illegal and accept the consequences of her actions by surrendering herself to the police (behavioural adjustment). Second, the person could stick to her cognitions and rationalize her behaviour by discounting positive law in favour of a set of moral cognitions (rationalization). She could, for instance, argue that theft is illegal but not immoral if one only steals from the rich. The third and most challenging option for this person would be to not change her own cognitions or rationalize her behaviour on moral grounds, but to try to change her environment in order to bring it in line with her own cognitions (legal change). She could, for instance, decide to become a politician and lobby for a change in the law to the effect that stealing money from rich people would become legal.

Now, what are the implications of Festinger's theory for secondary rule-making? As outlined above, dissonance reduction in international law must be achieved on two levels: on the level of primary rules, where dissonance is mitigated through the application of secondary rules, but also on the level of the secondary rules themselves, which must be in line with collective cognitions of fairness, sovereign equality, and so on. Hence, assuming an existing secondary rule is widely perceived as privileging a powerful minority of states, and whose use of their privileges is seen as being dissonant with other important (legal and moral) norms, this will trigger initiatives to revise this rule (in line with Festinger's third option i.e. legal change). Now, the problem with this third option is that it presupposes that it requires that the agent in question possess a certain degree of control over her environment, and thus imposes a rather high threshold for normative change (Festinger 1957, p. 20). In international politics, the degree of control wielded by an actor over her environment depends on a variety of factors: the actor's power resources (hard and soft ones), but also her institutional environment. If an institution's secondary

rules accord certain actors a greater say in decision-making processes than others, these actors will be highly reluctant to give up their privileges, making the existing regime of secondary rules extremely difficult to change. Charlotte Ku and Paul Diehl in their study of *The Dynamics of International Law* (2010) therefore stress above all the 'veto power' of powerful states over 'constructive' norm entrepreneurship, arguing that 'most critically, we see the power of leading states as lying in their ability to block operating system change rather than impose such modifications' (Ku and Diehl 2010, pp. 84f).[4] They do not, however, sufficiently take into account the autonomy of the law from the sphere of politics, and the extent to which even powerful actors seeking to influence law's operating system (i.e. its secondary rules) are constrained by the need to reduce dissonance between their behaviour and existing norms. The requirement of coherence thus immunizes the law—at least to a certain extent—against political usurpation, and thus forms the basis of international law's (partial) autonomy.

The law's autonomy—and thus, by extension, its legitimacy—can be further strengthened by appropriately designed secondary rules of implementation which limit the discretion of powerful actors in applying the law. This was exactly the impetus behind the initiative of a code of conduct for the permanent members of the UNSC, which will be discussed in more detail in the following section. The case of the responsibility not to veto certainly presents a hard case for the argument made here, as dissonance reduction crucially depends on the homogeneity of the social group in question: 'Social support is particularly easy to obtain when a rather large number of persons who associate together are all in the same situation—that is, they all have the same dissonance between cognitions which can be reduced in the same manner' (Festinger 1957, p. 192). Conversely, when a group comprises actors with rather diverging interests and cognitions—a condition which usually pertains in the pluralist international setting, and especially on the UNSC, where the stakes are extremely high and states fight tooth and nail to defend their interests—dissonance reduction will obviously be harder to obtain. In that sense, the UNSC certainly constitutes a hard case for any argument about the emergence of the rule of law on a global scale, as it is not only a body composed of actors with diverse, often conflicting preferences, but also one which operates in the area of 'high politics' where states are extremely reluctant to cede any of their prerogatives as sovereignty costs are rather high and legalization, (Abbott et al. 2000) thus harder to achieve.

The Case of Rn2V

The debate about Rn2V revolves around the question of whether the permanent five members of the UNSC's sway over the application of international law are compatible with the rule of law. The history of Rn2V demonstrates how powerful states became entrapped in their own human rights rhetoric and how contestation about the interpretation of the emerging primary norm (or concept) of the responsibility to protect (R2P) triggered demands for a secondary rule of implementation. R2P emerged from a decade of (Western) interventionism on behalf of human rights in the post-Cold War era, culminating in NATO's controversial bombing of Serbia in 1999. This set off a process of self-entrapment, as a normative expectation began to emerge that those same states that had intervened in Serbia to safeguard human rights would display a consistent commitment to the emerging (yet still opaque) norm of atrocity prevention in the future. However, those states which had intervened in Kosovo in 1999 have not always been consistent in their commitment to atrocity prevention, thus giving rise to dissonance between their proclaimed responsibility to protect civilians from mass atrocities on the one hand, and their actual behaviour on the other hand. One of the reasons for this implementation deficit is that the content of the primary R2P 'norm' remains ambiguous (Reinold 2010). Another reason is that the secondary rules governing the implementation of R2P are controversial, in particular those regarding the P-5's responsibility not to make use of their veto rights when a state slaughters its own people.

The veto rights of the P-5 seem increasingly anachronistic, leading one state representative to observe that the 'Council today seems to operate in a time warp, refusing to acknowledge the changes that have taken place since the end of the Cold War'.[5] Despite the blatant dissonance between the P-5's privileged position and the norms and interests of the international community at large, repeated attempts to reform the veto system have failed. In 1993, the GA established an open-ended working group to consider 'all aspects of the question of increase in the membership of the UNSC and other matters related to the council'.[6] However, the consultations quickly reached a dead end (Citizens for Global Solutions 2010, p. 3). Parallel efforts to make the UNSC's response to mass atrocities more consistent were undertaken by the ICISS, which suggested in its 2001 report that 'a permanent member, in matters where its vital national interests were not claimed to be involved, would not use its veto to obstruct the passage of what would otherwise be a majority resolution' (2001, p. 51).

In recent years, the Rn2V agenda has been carried forward above all by a group of smaller states, the so-called S-5, which comprise Costa Rica, Jordan, Liechtenstein, Singapore, and Switzerland. In light of the almost insurmountable procedural hurdles of amending the UN Charter, the S-5 have sought to change the rules of implementation for R2P through a non-binding GA resolution, where rule-making power is much more evenly distributed than in the UNSC. Their draft resolution, which was going to be tabled in May 2012, asked the P-5 to abstain from using their veto in situations involving mass atrocities and also required those states which do cast a veto to publicly explain their reasons for doing so, 'in particular with regard to its consistency with the purposes and principles of the Charter of the United Nations and applicable international law'.[7] The idea behind the S-5 proposal was thus obviously to expose the stark dissonance between the use of the veto to block humanitarian action on the one hand and widely accepted norms of international law on the other.

Even though the S-5's push for enhanced UNSC accountability enjoyed wide support among Member States (Citizens for Global Solutions 2010, p. 7), when the S-5 decided to put their draft resolution to a vote, they encountered great opposition on the part of the P-5. In a concerted campaign, the latter pressured the S-5 not to table the draft resolution, arguing that the resolution infringed upon the UNSC's prerogatives to decide upon its own rules of procedure (Lynch 2012a). In attempting to ward off the S-5 challenge, the P-5 capitalized on another secondary rule adopted previously by the GA: When the S-5 decided that it was time to put their draft resolution to a vote, the question arose whether a simple majority sufficed for the resolution to pass, or whether a two-thirds majority would be required. Under-Secretary General for Legal Affairs Patricia O'Brien, who was asked for a legal opinion regarding this procedural issue, referred to Art. 18(2) of the UN Charter, according to which decisions of the GA on 'important questions' (such as amendments of the Charter, for instance) shall be made by a two-thirds majority. Conceding that it was not clear if the S-5 draft fell within the ambit of Art. 18(2), O'Brien then referred to the precedent of a GA resolution adopted in 1998 'on the question of equitable representation on and increase in the membership of the UNSC and related matters' which declared that the affirmative vote of two-thirds of GA members was required for any resolution dealing with these matters to pass. According to O'Brien, the S-5 draft resolution fell into that category of 'related matters', and therefore she recommended it would be 'appropriate' to adopt the resolution only with a two-thirds majority.[8]

Even though the S-5 initiative enjoyed a significant measure of support among GA members, it apparently lacked a two-thirds majority and thus the S-5 decided to withdraw the draft resolution at the last moment. Swiss Ambassador Seger subsequently publicly criticized O'Brien's legal reasoning as 'utterly wrong and biased' (Lynch 2012b). The Singaporean Ambassador openly called into question O'Brien's impartiality: GA members, he said, learned of O'Brien's legal opinion not from the President of the GA, who had first raised the question about the requisite majority for the S-5 draft: 'Instead, it was a permanent member who faxed and emailed OLA's legal opinion to all Member States the morning of the formal consideration of the draft resolution, with the admonition to all Member States to support a no-action motion on A/66/L.42/Rev.2. How did that P-5 mission procure the OLA's legal opinion, even before the President of the General Assembly himself had circulated it to the United Nations membership? What does that say about the P-5's real position on working methods of the Security Council?'[9]

Despite this setback, the S-5 announced to continue consultations with those Member States that had expressed support for the draft resolution and, should these consultations lead to a new dynamic, to return to the matter. And indeed, the S-5 initiative gathered new momentum when the UNSC came under fire for its inconsistent commitment to R2P in the context of the humanitarian crisis in Syria. Russia and China had vetoed three resolutions seeking to get the Syrian regime to stop butchering its own people. The meeting records of the debates[10] that followed each double veto indicate that the tone became more and more acrimonious, and that the dissonance between the normative expectations arising out of the concept of R2P and Russia's and China's double vetoes became increasingly obvious. When the two powers first cast their vetoes in October 2011, they were not entirely isolated, as four other UNSC members (Brazil, India, Lebanon, and South Africa) abstained. The reasoning of the opposing and abstaining members was primarily informed by fears that the resolution would pave the way for Libyan-style regime change. They therefore stressed Syria's sovereignty, political independence, and its right to non-interference, while at the same time condemning the killing of innocent civilians.

However, as the death toll mounted and China and Russia continued to block Council action against Assad, they became more and more isolated. When they cast their second double veto, they failed to receive the backing of those four countries which had abstained on the first vote in 2011; instead, the 13 other Council members sided with the sponsors of the draft

resolution. Moreover, the tone of the debate was decidedly harsher than after the first double veto. In what has been described as 'perhaps the most acrimonious debate since the end of the Cold War' (Zifcak 2012, p. 25) the majority of delegates agreed that the Council had utterly failed in its responsibility to protect the Syrian people. While some used somewhat more diplomatic language to voice their criticism, with Morocco expressing 'great regret and disappointment over the Council's failure to adopt the draft resolution', Guatemala deploring 'that our vote was in vain owing to the very particular voting system that governs our decision-making process', and Pakistan claiming that 'our system has indeed let us down. … Either everyone should have the veto, and then see how the world gets on, or perhaps we should all consider not using it whatsoever'; others were more explicit: Germany called the Council's inaction a 'scandal', and the USA threw all diplomatic caution to the wind and expressed its 'disgust' at the double veto. The UK even broke with diplomatic tradition and explicitly named Russia and China as those responsible for Council inaction, saying that the UK was 'appalled by the decision of Russia and China to veto'. This explicit shaming is rather unusual in the Council, where delegates prefer to speak of 'certain members' or 'certain countries'.

After the third veto, the USA highlighted the blatant dissonance between Russia's and China's failure to live up to their responsibilities and the position of the international community at large:

> '[T]he fault lies squarely with the heinous Al-Assad regime and those Member States that refuse to join the international community and their fellow Council members in taking firm action against the regime. Their position is at odds with the majority of the Council that voted in favour of the draft resolution today. It is at odds with the League of Arab States. It is at odds with over 100 counties in the Group of Friends of the Syrian People that called for decisive action under Chapter VII to stop the killing and start a process of transition to post-Al-Assad-Syria. … The Security Council has failed utterly in the most important task on its agenda this year.'

Against the backdrop of the Council's paralysis, the Rn2V initiative gained new momentum. At the debate on UNSC working methods in November 2012,[11] Rn2V's opponents were rather isolated. While Russia sought to exclude the topic from the agenda altogether, France, as the first one of the P-5, announced that it would henceforth support the S-5 push for limiting the use of the veto in cases involving mass atrocities: 'France supports the permanent members of the Council voluntarily and

jointly foregoing the use of the veto in situations under the Council's consideration in which mass atrocities are being committed and, more generally, which pertain to the responsibility to protect', the French representative proclaimed, thus increasing justificatory pressure on the other permanent members to explain the dissonance between their verbal commitment to R2P on the one hand and their failure to live up to their responsibilities in the context of the current crisis in Syria on the other hand.[12] Other key Member States, which had previously been hesitant to support Rn2V, have equally revised their positions on the issue. The Argentine delegate, for instance, declared that the S-5 proposal is

> 'in line with Argentina's position on the matter. At that time [in May 2012, when the S-5 draft was tabled] Argentina did not deem it advisable to force a decision through a resolution adopted by a vote in the General Assembly. However, there is no reason why the Security Council should not benefit from the contributions that an in-depth debate in the General Assembly can generate. We believe that such a debate on methodological improvements is both appropriate and timely, and in no way impedes progress words a deeper, comprehensive reform of the Security Council'.[13]

Brazil equally called for 'objective parameters' governing the use of the veto. Spain and Indonesia called on those Member States which do cast a veto to explain their reasons for doing so, and circulate a copy of their justification to all Member States.[14] Malaysia and Slovenia also demanded that the use of the veto be prohibited in situations involving mass atrocities, stressing that such a step would contribute to strengthening the international rule of law.[15] Singapore complained that

> '[p]ublic statements made by the P-5 would suggest that they share our position on the need for improvements to the Council's working methods. … We are therefore puzzled that whenever serious opportunities for improvements in working methods are presented, they are more often than not blocked by none other than the P-5. … Draft resolution A/66/L.42/Rev.2 had asked the P-5 to consider refraining from vetoing action aimed at preventing genocide, war crimes, and crimes against humanity. … Those permanent members that repeatedly express outrage at what is happening within the Council on issues like Syria are the same ones that blocked A/66/L.42/Rev.2. Trumpeting moral outrage over the Council's non-action is particularly hypocritical because whatever divisions there may be among the P-5, they are united in having no limits placed on their use or abuse of the veto'.[16]

However, as mentioned above, the unity among the P-5 is beginning to fray. France as the first one of the permanent members not only decided to support the initiative for a code of conduct but also came up with a specific proposal for operationalizing such a mechanism: In an op-ed in the New York Times, French Minister of Foreign Affairs Laurent Fabius explained that France had submitted

> 'an ambitious yet simple proposal to the United Nations General Assembly. Our suggestion is that the five permanent members … themselves could voluntarily regulate their right to exercise their veto … if the Security Council were require to make a decision with regard to a mass crime, the permanent members would agree to suspend their right to veto. The criteria for implementation would be simple: at the request of at least 50 member states, the United Nations secretary general would be called upon to determine the nature of the crime. Once he had delivered his opinion, the code of conduct would immediately apply. To be realistically applicable, this code would exclude cases where the vital national interests of a permanent member of the Council were at stake. … It would convey the will of the international community to make the protection of human life a true priority'. (Fabius 2013)

The initiative garnered more and more support when it was taken up by the so-called ACT group, which stands for accountability, coherence and transparency, and which seeks to comprehensively reforming the working methods of the UNSC (Center for UN Reform 2015a). Instead of aiming at a GA resolution, as the S-5 had done, ACT elaborated a pledge that nations can subscribe to. On 23 October 2015, ACT formally launched its year-long initiative. By that day, 104 Member States had already signed on to the code of conduct (Center for UN Reform 2015b). The remaining states have until October 2016 to sign onto the pledge. Remarkably, the UK, as the second one of the P-5, has decided to give up its opposition to having its veto right restricted in situations involving mass atrocities. Explaining that the UK has not used its veto since 1989, Ambassador Rycroft declared that

> 'we cannot see circumstances, in which we would use our veto to block an appropriate response to mass atrocity … I'm proud to say that the United Kingdom is signing up to the ACT code of conduct. I hope that all current and prospective members of the Security Council will join us. Indeed, I'd be interested to know what reason they give if they are unable to do so. The ACT code … increases the political cost to those who do use their veto to

> block the way. I am proud to say that we will never vote against credible Security Council action to stop mass atrocities and crimes against humanity'. (Rycroft 2015)

In sum then, currently a significant majority of UN Member States favours a code of conduct, including two permanent members of the UNSC. The most adamant opposition comes from the remaining three permanent members, yet what is interesting is that at even those three permanent members are reluctant to oppose the idea of a code of conduct explicitly. China, for instance, merely declared that 'before taking any action, all Security Council members should fully consult with each other in an effort to guarantee the widest possible support and avoid tabling controversial drafts resolutions to vote' (GlobalR2P 2014a). Russia has also been rather evasive regarding its position on a code of conduct, even pretending to be interested in the details of the initiative, asking for more information about the proposed legitimacy criteria and the Secretary General's role (GlobalR2P 2014b). The USA, in turn, has claimed that 'all five permanent members have a responsibility to respond with acute urgency in the face of mass atrocities that take the lives of innocents and that threaten international peace and security' (Power 2014). This is obviously not an explicit rejection of the idea of a code of conduct, and given that the US Ambassador to the UN, Samantha Power, is a prominent human rights advocate who has in the past been known for a strongly pro-interventionist stance, pressure is certainly increasing on the USA to explain how the unlimited discretion in the use of the veto can be reconciled with a commitment to consistent and concerted international action in the face of mass atrocities.

Hence, it seems that the more people are dying at the hands of the Assad regime in Syria, the more international opinion is tending towards support for a code of conduct for the P-5. However, the secondary rules of implementation regarding R2P have not changed yet, and this has to do primarily with two factors: the degree of homogeneity of the social group in which dissonance arises as well as an agent's degree of control over her normative environment. The history of Rn2V shows that both factors—a high degree of heterogeneity as well as the S-5's low degree of control—were instrumental in slowing down progress on Rn2V. The main challenge faced by proponents of Rn2V was that in order to modify—through an amendment of the UN Charter—the existing secondary rule which grants the P-5 veto powers over implementing R2P, they would have needed

the consent of just those actors whose privileges they sought to curtail. In cases where existing secondary rules provide the powerful with veto rights over an amendment of these rules, this will immunize the existing secondary rule structure against challenges from materially weaker actors, even if this structure is widely perceived as inconsistent with the normative environment. The S-5 and later ACT therefore decided to explore a different option for changing the secondary rules—not via Charter amendment but through a GA resolution or a model pledge, respectively, which would establish a non-binding code of conduct for the P-5. Their efforts were spurred by an external shock—the atrocities committed by the Assad regime against its own people—which has reduced group heterogeneity in that broad international consensus in favour of tough action against Assad has emerged—thus increasing pressure on China and Russia to stop shielding the Syrian dictator through their vetoes. Even though in May 2012, the S-5 draft resolution did not have the requisite two-thirds majority, it was apparently an extremely close call,[17] and with each passing day of UNSC inaction on Syria, support for Rn2V is likely to increase, because of the perceived stark dissonance between the Council's R2P rhetoric on the one hand, and its failure to match words with deeds on the other. Even though no adjustment of the secondary rules of implementation has taken place yet, the significant successes that the ACT initiative has had thus far suggests that by October this year, a vast majority of UN members will have probably signed onto the code of conduct, thus increasing political pressure on the remaining P-3 to discharge their responsibility to protect in a more consistent and accountable way.

The debate over Rn2V—especially the proposal to formalize the justificatory requirements of casting a veto in situations involving mass atrocities—also shows that processes of reason-giving are an increasingly important element of the global rule of law, as Global Administrative Law (GAL) scholars have pointed out. GAL aims at promoting the 'accountability of global administrative bodies, in particular by ensuring they meet adequate standards of transparency, participation, reasoned decision, and legality, and by providing effective review of the rules and decisions they make' (Kingsbury et al. 2005, p. 17). Even the UNSC has come to accept that it needs to improve its working methods, as a 2010 concept note by the President of the Council shows, in which the Council agrees to make its work more transparent and participatory.[18] For instance, the Council now holds annual open debates on its working methods. In these processes of reason-giving, GAL's proponents argue, 'publicness' criteria play an

important role. Publicness means 'the claim made for law that it has been wrought by the whole society, by the public, and the connected claim that law addresses matters of concern to the society as such' (Kingsbury 2009, p. 31). In the case of Rn2V, publicness arguments were those pointing to the UNSC's responsibility for safeguarding fundamental human rights. The Council's failure to discharge its responsibility due to the vetoes cast by Russia and China threw into sharp relief the dissonance between the latter's proclaimed support for universal values and their actual behaviour, which was widely perceived as serving their narrow national interests.

However, at this point, it is difficult to reliably predict the direction of change that international law is undergoing, because the order of precedence among the universal values at stake—the responsibility to protect versus the principles of non-intervention and non-use of force—is currently unclear. At present, the international legal order thus lacks coherence, as two values—the protection of states/regimes versus the protection of peoples—prescribe mutually inconsistent overall objectives. The rules governing international intervention on behalf of human rights are in flux, and it is difficult to predict which consequences the perceived dissonance will have for the development of international law, both on the level of primary and secondary rules. At the outset of the Libyan uprising international concerns over civilian protection outweighed the principle of non-intervention, to the point that even Russia and China apparently 'felt that they could not, politically, veto resolutions to intercede—that is, that they felt constrained by an RN2V-like norm' (Levine 2011, p. 343).

Yet NATO's campaign of regime change in Libya has undermined international support for R2P and has apparently changed the global normative climate to the effect that arguments supporting the Syrian *people's* right to protection have been weakened vis-à-vis arguments stressing the target *state's* sovereignty, political independence, and its right to non-interference. It thus seems that the shadow that the Libyan intervention has cast on the principle of R2P has at the same time re-legitimized the use of the veto on behalf of the non-intervention principle, at least this was the state of affairs at the beginning of the Syrian crisis. However, despite this relapse, it seems that the more people are dying at the hands of the Assad regime, the more international opinion is tending back towards R2P-based arguments and hence in favour of Rn2V. Thus, even though the direction of legal change cannot be predicted with certainty, what is clear is that international law currently fails to 'make sense' in that there

is no consensus on overarching principles on the basis of which individual rules (such as the rules governing the use of the veto) can be rationalized. Hence, the legitimacy crisis of the UNSC is at the same time a legitimacy crisis of international law.

Conclusions

In this chapter, I argued that the human desire for dissonance reduction is not only an undertheorized driver of legal innovation but also accounts for the law's partial autonomy from political manoeuvrings. I also argued that secondary rules have a dual role to play with regard to dissonance reduction in international law: They must provide for orderly processes to reduce dissonance on the level of primary rules, and they must not evoke dissonance themselves, that is secondary rules must be perceived not to be overly biased in favour of particular actors. If they fulfil both criteria, they contribute to strengthening the global rule of law by striking a balance between the demands of stability and legal certainty on the one hand and a progressive adaptation of the law to changing political circumstances on the other. This function of secondary rules is crucial in the highly heterogeneous international realm, where a diverse group of actors operating at multiple layers of governance struggle for power and for realizing their particular visions of the common good. The case of Rn2V demonstrates that secondary rules which are perceived as being biased in favour of a small elite of powerful states will be subject to continuing contestation, and that the rule of law is undermined as a result. At present, the primary 'norm' (or rather concept) of R2P as well as the secondary rules governing its implementation are in flux, and the jury is still out on whether ACT's initiative to subject the UNSC to a minimum of rule of law constraints will be successful.

The case of Rn2V also underlines that multi-level governance has ambivalent consequences for the emergence of the rule of law on a global scale. Rn2V, especially the variation of this concept proposed by France, would seem to strengthen the rule of law in that it disperses power by multiplying the number of actors involved in decision-making about humanitarian action, thus wrestling the monopoly on decision-making in these situations away from the permanent members of the UNSC. However, since the code of conduct, if implemented, will come in the form of a soft law instrument, its ability to constrain power-holders is rather limited, at least in the case of Russia and China. This is so because the relevant scope

conditions (susceptibility to reputational concerns or norm adherence out of a sense of appropriateness) were not present in the case of these actors.

While the UNSC's paralysis in the Syrian crisis suggests that there is little ground for optimism, I think we ought take a step back for a moment, and adopt a longer-term perspective on the development of an international rule of law: When in 1994, Rwandan hate radio *Milles Collines* called the Tutsi minority 'cockroaches' that had to be exterminated, the international community shrugged it off and stood by while almost a million people were butchered. When in 2011, Muammar Gaddafi used the same expression to describe the insurgents of Benghazi, the UNSC sprang into action rather swiftly. The end of the story is well known. What do we learn from this? We learn not only that words are powerful, but also that the global normative climate has changed over the course of the past two decades, and that events that in the early 1990s policymakers could safely ignore at no political cost evoked major dissonance only two decades later, prompting even the most recalcitrant of the P-5 to abstain from using their veto to block action on behalf of Libyan civilians. Hence, international law does move, but it does so rather slowly, and not always in a linear fashion.

Notes

1. But see Frank, J. (1963) *Law and the Modern Mind*, 6th ed. (New York: Anchor Books); Tyler, T.R. (1997) 'The Psychology of Legitimacy: A Relational Perspective on Voluntary Deference to Authorities', *Personality and Social Psychology Review*, 1, 4, 323–45.
2. A/61/47, 14 September 2007.
3. See, for example, Alexy, R. and A. Peczenik (1990) 'The Concept of Coherence and Its Significance for Discursive Rationality', Ratio Juris, 3, 1, 130–47; Baum Levenbook, B. (1984) 'The Role of Coherence in Legal Reasoning', *Law and Philosophy*, 3, 355–74; Kress, K. J. (1984) 'Legal Reasoning and Coherence Theories: Dworkin's Rights Thesis, Retroactivity, and the Linear Order of Decisions', *California Law Review*, 72, 3, 369–402; MacCormick, N. (2005) *Rhetoric and the Rule of Law. A Theory of Legal Reasoning* (Oxford: Oxford University Press); Peczenik, A. (1994) 'Law, Morality, Coherence and Truth', *Ratio Juris,* 7, 2, 146–76; Weinreb, L. L. (2005) *Legal Reason. The Use of Analogy in Legal Argument* (Cambridge: Cambridge University Press).
4. Ku's and Diehl's concept of the law's 'operating system' roughly corresponds to Hart's concept of secondary rules. For a more elaborate discussion, see Ku and Diehl's chapter in this volume.

5. S/PV.6870 (Resumption 1), 26 November 2012.
6. A/RES/48/26, 3 December 1993.
7. A/66/L.42/Rev.1, 3 May 2012.
8. Lynch, C. (2012b) *The Brobdingnagians Win Again*, 16 May 2012. http://foreignpolicy.com/2012/05/16/the-brobdingnagians-win-again/, date accessed 19 April 2016.
9. S/PV.687026 November 2012.
10. S/PV.6627, 4 October 2011; S/PV.6711, 4 February 2012; 19 July 2012.
11. S/PV.6870, 26 November 2012.
12. S/PV.6870, 26 November 2012.
13. S/PV.6870, 26 November 2012.
14. S/PV.6870, 26 November 2012.
15. S/PV.6870, 26 November 2012.
16. S/PV.6870, 26 November 2012.
17. According to Liechtenstein's Ambassador, the draft received 'considerable support among the membership of the United Nations, to the point that we are asked to this day why it was withdrawn instead of being put to a vote'.
18. S/2010/507, 26 July 2010.

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Accountability

Accountability Dynamics and the Emergence of an International Rule of Law for Detentions in Multilateral Peace Operations

Gisela Hirschmann

The characteristics of multilateral peace operations today pointedly illustrate the major challenges of multi-level governance for the rule of law. Current operations encompass a much wider range of activities than operations before 1990.[1] The scope of the mandate has significantly expanded and requires an increasing variety of implementing actors.[2] These include regional organizations, national peacekeeping troops, police officers, civilian staff as well as private actors from humanitarian organizations or security companies. As a consequence, while decisions about peacekeeping are made at the level of the United Nations Security Council (UNSC), the

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implementation involves entities from regional and national levels with different legal frameworks.

At the same time, the rule of law has become increasingly important for peacekeeping given the type of activities undertaken by current operations. Instead of merely monitoring cease-fires to keep fighting parties apart, the mandates of peace operations nowadays lead to a much more direct interaction between the actors implementing an operation and the local population. Moreover, the insecure environment in which peace operations are deployed often demands the adoption of measures that have a substantial impact on individual human rights. One of these measures, the detention of individuals, has become a rather widespread although publicly less well-known phenomenon (Oswald 2011). Whether undertaken domestically by nation-states or in the context of peace operations, however, detentions must not be arbitrary in order to be lawful. This means that there should be some rules and safeguards that guide detentions and the treatment of detainees in line with applicable legal frameworks. Only through the rule of law can power exercised through detentions be limited and constrained so that the respect of detainees' rights is guaranteed. However, the multi-level governance structure in a pluralist legal framework poses particular challenges for the evolution of the rule of law in peacekeeping as lines of responsibility become blurred with the increasing complexity of the delegation relationship (Daase and Friesendorf 2010).

Despite the above-quoted article on arbitrary detentions in the International Covenant on Civil and Political Rights (ICCPR), for a long time, it remained unclear what rules and laws apply for detentions in the context of multilateral peace operations. The traditional assumption that international human rights law (IHRL) did not apply to situations of armed conflict has been revoked by now. Today, IHRL and international humanitarian law (IHL) are regarded as two complementary sources of law applicable to situations of armed conflict (OHCHR 2011). Until the end of the 1990s, however, there were simply no provisions addressing procedural aspects of how detentions in the United Nations (UN) or North Atlantic Treaty Organization (NATO) operations should be undertaken nor any that would outline human rights standards to which detention practices should adhere. This lack of rule of law stems in part from the UN's refusal to recognize that UNSC-mandated operations could potentially become party to a conflict to which IHL would apply (ICRC 2011, p. 30). Only fairly recently can we identify a growing concern for rule of law

principles both within the UN and among states implementing multilateral operations. In 1999, the UN Secretary-General adopted the Bulletin (SGB) on the Observance of IHL for UN forces of 1999 (UN Secretary-General 1999a). Mission-specific detention provisions were developed, for example, for the operation in Kosovo and the Copenhagen Process on the Handling of Detainees was launched between 2007 and 2012. These initiatives indicate an emerging international rule of law that aims to protect fundamental individuals' rights and to provide procedural guidelines for detentions.

This chapter asks how a growing respect for the rule of law emerged for detentions in multilateral peace operations. I argue that in order to understand how the rule of law for detentions evolved in this setting of multi-level governance and legal pluralism, it is crucial to investigate the dynamics of transnational and national accountability that were at work. Accountability hereby is conceptualized as the relationship between two actors, whereby one actor (the accountability holder) sets the standards for the other (the accountant), monitors their compliance and imposes sanctions in the case of misbehaviour (Grant and Keohane 2005; Bovens 2007; de Wet 2010). In traditional vertical accountability, these accountability functions are exercised by the mandating authority. While traditional accountability has been rather weak in peacekeeping due to the characteristics of the multi-level governance system, there is a rising trend to alternative ways of accountability, whereby external third parties act as accountability holders. This chapter demonstrates how this pluralist accountability, as I term it, helped to overcome the lack of a rule of law for detentions to a certain extent.

In light of the growing literature on the human rights obligations of international organizations (IOs) (Fassbender 2011; Heupel and Zürn 2016), this contribution sets out to understand the origins of rule of law standards to which IOs align their policies. I argue that the growing respect for the rule of law within IOs can be linked to the accountability dynamics that the implementing actors in multilateral peace operations were confronted with. Moreover, the development of an international rule of law for detentions takes place both within and outside the IO. It can thus be regarded as process of a rather 'global' dimension, however without proposing that there has been a 'global rule of law' emerging yet (Chesterman 2009, p. 69).

The results of this chapter speak directly to the three cross-cutting themes of this volume that deal with the implications of multi-level

governance and legal pluralism for the limitation of power, the coherence of law and the choice between hard and soft law. The analysis demonstrates how the rule of law can constrain the exercise of power: the UN Secretary-General's bulletin on the Observance of IHL obligations by UN forces of 1999, the Department of Peacekeeping Operations (DPKO)/Department of Field Support (DFS) Standard Operating Procedures on detentions in peace operations, the Copenhagen Process Principles and Guidelines on the Handling of Detainees in International Military Operations as well as the review mechanism on the level of the operation in Kosovo all build up to a framework of rule of law that limits the power of detaining authorities in peacekeeping operations. In this case, all the different layers of law add up to a more coherent framework of legal norms for detentions in peace operations as they complement rather than contradict each other. The majority of these regulations however is non-binding and cannot be easily adjudicated. We can thus recognize an increasing trend towards soft law that seems to be an attempt to compensate for the lack of hard law in the area of peacekeeping. Regarding the implications of multi-level governance and legal pluralism for the choice of hard and soft law, this chapter demonstrates how accountability holders tried to promote soft law arrangements in order to compensate the absence of hard law regulations for detentions in peace operations. However, the analysis also reveals the limitations of soft law for the effective protection of the rights of detainees. The lack of comprehensive binding regulations for all implementing actors and independent authoritative review mechanisms monitoring detentions in peace operations can still be considered important shortcomings of the current rule of law for detentions. Nevertheless, initiatives like the Copenhagen Process on the Handling of Detainees give hope that soft law regulations might eventually be turned into more powerful legal commitments in the future.

The chapter proceeds in three steps. In the following section, I demonstrate that there is indeed an emerging international rule of law for detentions; I do so by identifying core elements of the rule of law in the UN Secretary-General's Bulletin on the Observance of IHL for UN forces of 1999, in mission-specific provisions for the operation in Kosovo, as well as in the outcome document of the Copenhagen Process on the handling of detainees in international military operations of 2012. In the second part, I investigate how the emergence of an international rule of law can be explained in these three instances. For this purpose, accountability is conceptualized as a three-step process of standard setting, monitoring and sanctioning. Tracing back the evolution of the rule of law,

I reveal the influence of pluralist accountability dynamics on the national and transnational levels. The conclusion summarizes the findings and highlights the challenges that remain for an international rule of law for detentions to be enforced.

The Rule of Law for Detentions in Multilateral Operations

Despite the prominence of the concept in the scholarly and practitioners' discourse, there is no agreed definition of the rule of law yet (Nollkaemper 2009). Some definitions rely on a 'thin' conception, which emphasizes that the exercise of power may not be arbitrary but has to be bound by law (Chesterman 2008, para. 11). Others advocate a 'thick' conception, which includes substantive norms (Chesterman 2009, 69). The most prominent of thicker conceptions is the definition provided by the UN Secretary-General in his report on 'The rule of law and transitional justice in conflict and post-conflict societies' (UN Secretary-General 2004, para. 6). As with many thick conceptions, this UN definition includes accountability as an element of the rule of law.[3]

Given that there is no consensus on the constitutive elements of an international rule of law yet, the components most relevant for detention practices need to be identified. The rule of law concept that is used in this chapter comprises both procedural and right-based elements (Kingsbury 2009, p. 33). In order to make out an emerging international rule of law for detentions in the context of peace operations, we need to be able to identify, first, internationally recognized procedural guidelines for how detentions should be conducted in multilateral operations and, second, provisions that outline the substantive normative standards to which detentions should adhere. The sources can be found both in IHRL and IHL.

Both bodies of law can, according to contemporary legal scholarship, be applied complementarily to detentions in peace operations (OHCHR 2011, pp. 5–6). From IHRL, the right to habeas corpus, the fundamental right to petition against the legality of detentions before an independent court, can be derived (Farrell 2008). As the ICCPR stipulates in Article 9(4), '[a]nyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful'. In a state of emergency, however, possible derogations can be made that would then restrict these procedural

safeguards. This points to possible limitations of IHRL in situations of armed conflict. Provisions of IHL that speak directly to detentions in armed conflicts can be found in the Geneva Conventions and customary international law.[4] IHL thereby explicitly provides rules for situations of armed conflict, while distinguishing detentions of prisoners of war (Third Convention) from the internment of civilians (Fourth Convention) (OHCHR 2011, p. 12). The Conventions include fundamental *ius cogens* norms, such as the prohibition of torture, that are non-derogable, and therefore continue to apply as the legal framework for detentions.

These principles had originally been developed with regard to detentions undertaken by nation-states in an international armed conflict or in the context of occupation. There have thus been intense debates about their applicability to multinational operations (see e.g. Abraham 2003; ICRC 2011). In 1994, the UN General Assembly (GA) for the first time recognized the responsibility of UN and associated personnel to respect IHL and 'universally recognized standards of human rights as contained in international instruments' (Art. 20a).[5] Subsequently over the last 15 years, principles of habeas corpus, IHL and customary international law have become the legal framework for detentions undertaken in the context of peace operations.

First Steps: The 1999 UN Secretary-General Bulletin on the Observance of IHL Obligations

In 1999, the UN Secretary-General Kofi Annan issued a bulletin on the 'Observance of IHL obligations by UN forces' (UN Secretary-General 1999a). Regarding the treatment of detainees, the bulletin promulgated that they should be treated 'in accordance with the relevant provisions of the Third Geneva Convention of 1949' (Section 8). Most importantly, the bulletin stated that '[t]hey shall under no circumstances be subjected to any form of torture or ill-treatment' (UN Secretary-General 1999a). In addition to that, the bulletin also included principles of customary international law, for example that access should be granted to the International Committee for the Red Cross (ICRC) to visit detainees. Although the bulletin refers to conditions of detentions only and does not address any procedural safeguards or other legal norms such as the right to habeas corpus, it nevertheless constitutes the first legally binding document for detentions in the context of UN-mandated peace operations.

In the field, however, the relevant implementing actors still are not very familiar with the rules outlined in the bulletin. According to the experience of ICRC field delegates who are involved in the training of troops to be deployed in a UN mission, a significant number of troops are unaware of the existence of the bulletin and its obligations.[6] Thus, while principles of the rule of law have been recognized at the level of the UN leadership, their implementation still remains a challenge for the organization. As an attempt to overcome this challenge, the Office of Legal Affairs of the UN Secretariat in 2010 developed the DPKO/DFS Interim Standard Operating Procedure (SOP) on Detention in UN Peace Operations. In these SOPs, the UN for the first time included the principle of non-refoulement in an internal document that is binding upon the troops deployed by the UN. These SOPs have recently been reviewed to assess how they should be implemented more effectively, but remain unavailable to the public.[7]

Rule of Law Provisions on the Mission Level: The Operation in Kosovo

On the global level, for a long time, the Secretary-General's bulletin remained the only official document that provided a legal framework for detentions in peace operations. There were nevertheless some initiatives that contributed to the development of an international rule of law for detentions on the level of individual operations. Especially the operation in Kosovo stands out for having addressed certain rule of law components for detentions most comprehensively. Detentions in Kosovo were undertaken between 1999 and 2005, both by the civil administration under UN leadership (United Nations Interim Administration Mission in Kosovo [UNMIK]) and the NATO military presence Kosovo Force (KFOR). UNMIK's head, the Special Representative of the Secretary-General (SRSG), issued executive orders to detain arrested persons that would otherwise have had to be released (OSCE 2001, p. 33). As the UNSC had in its Resolution 1244 equipped the UN administration with an unprecedentedly high degree of authority, the SRSG argued that this legitimized him to detain suspects that posed a 'menace to public security' (OSCE 2001, p. 33). One executive-order detention was issued under the SRSG Bernard Kouchner and four more were ordered by his successor, SRSG Hans Haekkerup. By declaring that the UN was administering a state of emergency, UNMIK executive order detentions thus derogated from procedural safeguards.

Far more detentions were undertaken by NATO. In the years between 2001 and 2003, 140 to over 3500 detainees were held in Camp Bondsteel, a KFOR detention facility under US leadership (CoE 2002, para. 95; OSCE 2003). The Commander KFOR determined in the Kosovo Force Commander (COMKFOR) directive 42 of 2001 that detentions could be ordered if the suspects 'constitute a threat to KFOR or a safe and secure environment in Kosovo and civilian authorities are unable or unwilling to take responsibility for the matter' (AI 2004, p. 21). No further legal justification was regarded as necessary.

The UNSC Resolution 1244, which mandated both UNMIK and KFOR, neither explicitly authorized these detentions nor provided any rule of law safeguards. Nevertheless, the implementing organizations established two bodies that can be regarded as first attempts to implement the right to habeas corpus on the mission level. The UNMIK Detention Review Commission was established in 2001 to provide an avenue for claims against executive-order detentions issued by the SRSG (UNMIK Regulation 2001/18 of 25 August 2001). However, the review commission convened only once before its mandate expired after three months (Pacquée and Dewulf 2006, p. 8). The attempt to guarantee the right to habeas corpus, to challenge UNMIK detentions before an independent body, was therefore of short duration while the SRSG continued to issue executive-order detentions.

Similar to UNMIK, KFOR in its Standard Operating Procedure 3023 of 22 March 2003 provided for a claims office for various kinds of complaints against the KFOR headquarters structure by affected individuals. Already the COMKFOR directive of 2001 had provided that individuals detained by KFOR could file complaints to the Commander KFOR (COMKFOR directive No. 42 as quoted in CoE 2002, Section 5c). In addition to that, claims offices were opened in 2001 throughout the country where individuals could file complaints against KFOR. However, given that claims against detentions could only be directed towards the detaining authority, the KFOR commission did not fulfil the criteria of an independent judicial appeal body as a full implementation of the right to habeas corpus would require (AI 2001).

These initiatives by UNMIK and KFOR demonstrate the limits of the attempts to establish an international rule of law for detentions at the mission level. Two further rule of law elements however have to be mentioned. As required by customary international law, the ICRC was granted access to visit detainees in UNMIK and KFOR detention facilities.

Moreover, the SRSG determined in a regulation that 'in exercising their functions, all persons undertaking public duties or holding public office in Kosovo shall observe internationally recognized human rights standards' (UNMIK 1999a, section 2). This was later specified by UNMIK regulation no. 24, which detailed the international human rights instruments to which the previous regulation was referring (UNMIK 1999b). The list of international legal obligations relevant for the case of detentions included the Universal Declaration on Human Rights, the European Convention for the Protection of Human Rights and Fundamental Freedoms and its protocols, the International Covenant on Civil and Political Rights and its protocols, and the Convention Against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment. Despite these comprehensive legal frameworks, however, the concrete application of IHRL to UNMIK's actions remained unclear, even to components of the mission itself (Marshall and Inglis 2003, p. 105).

Against this background of a limited international rule of law for detentions, UNMIK established in 2006 the Human Rights Advisory Panel to examine complaints about alleged human rights abuses by UNMIK on the basis that 'all other avenues for review had been exhausted' (Momirov 2012, p. 11). If the panel approved a claim to be admissible and deemed UNMIK to be responsible for the alleged human rights violation, it issued a recommendation to the SRSG about how to handle the claim (UNMIK 2006; Visoka 2012, p. 200). This was a rare and novel approach to strengthening the rule of law, not only regarding detentions but also concerning all other acts undertaken by UNMIK. While being an advisory body, the panel nevertheless provided an independent assessment of complaints against UNMIK. However, some restrictions were introduced by UNMIK Administrative Directive 2009/1. According to the regulation, complaints could only be accepted before 31 March 2010. Moreover, the admissibility of claims was restricted to human rights violations committed between 2005 and 2008, while the extent of UNMIK authority peaked before 2005, meaning the majority of potential complaints about the misuse of this authority may not be admissible (Visoka 2012, p. 203).[8] Despite these limitations, however, the establishment of the Human Rights Advisory Panel contributed an important component of the rule of law for UNMIK detentions, which has yet to be replicated by other UN-mandated operations.

These provisions, although important steps on the mission level, were limited to the operation in Kosovo and did not translate into a comprehensive set of rule of law standards. On the global level, the bulletin of the UN

Secretary-General of 1999 remained the core document of reference. However, detentions in peace operations are undertaken by several actors and the Secretary-General's bulletin does not apply to all of them even if they are deployed under UN-mandate.[9] This lacuna was recognized by the Danish government, which in 2007 launched the Copenhagen Process on the Handling of Detainees in International Military Operations (Winkler 2010).

The Copenhagen Process Principles and Guidelines: A Further Step towards an International Rule of Law for Detentions?

The 2007–2012 Copenhagen Process Principles and Guidelines on the Handling of Detainees in International Military Operations were a further attempt to establish an international rule of law for detentions. In contrast to the intention of the initiators, which was to establish a binding legal framework that could be attached to UNSC mandates for peace operations, the outcome document was a non-binding declaration with basic principles that all participating states could agree to. The principles were applicable to detentions in the context of non-international armed conflicts and peace operations, but not in the context of international armed conflicts.

Based on what the Third Geneva Convention determined for the treatment of prisoners of war, the Copenhagen Process Principles and Guidelines provided that '[a]ll persons detained or whose liberty is being restricted will in all circumstances be treated humanely and with respect for their dignity. […] Torture, and other cruel, inhuman, or degrading treatment or punishment is prohibited' (principle 2). The document also stipulated that detentions 'must be conducted in accordance with applicable international law' (principle 4). While this is a very general provision, the document nevertheless emphasized that detentions had to be lawful, which was to be reviewed by an 'impartial and objective authority' (principle 12). This can be regarded as a step towards the right to habeas corpus, although it did not entail any judicial review or avenues of judicial complaint. The outcome document further concluded that avenues for complaint about the conditions should be provided to the detainees by the detaining authority (principle 14) and that access should be granted to the ICRC or other impartial humanitarian organizations to visit detainees (principle 11). Even more importantly, the document also made some provisions for the transfer of detainees to another authority, which constitutes a rather frequent phenomenon in multilateral peace operations. It concluded that the transferring state or IO still had some responsibilities

to ensure that detainees were transferred only to authorities that comply with international law (principle 15). Through continued monitoring, the transferring authority was to ensure that detainees were not mistreated or tortured after the transfer, as it happened, for example, with detainees in Afghanistan who were transferred by the NATO International Security Assistance Force operation to the Afghan national authorities.[10]

The Copenhagen outcome document, although not legally binding, therefore established the core rule of law principles that applied to detentions in multilateral operations. These included IHL obligations, such as the prohibition of torture and mistreatment, customary international law, such as the cooperation with the ICRC, as well as some elements of review concerning the lawfulness of the detention. However, an explicit provision that guarantees the right to habeas corpus, to judicially challenge the legality of a detention, is still lacking in the international rule of law guiding detentions in multilateral operations, an omission that was strongly criticized by human rights organizations (AI 2012).

The analysis thus far has identified three important components that contribute to an international rule of law for detentions. These have been, on the global level, the Secretary-General's bulletin on the Observance of IHL of 1999 and the Copenhagen Process Principles and Guidelines of 2012, and, on the level of the operation in Kosovo, the UNMIK and KFOR detention review commissions and the Human Rights Advisory Panel. Independent of whether these rule of law provisions have been developed by states or IOs, their emergence can be traced back to the effects of external accountability dynamics. This will be demonstrated in the following section.

Explaining Rule of Law Development: Accountability Dynamics

In order to explain the development of rule of law principles for detentions, I build upon two important strands of existing literature, namely the literature on global administrative law (GAL) and on the accountability of IOs. Researchers, especially legal scholars, have demonstrated that there is a growing body of laws that applies to IOs and their activities. Proponents of GAL argue that IOs increasingly adopt principles and mechanisms that enhance their accountability (Kingsbury et al. 2005). These encompass institutional procedures that enhance transparency, participation, reasoned decisions and complaint mechanisms. The focus lies on procedural aspects,

not on the content of rules (Kingsbury et al. 2005, p. 29). Prominent examples include the provisions for listing and de-listing procedures by the UN Security Council Sanctions Committee (Heupel 2016) or the World Bank Inspection Panel (Heupel, this volume). In addition to these internal procedures, GAL scholars emphasize the role of domestic institutions (Kingsbury et al. 2005, p. 31). Institutions such as national courts or parliaments have started reviewing the actions of IOs. Take, for example, the decision of the Bosnian Constitutional Court of 2000, in which the court accepted complaints against the Office of the UN High Representative in the country. Also regional institutions, such as the European Court for Human Rights, have become important accountability holders, especially when reviewing the UNSC's sanctions policies (Heupel 2009).

Based on these insights, I argue that the exercise of accountability functions by external (national or transnational) actors in peacekeeping detentions contributed to the emergence of an international rule of law. This argument however only works if we disentangle accountability from the concept of the rule of law. Accountability hereby is conceptualized in line with recent literature as a three-step process involving standard setting, monitoring and sanctioning (Grant and Keohane 2005; Bovens 2007; de Wet 2010). The actors exercising these functions are called 'accountability holders'. They monitor and sanction the behaviour of another actor with regard to a certain set of standards. While GAL scholars have emphasized the role of external (domestic) actors as accountability holders regarding the actions of IOs, research on the accountability of IOs so far has not provided a comprehensive analysis of the effects of these 'diagonal or new forms of accountability' (Bovens 2007) or 'non-institutionalized accountability mechanisms that operate outside of a given regime' (Krisch 2010). In this contribution, I intend to address this gap and demonstrate that the concept of accountability can highly profit from an analysis of these pluralist accountability dynamics.

I argue in this chapter that pluralist accountability, which involves external actors as accountability holders, contributed to the emergence of an international rule of law for detentions. For this purpose, I chose a qualitative case study approach combined with the method of process-tracing (George and Bennett 2005). For each of the individual steps towards the emerging international rule of law, the respective accountability holders will be identified and their effects on the development of the rule of law will be traced back. As we will see below, although accountability holders can exercise all three accountability functions, they often engage in

either standard setting, monitoring or sanctioning. In this case, a network of accountability has evolved in which a conglomerate of external actors set standards, monitor or sanction the various implementing actors. Taken together, the accountability functions exercised by international non-governmental organizations (NGOs), regional courts and intergovernmental organizations, as well as domestic courts all contributed to the development of an international rule of law for detentions. Without putting forward a mono-causal argument, I stipulate on the basis of my research that the influence of these pluralist accountability dynamics is worth to be explored as a potential explanatory factor for the development of the rule of law. The case of detentions hereby serves as an explorative case study to analyse the impact of accountability for the rule of law development. I expect similar dynamics to take place in comparable circumstances of multi-level governance and global legal pluralism.

Accountability Dynamics and the Development of the SGB of 1999

The initiative for a legal framework for UN peace operations, which eventually resulted in the development of the Secretary-General's bulletin on the Observance of IHL for UN Forces, originates in the standard-setting activities of the ICRC. Since the very first UN operation, the ICRC argued that IHL applied to UN peacekeeping troops as they could be drawn into hostilities and thus become party to an armed conflict.[11] For decades, the UN had strongly rejected the notion that IHL was applicable to UN forces. However, in the 1990s, the ICRC increased its pressure on the UN to recognize IHL standards. Referring to the UN's experiences in the armed conflicts in Somalia and on the Balkans, the ICRC successfully argued in public and in inter-organizational consultations that the UN needed to have specific guidelines relating to IHL. With expert meetings and position papers on the application of IHL, the ICRC undertook significant steps to define the legal standards for the implementation of peace operations.

In 1994 and 1995, the ICRC convened a symposium and two expert meetings under the heading 'International Humanitarian Law for Forces Undertaking United Nations Peace Operations' in Geneva to outline the main IHL obligations for UN forces.[12] At these meetings, which also involved UN representatives, experts in the field of IHL, and state representatives, the participants clearly agreed upon the fact that IHL standards were a must for the UN. Another experts meeting took place in 1996, where experts under the lead of the ICRC but also of the UN Office of

Legal Affairs (OLA) tried to develop some IHL guidelines for UN forces. Based on these guidelines, the OLA in 1999 proposed a first draft of what would later become the Secretary-General's bulletin and asked the ICRC to comment on the draft. Since then, the legal consultations between the ICRC and the UN Secretariat have more and more increased. After the adoption of the bulletin, the ICRC even continued its standard-setting activities. In a position paper drawn up in 2005, it outlined the 'Procedural Principles and Safeguards for Internment/Administrative Detention in Armed Conflict and Other Situations of Violence', which were later attached to the report on IHL and the Challenges of Contemporary Armed Conflicts presented at the 2007 International Conference. Given its legal expertise and its monitoring activities on the ground, the ICRC has been involved in the drafting process of the 2010 SOP on Detention in UN Peace Operations in an even closer exchange with the UN's legal office than at the time of the development of the bulletin. Thus, the rule of law standards for detentions adopted by the UN have greatly benefited from the standard-setting activities of the ICRC.

Accountability Dynamics for Rule of Law Provisions in Kosovo

On the mission level, the development of rule of law provisions can be attributed to the accountability functions exercised by regional organizations and courts, at least this is what the case of Kosovo suggests.[13] The establishment of the UNMIK detention review panel can mainly be traced back to the accountability exercised by the Ombudsperson Institution in Kosovo (OIK), which had been established under the significant influence of the Organization for Security and Co-operation in Europe (OSCE) and the Council of Europe (CoE). Originally intended as an advisory body to UNMIK, the ombudsperson became an influential accountability holder for UNMIK through his activities and the strong support that he received from the two regional organizations. The OIK was key for monitoring UNMIK's actions and their accordance with human rights standards (Morimov 2012, p. 8). The office visited detention facilities, conducted own investigations and became a focal point for affected individuals to submit complaints. From early on, the OIK demanded that the UNMIK implement the right to habeas corpus when undertaking detentions.

Given that the OIK had no judicial power and lacked enforcement mechanisms, the only way of sanctioning foreseen by the mandate was through public reporting (UN Secretary-General 1999b, para. 90).

The ombudsperson very outspokenly criticized the SRSG's practice of issuing executive detentions and thus by his own initiative used his position to exercise normative sanctioning. Similarly to what NGOs and other human rights organizations have criticized, the OIK pointed to the contradiction between UNMIK's mandate and its practice.

It is ironic that the UN, the self-proclaimed champion of human rights in the world, has by its own actions placed the people of Kosovo under UN control, thereby removing them from the protection of the international human rights regime that formed the justification for UN engagement in Kosovo in the first place (OIK 2002, p. 5).

In the two special reports on detentions, the OIK concluded that UNMIK executive detentions violated Art. 5 of the European Convention on Human Rights (OIK Special Reports No. 3 and 4 of June and August 2001). He demanded that the SRSG should immediately refrain from issuing executive detentions and that he convened within a month a panel of international judges to review detentions (OIK 2001, para. 32). In the same report, the OIK suggested to establish a panel that should be enabled to review UNMIK's detention practices. As a reaction, the SRSG established a Detention Review Commission for executive-order detentions (UNMIK 2001).

The OSCE and the CoE argued that the OIK should also become an accountability holder for the NATO-led operation KFOR, but faced strong resistance by NATO (Brand 2005, p. 483). The lack of OIK jurisdiction over KFOR was criticized by NGOs and various representatives of other international institutions, such as the Commissioner for Human Rights of the CoE (CoE 2002, para. 130). The COMKFOR directive no. 42 of 2001 to a certain extent responded to this criticism. In the directive, the COMKFOR emphasized that 'no one shall be subjected to arbitrary detention' and that his 'authority to detain is a military decision, not a judicial one' (as quoted in CoE 2002). In order to at least partially satisfy the demands for judicial review, the directive established the Detention Review Panel that was to review all detention requests. While the OIK did not receive jurisdiction over KFOR, it nevertheless helped to implement claims offices. During at least the first period of the existence of these claims offices, the OIK served as a focal point and collected the complaints for KFOR.[14] Twice during 2000 and 2001, the OIK also visited the main KFOR detention centre at Camp Bondsteel, which was under the command of the USA. However, this had no significant effect on the further development of the rule of law for KFOR detentions.

As it was clear from the outset that the OIK would become a purely national institution after some time, the CoE again acted as an accountability holder and proposed the human rights advisory panel for UNMIK. It was mandated by the European Court on Human Rights to propose a solution for the court's lacking jurisdiction over the Kosovo under UN administration. Since UNMIK was not a treaty party to the European Convention of Human Rights, the court worried that a population within Europe was denied the possibility of judicial appeal, a core element of the rule of law. Based on the advisory opinion of a group of international legal experts, the Venice Commission proposed the Human Rights Advisory Panel as an interim accountability mechanism (CoE 2004). This proposal, which was backed by the Parliamentary Assembly of the CoE, foresaw the establishment of a court-like panel that should complement the work of the OIK until a long-term 'Human Rights Court for Kosovo' could be established. Even if the character of the panel remained purely advisory and the proposed court was never established, the standard setting and monitoring activities of the CoE certainly enhanced the rule of law regarding UNMIK's activities in Kosovo. This had effects on the international rule of law in Kosovo even beyond UNMIK: when the European Union took over great parts of UNMIK's mandate by mandating the European Union Rule of Law Mission (EULEX), a EULEX Human Rights Review Panel was established based on the experiences from the UNMIK panel.

Accountability Dynamics and the Initiation of the Copenhagen Process

The accountability dynamics resulting from decisions taken by regional and domestic courts can be identified as the core causal factor that contributed to the initiative of the Copenhagen Process on the Handling of Detainees in International Military Operations.[15] Even if the courts differed in their decisions in the end, the fact that nations were confronted with legal claims and the prospect of losing the court cases alone proved to be a strong enough driving force (Winkler 2010). In the prominent Behrami and Saramati decision of 2007, the European Court of Human Rights (ECtHR) attributed the primary responsibility for actions undertaken in the implementation of the mandate to the UNSC. The ECtHR declared the claims of Behrami and Saramati against NATO troop-contributing countries inadmissible. The court

argued that 'KFOR was exercising lawfully delegated Chapter VII powers of the UNSC' and that any conditions on the implementation of UNSC-mandated operations had to be imposed by the UNSC himself (para. 141, 151). The UN strongly criticized this decision and argued that the attribution of responsibility depended on who exercised the operational command and control (GA 2011).

Nation-states, however, also had their obligations and responsibilities as it became clear from domestic court decisions. Several troop-contributing countries, including Denmark,[16] the UK[17] and Canada,[18] were confronted with claims before courts against detentions that they undertook in the context of peace operations (Winkler 2010, p. 492). In these cases, courts not only had to deal with detention practices in peace operations as such, but especially pointed to remaining responsibilities in the cases where detainees were transferred to national authorities. So far, there had been no rule of law provisions that could guide detainee transfers. Instead, each of the troop-contributing states concluded individual memoranda of understanding with the host-state government, as they did, for example, in Afghanistan. Other transfers, such as to the US forces operating in Afghanistan, were under no guidance at all. This legal uncertainty prompted the Danish government to multilaterally identify the core framework applicable to detentions (Winkler 2010, p. 492).

The role of courts as accountability holders therefore was crucial for the Copenhagen Process to be initiated. The sanctioning power of domestic courts in particular was anticipated by the initiators, whose main concern was to clarify the legal framework and the procedural safeguards for detentions and detainee transfers. If not several countries engaging in peace operations under NATO leadership had been facing court cases, the dynamic in which a multilateral process could lead to the adoption of some rule of law components for detentions would certainly not have been possible.

Conclusion

This chapter set out to shed light on the influence of accountability dynamics on the rule of law development in the context of multi-level governance and legal pluralism. The complex governance structures of peacekeeping and global legal pluralism have made traditional vertical accountability difficult. The various implementing actors operate in far distance from the mandating authority, the UNSC and under a variety of different legal

frameworks. These prolonged delegation chains have created a lack of the rule of law regarding the implementation of peace operations, in particular concerning detentions.

Nevertheless, the complete absence of a rule of law for detentions in multilateral peace operations has been addressed by several efforts during the last 15 years that attempted from within and outside the UN to overcome this lacuna. The analysis has shown how alternative, pluralist accountability dynamics contributed to the development of an international rule of law. The standard-setting activities of the ICRC provided valuable input for the development of the UN Secretary-General's bulletin on the observance of IHL obligations for UN forces of 1999 and the recently developed DPKO/DFS SOP on Detention in United Nations Peace Operations. The standard setting and monitoring activities undertaken by the Ombudsperson in Kosovo and by regional organizations, such as the OSCE and the CoE, were the driving forces behind the creation of detention review panels, and ultimately the Human Rights Advisory Panel. And lastly, the sanctioning effects of domestic courts have contributed to the initiation of the Copenhagen Process on the Handling of Detainees in 2007. The findings of the analysis thus suggest that the evolution of the rule of law does not necessarily depend on the exclusive action of (powerful) states. Instead, the pluralist accountability dynamics that involved a variety of actors on different levels, be it NGOs, regional organizations or courts, can contribute to the development of the rule of law.

In sum, this reveals how pluralist accountability contributed to an emerging rule of law for detentions in the context of multi-level governance and global legal pluralism. While complex governance structures and pluralist legal frameworks have hindered effective vertical accountability as the traditional limitation of the exercise of power in peacekeeping detentions, they nevertheless enable a broader range of actors to become involved as accountability holders. This rendered the rule of law development a more participatory and transparent process, leading to a more coherent legal framework. As the complexity of current governance systems remains high, pluralist accountability can thus be considered an important alternative to cope with the blurred lines of responsibility in prolonged delegation chains. This shows how multi-level governance and global legal pluralism can, in fact, enhance the rule of law through pluralist accountability rather than through traditional vertical accountability.

A quick assessment however is due in order to evaluate the emerging rule of law for detentions with regard to the question of soft or hard law.

If the minimal conception of the rule of law requires that the execution of detentions is bound by legal principles, how much law is in there in terms of binding international rules? Regarding the content and the quality of these provisions, we have to assess that IHL provisions by now have become a core component. However, procedural aspects such as the right to habeas corpus have not yet been accepted to the same degree.[19] Each of the review mechanisms suffered from a lack of independence. Moreover, while the Human Rights Advisory Panel in Kosovo has been a substantial step forward, it has yet to be replicated in other operations. In the context of multilateral peace operations, where far-ranging immunity regulations for the implementing actors hinder any domestic judicial review, guaranteeing the right to habeas corpus remains one of the core challenges. The Copenhagen Process Principles and Guidelines finally are completely non-binding and do not address questions of independent judicial review. The only binding general document that applies to all peace operations therefore remains the Secretary-General's bulletin of 1999. It outlined key IHL obligations for UN forces, however with a scope of application that is rather limited if we take into consideration the nature of peace operations today. Regarding their implementation, the UN again depends on the respective troop-contributing countries to enforce the regulations of the bulletin. Furthermore, the lack of comprehensive binding regulations and independent review mechanisms still constitutes a weak spot in rule of law framework for detentions. While soft law is better than no law, only the future will show whether these predominantly soft law regulations will lead to the sufficient protection of the rights of detainees or will have to be turned into hard law in order to be effective. Despite these limitations, however, the promotion of 'the rule of law at the international level' has arrived on the UN's agenda as a consequence of the accountability dynamics analysed in this study (GA 2009).

The analysis furthermore has revealed the variation in the effects of standard setting, monitoring and sanctioning activities. The standard setting and monitoring activities of actors with renowned legal expertise, such as the ICRC and the CoE, had quite significant effects on the development of rule of law standards and review mechanisms. The UN as the implementing organization responded to the accountability dynamics by enhancing the rule of law both on the global level, as well as with regard to an individual mission. These findings support existing research on the role of epistemic communities and highlight their influence as accountability holders (Adler and Haas 1992).

In contrast to the developments within the context of the UN, however, the multilateral efforts outside of the organization as promoted by the Danish government did not experience a comparable evolution so far. Sanctioning by domestic courts had a too weak effect to produce a binding rule of law framework within the Copenhagen Process. In order for states to adopt binding standards and review mechanisms, pluralist accountability dynamics alone were not sufficient. Thus, while accountability did play a role for the emergence of an international rule of law for detentions, the quality of the regulations might have been greater if supported by a powerful state or a strong transnational advocacy coalition (Abbott et al. 2000, pp. 450–52).

This indicates some potential scope conditions for the implications of multi-level governance and legal pluralism for the rule of law in detentions. The length of the delegation chain as well the position of the respective actors within this chain certainly has an impact on the limitation of the power of detaining authorities. The great distance between the implementing actors and the mandating authority in peacekeeping renders vertical mechanisms of oversight and control rather difficult. With lines of responsibilities becoming blurred, an effective rule of law for detentions in peace operations requires authoritative actors with strong capacities for standard setting, monitoring and sanctioning, who act as accountability holders outside of the original delegation relationship. Furthermore, for an effective rule of law to evolve through pluralist accountability, the standards introduced by external accountability holders need to be compatible with other existing powerful norms, such as sovereignty or security in the case of detentions. As any accountability relationship depends on the mutual recognition of accountability holder and accountant, the rule of law standards for detentions need to resonate with the overall normative framework that characterizes the environment of the detaining authorities. However, these claims about potential scope conditions remain very tentative as this study focused on the case of a rule of law development for detentions in peacekeeping only. One could nevertheless imagine the same dynamics leading to an emerging rule of law in global economic governance or global development cooperation, for example. Further comparative studies are thus needed in order to substantiate these claims also with regard to other areas of multi-level governance.

Notes

1. Throughout this chapter, the terms 'multilateral peace operation' or 'peace operation' refer to UN-mandated operations. This definition leaves out cases of detention in the context of operations by coalitions of states that were not mandated by the UN Security Council, such as the Operation Enduring Freedom in Afghanistan or secret detentions conducted by the Central Intelligence Agency and cooperating partners across Europe.
2. The term 'implementing actors' in this chapter refers to the actors undertaking arrests and detentions.
3. According the UN definition, the rule of law as is defined as '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' (Report of the Secretary-General 2004: The rule of law and transitional justice in conflict and post-conflict societies).
4. Customary international law principles. http://www.icrc.org/customary-ihl/eng/docs/v1_cha_chapter37, date accessed 28 May 2013.
5. Convention on the Safety of United Nations and Associated Personnel. http://www.un.org/law/cod/safety.htm, date accessed 28 May 2013.
6. Author's telephone interview with an ICRC official, date accessed 18 September 2012.
7. See http://repository.un.org/handle/11176/89521?show=full, date accessed 8 October 2015.
8. These restrictions were strongly criticized as a 'demise' of the panel (Visoka 2012, p. 200; Momirov 2012, p. 11). This criticism however does not take into account that UNMIK was in a transition phase, transferring authority to European Union operation EULEX and that EULEX itself established a similar panel based on UNMIK's experiences.
9. In Kosovo and Afghanistan, moreover, the USA unilaterally undertook detentions in the context of operations which were outside of the UN Security Council's mandate.
10. United Nations Assistance Mission in Afghanistan and the UN Office of the High Commissioner for Human Rights (OHCHR): Treatment of Conflict-Related Detainees in Afghan Custody, October 2011, Kabul, Afghanistan.
11. Author's interview with an ICRC official, 19 September 2012.
12. Author's interview with an ICRC official, 19 September 2012.
13. Given that there are too few cases in which rule of law developments can be observed on the mission level, the emergence of rule of law provisions in Kosovo cannot be easily generalized.

14. Author's interview with Marek Nowicki, 28 November 2012.
15. The important role of courts in strengthening the evolution of an international rule of law is also emphasized in the chapters by Heupel and Bexell in this volume.
16. Judgement of the Danish Supreme Court, case no. B-1627-07, *Ghousouallah Tarin* v. *Ministry of Defense*.
17. *Sec'y of State for For. and Commw. Aff. & Another* v. *Yunus Rahmatullah*, [2012] UKSC 48; and *R (on the Application of Al Jedda) (FC)* v. *Sec'y of State for Def.* [2007] UKHL 58.
18. While the Canadian court ruled that the claim was not admissible due to the lack of extra-territorial application of the Canadian Charter (*Amnesty International* v. *Canada*), the hearings were accompanied by great public attention and an intense debate about the responsibility of the Canadian forces for torture committed by Afghan Security Forces after detainees had been transferred to the latter.
19. This might be due to the fact that international human rights law has for a long time been regarded as distinct from situations of armed conflict where only IHL would apply.

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Human Rights Protection in International Organizations in the Era of Multi-level Governance and Legal Pluralism

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Introduction

The duty to protect human rights has traditionally been associated with the state. As other sites of authority have emerged beyond the state, however, normative expectations have traveled upward, too. Consequently, today international organizations (IOs) too are expected to abide by the rule of law, understood as exercise of power bound by formal and substantive legal principles—or by human rights standards, specifically (Clapham 2006). Responding to this expectation, IOs across different issue areas have begun to develop human rights safeguards. The European Union (EU), the pioneer in this regard, has committed itself to the Charter of Fundamental Rights and grants citizens the right to have its Court of Justice assess whether EU policies conform to the Charter.[1] In other IOs, less advanced provisions have emerged. The Office of the United Nations High Commissioner for Refugees, for instance, has given itself a Code of Conduct and allows refugees to file complaints on the determination of their status.[2]

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Establishing human rights protection in IOs is a contested political process. Binding IOs to global administrative law[3] and enabling citizens to hold them to account for human rights violations constrains their autonomy. This provokes resistance not only from IO bureaucracies but also from states which use IOs to advance their interests, diffuse norms or launder policies. Rather than being a carefully designed response to functional needs, the institutionalization of human rights protection in IOs tends to go 'through cycles of conflict and reform (during which) concessions may cumulate' (Fox and Brown 2000, p. 12).

In today's post-Westphalian world, these 'cycles of conflict and reform' take place in the context of multi-level governance and legal pluralism. This context can have detrimental effects on the rule of law as it enables states to delegate competences to international authorities to which rule of law standards apply to a lesser extent. This phenomenon is alluded to when scholars argue that the heterarchical structure of global governance, and the concomitant legal pluralism, may weaken the rule of law and, more specifically, the protection of human rights (Krisch 2010, p. 23; Isiksel and Thies 2013, pp. 157–8). Yet, multi-level governance and legal pluralism also open up spaces for contestation. When authority is dispersed across different power holders, actors whose rights are violated may find more points of access to challenge existing policies and submit complaints. Moreover, legal pluralism facilitates forum shopping in the sense that aggrieved individuals may try to invoke the norms embodied in those legal orders most suitable for their cause (see Krisch 2010, p. 282; Isiksel and Thies 2013, pp. 157–8; Rosenau 2000).

While we know that the institutionalization of the rule of law, be it on the national or the global level, is a drawn-out and disputed process (Tamanaha 2004), there is little theory-guided research on the pathways that lead to human rights protection in IOs and their limitations. Nor do we have insights into the implications of multi-level governance and legal pluralism for the establishment of human rights safeguards in IOs. This chapter intends to explore these dynamics on the basis of two brief case studies on World Bank lending and EU sanctions policy. The method employed for this purpose is process tracing. The cases have been selected because they cover different issue areas and because in both comparably developed human rights protection provisions have emerged. Both cases are also particularly relevant in that they had implications for related developments in other IOs.

The chapter arrives at the following findings: First, the case studies provide insights into the *implications of multi-level governance and legal pluralism for the rule of law*. In both cases, multi-level governance and legal pluralism initially proved detrimental to the rule of law. Indeed, in both cases, IO member states at first delegated competences to an IO without committing it to human rights protection and creating reliable accountability mechanisms. This, moreover, added to the incoherence of international law, given that specific policies (development lending and sanctions) were subject to different human rights safeguards, depending on whether they were multilateral policies or policies by individual states. Yet, once IOs' human rights violations became salient, concerned actors harnessed the opportunities for contestation provided by multi-level governance and legal pluralism. They skillfully exploited the fact that multi-level governance and legal pluralism provide diverse access points and different legal orders to challenge IOs and that way put significant pressure on the two IOs in question. Finally, both the World Bank and the EU introduced human rights safeguards, moving over time gradually from soft law toward hard law regulation. As a consequence, the coherence of the law was enhanced to some extent, given that the rift between the comparably developed human rights safeguards that applied to national policies and the less developed ones that applied to multilateral policies gradually shrank. Multi-level governance and legal pluralism thus have no uniform effect on the rule of law. The case studies rather suggest that whether the effects are detrimental or beneficial depends on specific scope conditions, namely the power of the reform-oriented actors, the routines that have developed and the presence of domestic or international scripts that provide inspiration for reforms.

Second, there is *no single pathway* that leads to human rights protection in IOs. In the World Bank, reforms were largely the result of hegemonic lawmaking in that the United States of America (USA) pressured the Bank to introduce social and environmental safeguards and an accountability mechanism. Reforms in the EU were largely due to judicial lawmaking inasmuch as the Court of Justice of the EU (CJEU) pushed the Council of the EU to introduce due-process protection in its sanctions policy. That different pathways were chosen was consequential, in part, on the respective vulnerabilities of the IOs. There is no court with jurisdiction over the World Bank, but the Bank grants formal privileges to the USA and is thus vulnerable to hegemonic lawmaking. In EU sanctions policy, no state enjoys formal privileges,

but the presence of the CJEU, a powerful court with jurisdiction over the EU, makes it vulnerable to judicial lawmaking. That the IOs violated different rights also influenced the choice of pathways. Non-governmental organizations (NGOs) could mobilize the USA to put pressure on the World Bank because it was comparatively easy to create empathy with poor indigenous peoples, while courts tended to be reluctant to issue judgments on the violation of social, economic or cultural rights. Creating empathy with blacklisted terror suspects, on the other hand, was more challenging, though it was easier to find courts that accepted complaints on the violation of due-process rights.

Third, although different pathways were involved, both cases display a number of possibly generalizable similarities, related to the *constraints* faced by the actors who took them. In both cases, it was civil society that laid out the pathways in the first place. While the initiative of the USA and the CJEU was ultimately decisive, neither hegemonic nor judicial lawmaking would have taken off at all had not NGOs mobilized the US Congress and had not private litigants, often supported by NGOs with an interest in strategic litigation, filed lawsuits. Once the USA and the court had been stirred into action, they both faced opposition from actors who rejected rules that constrained their scope of action. They therefore took care to find allies in the IOs—or at least made sure that their demands did not diverge too far from the positions other relevant actors held. Once human rights protection had been institutionalized, actors in the IOs found ways to dilute its impact. As for implementation, staff and borrowing states in the case of the World Bank and important member states in the case of the EU tended to opt for only the most obvious measures. When the rules, at the behest of the USA and the court respectively, had eventually been refined in such a way that implementation had to be taken seriously, Bank lending and EU sanctions policy were only restructured so far, and the scope of policies to which human rights protection provisions applied remained limited.

The chapter unfolds as follows. The second section draws on the concept of hegemonic lawmaking to trace how the US Congress pushed for environmental and social safeguards and a complaint mechanism in the World Bank. The third uses the concept of judicial lawmaking to show how the CJEU prompted the Council of the EU to introduce basic due-process protection in EU sanctions policy. The fourth draws conclusions regarding the implications of multi-level governance and legal pluralism for the rule of law. The last section summarizes the findings and provides a look ahead.

Hegemonic Lawmaking and Human Rights Protection in World Bank Lending

Hegemonic Lawmaking

International law cannot be fully controlled by powerful states, but it is always shaped by power relations. International law scholars have thus regarded international law as an 'instrument of stabilization … (that) allows dominant states to project their visions of world order into the future' (Krisch 2005, p. 377). Dominant states have developed strategies to use international law to their advantage, such as uploading domestic law to the international level, instituting legal rules that only bind other actors but not themselves or diffusing soft law (Krisch 2005). International law has also been described as a 'hegemonic technique' and as a 'process of articulating political preferences into legal claims that cannot be detached from the conditions of political contestation in which they are made' (Koskenniemi 2004, p. 198). Similarly, the term 'hegemonic international law' refers to the hegemon using international law to promote new, usually indeterminate, legal rules and interpret existing rules in accordance with its interests (Alvarez 2003; see also Goldsmith and Posner 2005). In International Relations scholarship, realists hold that international institutions reflect the distribution of power (Mearsheimer 1994), while institutionalists stress that dominant states like the USA after World War II drew on their superior power resources to establish rules, principles and institutions to create and maintain a world order that reflects their exceptional status (Ikenberry 2000).

Dominant states can influence international law in general, and the legal rules embodied in international institutions more specifically, by drawing on different power resources (see Barnett and Duvall 2005). They make use of institutional power when they benefit from favorable decision-making rules to shape international law. In many IOs, the USA enjoys institutional privileges, such as weighted voting rules (International Monetary Fund), permanent membership and the veto right (UN Security Council) or the prerogative to appoint the President (World Bank). The USA also possesses compulsory power as it can create material incentives for other actors to bow to its beliefs or interests. For instance, it has frequently tried to impose reforms on the UN system by making appropriations conditional on the fulfillment of its demands (Alvarez 1996). Finally, the USA possesses productive power in that it can set the agenda and

produce meanings that are then embodied in international law. Consider the soft law standards on human trafficking that the North Atlantic Treaty Organization established after the USA persuaded other states of its importance (Hirschmann 2016).

Nonetheless, there are limits to hegemonic lawmaking. Autopoietic law theory with its emphasis on legal autonomy and self-referentiality assumes that 'the autopoietic closure sets effective limits to the political instrumentalization of law' (Teubner 1987, p. 4). Moreover, legal rules should be considered legitimate by the actors that are bound by them. Legitimate rules have a greater compliance pull than rules that are perceived to be unfair because of their substance or because they came into existence by unfair procedures (Franck 1990). Hence, the dominant state must not act like a bully or deviate too far from the beliefs and interests of other relevant actors. When building the post-World War II order, the USA therefore institutionalized restraints to its power (Ikenberry 2000). If other states or actors in IOs question the legitimacy of hegemonic lawmaking, they can soft-balance against the hegemon (Pape 2005). They can also try to refuse to implement the rules or curtail their scope of application.

US Hegemony at the World Bank

The USA is the World Bank's most powerful member. It can draw on various power resources to shape the Bank's administrative law. The USA can shape the ideology that guides the World Bank as the majority of its economists are trained at North American universities and its President always has US citizenship. It also keeps an eye on who occupies other 'ideas-controlling' positions (Wade 2002). The World Bank's institutional design also privileges the USA. Based on its provision of 16.8% of the budget of the International Bank of Reconstruction and Development (IBRD), the USA holds 15.9% of all votes on the Board of Directors.[4] Moreover, although the USA cannot veto project funding by the Board, during the Cold War decisions frequently reflected US geostrategic interests (Gwin 1994). And the USA can tie conditions to increases in the capital of the IBRD and replenishments to the International Development Association (IDA).

Congress is a central player in US–World Bank relations. The US Constitution empowers Congress to enact legislation which guides foreign policy and authorizes US contributions to international institutions. Congress has made use of its power of the purse to influence the World

Bank since the early 1980s. It has provided policy guidance to, and placed voting restrictions on, the US Executive Director at the World Bank. It has repeatedly threatened to withhold funding to the IDA and the IBRD unless specific conditions were met—and in some cases followed through with its threats (Ascher 1992, pp. 125–26). Congress's strong position has also provided a gateway for NGOs. In fact, many of the conditions Congress tied to US financial contributions reflected the positions of lobby groups (Woods 2003, p. 112).

There are also limits to the influence of the USA at the World Bank. To fulfill its purpose, the World Bank must not be perceived as fully US-controlled. Too rigorous interventions have been regarded as illegitimate (see Woods 2003), and it has proven easier for the USA to assert its interests if it is supported by other important donors (Gwin 1994, p. 270). Even when the USA successfully uploaded its agenda to the World Bank, Bank management and staff often managed to weaken its impact. Indeed, implementation of reforms at the World Bank was often hampered by deep-rooted bureaucratic interests and the Bank's specific bureaucratic culture (Ascher 1992).

Safeguards, Accountability and US Hegemonic Lawmaking at the World Bank

The World Bank offers assistance to developing countries to support development and reduce poverty. Today, the Bank funds specific economic and social development projects (investment operations) and provides budget support for policy and institutional reforms (development policy operations).[5] For many years, the World Bank had no provisions that would have bound it to ensure that it did no harm. Consequently, Bank-funded projects frequently produced negative externalities such as environmental damage or uncompensated resettlement that violated social, economic and cultural rights of indigenous peoples and other vulnerable groups (Clark 2002).

Prior to the mid-1980s, the World Bank did not have a coherent social and environmental policy, but it had taken first steps. In the 1950s and 1960s, the Bank included requirements for environmental protection in loan agreements for some mining projects (Wade 1997, p. 615). During the 1970s, it drafted non-binding general guidelines. Operational Policy Memorandum (OPM) 2.20 *Project Appraisal* (1971) provided for an assessment of the projects' potential impact on the environment and the health and well-being of civilians, and, as always, the Bank worked

with a broad notion of the environment that also included various social issues. It also created the Office of Environmental Affairs (OEA). This, however, was tiny and normally waved project proposals through late in the project cycle (Nielson and Tierney 2003, p. 253). In the 1980s, further general guidelines were developed. The Bank adopted Operational Manual Statement (OMS) 2.33 *Social Issues Associated with Involuntary Resettlement in Bank-Financed Projects* (1980), which stipulated that the relocated population had to be compensated. It established OMS 2.34 *Tribal People in Bank-Financed Projects* (1982), which demanded appropriate safeguards to mitigate the encroachment on territories inhabited by indigenous peoples. OMS 2.36 *Environmental Aspects of Bank Work* (1984) banned the Bank from funding projects with negative social and environmental externalities if it did not provide for mitigating measures. Finally, OPM 2.20 was replaced by OMS 2.20 *Project Appraisal* (1984), which not only was considered more imperative but also explicitly required an assessment of the possible effects of projects on 'sociological aspects' including poverty alleviation and the violation of cultural rights. All in all, these were important first steps. Yet, their impact was limited because Bank management did not provide for sufficient capacity building to facilitate implementation and Bank staff did not treat the guidelines as imperative.

These first reforms were *not* instituted at the behest of the USA (Bowles and Kormos 1995, p. 782). The creation of the OEA and the related hiring of some social scientists are attributed to the pro-environment *zeitgeist* and the initiative of President McNamara (Wade 1997, p. 618). Other innovations, such as the OMS on resettlement and indigenous people, are ascribed to a combination of external and internal drivers: NGOs and church groups documented the negative impact of specific Bank projects (Wade 1997, p. 631) and the social scientists hired by McNamara took the initiative and began to draft no-harm policies (Francis and Jacobs 1999, p. 342).

For a long time, the US Treasury Department and the US Executive Director at the World Bank ignored the social and environmental aspects of lending. This changed in 1983 when Congress started to push for reforms. Congress had been mobilized by NGOs that had identified Congress as the 'chink in the World Bank's armor' and a means to harness the material power of the USA (Park 2010, p. 67). NGOs thus harnessed the policy space provided by multi-level governance and legal pluralism, and turned to the lower level to indirectly influence policy-making in the World Bank. In the process, Northern, mostly Washington-based NGOs with access to Congress collaborated with Southern NGOs, which provided information

and legitimacy (Wirth 2000). NGOs condemned selected projects and drew the attention of the US media to the Bank's most obvious failures. They chose the Polonoroeste project, a road project in the Brazilian Amazon, which involved massive environmental destruction and violation of the rights of indigenous peoples (Keck and Sikkink 1998, pp. 135–50), and were successful in stirring Congress into action because they found bipartisan support among Republicans and Democrats. Congress applied different strategies to push for reforms at the World Bank. It held hearings to set the agenda. Subsequently, it adopted policy guidance and imposed limitations on the Executive Director as regarded voting decisions on specific projects and broader reforms. Eventually, Congress established statutory conditions for US payments to the World Bank (Park 2010, pp. 64–72).

The World Bank took the first serious measures to assure that its projects did not violate human rights between 1987 and 1991. This time, Congress activism was the main driving force. In 1987, the World Bank became exceptionally vulnerable to pressure from Congress because not only was the regular IDA replenishment due but the Bank was also asking member states for a capital increase to the IBRD to respond to the Latin American debt crisis. Congress could, therefore, not only tie conditions to its IDA appropriations but also make its consent to the IBRD capital increase dependent on the Bank being responsive to its demands. Under this pressure, the Treasury agreed to articulate Congress's demands to the World Bank and the Bank caved in and created an Environmental Department (ED) and regional environmental divisions (REDs) (1987). The ED had more staff than its predecessor, the OEA, and was authorized to conduct an obligatory review of each project. The REDs had sign-off authority for environmental assessment of pro-jects (Wade 1997, pp. 668–81). In 1989, the Bank adopted Operational Directive (OD) 4.00 (Annex A) *Environmental Assessment* (1989), which made the assessment of the social and environmental impact of projects mandatory and provided detailed guidelines for the assessment process.

Congress continued to lobby for reforms that would enhance the transparency of the World Bank. In 1989, it enacted the Development and Finance Act including the Pelosi Amendment that prohibited the US Directors of multilateral development banks from voting for a loan if the environmental impact assessment had not been made public.[6] Thereupon, the Treasury started negotiations with Bank management to fathom how Bank rules could be adapted to ensure that the US institutions involved would comply with US law (Bowles and Kormos 1995, pp. 826–28).

Eventually, the Bank replaced OD 4.00 with OD 4.01 *Environmental Assessment* (1991) and permitted the release of the environmental assessments to the Executive Directors.

The new standards looked good on paper—but implementation was clearly deficient. Borrowing countries opposed conditionalities and partly viewed the standards as Western imperialism. Bank staff was reluctant to thoroughly apply the standards because of conflicting career incentives. There were also few incentives for strict implementation because noncompliance was largely inconsequential as affected individuals or communities could not hold the World Bank to account for implementation failures (Rich 1990).

The establishment of such an accountability mechanism—and hence the introduction of a further element typically associated with hard law—was, therefore, the next demand Congress voiced. Again, NGOs set the agenda by testifying before Congress and providing proposals for the mechanism's institutional design. This time, NGOs denounced the Narmada project, a dam project in India that involved the forcible relocation of a large number of farmers and blatantly violated Bank safeguard policies. Repeating the winning strategy of the past, Congress tied its consent to the upcoming IDA replenishment to the creation of an accountability mechanism. In 1993, in an unprecedented move, Congress authorized funding for only two instead of three years and threatened to withhold the final tranche. The World Bank managing director then met with the chair of the relevant House Subcommittee and the Treasury Department to discuss the issue. Bank management even leaked a proposal for an accountability mechanism to Congress before it presented it to the Board, which Congress then discussed with NGOs. Eventually, in 1993, the Bank established the Inspection Panel (IP) whose design and mandate reflected many recommendations from Congress (Udall 2000; Wade 1997, pp. 687–730).

The creation of the IP was a remarkable step because never before had an IO introduced a mechanism that enabled individuals to hold it to account. The IP accepts complaints from citizens who believe that their rights have been violated because the Bank has failed to comply with its operational policies. The IP is not an independent court but a quasi-judicial body. Bank management decides whether an investigation is to be initiated. At the end of the investigation, the IP provides an assessment and, where applicable, recommends remedial measures; management is free to decide, however, if it follows the Panel's recommendations.[7]

Since the mid-1990s, most changes have weakened rather than strengthened human rights protection in World Bank lending. To immunize projects against Panel proceedings, the Board has made a number of requirements that had hitherto been binding non-binding, thus to some extent shifting from hard law back to soft law (Lawrence 2005). At the urging of important borrower countries like China, India and Brazil, the Board has also created new instruments, like the Country Systems approach and the Programs-for-Results (P4R) Financing, that allowed borrowing countries to apply their own environmental and social standards.[8] Congress occasionally flexed its muscles. It campaigned for the IP's mandate to be slightly strengthened. In also enforced a ceiling for P4R projects, once again by making IDA replenishment conditional upon the fulfillment of its demand (Alexander 2012).[9] Overall, however, pressure from Congress has decreased. The end of bipartisanship in Congress complicated NGO mobilization, while many NGOs turned to other topics anyway. The growing power of China and other important borrowers also dampened the clout of US hegemonic lawmaking. As important borrowing countries increasingly had access to credits from private sources, their bargaining position at the World Bank was strengthened,[10] and this allowed them to use the opportunities provided by multi-level governance and legal pluralism for their own purposes.

Overall, the impact of the USA on the institutionalization of human rights protection in the World Bank is an example of hegemonic lawmaking. The USA influenced the evolution of administrative law at the Bank so as to make it reflect its own values and interests. It drew upon its power resources, particularly its ability to link its demands to the approval of financial contributions, to direct the course of the World Bank. In line with this concept, the USA lobbied for legal rules that would bind others but not itself—given that the Bank's safeguard policies and the IP bind it, and indirectly its borrowers, but not donors. Finally, in line with expectations inherent in the multi-level governance concept, the USA uploaded some of its domestic law to the international level. The rules the World Bank enacted relating to environmental assessment, for instance, resembled those that the USA had earlier established domestically to guide funding decisions by US government agencies (Wade 1997, pp. 619, 633).

As argued above, hegemonic lawmaking faces limitations—and these limitations have constrained the US freedom of movement. Without the NGO network, the interests of Congress and Treasury would not have converged. Resistance from other World Bank members and Bank

management and staff has been a constraining factor, too. Indeed, it was easier for the USA to have its demands accepted when it was supported by other important donors (Wirth 2000, p. 56) and internal advocacy in the World Bank was also a crucial factor (O'Brien et al. 2000, p. 131). Moreover, Bank management and staff and member states with conflicting interests diluted the impact of hegemonic lawmaking. They resisted the demands of the USA until the costs of doing so became prohibitively high. Once standards were established, they watered down their impact by neglecting implementation—because they took issue with the substance of the rules, because they resented the bullying behavior of the USA, or on account of personal considerations. At times, implementation failures were so widespread that the Bank's safeguard policies were labeled 'greenspeak' (Rich 1990, p. 308) and 'organized hypocrisy' (Weaver 2008). Once implementation could no longer be dismissed, the standards were revised and their scope of application restricted.

Judicial Lawmaking and Human Rights Protection in EU Sanctions Policy

Judicial Lawmaking[11]

Judicial lawmaking refers to lawmaking by or with judges at the expense of the autonomy of the legislature and the executive (Stone Sweet 2000). While judicial lawmaking has long been discussed with regard to national courts, the concept has recently also been applied to international courts and quasi-judicial bodies. For instance, the European Court of Human Rights, the World Trade Organization's dispute settlement body and international criminal tribunals have all changed legal doctrine when issuing judgments on particular cases (see, e.g. Cichowski 2006). An uncontroversial form of judicial lawmaking is gap-filling, which is often unavoidable as legislatures frequently do not specify rules or their realm of application in detail. A more controversial form is judicial activism, which involves judges deliberately transforming the law (Wessel 2006).

There are different explanations for judicial lawmaking. One explanation bears on the character of law. Law never gives definite direction but needs judges who can apply it to concrete situations and clarify the relation between conflicting legal norms (Shapiro 1981). Another explanation emphasizes the role of states. States delegate competences to courts for various reasons, including the need for independent institutions to decide

on disputes. For courts to take on this role, states have to create agents, or even trustees, that are difficult to control. Cutting back material support or non-compliance with court judgments is costly, as states need functioning courts and care about their own reputation. Recontracting is likewise difficult, given that consensus is usually required to alter the founding treaties of international courts (Alter 2008).

The power of international courts is not unlimited, though. Judges can only issue judgments if plaintiffs file lawsuits (Alter and Helfer 2010). They also depend on states accepting their authority. If international courts fail to present their judgments as consistent with extant legislation and their action in line with their mandates, they may be perceived as illegitimate. If they regularly issue rulings that run counter to the interests of powerful states, they antagonize them. Hence, while it is difficult for states to directly rein international courts in, there are more subtle mechanisms that constrain courts' freedom to act *ex ante* (see Kelemen 2001; Ginsburg 2005). Moreover, if courts issue controversial judgments, states rarely reject implementation outright—but they can protract implementation or interpret the judgments in such a way that the intention of the judges is diluted.

Judicial Lawmaking by the Court of Justice of the EU[12]

The CJEU is the most powerful international court in history. The Court, or more precisely its highest instance, the European Court of Justice (ECJ), is also the court that is usually referred to as example of an international court engaging in judicial lawmaking. The ECJ reviews the legality of the decisions of EU institutions, it controls whether EU members act in conformity with their treaty obligations and it interprets EU law at the request of national courts. It is accessible not only to EU institutions and members but also to private litigants.

The ECJ has, over time, immensely expanded its competences. By means of case law and against the wishes of powerful EU members, it transformed the Treaty of Rome into a supranational constitution that conferred enforceable rights on individuals (Burley and Mattli 1993). In the early 1960s, the court created a decentralized enforcement system that authorized national courts to assess, at the behest of citizens, the conformity of national law with the law of the European Community (EC). In the early 1990s, the ECJ expanded the state liability principle and empowered individuals whose rights had been violated by EU members

to demand compensation (Tallberg 2000a). The court also institutionalized human rights in the EC/EU. Although the EC had not yet bound itself to a human rights catalogue, the ECJ determined that human rights were general principles of EC law. Moreover, even though the court did not have a mandate to review whether EC/EU legislation complied with human rights law, it empowered itself to do so (Schimmelfennig 2006).

EU member states found few ways of arresting the court. The ECJ immunized itself against the allegation that it overstepped its mandate by carefully relating new legal doctrine to extant law (Tallberg 2000b). National courts reinforced the authority of the ECJ when they enforced ECJ rulings against their own governments (Alter 1998). Some states temporarily responded with non-compliance; however, non-compliance tended to be costly (Tallberg 2000a). Most importantly, there was no consensus among EC/EU members that ECJ activism was undesirable. Weaker states tended to welcome a strong court to balance powerful states, whereas powerful states tended to be wary of an activist court. The threat of recontracting was thus not available as a means to rein in the ECJ (Alter 1998).

Due-Process Protection and Judicial Lawmaking by the Court of Justice of the EU

Common EU sanctions policy was launched in the early 1990s. Learning from the UN's comprehensive trade sanctions against Iraq that severely harmed the Iraqi population, the EU from the outset only applied targeted sanctions, that is, sanctions that single out specific individuals, groups, entities, commodities or sectors. The blacklisting of parties whose funds were frozen and travel restricted entailed another set of problems, however: the violation of due-process rights.

Blacklisting began to be used in the EU in the second half of the 1990s. It was applied to deal with terrorism, the proliferation of weapons of mass destruction, massive human rights abuses and internal crises.[13] For several years, there were only fragmentary and vague guidelines on the protection of due-process rights in EU sanctions policy. Council guidelines of 2003 stated that sanctions had to respect human rights and rule of law principles but did not specify what that meant in practice.[14] A Best Practices document of 2006 was somewhat more specific in that it mentioned that states should share information on listing proposals; it also highlighted the importance of effective delisting procedures—but still failed to provide specific guidance.[15] Listed parties, therefore, had no right to be informed of the reasons for their listing and had to rely on states to hand in delisting requests on their behalf.

In light of the multi-level nature of EU sanctions policy, listed parties could try to start proceedings against listing decisions before both national and the European courts and thus had the opportunity to invoke different legal orders. On the one hand, they could challenge the listing suggestions of national authorities on the basis of national administrative complaints procedures and start proceedings in national courts against national nominations for EU blacklists. What the effect on EU decision-making would be was unclear, however. Listed parties could also, on the other hand, try to challenge their inclusion on EU blacklists at the Court of First Instance (CFI), the subordinate instance of the CJEU. The CFI did not consider itself competent to rule on the issue before 2006, however.

The first cases brought before national and European courts did not create any immediate pressure to act. They did, however, create a sense of awareness among states that EU sanctions policy might be jeopardized in the future unless basic due-process safeguards were introduced. At the same time, the EU faced not only court cases but also criticism from civil society. Academics and NGOs accused the EU of violating the human rights of listed parties (Cameron 2002) and activists practiced civil disobedience by transferring money to terror suspects (Sullivan and Hayes 2010, pp. 53–5). In response, the Council of the EU in 2004 created the Foreign Relations Counsellors Working Party (RELEX)/ Sanctions working group to develop best practices for its sanctions policy.[16] The group comprised each EU member's RELEX Counsellor, officials of national administrations and EU officials. It also exchanged ideas with external experts who gave advice on how due-process rights could be effectively safeguarded. In the absence of strong pressure, RELEX/Sanctions did not agree on important procedural innovations before 2007, however.

Finally, a key judgment by the CFI on the case *Organisation des Modjahedines du Peuple d'Iran* (*OMPI*) v. *Council of the European Union* of late 2006 forced the Council to move (Eckes 2008). The OMPI filed an action in 2002 against its inclusion in the EU list of terror suspects. In December 2006, the CFI decided that the EU's listing and delisting procedures underpinning its sanctions regime against terror suspects must respect the right to a fair hearing, the obligation to provide reasons for listing and the right to effective judicial protection. It also determined that the OMPI had not been given sufficient information on the reasons for its listing and was thus unable to file a lawsuit against the Council. The CFI therefore revoked the Council's most recent decision on the freezing of OMPI's assets.[17]

The judgment led EU members to consider significant reforms that would not only move EU regulation closer to hard law but also further the coherence of the law as it narrowed the gap between national and European standards for protecting the due-process rights of parties subjected to sanctions.[18] States were concerned that the CFI might take its judgment as a precedent and in the future regularly annul listing decisions (Guild 2008, p. 189). States also feared that lost court cases would send an image of weakness to targeted parties and undermine states' willingness to suggest names for the list—and they began to question the moral integrity of the EU's listing and delisting provisions.[19] The CFI's judgment gave rise to important reforms at several levels. Most immediately, it triggered reforms to the listing and delisting provisions of the sanctions regime against terror suspects under which OMPI had been listed.[20] But the EU also developed more specific general guidelines for listing and delisting. These stated explicitly that listed parties could hand in delisting requests that would be processed by the respective Council Working Groups. In addition, states were called upon to inform listed parties of the reasons for listings and the possibility of challenging listing decisions before the CFI.[21] The Council of the EU thus accepted that the CFI and the ECJ were competent to rule on the constitutional rules underpinning its sanctions policy and on specific delisting decisions: After the courts had offered themselves as a complaints mechanism, the EU hence *ex post* accepted their self-empowerment.

Since the important reforms of 2007, there have been further changes, mostly at the level of individual sanctions regimes. The exchange of information among states prior to listing has improved. Access to information for listed parties was also improved when the Council began to publish the reasons for listing in the Official Journal of the EU, and since 2009, it has notified every listed party by mail (Eriksson 2009). Furthermore, complaints provisions have been mainstreamed. The Lisbon Treaty (2009) explicitly confirms that parties listed under any sanctions regime have access to an administrative and a legalized complaints mechanism as described above.[22] In addition, it has become practice that the Council of the EU delists targeted parties if they win their case in appellate proceedings before national courts.

These gradual reforms were for the most part due to steady pressure from actual or looming judgments primarily in European courts (Eriksson 2009, pp. 22, 32). After the landmark OMPI judgment, more and more plaintiffs and also plaintiffs listed under non-terrorism-related sanctions

regimes, won their cases before the European courts so that EU sanctions policy as a whole was challenged. Several important judgments were issued on cases related to the EU's Côte d'Ivoire, Myanmar and Iran sanctions regimes. In *Nadiany Bamba* v. *Council of the EU*, the General Court, the successor to the CFI, declared invalid the Council's listing of Bamba and demanded that the Council lay open more detailed reasons to substantiate its listing decisions.[23] Similarly, in *Pye Phyo Tay Za* v. *Council of the EU*, the General Court abrogated the sanctions against the plaintiff and required that the Council provide specific evidence to justify listings.[24] Finally, in *Fulmen/Feredoun Mahmoudian* v. *Council of the EU*, the General Court decided that listing decisions must not be taken with reference to 'unsubstantiated allegations.'[25]

Simultaneously, the Council of the EU was also increasingly confronted with unwelcome judgments from national courts, because blacklisted parties not only started proceedings against their incorporation in EU blacklists before EU courts but also complained in national courts against the listing decisions of national bodies that preceded the EU decisions. The Court of Appeal in The Hague, for example, overturned a judgment of a Dutch court which had declared Mohamed El Morabit to be a member of a criminal organization which pursued terrorist aims. It thus nullified the decisions by national authorities on which El Morabit's inclusion on the EU blacklist had depended in the first place.[26] Similarly, the Court of Appeal of England and Wales decided in 2008 that OMPI was not 'concerned in terrorism' and thus annulled the national decision that had provided the basis for OMPI's listing by the Council of the EU.[27] In both cases, the Council of the EU responded to the judgments by delisting the plaintiff, acknowledging that the basis for listing had ceased to exist. Both cases are thus prime examples of how affected individuals availed themselves of the opportunities provided by multi-level governance and legal pluralism to claim their due-process rights. For in both cases individuals who considered themselves to be wrongfully listed by the EU turned downward to the domestic level and challenged domestic proposals for the EU list rather than challenging the EU directly and, as a consequence, not only effectuated their delisting but also furthered the binding of EU sanctions policy to the rule of law.

The sustained pressure from courts also empowered a range of different actors that advocated reliable human rights protection in EU sanctions policy. Concerned EU members, like, for instance, Sweden, could use the tailwind of the judgments to press for procedural reforms

in RELEX/Sanctions and Council debates.[28] Non-state actors also alluded to the judgments to put more weight behind their demands. Indeed, given that the authority of the EU courts was unquestioned among EU members, it was now easier to censure EU sanctions policy by pointing out that these courts found that the EU failed to abide by its core values.[29]

The evolution of due-process protection in EU sanctions policy is an example of judicial lawmaking. Without the European courts, reluctant states in the Council would not have agreed to introduce due-process safeguards. The rising number of court cases at first prompted the Council to create a forum, RELEX/Sanctions, to develop guidelines. Moreover, all important reforms to the listing and delisting procedures can be traced back to case law—first and foremost, the 2006 OMPI judgment. The CJEU was able to influence the evolution of global administrative law in EU sanctions policy because it had earlier expanded its competences and introduced individual rights protection in EU law. The court also benefitted from the ambiguity of law, in this case, the application of the right to due process to EU institutions. Finally, the court capitalized on the fact that EU members felt that its judgments ought to be respected even if they ran counter to their interests. States that entertained some doubt regarding strong due-process protection in EU sanctions policy, such as the UK, delayed the implementation of judgments, for instance, by urging other states to support appeals procedures, but they refrained from outright non-compliance.[30]

The development of due-process protection in EU sanctions policy also exhibits some of the constraints of judicial lawmaking. For several years, the EU courts were reluctant to go against the interests of important EU members and desisted from declaring themselves competent to rule on the complaints of listed parties. Later, they did not demand more than reform-oriented EU members wanted anyway. When the courts issued judgments that strengthened the rights of listed parties, states endeavored to dilute their impact. When implementing the judgments, the Council of the EU interpreted them in the least ambitious way possible. Consequently, implementation often failed to conform to what the courts had intended, so that subsequent judgments frequently concluded that rights were still violated. Once evolving case law had made clear that due-process rights had to be respected, the Council began to modify its sanctions policy in such a way that the scope of application of the new rules was limited. When parties increasingly won their court cases, the Legal Counsel of the

EU recommended to the Council that it consider scaling back blacklisting in favor of commodity and sector-wide sanctions as these were less vulnerable to legal challenges than individualized sanctions.[31] Current trends in EU sanctions policy indicate that the EU seems to be following the advice. Those who believe that the EU's listings and delisting procedures still violate due-process rights might welcome this trend. But commodity and sector-wide sanctions, especially if various measures are combined, tend to have negative externalities, too, in that they hurt the wider population—the very reason why the EU opted for targeted sanctions in the first place.

The Implications of Multi-level Governance and Legal Pluralism for Human Rights Protection in IOs

The case studies suggest important conclusions as regards the implications of multi-level governance and legal pluralism for the rule of law. In both cases, multi-level governance and legal pluralism initially had detrimental consequences for the rule of law. IO Member states capitalized on the loopholes multi-level governance provides and delegated competences to IOs without attaching effective human rights safeguards. The World Bank was empowered to provide funding to development projects without having to make sure that the projects did not violate economic and cultural rights and that aggrieved individuals had access to redress. The EU was authorized to adopt sanctions against individuals but did not have to ensure that their due-process rights were protected, that is, that listed parties were informed of what was held against them and were allowed to file a complaint. In doing so, IO member states also exploited the implications of legal pluralism, that is, that states and IOs are subject to different legal orders and that the rule of law as it applies to IOs tends to be less developed than the rule of law as it applies to states. That states delegated competences to IOs without creating effective human rights safeguards not only facilitated the violation of human rights by IOs, but furthermore weakened the coherence of the law, given that national policies were regulated by different human rights safeguards than those operated by the IOs. For instance, while the US Agency for International Development was already assessing in the late 1970s whether bilateral US development projects complied with environmental standards, no such assessments were being conducted by the World Bank at that time (Wade 1997, pp. 619, 633).

As the salience of IOs' human rights violations grew, the beneficial effects of multi-level governance and legal pluralism for the rule of law grew, too. Once awareness of IOs' rights violations had increased, concerned actors realized that the arrangements for multi-level governance and its grounding in different legal orders provided a variety of access points for contestation.[32] In the World Bank case, NGOs had first tried to mobilize the World Bank directly. When such efforts proved futile, they turned to the US Congress, assuming that the World Bank would be most vulnerable if they stirred into action its most important member state, thus making a detour and moving one level down (Aufderheide and Rich 1988, p. 306). In the EU case, OMPI, whose case proved decisive for moving the EU sanctions closer to conformity with rule of law standards, had first tried to challenge its designation as a terrorist association by the UK before a national administrative appeals body and before the High Court of England and Wales. When the challenges were repudiated, OMPI moved one level up, appealing the listing decision by the Council of the EU before the EU's CFI.[33] When the EU failed to permanently delist OMPI after the CFI's judgment, OMPI once more turned to the national level and brought about a judgment by the national appeals court that nullified its national designation as a terrorist organization.[34] That actors exploited the multi-level character of World Bank lending and EU sanctions policy and their embeddedness in multiple legal orders also had positive effects on the coherence of the law, given that the human rights safeguards that emerged in the IOs moved closer to those that had already been established at the domestic level (see e.g. OED 2001, p. 3).

When reform-oriented actors availed themselves of the opportunities provided by multi-level governance and legal pluralism, they also ensured that the soft law rules that first emerged in both IOs hardened over time. In the World Bank, the safeguards and related regulations that were created were at first vague and non-binding. Over time, interventions, especially those by the US Congress, compelled the World Bank to make at least some of its standards more precise and binding. Likewise, in the EU, the initial listing and delisting standards were formulated in such a way that they were open to different interpretations. Judgments by the ECJ, however, led the Council of the EU to specify its rules and accept that listed individuals had recourse to a court. All in all, the gradual emergence of hard law elements had a positive effect on the international rule of law. In the EU sanctions case, the protection of due-process rights of blacklisted individuals has significantly improved since EU guidelines have

become more precise and binding. In the World Bank case, the hardening of the Bank's guidelines has had a positive effect on the protection of economic and cultural rights of individuals affected by Bank-funded projects, although compliance problems persist and recent tendencies to return to soft law standards might reverse this effect.

That change has been possible suggests that whether multi-level governance and legal pluralism have detrimental or beneficial effects on the rule of law depends on specific scope conditions. This chapter's analysis suggests there are three of them.

First is the power of the actors that can be stirred into action to exploit the policy space provided by multi-level governance and legal pluralism. Had NGOs not succeeded in mobilizing the US Congress for their cause but only parliaments in less important member states of the World Bank, the Bank would have been less likely to introduce comparatively far-reaching safeguards policies and an at that time revolutionary accountability mechanism. Likewise, in the EU case, it mattered that the judgments that demanded that the EU substantially reform its listing and delisting procedures came from the ECJ, a court that enjoys a high reputation among EU member states.

Second are routines that emerge over time. The US Congress has a long history of shaping the policy of the World Bank. Even before setting the issue of social and environmental safeguards and an accountability mechanism on the agenda of the US Executive Director at the World Bank, Congress had shaped US policy vis-à-vis the Bank in various ways and the Bank had frequently catered to the interests of the USA. Hence, when the US Executive Director demanded effective safeguards and an accountability mechanism, there was ample precedent for how other member states and the World Bank management would respond to such demands. Similarly, in the EU, there is a long history of judicial lawmaking by the ECJ. In fact, that the ECJ is considered at all capable of issuing judgments on whether EU institutions comply with human rights standards is itself the product of ECJ judicial lawmaking. Again, the routines that have emerged over decades have enabled plaintiffs to turn to the ECJ to help them bind EU sanctions policy to the rule of law.

Third, it seems that beneficial effects on the rule of law are more likely if there are domestic scripts that can be uploaded to IOs or international scripts that can serve as an example to them. In the World Bank case, the USA had domestic legislation on development lending in place that could serve as an inspiration when the Bank developed its own safeguards policies

(OED 2001, p. 3). This does not mean that, without such domestic legislation in the USA, human rights safeguards would not have emerged at the World Bank. Yet, that uploading was possible certainly proved helpful in the process. In the case of EU sanctions policy, a closer look at the landmark judgment in the OMPI case reveals that the existence of domestic and international scripts did play a role. In their justification of why they believed that the EU's listing and delisting procedures failed to reliably protect due-process rights, the judges referred to the constitutional traditions of EU member states. Furthermore, to additionally legitimate their judgments, judges also referred to judgments on similar issues by another regional court, namely the European Court of Human Rights.[35] Again, it seems plausible that the existence of more far-reaching rules and case law elsewhere facilitated the emergence comparably effective due-process provisions in EU sanctions policy.

Conclusion

This chapter has explored the emergence of human rights protection provisions in IOs and thus a specific manifestation of the spread of rule of law standards to the international level. It has shown that such provisions can emerge via different pathways, namely hegemonic and judicial lawmaking. It has also shown that the institutionalization of human rights protection in IOs is a contested political process and that both pathways are subject to similar constraints. The cases suggest that multi-level governance and legal pluralism can have both detrimental and beneficial effects for the rule of law, depending on specific scope conditions. In both cases, states at first exploited the opportunities provided by multi-level governance and legal pluralism and delegated competences to IOs without attaching effective human rights safeguards. Over time, however, powerful actors, benefitting from established routines and the presence of domestic and international scripts, exploited the access points provided by the multi-level nature of the underlying governance arrangements and their embeddedness in different legal orders, and successfully made the World Bank and the EU to commit to human rights safeguards.

I have stated in the introduction that the emergence of human rights protection provisions in IOs is a contested process. Reflecting this, the process has been described as a 'relatively slow, ongoing process, with forward steps often followed by backward or sideways steps' (Gutner 2005,

p. 778). Whether forward steps will outweigh backward or sideways steps in the years to come will depend on which actors best exploit the opportunities of multi-level governance and legal pluralism for their own ends. In the case of EU sanctions policy, we may expect that we will see further forward steps. At least there is an uncircumscribed trend for the ECJ to engage in judicial lawmaking not only when it comes to EU sanctions policy but also with regard to other issue areas. In the World Bank case, however, the current Safeguards Review in particular suggests that, at present, backward steps prevail. Due to the rise of China and other emerging powers with different ideas on the accountability of IOs toward individuals, the influence of the USA in the World Bank has been declining since the mid-1990s. Against this background, the routines that have emerged and the uploading of domestic scripts from Western countries no longer work as they used to and new actors are trying to exploit multi-level governance and legal pluralism to assert their influence.

However the two cases develop, it is clear that the days of permissive consensus vis-à-vis IOs are over. New actors may emerge with their own strategies to exploit multi-level governance and legal pluralism to weaken the international rule of law and dilute the human rights safeguards that have emerged in IOs or prevent their spread to others. Yet, the norm that IOs should protect the human rights of the individuals affected by their policies seems to be strong enough to confront its critics. After all, multi-level governance and legal pluralism provide all actors, critics and supporters alike, with opportunities to shape the way the rule of law is transferred to the international arena.

Notes

1. Charter of Fundamental Rights of the European Union, 2000/C 364/01, 18.12.2000, Official Journal of the European Communities, http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2000:364:0001:0022:EN:PDF, date accessed 11 March 2016.
2. UNHCR Code of Conduct (2004), http://www.unhcr.org/422dbc89a.html, date accessed 31 May 2013; UNHCR Procedural Standards for Refugee Status Determination under UNHCR's Mandate (2005), http://www.unhcr.org/4316f0c02.html, date accessed 11 March 2016.
3. Global administrative law refers to the 'mechanisms, principles, practices, and supporting social understandings that promote or otherwise affect the

accountability of global administrative bodies, in particular by ensuring they meet adequate standards of transparency, participation, reasoned decision, and legality, and by providing effective review of the rules and decisions they make' (Kingsbury et al. 2005, p. 17).

4. World Bank (2016) International Bank for Reconstruction and Development Subscriptions and Voting Power of Member Countries, 09 March 2016, http://siteresources.worldbank.org/BODINT/Resources/278027-1215524804501/IBRDCountryVotingTable.pdf, date accessed 11 March 2016.
5. World Bank (2013) Investment, Development Policy and Program-for-Results Operations, http://web.worldbank.org/WBSITE/EXTERNAL/PROJECTS/0,contentMDK:20120732~menuPK:268725~pagePK:41367~piPK:51533~theSitePK:40941,00.html, date accessed 11 March 2016.
6. International Development and Finance Act of 1989, H.R.2494, 101st Cong., 1st Sess. (1989), http://thomas.loc.gov/cgi-bin/query/z?c101:S.1630, date accessed 11 March 2016.
7. IBRD and IDA (1993) Resolution No. IBRD 93–10, Resolution IDA 93–6, 'The World Bank Inspection Panel' http://siteresources.worldbank.org/EXTINSPECTIONPANEL/Resources/ResolutionMarch2005.pdf, date accessed 11 March 2016.
8. Interview with David Hunter, American University, Washington, DC, 21 September 2012.
9. See also interview with member state representative, Washington, DC, 20 September 2012.
10. Interview with World Bank staff, Washington, DC, 18 September 2012.
11. Parts of this section are inspired by Heupel (2012).
12. Parts of this section are inspired by Heupel (2012).
13. For a list of current sanctions regimes, see European Commission (2013), restrictive measures (sanctions) in force, last updated 21 February 2013, http://eeas.europa.eu/cfsp/sanctions/docs/measures_en.pdf, date accessed 11 March 2016.
14. Council of the EU (2003) Guidelines on implementation and evaluation of restrictive measures (sanctions) in the framework of the EU Common Foreign and Security Policy, 3 December 2003, 15579/03, p. 5, http://register.consilium.europa.eu/pdf/en/03/st15/st15579.en03.pdf, date accessed 11 March 2016.
15. Council of the EU (2006) Restrictive Measures: EU Best Practices for the effective implementation of restrictive measures, 14 June 2006, 10533/06, p. 9, 24, http://register.consilium.europa.eu/pdf/en/06/st10/st10533.en06.pdf, date accessed 11 March 2016.
16. Council of the EU (2004) Monitoring and evaluation of restrictive measures (sanctions) in the framework of CFSP—Establishment of a 'Sanctions'

formation of the Foreign Relations Counsellors Working party (RELEX/Sanctions), 22 January 2004, 5603/04, http://register.consilium.europa.eu/pdf/en/04/st05/st05603.en04.pdf, date accessed 11 March 2016.

17. Judgment of the Court of First Instance of 12 December 2006, case T-228/02, Organisation des Modjahedines du people d'Iran v. Council of the European Union, http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:62002TJ0228&from=EN, date accessed 11 March 2016.
18. For a comparison with national provisions see, for instance, the following legislation the UK had enacted prior to the judgment in the OMPI case: Terrorism Act 2000 (http://www.legislation.gov.uk/ukpga/2000/11/contents), Terrorism Act 2006 (http://www.legislation.gov.uk/ukpga/2006/11/contents) and The Terrorism (United Nations Measures) Order 2006 (http://www.legislation.gov.uk/uksi/2006/2657/introduction/made).
19. Interview with staff of the German Ministry of Foreign Affairs, Berlin, 20 June 2012.
20. Council of the European Union (2001) Fight against the financing of terrorism—implementation of Common Position 2001/931/CFSP, 10826/07, 21 June 2007, http://www.consilium.europa.eu/uedocs/cmsUpload/st10826-re01en07.pdf, date accessed 11 March 2016.
21. Council of the EU (2007) European Union autonomous/additional restrictive measures (sanctions)—Recommendations for dealing with country-specific EU autonomous sanctions or EU additions to UN sanctions lists, 3 April 2007, 7697/07, http://register.consilium.europa.eu/pdf/en/07/st07/st07697.en07.pdf, date accessed 11 March 2016.
22. Lisbon Treaty, Article 275, pp. 217–218, http://eur-lex.europa.eu/legal-content/EL/TXT/PDF/?uri=CELEX:12007L/TXT&from=EN, date accessed 11 March 2016.
23. Judgment of the EGC, case T-86/11, *Nadiany Bamba* v. *Council of the EU*, 8 June 2011, http://curia.europa.eu/juris/document/document.jsf?text=&docid=84923&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=3751369, date accessed 1 November 2015. In 2012, the third chamber of the Court dismissed Bamba's action in an appeal case, case C-417/11 P, 15 November 2012.
24. Judgment of the ECJ, case C-376/10 P, *Pye Phyo Tay Za* v. *Council of the EU*, 13 March 2012, http://curia.europa.eu/juris/document/document.jsf?text=&docid=120361&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=3751706, date accessed 11 March 2016.
25. Judgment of the EGC, cases T-439/10 and T-440/10, *Fulmen/Fereydoun Mahmoudian* v. *Council of the EU*, 21 March 2012, http://curia.europa.eu/juris/document/document.jsf?text=&docid=120664&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=3751804, date accessed 1 November 2015. The judgment was upheld by the ECJ in

November 2013, case C-280/12 P, *Council* v. *Fulmen and Mahmoudian*, 11 March 2016, http://curia.europa.eu/juris/document/document.jsf?text=restrictive%2Bmeasures%2BOR%2Bsanctions&docid=144985&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=232803#ctx1, date accessed 11 March 2016.

26. Judgment of Court of Appeal in The Hague, case ECLI:NL:GHSGR:2008:BC4177, 23 January 2008, http://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:GHSGR:2008:BC4177, date accessed 11 March 2016.
27. Decision of England and Wales Court of Appeal (Civil Division), case 2007/9516, *The Secretary of State for the Home Department* v. *Lord Alton of Liverpool and Others*, 7 May 2008, www.bailii.org/ew/cases/EWCA/Civ/2008/443.html, data accessed 11 March 2016. Lester and Kennelly (2013) provide an overview of domestic proceedings (2013).
28. Council of the EU (2008) Summary of discussions of the Foreign Policy Counsellors 'Sanctions' formation Working Party meeting held on 9 April 2008, 21 April 2008, 8275/08, http://www.eumonitor.nl/9353000/1/j4nvgs5kjg27kof_j9vvik7m1c3gyxp/vi7jgt8dv2v6/f=/8275_08.pdf, date accessed 11 March 2016.
29. Parliamentary Assembly Council of Europe (2007) United Nations Security Council and European Union blacklists. Doc. 11454. 16 November 2007, Committee on Legal Affairs and Human Rights, http://assembly.coe.int/Documents/WorkingDocs/2007/edoc11454.htm, date accessed 26 May 2013; see also European Parliament (2010) Current challenges regarding respect of human rights in the fight against terrorism, Directorate General for external policies, policy department, PE 410.208, April 2010, http://www.europarl.europa.eu/RegData/etudes/note/join/2010/410208/EXPO-DROI_NT(2010)410208_EN.pdf, date accessed 11 March 2016.
30. Interview with EU member state representative, Brussels, 5 June 2012.
31. Interview with member state representative, Brussels, 6 June 2012.
32. Ku and Diehl equally observe in their chapter in this volume that those actors trying to strengthen the rule of law beyond the nation state benefitted from the simultaneous availability of multiple fora and access points provided by multi-level governance and global legal pluralism.
33. See Judgment of the Court of First Instance of 12 December 2006, case T-228/02, Organisation des Modjahedines du people d'Iran v. Council of the European Union, http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:62002TJ0228&from=EN, date accessed 10 March 2016.
34. See Judgment of the Court of First Instance of 4 December 2008, case T-284-08, Organisation des Modjahedines du people d'Iran v. Council of the European Union, http://eur-lex.europa.eu/legal-content/EN/

TXT/HTML/?uri=CELEX:62008TJ0284&from=EN, date accessed 21 March 2016.

35. See Judgment of the Court of First Instance of 12 December 2006, case T-228/02, Organisation des Modjahedines du people d'Iran v. Council of the European Union, http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:62002TJ0228&from=EN, p. 36, 44, date accessed 10 March 2016.

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Multi-level Governance and the Rule of International Human Rights Law: The Case of the *Voluntary Principles on Security and Human Rights*

Magdalena Bexell

Introduction

In comparison with many issue areas of global concern, there is an elaborate body of law and organizations in the realm of human rights. Internationally, public international human rights law has been developed through the United Nations (UN) and regional organizations. Nationally, human rights are to different degrees part of the legal system in most countries. However, the weaknesses of the monitoring bodies of international human rights institutions with regard to securing compliance have given rise to other forms of regulation. Most prevalent among these are various kinds of voluntary-based regulatory initiatives, often concerned with businesses' responsibility for human rights. This chapter explores one such case, the *Voluntary Principles on Security and Human Rights* ('Voluntary Principles'). The purpose of the Voluntary Principles, created in the year 2000, is for oil and mining companies to avoid complicity in human rights abuses in connection with security arrangements where

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those companies operate. After 15 years in existence, there is certain empirical ground to explore the Voluntary Principles' role in the multi-level governance of human rights. The Voluntary Principles exhibit key features of multi-stakeholder-generated human rights rules, and therefore constitute a representative case for studying accountability issues related to such forms of steering. Rather than providing an in-depth case study, however, the chapter's ambition is limited to identifying scope conditions that impact the extent to which the Voluntary Principles strengthen or undermine the rule of law, at the nexus of multi-level governance and global legal pluralism.

The chapter proceeds as follows. The next section introduces multi-level governance and the concept of global legal pluralism in the human rights realm, emphasizing concerns with accountability and power relations. After that, I examine the creation and content of the Voluntary Principles, showing that their substance aligns with international human rights law, as does their emphasis on state responsibility. I then trace how forms of accountability of the Voluntary Principles have developed over time, concluding that the main form is peer-based accountability. Next, by examining two contrasting examples of domestic implementation, I identify national-level scope conditions that can promote realization of the principles. The ensuing section highlights recent developments at the soft–hard law nexus, pointing to the role of contracts and courts for strengthening the status of the principles. I conclude that, thus far, the Voluntary Principles have not strengthened the rule of law, as member companies and member states avoid creating binding accountability instruments. Yet, the chapter identifies emerging issues in contracts and court cases related to the Voluntary Principles, where these soft law rules are being used in hard law settings to promote human rights.

Multi-level Human Rights Governance and Legal Pluralism

Multi-level governance is a condition in which governance is dispersed across multiple centres of authority involving a large number of decision-making actors and arenas differentiated along functional and/or territorial lines. Those are interlinked in a non-hierarchical way and involve different constellations of public and non-public actors (Hooghe and Marks 2003; Papadopoulos 2007, p. 469). In the case of human rights, governance has

increasingly grown to be multi-level over the past decades. In addition to intergovernmental monitoring bodies (UN-based and regional), civil society organizations across the world have become important actors in the governance of human rights. More recently, the business community has become involved in cross-sectoral and business-driven initiatives for human rights protection. As a result, the range of non-state, voluntary-based regulatory schemes addressing human rights and other societal issues has expanded rapidly. Voluntary-based standards have been created in most industry sectors over the past decade in response to non-governmental organizations (NGO) campaigns, consumer demands, and industry interests. There are industry-wide codes, for instance, in the sectors of agriculture (International Cocoa Initiative, Better Cotton Initiative), apparel (Fair Labor Association), and toys (International Council of Toy Industries Code of Business Practices), as well as codes of conduct of individual companies. Certain governments have been active in convening multi-stakeholder regulation with regard to company operations in 'high-risk environments', most notably in the cases of the Voluntary Principles, the Extractive Industries Transparency Initiative, the Kimberly Process Certification Scheme, and the International Code of Conduct for Private Security Providers.

While the concept of multi-level governance puts the spotlight on the interaction between a broad range of *actors* striving to steer a functionally defined domain or a territory, the concept of 'global legal pluralism' refers to the *structural* coexistence of diverse legal orders within a given space (which might be functional, territorial, or personal). Global legal pluralism can be of a *Westphalian* kind, comprising sovereign states with discrete legal orders in the absence of any overarching legal authority. Such pluralism can also be of a *postnational* kind, composed of a diverse range of norm-producing institutions and regimes at the transnational level alongside states (Isiksel 2013, p. 163; compare Krisch 2010). The concept of postnational global legal pluralism describes a more complex form of pluralism containing both legal and quasi-legal bodies (UN, World Trade Organization, International Chamber of Commerce, and International Organization for Standardization standards) varying along dimensions of substantive scope, degree of bindingness, institutional set-up, and functions. Postnational legal pluralism is deeply at odds with Westphalian legal pluralism, where each state claims exclusive jurisdiction over its territory and inhabitants (McCorquodale 2013; Isiksel 2013).

Traditionally, the Westphalian kind of global legal pluralism has been characteristic of human rights, due to the strong standing of the principle of state sovereignty in this realm. Contemporary multi-level governance of human rights displays traits of global legal pluralism of the postnational kind in the sense that it is rich in different forms of rules, governance initiatives, and actors aiming to promote compliance with the rules. This is particularly the case if applying a non-dichotomous view of what constitutes law in this governance realm. Due to the lack of effective enforcement of 'hard law' international human rights conventions, so-called soft law is best understood as an endpoint in a continuum, rather than through a dichotomy. Adherence to soft law is not necessarily completely voluntary, as there are compliance pulls in, for instance, public opinion or consumer and political pressure. In addition, soft law regulations can nurture the development of new hard law in the longer run (Jerbi 2012, p. 1032). The more we loosen notions of what counts as law, the more elements of postnational global legal pluralism we find in the realm of human rights governance. Scholarly debates on multi-level governance and postnational global legal pluralism resist categorical distinctions, yet continue to grapple with conceptualizing relationships between state and non-state, law and non-law (compare Krisch 2010, p. 305).

The voluntary nature of multi-stakeholder rules makes monitoring and accountability their main Achilles heel. Network-based multi-level governance increases the number of actors lacking democratic authorization that are involved in rule-setting decisions (e.g., Cutler 2003; Papadopoulos 2007, p. 476; Vogel 2009, p. 164; Bexell et al. 2010). Democratic problems of accountability in multi-level governance stem from the weak presence of citizen representatives, lack of visibility and transparency, and the dominance of peer accountability. A lack of congruence between those who are being governed and those to whom governing bodies are accountable remains a main problem of governance beyond the nation state (Papadopoulos 2007; Black 2008, p. 153). Broader global patterns of exclusion make the selection of participants in private rule-setting initiatives skewed, especially with regard to limited participation of civil society organizations from the global south (Börzel and Risse 2005; Meadowcroft 2007). In multi-level governance, forms of accountability such as *legal*, *supervisory*, and *hierarchical* accountability are usually weaker than the horizontally based *public reputational* accountability (naming and shaming strategies), *peer* accountability (monitoring by members of the same professional community), *market* accountability (markets can reward or punish

market actors of networks), and *financial* accountability (e.g. accounting to donors for the use of funds) (compare Grant and Keohane 2005). This limits the extent to which one can expect multi-level governance to provide limitations on power in a systematic manner. Similarly, nascent global legal pluralism keeps relationships between legal orders undetermined, which leaves them open to redefinition over time and to being shaped by power relations. Pre-existing power asymmetries and disparities in resources then determine each legal regime's ability to pursue its own ends in the face of competing claims to authority. Therefore, legal pluralism may reflect rather than remake the status quo, whatever the qualities of the latter (McCorquodale 2013; Isiksel 2013, p. 186).

The Creation of the Voluntary Principles

The human rights impact of security arrangements related to the operations of Shell in Nigeria and British Petroleum (BP) in Colombia was a main trigger for growing activist concerns with oil companies and human rights in the 1990s. Such concern related primarily to security forces' violations of human rights, but also to corruption and environmental damage. The Voluntary Principles was the first government-initiated dialogue on security and human rights involving both companies and NGOs (Freeman et al. 2001, p. 430; Hofferberth 2011, p. 11). A dialogue on the creation of a set of principles was chaired by the governments of the USA and the UK. During 2000, the two governments met with eight companies in the oil and mining industry sectors and certain NGOs to discuss ways for companies of those industries to protect human rights (for a more detailed history of their drafting, see Freeman et al. 2001; Freeman and Hernández Uriz 2003). The dialogue between convening governments, companies, and NGOs during 2000 focused only on the clash between security and human rights and companies' relationships with security forces and host-country governments (Freeman and Hernández Uriz 2003, p. 244; Williams 2004). Unsurprisingly, there was disagreement on many issues. Intensive, behind-the-scenes efforts by the two governments facilitated the negotiating process towards an agreement (Freeman et al. 2001, p. 431). Without the key drafting role of the US and UK governments, the Voluntary Principles would probably not have been agreed upon (Freeman and Hernández Uriz 2003, p. 246).[1] Host governments[2] were not invited to the drafting of the principles. This decision was made in order to promote information sharing and openness among participants,

and to avoid limiting the discussion to country-specific issues (Freeman et al. 2001, p. 432). The conveners decided that a broader dialogue would take too long to complete and that a narrow agreement could be the basis of further efforts to create a more inclusive global process and standard (Freeman and Hernández Uriz 2003, p. 254).

In December of the same year, participants announced the *Voluntary Principles on Security and Human Rights*, to be respected by companies on a non-legal basis. As mentioned above, multi-level governance is usually built around such soft law steering, paving the way for monitoring and accountability concerns. Their preamble explains that the Voluntary Principles are guided by the norms of the Universal Declaration of Human Rights and international humanitarian law. Further, it states that governments have the primary responsibility to promote and protect human rights and that companies must act consistently with the law of the countries in which they operate. The principles aim 'to guide Companies in maintaining the safety and security of their operations within an operating framework that ensures respect for human rights and fundamental freedoms'. The Voluntary Principles' first section elaborates on factors that effective risk assessment efforts ought to include: inter alia, the potential for violence; the human rights records of public security forces, national law enforcement, and private security; the local judiciary's capacity to hold those responsible for human rights abuses accountable; and the nature of local conflicts. The second section, 'Interactions Between Companies and Public Security', contains principles outlining that companies should consult with host governments and local communities about the impact of their security arrangements, communicate their policies on human rights to public security providers, and express that those should be respected. Companies should also use their influence to promote with public security the rights of individuals to exercise freedom of association. Companies should report credible allegations of human rights abuses by public security to host governments, and where appropriate, urge investigations. Finally, the third section, 'Interactions Between Companies and Private Security', first outlines principles to guide the conduct of private security providers. Second, it states that 'where appropriate', companies should include those principles as contractual provisions in agreements with private security companies. Companies should also ensure that private security personnel are adequately trained to respect human rights of the local community, and 'to the extent practicable', require investigations of

abusive behaviour. They should also monitor security providers to ensure they fulfil their obligations. Overall, the Voluntary Principles allow for much interpretative scope by including qualifications on company human rights obligations, such as 'subject to any overriding safety and security concerns', 'where appropriate', 'to the extent reasonable', and 'to the extent practicable'.

Accordingly, the Voluntary Principles emerged from a minimal consensus between two Western governments, a small number of Western-headquartered oil and mining companies, and a couple of large human rights NGOs such as Amnesty International, Human Rights Watch, International Alert (IA), and the Lawyers Committee for Human Rights (now called Human Rights First). This non-hierarchical mix of state and non-state actors is characteristic of multi-level governance arrangements. The number of participants has since grown. As of 2016, 9 governments (Australia, Canada, Colombia, Ghana, the Netherlands, Norway, Switzerland, UK, USA), 10 NGOs (including Human Rights Watch, IA, The Fund for Peace), and 30 companies (including AngloAmerican, BP, Chevron, ExxonMobil, Norsk Hydro, Rio Tinto, Shell, Statoil) were Voluntary Principles participants. The most recent governments to become members were Ghana in 2014 and Switzerland, Canada, and Colombia in 2011. Medium- and small-sized extractive companies are not among the members, while often operating in environments where security arrangements impact human rights negatively (Börzel and Hönke 2011, p. 14).

In sum, the Voluntary Principles represent multi-level governance of human rights due to their voluntary-based rule system involving actors from government, civil society, and the business spheres in a non-hierarchical steering constellation. The arrangement is multi-level in the sense that it is transnationally agreed, builds on existing public international human rights law, and addresses human rights protection in local settings of company operations. In line with the majority of business human rights instruments, the Voluntary Principles emphasize that the primary responsibility for human rights rests with governments. Nevertheless, companies are expected to take measures not to be complicit in human rights violations. In other words, the degree of compatibility of soft and hard law is high in this case, which is a scope condition affecting the extent to which soft law can be expected to be used in rule of law processes (see Reinold, Heupel, this volume).

Accountability Instruments of the Voluntary Principles

Issues related to accountability have been at the heart of debates on the Voluntary Principles since the start. During their first decade, the Voluntary Principles faced criticism related to a lack of monitoring, reporting requirements, participation criteria, and implementation. The Voluntary Principles were created with weak monitoring mechanisms, including vaguely defined performance criteria. They were not built around legal accountability. Reporting criteria have also been weak, primarily related to procedural matters and quite little to what happens on the ground (Carbonnier et al. 2011; Jerbi 2012, p. 1034; Pitts 2011, p. 362). This reflects the converging interests in 2000 of companies and governments. The UK and US governments wished to ensure the presence of oil companies in so-called problematic environments (Hansen 2009, p. 19; Börzel and Hönke 2011). Since then, efforts have been made to strengthen governance and implementation of the Voluntary Principles. Formal participation criteria were agreed upon in 2007 for the first time in the explicit hope that they would strengthen accountability and implementation. Any company in the extractive industries or any NGO can apply, but at least 75% of the members of each Pillar (the Corporate, the NGO, and the Government Pillars) must approve of participation. Any government can apply, but member governments can use their veto power to deny membership (Voluntary Principles, 2012, pp. 30–42). A significant number of participating companies have inserted the principles into their own internal auditing systems (Voluntary Principles on Security and Human Rights Overview of Company Efforts to Implement the Voluntary Principles n.d., p. 8).

In September 2011, an extraordinary plenary session of the participants in the Voluntary Principles was held in Ottawa, including representatives from 7 governments, 10 NGOs, and 19 oil and mining companies. The meeting decided on a set of governance rules for the Voluntary Principles by negotiating a core document outlining the expectations of the participants. The meeting also decided to create a formal legal entity in the Netherlands for financial matters related to governing the Voluntary Principles. Moreover, participants announced projects to explore ways of verifying that companies live up to their commitments. The 2011 Plenary identified host government outreach and in-country implementation as priorities and created a Host Government Outreach Working Group.

In March 2012, the Annual Plenary Meeting, where all participants are expected to attend, approved the new governance rules. Those clarified that the Plenary is the formal decision-making body of the Voluntary Principles, with a government chair on a one-year rotating basis. The Steering Committee is the executive body, consisting of four members of each participant pillar.[3]

A Voluntary Principles dispute resolution process was adopted in 2007, through which participants can raise concerns related to another participant's compliance with the principles. It has been used by the NGO Oxfam America against the US-headquartered company Newmont Mining. The company agreed in 2007 to a dispute resolution review, following allegations of serious human rights abuses committed by security forces hired to protect a mine in northern Peru. An independent review took place over two years under the auspices of the Voluntary Principles, resulting in a report calling upon Newmont to more vigorously implement the principles and providing recommendations on how to address ongoing human rights problems related to the mining projects in Peru (Oxfam America 2009).

After extensive discussions on the development of effective accountability mechanisms, influential human rights NGOs, some of which were among the original participants, left the Voluntary Principles in 2013, notably Amnesty International, Oxfam, and Human Rights First. In May 2013, Amnesty International decided to terminate its membership, having been a member since the start. The reason for this decision was Amnesty International's concern with the failure to develop robust accountability mechanisms for member companies, which the organization argued brought the credibility and effectiveness of the Voluntary Principles into question. Amnesty International claimed that the value of the Voluntary Principles can only be properly realized if accountability mechanisms are developed (AI 2013). Oxfam too announced it would terminate its membership with the Voluntary Principles due to a lack of progress in, including independent assurance mechanisms as a condition of membership, despite ten years of discussion on the topic. Oxfam considered independent assurance essential to building the credibility of the Voluntary Principles and encouraged members to push for its adoption. Oxfam had joined the Voluntary Principles in 2006 and worked to establish complaint mechanisms and criteria for participation and governance. When leaving, Oxfam expressed recognition of the work of individual companies to develop indicators as well as approval of ongoing efforts by certain companies to improve on-the-ground implementation (CTI 2013).

The Voluntary Principles are not particularly transparent to outside observers. The governance rules declare that 'in order to facilitate the goals of the Voluntary Principles Initiative and to encourage full and open dialogue, all proceedings of the Voluntary Principles Initiative are on a non-attribution and non-quotation basis' (Voluntary Principles 2012, p. 12). All documents of the Voluntary Principles are considered confidential unless approved for public release by the Plenary or Steering Committee. In this case, the involvement of democratic governments has not promoted openness and transparency to the public (compare Abbott and Snidal 2009). Reporting procedures are built around peer accountability, where participants assess and discuss each other's performance. Current reporting criteria state that each participant should report annually to the Plenary on its efforts at implementing the principles. A participant may be declared inactive if it fails to submit a report according to the criteria specified (Voluntary Principles 2012, p. 19). Participants can now opt to make annual reports publicly available on the Voluntary Principles' website, in an effort to increase transparency.[4] The Plenary can decide to expel a participant that does not fulfil the participation criteria, such as by failure to submit an annual report or 'categorical refusal to engage with another Participant as provided in the Participation Criteria' (Voluntary Principles 2012, p. 21). This is a decision subject to unanimous agreement among all members.

In sum, lacking legal accountability, the Voluntary Principles rely on peer-based forms of horizontal accountability built around self-reporting and low public transparency. In response to persistent debate, governance and participation criteria have been adopted, and new members have gained access. There are now clearer reporting demands as well as a dispute resolution process and criteria for expelling a participant. There are also exchanges of best practices, working groups, and discussions on elaborating performance criteria. Yet, the decisions of NGOs to leave the Voluntary Principles bear witness to continuous contestation of voluntary regulation of human rights. Those who are supposed to benefit most from strengthened protection of human rights in connection with company operations have few means to directly demand accountability from Voluntary Principles members. The initiative's multi-stakeholder character results in long and indirect accountability chains. Governments, companies, and NGOs cooperate in a transnational forum, while their formal accountability relations remain national, directed respectively towards voters, shareholders, and members/financiers. This suggests that the length

of the accountability chain and degree of transparency are scope conditions that impact the extent to which power is limited by multi-level governance arrangements.

Country-Level Voluntary Principles Experiences

For the purpose of identifying further scope factors conditioning the implications of multi-level governance for the rule of law, this section examines two brief examples of country-level implementation of the Voluntary Principles. The examples are chosen based on how successful national-level work on the principles has been. To cover two endpoints on a scale of estimated success, one—in relative terms—successful country, Colombia, and one unsuccessful country, Nigeria, are selected.

Colombia

In Colombia, early implementation of the Voluntary Principles was led by proactive local managers of the company BP Colombia. This took place in light of accusations against BP in the 1990s for inappropriate security arrangements and links to illegal paramilitary groups. In the case of Occidental Petroleum's Colombian division (OxyCol), local managers were also proactive in working with human rights issues. The company's headquarter eventually used the Colombian experiences to spread knowledge to other countries where Occidental operates. These and other extractive companies in Colombia have created human rights policies and aligned communication plans; held human rights training courses for security employees, contractors, and local authorities; and created impact assessment tools and procedures for registering information on wrongdoings by employees or security providers. Public security forces were reminded by company representatives about their duties with respect to human rights and warned that violations would be reported to judicial authorities (Guáqueta 2013, pp. 137–8). In 2003, BP and Occidental created a national working group on security and human rights within the National Petroleum Association. The same year, a US Assistant Secretary of State hosted a formal meeting in Colombia with embassies, high-level Colombian government officials, and Voluntary Principles companies in Colombia. As a result, the working group was turned into a multi-stakeholder Voluntary Principles national committee. Increasingly, national-level politicians committed to the initiative. In 2007, the vice minister of defense issued a new policy on human

rights and international humanitarian law that included the Voluntary Principles (Guáqueta 2013; Earth Rights International ERI 2013, p. 29). Government officials have been trained in the Voluntary Principles, and the Ministry of Defence includes a commitment to the principles in its security agreements for oil facilities (Earth Rights International ERI 2013, p. 7; Voluntary Principles 2013b, p. 11).

In 2014, several Voluntary Principles member companies reported that they had included the principles in agreements with public security agencies in Colombia. NGO members reported that they had held training sessions on security and human rights for several Colombian companies (Voluntary Principles 2014, pp. 17–18). For instance, NGO IA reported that it was the first NGO to formally join the Colombian Mining and Energy Committee. IA continued to work with several oil companies on impact assessment and recommendations. It also worked with Colombian civil society organizations to ensure their concerns were considered in Voluntary Principles processes (IA 2015). The Colombian government's report highlights factors that have facilitated joint work with the Voluntary Principles: Existing risks for companies working in Colombia, the government's willingness to acknowledge that human rights violations have taken place in the country, and the presence of a highly committed individual in the Colombian government (the vice-president) (Colombia VPs Process Report 2014). The Colombian case has been a basis for the development of general guidelines for implementation of the Voluntary Principles at the national level (Guáqueta 2013; Earth Rights International 2013).

Nigeria

In Nigeria, oil companies face corporate social responsibility issues related to corruption, poverty, and inequitable oil revenue distribution, including a weak state and high levels of community–company conflicts (Idemudia 2010, p. 840). The country is not a member of the Voluntary Principles, but a key host country with a continuing high degree of human rights abuses associated with the extractive sector, particularly in the Niger Delta. There is often weak enforcement by public authorities of laws intended to protect the environment and local communities against human rights violations. Voluntary codes of conduct have been insufficient to address the situation (Oluduro 2012). Several Voluntary Principles member companies operate in Nigeria. Voluntary Principles participants did not, however, form a Nigeria Implementation Working Group until 2011.

The Voluntary Principles 2013 Annual Plenary Meeting aimed to engage more governments in working with the principles in order to promote implementation. The governments of Angola, the Democratic Republic of the Congo, Ghana, Indonesia, Iraq, Nigeria, and Panama were invited as guests of the Plenary (Voluntary Principles 2013a). The active approach of the American and Colombian governments in the Colombian case contrasts with the Nigerian government's approach.

A recent report by the NGO Earth Rights International (ERI), working with local communities in resource-rich countries, concludes that the Voluntary Principles appear to be largely a failure in Nigeria, as security forces continue to commit severe human rights abuses in connection with resource extraction. This includes such extraction related to Chevron and Shell, which are participants in the Voluntary Principles (Earth Rights International ERI 2013). The implementation problems identified in the report are failure to consult with local communities; inadequate risk assessments failing to consider root causes of conflict; and a lack of focus on day-to-day interaction between company employees, security forces, and communities. This means the Voluntary Principles remain disconnected from the public security providers who actually carry out policies and from communities most affected by them. ERI (2013, pp. 23–27) points out that NGO participation is at best a poor substitute for community engagement, as the reach of civil society organizations in the Niger Delta is relatively weak. Among civil society organizations in the Niger Delta, there is little faith in company implementation of the Voluntary Principles (Global Rights 2014, p. 3).

According to the 2014 Voluntary Principles Annual Report, several member governments are engaged in promoting the Voluntary Principles in Nigeria through workshops and meetings with NGOs as well as the Nigerian government (Voluntary Principles 2014, pp. 20–1). The Dutch government is in charge of government-to-government outreach towards Nigeria and reports that recent years have seen increased activity on the Voluntary Principles in Nigeria, due to an in-country team of embassies and NGOs. The Dutch government states that all relevant government ministries in Nigeria are now engaged, but that there remains a lot to be done in promoting the principles in the country. The Dutch government's annual report highlights NGO advocacy work as having positive impact on the promotion of the Voluntary Principles in Nigeria. The report does not mention any proactive Nigerian governmental efforts in that direction (Government of the Netherlands 2015). NGO members of

the Voluntary Principles reported several efforts to raise awareness of the principles in Nigeria and to pressure the government to sign on to the principles (Voluntary Principles 2014, p. 21). The Nigerian case shows that willingness of the host country government is a key scope condition for voluntary business human rights rules to have an impact. If host states are unwilling to target human rights abuses related to security arrangements of the extractive industry, the degree of home state involvement becomes important as a secondary scope condition for implementation (compare Hofferberth 2011).

Conclusions

The contrasting country-level experiences with the Voluntary Principles in Colombia and Nigeria point to the key role of proactive home and host governments. Host state ability and degree of willingness to secure human rights are central scope conditions for company compliance with human rights principles (compare Deitelhoff and Wolf 2013). The willingness and ability of the rule's target (whether government or company) to bring about change in line with the principles are key scope conditions determining to what extent voluntary rules limit the exercise of power. Company compliance improves if the host government is committed to human rights but lacks capacity to implement voluntary human rights regulation (Risse and Sikkink 2013). In addition, the Colombian example displays a high degree of centralized rule implementation through the national multi-stakeholder committee, suggesting that this is a favourable condition for rule implementation. In contrast, no such joint node exists in the Nigerian case. As noted earlier, the majority of host states are not participants of the Voluntary Principles, which leads to a gap between those who make regulatory decisions and those who are pivotal for their realization. Colombia and Ghana are the only host countries that were members of the Voluntary Principles as of Spring 2016.

The Soft–Hard Law Nexus: The Voluntary Principles in Courts and Contracts

This section moves from a concern with factors influencing the impact of transnational rules in country-level settings to explore their relationship to binding hard law. To repeat, the Voluntary Principles do not create legal accountability for signatory companies or governments. This is explicit in the formal participation criteria, according to which 'alleged failures to

abide by the Voluntary Principles shall not be used to support a claim in any legal or administrative proceeding against a Participant' (Voluntary Principles on Security and Human Rights Participation Criteria n.d., p. 4). Yet, I argue that there are two ways in which the Voluntary Principles have recently been used to promote the rule of law, albeit unsystematically and tentatively. The first concerns court cases of alleged company responsibility in relation to human rights violations by security forces, involving a novel claim of parent company responsibility for actions of overseas subsidiaries. The second is about incorporation of the Voluntary Principles into individual company contracts.

Court Cases

First, domestic judicial systems in company home states, primarily the USA and Canada, are the main arenas where legal proceedings are played out.[5] Recent Canadian court cases have directly referred to the Voluntary Principles. In 2013, three law suits were brought in a Canadian court against Canadian company Hudbay Minerals for alleged abuses committed by security personnel against a Mayan community in Guatemala. The plaintiffs claimed that Hudbay Minerals had violated its 'duty of care' by failing to prevent harms. This duty was said to derive from international norms that the company had publicly committed to follow, including the Voluntary Principles. The court recognized this negligence claim as 'novel' and found that plaintiffs had properly pled the 'duty of care', noting that there was a proximate relationship between plaintiffs and the company due to the company's public statements on its adoption of these international norms. The court denied a preliminary motion by the company to strike the case (Kloosterman et al. 2015; BHRRC 2014b). In June 2015 the Ontario Court of Justice ordered the company to disclose extensive internal company documentation on its control of its Guatemalan subsidiary. Regardless of the final outcome, these three cases show that soft law norms can make their way into hard law processes, testing Canadian courts' willingness to redress alleged overseas human rights violations.

In 2014, seven Guatemalan citizens filed suit in a Canadian court against Canadian company Tahoe Resources Inc., alleging that the company failed in preventing security staff at one of its Guatemalan mines from using excessive force in violation of international norms adopted by the company (including the Voluntary Principles). The company filed a jurisdictional challenge, arguing that the case would be more appropriately tried in Guatemala. In November 2015, the British Columbia Supreme

Court declined jurisdiction and stopped the case, holding that Guatemala is the more appropriate forum for determining the case (*BC Court Declines Jurisdiction in Garcia* v. *Tahoe Resources Inc.*, 20 November 2015). It remains therefore to be seen whether a Canadian court would hold a parent company liable for a subsidiary's human rights violation, in case Canadian jurisdiction were accepted.

While some US court cases have concerned companies participating in the Voluntary Principles, the Voluntary Principles as such have not been a piece of reference in those cases. Yet, some cases deal with the precise substantive matters that the principles aim to regulate. The most well-known court case involving a large oil company and dealing specifically with security and human rights is the *Wiwa* v. *Royal Dutch Shell*. There, Shell was charged with complicity in human rights abuses committed by Nigerian military forces against the Ogoni people in Nigeria. In 2009, on the eve of the trial, Shell agreed to a settlement of the lawsuits filed against it, providing about $15 million in compensation to the plaintiffs. In another case, a group of Nigerians brought a law suit against Chevron in a US federal court, alleging that they suffered human rights violations by the Nigerian military, called upon by Chevron to suppress the plaintiffs' protests at a Chevron platform. In 2008, a federal jury in San Francisco cleared Chevron of the charges, and in 2009, the federal judge denied the plaintiffs' request for a new trial. In 2012, the Supreme Court declined to hear an appeal in the case (BHRRC 2014a). In another court case against oil company UNOCAL, the Bush administration intervened to argue that the company should not be held liable for alleged complicity with human rights abuses in Burma. The Bush administration also wrote letters claiming that lawsuits should be dismissed against Exxon's operations in Indonesia and against Rio Tinto in Papua New Guinea (Williams 2004, p. 483). Several cases brought by civil society groups against companies have been settled by companies out of court, leading to a lack of standard-setting legal decisions, case law, and court-sanctioned record of events (McCorquodale 2013, p. 303).

Contracts with Security Providers

Second, individual companies have entered the Voluntary Principles into contracts with security providers. According to a recent *Summary Report from Participating Organizations* (Voluntary Principles 2013b, 16, 2014, pp. 9, 25), many companies now incorporate the principles into contracts with both private and public security providers. Certain companies state

that it is now mandatory within their companies to specifically cite the Voluntary Principles in contract language. One company also reported that when engaging private security companies, it requires those to be signatories to the International Code of Conduct for Private Security Providers. One member company reported that it signed 17 contracts with private security providers in 2014, and that all of those included clauses on the Voluntary Principles (Voluntary Principles 2014, pp. 9, 25–6). Yet another company reported that its contract with private security providers in 2012 in the Kurdistan region of Iraq included provisions regarding the Voluntary Principles (Voluntary Principles 2013b, p. 13). References to the Voluntary Principles in contracts with security forces give them the force of private mandatory law in functioning rule of law settings (Pitts 2011, p. 360; Voluntary Principles on Security and Human Rights Participation Criteria n.d., p. 7).

Companies are not formally required to include the Voluntary Principles in contracts with host country governments. A few companies have, however, included the principles in such agreements (Voluntary Principles on Security and Human Rights Overview of Company Efforts to Implement the Voluntary Principles n.d., p. 7). The Voluntary Principles have been incorporated in contract provisions between companies and host governments in, for instance, Indonesia and Colombia (Hansen 2009, p. 24). When signing a contract on an oil concession with the Indonesian government in 2002, oil company BP included specific contractual language obligating it to comply with the Voluntary Principles in its relationship with security forces. In 2003, the host country governments of Turkey, Azerbaijan, and Georgia agreed in a contract with a consortium of large oil companies operating in the Caspian Sea to abide by the Voluntary Principles when providing security for the project (Williams 2004, p. 481; Earth Rights International 2013, p. 32).

Conclusions

These developments at the soft–hard law nexus show that the degree of willingness of home state courts to accept jurisdiction for human rights violations committed by overseas company subsidiaries is an important scope condition for the extent to which voluntary rules can contribute to limiting power. Court decisions provide key precedents for all actors facing similar circumstances. Additionally, individual companies' incorporation of the Voluntary Principles into legally binding private contracts is a way

of strengthening their status. If the Voluntary Principles are inserted into contractual agreements, their status is enhanced, as a violation of contracts could trigger legal accountability of the violating party. The extent to which such contracts will strengthen the legal status of the Voluntary Principles is conditioned by the degree of rule of law statehood in the host state where contracts are made. In sum, the key role of courts and contracts manifests that the character of the domestic legal setting continues to be central for legal pluralism to promote the rule of law.

Conclusions: Voluntary Human Rights Rules and International Rule of Law

This chapter has examined one component of the increasingly complex multi-level governance system for human rights protection. It demonstrates that the Voluntary Principles do not contribute to fragmentation in terms of the *substance* of international human rights rules. Rather, the principles' substance builds on and seeks legitimacy from references to the Universal Declaration on Human Rights and international human rights law. Moreover, the principles reinforce the predominant view that the main responsibility for human rights protection rests with states, including host state responsibility for the human rights impact of third parties operating on its territory. However, I have demonstrated that the *form* of regulation promoted by the Voluntary Principles is contentious, due to weak and long accountability chains. Contention remains, even though participants of the Voluntary Principles have over time strengthened their governance mechanisms. These now include participation criteria, a complaints mechanism, and the possible exclusion of non-communicating participants.

The chapter has identified a set of scope conditions that influence the degree to which multi-stakeholder governance arrangements can limit exercise of power that impacts human rights in negative ways. In sum, those conditions are the degree of compatibility of hard and soft law, the length of the accountability chain, the degree of host state ability and willingness to secure human rights, the degree of centralized rule implementation, the degree of willingness of home state courts to accept jurisdiction, and finally, the degree of rule of law statehood of host states. Based on previous research, we can expect additional scope conditions to matter too. Those concern primarily the degree of vulnerability of the target (company or state) and the strength of advocacy campaigns directed against it (Deitelhoff and Wolf 2013). Such conditions draw

on public reputational accountability, which has not been strong thus far in the Voluntary Principles case. Voluntary schemes might partially reduce accountability gaps for some companies some of the time, particularly those that are well known among northern publics, NGOs, and consumers, thereby subject to concerns about brand reputation. Yet, underdeveloped accountability mechanisms remain the main weakness of self-regulatory arrangements. The Voluntary Principles have not yet strengthened the rule of law, as both companies and states avoid creating binding accountability instruments. In addition, at the local level, competing understandings often remain between local communities' perceptions of security and resource companies' security concerns (compare Börzel and Hönke 2011). The Voluntary Principles have, however, raised awareness of human rights issues among resource companies, increased dialogue among stakeholders, and changed practices to some extent, for instance, with regard to human rights impact assessments and reporting by companies.

In policy perspective, the scope conditions identified in this chapter show that the overarching regulatory problem remains increasing the capacity and will of states to comply with international human rights law, particularly in areas of limited statehood. Encouraging governments to exercise proactive leadership within existing regulatory arrangements in line with states' duty to protect human rights is more important than creating yet new layers of rules. Continued emphasis on the international legal obligations of home and host states to protect human rights against violations associated with companies' security arrangements is key, in order not to leave implementation up to the goodwill of individual companies. To strengthen accountability and make the Voluntary Principles more effective, more host country governments need to be involved as well as additional home countries (Freeman et al. 2001, p. 429; Ruggie 2010). Notable among home country non-members are France, Germany, China, South Africa, Brazil, India, and Russia (Börzel and Hönke 2011, p. 14). In addition, there are no participating state-owned companies from rising economies. The USA and the UK dominate government-convened, multi-stakeholder rule setting. In combination with the northern-headquartered companies and NGOs involved, this tilts global regulatory power towards the north. Friction between different forms of regulation aiming to promote accountability will continue to characterize the multi-level governance of human rights.

Notes

1. The chapter by Heupel in this volume also points to the important role of powerful states in establishing rule of law safeguards beyond the nation state.
2. Host governments are those of countries where transnational (oil) companies operate, whereas home governments are those where such companies are headquartered.
3. Since 2010, the law firm Foley Hoag LLP in Washington DC has served as the secretariat of the Voluntary Principles. Earlier, the secretariat was managed jointly by Business for Social Responsibility and the International Business Leaders Forum.
4. As of March 2016, four companies, five governments, and one NGO displayed their annual reports publicly on the website of the Voluntary Principles.
5. Heupel and Hirschmann equally stress in their respective chapters that courts can play an important role in committing non-state actors to the rule of law.

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Whitelisting and the Rule of Law: Legal Technologies and Governance in Contemporary Commercial Security

Anna Leander

As the editors point out when introducing the rationale for this volume: 'the rule of law is conspicuously absent' from debates in political science/international relations about 'the causes and consequences of multi-level governance'. Arguably, it is similarly absent from discussions among legal

This chapter draws on and develops ideas published in a special issue about the politics of lists (Leander 2016). This revised version of the argument has benefitted from comments by Liliana Andonova, Tom Bierstecker, Lisa Hilbink, Robert Nichols, David Sylvan and Joan Tronto. For their comments and input on the original version, I wish to acknowledge the many people from the busy world of commercial security regulation who took time to talk to and e-mail me. Special thanks to Andre du Plessis, Charles Chadwick and Rebecca de-Winter Schmitt for their generous engagement. Comments from the participants in the working group III meeting of COST Action IS1003 and especially Marieke de Goede and Wouter Werner are gratefully acknowledged, as are the comments by Ester Baringa, Ole Bjerg, Christian Borch and Antje Wiener, the team at Environment and Planning D: Society and Space (EPD) and two anonymous reviewers.

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scholars. Thus, prominent legal theorists, including Koskenniemi and Kennedy, deplore the rise of a 'managerialism' reducing law to a tool for princes and corporations, while ignoring the implications for what is here termed the rule of law (Koskenniemi 2011; Kennedy 2016). Yet, despite the recurring lament of this neglect of the rule of law in both legal and political scholarship, the discussion often remains a lament rather than an analysis. As Johns argues with reference to the legal debate: Koskenniemi is 'ill-inclined to map this managerialist expanse except in the broadest strokes' while Kennedy writes in 'a tone of declamation' and 'prefers pithy anecdote to detailed illustration and capitalised surnames to exposition' (Johns 2013, pp. 14, 18). More generally, there is a disturbing tendency into both international relations and international law to shift the blame for the developments to the other discipline *and* to search for solutions in it instead of placing energy in closely analysing the evolving struggles over legality and the shifts in the rule of law linked to them (Leander and Werner 2016). However, as this volume clearly demonstrates, this non-engagement with the rule of law is no inevitable fate. It is possible to move from declamatory broad brush generalities and interdisciplinary blame-shifting to analysis and argument.

In this chapter, I wish to do precisely this by closely observing one very specific legal technology closely linked to the shifting forms of governance: namely listing (de Goede et al. 2016). Lists—from the seemingly innocuous endangered species and gambling lists, to the more spectacular politically exposed persons lists or kill lists—have proliferated and are at the heart of a global governance (Johns 2016). This makes it important to reflect on what this list-proliferation can tell us about the rule of law. Here, I do this with reference to one specific listing practice: whitelisting in commercial security. This focus helps direct attention to the central place of a seemingly innocuous and marginal, that is 'infralegal',[1] tool in the production of the rule of law. The focus on commercial security anchors the discussion in one regulatory practice to arrive at conclusions regarding its consequences for the rule of law. More precisely, the chapter argues that the whitelists of companies, states and organizations that have signed up to the codes of conduct, best practices, benchmarks and standards now regulating commercial security have far-reaching significance for the rule of law. These whitelists do core regulatory work, and in the process, they leave deep imprints on the regulatory landscape (or topology) of commercial security. The result is a transformation of the rule of law that becomes skewed towards the consolidation of commercially governed security.

The argument is organized in three parts. The first outlines its basic terms. It situates whitelisting as core to multi-level governance in commercial security and beyond. It justifies the rationale for working with an analytical strategy exploring how the practical, pragmatic and poetic characteristics of lists fashion their work and topological imprints of lists through close observation. The second and third sections unfold the argument. Section two shows the regulatory work whitelists do by staking out regulatory space, establishing regulatory relations and prioritizing potentiality. Section three argues lists also leave a topological imprint that devalues evidence, empowers a novel legal 'Codes, Best Practices, Benchmarks and Standards' (COBBES) expertise and displaces criticism. Through their work and topological imprint, lists make soft- or self-regulated commercial security appear as the only available road ahead. As the minions in Pignarre and Stengers account of the capitalist spell, lists produce '"infernal alternative" … that seems to leave no other choice than resignation or a slightly hollow sounding denunciation' (Pignarre and Stengers 2011, p. 24). As the chapter concludes, this has far-reaching implications for accountability that are at the same time paradoxically obvious for all to see and yet difficult to put into words, discuss and act upon. Hence, the significance of engaging, in detail and self-consciously with the conspicuously absent question regarding the rule of law.

Relating Whitelisting and the Rule of Law

Before engaging the description of how whitelisting transforms the rule of law, this section introduces its basic terms. It begins by explaining what is meant by 'whitelist'. It then proceeds to introduce the three oft noted characteristics of lists, white or otherwise, that will guide the description to follow: their capacities to abstract, link and remain open. The last section clarifies why the implications of whitelisting for the rule of law is studied through an observation of the regulatory work they do and the imprint they leave on regulatory topographies, hence clarifying the methodological rationale of this study.

Situating Whitelists in Commercial Security Governance

Lists are omnipresent in a wide range of forms and political roles. The kinds of lists dealt with in this chapter are whitelists in commercial security. The emergence and growing centrality of these whitelists is closely

tied to the development of COBBES henceforth. COBBES are hailed as the most (or only) effective response to the complexity of regulating contemporary markets in general. Their malleable, fluid or 'soft' form, it is suggested, makes them ideal for handling the many legal and regulatory 'contradictions', 'paradoxes' and 'dissonances' generated by activities that span a range of regulatory spaces (e.g. Fischer-Lescano and Teubner 2004; Stark 2009; Teubner 2011). COBBES are in other words hailed as an efficient response to the dual regulatory challenges generated by legal pluralism and multi-level governance as defined in the introduction. They can link the different levels of governance and handle the maze of regulatory norms involved. In commercial security, the value of COBBES is further heightened, as they circumvent the political sensitivities that mar all and any regulatory initiative in the area. 'The very fact of privatization—with its hybrid public-private character—may open up alternative avenues of accountability beyond the formal instruments of international law', as Dickinson puts it (2005, p. 141). In commercial security, governments, international organizations (IOs), non-governmental organizations (NGOs), Interest groups and companies have therefore elaborated a minor forest of standards and codes of conduct (Leander 2012).

The lists this chapter deals with show who has signed up to a specific COBBES. In the chapter, these lists are referred to as whitelists and often in the plural. The reason for the plural is that the chapter is intent on describing how lists (in plural, as a horde of minions) transform regulatory politics and the rule of law. This plural does not imply that all whitelists in commercial security lists are the same. They are not. Lists are published by the sponsors of a set of COBBES to show who is committed to them, as well as by companies or organizations to inform what COBBES they have signed up to. These lists refer to a wide range of issues and contexts, and therefore are very different, not only in terms of what they are referring to, but also in terms of which entities figure on them and what kind of structure and length they have. This said, the lists in plural can have effects collectively, like other entities that are diverse internally, including NGOs, political parties, companies or states.

But why *white*lists? The lists in commercial security are positive lists. There are no negative blacklists. The lists indicate what companies and organizations have signed up to what COBBES. Figuring on these lists provides 'a particular privilege, service, mobility, access or recognition' the nature of which obviously varies with the COBBES the list refers to. Being committed to a given COBBES may be a precondition for competing for

a contract or it may just be a matter of demonstrating that one deserves to be 'considered acceptable or trustworthy'. Either way, this combination of a particular privilege and a status as acceptable and trustworthy is the dictionary definition of a whitelist (Oxford Dictionary online; Bedford 2016). It is important to note that in commercial security, this whitelisting does *not* signal anything beyond an expressed commitment. However, even so, figuring on the lists is the source of privileges and a token of trustworthiness. Disregarding this by not terming the lists pertaining to the COBBES in commercial security whitelists would be misleading and biased.

Practical, Pragmatic and Poetic Whitelists

To describe the relationship of these whitelists, the account below focuses on three interrelated general characteristics of lists that figure prominently in more general discussions of lists, namely that lists rely on discontinuity and abstraction from context, that they can (therefore) connect these contexts, and that they orient towards the future in suspending conflict and contradictions in the present. Another way of summarizing these characteristics is to follow Eco, who distinguishes between practical, pragmatic and poetic lists (2009, p. 113).

First, to the practical character of lists: As Goody points out in his account of why lists have been core to the development of abstract cultures based on writing from the Sumer to our own, it is because 'the list relies on discontinuity rather than continuity' (Goody 1977, p. 81). His general point is that lists escape the embedded, embodied, narrative and contextual. Working by discontinuity makes it possible to compile and link things according to abstract, flexible and possibly changing classificatory schemes. According to Goody, lists are therefore central to the development of complex economic and state organizations and to the specific form of abstract and classificatory thinking that accompany these. Lists can be searched and information retrieved without first disengaging and disentangling it from a sticky and complicating context precisely because they abstract from otherwise complex, heterogeneous, contradictory and conflicting information. Bringing out the politics of this 'invisible work' of abstracting is at the heart of Stäheli's treatment of lists (2012 and 2016). Borges famously used lists precisely to bring together the seemingly inconsistent and unrelated.[2] Similarly, to include the heterogeneous content that he thinks is needed to understand the Columbian drug trade without having to impose a single logic on it, anthropologist Taussig relies on a list to

provide an inventory of what he terms 'My Columbian Cocaine Museum' (2004). As Borges' and Taussig's lists indicate, lists work through discontinuity, abstracting from context. This allows them to take on an essential, compiling, role. They are practical, in Eco's terms.

Related to this is a second characteristic of lists, namely that lists often work to link and relate diverse and perhaps contradictory and incompatible contexts. Because they are abstract, lists can also be acceptable across contexts. They can work as 'boundary objects', spanning the boundaries between contexts, and hence linking them while taking on different and perhaps contradictory roles in each. As Star insists, precisely this is a key (frequently overlooked) role of boundary objects. According to her, boundary objects make it possible to have 'a sort of arrangement that allows different groups to work together without consensus' (Star 2010, p. 602). Lists function similarly. They can pragmatically (to use Eco's terminology again) link different contexts without being marred by their contradictions and incompatibilities. The pragmatism of lists makes it possible for them to occupy a fore place in a 'Global Law' in which 'lists plus algorithms' are 'conduits', 'shortcuts' and 'objects' (Johns 2016). More generally, the fact that boundary objects link contexts often makes them the fall-back option, something relied upon by default as it were. 'When an object [in this case a whitelist] becomes naturalized in more than one community of practice, its naturalization gains enormous power, to the extent that a basis is formed for dissent to be viewed as madness or heresy' (Bowker and Star 2000, p. 312).

The tendency to accept lists and allow them to become a 'natural' part of a context is reinforced by a third characteristic of lists, namely their openness, future orientation and appeal to imagination, creativity and aesthetic sensibilities. Because lists work by disconnection and by tying contexts together, lists seem to follow an open-ended 'logic of the ands' (Fuller 2005). Additions can be made. The criteria for adding to the list may be rethought and revised. This makes the list at least potentially follow a 'logic of infinite addition' (Weber 2016; de Goede and Sullivan 2016). As Eco puts it: a book about lists 'cannot but end with an etcetera' (2009, p. 7). This openness and future orientation make lists appear full of potential. They direct attention away from an inscrutable present/past towards an open future. They evoke the ineffable as Eco emphasizes when discussing the poetic character of lists (2009, passim). The list is 'seductive' to a point where even those observing its politics are prone to be seduced and describe lists in almost lyrical terms (Stäheli 2012, pp. 238–240). Eco is

certainly seduced by lists. As he explains to his readers, he 'did not hesitate for a second, and proposed the list' when given a free hand by the Louvre to select a theme to work with in 2009 (Eco 2009, p. 7).

These three characteristics do not mark all lists in the same way. 'There are lists and lists' (Eco 2009, pp. 112–130). A shopping list is no pragmatic enumeration and no approximation of the ineffable. This is no less true in commercial security than elsewhere. There are few lists that would immediately strike observers as poetic in commercial security. However, lists are not of one or the other kind. Rather, the three recurring characteristics of lists are interlinked and overlapping in a myriad of changing ways depending on the situation. The shopping list may have more in common with the approximation of the ineffable than we usually think. It may be not only practical but *also* a poetic expression of potential future relationships and bonds (Miller 1998) or *also* a pragmatic part of a more general to-do-today list. The characteristics of lists are therefore neither pure nor essential nor unchanging. This is as true of whitelists in commercial security as of other lists. However, to bring out the relations of whitelisting to the rule of law, I direct attention to the significance of one characteristic at the time: that is, to the practical, pragmatic and poetic sides of lists.

Productive Whitelists: Work, Topological Imprints and the Rule of Law

Conceiving of lists as shaping the rule of law may be controversial. It involves a contention that lists are not simply used, mobilized or interpreted in various ways that have political consequences, but that they are actually doing politics. Lists 'come alive' (Leyshon and Thrift 2009). One way of insisting on this point is to present lists as 'actants'. The idea of actants has been popularized through the work of Bruno Latour, who borrowed it from literary analysis, where it refers to *someone* or *something* that makes things happen in an account. The attractiveness of the term is that it makes the symmetry between the material and the human explicit. It opens up for conceiving of material objects, such as the whitelists in this chapter, as having a form of 'agency' that is, of course, distinct from human agency in many ways. It does not involve the same kind of cognitive, emotional and more generally psychic processes as human agency. However, the agency of lists remains symmetrical in that they can make things happen and can therefore also be held co-responsible for political developments. Obviously (and again symmetrically to human actants),

they do so in a context as part of an '*agencement*' or a 'network' or a field (Callon 2008, pp. 35ff; Latour, 2005, 54, passim; Leander 2013).

The question then becomes how to best engage rule of law that these actants are co-producing. For the purpose of this chapter, I distinguish between the rule of law that is produced in the regulatory work of the actants/whitelists and the imprint the actants/work leave on the regulatory topology more generally. This distinction is inspired by work in the Deleuzian tradition (where Stengers also locates her work). More specifically, it stems from Manuel DeLanda's distinction between 'assemblage' and 'topology' (2006), where assemblage captures the actual (the work done by lists) and topology, the folding of the present into the future (the imprint of this work). The two are obviously linked. However, as DeLanda puts it:

Assemblage theory is not conceptual but causal, concerned with the actual mechanisms operating at a given spatial scale. On the other hand, the topological structure defining the diagram of an assemblage is not actual but virtual and mechanism independent, capable of being realized in a variety of actual mechanisms, so it demands a different form of analysis. (DeLanda 2006, p. 31)

This 'different form' of analysis is one focussed primarily on understanding what DeLanda calls the 'attractors' that mark the topology. These attractors give the topology its shape by structuring the 'phase spaces' of possibility that make up the topology (DeLanda 2006, p. 29). The account below works with these ideas to describe how whitelists fashion these 'attractors' and the 'phase spaces' of possibility, that is, leave an 'imprint' on the regulatory topology. It combines this with a description of the work through which whitelists shape the regulatory assemblages. As a whole this gives a picture of how whitelisting is transforming the rule of law.

Describing the Work and Topological Imprint of Whitelists

Before providing this picture, I wish to outline its methodological foundations; on the basis of what data, how and why is the picture construed? Succinctly put, the answer to these questions is that the data is ethnographic and has been drawn upon to construct the object of research (the relation between whitelisting and the rule) in order to intervene in a situated theoretical discussion about the rule of law (how to understand the transformation of the rule of law, including its trend towards managerialism). This answer deserves elaboration which I will give starting from the back.

First, the *why* of the proposed description has been introduced in the preceding discussion but highlighting some of its methodological implications helps clarify why this description takes the form it does. The overall purpose of this chapter is to explore how a mere 'infralegal' 'tool' such as whitelisting in commercial security is transforming the rule of law. This entails three methodologically pertinent choices that deserve highlighting. One is the move from a focus on *why* to a question about *how*. We are not primarily interested in why whitelists has an influence on the rule of law but in what direction, whitelisting is skewing it, in how this legal technology is transforming the substantive meaning and practice of law, as will often be the case in legal argument (e.g. Onuf 2013). Second, the focus spelled out above also implies a move from a focus on *norms* to focus on *practices* as standing at the heart of the rule of law. The contention is that while the legal norms as articulated in legal writing are of essence, the way they are interpreted but also enacted is what ultimately becomes defining for the rule of law (e.g. Koskenniemi 2004; Kratochwil 2015). This is so because norms are always subject to interpretation and, of course, also need to be implemented to shape the rule of law. Third, as the emphasis on the activity of lists implies a third move is of essence here namely one from *socio-linguistic* practices exclusively to a focus also on the *materiality* and *artefacts* of legal practices (e.g. Riles 2011).

These shifts in the why of the description have significance also for *how* the description is carried out. The focus on how listing becomes part of the (socio-material) practices through which the rule of law is enacted, calls for a methodology geared to capture that which is usually neglected in context. At the core of practice theorizing is the acknowledgment that practices are relational and situated in space and time. This needs to be reflected in the categories of analysis and selection of data. Practice theorizing usually also acknowledges that this holds also for cultures of observation. There is no 'transcendent culture of no-culture' from which issues could be theorized and observation undertaken (Haraway 1997, p. 37). On this account, 'objectivity'—which as Stengers (2008)[3] points out is the qualifier of competent scientific observation—can only be strengthened through an awareness of the epistemological, ontological and situatedness both of the observer and of the observation. An implication is that the reflexivity and openness enhancing the reformulation of the categories both of theorization and observation becomes methodologically pivotal. They are the *sine qua non* of an analytical strategy aimed at constructing the relation of whitelisting to the rule of law as an object of analysis (Bourdieu et al. 1991). This clearly precludes a 'cookbook' approach to

method assuming that variables should be derived from pre-existing theories and measures established before the observation is carried out so that these can just be 'applied'. Instead and rather, it presupposes approaching methods more as something akin to an open still unfinished dictionary that not only invites but also actively encourages tinkering with theoretical terms and classifications and an imaginative approach to the 'data'.[4]

This leads straight to the question regarding *what* data the picture provided is based on. As the insistence on an imaginative approach to data signals, the approach adopted is ethnographic or anthropological in the sense that it combines a wide range of heterogeneous observations in an analysis resting on a consciously constructed object of research.[5] This understanding of anthropological and ethnographic is commonly used not only by scholarly authorities to such as Foucault or Bourdieu to describe their own work, it is much used also in contemporary ethnography and anthropology where the conventional focus on immersive fieldwork has given place to broader range of observational strategies, including multi-sited, and poststructuralist approaches (Gupta and Ferguson 1997; Marcus 1995; Clifford and Marcus 1986; Kozinets 2010). More specifically, in my case, I draw on a combination of secondary sources, including academic studies, news articles, reports and public documents and primary sources including the COBBES and the related lists, my observation in meetings and conferences about regulation and the interviews I carried out specifically for this research. In these interviews, I asked with the informants about the COBBES they were working with, including how they viewed its normative content and its regulatory reach. I also talked with them about the listing practices attached to the COBBES they were developing.[6] The picture below is drawn by interweaving these heterogeneous sources.

To sum up, the ambition in this chapter is to provide a description of how whitelists in commercial security reshape the rule of law. It looks at how the work they do helps assemble a specific form of rule of law, and it looks at the imprints left by their constant activities on the regulatory topology. The description proceeds through a focus on how three general characteristics of lists—their practical, pragmatic and poetic character—fashion their work and its topological imprint. To look ahead, the place this description will leads to is one from which it is easier to grasp, resist and refashion the role of whitelists in turning a soft- or self-regulated commercial security market into an 'infernal alternative'.

The Regulatory Work of Commercial Security Whitelists

Listing who has pledged to follow what COBBES, as whitelists in commercial security do, may seem to be a rather unlikely way of doing politics. And indeed, like many of the other lists, the whitelists in commercial security are often thought of as mere tools of recording. However, if we take pause to describe how the practical, pragmatic and poetic characteristics of lists shape this recording, it becomes clear that the whitelists do central regulatory work. Their practical character allows whitelists to stake out and map regulatory spaces, their pragmatic character helps them link these spaces and their poetic character helps them direct attention towards the potential of regulation. However, unlikely it may sound, the whitelists in commercial security are doing politics.

Staking out Regulatory Space

The practical character of whitelists allows them to do important signposting work. They delineate the territory of the COBBES in commercial security. This is much needed. It is far from clear which COBBES apply to whom in what context. Rather, in the present multi-level governance context, COBBES may be formulated by IOs, by national governments, by professional associations or by companies. In practice, therefore, a multiplicity of codes and standards coexist and overlap. In a strong manifestation of legal pluralism, COBBES relevant to commercial security seem to be in effect mushrooming. Providing an overview of these COBBES is far beyond the scope of this chapter. The importance of any specific COBBES is both context specific and deeply contested. In some situations, adhering to a specific set of COBBES is turned into an obligation, and its significance is therefore relatively uncontroversial.[7] In other cases, COBBES are followed because of pressures from advocacy groups, the activities of an energetic manager or the views of a consultancy company.[8] This makes the weight of the COBBES uncertain. Not surprisingly therefore, finding out which COBBES exist in any given context at a precise time and to whom they apply is exceedingly difficult. In 2007, one single company, ArmorGroup, pledged to abide by more than 30 different codes and standards (Leander 2012, table 1). That number would certainly have been different for another company at the time and would be different for ArmorGroup/G4S today.

This disputed and unstable multiplicity of COBBES renders the practical recording work done by the whitelists in commercial security vital. The whitelists indicate who, at any given time, has pledged to abide by a specific set of COBBES. The lists signpost the regulatory space of the COBBES. A graphic illustration of the central (and growing) role of this practical work is the development of the International Code of Conduct for Private Security Service Providers (ICoC)/ICoCA websites.[9] In 2013, the ICoC site featured a world map where countries were coloured according to how many signatory companies were headquartered there. This map occupied the bulk of the welcome page, visualizing the regulatory space of the ICoC. In 2015, the ICoCA had expanded the place it devoted to mapping and made the link between the maps and lists visible. As shown in Fig. 1, the membership tab on the website displays the access to the searchable lists and the maps in direct connection. Both lists and maps are more refined and differentiated. It has become possible to visualize the private security companies, governments and civil society organizations separately. This emphasis on the mapping work of whitelists may be exceptionally strong on the ICoCA website. However, it usefully highlights the more general point that lists play a core role in the mapping of regulatory space, a point that is valid even if it is not fronted on the website of the COBBES, the list refers to.

Establishing Regulatory Relations

The pragmatic character of lists makes them do a second kind of regulatory work in commercial security: that of managing relations between heterogeneous regulations. COBBES overlap not only with each other but also with other regulatory norms and legal arrangements. Administrative rules, regulations specific to companies, armed forces, states and IOs, as well as national and international law cover the same terrain (for an overview, see Leander 2012). This overlapping makes the question of how to handle the tensions and contradictions inevitable. Which code, standard, benchmark, best practice, law, norm or treaty counts? What should be done in case they are conflicting? What is the hierarchy of regulatory norms to be applied? Whitelists are helpful when it comes to answering, or better evading, these fundamentally political questions. Their pragmatic character afford them the position of the intermediary, who is not directly involved in or expressing the messy conflicts and tensions that need to be resolved, between each set of COBBES and the many rules and regulations with which they overlap.

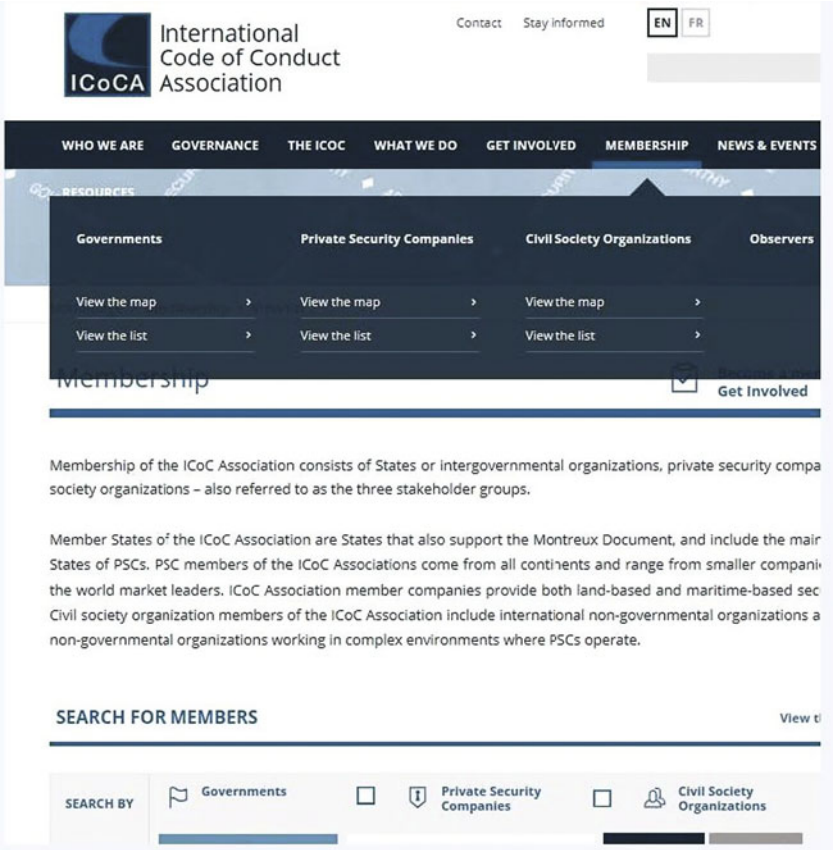

Fig. 1 Linking lists and maps on the ICoCA website (Courtesy of the ICoCA) (*Source*: www.icoca.ch. Accessed 15 March 2014)

Consider the way the relationship between the ICoC and other regulations is established. The United Nations (UN) and some states, including the USA, have made ICoCA membership a condition for contracting. They require companies to figure on the ICoCA whitelist. Companies can pledge to abide by ICoC. Concretely, this implies figuring on the ICoCA whitelist or listing the company commitment to the ICoC among its COBBES commitments. The ICoC itself refers to a range of national

and international laws as well as to best practices and company codes. Figuring on the ICoCA whitelist therefore establishes links to these forms of regulation. In all these cases, the list makes it possible *not* to sort out what the exact relationship between these multiple regulatory standards is or even begin arguing about what it should be. There is no need to for the UN or the USA to make explicit what they think it means for contractors to follow the ICoC or how this might relate to other obligations. It is enough to refer to the whitelist. Analogously, the reference to the whitelist makes it unnecessary for the companies to explicate how exactly the ICoC relates to other COBBES, laws and norms they follow, or for the ICoCA, to clarify how it views the relationship between the many kinds of laws and regulations its Code refers to.

Whitelists, in sum, open the possibility of constructing a web of linkages that tie the heterogeneous and contradictory COBBES, rules and norms into a criss-crossing web of relationships across multiple level of governance and a plurality of legal norms. They can do this because they pragmatically leave out the details and allow the rules and regulations they are dealing with to remain in the background. The ICoC has been used to illustrate this, but the rationale is more general. A company listing the UN Guiding principles, the USA/UK Voluntary Principles, the ANSI/ASIS PSC 1–4 (PSCI 1–4) or the Defense Industry Initiative on Business Ethics and Conduct (DII) is in effect doing something analogous. It places the list as an intermediary that pragmatically circumvents the complications of having to explicate what exactly this COBBES means, including how adjustments, tensions or conflicts that arise from abiding by its rule are handled.

Prioritizing Potentiality

Finally, their open character has made the whitelists do important work to confirm and consolidate the future orientation of regulation in commercial security. Those who promote COBBES are clear that, unlike classical law and binding rules, their regulatory norms are future oriented. As explained by the former vice-president of BAE Systems, who has also been directly active in developing core ethics codes,[10] 'the goal here [with the IFBEC] is to actually influence correct conduct. It is not to punish them [companies that do not follow the rule]. It is about how we get them to do the right thing'.[11] COBBES emphasize 'dialogue' and 'self-reporting' intended to foster reflexivity and help companies become better at creatively imagining and engaging their tasks in ways conforming with

the norms they are signing up to. Monitoring, policing and controlling are thought of as counterproductive for this process. They destroy the trust and engagement of the companies that dialogue and encouragement can generate. But more fundamentally, from this perspective, monitoring, punishments and expulsions from an association miss the point. They close the future. They block the possibility of supporting processes of improvement. As those responsible for the ethics code of the AeroSpace and Defence Industries Association of Europe put it:

The NGOs have been railing on about their [large defence company's] past demeanours. Our attitude is that they are setting a new bench mark in terms of corporate social responsibility behaviour policies. The new [major defence company] has very little, if any, relation to former [major defence company]. Therefore why punish someone on the basis of past misdemeanours by a previous management? We would rather have the possibility to work with them in the future.[12]

And along very similar lines:

Take [major defense company] for example: it had major problems, major ethics issues. There was no talk of expelling them from the DII [Defense Industry Initiative on Ethics and Business Conduct]. They acted to remedy. Why would we want to expel them? We would rather assist them in remedying any weaknesses in their compliance program.[13]

The whitelists support and enshrine this orientation of regulation towards potentiality. The lists record the companies, civil society organizations and governments that *pledge* commitment to principles of the code in general and promise to work on realizing and developing them. They commit to a process. They do not claim that the process has been achieved. To figure on one of the lists in commercial security therefore requires very little, as acknowledged by everyone involved. 'At the moment we've got a situation where companies can sign on the dotted line and say we acknowledge the standard and we want to abide by it'.[14] ICoC had 708 signatory companies in 2013, of which many were not even working in the security sector. This is well known, and those responsible often mention it and find it problematic. It undermines the credibility of the COBBES and makes their norms appear to 'lack teeth'.[15] Yet, the moves towards a stricter approach to listing are timid. Even the ICoC Association (created in 2013), which introduced reporting and monitoring requirements, has done little to change the situation.[16] For the time being, the listing practices tend to confirm and consolidate the overarching future orientation of the COBBES.

The lists bolster the orientation towards potentiality also in a second way. They generate momentum and community around the COBBES. The lists are in most cases the concrete manifestation of the breadth and depth of the backing and support for the COBBES. They display who is committed to the set of COBBES besides the organization(s) that issued it. The lists hence demarcate the boundaries of the community backing a set of COBBES, and not only of its regulatory space. These communities may be very different in size and type. A company code usually rests on a community of the employees of the company, who formulated it possibly extending to the subcontractors. Other codes, such as the DII, IFBEC or the ICoC, have a varied range of signatories including states, advocacy groups, companies and international institutions. Either way, the display of commitment carried out by the list is important not only because it shows these differences among the communities but also because this display is essential for the momentum (or lack thereof) around the lists, and hence for whether or not their boundaries expand or shrink. This has been the case for the ICoCA, where the reluctant enrolment of civil society organizations has been prompted by the concern of being left out of a process that has seemed to gain momentum and importance. The lists' display of commitment has the same performative effect as classical political representation. It represents a community which it creates in the process of representing it. The lists produce a version of the 'mystery of ministry' (Wacquant 2005).

To sum up, the whitelists in commercial security do significant regulatory work. They signpost the regulatory space to which the COBBES apply, they help establish the relationship between the COBBES and other regulatory instruments and they contribute to defining the community the COBBES rest on. This regulatory work is profoundly political. It weighs on what kind of rules apply where, how they are related and what kind of activities they regulate. But more than this, this regulatory work also enacts and enshrines the specific form of regulation the COBBES are tied to and the political choices that are embedded in them. It turns this form of regulation into the most feasible, useful and attractive form of regulation. Just as the minions produce the infernal alternatives necessary for the 'spell of capitalism' to retain its magic, so the regulatory work whitelists do produces the 'infernal alternative' of softly regulated commercial security. It makes the rule of law serve primarily the consolidation of commercially governed security. The next section takes this description further. It follows the imprints this work is leaving on the regulatory topology in commercial security.

The Imprint of Whitelisting on the Regulatory Topology in Commercial Security

The work of the whitelists is leaving imprints on the regulatory 'topology' in commercial security. They are shaping and refashioning the wider landscape of regulatory activities, including ideas about what regulation is easy, difficult or impossible to imagine and engage in. Whitelists are altering the attractors that fashion the phase spaces of possibilities to recall the terms in which the idea of a topology was introduced above. This is an aspect of the politics of whitelisting other than the one discussed in the preceding section. Instead of focussing on mechanisms though which whitelists do politics, it focuses on describing the way whitelisting is transforming the conditions for politics (i.e. their imprint on the regulatory topology). It looks at how their activities are altering features of the topology that are particularly central to the organization of politics (the attractors). To do this, the section focuses on the imprint left by the three types of whitelist work just discussed (the staking out of regulatory space, the establishment of regulatory relations and the focus on potentiality). It highlights the way the practical work whitelists do to signpost territory has also devalued the role of evidence in regulatory debates. The pragmatic work they do to establish regulatory relations has produced a self-referential, selective and exclusionary expertise. Finally, the poetic listing work directing attention towards potentialities has limited the scope for contestation. The section shows that whitelists are reshaping the place of evidence, expertise and criticism in the politics of regulation.

The De-Valuation of Evidence

Whitelists in commercial security have a practical, matter of fact, character. As underscored above, precisely this practical character enables list to take on an important role in signposting regulatory space. However, the practical disregard of context and complexity—the work by 'discontinuity' as Goody puts it—changes the place of evidence in regulatory debate. Inherent in the practical work of abstracting is the capacity to disregard and also dismiss the relevance of contextual evidence and empirical argument about who figures on the whitelists and why. Moving from the engaged and involved to the abstract and general, to begin 'seeing like an index', is at the heart of listing (Stäheli 2016). An implication is that referring to context and complexity to criticize or simply raise questions

about the way lists signpost regulatory space (and work more generally) misses the point. 'Evidence' of what happens in a specific case or context is irrelevant.

This is true when it comes to debate about the regulatory space established by whitelists. Including Boeing on a list of companies abiding by a code of ethical conduct in relation to corruption or Triple Canopy on an Ethics Code pertaining to the provision of security services would be very difficult if the lists could not abstract. Their inclusion depends on disregarding the many contextual and complex bribery incidences involving Boeing and the 'Big Boy Rules' Triple Canopy reportedly draw on when dealing with civilians, independently of whether or not the accusations are warranted. Analogously, the practical capacity to work by discontinuity, to see like an index, also makes arguments referring to the complexities of the contextual appear irrelevant in the debate about the thematic scope of the regulatory space of lists. The claim that the same corruption ethics standards are adequate for companies 'whether they do private security or sell Christmas decorations'[17] is much easier to make if there is no need to consider the issues involved or the consequences of disregarding ethical standards in the two areas.

The devaluation of evidence is starkly expressed in the limited opportunity there is for brining evidence to weigh upon specific whitelisting practices or the COBBES they are referring to. Institutionalized channels through which contextual evidence can be made relevant are scarce. The few COBBES that *do* institutionalize such channels, for example, by creating complaint mechanisms, carefully guard information about their workings. The extent to which these mechanisms are functional at all is an open question. The message of the vice-president of the International Committee for the Red Cross (ICRC)—that 'rules should be implemented'—addressed to those gathered to celebrate the fifth anniversary of the Montreux Document[18] is therefore of more general pertinence (Beerli 2013). Even COBBES purporting to embrace auditing and monitoring processes that would valorize evidence appear to have dysfunctional institutional channels. A case in point is the reportedly rigorous US PSC 1–4 standards. ANSI-ASQ National Accreditation Board (ANAB)/ASIS PSC1 establishes that there are to be company-level complaints mechanisms. It leaves open how these should work and to what effect. Moreover, it does not require that complaints, their outcomes or the related reports be made public. The consequence is that, even in this case, contextual evidence and complaints based on it are marginalized or become invisible. 'Have a look

at it [the ANAB complaint mechanism][19]. I tried. It is impossible to find out what complaints were launched, let alone how they were handled'.[20] Contextual evidence when brought forward in other words disappears. It may linger on in the background but is fundamentally devalued.

Ultimately, the whitelists work only to accurately register who has committed to following the COBBES in general terms. Hence, it is not relevant what evidence there might be regarding the actual behaviour of those figuring on the list. 'For ADS, it all depends on the sincerity of the company. If they don't give a stuff, that would be born in mind. It is better to apologize and be forgiven' as Salzmann[21] explained. There is no reference to actual behaviour, to evidence beyond a declared commitment. This systematic disregard of contextual evidence biases the rule of law in favour of the commercial security order. However, no conspiracy is necessary for it to come about. The visible imprint left by the practical work of whitelists on the regulatory topology is sufficient.

The Emergence of COBBES Expertise

A second imprint left by the work of whitelists on the regulatory topology is the creation of a specific kind of expertise, a 'COBBES expertise'. As underscored in the discussion above, the work of the lists requires a special pragmatic quality to link the different regulatory environments. This quality needs to be developed and nurtured. It does not spontaneously emerge from the lists to those involved in regulatory activities. As in other professions, those involved in regulation defend their own turf in the overall landscape.[22] There is no reason for them to enthusiastically embrace the COBBES establishing themselves, threatening their turf and worse still purporting to be masterminding the map of regulatory relationships, let alone even allow this if they had a choice.

Rather, a range of COBBES-specific pragmatic practices, involving people invested in the COBBES, and COBBES-specific documents and technologies are integral to the work COBBES do in imposing regulatory relationships. Just like the practices of any profession, and if we should believe Latour (2010)[23] of the legal and regulatory profession in particular, these practices are largely self-referential, those involved draw lessons from their work and that of their colleagues. Existing documents and technologies become the foundation for further work and developments. As the former director of the IFBEC explained:

When we created our company accountability questionnaire, we started with the parallel document from the US DII plus the TII Defense Companies Anti-Corruption Index questionnaire. We then picked and chose from those documents and added what we thought were important elements not covered by either of those sources.[24]

The result is the emergence of what increasingly looks like a professional system revolving around the COBBES.[25] This further spurns self-referentiality. We are witnessing the emergence of a specific form of 'COBBES expertise'. This has a significant mark on the topology of the regulatory landscape in its own right.

This self-referential expertise is inserting itself into the regulatory map and altering it in the process. It is also affecting the position of other forms of authoritative knowledge in the field and hence their possibilities of engaging in regulatory work, whether related to specific COBBES or more generally. Most obviously, the growth of a specific COBBES-related expertise weakens the standing of critics who do not wish to accept the terms of debate and who are also prone to exclude themselves. This often becomes the foundation for deploring the absence of reasonable and rational critique. Occasionally, it becomes an object of critique. The US-based feminist organization Code Pink, for example, issued a fake press release in the wake of the Nisour Square shooting stating that Blackwater was creating a new 'Department of Corporate Integrity' that would put the 'mercy back in mercenary' (Code Pink 2007). Besides obviously criticizing Blackwater, this fake press release ridiculed the self-referential regulatory debate focussed largely on self-regulation through codes of conduct. It clearly stated that Code Pink was not willing to partake in a regulatory debate on those terms.

The emergence of this pragmatic regulatory expertise is not only weakening the position of critics and experts who reject and refuse to engage COBBES altogether, but is also weakening many conventional legal experts and regulators who are interested in the process, would like to engage with it but who raise critical points about the COBBES form of regulation or are not specialized in that area. The rule of law comes to further undergird and accentuate the trend towards commercially governed security. Human rights advocates and lawyers, for example, often find themselves relegated to peripheral positions, as they fall outside the self-referential circle of COBBES experts and yet work on a terrain closely related to it.[26] A case in point is the shifting fortunes of the UN working group on mercenaries. It began holding a central place as a venue in

which regulation could be discussed, and it continues to actively engage in reporting on and working with the regulation. However, with the emergence of alternative fora and the fragmentation of regulatory expertise, it has been excluded. For example, in relation to the ICoC process, although the UN Office of the High Commissioner for Human Rights under which the working group is placed is based in Geneva, as are DCAF and the ICRC, who initiated and are pushing the ICoC, although the people know each other, and although the working group is interested in the ongoing process, it is not involved, not even in a consulting function.[27] On the contrary, it is often summarily dismissed.[28] Along with other specialized (non-COBBES) forms of expertise, its role in the regulatory landscape has been decidedly diminished.

In spite of the insistence on 'dialogue' and 'inclusiveness' in most COBBES contexts, the work of the whitelists is in sum generating an exclusive and self-referential expertise that is increasingly influential in regulatory debates. Arguably, this is precisely what pragmatic expertise is all about. It is an expertise that marginalizes experts who would take strong and hence non-pragmatic positions—like the UN working group in favour of a binding instrument, for example—undermining the seemingly smooth and non-conflictual interlinking of regulatory forms. The pragmatic work done by lists is not only affecting the regulatory topology by leaving its own imprint; in the process, it is also shifting the place of other experts and their expertise.

The Displacement of Criticism

A final imprint left by the whitelists is that they have restricted the scope for criticism. The emphasis placed on potential also works as a soundproofing against the disturbing noise of criticism. If indeed 'the important thing is to have the standards [and] having the standards is more important than what exactly they say'[29] because they have potential, then clearly critique is difficult to wage. To become credible, criticism has to show that the alleged potential does not exist. It has to present an image of the future persuasively demonstrating that the potentiality the list opens up is either absent or, even more strongly, that allowing the work of the lists to continue would have some regrettable consequence. Constructing such an image is difficult. It requires nothing less than becoming a reader of the future, a soothsayer, to be taken seriously. This feat is formidable. It requires overcoming the positive mood, the atmosphere of optimism,

which surrounds 'potentiality'. This includes both the positive affect generated around COBBES specifically—that is, the promise that they will be the solution to the regulatory conundrums that mark commercial security—*and* the more generally positive affect generated by the idea of 'potentiality' that has become a trope of contemporary management and politics (e.g. Holmqvist and Spicer 2012). Criticism therefore begins from a singularly weak position. There is no need for Apollo's curse to make critics of the whitelists and the COBBES appear as the Cassandras. Potentiality does the work.

The focus on potentiality displaces critique by making its emergence less likely and the form it takes when it does emerge easier to reject. This is so strong that those observing the regulatory discussions lament the weakness/absence of civil society engagement. They have been surprisingly 'friendly', as Joachim and Schneiker (2012) put it. Or as the Amnesty International Business and Human Rights Initiative explained with respect to the ICoC process specifically: 'The civil society representation is really weak. There are tremendous shortcomings … there are no Southern states, no Southern NGOs'.[30] At the same time, a considerable number of important civil society initiatives have formulated fundamental criticism. War on Want (2006), Human Rights First (2008), International Alert (2003), StateWatch (2010) and CorpWatch (2009) have all participated in the painstaking effort of documenting abuses and suggesting better regulations. Organizations such as the American Civil Liberties Union, The Centre for Constitutional Rights or the Centre for Public Integrity have placed the emphasis on the need for more effective legislation.[31] However, these engagements are not reflected upon in the processes surrounding the COBBES. Instead, the critical work of civil society organizations is reduced to a refusal to engage, a 'radical and unreasonable attitude', as a government representative at the Montreux +5 Conference put it in his response NGO criticism.[32] The displacement of conventionally formulated critique as radical and unreasonable may be one of the reasons art and irony are occupying a growing space, as illustrated, for example, by the already cited Pink Code fake press release.

The displacement of criticism, both by weakening its credibility and by dismissing it as radical and unreasonable, makes it possible to present the whitelisting processes and the COBBES they refer to as if they were consensual. This consensus, in turn, becomes a reason for sticking to the *status quo* of the listing practices and for not responding to whatever critique about them transpires through the cracks in the soundproofing wall.

As Chadwick phrased it when reflecting upon the possible inclusion of a human rights provision in the IFBEC standard:

We could be accused of not being expansive enough, not moving quickly enough. However, we would rather implement something we know everyone can agree on, dig our heels and grow slowly. That is far better than trying to achieve a perfect world tomorrow and, therefore, get no consensus and no action at all.[33]

Conclusion: Whitelisting, Managerialism and (Un-) Accountability

The burgeoning of Codes of Conduct, Benchmarks, Best Practices and Standards is provoking major shifts in the practices that make up the rule of law. In commercial security, whitelists play a core parts in this. They stake out regulatory space, establish the relations between forms of regulation and alter the temporality of law by directing its attention to the future. As argued in the last section of this chapter, this has implications for the conditions of possibility of future regulatory developments. It devalues evidence since regulation is skewed towards potentiality and future intention. It introduces a new form of regulatory expertise focussed on Codes of Conduct, Best Practices, Benchmarks and Standards that displaces and transforms conventional hard law expertise. And, perhaps most fundamentally, it pre-empts critical discussion of these transformations, hence hampering efforts to change the direction of regulatory developments. The seemingly innocuous and rapidly expanding whitelisting technology is, in other words, having far-reaching consequences for how governance is practised in commercial security.

These transformations are momentous and have far-reaching consequences for the rule of law. However, they are transforming rather than undermining or strengthening it. As pointed out in the introduction, the rule of law can usefully be thought of as reflecting a capacity to limit power, to ensure coherence and to draw on hard rather than soft law. The whitelists in commercial security do consolidate the power of markets and market actors but in the process, they also create (imperfect) limits to this power (that usually remain unexplored) where there would otherwise be none. Similarly, whitelists do increase the incoherence of law through the proliferation of contradictory regulatory arrangements but they also impose a new coherence in the guise of COBBES-based expertise and regulation. And, finally, whitelists do increase the role of soft law but this soft law can

be and is linked to hard law and/or fuel hard law developments. The main significance of whitelisting for the 'rule of law' is therefore uneasily captured by dichotomies such as weaken/strengthen, undermine/bolster or shrink/expand. Instead, whitelisting is significant for its role in transforming how 'the rule of law' is practised, and hence its substantive content and relationship to political order and society.

As this chapter has shown, whitelists consolidate a rule of law characterized by the managerialism that Kennedy and Koskenniemi are wary of. The privileges provided through the pervasive whitelisting accrues to the princes and corporations listed. The COBBES the whitelists lists refer to are justified as a palliative for their practical problems of dealing with cross-cutting, contradictory and complex rules and regulation. Inversely, the concerns of those with qualms about the activities of the corporations and princes in commercial security remain largely unaddressed. Quests for accountability turn into obstacle races where the runners have to surmount not only the shift from hard to soft law but also the devaluation of evidence brought, the framing of accountability to focus on future intentions rather than past deeds and (perhaps most significantly) the widespread consensus that since this form of regulation is the best—and possibly the only one—available these issues do not have to be addressed.[34] The rule of law enacted through whitelisting in clear rests on managerial premises and enshrines unaccountability in commercial security, and in the process, consolidates a rule of law serving commercial security governance in the market, in public institutions and the rapidly expanding space where the two are intertwined.

Closely describing *how* this rule of law comes into being, and directing attention to the place of mundane regulatory technologies such as whitelisting is not only a way of moving beyond the lament in the form of broad brush strokes and general declamations. It is of course and obviously also an invitation to imagine alternatives and ways in which the fissures and tensions, the lack of stability and clarity in the existing rule of law might be appropriated and relied upon to inform a politics of change. There is indeed plenty of scope for imagining how the COBBES could become part of a *jurisgenerative* process analogous to that which Benhabib (2009) locates at the heart of the expansion and transformation of human rights. Indeed, this is arguably already taking place as illustrated, for example, with reference to the specific critique of the absence of effective accountability waged by human rights activists such as Patricia Feeney (executive director, Rights and Accountability in Development) or the more general

and ironic questioning of the ethics of ethics codes for commercial security providers by Code Pink (for further examples, Leander 2012). The more specific, our understanding of *how* the managerial rule of law is enacted in commercial security, the more effective these appropriations and mobilizations are bound to be. Hence the practical, action oriented, significance of close descriptions such as the one of whitelistings' relation to the rule of law provided here.

As this underscores, I could not agree more with Koskenniemi that in reflections and comments on the rule of law:

> the message is that there must be limits to the exercise of power, that those who are in positions of strength must be accountable and that those who are weak must be heard and protected, and that when professional men and women engage in an argument about what is lawful and what is not, they are engaged *in a politics that imagines the possibility of a community overriding particular alliances* and preferences and allowing a meaningful distinction between lawful constraint and the application of naked power. (Koskenniemi 2001, p. 502, my italics)

However, unlike Koskenniemi, I do not believe that the politics of that imagination is the preserve of the *legal* professionals Koskenniemi has in mind when writing.[35] Rather, they are bound to be just as situated in their own practice as other observers and practitioners. While the reflexivity of critical legal studies may provide some corrective to this, the professional 'culture of formalism' that Koskenniemi hails seems an unlikely source of alternatives. Transdisciplinary work would appear as more likely harbingers of imaginative reasoning taking the culture of formalism beyond its own limits, including beyond the managerialism in which it has a tendency to be trapped (Orford 2006 for an elaboration), hence the significance of arguments such as that undertaken in the pages of this volume.[36]

Notes

1. '"infra-" denotes below inferior to or underneath, but also within. So, making infralegality entails making that which lies at the edges of conventional international legal sightlines' (Johns 2013, p. 187).
2. Foucault, Hacking and Staeheli are only some of the scholars drawing on Borges with reference to his reliance on listing. For a discussion centred on the insights to be gained for politics in the age of digital media, where everything is lists, see Palma (2010) *Borges.com. La ficción de la filosofía, la política y los medios* (Buenos Aires: Editorial Biblos).

3. 'Objectivity is indeed the name of an achievement, the very specific value of which permeates both the concern of the experimenter and the achievement's verification by her competent colleagues' (p. 93).
4. This approach is common in work on practices concerned with the place of materiality as illustrated, for example, by Savage's defense of a 'descriptive' turn, Thrift's call for an 'empirical' turn and Braidotti's call alternative 'complex' method (see, respectively Savage 2009; Thrift 2011; Braidotti 2013, pp. 163–169).
5. Unlike others who work in similar fashion, I therefore do not feel compelled to find an alternative term or add a qualifier such as 'quasi' to my claim that my work is 'ethnographic' (Johns 2013, pp. 21–26) although this study does not involve long term immersion with a tribe. In fact, as in many contemporary, the tribe is too busy, changing, mobile and dispersed for such immersion to make much sense (Czarniawska 2007).
6. I carried out 17 interviews on Skype, recorded and transcribed them. I asked the interviewees to confirm my usage of quotes by sending them text before publication. Some wanted to retract or significantly modify the arguments they made in the interviews. In these cases, I have not included their information. Hence, there are no direct quotes, for example, from the interview I did with the person at Geneva Centre for the Democratic Control of Armed Forces (DCAF) responsible for the International Code of Conduct.
7. The US department of State, for example, recently began requiring ICoCA membership from their contractors https://www.fbo.gov/index?s=opportunity&mode=form&id=6247a35a5d9816a4b5e4f067b8758ecc&tab=core&_cview=0. Accessed 8 April 2016.
8. For inroads into this vast literature on why companies adopt codes, see Gond, J.-P., S. Grubnic, C. Herzig and J. Moon (2012) 'Configuring management control systems: Theorizing the integration of strategy and sustainability', *Management Accounting Research*, 23, 3, 205–223.
9. International Code of Conduct Association. www.icoc-psp.org/, date accessed 29 October 2013 and www.icoca.ch/en/contact-us, date accessed 23 April 2015. The International Code of Conduct was adopted in November 2010 and the ICoCA established in September 2013.
10. The DII and the International Forum on Business Ethical Conduct (IFBEC).
11. Interview with C.D. Chadwick about listing practices in the commercial security industry, formerly chair of the IFBEC and BAE Systems, Inc., vice-president, Contracts and Business Conduct (17 June 2013).
12. Interview with B. Salzmann about listing practices in the commercial security industry, ADS director—overseas and exports (Trade Organisation for the UK Aerospace Defence, Security and Space industries) (10 June 2013).

13. Interview with C.D. Chadwick, cited in note 11.
14. Interview with B. Salzmann, cited in note 12.
15. Interview with A. Katz about listing practices in the commercial security industry, Member of the Cape and New York Bars Chair Rapporteur, United Nations Human Rights Council Working Group on Mercenaries (10 June 2013).
16. The more active approach to listing has meant that the number of signatory companies fell from 708 to 156 as the association agreement was introduced. However, this does not alter the fact that signing up signals an intention to implement the ICoC. Moreover, there are a range of legal and practical difficulties involved. It is difficult to monitor commercial security both because of safety concerns and because the activities are often secretive. Moreover, there are no authorized auditors that could do the monitoring. And, finally, there are the standard questions of how to manage the overlapping and contradictory legal obligations involved (interview with R. DeWinter-Schmitt about listing practices in the commercial security industry, co-director, Initiative for Human Rights in Business, Center for Human Rights and Humanitarian Law, American University Washington College of Law and co-chair, Business and Human Rights Group, Amnesty International USA (11 June 2013).
17. Interview with B. Salzmann, cited in note 12.
18. The Montreux Document established 'best practices' relating to the implementation of the Geneva Conventions when contractors are involved.
19. The complaint mechanism can be accessed at http://www.anab.org/feedback/complaints.aspx (accessed 29 October 2013)
20. Interview with R. DeWinter-Schmitt, cited in note 16.
21. Interview with B. Salzmann, cited in note 12.
22. According to Abbott, 'professions are exclusive occupational groups applying somewhat abstract knowledge to particular cases' (1988, p. 8).
23. In a provocative argument that challenges established granted understandings of science and law, Latour argues that, to a much larger extent than the sciences, law accumulates and builds on existing knowledge far more strictly than do the sciences (2010, concluding chapter especially).
24. Interview with C.D. Chadwick, cited in note 11.
25. 'There is a long history of management systems standards: the infrastructure systems in place are very professionalized. This is their advantage', as DeWinter-Schmitt explained to me (interview cited in note 16).
26. For example, in the context of US PSC standards, the Amnesty International chair of Business and Human Rights group explained that 'I was participating in examining the accreditation rule. It is not a permanent role … I was the only one with HR background' (see interview with R. DeWinter-Schmitt, cited in note 16.

27. 'We are willing to assist if we are asked to and it is within the mandate. … We are in regular contact with members. You have seen the constitution of steering committee. We could contribute if they offered' (see interview with A. Katz, cited in note 15.
28. 'Summarily', because the reasons do not stand up to scrutiny. The most common arguments are that it is associated with the UN Convention on Mercenaries, which means that its expertise is sponsored by Cuba and has nothing to do with commercial security. However, there are above one hundred signatory states, it is currently developing a binding instrument for private military companies, and the core experts in this are USA and South African nationals.
29. Interview with C.D. Chadwick, cited in note 11.
30. Interview with R. DeWinter-Schmitt, cited in note 16.
31. For example, the American Civil Liberties Union has looked into human trafficking by contractors and questioned the way it has been handled legally https://www.aclu.org/military-contractor-human-trafficking-foia-request and the Center for Constitutional Rights have questioned the way contractors' liability was handled legally, not only in connection to the Nisour Square shootings (where it recently won a major victory), but in many other cases, including the Abu Ghraib prisoner abuse http://ccrjustice.org/ourcases/current-cases/al-shimari-v-caci-et-al.
32. The exchange took place following the presentation by Patricia Feeney, executive director, Rights and Accountability in Development (RAID). Her presentation deplored the weak 'accountability and victims' access to remedies' ensured by the Montreux Document. For the conference programme, see http://psm.du.edu/media/documents/international_regulation/global_standards_codes_of_conduct/montreux/montreux5_agenda.pdf.
33. Interview with C.D. Chadwick, cited in note 11.
34. For the relationship between soft law and accountability, see also the contribution by Bexell in this chapter.
35. He thinks they (at least potentially) share a 'culture of formalism' that makes such political imagination possible. The culture of formalism is given by the structure of legal argument that always balances between the apology (i.e. engagement with and for the powers that be) and utopia (i.e. the possibility of using formal rules against these power), see Koskenniemi (2006) *From apology to Utopia. The structure of international legal argument* (Cambridge: Cambridge University Press).
36. Koskenniemi argues that interdisciplinarity and the nefarious influence of sociology, political science and international relations that according to

him pushes a managerial regulation and governance agenda as threatening the culture of legal formalism that he considers as the core not only for a progressive use of law but also for progressive politics more generally. In his words: 'What I want to say, instead, is that the interdisciplinary agenda itself, together with a deformalized concept of law, and enthusiasm about the spread of "liberalism", constitutes an academic project that cannot but buttress the justification of American empire, as both Schmitt and McDougal well understood' (Koskenniemi 2001, p. 482).

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