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## Note

### The International Rule of Law: An Analysis

Monica P. Moyo\*

On November 15, 1989, the United Nations General Assembly declared 1990–1999 the “United Nations Decade of International Law.”<sup>1</sup> In that proclamation lay buried the centuries-old hope for a just international order ruled by law and based on the “rule of law.”<sup>2</sup> Today, the rule of law is generally thought to be the panacea for the irregularities and arbitrariness that politics brings into social relations and matters of governance. Moreover, although the evidence is inconclusive, the rule of law is associated with the advancement of ideals such as democracy, human rights, and economic development.<sup>3</sup> Thus, the rule of law is considered a necessity for social progress within a globalized world.<sup>4</sup>

Despite its popularity, however, the concept of the rule of law is fraught with definitional and practical application challenges.<sup>5</sup> In a 2004 report on the rule of law, then U.N.

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1. G.A. Res. 44/23, U.N. Doc. A/RES/44/23 (Nov. 15, 1989).

2. See *infra* pp. 4–8.

3. See generally Rachel Kleinfeld Belton, *Competing Definitions of the Rule of Law: Implications for Practitioners*, 55 DEMOCRACY AND RULE OF LAW PROJECT 5, 5 (2005) (indicating that despite the scant evidence that the rule of law has actually resulted in these outcomes, between 1985 and 2005 the international community spent over a billion dollars in rule of law building in underdeveloped countries and transitioning democracies). See also Tor Krever, *The Legal Turn in Late Development Theory: The Rule of Law and the World Bank's Development Model*, 52 HARV. INT'L L.J. 287, 294 (2011).

4. See generally PHILIP ALLOTT, TOWARDS THE INTERNATIONAL RULE OF LAW: ESSAYS IN INTEGRATED CONSTITUTIONAL THEORY (2005) (discussing the possibilities of an internationalized rule of law).

5. See *id.* for a discussion of how some of the definitional challenges of the concept can be attributed to the varying lenses through which practitioners viewed the concept during their respective periods in history. For example, post-Communism practitioners viewed the rule of law in terms of the

Secretary General, Kofi Annan, noted the need for a “common understanding” of the concept and the need to promote it at both international and national levels.<sup>6</sup> Calls to internationalize the rule of law are often uncritically premised on the assumption that the concept can be applied similarly in national and international systems alike despite their structural, political, and legal differences. The practical challenges of applying the concept to the international arena are amply documented,<sup>7</sup> so scholars and practitioners often focus their efforts and analyses on how international structures might be adjusted to make such structures more receptive to the diffusion of the norm. Beyond trying to explain its elements, scholars have done little to understand and explain what Thomas Carothers termed the norm’s “essence”<sup>8</sup> and what impact this might have on its application.

This Note seeks to explain the essence of the concept of the “international rule of law”<sup>9</sup> and how it might be effectively applied in inter-state relations. Section I outlines the definitional challenges associated with the rule of law generally and the problem with its international application. Section II deconstructs the concept of the rule of law, analyzes its problematic assumptions, and explains how these assumptions are in conflict with what is known about the structure of the international system. Section III argues that a significant obstacle to the realization of an international rule of law is the concept’s lack of a theory of justice, and offers a socio-legal framework within which such a theory might be implemented. Although many aspects of this Note’s critique can be applied to the domestic arena, its focus is international.

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institutions in need of reform and emphasized institutions in their definitions of the concept. In Latin America the focus was on judicial reform, while proponents in Eastern Europe emphasized legal change and, later, rule of law institution reform.

6. U.N. Secretary-General, *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*, ¶ 5, U.N. Doc. S/2004/616\* (Aug. 23, 2004) (“U.N. Secretary-General”) (noting the multiplicity of definitions associated with the concept and the overlap with security sector reform at the operational level).

7. See *infra* p. 11 and note 37 and accompanying text.

8. Thomas Carothers, *Promoting the Rule of Law Abroad: The Problem of Knowledge*, 34 DEMOCRACY AND RULE OF LAW PROJECT 5, 8 (2003) (noting that “practitioners know what the rule of law is supposed to look like in practice, but they are less certain what the essence of the rule of law is”).

9. Throughout this Note, the phrase “international rule of law” will be used to refer to how the concept of the rule of law is understood and applied in inter-state relations.

## I. UNDERSTANDINGS OF THE RULE OF LAW

### A. DEFINING THE RULE OF LAW

Articulations of the rule of law can be found as early as the medieval period.<sup>10</sup> Most modern conceptions of the idea can be traced to the writings of Albert Venn Dicey, the scholar credited with coining the term.<sup>11</sup> Although Dicey offered a view of the rule of law within the international arena, he situated his understanding primarily within the domestic,<sup>12</sup> and most theorists have done the same. The idea of an internationalized rule of law, therefore, is in many ways an emerging norm.<sup>13</sup>

At the heart of the challenge of internationalizing the rule of law is the fact that, despite its long history and popularity in both legal and political discourse, the very idea of the rule of law remains vague and uncertain.<sup>14</sup> Judith Shklar referred to it as “a bit of ruling class chatter” which had become “meaningless thanks to ideological abuse and general over-use.”<sup>15</sup> Others have argued that the concept has wide theoretical acceptance precisely because its meaning is unclear in practice.<sup>16</sup>

Dicey argued that the rule of law has three essential

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10. Friedrich A. Hayek, *The Origins of the Rule of Law*, in *THE CONSTITUTION OF LIBERTY* 162 (Friedrich A. Hayek ed., 1960).

11. See H. W. Arndt, *The Origins of Dicey's Concept of the "Rule of Law,"* 31 *THE AUSTRALIAN L. J.* 117 (1957).

12. RICHARD A. COSGROVE, *THE RULE OF LAW: ALBERT VENN DICEY, VICTORIAN JURIST* (1987).

13. See Stéphane Beaulac, *The Rule of Law in International Law Today*, in *RELOCATING THE RULE OF LAW* 220 (Gianluigi Palombella & Neil Walker eds., 2009) (describing “an emerging ‘international rule of law’, in terms of the externalisation of rule of law values”); see also BRIAN Z. TAMANAHA, *ON THE RULE OF LAW: HISTORY, POLITICS, THEORY* 91, 127 (2004) (noting that the international rule of law “has only just begun”).

14. Joseph Raz, *The Rule of Law and its Virtue*, in *THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY* 210–229 (Joseph Raz ed., 1979). See also, Olufemi Taiwo, *The Rule of Law: The New Leviathan?*, 12 *CAN. J.L. & JURISPRUDENCE* 151, 154 (1999) (noting that “[i]t is very difficult to talk about the ‘rule of law’. There are almost as many conceptions of the rule of law as there are people defending it”).

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

16. Simon Chesterman, *An International Rule of Law?*, 56 *AM. J. COMP. L.* 331, 331–361 (2008).

components: (1) the regulation of government power, (2) equality before the law, and (3) the presence of an effective judicial system.<sup>17</sup> This view has become associated with all formal understandings of the rule of law and is often the foundation upon which other, more substantive understandings of the concept are built.<sup>18</sup> While the formal aspects of the concept focus on Dicey's three elements, the substantive aspects focus on the content of the law itself.<sup>19</sup> Given the wide spectrum of understandings within these two categories, scholars have created a continuum that runs from "thin" to "thick." The thin or formal conceptions include elements such as "rule by law" or "formal legality," and the thick include individual rights or matters of dignity and justice.<sup>20</sup>

A number of normative principles have been used to define the thick or substantive understanding of the rule of law, including fairness in adjudication, clarity of law, limitation of discretion, ability to resolve civil disputes appropriately, and equal application of law.<sup>21</sup> Other elements of a thick understanding of the rule of law include respect for international law<sup>22</sup> as well as moral values such as the preservation of the "dignity, equality, and human rights of all persons."<sup>23</sup> In light of the multiplicity of views of the concept,

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17. COSGROVE, *supra* note 12.

18. See, e.g., Justice Anthony M. Kennedy, *The Rule of Law, Remarks to the American Bar Association*, C-SPAN (Aug. 5, 2006), <http://www.c-spanvideo.org/program/193757-1> (echoing Dicey's principles, but also noting that in conceptions of the rule of law, the law must also "respect and preserve the dignity, equality, and human rights of all persons").

19. See, e.g., Lord Bingham, *Lecture at the Center for Public Law: The Rule of Law*, CPL (Nov. 16, 2006), [http://www.cpl.law.cam.ac.uk/past\\_activities/the\\_rule\\_of\\_law\\_text\\_transcript.php](http://www.cpl.law.cam.ac.uk/past_activities/the_rule_of_law_text_transcript.php).

20. TAMANAHA, *supra* note 13, at 91. See also Randall Peerenboom, *Varieties of Rule of Law*, in *ASIAN DISCOURSES OF RULE OF LAW: THEORIES AND IMPLEMENTATION OF RULE OF LAW IN TWELVE ASIAN COUNTRIES, FRANCE AND THE US 1* (Randall Peerenboom ed. 2004).

21. Bingham, *supra* note 19.

22. *Id.*

23. Justice Anthony M. Kennedy, *20<sup>th</sup> Sultan Azlan Shah Law Lecture* in Kuala Lumpur, Malaysia: *Written Constitutions and the Common Law Tradition 11* (Aug. 10, 2006). See also Mark Ellis, *Toward a Common Ground Definition of the Rule of Law Incorporating Substantive Principles of Justice*, 72 U. PITT. L. REV. 191, 199 (2010) (noting the need for respect of fundamental rights and arguing that "a country that has a solid institutional legal framework but fails to protect fundamental human rights is at best a country ruled by the law but should not be considered a country based on the rule of law") (emphasis added). There is continued disagreement as to whether these are elements or by-products of the rule of law. See, e.g., Hans Corell, *A*

some scholars have held that the rule of law is an ideal<sup>24</sup> rather than something to be attained.<sup>25</sup> Support for the rule of law as a political ideal is found among those concerned with its manifestation in inter-state relations.<sup>26</sup> In international affairs, one must ask which of the myriad views of the concept is best for the international order and who should make this determination.

#### B. UNDERSTANDINGS OF THE INTERNATIONAL RULE OF LAW

To determine the meaning of the rule of law in international affairs, it is important to examine the U.N. Charter—the multilateral instrument and constitutive document upon which the post-World War II international order is established.<sup>27</sup> Although the phrase “rule of law” is not found in the provisions of the Charter, the principle is found in the Preamble and presented as one of the four goals of the U.N. The goal is “to establish conditions under which justice and the respect for the obligations arising from treaties and other sources of international law can be maintained.”<sup>28</sup> The U.N.

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*Challenge to the United Nations and the World: Developing the Rule of Law*, 18 TEMP. INT'L & COMP. L.J. 391 (2004) (noting that the rule of law includes democracy and respect for human rights). *But see* Krever, *supra* note 3, at 294 (noting that democracy and human rights are not part of the rule of law but its by-product).

24. *See generally*, WOLFGANG FRIEDMANN, *LAW AND SOCIAL CHANGE IN CONTEMPORARY BRITAIN* 282 (1951) (discussing the ideological connotations that attach to the rule of law among democratic states and how they differ from those under authoritarian regimes).

25. *See, e.g.*, Robert A. Stein, *Rule of Law: What does it Mean?*, 18 MINN J. INT'L L. 293, 303 (2009) (arguing that the rule of law in a “purist sense, is an ideal, a goal, something to be strived for. As an ideal, it is never fully achieved”).

26. *See, e.g.*, Chesterman, *supra* note 16, at 360 (arguing that viewing the rule of law as a political ideal “properly locates the conduct of most international affairs in the political rather than the strictly legal sphere”).

27. *See generally*, U.N. Charter Preamble; *see also*, G.A. Res. 2625, U.N. Doc. A/RES/2625 (Oct. 24, 1970). Declaration on the Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United States, G.A. Res. 2625 (XXV), U.N. GAOR, 25th Sess., Supp. No. 28, U.N. Doc. A/8082, at 121 (Oct. 24, 1970), recognizes the inherent link between the UN and the international rule of law. Its preamble emphasizes “the paramount importance of the Charter of the United Nations in the promotion of the rule of law among nations.”

28. U.N. Charter Preamble, *supra* note 27. The other three goals as presented in the Preamble of the U.N. Charter are: “[1] to save succeeding generations from the scourge of war, which twice in our lifetime has brought

maintains that “the concept of the rule of law is deeply linked to the principle of justice, involving an ideal of accountability and fairness in the protection and vindication of rights and the prevention and punishment of wrongs.”<sup>29</sup>

In his 2004 report on the rule of law and transitional justice in conflict and post-conflict societies, Annan presented a view of the rule of law that is at once idealist, functionalist, formal, and substantive, with an aim of making it applicable at both national and international levels.<sup>30</sup> Annan described the rule of law as a principle of governance characterized by the following: accountability of all actors, public promulgation of law, equal enforcement, independent adjudication, consistency with international human rights norms and standards, legal certainty, procedural and legal transparency, and so on.<sup>31</sup> Bolstering the view that the U.N.’s understanding of the concept is thick or substantive, Annan noted that the normative foundation for the organization’s advancement of the rule of law is the U.N. Charter, international human rights law, international humanitarian law, international criminal law, and international refugee law.<sup>32</sup> These bodies of law carry both concrete and aspirational norms, an attribute that often undermines clarity and, in turn, the international application of the rule of law.<sup>33</sup> Annan noted that the U.N. would promote

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untold sorrow to mankind [2] to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small . . . and [4] to promote social progress and better standards of life in larger freedom.”

29. *What is the Rule of Law?*, UNITED NATIONS RULE OF LAW, [http://www.unrol.org/article.aspx?article\\_id=3](http://www.unrol.org/article.aspx?article_id=3) (last visited Sept. 19, 2013).

30. U.N. Secretary General, *supra* note 6, at ¶ 6 (noting that “the rule of law is a concept at the very heart of the Organization’s mission” and explaining what it might mean and what additional measures may be required to operationalize it).

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

32. *Id.* at ¶ 9.

33. This is a particularly important issue because fragmentation, or the problems that have arisen as a result of the diversification and expansion of international law, undermines the clarity of norms in international law. For comprehensive treatment of this subject, *see generally* Rep. of the Study Group

the rule of law at national and international levels.<sup>34</sup> This vision was affirmed at the 2005 World Summit Outcome and at the General Assembly's 2012 High Level meeting on the Rule of Law at the National and International Levels.<sup>35</sup> Annan's views beg the question whether the rule of law can be applied similarly within the domestic and international arenas. Furthermore, given states' preferences for systems with which they are familiar, conceptions of an international rule of law tend to mirror understandings of what the concept means within a national system.<sup>36</sup>

There are many problems associated with applying domestic understandings of the rule of law to international affairs. Judge Higgins of the International Court of Justice (ICJ) summarized the problems when she asked:

“How then, in this national model, should an ‘international rule of law’ look? First, there should be an executive reflecting popular choice, taking non-arbitrary decisions applicable to all, for the most part judicially-reviewable for constitutionality, laws known to all, applied equally to all, and independent courts to resolve legal disputes and to hold accountable violations of criminal law, itself applying the governing legal rules in a consistent matter. One has only to state this set of propositions to see the problems.”<sup>37</sup>

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of the Int'l Law Comm'n, *Fragmentation of International Law: Difficulties Arising From the Diversification and Expansion of International Law*, May 1–June 9, July 3–Aug. 11, 2006, U.N. Doc. A/CN.4/L.682 (Apr. 13, 2006) (“Fragmentation of International Law”).

34. U.N. Secretary General, *supra* note 6, at ¶ 6.

35. See 2005 World Summit Outcome, G.A. Res. 60/1, ¶ 134, U.N. Doc. A/RES/60/1 (Sept. 16, 2005); G.A. Res. 66/102, U.N. Doc. A/RES/66/102 (Jan. 13, 2012) (“*Reaffirming also* the need for universal adherence to and implementation of the rule of law at both the national and international levels and its solemn commitment to an international order based on the rule of law and international law, which, together with the principles of justice, is essential for peaceful coexistence and cooperation among States. . .”).

36. See Frank Schimmelfennig, *A Comparison of the Rule of Law Promotion Policies of Major Western Powers*, in *RULE OF LAW DYNAMICS* 115 (Michael Zurn, Andre Nollkaemper, & Randall Peerenboom eds., 2012) (explaining that this is so because such similarities create “a legal environment that they are familiar with and know to use to their benefit”).

37. Judge Rosalyn Higgins, Remarks at the United Nations University: The ICJ and the Rule of Law (Apr. 11, 2007) (available at <http://collection.unu-mc.org/view/UNU:2363>).



Unlike the domestic arena where it guides a vertical relationship between a subject and a sovereign, international application of the norm is particularly troublesome because in international relations the norm must guide a horizontal relationship between equal sovereigns.<sup>38</sup> Jeremy Waldron noted that analogizing states within an international system to individuals within a domestic setting is problematic because states are subjects of international law, as well its officials and sources.<sup>39</sup> Further demonstrating the depth of the conceptual problem of an international rule of law, Waldron argued that states are not human beings, but they exist for the sake of human beings.<sup>40</sup> In other words, international law is meant to ensure the wellbeing of human beings rather than state freedom,<sup>41</sup> yet formulations of an international rule of law based on a domestic analogy would privilege the latter.

The question of whether an international rule of law is possible is inextricably linked to the traditional question of whether international law can be said to rule at all. The former question addresses whether the various elements attached to understandings of the rule of law are possible at the international level, while the latter addresses the efficacy of the norms articulated in various international legal instruments. Chesterman argued that when the rule of law is understood in the core, formal sense, one need only consider the international judicial systems and the processes of law-making to reasonably conclude that “there is presently no such thing as the international rule of law.”<sup>42</sup>

Other scholars disagree. Beaulac, for instance, argued that the formal aspects of the rule of law are, to a large extent, already reflected in the international legal system.<sup>43</sup> To support this view, first, he pointed out the presence of norms having the

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38. Chesterman, *supra* note 16, at 358 (adding that structural issues must also take into account “the historical and political context within which the rule of law was developed”).

39. See Jeremy Waldron, *The Rule of International Law*, 30 HARV. J.L. & PUB. POLY 16, 23 (2007) (noting also that although individuals can become sources of law within a municipal system through contracts, there are many sources of law within such a system that are not dependent on individuals, but only a few in international law not dependent on states).

40. *Id.* at 24.

41. *Id.*

42. Chesterman, *supra* note 38, at 358.

43. Beaulac, *supra* note 13, at 208.

characteristics of law and providing certainty, predictability, and stability to the system, and limiting the use of arbitrary power.<sup>44</sup> Second, Beaulac argued that international norms are adequately created and equally applied among states, citing as evidence the voluntary and sometimes widespread ratification of treaties by states.<sup>45</sup> Third, he argued that the international system has “adjudicative enforcement of normativity,” supporting this assertion by pointing out the existence of the ICJ, which is capable of adjudicating all legal disputes between states.<sup>46</sup> He acknowledged, however, that this view of the ICJ was “a mere illusion” given the limits imposed on the court by state consent, but maintained that this is “not so bad” because states do not have to give their consent on a case-by-case basis.<sup>47</sup> Acknowledging the limits of his chosen variables, Beaulac argued that overall at the normative and functional levels a strong case can be made for the existence of an international rule of law, much like that at the domestic level, but that significant challenges remain at the institutional

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44. *Id.* (noting that “international law is regarded as true positive law, which forms part of a real legal system, in which ‘every international situation is capable of being determined as a matter of law’”(quoting 1 ROBERT JENNINGS & ARTHUR WATTS, *OPPENHEIM’S INTERNATIONAL LAW* 13 (Longman Group, 9th ed. 1992))).

45. Beaulac, *supra* note 13, at 208 (noting, for example, that the Vienna Convention on the Law of Treaties is widely ratified and that even those states that have not ratified the instrument recognize that they are bound by its provisions because they embody customary norms). To support the idea of equal application, Beaulac pointed to the fact that international law applies to all states not just a few, with all members having the same duties and obligations. *See id.* at 210 (noting that normativity requires the application of law to all members, and finding that in international law the requirement of legal objectivity with regards to political subjectivity is met). However, he also defined equality as “whatever is lawful for one nation is equally lawful for any other; and whatever is unjustifiable in the one is equally so in the other” (quoting E. DE VATTEL, *THE LAW OF NATIONS, OR, PRINCIPLES OF THE LAW OF NATURE APPLIED TO THE CONDUCT AND AFFAIRS OF NATIONS AND SOVEREIGNS* (Philadelphia, T. & J.W. Johnson 1863)), but did not address the practical challenges of the legal notion of sovereign equality. They chose instead to focus on the codification of the norm in instruments such as the U.N. Charter and the Declarations on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations.

46. Beaulac, *supra* note 13, at 212–13.

47. *Id.* at 214. *But see*, Arthur Watts, *The International Rule of Law* 36 GERMAN Y.B INT’L. L. 15, 37 (1993) (noting that “such a purely consensual basis for the judicial settlement of legal disputes cannot be satisfactory in terms of the rule of law.”). For the basis of the ICJ’s jurisdiction, *see* Statute of the International Court of Justice, art. 34–38.

level.<sup>48</sup>

Unlike Beaulac, political realists are skeptical about the possibility of both a rule of international law and an international rule of law. This is largely because realists tend to ground their analyses not in the external indicia of the rule of law but on the structure of the international system. Political realists view the international system as anarchic and states as entities driven primarily by self-interest.<sup>49</sup> Basing their reasoning on presuppositions of neoclassical realism, some modern legal scholars have argued that international law serves the self-interest of states and it does not, on its own, carry sufficient normative strength to compel states to act contrary to their interests.<sup>50</sup> Thus the international rule of law is conceptualized as an instrumentalist construct with states having no moral obligation to comply with international law.<sup>51</sup> From this perspective, the concept is unstable; it could be thick or thin depending on the prevailing interests of the most influential states.

## II. DECONSTRUCTING THE CONCEPT OF THE RULE OF LAW

From the preceding discussion, it is clear that the concept of the rule of law is fraught with both theoretical and practical application problems. However, the norm continues to be

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48. Beaulac, *supra* note 13 at 221.

49. For a comprehensive treatment of political realism, see HANS J. MORGENTHAU, *POLITICS AMONG NATIONS: THE STRUGGLE FOR POWER AND PEACE* (5<sup>th</sup> ed., 1973). In support of his views, Morgenthau presented six principles of political realism: (1) politics is governed by objective laws rooted in human nature; (2) interest is defined in terms of power; (3) power is an objective and universally valid category; (4) political action has moral significance; (5) moral laws of a particular nation are not necessarily the same as those that govern the universe; (6) realism is based on pluralistic view of human nature. See generally KENNETH N. WALTZ, *THEORY OF INTERNATIONAL POLITICS* (1979) (explaining the key propositions of neo-classical realism).

50. JACK L. GOLDSMITH & ERIC A. POSNER, *THE LIMITS OF INTERNATIONAL LAW* 165 (2005) (arguing that the behavioral features of international law, particularly compliance, are “better explained by a theory of self-interest than by the various alternatives”).

51. *Id.* at 202 (arguing that international law must be excluded from ideas of moral reasons for compliance and noting that “[s]tates could have an intrinsic desire to comply with international law for reasons other than moral obligation. It is possible that even if states did not have a moral obligation to comply with international law, citizens and leaders might think that the state has an obligation to comply with international law.”).

understood as fundamentally apolitical—objective in conception and application—because of the belief that it facilitates the actualization of some objective notion of justice. To suggest that the rule of law is, in fact, a political preference or concept is to say that as a regulatory instrument it lacks the stability needed to ensure consistent and predictable outcomes in interstate relations. Thus, for rule of law proponents, “the fight for an international rule of law is a fight against politics.”<sup>52</sup> With understandings of the rule of law pitting law against politics, politics is viewed as representing the arbitrary application of power based on the preferences of influential groups,<sup>53</sup> while law is associated with neutrality and, hence, the attainment of justice. At the heart of this view is the faulty assumption that the law itself is apolitical and embodies justice.<sup>54</sup>

The following section challenges this assumption and argues that the law is, in fact, political; it is neither neutral nor objective and it does not have intrinsic value.<sup>55</sup> By deduction, the concept of the rule of law is likewise not politically neutral as the law’s substantive content embodies politically motivated preferences and interests, and any application of the rule of law leads to politically influenced outcomes that may or may not be just. Furthermore, this Note argues that presenting the international rule of law as politically neutral creates both conceptual and application problems.

#### A. THE LAW IS NOT APOLITICAL

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52. Martti Koskenniemi, *The Politics of International Law*, 1 EUR. J. INT’L L. 4, 5 (1990), <http://www.ejil.org/pdfs/1/1/1144.pdf> (indicating also that this fight is “understood as a matter of furthering subjective desires and leading into an international anarchy”).

53. *Id.* at 6 (arguing that the rule of law among states, articulated within the UN in the late 1980s was “yet another liberal impulse to escape politics”).

54. See John Hasnas, *The Myth of the Rule of Law*, 1995 WIS. L. REV. 199, 201 (explaining how citizens come to believe that “law is a body of consistent, politically neutral rules that can be objectively applied”). See also Hilary Charlesworth et al., *Feminist Approaches to International Law*, 85 AM. J. INT’L L. 613, 85 (1991) (noting that “[a] central feature of many western theories about law is that the law is an autonomous entity, distinct from the society it regulates. A legal system is regarded as different from a political or economic system, for example, because it operates on the basis of abstract rationality, and is thus universally applicable and capable of achieving neutrality and objectivity”).

55. Wade Channel, *Lessons not yet Learned: Problems with Western Aid for Law Reform in Postcommunist Countries*, 57 DEMOCRACY AND RULE OF L. PROJECT 3, 8 (2005).

To be objective, the law needs to be both concrete and normative.<sup>56</sup> However, the more concrete a rule, the less normative it becomes; too much concreteness leads to arguments that the law is political (providing a defense for existing structures) and too much normativity leads to arguments that the law is idealist, with judgments of what is desirable based on political preferences.<sup>57</sup> Either way, legal rules are inherently entwined with politics, making political preferences a necessary component of law and subsequently the concept of the rule of law. Koskenniemi reasoned that although some politics is inevitable in the formulation of law, “it should be constrained by non-political rules.”<sup>58</sup>

The political nature of law is particularly apparent in international law. The formation, content, and application of international law reveal political preferences, interests, and competing values.<sup>59</sup> At treaty formation, states negotiate the contents of various agreements based on their national interests. The resulting content reflects compromises and the values of the signatories to the extent that the views of all are taken into consideration. International law norms are characterized as hard or soft law, rules and principles, *jus cogens*, and so on, based on the political choices of the states that are involved in their creation, impacting the weight given to the various instruments. Furthermore, although states can be bound by customary law to which they have not affirmatively consented (unless they are persistent objectors), states are bound by treaty norms to the extent they consent to being so bound, which is another political choice. Moreover, the application of the rules will often depend on the forum in which any conflict is resolved. The political preferences of the reviewer (whether it be the Security Council or the ICJ, for

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56. See Koskenniemi, *supra* note 52, at 7 (arguing that in the modern view the concreteness of law is found in that law is understood as “an artificial creation not a natural one,” and the normativity of law requires application in spite of political preferences).

57. *Id.* at 8.

58. *Id.* at 5.

59. The development of international criminal law provides a stark example of the role of politics in the creation of law. See generally ROBERT CRYER ET AL., AN INTRODUCTION TO INTERNATIONAL CRIMINAL LAW AND PROCEDURE 144–179 (2d ed. 2010) (discussing the problems that plagued the lengthy negotiations at the creation of the Rome Statute and the lack of *travaux préparatoires* documenting the reasoning and history behind controversial provisions).

example) will affect the interpretation of legal norms, much like judges within domestic systems are often influenced by political preferences in their interpretation of the law.<sup>60</sup>

Although the manner in which various agreements are created supports the idea of sovereign equality and the rule of law's principle of fairness in the creation of law, it obscures the realities of unequal bargaining power and the fact that weaker states often acquiesce to sub-optimal or unfavorable terms that are disproportionately advantageous to more influential states.<sup>61</sup> The types of rules that thicker conceptions of the rule of law might propagate, such as those embodying ideals of fairness and justice will tend to have soft law status. They might be absorbed into the system as aspirational norms, written in vague language, viewed as progressively realizable rather than immediately applicable, and lacking enforcement capability.<sup>62</sup> States ratify international human rights treaties, which are

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60. See Hasnas, *supra* note 54 at 232 ("The law is an amalgam of contradictory rules and counter-rules expressed in inherently vague language that can yield a legitimate legal argument for any desired conclusion.").

61. This is particularly true of free trade agreements. An example is the impact of NAFTA on Mexican farmers. In this case, the 7% annual growth that had been promised to Mexico at signing became only 1.6% as the US continued to subsidize its farmers and use non-tariff barriers against Mexican products. For a discussion of NAFTA's impact on Mexico, see JOSEPH E. STIGLITZ, *MAKING GLOBALIZATION WORK* 64–66 (1st ed. 2006).

62. An example is the legal architecture of the International Covenant on Economic Social and Cultural Rights, G.A. Res. 2200A (XXI), U.N. Doc. A/RES/2200A (XXI) (Dec. 16, 1966), whose language is primarily aspirational, in part because of the recognition that economic development is a process. Except for the minimum standard requirements, the Covenant leaves states with no real enforceable legal obligations towards one another (though the norms are justiciable within states). Another example is the manner in which norms concerning the human rights obligations of transnational corporations are developing. The U.N.'s Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, which might have aided in holding transnational corporations accountable for human rights violations, were effectively dismantled by Special Representative John Ruggie's Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy Framework," U.N. Doc. A/HRC/17/31 (March 21, 2011), which presented such corporations' respect for rights as their responsibility rather than their legal duty. United Nations, Econ. & Soc. Council, Comm. on the Norms on the Responsibilities of Transnational Corp. and Other Bus. Enter. with Regard to Human Rights U.N. Doc. E/CN.4/Sub.2/2003/12/Rev.2 (Aug. 26, 2003); Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corp. and Other Bus. Enter., *Guiding Principles on Bus and Human Rights: Implementing the United Nations "Protect, Respect and Remedy Framework"*, Human Rights Council, U.N. Doc. A/HRC/17/31 (Mar. 21, 2011).

arguably the moral core of international law, with declarations, understandings, and reservations, which further articulate their political preferences, and in some ways compromise the robustness of the norms.<sup>63</sup> This process often results in treaties with unenforceable norms and dispute resolution that is left to political rather than legal processes.<sup>64</sup> Furthermore, the flexibility of the norms in much of international law arguably reflects recognition of the primacy of politics rather than law in international relations and states' preference for the same. The political nature of international law is, therefore, inescapable.

With the law itself being political and its validity as an impartial referee of international affairs questionable, it is difficult to sustain an argument that the rule of law is apolitical<sup>65</sup> and, therefore, a suitable arbiter. Even the three principles that underpin the thin or formal understandings of the rule of law—supremacy of law, equality before the law, and an effective judiciary—are political preferences. These three attributes have a veneer of objectivity, but they can only be politically neutral if the law itself were so. As Zurn and Reinhold noted, “even formal conceptions of the rule of law are never politically neutral, because the rules about the rules are as much products of power struggles as the rules themselves.”<sup>66</sup> This fundamental incongruity within understandings of the concept of the rule of law makes its application to an international system of autonomous political units, built on and governed primarily by political principles, at best difficult and, at worst, unjust.<sup>67</sup>

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63. See generally Eric Neumayer, *Qualified Ratification: Explaining Reservations to International Human Rights Treaties*, 36 J. LEGAL STUD. 397, 401 (2007) (explaining the impact of reservations, declarations, and understandings on the efficacy of human rights norms). An example of a heavily reserved human rights treaty is the Convention on the Elimination of Discrimination Against Women, where the most reserved provisions (articles 2 and 16) arguably embody the object and purpose of the instrument. Convention on the Elimination of Discrimination Against Women, G.A. Res. 34/180, U.N. Doc. A/RES/34/180 (Dec. 18, 1979).

64. Neumayer, *supra* note 63, at 401.

65. See Belton, *supra* note 3, at 810 (noting that rule of law ends are historically and culturally determined).

66. See Michael Zürn & Theresa Reinold, *Rule of Law Promotion and Legalization Beyond the Nation-State*, WISSENSCHAFTSZENTRUM BERLIN FÜR SOZIALFORSCHUNG, <http://www.wzb.eu/en/research/international-politics-and-law/global-governance/projects/foerderung-der-rule-of-law-und-verrechtlich> (last visited Sept. 21, 2013).

67. Koskenniemi *supra* note 52, at 28 (“The Rule of Law constitutes an attempt to provide communal life without giving up individual autonomy.

## B. HOW SOVEREIGNTY IMPACTS THE INTERNATIONAL RULE OF LAW

The international system is built on the notion of state sovereignty,<sup>68</sup> a legal and political principle that has been described as the most essential quality of a state in international law.<sup>69</sup> Although the concept is plagued with definitional problems,<sup>70</sup> at its core it describes “the supreme authority exercised by each state”<sup>71</sup> in matters concerning its territory. Sovereignty complicates the conceptualization and application of an international rule of law by: (1) encouraging the prioritization of national self-interest in state interactions, thereby compromising the fairness of the processes of rule creation and the substantive content of the rules and (2) making compliance with international law an unreliable indicator of the actualization of the rule of law. This Note will address these in turn.

First, although it has been argued that international institutions and the forces of globalization are eroding state sovereignty, the reality is that the world is still not borderless.<sup>72</sup>

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Communal life is, of course, needed to check individualism from leading either into anarchy or tyranny. Individualism is needed because otherwise it would remain objectionable for those who feel that the kind of community provided by it does not meet their political criteria. From their perspective, the law’s communitarian pretensions would turn out as totalitarian apologies.”)

68. See generally STEPHEN D. KRASNER, *SOVEREIGNTY: ORGANIZED HYPOCRISY* 3–4 (1999) (describing four types of sovereignty: international legal sovereignty, which deals with practices associated with mutual recognition; Westphalian sovereignty, which deals with political organization and the exclusion of external structures; domestic sovereignty, which deals with the formal organization of authority within states; and interdependence sovereignty, which deals with the ability of public authorities to regulate the flow of things across the borders of their state).

69. GEOFFREY ROBERTSON, *CRIMES AGAINST HUMANITY: THE STRUGGLE FOR GLOBAL JUSTICE* 81 (The New Press 2000). See also, U.N. Charter art. 2, para. 1.

70. Much of the confusion stems from the complexity of deconstructing its essential elements; for instance, who are its subject and authorizers? There is also the difficulty of distinguishing the symbolic from the substantive meanings. What is the difference between tyranny and sovereignty? For a comprehensive treatment of the subject, see Richard Falk, *Sovereignty and Human Rights: The Search for Reconciliation*, 5 *ISSUES OF DEMOCRACY* 29, 32–35 (2000).

71. BLACK’S LAW DICTIONARY 1541 (9th ed. 2009).

72. See J. Samuel Barkin, *The Evolution of the Constitution of Sovereignty and the Emergence of Human Rights Norms*, 27 *MILLENNIUM J. OF INT’L STUD.*



States remain primarily responsible for their own territory. States may have extraterritorial obligations in some instances,<sup>73</sup> but these remain limited and highly contested depending on the area of law.<sup>74</sup> Because sovereignty is designed to protect statehood, it ensures that states will prioritize the safeguarding and furtherance of national rather than collective self interest in their interactions with other states. This has the effect of compromising the U.N.'s goal of international justice. Moreover, states, in their sovereign discretion, choose the manner in which they will participate in any given legal regime, if at all, a practice that tends to undermine the rule of law.<sup>75</sup>

A system of autonomous political units with no supreme legislative or administrative authority also ensures that much of inter-state interaction will be based on political bargaining rather than on legal rules, and those with greater bargaining power will tend to dictate the rules of interaction.<sup>76</sup> Thus, sovereignty empowers states to influence both the content and application of the law itself. The result is that the law, which is supposed to rule, often reflects the preferences of the most influential sovereigns.<sup>77</sup> Sovereign equality remains a legal

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229, 232 (1998) (arguing that a "state's need for certain institutional structures to legitimate themselves can act as a significant constraint on states' final authority over their internal affairs"); *but see* KENNETH N. WALTZ, *THEORY OF INTERNATIONAL POLITICS* 158 (1979) (arguing that interdependence is a myth that "obscures the realities of international politics"). Within the European context, however, there is an argument to be made for the relinquishment of essential features of sovereignty, including free internal movement across borders and the use of a common currency, through state participation in the European Union.

73. For examples of how extraterritorial obligations apply in international human rights law, *see* *CASES AND CONCEPTS ON EXTRATERRITORIAL OBLIGATIONS IN THE AREA OF ECONOMIC, SOCIAL AND CULTURAL RIGHTS* (Fons Coomans & Rolf Künnemann, eds., 2012). International environmental law also regulates activities that might have an effect across boundaries. *See, e.g.,* Austen L. Parrish, *Trail Smelter Déjà Vu: Extraterritoriality, International Environmental Law, and the Search for Solutions to Canadian-U.S. Transboundary Water Pollution Disputes*, 85 B.U. L. REV. 363, 415 (2005). There are also extraterritorial obligations in international humanitarian law. *Id.*

74. Parrish, *supra* note 74, at 395 (discussing the exception to the general presumption against enforcing domestic law extraterritorially in the case of environmental law).

75. *See supra* notes 3 and 62 and accompanying text.

76. *See* Hasnas, *supra* note 54, at 232 (1995) (arguing that the law "will always reflect the political ideology of those invested with decisionmaking power").

77. *Id.*

fiction. In this context, a concept of the rule of law that claims to be apolitical will inadvertently grant the practice of “rule by the powerful” legal and moral legitimacy.

Second, because of its impact on both state motives and the law’s substantive content, sovereignty makes state compliance with international law an unreliable indicator of the actualization of an international rule of law.<sup>78</sup> Compliance out of a sense of legal duty, even at a state’s expense, would demonstrate a commitment to legal norms per se and support the argument that there can, in fact, be an international rule of law. However, selective compliance, on the other hand, would undermine it. Although there is support for Louis Henkin’s contention that “almost all nations observe almost all principles of international law and almost all of their obligations almost all of the time,”<sup>79</sup> it would be a mistake to interpret it as evidence of the rule of law, thick or thin, without assessing patterns of compliance within their political context and analyzing the content of the law itself.

Although the compliance question remains largely unresolved, in practice, states’ compliance appears to vary depending on the area of law.<sup>80</sup> States may choose to follow international aviation rules governing flights, for instance, because the international political costs are low and the domestic interest of ensuring that citizens are able to travel internationally is high.<sup>81</sup> At other times, they obey rules because the political or, more precisely, the reputational costs

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78. See Koskeniemi *supra* note 52 at 8 (indicating that international lawyers have pointed out that “legal rules whose content or application depends on the will of the legal subject for whom they are valid are not proper legal rules at all but apologies for the legal subject’s political interest”).

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

80. See GOLDSMITH & POSNER, *supra* note 50, at 102–04 (arguing that while the idea of doing “the right thing” may explain compliance with certain treaty regimes, it does not explain compliance with trade and human rights treaties, and noting also that cost-benefit analyses precedes a state’s decision to enter into any treaty). *But see* Harold Hongju Koh, *Why Do Nations Obey International Law?*, 106 *YALE L.J.* 2599, 2602 (1996–97) (arguing that this instrumentalist logic is limited; it does not explain the internalization of legal norms in domestic systems through ongoing transnational legal processes). The internalization of legal norms, however, does not empty them of their political content. Thus, Koh’s view does not support the idea of an international rule of law, which is based on objective norms that might actualize the elusive idea of justice.

81. See THOMAS M. FRANCK, *FAIRNESS IN INTERNATIONAL LAW AND INSTITUTIONS* 14 (1995) (arguing that nations “obey powerless rules”).

of not doing so are high.<sup>82</sup> For instance, when there is growing consensus around a norm, a state may participate out of fear of retaliation or being considered an outcast.<sup>83</sup> States continue to bend the rules or act contrary to them when their self-interest so dictates. Thus, national self-interest, rather than loyalty to international legal norms out of a sense of moral or legal obligation, appears to be the single constant determinant of state compliance with international law.<sup>84</sup> The problem is that the concept of rule of law presupposes compliance despite state preferences.

The question that arises is whether there is a formulation of the rule of law that is not only sensitive to the complexities sovereignty presents, but one that can also be used to further the purposes of justice as envisioned by the drafters of the Charter.<sup>85</sup>

### III. TOWARDS AN INTERNATIONAL RULE OF LAW

The fact that the concept of an international rule of law is not apolitical does not necessarily mean the idea must be discarded. However, it does mean that the rule of law must be understood differently if it is to become fit for international application. Because the goal of the rule of law is to realize some notion of international justice, it must be grounded in a theory of justice.<sup>86</sup> The formulation of an adequate theory of

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82. GOLDSMITH & POSNER, *supra* note 50, at 102.

83. Roger P. Alford & James Fallows Tierney, *Moral Reasoning in International Law in THE ROLE OF ETHICS IN INTERNATIONAL LAW* 11, 11 (Donald Earl Childress III ed., 2011) (indicating that traditional theories of compliance present states as complying out of “a desire to avoid sanctions, as well as by obedience to authority, utilitarian compliance, socialization, reputational concerns, or norm internalization”). See also GOLDSMITH & POSNER, *supra* note 50, at 165.

84. See GOLDSMITH & POSNER, *supra* note 50; but see, Alford & Tierney, *supra* note 83 (arguing that moral reasoning plays a role in the decision-making of agents acting on behalf of states).

85. See *supra* notes 28 and 29 and accompanying text.

86. See generally TAMANAHA, *supra* note 20 at 151 (arguing that “whenever implemented, the rule of law . . . should always be subject to evaluation from the standpoint of justice” and discussing, among other conceptions of the rule of law, the various ways through which theorists have understood justice as a component of the rule of law). An example of a theory of justice that is yet to be operationalized is the “capabilities approach” in Martha C. Nussbaum, *Beyond the Social Contract: Capabilities and Global Justice*, 32 OXFORD DEV. STUD. 3, 4 (2004); see also AMARTYA SEN, DEVELOPMENT AS FREEDOM 87 (1999).

justice is a difficult task that is both philosophical and political at its core. This Note does not attempt to present one.<sup>87</sup> Instead, because this is fundamentally an institutional design problem, the Note focuses on the socio-legal cooperative or coordinative conditions that would be necessary for the implementation of any theory of justice that might be later developed or implemented.

#### A. SOME ESSENTIAL COMPONENTS OF A USABLE INTERNATIONAL THEORY OF JUSTICE

The idea of finding the meaning of justice is a serious intellectual exercise, which is often relegated to moral or political philosophy and shunned by international lawyers because it smacks of utopianism or “legal idealism.”<sup>88</sup> Despite the perception that such an effort represents a reversion from positivist<sup>89</sup> to naturalist<sup>90</sup> legal thinking, it is nonetheless important to know at what precisely the international rule of law is aimed if its normative content is to become clearer and made more effectual.

The theory might take the form of a document such as the Universal Declaration of Human Rights or other General Assembly resolution articulating broad principles and then eventually branching out and developing into more concrete norms in various instruments. First, it would need to identify the ethical foundations of and the principles that underpin

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87. See, e.g., CHARLES R. BEITZ, *POLITICAL THEORY AND INTERNATIONAL RELATIONS* 179 (rev. ed. 1999); MICHAEL WALZER, *SPHERES OF JUSTICE: A DEFENSE OF PLURALISM AND EQUALITY* 5 (1983); JOHN RAWLS, *A THEORY OF JUSTICE* 11 (1971).

88. See generally G.J.H. VAN HOOF, *RETHINKING THE SOURCES OF INTERNATIONAL LAW* 85 (1983) (discussing the sources of international law).

89. Legal positivism is a philosophical position which emphasizes a view of international law derived not from absolute principles but rather from an empirical study of how states interact—the agreements states enter into and custom are its basis. See generally MALCOLM N. SHAW, *INTERNATIONAL LAW* 26 (5th ed. 2003).

90. Theorists adhering to this view, common in the 1600s, argued that state practice and treaties could never be sources of international law as it was to be thought of primarily as a part of natural law; the emphasis was on what states ought to do rather than on what they did. See, e.g., SAMUEL PUFENDORF, *ELEMENTORUM JURISPRUDENTIAE UNIVERSALIS LIBRI DUO* [THE TWO BOOKS OF THE ELEMENTS OF UNIVERSAL JURISPRUDENCE] 168 (William Abbott Oldfather trans., Oxford Univ. Press 1931). For a contemporary discussion of natural law see *THE THREADS OF NATURAL LAW: UNRAVELLING A PHILOSOPHICAL TRADITION* (Francisco José Contreras ed., 2013).

international law. Second, although it is a widely accepted principle of international law, the theory would need to explain in greater detail the idea of sovereign equality and its limitations as it tends to have a profound impact on inter-state relations.<sup>91</sup> Third, it would also need to articulate principles explaining the idea of “fairness” and present criteria articulating how it might look when implemented within the context of specific international legal regimes.

Although it is unlikely that an intractable principle like “justice” would be defined in such a manner as to garner the support of all states, there are many aspects of the principle that would. Controversy over the substantive aspects of “equality” and the precise boundaries of extraterritorial obligations, for example, will likely continue; however, other principles such as liberty and opportunity would likely garner immediate if not universal support. Within this context, such tensions are not to be taken as evidence of the politics that obstructs the actualization of an international rule of law, but rather as a normal aspect of the political bargaining that occurs in the process of norm creation, maturation, and diffusion.<sup>92</sup>

#### B. INCORPORATING A THEORY OF JUSTICE INTO UNDERSTANDINGS OF THE RULE OF LAW

Adding a theory of justice to understandings of the international rule of law would be beneficial to the international system in several ways. First, it would help to clarify the legal content of the international rule of law and move it from simply being an emerging norm to maturity. Articulating the precise goal of the norm would make it possible to begin to formulate less ambiguous rule of law elements. Currently, the ambiguity in descriptions of elements of the rule of law makes it difficult to assess the norm’s maturation and, more importantly, how to make it more effectual. Measurement and assessment are particularly important because the maturation of the norm could lead to the creation of globally justiciable rule of law norms upon which case law might eventually be built, further aiding the diffusion

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91. See brief discussion of impact of unequal bargaining power on interstate relations under Section II (A).

92. See generally Martha Finnemore & Kathryn Sikkink, *International Norm Dynamics and Political Change*, 52 INT’L ORG. 887, 888 (1998) (discussing norm diffusion in international relations).

of the norm within and among states.<sup>93</sup> Moreover, given that the goals noted in the U.N. Charter already present an understanding of international justice,<sup>94</sup> the development of a theory of justice would help to create and advance concrete and usable standards that bring current understandings of the international rule of law in line with the vision of the drafters of the Charter.

Second, grounding the rule of law in a theory of justice would provide a much-needed regulatory framework in the context of international rule creation. Thus far, rules are created in various fora with few checks for consistency with other international norms.<sup>95</sup> The result is the fragmentation of international law and the development of self-contained regimes.<sup>96</sup> A substantive theory of justice would provide a filter through which various rules of international law may be tested for fairness and a way to begin to operationalize the thick concept of the rule of law envisioned by the drafters of the Charter. A well-articulated theory of justice might be a particularly useful filter in the negotiation of free trade agreements. Requiring that such agreements pass a rule of law or justice test before they are deemed legally acceptable would go a long way towards meaningfully leveling the playing field.

Third, adding a theory of justice to the rule of law would likely grant the norm greater legitimacy, particularly among weaker states. Although this alone is unlikely to change states' practice of prioritizing national self-interest, it would create a framework within which collective self-interest might become embedded in the system in much the same way that national self-interest is. This would, in turn, promote the U.N.'s vision of international cooperation.<sup>97</sup> Moreover, suspicions that the idea of the rule of law is a political tool used to enforce the will of the most influential states would likely be lessened if an adequate theory of justice were made a core component of the international law corpus.

The preceding benefits are, of course, only theoretical. Given the high stakes involved, one of the most significant challenges would be getting states to agree not only with

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93. *Id.*

94. *See generally*, U.N. Charter Preamble.

95. *See generally*, *Fragmentation of International Law*, *supra* note 33 at ¶ 34.

96. *See generally*, *id.* at ¶ 44.

97. *See* U.N. Charter art. 1, para. 3; art. 13, para. 1; art. 56.

regard to the substantive aspects of the theory, but also on other preliminary and highly political matters such as who would be tasked with the drafting of the instrument. The International Law Commission—the independent body of experts within the U.N. tasked with codifying all the essential principles of public international law, and filling in the gaps to ensure continuity— would likely be the appropriate organ for this monumental task.<sup>98</sup>

### CONCLUSION

As a norm, the international rule of law has the potential to positively impact inter-state relations. However, simply building institutions around it, while ignoring its conceptual challenges, will do little to bring it to maturity. This Note has demonstrated that although the concept has a fundamental flaw in its logic, namely the denial of law's political nature, its greatest weakness is that it exists to promote justice yet it lacks a usable theory of justice. Without such a theory, when applied to international affairs the rule of law cannot attain the goals of justice noted in the U.N. Charter. Instead, it easily becomes what it does not want to be: a sophisticated form of politics that perpetuates the imbalances within the international system.

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98. The ILC was created by the GA as part of its responsibilities under U.N. Charter article 13(1)(a). It is important to note that although the Commission is a body of independent experts, politics plays a role in their election. Nonetheless, the benefit of using the Commission is that from its inception its work has proceeded deliberatively and has been less influenced by the priorities of governments. ALAN BOYLE & CHRISTINE CHINKIN, *THE MAKING OF INTERNATIONAL LAW* 171 (2007). Furthermore, when the GA recommends topics to the ILC for consideration they become priority according to Article 18(3) of the statute of the ILC. *Id.* at 176.