

Two idea(l)s of the international rule of law

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Abstract: The international rule of law is a somewhat ubiquitous concept yet, as idea, it is marred by ambiguity and disagreement and, as ideal, constantly frustrated by the institutional conditions of the decentralised international legal order. Rather than necessarily undermining the concept, however, I argue that these structural conditions cause a kind of conceptual rupture, resulting in seemingly opposed or contradictory idealisations. On the one hand, the international rule of law can be understood as what Terry Nardin has called the ‘basis of association’ in international relations. This understanding places importance on the legal form as an end in itself, whereby the structural or institutional autonomy of international law is critical to the peaceable conduct of international relations. On the other hand, however, the rule of law exists as an unfulfilled promise of an order to come: it is distinctly anti-formalist in nature, stressing the functional capacity of international law to actually constrain political actors (primarily states) and thus seeking to develop more effective international institutional mechanisms. Although these competing idealisations give rise to a certain contradiction and inherent tension, their conceptual opposition is, I believe, critical to an understanding of authority and accountability dynamics in an era of ‘global governance’.

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I. Introduction

International law, in its modern form, is a professional and academic practice that was largely self-constructed between the late-eighteenth and

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early-twentieth centuries in an effort to reimagine interstate diplomacy as a system of positive legal rules. What had once been a deductive, philosophical tradition was reinvented under the influence of a disparate group of self-consciously ‘professional’ (and largely European) jurists who, spurred by enlightenment reformism, aimed to transform international law into an inductive, institutional, and above all else scientific practice. As most famously recalled in Martti Koskenniemi’s account of the ‘gentle civilizers’ of this time, these jurists ‘took it upon themselves to explain international affairs in the image of the domestic State, governed by the Rule of Law’.¹

This story of disciplinary transformation is by now well retold,² just as is the tale of the fate of international law since: a narrative of faith and scepticism, commitment and disenchantment, as successive generations of international lawyers struggled to prove the reality and relevance of international legal rules on these terms.³ The rule of law thus emerges as critical to the coherence of modern international law – understood as a transformative project as much as a disciplinary practice – even if the realisation of this ideal appears repeatedly frustrated in practice. Indeed, successive generations of international lawyers have struggled to reconcile their rule of law ambitions with the decentralised institutional architecture of international law and the realities of an international system in which power and strategic interest often trump legal constraint.⁴

Despite this recurring frustration, today the concept of the rule of law appears more rather than less central to international legal practice, not only in the reformist ambitions of international lawyers, but as an increasingly important plank of interstate diplomacy. Since the early years of the new millennium, in fact, world leaders at the United Nations (UN)

¹ M Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870–1960* (Cambridge University Press, Cambridge, 2001) 361.

² In addition to Koskenniemi’s work, see also A Carty, ‘Why Theory? – The Implications for International Law Teaching’ in P Allott *et al.*, *Theory and International Law: An Introduction* (BIICL, London, 1991) 75, 80–2; and generally A Carty, *The Decay of International Law: A Reappraisal of the Limits of Legal Imagination in International Affairs* (Manchester University Press, Manchester, 1986) as well as Chs 1–2 of R Collins, *The Institutional Problem in Modern International Law* (Hart, Oxford, 2016).

³ See generally Collins (n 2).

⁴ See *inter alia* R Collins, ‘The Rule of Law and the Quest for Constitutional Substitutes in International Law’ (2014) 83 *Nordic Journal of International Law* 87; A Somek, ‘From the Rule of Law to the Constitutionalist Makeover: Changing European Conceptions of Public International Law’ (2011) 18 *Constellations* 567.

have repeatedly reaffirmed their faith in ‘an international order based on the rule of law’, seen as one of the ‘indispensable foundations for a more peaceful, prosperous and just world’.⁵ Meanwhile, in contemporary academic literature, the rule of law has been described as the ‘*raison d’être* of international law’,⁶ and as the ‘single most important goal of the international system’,⁷ though the discipline’s growing attachment to the concept might just as easily be judged by the sheer weight of literature emerging on the topic in recent times.⁸

How are we to understand this recurrent reaffirmation of the rule of law ideal given the constant frustration over its realisation in practice? It might well be the case, as Simon Chesterman has noted, that ‘such a high degree of consensus on the virtues of the rule of law is possible only because of dissensus as to its meaning’.⁹ Indeed, Christopher May has recently defended the idea of the rule of law as a kind of ‘global common sense’, which functions as such only because of a certain indeterminacy as to its core meaning.¹⁰ Even in its domestic application, the rule of law is a notoriously imprecise and somewhat amorphous concept,¹¹ and such malleability is only likely further compounded by the uncertainty as to how the concept adapts to the international environment. However, as I have elsewhere argued,¹² even where precise definitions or institutional desiderata are put aside to focus on the overall point or function of the concept – at the very least, that law should structure and pre-empt the political choices of powerful actors – there is still an evident disconnect

⁵ UNGA Res 67/1, ‘Declaration of the High-level Meeting of the General Assembly on the Rule of Law at the National and International Levels’ (30 November 2012) para 1, at <<https://www.un.org/ruleoflaw/files/A-RES-67-1.pdf>>.

⁶ A Nollkaemper, *National Courts and the International Rule of Law* (Oxford University Press, Oxford, 2011) 1.

⁷ G Blum, ‘Bilateralism, Multilateralism, and the Architecture of International Law’ (2008) 48 *Harvard International Law Journal* 323, 331–2.

⁸ I will not list the literature here, though many of the most relevant pieces will be cited as the article develops. See, in particular, references from nn 54–55 onwards.

⁹ S Chesterman, ‘An International Rule of Law?’ (2008) 56 *American Journal of Comparative Law* 331, 332.

¹⁰ C May, *The Rule of Law: The Common Sense of Global Politics* (Edward Elgar, Cheltenham, 2014).

¹¹ For discussion, see P Burgess, ‘The Rule of Law: Beyond Contestedness’ (2017) 8 *Jurisprudence* 480; and more broadly see *inter alia* T Endicott, ‘The Impossibility of the Rule of Law’ (1999) 19 *Oxford Journal of Legal Studies* 1; J Waldron, ‘Is the Rule of Law an Essentially Contested Concept (in Florida)?’ (2002) 21 *Law and Philosophy* 137; and S Williams, ‘Indeterminacy and the Rule of Law’ (2004) 24 *Oxford Journal of Legal Studies* 539.

¹² See Collins (n 4).

between such ambition and the institutional and political realities of the decentralised international legal system.

Perhaps, then, this collective embrace of the rule of law ideal is just a mere rhetorical puff,¹³ wishful thinking, or hopeless idealism – another symptom of the ever-present domestic analogy that has plagued the modern discipline?¹⁴ In many cases, no doubt, such recourse to the language of the rule of law will appear as somewhat hollow and meaningless, or worse, as Judith Shklar once put this, as simply a ‘self-congratulatory rhetorical device’ or form of ‘ruling class chatter’.¹⁵ However, for at least two reasons, I do not think we should dismiss the relevance of the idea, *and ideal*, of the international rule of law.

The first and perhaps most significant reason is that the practice of modern international law has, as I have suggested above, already been constructed on the basis of a domestic analogy, such that the very idea of international law as a system of positive legal rules appears ‘historically as well as conceptually linked with that of an international Rule of Law’.¹⁶ Of course, the effort to explain international law in this way has only served to highlight the peculiarities of the international legal system, which necessarily makes the application of the rule of law thereto ‘somewhat indirect and complex’.¹⁷ However, whilst accepting the need for some caution and qualification in this respect, we clearly have *prima facie* reasons to take the concept seriously.

The second reason – which follows from the first, though functions also as a stand-alone justification – is simply the concept’s near unanimous endorsement within the modern discipline. Given that international law is, if nothing else, a socially-constructed form of institutional practice, to dismiss the relevance of the international rule of law would seem to undermine the coherence of this practice as it is understood by international legal ‘participants’ themselves – a group which can be broadly defined to include states, international lawyers, international organisations,

¹³ On the rhetorical uses of the rule of law generally, see the very recent and very helpful introductory chapter: C May and A Winchester, ‘Introduction to the *Handbook on the Rule of Law*’ in C May and A Winchester (eds), *Handbook on the Rule of Law* (Edward Elgar, Cheltenham, 2018) 1, 2–7.

¹⁴ *Ibid* and I Hurd, ‘The International Rule of Law and the Domestic Analogy’ (2015) 4 *Global Constitutionalism* 365.

¹⁵ J Shklar, ‘Political Theory and the Rule of Law’ in AC Hutchinson and P Monahan (eds), *The Rule of Law: Ideal and Ideology* (Carswell, Toronto, 1987) 1, 1.

¹⁶ M Koskeniemi, ‘The Politics of International Law’ (1990) 1 *European Journal of International Law* 4, 4.

¹⁷ T Nardin, *Law, Morality, and the Relations of States* (Princeton University Press, Princeton, NJ, 1983) 183.

and other relevant actors.¹⁸ Unless the modern discipline is infected by a kind of collective delusion – a possibility, of course, but given the above points it would seem unfair to initially presume so – it surely behoves the theorist to take these claims seriously and therefore attempt to give a plausible account of what the international rule of law *should* mean. In other words, rather than rejecting it outright, it might well be possible still to explain the concept in a way that is meaningful to those who deploy it, yet theoretically coherent and normatively robust on its own terms.

On these terms, however, there arguably remains a more fundamental challenge in giving an adequate account of the rule of law at the international level. This challenge is perhaps best illustrated by two quite different, yet equally unhelpful tendencies that reveal themselves in the literature. The first is a recurrent argument for a kind of modified, simplified or less demanding list of rule-of-law desiderata derived from the domestic context. Whilst this strategy purports to recognise the unique institutional circumstances of the international legal order, these circumstances are often treated simply as faults to be compensated for, rather than as critical components in an adequate theorisation of an international rule of law. At the same time, a second, and in many ways equally problematic tendency is to seemingly put aside our inherited experiences of the rule of law in the domestic context in order to conjure up a bespoke concept that is more consonant with how legal rules actually function in the international context. Whilst this kind of inductive learning is important in making sense of legal practices in an international context, if the concept of the rule of law is to retain any critical, counterfactual potential it surely cannot just be reduced to a mere reflection of extant legal practices. Indeed, I believe that a coherent and persuasive view of the international rule of law must of course reflect what is significant about doctrines and legal structures to those participants engaged in international legal practices, but the theorist must also abstract from those practices in order to evaluate what is most meaningful and defensible about them, that is, to offer a representation of the legal form seen in its best light.

Nevertheless, on these terms one still faces a further difficulty in giving a plausible account of the international rule of law. This difficulty comes from the simple fact that the question of what is important or valuable about international law is itself a matter about which the modern discipline

¹⁸ See eg R Higgins, *Problems and Process: International Law and How We Use It* (Clarendon Press, Oxford, 1994) 49–50 and, more recently, J d’Aspremont, ‘Introduction’ in J d’Aspremont (ed), *Participants in the International Legal System: Multiple Perspectives on Non-State Actors in International Law* (Routledge, Abingdon, 2011) 1, 1–3.

appears fundamentally conflicted, revealing almost diametrically opposed understandings of the role and function of legal rules in the conduct of international politics. My point is not just that different participants have different understandings of what international law is or how it functions in practice.¹⁹ Rather, it is that from amongst these many understandings there emerges two plausible and in many respects equally convincing idealisations of an international rule of law: a more rationalist, functional or instrumental understanding on the one side; a more formal, procedural and fundamentally pluralist understanding on the other.²⁰

To explain this claim more fully, from one perspective we might say that the international rule of law is an ideal that is intrinsic to the systemic integrity of international law as a decentralised legal order. It subsists in the idea of legal association between political actors related to each other formally, rather than because of shared values or ends. On this account, the rule of law is understood as a ‘non-instrumental’ ideal, insofar as it expresses a commitment to legality in international politics as an important end in itself. The rule of law thus inheres in the form of international law understood ideally as a particular kind of well-functioning legal system. From another perspective, however, the rule of law acts more as a way to judge, reform and ensure the fulfilment of international law’s promise as, in Lassa Oppenheim’s words, ‘a means to certain ends outside itself’.²¹ On this account, there is nothing intrinsically valuable about the *current* form of international law and, indeed, institutional developments that in many ways stress and strain international law’s decentralised institutional character – for instance, the creation of the UN Security Council, or the International Criminal Court (ICC) – are seen as important innovations aimed at ending outlawry and impunity and therefore helping to realise a more purposive vision of ‘legality’. Here, the rule of law is understood broadly by reference to law’s functional capacity to actually pre-empt political choices and realise agreed-upon objectives.

¹⁹ See generally, Ch 1 of P Capps, *Human Dignity and the Foundations of International Law* (Hart, Oxford, 2009).

²⁰ I am not making a hugely novel claim in highlighting this tension. The best outline of these tensions in the rule of law and the modern law-state generally is arguably R Unger, *Law in Modern Society* (Free Press, New York, NY, 1976). Applied to international law more broadly, this tension is outlined most obviously in M Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (Cambridge, Cambridge University Press, 2005).

²¹ For Oppenheim, these ends could loosely be summarised as ‘peace among the nations and the governance of their intercourse by what makes for order and is right and just’. See L Oppenheim, ‘The Science of International Law: Its Task and Method’ (1908) 2 *American Journal of International Law* 313, 314.

Clearly, much more needs to be said – and will be said – about both idealisations, but the important point for current purposes is that whilst these two images seem intrinsically opposed to each other, they are also interlinked and, indeed, only really take on meaning in their conceptual opposition. In that sense, whilst the realisation of one vision might seem to stress and strain the other, it seems equally true that both reveal plausible and important aspects of what a commitment to ‘legality’ in contemporary international law necessarily means. In other words, that the rule of law seems both to be reflected within yet also challenged by the international legal form is simply a reflection of the fact that there are, I believe, actually ‘two types of logic at play in the international rule of law’.²²

To make this point, of course, might simply be to point to an inherent dialectic tension at the heart of international law as a form of disciplinary practice.²³ Indeed, a similar tension seems to arise in a number of dichotomous oppositions in international legal theory: between pluralism and solidarism;²⁴ society and community;²⁵ coexistence and cooperation;²⁶ formalism and instrumentalism;²⁷ and so on. Furthermore, it is very likely that these tensions themselves only really reflect a broader rationalist-empiricist tension at the heart of liberal political theory more broadly²⁸ – albeit one which is arguably more pronounced at the international level due to the decentralised character of the international political community.²⁹ Nevertheless, my ambition is not to revisit or resolve these older debates nor to necessarily take a side within them. In fact, my central point is that these conflicting urges are captured within what the international rule of law is, for the failure or disjuncture in the domestic analogy – the specific decentralised character of international law – causes an unending and irresolvable oscillation between these two urges. In that sense, both

²² M Koskenniemi, ‘What is International Law for?’ in M Evans, *International Law* (4th edn, Oxford University Press, Oxford, 2014) 29, 39.

²³ See, most obviously, Koskenniemi (n 20).

²⁴ See, eg, J Williams, ‘Pluralism, Solidarism and the Emergence of World Society in English School Theory’ (2005) 19 *International Relations* 19.

²⁵ R Buchan, ‘A Clash of Normativities: International Society and International Community’ (2008) 10 *International Community Law Review* 3.

²⁶ See WG Friedmann, *The Changing Structure of International Law* (London, Stevens & Sons, 1964); and more recently, see P-M Dupuy, ‘International Law: Torn between Coexistence, Cooperation and Globalization. General Conclusion’ (1998) 9 *European Journal of International Law* 278.

²⁷ Koskenniemi (n 22) at 47–9 in particular.

²⁸ J Gray, *Two Faces of Liberalism* (Polity Press, London, 2000).

²⁹ See, eg, G Simpson, ‘Two Liberalisms’ (2001) 12 *European Journal of International Law* 537.

ideals are intrinsically connected and only really take on meaning in their conceptual opposition. Each suggests a vision that cannot be fully articulated without inviting an equally plausible objection from the opposite perspective.

Accordingly, frustration over the realisation of the rule of law – the story of hope and frustration, scepticism and disenchantment, recounted briefly above – can in this way be recast within the *topos* of the international rule of law itself. Again, this is not to suggest that such a tension is unique to the international legal system, or indeed that this tension can always be successfully mediated within the state or other contexts. Rather, my concern is more to highlight how the architecture of international law makes this tension more apparent and explicit in the functioning of the system itself. This somewhat constructed ‘fence-sitting’ might sound like uncommitted ambivalence, but this is not my intention. I will argue that in the context of international law’s decentralised institutional architecture both rule of law logics continue to play off against each other in an important balance and antagonism which allows for a critical debate about international policy whilst securing a measure of relational accountability. Furthermore, insofar as international lawyers increasingly grapple with the problem of the accountability of ‘global governance’ institutions and the rule of law features as an important critical counterpoint in coming to terms with this phenomenon, I believe that this constructive tension becomes even more important in understanding the legitimacy (or otherwise) of this kind of ‘post-national’ normative influence.

I will return to this latter point in the final section of the article, but before doing so I will first (Section 2) consider how the domestic analogy plays out in structuring international legal thought, but also seemingly frustrating the realisation of the rule of law therein. I then (in Section 3) consider how the structural peculiarities of the international legal order are, and should be, taken into account in theorising the international rule of law. Based on this understanding, I consider (in Sections 4 and 5 respectively) these two competing idealisations of the international rule of law, whilst arguing that they should be seen as important counterpoints in a necessary tension within an overall account of the rule of law in international relations, a tension which helps to secure some accountability in a decentralised institutional space.

II. Domestic analogy and the rule of law in the relations of states

The use of domestic analogies in structuring thinking about the nature of international relations, as well as the potential for legal rules to regulate

these relations, has a long, even if not uncontroversial pedigree.³⁰ Historically, the analogy was explicit in Thomas Hobbes' view of the problem of international (dis)order, wherein he compared the misery of the state of nature to the continual interstate hostilities of the international realm,³¹ just as it featured in the works of those following Hobbes in the social contract tradition, such as John Locke,³² Jean-Jacques Rousseau,³³ and Immanuel Kant.³⁴ Whilst by the twentieth century there would be an increasing aversion to the use of the analogy amongst international lawyers and international relations theorists alike, particularly those keen to point to the unique, or *sui generis* character of the international system,³⁵ analogical reasoning has continued to play a prominent role in structuring international thought. Not only has the analogy provided much of the background framing for successive proposals for institutional reform, from the Hague conferences at the end of the nineteenth century to the creation of the League of Nations and UN in the wake of successive world wars,³⁶ but it has also informed much of the scepticism that has greeted

³⁰ Hans Morgenthau once argued that '[t]he application of domestic legal experience to international law is really the main stock in trade of modern international thought'. H Morgenthau, *Scientific Man vs. Power Politics* (University of Chicago Press, Chicago, IL, 1946) 113. See also JHH Weiler, 'The Geology of International Law – Governance, Democracy and Legitimacy' (2004) 64 *Zeitschrift für Ausländisches Öffentliches Recht und Völkerrecht* 547, 550. For a comprehensive overview, see H Suganami, *The Domestic Analogy and World Order Proposals* (Cambridge University Press, Cambridge, 1989).

³¹ See, generally, Ch 13 of T Hobbes, *Leviathan*, edited by R Tuck (Cambridge University Press, Cambridge, 1996).

³² See in particular Ch XI of the Second Treatise: J Locke, *Two Treatises of Government, and a Letter Concerning Toleration*, edited by I Shapiro (Yale University Press, New Haven, CT, 2003) 178–87.

³³ See eg Bk 1, Ch 7 of J-J Rousseau, 'The Social Contract' in V Gourevitch (ed), *The Social Contract and Other Later Political Writings* (Cambridge University Press, Cambridge, 1997) 52, discussion in R Tuck, *The Rights of War and Peace: Political Thought and the International Order from Grotius to Kant* (Oxford University Press, Oxford, 2001) 197–225, and DS Grewal, 'The Domestic Analogy Revisited: Hobbes on International Order' (2016) 125 *Yale Law Journal* 618, 666–8, *passim*.

³⁴ See, most extensively, I Kant, 'Perpetual Peace: A Philosophical Sketch' in HS Reiss (ed), *Kant: Political Writings* (2nd edn, Cambridge University Press, Cambridge, 1998) 93–130 and discussion in C Bottici, 'The Domestic Analogy and the Kantian Project of *Perpetual Peace*' (2003) 11 *The Journal of Political Philosophy* 392, 396–9 in particular.

³⁵ On the international law side, see especially Ch 1 of L Oppenheim, *International Law: A Treatise*, vol 1 (3rd edn, Longmans, Green & Co., London, 1920). On the international relations side, see, most famously, Ch 2 of H Bull, *The Anarchical Society: A Study of Order in World Politics* (4th edn, Basingstoke, Palgrave Macmillan, 2012).

³⁶ See eg EH Carr, *The Twenty Years' Crisis 1919–1939: An Introduction to the Study of International Relations* (2nd edn, MacMillan, London, 1946) 27–8 and discussion in JE Alvarez, *International Organizations as Law-Makers* (Oxford University Press, Oxford, 2005) 18–19, as well as Grewal (n 33) 628.

such institutional reforms, insofar as they are seen as failing to deliver the kind of constitutional architecture underpinning the realisation of the rule of law in the domestic context.³⁷ In this regard, one might well agree with Hidemi Suganami that the domestic analogy is necessarily assumed by ‘any contemporary writer on international affairs who attributes the instability of the international system primarily to its decentralized structure’.³⁸

The analogy is thus as ubiquitous as it is controversial, but we should perhaps not be too surprised in this respect. It is not, or not just, that we international lawyers or theorists are drawn inevitably to analogical reasoning through habit or experience – that we are all, in Joseph Weiler’s words, ‘habitual sinners in this respect’.³⁹ Rather, this reasoning is so recurrent precisely because what modern international law actually *is* as a self-constructed project of (largely European) legal imagination presumes the domestic analogy. For as long as international law has been thought of as a broadly consensual, institutional practice, its core doctrines (sovereignty, statehood, self-determination, sources, etc) assume something like the rule of law as the basis of mediating the ‘individual’ sovereignty of states.⁴⁰ As Martti Koskenniemi argues:

This is a theory which identifies itself on two assumptions. First, it assumes that legal standards emerge from the legal subjects themselves. There is no natural normative order. Such order is artificial and justifiable only if it can be linked to the concrete wills and interests of individuals. Second, it assumes that once created, social order will become binding on these same individuals. They cannot invoke their subjective opinions to escape its constraining force. If they could, then the point and purpose of their initial, order-creating will and interest would be frustrated.⁴¹

As such, the rule of law has entered international legal imagination as a necessary presumption of the very *idea* of international law as an institutional practice, the legitimacy of which is related to the self-authorship (non-arbitrariness) and autonomy (objectivity) of international legal rules. However, insofar as this understanding has always seemed

³⁷ See eg H Morgenthau, *Politics among Nations* (Knopf, New York, NY, 1949) 398–406. See also critical engagement by Suganami (n 30) 99–100.

³⁸ Suganami (n 30) 19.

³⁹ Weiler (n 30) 550

⁴⁰ On this account, ‘a legitimate social order is one which is objective, one that consists of formally neutral and objectively ascertainable rules, created in a process of popular legislation’. Koskenniemi (n 20) 71; and see further Koskenniemi (n 16) 4–7, and FV Kratochwil, ‘How Do Norms Matter?’ in M Byers (ed), *The Role of Law in International Politics* (Oxford University Press, Oxford, 2000) 35, 39–40.

⁴¹ Koskenniemi (n 20) 21–2.

somewhat problematic when applied at the international level, where the decentralised institutional structure of international law seems to undermine its autonomy and objectivity in practice,⁴² the rule of law emerges also as an equally important reformist *ideal*, stressing the important work to be done to ‘complete’ such a vision of ordered international relations.

I will come back to this apparent tension in the concept in due course. My more immediate point, however, is simply that we should not be too quick to dismiss the importance of analogical reasoning in gaining an understanding of the nature of modern international law. Where the resort to analogy might become more problematic, however, is in the move from descriptive comparison to normative prescription. In other words, one should be cautious where the differences revealed through analogical reasoning are treated simply as faults in the object of description (international law), rather than themselves revealing important features that individuate the international legal form or, indeed, demonstrate necessary truths about law more generally. As such, the warnings of those such as Bull remain prescient in highlighting the ever-present danger that the analogy merely masks certain taken-for-granted, though by no means uncontroversial, normative presumptions about the state and/or the international system. This is a point well made by Thomas Poole, who acknowledges the harmless, comparative aspects of analogical reasoning, whilst cautioning against the kinds of argumentative ‘short cuts’ that occur when analogies buttress normative assertions. As he notes, ‘[t]here may be plenty of very good reasons, even if such-and-such is like so-and-so, not to treat the two in the same way. *It depends*.’⁴³

Poole’s caution thus serves to put us on alert to the presence of the ‘negative’ in addition to the ‘positive’ moment in the analogical inference. In fact, we might take this reasoning further to argue that analogical (as opposed to inductive) inferences are *defined by* the interplay of both positive (apparent similarities) and negative (perceived differences) assertions.⁴⁴ As Chiara Bottici also acknowledges, the negative assertions tend to weaken or qualify the positive, such that the analogy is rarely if ever applied in an ‘all’ or ‘nothing’ fashion, that is, to argue for a global leviathan or superstate.⁴⁵ There thus arises a kind of normative disjuncture in the chain of reasoning that, in something like the social contract, starts from the idea of moral autonomy and leads towards justifying

⁴² See Collins (n 2).

⁴³ T Poole, ‘Sovereign Indignities: International Law as Public Law’ (2011) 22 *European Journal of International Law* 351, 351–2 (emphasis added).

⁴⁴ C Bottici, *Men and States: Rethinking the Domestic Analogy in a Global Age* (Palgrave Macmillan, Basingstoke, 2009) 20–1.

⁴⁵ *Ibid* 26.

the centralised authority of the state. Patrick Capps has labelled this normative disjuncture the *discontinuity thesis*, though the thesis is really just a rather loose assemblage of different reasons why a universal state cannot or should not materialise, ranging from the pragmatic (that such an ordering is simply not feasible in the conditions that pertain in the international system) to the more normative and prescriptive (that such an ordering would be illegitimate bearing in mind the distinctive nature of these conditions).⁴⁶ Whilst the *discontinuity thesis* might at times be deployed as a way of demonstrating the futility of the very idea of international law, such arguments are rather extreme and nowadays quite rare.⁴⁷ More likely, the thesis just highlights the need to take seriously the unique characteristics of international relations and how these characteristics might impact our understanding of legal ordering at the international level.⁴⁸

Whilst I do not intend to delve deeply into the question of exactly what are the unique characteristics of the international legal order, it is worth briefly highlighting two recurrent structural claims that are taken to impact international theory generally and which, I believe, have particular relevance to the debate about the international rule of law: the first being that states and individuals are quite distinct kinds of moral agents, and the second – in part following on from the first – is that the environment in which states find themselves is different in certain fundamental ways from the kind of pre-contractual, Hobbesian state of nature, hypothesised between individual human beings.⁴⁹ These points of differentiation are at least as old as the social contract tradition itself. Indeed, despite using the domestic analogy to highlight the starkness of the state of nature, Hobbes himself acknowledged that sovereigns simply do not pose the same kind of danger to each other as individual humans do within the state of nature.⁵⁰ Meanwhile, Kant used similar arguments to reject the idea of the universal state in favour of a *League of Peoples*, which he understood as a kind

⁴⁶ P Capps, 'The Rejection of the Universal State' in N Tsagourias (ed), *Transnational Constitutionalism* (Cambridge University Press, Cambridge, 2007) 17, 28–40; and see Ch 9 of Capps (n 19) 215–41.

⁴⁷ Perhaps the clearest example being Austin's view of international law as a form of 'positive morality'. See J Austin, *Lectures on Jurisprudence or the Philosophy of Positive Law*, edited by R Campbell (4th edn, John Murray, London, 1873) 188, *passim*.

⁴⁸ See further Collins (n 2) 181–2.

⁴⁹ See eg H Bull, *The Anarchical Society: A Study of Order in World Politics* (4th edn, Palgrave Macmillan, Basingstoke, 2012, first published 1977) 44–9. Capps (n 19) also highlights both kinds of arguments. See also Grewal (n 33) 629–31, *passim* as well as Bottici (n 44) 2, *passim*.

⁵⁰ See eg Hobbes (n 31) 13.12.

of congress of nations under law.⁵¹ In more recent times, international lawyers have deployed similar reasoning in order to explain and justify the specific character of the international legal order,⁵² its particular function,⁵³ or the ‘horizontal’ allocation of authority therein, wherein states are understood to be both legal subjects and systemic ‘agents’ or ‘officials’ at the same time.⁵⁴

Without necessarily endorsing any of these arguments specifically, I think the observations on which they are based are indeed plausible understandings of certain key differences revealed through such analogical reasoning. My more immediate concern, however, and one upon which I do wish to reflect more fully, is how these points of differentiation should impact on theorising the rule of law at the international level. As I show in the next section, in fact, very few scholars have attempted to argue that the international rule of law is simply the domestic rule of law ‘writ large’.⁵⁵ Instead, the unique characteristics of the international legal order tend to be understood as necessitating some kind of adjustment, loosening or stripping back of the concept at the international level.⁵⁶ Nevertheless, in highlighting some of the methodological flaws in this form of disjunctive reasoning, I suggest that the question of the rule of law’s application

⁵¹ As Kant explains, ‘[t]he idea of international right presupposes the separate existence of many independent adjoining states. And such a state of affairs is essentially a state of war, unless there is a federal union to prevent hostilities breaking out. But in the light of the idea of reason, this state is *still to be preferred to an amalgamation of the separate nations under a single power*’. Kant (n 34) 113; and see commentary of Capps (n 19) 238–9.

⁵² See eg the critique of Lauterpacht on this point: H Lauterpacht, ‘The Nature of International Law and General Jurisprudence’ (1932) 37 *Economica* 301, 304.

⁵³ For example, P Weil, ‘Towards Normative Relativity in International Law?’ (1983) 77 *American Journal of International Law* 413.

⁵⁴ See eg Georges Scelle’s theory of *dédoublément fonctionnel* or ‘role-splitting’ as set out in G Scelle, *Précis de droit des gens: principes et systématique. Pt.2, Droit constitutionnel international* (Sirey, Paris, 1934) 10–12, *passim*. For general commentary, see also R Collins, ‘The Problematic Concept of the International Legal Official’ (2015) 3–4 *Transnational Legal Theory* 608.

⁵⁵ However, this is argued *inter alia* in T Bingham, *The Rule of Law* (Penguin, London, 2010) Ch10. See also P Burgess, ‘Deriving the International Rule of Law’, paper on file with the author.

⁵⁶ See Burgess, *ibid*, and references cited therein, including S Chesterman, ‘An International Rule of Law?’ (2008) 56 *American Journal of Comparative Law* 331, 358; J Waldron, ‘Are Sovereigns Entitled to the Benefit of the International Rule of Law?’ (2011) 22 *European Journal of International Law* 315, 317; R McCorquodale, ‘Defining the International Rule of Law: Defying Gravity?’ (2016) 65 *International & Comparative Law Quarterly* 277, 290–2; J Crawford, ‘International Law and the Rule of Law’ (2003) 24 *Adelaide Law Review* 3, 5–6; and S Beaulac, ‘The Rule of Law in International Law Today’ in G Palombella and N Walker (eds), *Relocating the Rule of Law* (Hart Publishing, Oxford, 2009) 197–223.

cannot be decided by simply choosing between or otherwise modifying domestic models of the rule of law. Rather, I argue that the rule of law can only take on specific meaning in the international context on the back of an evaluative account of what international law is, or what it is for. Nevertheless, as my argument progresses, I will also suggest that this question is itself complicated by a tension at the very core of international law as a practice, which means that the rule of law is necessarily caught between two plausible, yet seemingly irreconcilable idealisations.

III. Discontinuity and disjuncture in theorising the international rule of law

Two interim conclusions can be drawn from the preceding analysis. The first is that the rule of law is inescapably important to the coherence of modern international law, both as an *idea* that structures international legal practices and normative expectations and as an *ideal* in the self-understanding of international law as a kind of collective project. The second is that the concept of the rule of law as it has developed in the domestic context cannot easily be translated to the international legal order due to the structural differences perceived and, arguably, justified in the unique circumstances of international relations. It is for this reason, in fact, that those who have pondered the question explicitly have tended to suggest that the application of the rule of law to the international level necessitates some qualification or contextual adaptation. Certainly, this has tended to involve prioritisation of ‘thinner’ over ‘thicker’ conceptions of the rule of law,⁵⁷ of procedural safeguards over substantive protections,⁵⁸ but there has also been a tendency to look beyond precise institutional requirements in favour of broadly directive principles,⁵⁹ or a more general understanding of the rule of law by reference to its purpose or function.⁶⁰

A common tactic in this regard has been to take a loose tripartite formula – perhaps adapted from Dicey or Hayek, for example – which coalesces around the principled generality, equality and certainty of legal rules, and to test international law accordingly. For instance, Stéphane Beaulac argues that the rule of law can be meaningfully ‘externalised’

⁵⁷ See, relatively recently, M Kanetake, ‘The Interfaces between the National and International Rule of Law: A Framework Paper’ in M Kanetake and A Nollkaemper (eds), *The Rule of Law at the National and International Levels: Contestations and Deference* (Hart, Oxford, 2016) 11, 20–2.

⁵⁸ See, for instance, Beaulac (n 56) 204ff.

⁵⁹ A good example being the extended treatment of McCorquodale (n 56).

⁶⁰ See eg Chesterman (n 56).

beyond the state by applying it simply as three broad principles, which he defines as ‘(1) the existence of principled normative rules, (2) [that are] adequately created and equally applicable to all legal subjects and (3) enforced by accessible courts of general jurisdiction’.⁶¹ Chesterman, similarly, though perhaps more cautiously, posits a looser tripartite formula which requires (1) ‘non-arbitrariness in the exercise of power’, (2) ‘supremacy of the law’, and (3) ‘equality before the law’ – though even these principles have to be understood in a somewhat differentiated, strained form in comparison to their usual application within the state.⁶²

Whilst I do not intend to give a full survey of the many formulations of the international rule of law that have been countenanced in recent literature, it seems to be the case that all of these kinds of looser, adapted, or more minimal ‘criterial’ approaches tend to still result in an inevitable frustration due to the decentralised institutional structure of international law. Authors tend to highlight significant institutional failings, chief among them being the consensual, fragmented and somewhat uncoordinated international judicial function.⁶³ Others have highlighted the way in which international law is created and/or identified as itself particularly problematic from a rule of law perspective.⁶⁴ More broadly, a central preoccupation would appear to be international law’s failure to constrain the political choices of states and other actors.⁶⁵ If the institutional structure of international law is not seen as inherently problematic, the suggestion would appear to be that the international legal order is relatively underdeveloped and in need of further strengthening through institutional reinforcement.⁶⁶ In fact, following this logic one might easily agree with Chesterman either that ‘there is presently no such thing as the international rule of law’ or ‘that international law has yet to achieve a certain normative or institutional threshold to justify use of the term’.⁶⁷

⁶¹ Beaulac (n 56) 203–4.

⁶² Chesterman (n 56) 359–60. For similar views, see also I Brownlie, *The Rule of Law in International Affairs: International Law at the Fiftieth Anniversary of the United Nations* (Martinus Nijhoff, The Hague, 1998) 213–14. Crawford (n 56) at 4, adopts a four-part formulation of the rule of law, adapted from Joseph Raz. For a ‘thicker’ four-part definition, including the protection of human rights, see also McCorquodale (n 56) 292.

⁶³ Beaulac (n 56) 212–20. And see Y Shany, ‘No Longer a Weak Department of Power? Reflections on the Emergence of a New International Judiciary’ (2009) 20 *European Journal of International Law* 73, 74–75; Crawford (n 56) 10–12; and A Watts, ‘The International Rule of Law’ (1993) 36 *German Yearbook of International Law* 15, 37.

⁶⁴ Watts (n 63) 28.

⁶⁵ See eg Hurd (n 14) 367; Blum (n 7) 332.

⁶⁶ For the latter conclusion, see the more nuanced account contained in McCorquodale (n 56) 296, *passim*.

⁶⁷ Chesterman (n 56) 358.

Are these plausible conclusions to reach about the possibility of an international rule of law? Perhaps, but it seems difficult to argue as such without some broader conceptual account of international law's central function and importance to international legal participants. In other words, drawing on the cautionary remarks of the preceding section, it is not enough to just abstract by analogy the idea of an international rule of law and assert that the apparent 'faults' of the international legal order can be fixed by it more closely resembling its domestic counterpart. To simply water down the rule of law as it is understood in a domestic context, to derive and abstract certain transferable principles, appears methodologically problematic.⁶⁸ Such reasoning would seem to suggest (though without adequately defending) the conclusion that the international legal system is merely a more loosely organised or less developed version of its domestic counterpart. This view might well turn out to be true – though, I should note, it sits uneasily with the *discontinuity thesis*, as outlined above – but it surely *cannot just be presumed* to be the case.

To look at this problem another way, if – as I have suggested – the decentralised character of international law is deemed important to its legitimacy as such, and if that character necessarily implies a certain degree of 'auto-interpretation' by states as an important component of this legitimacy, then arguing that international law should be institutionally strengthened vis-à-vis a centralisation of authority appears logically and normatively problematic.⁶⁹ This is a point made most emphatically by Ian Hurd, who dismisses these kinds of derivative rule of law formula as 'conceptually inconsistent and empirically unrealistic'.⁷⁰ Specifically, he argues that the kind of prescriptive institutional desiderata outlined on such accounts cannot be seen simply as neutral 'procedural requirements' capable of being abstracted and applied outside of the state context, for these desiderata presume 'a substantive commitment to dividing political power in a certain way'.⁷¹ I myself have made similar claims, noting how the 'lack of fit' between this rule of law idealism and the structural conditions of international relations tend to fundamentally undermine the rule of law on these terms.⁷² In other words, the kinds of abstracted formula outlined above necessarily presume the state, and would inevitably

⁶⁸ On the difficulties of abstracting rule of law values out of context, generally, see recently P Zumbansen, 'The Rule of Law, Legal Pluralism, and Challenges to a Western-centric View: Some Very Preliminary Observations' in May and Winchester (n 13) 57–74.

⁶⁹ See eg Nardin (n 17) 147–8.

⁷⁰ Hurd (n 14) 366.

⁷¹ Ibid 369.

⁷² Collins (n 4) 125, *passim*.

lead towards justifying something like a universal state (or a rough approximation thereto). It may well be possible, indeed even warranted to argue counterfactually that international law should be reformed towards a more effective institutional architecture, that is, one more able to regulate the conduct of international politics. However, what such an architecture might look like will inevitably depend upon a prior (and sufficiently convincing) account of the nature and normative orientation of international relations as a particular kind of political organisation.

For this reason, Hurd himself argues for a version of the international rule of law more sensitive to what he sees as the deeply instrumental role of law in international relations, whereby rule of law compliance is measured ‘in the degree to which states feel the need to account for their policies in terms of international law’.⁷³ On this account, there is an ‘inescapable connection between law and power’, where the use of legal argument as a means to justify state conduct suggests both a constraining and empowering aspect to the international legal form.⁷⁴ Whether or not one accepts or agrees with Hurd’s own formulation, the underlying point of his analysis is to show how the structural differences between international and domestic political contexts should change rather than simply undermine our expectations of what the rule of law might plausibly mean at the international level.⁷⁵

At the same time, one might question whether Hurd’s analysis too easily drains the concept of the international rule of law of its critical, counterfactual content. Although his thesis is particularly useful in drawing out the peculiarities of international law’s institutional form, it is nonetheless difficult to see how his own view of the international rule of law is any more preferable to the accounts he criticises. The problem would seem to be that the kind of realist-instrumentalist view of international law upon which his argument is premised is simply posited and presumed, rather than cogently defended in ideal terms. The question of who is correct – Hurd, or the kinds of authors he criticises – cannot be resolved simply by assessing which account more adequately describes the conditions of international politics. This conclusion follows simply from acknowledging that the object being described, the rule of law as applied to international relations, should not just aim to mirror the extant practices of contemporary international law. Even if those practices themselves reveal important truths about how the rule of law

⁷³ Hurd (n 14) 394.

⁷⁴ *Ibid* 393.

⁷⁵ *Ibid* 366–7.

might manifest at the international level, the theorist's role is to attempt to construct an ideal account of the role of legal practices in the conduct of international relations.⁷⁶ Indeed, and as I claimed at the beginning of this article, given that those engaged in such practices – academic and professional lawyers as much as state representatives – tend themselves to deploy the concept in this counterfactual sense, it surely behoves the legal theorist to attempt to construct a meaningful yet sufficiently robust account of legality to best reflect this critical ambition. In other words, such idealisation and abstraction is, I believe, necessary in order to adequately distinguish a concept of the rule of law from a concept of law more broadly.

More promising, it might seem, is the recent argument of Jeremy Waldron, who is critical of the view that the rule of law concept can just be loosened or adapted in the sense suggested. Specifically, Waldron develops an explicit version of the *discontinuity thesis*, as outlined above, in order to suggest that the usual form of the domestic analogy necessarily breaks down. As he claims,

... the state is quite unlike an individual; certainly it is quite unlike an individual when it comes to the value of its freedom of action. Considered in both its municipal aspect and in its international aspect, a state's sovereignty is an artificial construct, not something whose value is to be assumed as a first principle of normative analysis ... What its sovereignty is and what it amounts to is not given as a matter of the intrinsic value of its individuality, but determined by the rules of the international order.⁷⁷

At the international level, then, Waldron's central point – that 'the state remains a creature of law'⁷⁸ – means that the international rule of law should not be understood as something distinct from its domestic counterpart, as some externally imposed constraint. Rather, it has to be understood as reflecting the normative constraints that should limit governmentals in their external as much as internal actions. For this reason, then, Waldron argues that the state should not benefit from the rule of law in the way that an individual does in its relationship with the state. In fact, the apparent freedom that a state possesses, the exact extent

⁷⁶ See eg D Dyzenhaus, 'Hobbes and the International Rule of Law' (2015) 28 *Ethics & International Affairs* 53; T Nardin, 'Theorizing the International Rule of Law' (2008) 34 *Review of International Studies* 385, 385–6.

⁷⁷ J Waldron, 'The Rule of International Law' (2006) 30 *Harvard Journal of Law & Public Policy* 15, 21.

⁷⁸ *Ibid* 23.

of its agency and autonomy, can only be determined by its participation within the international legal system.⁷⁹

Nevertheless, whilst Waldron's account is, I believe, more nuanced and self-aware of the dangers of reasoning by analogy than many others, his own attempt to reconfigure and argue for a 'new analogy' in which the state is seen more as a kind of external, systemic agent of the international legal order, is neither particularly novel, nor informative. This new analogy would seem to be simply a restatement of older ideas already absorbed into international legal theory: for instance, Georges Scelle's well-rehearsed theory of *dédoublement fonctionnel*, or 'role-splitting'.⁸⁰ The problem with reverting to this kind of 'states-as-agents' argument, as insightful as it might be, is that it itself serves to demonstrate what is commonly perceived to be one of the principle obstacles to the realisation of the rule of law at the international level, that is, the 'auto-interpretation' of legal obligations by states and the concordant lack of adequate external institutional constraint. This might matter less if Waldron was more sensitive to the ways in which the structural limitations of the international legal order function to condition and shape the choices of state-agents, but by focussing his critique more towards domestic foreign policy he tends to overlook such *inter-national* structural constraints.⁸¹ In this way Waldron not only misses the way in which the discontinuities in the 'old analogy' play out to create unique mechanisms of accountability – a point, in that sense, better made by Hurd – but, in doing so, he arguably also fails to capture an account of the rule of law that accords with the self-understanding of legal participants themselves.

Although these brief reflections on both views cannot do justice to the importance of their contribution to international rule of law debates, I counterpoise both here more to illustrate how each acts as a critical counterpoint to the other and how, in their confrontation, one gets a clearer sense of the seemingly conflicting urges that materialise in the attempt to translate the rule of law to the international context. Hurd's account suggests important ways in which the rule of law is already presumed within international legal practices and acts as an important measure of accountability, giving legitimacy to international legal doctrines and institutions. At the same time, Waldron is correct to point to some of the difficulties in theorising international relations in this way and, indeed, of the need to rethink the domestic analogy underlying this theorisation of

⁷⁹ He develops this specific argument further in Waldron (n 56).

⁸⁰ See eg Scelle (n 54).

⁸¹ See criticisms of Poole (n 43).

international legal practice. As such, his own intervention acts as an important counterfactual plea to bring such practices in line with already well-established rule of law values. In the two sections which follow I will aim to flesh out further how we might better understand and theorise these conflicting urges in terms of two distinct idealisations of the international rule of law. However, I will suggest that, rather than choose between them, both idealisations should be harnessed as important, yet competing sides of an overarching account of the rule of law at the international level.

IV. The rule of law as the ‘basis of association’ in international relations?

With this background in mind, we begin to get a clearer picture of what is required, methodologically speaking, to forge a more plausible understanding of the international rule of law. Rather than adapting a list of abstract institutional requirements by analogy to the state context, we must determine what is valuable about international law in the context of a different kind of political relationship; we must relate how the rule of law is understood as meaningful amongst international legal participants themselves, but also abstract from the likely many resulting ideas and idealisations in order to construct a rationally defensible account of the rule of law in this specific context. As Terry Nardin has argued on this point,

Theorists of international law cannot avoid thinking about the contingencies of the existing legal order. But at its most theoretical, international legal theory abstracts from those contingencies to uncover the presuppositions of international law as an idea. In doing so, it aims to define the character of international law as a distinguishable mode of relationship, not to describe the incidental features of an existing legal system.⁸²

As such, I do not think that the theorist can escape the necessary evaluative judgement and normative commitment required to conceptualise the international rule of law on these terms. Arguably, as I have claimed elsewhere,⁸³ this conclusion follows for any conceptual account of legal phenomena, insofar as such judgement and engagement is necessary to cut through competing and incommensurable viewpoints.⁸⁴ However, in the

⁸² Nardin (n 76) 386.

⁸³ See Chs 4–6 of Collins (n 2) and further discussed in R Collins, ‘International Law and the Analytical Tradition in Jurisprudence’ (2014) 5 *Jurisprudence* 265.

⁸⁴ In this respect, though not in many others, I follow John Finnis in understanding the method of legal conceptual analysis as an effort to determine the ‘practically reasonable’ viewpoint. See J Finnis, *Natural Law and Natural Rights* (2nd edn, Oxford University Press, Oxford, 2011) 15; and see further on this point, Collins (n 2) Ch 5.

current context I wish simply to stress the particular evaluative burden that arises due to the critical, counterfactual role of the rule of law in engaging with extant legal practices.

On this basis, then, Nardin's own response to this challenge is to argue that the international rule of law should not be thought of as some set of determinate institutional characteristics by which to evaluate the performance of international law in achieving certain ends. Rather, it can be derived from the form of international law as an ideal representation of a particular kind of political relationship. In other words, he argues that the rule of law functions as the 'basis of association' in international relations.⁸⁵ It is the moral expression of the kind of 'deep-structural mutuality'⁸⁶ that is encapsulated within many of the core doctrines and institutional structures of international legal practice. However, this is not to suggest some kind of *apologia* to the status quo, or the *raison d'état*, and instead expresses the importance of international legal order as a peaceable end in itself. *Contra* Hurd – or, at least, *contra* his own description of his account – this view of the rule of law is understood in distinctly *non-instrumental* terms: a commitment to international 'legality' as expressed through the autonomy of the legal form itself.

To argue that the rule of law is a 'non-instrumental' ideal is to suggest a particular way of conducting international politics by known, general, and non-arbitrary rules. To be clear, this commitment is not to reduce the international rule of law to some criterial formula, for the ends associated with the concept – generality, equality, non-arbitrariness, and so on – are simply what follows from the relative autonomy of a well-functioning legal system. Likewise, it is not to suggest, as does Hurd (at least to some degree), that the international rule of law is satisfied simply when the international legal form is used by states and other actors. Rather, the rule of law on these terms represents a more substantive commitment to 'legality' as a counterfactual abstraction of the international legal relationship: an ethos of playing by the rules which, though manifesting in terms of a kind of empty, procedural formality, is not itself devoid of moral content and will function to place substantive and not merely procedural limitations on the interpretive freedom of legal participants. This point is perhaps best expressed by David Dyzenhaus, who develops a kind of neo-Hobbesian reading of the rule of law in international relations:

⁸⁵ Nardin (n 17) 106, 183.

⁸⁶ P Allott, 'The Concept of International Law' (1999) 10 *European Journal of International Law* 31, 44.

The point is deeper than that the sovereign states of the international order find themselves always entangled in international law as they consider how best to advance their interests. It is that they are themselves creatures of international law, and to maintain their status as sovereign states they must treat as binding the law that constitutes the jural community of which they are a part. Hence, when one state raises a question about the legality of another's action or proposed action, that state must accept the onus of justifying its action as *having a warrant in a reasonable interpretation of the law*.⁸⁷

Dyzenhaus's point here has clear echoes of Waldron's argument, considered above, yet he is arguably far more attentive to how the structural and relational aspects of international legal practice help to maintain in place a procedural guarantee of accountability.⁸⁸

What I have in mind, therefore, would be closer to a kind of Fullerian 'inner morality' of law,⁸⁹ a view which was more recently given expression in an international context in Jutta Brunnée and Stephen Toope's 'interactional' account of international law, whereby they stress a 'practice of legality' which leaves scope for legal participants 'to pursue their purposes and organize their interactions through law'.⁹⁰ More broadly, this argument has clear affinity with EP Thompson's famous defence of (a somewhat minimal conception of) the rule of law as an 'unqualified human good'.⁹¹ Despite seeing the potential for legal rules to perpetuate injustices, Thompson also saw how the legal form placed both substantive and procedural limitations on the exercise of political power, whilst creating an equalising framework from which alternative interests could find a platform.⁹² At the international level, a similar ethic is expressed by Koskenniemi in terms of, alternatively, a 'culture of formalism'⁹³ and as a

⁸⁷ D Dyzenhaus, 'Hobbes on the International Rule of Law' (2014) 28 *Ethics & International Affairs* 53, 61.

⁸⁸ In fact, Dyzenhaus is developing views he already advanced in answer to Waldron in an earlier, but shorter comment: D Dyzenhaus, 'Positivism and the Pesky Sovereign' (2011) 22 *European Journal of International Law* 363.

⁸⁹ L Fuller, *The Morality of Law* (rev edn, Yale University Press, New Haven, CT, 1969) 39, *passim*. And for a commentary on Fuller's account of the rule of law as a 'non-instrumental' good, see C Murphy, 'Lon Fuller and the Moral Value of the Rule of Law' (2005) 24 *Law and Philosophy* 239.

⁹⁰ J Brunnée and S Toope, *Legitimacy and Legality in International Law: An Interactional Account* (Cambridge University Press, Cambridge, 2010) 7.

⁹¹ EP Thompson, *Whigs and Hunters: The Origins of the Black Act* (Allen Lane, London, 1975)

⁹² For discussion see DH Cole, "'An Unqualified Human Good": E.P. Thompson and the Rule of Law' (2001) 28 *Journal of Law and Society* 177.

⁹³ Koskenniemi (n 1) 494–509; Koskenniemi (n 22) 41, 45.

‘constitutional mindset’,⁹⁴ whereby international law provides the ‘shared surface’ for legal participants to channel their normative disagreements under an ‘assumed universality’.⁹⁵

Nevertheless, the most explicit and well-thought out version of this ideal is given by Nardin, who argues that the international rule of law should be conceived as:

... a particular interpretation of the idea of rule-governed association according to which authorities are accountable for their decisions and there exist procedures for evaluating these decisions and thus implementing the principle of accountability. More specifically, the criteria according to which the evaluation of official conduct is made are known, public, alterable only by some regular procedure, and consistently applied.⁹⁶

Nardin’s account is particularly useful in the current context as he grounds it historically and conceptually in the emergence of the modern understanding of international law as a positive, systemic practice – as I have also described this transition, above.⁹⁷ At the same time, his aim is not simply to describe the impact of liberal political doctrines in structuring international legal thought, but to actively theorise how such an understanding might be plausibly realised in international relations in ideal terms. To do so, he draws extensively on the approach of the English political philosopher, Michael Oakeshott, whilst relating his ideas to the theory of ‘international society’ developed by the English School in international relations, which offers a distinctive defence of the pluralist character of international legal and political institutions.⁹⁸ Nardin’s view of the international rule of law thus reflects what he calls the ‘practical conception’ of international society. According to this view, states are understood as related to one another ‘in terms of common practices, customs, and rules’, which in turn allow ‘for making judgments of just and unjust international conduct, for advancing claims ... and for seeking vindication and redress when rules are violated, rights infringed, and duties ignored’.⁹⁹ Accordingly, Nardin follows Oakeshott in understanding the rule of law as forming the very basis of this association, in the sense

⁹⁴ M Koskenniemi, ‘Constitutionalism as Mindset: Reflections on Kantian Themes about International Law and Globalization’ (2007) 8 *Theoretical Inquiries in Law* 9.

⁹⁵ Koskenniemi (n 22) 48.

⁹⁶ Nardin (n 17) 183.

⁹⁷ Ibid 19–21, *passim*.

⁹⁸ For an overview, see T Dunne, *Inventing International Society: A History of the English School* (MacMillan, London, 1998).

⁹⁹ Nardin (n 17) 34–5.

that it represents an ideal expression of a shared moral commitment to a system of common rules, the authority of which stems from this commitment alone and not from any sense of higher purpose or instrumental benefit.

Although Oakeshott himself did not see international relations as capable of being theorised by reference to his account of civil association,¹⁰⁰ and although Nardin is not alone in nonetheless attempting to transpose Oakeshott's ideas to the international context,¹⁰¹ his is arguably the clearest and most extensive elaboration of the potential of Oakeshott's philosophy in better understanding the nature and point of international legal practices. In fact, Nardin argues that Oakeshott's understanding of political community is more, rather than less relevant in the international context, precisely because of the broadly pluralist character of international society.¹⁰² As such, it is worth briefly recounting the core tenets of Oakeshott's understanding of civil society and the rule of law underpinning it in order to more fully understand the commitment to autonomous legal order as a 'non-instrumental' good.

Oakeshott's philosophy is not easy to distil in brief, particularly bearing in the mind the somewhat idiosyncratic terminology he employed to make sense of the state and political community more broadly. The core tenets of his theory are found in his most complete work of political philosophy, *On Human Conduct*,¹⁰³ though also elaborated more directly in an extended essay on the rule of law published some years later.¹⁰⁴ Within these works Oakeshott defends an understanding of civil association as distinguishable by its non-voluntary and non-instrumental character: the former quality premised on the acceptance of the authority of the rules contained within the association; the latter explaining the particular kind of 'freedom' to which this kind of ordering gives rise. To explain this latter quality more clearly, Oakeshott distinguishes two types of non-voluntary association: civil association and what he somewhat disparagingly refers to as 'enterprise association': a type of political relationship in which the constituent members are joined together in view of the fulfilment of some substantive goal(s) or purpose(s). Under 'enterprise association', one might

¹⁰⁰ See M Oakeshott, 'The Rule of Law' in M Oakeshott, *On History and Other Essays* (Barnes & Noble, Totowa, NJ, 1983) 119–64, 163, wherein he paints a picture of international engagements between states as entirely instrumental in character.

¹⁰¹ See, most extensively, R Jackson, *The Global Covenant: Human Conduct in a World of States* (Oxford University Press, Oxford, 2000).

¹⁰² Nardin (n 17) 17.

¹⁰³ M Oakeshott, *On Human Conduct* (Oxford University Press, Oxford, 1975).

¹⁰⁴ Oakeshott (n 100).

say that the members are free in the sense that their participation remains voluntary, and dependent in particular on the enterprise continuing to serve the ends for which it was constituted. He claims that this is the most familiar form of human association and is therefore commonly, but erroneously, assumed to form the basis of civil association.¹⁰⁵ In contrast, Oakeshott's view of civil association, or *civitas*, can be understood as an order in which the constituent members (*cives*) are free to pursue their own ends;¹⁰⁶ it is resistant to the realisation of any particular conception of the common good; and in its prioritisation of political equality it denies that any one member of the political community is free to impose their own conceptions of the good on others.

In what Richard Friedman has referred to as the 'ambiguity thesis',¹⁰⁷ Oakeshott was clear that the modern (European) state was in actuality an amalgam of both civil and enterprise association, and in that sense its actual character was capable of idealisation according to either logic. However, in Oakeshott's view, the rule of law manifests only in the former mode of association, where civil order is maintained through a system of non-instrumental laws.¹⁰⁸ In his own words:

The expression 'the rule of law', taken precisely, stands for a mode of moral association exclusively in terms of the recognition of the authority of known, non-instrumental rules (that is, laws) which impose obligations to subscribe to adverbial conditions in the performance of the self-chosen actions of all who fall within their jurisdiction.¹⁰⁹

Much more could be said about Oakeshott's understanding of civil association, as well as its relation to the rule of law specifically, but for current purposes the key point is that his account provides a moral justification for the idea of civil association under an autonomous

¹⁰⁵ Oakeshott (n 103) 117–18.

¹⁰⁶ Freedom, on these terms, 'does not follow as a consequence' of civil association, rather 'it is inherent in its character'. Oakeshott (n 103) 175. See further D Dyzenhaus, 'Dreaming the Rule of Law' in D Dyzenhaus and T Poole (eds), *Law, Liberty and State: Oakeshott, Hayek and Schmitt on the Rule of Law* (Cambridge University Press, Cambridge, 2015) 234, 234–5, 248.

¹⁰⁷ RB Friedman, 'Oakeshott on the Authority of Law' (1989) 2 *Ratio Juris* 27–40. See further, T Nardin, *The Philosophy of Michael Oakeshott* (Penn State University Press, University Park, PA, 2001) 197–8.

¹⁰⁸ RB Friedman, 'What is a Non-Instrumental Law?' (1992) 21 *Political Science Reviewer* 81, 83. On the difficulty in framing Oakeshott's theory as entirely 'non-instrumental', particularly given Oakeshott's debt to Hobbes, see Dyzenhaus (n 106) 257–8, and N Malcom, 'Oakeshott and Hobbes' in P Franco and L Marsh (eds), *A Companion to Michael Oakeshott* (Penn State Press, Pennsylvania, PA, 2012) 217, 228–30.

¹⁰⁹ Oakeshott (n 100) 148.

system of law.¹¹⁰ Thus, where the rule of law adheres there arises a kind of ‘self-sufficient (although not self-explanatory) system’, in the sense that law is understood (in somewhat Kelsenian terms) as identifying or defining its own jurisdiction.¹¹¹ This point requires some clarification, however, as it is clear that Oakeshott did not believe that such law could ‘run of itself’, operating as some kind of *deus ex machina*. His account necessarily presupposes a system of rules in which ‘umpires’ are deployed to mitigate unending conflicts of interpretation, and there is submission to some arbitrator to mediate between individual agents in their pursuit of more instrumental purposes through the legal form.¹¹² For Oakeshott, then, adjudication is a necessary and not merely contingent condition of civil association.¹¹³

For this reason, one might be sceptical that this rule of law ideal might be feasibly realised in the decentralised institutional conditions of international law. However, this is a point considered at some length by Nardin, who argues that there is nothing in Oakeshott’s account that requires centralised institutions as such, but only agreed-upon procedures for authoritative interpretation and dispute resolution in particular circumstances. There is clearly evidence of this kind of systemic agency in international law, of a ‘variety of means for applying international law’ as well as ‘rules delimiting their jurisdiction and defining the scope and significance of their authoritative determinations’, and there is therefore nothing problematic, conceptually speaking, in further institutional reform to realise more effective international procedures in this regard.¹¹⁴

The main point of applying his theory to international law is that Oakeshott did not see such institutional roles as necessary for the achievement of some collective purpose; they are there to help realise the conditions of civil association itself. As such, the key innovation in this understanding of the rule of law, compared to arguably more recognisable, but intrinsically more instrumental accounts (eg Raz), is that Oakeshott does not see the rule of law as something that acts on government to limit its arbitrary power in order to realise freedom. Rather, the rule of law acts as an idealised embodiment of a certain type of freedom: it is a prior, assumed commitment which, where it pertains, nonetheless has the effect of guiding and limiting the range of permissible actions of the sovereign.

¹¹⁰ See Friedmann (n 108) 82 and Oakeshott (n 103) 129, 161, 174–5.

¹¹¹ Oakeshott (n 103) 129.

¹¹² *Ibid* 131–3.

¹¹³ *Ibid* 133.

¹¹⁴ Nardin (n 17) 163–4.

As such, what we arrive at is precisely a philosophical justification for a view of the rule of law that inheres in the form of legal order itself and which, in the international context, presumes a kind of inter-relational limitation to the freedom of sovereign states, as well as the institutions they create. This theory gives moral grounding to a popular disciplinary narrative surrounding the necessary autonomy of international law, which is seen as important to make international law an objective condition for the conduct of international politics.¹¹⁵ In other words, Nardin's extrapolation of Oakeshott's ideas gives a particular expression to what Christian Reus-Smit has described as a pervasive 'discourse of institutional autonomy' in international law, a discourse which has played out in the disciplinary effort to defend the relevance and reality of legal rules in the conduct of international politics.¹¹⁶

Nevertheless, recognising that the rule of law is expressed through the ideal of international law's autonomy only serves to highlight a fundamental ambiguity in what we mean when we speak of the autonomy of law on these terms. Indeed, for as long as this discourse has played out, there has always been a rival articulation of the ambition to subject international politics to objective legal rules.¹¹⁷ As Oscar Schachter once argued, to say that international law possesses a degree of autonomy cannot just be to present it as a kind of 'specialized or symbolic language to describe behaviour'. Rather, he claimed, the law must function as 'a means of independent control that effectively limits the acts of the entities subject to it'.¹¹⁸

On these terms, then, the objectivity of law manifests in its ability to constrain the political choices of states in order to realise agreed-upon objectives – ends which are seen as equally intrinsic to the idea of international legal order, whether peace, order, friendly relations, and so on. Accordingly, the rule of law is understood by reference to the

¹¹⁵ See, in particular, Collins (n 2) Ch 3.

¹¹⁶ See C Reus-Smit, 'The Politics of International Law' in C Reus-Smit (ed), *The Politics of International Law* (Cambridge University Press, Cambridge, 2004) 14, 36–7.

¹¹⁷ On the connections between the ideal of the rule of law and the importance of, as well as ambiguities surrounding, the autonomy of international law, see Collins (n 4), as well as R Collins, 'Autonomy' in J d'Aspremont and S Singh (eds), *Concepts for International Law: Contributions to Disciplinary Thought* (Edward Elgar, Cheltenham, 2019). On the ambiguities surrounding the idea of law's autonomy generally, see BH Bix, 'Law as an Autonomous Discipline' in P Cane and M Tushnet (eds), *The Oxford Handbook of Legal Studies* (Oxford University Press, Oxford, 2003) 975–87; and Unger (n 20) 52–4.

¹¹⁸ O Schachter, 'The Nature and Process of Legal Development in International Society' in RStJ Macdonald and DM Johnston (eds), *The Structure and Process of International Law: Essays in Legal Philosophy, Doctrine, and Theory* (Martinus Nijhoff, The Hague, 1983) 745, 747.

institutional conditions necessary for law to manifest this kind of objective normative constraint. Rather than being reflected within international law's institutional form, then, it is more likely now that the rule of law is seen to be hindered by the apparent limitations of a decentralised legal order, thus necessitating certain institutional reforms.

In this way, the modern discipline came to place its hope for the realisation of an international rule of law in the expectation that the international legal order will develop institutional structures more able to effectively secure the restraint of arbitrary political power. Indeed, Nardin himself conceded as much, arguing that since the creation of the UN the rule of law has come to be thought of – wrongly, in his view – less as a pre-existing basis of association (from which one might engage in such institutionalised cooperation) and more as a goal to be achieved through enhancing the capacity of such institutions to protect community interests.¹¹⁹ Nevertheless, as I show in the next and final section, this alternative idealisation of an international rule of law is not necessarily misguided or wrong-headed, as Nardin believes, but simply reflects an alternative, competing, but equally important logic of the rule of law as it plays out in the international context. To fully understand the international rule of law one must thus appreciate the antagonistic, yet mutually-constitutive and constructive relationship between both idealisations.

V. The rule of law as institutional ideal: The emergence of global governance

The account of the international rule of law I have just provided reflects the collective experience of the modern discipline in trying to work out a feasible and legitimate system of positive laws as a means of structuring international political relations. I believe that this idealisation of international law as an autonomous, systemic legal order is plausible and persuasive, reflecting familiar and important aspects of international legal practice. I also believe, therefore, that Oakeshott was wrong to deny the possibility of explaining the international legal order on these terms. Nevertheless, the differences that he perceived between the state and international relations do arguably highlight a way in which international law might appear inherently more instrumental, not just in how rules are created and used by states and other participants, but also in the discipline's desire to subject international law to the governance of objective legal rules more broadly. Let me now explain this point further.

¹¹⁹ Nardin (n 17) 105–12.

As previously noted, the effort to make sense of international law as an autonomous legal order by reference to an ideal of legality derived from domestic legal experience has to be thought of as a very deliberate disciplinary transition, precisely because such autonomy is seen to be critical in subjecting states to more effective legal regulation. This is precisely why, to begin with, I have claimed that international law has always been as much a project as a practice, as much a promise of a future order to come as a reflection of institutional reality. This condition creates something of a tension as far as the international rule of law is concerned, however, for the pluralist justification for law's systemic autonomy competes with a more rational, functional justification that sees this autonomy as important to the achievement of law's regulatory purpose.¹²⁰ On one view, then, the differences revealed in our analogical inference – the specific characteristics of international law as a decentralised legal order – are seen as important aspects of the legitimacy of international law as a regulatory system between diverse political communities; on another view, however, they look much more like a kind of 'constitutional deficiency' that undermines the determinacy of international law and thus prevents the full realisation of the rule of law.¹²¹

One can see this latter view laid out most explicitly in the early writings of Hersch Lauterpacht – certainly one of the twentieth century's most celebrated international lawyers, and one of the most vocal champions for the advancement of the international rule of law. As he states:

International law can form part of jurisprudence only when its present imperfections are regarded as transient. These imperfections are fundamental, and it is only because they are deemed to be provisional that it is possible to treat international law as part of jurisprudence. Once they are regarded as permanent, international law vanishes completely from the horizon of jurisprudence.¹²²

Lauterpacht's argument is not to deny the legal character of international law outright, but it is to make the question of international legality somewhat

¹²⁰ In other words, this account would be more akin to a Razian than a Fullerian view of the rule of law. See Murphy (n 89).

¹²¹ See, principally, A Somek, 'From the Rule of Law to the Constitutionalist Makeover: Changing European Conceptions of Public International Law' (2011) 18 *Constellations* 567, 576, *passim*; and see further Collins (n 2).

¹²² H Lauterpacht, 'The Place of International Law in Jurisprudence' in E Lauterpacht (ed), *International Law: Being the Collected Papers of Hersch Lauterpacht – Volume 2: The Law of Peace, Pt 1* (Cambridge University Press, Cambridge, 1975) 193, 208. Lauterpacht was making reference here to Holland's assertion that international law was the 'vanishing point of jurisprudence'. See TE Holland, *Elements of Jurisprudence* (9th edn, Oxford, Oxford University Press, 1900) 369.

relative to the institutional maturity of the international legal order. Thus, whilst international law's apparent imperfections might not call for the installation of a universal state, for Lauterpacht, they did necessitate that international lawyers work towards securing a more effective global architecture, that is, one more able to effectively realise collective ambitions against recalcitrant states and other powerful actors.¹²³

This more instrumental understanding of an international rule of law has been a recurrent rhetoric in the modern discipline, but particularly since international law's 'move to institutions' at the start of the twentieth century.¹²⁴ Each new post-war project of international organisation, from the League of Nations to the creation of the UN, has been interpreted, at least in part, as an attempt to counteract or fix the apparent constitutional weaknesses of a decentralised legal order. This is evident in particular in Lauterpacht's reading of the League Covenant, which he saw as an effort to centralise the international system through a kind of proto-constitution.¹²⁵ He was sensitive to the fact that the actual legal form of the Covenant as an interstate treaty reduced the cogency of the constitutional analogy,¹²⁶ but the key point was precisely to look beyond the legal form, to actively interpret the institutional structures which it created in a more functional way, and thus necessarily changing the nature of international law in practice.¹²⁷ Lauterpacht was by no means alone in advocating this kind of internationalist and functionalist reading of the League and its impact on the constitutional structure of the international legal order. Arnold McNair, the author of the leading text on the law of treaties at the time, argued that the constitutive instruments of international organisations could be thought of as a kind of decentralised form of 'legislation', allowing the international community to create institutional structures more able to effectively protect community interests.¹²⁸ Similarly, James Brierly, a contemporary

¹²³ Lauterpacht's views are sometimes interpreted as endorsing the end of a universal state, but his ambition was only to bring about the 'realizable and certainly not infinite ideal of the Federation of the World conceived as a commonwealth of *autonomous States exercising full internal independence*'. See H Lauterpacht, 'The Nature of International Law and General Jurisprudence' in Lauterpacht (n 122) 1, 47 (emphasis added).

¹²⁴ D Kennedy, 'The Move to Institutions' (1987) 8 *Cardozo Law Review* 841, 857–59.

¹²⁵ See, eg, H Lauterpacht, 'The Covenant as the Higher Law' (1936) 17 *British Yearbook of International Law* 54. On Lauterpacht's commitment to the constitutionalisation of international politics generally, see also Koskenniemi (n 1) 376–88.

¹²⁶ Lauterpacht (n 123) 64–5.

¹²⁷ See on this point, P Capps, 'Lauterpacht's Method' (2012) 82 *British Yearbook of International Law* 248.

¹²⁸ See, eg, A McNair, 'International Legislation' (1933–34) 19 *Iowa Law Review* 177, 178–9; and later CW Jenks, 'The Conflict of Law-Making Treaties' (1953) 30 *British Yearbook of International Law* 401. For commentary, see also C Brölmann, 'Law-Making Treaties: Form and Function in International Law' (2005) 74 *Nordic Journal of International Law* 383.

of Lauterpacht, was quite explicit on the necessity of such a functional reading in order to fulfil collective ambitions for an international rule of law:

The real justification for ascribing a law-making function to these treaties is the practical one ... that they do in fact perform the function which a legislature performs in a state, though they do so only imperfectly; and that they are the only machinery which exists for the purposive adapting of international law to new conditions and in general for *strengthening the force of the rule of law between states* ... It is right that we should look behind the form of these treaties to their substantial effect.¹²⁹

This sort of functional reading of the project of international organisation continued well into the latter years of the twentieth century, fuelled by the creation of the UN and the proliferation of institutions, regimes, courts and dispute settlement mechanisms that followed in its wake. Whilst few would go on to see the UN Charter as an actual constitution for the international system,¹³⁰ it seems to be more broadly accepted that the UN system and associated institutions are essentially ‘gap-filling’ for the lack of actual constitutional organs at the international level.¹³¹ At times this kind of functional reading has been explicitly advocated in distinctly anti-formal terms.¹³² More often, however, it has manifested simply in the presumption that the advancement of the functional autonomy of international institutions will help constrain the arbitrary choices of states in order to advance international law’s regulatory ambitions.¹³³

Nevertheless, whilst it is difficult today to deny the impact of international institutions in the actual functioning of the international legal system – whether in facilitating the advancement of ‘community interests’ through

¹²⁹ JL Brierly, *The Law of Nations: An Introduction to the International Law of Peace* (2nd edn, Oxford University Press, Oxford, 1936) 48–49 (emphasis added).

¹³⁰ There are notable exceptions, of course, particularly (though not exclusively) in Germanic international law scholarship. For commentary, see B Fassbender, *The United Nations Charter as the Constitution of the International Community* (Martinus Nijhoff, Leiden, 2009), especially the works he surveys at 27–51.

¹³¹ See, eg, A Cassese, *International Law in a Divided World* (Clarendon Press, Oxford, 1986) 401–3; A Cassese, *International Law* (2nd edn, Oxford University Press, Oxford, 2005) 66–7.

¹³² See, eg, PC Jessup, *A Modern Law of Nations: An Introduction* (Macmillan, New York, NY, 1952) 2–3, 8–12 on the defects of a sovereign-centred and decentralised legal order. See also his stress on function over form in his separate opinion in the *South West Africa* case: ICJ Reports 1966, 319, 411; and see also CW Jenks, ‘Craftsmanship in International Law’ (1956) 50 *American Journal of International Law* 32, and M Lachs, ‘Some Reflections on Substance and Form in International Law’ in W Friedmann, L Henkin and O Lissitzyn (eds), *Transnational Law in a Changing Society: Essays in Honour of Philip C Jessup* (Columbia University Press, New York, NY, 1972) 99–112.

¹³³ See, eg, Alvarez (n 36) 585.

communal institutional fora,¹³⁴ or in enhancing international law's law-making procedures,¹³⁵ or the available means for adjudication and enforcement in practice¹³⁶ – it is clear that this impact is seen in increasingly ambivalent terms from the perspective of the international rule of law. Although many international institutions have come to exercise a kind of functional authority and influence that belies their formal grounding in treaty law, such innovations cannot but strain the kind of formalist, non-instrumental logic inherent in the rule of law ideal as defended above.¹³⁷ Thus, on the one hand, the increasing activism of the UN Security Council in the post-Cold War period was initially greeted with disciplinary enthusiasm, but this soon gave way to concern over the Council's apparent institutional overreach, selectivity, and lack of legal accountability.¹³⁸ Likewise, although the ICC was initially heralded as helping to end impunity and ensure the more effective protection of global human rights, the institutional design and functioning of the Court in practice increasingly raises concerns over its politicisation and apparent Western bias.¹³⁹

In light of such concerns, it is hardly surprising that the new millennium brought with it an increasing academic focus on the question of the legitimacy of international institutions;¹⁴⁰ policy initiatives aimed at

¹³⁴ As Alvarez acknowledges, '*Jus cogens* and *erga omnes* obligations are products of the age of IOs [international organisations] precisely because they made real (or more real than ever before) the idea of a 'community of states as a whole' on which such hierarchical concepts could be built'. JE Alvarez, 'International Organizations: Then and Now' (2006) 100 *American Journal of International Law* 324, 327.

¹³⁵ See generally Alvarez (n 36) 217–44; A Boyle and C Chinkin, *The Making of International Law* (Oxford, Oxford University Press, 2007) 108–41.

¹³⁶ For a number of perspectives on this trend, see J Goldstein *et al.* (eds), *Legalization and World Politics* (MIT Press, Cambridge, MA, 2001).

¹³⁷ For an extended discussion of this point, see R Collins, 'Mapping the Terrain of Institutional "Lawmaking": Form and Function in International Law' in E Fahey (ed), *The Actors of Postnational Rule-Making: Contemporary Challenges of European and International Law* (Routledge, Abingdon, 2015) 27–46.

¹³⁸ For a useful discussion, see S Chesterman, 'The UN Security Council and the Rule of Law: The Role of the Security Council in Strengthening a Rules-based International System: Final Report and Recommendations from the Austrian Initiative, 2004-2008' available at <https://www.ijl.org/wp-content/uploads/2017/08/unsc_and_the_rule_of_law.pdf>. And see also A Tzanakopoulos, *Disobeying the Security Council: Countermeasures against Wrongful Sanctions* (Oxford University Press, Oxford, 2011).

¹³⁹ See, amongst a burgeoning literature, A Tiemessen, 'The International Criminal Court and the Politics of Prosecutions' (2014) 18 *The International Journal of Human Rights* 444.

¹⁴⁰ See *inter alia* J Klabbers 'The Changing Image of International Institutions' in J-M Coicaud and V Heiskanen (eds), *The Legitimacy of International Organizations* (United Nations University Press, Tokyo, 2001) 221–55, as well as many of the other contributions in the same volume, noting issues of accountability and perceived institutional biases.

addressing questions of accountability and institutional responsibility;¹⁴¹ as well as the emergence of new movements self-defined in terms of ‘global constitutionalism’¹⁴² and ‘global administrative law’,¹⁴³ the ethos of which is essentially to address the kind of rule of law concerns that arise from the apparent overreach of ‘global governance’ institutions.¹⁴⁴ Certainly, much of the concern surrounding the normative impact of such institutions and regimes stems from a perceived weakening of rule of law protections at the domestic level, as much as the international. However, from the international perspective, two particular concerns have arisen and suggest that the account of the international rule of law set out above remains a still pertinent facet of the overall legitimacy of international law. First, insofar as these different regimes and institutions are seen to develop a range of normative instruments, standards and forms of policy influence which fall outside of the recognised sources of international law, there appears to be a particular concern related to the law’s *deformalisation*.¹⁴⁵ Second, where such regimes and institutions do apply, interpret or enforce recognised rules of international law, the worry is rather that the structural bias of each may well contribute to the apparent *fragmentation* of international law, thereby undermining its overall systemic coherence.¹⁴⁶

¹⁴¹ See eg International Law Association, ‘Accountability of International Organisations’ in *Final Report of Committee on Accountability of International Organizations*, Berlin Conference, (2004) available at <<https://ila.vettoreweb.com/Storage/Download.aspx?DbStorageId=1058&StorageFileGuid=04c9caf1-2834-4490-9125-7d9ba3683246>>; International Law Commission, ‘Draft Articles on the Responsibility of International Organizations, with Commentaries’ in *Report on the Work of Its Sixty-third Session* (26 April–3 June and 4 July–12 August 2011) UN Doc A/66/10, Ch V, available at <http://legal.un.org/ilc/documentation/english/reports/a_66_10.pdf>.

¹⁴² Amongst the many recent contributions, see principally, J Klabbbers, A Peters and G Ulfstein, *The Constitutionalization of International Law* (Oxford University Press, Oxford, 2010).

¹⁴³ The literature here is now somewhat voluminous, but as an introduction, see principally N Krisch and B Kingsbury, ‘Introduction: Global Governance and Global Administrative Law in the International Legal Order’ (2006) 17 *European Journal of International Law* 1; and see the symposium which follows at 1–278 of the same edition; B Kingsbury, N Krisch and R Stewart, ‘The Emergence of Global Administrative Law’ (2005) 68 *Law and Contemporary Problems* 15, and the rest of the symposium in the same issue, at 1–377.

¹⁴⁴ The literature here is also quite extensive, but for a good introduction see Weiler (n 30) and, for a more recent and quite thorough survey, see E Benvenisti, *The Law of Global Governance* (Brill, The Hague, 2014).

¹⁴⁵ M Koskenniemi, ‘The Fate of Public International Law: Between Technique and Politics’ (2007) 70 *Modern Law Review* 1.

¹⁴⁶ See *inter alia* N Walker, ‘Beyond Boundary Disputes and Basic Grids: Mapping the Global Disorder of Normative Orders’ (2008) 3 *International Journal of Constitutional Law* 373.

Whilst space precludes any deeper inquiry into the global governance phenomenon and the apparently ‘postmodern anxieties’ that it raises,¹⁴⁷ what I do want to suggest in the remaining paragraphs is that the growing embrace of, yet seeming ambivalence towards international law’s institutionalisation demonstrates the interplay between the two opposed idealisations of the international rule of law: on the one side, calling for the development of autonomous institutional structures to overcome the perceived inefficiencies and externalities of a decentralised legal order; on the other side, however, the more autonomous and effective such regimes and institutions become, the more they appear threatening to the rule of law understood by reference to the law’s formal systematicity. The competing formal-pluralist and functional-rationalist logics play off against each other, with the instrumental urge towards institutional effectiveness causing a strain from the perspective of the formal-structural and non-instrumental ‘*lex*’ of the system, whilst these structural rules at the same time seemingly undermine or limit the attainment of communitarian goals. This tension carries over into the institutional framework of intergovernmental organisations, whereby their functionality may well contribute to enhance or streamline international legal processes (for example, the formation of customary international law, the enforcement of legal frameworks, and so on), but insofar as this kind of functional authority lacks any formal legal grounding other than the constitutive rules of treaty law, such normative influence will always be somewhat contingent, revisable and challengeable from within (by member states) as well as from outside (by interested global publics) the constraining legal framework of the institution.

One might therefore see the structural tenets of a decentralised legal order as giving rise to uncertainty and inefficiency, requiring necessary institutional innovations to secure more effective legal mechanisms, but such institutional innovation will always be tempered by a counter-logic expressed through the formal systematicity implied by the rule of law as the basis of international association. It is this kind of rule of law logic that insists on accountability through formal legal warrant, that ends do not override means, and which creates the formal-legal equality necessary to counteract the pervasive structural inequalities of the global system.

One might equally see global governance as straining the system of international law, or as giving rise to certain legitimacy deficits, precisely

¹⁴⁷ M Koskeniemi and P Leino, ‘Fragmentation of International Law? Postmodern Anxieties’ (2002) *Leiden Journal of International Law* 553.

because of concern to protect the value of this formal systematicity. Certainly, the concerns surrounding international law's fragmentation are an acute expression of this urge to protect the systemic autonomy of international law. However, this kind of functional authority is no less important to what contemporary international law is, providing a dynamism to its institutional framework to respond more effectively to arising global challenges, as well as a counterweight to the kind of sovereigntist rhetoric that arguably threatens to abuse legal formalities for the sake of protecting the entrenched interests, biases and policy preferences of powerful actors (whether states or global institutions).¹⁴⁸

VI. Conclusion

As such, rather than seeing this apparent tension, this push and pull of legitimacy claims, in negative terms, I believe that the two competing, seemingly incompatible visions should be seen as equally important, yet mutually antagonistic sides of an overall vision of the international rule of law. These two ideals may be justified by quite distinctive logics, but their mutual antagonism makes them also inseparable in expressing urges that make little sense except in their opposition: the functional vision expressing the need to avoid an over-fetishised legal formalism that tends to mask structural inequalities, biases and global injustices; the formal vision ensuring a degree of accountability and restraint that can only be ensured through the systematic logic of the international legal form itself.

To be sure, the argument presented here will not exhaust all of the ways in which the rule of law is marshalled in international legal discourse, whether from within the internal legal order of particular global regimes, or from the perspective of the individual who finds her state-anchored rule-of-law protections increasingly undermined by exactly these kinds of global governance institutions. However, it is not my ambition to provide a holistic, monist view of the rule of law, or to make sense of the many ways in which the language of legality may be deployed in the increasingly post-national political space. Rather, I hope to have provided a meaningful account of what the rule of law can and should mean at the broadest level of the international legal system itself. In this context, the rule of law has

¹⁴⁸ I particularly have in mind, in this regard, China and Russia's recent Joint Declaration on Promotion and Principles of International Law (25 June 2016) available at <http://www.mid.ru/en/foreign_policy/position_word_order/-/asset_publisher/6S4RuXfeYIKr/content/id/2331698>.

to account for the decentralised, interstate structure of international law, but also how such a structure should be modified and adapted towards the achievement of collective ambitions. To understand the rule of law as it is deployed in international legal practice is thus to explain, unpack and meaningfully reconstruct these competing idealisations as both expressing key aspects of international legality.