

# THE RULE OF (ADMINISTRATIVE) LAW IN INTERNATIONAL LAW

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## I

### INTRODUCTION

In common-law legal orders, public power is supposed to be exercised in accordance with the rule of law. Administrative law, the law that governs the exercise of power by public officials, is the body of rules and principles developed by judges to ensure that when public officials act, they act in accordance with the rule of law. Severe tensions can arise within the common-law understanding of administrative law when a legislature enacts a law that meets the legal order's formal criteria for validity, yet purports to exempt officials from the requirements of the rule of law. If those officials' decisions are challenged before a court, should the court declare them invalid simply on the basis that they fail to accord with the rule of law? Judges who adopt positivistic theories of law will generally answer "no" to this question, while judges of a more natural law bent will tend to answer "yes." The former will determine a law's validity based only on the criteria explicitly set out in the positive law of their order, while the latter will think that there is more to the question than positive law—namely, the transcendent moral values of the rule of law.

Although judges of a natural-law bent will likely appreciate the tensions better than positivistically inclined judges, a more sophisticated response to the problem is available than one that simply reduces it to a question of whether a law offensive to the rule of law is or is not a law. That response presupposes a natural-law understanding of the rule of law, one which holds that the value content of the rule of law transcends what any formal source of law declares the law to be. However, such a response does not require that a law is always invalid when it fails to comply with the values of the rule of law. Rather, all it requires is that the tensions created by such a law are understood as tensions internal to legal order, tensions which must be resolved in order for that legal order to sustain its claim to be such—an order constituted by law. Thus, judges are not necessarily always able or even often best suited to resolve such tensions.

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An exploration of this response begins with an account of how judges in common-law legal orders have found the norms of international law, in particular international human rights law, helpful in elaborating their understanding of their role in upholding the rule of law. Indeed, international human rights law has helped greatly to clarify the idea of the rule of law on which the judges rely, both in terms of the interactions among its components and the assumptions that hold it together. Judges have found international law particularly useful in ensuring that the rule of law is respected in an area in which traditionally positivistic judges have deemed the rule of law inapplicable—namely, in the exercise of public power, which is based, not on law, but on the prerogative of the executive to deal with immigration and national security as it sees fit. Natural-law judges have been amenable to the influence of international law because their understanding of law and the rule of law rejects positivistic assumptions that lead to the marginalization of international law, even to its very claim to be law. However, international legal bodies have proven capable of introducing the same sorts of tensions—tensions often created in the areas of national security and immigration.

One might say that these natural law judges, working within the common law tradition, have paid international law the compliment of not only recognizing its claim to be law, but also of considering it to be constitutive of their understanding of the rule of law or legality, so that public officials must comply with international law if they are to abide by the rule of law. Thus, it is incumbent on the international bodies charged with making decisions affecting the interests of individuals subject to their legal regimes to repay the compliment. International bodies should put in place mechanisms that will help to ensure that their officials comply with the package of rule-of-law controls. As a corollary, domestic courts should consider decisions of international bodies suspect, though not necessarily invalid, to the extent that these decisions do not comply with such controls.

This article will thus move from the reception of international legal norms (Part II.A.) to the administrative law of common-law countries (Part II.B.1.), and then to the reception of administrative law norms into international law (Part II.B.2.).<sup>1</sup> The theme common to these topics is that the rule of law is not about maintaining a formal separation of powers, but about all institutions of legal order, whether international or domestic, serving the values articulated by the rule of law.<sup>2</sup> The article will close by drawing out theoretical implications of

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1. This does not imply that the common law's conception of the rule of law has more to offer to the debate about international administrative law than does that of civil law systems. The latter may offer more, but here my ignorance is a fact if not an excuse.

2. The argument here owes much to Mark D. Walters, *The Common Constitution and Legal Cosmopolitanism*, in *THE UNITY OF PUBLIC LAW* 431 (David Dyzenhaus ed., 2004). Walters wants to revive the original Roman idea of the *ius gentium*, which differed from the *ius feciale*, the law between states, since it was about a natural law or "moral common law of humanity." *Id.* at 440. Walters argues that this natural law idea was lost when the Westphalian international system came into being and was equated with the *ius gentium*, in substance replacing the former with the *ius feciale*. *Id.* He asserts that *Baker v. Canada (Minister of Citizenship and Immigration)* [1999] 2 S.C.R. 817, and other cases dis-

this theme for debates between positivists and natural-law jurists regarding the nature of international law.

## II

### THE RULE OF LAW, INTERNATIONAL LAW, AND JUDICIAL REVIEW OF ADMINISTRATIVE DECISIONS IN FOREIGN AFFAIRS AND SECURITY MATTERS

#### A. The Common-Law Courts and the Rule of Law

Common-law judges presume that individuals whose interests are affected by the decisions of administrative public officials have certain rights. The package of rights involved depends on many factors, including the way in which doctrine has developed in the particular legal order, the nature of the interest affected, the impact of the decision on the interest, and, assuming the official is acting on the basis of authority delegated by statute, on what the statute actually prescribes. In the abstract, the package at its fullest may include the right to a hearing before a decision is made, the right to have the decision made in an unbiased and impartial fashion, the right to know the basis of the decision so that it can be contested, the right to reasons for the official's decision, and the right to a decision that is reasonably justified by all relevant legal and factual considerations. Except for the last, all these rights are usually grouped into the category of "procedural rights," which pertain to the way in which a decision is made. By contrast, the last-mentioned gives the individual the right to a substantively sound decision. To make these rights effective, one more right must be added to the package—the right to have the validity of the decision tested in a court of law.

When common-law judges uphold official decisions, they are also certifying that the officials acted in accordance with the rule of law. Official compliance with the package of rights thus marks the difference between a rule-of-law society and one in which individuals are subject to the arbitrary rule of men.

In the common law of judicial review, something roughly like the package of rights just described is thought to supply the content of the rule-of-law regime with which judges presume all officials must comply. The qualification "something roughly like" is necessary to indicate that the content of the package is controversial and that the rule of law is an essentially contested concept.<sup>3</sup> However, the terms of that contest can be unpacked in order to illuminate the subject of the rule of (administrative) law in international law. The claim here is that the package fulfills the central aspiration of the rule of law—the subjection

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cussed *infra*, demonstrate that the common law constitution can be understood as embodying Kant's idea of a *ius cosmopolitanum*, itself an attempt to revive the original *ius gentium*. Moreover, he believes that revival can meet the challenge of what would otherwise appear to be black holes in legal order. *Id.*

3. See Jeremy Waldron, *Is the Rule of Law an Essentially Contested Concept (in Florida)?*, 21 L. & PHIL. 137 (2002).

of public power to controls that ensure it is exercised in the interests of those affected by it.

Further, in order to have that package, one has to adopt a non-positivist understanding of law and legal order or legality, which, for now, can be described as embracing just three points: First, while the prescriptions of the statute under whose authority an official is acting are most relevant to determining the content of the package, the content is not contingent on the statute's prescriptions. As a well-known judgment put it, "the justice of the common law will supply the omission of the legislature."<sup>4</sup> Put differently, the basis of the rule of law is not in the positive law provided by the legislature, but in what can be thought of as the unwritten or common-law constitution. Second, the common-law constitution applies even when the official's claimed authority is not derived from statute but from the prerogative powers of government—the residuary power of the sovereign, which, as Dicey claimed, is the "residue of discretionary or arbitrary authority which at any given time is legally left in the hands of the Crown."<sup>5</sup> These two points suggest—against the grain of positivist tradition—that the operation of the values of the rule of law does not depend on their prior expression in positive enactments of the legislature. In addition, a third point undermines a more sophisticated kind of legal positivism, one that seeks to recognize judgments as a source of positive law: that judges have developed a common law of judicial review over time is considered the positive law basis for their understanding of the rule of law. The idea is that proponents of the common-law constitution consider judgments to be evidence of the requirements of the rule of law and not the source of those requirements.

The most controversial part of the package is its substantive component, the right to a decision that is reasonably justified by all relevant legal and factual considerations. When judges review on the basis of procedural components, they can claim that because procedure pertains to how a decision is made, not which decision was made, they are not second-guessing the legislature's decision to delegate authority over substance to the officials charged with implementing the statute. This distinction between process and substance is hard to sustain, not only because procedural rights might protect the same values as substantive rights, but also because the connection between procedural and substantive components is very tight. Procedural and substantive rights have what one can think of as a symbiotic relationship. For the moment, however, the focus will be not on the fragility of this distinction, but on the reasons for making it—a judicial concern about the legitimacy of the common law of judicial review.

This concern stems from a formal doctrine about the separation of powers, which holds that Parliament has a monopoly on making law—on the production of legal norms. The rest of the powers necessary to sustain the rule of law are divided between the executive, with its monopoly on implementing the law, and

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4. *Cooper v. Bd. of Works for the Wandsworth Dist.*, 21 Eng. Rep. 414, 420 (C.B.), 14 C.B. (N.S.) 180, 194 (1863) (Byles, J.).

5. A.V. DICEY, *AN INTRODUCTION TO THE STUDY OF THE CONSTITUTION* 424 (1987).

the judiciary, with its monopoly on interpreting the law. When the executive acts, it must act within the limits of its legal authority, that is, within the authority provided by the particular enabling statute. Judges fulfill their role by policing those limits. This doctrine of judicial review, the doctrine of *ultra vires*, thus holds that the limits on executive discretion in implementing a statutory mandate are only the limits prescribed by statute or by some other supra-authoritative source, for example, a statute prescribing general rules for all administrative bodies or a written constitution.

In democratic theory, Parliament's alleged monopoly on legislative power is rooted in the claim that only the people's representatives have the authority to make law. But justification for the formal doctrine of the separation of powers need not be rooted in democratic theory. It can, for example, reside in a Hobbesian argument about the need to concentrate legislative power in one body. However, for present purposes, it will be assumed that the judicial concern about the legitimacy of intruding upon executive decisionmaking is a democratic one.

Now, the history of the common law of judicial review is a history of judges imposing controls on public officials that are not prescribed by any statute. Not all judges have been comfortable with this history, and so there has been, and continues to be, significant judicial resistance to imposing controls beyond those explicitly contemplated by statute or written constitution. To the extent there has been comfort among such judges, it has rested on the distinction between process and substance: if judges stick to the process side of the distinction, they are not intruding into substance. It is also often claimed that there is a kind of tacit legislative consent to judicial imposition of procedural controls discernable from the legislature's ability, if it chose, either to preemptively exclude such controls or to override them in the wake of a judgment. However, the doctrine of tacit consent cannot be invoked with respect to judicial intrusion into substance, since the very legislative delegation of authority to the executive is taken as an altogether explicit signal to the judiciary of legislative intent.

The formal doctrine of the separation of powers, the doctrine that leads to this judicial discomfort with review, is unhelpful. On its best understanding, the separation of powers is not so much about formal divisions between the competences of the legislative, the judicial, and the executive. Rather, it concerns their roles in ensuring that public power is exercised in accordance with the substantive and procedural values of the rule of law.

## B. The Rule of Law: Challenges and Opportunities

### 1. Domestic Administrative Decisions

The idea of unfettered discretion, that officials are a "law unto themselves" within the limits clearly stated in the statute, has important affinities with the idea of the prerogative as a legally uncontrolled space. There seems to be a family of such ideas in the theory and practice of law in common-law legal or-

ders—ideas that are connected to the Hobbesian idea that the international domain is a lawless state of nature. Foreign affairs or participation by states in that domain is considered to be a matter of uncontrolled prerogative, since states within that domain are seen as analogous to individuals within the state of nature. Similarly, the thought of national security as a matter for the prerogative is connected to the idea that those who threaten the very existence of the state have put themselves into a state of nature with regard to that sovereign. Control over immigration or aliens is thus control over those who wish to enter a civil society from either a state of nature or from another civil society whose relationship with the first is itself in a state of nature. While both immigration and national security are now generally controlled by statute, their history as prerogative powers often looms large in a judge's approach to statutory interpretation, especially when officials are given broad discretionary powers to make security or immigration determinations.

Given this concern about judicial intrusion into substance, it is hardly surprising that many common-law judges have adopted the stance known as “dualism” with respect to the norms of international law other than those of customary international law, which are supposed to have domestic force whether or not the legislature has explicitly incorporated them. Dualists hold that the only legitimate source of legal norms within their legal orders is the legislature. They thus argue that with the exception of customary international law, international legal norms may have force domestically only when the legislature has explicitly incorporated them by statute. It follows that executive ratification of a treaty is a signal to the outside world, but not to the subjects of the domestic legal order. To enforce such norms would be to permit the executive to usurp legislative power, though the instrument of usurpation would not be the executive itself, but judges, who would in substance have incorporated the norms through the back door.<sup>6</sup>

The tale that follows illustrates how common-law judges responsible for bringing international norms into the embrace of the common law of their four jurisdictions—New Zealand, Australia, Canada, and the United Kingdom—understood what they were doing, not as incorporating through the back door, but as updating the values of the rule of law, or “working the law pure.”<sup>7</sup> The tale is remarkable in its display of what one could call an international dialogue between judges about the role of international norms in domestic law, particularly in informing their understanding of the controls exercised on public officials by the rule of law.

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6. Dualists do permit one port of entry into domestic law for these non-customary norms of international law, via the maxim that judges should deal with statutory ambiguity by resolving it in favor of international law. However, since grants of discretion to officials were long viewed as unambiguous delegations of authority to the officials—an unfettered discretion to decide as they thought best—there did not usually seem to dualists to be any ambiguity to resolve.

7. For a full account of all except the last case discussed in this section, see David Dyzenhaus et al., *The Principle of Legality in Administrative Law: Internationalisation as Constitutionalisation*, 1 OXFORD U. COMMONWEALTH L.J. 5 (2001).

In the first three countries, the norm that sparked the process was Article 3 of the *United Nations Convention on the Rights of the Child* (CRC),<sup>8</sup> which all three had ratified but not incorporated. Article 3 provides that, “in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.” In all three cases, the issue was whether an immigration official’s decision to deport a parent with children in the host country had to take into account the interests of the children as a “primary consideration.” The legal vehicles for Article 3 were the statutory regimes of the three countries, which required, in various ways, that decisions about whether to deport an individual had to be taken in the light of “humanitarian” or “compassionate” considerations.

The first decision by New Zealand’s Court of Appeal, *Tavita v. Minister of Immigration*,<sup>9</sup> did not formally decide anything because the case was adjourned so that the Minister could reconsider. However, in rejecting the argument put forth by the Crown, which conceded that the Minister had not considered the CRC but contended that the CRC was of no effect in the domestic legal system, the Court stated an important principle, describing this argument as “unattractive, apparently implying that New Zealand’s adherence to the international instruments has been at least partly window-dressing.”<sup>10</sup> In the Court’s view, when an official is making this kind of decision, “the basic rights of the family and the child are the starting point.”<sup>11</sup>

This idea of a presumption against hypocrisy was then relied on by the majority of the High Court of Australia in *Minister of State for Immigration and Ethnic Affairs v. Teoh*,<sup>12</sup> which reasoned that the CRC created a legitimate expectation in *Teoh* and his children that any decision relating to residency or deportation would be made in accordance with the principle in Article 3(1), namely, that the best interests of the children would be a primary consideration.<sup>13</sup> This expectation could be validly defeated only by informing the *Teohs* that the Convention principle would not be applied and by giving them the opportunity to persuade the decisionmaker to change her mind.<sup>14</sup>

Finally, in *Baker v. Canada (Minister of Citizenship and Immigration)*,<sup>15</sup> Canada’s Supreme Court held that although a decision about whether to stay a deportation order on “humanitarian and compassionate grounds” was one the legislature had delegated to the expert discretion of immigration officials, the decision still had to be reasonable, that is, justified by relevant legal considera-

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8. Convention on the Rights of the Child, adopted Nov. 20, 1989, 1577 U.N.T.S. 3.

9. [1994] 2 N.Z.L.R. 257 (C.A.).

10. *Id.* at 266.

11. *Id.* at 265.

12. (1995) 183 C.L.R. 273.

13. *Id.* at 291.

14. *Id.* at 291-92.

15. [1999] 2 S.C.R. 817.

tions.<sup>16</sup> In other words, discretion was no longer viewed as a legal void or state of nature, but as replete with legal values. The Court held that among the legal factors informing its understanding of the content of reasonableness was Article 3 of the CRC.<sup>17</sup> Since the officials had not given sufficient weight to the interests of Baker's children, their decision was thus invalid because it was unreasonable.<sup>18</sup> En route to this holding, the Court also articulated a general duty at common law to give reasons for decisions that affect important interests—the first time the highest court in any one of these four jurisdictions discussed in this section had claimed that such a duty exists.<sup>19</sup>

The duty to give reasons, articulated in the procedural part of the judgment, not only seems premised on the idea of the inherent dignity of the individual, but was considered necessary, in large part, to make possible the kind of reasonableness review described in the substantive part of the judgment.<sup>20</sup> Moreover, while the content given to reasonableness—the idea that the children's interests had to be given special weight—was drawn from sources besides Article 3, namely, the immigration statute and the Immigration Department's own regulations and guidelines, it seems clear that Article 3 was the main—and perhaps the only—source of inspiration for the idea.<sup>21</sup>

This is only fitting. Expressed in various ways in the immigration regimes of these countries, the idea that deportable non-citizens are not subject to the completely unfettered discretion of the immigration department, but must be treated in a way that is attentive to humanitarian considerations, is itself a post-war innovation inspired by the international law discourse on human rights.<sup>22</sup>

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16. *Id.* at 857-58.

17. *Id.* at 861.

18. *Id.* at 863. The Court also invalidated the decision on the ground of bias and recognized that the case could have been decided on that basis alone.

19. *Id.* at 848-49.

20. See David Mullan, *Baker v. Canada (Minister of Citizenship and Immigration)—A Defining Moment in Canadian Administrative Law*, 7 REID'S ADMIN. L. 145, 151 (1999).

21. As in other cases on the CRC discussed in the text, the line of argument put forward by lawyers shifted after they had started the process of litigation before the courts, once they had become apprised of the possible impact of the CRC.

22. The decision of the majority of the House of Lords in *A v. Sec'y of State for the Home Department* is instructive here. [2004] U.K.H.L. 56 (appeal taken from Eng.). At issue was Chapter 23, Section 1 of the Anti-terrorism, Crime and Security Act 2001, a post-September 11 statute, which permitted the indefinite detention of suspected international terrorists who could not be deported because they faced the risk of torture in their home countries. The majority of the House of Lords quashed the Human Rights Act 1998 (Designated Derogation) Order 2001, which alleged that the United Kingdom was entitled, because of the emergency which followed September 11, to derogate from Article 5(1)(f) of the European Convention on Human Rights, which permits deprivation of liberty only in certain exceptional cases, including deprivation of liberty of a person "against whom action is being taken with a view to deportation." *Id.* at para. 72. The Court also issued a declaration of incompatibility with Article 5 and with Article 14, which precludes discrimination on the grounds of national origin. *Id.* at para. 158. While the majority conceded that the question whether there was an emergency was for the executive and Parliament to decide, the judges were not prepared to hold that a measure that targeted aliens was a proportionate and non-discriminatory response to the emergency, especially given that the government conceded that there were suspected national terrorists at large in the United Kingdom. *Id.* at para. 72. The majority drew extensive support from international human rights law for its argument

This discourse has advanced the idea that officials should be attentive to policy and political considerations, but must also take into account the humanity of the individuals subject to the decision and the impact of the decision on them. In other words, the idea of the individual as a bearer of human rights reinforces the notion that any individual subject to official power must be treated in a way respectful of his or her status as a member of humanity. Thus, it should be no great surprise if the developing international human rights discourse is then used to fill out the content of humanitarianism.

Together, these cases evoke two important themes of the jurisprudence on international human rights norms. First, a public commitment to membership in the international human rights community must, on pain of conviction of hypocrisy, be given domestic legal force.<sup>23</sup> Second, when international human rights are in issue, they must be given special weight when it comes to balancing their demands against the demands of other considerations such as public policy. Human rights cannot be thought about only to be dismissed. There is a kind of logic to taking human rights seriously, which requires them to be given special weight in the deliberations of public officials.<sup>24</sup>

In contrast, the stance of judges who dissent in these sorts of cases is often driven by the old idea that control of immigration is a matter of executive prerogative and thus immune to the rule of law.<sup>25</sup> The prerogative is preserved in

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that it was impermissible to draw a distinction between nationals and aliens when at issue was the liberty interest involved in indefinite detention derogation orders. *Id.* at paras. 44-72.

23. Nevertheless, the Court in *Baker*, [1999] 2 S.C.R. 817, avoided relying explicitly on this theme.

24. Since *Suresh v. Canada*, [2002] 1 S.C.R. 3, the Supreme Court of Canada is now rather preoccupied with the idea that whatever judges do, they should not “reweigh” the factors officials have to take into account in order to demonstrate that their decisions are reasonable. Weight is, however, just a metaphor for a proper inquiry into the balance of reasons. It became part of the Canadian discussion because the majority in *Baker* was clearly influenced by Canada’s having ratified, though not incorporating by legislation, the CRC. *Id.* at 860-61. Since *Baker*, the Supreme Court has retreated from its position expressed therein, and has adopted the view, more like that of the Federal Court of Appeal in *Baker*, that judges must never evaluate the way that legally relevant factors figure in the official’s reasoning. *Baker v. Canada*, [1997] 142 D.L.R. 554, 563 (Fed C.A.). They can verify that the right reasons were taken into account but may not balance, or reweigh, the reasons. It is hardly an accident that this apparent retreat from *Baker* took place in *Suresh*, the first major decision in the national security area given by the Supreme Court after September 11, 2001. For comment, see David Mullan, *Deference from Baker to Suresh and Beyond—Interpreting the Conflicting Signals*, in *THE UNITY OF PUBLIC LAW* 21 (David Dyzenhaus ed., 2004).

25. Thus, in New Zealand, in a subsequent Court of Appeal decision, Justice Keith suggested, against the claim in *Tavita v. Minister of Immigration*, [1994] 2 N.Z.L.R. 257 (C.A.), that the children’s interests should be the “starting point” of the analysis, that special weight should not be given to the children’s interests in these sorts of cases since the starting point in an official’s reasoning “must be the position of the person who is unlawfully in the country or who is being deprived of residency rights.” *Puli’uvea v. Removal Review Auth.*, [1996] N.Z.L.R. 538, 540 (C.A.). The analysis in *Rajan v. Minister of Immigration*, [1996] 3 N.Z.L.R. 543 (C.A.), is similarly unenthusiastic about the approach suggested in *Tavita*. In *Minister of State for Immigration and Ethnic Affairs v. Teoh*, (1995) 183 C.L.R. 273, Justice McHugh forcefully dissented on separation of powers grounds, while in *Baker*, two judges entered a partial dissent, also on separation of powers grounds, to permitting the Convention any role in the determination of weight. The Federal Court of Appeal’s decision in *Baker* adopted Justice McHugh’s dissent in *Teoh*. When the Supreme Court decided *Baker*, both the majority and the partial dissent avoided any mention of *Teoh*, perhaps because dealing with *Teoh* would have required the judges to confront very directly the distinction between process and substance. For similar reasons, the majority

that, even when the immigration statute prescribes that officials must take humanitarian considerations into account, the judge deems the manner in which that is achieved to be within the discretion of the official.

However, even when no statute is involved and the exercise of executive authority is based entirely on the prerogative, common-law courts are evidently willing, on occasion, to extend the reach of the rule of law, as is illustrated by *Abbasi v. Secretary of State for the Home Department*.<sup>26</sup> In *Abbasi*, the English Court of Appeal had to deal with the detention of the plaintiff in what it described as a “legal black hole.”<sup>27</sup> *Abbasi* was one of a number of British citizens captured by American forces in Afghanistan and transferred to Guantanamo Bay, an area controlled by the United States and thus beyond the jurisdiction of English courts. Challenges in the U.S. courts had at that stage led nowhere; these courts had held that the “legality” of the detention of foreign nationals rests “solely on the dictate of the United States Government, and, unlike that of United States’ citizens, is said to be immune from review in any court or independent forum.”<sup>28</sup>

*Abbasi*’s lawyers sought a finding from the English Court of Appeal that the Foreign Secretary owed him a duty to respond positively to his request for diplomatic assistance. Two obstacles seemed to stand in *Abbasi*’s way. First, the principle of comity requires that an English court will not examine the legitimacy of action taken by a foreign sovereign state. Second, an English court will not adjudicate upon actions taken by the executive in the exercise of its prerogative to conduct foreign relations.

In response to the first obstacle, the Court of Appeal relied on previous authority in accepting *Abbasi*’s contention that “where fundamental human rights are in play, the courts of this country will not abstain from reviewing the legitimacy of the actions of a foreign sovereign state.”<sup>29</sup> The Court then went on to accept the argument that *Abbasi*’s detention contravened “fundamental principles recognised by both jurisdictions and by international law.”<sup>30</sup> It referred to

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avoided using the exact language of the CRC to describe the process whereby an official had to take into account the children’s interests.

26. [2002] E.W.C.A. Civ. 1598.

27. *Id.* at para. 64.

28. *Id.* at para. 66.

29. *Id.* at para. 53. One of the authorities relied upon was the famous decision of the House of Lords in *Oppenheimer v. Cattermole*, [1976] A.C. 249 (appeal taken from Eng.), a decision in which the Court had to decide whether a decree passed in Germany in 1941, which deprived Jews who had emigrated from Germany of their citizenship, should be recognized by the English court. *Abbasi*, at para. 52. Lord Phillips quoted at length the passage from Lord Cross’s judgment, which ends with this line: “To my mind a law of this sort constitutes so grave an infringement of human rights that the courts of this country ought to refuse to recognise it as a law at all.” *Id.* at para. 52 (quoting *Oppenheimer*, at 278).

30. *Id.* at para. 64.

common law, to U.S. constitutional law,<sup>31</sup> and to the *International Covenant of Civil and Political Rights* (ICCPR).<sup>32</sup>

In responding to the argument about the non-justiciability of the foreign affairs prerogative, the Court rejected arguments that either the *European Convention on Human Rights* or the *Human Rights Act* (1998) provided that the Foreign Secretary owed Abbasi a duty to exercise diplomacy on his behalf.<sup>33</sup> The Court did not conclude, however, that decisions by the executive are non-justiciable when they pertain to its dealings with foreign states regarding the protection of British nationals abroad.<sup>34</sup> Rather, the Court drew on *Council of Civil Service Unions v. Minister for the Civil Service*<sup>35</sup> for two propositions. First, the doctrine of legitimate expectation “provides a well-established and flexible means for giving legal effect to a settled policy or practice for the exercise of an administrative discretion.”<sup>36</sup> The expectation, which may arise from an express promise or the existence of a regular practice, is not necessarily that the promise will be fulfilled or that the practice will continue, but that the subject is entitled to have the promise or practice properly considered before any change is made.<sup>37</sup> Second, the mere fact that a power derives from the royal prerogative does not “necessarily exclude it from the scope of judicial review.” Rather, the issue of justiciability “depends, not on general principle, but on subject matter and suitability in the particular case.”<sup>38</sup> Here the Court, following *Teoh*, referred to a prior decision that accepted that ratification by the United Kingdom of an international convention could, in principle, create a legitimate expectation.<sup>39</sup>

The Court then noted that the Foreign and Commonwealth Office had a policy of assisting British citizens abroad when there is evidence of a miscarriage or denial of justice.<sup>40</sup> Since Abbasi’s case involved the denial of a fundamental right, it followed he had a legitimate expectation that the government

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31. Specifically, the Court referred to Lord Atkin’s dissent in *Liversidge v. Anderson*, [1942] A.C. 206 (appeal taken from Eng.), *id.* at para. 60, and to a dictum of Justice Brennan for the U.S. Supreme Court in 1963, in which Brennan adopted the claim of an English judge that *habeas corpus* was “a writ antecedent to statute, and throwing its root deep into the genius of our common law.” *Id.* at para. 61, *citing* *Fay v. Noia*, 372 U.S. 391, 400 (1963), adopting Lord Birkenhead, in *Sec’y of State v. O’ Brien*, [1923] A.C. 603, 609 (appeal taken from Ir.).

32. *Abbasi*, at para. 63. In Article 4, the ICCPR provides the right of a detainee to have access to a court to decide on the lawfulness of his detention and, in Article 2, requires that the parties, which include the United States and the United Kingdom, ensure that the rights protected by the Covenant are accorded to all individuals “without distinction of any kind, such as . . . national origin.” *Id.* at para. 63.

33. *Id.* at paras. 70-79.

34. *Id.* at para. 80.

35. [1985] A.C. 374 (1984).

36. *Abbasi*, at para. 82.

37. *Id.*

38. *Id.* at paras. 83-85.

39. *Id.* at para. 86, *citing* *R v. Home Sec’y of State for the Home Dept. (Ex p. Ahmed and Patel)*, [1998] I.N.L.R. 570, at 584.

40. *Id.* at paras. 88-92.

would “consider” making representations.<sup>41</sup> However, the Court stressed the limited nature of the expectation, in that the individual’s request will be properly considered, that is, weighed against all the other non-justiciable and highly sensitive political factors.<sup>42</sup> The “extreme case,” one in which judges should make a mandatory order that the Foreign Office give due consideration to the Applicant’s case, would lie if the Office were, “contrary to its stated practice, to refuse even to consider whether to make diplomatic representations on behalf of a subject whose fundamental rights were being violated.”<sup>43</sup> Finally, the Court expressed its confidence that U.S. Appellate Courts would prove to have the “same respect for human rights as our own,” and noted that the Inter-American Commission on Human Rights had “taken up the case of the detainees,” though it was “yet unclear what the result of the Commission’s intervention will be.”<sup>44</sup>

The Court thus informed the executive it would be concerned if the executive departed from its practice and also sent a disapproving message to the U.S. government and its courts. This message has been strongly reinforced by a member of the House of Lords, Lord Steyn, who in two speeches has suggested to both the U.S. Supreme Court and his own that they put their rule-of-law house in order.<sup>45</sup> There is, however, more to the judgment than that.

The Court left open the possibility of more intrusive review in other circumstances.<sup>46</sup> For example, if there were no outstanding court actions in regard to Abbasi, it might be thought appropriate for Abbasi to have a legitimate expectation that went beyond a mere “consideration” of his case. However, the significance of the decision lies in its “clear signal that where fundamental human rights are at stake, the courts will be reluctant to allow the government to hide too far behind the prerogative power”<sup>47</sup> or to allow foreign governments to hide behind the doctrine of comity. It is this issue that explains the Court’s reference to the role of international human rights conventions in legitimately influencing a court’s understanding of the legitimate expectations of individuals. This reference is the only loose end in an otherwise very tight set of reasons, unless one takes it as a general placeholder for the Court’s acceptance of Abbasi’s argument that the “increased regard paid to human rights in both international and domestic law”<sup>48</sup> meant international law could no longer be regarded as a matter of relations between states, but as giving “rise to individual rights.”<sup>49</sup> Although these rights might not manifest themselves as enforceable

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41. *Abbasi*, at para. 99. A British citizen had a legitimate expectation that if he is “subjected abroad to a violation of a fundamental right, the British government will not simply wash their hands of the matter and abandon him to his fate.” *Id.* at para. 98.

42. *Id.* at para. 99.

43. *Id.* at para. 104.

44. *Id.* at para. 107.

45. See Johan Steyn, *Guantanamo Bay: The Legal Black Hole*, 53 INT’L & COMP. L. Q. 1 (2004).

46. Charlotte Kilroy, R. (on the Application of Abbasi) v. Secretary of State for Foreign and Commonwealth Affairs; *Reviewing the Prerogative*, 2 EUR. HUM. RTS. L. R. 222, 229 (2003).

47. *Id.*

48. *Abbasi*, at para. 25.

49. *Id.* at para. 39.

duties in the domestic legal order, they still can play a role in controlling public authorities. Moreover, the role they play is not incorporating international legal norms through back door or front door, but rather, as the judges see it, through enriching the judges' sense of the content of the common-law constitution.

A fruitful way of capturing the difference between these cases and those that formally account for the separation of powers is to see the former as a judicial updating of the common law's stock of values to include human rights—rights whose articulation and importance is not exclusively or even mainly in domestic legal instruments. In this newer, broader view, judges no longer consider their role to be as guardians of values that sustain the relationship between citizen and state, but to be also, even primarily, guardians of the values that sustain the relationship between individual and state, in which the individual is understood as the bearer of human rights. The change is the product of the human rights era, itself the product of the wave of treaties and conventions that responded to the abuses of the Second World War, as well as to the decolonization process that followed that war.

While this change should not be underestimated—it is a consequential reconceptualization of the judicial role—nor in one important sense should it be overestimated. The common law of judicial review always depended for its legitimacy on the notion of an unwritten constitution of legality. Judgments are but the evidence of this constitution, as are other legal texts, and its content evolves as we come better to understand what legality requires. Thus, the change is not in the methodology of the common law's self-understanding, but only in the content of that understanding. Moreover, the change in content brings to the fore an aspect of common-law constitutionalism, an aspect that highlights the productive tension between the claim that the values of the common law have existed from time immemorial and the claim that our understanding of those values evolves.

If one takes the dualism of the partial dissent in *Baker*<sup>50</sup> seriously, one must also take seriously the political objection that supports dualism—that Parliament has a monopoly on creating legal value within the domestic legal order. However, this objection applies with equal force to the majority's recognition that the reviewing court has a common-law duty to give reasons. It applies as well to extending reasonableness review to discretionary decisions, which in the past would have been considered reviewable at most on a much less strict standard, such as patent or manifest unreasonableness.<sup>51</sup> The objection applies with equal force unless one adopts the rather strained device of attempting to legitimate what judges do by reference to the tacit or implied consent of the legislature—the *ultra vires* doctrine. This device, however, cannot be stretched to in-

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50. *Baker v. Canada*, [1999] 2 S.C.R. 817, at 865-66.

51. This is the Canadian standard, which is equivalent in the United Kingdom to *Wednesbury* unreasonableness, see *Assoc. Provincial Picture Houses v. Wednesbury*, [1948] 1 K.B. 223 (1947), and in the U.S. to an "arbitrary and capricious" standard.

clude unincorporated, though ratified, human rights conventions because legislative failure to incorporate cannot be interpreted as tacit consent.

That the device cannot be stretched this far might be thought, as did the dissenters in *Teoh* and *Baker*, to indicate simply that judges have reached the limits of their review authority. The better understanding is, however, that one contribution of the judicial domestication of international human rights law is that it underlines the poverty of the *ultra vires* doctrine as a justification for judicial review. This judicial domestication shows that the true justification was never a view of legislative consent derived from the separation of powers. Rather, it was the constitution of legality, a constitution to whose values the legislature is just as accountable as the executive. Put differently, overcoming dualism about international norms may help us to finally move away from the kind of internal dualism sustained by legal positivist accounts of the judicial role in upholding the rule of law.

## 2. International Administrative Decisions

This section develops an international law case study of the listing mechanism developed by the Security Council of the United Nations in the wake of September 11.<sup>52</sup> It concerns one specific act of legislation or lawmaking by the Security Council that has potentially profound consequences for the human rights of individuals.<sup>53</sup> Under Article 39 of Chapter VII of the *United Nations Charter*, the Security Council may make a determination that there exists a “threat to the peace, breach of the peace, or act of aggression,” and it may then either make “recommendations, or decide what measures shall be taken . . . to maintain or restore international peace and security.” Here, it relies on the authority provided by Articles 40, 41, and 42. Article 41 of the *United Nations Charter* authorizes the Security Council to decide “what measures not involving the use of armed force are to be employed to give effect to its decisions” and to “call upon the Members of the United Nations to apply such measures.”

Prior to 2001, the practice of the Security Council had generally been to exercise these powers regarding specific conflicts and situations, for example, by imposing sanctions on a state in order to bring it into compliance with interna-

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52. The argument relies very heavily on an excellent paper by E. Alexandra Dosman, *For the Record: Designating “Listed Entities” for the Purposes of Terrorist Financing Offenses at Canadian Law*, 62 U. TORONTO FAC. OF L. R. 1 (Winter 2004), as well as on the factum (brief) prepared by the lawyers for Liban Hussein: Michael D. Edelson and David M. Paciocco, Edelson and Associates, Ottawa, Ontario (on file with the author). The author thanks David Paciocco for answering some queries about the episode.

53. One might object to this study on two grounds. First, it is about only one case, so little can be learned from it. However, this kind of lawmaking by international bodies is quite widespread (for example, edicts by the World Health Organization about whether a city or country is SARS-affected) and is one of the factors that prompted inquiry into the prospects for a global administrative law. Second, one might object that international law purports to relate primarily to the interests of states and states’ interests were adequately protected in the case discussed here. My argument presupposes the position that international law, especially given the development of international human rights law, can no longer be seen as being exclusively about states’ interests. It is also about the protection of individuals’ human rights from arbitrary power, whatever the source of that power.

tional law. The Council would enjoin all states to comply with its decision, but the particular and temporary nature of the decisions did not appear legislative and thus did not offend the thought that intergovernmental organizations cannot legislate international law.<sup>54</sup> To the extent that the Council departed from this particularism and addressed conflicts in general, it would refrain from addressing states in compulsory terms and “call upon” them or “urge” them to take measures.<sup>55</sup>

After September 11, prompted by the United States, the Council adopted Resolution 1373, which posited “all States shall” take certain actions against the financing of terrorist activities, among other actions.<sup>56</sup> The resolution also established a plenary committee of the Council, the “Counter-Terrorism Committee,” to monitor implementation of the resolution. Since this Resolution is limited neither by time nor to a particular conflict, but focuses rather on an undefined threat of “global terrorism,” in significant measure it can be “said to establish new binding rules of international law—rather than mere commands relating to a particular situation—and, moreover, even [to] create[] a mechanism for monitoring compliance with them.”<sup>57</sup>

In addition, the Afghanistan Committee<sup>58</sup> had its mandate expanded to include monitoring economic sanctions imposed by Resolution 1390 of 2002, which clarifies state obligations regarding listed entities.<sup>59</sup> The committee subsequently became known as the 1267 Committee and was responsible for compiling a list of individuals and entities pursuant to Paragraph 2 of Resolution 1390.<sup>60</sup> In practice, the 1267 Committee’s list is based more or less on information supplied by countries, most notably the United States.

The listing mechanism can have far-reaching domestic consequences.<sup>61</sup> Canada, by tradition a dualist country, requires the legislature to transform international treaty rules by legislation before the norms will be given domestic effect. Section 2 of Canada’s United Nations Act of 1945 authorizes the Governor in Council (or Cabinet), once the Security Council has called on Canada under

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54. Paul C. Szasz, *The Security Council Starts Legislating*, 96 AM. J. INT’L L. 901 (2002).

55. *Id.* at 902.

56. S.C. Res. 1373, U.N. SCOR, 56th Sess., 4385th mtg., at 2, U.N. Doc. S/RES/1373 (2001).

57. Szasz, *supra* note 54, at 902.

58. The Afghanistan Committee was created previously by Resolution 1267 of the Security Council in order to deal with Afghanistan, S.C. Res. 1267, U.N. SCOR, 54th Sess., 4051st mtg., U.N. Doc. S/RES/1267 (1999).

59. S.C. Res. 1390, U.N. SCOR, 57th Sess., 4452d mtg., U.N. Doc. S/RES/1390 (2002).

60. An individual or organization that has been listed cannot apply to be delisted. A listed person must petition his or her home country to request a review of the case, and the home country then acts as the person’s advocate if the review is favorable. The home country has to approach the government requesting the listing and attempt to persuade it to submit a joint or separate request to the Security Council for delisting. The home country can then submit the request even if the other government does not agree, but every member of the committee has an effective veto on any request. If the committee cannot achieve consensus, then the matter is remitted to the Security Council for final decision-making. See Dosman, *supra* note 52, at 13 (discussing the Guidelines established for the 1267 Committee.)

61. For an illuminating study of the listing mechanism, see Dosman, *supra* note 52.

Article 41 of the United Nations Charter, to apply one of its measures to “make such orders and Regulations as appear to him to be necessary or expedient for enabling the measure to be effectively applied.” These executive measures have to be laid before Parliament, which may resolve them within forty working days; otherwise the order or regulation ceases to have effect.

Four days after the Security Council adopted Resolution 1373, the Governor in Council issued the United Nations Suppression of Terrorism Regulations. These Regulations aim to cut off funding of terrorists by prohibiting financial dealings with a list of entities and by making it an offense to provide or collect funds for a listed person.<sup>62</sup> Further, they impose a duty on Canadian financial institutions, residents of Canada, and all other Canadians to disclose any property they have reason to believe is owned by or controlled by or on behalf of a listed person, as well as information related to transactions involving such property.

On November 7, 2001, the U.S. sought the extradition of Liban M. Hussein, a Canadian citizen and resident of Ottawa, for allegedly engaging in an illegal money transmittal business, an offense under U.S. law.<sup>63</sup> Although Canadian law requires that extradition be on the basis of an offense that has a parallel in Canadian law, no such offense existed. In any case, U.S. authorities clearly wanted Hussein for questioning in connection with the “war” on terror, as they had been alerted by a private company with which they had contracted to engage in counter-terrorism that Hussein was transmitting money to Arab countries. However, even though the U.S. Customs Service had engaged in an extensive investigation of Hussein’s activities, no terrorism or money-laundering charges had been brought against him. Indeed, later in the proceedings, the Royal Canadian Mounted Police said they had not received any information from the U.S. that linked Hussein with terrorism.

The extradition warrant cited an executive order issued by President Bush on the same day designating Hussein and two of his companies, Barakaat North America Inc. and Al Baraka Exchange LLC, among others, as “foreign persons” to whom it would be illegal to provide financial or other services.<sup>64</sup> Such

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62. Section 2(1) states that a “person whose name is listed in the schedule is a person who there are reasonable grounds to believe (a) has carried out, attempted to carry out, participated in or facilitated the carrying out of a terrorist activity,” (b) is controlled directly or indirectly by any person conducting any of the activities set out in paragraph (a); or (c) are acting on behalf of, or at the direction of, or in association with any person conducting any of the activities involved in paragraph (a).” The Regulations create two tracks of listed persons. The first is directly linked to the list controlled by the 1267 Committee, so that the names that appear on its list are directly incorporated into Canadian law. The second track is contained in a Schedule created by Canadian authorities. The maximum fine and maximum term of imprisonment are those set out by the United Nations Act. In addition, Canada’s Anti-Terrorism Act, another reaction to September 11, amended the punishment provisions of the United Nations Act to increase the fine on conviction from \$5000 to \$100,000 and the maximum term of imprisonment from five to ten years.

63. See Dosman, *supra* note 52.

64. 2001 WL1420777 (F.D.I.C.). This order added names to a list already issued by executive order on September 23, 2001, Exec. Order 13,224, 66 Fed. Reg. 49,079, primarily under the authority of International Emergency Economic Powers Act, 50 U.S.C. § 1701 (1977), but also claiming the authority of

an executive order does not require a statement of reasonable grounds for believing that listed persons are engaged in terrorist activity. Later that day, after Canada received the extradition warrant, Hussein and his companies, together with the other names listed on the presidential executive order, were listed in Canada through the schedule mechanism of the Canadian Terrorism Regulations. On November 9, Hussein was listed by the 1267 Committee of the Security Council, which meant that he was listed three times under Canadian law: under earlier Afghanistan Regulations, also made under authority of the United Nations Act; under the first track of “listed persons” in the Terrorism Regulations; and under the second track in the Terrorism Regulations because of the Schedule listing of November 7.

Canadian government officials stated that the parallel offenses for which Hussein should be extradited were those of acting contrary to the Terrorism Regulations, specifically, knowingly providing or collecting funds for use by a listed person and providing financial services to a listed person. Hussein’s offense was having financial dealings with himself, as a listed person, and with his businesses.<sup>65</sup> Extensive media coverage in both the U.S. and Canada linked Hussein with terrorism, with immediate negative consequences for his business activity in Canada.

Hussein’s lawyers contested the extradition as contrary to Canada’s *Charter of Rights and Freedoms*, relying on section 7, which deems a violation to take place when someone is deprived of his right to “life, liberty and security of the person” in a way that violates the “principles of fundamental justice.” Since the Terrorism Regulations provide for imprisonment, they clearly pass the threshold for deprivation of “life, liberty and security of the person.” Regarding the second part of the test, the lawyers argued the Terrorism Regulations create criminal offenses—moreover, criminal offenses that are “inherently wrong” rather than mere “regulatory offen[s]es.”<sup>66</sup> This, they argued, is precluded by section 7, for a principle “so ingrained” in the Canadian legal system—part of the “principle of legality” or the rule of law—is that all true crimes (offenses that prohibit intrinsically wrong conduct) are to be created only by legislation. Their argument here was a democratic one: because of the stigmatization and serious consequences of true crimes, deeming conduct to be criminal had to be done in the “open air of Parliament rather than through administration.”<sup>67</sup> Although Canada’s Anti-Terrorism Act creates similar offenses, they noted, it had been enacted as a statute only after full legislative debate.<sup>68</sup>

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various other statutes and United Nations Resolutions. In *Why the President (Almost) Always Wins in Foreign Affairs: Lessons of the Iran-Contra Affair*, 97 YALE L.J. 1255, Harold Hongju Koh notes the Act was enacted in 1977 to curb executive abuses of national emergency powers but has become a vehicle for the kind of exercise it was supposed to limit. *Id.* at 1264-65.

65. Dosman, *supra* note 52, at 16.

66. Factum, *supra* note 52, at paras. 45-57.

67. *Id.* at paras. 58-71.

68. *Id.* The factum argues that laying regulations before Parliament is not a sufficient democratic safeguard.

Hussein's lawyers next argued that the Terrorism Regulations contravene the presumption of innocence, protected by section 11(d) of the *Charter*, since they deem listed persons to be those for whom there are reasonable grounds to believe have carried out, attempted, facilitated, or otherwise been complicit in terrorist activity. This amounts to legislatively presuming facts that would otherwise have to be proved, removing the onus on the Crown to prove beyond a reasonable doubt that listed persons are in fact engaged in these activities.<sup>69</sup>

Finally, the lawyers argued that the combination of Canada's legislative, after-the-fact determination of Hussein's criminality and the U.S.'s attempt to extradite him for a licensing offense, when in fact what it wanted was to question him about terrorism, amounted to an abuse of the Canadian judicial process that could not be countenanced at common law—an offense that had been subsumed into the section 7 prohibition of deprivations that violated “principles of fundamental justice.”<sup>70</sup>

The Canadian government decided to avoid the challenge in court and instead amended the Terrorism Regulations to exempt Hussein. Canadian officials had been in contact with U.S. officials and had concluded that Hussein should not be on the list because he was not connected to any terrorist activities. This exemption meant that Canada was no longer in compliance with its obligations to the Security Council, and it also left Hussein subject to sanctions by other nations. However, Canada succeeded in getting him taken off the Security Council list, thereby coming once more into compliance.

The listing by the 1267 Committee did not play a direct role in creating the basis for an extradition order against Hussein, for his initial listing happened under the second track of the Terrorism Regulations, and on November 7 the Canadian government simply took over Bush's executive order. However, it is far from insignificant that the full title of these regulations includes “United Nations,” that the regulations were made relying on the United Nations Act, and that the 1267 Committee in fact adopted the same list two days later, leaving Canada in non-compliance with its obligations to the Security Council once Hussein's name was removed from the Canadian list. What drove the whole process was the legitimacy and legal status that the Security Council and the United Nations as a whole enjoys in Canada. Indeed, in the fairly heated debate about whether it was appropriate for Canada to react to September 11<sup>th</sup>

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69. *Id.* at paras. 72-78. The Regulations thus in this respect also violated section 7. The lawyers also argued that the Regulations violated section 2(d) of the *Charter*, which protects freedom of association, since they prevent association with listed persons in the absence of reasonable grounds to believe they are involved in terrorism, or penalizes “unwitting or innocent association with persons who are involved in terrorist activities.” *Id.* at paras. 79-96. They submitted that Canada's *Extradition Act* was constitutionally invalid to the extent that it permitted the retroactive application of legislation. That is, the Act permitted Hussein to be extradited for actions that were criminal at the time extradition was sought rather than at the time he did those things. Retroactivity, especially criminal retroactivity, is against the rule of law, and the *Charter of Rights and Freedoms* is intended to secure the rule of law. “The primary mischief is avoidance of arbitrary and targeted use of legislation by the government of Canada to prejudice persons after they have already acted.” *Id.* at paras. 98-114.

70. *Id.* at paras. 115-26.

with a terrorism statute—one that would become part of the ordinary law of the land—the argument that Canada was merely fulfilling its obligations to the international community loomed large on the side of those who thought such legislation necessary.<sup>71</sup>

There is, then, a deep question about the legitimacy of the process the Security Council put in place for listing terrorist individuals and entities—a question also about the legality of that process.<sup>72</sup> The factum, or brief, put together by Hussein's lawyers is fundamentally an argument about legality or the rule of law, although it is an argument made easier for them by the existence of an entrenched bill of rights.<sup>73</sup>

That argument is clearest in its final limb about abuse of process, a section of the factum that unites the proceeding parts. A crucial sentence from this part of the factum is the following:

It was after Canadian officials received requests relating to [Hussein's] arrest and extradition that the Government of Canada attempted to make arrest and extradition possible, not by creating an offence of general application, but by creating specific legal prerequisites peculiar to the person whose extradition was being sought. This is not the case of an extradition respondent being caught by the misfortune of the creation of an offence of general application that . . . satisfies the double criminality requirement. It is the case of specific and targeted legislative action being taken to satisfy the double criminality requirement.<sup>74</sup>

The basic charge here is that the listing mechanism is a “bill of attainder”—an administrative or legislative deeming of guilt.<sup>75</sup>

One way of understanding the offense is in terms of the separation of powers: it is the judiciary's role to determine both guilt and appropriate punishment in an open trial. If this understanding is correct, it might seem that the idea of a bill of attainder has no purchase in the international context, precisely

71. See, e.g., Patrick Macklem, *Canada's Obligations at International Criminal Law*, in *THE SECURITY OF FREEDOM: ESSAYS ON CANADA'S ANTI-TERRORISM BILL 353* (Ronald J. Daniels et al. eds., 2001). *But see* Jutta Brunnée, *Terrorism and Legal Change: An International Law Lesson*, *id.* at 341.

72. For an analysis sympathetic to this kind of argument, see Andrea Bianchi, *Ad-hocism and the Rule of Law*, 13 *EUR. J. INT'L L.* 263, 269-72 (2002).

73. At para. 58 of the Edelson and Paciocco Factum, *supra* note 52, the lawyers observe that the *Charter of Rights and Freedoms* permits them to avoid relying on a constitutional convention argument about the impropriety of the legislature conferring legislative powers on the executive, an argument rejected by the Canadian Supreme Court in *In re Grey*, [1918] 57 S.C.R. 150 (Can.). See Peter W. Hogg, *CONSTITUTIONAL LAW OF CANADA* § 14.1(d) – (14.2(a)) (4th ed. 1997 & Supp. 2004). That the lawyers did not choose to rely on an argument akin to the one outlined below does not undermine it, for reasons explored in the text.

74. Factum, *supra* note 52, at para. 125.

75. As the author of a 1962 Note in the *Yale Law Journal* explains, the term “act” or “bill of attainder” comes from the practice in sixteenth, seventeenth, and eighteenth century England of using statutes to sentence “to death, without a conviction in the ordinary course of judicial trial, named or described persons or groups.” Note, *The Bounds of Legislative Specification: A Suggested Approach to the Bill of Attainder Clause*, 72 *YALE L.J.* 330 (1962). In addition, the term came to be used for “bills of pains and penalties,” statutes that imposed sanctions less than capital. *Id.* at 331. Both sorts of statutes were aimed at revolutionaries and were considered offensive to the rule of law because they attempted to bypass the courts by establishing a system of either legislative or administrative conviction and punishment.

because of what one might think of as the international order's institutional immaturity, the lack of analogies to the institutions that in domestic legal orders together make up the separation of powers.<sup>76</sup>

However, Resolution 1267 has been described as legislative in nature.<sup>77</sup> Two questions arise from this description. One might ask on what authority the Security Council legislated and, in particular, used legislation to delegate authority to the 1267 Committee to make its lists. Second, one has to ask about the legal nature of the 1267 Committee. As a body that has been delegated authority by the Security Council, its authority looks administrative. But the Committee is also charged with determining who should figure on a list that, as long as states take their obligations to the Security Council seriously, will result in severe consequences to the individuals so named. Its function thus looks in part judicial, since it is making determinations equivalent to a finding of guilt, or a function that, at the least, will play a significant role in such determinations when states comply with their obligations. In substance, however, its process is not in any way judicial; rather, it seems one whereby names are merely transferred to the list from a list compiled by one country's security service.

In one view, the answer to the first question has to be found in the Charter of the U.N., in which authority to delegate, if any, will be either stated expressly or implied.<sup>78</sup> However, if the delegated authority was flawed from the perspec-

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76. See, e.g., DAVID SCHWEIGMAN, *THE AUTHORITY OF THE SECURITY COUNCIL UNDER CHAPTER VII OF THE UN CHARTER: LEGAL LIMITS AND THE ROLE OF THE INTERNATIONAL COURT OF JUSTICE* 276-77 (2001). Schweigman discusses the question of when Council decisions are *ultra vires*. The options he contemplates for who should declare decisions to be *ultra vires* are states and the International Court of Justice. He warns against domestic analogies, saying that "For one thing, the trias politica . . . is (as yet) not applicable in the international sphere. In other words, there is no distinction between the executive, the legislative and the judicial powers known to national systems." *Id.* at 276-77. But see IAN BROWNLIE, *THE RULE OF LAW IN INTERNATIONAL AFFAIRS: INTERNATIONAL LAW AT THE FIFTIETH ANNIVERSARY OF THE UNITED NATIONS* ch. 15 (1998). Brownlie, relying in part on Hersch Lauterpacht, argues that the domestic analogies are apt even if no adequate institutional means exist to remedy violations of the rule of law. Brownlie outlines several criteria of legality or non-arbitrariness which would bind the Security Council; see especially his discussion of the *ultra vires* doctrine in relation to the Security Council's exercise of its Chapter VII powers. *Id.* at 217-25.

77. Szasz, *supra* note 54; see also text accompanying note 54, *supra*.

78. In a review of a book by Danesh Sarooshi about the Security Council's delegation of its Chapter VII powers, Bardo Fassbender reproduces Sarooshi's quotation of Hans Kelsen's remark that, "No organ can legally delegate power to another organ without being authorised by the constitution to do so." DANESH SAROOSHI, *THE UNITED NATIONS AND THE DEVELOPMENT OF COLLECTIVE SECURITY: THE DELEGATION BY THE UN SECURITY COUNCIL OF ITS CHAPTER VII POWERS* 20, n.81 (1999), reviewed by Bardo Fassbender, *Quis iudicabit? The Security Council: Its Powers and Its Legal Control*, 11 EUR. J. INT'L L. 219, 228-32 (2000), quoting at 231, HANS KELSEN, *THE LAW OF THE UNITED NATIONS: A CRITICAL ANALYSIS OF ITS FUNDAMENTAL PROBLEMS* 142 (1950). Fassbender says this remark provides the right point of departure for the idea of delegation in this context: "[A] recognition first of the Charter as the constitution of the international community, second of the Security Council as an organ of that community established by the constitution, and third of the proposition . . . that in the absence of an express or implicit authorisation by the constitution an organ is not entitled to delegate its power to another organ or entity. . . . The next task would then have been to interpret the U.N. Charter in order to determine the existence, possible scope, and limitations of such an authorisation, taking into account the Charter's singularity as well as its affinity to other constitutional documents." Fassbender, at 231-32 (footnote omitted).

tive of the rule of law, then, whether the Security Council has a general authority to legislate or not, the legislation itself would be flawed in the same way.<sup>79</sup>

Legality and legitimacy are deeply implicated in the common law of judicial review since public exercises of power are lawful on condition that they do not violate these values and principles. Moreover, what is meant by public exercise of power is not confined to executive action under the authority of statute. Even in a legal order that lacks a written constitution of any sort, the legislature is answerable to the same set of values and principles. If a domestic court has good rule-of-law reasons to resist an extradition order based on the listing mechanism of the 1267 Committee, then its refusal to accord authority to that mechanism indicates a failure of legality the Security Council must remedy before its legislation will merit respect. In addition, assuming that listing a person in this manner is an illegal act, in principle, one who has been listed and who has suffered as a result would be able to claim damages from the institutions that had participated in this process. Of course, if the U.N. were to be sued, it would rely on the doctrine of immunity.<sup>80</sup> However, the doctrine of immunity,

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79. The idea of constitutionalism that is relied on here is quite different from the one that seems to be at stake in current debates among international lawyers about to draw on the title of a paper by Laurence R. Helfer, *Constitutional Analogies in the International Legal System*, 37 LOY. L.A. L. REV. 193 (2004). Those engaged in the search for such analogies are generally looking for a constitution in the sense of a founding document, preferably one that includes a bill of rights, whereas the unwritten constitution consists in the values and principles that together make up the idea of the rule of law or legality. I do, however, want to adapt Helfer's suggestion that one of the ways in which international norms become constitutional is through judicial interpretation. He argues that the European Court of Justice, in taking references from national courts for a preliminary ruling on European Community law and then proclaiming doctrines which had direct analogies in domestic constitutional jurisprudence, bolstered the authority of the European Community's legislative and executive arms and at the same time elevated itself into the position of a kind of constitutional court. *Id.* at 200. Similarly, he argues that the tribunal structure of the World Trade Organization, especially its Appellate Body, has also endowed the various treaties governing that organization with constitutional status, although not with the same status as the Treaty of Rome. *Id.* at 201-02. The rulings of the Appellate Body are not enforceable as a matter of private right before domestic courts. The global scope of the WTO has made it more difficult for it to reach a kind of constitutional consensus on meta-norms, and jurists have found it more appropriate to present their ruling as enforcing bargains between states rather than as filling in the gaps in an emerging constitution. *Id.* at 203. This adaptation is largely a negative one in the sense that a different kind of constitutionalism emerges when domestic courts refuse to enforce decisions made by international bodies for rule of law reasons.

80. Relevant here is the case of Maher Arar, a Canadian citizen who was detained in the U.S. in September 2002 while in transit to Canada. According to Arar, he was very aggressively interrogated by U.S. officials seeking to determine alleged links to terrorist groups. He was threatened with deportation to Syria, his country of origin, which he protested against because of his fear that he would be tortured there. He was sent first to Jordan, where he was beaten by Jordanian officials, and then to Syria, where he was detained and tortured. Over a year later, having made a full "confession," he was released and allowed to return to Canada. Arar is now seeking redress against Syria and Jordan by suing these governments in Canada. His lawyer has been granted leave to intervene as an added party in the appeal against the decision of the Ontario Superior Court of Justice in *Bouzari v. Iran*, 2002 Carswell Ont. 1469. In *Bouzari*, the court, in a rather unimaginative judgment, held that Canada's State Immunity Act, R.S.C., ch. S-18 (1985), which provides foreign states with immunity from the jurisdiction of Canadian courts, bars Bouzari's claim against Iran for the torture he suffered at the hands of Iranian officials. Bouzari's lawyers argued, *inter alia*, that developments in international law, in particular, the absolute prohibition against torture and the emerging sense in international law that there should be a right of redress for such acts in domestic law, required the court to find an exception to the immunity granted by the statute. The lawyers admitted that the position they were advocating was

whether of states or international organizations, is overdue for revision when the legal wrong for which redress is sought is a violation of human rights.<sup>81</sup>

As was argued on behalf of Abbasi, an international standard of a human right of access to a court is emerging, a right recognized in the constitutional law of many legal orders.<sup>82</sup> Indeed, the U.S. Supreme Court has now gone some way towards recognizing such a right, both in asserting in *Rasul v. Bush*<sup>83</sup> the jurisdiction of federal courts over the detainees at Guantanamo Bay, and in holding in *Hamdi v. Rumsfeld*<sup>84</sup> that those designated as “enemy combatants” by the Bush administration have a constitutional entitlement to some minimum of due process in order to permit them to contest that designation. Both decisions can be seen as continuing a tradition of common-law judicial protection of liberty, informed to some extent by an awareness of norms of international law.<sup>85</sup>

Even if the Canadian government were to react to a judicial decision that accepted Hussein’s legal arguments by legislating the listing mechanism into the criminal law, its doing so would not affect the merits of the rule of law arguments. Indeed, Canada’s *Anti-Terrorism* statute took over in large part the *Terrorism Regulations* made under the United Nations Act. The statute provides that the Cabinet may list a group as a terrorist group if it is “satisfied” there are “reasonable grounds to believe” the person has been involved in terrorist activ-

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based on an argument about where international law was progressing and should be progressing. However, they also argued both that torture is an act that cannot be characterized as a legitimate exercise of state authority and that the *Charter of Rights and Freedoms*, in particular section 7, makes it inconsistent for Canada to grant immunity to a state for acts that are not in accordance with the principles of fundamental justice. I am grateful to Lorne Waldman, Arar’s lawyer, for providing me with the materials on which this note is based. Arar has also filed suit in the Eastern District of New York, asserting that Attorney General John Ashcroft and others violated his “constitutional, civil and international human rights,” including those rights protected under the *Torture Victims Protection Act*. *Arar v. Ashcroft*, Complaint and Demand for Jury Trial, filed Jan. 22, 2004 (E.D.N.Y.), citing *Torture Victim Protection Act*, 28 U.S.C. § 1350 (1991).

81. See AUGUST REINISCH, *INTERNATIONAL ORGANIZATIONS BEFORE NATIONAL COURTS* 281 (2000). Reinisch claims there is an “apparent contradiction between the international-law-based human right of access to court and the restriction of such access by the concept of immunity.” *Id.* at 282. He notes it is surprising that this contradiction is rarely discussed, though he cites as an exception Lauterpacht’s 1951 article, *The Problem of Jurisdictional Immunity of Foreign States*, B.Y. 28 (1951), reprinted in 3 *INTERNATIONAL LAW: BEING THE COLLECTED PAPERS OF HERSCH LAUTERPACHT* 315 (Elihu Lauterpacht ed., Cambridge University Press 1977) [hereinafter *INT’L LAW*], *id.* at n.147, in which Lauterpacht argued that with the “recognition of human freedoms as part of positive international law . . . it may be opportune to re-examine the problem of jurisdictional immunities of foreign States.” *Id.* at 317. It is worth noting here the analogy between this kind of claim and that accepted by the English courts in the Pinochet matter, that the immunity traditionally granted heads and former heads of state should not in principle be a bar to a legal claim when the violation of human rights is in issue. As Ruth Wedgwood has pointed out, the idea of immunity that gets in the way here is analogous to the idea of prerogative power. Ruth Wedgwood, *International Criminal Law and Augusto Pinochet*, 40 VA. J. INT’L LAW 829, 839-40 (2000).

82. Reinisch, *supra* note 81, at 281.

83. 124 S. Ct. 2686 (2004).

84. 124 S. Ct. 2633 (2004).

85. However, the meager amount of due process indicated by the plurality in *Hamdi* as constitutionally appropriate, as well as the plurality regarding a Congressional resolution as sufficient warrant for detention, are deeply troubling holdings.

ity.<sup>86</sup> Judicial review is available after a group has been listed, but the group seeking review is not entitled to all the information before the judge. Further, the Solicitor General can withdraw the information, with the effect that the judge must pretend it does not exist when determining the reasonableness of the decision to list.<sup>87</sup> This procedure seems to amount to an usurpation of judicial independence, invoking again the idea of a bill of attainder.<sup>88</sup>

Nevertheless, a common-law court does not always have the authority to invalidate legislation because it amounts to a bill of attainder. Even if protection against such bills is constitutionally entrenched, as in Article I, Section 9, of the American Constitution, which states, “No Bill of Attainder or ex post facto law shall be passed,” it will often be controversial whether a particular statute amounts to such a bill.

It is important to note that the listing mechanisms initiated by the 1267 Committee replicate the U.S. Foreign Narcotics Kingpin Designation Act of 1999 (the *Kingpin Act*),<sup>89</sup> which aimed to generalize the practice of sanctioning Colombian Drug traffickers by Presidential Executive Order. This Act provides for the imposition of economic sanctions on a world-wide basis against major international narcotics traffickers, their organizations, and the foreign individuals and entities that provide support for them. It established a two-tiered system: the first, permitting the President to designate foreign persons deemed to be drug “kingpins” for sanctions; and the second, permitting the Secretary of the Treasury to designate “foreign persons” deemed to be facilitating the activities of the kingpins. The Act requires that property subject to U.S. jurisdiction of designated individuals be blocked, prohibits U.S. individuals from dealing with designated individuals, and subjects violations of the Act to a range of civil and criminal penalties. The Act explicitly precludes judicial review of the designations, though it does permit review of the civil penalties. On January 23, 2001, the Judicial Review Commission on Foreign Asset Control, which was established by the Act, submitted a final report on the Act to Congress.<sup>90</sup>

Although the Commission recommended that judicial review, along with an internal system of administrative review, be introduced into the system, the majority of the Commission rejected the claim that the *Kingpin Act* amounted to a bill of attainder. On its understanding of U.S. constitutional jurisprudence, the Commission concluded that a bill of attainder has to be a law that is both specific and imposes punishment.<sup>91</sup> It argued that because the executive, not the legislature, names individuals, the constitutional protection against such bills

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86. See *supra* text accompanying note 69.

87. See Dosman, *supra* note 52, at 21.

88. KENT ROACH, SEPTEMBER 11: CONSEQUENCES FOR CANADA 36-38 (2003).

89. Pub. L. No. 106-120, 113 Stat. 1626 (1999).

90. Judicial Review Commission on Foreign Asset Control, Final Report to Congress, G.P.O. Item No. 1089, submitted to the House Permanent Select Committee on Intelligence and Senate Select Committee on Intelligence on Jan. 23, 2001 (on file with Law & Contemp. Probs.), available at [http://www.law.stetson.edu/Judicial Review Commission](http://www.law.stetson.edu/Judicial%20Review%20Commission) (last visited June 25, 2005).

91. *Id.* at 95.

does not apply, since they constrain legislative, not executive, action.<sup>92</sup> In addition, the Commission concluded the Act was not punitive in the required sense, since blocked assets could be released; the Act was related to goals other than punishment; there was no basis for inferring Congress's subjective intent to punish; and any criminal penalties would be imposed by federal courts based on "rules of general applicability" laid down by the legislature.<sup>93</sup>

Commissioner David B. Smith delivered a minority report much more damning of the Act.<sup>94</sup> He discussed the U.S. Supreme Court decision in *Joint Anti-Fascist Refugee Committee v. McGrath*,<sup>95</sup> which concerned a list prepared by the Attorney General under the authority of an executive order of "communist" or "subversive" organizations. The list was forwarded to the "Loyalty Review Board" of the Civil Service Commission, which used it to weed communists and subversives out of government. Further, no opportunity to challenge one's listing was offered.<sup>96</sup>

Smith highlighted his agreement with Justice Black, who thought it absurd to suppose that the Constitution would deny the legislature the opportunity to do something odious while permitting the executive to do the very same thing. As Smith pointed out, even if Black were wrong on this point of doctrine, he was right on substance, since the real issue is the determination of guilt. Indeed, he was *a fortiori* right since the executive branch operates under fewer constraints than the legislative branch.<sup>97</sup> In Smith's view, the penalties imposed through the *Kingpin Act* made it even more susceptible to characterization as a bill of attainder than the process impugned in *McGrath*. He was unimpressed by the claim that assets were only blocked, not expropriated.<sup>98</sup>

Where the majority of the Commission went wrong was in viewing the issue through the optic of the formal separation of powers.<sup>99</sup> However, more important was that their recommendations make it plain that they fully appreciated the problems for the rule of law created by the Act and so saw the need for far-reaching reform. Hence, the point is not so much about whether a statute is correctly characterized as a bill of attainder, or whether, if it is so characterized, judges are entitled to invalidate it. For the label "bill of attainder" merely seeks to specify one particular kind of affront to the rule of law. The argument against bills of attainder is that the statute at issue offends the constitutional guarantee, written or unwritten, of an independent judiciary presiding in open

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92. *Id.* at 96-97.

93. *Id.* at 98-100.

94. *Id.*, Additional Views of Commissioner David B. Smith.

95. 314 U.S. 123 (1951).

96. See Smith, *supra* note 94, at 38.

97. *Id.* at 39, n.59.

98. *Id.* at 38-42.

99. For discussion of analogous problems, see the discussion of the issues arising out of the Australian Parliament's legislative ban of the Communist Party, invalidated in *Australian Communist Party v. Commonwealth* (1951) 83 C.L.R. 1. David Dyzenhaus, *Constituting the Enemy: A Response to Carl Schmitt*, in *MILITANT DEMOCRACY* 15 (Andras Sajó ed., 2004).

court over determinations of guilt and punishment.<sup>100</sup> A bill of attainder is just “the paradigmatic example of legislation whose violation of the principles of equality and due process contravenes the rule of law.”<sup>101</sup> The repugnance of such statutes to the common-law tradition is born of the idea that while a legislature can enact into law its understandings of subversion and other offenses, the rule of law requires both that the offence be framed generally and that anyone accused of such an offense be tried in a court of law.<sup>102</sup> In other words, the argument is a deeply normative one, which is not as much about the separation of powers as it is about the reasons for the separation of powers. The constitutional role of the judges is to guard the civil rights of the individual, here both the right to a fair trial and the right to be treated as equal before the law. If judges cannot carry out their constitutional duty, it does not follow that they have no such duty. What does follow is that legal reform is required in order for the legal order to maintain its claim to be such, to be an order governed by the rule of law.

That legislatures must be so restricted in order for a legal order to maintain its legitimacy is controversial in common-law jurisdictions. In the absence of express constitutional constraints on legislative authority, many lawyers in common-law jurisdictions assume that the legislature is supreme because there are no legal constraints other than constraints of manner and form on legislation. Whatever one might think is wrong with the content of a statute, as long as the legislature observes the constraints of manner and form, there can be no complaint from the rule of law perspective about the statute’s legality, since legality is just a matter of compliance with these rules. But there is more to the idea of legality than such compliance.

This tale of the evolution of the common law of judicial review—the rule of the principles of administrative law—is, then, not just about a change in judicial thinking; it is also about institutional design, about how institutions, including the administrative state, should function if domestic legal order is to meet the imperative of the rule of law as understood in the era of human rights. The role of the judiciary in this tale is not supposed to lead to the conclusion that judges are the most important legal actors, nor that they should always have the last word about the interpretation of law. The cases merely afford an opportunity for reflection on the pathologies of legal order, so that one can also reflect on how a better institutional design might help ensure official accountability to the values of the rule of law.

In order for such reflection to be productive, one has to move away from the notion that the rule of law is maintained by a formal separation of powers that imposes checks and balances on government. Rather, the separation of powers is to be regarded as the realization of, in Kantian terms, a republican ideal. In

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100. This is argued by T.R.S. Allan in the leading theoretical treatment on the rule of law. T.R.S. ALLAN, *CONSTITUTIONAL JUSTICE: A LIBERAL THEORY OF THE RULE OF LAW* 148-60 (2001).

101. *Id.* at 148.

102. *Id.* at 154.

Heiner Bielefeldt's translation of the well-known passage from Kant's *Perpetual Peace*, "Republicanism is the political principle of separation of the executive power (the government) from the legislative power; despotism is that of the high-handed management of the state by laws the regent has himself given, inasmuch as he handles the public will as his private will."<sup>103</sup> As Bielefeldt explains, the republican ideal seeks to prevent the general will from getting "lost in the problems of everyday power politics."<sup>104</sup> It is, then, "not an external imposition on a republic of self-legislating citizens, but instead makes up the inner quality of a polity that proceeds in accordance with the underlying normative principle of republican self-legislation—that is, the united lawgiving will of the people."<sup>105</sup> In this way, the separation of powers is not, or is not only, an external means of moderating legislation. Rather, it is an internal means of institutionalizing republican self-control and self-criticism "with regard to the basic normative principle of the legal order in general—namely, the 'innate right' of every human being, which is to be spelled out in republican legislation."<sup>106</sup>

However, the claim is not that international law is best explained as a Kantian order of right. Rather, from the perspective of the rule of law, the reasons for having a separation of powers are more important than any particular arrangement of powers. Put differently, violations of the rule of law are to be determined by looking to the substantive values that the separation of powers are supposed to protect rather than to whether the particular arrangement of powers in a legal order has been disturbed. Such a failure faces those who could trigger the process of reform which would make a remedy possible with the question whether they wish to make a choice for the rule of law. If no remedy is available, then the rule of law has failed. If those who can trigger the process of remedial reform choose the values underlying the rule of law over the expression of its arrangement, they should design and install institutions that make it possible for legal authorities to exercise their power according to a rule of law that rests on such values.<sup>107</sup> At the least, as the U.S. Supreme Court has recognized in *Rasul* and *Hamdi*, there must be some governmental body with jurisdiction over the matter that affords those affected by a public decision the opportunity to have their cases properly heard.

Without such institutions in place, legal order is, to evoke the first sentence of Kant's "An Answer to the Question: What is Enlightenment?", in a state of self-incurred immaturity.<sup>108</sup>

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103. HEINER BIELEFELDT, *SYMBOLIC REPRESENTATION IN KANT'S PRACTICAL PHILOSOPHY* 111 (2003). For the standard English translation, see IMMANUEL KANT, *PERPETUAL PEACE: A PHILOSOPHICAL SKETCH*, reprinted in *KANT: POLITICAL WRITINGS* 93, 101 (Hans Reiss ed. & H.B. Nisbet trans., Cambridge University Press, 2d ed. 1991) (1795).

104. BIELEFELDT, *supra* note 103, at 112.

105. *Id.* (emphasis removed).

106. *Id.* at 113-14.

107. See Bianchi, *supra* note 72, at 269-72.

108. Immanuel Kant, reprinted in *KANT: POLITICAL WRITINGS*, *supra* note 103, at 54 (1784).

## III

## THE RULE OF LAW AND THE LEGITIMACY OF INTERNATIONAL LAW

The law of nature has been rightly exposed to the charge of vagueness and arbitrariness. But the uncertainty of the 'higher law' is preferable to the arbitrariness and insolence of naked force. These considerations explain the significance of this aspect of the Grotian tradition in the history of the Law of Nations. [Grotius] secularized the law of nature. He gave it added authority and dignity by making it an integral part of the exposition of a system of law which became essential to civilized life. By doing this he laid, more truly than any other writer before him, the foundations of international law.<sup>109</sup>

The idea that international legal order can, in certain respects, be considered immature is inspired by a remark of Sir Hersch Lauterpacht in *The Development of International Law by the International Court*.<sup>110</sup> Lauterpacht starts the section in which he discusses what he calls "Judicial Legislation Through Application of General Principles of Law"<sup>111</sup> by noting that international law, "being an immature legal system, departs in some ways from principles of law as generally recognized."<sup>112</sup> Writing some forty years later, Thomas Franck asserts that international law has recently "attained the status of a mature, complex system with rules and processes every bit as variegated as those of a nation."<sup>113</sup> It is a "complete legal system."<sup>114</sup> So confident is he of this claim that he says international lawyers can now move away from the traditional question on which they focused—"Is international law law?"—and ask questions about its efficacy, its enforceability, its comprehensibility, and, the question Franck finds most important, "Is international law fair?"<sup>115</sup>

A good case can be made for the continuing immaturity of international law in the failure of international organizations to provide controls of the rule of law, which are the mark of a mature legal order.<sup>116</sup> These controls are anchored in the values of fairness, which in common-law legal orders have been developed by judges who have shown how public administration can be subject to the rule of law. The failure to put the controls in place is, then, the way in which this kind of immaturity is self-incurred. However, how one conceives fairness depends fundamentally on one's answer to the question, "What is law?" Thus, the question from which Franck hopes international law can escape reemerges

109. Hersch Lauterpacht, *The Grotian Tradition in International Law*, 23 BRIT. Y.B. INT'L L. 1 (1946), reprinted in 2 INT'L LAW, *supra* note 81, at 333.

110. HERSCH LAUTERPACHT, *THE DEVELOPMENT OF INTERNATIONAL LAW BY THE INTERNATIONAL COURT* (1958).

111. *Id.* at 158-72.

112. *Id.* at 158. One should not be misled by his use of the word "legislation" to describe what judges do. Lauterpacht is not adopting a positivistic view of adjudication as a practice in which judges create law on the basis of their own subjective preferences. For him, legislation was little more than a term of convenience for judicial development of the law on the basis of existing principles. *See, e.g., id.* at 155-57, 166-67.

113. THOMAS M. FRANCK, *FAIRNESS IN INTERNATIONAL LAW AND INSTITUTIONS* 5 (1995).

114. *Id.*

115. *Id.* at 6.

116. *See* Part II.B.2, *supra*.

within international law, perhaps because of the very maturity it has achieved. Indeed, the necessity of this question, and that it will reemerge whether one is confronting the phenomenon of international law or law in general, shows the distinction Franck draws between legitimacy and justice is not as firm as he alleges.<sup>117</sup>

Lauterpacht's concern in his book was rather different—the failure of governments to fully join the international legal order. Governments had failed to fully “avail[ ] themselves” of international law's potential “for justice”<sup>118</sup> by not consenting more often to the World Court's jurisdiction. This concern was the product of Lauterpacht's optimism about international law and international adjudication. Although he recognized that “law is not a panacea and that not all causes of international conflict or tension can be settled by law,” he still held that once a dispute is submitted for judicial determination, “the principle of the completeness of the legal order fully applies, with the result that all disputes thus submitted are capable of a legal solution.”<sup>119</sup>

Lauterpacht's optimism about law, and his thought that judges have an important role both in developing the principles of the rule of law and in ensuring that the principles are protected, are attractive. In addition, the three principles he identified as general principles of law are part of a package of common-law rights.<sup>120</sup> The first is *nemo iudex in re sua*, that no one should be judge in his own cause, of which Lauterpacht remarks, with regret, that “[n]o rule is more firmly embedded in the practice of modern international law than the principle that States are not bound, in the absence of an agreement to the contrary, to submit their disputes with other States to final adjudication by a third party.”<sup>121</sup> The second principle is abuse of right, which Lauterpacht says must “exist in the background in any system of administration of justice in which courts are not purely mechanical agencies.”<sup>122</sup> One cannot determine by reference to an abstract legislative rule when the exercise of a legal right “has degenerated into abuse of a right” and thus requires the “activity of courts drawing the line in each particular case.”<sup>123</sup> Moreover, this activity is particularly important in international society “in which the legislative process by regular organs is practi-

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117. See THOMAS M. FRANCK, *THE POWER OF LEGITIMACY AMONG NATIONS* (1990). See also Lauterpacht, *The Nature of International Law and General Jurisprudence*, in 2 INT'L LAW, *supra* note 81, at 7-8. Lauterpacht asks the question, “Shall international law aim at improvement by trying to bring its rules within the compass of the generally accepted notion of law, or shall it disintegrate it and thus deprive itself of a concrete ideal of perfection?” As he points out, this question “transcends the limits of a problem of international law” and becomes a “problem of general jurisprudence.” *Id.* at 8.

118. Lauterpacht, *supra* note 110, at 4-5.

119. *Id.*

120. See Part II.A., *supra*.

121. *Id.* at 158.

122. *Id.* at 165. In the common law of judicial review, requirements that discretion be exercised fairly and reasonably are functional equivalents of what Lauterpacht has in mind as protections against abuse of right.

123. *Id.* at 162.

cally non-existent.”<sup>124</sup> Finally, he discusses the principle of estoppel, which he takes to stand for the moral claim that a “person may—having regard to the obligation to act in good faith and the corresponding right of others to rely on his conduct—be bound by his own act.”<sup>125</sup> “Like law as a whole,” he writes, “so also ‘general principles of law’ are in substance, an expression of what has been described as socially realizable morality. In legal history, courts—as distinguished from formal legislation—have been mainly responsible for the infusion of morals into law”.<sup>126</sup>

In one sense the international legal order can be said to have reached a stage of moral enlightenment, compared to which domestic legal orders seem immature. I mean here the development of international human rights law, which together with older conventions like the Geneva Convention often these days seems to provide the most powerful grammar for moral criticism of the practice of nation states, either for their failure to commit to these norms or for their failure to live up to their commitments. However, just as it might be appropriate to condemn countries for failing to join or for flouting the values of the moral community of those who respect human rights, so perhaps should international bodies be criticized if or when they create norms without putting in place the kind of institutional mechanisms that mature domestic systems take for granted. From the perspective of the international law of human rights, the question might seem to be one about how to bring all nations fully into the normative moral community. From the perspective of domestic legal orders, the question might seem to be one about how to bring the international legal order fully into the legal institutional community.<sup>127</sup>

A similar point is made in Hans Kelsen’s treatment of international law.<sup>128</sup> He argues international law is a “primitive” system, in that it lacks organs for creating and applying legal norms, and so has to rely on the members of the international legal community to create norms and on individual states to enforce them.<sup>129</sup> He also argues it is the “primitive man” who, noticing conflicts between the norms of his legal community and those of the international community, concludes not only that there is a dualism of legal orders, but that his community has primacy—an attitude that Kelsen compares to one who considers that “all those not belonging to his community” are “lawless ‘barbarians’” and which, he says, does not really regard international law as true “law.”<sup>130</sup> Like

124. Lauterpacht, *supra* note 109, at 162.

125. *Id.* at 172. The doctrine of legitimate expectations is a functional equivalent here, in addition to the developing idea of public law estoppel.

126. *Id.* at 171-72.

127. This echoes terminology used in P.F. Strawson’s essay, *Freedom and Resentment*, 48 *PROC. BRIT. ACAD.*, reprinted in *FREEDOM AND RESENTMENT AND OTHER ESSAYS 1* (Methuen & Company 1974) (1962).

128. The argument relies here on just one, though a very central, work in Kelsen’s corpus, *INTRODUCTION TO THE PROBLEMS OF LEGAL THEORY* 107-25 (Bonnie Litschewski Paulson & Stanley L. Paulson trans., Clarendon Press 1992), translated from *REINE RECHTSLEHRE* (1934).

129. *Id.* at 108-09, 113-14.

130. *Id.* at 113-14.

Lauterpacht, Kelsen postulated not only the unity of legal order but also its completeness. Where they parted company, as is well known, and as the epigraph to this section tells us, is that Lauterpacht thought the best way to understand international law is as law founded on a secularized law of nature. What Lauterpacht shared with Kelsen requires, as Lauterpacht claimed, a basis in secularized natural law.

The issue at stake here can be elaborated by attending to the *The Gentle Civilizer of Nations*,<sup>131</sup> in which Martti Koskenniemi tells a fascinating story about the “rise and fall of international law” out of the interaction between politics, legal practice, and scholarship. The book ends on two discordant notes. On the one hand, it criticizes romantic accounts of the rule of law: it is an anti-formalist deconstruction of law’s boast to constrain politics, which results in a kind of realist, even pessimistic view, influenced by Carl Schmitt and Hans Morgenthau, that law, especially international law, is subordinate to power politics. On the other hand, it sounds a more optimistic note: a decision to adopt the rhetoric of law imposes a kind of civilizing discipline on interaction, whether between individuals or states, a discipline that is worth having because it can assist in an emancipatory project capable of constructing an international community that will give “voice to those who are otherwise routinely excluded.”<sup>132</sup>

Koskenniemi’s last substantive chapter, which strikes the Schmittian note, is preceded by a chapter on Lauterpacht, who exemplifies the romantic, cosmopolitan view of the rule of international law. Koskenniemi’s treatment of Lauterpacht is as respectful as it is critical. One can discern from this respect more than just careful scholarship on a formidable figure in the discipline—a kind of yearning for the possibility of “a morality of sweet reasonableness.”<sup>133</sup> Koskenniemi is keen to emphasize both the pragmatic aspect of Lauterpacht’s constructivist understanding of international law and that Lauterpacht’s view of law was not the kind of natural law in which general principles are derived from, say, a “Thomistic, religious morality.” Rather, following Grotius, it is a “morality of attitude . . . a morality of putting one’s foot down when everybody’s arguments have been given a hearing.”<sup>134</sup>

An analogy to this idea, reminiscent of the Weberian distinction between an ethic of conviction and an ethic of responsibility, is to be found in Kelsen’s claim that one has to choose between the primacy of international law and the primacy of domestic law, the choice being dictated, in his view, by one’s ethical stance. Kelsen, as a pacifist dedicated to affirming the autonomy of the individual, opted for the primacy of international law. Lauterpacht did not think that such a choice had to be made. Rather, one simply chooses law, putting one’s foot down for legal order, whether international or domestic. Legal order could

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131. MARTTI KOSKENNIEMI, *THE GENTLE CIVILIZER OF NATIONS: THE RISE AND FALL OF INTERNATIONAL LAW 1870-1960* (2001).

132. *Id.* at 517.

133. *Id.* at 410.

134. *Id.*

not, he thought, be understood without reference to natural law. This thought is as important for resisting Kelsen's dichotomy as for resisting the idea that the choice is between rule-of-law cosmopolitanism, on the one hand, and realism and pragmatism, on the other. Rather, as Koskenniemi might be taken to suggest, one can be a pragmatist and regard a commitment to a fairly substantive or natural law account of the rule of law as required.<sup>135</sup>

As indicated in the epigraph to this section, Lauterpacht was well aware of the history of the abuse of the category of natural law. In a brilliant 1933 essay on Kelsen,<sup>136</sup> Lauterpacht recognized why Kelsen turned away from natural law, rightly suspecting that Kelsen, despite his claims about the scientific status of the Pure Theory of Law and his rejection of natural law, was inspired by his desire for the "affirmation of the dignity and autonomy of man."<sup>137</sup> For that dignity to be respected, law must be seen as a "free creation of the human legislator and judge," not as an "imperfect attempt at reproduction of the law in itself, of a natural law above the positive law."<sup>138</sup>

However, as Lauterpacht shows, Kelsen, while committing himself to the fundamental postulate of legal order as a unity, bound together by his *Grundnorm*, wished to claim that the *Grundnorm* is not a precept of natural law. Rather, it is a hypothesis of the legal scientist, one that translates might into right, but without any ethical consequence. The subsequent emptiness of the idea means the hypothesis works out for judges as an authorization to use discretion to decide cases about the interpretation of the law, whereas discretion means they rely on their own subjective preferences. The assumption of the unity and completeness of legal order turns out to be no constraint on judges at all, to provide no discipline on the elaboration of what the law requires.<sup>139</sup>

Lauterpacht makes the further point that as we look at how judges elaborate the law in their interpretations, we find that in the "daily activity of courts[,] homage is paid to the fact that law is the realization of socially obtainable justice—which means of the socially obtainable natural law."<sup>140</sup> His position does not require judges to have the last word about what counts as a valid law, but about the way in which judicial interpretation necessarily conditions the exercise of legal authority. "We may have abandoned," he says, "the theory that statutes repugnant to natural justice are void, but that does not mean that we have ceased to shape positive law and to interpret it, sometimes out of recogni-

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135. See Bianchi, *supra* note 72, at 264-65.

136. Hersch Lauterpacht, *Kelsen's Pure Science of Law*, in MODERN THEORIES OF LAW 105 (W. Ivor Jennings ed., 1993).

137. *Id.* at 131.

138. *Id.*

139. For this reason, Richard Posner's recent sympathetic treatment of Kelsen overestimates the extent to which Kelsen's "concept of law is closer to judges' conception of their role than [H.L.A.] Hart's is." RICHARD A. POSNER, LAW, PRAGMATISM, AND DEMOCRACY 269 (2003). Posner also does not see that the substantive emptiness of Kelsen's theory does not allow Kelsen to distinguish, as Posner does, between "law" and "rule of law." *Id.* at 281. To make that distinction one needs precisely the kind of Fullerian idea of an internal morality of law that Posner dismisses. *Id.* at 282.

140. Lauterpacht, *supra* note 136, at 133.

tion, by ideas for which the term natural law is an elastic and convenient expression.”<sup>141</sup>

Lauterpacht’s view of international law, and of law in general—that once a dispute is submitted for judicial determination, “the principle of the completeness of the legal order fully applies, with the result that all disputes thus submitted are capable of a legal solution,”<sup>142</sup>—is deeply opposed to the Hobbesian one. As Koskenniemi has noted, Lauterpacht’s is very much a common-law view, which contests the idea that the international domain is a lawless state of nature in which the only obligations are those to which states consent.<sup>143</sup> According to that view, there are no black holes in international legal order except insofar as international actors have failed to design the institutions appropriate for maintaining legal order, or insofar as states have failed to submit to the jurisdiction of existing institutions.

For example, in his essay “The Grotian Tradition in International Law”<sup>144</sup> Lauterpacht finds Grotius’ contribution to the perennial problems of international law to reside in the following insights: First, the problems of international law must be understood as problems of law in general. Grotius’ exposition of international law is “woven into the structure of a general system of law and jurisprudence—a significant affirmation of the unity of all law and of the final place of international law in the general scheme of legal science.”<sup>145</sup> Second, the “totality of the relations between States is governed by law . . . . There are no lacunae in that subjection of States to the rule of law.”<sup>146</sup> Here, Lauterpacht emphasizes Grotius’ rejection of any absolute right of the state to self-preservation through his insistence on the distinction between just and unjust war. Third, there is Grotius’ view “that the law . . . binding upon States is not solely the product of their express will.”<sup>147</sup> The precept *pacta sunt servanda* is not the product of a practice whereby states consent to be bound by international law, but instead makes possible that practice. In other words, law is itself constitutive of the practice, and so Grotius argued that the precept is one, “perhaps the main precept of natural law.” Lauterpacht remarks that in international society,

deprived of normal legislative and judicial organs—the function of natural law, whatever may be its form, must approximate more closely to that of a direct source of law. In the absence of the overriding authority of the judicial and legislative organs of the State, the persuasive but potent authority of reason and principle derived from the fact of the necessary coexistence of a plurality of States<sup>148</sup>

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141. *Id.*

142. *Id.*

143. KOSKENNIEMI, *supra* note 131, at 369.

144. Lauterpacht, *supra* note 109.

145. *Id.* at 326.

146. *Id.* at 327-28.

147. *Id.* at 329.

148. *Id.* at 331.

Lauterpacht shows how Grotius thus rejected altogether the idea that “reason of State” could be invoked as the basis of international law, and he suggests that modern theories of international law as a law of coordination between states have a direct affinity with the “reason of State” that Grotius rejected.<sup>149</sup>

It is important to see two levels of analysis in order to appreciate the argument for the common-law understanding of the rule of law. At the first level, the theorist seeks to answer questions about the legitimacy of legal order, while, at the second, the theorist seeks to answer questions about the legitimacy of the exercise of legal authority. Most contemporary legal positivists are not concerned with answering questions about legitimacy, but, like Kelsen, with what they consider to be the purely analytic task of unpacking the conceptual structure of law.<sup>150</sup> These arguments cannot be properly addressed here. Instead, the focus will be on the arguments of normative or political positivists, who argue that there is a basis in political morality for the legitimacy of legal order, but who conclude from this basis that the best way to understand law is as positive law.<sup>151</sup>

Political positivists argue that in a world with deep ideological divisions, law can perform the useful function of establishing a stable framework of rules for interaction. But law can perform this function only if its components, its rules, are determinate. Public tests must exist for determining both what counts as a valid primary rule—a rule governing conduct of legal subjects—and for determining the content of the rule—what it in fact requires of those subject to it.

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149. Lauterpacht, *supra* note 109, at 340-46.

150. In Joseph Raz's work, the idea of legitimacy becomes important because he thinks that legal authorities necessarily claim to be legitimate. But this claim is part of the logical structure of claim to legal authority and so does not in his view bring one into the political or moral debate about what makes law in fact legitimate. See JOSEPH RAZ, *ETHICS IN THE PUBLIC DOMAIN: ESSAYS IN THE MORALITY OF LAW AND POLITICS* 194 (1994).

151. The most prominent legal positivist of this sort is Jeremy Waldron. Ben Kingsbury has recently revived this sort of positivism in the debate about the nature of international law. Kingsbury relies on Waldron's arguments but as an aid to bringing to the surface the jurisprudence of Lassa Oppenheim. See Benedict Kingsbury, *Legal Positivism as Normative Politics: International Society, Balance of Power and Lassa Oppenheim's Positive International Law*, 13 EUR. J. INT'L L. 401 (2002). Kingsbury has further suggested that the way forward for international law is through Grotianism. In his summary, the new Grotian theory will “define and differentiate international law, separating the subject with clarity from other intellectual disciplines in order then to engage coherently with them.” Benedict Kingsbury, *The International Legal Order*, in THE OXFORD HANDBOOK OF LEGAL STUDIES 271, 295 (Peter Cane & Mark Tushnet eds., 2003). It will also “integrate an ethically justified normative positivism with theories going to the processes and content of international law, including a nested set of theories of governance, institutions, and community. It will be a hybrid of sources-based criteria and content-based criteria.” *Id.* For a discussion of analytic legal positivism, see David Dyzenhaus, *The Genealogy of Legal Positivism*, 24 OXFORD J. LEGAL STUD. 39 (2004). Analytic legal positivism is an unproductive diversion, started by John Austin, from the political tradition of Hobbes and Bentham, so the revival of normative positivism by Waldron and others is welcome. The legal positivist view that international law is not really law seems in the Anglo-American tradition to be due to John Austin, not to Jeremy Bentham. See MW Janis, *Jeremy Bentham and the Fashioning of “International Law,”* 78 AM. J. INT'L L. 405 (1984). The discussion of political legal positivism below at times relies on terminology developed within the tradition of analytical legal positivism, especially by H.L.A. Hart. The claim, following Ronald Dworkin, about analytical legal positivism is not that analytical arguments are unhelpful to understanding the problems of legal order. Rather, the claim is that they are helpful only when nested in political theories of law.

These public tests are themselves rules about rules, or secondary rules, which means they too must satisfy the determinacy requirement. Ultimately, there will be a secondary rule so basic that no rule can be found to attest to its validity and this most basic rule is one that predominates in practice—a practice whose only guarantee of persistence is that its central participants accept that following the rule is the right thing to do. It is crucial that the rules, whether primary, secondary, or most basic secondary, all have content that can be determined as a matter of public fact, because otherwise law cannot perform its function of providing stability in a world of ideological division. If the content of law has to be determined by the political arguments law is supposed to preempt, then ideological division will break out in debate about what the law requires, which undermines the point of law.

For political positivists, certain institutional arrangements are more likely to help law serve its function, namely, a supreme legislature, a staff of independent officials or judges to interpret the law, and an administration capable of implementing and enforcing the law. However, the most important feature of legal order is not how it is maintained but the function it serves—the point of law. Thus, while international law might look like a doubtful candidate for legal order because, for example, it lacks a supreme legislature, that deficiency is not fatal. It is not the lack of a legislature that will disqualify international law from being law, but the inability of international law to perform law's function. Thus, if international lawyers today can find ways of showing either how international law already serves this function, or how it could if suitably reformed, there is no reason for a political positivist to deny international law its character as law. The division of powers, or separation of powers, is not something sacred. It is meant to serve law's function.

Once legal order is established, a question arises about why those subject to it should comply with its rules. One positivist answer to this question is that it can be preempted from arising, since in a properly functioning legal order, the penalties of disobedience will outweigh the rewards, so sanctions attached to primary rules provide sufficient reasons for obedience. That the international legal order lacks the sanctioning mechanisms of domestic legal orders has often been thought to be a problem for international law's claim to be law. However, as in the case of the separation of powers, political positivism will not require sanctions as a necessary feature of legal order, unless law cannot serve its function without sanctions. More importantly, with the exception of John Austin and Kelsen, no eminent legal positivist has thought sanctions to be an adequate answer to the question. For political positivists, the argument from the legitimating basis of legal order leading to the conclusion that positivism is the best way to understand law must be the reasons motivating at least a significant number of those subject to the law to obey it. Thus, for example, Thomas Franck's discussion of justice in *The Power of Legitimacy Among Nations* is

postponed to a “Postlude: Why not Justice?”<sup>152</sup> because he wants to show that the basis of legitimacy can be made up of components that transcend ideological division. These are components on which the actors in the international legal order can agree, whatever their different views on justice, and which thus explain the astonishing fact of compliance despite the lack of sanctions.<sup>153</sup>

This still leaves the question that occurs at a second level.<sup>154</sup> Once one has established the legitimating basis of legal order and worked out the structure of legal order shaped by one’s conception of law’s function, the question remains about how legal power is to be exercised in all three modes of power: legislative, executive, and interpretative. For positivists, law is the vehicle for expressing determinate judgments capable of stabilizing what would otherwise be an endless power play of contestable interpretations. Law itself therefore places no constraints on legislative power. Those who have legislative power are simply enjoined to come up with their best judgment, all things considered, about what the law should be. However, when it comes to implementation and interpretation of the law, those charged with these tasks must first seek to determine the actual content of the law. Only if they find no actual or determinate content are they free to act on their own interpretation, which they should make in the way just sketched. When the executive and the judiciary have this freedom, their judgment is thus quasi-legislative.

The common-law conception of law differs from that of the positivist in making claims primarily, even exclusively, at the second level. While the common law tradition does appeal to time immemorial as a kind of external legitimation of the common law method, the focus of its legitimacy claim is on the method—on the idea of working the law pure. If legal power is exercised in accordance with the values of the common law, it will be legitimate, which is tantamount to saying that it will have legal authority or the character of legality. It is also tantamount to saying that the law is just, at least from the perspective of legality.

Moreover, although the rule-of-law values for the positivist tradition—certainty, stability, and so on—are also part of the common law’s set of values, they are not the only, or even the most important, part. Generality of law, equality before the law, fairness (including the requirements of natural justice and the requirement that all decisions be given or be capable of being given a reasonable justification), and the liberty and dignity of the legal subject are all very strong candidates for the common law’s stock of legal values. Some or all

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152. FRANCK, *supra* note 113, at 208.

153. *Id.*

154. *See, e.g.,* Jutta Brunnée & Stephen J. Toope, *Persuasion and Enforcement: Explaining Compliance with International Law*, 13 FINNISH Y.B. INT’L L. 273 (2002). Taking their inspiration, from the legal theory of Lon L. Fuller, Brunnée and Toope argue Franck is right in that internal features of law must play a role in an account of the legitimacy of law, but this role cannot be adequately captured by a positivist theory of law. Law’s ability to assert authority over power lies in an account of law’s workings that includes the procedural and substantive components necessary to understand law’s nature as an interactional rather than managerial (positivistic) enterprise.

of these values will figure in many attempts to find a first level justification for law. But the claim of the common law is that they are needed to make sense of law from the inside, as an account of a properly functioning legal order. The values do not then have to be incorporated from outside the law, as positivists would have it. Rather, the values are necessarily implicated in the process of working the law pure.

At this second level the contest between political positivism and the common-law conception of legality is properly joined. For the common law does not allow the issue of justice to be deferred to a kind of postscript to understanding the legitimacy of law. Justice is internal to the ways in which legal authority manifests itself, if such manifestation is to be either legal or authoritative. As is the case with political positivism, issues about other features of legal order, such as the structure of the separation or division of powers, are not essential. What matters most is service to the function of law, which for the common-law conception is both to provide a stable framework of rules and to ensure that when someone is made subject to an exercise of legal power, the exercise is just. Put another way, the exercise must not be arbitrary—it must be in accordance with the law. However, that point can and is, of course, also made by political legal positivism. The difference resides in the substantive content of justice, which the common law equates with non-arbitrariness.

The point of the epigraph by Lauterpacht is not only that natural law is secularized. Rather, it is no longer seen as a source of law, but as a way of making sense from inside the legal order. As Lauterpacht writes, it is important not to underestimate Kelsen's contribution both to general jurisprudence and to our understanding of international law. The idea that all state power, even at the international level, is subject to the rule of law is a moral milestone, an expression of the liberal hope that, as Carl Schmitt understood it, the exception could be banished from the world.<sup>155</sup>

In common-law legal orders, the gradual subjection of prerogative powers to the control of both legislation and the common law can rightly be thought of as an expression of that hope in legal practice. Similarly, the thought that international law is just as much law as domestic law and that the task for the jurist is to seek to harmonize the norms of both by regarding each as a part of a unity, is an important step in the movement from the misery of the state of nature. Kelsen goes wrong, however, in refusing to countenance the thought of enlightenment as a reciprocal process. International law can be viewed as the default system with whose norms domestic law must always comply only if one is compelled, as Kelsen thought, to avoid any reference to the laws of nature, to the substantive moral content of the rule of law.

Here, Hobbes is a surer guide than Kelsen, for he saw that the exercise of legal authority is conditioned by an understanding of the laws of nature. It is

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155. CARL SCHMITT, *POLITICAL THEOLOGY: FOUR CHAPTERS ON THE CONCEPT OF SOVEREIGNTY* 48 (George Schwab trans., M.I.T. Press 1985) (1922).

significant that if one looks to Hobbes himself (rather than to the Hobbesian, or Hobbist, tradition of political and legal thought), he had very much the same view. Hobbes, despite his deep opposition to the common-law tradition, shares with it the thought that intrinsic to the very idea of legality is a set of values, articulated in his discussion of the laws of nature, with which law must comply if it is to have any authority.<sup>156</sup>

In order for the sovereign to exercise judgment about what the laws of nature require, he must generally exercise that judgment through law.<sup>157</sup> Hobbes's claim that the sovereign cannot do injustice is a shorthand way of saying that the sovereign's laws cannot be unjust. However, before laws can achieve the status of immunity to charges of injustice, they first must achieve the status of law, which requires they be in compliance not only with secondary rules, but also with the laws of nature. Hobbes is clear that all laws require interpretation, and that interpretation is a task that falls to an independent staff of officials—judges—who must regard the law alone when deciding what is required by law.<sup>158</sup>

Hobbes also says it would be an insult to the sovereign for judges to impute inequity to the sovereign, requiring them to interpret the law in a way that is consistent with equity. Further, he assumes judges have to be able interpreters of the laws of nature, which suggests that they are to interpret the civil law in light of their understanding of the laws of nature. Laws thus have to be justifiable—potentially or in fact—as particularizations of the laws of nature since all laws are potentially subject to judicial interpretation. Indeed, it is Hobbes's view that judges are best understood not as competitors for sovereign authority,

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156. See THOMAS HOBBS, *LEVIATHAN* (Cambridge University Press 1997) (1651), especially ch. 26, "Of Civil Laws," ch. 14, "Of the First and Second Natural Laws, and of Contracts," and ch. 15, "Of Other Laws of Nature." For discussion, see David Dyzenhaus, *Hobbes and the Legitimacy of Law*, 20 L. & PHIL. 461 (2001). Similarly, I think it significant that in his later reflection on the topic of legitimacy, FRANCK, *supra* note 114, at 47, includes a chapter on "Equity as Fairness." Regarding the first level of legitimacy, Hobbes does argue that anyone who is not a prisoner or slave within civil society should understand he has consented to the authority of the sovereign. But since Hobbes considers all actual sovereign power to be originally won by violence, he does not think an inquiry into the foundation of any actual state to be fruitful for understanding why the sovereign is legitimate. Rather, he is more concerned, again to borrow from Lauterpacht on Grotius, to show how the uncertainty of the higher or natural law, as concretized by the sovereign, is "preferable to the arbitrariness and insolence of naked force." Lauterpacht, *supra* note 109. If all there was to natural law was the sovereign's interpretations, that would make natural law disappear at the moment of sovereign judgment, as Norberto Bobbio understood Hobbes as requiring. NORBERTO BOBBIO, *THOMAS HOBBS AND THE NATURAL LAW TRADITION* (Daniela Gobetti trans., Univ. of Chicago Press 1993) (1989). This understanding neglects Hobbes's account of the role of judges.

157. Hobbes does not limit the exercise of the sovereign's power to making laws that will then authorize his officials to implement the law. The sovereign may and sometimes must also act in exceptional situations, including foreign affairs. However, when the sovereign so acts he is still bound to act on an understanding of what the laws of nature require, just as officials and judges must, in the absence of the sovereign's explicit judgment, decide in the light of their understanding of the same laws. If one puts Hobbes and Kelsen together in one package, one gets a potent combination of the Kelsenian idea that all sovereign acts are subject to law with Hobbes's argument that the laws of nature are necessarily part of the law to which the sovereign is subject.

158. See HOBBS, *supra* note 156, at ch. 26.

but as the sovereign's agents, because they complete the legislative process in their interpretations.<sup>159</sup> In common with the common-law position, Hobbes holds the view that all legal powers within civil society must be understood to be engaged in a project of realizing the values of the laws of nature, many of which reflect both the principles Lauterpacht outlined as general principles of law and those developed in the common law of judicial review.

It follows logically from such a position that a technically valid law that strays from the normative basis of law's authority is under a cloud of legal doubt: its claim to authority is shaky from the perspective of the rule of law. Whether or not there exists an institution to which one subject to the law can appeal to have it invalidated is of course an issue of great importance. But the point about the law's dubious claim to authority does not depend on that issue. For once the point is understood, the case has been made for creating such an institution where none existed, or for a state to submit the issue to an existing institution; for without this step, the commitment by states to the rule of law appears hypocritical.

In the same way, the Security Council's delegation of power to the 1267 Committee, and the subsequent exercise of authority by the Committee, lacked legal authority, whether or not one accepts that the Security Council is entitled to legislate. For a domestic court to give legal force to the lists established by the 1267 Committee, or to let doctrines of immunity stand in the way of those who have been harmed by such a list and who seek a remedy, is to allow the Security Council to establish a kind of legal black hole both internationally and domestically. Of course, it is embarrassing for a domestic court to face a dilemma between deciding in favor of immunity and providing access to a court without which an individual will find himself in a legal void, or between enforcing what looks like an international obligation, particularized by a domestic statute, to give force to a list of suspected terrorists and respecting the requirements of the common-law constitution. Kelsen, it seems, would recommend that whenever a court faces a choice between domestic law and international law, it should choose the latter, if it is not to be a barbarian.

But the dilemmas are often not easily described as clashes between two legal orders. Rather, they seem to be tensions that arise out of values that are recognised both domestically and internationally. The tensions in the situation created by the 1267 Committee are not only between norms of the rule of law and a norm issued by an international body. They are also tensions within the international legal order between that norm and conventions that guarantee access to a court, and within the Canadian domestic order between the Charter and the common law, on the one hand, and, on the other, the Terrorism Regulations made by the Cabinet under the authority of the United Nations Act. And even if the clash is between an international and a domestic norm, one needs Kel-

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159. Nevertheless, he seeks to ensure that their judgments do not compete with the general laws by refusing them application beyond the particular case.

sen's refusal to move beyond moral relativism to require that the choice be automatically for the international norm. Finally, judges should be loath to characterize the issue as a clash between two norms until that characterization is forced on them by a very explicit statement in a technically valid legal instrument. Far better is to adopt the view taken by the common-law judges described earlier, which appears to be more or less the natural law view of the rule of law advocated by Lauterpacht. As he put it, the question for international law is whether it should refuse to admit "its present imperfections and by elevating them to the authority of legitimate and permanent manifestations of a 'specific' law, abdicate its task of raising itself above the level of a specific community?"<sup>160</sup> Thus, he argued, one should regard international law as a law of "subordination," a subjection to the rule of law, so that its future development is conditioned by a progressive approximation to "those standards of morals and order which are the ultimate foundation of all law."<sup>161</sup> The choice for law, then, is to make every effort to realize the substantive values of the rule of law in both the domestic and international legal orders.

The argument is not that judges working within their domestic legal orders can undertake this task. Rather, they can alert us to rule of law problems that are the result of decisions made by the principal actors in international law. If those problems seem to be part of a pattern, and thus systemic, they can be corrected only by institutional reform at the international level. Systemic problems about the exercise of legal authority—problems that arise at the second level—can be corrected only at the first level, in the design of legitimate legal order. In making this point, one perhaps lays the foundation for a productive rapprochement between political positivism and the natural law tradition, the latter being exemplified in the idea of the common-law constitution.

All one needs for such a rapprochement to take place is a concession from both camps. The natural law camp would concede that solutions to systemic problems are ultimately political, not legal, in nature, and that, often, judges neither have the authority to provide them nor, usually, are they best placed to design them. The positivist camp would concede that legal authority is conditioned by values that go beyond certainty and stability. With these concessions in place, one has removed at least the theoretical obstacles in the way of a project of realizing a global rule of (administrative) law.

#### IV

#### CONCLUSION

In part I, I explored how judges of a natural law bent have in common law legal orders developed a productive understanding of the rule of law to which public officials can be held to account. As I showed, that understanding has been greatly enriched by the judges' sense of the importance of international

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160. See Lauterpacht, *supra* note 117, at 19.

161. *Id.*

human rights norms. Yet, as we also saw in Part I, international bodies are as capable as their domestic counterparts of issuing norms that are in tension with the rule of law. I did not argue that judges are always able to resolve such tensions, nor that they are best equipped to craft solutions. Rather, I argued that the crucial point is that a commitment to the rule of law requires that solutions be developed and that one has to adopt a richer understanding of the rule of law than that espoused by legal positivism. Moreover, as I argued in Part II, this richer understanding of the rule of law supports the idea of international law and of international legal order, though it requires that international legal order become more mature institutionally. In the context of my case study of the 1267 Committee, that requirement translates into the development of appropriate due process requirements before any individual is listed as a suspected terrorist. As we saw, the problem from the perspective of the rule of law with such listing mechanisms is by no means confined to the international legal order. But then the virtue of the conception of the rule of law sketched in these pages is that it applies equally to domestic and international legal order.