

# EMERGING FROM SELF-INCURRED IMMATURITY<sup>1</sup>

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## DRAFT

“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. He 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”. Sir Hersch Lauterpacht, “The Grotian Tradition in International Law”.<sup>2</sup>

## INTRODUCTION

The evocation in my title of the first sentence of Kant’s “An Answer to the Question: What is Enlightenment?” is inspired by a remark of Sir Hersch Lauterpacht in *The Development of International Law by the International Court*.<sup>3</sup> In the section where Lauterpacht discusses what he calls “Judicial Legislation Through Application of General Principles of Law,”<sup>4</sup> he starts by noting that international law, “being an immature legal system, departs in some ways from principles of law as generally recognized”.<sup>5</sup> Writing some forty years later, Thomas Franck says 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”. It is a “complete legal system”.<sup>6</sup> So confident is he of this claim that he says that 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 he says is the most important, “Is international law fair?”

The theme of this paper is fairness in international law. I will argue that one can make a good case for the continuing immaturity of international law in the failure of international organizations to provide the controls of the rule of law which are the mark of a mature legal order. These controls are anchored in the values of fairness which in common law legal orders have been developed by judges in the course of showing how public administration can be subject to the rule of law. The failure to put in the place the controls is then the way in which this kind of immaturity is self-incurred. But, as I will also argue, how one conceives fairness depends fundamentally on one’s answer to the question, “What is law?”, so that the question from which Franck hopes international law can escape reemerges within international law, perhaps because of the very maturity which it has achieved. Indeed, I will claim that the necessity of this question, the fact that it will reemerge whether one is confronting the phenomenon of international law or law in general, shows that the distinction Franck draws in his work between legitimacy and justice is not as firm as he alleges.<sup>7</sup>

Lauterpacht’s concern in his book was rather different--the failure of governments fully to join the international legal order. Governments had not, that is, more fully “availed themselves” of international law’s potential “for justice”<sup>8</sup> through not consenting more often to the jurisdiction of the World Court. But this concern was the product of Lauterpacht’s optimism about international law and international adjudication. While he recognised 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>9</sup> One should not be misled by his use of the word legislation to describe what judges do into thinking that he adopts 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.<sup>10</sup>

I share Lauterpacht’s optimism about law and adjudication and also regard the three principles he identified as general principles of law as among the most important principles of the rule of law. 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 “No 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>11</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>12</sup> He points out 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 one requires the “activity of courts drawing the line in each particular case”. Moreover, this activity is particularly important in international society “in which the legislative process by regular organs is practically non-existent”.<sup>13</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”. He goes on:

“Like law as a whole, 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>14</sup>

There is of course a sense in which 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. But just as we might regard it as appropriate to condemn countries which fail to join or which flout the values of the moral community of respecters of human rights, so we might want to condemn international bodies which 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>15</sup>

Note that a similar point is made in Kelsen’s treatment of international law.<sup>16</sup> He argues that 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. But he also argues that it is only 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>17</sup> And like Lauterpacht, Kelsen postulated not only the unity of legal order but also its completeness. Where they parted company, as is well known, is that Lauterpacht, as the epigraph tells us, thought that the best way to understand international law is as founded on a secularized law of nature.

In this paper, I will argue that what Lauterpacht shared with Kelsen requires, as Lauterpacht claimed, a basis in secularized natural law. I start with a case study in international law of the listing mechanism developed by the Security Council in the wake of 11 September 2001. The structure of an answer to the questions raised by that case study can be found in the subsequent case study of the common law of judicial review, where I analyze cases where judges have been heavily influenced by international law, in particular by international human rights law. Indeed, the influence of international law helped greatly to clarify the idea of the rule of law on which the judges rely, both the interactions between its components and the assumptions which hold it together. But these judges were amenable to that influence because their understanding of law and the rule of law did not depend on a different set of assumptions, the kind that lead to the marginalization of international law, even to disparagement of international law’s very claim to be law.

One might say that these judges 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. It is then, or so I will argue, incumbent on those international bodies charged with making decisions which affect the interests of individuals subject to their legal regimes to repay the compliment. They should put in place the mechanisms that will help to ensure that their officials comply with the

package of rule of law controls. A corollary is that domestic courts should consider decisions of international bodies suspect to the extent that these decisions do not comply with such controls. Put differently, I will move from a discussion of international law to the topic of the reception of international legal norms into the administrative law of common law countries and, finally, to the topic of the reception of administrative law norms into international law.<sup>18</sup>

#### A CASE STUDY: THE SECURITY COUNCIL AND LIBAN M HUSSEIN<sup>19</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 it has through Articles 40, 41 and 42. Article 41 of the *United Nations Charter* gives the Security Council authority 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 in regard to specific conflicts and situations, for example, by imposing sanctions on a state in order to bring it into compliance with international law. The Council would enjoin all states to comply with its decision, but, as Paul Szasz had pointed out, these decisions because of their particularity and their temporality did not look legislative in nature, and so did not offend against the thought that intergovernmental organisations cannot legislate international law.<sup>20</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.

But after 11 September, the Council, prompted by the United States of America, adopted Resolution 1373, which decided that “all States shall” take certain actions against the financing of terrorist activities, as well as other actions. 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 rather focuses on an undefined threat of “global terrorism”. Szasz says that it can in significant measure be “said to establish new binding rules of international law—rather than mere commands relating to a particular situation—and, moreover, even creates a mechanism for monitoring compliance with them”.<sup>21</sup>

In addition, the Afghanistan Committee created by an earlier resolution of the Security Council to deal with Afghanistan, Resolution 1267, had its mandate expanded to include monitoring economic sanctions imposed by Resolution 1390 (2002), which clarifies state obligations regarding listed entities. The committee subsequently became known as the 1267 Committee and was responsible for compiling a list of individuals and entities in terms of paragraph 2 of Resolution 1390. An individual or organization which has been listed cannot apply to be delisted. Listed persons have to petition their home country to request a review of their case and the home country then acts as the person’s advocate if the review is favourable. The home country has to approach the government which requested the listing and attempt to persuade it to submit a joint or separate request to the Security Council for delisting. The home country can 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. In practice, the 1267 Committee's list is more or less composed on the basis of information supplied by countries, most notably the United States of America.

As Alexandra Dosman has shown in an illuminating study of the listing mechanism, it can have far-reaching domestic consequences.<sup>22</sup> Canada, by tradition a dualist country, requires the legislature to transform international rules by legislation before the norms will be considered to have domestic effect. Section 2 of Canada's *United Nations Act* of 1945 gives the authority to the Governor in Council (or Cabinet), once the Security Council has called on Canada under 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 within 40 working days that the order or regulation ceases to have effect.

Four days after the Security Council adopted Resolution 1373, the Governor in Council made 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. The Regulations make it an offence to provide to or collect funds for a listed person and impose a duty on Canadian financial institutions as well as all residents of Canada and all Canadians to disclose any property which they have reason to believe is owned or controlled by or on behalf of a listed person as well as information related to transactions involving such property. 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*. But Canada’s *Anti-Terrorism Act*, another reaction to 11 September, amended the punishment provisions of the *United Nations Act*, increasing the fine on conviction from \$5000 to \$100,000 and the maximum term of imprisonment from 5 years to 10.

Dosman’s case study has as its central character Liban M Hussein, a Canadian citizen resident in Ottawa. On 7 November 2001, the USA sought Hussein’s extradition on the basis that he had engaged in an illegal money transmittal business, an offence under USA law. Canadian law requires that extradition must be on the basis of an offence that has a parallel in Canadian law but no such offence existed. In any case, it was clear that the USA authorities wanted Hussein for questioning in connection with the “war” on terror, as they had been alerted by a private company, engaged in counter-terrorism under contract with US authorities, that Hussein was engaged in transmitting money to Arab countries. However, despite the fact that the US 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 that they had received no information from the USA which linked Hussein with terrorism.

The extradition warrant cited an executive order issued by President Bush on the same day, which designated 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>23</sup> Such an executive order does not require

reasonable grounds to be stated for believing that listed persons are engaged in terrorist activity. Later that day, that is, after Canada has 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 9 November, 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 7 November.

Canadian government officials stated that the parallel offences for which he should be extradited were the offences of acting contrary to the *Terrorism Regulations*. The parallel offence was that of knowingly providing or collecting funds for use by a listed person and providing financial services to a listed person. Dosman points out that Hussein’s offence was having financial dealings with himself, as a listed person, and his businesses.<sup>24</sup> There was extensive media coverage in both the USA and Canada which 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 which violates the “principles of fundamental justice”. Since the *Terrorism Regulations* provide for imprisonment they clearly pass the threshold for engaging “life, liberty and security of the person”. In regard to the second part of the test, the lawyers argued the *Terrorism Regulations* create criminal offences, and moreover offences which are “inherently wrong” rather than mere “regulatory offences”.<sup>25</sup> This, they argued, is precluded by section 7. They asserted that there

is a principle “so ingrained” in the Canadian legal system, part of the “principle of legality” or the rule of law, that all true crimes ( offences that prohibit intrinsically wrong conduct) are to be created only by legislation. Their argument here is a democratic one that because of the stigmatisation 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”. They pointed out that Canada’s *Anti-Terrorism Act* creates similar offences, but that it had been enacted as a statute after full legislative debate.<sup>26</sup>

The lawyers argued, secondly, that the *Terrorism Regulations* combine to contravene the presumption of innocence, protected by section 11(d) of the *Charter*, since they deem listed persons to be persons for whom there are reasonable grounds to believe to have carried out, attempted, facilitated terrorist activity, etc. This amounts to a legislative deeming of facts that would otherwise have to be proved and removes the onus on the Crown to prove beyond a reasonable doubt that listed persons are in fact engaged in these activities. The Regulations thus in this respect also violated section 7.<sup>27</sup>

Finally, they argued that the combination of Canada’s legislative after the fact deeming of Hussein’s criminality and the USA’s attempt to extradite him for a licensing offence when in fact what it wanted was to question him about terrorism amounted to an abuse of the Canadian judicial process which could not be countenanced at common law, an offence which had been subsumed into the section 7 prohibition of deprivations that violated “principles of fundamental justice”.<sup>28</sup>

The Canadian government decided to avoid the challenge in court and instead amended the *Terrorism Regulations* to exempt Hussein. Officials had been in contact with USA 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 still left Hussein subject to sanctions by other nations. However, Canada succeeded in getting him taken off the Security Council list.

Now the listing by the 1267 Committee did not play a direct role in creating the basis for an extradition order against Hussein. Recall that his initial listing happened under the second track of the *Terrorism Regulations*, for on 7 November the Canadian government simply took over Bush's executive order. But it is far from insignificant that the full title of these regulations includes "United Nations", likewise that the regulations were made relying on the *United Nations Act* and that the 1267 Committee did in fact adopt the same list two days later, which left Canada in non-compliance with its obligations to the Security Council once Hussein's name was removed from Canada's list. What drives the whole process is the legitimacy and legal status which 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 11 September 2001 with a terrorism statute which 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>29</sup>

There is then a deep question about the legitimacy of the process which the Security Council put in place for listing terrorist individuals and entities. And I want to show that question is also about the legality of that process.<sup>30</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>31</sup>

That argument is clearest in its final limb about abuse of process, a section of the factum which 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 his 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>32</sup>

The basic charge here amounts to the claim that the listing mechanism is a bill of attainder. As the author of the famous Note in 1962 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”.<sup>33</sup> In addition, the term came to be used for “bills of pains and penalties”, statutes that imposed sanctions less than capital.<sup>34</sup> Both sorts of statute were aimed at revolutionaries and were considered offensive to the spirit of the common law because they attempted to bypass the courts by establishing a system of either legislative or administrative conviction and punishment.

One way of understanding the offence is in terms of an idea of the separation of powers, where the judiciary has the role of determining in an open trial both guilt and appropriate punishment. If this understanding is right, it might seem that the idea of the bill

of attainder has no purchase in the international context, precisely because of 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>35</sup>

Recall, however, Szasz's description of Resolution 1267 as legislative in nature. Two questions arise from this description. One might ask by what authority the Security Council legislated and in particular used legislation to delegate authority to the 1267 Committee to make up its lists. Second, one has to ask about the legal nature of the 1267 Committee. As a body which has been delegated authority by the Security Council, its authority looks administrative. But it is also charged with making determinations of names that should figure on a list which, as long as States take seriously their obligations to the Security Council, 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 which, 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 transferred from a list compiled by one country's security service to another list.

On one view, the answer to the first question has to be found in the Charter of the UN, where if there is authority to delegate it will be found to exist either in some express provision or by implication.<sup>36</sup> But I think that one can approach that question another way. If there were a flaw from the perspective of the rule of law with the authority that was in fact delegated, then, whether or not the Security Council has a general authority to legislate, the legislation itself was flawed in the same way.<sup>37</sup>

This claim 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 in the sense that 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 perspective of the rule of law 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. Moreover, as I will now show, the process of interpretation confers in important respects legislative authority on bodies, just as it can confer validity on executive acts, or constitutional status on legal documents or simply on values or principles that are considered fundamental to legal order.

#### THE COMMON LAW OF LEGALITY AND INTERNATIONAL LAW

Judges of the common law family of legal orders presume that individuals whose interests are affected by decisions of the public officials who staff the administrative state have certain rights. The package of rights will depend 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. However, in the abstract the package at its fullest may include: the right to a hearing before the decision is made, the right to have the decision made in an unbiased and impartial fashion, the right to know the basis on which the official intends to decide 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 the relevant legal and factual considerations. All the rights except for the very last one are

usually grouped into the category of procedural rights. They pertain to the way in which the decision is made, in contrast to the last which gives the individual the right to a substantively sound decision. And in order to make these rights effective one has to add one more right to the package—the right to have the validity of the decision tested in a court of law.

When judges in a common law legal order uphold official decisions as valid, 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 sketched is thought by judges to supply the content of the rule of law regime with which they presume all officials must comply. The qualification “something roughly like” is necessary to indicate that the content of the package is controversial and I do not in fact want to deny the claim that the rule of law is an essentially contested concept.<sup>38</sup> Rather, I want to unpack the terms of that contest in a bid to illuminate the topic of my paper – the rule of (administrative) law in international law. My claim is that the package fulfils the central aspiration of the rule of law – the subjection of public power to the kinds of control which help to ensure that its exercise is in the interests of those who are affected by it. But I want also to show that to have that package, one has to adopt a non-positivist understanding of law and legal order or legality. I will elaborate this understanding later, noting for the moment 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>39</sup> Put differently, the basis of the rule of law



is not in the positive law of the legislature but in what we can think of as the unwritten or common law constitution. Second, the common law constitution applies even when the official's authority is claimed not to derive from statute but from the prerogative powers of government--the residuary power of the sovereign which, or so 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>40</sup> These two points suggest, against the grain of the positivist tradition, that the operation of the values of the rule of law do not depend on their prior expression in the positive enactments of the legislature. The third point undermines a more sophisticated kind of legal positivism, which seeks to recognise judgments as a source of positive law so that the fact 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 point 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 the relevant legal and factual considerations. When judges review on the basis of the procedural components, they can claim that because procedure pertains to how and not what 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, as I will soon show, procedural rights might protect the same values as substantive rights, but also because the connection between the procedural components and the substantive one is very tight. Procedural and substantive rights have what one can think of as a symbiotic relationship. But, for the moment, I want to focus not on the fragility of

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

In democratic theory, parliament's monopoly on legislative power is rooted in the claim that only the people's representatives have the authority to make law, although the justification for the formal doctrine of the separation of powers need not be democratic. It can, for example, reside in a Hobbesian argument about the need to concentrate legislative power in one body. However, I will generally assume that the legitimacy concern which judges have about intruding into the substance of executive decision making is a democratic one.

Now the history of the common law of judicial review is a history of judges imposing controls on public officials which were not prescribed by any statute. Not all judges have been comfortable with this history and so there has been and continues to be significant resistance within the judiciary to the imposition of controls beyond those

explicitly contemplated by statute or written constitution. But to the extent there has been comfort, the comfort has rested on the process/substance distinction. Comfort derives in part from the claim I have already mentioned—that 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 which can be discerned from the fact that the legislature could if it chose either preemptively exclude such controls or override them in the wake of a judgment. But the doctrine of tacit consent cannot be invoked in respect of judicial intrusion into substance, since the very delegation by the legislature of authority to the executive is taken as an altogether explicit signal to the judiciary of legislative intent.

It is hardly surprising, given this concern about substance, that in common law legal orders many judges have adopted the stance known as dualism in regard to the norms of international law other than the norms of customary international law. Since the only legitimate source of legal norms within their legal orders is the legislature, international legal norms may have force domestically only when the legislature has explicitly incorporated them by statute. Executive ratification of a treaty is a signal to the outside world but not to the subjects of the domestic legal order. To allow such norms any force would be to permit the executive to usurp legislative power, though the instrument of usurpation would not be the executive itself, but the judges, who would in substance have incorporated the norms through the back door.

In addition, judges have often taken the position we saw Kelsen describe as primitive. When a domestic statute is in conflict with an international norm, even if it is a norm of customary international law, the domestic norm must prevail. The only port of entry into domestic law is via the maxim that judges should deal with statutory ambiguity by

resolving it in favour of international law. But since grants of discretion to officials were for a long time viewed as unambiguous delegations of authority to the officials--an unfettered discretion to decide as they thought best--there did not seem to be any ambiguity to resolve.

The idea that discretion is unfettered, that the 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 orders, which 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 the domain are as individuals are to each other in the state of nature. Similarly, the thought that national security is 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 in regard to the sovereign, and control over immigration or aliens is a control on those who wish to enter into a civil society from either the state of nature or from another civil society whose relations with the first are relations in a state of nature. While both immigration and security are generally controlled by statute, their history as prerogative powers often looms large in judges’ approach to statutory interpretation, especially when officials are given broad discretionary powers to make security or immigration determinations.

In this section, I want very briefly to recount the interesting tale of how the judges in the common law world who were responsible for bringing international norms into the embrace of the common law understood what they were doing not as backdoor incorporation but as updating the values of the rule of law, as—to use the well known metaphor—working the law pure.<sup>41</sup> The tale includes four common law jurisdictions, New

Zealand, Australia, Canada and the United Kingdom and it is remarkable in its display of what one could call an international dialogue between judges about the role of international norms in domestic law, in particular in informing their understanding of the controls exercised by the rule of law on public officials.

In the first three countries, the norm which sparked the process was Article 3 of the *United Nations Convention on the Rights of the Child* 1989 (CRC)<sup>42</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 someone who had children in the host country had to take into account the interests of the children as a “primary consideration”. The legal vehicle for Article 3 was that the statutory regimes of the three countries required in various ways that decisions about whether to deport an individual who other things being equal was liable to deportation 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>43</sup> did not formally decide anything, since the case was adjourned so that the Minister could reconsider. But President Cooke for the Court stated an important principle in rejecting the argument put by crown counsel, who conceded that the Minister had not had regard to the CRC but argued that this lack was no flaw since the CRC was of no effect in the domestic legal system. He described this argument as “unattractive, apparently implying that New Zealand’s adherence to the international instruments has been at least partly window-dressing”.<sup>44</sup> In his view, when an official is making this kind of decision, “the basic rights of the family and the child are the starting point”.<sup>45</sup>

This idea of a presumption against hypocrisy was then relied on by the majority of the High Court of Australia in *Minister for Immigration and Ethnic Affairs v Teoh*,<sup>46</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 by treating the best interests of the children as a primary consideration. That expectation could be validly defeated only by informing the Teohs that the Convention principle would not be applied and giving them the opportunity to persuade the decision-maker to change her mind.

Finally, Canada's Supreme Court in *Baker v Canada (Minister of Citizenship and Immigration)*<sup>47</sup> held that although a decision about whether to stay a deportation order on "humanitarian and compassionate grounds" was one which the legislature had delegated to the expert discretion of immigration officials, the decision still had to be reasonable, that is, justified by relevant legal considerations. In other words, discretion was no longer viewed as a legal void or state of nature, but as replete with legal values. And the Court held that among the legal factors that informed its understanding of the content of reasonableness was Article 3 of the CRC. 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>48</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 that the highest court of a common law jurisdiction has claimed that such a duty exists.

The duty to give reasons, which is articulated in the procedural part of the judgment, not only seems premised on an idea of the inherent dignity of the individual,<sup>49</sup> but was considered necessary in large part to make possible the kind of reasonableness review described in the substantive part of the judgment. 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, the immigration statute and the Immigration Department's own regulations and guidelines, it seems clear that Article 3 was the main, perhaps the only, source of inspiration for the idea.<sup>50</sup>

This is only fitting. The idea, expressed in various ways in the immigration regimes of these countries, that non-citizens who have become deportable are not subject to the completely unfettered discretion of the immigration department, but have to be treated in a way that is attentive to humanitarian considerations, is, I suspect, itself a postwar innovation, inspired by the international law discourse on human rights. For the idea is that the officials should not be attentive only to policy/political considerations, but must take into account the humanity of the individuals subject to the decision and the impact of the decision on them. The idea of the individual as bearer of human rights is, in other words, behind the idea that any individual subject to official power must be treated in a way respectful of his or her status as a member of humanity. And it should be no great surprise if the developing international human rights discourse is then used to fill out the content of humanitarianism.

In my view, these cases together evoke the two important themes of jurisprudence on international human rights norms. First, there is the theme that a public commitment to membership in the international human rights community must, on pain of conviction of hypocrisy, be given domestic legal force.<sup>51</sup> Second, there is the theme that 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, for example, public policy. Human rights cannot be considered in the sense of being 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>52</sup>

In contrast, the stance of the judges in dissent in these sorts of cases, or who do not follow this line of thought, 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>53</sup> The prerogative is preserved in that even when the immigration statute prescribes that officials must take humanitarian considerations into account, how these are to be taken into account is said by the judge to be within the discretion of the official.

But even where there is no statute in issue, so that the exercise of executive authority is based entirely on the prerogative, common law courts are showing that they are willing on occasion to extend the reach of the rule of law, as is illustrated by *Abbasi v. Secretary of State for Foreign and Commonwealth Affairs & Secretary of State for the Home Department*.<sup>54</sup> Here the English Court of Appeal had to deal with the detention of Mr Abbasi in what it described as a “legal back hole”.<sup>55</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 of America and so beyond the jurisdiction of English courts. Challenges in the courts in the United States had led nowhere, as, on the Court of Appeal’s description, these courts had held that the “legality” of the detention of foreign nationals rested “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>56</sup>

Abbasi’s lawyers sought a finding from the Court that the Foreign Secretary owed Abbasi a duty to respond positively to his and his mother’s 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 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>57</sup> Lord Phillips then went on to accept the argument that Abbasi's detention contravened "fundamental principles recognised by both jurisdictions and by international law". He referred here to both common law and USA constitutional law<sup>58</sup> and to the *International Covenant of Civil and Political Rights*, which in Article 4 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 ...".<sup>59</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* supported the contention that the Foreign Secretary owed Abbasi a duty to exercise diplomacy on his behalf. But the Court did not conclude that therefore the government was right that decisions by the executive are non-justiciable when these pertain to its dealings with foreign states regarding the protection of British nationals abroad. Rather, the Court drew on *Council of Civil Service Unions v Minister for the Civil Service*<sup>60</sup> for the following 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." 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 the practice continue, but that the subject is entitled to have the promise or practice properly considered before any change is made.<sup>61</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>62</sup> Here the Court referred to one of its prior decisions where it was accepted, following *Teoh*, that ratification by the United Kingdom of an international convention could in principle create a legitimate expectation.<sup>63</sup>

The Court then noted that the Foreign and Commonwealth Office had a policy of assisting British citizens abroad when there is evidence of miscarriage or denial of justice. Since in *Abassi*’s case, the denial was of a fundamental right, it followed that he had a legitimate expectation that the government would “consider” making representations.<sup>64</sup> 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”,<sup>65</sup> The Court stressed the limited nature of the expectation, that the individual’s request will be properly considered, that is, weighed against all the other non-justiciable and highly sensitive political factors.<sup>66</sup> The “extreme case”, the one where 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>67</sup> Finally, the Court expressed its confidence that the appellate courts in the United States would prove to have the “same respect for human rights as our own” and it 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 would be.”<sup>68</sup>

The Court is thus engaged in a process of letting the executive know that it would be concerned if the executive departed from its practice and it is also sending a disapproving

message to the government and courts of the United States, a message which it is worth noting has been strongly reinforced by a member of the House of Lords, Lord Steyn, who has made two speeches in which he has suggested to both the US Supreme Court and his own that they put their rule of law house in order.<sup>69</sup> There is, however, more to the judgment than that.

As Charlotte Kilroy has pointed out,<sup>70</sup> the Court left open the possibility of more intrusive review in other circumstances, 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. But, as she also points out, 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 its prerogative power”,<sup>71</sup> and, I would add, reluctant to allow foreign governments to hide behind the doctrine of comity. And I think it is this issue that explains Lord Phillips’s reference to the role of international human rights conventions in legitimately influencing a court’s understanding of the legitimate expectations that individuals have. 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 the argument put forward by Nicholas Blake for Abbasi that the “increased regard paid to human rights in both international and domestic law”<sup>72</sup> meant that international law could no longer be regarded as a matter of relations between states but as giving “rise to individual rights”.<sup>73</sup> These rights might not manifest themselves in the domestic legal order as enforceable duties, but still can play a role in controlling public authorities. Moreover, the role they play is not through backdoor or front door incorporation, but rather, as the judges see it, through enriching the judges’ sense of the content of the common law constitution, the topic of my next section.

## THE COMMON LAW CONSTITUTION AND INTERNATIONAL LAW

A fruitful way of capturing the difference between these cases and those which work with the very formal account of 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 updating, judges no longer consider their role to be as guardians of values that sustain the relationship between citizen and state but also, even primarily, as values that sustain the relationship between individual and state, where 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 reconceptualisation of the judicial role—there is an important sense in which it should not be overestimated. The common law of judicial review always depended for its legitimacy on the claim that there is 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. So 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 which 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 what those values evolves.

If one were to take the dualism of the partial dissent in *Baker* seriously, one would have to take seriously the political objection that supports dualism, that parliament has a monopoly on creating legal value within the domestic legal order. But that objection applies with equal force to the majority's finding that there is a common law duty to give reasons, as well as to the extension of reasonableness review to discretionary decisions, which at most in the past would have been considered reviewable on a much less strict standard, in Canada patent or manifest unreasonableness.<sup>74</sup> At least, 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. But the device cannot be stretched to include 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 the dissenters in *Teoh* and *Baker* did, to indicate simply that judges have reached the limits of their review authority. But equally, and I would argue better, is the understanding that one of the contributions made by the process of judicial domestication of international human rights law is to further underline the poverty of the *ultra vires* doctrine as a justification for judicial review. This process underlines 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.<sup>75</sup> Put differently, overcoming dualism about international norms may help us finally to move away from the kind of internal dualism sustained by legal positivist accounts of the judicial role in upholding the rule of law.

The idea of constitutionalism I am relying on here is quite different from the one which seems to be at stake in current debates among international lawyers about, to draw on

the title of a paper by Laurence Helfer, “Constitutional Analogies in the International Legal System”.<sup>76</sup> 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.<sup>77</sup>

In the common law of judicial review, legality and legitimacy are deeply implicated, 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. The legislature, even in a legal order where there is no written constitution of any sort, is answerable to the same set of values and principles.

I do however want to adapt one of Helfer’s suggestions, 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. Similarly, he argues that that tribunal structure of the World Trade Organisation , 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. 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 the 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.

But my adaptation is largely a negative one in the sense that I want to argue that a different kind of constitutionalism emerges when domestic courts for rule of law reasons refuse to enforce decisions made by international bodies. If, as I suggested earlier, there were good rule of law reasons for a domestic court to resist an extradition order based on the listing mechanism of the 1267 Committee, then a court's refusal to accord authority to that mechanism indicates that there has been a failure of legality which the Security Council has to remedy before its legislation will merit respect. And, on the assumption that listing a person in this manner is an illegal act, in principle someone who had been listed and who had suffered as a result would be able to claim damages from the institutions that had participated in this process. Of course, if the United Nations were to be sued, it would rely on the doctrine of immunity. But, as August Reinisch has argued, the doctrine of immunity, whether of states or international organizations, is overdue for revision, especially when the legal wrong for which redress is sought is a violation of human rights.<sup>78</sup>

As Reinisch points out, and as we saw was argued on behalf of Abbasi, there is an emerging international standard of a human right of access to a court, a right recognised in the constitutional law of many legal orders, and Reinisch claims that 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".<sup>79</sup> 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 be in principle bar to a legal claim when the violation of human rights is in issue. Further, as Ruth

Wedgwood has pointed out, the idea of immunity that gets in the way here is analogous to the idea of prerogative power.<sup>80</sup>

Notice that if the Canadian government were to react to a judicial decision which accepted the legal arguments made by Hussein's lawyers by legislating into the criminal law the listing mechanism, this measure 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" that there are "reasonable grounds to believe that ...". 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 and the Solicitor General can withdraw the information with the effect that the judge must pretend that it does not exist when determining the reasonableness of the decision to list.<sup>81</sup> As argued by Kent Roach, this procedure seems to amount to a usurpation of judicial independence, thus invoking the idea of a bill of attainder mentioned earlier.<sup>82</sup>

The point here is not that such an argument will succeed, even if it is given a place within an entrenched bill of rights, as in Article I, Section 9 of the American constitution: "No Bill of Attainder or ex post facto law shall be passed".<sup>83</sup> Rather, the point is that whether or not judges either can or will do something about the affront to legality in a bill of attainder, it is important to see it for what is. As TRS Allan argues in the leading theoretical treatment of the rule of law, the substance of the argument against bills of attainder pertains to the fact that the statute in issue offends the constitutional guarantee, written or unwritten, of an independent judiciary presiding in open court over determinations of guilt and punishment. A bill of attainder, he says, is just "the paradigmatic example of legislation whose violation of the principles of equality and due process contravenes the rule of law."<sup>84</sup>



The repugnance of the common law tradition to such statutes is born of the idea that while the legislature can enact into law its understandings of subversion and other offences, the rule of law requires both that that offence be framed generally and that anyone accused of such an offence be tried in a court of law. In other words, the argument is a deeply normative one, not so much about the separation of powers, as 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.

I want then to suggest that the separation of powers is not so much about checks and balances as about the realization of, in Kantian terms, a republican ideal. In 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 (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>85</sup> As Bielefeldt explains, the republican ideal seeks to prevent the general will from getting "lost in the problems of everyday power politics". 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>86</sup> In this way, the separation of powers is not, or not only, the idea put forward by Montesquieu and others, an external means of moderating legislation. Rather, it is an internal means of institutionalising 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>87</sup>

However, my claim is not that international law is best explained as a Kantian order of right.<sup>88</sup> I merely wish to emphasize that the offensiveness of an act of attainder, what makes it repugnant to the rule of law, is not ultimately the separation of powers but the reasons for having a separation of powers. Moreover, once this point is appreciated, one can also come to appreciate that a failure of legality or of the rule of law takes place even when no institution exists which can provide a remedy. That no remedy is in fact possible tells one that there is a failure from the perspective of the rule of law. 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 they make that choice, it is incumbent on them to design and put in place institutions that make it possible for legal authorities to exercise their power according to law.<sup>89</sup>

The tale of the evolution of the common law of judicial review—the rule of the principles of administrative law—is 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 reflect on how better design might assist to ensure official or public accountability to the values of the rule of law.

However, if institutional solutions cannot be found for a rule of law pathology created by an exercise of power, then that exercise of power is not one that can be filtered through law and thus it lacks legal authority. In short, the choice for the rule of law is the same as the choice for law.

## THE CHOICE FOR LAW AND THE RULE OF LAW IMPERATIVE

In *The Gentle Civilizer of Nations*,<sup>90</sup> 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, there is a critique of romantic accounts of the rule of law, 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, there is 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 which is worth having because it can assist in an emancipatory project capable of constructing an international community which will give “voice to those who are otherwise routinely excluded”.<sup>91</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. I think that one can discern from the respect more than the trait of careful scholarship on a formidable figure in the discipline, but also a kind of yearning for the possibility of “a morality of sweet reasonableness”. And Koskenniemi is keen to emphasise both the pragmatic aspect of Lauterpacht’s constructivist understanding of international law and the fact that Lauterpacht’s view of law was not the kind of natural law where 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>92</sup>

An analogy to this idea, reminiscent of the Weberian distinction between an ethic of conviction and an ethic of ultimate ends, 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, from outside of law by one’s ethical stance. Kelsen, as a pacifist, dedicated to affirming the autonomy of the individual, opted as we have seen for the primacy of international law. Lauterpacht, who wrote a brilliant essay on Kelsen in 1933,<sup>93</sup> 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. And legal order could not, he thought, be understood without reference to natural law. This thought is, I think, important for resisting Kelsen’s dichotomy, as it is important to resist 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>94</sup>

In his essay on Kelsen, Lauterpacht recognises the reasons why Kelsen turned away from natural law. As he indicates in the epigraph to this paper, he is well aware of the history of the abuse of the category of natural law. Lauterpacht also rightly suspects 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 honour of man”.<sup>95</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>96</sup>

But, as Lauterpacht effectively shows, Kelsen, while committing himself to the fundamental postulate of legal order as a unity, bound together by his *Grundnorm*, wishes to claim that the *Grundnorm* is not a precept of natural law. Rather, it is a hypothesis of the legal scientist, one which translates might into right, but without any ethical consequence. The subsequent emptiness of the idea means that the hypothesis works out for judges as an authorization to use discretion to decide cases about the interpretation of the law, where discretion means that 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>97</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”. As in my argument in the last section, his claim is not one about judges necessarily having the last word about what counts as a valid law, but about the way in which judicial interpretation 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 recognition, by ideas for which the term natural law is an elastic and convenient expression”.<sup>98</sup>

Recall from the Introduction Lauterpacht’s view 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>99</sup> This view is deeply opposed to the Hobbesian vision not only of international law, but also of law in general. And, as Koskenniemi has noted,<sup>100</sup> Lauterpacht’s contrasting vision is very much a

common law one which contests the idea that the international domain is a lawless state of nature where the only obligations are those to which states consent.

For example, in his essay “The Grotian Tradition in International Law”,<sup>101</sup> Lauterpacht finds Grotius’s 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’s 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 scheme of legal science”.<sup>102</sup> Second, the totality of the relations between States [are] governed by law... There are no lacunae in that subjection of States to the rule of law”. Here Lauterpacht emphasizes Grotius’s rejection of any absolute right of the state to self-preservation through his insistence on the distinction between just and unjust war.<sup>103</sup> Third, there is Grotius’s view “that the law ... binding upon States is not solely the product of their express will”. The precept *pacta sunt servanda* is not the product of a practice whereby states consent to be bound by international law, but 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 there must assert itself—unless anarchy or stagnation are to ensue—the persuasive but potent authority of reason and principle derived from the fact of the necessary coexistence of a plurality of states”.<sup>104</sup> And he shows how Grotius thus rejected altogether the idea that “reason of State” could be invoked as the basis of international law, and Lauterpacht suggests that modern

theories of international law as a law of coordination between states have a direct affinity with what Grotius rejected when he rejected reason of state.<sup>105</sup>

In my view, it is important to see that there are two levels of analysis here 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>106</sup> I cannot properly address their arguments here. Instead, I want to address the arguments of normative or political positivists, those who argue that there is a basis in political morality for the legitimacy of legal order, but conclude from that basis that the best way to understand law is as positive law.<sup>107</sup>

Political positivists argue that in a world where there are deep ideological divisions, law can perform the useful function of establishing a stable framework of rules for interaction. But law can only perform this function if its components, its rules, are determinate. There must exist public tests 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. These public tests are themselves rules about rules or secondary rules, which means that 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 which exists as a matter of fact about dominant 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 a 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 sorts of political argument which 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 than the others. A supreme legislature, a staff of independent officials or judges to interpret the law, and an administration capable of implementing and enforcing the law, are the institutions. 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, of the lack of a supreme legislature, that lack is not fatal. It is not the lack of the legislature that will disqualify international law from being law, but the inability of international law to perform law's function. So if international lawyers today can either find ways of showing how international law already serves this function, or how suitably reformed it could, 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, there is a question about why those subject to it should comply with its rules. One answer in the positivist tradition 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 and so the sanctions attached to primary rules provide sufficient reason to legal subjects for obedience. The fact 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. But, as in the case of the separation of



powers, political positivism will not require sanctions as a necessary feature of legal order unless without sanctions law cannot serve its function. More important is that, with the exception of John Austin and Kelsen, no eminent legal positivist I know of has thought the existence of sanctions to be an adequate answer to the question. For political positivists, the argument from the legitimating basis of legal order to the conclusion that positivism is the best way to understand law must be the reason that at least a significant number of those subject to the law 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?", because he wants to show that the basis of legitimacy can be made up of components that transcend ideological division, components on which the actors in the international legal order can agree whatever their different views on justice and which thus explain the astonishing (to an Austinian positivist) fact of compliance despite the lack of sanctions.<sup>108</sup>

This still leaves the question that occurs at what I called the second level.<sup>109</sup> Once one has established the legitimating basis of legal order and at the same time worked out the structure of legal order, shaped by one's conception of law's function, there is the question about how legal power is to be exercised, by which I mean 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 the 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 the 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 and foremost seek to determine the actual content of the law. Only if they find that there is no actual or determinate content are they free to act on their own interpretation, which they

should make in the all things considered 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 the positivist one in making claims mainly 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 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, while the values which for the positivist tradition compose the set of rule of law values—certainty, stability, and so on—are 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 both the requirements of natural justice and the requirement that all decisions be given or be capable of being given a reasonable justification), the liberty and dignity of the legal subject, are all very strong candidates for the common law's stock of legal values. But while some or all of these values will figure in many attempts to find a first level justification for law, 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 then have to be incorporated from the outside of law, as positivists would have it; the values are necessarily implicated in the process of working the law pure.

It is at this second level that 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 way in which legal authority manifests itself, if it wishes to claim

to be such, that is, either legal or authoritative. As is the case with political positivism, issues about the other features of legal order, for example, the structure of the separation or division of powers, are not essential; what matters most is service to 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 that exercise is just. Another way of putting this last point is to say that the exercise must not be arbitrary—it must be in accordance with the law. But that point can and is of course also made by political legal positivism. The difference resides in the substantive content of justice the common law equates with non-arbitrariness.

If we revert to the epigraph from Lauterpacht, the point 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 the inside of legal order. Like Lauterpacht, I think it 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 put it, the exception could be banished from the world.<sup>110</sup>

In common law legal orders, the gradual subjection of prerogative powers to the control both of legislation and the common law can rightly be thought of as the way in which that hope is expressed 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 achieve harmony between the norms of both by choosing to regard both as parts of a unity is an important step in the move away from the misery of the state of nature. But where Kelsen goes wrong is in refusing to countenance the thought that enlightenment is 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 it turns out that Hobbes is a surer guide than Kelsen, for he sees that the exercise of legal authority is conditioned by an understanding of the laws of nature. It is, in my view, significant that if one looks to Hobbes himself, rather than to the Hobbesian or, as I prefer to put it, the Hobbist tradition of political and legal thought, it is clear that Hobbes 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 carry authority.<sup>111</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>112</sup> Hobbes's claim that the sovereign cannot do injustice is a shorthand way of saying that the sovereign's laws cannot be unjust. But before laws can achieve the status of immunity to charges of injustice, they first have to achieve the status of law and to achieve that status they have to be in compliance not only with secondary rules but also with the laws of nature. Hobbes is clear both that all laws require interpretation and that interpretation is a task that falls to an independent staff of officials, judges, who must have regard to the law alone when deciding what is required by law.

Hobbes also says that it would be an insult to the sovereign for judges ever to impute inequity to the sovereign, thus requiring judges to seek to interpret the law in a way that makes it consistent with equity. And he says that 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 beyond the law that requires equity. 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 the case for Hobbes that judges are best understood not as competitors for sovereign authority, but as the sovereign's agents in that they complete the legislative process in their interpretations.<sup>113</sup> In common with the common law position, he holds the view that all the legal powers within civil society must be understood as engaged in a project of realising the values of the laws of nature, many of which reflect both the principles which Lauterpacht outlined as general principles of law and the principles developed in the common law of judicial review.

In my view, there is a strong case to be made that for Hobbes sovereign commands that are technically valid but not justifiable as particularizations of the laws of nature are sustained by the sovereign's power and not by his claim to obedience through an exercise of authority. The rational legal subject does not obey the law because he fears the sovereign's sanctions, but because the law rightly claims his obedience. And a technically valid command that undermines the point of obedience to law has no claim on obedience, which is to say it is not authoritative. It might well be enforced despite its lack of authority, but the relationship between sovereign and subject is at that moment transformed into a relationship between individual and individual in the state of nature.

In the same way, I want to claim, the Security Council's delegation of power to the 1267 Committee and the 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 from a domestic court, 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 favour of immunity and giving someone access to a court without which he or she will find himself in a legal void, or between enforcing what looks like an international obligation, particularised by a domestic statute, to give force to a list of suspected terrorists and respecting the requirements of the common law constitution. Kelsen would, it seems, recommend that in every situation where 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 Kelsen's refusal to move beyond moral relativism to require that the choice automatically be for the international norm. Finally, judges should be loath to characterize the issue as a clash between two norms, until the point that characterization is forced on them by a very explicit statement in a technically valid legal instrument. Far better, I suggest, is to adopt the view taken by the common law judges I described earlier, which I take to be more or less the 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>114</sup> One should thus, he argued, regard international law as a law of “subordination”, subjection to the rule of law, so that its future development is conditioned by a progressive approximation to the “those standards of morals and order which are the ultimate foundation of all law”.<sup>115</sup> The choice for law, whether by judge or jurist, is then a choice to make every effort to realise the substantive values of the rule of law in both the domestic and international legal orders.

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<sup>1</sup> Paul Martin assisted me hugely both with research for and substantive comments on this draft.

<sup>2</sup> In *International Law: Being the Collected Papers of Hersch Lauterpacht*, systematically arranged and edited by E Lauterpacht, QC (Cambridge: Cambridge University Press, 1970), Volume 2, 307, at 333.

<sup>3</sup> Hersch Lauterpacht, *The Development of International Law by the International Court*. (London: Stevens & Sons Limited, 1958).

<sup>4</sup> *Ibid.*, 158-72.

<sup>5</sup> *Ibid.*, 158.

<sup>6</sup> Thomas M Franck, *Fairness in International Law and Institutions* (Oxford: Clarendon Press, 1995) 5.

<sup>7</sup> See Thomas M Franck, *The Power of Legitimacy Among Nations* (Oxford: Clarendon Press, 1990). See on this point, Lauterpacht, “The Nature of International Law and General Jurisprudence”, in *International Law: Being the Collected Papers of Hersch Lauterpacht*, Volume XXX, especially at 7-8. At 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”.

<sup>8</sup> Lauterpacht, *The Development of International Law by the International Court*, 4-5.

<sup>9</sup> *Ibid.*

<sup>10</sup> See for example *ibid.* 155-7 and 166-7.

<sup>11</sup> *Ibid.*, 158.

<sup>12</sup> *Ibid.*, 165.

<sup>13</sup> *Ibid.*, 162.

<sup>14</sup> *Ibid.*, 171-2.

<sup>15</sup> Here I echo terminology used in PF Strawson’s essay, “Freedom and Resentment”, in *Freedom and Resentment and Other Essays* (Methuen: London, 1974) 1.

<sup>16</sup> I rely here on just one, though a very central, work in Kelsen’s corpus, the *Reine Rechtslehre* (1934), translated by Bonnie Litchewski Paulson and Stanley L Paulson under the title *Introduction to the Problems of Legal Theory* (Oxford: Clarendon Press, 1992), chapter IX.

<sup>17</sup> *Ibid.*, 108-9, 113-14.

<sup>18</sup> I do not claim at all that the common law’s conception of the rule of law has more to offer to the debate about international administrative law than civil law systems. The latter may offer more, but here my ignorance is a fact if not an excuse.

<sup>19</sup> I rely very heavily in what follows on an as yet unpublished and excellent paper by Alexandra Dosman, “Terrorist Financing in the Balance: International Law, Domestic Law, and the Listing of Terrorist Entities in Canada”, *University of Toronto Faculty of Law Review* forthcoming 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, available at <http://www.edelsonandassociates.com>. I thank David Paciocco for answering some queries about the episode.

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<sup>20</sup> Paul C Szasz, “The Security Council Starts Legislating” (2002) 96 *American Journal of International Law* 901.

<sup>21</sup> *Ibid.*, 901-2.

<sup>22</sup> Dosman, “Terrorist Financing in the Balance”.

<sup>23</sup> This order added names to a list already issued by executive order issued on 23 September 2001, executive order 13224, issued primarily under the authority of *International Emergency Economic Powers Act* (50 USC), but also claiming the authority of various other statutes and United Nations Resolutions. In “Why the President (Almost) Always Wins in Foreign Affairs: Lessons of the Iran-Contra Affair”, (1988) 97 *Yale Law Journal* 1255, Harold Hongju Koh points out that 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; 1263-65.

<sup>24</sup> *Ibid.*

<sup>25</sup> Edelson and Paciocco Factum ¶¶ 45-57.

<sup>26</sup> *Ibid.*, ¶¶ 58-71. The factum argues that laying regulations before Parliament is not a sufficient democratic safeguard.

<sup>27</sup> *Ibid.*, ¶¶ 72-78. They also argued that the Regulations violated section 2(d) of the *Charter*, which protects freedom of association, since they prevent association with persons in the absence of reasonable grounds to believe they are involved in terrorism, or penalises “unwitting or innocent association with persons who are involved in terrorist activities”; ¶¶ 79-96. And 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”; ¶¶ 98-114. (Note that in XXXX, Canada’s Supreme Court has subsequently rejected this kind of challenge to the *Extradition Act*.)

<sup>28</sup> *Ibid.*, ¶¶ 115-126.

<sup>29</sup> See for example Patrick Macklem, “Canada’s Obligations at International Criminal Law” in Ronald J. Daniels, Patrick Macklem and Kent Roach, eds., *The Security of Freedom: Essays on Canada’s Anti-Terrorism Bill* (Toronto: University of Toronto Press, 2001) 353. Contrast Jutta Brunnée, “Terrorism and Legal Cahnge: An International Law Lesson”, *ibid.*, 341.

<sup>30</sup> For an analysis sympathetic to this kind of argument, see Andrea Bianchi, “Ad-hocism and the Rule of Law”, (2002) 13 *EJIL* 263, especially 269-72.

<sup>31</sup> At ¶ 58 of the Edelson and Paciocco Factum, the lawyers point out 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 which had been rejected by the Supreme Court in *In re Grey* (1918) 57 SCR 150. See Peter Hogg, *Constitutional Law of Canada* (Toronto: Carswell, 1998) 312-3. That they did not choose to rely on an argument akin to the one I will shortly outline does not undermine the one outlined, for reasons I explore in the text.

<sup>32</sup> Edelson and Paciocco Factum ¶ 125.

<sup>33</sup> Note, (1962) 72 *Yale Law Journal* 330.

<sup>34</sup> *Ibid.*, 331.

<sup>35</sup> See for example, 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* (XXXX: Kluwer, XXXX) who discusses the question when Council decisions are *ultra vires*. The options he contemplates for who might declare decisions to be *ultra vires* are states and the International Court of Justice. At 276-77, 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”. Contrast Ian Brownlie, *The Rule of Law in International Affairs: International Law at the Fiftieth Anniversary of the United Nations* (The Hague: Matrinus Nijhoff Publishers, 1998) Chapter 15, “The Role of the Security Council and the Rule of Law”. Brownlie, relying in part on 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 at 217-25.

<sup>36</sup> Bardo Fassbender, in a review of a book by Danesh Sarooshi about the Security Council’s delegation of its Chapter VII powers, 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*



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*United Nations and the Development of Collective Security: The Delegation by the UN Security Council of its Chapter VII Powers* (Oxford: Clarendon Press, 1999), 20, note 81, reviewed by Bardo Fassbender, Review Essay, "Quis judicabit? The Security Council: Its Powers and Its Legal Control", (2000) 11 *European Journal of International Law* 219, 228-32, quoting at 231, Hans Kelsen, *The Law of the United Nations: A Critical Analysis of its Fundamental Problems* (1951) 142. Fassbender says that 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 authorization by the constitution an organ is not entitled to delegate its power to another organ or entity". He continues: "The next task would then have been to interpret the UN Charter in order to determine the existence, possible scope and limitations of such an authorization, taking into account the Charter's singularity as well as its affinity to other constitutional documents". Fassbender, 231-2, footnote omitted.

<sup>37</sup> This point also works in reverse. That is, if there is a flaw from the perspective of the rule of law in a legislative deeming of guilt, that flaw will taint authority delegated to the executive to do the very same thing. Note in this regard that these listing mechanisms replicate the US *Foreign Narcotics Kingpin Designation Act* of 1999 (the *Kingpin Act*), which in turn aims to generalize the practice of sanctioning Colombian Drug traffickers by Presidential Executive Order. This Act provides for 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, one permitting the President to designate foreign persons deemed to be drug "kingpins" for sanctions, the second permitting the Secretary of the Treasury to designate "foreign persons" deemed to be facilitating the activities of the kingpins. The Act requires blocking of property subject to USA jurisdiction of designated individuals, prohibits US individuals from dealing with them, 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; see <http://www.law.stetson.edu/JudicialReviewCommission/finalreport.htm>.

While the Commission recommended that judicial review be introduced into the system as well as an internal system of administrative review, the majority of the Commission rejected the claim that the *Kingpin Act* amounted to a bill of attainder. On its understanding of USA constitutional jurisprudence, the Commission found that a bill of attainder has to be a law that is both specific and imposes punishment. It argued that because it is the executive not the legislature that names individuals, the constitutional protection against such bills does not apply, since it applies to legislation not executive action. In addition, it found that 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 the criminal penalties which could be imposed would be imposed by federal courts on the basis of "rules of general applicability" laid down by the legislature; 94-100.

Commissioner David B Smith delivered a minority report which was much more damning of the Act. He discussed the USA Supreme Court decision in *Joint Anti-Fascist Refugee Committee v. McGrath* 314 US 123 (1951), where in issue was 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. No opportunity to challenge one's listing was offered.

While the majority of the Court was divided, Smith highlights his agreement with Justice Black who thought it absurd to suppose that Constitution will deny the legislature the opportunity to do something odious while permitting the executive to do the very same thing. But as Smith points out, even if Black is wrong on this point of doctrine, he is right on substance, since the real issue is deeming of guilt. Indeed, he is a fortiori right since the executive branch operates under fewer constraints than the legislative branch. 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 that was impugned in *McGrath*. He was unimpressed by the claim that assets were only blocked not expropriated; 38-42.

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Where the majority of the Commission goes wrong is, as I will argue below, is in viewing the issue through the optic of the separation of powers though their recommendations make it plain that they did fully appreciate the problems for the rule of law created by the Act. For discussion of analogous problems, see my “Constituting the Enemy”, a 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 CLR 1, forthcoming in Andras Sajo, ed., *Militant Democracy*.

<sup>38</sup> See Jeremy Waldron, “Is the Rule of Law an Essentially Contested Concept (in Florida)?” (2002) 21 *Law and Philosophy* 137.

<sup>39</sup>

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<sup>41</sup> For a full account of all except the last case discussed in this section, see David Dyzenhaus, Murray Hunt and Michael Taggart, “The Principle of Legality in Administrative Law: Internationalisation as Constitutionalisation” (2001) 1 *Oxford University Commonwealth Law Journal* 5.

<sup>42</sup> 1577 UNTS 3.

<sup>43</sup> [1994] 2 NZLR 257 (CA).

<sup>44</sup> *Tavita*, 266.

<sup>45</sup> 265.

<sup>46</sup> (1995) 183 CLR 273 (HCA).

<sup>47</sup> [1999] 2 SCR 817.

<sup>48</sup> The Court also invalidated the decision on the ground of bias and recognised that the case could have been decided on this ground alone.

<sup>49</sup> See David Mullan, “*Baker v Canada (Minister of Citizenship and Immigration)*—A Defining Moment in Canadian Administrative Law” (1999) 7 *Reid’s Administrative Law* 145.

<sup>50</sup> As in other cases on the CRC, 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.

<sup>51</sup> Although the Court in *Baker* avoided relying explicitly on this theme.

<sup>52</sup> 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 in *Baker* the majority was clearly influenced by the fact that Canada had ratified, though had not incorporated by legislation, the CRC. Since *Baker*, the Supreme Court has retreated from its position expressed there and has adopted the view, more like that of the Federal Court of Appeal in *Baker* ((1997) 142 DLR (4th) 554 (Fed CA)), that judges must never evaluate the way that legally relevant factors figure in the official’s reasoning. They can check that the right reasons were taken into account, but may not go into the balance of reasons, which is to say, reweigh the reasons. It is hardly an accident that this apparent retreat from *Baker* took place in the first major decision in the national security area given by the Supreme Court after 11 September 2001, *Suresh v Canada (Minister of Citizenship and Immigration)*. [2002] 1 SCR 3. For comment, see David Mullan in Dyzenhaus, ed., *The Unity of Public Law* (Oxford: Hart Publishing, 2004).

<sup>53</sup> Thus in New Zealand in a subsequent Court of Appeal decision, Keith J suggested, against the claim in *Tavita* 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 Authority* (1996) 2 HRNZ 510 (CA), at 517. (*Rajan v Minister of Immigration* [1996] 3 NZLR 543 (CA) is similarly unenthusiastic about the approach suggested in *Tavita*.) In *Teob*, McHugh J 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 McHugh J’s dissent in *Teob*. When the Supreme Court decided *Baker*, both the majority and the partial dissent avoided any mention of *Teob*, in my view because dealing with *Teob* would have required the judges to confront the process/substance distinction very directly. For similar reasons, the majority avoided using the exact language of the CRC to describe the process whereby an official had to take into account the children’s interests.

<sup>54</sup> CA 2002.

<sup>55</sup> ¶ 64.

<sup>56</sup> *Abbasi*, ¶ 66.

<sup>57</sup> ¶ 53. One of the authorities relied upon was the famous decision of the House of Lords in *Oppenheim v Cattermole* [1976] AC 249, a decision in which the Court had to decide whether a decree passed in Germany in

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1941 which deprived Jews who had emigrated from Germany of their citizenship should be recognised by the English court. Lord Phillips quoted at length the passage from Lord Cross's judgment at 277 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 law at all"

<sup>58</sup> To Lord Atkin's dissent in *Liversidge v Anderson* and to a dictum of Justice Brennan for the US Supreme Court in 1963, where 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", *Fay v Noia* (1963) 372 US 391, 400, adopting Lord Birkenhead LC, in *Secretary of State v O'Brien* [1923] AC 603, 609.

<sup>59</sup> *Abbasi*, ¶ 63, 64.

<sup>60</sup> [1985] AC 374.

<sup>61</sup> *Abbasi*, ¶ 82.

<sup>62</sup> *Ibid.*, ¶ 83-5.

<sup>63</sup> *Ibid.*, ¶ 86, citing *R v Home Secretary ex p Ahmed and Patel* [1998] INLR 570, at 584.

<sup>64</sup> *Abbasi*, ¶ 99.

<sup>65</sup> *Ibid.*, ¶ 98.

<sup>66</sup> *Ibid.*, ¶ 99.

<sup>67</sup> *Ibid.*, ¶ 104.

<sup>68</sup> Cite to Inter-American Commission Proceedings.

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<sup>70</sup> Charlotte Kilroy, "R. (*on the application of Abbasi*) v Secretary of State for Foreign and Commonwealth Affairs: Reviewing the Prerogative" (2003) 2 *European Human Rights Law Review* 222.

<sup>71</sup> *Ibid.*, 229.

<sup>72</sup> *Abbasi*, ¶ 25.

<sup>73</sup> *Ibid.*, ¶ 39.

<sup>74</sup> Equivalent in the United Kingdom to *Wednesbury* unreasonableness and in the USA to an "arbitrary and capricious" standard.

<sup>75</sup> And, to take into account the discussion in the note on the *Kingpin Act*, values to which the executive is just as accountable as the legislature.

<sup>76</sup> Laurence Helfer, "Constitutional Analogies in the International Legal System", forthcoming in (2004) 37 *Loy. L.A. L. Rev.*, available from the Social Science Research Network Electronic Paper Collection at: <http://ssrn.com/abstract=437180>.

<sup>77</sup> My argument here owes much to Mark Walters. "The Common Constitution and Legal Cosmopolitanism" in Dyzenhaus, ed., *The Unity of Public Law* (Oxford: Hart Publishing, 2004) 431. 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"; 440. However, Walters argues, 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*. Walters argues that *Baker* and other cases discussed above show 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*. And that revival can, he thinks, meet the challenge of legal back holes.

<sup>78</sup> August Reinish, *International Organizations Before National Courts* (Cambridge: Cambridge University Press, 2000) 281 ff.

<sup>79</sup> *Ibid.*, 282. He notes that it is surprising that this contradiction is rarely discussed, though in note 147 he cites as an exception Lauterpacht's 1951 article, "The Problem of Jurisdictional Immunity of Foreign States", *International Law: Being the Collected Papers of Hersch Lauterpacht*, Volume 3, 315, 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"; 316-17. See further Lauterpacht, "State Sovereignty and Human Rights", *ibid.*,

Relevant here is the case of Maher Arar, a Canadian citizen who was detained in the USA in September 2002 while in transit to Canada. According to Arar he was very aggressively interrogated by USA 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

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intervene as an added party in the appeal against the decision of the Ontario Superior Court of Justice in *Bouzari v Iran* [2002] OJ No. 1624, in which the Court in a rather unimaginative judgment held that Canada's *State Immunity Act RSC 1985, c S-18*, which provides foreign states with immunity from the jurisdiction of Canadian courts, barred Bouzari's claim against Iran for 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 based on an argument about where international law was progressing and should be progressing. But 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. Note that 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 January 22, 2004.

<sup>80</sup> Ruth Wedgwood, "International Criminal Law and Augusto Pinochet" (2000) 40 *Virginia Journal of International Law* 829, at 839-40.

<sup>81</sup> See Dosman,

<sup>82</sup> Ken Roach, *September 11: Consequences for Canada* (Montreal & Kingston: McGill-Queen's University Press, 2003) 36-8.

<sup>83</sup> See note on *Kingpin Act* above.

<sup>84</sup> Allan, *Constitutional Justice: A Liberal Theory of the Rule of Law*, 148.

<sup>85</sup> Heiner Bielefeldt, *Symbolic Representation in Kant's Practical Philosophy* (Cambridge: Cambridge University Press, 2003) 111. For the standard English translation, see Kant, *Perpetual Peace: A Philosophical Sketch* in Hans Reiss, ed., *Kant: Political Writings* (Cambridge: Cambridge University Press, 1993) 93, at 101.

<sup>86</sup> Bielefeldt, 112, emphasis removed.

<sup>87</sup> *Ibid.*, 113-14.

<sup>88</sup> As in Teson's work, see

<sup>89</sup> See Bianchi, "Ad-hocism and the Rule of Law", 269-72.

<sup>90</sup> Martti Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870-1960* (Cambridge: Cambridge University Press, 2001).

<sup>91</sup> *Ibid.*, 517.

<sup>92</sup> *Ibid.*, 410.

<sup>93</sup> H. Lauterpacht, "Kelsen's Pure Science of Law", in WI Jennings, ed., *Modern Theories of Law* (Oxford: Oxford University Press, 1933) 105.

<sup>94</sup> See Bianchi, "Ad-hocism and the Rule of Law", 264-5.

<sup>95</sup> *Ibid.*, 131.

<sup>96</sup> *Ibid.*

<sup>97</sup> For this reason, I think 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 [HLA] Hart's is"; Richard A. Posner, *Law, Pragmatism, and Democracy* (Cambridge: Harvard University Press, 2003) 269. 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"; *ibid.* 281. To make that distinction one needs precisely the kind of Fullerian idea of an internal morality of law that Posner dismisses at 282. In "The Rule of Law and Its Virtue", Joseph Raz attempts to turn Fuller's internal morality into something very much like a Kelsenian account of the rule of law.

<sup>98</sup> H. Lauterpacht, "Kelsen's Pure Science of Law", in WI Jennings, ed., *Modern Theories of Law* (Oxford: Oxford University Press, 1933) 105, at 133.

<sup>99</sup> *Ibid.*

<sup>100</sup> Martti Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870-1960* (Cambridge: Cambridge University Press, 2001) 369.

<sup>101</sup> Note XXX *supra*,

<sup>102</sup> *Ibid.*, 326.

<sup>103</sup> *Ibid.*, 327-8.

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<sup>104</sup> Ibid, 331.

<sup>105</sup> Ibid, 340-6.

<sup>106</sup> 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.

<sup>107</sup> 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: "Legal Positivism as Normative Politics: International Society, Balance of Power and Lassa Oppenheim's Positive International Law", (2002) 13 *European Journal of International Law* 401. 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 to engage coherently with them". 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" Benedict Kingsbury, "The International Legal Order", in Peter Cane and Mark Tushnet, eds, *Oxford Handbook of Legal Studies* (Oxford: Oxford University Press, 2003) 271, at 281. My own view, for reasons explored below, is that Grotianism is inconsistent with positivism.

I address analytic legal positivism in "The Genealogy of Legal Positivism" (2004) *Oxford Journal of Legal Studies*. There I argue that analytic legal positivism is an unproductive diversion, started by John Austin, from the political tradition of Hobbes and Bentham and so I welcome the revival of normative positivism by Waldron and others. It is worth noting in this regard that 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'", (1984) 78 *American Journal of International Law* 405. Note also that when I discuss political legal positivism below I will at times rely on terminology developed within the tradition of analytical legal positivism, especially by HLA Hart. My claim, following Ronald Dworkin, about analytical legal positivism is not that analytical arguments are unhelpful to understanding the problems of legal order, only that they are helpful only when nested in political theories of law.

<sup>108</sup> See chapter XXX

<sup>109</sup> See on this the work of Jutta Brunnée and Stephen J. Toope, exemplified for the purposes of my argument, in "Persuasion and Enforcement: Explaining Compliance with International Law" (2002) 13 *Finnish Yearbook of International Law* 1. Taking their inspiration, as do I, from the legal theory of Lon L. Fuller, they argue that Franck is right that internal features of law must play a role in an account of the legitimacy of law, but that 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.

<sup>110</sup> Carl Schmitt,

<sup>111</sup> Similarly, I think it significant that in his later reflection on the topic of legitimacy, *Fairness in International Law and Institutions*, Franck includes a chapter on "Equity as Fairness". In regard to the first level of legitimacy, Hobbes does argue that anyone who is not a prisoner or slave within civil society should understand that he has consented to the authority of the sovereign. But since he considers all actual sovereign power to be originally won by violence, he does not think that 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". 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; Bobbio, *Thomas Hobbes and the Natural Law Tradition* . But, as I will suggest in the text, this understanding neglects Hobbes's account of the role of judges.

<sup>112</sup> Hobbes does not limit the exercise of the sovereign's power to making laws which will then authorize his officials to implement the law. The sovereign may and sometimes must also act in exceptional situations, including foreign affairs. But 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 understandings 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.

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<sup>113</sup> Although he seeks to ensure that their judgments do not compete with the general laws by refusing them application beyond the particular case.

<sup>114</sup> See Lauterpacht, "The Nature of International Law and General Jurisprudence", 19.

<sup>115</sup> Ibid.