HiiL innovating Justice

Policy Brief



The Internationalization of Rule of Law

Changing Contexts and New Challenges

About the project

The nature, objectives, and effects of rule of law promotion are undergoing major transformations as a result of the increasing international and transnational dimensions of governance. This policy brief, conducted under the auspices of the Hague Institute for the Internationalisation of Law (HiiL), is part of a multi-year research project which aims to explore the consequences of internationalization for contemporary rule of law promotion.

In the first phase of this project, the research team described and analyzed the various strategies, mechanisms, and processes that influence rule of law dynamics across borders and the national/international divide. These results were published in: Michael Zürn, André Nollkaemper and Randall Peerenboom (eds.), *Rule of Law Dynamics / In an Era of International and Transnational Governance* (Cambridge: Cambridge University Press, 2014).

In the second phase, the research proceeded along three separate tracks:

1. Rule of law promotion and legalisation beyond the nation-state
2. New checks and balances
3. The challenges of rule of law promotion in middle-income countries

This policy brief presents the outcomes of tracks 1 & 2, and is a collaborative effort between HiiL, the Amsterdam Centre for International Law, and the Social Science Research Center Berlin.

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Publications

The research on which this policy brief was based can be found in:

- Monika Heupel, Gisela Hirschmann and Michael Zürn (2015). "Internationale Organisationen und der Schutz der Menschenrechte" in Eugénia da Conceição-Heldt, Martin Koch and Andrea Liese (eds.) *Internationale Organisationen: Autonomie, Politisierung, interorganisationale Beziehungen und Wandel*, Special Issue 49.
- Theresa Reinold and Michael Zürn (2014). "'Rules about rules' and the endogenous dynamics of international law: Dissonance reduction as a mechanism of secondary rule-making" *Global Constitutionalism* vol. 3, pp 236-273. doi:10.1017/S2045381714000045.
- Monika Heupel (2013). "With power comes responsibility: Human rights protection in United Nations sanctions policy" *European Journal of International Relations* vol. 19 no. 4, 773–796. DOI: 10.1177/1354066111426621.
- Theresa Reinold (2014). "The 'Responsibility Not to Veto', Secondary Rules, and the Rule of Law." *Global Responsibility to Protect*, vol. 6, no. 3, 269–294. DOI: 10.1163/1875984X-00603002.
- Machiko Kanetake and André Nollkaemper (eds., forthcoming, 2015). *The Rule of Law at the National and International Levels: Contestation and Deference* (Hart Publishing).
- Machiko Kanetake and André Nollkaemper (2014). "The Application of Informal International Instruments before Domestic Courts" *George Washington International Law Review*, vol. 46, no 4.
- Machiko Kanetake (2012). "The Interfaces between the National and International Rule of Law: The Case of UN Targeted Sanctions" *International Organizations Law Review* vol. 9, 267–338.
- Machiko Kanetake (forthcoming, 2015). "Catching up with Society-What, How, and Why: The Regulation of the UN Security Council's Targeted Sanctions" in Hironobu Sakai, Akiho Shibata, and Shotaro Hamamoto (eds.), *Essays in Honour of Professor Ryuichi Ida: L'être situé, Effectiveness and Purposes of International Law* (Brill Publishing).
- Monika Heupel (2012). "Judicial Policymaking in the EU Courts: Safeguarding Due Process in EU Sanctions Policy against Terror Suspects" in *European Journal on Criminal Policy and Research* vol. 18, no. 4, 311-327.

Introduction

The proposition that those who exercise governmental authority ought to be subject to a range of legally proscribed procedural and substantive constraints is widely thought to be constitutive of the rule of law, and has long shaped our thinking about the appropriate relationship between the state and its citizens. Indeed, it continues to shape our thinking to this day. Even after making allowances for the fact that substantial disagreement persists about what the rule of law requires in practice, the principle itself arguably commands a wider degree of acceptance today than at any previous point in history.

Yet this broad acceptance does not mean that the rule of law is static, nor that it is immune to changing circumstances. Policymakers, scholars and the general public are increasingly attuned to the fact that the singularly important feature of political and legal authority in the contemporary world is its increasing *internationalization*. The regulatory universe is no longer populated solely by states; indeed, authority is now dispersed and diffuse. In addition to private or semi-public civil society actors, which increasingly take on governance roles, authority is vested in a vast, multifarious array of international institutions, such as the European Union, the United Nations Security Council, the World Trade Organization and the International Criminal Court. These actors influence many areas of social life that previously fell within the exclusive purview of national governments.



The International Criminal Court, The Hague.

Consequently, there is a growing recognition on the part of both policymakers and scholars that if the rule of law is to serve as a viable check on the exercise of authority, it will have to account for the greatly enlarged role of, in particular, international institutions in governing the modern world.

This policy brief sets out a framework through which to apprehend the basic contours of an emergent 'international rule of law,' while also formulating a number of concrete implications for actors concerned with promoting the rule of law in an internationalized context.

The internationalization of the rule of law?

A network of relationships

Whereas it is fairly uncontroversial to hold the view that, with a few notable exceptions, the national rule of law is addressed primarily to one particular type of actor – national governments – and set of relationships – government and its citizens – the structure of the international rule of law is less clear-cut. Should it apply to the relationship between international institutions and states? Between international institutions and citizens? Between states? Or some combination thereof? And what of the lack of a global, central government, the existence of which many supporters of rule of law theory seem to require, or of the fact that many regulatory functions are vested in private rather than public actors?

These conceptual issues – challenging in themselves – are compounded by the fact that the same core questions that are controversial at the national level re-appear with equal force at the international level. Even assuming that we could agree on the basic structure of the relevant relationships, we still face questions such as: does the rule of law require certain minimal procedural safeguards? Or do its requirements extend to cover more substantive and positive obligations on the part of rule of law addressees?

The internationalization of the rule of law thus implies a multiplication of legal, political and social relations that gives rise to a more intricate conceptual structure than the one we are faced with when simply considering the relationship between states and citizens. Within this structure, the international rule of law is likely to involve a range of cross-cutting and overlapping sets of relationships and dynamics at all of the aforementioned levels, each of which must be considered in turn.

International institutions: the traditional view

The view that the international rule of law consists of a network of relationships is significantly at odds with the conventional understanding of the concept, which commonly portrays international institutions as the quintessential *promoters* of the rule of law, with states acting as their executive agents.

Indeed, many norms central to the rule of law – including, notably, a broad catalogue of human, civil and political human rights – are enshrined in international law. Yet international institutions *themselves* only rarely become directly involved with implementing the rule of law: it is still national governments that are charged with implementing international legal norms. This has given rise to the widespread belief that international institutions themselves need not be subject to the rule of law, on account of the fact that the ultimate authority remains vested in sovereign states.

Our research challenges this conventional account, singling out two assumptions inherent in this view that are particularly problematic.

The first is the view that the international rule of law is best conceived of as a unidirectional flow from the international to the national level. The basic thrust of this model, familiar from public international law, involves the argument that, because international rule of law in turn requires international legal norms to be faithfully implemented at the national level, it can and will promote uniformity and consistency in the observance of the rule of law, and so strengthen the rule of law across national boundaries.

The second assumption of which we are skeptical is the view that international institutions themselves ought to be exempt from rule of law standards in regards to their own conduct. International institutions were once viewed as little more than proxies for the states upon which their legal existence depended, thereby obviating the need to justify or account for their authority separately from that of states. The paradigmatic function of this kind of international institution is to facilitate coordination *between* states, rather than the regulation of affairs *within* states. Only the latter function, so the argument goes, creates concerns from a rule of law perspective, because only this dimension involves the direct exercise of authority over individuals. Therefore, international institutions cannot be subject to rule of law norms in conducting their own affairs.



The headquarters of the United Nations, New York.

Both assumptions impede a clear-eyed assessment of what an efficacious rule of law promotion requires in today's world. We show, in particular, that:

1. The international rule of law depends not on a passive reception of international legal norms by domestic actors, but rather on a back-and-forth dynamic, involving *contestation* – the critical engagement with international legal norms by domestic institutions – as well as *deference* – the subsequent adaptation of national feedback by international institutions. Domestic courts are thus not simply vessels for international law: they are co-creators, and acts of contestation can enhance the legitimacy of international institutions by bringing their precepts closer in-line with domestic understandings.

2. The position that international institutions should be exempt from rule of law requirements because they are incapable of violating human rights and the rule of law is not defensible. Today's international institutions are significant actors in their own right, with considerable independence from their member states, whom they are often capable of compelling to perform (or refrain from) particular courses of action against their will. They can therefore reasonably be expected to be held accountable as such, thus prompting the question of whether the rule of law ought to be applied to international institutions in addition to states. International institutions can, and do, violate such norms. Moreover, they can and, indeed, have instituted reforms to enhance their own compliance with the rule of law.

Both points should be read against the backdrop of the distinctive characteristics of modern international institutions. Traditionally, international institutions confined themselves largely to regulating matters of common concern *between* states, leaving affairs within states largely untouched. Moreover, decision-making within such institutions tended to rely on the oftentimes unanimous consensus of the states involved, and decisions were rarely implemented in direct opposition to the will of the states concerned.

All this has changed significantly in recent years. Today's international institution is a more visible and considerably more robust entity, having become ever more deeply involved in wide swathes of social life – from finance, trade, and the environment, to public health, energy, the conservation of cultural heritage and much more. In many of these areas, global institutions now sit alongside national governments as the regulatory actors of the modern world. If the rule of law applies to those actors that exercise authority in regulating global affairs, then this gradually-acquired significance must be duly accounted for.

We offer such an account, and do so from two broad perspectives. The first deals with the relationship between national and international legal actors, arguing that the international rule of law can be situated in the interplay of *contestation* and *deference*. The second deals with the problem of applying the rule of law to international institutions *themselves*. We will discuss each in turn.

The international rule of law: cycles of contestation and deference

Contestation: defiance or engagement?

In the 2009 *R v Horncastle* judgment, the UK Supreme Court ruled that a criminal conviction based exclusively or primarily on hearsay evidence does not in itself constitute a breach of the defendants' right to a fair trial under the European Convention of Human Rights. From a rule of law perspective, this is a highly salient decision and, more significantly, one that at the time was in clear contradiction of the European Court of Human Rights' jurisprudence, which had earlier concluded that there were virtually no circumstances under which convictions of this sort could stand. In so doing, the international interpretation of what the rule of law requires was firmly asserted.

Reflecting on their refusal to follow the international legal norms applicable to this case, the justices observed that, although the UK Human Rights Act (the implementing legislation of the convention) compelled them to take into account the precedents of the Strasbourg court, these precedents sometimes 'insufficiently appreciated or accommodated particular aspects of the domestic process.' Feeling that English law provided sufficient safeguards to ensure a fair trial even when convictions were largely based on hearsay evidence, the UK court further noted that the importance of being able to tailor international legal norms in light of local 'constitutional fundamentals.'

How are we to assess such actions on the part of the UK Supreme Court from the perspective of the international rule of law? The traditional view on this point is quite unequivocal. Valid international law takes precedence over national law (although what is and is not valid can at times be itself a murky notion). Indeed, the conventional logic of rule of law promotion holds that, at the domestic level, the rule of law is greatly strengthened by this fact: because actors at the national level are required to comply with these higher norms, international law creates an incentive for the reinforcement of the rule of law and an institutional check against backsliding. When functioning properly, such situations provide a clear avenue of redress to aggrieved citizens who feel their rights have been violated. By implication, domestic courts that fail to faithfully act as a vessel for international legal norms and decisions are thus compromising the international rule of law.

Yet this rather rigid, top-down view captures neither the reality of today's rule of law dynamics nor, arguably, does it serve its ideals. The intent of the UK Supreme Court was not to defy the international legal order, but rather to engage with it. In his decision, Lord Phillips explicitly notes that the outcome 'is likely to give the Strasbourg court the opportunity to reconsider the particular aspect of the decision that is in issue, so that there takes place what may prove to be a valuable dialogue between this court and the Strasbourg court.'

This is, in fact, precisely what occurred. Two years later, in the 2011 *al-Khawaja* case, the Strasbourg



United Kingdom Supreme Court, London.



European Court of Human Rights, Strasbourg.



European Court of Justice in Luxembourg.

Contestations

Acts of contestation occur across many areas of law, and occur in a variety of forms. As we understand it, contestation includes a range of responses on the part of national actors; these might include an outright refusal to apply international legal norms and the decisions of international courts and organizations, their partial application, or their full application accompanied by considerable scrutiny and critical reasoning. Contestation differs from resistance in the sense that the aim of such actions is not defiance per se, but an attempt to initiate a two-way dialogue to ensure that international legal norms remain consonant with domestic understandings of the rule of law.

Deference

International institutions show deference when acts of contestation prompt them to subsequently take national views into account. Like contestation, deference also admits of degrees: international institutions can fully defer to domestic views on a particular legal matter or the interpretation of a norm by adjusting their own future decisions to that effect, or they can do so by diverging from these views whilst nevertheless engaging constructively with their reasoning.
Many international courts have developed doctrinal instruments that can be viewed as devices through which to systematize deference. Prominent among these are the concepts of subsidiarity and margin of appreciation.

court conceded the point that the threat to a fair trial resulting from the admission of hearsay evidence could, under certain circumstances, be counter-balanced by other procedural safeguards, as the UK Supreme Court had suggested. The Strasbourg court further concluded that its earlier decision that hearsay evidence would constitute a blanket violation of the convention was too restrictive. In other words, the international court *deferred* to a domestic interpretation of widely shared rule of law norms.

Deference: retrenchment or engagement?

This case is a prime example of a domestic court working in *conjunction with* rather than *in opposition to* an international court in order to successfully negotiate the meaning and application of the rule of law in a domestic context. This case is hardly exceptional. There have been many more like it in recent years: so many, in fact, that we feel we can confidently speak of a paradigm shift in regards to the respective roles played by domestic and international actors in rule of law promotion.

As previously mentioned, we refer to the governing dynamic of this new paradigm as alternating cycles of *contestation* and *deference*. This model suggests that cases and rulings that might on the surface appear as evidence of increased resistance from domestic actors to international law – such as the *Medellín v. Texas* case in the United States Supreme Court, or the aforementioned *Horncastle* case in the UK Supreme Court – are better understood as acts designed in part to provoke a response from international institutions in an effort to achieve a better fit between domestic and international understandings of the rule of law.

What we are seeing is thus not a breakdown of the rule of law, as nations retreat into their own sovereign spheres of influence. Domestic courts that contest international legal norms often do so in good faith, in a sincere attempt to remain true to both domestic and international understandings of the rule of law (evident, among other things, in the fact that when national courts do dissent, they tend to do so in comprehensively reasoned and nuanced language).

Contestation and deference: recent developments

- Domestic courts have begun to subject international judicial and political decisions to the national standards of review and the national interpretation of international law across many areas of law.

- In the area of investment law with,for example, one notable case was in 2001, when the Supreme Court of British Columbia in Canada partially set aside the award of the NAFTA Chapter 11 tribunal and reduced the size of the damages to be paid by Mexico to the Metalclad Corporation. In the context of Bilateral Investment Treaties, discrepancies between domestic and international understandings of what the rule of law requires have become more common. On the one hand, international investors require protection from arbitrary state action and often require guarantees that domestic policy will accommodate their needs (an understanding of the rule of law favored by the international community at large), yet for many citizens of individual countries – particularly those with less economic and political clout in the global system – the rule of law requires that their governments are not hamstrung to the point of being unable to provide public services, foster investment in education, health, and productivity, or pursue independent fiscal and monetary policies, all areas which are frequently circumscribed by bilateral investment treaties.

- The far-reaching immunities typically granted to international organizations are increasingly scrutinized by national courts, leading to the growing sentiment that far-reaching blanket immunities would render the work of international organizations unaccountable and may contribute to violations of the rule of law and of various legal obligations under the international human rights regime. International organizations have in turn paved the way for new dispute resolution mechanisms and a more rigorous self-monitoring approach aimed at raising the level of human rights protection within international organizations.

- The European Court of Human Rights tends to observe a range of interpretive constraints in determining the compatibility of domestic policies and the European Convention, many of which revolve around the express purpose of displaying a degree of deference to domestic policy-making (for instance, by according states a margin of discretion in interpreting their obligations under the convention, and by taking into account any 'emerging consensus' between different member states regarding the convention's provisions).

- International human rights courts have become very reluctant to mandate uniform interpretation of human rights norms, instead gravitating toward the view that there is significant scope for differential interpretations of human rights law, thus enabling domestic actors to balance competing demands of the domestic and international legal sphere in light of the rule of law.

- Many international courts follow some variant of the principle of subsidiarity: the notion that public decision-making should be devolved to the lowest possible level of governance. Conceptions such as the margin of appreciation in the European Court of Human Rights, or the complementarity principle in the International Criminal Court, are representative of a wider tendency on the part of international courts to move away from a hierarchical, top-down view of international law towards a view that recognizes the importance of a two-way exchange in which the lower levels influence the higher levels.



United States Supreme Court, Washington DC.

Instead of international institutions doubling-down in turn and insisting that domestic courts should show deference to international institutions, the reverse has actually occurred: international institutions increasingly display deference to the *national* level. That this, too, is part of efforts to engage in a productive dialogue is evident in the fact that the deference shown is not simply accidental or haphazard. Rather, it is visible in the articulation of various systematic principles designed to guide international institutions' efforts to engage constructively with national differences.

Just as national courts have tried to formulate principles to identify situations in which the jurisprudence of international courts may be rejected or qualified, international courts have themselves relied on criteria such as 'subsidiarity,' 'margin of appreciation' and 'emerging member-state consensus' in their determination of states' obligations under international law, thus availing themselves of a range of doctrinal instruments designed to incorporate the concerns and practices of member states.

In sum, then, we can state that the international rule of law is in a key sense the *outcome* of interactional effects between national and international actors, as each tries to interpret and apply the requirements of the rule of law as each sees fit. Neither actor does so in isolation, but in a way that takes into account the views and actions of other actors.

The rule of law within the new international organization

The dynamic processes of contestation and deference just discussed form one of two pillars in our account of the international rule of law. For a more developed account of the international rule of law, we must now turn to the second main pillar, which emerges when we consider international organizations in their own right, and in particular the question of whether international organizations ought to be directly subject to the requirements of the rule of law. Although this question has long provoked theoretical speculation amongst scholars, in recent years it has taken on a decidedly practical slant, with the growing realization that international organizations, as entities distinct from nation-states, can *themselves* violate human rights and the rule of law. Sometimes, flagrantly so. In recent years there have been reports of sexual exploitation and arbitrary detention by UN and NATO peacekeeping forces. On account of their tendency to harm or otherwise affect large subject populations, diplomatic and economic sanctions imposed by bodies such as the EU and the UN have also been linked to, or construed as, human rights violations, as have the lending and aid practices (and the controversial 'conditionality' clauses attaching to them) of the IMF and the World Bank.

To these more visible violations, we can add a variety of less striking but, from the perspective of the rule of law, highly significant concerns related to the transparency and accountability of international organizations. Because there is a global governance component to almost every area of social life, virtually no dimension of public policy is without significant trans- and international components. Indeed, international organizations frequently assume regulatory roles traditionally played by national governments. Yet international institutions are only rarely subject to the kinds of legal requirements and constraints designed to ensure the accountability, transparency and equitable treatment of individuals in their dealings with public authorities in the domestic sphere.
In cases such as these it is patently inadequate to ascribe the rule of law violation to specific states rather than to the international organization to which they belong. The authority of international organizations in these cases is sufficiently independent from the states which make up their membership, such that we can plausibly ascribe such violations to the international organization itself, rather than to individual states.

In a world in which international institutions are not simply in a position to promote the rule of law or to advocate for human rights protections, but ever more frequently are also in a position to violate such principles themselves, the question naturally arises: should the rule of law apply directly to such organizations?

Prospects for reform

The moral case for applying rule of law principles to the conduct of international institutions is strong, and has gained widespread acceptance in recent years. On



In light of their growing authority, international organizations experience mounting pressures to conform to the rule of law.



UN peace keeping forces have in recent years been accused of violating human rights and the rule of law.

Table 3: Areas of violations and reform linked to the Authority-Legitimacy Mechanism (ALM)		
Actor	**Areas of alleged violation**	**Scope of reform**
UN	Peacekeeping: sexual exploitation	Comprehensive
World Bank	Lending	Comprehensive
EU	Sanctions: blacklisting	Comprehensive
UN	Sanctions: blacklisting	Comprehensive
UN	Peacekeeping: arbitrary detention	Comprehensive
NATO	Peacekeeping: sexual exploitation	Limited
UN	Sanctions: hardship through comprehensive trade sanctions	Limited
EU	Sanctions: hardship through comprehensive trade sanctions	Limited
NATO	Peacekeeping: arbitrary detention	Limited
IMF	Lending	Limited

21 September 2004, in a speech to the UN General Assembly, the then UN Secretary Kofi Annan observed:

> *Where rule of law is most earnestly invoked, as in the Commission on Human Rights, those invoking it do not always practise what they preach. Those who seek to bestow legitimacy must themselves embody it; and those who invoke international law must themselves submit to it. Just as, within a country, respect for the law depends on the sense that all have a say in making and implementing it, so it is in our global community.*
>
> *But our goal here is not to state the case that international organizations should subject themselves to rule of law requirements, but we provide evidence that they have in fact done so in increasing numbers in recent years.*

As Table 3 demonstrates, international institutions across the board have adopted reforms that can plausibly be characterized as efforts to implement rule of law standards. Included amongst these reforms are the introduction of appeals procedures for affected parties, internal monitoring bodies, enhanced transparency, stronger sanctions for international organizations' personnel found to have violated standards of conduct, and more.

This development is all the more remarkable given that the post 9/11 international order is frequently characterized in terms of a resurgence of unilateralism and a distinct lack of enthusiasm for more thorough multilateral cooperation on the part of great powers such as Russia, China and (to a certain extent) the United States, all of whom have in either their words or actions championed more traditional values of national sovereignty and co-ordination rather than multilateralism and robust international co-operation. This view is further bolstered by a string of prominent failures on the part of the international community to offer concerted responses to global collective action problems such as the negotiation of a successor treaty to the Kyoto protocol and the mounting of a multilateral intervention in Syria. The central role played by the United States in the global order has meant that concerns about the legality of the 2003 invasion of Iraq have fuelled serious doubts about the very possibility of a strong multilateral international order.

The conventional wisdom suggests that far-reaching reforms of the international order stand or fall according to the support of the heavyweights of the international order, many of which are heavily over-represented in conducting the affairs of international organizations. Given their conspicuous lack of enthusiasm, we might ask: what can nevertheless explain the adoption of rule of law reforms, in spite of resistance and sometimes outright opposition from the larger members of the international community?

Explaining rule of law reform in international institutions: two mechanisms

We have identified two principal mechanisms, both of which point to causal patterns capable of explaining how significant pressure is brought to bear upon international institutions. The first we shall refer to as the *Authority-Legitimacy Mechanism* (ALM), the second as the *Dissonance-Reduction Mechanism* (DRM).

The Authority-Legitimacy Mechanism is so named because it focuses principally on the way in which

Table 4: The Authority-Legitimacy Mechanism			
Principal actors	**More probable when**	**More likely to lead to comprehensive provisions if**	**Strategy**
Like-minded coalition of medium-sized powers, NGOs, scientists, individuals, and reform-minded factions within the IO	IOs human right violation are highly visible Presence of victims viewed or portrayed as innocent and/or vulnerable	IO is vulnerable due to policies that are the target of protests or openly violate standards that are to be fostered by the very same policies	Shaming, scandalizing
Legislative bodies in larger, internationally prominent states	Legislature is relatively independent from the executive and possesses strong powers of oversight	Legislature is strong and capable of influencing key decision makers in the IO Costs in terms of domestic resistance are low	Political pressure
International courts, domestic courts of powerful states	Violations are justiciable Presence of courts with appropriate jurisdiction	Court is strong because it is internationally recognized as having jurisdiction over the IO, or controls the implementation process in strong member states	Litigation
Internal commissions and knowledge agencies	Existence of a role-model with human rights provisions already in place	The exemplar or role-model also contains comprehensive provisions	Lobbying, persuasion

the augmented authority of international institutions prompts efforts by external, third-party actors to pressure these institutions to act in more accountable ways. As the exercise of authority by international institutions becomes more pervasive, its effects will be more acutely felt. Nation-states may find themselves at the mercy of an international institution's binding decisions (say, an unfavorable ruling from the WTO Dispute Settlement Body), or they might find themselves at the receiving end of economic sanctions. Individuals may, in turn, find themselves at the mercy of international institutions and their personnel, particularly when such institutions get involved in conflict situations, the administration of refugee camps or the provision of humanitarian assistance.

In situations such as these, it is clear that international institutions are quite capable of committing human rights violations and, in general, of overstepping the proper limits of their authority. This fact, in turn, invites a great deal of scrutiny by outside parties: both those directly affected, as well as those such as small states or civil society actors, who are more structurally affected by the scope and exercise of power by international organizations. Indeed, because the exercise of power is by its nature contentious and controversial, scrutiny will be forthcoming even where power is seemingly used in a prudent and judicious fashion.

Although we present evidence that this mechanism constitutes a general trend, we stress that it is just that: a trend. The ALM will not apply to all cases, and not every instance of the ALM will play out in the same fashion. In Table 4 we identify several factors that help explain when and how the ALM is likely lead to institutional reform. Much depends on the nature of the grievance, as well as the kinds of actors involved and their relative endowments.

Sometimes the disaffected themselves will speak up; at other times the initiative will be taken by parties farther removed from the violation, from small states to policy-makers, from NGOs, norm entrepreneurs and other civil society actors, to more bottom-up, popular movements for reform (such as the 2001 anti-globalization protests against the WTO in Seattle). Sometimes calls for reform will be channelled diffusely through the public sphere (using the media and other publicity), at other times actors pursuing reform may seek to proceed through international courts or a powerful legislature (for instance, the United States congress, which through its controlling power of the executive carries a great deal of weight in international affairs).

The strength of the resulting reforms is likely to vary according to several factors: flagrant violations of human rights on the part of highly visible international organizations are more likely to lead to reform, whereas more diffuse and differentiated violations (such as some economic sanctions) on the part of relatively obscure organizations are less likely to reach

Table 5: The Dissonance-Reduction Mechanism		
Type of dissonance	**Mechanism of Dissonance Reduction**	**Example**
Norm-Behavior Behavior that violates an existing and generally accepted rule	Justificatory trap	Powerful state *A* breaches norm *X* (e.g., a prohibition on the use of force). If this prompts criticism, the state will attempt to justify its infraction of *X* by arguing that its behavior is not covered by the rule ('It wasn't force, it was self-defence'), or that the rule should be interpreted differently ('It does not apply, in light of other circumstances'). In time, these kinds of contestations call for resolution through the introduction of secondary rules, such as a rule of adjudication to decide on the definite meaning of a particular primary norm ('The ICJ may rule on whether or not a given behavior violated a settled rule').
	Self-persuasion	If representatives of international organizations justify intrusions into domestic legal orders with reference to the rule of law or democracy, the international organization is more likely to incorporate these norms into its own policies and procedures.
Norm-Norm Two or more norms require different, contradictory behavior	Conflict resolution	As the number of rules governing a given behavior grows, collisions between these rules, as well as conflicts over their implementation, becomes more likely and, thus, more frequent. The resulting dissonance will fuel demand for establishing secondary rules in order to address these conflicts and create more consonance across a network of potentially conflicting norms.
Norm-Shared Understanding Widely shared societal understandings of what is appropriate conduct come into conflict with an established norm of international law	Normative adaptation through modification or enactment	When long-standing norms come into conflict with evolving and widespread normative understandings in society, there will be calls for mechanisms to adapt existing rules to fit. Assumes a long-standing legal norm – such as open discrimination of certain members of society – does not sit well with the broader normative understandings prevalent in this society anymore. In this case there are essentially two ways to bring the norm in line with shared understandings to maintain the legitimacy of law: one is court decisions through which a re-interpretation of existing law takes place; the other option is legal change via new rule-setting. Both responses require secondary rules.

a critical level of pressure to induce reform. Similarly, well-resourced and unified actors are more capable of bringing to bear considerable pressure than under-resourced, dispersed actors.

Thus, just as the historical emergence of the rule of law, as an instrument to check the power of the state, went hand in hand with the increase in that very same power, so the bare possession of authority by international organizations will at the same time attract scrutiny as to how that authority is exercised.

The second source of pressure, which we refer to as the Dissonance-Reduction Mechanism, relies less on the reforming zeal of political actors, but points instead to systemic pressures arising out of the structural features of the international legal order itself. Especially legal theorists like H.L.A. Hart see norms transformed to 'real' law when 'primary' rules are supplemented by 'secondary' rules. Primary rules are rules that proscribe or prohibit particular behaviors on the part of individuals or groups (such as the prohibition on violating the territorial integrity of states, or the proscription to respect the immunity of diplomatic representatives). Secondary rules, by contrast, stipulate how we are to identify, apply, interpret and adjudicate primary rules (such as the rules setting out the voting procedure on the UN Security Council, or a treaty granting jurisdiction over particular types of cases to an international court). The DRM explains how such rules often emerge out of an internal tendency on the part of norm-users towards enhancing a sense of coherence and consistency within a system of rules.

Secondary rules are designed to solve a range of problems, for instance: which rule should be followed when two rules conflict (say, the prohibition against



The drive to reduce cognitive dissonance on the part of legal actors can enhance the rule of law.

the use of force versus the responsibility to intervene to prevent genocide)? How should we act when there exists reasonable disagreement about which behavior is covered by a particular rule (what, precisely, is a 'crime of aggression')? How should new rules be introduced when this is called for by changing circumstances (which bodies are authorized to introduce new rules, and which procedures must be observed)?

Many institutional manifestations of the rule of law involve secondary rules. At a practical level, the right to a fair trial, the imperative that norms be clear, prospective and unambiguous, the principle that the exercise of powers be subject to ascertainable and regular procedures, can all be plausibly viewed as instances of secondary rules.

The practical need for such rules arises as both the quantity of rules, and the scope of behavior to which they apply, grows. Our research argues that, in causal terms, such rules emerge when the desire of actors who are users of the norm take concrete steps to avoid or mitigate *dissonance.* Dissonance can be related both to the properties of individual rules themselves (they may be unclear or ambiguous), the relationship between rules (different rules may make conflicting demands on an actor's behavior), the relationship between rules and behavior (widespread behavior in violation of rules) or some combination of these.

Where dissonance is widespread, it is likely to fuel a range of efforts to have this dissonance reduced, frequently resulting in the establishment of secondary rules (see Table 5 for an overview). Unlike, say, affiliated concepts such as constitutionalization or legalization, the introduction of secondary rules need not imply any kind of substantive, moral commitment. For instance, secondary rules can be *instrumentally* useful to pursue ends wholly contrary to 'thicker' concepts of the rule of law, such as substantive concepts of equality or the more concrete conceptions of human rights. Indeed, such rules can potentially make the pursuit of nefarious ends more efficient. The introduction of secondary rules, in practice, tends to promote the rule of law, but it is important to remember that this is not necessarily always true.

Thus, the drive to reduce dissonance follows from instrumental rather than overtly moral considerations. Actors who are constantly engaged in justifying their behavior with reference to rules – *even* actors who try to bend or circumvent such rules – will stand to benefit from clear procedures and mechanisms to alter existing rules, challenge their interpretation and resolve conflicts.

The key point, for our purposes, is that many secondary rules overlap with the kind of institutional devices commonly viewed as implementations of rule of law ideals. Dispute resolution mechanisms, avenues for appeal, transparency in decision-making: all such values are difficult to translate into concrete institutional forms without resorting to secondary rules. It is the ubiquitous and urgently felt practical need for avoiding dissonance that turns the DRM into an important mechanism for consolidating the rule of law amongst international institutions themselves.

Conclusion

Perhaps unsurprisingly, there is no single policy recommendation that applies across the board. Those wishing to advance the rule of law within and throughout the international sphere have at their disposal a variety of strategies and avenues for action. This is of course generally true for complex social matters, but in the case of the international rule of law, it is true in a more foundational sense. The 'international rule of law,' as we understand it, is by its very nature marked by its multi-layered, overlapping and cross-cutting structure; it involves individuals, states, and international institutions, individually and together, and in considerable number. As a consequence, any conception of what the 'international' rule of law entails is necessarily multi-dimensional.

Our research has focused on two dimensions in particular: the international rule of law as it emerges from the interactions between national and international institutions, and the application of the rule of law directly to international institutions. The mechanisms discussed in this context are largely unique to the international order. They do not mirror perfectly the national experience, and are shaped by the institutional attributes of the international sphere.

Thus, for those seeking to promote the rule of law in practice, the international rule of law will mean different things at different times. On occasions where it refers primarily to the interaction of national and international courts, actors would do well to look beyond the surface appearance of discord between national and international courts. It may well be the case that the relevant courts are engaged in a process of negotiating the meaning of the rule of law within their respective jurisdictions, rather than an attempt to undermine it by resisting the imposition, on the part of international institutions, of uniformity across all jurisdictions.

At other times, the appropriate target will be international institutions themselves. In this sphere, a sudden and visible human rights violation on the part of an international institution may suddenly unleash a torrent of criticism and activism, by rallying social movements, NGOs and states into action in an attempt to hold international institutions to account.

Similarly, once rules are in place, these can then be used to call international institutions to account with reference to such rules. In the process of justification, it is likely that the pressures of normative dissonance will induce international institutions to institute reforms. After all, one can only spend so much time surrounded by the rhetoric of the rule of law and the practice of an international order governed, for better of worse, by norms, without internalizing those norms.

Our research has also shown that advances have already been made in this regard. The logic of contestation and deference has firmly taken root and has evolved into a powerful process for consolidating rule of law principles across the national and international level. The Authority-Legitimacy Mechanism and the Dissonance-Reduction Mechanism together present a variety of possible pathways and pressure points which may compel international institutions to adopt a more robust institutional response to demands for rule of law conformity.

There is undoubtedly much scope for improvement in this regard. But it is important to recognize that the internationalization of the rule of law will frequently compel us to transcend the confines of the nation-state paradigm. Whatever form the international rule of law may assume in years to come, it is likely to be shaped as much by the idiosyncrasies of a globalized political, legal and social context as it is by the models and exemplars provided by the history of the rule of law in the context of the nation-state.

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