

3. THE INTERNATIONAL RULE OF LAW*

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The chapter explores the significance of the international rule of law for international conflict and security law. The first part of the chapter investigates how the international rule of law is conceptualised, unpacking its formal and substantive requirements. The second part applies the concept in the context of international conflict and security law, focusing in particular on the implications for the use of lethal force. In doing so, an argument is advanced for the prioritisation of compliance with both formal and substantive requirements of the international rule of law. Necessary for the maintenance of international peace and security, and for the prevention and punishment of international crimes, emphasis is placed on the importance of the international rule of law for the integrity of the international legal order and for the future development of international conflict and security law.

Keywords: international rule of law, international human rights law, international humanitarian law, use of force, international legality, substantive values, extraterritoriality, *jus ad bellum*, *jus in bello*, armed conflict, drones, UN Charter, *jus cogens*, customary international law.

3.1. Introduction

A foundational principle of the international legal order, the international rule of law is a requisite for the maintenance of international peace and security and for the prevention and punishment of international crimes. This chapter will explore the relevance of the international rule of law to international conflict and security law by first describing how the rule of law is conceptualised. It will then examine the formal requirements of the principle and consider some of the substantive values protected by the international rule of law. In doing so, the significance of the principle will be unpacked, focusing in particular on the challenges presented by the use of lethal force. In this way, the chapter will seek to demonstrate the applicability of the international rule of law as a pre-condition of international conflict and security law.

3.2. Delineating the International Rule of Law

The concept of the international rule of law belongs to the most complicated and debatable topics in international legal scholarship.¹ One of the central issues regarding the nature and importance of the international rule of law is the question of the sense in which it is ‘international’ and whether the rule of law is ever possible in international law as such. For domestic jurisprudence, the idea of the rule of law is connected with what B. Tamanaha calls ‘the three main themes’:² government limited by law, formal legality, and the rule of law, not man. Even though a specific meaning of these three themes depends on a context, they determine the general frames for the rule of law discourse. However, things are less apparent in international law. First, there is no centralised government to be limited by law; second, the threshold of formal legality in international law is less clear than in national law; third, states are officials in themselves, which makes it challenging to pursue the superiority of

¹ During recent decades, the international rule of law has become a widely discussed topic. We base our analysis on works by Beaulac 2009, Chesterman 2008, Hurd 2014, 2015a, 2015b, Nardin 2008, Nollkaemper 2009 and others.

² Tamanaha 2004, pp 114-126

rules over the particular interests of powerful states and alliances. As a result, it is widely accepted that a direct analogy between the domestic and the international rule of law is counterproductive.³

There are several approaches to understanding the essence of the rule of law as ‘international.’ First, the international rule of law can be seen as a result of the ‘internationalisation’ of the rule of law as known in domestic legal systems. Thus, the international rule of law is supplementary to the domestic rule of law in the sense that international institutions become actively involved in promoting and strengthening the rule of law within states. This understanding of the rule of law is commonly (although not exclusively) used by the United Nations, the Council of Europe, and other international organisations. The influential definition of the rule of law suggested by the UN Secretary-General in 2004,⁴ ‘is a statement about how the rule of law should operate in *national* systems and it is *not* a definition of the rule of law at the global level.’⁵ Such a vision of the international rule of law implies a focus on states as the primary addressees of rule of law requirements which must be implemented within their legal systems. It is worth noting that this approach to the international rule of law does not imply its perception as a genuine phenomenon of the international legal system, or as a legal ideology applicable to international law as such. The international rule of law here is merely an additional layer of promoting and strengthening the rule of law within states.

Second, the international rule of law may be treated as an independent set of principles relevant to the international legal system. Thus, the international rule of law is not merely a result of international cooperation on promoting the rule of law amongst states, but a specific version or a branch of the rule of law as a universal legal ideal. It implies that a concept of the international rule of law

³ See Hurd 2015b; Nardin 2008

⁴ ‘A principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency.’

The rule of law and transitional justice in conflict and post-conflict societies: Report of the Secretary-General (S/2004/616), para 6

⁵ McCorquodale 2016, p 286

should not be a deduction (or reduction) of the rule of law known domestically; both versions of the rule of law (domestic and international) are conceptually self-reliant. The international rule of law constitutes a set of principles which ensure compliance with and accountability under international law of all relevant actors, as well as a transparent and procedurally appropriate way of the creation and application of the rules of international law.⁶ Such an understanding of the international rule of law traces back to the Grotian tradition of international law and implies that the international rule of law is not a weaker or defective version of the rule of law but its independent manifestation.⁷

Third, there are attempts to provide an integral vision of the international rule of law which would combine its ‘internationalised’ and ‘genuinely international’ sides. Thus, M. Kanetake argues that the international rule of law concerns three levels of relations: horizontal state-to-state relations; relations in respect of the execution of governmental authority in regard to individuals and non-state actors; and relations in respect of the execution of authority by international institutions.⁸ According to this approach, the international rule of law gains its integrity as a legal ideology that highlights both formal and substantive aspects of how international law should operate and how states should apply it both within their domestic legal systems and in relations with each other. The international rule of law is, therefore, the ideological core of the international legal system and also a key principle of international law’s interplay with domestic law in securing and guaranteeing the values of humankind.

In the context of international conflict and security law, the international rule of law has a twofold nature: first, it advocates compliance, transparency, and accountability of international decision-making regarding the maintenance of international peace and security; second, it serves a guide to the substantive values shared by the international community.

⁶ See: Beaulac 2008

⁷ Nijman 2015, p 135

⁸ Kanetake 2016, p 16

3.3. The international rule of law, international legality, and values of humanity

The rule of law is commonly discussed through the opposition and complementarity of its ‘thin’ and ‘thick’ versions.⁹ The ‘thin’ version of the rule of law is concerned with the principles of formal legality requiring laws to be made, applied, adjudicated, and enforced equally, consistently, and within a due and transparent procedure. This version of the rule of law also contains such requirements as ‘no-one can be a judge in his own cause’, ‘laws should not prescribe the impossible’, etc.¹⁰ The ‘thick’ version of the rule of law goes beyond these formal requirements and also includes substantive values and goals which should be furthered; mere legality is not enough to speak of the rule of law. Commonly, in the context of international law, these are human dignity, peace and security, social progress and development, self-determination of peoples, and the like.¹¹

The metaphor of ‘thin’ and ‘thick’ rule of law implies that in order to get thicker, one must first be thin, that is, the ‘thin’, formal rule of law is a necessary precondition for going further in pursuing substantive goals. The ‘thin’ rule of law is therefore about ‘doing things right’, whereas the ‘thick’ rule of law is about ‘doing the right thing’.¹² Even though these two aspects of the rule of law go hand-in-hand, its formal side is a common starting point for analysis, and the international rule of law is no exception.¹³ At the same time, the formal version of the (international) rule of law does not exist separately or independently from its substantive version; they often presuppose each other in rule of law discourses.¹⁴ They always intertwine, and in the case of the

⁹ Bingham 2010; Gowder 2016; Tamanaha 2004

¹⁰ The idea behind the ‘thin’ version of the rule of law is that law is considered to be morally indifferent. See: Raz 1979, pp 212-218.

¹¹ See, for example, Spijkers 2011

¹² Westerman 2018, pp 141-167

¹³ See Beaulac 2009; Hurd 2015b

¹⁴ Gowder insists that the ‘thin’ and ‘thick’ rule of law are better called the ‘weak’ and the ‘strong’ versions of the rule of law. Formal legality is ‘weak’ exactly because it does not encompass substantive values represented by the rules of law. For instance, the requirement of equality can be treated formally through the formula ‘treat like cases alike’, yet to determine which cases are indeed ‘like’ and which are not, one must always consider the substance of the rules. Gowder 2016, ch. 2-3

international rule of law, it is not always feasible to perceive one in detachment from the other.

3.3.1. Formal Side of the International Rule of Law

The formal, or 'thin' version, of the international rule of law is linked to the principles of international legality. It primarily requires a basic level of legal ordering of international affairs, meaning not only the existence of international law but also compliance with it, that is, its minimal effectiveness. The international rule of law is hence based on international actors' treatment of international law as authoritative, that is, as a normative order capable of guiding and constraining their actions.¹⁵ For such a normative order to become authoritative, there exist several sets of requirements for its elements and structure.¹⁶ The first set of requirements relates to the qualities of the rules that constitute such a normative order; they should be stable, predictable, certain, etc. The second set, to the scope and conditions of their application: the rules of international law are to be applied equally and consistently. The third set, to the status and limits of discretion of the agencies authorised to enforce these rules.

3.3.1.1. Stable, predictable, and certain rules

A basic legal ordering of international affairs requires the rules of international law to be stable, predictable, and certain,¹⁷ otherwise they cannot effectively guide actors' behaviour. This primarily implies that the international rule of law is rooted in the idea that maintaining global peace and security, as well as the resolution of conflicts, should be based on rules, not on the particular actors' motives and wishes. The international rule of law therefore becomes undermined by uncertainty, indeterminateness, or change in the normative and institutional structure of the international legal order. Such uncertainty and indeterminateness is directly linked to the (il)legality of the most dangerous

¹⁵ Kumm 2003-2004, p 19

¹⁶ As noted by Raz, these requirements do not exist for their own sake. They simply determine some minimal qualities any law must possess so that its addressees can be guided by it. Raz 1979

¹⁷ This list of formal qualities of legal rules is not exhaustive. One of the most widely recognised lists of such formal qualities of law is offered by Fuller (see Fuller 1964; for the application to international law, see also Kumm 2004, Brunnée and Toope 2010). It is beyond the scope of this chapter to discuss all the intricacies of formal legality in international law.

threats to the international order, such as war. This is exactly why today's concept of the international rule of law is based on the general prohibition of the threat or use of force established by Art. 2(4) of the United Nations Charter.¹⁸ Such a general prohibition, which only provides for an exception in cases of self-defence and actions with respect to threats to the peace, breaches of the peace, and acts of aggression,¹⁹ serves the purpose of establishing a stable and predictable world order.

As with most of the formal requirements of the rule of law, the stability, predictability, and certainty of rules are merely the means employed to enable conditions for the peaceful coexistence of states and peoples. Yet the fundamental status of these requirements shapes their greater importance which reaches beyond a pure instrumentalist vision of the international rule of law. It is especially visible against the background of the debates around humanitarian intervention.²⁰ From the perspective of the international rule of law, even a legitimate aim cannot be furthered by the illegal use of available means; hence for humanitarian interventions to avoid undermining the international rule of law, they must be conducted within a set of existing rules. The maintenance of international peace and security, as well as the resolution of conflict, are to be constructed and governed by legal rules; otherwise the international rule of law is undermined.

The formal qualities of the rules of international law certainly go beyond the issues of international peace, security, and conflict resolution. The international legal order, in general, should consist of rules that provide for clear and reliable guidance for the subjects of international law, and in this regard, international legality as such is of instrumental *and* substantive value.

3.3.1.2. Equally applicable and justiciable rules

For the rules of international law to fulfil the requirements of the rule of law, mere stability, predictability, and certainty are not enough as they mean little if

¹⁸ Randelzhofer and Dörr 2012. See also Hathaway and Shapiro 2017 for a discussion of the interplay between rule of law rhetoric and outlawing war.

¹⁹ It is beyond the scope of this contribution to discuss whether Art. 51 and Ch. VII of the UN Charter constitute exceptions from the general prohibition of the use of force. For discussion, see de Hoogh 2015.

²⁰ See for discussion: Chesterman 2001; Hurd 2011; Rodley 2015; Simma 1999; Tesón 2005; Koh 2016

these rules are not equally applicable and justiciable. Moreover, it is rare that a rule is clear and unequivocal to the extent that all affected subjects interpret it uniformly.

Equal application of international law has several dimensions. *Ratione loci*, it implies the universality and generality of the international legal order, that is, its validity for all states regardless of their political, cultural, religious or other identities. *Ratione personae*, the equal applicability of international law requires the fulfilment of the principle of the sovereign equality of states in their international relations. Finally, *ratione materiae*, this requirement is widely known as the principle ‘treat like cases alike’ and implies consistency and uniformity in the application of international law.

The requirement of equal application raises the most significant concerns regarding the basic ability of international law to conform to the rule of law. However, the mere difficulties in reaching equal applicability of international law should not be treated as a sign of the irrelevance or unattainability of the international rule of law. The international rule of law is a legal ideal, and, as in the case of any other ideal, its value must not be measured against practical obstacles to its achievement.

The justiciability of rules, also, constitutes an integral part of the (international) rule of law, and it has been referred to as such throughout the whole history of this doctrine.²¹ In the case of international law, however, this crucial requirement of the rule of law is amongst the most challenging in the present structure of the international legal order. Even though the creation of the International Court of Justice is often seen as a significant achievement of the international rule of law,²² its jurisdiction is far from what might be considered as satisfactory in the light of the rule of law’s requirements. The proliferation of international courts and tribunals in recent decades has provided for a more comprehensive justiciability of rules, since different fields of international relations are increasingly covered by the jurisdiction of one or another judicial authority.²³ Yet the existing limitations upon the international judiciary are still

²¹ See Bingham 2010; Dicey 1897; Hayek 2012

²² Jessup 1945; Lauterpacht 2011; for a recent inquiry, see Feinäugle 2016a

²³ See Simma 2004, 2009.

of concern, insofar as courts remain the crucial institutional guards for the rule of law.

3.3.1.3. Governance limited by law

No formal concept of the international rule of law can be complete without the idea of procedural limitations on the powers of authorities. Such a limitation strongly relates to the idea that discretionary powers must be subjected to the requirements of due procedure, a fair trial, the right to be heard, inclusion, etc. Taken broadly, the international rule of law can only be a meaningful concept if it applies to institutions set up to shape and maintain the international legal order, that is, to international organisations, and primarily to the United Nations given its exceptional mission and functions. It is at the core of the meaning of the rule of law that power should not be exercised arbitrarily, and that authorities, especially those enforcing law, must be bound by procedural rules guaranteeing transparency and accountability. To ensure accountability, there must be legal mechanisms for holding the law-applying and law-enforcing agencies accountable.²⁴

The United Nations, as the most representative international organization, set up to maintain international peace and security, has declared that, ‘the rule of law applies to [...] the United Nations and [...] should guide all of [its] activities.’²⁵ In the light of the international rule of law, the UN and its bodies can indeed be considered as exercising public authority regarding its member-states,²⁶ and, as became apparent after *Kadi*, even over particular individuals,²⁷ which is of extreme importance in relation to Security Council powers under Chapter VII of the UN Charter. Thus, the intricacies of Security Council procedure also play a significant role in determining its conformity with the principles of the international rule of law. In this light, the right of the five permanent members to veto raises many concerns regarding the Security Council’s practical

²⁴ This ratio stands behind the Draft Articles on the Responsibility of International Organizations. ILC, ‘Report of the International Law Commission on the Work of its 43rd Session’ (26 April – 3 June and 4 July – 12 August 2011) UN Doc A/66/10

²⁵ General Assembly (GA) Res 67/1 UN Doc A/RES/67/1, 30 November 2012, para. 2

²⁶ Feinäugle 2016b, p 161

²⁷ Joined Cases C-402/05 P and C-415/05 P *Yassin Abdullah Kadi and Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities* [2008] ECR 461, paras 323-325

commitment to the formal legality which gives rise to criticism of the Council in general.²⁸ Remarkably, some of the members of the Security Council do not regard the right to veto as one of the Council's working methods thus taking it out of the context of the procedural requirements of the rule of law.²⁹ The practice of the UN Security Council is also quite illustrative of the value of procedural limitations as an element of the international rule of law: these limitations should not exist for the sake of procedure, they should exist to make the practice of the authorities more predictable. The right to veto – taken as a procedural working method or not – undermines this principle, and in most cases in relation to the authorization of the use of force the practice of the Council is not consistent. In this way, the Security Council, while being designed as the principled organ for maintaining and restoring the international rule of law, can also be a threat to it.

Overall, the formal side of the international rule of law as encompassing the principles relating to the qualities of rules, mode of their application and enforcement, as well as to the procedural limitations of the authorities, unlike in domestic law, is a value in itself. The international rule of law cannot be seen as formal legality alone, as it is not enough for maintaining the authority of international law. This is why the substantive side of the international rule of law is not something additional or supplementary in respect to formal legality, but rather a necessary counterpart which enables the international rule of law as such.

3.3.2. The international rule of law and global values

Even a brief analysis of the international rule of law cannot be complete without some consideration of the substantive side of this concept and doctrine. One of the critical breaking points in the theory of the rule of law has always been the issue of whether the rule of law includes requirements as to the *content* of law, and not only its formal features. This, to a significant degree, relates to a teleological understanding of the rule of law, that is, that the rule of law is by definition incompatible with tyranny, oppression and violations of human rights,

²⁸ See Bailey and Daws 2003, pp 379-412

²⁹ See Harrington 2017, p 42 ff

and should thus indicate a path to a better and more just law, not only to a formally proper law. Therefore, substantively, the rule of law is not always distinguishable from the other merits a legal order may have, and the rule of law often, though not always, includes and assumes an idea of the rule of *good* law. Such a view links to the idea that, at least to some extent, the doctrine of the international rule of law must be aligned to the substantive values underlying contemporary international legal order.

One of the problems with broadening the idea of the (international) rule of law, though, is that it is not always clear what kind of values must be taken into account as relevant for the rule of law. Moreover, in case of international law, it is even more complicated since consensus on universal values cannot be assumed. Yet as highlighted by Spijkers, ‘the identification of global values is motivated by an urgent sense of what is lacking, a sense that the state of the world could – and should be – better than it is now.’³⁰

Traditionally, the mere idea of the international rule of law has always been tightly related to the value of maintaining peace, which in the modern era has been transformed into the main purpose of the United Nations.³¹ This, to a significant degree, has its roots in the idea that international law as a normative system is chiefly legitimised by its ability to prevent wars, or at least to mitigate their consequences. Hence, the international rule of law is often associated with an image of international law as the only normative framework available as an alternative to the chaos of war.³² Such connotations are also evident in the preamble to the UN Charter, where adherence to international law is linked to the necessity of saving future generations from the sorrow of war.

Apart from being substantively connected to the fundamental value of international peace and security, the international rule of law can also be conceptualised through the prism of human rights and dignity. From this perspective, the formal requirements of the international rule of law ‘have to be constrained by, and balanced against the more fundamental goal of an international rule of law, the protection of the autonomy of individual persons,

³⁰ Spijkers 2012, p 365

³¹ See Wolfrum 2012, pp 109-115

³² This goes back to Hobbesian conceptions of law- or rule-based order as opposed to the natural condition states would inevitably fall into if there were no international law. See Dyzenhaus 2014

best realized through the entrenchment of basic human rights.’³³ Such an approach links to the idea that at its core, the international rule of law is needed as a safeguard for the autonomy of the subject of law. And if international peace and security are the values reflecting the autonomy of the primary subjects of international law, namely states, then human dignity and human rights reflect the autonomy of individuals who are directly affected by international law more and more often. From this perspective, the discourse relating to the international rule of law is indistinguishable from the discourse of human dignity and autonomy; hence international law may only comply with the rule of law if it respects and promotes them.³⁴

In recent decades, the idea of development has also turned into one of the values determining the content of the international rule of law. The paradigm of sustainable development that is designed to comprehensively cover all critical spheres of the world community and integrate them into one overarching policy, though not always translated into legal language, has had a major impact on the international rule of law. Promotion of the rule of law at national and international levels is one of the SDGs’ targets,³⁵ but the relations between the SDGs and the international rule of law are much deeper than this. The SDGs’ policies tend to ‘leak’ into the legal field by impacting the ways international law is perceived and interpreted. Because of the SDGs, more and more domains covered by, or incorporated into, Agenda-2030 get directly or indirectly subjected to the authority of international law. As a consequence, the interrelation between the global policy of the SDGs and the international rule of law is twofold. First, the mere existence and implementation of this policy increases the importance of international law and its ‘coverage’; second, the strengthening of the international rule of law is itself an element of this global policy.

Inclusion of global values into the structure of the international rule of law provides a more comprehensive picture of this normative ideal and shows its relevance for the international legal order not only from the side of its formal

³³ Pavel 2019, p 3

³⁴ Also see Fabender 2018, pp 771-72. McCorquodale emphasises the importance of human rights for the definition of the international rule of law through the arguments of legal pluralism, McCorquodale 2016, pp 292-94

³⁵ Transforming our world: the 2030 Agenda for Sustainable Development: UN General Assembly Resolution (A/RES/70/1), para 59, target 16.3

features, but also from the side of its development towards a better and more just future. From these two perspectives, the nature of the international rule of law appears as a merit of the international legal order that grounds its authority and legitimacy.

3.4. The International Rule of Law in Practice: Conflict and Security Context

As mentioned above, in the context of international conflict and security law, the international rule of law has a twofold nature: first, it advocates compliance, transparency, and accountability of international decision-making regarding the maintenance of international peace and security. Second, it serves as a guide to the substantive values shared by the international community, including in relation to the means and methods of warfare. The sections that follow explore the significance of each aspect, focusing on the use of lethal force.

3.4.1. The use of force and the conduct of hostilities

The use of lethal force is regulated at an international level by international humanitarian law, international human rights law, and rules governing the resort to the use of armed force. As a principle of the international legal order, the international rule of law provides a framework that supports each of these different bodies of law in their distinctive functions. While the use of lethal force is often undertaken covertly, the international rule of law requires transparency and accountability with regard to its legal basis. It also requires – reflecting the substantive values shared by the international community – compliance with fundamental guarantees that protect the inherent dignity of an individual. When either requirement is not fulfilled, the efficacy of the regulation provided for by the different bodies under international law is undermined. To illustrate this, it is instructive to consider the debate generated by the use of lethal force in extraterritorial counter-terrorism operations.

3.4.2. Issues of transparency and accountability

In a report issued on use of lethal force through armed drones, the UN Special Rapporteur on extrajudicial, summary or arbitrary executions, Christof Heyns,

highlighted the implications of the practice for the rule of law: ‘A lack of appropriate transparency and accountability concerning the deployment of drones undermines the rule of law and may threaten international security.’³⁶ Emphasising the importance of compliance with international standards, Heyns stated that ‘Accountability for violations of international human rights law (or international humanitarian law) is not a matter of choice or policy; it is a duty under domestic and international law.’³⁷

Issues of transparency and accountability – fundamental requirements of the international rule of law – have been recurring themes in the debate concerning the use of armed drones. A concern that has been frequently raised is the lack of clarity on the legal basis for the extraterritorial use of armed force. Amnesty International have emphasized:

States must ensure transparency in the use of armed drones, publicly disclose the legal criteria governing their lethal targeting operations, specify the safeguards in place to ensure compliance with international law, and conduct prompt, independent and impartial investigations whenever there is credible information about a possible violation of international law caused by their use of armed drones.³⁸

The conduct of prompt, independent and impartial investigations requires clarity concerning the legal framework for the extraterritorial use of force. In the absence of such clarity, the non-disclosure by State authorities of the basis for the use of lethal force raises significant issues for the rule of law at both national and international levels. To comply with this principle as a matter of national law, the laws enabling such operations must be accessible. As noted by Lord Bingham, the rule of law requires that ‘the law must be accessible and so far as possible intelligible, clear and predictable. This seems obvious: if everyone is

³⁶ Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Christof Heyns, UN Doc A/68/382, 13 September 2013, para. 97

³⁷ Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Christof Heyns, UN Doc A/68/382, 13 September 2013, para. 97

³⁸ ‘Oral Intervention by Amnesty International in the UN Human Rights Council’s panel discussion on “Ensuring use of remotely piloted aircraft or armed drones in counterterrorism and military operations in accordance with international law, including international human rights and humanitarian law”,’ statement by Amnesty International, UN Human Rights Council, Geneva, 22 September 2014.

bound by the law they must be able without undue difficulty to find out what it is.’³⁹ The lack of transparency on the part of states such as the United States and the United Kingdom also has significant implications for accountability and compliance with applicable rules of international law. In 2014, the UN Human Rights Council convened an interactive panel discussion of experts on the use of armed drones and issues of compliance with international law. The report that summarises the discussion of the panel highlights the importance of transparency for the rule of law:

Many delegations emphasized that lack of transparency created an accountability vacuum and prevented access to an effective remedy for victims. Transparency played an important role in assessing and enhancing respect for the rule of law. It was required for an evaluation of the consequences of the use of armed drones, a determination of the applicable legal framework and, consequently, a determination of the lawfulness of each strike. States that were using drones were urged to be as transparent as possible concerning the use of armed drones, as a significant step towards ensuring accountability.⁴⁰

As a requirement of the rule of law at national and international levels, accountability presupposes access to an effective remedy. For example, the decision-making process at some level should be amenable to judicial review. The lack of clarity concerning the applicable law undercuts the legal basis for judicial review in the event of violations. In a resolution adopted at its 55th meeting, the UN Human Rights Council called upon ‘States to ensure transparency in their records on the use of remotely piloted aircraft or armed drones and to conduct prompt, independent and impartial investigations whenever there are indications of a violation to international law caused by their use.’⁴¹ The European

³⁹ Bingham 2007, p 69-70

⁴⁰ Summary of the Human Rights Council interactive panel discussion of experts on the use of remotely piloted aircraft or armed drones in compliance with international law: Report of the Office of the United Nations High Commissioner for Human Rights, UN Doc. A/HRC/28/38, 15 December 2014, para. 46

⁴¹ UN Human Rights Council, Resolution 25/22, Ensuring use of remotely piloted aircraft or armed drones in counterterrorism and military operations in accordance with international law, including

Parliament made a similar call in a resolution adopted on the use of armed drones, calling on the European Union ‘to promote greater transparency and accountability on the part of third countries in the use of armed drones with regard to the legal basis for their use and to operational responsibility, to allow for judicial review of drone strikes and to ensure that victims of unlawful drone strikes have effective access to remedies.’⁴² The lack of access to an effective remedy undermines guarantees provided for under national and international law and weakens the rule of law at national and international levels. Both international human rights law and international humanitarian law obligate State authorities to investigate possible violations. The importance of such investigations has been emphasised by a number of UN Special Rapporteurs, including Ben Emmerson, a UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism; he urged states to ensure that ‘in any case in which there is a plausible indication from any apparently reliable source that civilians have been killed or injured in a counter-terrorism operation, including through the use of remotely piloted aircraft, the relevant authorities conduct a prompt, independent and impartial fact-finding inquiry, and provide a detailed public explanation.’⁴³

As requirements of rule of law at national and international levels, transparency and accountability protect the integrity of national and international legal orders. In doing so, they support the rights of victims as subjects of national and international law. The lack of transparency and accountability in the use of lethal force has implications not only for victims, but also for those involved in facilitating the execution of such operations. This was highlighted in a report issued in 2016 by the UK Parliament Joint Committee on Human Rights. Following the killing of Reyaad Khan by an RAF drone strike in Syria in 2015, concerns

international human rights and humanitarian law, adopted on 28 March 2014, UN Doc. A/HRC/RES/25/22, 15 April 2014.

⁴² European Parliament resolution on the use of armed drones, 2014/2567(RSP), 25 February 2014, para 4. It is instructive to recall the rule of law as one of the fundamental values upon which the European Union is based. See: Treaty on European Union, 31 I.L.M. 253 (1992), Article 6(1): ‘The Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States.’ See: Pech 2009, 2010

⁴³ Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Ben Emmerson, UN Doc A/HRC/25/59, 11 March 2014, para 73

regarding the lack of clarity in the UK government's legal position were raised before the Committee. The Committee's report on its enquiry into the use of drones for targeted killing states that the 'ongoing uncertainty about the Government's policy might leave front-line intelligence and service personnel in considerable doubt about whether what they are being asked to do is lawful, and may therefore expose them, and Ministers, to the risk of criminal prosecution for murder or complicity in murder.'⁴⁴ Under such conditions, it is clear that the efficacy of rules and regulations that exist to support compliance with the law are weakened in the absence of transparency on the part of State authorities. The section that follows considers the significance of compliance for the international rule of law and for the substantive values shared by the international community in the field of conflict and security law.

3.4.3. Issues of compliance with substantive values shared by the international community

In addition to the formal requirements of transparency and accountability, the international rule of law presupposes adherence to the substantive values shared by the international community. These are reflected in customary international law, in particular the rules of *jus cogens*. This section will focus on the significance of the international rule of law for compliance with such rules in relation to the use of lethal force. It will consider how the formal and substantive aspects of the international rule of law are inter-related and how the principle imposes positive and negative obligations on States and international organisations.

3.4.3.1 International Human Rights Law

The preamble of the Universal Declaration on Human Rights states: 'it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law.'⁴⁵ In as much as human rights are to be protected by the rule

⁴⁴ UK Parliament Joint Committee on Human Rights, *The Government's policy on the use of drones for targeted killing: Second Report of Session 2015-16*, HC 574, HL Paper 141, 10 May 2016, p 6

⁴⁵ Universal Declaration of Human Rights, G.A. res. 217A (III), U.N. Doc A/810 at 71 (1948), preamble.

of law, it is clear that the rule of law at the national and international levels cannot be sustained without the protection of fundamental human rights. A right of particular significance to international conflict and security law is the right to life. As noted by Christof Heyns and Thomas Probert, ‘The right to life has been described as the “supreme” or “foundational” right. Efforts to ensure other rights can be of little consequence if the right to life is not protected.’⁴⁶ The customary status of the right is beyond debate:

The right to life is a well-established and developed part of international law, in treaties, custom, and general principles, and, in its core elements, in the rules of *jus cogens*. Its primacy and the central features of the prohibition on arbitrary deprivations of life are not contested. Nonetheless, in practice, life remains cheap in many parts of the world. This is true in the many armed conflicts that are raging, but also outside such conflicts, where police and others authorised or tolerated by states often use excessive force, or there is a failure to investigate homicides.⁴⁷

When the prohibition on the arbitrary deprivation of life is not enforced, the rule of law is undermined. As a substantive value shared by the international community, respect for the right to life is a fundamental prerequisite of the international rule of law. As a norm of international human rights law, the right to life implies not only a prohibition on the arbitrary deprivation of life but also a duty to investigate violations. Here the substantive and formal aspects of the rule of law dovetail into accountability, highlighting the fundamental importance of prompt, independent and impartial investigations. Although the protection provided by international human rights law is clear, the continued use of lethal force in extraterritorial counter-terrorism operations presents significant challenges to compliance with the right to life. As noted by a panel of experts convened by the UN Human Rights Council on the use of armed drones:

⁴⁶ Heyns and Probert 2016

⁴⁷ Heyns and Probert 2016

The lack of accountability for violations of international human rights law, in particular the right to life, must be addressed. Where there were credible allegations of violations of international law, States were under an obligation to carry out prompt, independent and impartial investigations, and to make the results publicly available. States had a duty of public explanation to victims and to the international community. States should permit judicial review of the claims alleging grave violations of domestic and international law, and should be more transparent in their use of drones as a precondition to any meaningful accountability, including by providing information about the legal basis for the use of drones and facts about specific strikes.⁴⁸

3.4.3.2 International Humanitarian Law

The duty to investigate violations is also provided for under international humanitarian law. The ICRC Study on Customary International Humanitarian Law states that: ‘States must investigate war crimes allegedly committed by their nationals or armed forces, or on their territory, and, if appropriate, prosecute the suspects. They must also investigate other war crimes over which they have jurisdiction and, if appropriate, prosecute the suspects.’⁴⁹ Another rule of customary international law which is significant for the international rule of law is that which pertains to ensuring respect for international humanitarian law *erga omnes*: ‘States may not encourage violations of international humanitarian law by parties to an armed conflict. They must exert their influence, to the degree possible, to stop violations of international humanitarian law.’⁵⁰ Compliance with the substantive values enshrined in international humanitarian law also entails an obligation to prevent violations, to ‘ensure respect’ for the law. For instance, the UN General Assembly has urged states to ‘ensure that any measures taken or means employed to counter terrorism, including the use of remotely piloted

⁴⁸ Summary of the Human Rights Council interactive panel discussion of experts on the use of remotely piloted aircraft or armed drones in compliance with international law: Report of the Office of the United Nations High Commissioner for Human Rights, UN Doc. A/HRC/28/38, 15 December 2014, para. 54

⁴⁹ Henckaert and Doswald-Beck 2005, p 607

⁵⁰ Henckaert and Doswald-Beck 2005, p 509

aircraft, comply with their obligations under international law, including the Charter of the United Nations, human rights law and international humanitarian law, in particular the principles of distinction and proportionality.’⁵¹ The issue here for the rule of law at national and international level is one of compliance. Speaking on the 70th anniversary of the Diplomatic Conference which drafted the Geneva Conventions of 1949, the President of the International Committee of the Red Cross stated that ‘in conflicts across the world we see enormous violations of IHL... Our collective challenge today is to find ways to ensure greater respect within the changing dynamics of conflict.’⁵²

The challenge of ensuring greater respect for international humanitarian law cannot be realized without strengthening the international rule of law. While institutions of international criminal justice have a role to play, ‘international criminal law as a whole can only provide a remedy for crimes that shock the conscience of mankind after the fact – it cannot operate so as to prevent such injustice from occurring in the first place.’⁵³ Prevention supposes frameworks of rules, procedures and processes reinforcing the rule of law at national and international levels. While international humanitarian law regulates the use of force in the context of armed conflict, the law prohibiting resort to the use of force has been described as the cornerstone of the UN Charter system.⁵⁴ The section that follows considers the significance of this area of international law for the international rule of law.

3.4.3.3 Legal regulation of resort to the use of force

The international rule of law is substantively connected to the fundamental value of international peace and security. Although the term is not used in the Charter of the United Nations, the rule of law is implicit in the framework of the rule-based international legal order established by the Charter. As with international

⁵¹ UN General Assembly Resolution 68/178, Protection of human rights and fundamental freedoms while countering terrorism, adopted on 18 December 2013, UN Doc A/RES/68/178, 28 January 2014, para. 6(s)

⁵² Maurer 2019

⁵³ Crawford 2014, p 492

⁵⁴ Armed Activities on the Territory of Congo, ICJ Reports (2005) 168 at para 148, 45 ILM (2006) 271

human rights law and international humanitarian law, the most significant concern with rules governing resort to the use of force is one of compliance. However, the fact that violations exist does not render the law obsolete. The international rule of law is a legal ideal the value of which is not to be measured against impediments to its realisation. It can only be understood in terms of the formal and substantive requirements of the international legal order.

One of the most widely debated issues in regard to the international rule of law and the use of force is humanitarian intervention and related doctrines (such as the responsibility to protect). The question of whether or not a state or a group of states may resort to armed force using the humanitarian justification reveals an important inner tension in the concept of the international rule of law. On the one hand, the requirements of legality as one of the core elements of the international rule of law imply that rules of positive international law must be obeyed. Positive international law is clear on the matter: use of force is prohibited under the UN Charter; it can only be legitimate when authorised by the Security Council or in situations of self-defence. Humanitarian intervention, therefore, cannot be a legitimate ground for the use of force, and many attempts to argue otherwise suffer from a lack of justification as a matter of *lex lata*. On the other hand, the substantive side of the international rule of law, which links it to the fundamental values of the international community, including human dignity, peace, and self-determination, makes it possible to argue in favour of humanitarian intervention in the context of *lex ferenda*.

This ambivalence of the international rule of law in regard to humanitarian intervention, however, only reinforces the point made earlier, namely that the logic of the (international) rule of law has entailed a movement from ‘thin’ to ‘thick’, that is, from formal requirements to substantive values, not the other way around. This logic prioritises the importance of substantive values such as peace or human dignity – typical justificatory devices for humanitarian intervention – over the formal requirements of legality. The logic of the thickening of the rule of law to further morally justifiable goals depends on the *modus operandi* of institutional arrangements supporting such ends. If the institutional arrangements do not comply with the formal requirements of the rule of law, the sustainability of such an approach is questionable. At the same

time, not furthering such goals and values does not mean non-conformity with the rule of law. This is precisely why reversing the idea of the international rule of law in justifying the doctrine of humanitarian intervention substantially risks weakening rather than strengthening the current legal regime prohibiting the use of force. The strengthening of this legal regime would require institutions of global governance to be reformed to effectively secure the primacy of the international rule of law. Until this is realised, compliance with the prohibition on the threat or use of force will continue to be an issue.

3.5. Conclusions

There is no concept more fundamental to the integrity of the international legal order than the international rule of law. It is the foundation upon which international conflict and security law is based. As a value protected by the international community, the international rule of law requires transparency, accountability and compliance with the various rules of international law applicable to the use of lethal force. It serves not only as a measure of progress but also as an indicator of threats and challenges to international peace and security, which are often reflected in the level of protection accorded to the right to life.

The substantive values embodied in the international rule of law are intertwined with the formal requirements of the principle. For example, laws protecting human rights cannot be enforced without the provision of access to an effective remedy. Access to an effective remedy presupposes the existence of transparency and accountability. These are prerequisites for judicial review and the conduct of prompt, independent and impartial investigations. Here the formal and substantive requirements of the international rule of law provide a framework of rules that are fundamental not only to the current efficacy of international conflict and security law, but also its future development.

The formal and substantive aspects of the international rule of law provide important indicators illuminating the state of health of the international legal order. International conflict and security law is dependent upon the integrity of

this legal order in fulfilling its functions. In this context, the challenge that currently faces the international community is one of prioritising compliance, in particular with regard to the rules of international law governing the use of lethal force. In the absence of such compliance, the future development of international conflict and security law will rest on weak foundations.

(General comments: Good contribution, but requires linguistic corrections at many places.)

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