

# **The UN Declaration on the Rule of Law and the Application of the Rule of Law to the UN: A Reconstruction From an International Public Authority Perspective**

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## Abstract

The UN Declaration on the rule of law at the national and international levels seems to open new possibilities for listed terrorist suspects claiming legal protection or those seeking damages for harm caused by UN peacekeepers because the Declaration provides that the rule of law applies to the United Nations itself. However, the Declaration raises questions regarding the elements of the rule of law, its legal basis, and binding nature. This paper attempts a reconstruction of the UN Declaration and relevant UN practice under an international public authority perspective to explain and develop elements of the rule of law applicable to the UN, to determine its legal basis, and to investigate its binding nature. It argues, that since measures under Chapter VII must be effective if the UN wants to fulfil its purpose (Article 1 (1) *UN Charter*), the UN is bound by the rule of law insofar as “effective” measures require that related legitimacy concerns are addressed by rule of law safeguards.

## A. Introduction

“[T]he rule of law applies to [...] the United Nations and [...] should guide all of [its] activities.”<sup>1</sup> This is a statement that sounds like a wonderful and far-reaching promise: many States that were addressees of United Nations (UN) sanctions might have wished more than once to find a convincing argument to stop the Security Council from adopting measures which in their view were unfair or inappropriate. Others might have wanted to hold the Security Council accountable for actions under a UN mandate that caused damage to innocent people.<sup>2</sup> Still others have hoped to find a way to “democratize” Security Council composition and procedure.<sup>3</sup> UN staff, in turn, had an interest in an internal judicial mechanism against the UN as an employer not subject to national jurisdiction.<sup>4</sup> Furthermore, most strikingly, individuals listed as terrorist

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

<sup>2</sup> See, e.g., *Behrami and Behrami v. France*, ECtHR, Application No. 71412/01, Decision as to the Admissibility of 2 May 2007.

<sup>3</sup> Algeria (GA, 5th Plenary Meeting (67th Session), Official Records, UN Doc A/67/PV.5, 24 September 2012, 7). See on the discussion of the UN Security Council (SC) reform J.-P. Cot, ‘United Nations, Reform’, in R. Wolfrum (ed), *The Max Planck Encyclopedia of Public International Law*, Vol. X (2012), 428, 439-441.

<sup>4</sup> *Charter of the United Nations*, 26 June 1945, 1 UNTS XVI, Art. 105 [UN Charter]; see also H. Schermers & N. Blokker, *International Institutional Law*, 5th ed. (2011), para. 1611.

suspects long for due process and legal protection.<sup>5</sup> The question whether there is something like the rule of law in the international sphere has been discussed earlier<sup>6</sup> but has more recently gained momentum.<sup>7</sup> Now, the application of the rule of law to the UN seems to have become a reality: the “Declaration of the high-level meeting of the General Assembly on the rule of law at the national and international levels” adopted as a resolution by the UN General Assembly on 24 September 2012 (UN Declaration) declares the rule of law applicable to the UN itself and its principal organs.<sup>8</sup> But what seems to be a long-awaited breakthrough raises questions upon closer examination: Why is the rule of law relevant for the UN? What is its legal basis? Is it binding? And what are its elements?

This paper examines the UN Declaration from an international public authority (IPA) perspective. By way of reconstruction, it investigates whether there were legitimacy concerns regarding UN activities during the debate at the UN, and whether in the adopted text and other UN practice the rule of law was seen as the suitable answer to address such concerns. To that end, I will sketch the basics of the international public authority perspective (B.), briefly examine the nature of the UN Declaration (C.), analyze the UN Declaration’s genesis and its text from an IPA perspective by reference to specific exercises of public authority by the UN and the surrounding debates (D.), and address the question of the legal basis and the binding nature of the rule of law for the UN (E.) before drawing conclusions (F.).

<sup>5</sup> The still most prominent case in that regard is the Kadi I Case, *Kadi and Al Barakaat International Foundation v. Council and Commission*, Joined Cases C-402/05 P and C-415/05 P, & Kadi II, *Commission and Others v. Kadi*, Joined Cases C-584/10 P, C-593/10 P and C-595/10 P.

<sup>6</sup> J. Halderman, *The United Nations and the Rule of Law* (1966); A. Watts, ‘The International Rule of Law’, 36 *German Yearbook of International Law* (1993), 15 & 45.

<sup>7</sup> See, e.g., F. Kratochwil, *The Status of Law in World Society - Meditations on the Role and Rule of Law* (2014); L. Grenfell, *Promoting the Rule of Law in Post-Conflict States* (2013); M. Zürn, A. Nollkaemper & R. Peerenboom, *Rule of Law Dynamics: In an Era of International and Transnational Governance* (2012); G. Lautenbach, *The Rule of Law Concept in the Case Law of the European Court of Human Rights* (2012); A. Nollkaemper, *National Courts and the International Rule of Law* (2012); T. Bingham, *The Rule of Law* (2011); R. McCorquodale, *The Rule of Law in International and Comparative Context, British Institute of International and Comparative Law* (2010); C. Bull, *No Entry Without Strategy: Building the Rule of Law under UN Transitional Administration* (2008); J. M. Farrall, *United Nations Sanctions and the Rule of Law* (2007); J. Crawford, ‘International Law and the Rule of Law’, 24 *Adelaide Law Review* (2003) 1, 3.

<sup>8</sup> See GA Res 67/1, *supra* note 1, para. 2.

## B. Basics of the International Public Authority Perspective and the Public Law Approach

An increasing transfer of competences to international institutions through globalization has resulted in the growing political significance of these institutions. Some of their acts, such as sanctions imposed on individuals, can be classified as exercises of public authority, understood as actions which determine others and reduce their freedom.<sup>9</sup> Such activities have triggered concerns about their legitimacy<sup>10</sup> as can be seen from cases filed before European courts. Targeted sanctions, for example, met with resistance since legal remedies against them did not exist.<sup>11</sup> The research project on international public authority<sup>12</sup> examines exercises of international public authority and strives to determine a normative justification for them by using a public law approach. The goal is to develop a legal framework for the exercise of international public authority which mitigates the legitimacy concerns.<sup>13</sup> The public law approach encompasses the debate about the constitutionalization of international law, administrative law perspectives, as well as insights from international institutional law.<sup>14</sup>

The UN Declaration presents the public law approach with an unusual case: so far, the international public authority project has mainly examined phenomena in different fields of international law by applying the public law approach in order to find the appropriate rules to tame the exercise of

<sup>9</sup> A. von Bogdandy, P. Dann & M. Goldmann, 'Developing the Publicness of Public International Law: Towards a Legal Framework for Global Governance Activities', in A. von Bogdandy *et al.* (eds), *The Exercise of Public Authority by International Institutions* (2010), 3, 8-9 & 11.

<sup>10</sup> Legitimacy is understood in the international public authority project as relating to the expectation concerning who, with what qualifications and mode of selection, is competent to make which decision by what criteria and what procedures, see *supra* note 9, footnote 18 on page 11. This concept of legitimacy can be said to incorporate elements of legal ('qualifications', 'selection', 'competence'), moral ('criteria') and social approaches ('expectation') to legitimacy. On these different approaches, see C. Thomas, 'The Uses and Abuses of Legitimacy in International Law', 34 *Oxford Journal of Legal Studies* (2014) 4, 729, 734-742.

<sup>11</sup> See in detail below, Section D. II. 2. a.

<sup>12</sup> See on the project A. von Bogdandy *et al.* (eds), *The Exercise of Public Authority by International Institutions* (2010) and A. von Bogdandy & I. Venzke (eds), *International Judicial Lawmaking* (2012).

<sup>13</sup> Von Bogdandy, Dann & Goldmann, *supra* note 9, 16-17.

<sup>14</sup> Von Bogdandy, Dann & Goldmann, *supra* note 9, 21.

international public authority.<sup>15</sup> The UN Declaration with its reference to the rule of law seems to establish such a legal framework for UN activities, while one might consider it at the same time as an exercise of public authority vis-à-vis the UN Member States as it urges them to implement the rule of law at the national level. An analysis of the UN Declaration from an IPA perspective thus needs to examine whether the order to respect the rule of law contained in the UN Declaration can be connected to instances of criticized UN exercise of public authority for which the rule of law was seen as the suitable solution.

### C. The Authoritative Character of the UN Declaration

Before analyzing the UN Declaration in detail, the nature of the UN Declaration as a resolution of the UN General Assembly should be considered. In order to fulfill its task of making recommendations to UN Members or to the Security Council for matters within the scope of the *UN Charter*,<sup>16</sup> the UN General Assembly may adopt resolutions which are - contrary to the powers of the UN Security Council<sup>17</sup> - in principle non-binding.<sup>18</sup> This finding from the *UN Charter* does not mean, however, that the UN Declaration is without any legal or factual effects. As an outcome document of a high-level meeting of heads of state and government that saw broad participation and a unanimous adoption,<sup>19</sup> the UN Declaration has strong authority and might be seen to have at least some legal implications since it purports to set forth legal rules. Also, the document is identified as a “Declaration,”<sup>20</sup> which reflects its particular importance for international law similarly to past Declarations such as the Universal Declaration of Human Rights of 1948<sup>21</sup> or the Friendly Relations Declaration of the General Assembly of 1970.<sup>22</sup> One might therefore conclude that the UN Declaration has strong authority, while leaving the question of the

<sup>15</sup> See the thematic studies, A. von Bogdandy *et al.* (eds), *The Exercise of Public Authority by International Institutions* (2010), 99-658.

<sup>16</sup> See Art. 10 *UN Charter*.

<sup>17</sup> See Art. 25 *UN Charter*.

<sup>18</sup> See Schermers & Blokker, *supra* note 4, § 1217.

<sup>19</sup> GA, 3rd Plenary Meeting (67th Session), Official Records, UN Doc A/67/PV.3, 24 September 2012, 3 [GA, 3rd Plenary Meeting (67th Session)].

<sup>20</sup> C. Tomuschat, ‘United Nations, General Assembly’, in R. Wolfrum (ed), *The Max Planck Encyclopedia of Public International Law*, Vol. X (2012), 371, 376 para. 22.

<sup>21</sup> GA Res. 217 A (III), UN Doc A/810 at 71, 10 December 1948.

<sup>22</sup> GA Res. 2625 (XXV), UN Doc A/RES/25/2625, 24 October 1970.

binding nature of the rule of law addressed therein open for the moment.<sup>23</sup> This allows for the application of the IPA approach.

## D. Analysis of the UN Declaration Under an International Public Authority Perspective

This part examines the UN debate that led to the Declaration being adopted and analyzes the Declaration text. For a reconstruction in light of the IPA approach, it will be of particular interest to see whether legitimacy concerns existed regarding UN activities which represent exercises of public authority and whether the rule of law was seen by the UN as the suitable answer to address such concerns.

### I. Reconstruction Based on the Debate in the United Nations

Before analyzing the UN Declaration text itself, it is worth looking at the debate leading up to the UN Declaration to find out what the considerations were behind the adoption of the Declaration. This might help to reconstruct whether there was the same or a similar motivation as that underlying the public law approach to the exercise of international public authority, i.e. to find a legal framework for such exercise in order to address legitimacy concerns.<sup>24</sup>

As early as the late 1940s, the preamble of the Universal Declaration of Human Rights stressed as essential “that human rights should be protected by the rule of law.”<sup>25</sup> The Friendly Relations Declaration of 1970 stated that the adoption of the Declaration constituted a landmark “in promoting the rule of law among nations.”<sup>26</sup> While the rule of law was already mentioned in these documents, both Declarations were only addressed to UN Member States.

Only in recent years has discussion started on the rule of law that also addresses its application to the UN itself. In 2003, the Security Council held its first thematic debate on the rule of law, entitled “Justice and the Rule of Law: the United Nations Role” and stressed the

“vital importance of these issues, recalling the repeated emphasis given to them in the work of the Council, for example in the

<sup>23</sup> See below, Section E.

<sup>24</sup> See von Bogdandy, Dann & Goldmann, *supra* note 9, 16.

<sup>25</sup> GA Res. 217 (III), *supra* note 21, preamble.

<sup>26</sup> GA Res. 2625 (XXV), *supra* note 22, preamble.

context of the protection of civilians in armed conflict, in relation to peacekeeping operations and in connection with international criminal justice.”<sup>27</sup>

Following the Security Council’s wish to receive more expertise and experience on these matters,<sup>28</sup> the Secretary-General delivered a report in 2004 under the title “The rule of law and transitional justice in conflict and post-conflict societies.”<sup>29</sup> This report was seen to provide for the first time a common definition of the rule of law.<sup>30</sup> In an address to the UN, the Secretary-General said that it had to be ensured that law enforcement personnel and peacekeepers did not contribute to the suffering of the vulnerable, including women and children, and that those who abused them were to be held accountable.<sup>31</sup> In his view, the rule of law meant that no one was above the law and that therefore the Secretary-General had to set out minimum standards of behavior expected of all UN personnel.<sup>32</sup>

The topic of the rule of law took a more prominent position in the World Summit Outcome document of the General Assembly in 2005<sup>33</sup> where “human rights and the rule of law” was identified as one of four problematic areas in which multilateral solutions should be provided.<sup>34</sup> The general spirit of the outcome document, however, was to recognize the need for UN Member States to adhere to the rule of law at the national and international levels, by calling on them, for example, to become parties to international treaties or to consider accepting the jurisdiction of the International Court of Justice,<sup>35</sup> rather than

<sup>27</sup> SC, *Statement by the President of the Security Council*, UN Doc S/PRST/2003/15 (2003), 24 September 2003.

<sup>28</sup> See *ibid.*

<sup>29</sup> SC, *The rule of law and transitional justice in conflict and post-conflict societies*, Report of the Secretary-General, UN Doc S/2004/616 (2004), 23 August 2004 [SC, *The rule of law and transitional justice*].

<sup>30</sup> M. Wood, ‘Public International Law and the Idea of the Rule of Law’, in M. Pogačnik & E. Petrič, *Challenges of Contemporary International Law and International Relations: liber amicorum in Honour of Ernest Petrič*, *Evropska pravna fakulteta* (2011), 431, 442; T. Fitschen, ‘Inventing the Rule of Law for the United Nations’, *12 Max Planck Yearbook of United Nations Law* (2008), 347, 350.

<sup>31</sup> See SC, *The rule of law and transitional justice*, *supra* note 29, para. 33.

<sup>32</sup> UN Secretariat, *Secretary-General’s Bulletin: Special measures for protection from sexual exploitation and sexual abuse*, UN Doc ST/SGB/2003/13, 9 October 2003.

<sup>33</sup> GA Res. 60/1, UN Doc A/RES/60/1, 24 October 2005.

<sup>34</sup> *Ibid.*, para. 16.

<sup>35</sup> *Ibid.*, para. 134.

addressing the UN itself, let alone specifying precise obligations of the UN under the rule of law.

In 2006, the Security Council held an open debate on ‘Strengthening international law: rule of law and the maintenance of international peace and security’ for which the then Danish presidency submitted a discussion paper including as one topic the legitimacy and efficiency of the Council’s endeavors to maintain international peace and security.<sup>36</sup> The paper stressed that due process guarantees would enhance the credibility of sanctions regimes and, as targeted sanctions which were seen as credible were more likely to be implemented, credibility would in turn enhance the efficiency of sanctions regimes.<sup>37</sup> In its presidential statement after the debate, the Security Council emphasized the importance of promoting the rule of law and confirmed it would ensure that sanctions were carefully targeted in support of clear objectives and were implemented in ways that balanced effectiveness against possible adverse consequences.<sup>38</sup> The Council said that it was committed to ensuring that fair and clear procedures existed for placing individuals and entities on sanctions lists and for removing them, as well as for granting humanitarian exemptions.<sup>39</sup>

Targeted sanctions of the UN can be seen as exercises of international public authority. Denmark spoke of credibility concerns and said that due process safeguards would enhance credibility. This shows that the considerations behind the UN Declaration are similar to those underlying the international public authority perspective.<sup>40</sup>

<sup>36</sup> *Strengthening international law: rule of law and the maintenance of international peace and security (Discussion paper for the open debate in the Security Council on 22 June 2006 under Denmark’s presidency)*, Letter dated 7 June 2006 from the Permanent Representative of Denmark to the United Nations addressed to the Secretary-General, UN Doc S/2006/367 (2006), 7 June 2006, 2.

<sup>37</sup> *Ibid.*, 4. Similar concerns were expressed two years later by the Secretary-General, see GA Report, UN Doc A/63/226, 6 August 2008, para. 28, and four years later by Mexico, see *Concept note for the open thematic debate in the Security Council to be held on 29 June 2010 under the presidency of Mexico, on the promotion and strengthening of the rule of law in the maintenance of international peace and security*, Annex to the letter dated 18 June 2010 from the Permanent Representative of Mexico to the United Nations addressed to the Secretary-General, UN Doc S/2010/322, 21 June 2010, 5.

<sup>38</sup> SC, UN Doc S/PRST/2006/28 (2006), 22 June 2006, 2.

<sup>39</sup> *Ibid.* Details for the introduction and implementation of sanctions presenting more or less the status quo in the Al Qaida sanctions regime at that time were later set out in GA Res. 64/89, UN Doc A/RES/64/115, 15 January 2010, Annex.

<sup>40</sup> See further to targeted sanctions below, Section D. II. 2. a.



In 2008, an inventory of the current rule of law activities of the UN requested by the General Assembly<sup>41</sup> and delivered by the Secretary-General<sup>42</sup> did not bring any new insights as to the idea behind the concept of the rule of law at the UN level. In a later report delivered the same year, the Secretary-General said that

“[t]he Organization has little credibility if it fails to apply the rule of law to itself. The United Nations is a creation of international law, established by treaty, and its activities are governed by the rules set out in its Charter. Appropriate rules of international law apply *mutatis mutandis* to the Organization as they do to States.”<sup>43</sup>

He continued,

“In the light of its responsibilities, the United Nations has a special duty to offer its staff timely, effective and fair justice through its internal justice system.”<sup>44</sup>

While this is a statement by the Secretary-General and not by the Security Council or the General Assembly, it nonetheless gives an idea of the aspects that might have played a role in the rule of law discussion. UN staff are subject to the authority of the Secretary-General,<sup>45</sup> which can be classified as international public authority since it is exercised on the basis of a competence instituted by an international act of States,<sup>46</sup> namely the *UN Charter* (Article 97). Thus, UN internal affairs can also be examined under the international public authority perspective. However, the Secretary-General only speaks generally about the credibility of the UN without specifying concerns regarding staff matters.<sup>47</sup>

The debate of the high-level meeting in 2012 entitled “The rule of law at the national and international levels”, which led up to the adoption of the

<sup>41</sup> GA Res. 61/39, UN Doc A/RES/61/39, 18 December 2006, para. 2.

<sup>42</sup> GA, *The rule of law at the national and international levels*, Report of the Secretary-General, UN Doc A/63/64, 12 March 2008.

<sup>43</sup> GA, *Strengthening and coordinating United Nations rule of law activities*, Report of the Secretary-General, UN Doc A/63/226, 6 August 2008, para. 27.

<sup>44</sup> *Ibid.*, para. 28.

<sup>45</sup> Secretary-General, *Secretary-General's bulletin: Staff Rules and Staff Regulations of the United Nations*, UN Doc ST/SGB/2014/1, 1 January 2014, Regulation 1.2 (c).

<sup>46</sup> Von Bogdandy, Dann & Goldmann, *supra* note 9, 13.

<sup>47</sup> See further on the internal administration of justice below, Section D. II. 2. c.

UN Declaration, was opened with the President of the General Assembly stating that

“[w]ithin States, the just application of the rule of law stands at the foundation of responsible governance. In the international arena, it helps ensure the predictability of actions and the legitimacy of outcomes.”<sup>48</sup>

The argument was reiterated that the rule of law had to apply to the UN itself for reasons of credibility: “Only an organization that upholds the highest standards itself can be credible in promoting those standards elsewhere.”<sup>49</sup> This argument phrases a lack of credibility as a legitimacy concern in cases when the UN does not practice what it preaches, even though it was not expressly connected to the exercise of public authority here. That the rule of law can be seen to mean different things was shown by States stressing that the rule of law could not be strengthened without making global institutions more democratic, i.e. without reforming the Security Council.<sup>50</sup>

In conclusion, this review of the debate that led to the adoption of the UN Declaration reveals that the application of the rule of law to the UN itself and its activities was one aspect of the discussion. Other aspects addressed, among others, the rule of law as it applies to UN Member States, calling on them, for example, to consider accepting the jurisdiction of the International Court of Justice. The discussion was characterized by rather general statements on the rule of law, neither specifying why the rule of law should be applied, nor going into detail as to the elements of the rule of law. Despite this lack of precision by the General Assembly and the Security Council, the Secretary-General in his reports on the rule of law presented cases of UN activities that can be seen, from an IPA perspective, as exercises of public authority, such as targeted sanctions, UN peacekeeping, and the internal administration of justice in the UN. Regarding these UN activities, several comments can be identified that highlighted legitimacy concerns and requested remedying them by introducing rule of law elements in the work of the UN. The debate and

<sup>48</sup> GA, 3rd Plenary Meeting (67th Session), *supra* note 19, 1.

<sup>49</sup> Swiss Confederation (GA, 4th Plenary Meeting (67th Session), Official Records, UN Doc A/67/PV.4, 24 September 2012, 2 [GA, 4th Plenary Meeting (67th Session)]) & Luxembourg (GA, 4th Plenary Meeting, *supra* this note, 7).

<sup>50</sup> Gabonese Republic, (GA, 3rd Plenary Meeting (67th Session), *supra* note 19, 22) & Bolivarian Republic of Venezuela (GA, 3rd Plenary Meeting (67th Session), *supra* note 19, 40).

comments reveal that such rule of law elements include accountability, minimum standards of behavior and respect for the rights of the people protected by UN personnel and UN peacekeepers in their operations, as well as due process guarantees in sanctions regimes and timely, effective, and fair internal justice for UN personnel in affairs internal to the organization. These elements will now be further examined in connection with the text of the UN Declaration and additional UN practice.

## II. Reconstruction Based on the Text of the UN Declaration and Relevant Practice

The IPA perspective can yield further insights by examining the text of the UN Declaration itself in respect of concrete UN activities representing exercises of public authority, and by addressing the legitimacy concerns raised by these activities and the reactions to them within the UN to see whether these concerns have been considered referring to the rule of law. Only in this case, the rule of law would seem to provide an adequate legal framework for these UN activities.

### 1. Initial Stumbling Blocks

Under the IPA perspective, one could argue that as far as the UN Declaration addresses the rule of law at the national level, the Declaration itself is an exercise of public authority. It urges UN Member States to follow and implement a certain rule of law standard in their territory. Even if the UN Declaration is seen as non-binding<sup>51</sup> so that it does not modify the legal situation of UN Member States,<sup>52</sup> it might condition their behavior<sup>53</sup> since a deviation from the Declaration might come at some reputational cost. The rule of law as an ideal is hard to object to.<sup>54</sup> The paper, however, does not focus on this dimension of the UN Declaration but investigates how the rule of law according to the UN Declaration applies to the UN and its activities as a legal framework for the exercise of its public authority.

<sup>51</sup> See above, Section C.

<sup>52</sup> See von Bogdandy, Dann & Goldmann, *supra* note 9, 11-12.

<sup>53</sup> See von Bogdandy, Dann & Goldmann, *supra* note 9, 12.

<sup>54</sup> See M. Kanetake, 'The Interfaces between the National and International Rule of Law: The Case of UN Targeted Sanctions', 9 *International Organizations Law Review* (2012) 2, 267, 275.

The Secretary-General repeated in a report of 2012 the definition of the rule of law from his earlier<sup>55</sup> report:

“The United Nations defines the rule of law as 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.”<sup>56</sup>

This broad definition covers both procedural requirements, such as equal enforcement of laws and independent adjudication, and substantive elements, such as consistency with human rights. It was, however, not included in the Declaration. The high-level meeting only took note of the report of the Secretary-General,<sup>57</sup> certainly because the definition only addressed the rule of law at the domestic level in conflict and post-conflict societies.<sup>58</sup> The program of action to strengthen the rule of law proposed in this report<sup>59</sup> which made detailed suggestions with regard to, e.g., the delivery of public services, was also not adopted by the General Assembly.<sup>60</sup> Only parts of the broad definition above made their way into the Declaration:

<sup>55</sup> SC, *The rule of law and transitional justice*, *supra* note 29, para. 6.

<sup>56</sup> GA, *Delivering justice: programme of action to strengthen the rule of law at the national and international levels*, Report of the Secretary-General, UN Doc A/66/749 (2012), 16 March 2012, para. 2 [GA, *Delivering justice*, Report of the Secretary-General].

<sup>57</sup> See GA Res 67/1, *supra* note 1, para. 39.

<sup>58</sup> Cf. J. Crawford, ‘Chance, Order, Change: The Course of International Law’, 365 *Recueil des Cours de l’Académie de Droit International* (2013), 13, 262 [Crawford, *Chance, Order, Change*]; P. Bodeau-Livinec & S.Villalpando, ‘La promotion de l’“Etat de droit” dans la pratique des Nations Unies’, in *Société Française pour le Droit International*, *L’Etat de droit en droit international* (2009), 81, 93.

<sup>59</sup> GA, *Delivering justice*, Report of the Secretary-General, *supra* note 56.

<sup>60</sup> See GA Res 67/1, *supra* note 1, para. 39.

“[A]ll persons, institutions and entities, public and private, including the State itself, are accountable to just, fair and equitable laws and are entitled without any discrimination to equal protection of the law.”<sup>61</sup>

In addition to lacking a comprehensive definition of the rule of law, this sentence uncovers another difficulty in determining the elements of the rule of law applicable to the UN. The Declaration deals with the “rule of law at the national and international levels” at the same time, and it addresses both UN Member States and the UN itself.<sup>62</sup>

Since the concrete design of the rule of law in the national constitutional order of a UN Member State is a matter of the internal affairs of that State,<sup>63</sup> the Declaration reference to the rule of law at the national level can only entail general obligations for UN Member States, such as accountability for just, fair, and equitable laws<sup>64</sup> without prescribing too many details. In contrast, the rule of law at the international level implies for UN Member States in particular respect for their obligations under international law, e.g. to respect the sovereign equality, territorial integrity, and political independence of all States, or to refrain from the threat or use of force if inconsistent with the purposes and principles of the United Nations, etc.<sup>65</sup> What the rule of law in the UN Declaration could mean for the UN is examined subsequently with regard to specific UN activities.

## 2. The Reconstruction of Elements of the Rule of Law in the Declaration in Light of UN Activities Which Represent an Exercise of Public Authority

This section examines the elements of the rule of law in the UN Declaration in light of some of the most important UN activities which represent exercises of public authority.

<sup>61</sup> See GA Res 67/1, *supra* note 1, para. 2.

<sup>62</sup> On the international reception of national rule of law practices regarding the rule of law, see Kanetake, *supra* note 54, 267-338. On the distinction between the rule of law at the national level and the rule of law at the international level Wood, *supra* note 30, 434.

<sup>63</sup> S. Besson, ‘Sovereignty’, in R. Wolfrum (ed), *The Max Planck Encyclopedia of Public International Law*, Vol. IX (2012), 366, 383 para. 121. See also GA, *Delivering justice*, Report of the Secretary-General, *supra* note 56, para. 48: “The rule of law is at the heart of State sovereignty [...]”

<sup>64</sup> See GA Res 67/1, *supra* note 1, para. 2.

<sup>65</sup> See GA Res 67/1, *supra* note 1, paras 3, 4 & 20.

### a. Targeted Sanctions

From an IPA perspective, the UN Declaration text seems to suggest first and foremost an examination of targeted sanctions. Targeted sanctions are adopted by the UN Security Council and are directed against individuals whose behavior is deemed a threat to international peace and security.<sup>66</sup> These individuals are listed by the UN sanctions committees, subsidiary bodies of the Security Council. As a consequence, these individuals are subject to sanctions such as a freezing of their assets, a travel ban or an arms embargo. When a sanctions committee on behalf of the Security Council identifies an individual to be targeted and puts the individual on the list, it exercises international public authority in the sense that it reduces this individual's freedom in a determinative way.<sup>67</sup> Targeted sanctions can thus be seen as exercises of international public authority by the UN.<sup>68</sup> The objections raised against targeted sanctions in the political arena as well as before national and regional courts mainly concerned the manner in which individuals were selected for listing without the possibility of formal review.<sup>69</sup> Sanctions thus did not meet the expectations of targeted individuals and of many States pertaining to adequate procedural safeguards and thus gave rise to concerns regarding their legitimacy.

Having identified targeted sanctions as exercises of international public authority, it remains to be seen in a second step whether the UN Declaration provides a sufficient legal framework to alleviate such legitimacy concerns related to targeted sanctions. Paragraph 29 of the UN Declaration stipulates that sanctions have to be (a) carefully targeted, in support of clear objectives, (b) be designed carefully so as to minimize possible adverse consequences, and that (c) fair and clear procedures have to be maintained and further developed.<sup>70</sup>

<sup>66</sup> See, for example, the sanctions regime concerning Liberia, established by SC Res. 1521, UN Doc S/RES/1521 (2003), 22 December 2003, or the sanctions regime pursuant to SC Res. 1267, UN Doc S/RES/1267 (1999), 15 October 1999, and SC Res. 1989, UN Doc S/RES/1989 (2011), 17 June 2011 concerning Al-Qaida and associated individuals and entities.

<sup>67</sup> See von Bogdandy, Dann & Goldmann, *supra* note 9, 11.

<sup>68</sup> C. Feinäugle, 'The UN Security Council Al-Qaida and Taliban Sanctions Committee: Emerging Principles of International Institutional Law for the Protection of Individuals?', 9 *German Law Journal* (2008) 11, 1513, 1514 [Feinäugle, UN Security Council Al-Qaida and Taliban Sanctions Committee].

<sup>69</sup> Kanetake, *supra* note 54, 283; S. Chesterman, "'I'll take Manhattan': The International Rule of Law and the United Nations Security Council", 1 *Hague Journal on the Rule of Law* (2009) 1, 67, 70.

<sup>70</sup> See GA Res 67/1, *supra* note 1, para. 29.

This means that there must be a clear objective for the adoption of sanctions, the sanctions must be suitable to attain this objective, and the sanctions must be designed with as little adverse consequences as possible. This is reminiscent of the elements of a proportionality test which is known, for example, from human rights protection at the international level.<sup>71</sup> The expression “fair and clear procedures” refers to what is known as due process in national constitutional law.

This raises the question of the significance of a proportionality test for the public law approach. As noted above, the public law approach relies on, *inter alia*, constitutionalist perspectives to build a legal framework for international public authority.<sup>72</sup> In respect of proportionality and due process, a comparison of domestic constitutional law shows that the principle of proportionality<sup>73</sup> and the guarantee of due process<sup>74</sup> are, while not denying existing variations between different national traditions, common features these days in national constitutional law. Under the public law approach, proportionality and due process can contribute to the legitimacy of public authority and should therefore be part of a legal framework applicable to UN targeted sanctions.<sup>75</sup> This insight is not just theoretical but also practical: if the rule of law standards established in an IPA perspective prove useful, additional principles applicable to UN sanctions can be similarly identified, which will refine the legal framework for sanctions.<sup>76</sup>

The further question arises whether the proportionality test required by para. 29 of the UN Declaration is sufficient to accord legitimacy to UN targeted

<sup>71</sup> *Handyside v. the United Kingdom*, ECtHR Application No. 5493/72, Judgment of 7 December 1976, para. 49. For the elements of proportionality in public international law E. Crawford, ‘Proportionality’, in R. Wolfrum (ed), *The Max Planck Encyclopedia of Public International Law*, Vol. VIII (2012), 533, 534 para. 2.

<sup>72</sup> See von Bogdandy, Dann & Goldmann, *supra* note 9, 21.

<sup>73</sup> M. Cohen-Eliya & I. Porat, *Proportionality and Constitutional Culture* (2013), 10-13.

<sup>74</sup> B. Fassbender, ‘Targeted Sanctions Imposed by the UN Security Council and Due Process Rights’, 3 *International Organizations Law Review* (2006) 2, 437, 457; stating that notwithstanding differences in definition there was today a universal minimum standard of due process.

<sup>75</sup> For the application of the principle of proportionality in the 1267 sanctions regime: Feinäugle, ‘UN Security Council Al-Qaida and Taliban Sanctions Committee’, *supra* note 68, 1539.

<sup>76</sup> See for such elements for the 1267 sanctions regime C. Feinäugle, *Hoheitsgewalt im Völkerrecht* (2011), 358-359 (*Summary: The Exercise of Public Authority in International Law*) [Feinäugle, *Hoheitsgewalt im Völkerrecht*].

sanctions. If we look at the example of the Al-Qaida targeted sanctions regime,<sup>77</sup> the changes introduced with regard to fair and clear procedures have on the one hand led the Advocate-General in *Kadi II* to conclude that these improvements in the procedure before the Sanctions Committee militated in favor of a limited review.<sup>78</sup> On the other hand, the Court of Justice did not follow this opinion. Listings are still challenged before courts,<sup>79</sup> which indicates that the legal framework might have to be further improved if the UN wants to avoid that the effective implementation of its measures is jeopardized. One option would be to give the Ombudsperson the power to delist persons with binding effect for the Sanctions Committee.

## b. UN Peacekeeping

Another core field of activity of the UN is peacekeeping. Peacekeeping operations are meant to assist States in transition from conflict to peace; they are a technique designed to preserve the peace where fighting has been halted.<sup>80</sup> Over the years, different types and forms of peacekeeping have developed, which has led to the notion of multi-dimensional peacekeeping,<sup>81</sup> while the traditional “passive” mandate of UN peacekeepers was mostly limited to monitoring local police forces and compliance with peace agreements, under “transformational” mandates, UN police and justice experts provide advice and guidance on restructuring and reforming the law enforcement sector as well as operational support to law enforcement agencies of the host State when needed.<sup>82</sup> The

<sup>77</sup> *Security Council Committee pursuant to resolutions 1267 (1999) and 1989 (2011) concerning Al-Qaida and associated individuals and entities*, available at <https://www.un.org/sc/suborg/en/sanctions/1267>.

<sup>78</sup> *Commission and Others v. Kadi*, *supra* note 5, Opinion of Advocate General Bot of 19 March 2013, para. 81.

<sup>79</sup> See Security Council, *Sixteenth Report of the Analytical Support and Sanctions Monitoring Team Submitted Pursuant to Resolution 2161 (2014) concerning Al-Qaida and associated individuals and entities*, UN Doc S/2014/770, 29 October 2014, para. 74-76.

<sup>80</sup> Department of Peacekeeping Operations, Department of Field Support, *United Nations Peacekeeping Operations - Principles and Guidelines* (2008), 18.

<sup>81</sup> *Ibid.*, 22.

<sup>82</sup> See T. Fitschen, ‘Taking the Rule of Law Seriously: More Legal Certainty for UN Police in Peacekeeping Missions’, Geneva Center for Security Policy (GCSP) Law Papers, Research Series No. 9, December 2012, 7-8 [Fitschen, More Legal Certainty for UN Police].



UN Missions in Kosovo<sup>83</sup> and Timor-Leste<sup>84</sup> had an even stronger mandate, including the provision of public security and law enforcement.<sup>85</sup>

At least some UN activities in peacekeeping missions can be classified as exercises of public authority. When UN peacekeepers have an explicit mandate “to contribute to the protection of civilians and the restoration of security and public order, through the use of appropriate measures,” their operations typically involve measures determining individuals and reducing their freedom.<sup>86</sup> This authority is “public”<sup>87</sup> as it is exercised on the basis of a UN Security Council resolution adopted under the competences of the Security Council provided by the *UN Charter* which, in turn, was concluded as a multilateral treaty in the public interest of international peace and security. Concerns about the legitimacy of peacekeeping played a role in the debate leading to the adoption of the UN Declaration<sup>88</sup> since especially cases of alleged sexual abuse by UN staff ran counter to expectations placed on the work of UN peacekeepers and their observance of their mandate and their appropriate behavior.<sup>89</sup> The connection to the rule of law was made by the Secretary-General in another report when he has said:

“Since the rule of law is an essential element of lasting peace, United Nations peacekeepers and peacebuilders have a solemn responsibility to respect the law themselves, and especially to respect the rights of the people whom it is their mission to help.”<sup>90</sup>

<sup>83</sup> The mission was established by SC Res. 1244, UN Doc S/RES/1244 (1999), 10 June 1999.

<sup>84</sup> The mission was established by SC Res. 1704, UN Doc S/RES/1704 (2006), 25 August 2006.

<sup>85</sup> See SC Res. 1244, *supra* note 83, para. 9(d) on Kosovo and SC Res. 1704, *supra* note 84, para. 4(c) on Timor-Leste. On the UN administration of territories, see below, Section D. II. 2 d.

<sup>86</sup> See as a recent example SC Res. 2127, UN Doc S/RES/2127 (2013), 5 December 2013, para. 28(i). For the elements of such exercise of authority see von Bogdandy, Dann & Goldmann, *supra* note 9, 11.

<sup>87</sup> Von Bogdandy, Dann & Goldmann, *supra* note 9, 13.

<sup>88</sup> See above, Section D. I.

<sup>89</sup> The legal framework established as a consequence can be found at UN Secretariat, *Secretary-General's Bulletin: Special measures for protection from sexual exploitation and sexual abuse*, UN Doc ST/SGB/2003/13, 9 October 2003.

<sup>90</sup> GA, *In larger freedom: towards development, security and human rights for all*, Report of the Secretary-General, UN Doc A/59/2005, 21 March 2005, para. 113.

With regard to peacekeeping, the UN Declaration in para. 18 only emphasizes “the importance of the rule of law as one of the key elements of [...] peacekeeping [...] and peacebuilding” and stresses that “justice, including transitional justice, is a fundamental building block of sustainable peace in countries in conflict and post-conflict situations”; para. 19 mentions peacekeeping operations “in accordance with their mandates.” While the first statement that the rule of law is a key element of peacekeeping does not provide any new insight on the content of the rule of law, the claim that peacekeeping operations should act in accordance with their mandates reminds of the primacy of the law as an element of the rule of law, a well-known constitutional principle.

The obligation to respect the primacy of the law has developed well beyond the actual mandate text laid down in a Security Council resolution. The model memorandum of understanding that governs the relationship between the UN and the troop-contributing State, for example, specifies that UN peacekeeping personnel have to respect local laws but must at the same time comply with the Guidelines on International Humanitarian Law for Forces Undertaking United Nations Peacekeeping Operations and the applicable portions of the Universal Declaration of Human Rights.<sup>91</sup> The policy for Formed Police Units provides that their operations will always be based on the principles of necessity, proportionality/minimum level of force, legality and accountability.<sup>92</sup> This shows that, in addition to the quite general section in the Declaration, further elements of the rule of law have developed in the context of UN peacekeeping.

As to the question whether the provisions of the UN Declaration regarding UN peacekeeping are sufficient or have to be further developed, the answer

<sup>91</sup> Special Committee on Peacekeeping Operations and its Working Group, *Report of the Special Committee on Peacekeeping Operations and its Working Group on the 2007 resumed session*, UN Doc A/61/19 (Part III), 12 June 2007. Likewise, UN support to non-UN security forces has to be consistent with the UN’s obligation to respect human rights and humanitarian law, see GA & SC, *Identical letters dated 25 February 2013 from the Secretary-General addressed to the President of the General Assembly and to the President of the Security Council*, UN Doc A/67/775-S/2013/110, 5 March 2013, Annex on Human rights due diligence policy on United Nations support to non-United Nations security forces, para. 1. This policy was later adopted as a standard for the United Nations Organization Stabilization Mission in the Democratic Republic of the Congo, see SC Res. 2098, UN Doc S/RES/2098 (2013), 28 March 2013, para. 12, lit. b.

<sup>92</sup> UN Department of Peacekeeping Operations & Department of Field Support, *Policy (revised): Formed Police Units in United Nations Peacekeeping Operations*, Ref. 2009. 32, D.2.1, para. 28, effective as of 1 March 2010, revised 1 March 2013, available at [http://www.un.org/en/peacekeeping/sites/police/documents/formed\\_police\\_unit\\_policy\\_032010.pdf](http://www.un.org/en/peacekeeping/sites/police/documents/formed_police_unit_policy_032010.pdf) (last visited 18 October 2015).

depends - under the public law approach - again on whether peacekeeping operations are seen as sufficiently legitimate. In this respect, the question of judicial review of UN peacekeeping actions is a crucial issue. The peacekeeping mission deployed to Haiti in 2004 shows why judicial review might be necessary.<sup>93</sup> Soldiers sent to Haiti as part of the UN mission after the earthquake of 2010 are alleged to have been the source of a cholera outbreak which has killed thousands of people. This has led to a number of lawsuits against the UN before national courts. Under the public law approach, judicial review may be based on a comparison of domestic constitutional law. It shows that judicial review of public authority is guaranteed in most States which respect the rule of law. The UN enjoys immunity, however. The idea of the rule of law raises the question whether this is acceptable. The requirement of judicial review might compel a narrow interpretation of Article 105 *UN Charter* granting the UN “such privileges and immunities as are necessary for the fulfilment of its purposes.”<sup>94</sup>

But overly optimistic ideas about the further elaboration of the rule of law for peacekeeping operations will likely prove naïve. A realistic perspective has to consider that peacekeepers in many instances work under extremely difficult conditions in the field, often experiencing undue time pressure and insufficient funding. The UN is dependent on UN Member States which have to provide the preconditions that enable the UN to abide by the rule of law in the first place.

### c. Internal Administration of Justice

Another UN activity relevant for the rule of law is the internal administration of justice within the UN. UN staff are subject to the authority of their superiors and ultimately of the Secretary-General. This enables supervisors to exercise international public authority, as seen above.<sup>95</sup> Legitimacy concerns relate to the lack of adequate remedies available to UN staff. The former justice system was criticized because it did “not provide proper or adequate remedies

<sup>93</sup> The United Nations Stabilization Mission in Haiti (MINUSTAH) was established in 2004 by SC Res. 1542, UN Doc S/RES/1542 (2004), 30 April 2004. Its mandate has been extended by SC Res. 2119, UN Doc S/RES/2119 (2013), 10 October 2013.

<sup>94</sup> Also arguing for limited immunity of international organizations in such cases: International Law Association (ILA), Berlin Conference, ‘Accountability of International Organizations, Final Report’ (2004), available at <http://www.ila-hq.org/en/committees/index.cfm/cid/9> (last visited 18 October 2015), 41.

<sup>95</sup> See above, Section D. I.

and failed to guarantee individual rights.”<sup>96</sup> As a consequence, it did not enjoy the confidence or the respect of staff, management or Member States.<sup>97</sup> It was said to generally lack transparency and to fail to satisfy minimum requirements of the rule of law, to be extremely slow, under-resourced, inefficient and, thus, ineffective.<sup>98</sup> Staff members, including staff unions and managers, voiced strong support for a professional, independent, and adequately-resourced system of internal justice that guaranteed the rule of law within the United Nations.<sup>99</sup> Shortly after, the Secretary-General included the matter in one of his reports on the rule of law,<sup>100</sup> as seen above.<sup>101</sup>

Concerning the applicability of the rule of law to the internal administration of the UN, para. 35 of the UN Declaration on good governance could be relevant. It reads that “good governance at the international level is fundamental for strengthening the rule of law” and stresses in this context the importance of “continuing efforts to revitalize the General Assembly” and “to reform the Security Council.” But “good governance” is deemed here as a precondition for the rule of law rather than an element of it. Apart from para. 35, the right of equal access to justice mentioned in para. 14 might give rise to rule of law requirements for UN internal administration. However, para. 14 refers to “vulnerable groups”, obviously addressing the national context, be it as an obligation of States or of UN missions. The only additional hint we receive from the UN Declaration in respect of the internal administration is that the rule of law should “accord predictability and legitimacy” to the actions of the UN (para. 2).

The UN Declaration thus does not give sufficient details on the rule of law as it could and should apply to the internal administration of justice. Nevertheless, a reform of the internal justice system<sup>102</sup> on the basis of the rule of

<sup>96</sup> GA, *Report of the Redesign Panel on the United Nations system of administration of justice*, UN Doc A/61/205, 28 July 2006, para. 73 [GA, Report on the UN system of administration of justice]. Another point of criticism was the lack of independence of the UN administrative tribunal from the Secretary-General and the senior UN staff, see E. Benvenisti, ‘The law of global governance’, 368 *Recueil des cours de l’Académie de droit international de La Haye* (2013), 47, 230.

<sup>97</sup> GA, *Report on the UN system of administration of justice*, *supra* note 96, para. 73.

<sup>98</sup> *Ibid.*, para. 5.

<sup>99</sup> *Ibid.*, para. 6.

<sup>100</sup> GA, *Strengthening and coordinating United Nations rule of law activities*, Report of the Secretary-General, UN Doc A/63/226, 6 August 2008, para. 28.

<sup>101</sup> See above, Section D. I.

<sup>102</sup> GA Res. 62/228, UN Doc A/RES/62/228, 6 February 2008.

law has taken place in the UN in the meantime. The General Assembly stressed in the relevant resolution that it had decided

“to establish a new, independent, transparent [...] system of administration of justice consistent with the relevant rules of international law and the principles of the rule of law and due process to ensure respect for the rights and obligations of staff members.”<sup>103</sup>

This reform includes classic procedural rule of law elements such as the independence of judges,<sup>104</sup> oral hearings, publication of judgments, procedures for maintaining the confidentiality of statements,<sup>105</sup> and the option of appeal.<sup>106</sup>

In a later report, the UN Secretary-General stressed that it was important for the Security Council, in addition to the other principal organs of the United Nations, to fully adhere to applicable international law and basic rule of law principles to ensure the legitimacy of their actions and that in this connection the Secretary-General fully supported the new system of administration of justice and would ensure that the principles of the rule of law were consistently applied throughout the United Nations.<sup>107</sup> This statement can be seen as a confirmation that the mentioned improvements on the basis of the rule of law were deemed successful in addressing the legitimacy concerns.

Nevertheless, a comparison of national administrative law would help to further develop elements of the rule of law applicable to the UN. The Council of Europe has adopted a Code of good administration that provides, albeit not a global, at least a broad European perspective. The elements of an effective, just and non-discriminatory administration are contained in the Code in Articles 7, 4 & 3.<sup>108</sup> Using this line of argument which this paper can only sketch

<sup>103</sup> *Ibid.*, preamble.

<sup>104</sup> GA Res. 62/253, UN Doc A/RES/63/253, 17 March 2009, Annex I, Article 4 & 9.

<sup>105</sup> *Ibid.*, 10.

<sup>106</sup> *Ibid.*, 18.

<sup>107</sup> GA, *Delivering justice*, Report of the Secretary-General, *supra* note 56, 3-4. Another important aspect of the internal administration of justice is the question by whom and how internal investigations can be conducted, see M. Waechter, ‘Due Process Rights at the United Nations: Fairness and Effectiveness in Internal Investigations’, 9 *International Organizations Law Review* (2012) 2, 339 et seq.

<sup>108</sup> Committee of Ministers, *Appendix to Recommendation CM/Rec(2007)7 of the Committee of Ministers to Member States on Good Administration*, 20 June 2007, Art. 5(2), available at <https://wcd.coe.int/ViewDoc.jsp?id=1155877> (last visited 18 October 2015).

and which will need further elaboration, the rudimentary content of para. 35 of the UN Declaration could be further refined.

#### d. UN Administration of Territories

In contrast to targeted sanctions where the listing or delisting of an individual follows specific guidelines,<sup>109</sup> UN staff members in the post-conflict administration of territories often find themselves in an unclear legal situation: if a mission is mandated to “ensure public safety and order,”<sup>110</sup> as in Kosovo, it is often difficult to identify the applicable law. This legal vacuum<sup>111</sup> is detrimental, among other things, to the realization of legal certainty as one element of the rule of law.<sup>112</sup> The security and civil presences provided by the UN, as in Kosovo, replace to some extent the local authorities and undertake executive functions. This kind of UN peacekeeping thus seems to be the UN activity closest to actions of organs of a nation state. Therefore, the view can be taken that in this specific context the contents of the rule of law which apply to UN staff should more or less be congruent with those the rule of law in the UN Declaration provides for States on the national level.

The administration of territories, like in Kosovo, where the task to “ensure public safety and order” is part of the mandate,<sup>113</sup> constitutes one of the clearest and most-intrusive exercises of international public authority by the UN.<sup>114</sup> The Secretary-General expressed legitimacy concerns when he said that peacekeepers should not contribute to suffering and be held accountable.<sup>115</sup>

With regard to a legal framework, the UN Declaration does not specifically address the administration of territories. But what has just been said in respect of peacekeeping would apply also here. In addition, one should

<sup>109</sup> At least in some sanctions regimes there exist such guidelines; the most elaborated guidelines in that respect are the guidelines of the SC Committee pursuant to SC Res. 1267 (1999) and SC Res. 1989 (2011) concerning Al-Qaida and associated individuals and entities, available at <https://www.un.org/sc/suborg/en/sanctions/1267/committee-guidelines>.

<sup>110</sup> SC Res. 1244, UN Doc S/RES/1244 (1999), 10 June 1999, para. 9(d).

<sup>111</sup> See Fitschen, ‘More Legal Certainty for UN Police’, *supra* note 82, 9 et seq.

<sup>112</sup> See the definition of the Secretary-General in GA, *Delivering justice*, Report of the Secretary-General, *supra* note 56, para. 2.

<sup>113</sup> SC Res. 1244, *supra* note 110, para. 9(d).

<sup>114</sup> Cf. also Kanetake, *supra* note 54, 303.

<sup>115</sup> SC, *The rule of law and transitional justice in conflict and post-conflict societies*, Report of the Secretary-General, UN Doc S/2004/616, 23 August 2004, para. 33; also above, Section D. I.; C. Stahn, *The Law and Practice of International Territorial Administration* (2008), 749, shares this view with regard to the UN as a holder of public authority.

consider Resolution 1244 (1999) which provides that the international civil presence in Kosovo has the responsibility to protect human rights.<sup>116</sup> As far as UN peacekeeping, as in Kosovo, assumes the role of domestic administrations, the provisions of the Declaration which principally address the rule of law in the Member States, such as the commitment to a principle of good governance and to an “effective, just, non-discriminatory and equitable delivery of public services pertaining to the rule of law, including criminal, civil and administrative justice” (para. 12) could arguably also apply to the administration of territories. Thus, human rights and the effective, just, non-discriminatory, and equitable delivery of public services emerge as core principles of the rule of law. They could be further specified by means of a comparative constitutional and administrative perspective<sup>117</sup> to the extent necessary to address further concerns regarding the UN administration of territories.

#### e. Use of Force

The decision to authorize the use of force by the UN Security Council under Chapter VII of the *UN Charter* constitutes an exercise of public authority as it typically reduces the freedom of others, e.g. when UN missions are mandated to take security and defense measures against third persons.<sup>118</sup> Legitimacy concerns regarding the use of force were not raised during the debate on the rule of law.

The only reference to the use of force in the UN Declaration concerns the confirmation of the Member States to refrain in their international relations from the threat or use of force in any manner inconsistent with the *UN Charter* (para. 3). As a result, with regard to the use of force by the UN, again only para. 2 of the Declaration applies which demands that the rule of law should “accord predictability and legitimacy” to UN actions.

With regard to the use of force, the Secretary-General identified deep divisions among the Member States on the appropriateness of the use of force to address threats to peace<sup>119</sup> and asked a high-level panel of eminent persons

<sup>116</sup> SC Res. 1244, *supra* note 110, para. 11(j).

<sup>117</sup> This comparative approach is only mentioned in this paper. Details are subject to further research.

<sup>118</sup> Like in SC Res. 1744, UN Doc S/RES/1744 (2007), 21 February 2007, para. 4, on Somalia authorizing AU member States to take all necessary measures to, *inter alia*, protect the personnel and ensure their security; see for the elements of the exercise of public authority von Bogdandy, Dann & Goldmann, *supra* note 9, 11.

<sup>119</sup> See GA, *Report of the High-level Panel on Threats, Challenges and Change*, UN Doc A/59/565, 2 December 2004, para. 1.

to make recommendations for strengthening the UN so that it could take more effective measures in the interest of collective security.<sup>120</sup> The report of the high-level panel, which was commended by the Secretary-General,<sup>121</sup> indeed also turned to the question of legitimacy of UN Security Council decisions authorizing the use of force. It said that the effectiveness of collective security measures depended also on the common perception of their legitimacy - their being made on solid evidentiary grounds and for the right reasons, morally as well as legally.<sup>122</sup> If the Security Council was to win the respect necessary as the primary body in the collective security system, its most important decisions needed to be better made, better substantiated and better communicated.<sup>123</sup> For the authorization of the use of force, the Council should adopt and systematically address a set of guidelines, dealing not with the question whether force could be used legally, but whether it should be used in good conscience and good sense.<sup>124</sup>

The guidelines were meant to maximize the possibility of achieving Security Council consensus on when it would be appropriate to use coercive action, to maximize international support for the decisions of the Security Council, and to minimize the possibility of individual Member States bypassing the Security Council.<sup>125</sup> As guidelines for deciding on the use of force, the report suggested five basic criteria of legitimacy: a) seriousness of the threat (is the threat to State or human security sufficiently clear and serious to justify *prima facie* the use of military force?); b) proper purpose of the use of force (is the primary purpose of the proposed military action to halt or avert the threat in question?); c) use of force as last resort (has every non-military option for confronting the threat in question been explored, and are there reasonable grounds to believe that it will not succeed?); d) proportional means (do the scale, duration and intensity of the proposed military action represent the minimum necessary to meet the threat in question?); e) balance of consequences (is there a reasonable chance that military action will be successful in averting the threat in question, and will the consequences of action not be worse than the consequences of inaction?).<sup>126</sup>

The legitimacy concerns related to decisions on the use of force can be interpreted as indirect concerns regarding the exercise of public authority which

<sup>120</sup> *Ibid.*, para. 1 & 3.

<sup>121</sup> *Ibid.*, para. 24.

<sup>122</sup> *Ibid.*, para. 204.

<sup>123</sup> *Ibid.*, para. 205.

<sup>124</sup> *Ibid.*, para. 205 (emphasis in the original text).

<sup>125</sup> *Ibid.*, para. 206.

<sup>126</sup> *Ibid.*, para. 207.



usually follow from the use of force in a concrete case. The deep divisions among the Member States on the appropriateness of the use of force uncovered different expectations about what criteria should apply when the Security Council has to decide on the use of force. The five criteria through which the legitimacy concerns are addressed represent an elaborate proportionality principle and thus an important element of the rule of law. The principle of proportionality has been identified above under the public law approach as a common feature in national constitutional law.<sup>127</sup>

### 3. Conclusion

This reconstruction of elements of the rule of law according to the Declaration and additional UN practice in relation to the exercise of public authority by the UN leads to the following conclusions.

The text of the UN Declaration does not produce much insight for the application of the rule of law to the UN, especially as to the question whether a thin definition confining itself to formal aspects like decision-making based on accessible and clear laws<sup>128</sup> or a thick definition comprising in addition substantive elements like the protection of human rights<sup>129</sup> should apply. The only rule of law elements which can be identified with reasonable certainty are the principles of due process and proportionality applying to targeted sanctions regimes (para. 29). Apart from that, many other aspects which could be relevant for the application of the rule of law, such as good governance (paras 12 & 35), are phrased too vaguely or do not clearly apply to the UN.

A thin, formal definition of the rule of law, including mainly procedural requirements, seems to reflect current public international law.<sup>130</sup> The finding

<sup>127</sup> See above, Section D. II. 2. a.

<sup>128</sup> See, e.g., S. Chesterman, 'An International Rule of Law?', 56 *American Journal of Comparative Law* (2008) 2, 331, 342 [Chesterman, International Rule of Law?].

<sup>129</sup> See, e.g., European Commission for Democracy through Law ("Venice Commission"), *Report on the Rule of Law*, adopted by the Venice Commission at its 86th Plenary Session, Venice, 25-26 March 2011, CDL-AD(2011)003rev, 12-13, paras 59-61 which looks, though, in a broader manner at national and international legal instruments and different legal traditions in order to find a definition of the rule of law.

<sup>130</sup> See, e.g., Crawford, 'Chance, Order, Change', *supra* note 58, 277; M. Kanetake, 'The Interfaces between the National and International Rule of Law: The Case of UN Targeted Sanctions', 9 *International Organizations Law Review* (2012) 2, 267, 271 & 276; M. Wood, *supra* note 30, 450; *The UN Security Council and the Rule of Law, The Role of the Security Council in Strengthening a Rules-based International System*, Annex to the letter dated 18 April 2008 from the Permanent Representative of Austria to the United Nations

that only proportionality and due process can be identified as rule of law elements in the UN Declaration seems to confirm this for the rule of law in the UN.

Yet, as I have tried to show in this paper, there are exercises of public authority by the UN besides the imposition of targeted sanctions which raise legitimacy concerns and for which the UN itself, in the person of the Secretary-General, has suggested solutions on the basis of the rule of law. Those solutions have been partly implemented: peacekeepers must act within their mandate (government of law) and are bound by human rights;<sup>131</sup> the UN has reacted to staff concerns with an internal administration reform; and for decisions on the use of force a procedure based on the principle of proportionality has been proposed.

This calls for further action by the UN and might give reason to expect that the understanding of the rule of law as applied to the UN might develop into a thicker, more substantive rule of law conception.<sup>132</sup> By virtue of its comparative perspective, the public law approach might support such a development. At the same time, the examples show that the rule of law means different things for different UN activities. With this, we come back to the question of the legal basis of the rule of law and its potentially binding nature on the UN.

## E. Legal Basis and Binding Nature of the Rule of Law in the *UN Charter*

The legal basis for the rule of law in the UN is not evident from the UN Declaration. Its text says that the rule of law belongs to the principles of the United Nations.<sup>133</sup> According to the Secretary-General, rule of law at the international level was the very foundation of the *UN Charter*.<sup>134</sup> The public law approach might help to identify which provisions of the *UN Charter* can serve as a legal basis for the rule of law.

addressed to the Secretary-General, UN Doc A/63/69-S/2008/270, 7 May 2008, 3-4 [The UN Security Council and the Rule of Law].

<sup>131</sup> See above, Section D. II. 2. b.

<sup>132</sup> J. Klabbbers, 'The EJIL Foreword: The Transformation of International Organizations Law', 26 *European Journal of International Law* (2015) 1, 9, 72, & 75, has recently identified a trend of an increased influence of human rights in relation to the activities of international organizations and the necessity to reconsider the traditional functionalist approach in international institutional law in the interest of third parties.

<sup>133</sup> See GA Res. 67/1, *supra* note 1, para. 5.

<sup>134</sup> GA, *Strengthening and coordinating United Nations rule of law activities*, Report of the Secretary-General, UN Doc A/66/133, 8 August 2011, para. 6.

Part of the public law approach is the idea of an internal constitutionalization of international organizations in the form of a legal framework for the exercise of public authority based on the founding document.<sup>135</sup> For the rule of law and more particularly for human rights, different articles of the *UN Charter* have been discussed in the past as potential legal bases.<sup>136</sup> Since this paper focuses on the exercise of public authority, Article 1 (1) *UN Charter* might provide for a new perspective. It defines the purpose of the UN as being to maintain international peace and security and says that, to that end, the UN should take

“effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace”.

The provision does not mention the rule of law. The context shows that only the peaceful settlement of disputes mentioned in the second half of the sentence must conform with the principles of justice and international law – which might, if any, include the rule of law. By contrast, these requirements do not seem to apply to collective measures taken in the interest of international peace and security.<sup>137</sup> But the Security Council is bound<sup>138</sup> by Article 1 (1) *UN Charter* to take “effective collective measures for the prevention and removal of threats to the peace”. That such measures have to be “effective” can be interpreted in light of the object and purpose of the *UN Charter*.<sup>139</sup> The emphasis on such a teleological interpretation could take into consideration the important connection of the Council’s effectiveness and the legitimacy of its acts.<sup>140</sup> Since the UN has to rely on its Member States for the implementation of its measures, these measures

<sup>135</sup> See von Bogdandy, Dann & Goldmann, *supra* note 9, 22-23.

<sup>136</sup> See for an overview Feinäugle, *Hoheitsgewalt im Völkerrecht*, *supra* note 76, 82.

<sup>137</sup> See recently Kanetake, *supra* note 54, 278.

<sup>138</sup> A. Paulus, ‘Article 2’, in B. Simma, *The Charter of the United Nations, commentary*, 3rd ed. (2012), para. 13; see also *UN Charter*, Art. 24(2): “2. In discharging these duties the Security Council shall act in accordance with the Purposes and Principles of the United Nations.”

<sup>139</sup> *Vienna Convention on the Law of Treaties*, 23 May 1969, 1155 UNTS 331, Art. 31(1).

<sup>140</sup> This relationship was already rightly highlighted in *The UN Security Council and the Rule of Law*, *supra* note 130, 19. Less convincing seems the argument that the Security Council was most effective if it ignored any rule of law standards.

can only be effective if they are considered legitimate.<sup>141</sup> Otherwise they will be resisted and will thus not be successful. As the examples shown above demonstrate, concerns about the legitimacy of different UN activities made, or might have made, these exercises of authority in pursuit of the UN's Charter obligations less effective. Targeted sanctions under the Al-Qaida sanctions regime have faced legal challenges in Europe, and improvements on the basis of the rule of law were suggested and implemented to remedy these problems.<sup>142</sup> Since UN activities under Chapter VII must be effective if the UN wants to fulfil its purpose (Article 1 (1) *UN Charter*), the UN is bound by the rule of law insofar as "effective" measures require that legitimacy concerns are addressed by actions based on the rule of law.<sup>143</sup>

## F. Conclusion

An analysis of the UN Declaration on the rule of law at the national and international levels reveals that the rule of law as it applies to the UN itself is still in a rudimentary stage of development, amounting to not much more than requiring due process and proportionality for UN sanctions regimes. An investigation of various UN activities from an international public authority perspective shows that concerns exist with regard to their legitimacy and that the UN has discussed measures based on the rule of law to address such concerns.

The rule of law for the UN can further be developed in line with the public law approach by drawing comparative insights from national administrative and constitutional law. This would allow the argument for human rights obligations of the UN in peacekeeping missions, in the administration of territories or for the application of the proportionality principle to the making of Security Council

<sup>141</sup> In that sense also *ibid.*: "Member States' preparedness to recognize the authority of the Council depends in significant part on how accountable it is or is seen to be".

<sup>142</sup> See above, Section D. II. 2. a.

<sup>143</sup> This corresponds partly to the recently stated view by Farrall – who, however, does not address the question of the legal basis of the rule of law – that it will be more fruitful to advance arguments that appeal to the self-interest of the Security Council and its members since they were more likely to be responsive to appeals to improve the Security Council's effectiveness by inducing greater legitimacy to their action thus commanding greater compliance than to respect the rule of law as an ideal, see J. Farrall, 'Rule of accountability or rule of law? Regulating the UN Security Council's accountability deficits', 19 *Journal of Conflict & Security Law* (2014) 3, 389, 407. With regard to the case of the internal administration of justice the Security Council is not acting under Chapter VII, of course, but effective measures under Art. 1(1) *UN Charter* require that also staff concerns are addressed as the UN depends on effective work by its staff.

decisions on the use of force. The public authority perspective and the search for a legal framework thus enable the channeling of legitimacy concerns into legal arguments and eventually into workable rules.<sup>144</sup>

With regard to the legal status of the rule of law in the framework of the *UN Charter*, a teleological interpretation of Article 1 (1) *UN Charter* in light of the object and purpose of the Charter could allow for the principle of the rule of law to be read from the Charter. This might seem bold at first glance and from a traditional perspective but could in the end represent a plausible and realistic view. Namely, the Security Council is bound by Article 1 (1) *UN Charter* to take “effective collective measures” for which it has to rely on its Member States for implementation. This means that the measures have to be seen as legitimate in order to be implemented. Since UN activities under Chapter VII must be effective if the UN wants to fulfil its purpose (Article 1 (1) *UN Charter*), the UN is bound by the rule of law insofar as “effective” measures require that legitimacy concerns are addressed by an application of the rule of law. The rule of law is thus not a precise legal principle as we know it from domestic constitutions. It is rather a principle providing broad guidance to the Security Council which leaves enough room for maneuver according to the political context in which the UN acts. This understanding does not render the rule of law meaningless. It is not only up to the UN to decide what is effective but also those on which the UN is dependent, i.e. the States. For the UN, the rule of law is thus a means to an end, to an effective fulfilment of its statutory purpose.<sup>145</sup> The IPA perspective and the public law approach might serve the further development of the rule of law applicable to the UN.

<sup>144</sup> See von Bogdandy, Dann & Goldmann, *supra* note 9, 20, taking into account the divergence of legality and legitimacy. Legality first and foremost means conformity with legal standards while common understandings of legitimacy also involve moral and social aspects, see C. Thomas, ‘The Uses and Abuses of Legitimacy in International Law’, 34 *Oxford Journal of Legal Studies* (2014) 4, 729, 738-742.

<sup>145</sup> In that sense also Chesterman, ‘International Rule of Law?’, *supra* note 128, 331.