THE RULE OF LAW, INTERNATIONAL LAW AND INTERLEGALITY: WHAT HEURISTIC MODEL (THIN, THICK OR "À LA CARTE") ?

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The rule of law is high on the international agenda – and hence in education and training curricula – for a reason: it constitutes a ticket to economic growth and political stability, as well as to sustainable development and international peace and security.[1] In my previous work on the topic, I have suggested that "the 'rule of law' is undoubtedly one of the most powerful expressions in the modern world. In a sense, it has become an activity in itself, a mental-social phenomenon which exists within human consciousness and acts independently within physical social realities, like a pat on the back or a slap in the face."[2] Indeed, the rule of law has become a "buzzword" (or "buzzphrase") in legal theory and political studies,[3] a sort of modern vernacular to address contemporary debates which were considered, not so long ago, from the perspectives of justice and democracy, two other examples of powerful language.[4] To borrow from Ogden and Richard's philosophy of language, the rule of law is a formulation of "hurrah !" words, that is to say, words that provoke a good feeling in those who voice or hear them.[5] Some would contend, however, that even the most virtuous ideas/words have their dark side,[6] an aspect that Martin Krygier has looked at in regard to the rule of law.[7]

Speaking on international development, Thomas Carothers made the following somewhat sarcastic observation: "One cannot get through a foreign policy

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1 See, in particular, J. Kaufmann, A. Kraay & P. Zoido-Lobatón, "Governance Matters" (1999) *World Bank Policy Research Working Papers*, n°2196, as well as the more recent updated studies on the subject, available at http://www.worldbank.org/research.

2 S. Beaulac, "The Rule of Law in International Law Today," in G. Palombella & N. Walker (eds.), *Relocating the Rule of Law* (Oxford : Hart Publishing, 2009), 197, at 197 [footnotes omitted].

3 For a point of comparison, where the linguistic sign "sovereignty" was scrutinised in this fashion, see S. Beaulac, *The Power of Language in the Making of International Law – The Word Sovereignty in Bodin and Vattel and the Myth of Westphalia* (Leiden & Boston: Martinus Nijhoff, 2004).

4 See B.Z. Tamanaha, *Law as a Means to an End: Threat to the Rule of Law* (Cambridge: Cambridge University Press, 2006).

5 C.K. Ogden & I.A. Richards, *The Meaning of Meaning*, 2nd ed. (London: Kegan Paul, 1927), at 149-150, suggest to divide the functions language can fulfil into two categories: symbolic and emotive. In the latter role, language is used to express or excite feelings or attitudes; language thus used can be referred to as 'hurrah!' words and 'boo!' words, because of the feelings, good or bad, that they generate.

6 See D. Kennedy, The Dark Side of Virtue: Reassessing International Humanitarianism (Princeton: Princeton University Press, 2004).

7 M. Krygier, "The Rule of Law: An Abuser's Guide," in A. Sajó (ed.), *The Dark Side of Fundamental Rights* (Utrecht: Eleven International Publishing, 2006), 129.

debate these days without someone proposing the rule of law as a solution to the world's troubles."[8] Surely, though, the United Nations has given material for such criticism in recent years, including in the context of post-conflict states and other situations of transition. Witness, *inter alia*, the 2004 UN Secretary-General's report on the rule of law and transitional justice,[9] the outcome document of the 2005 UN World Summit,[10] with a full section on the rule of law,[11] and the uninterrupted string of resolutions by the UN General Assembly, from 2006 to 2010, all entitled *The Rule of Law at the National and International Levels*,[12] as well as the creation of a rule of law unit in the Executive Office of the UN Secretary-General[13] and the many reports by UN officials on the rule of law since 2006.[14]

Beyond the rule of law rhetoric,[15] however, there is the great *performative*[16] power of the basic ideas behind the concept,[17] which Martin Krygier summed up as follows : "general rules rather than or superior to particular edicts, that are public not secret, prospective not retrospective, relatively clear and precise rather than ambiguous or vague, relatively stable, not always up for grabs, consistent with each other, and administered by legally authorized agencies in accordance with knowable and non-arbitrary interpretations of their terms."[18] He also noted, realistically, that knowing in general terms what the rule of law ideal is about may prove utterly unsatisfactory: "we can more easily state the values it serves, and recognize violations of it, than can specify the particular institutions and practices that will promote it."[19] Similarly, Randall Peerenboom opined thus: "Foreign actors and experts are better at the creation of norms and generating a menu of substantive legal rules than figuring out how they will be implemented."[20] No doubt, institutions and good practices are, simultaneously, the name of the game and the biggest challenges for the rule of law.[21]

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[8] T. Carothers, "The Rule of Law Revival" (1998) 77 *Foreign Affairs* 95, at 95.

[9] UN Security Council, Report of the Secretary-General, *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*, S/2004/616, 23 August 2004.

[10] Endorsed by UN General Assembly Resolution 60/1, *2005 World Summit Outcome*, A/RES/60/1, 24 October 2005.

[11] *Ibid.*, section 134.

[12] UN General Assembly, *The Rule of Law at the National and International Levels*, A/RES/61/39, 18 December 2006 ; A/RES/62/70, 8 January 2008 ; A/RES/63/128, 15 January 2009; A/RES/64/116, 15 January 2010.

[13] Which was recommended *as per* section 134(e) of the *2005 World Summit Outcome*, *supra* note 10, and was established pursuant to Resolution 61/39, *ibid.*

[14] See, for instance, the Secretary-General's Report entitled "Uniting our Strengths: Enhancing United Nations Support for the Rule of Law," (2006) A/61/636-S/2006/980 and Corr.1.

[15] See N. MacCormick, *Rhetoric and the Rule of Law – A Theory of Legal Reasoning* (Oxford & New York : Oxford University Press, 2005).

[16] This idea of language as "performative" borrows from the *speech-act theory* of J.L. Austin, *How to do Things with Words* (Oxford: Clarendon Press, 1962).

[17] See J. Waldron, "The Rule of International Law" (2006) 30 *Harvard Journal of Law & Public Policy* 15, at 15, who wrote: "The phrase 'the rule of law' brings to mind a particular set of values and principles associated with the idea of legality."

[18] M. Krygier, "Rethinking the Rule of Law after Communism," in A. Czarnota, M. Krygier & W. Sadurski (eds.), *Rethinking the Rule of Law after Communism* (Budapest & New York : Central European University Press, 2005), 265, at 265.

[19] *Ibid.*, p. 273. See also M. Krygier, "Transitional Questions About the Rule of Law: Why, What and How ?" (2001) 28 *East Central Europe/L'europe du centre-est* 1, at 12.

[20] R. Peerenboom, "The Future of Rule of Law: Challenges and Prospects for the Field" (2009) 1 *Hague Journal on the Rule of Law* 5, at 9.

[21] See R. Kleinfeld, "Competing Definitions of the Rule of Law," in T. Carothers (ed.), *Promoting the Rule of Law : In Search of Knowledge* (Washington: Carnegie Endowment, 2006), 31. Concentrating on structure and institutions, however, have proven insufficient; see J. Stromseth, "Strengthening Demand

The paper proposes an "*à la carte*" approach to the rule of law, with a view to helping articulate an analytical scheme for domestic courts resorting to international law. Before rule of law heuristic models, groundwork questions need to be briefly addressed: what does the UN mean by the "international rule of law" (section 1) and what do recent debates on interlegality[22] teach us in terms of the rule of law (section 2). Next, the crux of the paper (section 3) looks at the various formulations of the rule of law, from thin to thick understandings, and highlights the difficulties with a spectrum-type of reasoning. The conclusion : that an "à la carte" heuristic model is most appropriate for rationalising interlegality.

I. The United Nations and the Rule of Law

One thing is clear : the United Nations, for some time, has gone flat out around the world with the rule of law bandwagon.[23] Countries, both in the development and transition categories, have sung the song and danced the dance, appreciating that they are much better off being in favour than against virtues.[24] The following quote, from a Chinese legal expert, captures beautifully the cynicism at work in the field though: "Rule of law has no meaning. Everyone uses the phrase because everyone can get behind it and it might make it easier to get funding."[25] Leaving aside for a moment the actual content of this essentially contested concept[26] – analysed in detail later[27] – let us here focus on what the United Nations intends to achieve through the "international rule of law,"[28] pursuant to its proclaimed mission to promote *The Rule of Law at the National and International Levels*.[29]

What I want to underline is that referring to the rule of law at the international level can be linked to two different, albeit closely related phenomena.[30] First, what I refer to as the rule of law internationalized, that is to say, how rule of law values can be externalized onto and applied within the international legal order. In that regard, one would look at international adjudicative bodies, like the ICJ for instance, in order to assess the extent to which rule of law values are present, be it in

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for the Rule of Law in Post-Conflict Societies" (2009) 18 *Minnesota Journal of International Law* 415, at 418, who speaks of (and deplore) the "if we build it, they will come" attitude.

[22] I use the term *interlegality* to refer to the phenomenon of normative migration among legal orders, in particular the national application of international law by domestic courts.

[23] For a detailed analysis of the UN contributions to the development and promotion of the rule of law around the world over the years, starting with the *Universal Declaration of Human Rights* and up to the recent initiatives (cf. *supra* notes 9-14), see A.C. Bouloukos & B. Dakin, "Toward a Universal Declaration of the Rule of Law: Implications for Criminal Justice and Sustainable Development" (2001) 42 *International Journal of Comparative Sociology* 145, at 151-156.

[24] See N. MacCormick, *supra* note 15, at 12, who spoke of the rule of law as the "signal virtue of civilized societies ;" and T. Carothers, *supra* note 8, at 99, who bluntly put it as follows: "[H]ardly anyone these days will admit to being against the idea of law."

[25] Reported in M. Stephenson, "A Trojan Horse in China," in T. Carothers (ed.), *Promoting the Rule of Law : In Search of Knowledge* (Washington : Carnegie Endowment, 2006), 191, at 196.

[26] Borrowing from G.A. Gallie, "Essentially Contested Concepts" (1955-1956) 56 *Proceedings of the Aristotelian Society* 167, Jeremy Waldron has suggested that the rule of law is an essentially contested concept ; see J. Waldron, "Is the Rule of Law an Essentially Contested Concept (in Florida)?" (2002) 21 *Law and Philosophy* 137.

[27] See *infra*, section 3.

[28] On the international version of the rule of law, generally, see also J. Crawford, "International Law and the Rule of Law" (2004) 24 *Adelaide Law Review* 3.

[29] See *supra* note 12.

[30] This dichotomy was inspired, somewhat, by S. Chesterman, "An International Rule of Law?" (2008) 56 *American Journal of Comparative Law* 331.

terms of legality, equal application of the law, judicial review, to name but a few.[31] The twin phenomenon, or second occurrence, can be called the *internationalization* of the rule of law, that is to say, how the international plane may be used to export the rule of law from domestic spheres and promote its values within other domestic jurisdictions. It acknowledges the fact that rule of law in domestic law has become an international relations issue and that international normativity and institutions can act as a transit point, in a sense, for rule of law values.[32]

There are manifestations of this dual conception of the rule of law from UN policy statements and General Assembly resolutions.[33] One good illustration is the UN Secretary-General 2006 report entitled "Uniting our Strengths : Enhancing United Nations Support for the Rule of Law,"[34] especially the last part of the document dealing with the future, that is, how to strengthen the UN capacities, coherence and coordination in regard to the rule of law. The activities under UN auspices pertaining to the rule of law were put into three categories or "baskets." The first category is actually labelled the "rule of law at the international level" and deals with issues linked to the UN Charter, multilateral treaties, international dispute resolution mechanisms, the ICC, as well as training and education regarding international law. It is clear that these actions correspond, *as per* the classification suggested above, to the rule of law internationalized, given that the United Nations activities pursue rule of law values on the international plane. In other words, these elements are interested in how rule of law values – linked to institutions, normativity, adjudication, human rights – are to be present and embraced within the international legal order.

On the other hand, the second and third baskets of activities in the Secretary-General's report – namely, "rule of law in the context of conflict and post conflict situations" and "rule of law in the context of long-term development," respectively – are concerned with the other, twin phenomenon of the internationalization of the rule of law, because they obviously deal with domestic matters, which are promoted via the international law machinery. For example, these rule of law activities relate to the strengthening of justice systems and institutions in domestic jurisdictions (including by means of judicial review), the establishment of truth and reconciliation processes as well as fact-finding and commissions of inquiry, the improvement of the police and the reform of the penal system, particularly with respect to corruption and organized crime. Such rule of law elements, very much originating from domestic legal orders, are essentially interested in being promoted domestically in other state jurisdictions (not onto the international plane *per se*), especially in the development and transition settings. Thus we would speak of the internationalization of the rule of law when the values do no more than *transit*, so to speak, through the international legal sphere, the final destination being the domestic jurisdictions of states.

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[31] See S. Beaulac, "An Inquiry into the International Rule of Law" (2007) *European University Institute Working Papers*, MWP 2007/14.

[32] These ideas were first articulated at a seminar in January 2008, organised by the Amsterdam Center for International Law and the Leuven Center for Global Governance Studies, where I presented a paper on the recent debates at the United Nations on the meaning of the international rule of law, especially in terms of *accountability*, the theme of the workshop. See A. Nollkaemper, J. Wouters & N. Hachez, "Accountability and the Rule of Law at International Level," report available at : http ://www.mzes.uni-mannheim.de/projekte/typo3/site/fileadmin/reports/report%20Accountability%20and%20Rule%20of%20Law.pdf

[33] See *supra* notes 9-14.

[34] *Supra* note 14.

Before further developing upon the possible heuristic models for the rule of law, another background issue needs to be injected into the discussion : interlegality.

II. Interlegality and International Rule of Law Complementarity

International law scholarship has spilled much ink in the last century debating the relationship between international law and domestic law.[35] For better or worse, the narrative usually refers to the opposition between the so-called "dualist" theory, associated to Heinrich Triepel,[36] and the "monist" one, personified by Hans Kelsen.[37] Furthermore, the dualism-monism dichotomy assumes the necessity of a hierarchy between the domestic and the international legal orders,[38] a feature that has recently been challenged.[39] Jane Nijman and André Nollkaemper have suggested, for instance, the emergence of a global legal pluralism, which would be embedded in a community of principles and common values, "that allow co-existence and cooperation between multiple legal systems."[40]

Be that as it may, it is generally accepted that there is no "one-size-fits-all" answer on either side of the dualism-monism fence, for two reasons. First, the effect of international normativity depends, ultimately, on the domestic legal order of each national state.[41] As Christopher Greenwood put it, "the capacity of any institution created by national law and which derived its authority from national law [such as domestic courts] to apply a rule which emanated from a source outside the nation [is] necessarily confined by rules which circumscribed its jurisdiction."[42] Note that such an apprehension of the interlegality interface is, fundamentally, an application of the dualist logic,[43] used at some meta-level. As Mattias Kumm wrote : "The very

[35] See, among the classics, J.G. Starke, "Monism and Dualism in the Theory of International Law" (1936) 17 *British Yearbook of International Law* 66; G. Scelle, "Le phénomène du dédoublement fonctionnel," in M. Schätzel & H.J. Schlochauer (eds.), *Rechtsfragen der internationalen Organisation, Festschrift für Wehberg* (Cologne: Klostermann, 1956), 324; I. Seidl-Hohenfeldern, "Transformation or Adoption of International Law into Municipal Law" (1963) 12 *International & Comparative Law Quarterly* 88; and L. Ferrari-Bravo, "International and Municipal Law : The Complementarity of Legal Systems," in R.St.J. Macdonald & D.M. Johnston (eds.), *The Structure and Process of International Law: Essays in Legal Philosophy, Doctrine and Theory* (The Hague: Martinus Nijhoff, 1986), 715.

[36] H. Triepel, *Völkerrecht und Landesrecht* (Leipzig: Hirschfeld, 1899).

[37] H. Kelsen, Das Problem der Souveränität und die Theorie des *Völkerrechts* (Tübigen : Mohr, 1920).

[38] See A. von Bogdandy, "Pluralism, Direct Effect, and the Ultimate Say: On the Relationship Between International and Domestic Constitutional Law" (2008) 6 *International Journal of Constitutional Law* 397.

[39] See L. Garlicki, "Cooperation of Courts: The Role of Supranational Jurisdictions in Europe" (2008) 6 *International Journal of Constitutional Law* 509.

[40] J. Nijman & A. Nollkaemper, "Beyond the Divide," in J. Nijman & A. Nollkaemper (eds.), *New Perspectives on the Divide Between National and International Law* (Oxford & New York : Oxford University Press, 2007), 341, at 360.

[41] See T. Buergenthal, "Self-Executing and Non-Self-Executing Treaties in National and International Law" (1992) 235 *Hague Recueil* 303, at 317; and G. Gaja, "Dualism – A Review," in J. Nijman & A. Nollkaemper (eds.), *New Perspectives on the Divide Between National and International Law* (Oxford & New York: Oxford University Press, 2007), 52, at 61.

[42] C. Greenwood, "International Law in National Courts: Discussion," in J. Crawford & M. Young (eds.), The Function of Law in the International Community: An Anniversary Symposium – Proceedings of the 25th Anniversary Conference of the Lauterpacht Centre for International Law (Cambridge, 2008), available at http://www.lcil.cam.ac.uk ?25th_anniversary?book.php

[43] See R. Provost, "Judging in Splendid Isolation" (2008) 56 *American Journal of Comparative Law* 125.

idea that the national constitution is decisive for generating the doctrines that structure the relationship between national and international law is dualist."[44]

The second reason (linked to the first) why there is no universal black-or-white answer to interlegality existentialist issues is that most national constitutional law and practice show traits of both dualism and monism, which means that the line between them is blurred. Rosalyn Higgins' observation is on point: "in reality there is usually little explanation or discussion of these large jurisprudential matters in the domestic court hearing. The response of the court to the problem is often instinctive [and], the truth be told, the response is often somewhat confused and lacking in an intellectual coherence." As a result, she noted, "not everything is dependent upon whether a country accepts the monist or dualist view, [which] is evidenced by the fact that, even within a given country, different courts may approach differently the problem of the relationship between international and domestic law."[45] Interestingly, Eyal Benvenisti has expressed the view that domestic courts, in effect, act strategically in their use of international law. "An assertive court," he writes, "will bolster not only the domestic democratic processes, but also its own authority to interpret and apply national and international law."[46]

Accordingly, although different states make claims to monism in rationalising interlegality at the micro-level,[47] at the meta-level, the interface of the international and the national legal orders is essentially dualist in nature.[48] I have suggested in my previous work that,[49] indeed, the matrix within which states operate and international affairs are conducted continues to be based on the Westphalian model of international relations,[50] at the centre of which is the *idée-force* of sovereignty.[51] The legal by-products of this social construct[52] is twofold: constitutional law and international law,[53] which correspond to the exercise of internal sovereignty

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[44] M. Kumm, "Democratic Constitutionalism Encounters International Law: Terms of Engagement," in S. Choudhry (ed.), *The Migration of Constitutional Ideas* (Cambridge: Cambridge University Press, 2006), 256, at 258.

[45] R. Higgins, Problems and Process: International Law and How We Use It (Oxford : Clarendon Press, 1994), at 206.

[46] E. Benvenisti, "Reclaiming Democracy: The strategic Uses of Foreign and International Law by National Courts" (2008) 102 *American Journal of International Law* 241, at 248.

[47] For a forceful example of such a state, The Netherlands ; see A. Nollkaemper, "The Netherlands," in D. Sloss (ed.), *The Role of Domestic Courts in Treaty Enforcement: A Comparative Study* (Cambridge: Cambridge University Press, 2009), 326. Other examples of "automatic incorporation" of international law are Mexico, Azerbaijan, Namibia, Cambodia, Syria and Lebanon.

[48] See F.G. Jacobs, "Introduction," in F.G. Jacobs & S. Roberts (eds.), *The Effect of Treaties in Domestic Law* (London : Sweet & Maxwell, 1987), xxiii, at xxiv.

[49] For my latest contribution on this point, see S. Beaulac, "Thinking Outside the 'Westphalian Box': Dualism, Legal Interpretation and the Contextual Argument," in C.C. Eriksen & M. Emberland (eds.), *The New International Law – An Anthology* (Leiden : Brill Publishers, 2010), 17.

[50] Of course, Westphalia is an *aetiological myth*, created by international society to explain the whens, wheres and hows of its becoming and its being. This acknowledgement, however, does not diminish in any way the extraordinary semiotic effects of Westphalia on the consciousness of international society. See S. Beaulac, "The Westphalian Model in Defining International Law : Challenging the Myth" (2004) 8 *Australian Journal of Legal History* 181; and S. Beaulac, "The Westphalian Legal Orthodoxy – Myth or Reality ?" (2000) 2 *Journal of the History of International Law* 148.

[51] See A.-M. Slaughter & W. Burke-White, "The Future of International Law is Domestic (or, The European Way of Law)," in J. Nijman & A. Nollkaemper (eds.), *New Perspectives on the Divide Between National and International Law* (Oxford & New York : Oxford University Press, 2007), 110, at 110-111.

[52] T.J. Biersteker & C. Weber, "The Social Construction of State Sovereignty," in T.J. Biersteker & C. Weber (eds.), *State Sovereignty as Social Construct* (Cambridge : Cambridge University Press, 1996), 1.

[53] See N. Walker, "Late Sovereignty in the European Union," in N. Walker (ed.), *Sovereignty in Transition* (London : Hart Publishing, 2003), 3.

(Jean Bodin's[54]) and external sovereignty (Emer de Vattel's[55]). Thus the traditional stance holds that the Westphalian model of international relations, which is governed by the Vattelian legal structure, involves an international realm that is distinct and separate from the internal realms.[56] Geoffrey Palmer, while arguing that the situation is changing, provides the following useful image : "international law and municipal law have been seen as two separate circles that never intersect."[57]

The perspective adopted so far in this section centres on domestic actors and is no doubt very different from the international – or "internationalist"[58] – point of view, according to which the so-called principle of *supremacy* of international law affirms the superiority of the international legal order vis-à-vis domestic normativity. One of the main advocates of this doctrine was Gerald Fitzmaurice, in his "General Principles of International Law Considered from the Standpoint of the Rule of Law,"[59] where he wrote that the principle of supremacy is "one of the great principles of international law, informing the whole system and applying to every branch of it."[60] In cases of normative conflict, from the international perspective, it is clear that international law must, and in effect does always trump any incompatible national legal rules.[61] As it was recalled recently, the "principle of supremacy of international law thus is key to the international rule of law."[62] I agree that, on the one hand, supremacy is essential for the phenomenon (discussed above) of the rule of law internationalized, that is, rule of law values within the international legal sphere. On the other hand, international law supremacy is not at all compelling in terms of the internationalization of the rule of law – that is, exporting rule of law values into other states national law – the occurrence of the international rule of law which, *a priori*, interests interlegality most.

In reality, for the purposes of studying how domestic courts can and should resort to international law, there needs to be a sort of *relocating* of the supremacy legal character of normativity along, in fact beside the international-national axis. This kind of twilight zone of normative supremacy should be located parallel, in a sense, to both the international legal sphere and the domestic legal orders, while at the same time, ought to be reinforced by the respective claims of superiority of, yet again, both the international legal sphere and the domestic legal orders. In terms of

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[54] See S. Beaulac, "The Social Power of Bodin's 'Sovereignty' and International Law" (2003) 4 *Melbourne Journal of International Law* 1; and S. Beaulac, "Le pouvoir sémiologique du mot 'souveraineté' dans l'œuvre de Bodin" (2003) 16 *International Journal for the Semiotics of Law* 45.

[55] See S. Beaulac, "Emer de Vattel and the Externalization of Sovereignty" (2003) 5 *Journal of the History of International Law* 237.

[56] I first articulated this view in S. Beaulac, "National Application of International Law : The Statutory Interpretation Perspective" (2003) 41 *Canadian Yearbook of International Law* 225.

[57] G. Palmer, "Human Rights and the New Zealand Government's Treaty Obligations" (1999) 29 *Victoria University in Wellington Law Review* 27, at 59.

[58] See, *inter alia*, B. Kingsbury, N. Krisch & R. Stewart, "The Emergence of Global Administrative Law" (2005) 68 *Law & Contemporary Problems* 15 ; and, generally, D. Dyzenhaus (ed.), *The Unity of Public Law* (Oxford : Hart Publishing, 2004).

[59] G. Fitzmaurice, "The General Principles of International Law Considered from the Standpoint of the Rule of Law" (1957) 92 *Hague Recueil* 1.

[60] *Ibid.*, at 85.

[61] This application of the principle of supremacy of international law is at the basis of the law of treaties, *as per* articles 27 and 46 of the *Vienna Convention on the Law of Treaties* (1969), 1155 U.N.T.S. 331, 8 I.L.M. 679, as well as the law of international state responsibility, *as per* articles 3 and 32 of the *Draft Articles on the Responsibility of States for Internationally Wrongful Acts*, scheduled to the UN General Assembly Resolution , A/RES/56/83, 28 January 2002.

[62] A. Nollkaemper, "Rethinking the Supremacy of International Law" (2009) *Amsterdam Center for International Law Working Papers*, available at http ://ssrn.com/abstract=1336946. See also A. Watts, "The International Rule of Law" (1993) 36 *German Yearbook of International Law* 15.

actual rule of law values – examined later[63] – this space allows for what I call the *reflexive complementarity*[64] of both phenomena discussed in the previous section, namely of the rule of law internationalized, on the one hand, and of the internationalization of the rule of law, on the other. The phrase "reflexive complementarity"[65] is used here to refer to the idea of circular, mutually self-perfecting relationship between the cause of a phenomenon and the effect upon that same phenomenon. For the present purposes, it means that the occurrence of the rule of law internationalized onto the international plane reverts back and affects not only itself, but also the twin phenomenon of the internationalization of the rule of law in other jurisdictions, and in fact complements the latter. Conversely, the occurrence of the internationalization of the rule of law is not only reflexive onto itself, but it is also onto the other phenomenon of the rule of law internationalized, and in fact acts as a complement to it. Hence the suggestion of *reflexive complementarity*, as the twin phenomena are mutually self-perfecting in a circular fashion (onto itself and its twin).

The other idea, namely of separate, parallel space for normative supremacy as regards interlegality – where reflexive complementarity of the twin phenomena of the international rule of law occurs – draws from André Nollkaemper's contribution, who has suggested "a third domain between the two levels,"[66] that is to say, between the rule of law at the international level and the rule of law at the domestic level. "This is the rule of law as it applies to the overlapping sphere of domestic and international law," he wrote ; such a sphere "is characterized by the fact that international law and international institutions can fill rule of law gaps at the domestic law and vice versa, gaps brought about by the very growth of that overlap."[67] This aspect of rule of law "complementarity"[68] existing along (in fact, beside) the international legal sphere and the domestic legal orders – accomplished in a reflexive matter – is indeed central to the proposition of an "*à la carte*" heuristic model that follows.

III. The Thin-Thick Rule of Law Spectrum and its Limits

In their celebrated book, *Can Might Make Rights ? – Building the Rule of Law after Military Interventions*,[69] Jane Stromseth, David Wippman and Rosa Brooks are categorical that, one of the main reasons why many rule of law programs have been unsuccessful is "the failure of many policymakers to examine or fully understand

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[63] See *infra*, section 3.

[64] On *reflexivity* in the social sciences, see the work by Anthony Giddens, and his structuration theory: A. Giddens, *The Constitution of Society – Outline of the Theory of Structuration* (Cambridge: Polity Press, 1984); that by Pierre Bourdieu, and his sociology of sociology : P. Bourdieu, *Homo Academicus* (Stanford: Stanford University Press, 1988); and P. Bourdieu & L.J.D. Wacquant, *An Invitation to Reflexive Sociology* (Cambridge : Polity Press, 1992); as well as that by Ulrich Beck, and his reflexive modernization: U. Beck, *Risk Society – Towards a New Modernity* (London : Sage Publications, 1992); and U. Beck, A. Giddens & S. Lash, *Reflexive Modernization – Politics, Tradition and Aesthetics in the Modern Social Order* (Stanford : Stanford University Press, 1994).

[65] The terminology of "reflexive complementarity" is *sui generis* and of my own making.

[66] A. Nollkaemper, "The Internationalized Rule of Law" (2009) 1 *Hague Journal on the Rule of Law* 74, at 76.

[67] *Ibid.* The author makes a similar point in A. Nollkaemper, "The European Courts and the Security Council : Between Dédoublement Fonctionnel and Balancing of Values: Three Replies to Pasquale De Sena and Maria Chiara Vitucci" (2009) 20 *European Journal of International Law* 853, at 868.

[68] See also A. Nollkaemper, "Multi-level Accountability in International Law: A Case Study of the Aftermath of Srebrenica," in Y Shany & T. Broude, *The Shifting Allocation of Authority in International Law – Considering Sovereignty, Supremacy and Subsidiarity* (Oxford: Hart Publishing, 2008), 345.

[69] J. Stromseth, D. Wippman & R. Brooks, *Can Might Make Rights? – Building the Rule of Law after Military Interventions* (Cambridge: Cambridge University Press, 2006).

the very concept of 'the rule of law'."[70] Too many people involved in the field adopt an "I know it when I see it"[71] attitude toward the content of the rule of law which, though some say might have advantages – easy consensus, for one – raises serious problems, as "it permits superficiality and obtuseness that has badly limited the efficacy of many rule of law promotion efforts."[72] Hence the need to undertake, once again,[73] a little genealogy of the rule of law.[74]

It is generally agreed that, while the various ideas associated with the rule of law are undoubtedly very old[75] — going as far back as Plato and Aristotle[76] — the emergence of the rule of law as a mighty discursive tool within political and legal circles is relatively recent.[77] The expression itself was coined by 19th century author Albert Venn Dicey,[78] with his masterwork *Introduction to the Study of the Law of the Constitution*[79]. The British scholar wrote that the rule of law had "three meanings, or may be regarded from three different points of view."[80] First, it entails "the absolute supremacy or predominance of regular law as opposed to the influence of arbitrary power."[81] He further wrote: "In this sense the rule of law is contrasted with every system of government based on the exercise by persons in authority of wide, arbitrary, or discretionary powers of constraint."[82]

The second prong in Dicey's rule of law model relates to "equality before the law, or the equal subjection of all classes to the ordinary law of the law administered by the ordinary law courts."[83] "We mean, in the second place, when we speak of the 'rule of law' as a characteristic of our country, not only that with us no man is above the law, but (what is a different thing) that here every man, whatever be his rank or condition, is subject to the ordinary law of the realm and amenable to the jurisdiction of the ordinary tribunals."[84] Thirdly, according to Dicey, the rule of law entails that "the law of the constitution […] are not the source but the consequence of the rights of individuals, as defined and enforced by the courts."[85] Thus fundamental rights, "are with us the result of judicial decisions determining the rights of private

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[70] *Ibid.*, at 69 [italics in original]. See also J. Stromseth, "Post-Conflict Rule of Law Building: The Need for A Multi-Layered, Synergistic Approach" (2008) 49 *William & Mary Law Review* 1443, at 1445.
[71] This terminology was also used by M. Krygier, "False Dichotomies, True Perplexities, and the Rule of Law," in A. Sajo (ed.), *Human Rights with Modesty: The Problem of Universalism* (Leiden & Boston: Martinus Nijhoff, 2004), 251.
[72] J. Stromseth, D. Wippman & R. Brooks, *supra* note 69, at 69.
[73] As George Fletcher put it, this is because, "we are never quite sure what we mean by 'the rule of law';" see G.P. Fletcher, *Basic Concepts of Legal Thought* (Oxford & New York: Oxford University Press, 1996), at 12. See also R. Stein, "Rule of Law: What Does it Mean?" (2009) 18 *Minnesota Journal of International Law* 293, at 296.
[74] See R. Peerenboom, "Varieties of Rule of Law – An Introduction and Provisional Conclusion," in R. Peerenboom (ed.), *Asian Discourses of Rule of Law – Theories and Implementation of Rule of Law in Twelve Asian Countries, France and the U.S.* (London & New York: Routledge, 2004), 1.
[75] See J.N. Shklar, "Political Theory and the Rule of Law," in A.C. Hutchinson & P. Monahan (eds.), *The Rule of Law: Ideal or Ideology* (Toronto: Carswell, 1987), 1.
[76] Cf. Plato, *The Laws*, trans. by T.J. Saunders (London: Penguin Classics); and Aristotle, *Politics*, trans. by T.A. Sinclair (London: Penguin Classics).
[77] See J. Rose, "The Rule of Law in the Western World: An Overview" (2004) 35 *Journal of Social Philosophy* 457, at 457.
[78] See H.W. Arndt, "The Origins of Dicey's Concept of the 'Rule of Law'" (1957) 31 *Australian Law Journal* 117.
[79] A.V. Dicey, Introduction to the Study of the Law of the Constitution (London: Macmillan, 1885).
[80] *Ibid.*, at 202.
[81] *Ibid.*
[82] *Ibid.*, at 188.
[83] *Ibid.*, at 202.
[84] *Ibid.*, at 193 [footnotes omitted].
[85] *Ibid.*, at 203.

persons in particular cases brought before the Courts."[86] He suggested that this last element is very much a special attribute of British constitutionalism.

Accordingly, for Dicey, the rule of law means (1) to be ruled by law, not by discretionary power, (2) to be equal before the law, private individuals as well as government officials, and (3) to be submitted to the general jurisdiction of ordinary courts, the best source of legal protection.[87] These core ideas, in one form or another, are found in the scholarship of most modern authors who write on these issues, both in legal studies and political sciences.[88] It does not follow, however, that there is any kind of consensus or agreement on the meaning and scope of the rule of law, on the contrary it seems. Some criticisms have been voiced, for instance, on the vagueness and uncertainly of the concept,[89] with Joseph Raz famously calling the rule of law a mere slogan.[90]

Over the years, scholars have put the different versions or formulations of the concept into categories or models. Paul Craig suggested to distinguish between the *formal* conceptions of the rule of law, concerned with how the law is made and its essential attributes (clear, prospective), and the *substantive* conceptions of the rule of law, concerned with the formal precepts but also with some basic content of the law (justice, morality).[91] Brian Tamanaha built on this classification and divided up the formal and substantive models further, making them progressively go from "thinner" to "thicker" formulations, that is, from *minimalist* accounts with few requirements to more requirements, each subsequent version including the components of the previous ones, leading to a *maximalist* version of the concept. Thus starting with the formal conceptions of the rule of law, the thinnest is (1) the "rule-by-law" (law as instrument of government), then (2) "formal legality" (law that is general, prospective, clear, certain), and the thickest of the formal versions adds (3) "democracy" to legality (consent determines content of law) ; follow the substantive conceptions of the rule of law, which all encompass the formal elements, but refer

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[86] *Ibid.*, at 195 [footnotes omitted]. A common misreading of the last element in Dicey's model holds that the rule of law requires protection to some substantive rights and freedoms. As Paul Craig pointed out, however, this "is not what Dicey actually said;" see P. Craig, "Formal and Substantive Conception of the Rule of Law: An Analytical Framework" [1997] *Public Law* 467, at 473. Rather, his argument was simply that, providing a society wishes to give protection to individual rights, that is, if and only if there has been a political will to have such legal guarantees, then, one way of doing it is better than another way as far as the rule of law is concerned. Namely, the British common law technique ought to be favoured over the Continental written constitutional document technique. That is to say, judge-made-law individual rights would give more effective protection than bills or charters of rights and freedoms because the latter are easier to abrogate or change by governments.

[87] This part of the discussion, in particular Dicey's contribution, draws from S. Beaulac, *supra* note 31.

[88] See J. Stapleton, "Dicey and his Legacy" (1995) 16 *History of Political Thought* 234; and J. Rose, *supra* note 77, at 458. For a recent example see, in international law, I. Brownlie, *The Rule of Law in International Affairs* (The Hague : Martinus Nijhoff, 1998), at 212; and in anglo-saxon public law, H. Barnett, *Constitutional and Administrative Law*, 4th ed. (London: Cavendish Publishing, 2002), at 91, where Dicey's three-prong formulation is reproduced *verbatim* and analysed in detail.

[89] See J.N. Shklar, *supra* note 75, at 1: "It would not be very difficult to show that the phrase 'the Rule of Law' has become meaningless thanks to ideological abuse and general over-use. It may well have become just another one of those self-congratulatory rhetorical devices that grace the public utterances of Anglo-American politicians. No intellectual effort need therefore be wasted on this bit of ruling-class chatter."

[90] J. Raz, "The Rule of Law and its Virtue" (first published in (1977) 93 *Law Quarterly Review* 195), in J. Raz, *The Authority of Law: Essays on Law and Morality* (Oxford: Clarendon Press, 1979), 210, at 210: "Not uncommonly when a political ideal captures the imagination of large numbers of people its name becomes a slogan used by supporters of ideals which bear little or no relation to the one it originally designated."

[91] P. Craig, *supra* note 86. See also P. Craig, "Constitutional Foundations, the Rule of Law and Supremacy" [2003] *Public Law* 92.

also to other legal features such as (4) "individuals rights" (property, contract, privacy, autonomy), then a thicker version yet includes (5) "rights of dignity and/or justice" and, finally, the thickest of the models of the substantive rule of law, of all versions in fact, entails a dimension of (6) "social welfare" (substantive equality, welfare, community preservation).[92] This is known as the *sliding scale* of rule of law values, from the minimalist thin end to the maximalist thick end, according to a sort of rule of law "spectrum."

A number of scholars in legal studies and political sciences have followed a modest, largely positivist version of the rule of law, advocating limited models that emphasise the formalistic or process-oriented aspects. Lon Fuller, for instance, argues in favour of a system of general rules created and applied consistently with procedural justice and fairness.[93] Eight conditions need to be met : (1) a system of rules, (2) promulgation and publication of the rules, (3) avoidance of retroactive application, (4) clear and intelligible rules, (5) avoidance of contradictory rules, (6) practicable rules, (7) consistency of rules over time, and (8) congruence between official actions and declared rules.[94] A similar enumeration of eight factors essential to the rule of law is given by John Finnis.[95] Joseph Raz[96] too has a list of (yet again) eight elements that should be found in a rule of law system ; although slightly differently formulated than Fuller's and Finnis', they considerably overlap and all relate to formal aspects of law, on the thinner side of the scale.[97]

At the other end of the spectrum, a thicker formulation, "does not necessarily reject the notion that the rule of law has important structural and formal elements – predictability, universality, nonarbitrariness, and so on – but insists that true rule of law also requires particular substantive commitments."[98] Now, what are those thick rule of law features ? Randall Peerenboom suggested, "elements of political morality such as particular economic arrangements (free market capitalism, central planning, and so on), forms of government (democratic, single party socialist, and so on) or conceptions of human rights (liberal communitarian, collectivist, 'Asian Values,' and so on)."[99] Some of the well recognized proponents of a maximalist model of the rule of law are Ronald Dworkin,[100] Cass Sunstein[101] and Judith

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[92] B.Z. Tamanaha, *On the Rule of Law – History, Politics, Theory* (Cambridge : Cambridge University Press, 2004), at 91 *ff.*

[93] L. Fuller, *The Morality of Law*, 2nd ed. (New Haven: Yale University Press, 1969). On Fuller's, as well as Raz's, formalistic conception of the rule of law, see M. Bennett, "'The "Rule of Law" Means Literally What it Says: The Rule of Law': Fuller and Raz on Formal Legality and the Concept of Law" (2007) 32 *Australian Journal of Legal Philosophy* 90.

[94] L. Fuller, *ibid.*, at 38-39. See also R.P. George, "Reason, Freedom, and the Rule of Law: Their Significance in the Natural Law Tradition" (2001) 46 *American Journal of Jurisprudence* 249.

[95] J. Finnis, *Natural Law and Natural Rights* (Oxford : Clarendon Press, 1980), at 270. For his part, R.S. Summers, "The Principles of the Rule of Law" (1999) 74 *Notre Dame Law Review* 1691, stretches the list to eighteen such formal requirements, though only providing a more detailed account of the same basic ideas.

[96] J. Raz, *supra* note 90, at 214-218. For an interesting assessment of Raz's theory on the rule of law, see Y. Hasebe, "The Rule of Law and Its Predicament" (2004) 17 *Ratio Juris* 489.

[97] See also, favouring the formalistic version of the rule of law, J. Waldron, "The Concept and the Rule of Law" (2008) 43 *Georgia Law Review* 1; and M.J. Radin, "Reconsidering the Rule of Law" (1989) 69 *Boston University Law Review* 781.

[98] J. Stromseth, D. Wippman & R. Brooks, *supra* note 69, at 71 [italics in original]. See also D. Kairys, "Searching for the Rule of Law" (2003) 36 *Suffolk University Law Review* 307.

[99] R. Peerenboom, "Let One Hundred Flowers Bloom, One Hundred Schools Contend: Debating Rule of Law in China" (2002) 23 *Michigan Journal of International Law* 471, at 472.

[100] See R. Dworkin, "Political Judges and the Rule of Law," in R. Dworkin, *A Matter of Principle* (Cambridge : Harvard University Press, 1985), 9. On Dworkin and the rule of law, see J. Waldron, "The

Shklar.[102] Quite recently, Lord Thomas Bingham dwelled upon the meaning of the rule of law in the context of the 2005 constitutional reform in the UK, offering a definition containing substantive elements, notably fundamental human rights.[103] The thicker formulations of the rule of law have been harshly criticised by several commentators, such as Joseph Raz, who notoriously wrote that: "If the rule of law is the rule of the good law then to explain its nature is to propound a complete social philosophy."[104]

Be it as it may, the paradigmatic question becomes : Are we constrained to the thin-thick sliding scale approach in analysing possible heuristic models for the rule of law ? Some argue that we should lean toward the minimalist end of the spectrum and evacuate the substantive axiological rule of law features, with a view to improving support for structural reforms and good governance measures. "The more the theory of the rule of law is 'de-substantivized' to embrace only those institutional forms that as such serve values associated with a formal rule of law," writes Robert Summers, "the more likely it is that the formal rule of law will receive its due."[105] Conversely, the argument goes, thicker versions of the rule of law are more likely to be controversial and polarizing in society. Robert Summers again : "if the rule of law is taken in general discourse within the society to mean not just governance through rules (and facilitative institutional features) but also capitalism (or socialism), a Bill of Rights (or no Bill of Rights), general democracy (or limited democracy), etc., then the formal rule of law is not so likely to command the range of *neutral* support it merits (and requires)."[106]

However, this contention seems to be flawed and, as a matter of fact, warrants to go pass the thin-thick spectrum. Suggesting that, strategically, the better approach is to start with a formal conception of the rule of law, and then (presumably) move toward a more substantive one, is based on very little hard evidence, if any. Rosa Brooks disputed the assumption that the promotion of a thin rule of law version "will lead reliably and predictably to the emergence of a robust societal commitment to the more substantive aspects of the rule of law."[107] More importantly, too thin an account of the rule of law, with no basic human rights content for instance, can be counter-productive as the reforming measures may lack apparent legitimacy and, as a result, might be considered unsatisfactory by people in societies. On this point, Michael Trebilcock and Ronald Daniels wrote that, "it seems plausible that interested parties are at least as likely to be aggrieved by what is *left out* by a formalistic approach as by what is *brought in* by a more substantive one."[108] A bare minimalist model, in other words, can simply not be up to the task given the

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Rule of Law as a Theater of Debate," in J. Burley (ed.), *Dworkin and His Critics* (Oxford: Blackwell, 2004), 319.

[101] See C. Sunstein, *Democracy's Constitution* (Oxford & New York: Oxford University Press, 2001).

[102] See J.N. Shklar, *Political Thought and Political Thinkers* (Chicago: University of Chicago Press, 1998).

[103] T. Bingham, "The Rule of Law" (2006) *Cambridge Law Journal* 67, conference paper presented at the Sixth Sir David Williams Lecture, given at the University of Cambridge on 16 November 2006. See also T. Bingham, "The Rule of Law and the Sovereignty of Parliament" (2008) 19 *King's Law Journal* 223; and, his latest contribution, T. Bingham, *The Rule of Law* (London: Allen Lane, 2010).

[104] J. Raz, *supra* note 90, at 211.

[105] R.S. Summers, "A Formal Theory of the Rule of Law" (1993) 6 *Ratio Juris* 127, at 137.

[106] *Ibid.* [italics in original]. See also W.C. Whitford, "The Rule of Law" [2000] *Wisconsin Law Review* 726.

[107] R.E. Brooks, "The New Imperialism : Violence, Norms, and the Rule of Law" (2003) 101 *Michigan Law Review* 2275, at 2284.

[108] M.J. Trebilcock & R.J. Daniels, *Rule of Law Reform and Development – Charting the Fragile Path of Progress* (Cheltenham & Northampton : Edward Elgar, 2008), at 25 [italics in original].

hype and high aspirations that the rule of law – this formulation of "hurrah" words[109] – does provoke and generate.

Trebilcock and Daniels are interested in international development, of course, but the same observation no doubt applies *mutatis mutandis* to international relations in general, where rule of law performative power ought to contribute to moving away from the old international-national divide in approaching interlegality. For a domestic judiciary, therefore, an interlegality formulation of the rule of law needs not to follow the usual sliding scale or spectrum-type of reasoning. Instead, one's understanding of the concept should allow to take into account formal rule of law values, though maybe not all of them, and should also leave it open to include some substantive rule of law values, though again not necessarily towards the maximalist version. This is an "*à la carte*" model for the rule of law, which I am proposing in respect to the role domestic courts can and should play through the use of international normativity.

IV. Conclusion : *À la Carte* Rule of Law

But can an *à la carte* model for the rule of law be considered heuristic at all, for the purposes of apprehending issues of interlegality ? It was Gianluigi Palombella who recently opined that, although the rule of law is flexible, "its normative meaning does not essentially change ;" indeed, "any notion of the rule of law as something relative, its meaning varying from jurisdiction to jurisdiction, is unacceptable."[110] He referred to some linguistic usages of the concept – namely, rule of law, *Stato di diritto, Rechtsstaat*[111] – to support this contention, which he extended to the context of the European Union.[112] While I may agree with my distinguished Italian colleague that uniformity in one's model of the rule of law is imperative within the vanguard supra/trans-national legal order in Europe,[113] I do not think that a strict commonality is possible, let alone ontologically required, for the concept to help in understanding and rationalising how domestic courts resort to international law.

Reflecting upon the future and "the challenges and prospect for the field" of the rule of law in the 2009 inaugural issue of the *Hague Journal on the Rule of Law*, Randall Peerenboom identifies a clear "need to disaggregate rule of law and develop more differentiated rule of law promotion plans."[114] Although efforts are being made in that way, he deplores the continuing overall tendency, "to treat rule of law and rule of law promotion as a single entity or enterprise, and to rely on generally applicable, and hence overly simple, highly reductive and exceedingly abstract, international best practices and off-the-shelf rule of law toolkits."[115] Instead, he

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[109] See *supra* note 5 and accompanying text.
[110] G. Palombella, "The Rule of Law Beyond the State: Failures, Promises, and Theory" (2009) 7 *International Journal of Constitutional Law* 442, at 455.
[111] For references on these linguistic manifestations of the rule of law in different European languages, see L. Heuschling, *État de droit, Rechtsstaat, Rule of Law* (Paris: Dalloz, 2002); E. Carpano, *État de droit et droits européens* (Paris: L'Harmattan, 2005); and P. Costa & D. Zolo (eds.), *The Rule of Law – History, Theory and Criticism* (Dordrecht: Springer, 2007). See also R. Grote, "Rule of Law, Rechtsstaat and 'État de droit'," in S. Starck (ed.), *Constitutionalism, Universalism and Democracy – A Comparative Analysis* (Badden-Baden : Nomos Verlagsgesellschaft, 1999), 269.
[112] G. Palombella, *supra* note 110. See also "The Rule of Law and Its Core," in G. Palombella & N. Walker (eds.), *Relocating the Rule of Law* (Oxford: Hart Publishing, 2009), 17.
[113] See N. Walker, "The Rule of Law and the EU: Necessity's Mixed Virtue," in G. Palombella & N. Walker (eds.), *Relocating the Rule of Law* (Oxford: Hart Publishing, 2009), 119.
[114] R. Peerenboom, *supra* note 20, at 7.
[115] Ibid.

argues in favour of a "more refined typology of ideal types or patterns of developing countries and rule of law challenges."[116] In regard to the national use of international law, he opines that each national jurisdiction "presents a different set of issues or challenges that requires something more than the standard set of one-size-fits-all prescriptions."[117] In full agreement with Peerenboom, I would further argue that it is considerably reducing the potential performative power of the concept to hold that an *à la carte* approach to the rule of law is not a valid heuristic model.

Having said that, am I stuck once again with yet another "sort of laundry list of features that a healthy legal system should have,"[118] to borrow from Jeremy Waldron ? There is no need – indeed no space here – to speculate on an exhaustive list of rule of law values that the *perfect* domestic courts should pursue, within their parallel space of normative supremacy, within which they can justify recourse to international law. The contribution of this paper is thus relatively modest and limited to suggesting the actual heuristic value of the *à la carte* model for the rule of law in this context. Some further research will have to be conducted to provide real application of this approach and verify, empirically, the solidity of the argument.

[116] *Ibid.*, at 8.
[117] Ibid.
[118] J. Waldron, *supra* note 26, at 154. See also T. Ringer, "Development, Reform, and the Rule of Law: Some Prescriptions for a Common Understanding of the 'Rule of Law' and its Place in Development Theory and Practice" (2007) 10 *Yale Human Rights & Development Law Journal* 178, at 193.