Due Process in the United Nations

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Abstract: The legitimacy of the United Nations is essential to its effectiveness in carrying out its mandate. As UN organs exercise an increasing array of 'governmental' powers, it should come as no surprise that repeated failures by the UN to provide adequate due process to those affected by its decision-making has had a detrimental effect on the Organization and its activities. Yet UN organs continue to resist procedural reform, seemingly unpersuaded by reform proposals insisting that due process is unquestionably 'a good thing'. The aim of this article is to develop procedural principles for the UN context using a normatively rich rather than formalistic approach. The problem in relying on traditional international law source methodology — drawing on 'universally-recognized' procedural standards from customary international human rights law or 'general principles' of domestic public law — is that it ignores the contextual nature of due process. The article lays the foundations of a 'value-based' approach to the development of due process principles for the UN context, with a focus on two sites in which the choice of procedural framework is both problematic and unresolved: the targeted sanctions context and the Haiti cholera controversy.

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INTRODUCTION

'…hard it is for high and stately buildings long to stand, except they be upholden and staid by most strong shores, and rest upon most sure foundations…'

Jean Bodin, *The Six Books of a Commonweale* [1576], 517

It has been said of the redemptive quality of procedural reform that it is 'about nine parts myth and one part coconut oil'.[1] Yet there is little myth or copra in recognition that failure by the United Nations to provide adequate procedural justice has had a detrimental effect on the Organization and its activities. In the targeted sanctions context, litigation in over thirty national and regional courts over due process deficiencies has had a 'significant impact on the regime' placing it 'at a legal crossroads'.[2] In the peacekeeping context, the UN's position that claims in the ongoing Haiti cholera controversy are 'not receivable' has been described in extensive and uniformly critical press coverage as the 'UN's Watergate, except with far fewer consequences for the people responsible' and led to the initiation of class action tort claims in US courts.[3] Complacency in the face of allegations of sexual abuse by UN blue helmets led to the unprecedented ousting of a special representative to the Secretary-General in the Central African Republic. Economizing on due process standards is proving to be false economy.

The focus of this article is not to repeat the allegation of due process deficiencies. The '*j'accuse*' moment was seized by a range of academics and practitioners, but has passed. The task now facing international lawyers is more structural. The controversy and transnational discourse surrounding due process is symptomatic of the fact that UN decision-making is emerging as a new tier of governance applicable and accountable to a complex and hybrid global constituency. Yet there is still much normative work to be done in tracing out the full implications of the assumption of 'governmental' powers of decision-making in the international sphere. In terms of applicable procedural standards, the problem is that the normative case for the adoption of due process safeguards in UN decision-making has not adequately been made. Instead, would-be reformers have relied on a presumption that due process is unquestionably 'a good thing', with minimal analysis of the form it should take or the role we require it to play in the UN setting. At the same time, and without adequate normative justification,

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[1] Joseph L. Sax, *The (Unhappy) Truth About NEPA*, 26 OKLA. L. REV. 239, 239 (1973).
[2] Thirteenth report of 1267 Monitoring Team, UN doc S/2012/968, [19] (Dec. 31, 2012); Eighth Report of the 1267 Monitoring Team, UN Doc S/2008/324, [39] (May 14, 2008).
[3] *How the UN Caused a Massive Cholera Outbreak in Haiti*, BUSINESS INSIDER, Apr. 9, 2015. See also *Fault-Lines: Haiti in a Time of Cholera*, AL JAZEERA television broadcast, Mar. 2, 2015; *United in Immunity: UN in the Dock over Haiti Cholera Outbreak*, FRANCE 24 television broadcast Oct. 14, 2014; *The UN condemns Baby Doc but exonerates itself*, ECONOMIST, Mar. 2, 2013; *How the UN Caused Haiti's Cholera Crisis — and Won't be Held Responsible*, THE ATLANTIC, Feb. 26, 2013.

the UN rests on its traditional privileges such as primacy or immunity, resisting outside 'interference' with its decision-making in the form of procedural regulation and review.

This article proceeds from the starting point that the intransigence on the part of both sides of the due process debate is less a product of ideology about the virtue or otherwise of due process, and more a question of (flawed) methodology. In the reform debate, the task of developing a procedural framework for the UN setting has been largely a-theoretical. International lawyers have predominantly followed traditional international law source methodology, drawing 'universally-recognized' procedural standards from customary international law or general principles of civilized nations based on the recognition of such standards in 'x' number of treaties, or the representation of similar principles in 'y' number of states. This has led, on the one hand, to those favouring reform uniting around the need for a judicial remedy, drawing on due process guarantees binding on states under international and regional human rights sources. On the other hand, the UN staunchly rejects the idea of a judicial remedy.

This formalistic 'one-size-fits-all' approach to due process (or its blanket rejection) lacks normative foundation. As any public lawyer will readily identify, while due process rights are recognised by most legal systems, this should not lead us into the error of thinking either that this makes the principles 'universal' or that they take the same 'judicial' shape in every legal system.[4] In the domestic literature, it is well established that due process is *contextual*: different legal contexts legitimately require different procedural standards and operate according to different principles and values.[5] The netting of similar principles from an array of different legal systems in accordance with traditional international law source methodology results in the artificial generation of a universally applicable set of norms that does not sit comfortably with the contextual nature of due process.

The aim of this article is to develop procedural principles for the UN context using a normatively rich rather than formalistic approach. In the following pages, I lay out the foundations of a 'value-based' approach to the development of due process principles for the UN context, with a focus on two sites in which the choice of procedural framework is both problematic and unresolved: the targeted sanctions context and the Haiti cholera controversy. In both settings, a range of procedural frameworks have been proposed and applied, with certain mechanisms imposed by the UN itself, others embedded in reform proposals and still others evolving more organically. The aim is to consider the main procedural frameworks in terms of the due process model they most appropriately advance. Through a value-based approach, the aim is to move the due process debate on beyond its current deadlock, leapfrogging the superficial debate about form or remedy, and

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[4] Carol Harlow, *Global Administrative Law: The Quest for Principles and Values*, 17 EUR. J. INT'L L. 187, 204 (2006).

[5] One of the foremost comparative treatises on due process notes that 'there is no general blueprint to follow and the variety of approaches found in statutes is considerable': D. J. GALLIGAN, DUE PROCESS AND FAIR PROCEDURES: A STUDY OF ADMINISTRATIVE PROCEDURES (1996), 315.

exposing underlying choices about conceptions of international community, the role of law and the appropriate balance between international values.

1. A VALUE-BASED APPROACH: THREE MODELS OF DUE PROCESS

Even within domestic legal systems, it was felt historically that insufficient attention had been paid to the theoretical aspects of procedures, reflecting a sentiment that procedural rules relate 'only to the nuts and bolts of legal machinery, whereas central theoretical issues lie elsewhere'.[6] However, the vast literature on the subject in the last few decades reflects that the theoretical dimension of due process is extraordinarily rich. This literature has been virtually untapped in the debate about the application of due process to the UN setting. Instead, it has been common in the international debate to discuss due process in terms of a set of procedural rights, including (1) the right to notice; (2) the right to a hearing; (3) the right to reasons; (4) the right of appeal to an independent tribunal; (5) the right of public access to information and (6) the right to a judicial remedy. In proposing applicable procedural standards, little consideration has been given to the centralizing theoretical foundations that bind the constituent standards of due process to the broader concept, in particular the purpose or purposes underlying this set of rights. Yet due process is far more than the sum of its parts. An important aim of this value-based analysis is to demonstrate that due process is more than a set of discrete legal standards, but is a touchstone for the way in which a particular legal order conceives of far larger issues.

1.1. DUE PROCESS: HISTORY, POWER AND LEGITIMACY

Due process has played a very important historical role in shaping a society's legal, political and social decision-making structures. Shifts in governmental decision-making power have often been matched by widespread procedural reform. During the eighteenth, nineteenth and twentieth centuries, there was a shift in the centre of gravity of governmental authority from the legislative and judicial to the administrative branches of government across a range of countries, including the United States, England and France. In many cases, this shift in the locus of governmental authority was accompanied by crises of legitimacy, generally stemming from concerns about the concentration of decision-making authority in the hands of unelected officials, and attempts to insulate this authority from interference by the judiciary. It was largely through the reformation of due process

[6] Gerry Maher, *Natural Justice as Fairness* in THE LEGAL MIND: ESSAYS FOR TONY HONORÉ 104 (Neil MacCormick and Peter Birks eds., 1986).

law that these concerns were redressed. In the American context, the elaboration of due process principles has been described as the 'primary mechanism' for the redefinition of the modern administrative state.[7] Napoleon's 'rejudicialisation' of French administrative justice, through the establishment of the *Conseil d'Etat* and, later, the investiture of the *Conseil d'Etat* with the power of review over administrative decision-making authority, was described by Napoleon as necessary or 'the government will fall into scorn.'[8] In the UK, the constitutional significance of the House of Lords' decision in *Ridge v Baldwin*,[9] extending the right of procedural fairness to the exercise of all administrative decision-making, is expressed in its characterization as the 'Magna Carta of natural justice.'[10]

The idea that due process has served historically to enhance or restore legitimacy in the wake of shifts in decision-making authority is an interesting one in the present context of UN decision-making. The expanding assumption of decision-making authority over individuals by international institutions might be viewed as the next important shift in governmental authority, this time from the domestic to the international sphere. This shift in the locus of decision-making authority has certainly sparked similar concerns to those emerging during the rise of the modern administrative state, namely fears about the exercise of power over individuals by an unaccountable body and the absence of judicial review. Perceived against the backdrop of other historical shifts in governmental decision-making authority, failure by the UN to establish adequate due process safeguards regulating its assumption of decision-making authority over individuals can be recognized as something of an historical anomaly.

1.2. DUE PROCESS AS 'DIALOGUE'

Though due process has proved a valuable tool in comparable historical contexts, there has been a failure in the international sphere to appreciate the precise way or ways in which procedural law can positively contribute to UN decision-making. It is often said, and history confirms, that the essential aim of due process is to enhance the legitimacy of decision-making.[11] Of course, legitimacy is a wide lens. If the case for procedural reform is to be persuasive, it is necessary to bring the essential contribution of due process into sharper focus.

I argue that due process serves to establish a 'peculiar form of dialogue' in decision-making.[12] Safeguards associated with due process aim collectively to open up a structured dialogue between decision-making authority and those affected by

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[7] JERRY MASHAW, DUE PROCESS IN THE ADMINISTRATIVE STATE (1985), 1; Richard Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667, 1717–1722 (1975).
[8] PELET DE LA LOZÈRE, OPINIONS DE NAPOLÉON 191 (F Didot 1833).
[9] [1964] AC 40.
[10] C. K. ALLEN, LAW AND ORDERS 242 (3d ed. 1965).
[11] JERRY MASHAW, GREED, CHAOS AND GOVERNANCE 108 (1997); T. M. Scanlon, *Due Process*, *in* DUE PROCESS 94 (J Roland Pennock and John W Chapman eds., 1977); CAROL HARLOW AND RICHARD RAWLINGS, LAW AND ADMINISTRATION 621 (3d ed. 2009).
[12] This expression deliberately mimics Fuller's discussion of the related concept of adjudication: Lon Fuller, *The Forms and Limits of Adjudication* 92 HARV. L. REV. 353, 364 (1978).

decisions. Broadly, the aim of this dialogue is to enhance legitimacy. Whether 'legitimacy' is described by reference to a Habermasian 'worthiness to be recognized',[13] a Franckian 'connection to a community's evolving standards'[14] or Beetham's requirement that decision-making authority should find its foundation in 'beliefs shared by both dominant and subordinate',[15] the concept of legitimacy envisages a connection between decision-making authority and community values sufficient to ground acceptance of that authority in the relevant community. Due process acts in the service of legitimacy by shoring up the connection that acts as legitimacy's source, providing legal standards that serve to establish a dialogue between decision-makers and the community affected by decisions to ensure decision-making takes place in accordance with relevant community values. Setting up this general connection with legitimacy is important because it reveals that due process is necessarily intricately bound up with conceptions of community, values and the role of law in achieving these values. The contextual nature of due process arises from the fact that conceptions of community, law and values will differ between legal contexts.

1.3. THREE MODELS OF DUE PROCESS

In developing a normatively rich understanding of due process, it is possible to identify a number of distinct schools of thought as to how due process is thought to enhance the legitimacy of decision-making. These are commonly discussed in terms of process values, with scholars differing over the central process value or values advanced by procedural frameworks. While these process values are not mutually exclusive and may co-exist, it is helpful to examine them in terms of distinct value-based models in order to better appreciate the different ways in which due process is able to contribute to legitimacy in decision-making.[16]

1.3.1. The Instrumentalist Approach: A Model based on Accuracy

The classical model of due process contributes to the legitimacy of decision-making by seeking to minimize the incidence of error. This model ascribes an instrumental role to due process, regarding it above all as a mechanism by which to achieve greater *accuracy* in the application of the substantive law to the facts. The preceding sentence is deliberately qualified: the focus of the instrumentalist model is not on achieving accuracy or truth in decision-making *per se*, but on the somewhat narrower aim of ensuring that decision-makers accurately apply the substantive law in their decision-making.

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[13] J. Habermas, Legitimation Problems in the Modern State, *in* COMMUNICATION AND THE EVOLUTION OF SOCIETY 178–9 (T McCarthy trans. 1979).
[14] THOMAS M. FRANCK, FAIRNESS IN INTERNATIONAL LAW AND INSTITUTIONS 26 (1995).
[15] DAVID BEETHAM, THE LEGITIMATION OF POWER (Peter Jones and Albert Weale eds. 1991).
[16] The foundations for these models are outlined in greater detail in DEVIKA HOVELL, THE POWER OF PROCESS (2016).

Jeremy Bentham, an archetypal positivist, was the original and most influential proponent of the instrumental approach to procedural justice. It is important not to neglect the link between instrumentalism and legal positivism.[17] Essentially, the primary role of procedural law under this model is to make sure that the rules are applied as enacted by the legislature, thus fulfilling the positivist's aim of achieving the accurate and objective implementation of the legislature's will. Of course, under a positivist theory of the rule of law, legitimacy does not emerge merely from the accurate application of law, but from a deeper internal acceptance of the authority of the law-maker to enact the law. The idea is to ensure that unrepresentative bureaucratic decision-makers accurately apply the commands of a legitimate source of authority, usually the legislature.[18] Crucially, the instrumentalist model presupposes the existence of a 'legitimately representative lawmaker' in the legal system within which the model applies. The duty to submit to the rules derives from the legitimacy of the whole compromise rather than from that of the particular command.[19]

A court-based 'adjudicatory' framework has historically been considered as best placed to achieve the goals of the instrumentalist model. The model imagines a system based on clear and determinate standards, where decision-makers can apply these standards instead of their personal notions of fairness, justice or appropriateness. In turn, decision-making is amenable to review by a judicial arbiter in accordance with these standards to determine whether decisions can be counted as correct or incorrect.[20]

1.3.2. The Dignitarian Approach: A Model Based on Interest Representation

The quest for accuracy reflected in the instrumentalist approach to due process has been overshadowed in more recent times by a competing approach that recognizes individual dignity as one of the primary contemporary foundations for due process. This model emerged at the domestic level from an increasing sense that the accurate application of legislative standards does not define the 'core ideal' of due process.[21] Rather, due process has come to be associated with values including 'basic notions of dignity',[22] 'humaneness',[23] 'autonomy, of controlling the events that affect you…and the…self-respect that come with it,'[24] and as 'rights to

[17] Another celebrated positivist, H. L. A. Hart, described procedural law as the guarantor of impartiality and objectivity in the application of legal rules: H. L. A. HART, THE CONCEPT OF LAW 156 (1961).
[18] Stewart, *supra* note 7 at 1672, 1698.
[19] Duncan Kennedy, *Legal Formality*, 2 J. LEGAL STUD. 351, 369 (1973).
[20] Frank I. Michelman, *Formal and Associational Aims in Procedural Due Process*, *in* PENNOCK AND CHAPMAN, *supra* note 11 at 130.
[21] Maher, *supra* note 6.
[22] Richard B. Saphire, *Specifying Due Process Values: Toward a More Responsive Approach to Procedural Protection*, 127 U. PA. L. REV. 111, 119 (1978).
[23] Robert Summers, *Evaluating and Improving Legal Processes - a Plea for 'Process Values'* 60 CORNELL L. REV. 1, 23 (1974).
[24] Edward Dauer and Thomas Gilhool, *The Economics of Constitutionalized Repossession* 47 S. CAL. L. REV. 116, 148–9 (1973).

interchange [expressing] the idea that to be a person, rather than a thing, is at least to be consulted about what is done with one.'[25]

There has been much debate about the foundations of a model that translates essentially intuitive claims to dignity, self-respect and autonomy into rights.[26] The obvious candidate is to anchor the dignitarian model in the liberal-democratic intellectual tradition, with due process rebranded in terms of a 'Kantian injunction'.[27] However, Professor Mashaw's illuminating scholarship on due process has demonstrated the limited determinate value of a dignitarian model of due process derived from liberal theory. Ultimately, Mashaw finds that liberal theory is either too strong or too weak in its capacity to safeguard the individual.[28] Individual autonomy is either treated as an absolute value, where an individual is entitled to demand any process that he or she deems necessary to the pursuit of their purposes in life or, according to a more social interpretation of liberal theory, is subsumed to the demands of social necessity such that it is enough for decision-making to be *comprehensible* to the rational individual in order to avoid a liberal critique.[29]

Taking into account Mashaw's criticism, especially as it relates to the international legal setting where the role of the individual is in particular danger of being subsumed, a more satisfactory theoretical framework in my view is to situate the dignitarian approach within a pluralist conception of legal and political culture. Such an interpretation of the dignitarian model maintains the connection between due process and autonomy, but adopts a broader, more socially-embedded interpretation of autonomy as a concept associated with self-government. Autonomy relates essentially to a form of freedom of association on the part of individuals to organize themselves voluntarily into groups as a means through which to impress their private preferences on decision-makers. Within this framework, due process becomes a mechanism by which to assure 'interest representation' of individuals and groups within the broader community, with the aim of procedure being to involve in the process of decision-making all of the persons or groups affected by any decision-making action.[30] The idea is that decision-making becomes more like a process of free negotiation or uninhibited bargaining among the various participants where the numbers and intensities of preferences will ultimately be reflected in decision-making outcomes.[31]

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[25] LAURENCE TRIBE, AMERICAN CONSTITUTIONAL LAW 666 (2d ed. 1988).
[26] Due process scholars have acknowledged the inadequacy of intuition as a normative foundation, and have eschewed the value of a natural rights jurisprudence 'justly excoriated for its intuitive assertions of fundamental fairness': MASHAW, DUE PROCESS IN THE ADMINISTRATIVE STATE, *supra* note 7 at 47, 182.
[27] Edmund Pincoffs, *Due Process, Fraternity and a Kantian Injunction*, *in* PENNOCK AND CHAPMAN, *supra* note 11.
[28] MASHAW, DUE PROCESS IN THE ADMINISTRATIVE STATE, *supra* note 7 at 216.
[29] *Id.*, 175–6, 185, 216–217.
[30] Stewart, *supra* note 7 at 1759.
[31] Cass R. Sunstein, *Interest Groups in American Public Law* 38 STAN. L. REV. 29, 32–3 (1985–1986).

1.3.3. The Public Interest Approach: A Model based on Public Accountability

By contrast to the dignitarian model, which encourages a focus on self-interest, the public interest model regards procedural fairness as a mechanism through which to enhance representation of the public interest through decision-making. Proponents of this approach, including TRS Allan and Frank Michelman, view due process as a 'guarantee of the opportunity for all to play their part in the political process.'[32] It shifts the theoretical foundations away from individual autonomy, as defined in a Kantian or even a pluralist sense, and towards something more representative of social solidarity. From a theoretical perspective, it is underpinned by a 'communitarian' mentality, encouraging a wider sharing of legal authority based on the idea that popular consent and the development of shared beliefs can only arise from the public deliberation of the broad membership of the community.

The public interest model encourages a 'responsive' approach to law and legal system as depicted by scholars such as Nonet and Selznick (drawing in turn upon the writings of Lon Fuller).[33] Underpinning this model is the idea that no legal regime can endure without a foundation in consent. Responsive law borrows much from the experience of democracy, but considers that 'gross legitimation' through majority rule provides only crude accountability.[34] Rather, the public interest model complements theories of deliberative democracy, emphasizing access to information and active participation in rational discourse as the foundation for political will formation and agreement.[35] Due process serves as a process for communication and argument under which participants might be encouraged to phrase their objections as if they were thinking through which is best for all participants rather than encouraging self-interested claims. Increased opportunities for participation in decision-making strengthens the bonds of rational consent between individuals and decisions, feeding into discourse about the development of a shared body of values, with which decision-making should in turn accord. Under a public interest model of law, respect for decision-making authority is negotiated, not won by subordination to formal rules. The idea is that the decision- maker's claim to authority and legitimacy is enhanced by an acknowledgment that 'the law or policy in question has been fairly adopted by procedures which enable *all citizens* to exert an influence, however limited, in any particular case'.[36]

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[32] T. R. S. Allan, *Procedural Fairness and the Duty of Respect* 18 OXFORD J. LEGAL STUD. 497, 509 (1998); Michelman, supra note 20 at 136.

[33] PHILIPPE NONET AND PHILIP SELZNICK, LAW AND SOCIETY IN TRANSITION: TOWARD RESPONSIVE LAW (1978); LON FULLER, THE MORALITY OF LAW (Rev. ed., 1969).

[34] NONET AND SELZNICK, *id.,* 56.

35 See, for example, AMY GUTMANN AND DENNIS THOMPSON, DEMOCRACY AND DISAGREEMENT (1996); JÜRGEN HABERMAS, BETWEEN FACTS AND NORMS: CONTRIBUTION TO A DISCOURSE THEORY OF LAW AND DEMOCRACY (William Rehg trans. 1996).

[36] Allan, *supra* note 32 at 508 (emphasis added).

1.4. THE VALUE OF DUE PROCESS

The slow pace of procedural reform in the UN context indicates that influential organs in the international order remain unconvinced of (or potentially uninterested in) the value of due process. Yet there is little point expecting policy-based subsidiary organs of the Security Council such as sanctions committees or peacekeeping missions to adopt due process principles on blind faith. The step of unpacking the process values underlying due process law is an important one for academics to take in order to demonstrate the link between the legitimacy of such organs and due process, and to show the range of beneficial process values that can be promoted by due process. I have summarized the differences identified in the preceding discussion in Table 1 below. In the next sections, I examine how the three normative models of due process and the process values underlying them knit together with the emerging procedural frameworks in two contemporary contexts: the targeted sanctions regime and the Haiti cholera controversy.

Table 1

	Key Process Values	Key Community Participants	Theory of Law	Values
Instrumentalist	Accuracy	Lawmakers	Positivist	Value-Neutral
Dignitarian	Interest-Representation	Stakeholders	Pluralist	Pluralist Interests
Public Interest	Public Interest	Broad Community	Responsive	Universal Values

2. DUE PROCESS IN SECURITY COUNCIL SANCTIONS DECISION-MAKING

In the late 1990s, concern about the devastating humanitarian impact of blanket sanctions against states led to a strategic shift in policy by the Security Council. Beginning with the sanctions regime against the UNITA rebel movement in Angola, the Security Council started targeting sanctions measures against relevant individuals, entities and products, rather than in blanket fashion against states. When it was proposed that the UN Office of Legal Counsel should be consulted about the policy shift to targeted sanctions, the reply from the Security Council was that there were 'no legal issues' involved in the listing or de-listing of

individuals on sanctions blacklists.[37] The consequences of the Security Council's assumption of decision-making authority over individuals were clearly underestimated. Paradoxically, a shift in policy engineered to inject greater fairness into the sanctions regime has given rise to nearly two decades of debate about the lack of due process in sanctions decision-making.

As things stand, the 'debate' about due process in the sanctions context has become more in the nature of a conversation of the deaf. Seemingly intractably, the debate has become polarized around the need for a court. On the one hand, central to almost every reform proposal is the insistence on the inclusion of a judicial review mechanism in the sanctions decision-making process.[38] On the other hand, the Security Council maintains its strong opposition to any form of judicial review of its decision-making.[39] Instead, in 2009, the Security Council created the office of the UN Ombudsperson to engage in review of sanctions decision-making, though notably with a mandate that extends to only one of sixteen existing targeted sanctions regimes. This step has been deemed inadequate by (among others) the Court of Justice of the European Union, the European Court of Human Rights, the UK Supreme Court and the UN Special Rapporteur on Counter-terrorism and Human Rights, not because of its narrow scope of application to one sanctions regime, but on grounds the Ombudsperson is 'not a court'.[40] Problematically, with academics and critics almost exclusively focused on the need for a court-based process, the Security Council's failure to extend the Ombudsperson's mandate beyond the Al Qaeda sanctions regime has attracted limited comment, let alone opposition.[41]

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[37] *Remarks by Hans Corell to 103rd Annual Meeting of the American Society of International Law*, 'Is the Security Council Bound by Human Rights Law' (Mar. 27, 2009, Washington DC).

[38] See, for example, BARDO FASSBENDER, TARGETED SANCTIONS AND DUE PROCESS 31 (2006), para 12.12; Larissa Van den Herik, *The Security Council's Targeted Sanctions Regimes: In Need of Better Protection of the Individual*, 20 LEIDEN J. INT'L LAW 797, 806–807 (2007); International Commission of Jurists, Assessing Damage, Urging Action: Report of the Eminent Jurists Panel on Terrorism, Counter-Terrorism and Human Rights (2009), 116–17; Craig Forcese and Kent Roach, *Limping into the Future: The UN 1267 Terrorism Listing Process at the Crossroads* 42 GEO. WASH. INT'L L. REV. 217, 265, 275 (2010); Jared Genser and Kate Barth, *When Due Process Concerns Become Dangerous: The Security Council's 1267 Regime and the Need for Reform*, 33 B. C. INT'L COMP. L. REV. 1, 37 (2010); Erika de Wet, *Human Rights Considerations and the Enforcement of Targeted Sanctions in Europe: The Emergence of Core Standards of Judicial Protection*, *in* SECURING HUMAN RIGHTS?: ACHIEVEMENTS AND CHALLENGES OF THE UN SECURITY COUNCIL 169 (Bardo Fassbender ed., 2011); GUGLIELMO VERDIRAME, THE UN AND HUMAN RIGHTS: WHO GUARDS THE GUARDIANS? (2011); Grant L Willis, *Security Council Targeted Sanctions, Due Process and the 1267 Ombudsperson*, 42 GEO. J. OF INT'L LAW 673, 737, 743–745 (2011); Lisa Ginsborg and Martin Scheinin, *You Can't Always Get What You Want: The Kadi II Conundrum and the Security Council 1267 Terrorist Sanctions Regime*, 8 ESSEX HUMAN RIGHTS REVIEW 7, 11–12, 19 (2011).

[39] Thirteenth Report of the 1267 Monitoring Team, UN doc S/2012/968, [15]–[16], [21] (Dec. 31, 2012); Security Council Report, Special Research Report: UN Sanctions, 14 (Nov. 25, 2013).

[40] *European Commission & Council v Yassin Abdullah Kadi* [2013] ECR not yet reported, [133]; *Al-Dulimi and Montana v Switzerland* (App No 5809/08), ECHR, 26 November 2013, [119]; *Nada v. Switzerland* [2012] ECHR 1691, paras 209–214; *Her Majesty's Treasury v Ahmed* [2010] UKSC 2, [145]–[156] per Lord Phillips; [184]–[185] per Lord Rodger; [246] per Lord Mance; Ben Emmerson QC, Report of UN Special Rapporteur on the Promotion and Protection of Human Rights while Countering Terrorism, UN doc A/67/396, [14], [20]–[21], (Sept. 26, 2012).

[41] Consider, for example, the repeated rejection of proposals by the Group of Likeminded States to extend the Ombudsperson's mandate: UN doc S/PV.7285 (Oct. 23, 2014); UN doc S/PV.6964 (May 10, 2013); UN doc S/2012/805 (Nov. 9, 2012).

In this Part, I undertake a value-based analysis, assessing the three procedural frameworks that have emerged in the sanctions context in terms of their capacity to fulfil the goals of their best-fit due process model. First, I examine the capacity of the primary option pushed by courts and commentators, the 'internationalized judicial framework,' to fulfil the goals of the instrumentalist model of due process. Secondly, I examine a framework that has emerged in a somewhat more organic fashion as an example of the dignitarian model, notably the 'pluralist judicial framework' under which domestic and regional courts are increasingly accepting challenges to sanctions decision-making under domestic or regional law. Third, I look at the Security Council's nominated option, the UN Ombudsperson, and assess its capacity to fulfil the goals of the public interest model of due process. In doing so, I draw my own conclusions about which framework is best equipped to enhance legitimacy in the international domain, and resolve that it is not necessarily the court-based process favoured by most international lawyers.

2.1. INSTRUMENTALIST MODEL: EVALUATING THE CASE FOR INTERNATIONAL JUDICIAL REVIEW

We begin with discussion of the internationalized judicial or adjudicatory framework, the framework around which critics seeking reform in the Security Council sanctions setting have converged. The idea is that sanctions decision-making should be subject to judicial review based on standards of international law. This is the model that a number of domestic and regional courts and tribunals have adopted, recasting themselves as 'internationalized' courts engaging in review of Security Council action under international law.[42]

Recalling the focus of the instrumentalist model on greater accuracy, the model appears well positioned to contribute to the legitimacy of Security Council sanctions decision-making. The incidence of error has undoubtedly weakened the effectiveness and credibility of the sanctions regime. Yet it is as important to recall that the instrumentalist model and adjudicatory framework that supports it are equipped chiefly to deal with *legal* errors in a domestic governmental context. In its translation to the Security Council context, the model's capacity to enhance legitimacy is disrupted by unique features of the Security Council setting. In particular, adoption of an instrumentalist model and associated internationalized court framework in the Security Council context would serve to: (a) entrench a narrow conception of community; (b) overplay the role of law in Security Council decision-making; and (c) have a stagnating effect on international values.

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[42] See, for example, *Kadi v Council and Commission* [2005] ECR II-0000 ('CFI Kadi'); *Her Majesty's Treasury v Ahmed* [2010] UKSC 2 per Lord Brown; UN Human Rights Committee, *Sayadi and Vinck v Belgium* (Communication No 1472/2006, 29 December 2008) UN Doc CCPR/C/94/D/1472/2006 ('Sayadi'). I distinguish here courts that assess Security Council decision-making under domestic or regional law, discussed *infra* as examples of the dignitarian model in action.

2.1.1. Community: Power to the P5 (and their Platonic Guardians)

In terms of community, a key problem with transplanting the instrumentalist model into the Security Council sanctions context is that it fails to broaden representation in sanctions decision-making beyond the scope of 'law-makers', and positions courts as guardians of the international legal order. While this might operate to enhance legitimacy in a domestic governmental context defined by strong command chains between administrative decision-makers, a representative legislature and an independent judiciary, in the Security Council context, the model becomes unhinged from the source of its legitimacy.

The primary goal of the instrumentalist model is to advance the will of law-makers. Yet, as discussed above, this is tied to the assumption that the law-makers embody the consent of the broader community. In the Security Council context, it is well appreciated that decision-making is carried out 'without the benefit of lawmakers representative of the demos these rules purport to affect'.[43] The main achievement of the model in the sanctions context will accordingly be to ensure the 'accurate' application of Security Council resolutions developed by the 15 members of the Security Council, which — far from enhancing legitimacy — risks becoming highly authoritarian for the majority of international society. Rather than working to transform the traditional and increasingly outdated conception of international community, the predominant effect of an instrumentalist model would be to police the traditional gateway of the international community, legitimizing the dominance of the P5 and downplaying the significance of non-state actors in international society. In the sanctions setting, the Security Council is becoming increasingly reliant on non-state actors for co-operation, implementation and enforcement of its decision-making. If these actors feel side-lined or are otherwise dissatisfied with Security Council decision-making, they have shown a capacity to undermine the Council's decisions by facilitating offers of employment, educational or travel opportunities, declining to freeze funds or actively contributing funds to those on sanctions blacklists.[44]

In terms of review, those advocating reform have clearly seen an advantage in appointing courts as the central procedural actors in the Security Council context. Yet, as the brief history of the sanctions regime has shown, this has had undesirable effects, stringing courts between the poles of inert deference or over-representative defiance. Those courts taking a deferential approach have emphasized the broad discretion granted to the Security Council under the UN Charter, determining that the combined operation of Articles 25 and 103 leaves the Security Council essentially free to take whichever measures it chooses in response to any threat to international peace and security.[45] Other courts have

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[43] JOSE ALVAREZ, INTERNATIONAL ORGANIZATIONS AS LAW-MAKERS 630 (2005).

[44] See Per Cramér, *Recent Swedish Experiences with Targeted UN Sanctions: The Erosion of Trust in the Security Council*, *in* REVIEW OF THE SECURITY COUNCIL BY MEMBER STATES (Erika de Wet and André Nollkaemper eds., 2003); P Koring, *Federal lawyers argue they have no obligation to bring Abdelrazik home*, GLOBE AND MAIL (May 8, 2009).

[45] See, for example, the decision of the Administrative Appeals Board of the Turkish Council of State in *Al-Qadi v The State* (TK 2007) ILDC 311; UN Human Rights Committee, *Sayadi*, Individual opinion

shown deference by taking a narrow approach to the interpretation of applicable human rights principles, providing no protection for individuals and at the same time arguably distorting fundamental human rights principles.[46]

The judgment of the Court of First Instance in 2005 *Kadi* exhibits both approaches. Here, the court identified a 'rule of primacy' of international law over municipal law, concluding that it had no power to review the lawfulness of Security Council resolutions under EU law.[47] The court did, however, recognize a role 'to check, indirectly, the lawfulness of the resolutions of the Security Council in question with regard to jus cogens'.[48] The CFI took an unusually expansive reading of *jus cogens*, essentially putting all human rights within that category, including the right to a fair hearing, the right not to be arbitrarily deprived of property and the right to an effective remedy.[49] The CFI then arguably took a second (mis)step, holding that there had been no breach of these norms in the case in question, despite the fact it had previously been widely accepted that the UN sanctions regime fell foul of these human rights standards. The court's judgment has been roundly criticized for ultimately discarding the *jus cogens* qualification as a fig-leaf, interpreting this category as unusually broad yet seemingly impossible to violate.[50] It is notable that the influence of the decision has been minimal, and the European Court of Justice subsequently overturned it, as discussed later.

In contrast to the deferential approach, an instrumentalist model has led other courts to assume a far greater role in international-law-making than is normatively justifiable. Though the legal limits on the Security Council are narrow, they are also decidedly nebulous. While in the domestic setting, courts are accustomed to filling gaps left by the legislature, in the Security Council context, these gaps become chasms. Security Council resolutions are often vague, and are not drafted with the level of attention to detail that might be expected in the case of domestic legislation. Courts vested with the power of review would inevitably be required to make difficult and largely unguided substantive choices among competing values, and indeed among inevitably controverted political, social and moral conceptions of appropriate responses to threats to international peace and

(partly dissenting) by Sir Nigel Rodley, Ivan Shearer and Iulia Antoanella Motoc, 27; Individual (dissenting) opinion of Ruth Wedgwood, 30; Individual opinion of Ivan Shearer, 32.

[46] See CFI *Kadi*, [268] and [288]; UN Human Rights Committee, *Sayadi*, [10.8].

[47] CFI Kadi, paras. 218–225.

[48] CFI Kadi, paras. 226–231.

[49] CFI Kadi, paras. 226–229.

[50] CFI Kadi, paras. 226–230. For criticism of this decision, see Marko Milanovic, 'Norm Conflict in International Law: Whither International Law?' (2009) 20 Duke Journal of Comparative and International Law 69, 91 and 93; J. Klabbers, 'Setting the Scene' in J. Klabbers, A. Peters and G. Ulfstein, The Constitutionalization of International Law (Oxford: OUP, 2009) 1; C. Eckes, 'Judicial Review of European Anti-Terrorism Measures — The Yusuf and Kadi Judgments of the Court of First Instance' (2008) 14 European Law Journal 74; P. Eeckhout, 'Community Terrorism Listings, Fundamental Rights and UN Security Council Resolutions: In Search of the Right Fit' (2007) 3 European Constitutional Law Review 183, 195; E. Defeis, 'Targeted sanctions, human rights, and the Court of First Instance of the European Community' (2006) Fordham International Law Journal 1449, 1454.

security. For example, though the majority's approach to the 1267 regime in the UK Supreme Court decision in *Ahmed* was predominantly dignitarian, their approach to Security Council resolution 1373 was more instrumentalist. In their interpretation of resolution 1373, the judgments exhibit the capacity for fragmentation in the interpretation — and in some cases the capacity for misinterpretation — of the Council's intent. Lord Hope held that the 'reasonable grounds for suspicion test' adopted in the UK implementing mechanism went beyond the scope of the resolution, despite acknowledging evidence that this standard had overall support among states and was the standard applied by the Financial Action Task Force.[51] Lord Mance expressed preference for a 'balance of probabilities' standard.[52] Lord Phillips inserted a requirement into Security Council resolution 1373 that the asset-freeze regime applied only to "criminals," though the sanctions regime is widely understood to be preventative rather than punitive.[53] While the approach was more measured in the subsequent UK Supreme Court judgment in *Youssef*,[54] the problem in *Ahmed* is that the judges did not seem to be sufficiently guided by the special requirements of the Security Council sanctions context. Courts should not take it upon themselves to create new aims for international society or to impose on society new basic directives.[55] Judicial activism by a court purporting to act as an unrepresentative and largely uninvited 'guardian' of the international legal order threatens to undermine rather than enhance the legitimacy and effectiveness of Security Council decision-making.

2.1.2. Law: The Ambiguity of Council Law

A second set of problems stems from the nature and role of law in the Security Council setting. As discussed above, the instrumentalist model depends for its successful operation upon the existence of clear and determinate standards, rather than flexible guiding principles. As Professor Michelman notes (albeit in his critique of the instrumentalist model), 'unless there are objective standards in terms of which decisions can be counted correct or incorrect, it is hard to see in what sense we can say that a decision serves to secure to an individual that which is rightfully his.'[56] The instrumentalist model relies on a conception of law as a logically coherent and complete system of principles and rules, where consistency and predictability are the most important values, and where there is a concern to minimize the opportunity for arbitrary or unpredictable exercises of power.

By contrast, the Security Council is a deliberately hegemonic institution in which consistency counts for little and power is always unpredictable. The scope

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[51] *Her Majesty's Treasury v Ahmed* [2010] UKSC 2, para 57–61 (Lord Hope).
[52] *Id.*, Lord Mance, 225–231.
[53] *Id*, paras. 136–37 (Lord Phillips), cf para 165, 170 (Lord Rodger).
[54] Youssef v Secretary of State [2016] UKSC 3, paras. 48–50 (Lord Carnwath, with whom Lord Neuberger, Lord Mance, Lord Wilson and Lord Sumption agree).
[55] JOHN HART ELY, DEMOCRACY AND DISTRUST (1980); Fuller, *supra* note 12 at 392. See also *Jones v Saudi Arabia* [2006] UKHL 26, [63].
[56] Michelman, *supra* note 20 at 130.

of legal norms binding the Council are limited, vague and, to an extent, undecided, embracing (according to the least controversial interpretation) narrow limitations in the UN Charter and those few norms that can be said to have attained the stratospheric status of *jus cogens*. Rather than being governed by law, the Security Council exercises a hybrid of political and legal authority.[57] The leading commentary to the UN Charter contrasts the Security Council's role to that of the ICJ on grounds that while '[t]he ICJ has to decide exclusively on the basis of international law… the S[ecurity] C[ouncil] has to decide primarily according to political criteria'.[58]

The Security Council is a context in which discretion rather than rules is the gold standard. The consequence of this broad discretion is significant legal uncertainty. When asked to interpret whether the power granted to states under Security Council resolution 1730 to place a 90-day hold on a de-listing could be renewed indefinitely, the UN Office of Legal Affairs responded that a sanctions resolution means 'whatever the sanctions committee wants it to'. The instrumentalist model is ill-equipped to operate in such a setting. Indeed, in due process theory, it is generally appreciated that, as decision-making moves away from rule-based decision-making and becomes more clearly discretionary, adjudicatory frameworks may need to give way to more broadly political consultative processes, focused on the representation of pluralist interests, or the realization of certain goals in the public interest.[59]

2.1.3. Values: Stagnation of International Values

The third potential problem with the instrumentalist model in the Security Council context is that the model lacks any substantive normative dimension. Its concern is to ensure the accurate fulfilment of the substantive law, while failing to provide a basis to differentiate between acceptable and unacceptable aspects of that law. The judgments of courts adopting an instrumentalist approach in the sanctions context reveal that review based solely on the process value of 'legal accuracy' is not sufficient to ensure the legitimacy of sanctions decision-making. In both *Ahmed* and *Sayadi*, those judges and Committee members that took an instrumentalist approach were forced to reserve their most damning indictments of the deficiencies in the Security Council sanctions regime for comments subsidiary to the main decision.

Despite the fact that his legal analysis led him to confirm the validity of the sanctions regime in *Ahmed*, Lord Brown noted that '[t]he draconian nature of the

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[57] Rosalyn Higgins, *The Place of International Law in the Settlement of Disputes by the Security Council*, 64 AJIL 1 (1970); Martti Koskenniemi, *The Place of Law in Collective Security*, 17 MICH. J. INT'L L 455 (1996).
[58] J Delbrock, *Functions and Powers: Article 24*, *in* THE CHARTER OF THE UNITED NATIONS: A COMMENTARY (VOL I) 446 (Bruno Simma et al eds., 2002).
[59] Nicola Lacey, *The Jurisprudence of Discretion: Escaping the Legal Paradigm*, *in* THE USES OF DISCRETION (Keith Hawkins ed., 1992); D J GALLIGAN, DISCRETIONARY POWERS, 88, 343 (1986).

regime imposed under these asset-freezing orders can hardly be over-stated'[60] and that the regime maintained by the latter Order in Council was 'contrary to fundamental principles of human rights'.[61] In *Sayadi*, Committee members who found the Security Council to be immune from review preceded this finding with the powerful statement that 'by operation of the extravagant powers the Security Council has arrogated to itself, […] the executive branches of 15 member states…simply discard centuries of States' constitutional traditions of providing bulwarks against exorbitant and oppressive executive action.'[62]

These non-binding or subsidiary statements made in the broader context of decisions ultimately confirming the legal validity of an impugned regime reinforce the need to develop a procedural model that advances values apart from legal accuracy. The unintended effect of such a procedural framework may be freeze or crystallize international norms at a particular moment in time, failing to give sufficient credence to emerging perspectives on international legal norms and having a drag-effect on new developments.[63] The interests of legitimacy of the Security Council, and the international legal order more generally, requires more of a procedural framework in contemporary international society.

2.2. Dignitarian Model: Evaluating the Role of Domestic and Regional Courts

Given the glacial pace of reform in the Security Council sanctions context, and continuing refusal by the Council to respond to calls for an 'internationalized' judicial de-listing procedure, an alternative de-centralized judicial framework has emerged more organically. Faced with increasingly urgent challenges by individuals to the UN sanctions regime, domestic courts have extended their traditional role as guarantors of individual rights beyond domestic governmental parameters to the Security Council sanctions context. In so doing, certain courts have eschewed a traditional international law analysis of the relationship between the Security Council and municipal legal systems, enforcing *domestic or regional* interpretations of individual rights even in the face of inconsistent with Security Council resolutions.[64]

It is undoubtedly the case that this domestic and regional case law has been a most influential (and long overdue) source of individual rights protection in the sanctions context. The neglected voice of individuals placed on sanctions blacklists has been one of the major sources of criticism against the sanctions regime. The regime is not uncommonly compared to that of Josef K in Kafka's *The Trial*,

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[60] *Her Majesty's Treasury v Ahmed* [2010] UKSC 2, [192].
[61] *Id.,* [203].
[62] *Sayadi*, Individual opinion (partly dissenting) by Sir Nigel Rodley, Ivan Shearer and Iulia Antoanella Motoc, 27.
[63] Anthea Roberts, *Comparative International Law? The Role of National Courts in Creating and Enforcing International Law*, 60 ICLQ 57, 73 (2011).
[64] See, for example, CFI *Kadi*; *Kadi v European Commission* [2010] EUECJ (General Court); *Her Majesty's Treasury v Ahmed* [2010] UKSC 2; *Nada v. Switzerland*, [2012] ECHR 1691.

described as one that renders individuals 'effectively prisoners of state' that 'does not begin to achieve fairness for the person who is listed'.[65] Perceptions of the unfairness of the sanctions regime for individuals has been found by the Analytical Support and Sanctions Monitoring Team to have detracted from the credibility and effectiveness of the regime among member states.[66] The influence of domestic and regional courts has served to vault the individual into a more central position in Security Council decision-making.

However, expansion of this de-centralized adjudicatory framework has impact beyond more robust protection of individual rights. As other scholars have noted, the judicial review of Security Council decision-making in accordance with domestic and regional standards advances a pluralist vision of the international legal order.[67] In line with this scholarship, I argue that this intervention by domestic courts, or 'pluralist judicial framework', can be analysed in theoretical terms as an example of the dignitarian model in action. Recognition of this connection between the pluralist judicial framework and dignitarian model enables us to undertake a normatively rich analysis of this framework and to draw a distinction between 'moderate' and 'radical' versions of the model. The aim is (a) to discourage an elitist conception of interest representation in the international community; (b) to encourage a 'dialogue model' of international law; and (c) to reinforce the need for domestic courts to aim for a balance between domestic and international values.

2.2.1. Community: Trading International Community for a 'Multiplicity of Publics'

Under a dignitarian model, the main aim of procedural safeguards is to provide individuals with a modicum of dignity, autonomy and self-respect, providing affected individuals with an opportunity to state their case and have that case taken into account in decision-making.[68] That is not to say that individuals must in all cases directly represent their own interests before the decision-making body in question. The structure for interest representation under the dignitarian model is potentially more complex. As discussed above, the sturdiest theoretical foundations of the dignitarian model rest on a pluralist conception of autonomy,

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[65] *Abdelrazik v Minister of Foreign Affairs* 2009 FC 580, [53]; *Her Majesty's Treasury v Ahmed* [2010] UKSC 2, [60] per Lord Hope (quoting Sedley LJ), cited with approval in *Kadi v European Commission* [2010] EUE CJ T-85/09, [149]; *A, K, M, Q & G v HM Treasury* [2008] EWHC 869 (Admin), [18].

[66] See, for example, Thirteenth report of the 1267 Monitoring Team, UN doc S/2012/968, [17] (Dec. 31, 2012); Ninth report of the 1267 Monitoring Team, UN doc S/2009/245, [16] (May 13, 2009). See also Security Council Report, Special Research Report: UN Sanctions, 14 (Nov. 25, 2013).

[67] This has been recognized by scholars such as NICO KRISCH, BEYOND CONSTITUTIONALISM: THE PLURALIST STRUCTURE OF POSTNATIONAL LAW (2010); Gráinne de Búrca, *The European Court of Justice and the International Legal Order after* Kadi 51 HARV. INT'L L. J. 1 (2010); Daniel Halberstam and Eric Stein, *The United Nations, the European Union and the King of Sweden: Economic Sanctions and Individual Rights in a Plural World Order*, 46 C. M. L. REV 13 (2009); Samantha Besson, *European Legal Pluralism after* Kadi, 5 EUR. CONST. L. REV. 237 (2009).

[68] Stewart, *supra* note 7 at 1684–1686, 1712; Pincoffs, *supra* note 27 at 179.

recognizing individuals as self-legislating equals who are able to choose freely where their interests might be represented.

The use of domestic and regional courts under the dignitarian model is, in these terms, a manifestation of the right of individuals to choose freely the manner of their representation in the international domain. It builds upon a pluralist notion of public autonomy and the right of individuals to determine which polity they want to be governed in and by. The impact of the dignitarian model would not be to broaden the scope of the 'international community' as such. Under a dignitarian model, individuals caught up in sanctions decision-making are less likely to characterize themselves as members of an international community, and more as victims of it. Individuals do not claim rights under the dignitarian model as members of the international community, but as individuals exercising their right to choose between a multiplicity of overlapping and conflicting identities and loyalties depending upon the situation or issue at hand.[69] This is consistent with a pluralist conception of the international legal order, which rejects the idea of a singular constituency known as the 'international community' in favour of recognition of a 'multiplicity of publics'.[70]

2.2.2. Law: A 'Dialogue Model' of International Law[71]

Critique of the role of domestic courts in review of sanctions decision-making is most commonly framed in 'international rule of law' terms. Critics invoke the danger that judicial review by domestic and regional courts will fragment sanctions compliance along the borders of national and supra-national jurisdictions, and lead to a breakdown in traditional notions of hierarchy codified in Articles 25 and 103 of the Charter.[72] The consequences for the Security Council sanction regime are not insignificant. The sanctions regime is uniquely vulnerable to failure by individual states to comply. Sanctions measures such as travel bans and asset-freezing rely heavily on universal compliance, or else individuals and funds will be channelled into the breach. A steady stream of domestic case law along the lines of ECJ *Kadi* and the UK Supreme Court's *Ahmed* could see the Security Council sanctions framework buckle under the weight of opposition by domestic and regional courts.[73]

However, such criticism should also provoke us to question whether the transplant of 'rule of law' concepts to the international legal order is appropriate.

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[69] KRISCH, BEYOND CONSTITUTIONALISM, *supra* note 67 at 98.

[70] Nico Krisch, *The Pluralism of Global Administrative Law*, 17 EJIL 247 (2006); JOHN DRYZEK, DELIBERATIVE GLOBAL POLITICS: DISCOURSE AND DEMOCRACY IN A DIVIDED WORLD (2006); JAMES BOHMAN, DEMOCRACY ACROSS BORDERS (2007).

[71] On which, see further Devika Hovell, *A Dialogue Model: The Role of the Domestic Judge in Security Council Decision-making* 26 LEIDEN J. INT'L L. 579 (2013).

[72] As the General Court recognized, the necessary consequence of the ECJ decision in *Kadi* has been 'to render that primacy [of Security Council resolutions] ineffective in the Community legal order': *Kadi v European Commission* [2010] EUECJ, [118].

[73] Twelfth Report of the 1267 Monitoring Team, UN doc S/2012/729, [33] (Oct. 1, 2012); Richard Barrett, *Al-Qaeda and Taliban Sanctions Threatened*, POLICY WATCH (Oct. 6, 2008), *at* http://www.washingtoninstitute.org/templateC05.php?CID=2935.

While hallowed rule of law characteristics such as certainty, consistency and generality of application may be appropriate in more representative legal systems, a pluralist perspective cautions against exaggerating the importance of such qualities, particularly in an unrepresentative system such as the international legal order. In the international sphere, certainty in the application of the law may be a source of friction and instability where it clashes with the strong preferences of excluded actors. The idea that all law must originate in a single power source, typically the domestic legislature, is a distinctly domestic idea. In the international legal system, state organs, international and domestic courts and (even) academics are imbued with a role in law creation.[74]

In procedural terms, we may need to rethink the traditional conception of the judicial role where domestic and regional courts engage in review of international decision-making. Lon Fuller recognized the need for the judicial function to be constantly cognizant of the problem of *system*, in the sense that judges must always consider the coherence of the system in which they operate, and the powers and limitations of the institution of the judiciary as defined within that system.[75] When courts engage in the review of international decision-making, they need to be cognizant of their role in the broader international legal system. In the international legal sphere, domestic and regional courts are repositioned within a more political forum, wherein they provide not a check or balance, but legal counsel. When domestic and regional courts engage in review of Security Council decision-making, judicial decisions are not so much relevant in terms of their 'bindingness', but rather their level of persuasiveness, which will generally be tied to broader conceptions of an institution's legal reasoning and reputation.[76] Where a judicial decision resonates with a 'broader movement for change,' it will be influential in motivating reform; where it fails to resonate more broadly, it will be marginalized, seen as exceptional and have limited law-making effect.[77] As courts and the Council develop a greater understanding of each other's role, there is the potential for a legal culture to develop in which they come to see themselves as involved in a dialectical partnership or dialogue in which they are both working toward an appropriate balance between human rights and international security.[78]

We saw something of this with the 2008 *Kadi* decision in the European Court

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[74] ICJ Statute, Article 38(1).

[75] LON FULLER, ANATOMY OF THE LAW 94 (1968).

[76] KRISCH, BEYOND CONSTITUTIONALISM, *supra* note 67 at 12; Benedict Kingsbury, *Weighing Regulatory Rules and Decisions in National Courts*, ACTA JURIDICA 90 [2009]; Mayo Moran, *Shifting Boundaries: The Authority of International Law*, *in* NEW PERSPECTIVES ON THE DIVIDE BETWEEN NATIONAL AND INTERNATIONAL LAW 163 (J. Nijman and A. Nollkaemper eds., 2007).

[77] ALAN BOYLE AND CHRISTINE CHINKIN, THE MAKING OF INTERNATIONAL LAW 301 (2007).

[78] For a depiction of the increasingly dialogic nature of the relationship between courts and legislatures in the domestic human rights context, see Tom Hickman, *Constitutional Dialogue, Constitutional Theories and the Human Rights Act*, PUBLIC LAW 303 (2005); Kent Roach, *Dialogic Judicial Review and Its Critics*, 23 SUPREME COURT LAW REVIEW (2D) 49 (2004); Janet L. Hiebert, *Parliamentary Bills of Rights: An Alternative Model?*, 69 MOD. L. REV. 7 (2006).

of Justice.[79] As is well known, the ECJ rejected the Court of First Instance's deferential, instrumentalist approach and, in declining to defer to the Security Council, ultimately invalidated the regulation giving effect to the relevant Security Council resolution on the basis it violated fundamental rights of the European legal order. At the heart of the decision is the Court's determination that the EC Treaty establishes an 'autonomous legal system which is not to be prejudiced by an international agreement'.[80] With a vague reference to the 'alleged absolute primacy of the resolutions of the Security Council',[81] the ECJ declares it is not engaging in the review of the lawfulness of 'a resolution adopted by an international body', but rather of 'the Community act intended to give effect to that resolution'.[82] In drawing this separation between the EU implementing measure and its source in a Security Council resolution, the Court finds that 'any judgment given by the Community judicature deciding that a Community measure intended to give effect to such a resolution is contrary to a higher rule of law in the Community legal order would not entail any challenge to the primacy of that resolution in international law'.[83] The court concludes that the EU measure violates Mr Kadi's rights of defence (including his right to be heard and right to effective judicial protection) and his right to respect for property, and holds that it must be annulled.[84]

Critics of the decision condemned it as taking the path of 'European particularism' and eschewing 'engagement in the kind of international dialogue that has generally been presented as one of the EU"s strengths as a global actor.'[85] However, another interpretation is possible. Perhaps the judgment should be appreciated in its political context as more in the nature of an act of open judicial revolt against years of fruitless political dialogue. Türküler Isiksel invites us to see the ECJ's judgment in *Kadi* as 'an act of civil disobedience' rendered necessary by the UN Security Council's misapplication of foundational principles of the international order.[86] She argues (and I agree) that the ECJ's evasiveness towards international law in *Kadi* should not be regarded as lawless unilateralism, but as the fulfilment of its role to uphold the rule of law both within the EU *and* within the international legal order.[87] Undoubtedly, the effect of the 'disruptive' ECJ Kadi decision was to strengthen the role and relevance of the ECJ,[88] and also paradoxically to heighten the power and influence of the Security Council.

The Security Council's measured response to the decision, chiefly the introduction of the Office of the UN Ombudsperson, served to strengthen the

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[79] *Kadi v Council and Commission* [2008] ECR I–6351 ('ECJ Kadi').
[80] *Id.*, para. 316.
[81] *Id.*, para. 305
[82] *Id.*, paras. 286–7
[83] *Id.*, para. 288.
[84] *Id.*
[85] Halberstam and Stein, *supra* note 67 at 72; de Búrca, *supra* note 67.
[86] N. Türküler Isiksel, *Fundamental Rights in the EU after* Kadi *and* Al Barakaat 16(5) EUROPEAN LAW JOURNAL 551 (2010).
[87] *Id.*, 552.
[88] The constitutional ambition of the decision has been widely remarked on.

intelligence and legitimacy of decisions made. Yet, from a normative perspective, I argue that the approach adopted in ECJ *Kadi* is best interpreted as an *exceptionally* interventionist approach.[89] The ECJ's failure to engage in any form of dialogue or negotiation of standards by reference to the broader decision-making context is justifiable only if this judgment is seen as an 'act of civil disobedience' responding to the fact that the gap between what was legal and what was legitimate had become too wide, as perceived by those bound by the UN sanctions regime. The problem is that, in *Kadi II*, to be discussed in the next section, the CJEU made the mistake of transforming the exception, a justifiable act of rebellion, into the rule.

2.2.3. Values: Reconciling International, Regional and Domestic Values

The dignitarian model of due process provides the opportunity for a more open and pluralistic dialogue between different values and interests at issue in decision-making. The danger is that such a framework will ultimately lead to an overemphasis on powerful 'interests', paying little heed to the overarching need to contribute productive input into the development of a bedrock of shared fundamental 'values' that some regard as an essential complement to emerging structures of global governance.[90]

Scholars such as Cass Sunstein and Jenny Steele have criticized pluralist approaches by invoking this contrast between 'interests' and 'values.'[91] The concern is that the Security Council will increasingly be cast in the role of a 'broker of interests' rather than a guardian of the purposes and principles of the UN Charter and international community. The situation is magnified in the Security Council setting on account of power and wealth differentials and language and culture barriers, which render meaningful communication and deliberation beyond a narrow elite very difficult.[92] It is certainly the case that a geographical and socio-economic bias is evident already in the impact of the emerging pluralist adjudicatory framework in the sanctions setting.[93] Most judicial challenges to the sanctions regime have come from Europe and other advantaged nations, such as the United States and Canada. Smaller states agitating for reform in the sanctions context have declared it has been impossible even to get a conversation started on

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[89] Devika Hovell, *Kadi: King-slayer or King-maker? The Shifting Allocation of Decision-making Power between UN Security Council and Courts* 79(1) MOD. L. REV. 147 (2016).

[90] Stephen Gardbaum, *Human Rights and International Constitutionalism*, *in* RULING THE WORLD: CONSTITUTIONALISM, INTERNATIONAL LAW AND GLOBAL GOVERNANCE (Jeffrey Dunoff and Joel Trachtman eds., 2009), 249–251, 255–256; ANDREW HURRELL, ON GLOBAL ORDER: POWER, VALUES AND THE CONSTITUTION OF THE INTERNATIONAL SOCIETY (2007), chs 3 and 4; Erika de Wet, *The International Constitutional Order* 55 ICLQ 51, 57–61 (2006).

[91] Cass R. Sunstein, *Beyond the Republican Revival*, 97 YALE L. J. 1539 (1988); Jenny Steele, *Participation and Deliberation in Environmental Law: Exploring a Problem-solving Approach*, 21(3) OXFORD J. LEGAL STUD. 415 (2001).

[92] KRISCH, BEYOND CONSTITUTIONALISM, *supra* note 67, at 56. See also Eyal Benvenisti and G. W. Downs, *The Empire's New Clothes: Political Economy and the Fragmentation of International Law* 60 STAN. L. REV. 595 (2007).

[93] Forcese and Roach, *supra* note 38, at 217, 274.

the issue. By contrast, the decision in ECJ *Kadi*, facing the Council with the prospect of non-compliance by a region as influential as the European Union, yielded an immediate response with the establishment of the Office of the Ombudsperson. Arguably, the international legal order should not operate in accordance with principles of market-ordering so as to advance the interests and preferences of the most powerful and organized elites, but was created to ensure respect for certain fundamental values in international relations, which include substantive principles of equality and non-discrimination.

In thinking through the translation of the dignitarian model of due process to the Security Council context, it is appropriate to compare and contrast two versions of the model that have emerged in the case law. In line with pluralist terminology, these could be termed 'radical' and 'moderate' approaches.[94] Under the radical approach, domestic courts are almost entirely internally or domestically focused, and pay little regard to the overarching framework within which the decision under review was taken. Under a moderate approach, courts assign equal positions to different legal systems, though see the potential for their coordination having regard to a common point of reference or framework.

In *Kadi II* ('CJEU *Kadi*'), the Court of Justice of the European Union took a radical approach, transforming (what I have described above as) a justifiable act of rebellion in ECJ *Kadi* into an enduring normative approach. The CJEU held that, while Security Council resolutions had primacy at the international level, they became subject to the primacy of constitutional guarantees of the EU when implemented at the European level. The consequence is the application to Security Council decision-making of a peculiarly domestic interpretation of due process, developed in international treaties and across domestic legal systems to apply to the typical domestic governmental context, seemingly without reflection as to the appropriateness of its translation to the Security Council context.[95] The 'right to effective judicial protection' is interpreted as a 'declaration from a court, by means of a judgment ordering annulment whereby the contested measure is retroactively erased from the legal order' and is found to have been violated in the sanctions context.[96]

There is no attempt by the CJEU to evaluate the Ombudsperson procedure established as a review process in the Security Council sanctions context. The UN Ombudsperson is not even mentioned in the Court's findings. Instead, the Court merely alludes to the 'improvements added' with a fairly abrupt conclusion that

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[94] This 'pluralism of pluralisms' draws on literature developed within the context of the EU as a means of theorizing the impact of the conflicting supremacy claims of the national and European levels in the EU, as adapted in NICO KRISCH, BEYOND CONSTITUTIONALISM, *supra* note 67.

[95] Thomas Scanlon has recognized that this form of 'due process' is not readily exportable to regimes outside the domestic context on the ground that it depends on a minimal commitment to certain domestic institutional tenets: T. M. SCANLON, HUMAN RIGHTS AS A NEUTRAL CONCERN, IN THE DIFFICULTY OF TOLERANCE: ESSAYS IN POLITICAL PHILOSOPHY (T. M. Scanlon ed., 2003), 116.

[96] CJEU Kadi, [134].

'they do not provide to the person… listed… the guarantee of judicial protection.'[97]

Paradoxically, application of the right to 'effective judicial protection' in the Security Council sanctions context is inappropriate precisely because it proves *ineffective* in that context. In interpreting its power of review, the CJEU arrogates to itself a power to second-guess Security Council decision-making 'to ensure that that decision, which affects that person individually…is taken on a sufficiently solid factual basis'.[98] In doing so, it places the EU under an obligation to produce 'information or evidence… relevant to such an examination,'[99] emphasizing that 'the secrecy or confidentiality of that information or evidence is no valid objection' before the Courts of the EU. States, in particular members of the P5, will be extremely reluctant to give up information to a foreign court. Yet the CJEU acknowledges that, if it cannot get its hands on any information that supports the listing, it will be forced to annul the relevant sanctions measures.

A more 'moderate' version of the dignitarian model was adopted by the Advocates-General in the *Kadi* litigation. Both Advocates-General based their decisions on European law, though with a keen eye on the need for coordination between the separate legal orders (European and international) in order to maintain coherence and integrity in the realm they share in common. The core of Advocate-General Maduro's approach was to encourage a form of continuing dialogue between legal orders, stating that '[i]n an increasingly interdependent world, different legal orders will have to endeavour to accommodate each other's jurisdictional claims,'[100] Maduro proposed the application of an equivalence principle such as that applied in the famous *Solange* case,[101] promising respect for the primacy of Security Council resolutions on the condition that fundamental rights benefited from an equivalent degree of protection at the international level.[102]

Advocate General Bot, in turn, advocated a position of 'mutual confidence and effective collaboration', arguing that 'an effective global fight against terrorism requires confidence and collaboration between the participating international, regional and national institutions, rather than mistrust.'[103] Unlike the CJEU, he pays express attention to the improvements introduced following ECJ *Kadi*, in particular the establishment of the Office of the UN Ombudsperson. While emphasizing that the solution is not to give *carte blanche* to the Security Council, he

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[97] *Id.*, [133].
[98] *Id.*, [119].
[99] *Id.*, [120].
[100] *Id.*, [44].
[101] *Solange I* (1974) BVerfGE 37; *Solange II* (1986) BVerfGE 73. See further Antonios Tzanakopoulos, *The Solange Argument as a Justification for Disobeying the Security Council in the* Kadi *judgments*, *in* KADI ON TRIAL: A MULTIFACETED ANALYSIS OF THE KADI JUDGMENT (M. Avbelj, F. Fontanelli and G. Martinico eds., 2014).
[102] Opinion of Advocate General Maduro, *Kadi v Council of the European Union*, 16 January 2008; [44], [54].
[103] *Id.*, [85].

recognises that the Ombudsperson process 'reflects a realization within the United Nations that, despite confidentiality requirements, the listing and delisting procedures must now be implemented on the basis of a sufficient level of information, that the communication of that information to the person concerned must be encouraged, and that the statement of reasons must be adequately substantiated.'[104] He held that the Ombudsperson helped to guarantee that listings are based on sufficiently serious evidence and recognised that 'excessively high regional or national requirements could, in truth, prove to be counterproductive' if states were 'less inclined in future to transmit confidential information to the Sanctions Committee'.[105]

In considering the form of the dignitarian model, I argue that the moderate form is the preferable approach. The focus of courts should be on mechanisms by which to achieve the accommodation between conflicting values and interests in international society, and not on the triumph of one set of institutions or norms over another. Under a radical approach, the choice of frame, domestic, regional or international, determines the decision, where the danger is that each will seek to make its law govern the whole and to transform its preference into the general preference. Law and courts thereby become part of the problem, not of the solution. A more flexible moderate approach, seeking 'equivalence' of protection is arguably better equipped to motivate the Council to adopt a contextually appropriate set of rights that will strengthen the effectiveness of the Council *as well as* the protection of rights.[106]

2.3. THE PUBLIC INTEREST MODEL: EVALUATING THE ROLE OF THE UN OMBUDSPERSON

It remains to examine the procedural framework proposed by the Security Council itself in the sanctions context, the Office of the UN Ombudsperson. Yet rather than taking a dignitarian approach of assessing the 'equivalence' of the Office to regional or domestic procedural standards, the task is to examine the extent to which the Ombudsperson can be said to fulfil due process values under the public interest model. The primary appeal of the public interest model of due process is that it offers a capacity to redress one of the central critiques of the Security Council and the international legal order more generally: the idea that there is a 'democratic deficit' in international governance. The Security Council sanctions regime invites a distilled version of the criticism made of the international legal order more generally that it increasingly represents 'Governance without Government',[107] with the added sting that the Security Council has greater capacity than the rest of the international order to enforce its (undemocratic) diktats.

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[104] *Id.*, [82].
[105] *Id.*, [84].
[106] Halberstam and Stein *supra* note 67, at 24, 27.
[107] Joseph Weiler, *The Geology of International Law – Governance, Democracy and Legitimacy*, 64 ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT 547, 559–560 (2004).

It is not that the Security Council was ever intended to behave as a democracy. The value of the public interest model lies in its potential to provide an alternative, and arguably more appropriate, analogue of an individual's participation in a democratic political process. A number of scholars have argued for the adaptation of deliberative democracy theory to the Security Council context, identifying procedural safeguards as the key means through which to enhance the representativeness and therefore legitimacy of decision-making by international institutions.[108] Ian Johnstone goes so far as to describe the representative deficit in the Security Council as 'largely procedural in nature.'[109]

In the following section, I argue that the Ombudsperson is a superior framework to internationalized or pluralist judicial frameworks in its capacity to achieve the goals of the public interest model. This goes against the grain of current opinion. While the Ombudsperson procedure has received strands of support in the reform debate, the assessment of the Office from a due process perspective has been mainly critical in the scholarly literature.[110] The main concern, articulated by the CJEU, the European Court of Human Rights, the UK Supreme Court and the Special Rapporteur on the protection of fundamental rights while countering terrorism, among others, is that the Ombudsperson is 'not a court.'[111] Based on the value-based approach outlined in this article, I reach a different conclusion. My conclusion is that the Ombudsperson is in fact superior to a court process as it offers the most appropriate response to legitimacy gaps in Security Council sanctions decision-making. This is not to say that the Ombudsperson framework cannot be improved upon. However, far from dismissing the Ombudsperson framework as inadequate, those involved in the reform debate including practitioners, courts and scholars should encourage further strengthening the Ombudsperson's mandate so as to promote the key

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[108] Benedict Kingsbury, *The Concept of 'Law' in Global Administrative Law*, 20 EJIL 23, 48–50 (2009); Daniel Esty, *Good Governance at the Supranational Scale: Globalizing Administrative Law*, 115 YALE L. J. 1490, 1490, 1520, 1522 (2006); de Wet, *supra* note 90, 74; Allen Buchanan and Robert O. Keohane, *The Legitimacy of Global Governance Institutions*, 20 ETHICS AND INTERNATIONAL AFFAIRS 405, 432, 434 (2006); Mattias Kumm, *The Legitimacy of International Law: A Constitutionalist Framework of Analysis*, 15 EJIL 907, 924–927 (2004); David Caron, *The Legitimacy of the Collective Authority of the Security Council*, 87 AJIL 552, 561, 576 (1983).

[109] Ian Johnstone, *Legislation and Adjudication in the UN Security Council: Bringing Down the Deliberative Deficit*, 102 AJIL 275, 276 (2008).

[110] DAVID CORTRIGHT AND ERIKA DE WET, HUMAN RIGHTS STANDARDS FOR TARGETED SANCTIONS (2010), 10; Vanessa Arslanian, *Great Accountability Should Accompany Great Power: The ECJ and the UN Security Council in Kadi I and II*, 35 BOSTON COLLEGE INTERNATIONAL AND COMPARATIVE LAW REVIEW 1, 11, 15 (2008); Michael Lysander Fremuth, 'Ein Prozess...: Zum Ausgleich zwischen der effektiven Bekämpfung des Terrorismus und der Beachtung der Menschenrechte in der Sanktionspraxis des Sicherheitsrates', DIE ÖFFENTLICHE VERWALTUNG 81, 87 ff (2012); Lisa Ginsborg and Martin Scheinin, *supra* note 38, 11–12, 19; Willis, *supra* note 38, 745; Forcese and Roach, *supra* note 38, 219, 264–265, 275; Genser and Bath, *supra* note 38, 26, 41; Lorraine Finlay, *Between a Rock and a Hard Place: The Kadi Decision and Judicial Review of Security Council Resolutions*, 18 TUL. J. INT'L & COMP. L. 477, 481 (2010); Adele Kirschner, *Security Council Resolution 1904 (2009): A Significant Step in the Evolution of the Al Qaida and Taliban Sanctions Regime?* 70 ZAÖRV 585, 602, 604–605 (2010).

[111] See sources cited, *supra* note 40.

goals of the public interest model, and crucially its extension beyond the 1267 sanctions regime to other sanctions regimes.

2.3.1. Community: Access and Representation through the Ombudsperson Process

The public interest model of due process does not reject the classical conception of the international legal order, but seeks to regenerate it, situating it within a broader and recognisably more heterogeneous framework of other legal orders and non-state entities. While the question of legal responsibility has traditionally been geared toward states, there is an understanding that accountability is now owed to a larger concept of stakeholders.[112]

The Ombudsperson framework has undoubtedly opened up decision-making in important ways. The Ombudsperson is far more accessible than courts, and has the capacity to travel to the petitioner (rather than the reverse) for face-to-face interviews (or alternatively through email and telephone discussions) to ensure the petitioner's side of the case is heard. This was emphasized in a recent case where the Ombudsperson had to rely on the 'diligent and extraordinary efforts of officials' in the UN and other states to gain access to the petitioner, resources that would not be available to domestic or regional courts.[113]

The accessibility is enhanced by virtue of the fact the cost and delay of the Ombudsperson process is certainly less than that of judicial equivalents. While the absence of compulsory legal representation has been criticized,[114] the Ombudsperson argues that the fact petitioners are not required to be represented by legal counsel in fact serves to make the process more accessible for petitioners.[115] The *Kadi* case, already discussed in some detail, is clear evidence of its expeditiousness. Mr Kadi's twelve-year march through the European courts entailing untold legal costs to reach the CJEU's final 'non-decision' (in terms of its practical effect on Mr Kadi's listing) stands in clear contrast to the nine-month Ombudsperson process that led to Mr Kadi's de-listing and has been praised by Mr Kadi and his lawyers as a 'proper hearing', 'formal and probing', that made 'an enormous difference to the person involved in the process'.[116]

The public interest model does not merely seek to improve access for the petitioner, but also works to ensure decision-making is representative and inclusive of the international community more generally. As is normal for the Security Council, sanctions decision-making by and large take place behind closed doors,

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[112] Florian Hoffmann and Frédéric Mégret, *Fostering Human Rights Accountability: An Ombudsperson for the United Nations?*, 11 GLOBAL GOVERNANCE 43, 51 (2005).

[113] Eighth Report of the Office of the Ombudsperson, UN doc S/2014/73, [37] (Jul. 31, 2014).

[114] Ben Emmerson QC, 'Report of UN Special Rapporteur on the Promotion and Protection of Human Rights while Countering Terrorism', UN doc A/67/396, [52] (Sept. 26, 2012).

[115] In fact, petitioners were assisted by legal counsel in 26 of the 55 cases processed by the Ombudsperson to date: Eighth Report of the Office of the Ombudsperson, UN doc S/2014/73, [7] (July 31, 2014).

[116] *UN Sanctions, Human Rights and the Ombudsperson* (May 17, 2013, Chatham House, London).

without a public record being taken.[117] This 'culture of confidentiality' was initially a prized technique, with the 1267 Sanctions Committee paying tribute to a Chairman who had 'wisely determined that much of the work should be performed at informal meetings of the Committee to allow for enough flexibility in convening them and the free exchange of views, without a record'.[118] However, the Committee's lack of transparency has been the subject of trenchant criticism, to the extent it is now widely considered to have detracted from the effectiveness and legitimacy of the sanctions regime.

The establishment of the UN Ombudsperson has done more to open up sanctions decision-making than any previous reform. The Ombudsperson's role is structured to focus on information-gathering, consultation and outreach, and not just with the petitioner. In addition to a four-month period of information gathering (extendable for a further two months if necessary), and a two-month period of engagement, which may include a dialogue with the petitioner, to gain any additional information that may help the Committee with their decision, the Ombudsperson engages in significant outreach in the course of her work. She meets regularly with states, intergovernmental organizations, UN bodies, judges of national, regional and international courts, prosecutors, private lawyers, academics, representatives of non-governmental organizations and civil society.[119] In opening up decision-making in this way, the Ombudsperson process makes important political space, recognizing the role of NGOs, individuals, corporations and other levels of state governments beyond the executive.[120] More than court-based processes, the Ombudsperson process has the potential to function as both a forum and audience for democratization by increasing access to information and opening up deliberation to a wider cross-section of the international community.

2.4. Law: A Contextual and Responsive Set of Legal Standards

The Ombudsperson framework is not a one-way street in terms of outreach with the broader international community. By opening up the information flow between decision-making and the broader community, the aim is not solely to enhance public awareness about the sanctions regime, but also to increase the Council's responsiveness to public concerns about decision-making, and the values that should underlie it. Here, the non-judicial nature of the Office is an

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[117] Between the establishment of the Al Qaeda and Taliban Sanctions Committee in October 1999 and the end of 2014, the 1267 Committee held 45 formal (or public) meetings and 367 informal (or private) consultations, as reported in the *Annual Reports of the 1267 Sanctions Committee* between 2000 and 2014.

118 *Report of the Security Council Committee established pursuant to resolution 1267 (1999) concerning Al-Qaida and the Taliban and associated individuals and entities Annual Report*, UN Doc S/2004/1039, 10 (Dec. 31, 2004).

[119] See, for example, Third Report of the UN Ombudsperson, UN doc S/2012/49, [21]–[29] (Jan. 20, 2012); Seventh Report of the Office of the Ombudsperson, UN doc S/2014/73, [14]–[20] (Jan. 31, 2014).

[120] Harold Hongju Koh, *Why Do Nations Obey?* 106 YALE L. J. 2599 (1997); Mary Ellen O'Connell, *New International Legal Process* 93 AJIL 334 (1999).

advantage. The central aim of inviting and responding to public opinion does not sit comfortably with the judicial function. As Richard Stewart noted in his enduring critique of a judicially-implemented system of interest representation, judicial review was traditionally an instrument for checking governmental power and does not touch on the 'affirmative side' of government, which has to do with the representation of individuals and interests.[121]

In terms of applicable legal principles, the Ombudsperson is not confined in the same way as courts to review of the initial decision, 'frozen in time' as it were, restricted to the limited toolkit of binding international law (described under the instrumentalist model) or the divaricating toolkit of binding domestic or regional law (described under the dignitarian model). Instead, she is able to engage in *de novo* review to consider 'whether *today* the continued listing of the individual or entity is justified based on all of the information now available.'[122] Rather than being hamstrung by existing law, either domestic or international, the Ombudsperson has been able to develop a standard of review that responds both to the specific aims of sanctions measures (hampering access to resources and encouraging a change of conduct) and the international framework within which sanctions apply. In these circumstances, she has concluded it is inappropriate to use criminal standards though necessary to set a sufficient level of protection to take account of the seriousness of the measures for the individual affected. She was also conscious that the benchmark used could not be premised on the precepts of one particular legal system. The standard settled on is a unique one: 'whether there is sufficient information to provide a reasonable and credible basis for the listing.'[123]

The criticism of the 'non-judicial' nature of the Ombudsperson framework is not so much tied to the legal standards she applies, but is essentially shorthand for two critiques: first, the lack of bindingness of the Ombudsperson's report and, secondly, the lack of independence from the Security Council (tied to the capacity for the Security Council to overturn her report). The criticism is exaggerated. Security Council resolution 1989 strengthens the Ombudsperson procedure by building in a 'reverse consensus,' such that the Ombudsperson's recommendation to de-list will bind the sanctions committee unless, within 60 days, every single member of the sanctions committee decides *not* to follow it.[124] Much has been made of the fire-alarm possibility under which any Committee member can refer the matter to the Security Council for decision. However, the eventuality has not occurred over the first five-year operation of the Office and the Monitoring Team has expressed the view that it is 'extremely unlikely' that the Committee would reject the Ombudsperson's recommendation or refer it to the Security Council

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[121] Stewart, *supra* note 7, at 1687.
[122] UN Ombudsperson, *Approach to and Standard for Analysis, Observations, Principal Arguments And Recommendation* (Aug. 2011), available at http://www.un.org/en/sc/ombudsperson/approach.shtml (my emphasis).
[123] *Id.*
[124] UN Security Council resolution 1989, UN Doc S/RES/1989, [23] (Jun. 17, 2011).

unless it was already evident that at least nine members of the Council agreed the decision of the Ombudsperson was wrong and that no permanent member thought it was right.[125] Moreover, the possibility of Security Council intervention does not distinguish the Ombudsperson framework from other *judicial* contexts in the international legal system, including the International Court of Justice and the International Criminal Court.[126]

It is not the exception but the norm to build 'fire-alarm' controls into instruments establishing international courts, which can be triggered if judges are perceived by states to exceed the bounds of their delegated authority. The literature on international adjudication abounds with scholarly recognition of the limits of judicial independence in the global context, with Helfer and Slaughter referring to 'constrained independence,'[127] Ginsburg referring to 'bounded discretion'[128] and Steinberg referring to the 'strategic space' within which courts can operate.[129]

All this aside, it is not so much the bindingness of the decision that is most relevant. The power of the Ombudsperson stems, not from the bindingness of her decisions, but from their capacity to exact reputational costs. The Council is invited to enhance the legitimacy and effectiveness of its decision-making through an appeal, not to power politics, but to public reason. These reasons are in turn assessable by the 'court of public opinion'. As Johnstone elaborates in the Security Council context, '[i]f the interpretive community of governmental and non-governmental actors casts a negative judgment, the credibility of the Security Council will be undermined and those who must carry out the decisions will be less likely to comply.'[130]

As such, even if the Security Council did overturn the Ombudsperson's decision, the Council risks undermining the effectiveness of the sanctions regime where it has been deemed that there is no public justification for its decisions and it has withheld other information critical to the evaluation of institutional performance.[131] In this light, the key focus of reform to the Ombudsperson process should not be upon the bindingness or independence of the Office, but rather on greater transparency. As things stand, the Ombudsperson's comprehensive report is not made available to interested States, the petitioner or the public. A critical reform is to provide for public disclosure of reports with

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[125] Thirteenth Report of the 1267 Monitoring Team, UN doc S/2012/968, [12] (Dec. 31, 2012).
[126] UN Charter, Art. 94(2) (note in particular interpretation in *Medellin v Texas*, 552 US 491 (2008)); Rome Statute, Art. 16. See also CARLA DEL PONTE AND CHUCK SUDETIC, MADAME PROSECUTOR: CONFRONTATIONS WITH HUMANITY'S WORST CRIMINALS AND THE CULTURE OF IMPUNITY 60 (2009).
[127] Laurence Helfer and Anne-Marie Slaughter, *Why States Create International Tribunals: A Response to Professors Posner and Yoo*, 95 CAL. L. REV. 1, 44ff (2005).
[128] Tom Ginsburg, *Bounded Judicial Discretion in International Law-making* 45 VA. J. INT'L L. 1 (2005).
[129] Richard Steinberg, *Judicial Lawmaking at the WTO: Discursive Constitutional and Political Constraints* 98 AJIL 247 (2004). See also Yuval Shany, *No Longer a Weak Department of Power? Reflections on the Emergence of a New International Judiciary*, 20 EJIL 73 (2009).
[130] *Id.*, 307.
[131] Buchanan and Keohane, *supra* note 108, 429.

proper measures in place to ensure the protection of confidential material. The goals of the public interest model of due process will be most adequately served where the international community is placed in a position to understand and assess the reasons for the sanctions committee's (and the Ombudsperson's) decisions.

2.4.1. Values: Balancing Fundamental Values of Security Council and Individuals

In terms of a clash of values, the knife-edge along which some of the most problematic and intransigent divisions in the due process debate have arisen is the conflict between individual due process rights and the confidentiality of intelligence information upon which sanctions decisions are based. On the one hand, the Security Council cites confidentiality concerns as the key reason to limit due process protections on the basis that it is too complicated to '[find] a way to keep such intelligence, and how it was gathered, confidential.'[132] On the other hand, as discussed above in CJEU *Kadi*, the Court claimed the power to engage in full review of sanctions decision-making, while insisting that 'the secrecy or confidentiality of that information is no valid objection before the courts of the EU.'[133]

This deadlock is clearly unsatisfactory. The solution should neither be to abandon procedural protections altogether, nor to impose unrealistic obligations upon the Council to release information to domestic or regional agencies where that obligation is highly unlikely to be complied with. While it is well understood that transparency is a desirable institutional value and a core attribute of good governance, secrecy and non-disclosure can also have value in particular contexts.[134] At the same time, it is widely considered that the extent to which information about sanctions decision-making has been shielded has been disproportionate. The challenge is to devise imaginative institutional measures that can achieve the most appropriate balance between the individual rights of those placed on sanctions blacklists, and the interests of international peace and security.

I argue that the Ombudsperson framework offers the greatest potential for reconciliation of due process and confidentiality concerns. The Ombudsperson has described gaining access to classified or confidential information as 'one of the key challenges' she faces.[135] The Ombudsperson has expressed her confidence that in all cases (with one exception)[136] that the petitioner has been provided access to the reasons for their listing.[137] However, she is also aware that 'this question of

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[132] *Press Conference by Security Council President Ambassador Gérard Araud*, (Feb. 2, 2010), http://www.un.org/News/briefings/docs/2010/100202_Araud.doc.htm.
[133] CJEU *Kadi*, [125].
[134] Elizabeth Fisher, *Transparency and Administrative Law: A Critical Evaluation*, 63 CURR. LEGAL PROBS. 272, 280 (2010); ANNE-MARIE SLAUGHTER, A NEW WORLD ORDER 220 (2004).
[135] Second Report of the Office of the Ombudsperson' UN doc S/2011/447, [26] (Jul. 22, 2011).
[136] In the exceptional case, the Ombudsperson acknowledges that the petitioner was prejudiced as the relevant information was obtained at such a late stage that it could not be disclosed to the petitioner before preparation of the comprehensive report and has invited comments from the petitioner with a view to deciding whether he meets the threshold for a new petition: Sixth Report of the Office of the Ombudsperson, UN doc S/2013/452, [33]–[35] (Jul. 31, 2013).
[137] Eighth Report of the Office of the Ombudsperson, UN doc S/2014/73, [34] (Jul. 31, 2014).

access is a critical one for due process,'[138] and — in tangent with the Security Council — she has negotiated a set of procedures enhancing her capacity to access critical information. The advantages of the Ombudsperson framework over other institutional frameworks are threefold:

> *Expertise:* The Ombudsperson deals more in 'intelligence' than 'evidence'. With the support of the Monitoring Team, which is able to provide expert advice including analysis of audio-visual material, the Ombudsperson is in a far better position than courts to assess this credibility of information. The Ombudsperson has acknowledged the importance of experience and 'institutional memory' developed across the complex matrix of sanctions cases in enabling her to assess the key questions and issues of concern for the Sanctions Committee.[139] In particular, the Ombudsperson has emphasized the value of her personal access to petitioners in the dialogue phase of the process, during which she has the opportunity to ask petitioners to respond to and explain inferences that might be drawn from relevant intelligence while working classified material into the background.[140]
>
> *Access to Pressure Points:* While the Ombudsperson has no power to compel production of confidential information, she is in a unique position to place pressure on states to provide such information. First, the Ombudsperson's request for information is mandated by a Chapter VII Security Council resolution, which she has confirmed has proved useful in encouraging states to co-operate with the Ombudsperson.[141] Secondly, as the Ombudsperson has recognized in a recent report, 'any lack of detail does not work to the prejudice of the petitioner' as refusal by a state to provide information risks leading to a de-listing recommendation on the grounds of insufficient evidence.[142] As discussed above, the Ombudsperson's decision has a 'triggering effect', and can only be reversed if the sanctions committee decides by consensus to do so.[143] Third, the Ombudsperson is directed to update the 1267 Committee as individual cases progress, specifying 'details regarding which States have supplied information.'[144] Fourth, the Ombudsperson reports biannually directly to the Security Council, and in these reports typically discusses the level of state co-operation. Through such reports, both the Council and the

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[138] First Report of the Office of the Ombudsperson, UN Doc S/2011/29, [33] (Jan. 24, 2011).
[139] Third Report of the Office of the Ombudsperson, UN doc S/2012/49, [7] (Jan. 20, 2012); Seventh Report of the Office of the Ombudsperson, UN doc S/2014/73, [30] (Jan. 31, 2014).
[140] Though certain lawyers representing individuals in delisting proceedings have argued that this dialogue sheds little light on the nature of the secret allegations against their clients.
[141] Security Council resolution 1989, UN Doc S/RES/1989, [25] (Jun. 17, 2011). See also Third Report of the UN Ombudsperson, UN doc S/2012/49, [41] (Jan. 20, 2012).
[142] Third Report of the UN Ombudsperson, *id.*, at [42].
[143] UN Security Council resolution 1989, UN Doc S/RES/1989, [23] (Jun. 17, 2011).
[144] Security Council resolution 1904, UN doc S/RES/1904, Annex II, [4] (Dec. 17, 2009).

broader international community are made aware of failures in state co-operation, increasing pressure on states to comply.

Negotiation of Specific Arrangements: An additional innovation of the UN Ombudsperson is the practice of entering into specific arrangements with individual states to obtain access to confidential information. The Ombudsperson is in a unique position to build up a level of trust with states, which at least theoretically should not be difficult to achieve given the Ombudsperson is appointed by the Secretary-General in consultation with the sanctions committee and must be 'an eminent individual of high moral character, impartiality and integrity with high qualifications and experience in relevant fields.'[145]

2.5. CONCLUSION

Applying a value-based approach to the Security Council sanctions context, my conclusions are surprising. The internationalized judicial framework, measuring sanctions decision-making in terms of its accuracy in the application of binding law, emerges as the model least likely to enhance legitimacy in decision-making. By contrast, I conclude that the UN Ombudsperson offers the greatest potential to enhance the representativeness and responsiveness of Security Council sanctions regime. The non-judicial nature of the Office potentially serves as an advantage offering valuable techniques through which to hold the Security Council to account, while accommodating the Security Council context of broad discretion, political compromise and necessary confidentiality. Domestic courts exercising a moderate form of dignitarianism can also play an important role, though their most effective contribution would be less as agents of enforcement of international, regional or domestic law, and more through lending expert contribution to a broader dialogue. To test the value-based approach further, we turn next to the other major site of due process controversy in the UN context: the ongoing remedial failure relating to claims that UN peacekeepers negligently introduced cholera into Haiti.

3. DUE PROCESS IN A TIME OF CHOLERA

In October 2010, cholera appeared in Haiti for the first time in nearly a century. Shortly before the outbreak, a new contingent of Nepalese peacekeepers had been deployed to the Mirebelais camp of the UN Stabilization Mission in Haiti (MINUSTAH), located above a tributary of the Arbonite River, one of Haiti's main sources of drinking water. There is a credible argument from an

[145] Security Council resolution 1904, UN Doc S/RES/1904, Annex II, [20] (Dec. 17, 2009).

epidemiological and microbiological perspective that the cholera bacteria was introduced into the Arbonite River due to inadequate sanitation conditions at the Mirebelais camp.[146] The contamination triggered an epidemic that has caused the death of almost 9,000 people, close to twice the Ebola death toll in any one country, and the illness of over 700,000 more.[147] The Independent Panel of Experts appointed by the UN Secretary-General found that the evidence 'overwhelmingly supports' the conclusion that the 2010 Haiti cholera outbreak was caused by the contamination of the Meye Tributary System of the Artibonite River as 'a result of human activity' by bacteria that was a 'perfect match' with the Nepal cholera strain at the relevant time.[148] The Panel also found that sanitation conditions at the MINUSTAH camp were not sufficient to prevent contamination of the Meye Tributary System with human faecal waste.[149] Two years after the release of the initial report, the members of the Panel updated their findings and stated more directly that 'the preponderance of the evidence and the weight of the circumstantial evidence does lead to the conclusion that personnel associated with the Mirebalais MINUSTAH facility were the most likely source of introduction of cholera into Haiti.'[150]

The initial source of the cholera outbreak is no longer reasonably in question. What remains controversial is the question of UN accountability for its role in the cholera outbreak. While, not so long ago, such a crisis might have entered collective memory as an 'Act of God' or a regrettable historical episode defying explanation, responsibility or redress, 'accountability management' is part of any crisis post-mortem in today's risk society.[151] Societies affected by large-scale crisis typically demand some organization or entity to be held responsible and lessons to be drawn as part of an essential process in order to achieve a stable post-crisis equilibrium.[152] There is a widespread sense that the UN response has denied Haitian society this opportunity. In the month following the cholera outbreak, the UN spokesperson for MINUSTAH rejected any 'objective direct link… between the soldiers and the outbreak.'[153] In response to the report of the Independent

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[146] R. R. Frerichs et al, *Nepalese Origin of Cholera Epidemic in Haiti*, 18(6) CLINICAL MICROBIOLOGY AND INFECTION 158 (2012).

[147] Pan-American Health Organization and World Health Organization, *Epidemiological Update: Cholera*, (Oct. 9, 2015), available at http://www.paho.org/hq/index.php?option=com_docman&task=doc_view&Itemid=270&gid=31956&lang=en.

[148] *Final Report of the Independent Panel of Experts on the Cholera Outbreak in Haiti* (2011), available at http://www.un.org/News/dh/infocus/haiti/UN-cholera-report-final.pdf, 4, 27.

[149] *Id.*, 23.

[150] Daniele Lantagne, G. Balakrish Nair, Claudio F. Lanata and Alejandro Cravioto, *The Cholera Outbreak in Haiti: Where and How did it Begin?*, in CHOLERA OUTBREAKS 162 (G Balakrish Nair and Yoshifumi Takeda eds., 2014).

[151] GOVERNING AFTER CRISIS: THE POLITICS OF INVESTIGATION, ACCOUNTABILITY AND LEARNING (Arjen Boin, Allan McConnell and Paul 't Hart eds., 2008).

[152] Sanneke Kuipers and Paul 't Hart, *Accounting for Crises*, *in* THE OXFORD HANDBOOK OF PUBLIC ACCOUNTABILITY 589 (Mark Bovens, Robert E. Goodin and Thomas Schillemans eds., 2014).

[153] William Booth, *UN troops assaulted, blamed for outbreak*, WASHINGTON POST, Nov. 16, 2010, available at http://www.washingtonpost.com/wp-dyn/content/article/2010/11/15/AR2010111507227.html.

Panel, the UN declared that the report 'does not present any conclusive scientific evidence linking the outbreak to the MINUSTAH peacekeepers or the Mirebalais camp' and that '[a]nyone carrying the relevant strain of the disease in the area could have introduced the bacteria into the river.'[154] The Secretary-General appointed a Task Force to 'ensure prompt and appropriate follow-up' to the Panel's Report, however the first follow-up material did not appear until mid-2014 and then did not mention the question of UN accountability for its role in the cholera outbreak.

In the meantime, NGOs have pursued UN accountability for its role in the crisis. In November 2011, the Boston-based Institute for Justice and Democracy in Haiti (IJDH) working with lawyers in Haiti presented a petition to the UN Secretary-General on behalf of 5,000 individuals.[155] It took fifteen months for the UN to respond to the petitioners' legal arguments, which were dismissed in two sentences of a two-page letter on the basis the claims were 'not receivable' pursuant to section 29 of the General Convention on the Privileges and Immunities of the United Nations.[156] In a follow-up letter to a request by the petitioners for the UN to establish a standing claims commission, engage a mediator or even arrange a meeting to discuss the matter, the UN responded that 'there is no basis for such engagement in connection with claims that are not receivable.'[157] Since October 2013, three separate class action suits have been filed in the Southern District of New York against the UN.

The UN's handling of these credible allegations of malfeasance has been described as a 'public relations as well as public health disaster.'[158] The pervading sense is one of an organization stonewalling any inquiry into its accountability.[159] Yet it is also arguable that the quest for accountability has been too narrowly focused. The debate about due process has been confined to its separate legal silos of immunity and human rights, with little authoritative capacity to reconcile the two areas of law, though some authors have expressed the desire to move beyond them.[160] I argue that a value-based approach to due process offers a way to reconcile these conflicting yet fundamental legal spheres. Instead of focusing on the question of which area of law is more 'binding' or 'supreme', the overarching question is: what role do we require due process to play in this setting and which procedural framework is best equipped to achieve it?

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[154] *UN Haiti cholera panel avoids blaming peacekeepers*, REUTERS, May 5, 2011.

[155] *Petition for Relief* (Nov. 3, 2011), available at http://ijdh.org/wordpress/wp-content/uploads/2011/11/englishpetitionREDACTED.pdf.

[156] Letter from Patricia O'Brien (Under Secretary-General for Legal Affairs) to Brian Concannon (Director, IJDH), (Feb. 21, 2013), available at http://www.ijdh.org/wp-content/uploads/2013/07/20130705164515.pdf.

[157] Letter from Patricia O'Brien to Brian Colcannon (Jul. 5, 2013), 1, available at http://www.ijdh.org/wp-content/uploads/2013/07/20130705164515.pdf.

[158] Jose Alvarez, *The United Nations in the Time of Cholera*, AJIL UNBOUND (Apr. 4, 2014).

[159] For a dismal example, see the interview with the Deputy Spokesperson for the UN Secretary-General in the documentary *Fault-Lines: Haiti in a Time of Cholera*, AL JAZEERA television broadcast, Mar. 2, 2015.

[160] Frédéric Mégret, *La responsabilité des Nations Unies aux temps du cholera*, 47(1) REVUE BELGE DE DROIT INTERNATIONAL 161 (2013); Alvarez, *supra* note 158.

3.1. INSTRUMENTALIST MODEL: EVALUATING THE QUEST FOR LEGAL RESPONSIBILITY

As in the Security Council sanctions context, the debate about procedural protections applicable in the Haiti cholera controversy has taken a decidedly instrumentalist turn. In essence, the question of due process has been reduced to a fiercely debated contest over the most accurate interpretation of legal principles relating to UN immunity. Repeated assertions by UN officials that claims are 'not receivable' have been greeted in turn by a storm of critical scholarship, devoted to assessing whether the UN has accurately characterized its obligations under the General Convention. I argue that this 'instrumentalist bias' in the debate about due process is misplaced and unproductive. As I will argue below, the instrumentalist approach to the formulation of procedural safeguards will lead to a narrow debate, the result of which will be decided (a) by a state-centric echo chamber; (b) in accordance with under-developed legal standards; and (c) to comport with a 'functionalist' value system that many agree is out of date.

3.1.1. Community: Keeping it in the (UN) Family

Paradoxically, cholera was one of the early issues to unite the international community through the international sanitary conferences convened in the second half of the nineteenth century.[161] As might be expected, these early conferences were hardly paragons of internationalism. Though the disease caused its highest mortality rates in other regions, delegates were essentially united in defending Europe against 'the Oriental plague'. Over 150 years later, there is a sense that the structures of internationalism are still not tuned into the voice of those populations most vulnerable to cholera outbreaks.

Individuals or groups of individuals harmed by UN action have few options, still less where they are nationals of a vulnerable state such as Haiti dependent on UN assistance. The law relating to the responsibility of international organizations does not, in its current incarnation, have much to say at all about an organization's relationship with non-state actors. The ILC Articles on the Responsibility of International Organizations, concluded in 2011, expressly do not contemplate an accountability regime beyond responsibility to states in their individual or collective form.[162]

The UN response to victims of the Haiti cholera outbreak reflects that the narrowness of the legal regime for responsibility has also become culturally ingrained. The richest dialogue about the scope of UN accountability for the Haiti cholera outbreak was not with affected individuals or their legal representatives, but with other UN officials. On 25 September 2014, four UN-mandate-holders

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[161] Valeska Huber, *The Unification of the Globe by Disease? The International Sanitary Conferences on Cholera, 1851–1894,* 49(2) THE HISTORICAL JOURNAL 453 (2006).

[162] ILC, *Draft Articles on the Responsibility of International Organizations, with Commentaries, in Report on the Work of its Sixty-third Session* (hereafter, 'ILC Articles'), UN Doc, A/66/10, Arts. 43, 50 and Commentary (2011).

addressed a joint letter of allegation to the UN Secretary-General. In contrast to the two sentences denying UN liability in the response to the victims' petition discussed in the introduction to this section, the response to the UN Special Rapporteurs spent fifteen pages outlining the scope of UN accountability. Even here, the UN described its 'formal organizational accountability' as extending to 'the General Assembly, the Security Council or other relevant intergovernmental bodies', attributing only secondary relevance to individuals, civil society or other relevant actors (whose primary significance was described in terms of assisting with fact-finding inquiries).[163]

The 'natural forum' through which individuals have traditionally vindicated their rights, namely domestic courts, is essentially foreclosed in the UN context. At the heart of the regime for UN responsibility is recognition of broad, even absolute, immunity from 'every form of legal process.'[164] According to a traditional immunity analysis, it is still widely accepted that, whatever immunities other international organizations possess, the combined effect of Article 105 of the UN Charter and section 2 of the General Convention 'unequivocally grants the UN absolute immunity without exception.'[165] The General Convention and relevant Status of Forces Agreement between the UN and Haiti ('UN-Haiti SOFA') provides for the establishment of a standing claims commission as an alternative mode of dispute settlement, however these agreements can only be enforced by Haiti. Theoretically, under the General Convention, Haiti could request an advisory opinion from the ICJ requesting establishment of a standing claims commission.[166] However, in practice, this is unlikely. The Haitian government, under the Martelly administration, has not been supportive of justice for victims, concerned instead to portray Haiti as 'open for business' while remaining heavily dependent on UN assistance and foreign aid.[167]

3.1.2. Law: The Power and the Emptiness of Immunity Law

The international regime for the responsibility of international organizations is not only state-centric, but also steers the question of UN accountability down the path of a positivistic legal analysis. According to the ILC Articles, the responsibility of international organizations is to be determined by reference to international law.[168] This accounts for a highly legalistic debate in which the question of due process

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[163] Letter from Pedro Medrano, Assistant Secretary-General, to Ms Farha, Mr Gallon, Mr Puras and Ms De Albuquerque, (Nov. 25, 2014), [61], available at https://spdb.ohchr.org/hrdb/28th/Haiti_ASG_25.11.14_(3.2014).pdf

[164] Convention on the Privileges and Immunities of the United Nations, adopted Feb. 13, 1946, 1 UNTS 15 ('General Convention'), section 2.

[165] *Brzak v United Nations*, 597 F.3d 107 (2d Cir. 2010), para 112; *Manderlier v Organisation des Nations Unies et l' l'État Belge*, Brussels Civil Tribunal 1966, 45 ILR 446; *Mothers of Srebrenica v the Netherlands and the United Nations*, Supreme Court of the Netherlands, Case No 10/04437,13 April 2012, paras 4.3.6, 4.3.14; ILC, *Fourth Report on Relations between States and International Organizations*, UN doc A/CN.4/424 and Corr 1, 160 et seq (see paras 109–110).

[166] General Convention, section 30.

[167] *Haiti: Still Waiting for Recovery*, THE ECONOMIST, Jan. 5, 2013.

[168] ILC Articles, Article 5.

has been caught in the cross-fire of an ongoing turf war between immunity law and its chief pretender human rights law. The UN's 'traditional immunity analysis', described in the previous section, has been challenged by two main streams of legal argument, which I will describe as (i) a human rights analysis and (ii) a functional necessity analysis. The problem in instrumentalist terms is that, while these counter-arguments are persuasive in urging the need for law reform, they do not represent an accurate reflection of existing law. Instead, their primary effect is to emphasize the relative normative emptiness of extant law and the stronghold that international organizations and states continue to have over it.

3.1.2.1. Human Rights Analysis

Certain scholars have argued that it is time for a 'major evolution' in the regime for immunity of international organizations.[169] A 'human rights' approach to immunity has developed in legal scholarship,[170] with hints in the jurisprudence of the European Court of Human Rights.[171] The argument finds its strongest legal foundation in section 29 of the General Convention, in which the UN undertakes to 'make provisions for appropriate modes of settlement of… [d]isputes of a private law character to which the United Nations is a party'.[172] A number of scholars have argued that fulfilment of the section 29 undertaking is a 'condition precedent' to UN immunity such that, where the UN fails to provide an alternative remedy, immunity should be denied.[173]

It is by virtue of this instrumentalist 'human rights' approach that Frédéric Mégret has determined that the 'pivotal question' in the Haiti cholera dispute is 'the characterization of the claim as "private" or "public".'[174] The obligation to provide alternative modes of settlement applies only to disputes of a 'private law character,' begetting the inquiry as to which side of the public/private line the claims of Haiti cholera claims fall. The UN asserts that the claims raise 'broad issues of policy' and 'could not form the basis of a claim of a private law character.'[175] The problem is that any court asked to make an objective

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[169] Emmanuel Gaillard and Isabelle Pingel-Lenuzza, *International Organisations and Immunity from Jurisdiction: To Restrict or to Bypass*, 51 ICLQ 1, 1 (2002).

[170] Rosa Freedman, *UN Immunity or Impunity? A Human Rights Based Challenge*, 25 EUR. J. INT'L L. 239, 245–247 (2014); Cedric Ryngaert, *The Immunity of International Organizations Before Domestic Courts: Recent Trends*, 7 INT'L ORG. L. REV. 121, 148 (2010); Gaillard & Pingel-Lenuzza, *supra* note 169, 2–3; August Reinisch, International Organizations Before National Courts (2000), 366, 393.

[171] Though the ECHR ultimately upheld the immunity of the European Space Agency in *Waite and Kennedy v Germany*, Application No 26083/94, ECHR 1999–I, it held that a 'material factor to be taken into account was whether the applicants had available to them reasonable alternative means to protect effectively their rights under the ECHR', [68].

[172] UN-Haiti SOFA, section 55.

[173] Cedric Ryngaert, *The Immunity of International Organizations Before Domestic Courts: Recent Trends* 7 INT'L ORG. L. REV. 121, 148 (2010).

[174] Mégret, supra note 160, 166.

[175] Letter from UN Secretary-General to Members of United States Congress, Feb. 19, 2015, available at http://www.cepr.net/blogs/haiti-relief-and-reconstruction-watch/ban-ki-moon-explains-to-congress-why-the-un-wont-be-held-accountable-for-cholera-in-haiti.

determination of the question risks engaging in a theatre of the absurd. Duncan Kennedy argues that the success of any legal distinction depends on two facets: first, whether it is possible to make the distinction; and secondly, whether the distinction makes a difference.[176] Arguably the public/private distinction fails on both counts in the UN context. The dichotomy's foundations are unstable and insufficiently understood, even in the civil and continental system in which it finds its geographical and historical foundations.[177] In the UN context, there is considerable uncertainty as to whether the distinction refers to the body of law,[178] the nature of the complainant,[179] the nature of the conduct[180] or the nature of the forum.[181] The UN's public statements on the characterization are difficult to reconcile and much of its reasoning in relation to particular claims is buried in the inaccessible 'internal jurisprudence of the UN.'[182] It is difficult to avoid the conclusion that the UN's depiction of the Haiti cholera dispute is little more than a formalist brush-off that lacks meaning.

For the time being at least, the question is moot. The human rights analysis is yet to succeed before domestic courts.[183] To the extent there has been some 'nibbling away' at the edges of immunity outside the UN context in cases such as *Waite and Kennedy*, this is far from a finding that the international community of states has swallowed the argument.[184] As recognized above, it is still widely accepted that the UN enjoys broad if not absolute immunity before domestic courts, even where the UN fails to provide an alternative remedy.

3.1.2.2. Functional Necessity Analysis

Another version of the restrictive immunity argument looks to the normative foundation for granting immunity to international organizations. According to this analysis, immunity is functional and thus restricted such that the UN should 'be entitled to (no more than) what is strictly necessary for the exercise of its functions

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[176] Duncan Kennedy, *The Stages of the Decline of the Public/Private Distinction*, 130 U. PA. L. REV. 1349, 1349 (1982).

[177] Olivier Beaud, *La distinction entre droit public et droit privé: un dualisme qui résiste aux critiques*, *in* THE PUBLIC/PRIVATE DIVIDE: UNE ENTENTE ASSEZ CORDIALE? 21 (Mark Freedland and Jean-Bernard Auby eds., 2006).

[178] R. H. Harpignies, *Settlement of Disputes of a Private Law Character to which the United Nations is a Party* 7 REVUE BELGE DE DROIT INTERNATIONAL 451, 453–454 (1971); Chanaka Wickremasinghe and Guglielmo Verdirame, *Responsibility and Liability for Violations of Human Rights in the Course of UN Field Operations*, *in* TORTURE AS TORT 480 (Craig Scott ed., 2001).

[179] D. W. BOWETT, UNITED NATIONS FORCES: A LEGAL STUDY 149–150 (1964); MOSHE HIRSCH, THE RESPONSIBILITY OF INTERNATIONAL ORGANIZATIONS TOWARDS THIRD PARTIES: SOME BASIC PRINCIPLES 6, 70 (1995).

[180] Kirsten Schmalenbach, *Third Party Liability of International Organizations* 10 JOURNAL OF INTERNATIONAL PEACEKEEPING 33, 42 (2006); Kate Nancy Taylor, *Shifting Demands in International Institutional Accountability*, 45 NETHERLANDS YEARBOOK OF INTERNATIONAL LAW 157, 165–166 (2014).

[181] Katarina Lundahl, *The United Nations and the Remedy Gap: The Haiti Cholera Dispute*, 88 DIE FRIEDENS-WARTE 77 (2013).

[182] Mégret, supra note 160, 166.

[183] See, for example, *Bisson v United Nations and ors*, Case No 06-6352, ILDC 889 (US 2008).

[184] Moreover, the ECHR has backed down from the promise of *Waite and Kennedy* in subsequent judgments: *Stichting Mothers of Srebrenica and ors v the Netherlands*, Application No 65542/12 (ECHR, Jun. 11, 2013), para 139(f).

in the fulfilment of its purposes'.[185] This argument is said to be strengthened by Article 105 of the UN Charter (read in conjunction with Article 103), which grants immunity in terms narrower than those in the General Convention, referring to immunities 'necessary for the fulfilment of [UN] purposes'. However, this narrow reading is inconsistent with the stated intention of the drafters of the UN Charter.[186] Moreover, no court to date has been willing to deny UN immunity on the basis immunity is not functionally necessary. There seems to be fairly universal consensus that the question is, in any event, not one that should be left to domestic courts. As most scholars toying with the argument conclude, the proper forum for determining an organization's 'proper' purposes or functions is within the organization's political organs.[187]

3.1.2.3. Conclusion

Legally, the UN is on fairly solid legal ground in claiming immunity. There is room to argue that pressure should be placed upon the UN to establish a standing claims commission, however, this does not seem to be the main focus of much of the reform literature. Instead, well-intentioned legal scholars keen to push the law forward have engaged in normative overshoot by claiming that a restrictive 'human-rights-based' or 'functional' interpretation of UN immunity would justify domestic courts declining to recognize UN immunity in the present case. The problem is that the instrumentalist approach to due process ultimately leads to something of a legal *cul-de-sac*. While counter-arguments to the traditional immunity analysis may support desirable institutional values, they do not reflect current law. No matter how tempting, international lawyers should avoid fulfilling our satirized tendency to mistake the many gaps in international law as sites for the projection of our personal and institutional desires and ambitions.[188] The invocation of fundamental values to justify applying new rules of international law may be a legitimate political tactic, but it should not be advanced as a legal one.[189]

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[185] PETER BEKKER, THE LEGAL POSITION OF INTERGOVERNMENTAL ORGANIZATIONS: A FUNCTIONAL NECESSITY ANALYSIS OF THEIR LEGAL STATUS AND IMMUNITIES 39 (1994). See also Kristen Boon, *The United Nations as Good Samaritan: Immunity and Responsibility* 16 CHICAGO J. INT'L L. (2015); Gaillard and Pingel-Lenuzza, *supra* note 169; C. F. AMERASINGHE, PRINCIPLES OF THE INSTITUTIONAL LAW OF INTERNATIONAL ORGANIZATIONS 316, 318 (2d ed., 2005).

[186] *Documents of the United Nations Conference on International Organization* (Vol. XIII), 705 and 780 (San Francisco, 1945).

[187] Michael Singer, *Jurisdictional Immunity of International Organizations: Human Rights and Functional Necessity Concerns* 36 VA. J. INT'L L. 53, 108 (1995); Gaillard and Pingel-Lenuzza, *supra* note 169, 8.

[188] Roger O'Keefe, *Once upon a time there was a gap*…, EJIL TALK! (Dec. 8, 2010), available at http://www.ejiltalk.org/once-upon-a-time-there-was-a-gap- …/.

[189] Michael Wood, *Do International Organizations Enjoy Immunity Under Customary International Law*, *in* IMMUNITY OF INTERNATIONAL ORGANIZATIONS 29 (Niels Blokker and Nico Schrijver eds., 2015) at 59–60.

3.1.3. Values: Functionalism is Dead! Long Live Functionalism!

The contribution by scholars advocating progressive interpretations of the current law on UN immunity are most powerful as political arguments advocating the need for law reform. The law relating to UN immunity was created at the time of the Organization's genesis and has achieved gospel-like status despite the fact that the international community has long since abandoned belief in the UN as 'a kind of secular God for the international community.'[190] It is increasingly recognized that international institutions are capable of all manner of missteps, omissions and sins, including in some cases human rights violations.[191] Even if it is not yet reflected in conventional or customary law, there is a very good argument that the principle of absolute immunity is a historical anomaly that has outlasted its utility.

The problem with engaging with the question of due process in terms of existing law on UN immunity is that the artefact becomes the agent. By focusing on immunity law for the source and limits of UN accountability, international lawyers risk missing the point, akin to looking for the keys where the lamp is shining. As things stand, the current state of the law creates much heat, but sheds very little light on the issue of UN accountability. While immunity remains a very important guarantor of the UN's political and financial independence, the UN must look beyond legal boundaries when determining the appropriate scope of its accountability. In the Haiti cholera context, it is clear that a statement that claims against the UN are 'not receivable', even if technically legally accurate, does very little to overcome the widespread impression that the UN has done something wrong and that this wrong needs to be in some way addressed. As Jan Klabbers aptly describes it, the Haitian cholera outbreak is ultimately 'a remarkable signpost for the poverty of the law'.[192]

3.2. THE DIGNITARIAN MODEL: EVALUATING THE QUEST FOR TORTIOUS LIABILITY

The present legal framework governing the international responsibility of international organizations has been described as 'leaving individuals out in the cold'.[193] In the Haiti cholera context, it is undeniable that the victims of the cholera outbreak have been marginalized. Faced with UN refusal to set up any internal mechanism, lawyers representing the cholera victims and their families have commenced a class action against the UN and relevant officials in the Southern District of New York. The plaintiffs seek compensatory and punitive damages to remedy the injuries, including US$2.2 billion that the Haitian

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[190] Alvarez, *supra* note 158.

[191] Vanessa Kent, *Protecting Civilians from UN Peacekeepers and Humanitarian Workers: Sexual Exploitation and Abuse*, *in* UNINTENDED CONSEQUENCES OF PEACEKEEPING OPERATIONS 44 (Chiyuki Aoi et al eds., 2007) at 46; Frédéric Mégret and Florian Hoffmann, *The UN as a Human Rights Violator? Some Reflections on the United Nations Changing Human Rights Responsibilities* 25 HUM RTS Q 314 (2003).

[192] *Id.*

[193] Armin von Bogdandy and Mateja Steinbrück Platise, *ARIO and Human Rights Protection: Leaving the Individual in the Cold*, 9 INTERNATIONAL ORGANIZATIONS LAW REVIEW 67 (2012).

government requires to remedy Haiti's waterways, provide adequate sanitation and eradicate cholera.[194]

The initiation of the tort action on behalf of Haiti cholera victims has received support in the academic literature.[195] Applying a due process analysis, I take a different view. In the following section, I will consider the extent to which tort liability is capable of fulfilling dignitarian aims of due process. In particular, I question (a) whether class actions are capable of developing and enriching notions of international community; (b) the effectiveness of tort law as a legal regulator of international organizations; and (c) the appropriateness of transplanting the corrective justice values underlying tort law to the UN setting.

3.2.1. Community: Constructing Community through 'Class Action' in Domestic Courts

An action in tort is on its face a prototypical example of the dignitarian model of due process. The key significance of handing the problem over to tort litigation is that it *individualizes* the problem. The focus of tort law is squarely on the interpersonal relationship between tort-feasor and victim. A concept of equality underpins tort law, which bases the duty to compensate on the notion that two parties are 'juridically equal', such that neither should interfere with the freedom of the other to pursue their own projects and purposes.[196]

Where the tort action is in the nature of a class action against the United Nations, the interpersonal relationship at the heart of tort liability is challenged in two important respects. First, the defendant is not an individual but the UN, an international organization that — far from being in a position of juridical equality — is considered accountable precisely because it is in a position of juridical *in*equality owing special responsibilities to a vulnerable population. This issue will be dealt with in the next section as an issue of applicable law. Secondly, the plaintiff is not an individual, but (in the Haiti cholera case) the legal representatives of a 'class' comprising over 5,000 individuals 'who have been or will be injured… or… killed by cholera contracted in Haiti on or after October 9, 2010'. The potential for a class action of this nature to enhance the autonomy and interest representation of individuals in international society is open to question.

Mass tort actions are commonly regarded as poor vehicles for accountability.[197] The US class action litigation system itself is described as afflicted by accountability problems.[198] Class actions almost invariably come into

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[194] *Georges v United Nations*, Class Action Complaint, 9 October 2013, available at http://www.ijdh.org/wp-content/uploads/2013/10/Cholera-Complaint.pdf.

[195] See, for example, Boon, *supra* note 185; Rosa Freedman, *UN Immunity or Impunity? A Human Rights Based Challenge*, 25 EJIL 239 (2014).

[196] Peter Cane, *Tort Law and Public Functions*, *in* PHILOSOPHICAL FOUNDATIONS OF LAW OF TORTS 148 (John Oberdiek ed., 2014); Stephen Darwall and Julian Darwall, *Civil Recourse as Mutual Accountability*, 39 FLA. ST. U. L. REV. 17 (2012).

[197] CAROL HARLOW, STATE LIABILITY: TORT LAW AND BEYOND 50-51 (2004).

[198] John C. Coffee Jr, *Litigation Governance: Taking Accountability Seriously*, 110 COLUM. L. REV. 288, 290 (2010).

being through the actions of lawyers, as was the case in the Haiti cholera controversy, and many mass tort claims are only remotely connected with individuals. Class actions are widely known as 'lawyer actions', while the individuals represented 'often are recruited by class counsel, play no client role whatsoever, and – when deposed to test the adequacy of representation – commonly show no understanding of their litigation.'[199] A class action, once created, takes on a significant institutional life of its own, to the extent individual claimants have limited capacity to exit or opt out of the litigation.[200] Professor Nagareda argued throughout his scholarship that the modern class action has come to operate as a 'decidedly inferior rival' to public lawmaking, where lawyers appropriate rather than realize each claimant's autonomy over their day in court.[201]

The point of referring to such literature is not to level accusations at lawyers in the Haiti cholera controversy, but to sound a broader note of caution. Lawyers representing cholera victims acknowledge they have taken the tort action as a mechanism of 'last resort'.[202] They do not regard the tort litigation as the best approach, but have been forced to resort to such litigation as a 'nuclear option' advocacy technique. Class options have been recognized in other contexts as a 'useful tin-opener' or publicity vehicle for pressure groups and crusading lawyers hoping to open up dark and windowless areas of public administration.[203] In working toward a due process model for the UN context, it is clear class action tort litigation should not be regarded as a legally desirable remedy, but (at best) as a step in the *political* battle for compensation.

3.2.2. Law: Tort Law as Global Regulator (Whither Human Rights?)

The implications of the extension of tort law to the UN context are unknown and largely untested. In its study on the Accountability of International Organizations, the International Law Association acknowledged that the law on responsibility for the tortious acts of peacekeepers is 'underdeveloped.'[204] Yet, arguably, the ILA is getting ahead of itself. An important question remains over *whether* tort liability has a role in enhancing UN accountability. At the domestic level, the role of tort law continues to be a subject of exceptionally active philosophical inquiry.[205] There are muscular theories of tort law explaining its role in regulating relations between individuals, including, most prominently, the traditional mainstream 'corrective

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[199] Edward Cooper, *The (Cloudy) Future of Class Actions*, 40 ARIZ. L. REV. 923, 927 (1998).
[200] Samuel Issacharoff, *Governance and Legitimacy in the Law of Class Actions*, 1999 SUP. CT. REV. 337, 357.
[201] RICHARD A. NAGAREDA, MASS TORTS IN A WORLD OF SETTLEMENT ix–x (2007).
[202] Beatrice Lindstrom et al, *Access to Justice for Victims of Cholera in Haiti: Accountability for UN Torts in US Court*, B. U. INT'L L. J. (Nov. 3, 2014), available at http://www.bu.edu/ilj/2014/11/03/access-to-justice-for-victims-of-cholera-in-haiti-accountability-for-u-n-torts-in-u-s-court/.
[203] For the use of law in campaigning, see CAROL HARLOW AND RICHARD RAWLINGS, PRESSURE THROUGH LAW (1992).
[204] International Law Association, *Accountability of International Organizations: Final Report* (Berlin Conference, 2004), 21.
[205] See, for example, PHILOSOPHICAL FOUNDATIONS OF THE LAW OF TORTS (John Oberdiek ed., 2014).

justice' account[206] and economic theories of tort law building in instrumentalist rationales of deterrence and efficiency.[207] Yet, even in domestic contexts, the basis for the extension of tort liability to governmental authorities is in question. Scholars acknowledge that there does not yet exist a satisfactory theoretical explanation for the extension of tort law to public authorities.[208] Mainstream tort theory is concerned with interpersonal rights, constructed as a form of moral theory, not as a form of political theory, concerned with the powers and duties of government and the relationship between government and citizen.[209]

In considering the extension of tort law to the UN context, a gulf opens up between the home turf of tort law, based on equality (corrective justice theory) and the desire to deter risky behaviour (economic theory), and the natural habitat of the UN, where the UN is almost invariably placed into relationships with vulnerable populations, and where risk and compromise of individual rights in the interests of international security are less impediments than imperatives to UN action. Professor Cane has offered the most persuasive rationale for extension of tort liability to the public sphere, proposing that the concept of accountability could provide an attractive theoretical framework.[210] Yet an action for damages has been recognized as a 'very poor weapon' for investigating whether public bodies have behaved well or badly.[211] Tort law has been deemed an inefficient regulator and an ineffective deterrent in the public context, were the threat of damages claims builds in 'decision traps' rendering policy and decision-making more difficult and less rational and creating a 'chill-effect' on decision-taking with the most likely response being a 'greater dose of bureaucratic inertia.'[212]

Tort law is often contrasted negatively with human rights law in determining the appropriate body of law to regulate public authorities. In the consciousness of many international lawyers, questions of tort law and human rights law have become merged on account of a focus on the US *Alien Tort Statute* ('ATS'), which funnels an increasingly narrow set of human rights claims through a tortious process. The *Georges* litigation is not brought under the ATS, though has been praised as 'the perfect set of facts for a national court finally to recognise that the

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[206] ERNEST J. WEINRIB, THE IDEA OF PRIVATE LAW (1995), esp chs 6 and 7; ALLAN BEEVER, REDISCOVERING THE LAW OF NEGLIGENCE (2007); ROBERT STEVENS, TORTS AND RIGHTS (2007); Richard W. Wright, *Substantive Corrective Justice*, 77 IOWA L. REV. 625 (1992).

[207] GUIDO CALABRESI, THE COST OF ACCIDENTS (1970); RICHARD POSNER, ECONOMIC ANALYSIS OF LAW (8th ed., 2014).

[208] Cane, supra note 196; Donal Nolan, *Negligence and Human Rights Law: the Case for Separate Development*, 76 MOD. L. REV. 286 (2013); François du Bois, *Human Rights and the Tort Liability of Public Authorities*, 127 LAW Q. REV. 589, 609 (2011); Mark Aronson, *Government Liability in Negligence*, 32 MELBOURNE U. L. REV. 44 (2008); Harlow, *supra* note 197.

[209] Cane, *id.*, 149.

[210] Cane, *id.*

[211] Harlow, *supra* note 197, 30.

[212] Ronald A. Cass, *Damages Suits Against Public Officers*, 129 U. PA. L. REV. 1110 (1981); Harlow, *supra* note 197, 27.

UN cannot avoid its human rights obligations by hiding behind the cloak of immunity.'[213] In most tort litigation, human rights is a red herring.

Where the aim is to hold a public authority to account, it is arguable that cases should be funnelled away from the tort route to be dealt with in the context of the human rights framework. Tort and human rights differ markedly in terms of (i) the nature of the central relationship; (ii) the duty of care; and (iii) the standard of care. It is well rehearsed, both in this article and elsewhere, that tort law establishes a bi-polar relationship between two parties who are regarded as 'juridically equal'. By contrast, the aim of human rights law is less a targeting of negligent individuals than the targeting of the *systems* in which they operate.[214] On account of the fact that tort law and human rights law were developed to address different relationships, the regimes take quite different approaches to the duty and standard of care. In tort law, the trend has been to narrow the scope of duties owed by public authorities.[215] By contrast, human rights law goes well beyond prohibiting the infliction of harm, but makes public authorities answerable for the infringement of extensive 'positive' duties, reflecting an understanding of the state as bearing special responsibilities in respect of those over whom it exercises authority, different from the responsibilities individuals owe each other.[216] In terms of standard of care, the test of reasonableness in the tort context determines the balance between security and freedom that ought to govern the relations between two individuals entitled to pursue their own interests, while proportionality works with a more complex balance between the importance of the public objective pursued by the defendant public authority and the seriousness of its impact on the right-holder.

These differences are of course not accidental, but speak to the fact that, while tort law is designed to resolve conflicts between individual rights-holders, human rights law is designed to give effect to the 'special normative relationship between states and their citizens' and the distributional questions that arise therefrom.[217] That is not to say that a public official or public authority should never be subject to tort liability. The aim is to separate those claims aimed at vindicating rights in exactly the same way as remedies granted against private persons, from those aimed at ensuring the proper exercise of public functions or securing a just distribution of society's common resources.[218] In other words, the

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[213] Rosa Freedman and Nicolas Lemay-Hebert, *Towards an alternative interpretation of UN immunity: a human rights-based approach to the Haiti Cholera case*, QUESTIONS OF INTERNATIONAL LAW (Jul. 27, 2015), available at http://www.qil-qdi.org/towards-an-alternative-interpretation-of-un-immunity-a-human-rights-based-approach-to-the-haiti-cholera-case/.

[214] Harlow, supra note 197, 17.

[215] In the US, the Federal Tort Claims Act (FTCA) has been described as 'a limited waiver of the United States' sovereign immunity': Paul F. Figley, *Understanding the Federal Tort Claims Act: A Different Metaphor*, 44 TORT TRIAL AND INSURANCE PRACTICE JOURNAL 1105, 1106 (2009). In the UK, judges have adopted a non-interventionist restrictive approach to the establishment of duties of care in respect of public bodies: DUNCAN FAIRGRIEVE, STATE LIABILITY IN TORT: A COMPARATIVE LAW STUDY 64 (2003).

[216] SANDRA FREDMAN, HUMAN RIGHTS TRANSFORMED: POSITIVE RIGHTS AND POSITIVE DUTIES (2008).

[217] Du Bois, *supra* note 208, 595.

[218] Du Bois, *id.*, 603.

aim is to disentangle claims for corrective justice from those implicating questions of distributive justice.

3.2.3. Values: Corrective or Distributive Justice?

As highlighted above, the benefit of tort liability in dignitarian terms is the capacity of tort law to *individualize* the claim. Yet the problem of vindicating what are essentially public or human rights claims through tort liability is that it ignores the *social* or public dimension of the claim. The line between corrective and distributive justice is often used by tort lawyers to delineate the province of tort law from forms of resource allocation left more appropriately to political organs. While corrective justice 'operates on entitlements without addressing the justice of the underlying distribution',[219] distributive justice is concerned with the proper distribution of the benefits and burdens that are held in common by all who belong to a community.

The problem with extension of mass tort liability to the UN context is that it cannot help but implicate questions of distributive justice. This is closely connected to the question of remedy. There is much general agreement among tort lawyers that the primary objective of tort law is compensation.[220] Non-compensatory non-monetary remedies are exceptional and more-or-less controversial.[221] Jane Stapleton has noted that one effect of the extension of tort law to public authorities has been to channel a disproportionate burden of liability to deep-pocketed secondary actors, straining notions of causation and proximity.[222] Tort law is re-imagined as a public-spirited undertaking for the protection of vulnerable parties, inviting the expansion of tort law beyond its logical boundaries of corrective justice and into the territory of distributive justice.[223]

Particular problems arise in the case of mass tort claims in a realm of scarce resources. Much has been made of the paradox that the chance of getting a compensation payout following a traffic accident implicating UN officials would be higher than in the present case of UN negligence leading to a cholera outbreak killing almost 9,000 individuals and affecting hundreds of thousands of people. Yet the very scale of the injury may sensibly be a factor counting against tort liability. Large tort awards implicate not only a determination of the resources to be distributed to past victims of UN conduct, but also the amount to be taken away from future beneficiaries. It has been calculated that the total award to Haiti cholera victims in a successful tort claim would be between U.S.$15 billion and

[219] Weinrib, *supra* note 206, 80.
[220] GEORGE P. FLETCHER, TORT LIABILITY FOR HUMAN RIGHTS ABUSES 9 (2008).
[221] Cane, *supra* note 196, 165.
[222] Jane Stapleton, *Duty of Care: Peripheral Parties and Alternative Opportunities for Deterrence*, 111 LAW Q. REV. 301, 313 (1995).
[223] J J Spigelman, *Negligence: The Last Outpost of the Welfare State* 76 AUSTL. L. J. 432 (2002).

U.S.$36.5 billion.[224] When considered against the total proposed 2016-2017 U.N. biennium budget of U.S.$24.7 billion, the scale of the problem becomes clear.[225] Domestic tort judgments against the UN are a drain on scarce resources, threatening to seriously reduce the funds available to achieve UN purposes and potentially to multiply the victims of the same tortious act well beyond the context of the tort.

The central task of a domestic judge processing a tort claim is to rectify an injustice that has occurred between the doer and the sufferer of harm, not to distribute goods according to a more proportional criterion, comparing the relative merits of the participants in a political co-op as diverse and under-serviced as the international community. In many mass tort class actions, the final scheme for resolving claims essentially becomes an administrative process administered by judges, who (at least in the context of the asbestos litigation) have freely admitted they are an inefficient surrogate for the state.[226] Once again, the human rights framework arguably offers a more appropriate set of remedies. Judges in the domestic context have noted that individuals who have suffered at the hands of public authorities are not necessarily primarily motivated by a desire for monetary compensation, but institute proceedings because they want 'faceless persons in an apparently insensitive, unresponsive and impenetrable bureaucratic labyrinth…to acknowledge that something has gone wrong, to provide them with an explanation, an apology and an assurance that steps have been taken to ensure (so far as possible in an imperfect world) that the same mistake will not happen again.'[227] A measure of compensation can play an important role in providing recognition to victims, however it has been argued that damages should be 'on the low side', at least by comparison to torts cases.[228] This is in consideration of the fact that remedies for human rights violations should correspond, not only to the circumstances of the individual victim, but to what would serve the interests of the 'wider public who have an interest in the continued funding of the public service'.[229] I will expand further upon this below.

3.3. THE PUBLIC INTEREST MODEL AND HAITI CHOLERA: EVALUATING THE QUEST FOR ACCOUNTABILITY

In contrast to the sanctions context, no procedural framework has been adopted or proposed that would fit a public interest model of due process. There is a stale

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[224] Boon, *supra* note 185, 371.
[225] This figure represents the 'total net budget', including the 'regular budget' of U.S.$5.6 billion as well as 'extra-budgetary' expenditures such as support, substantive and operational activities: UN Secretary-General, *Proposed programme budget for the biennium 2016-2017*, U.N. Doc. A/70/6, 25 (May 15, 2015).
[226] Deborah R. Hensler, *As Time Goes By: Asbestos Litigation After Amchem and Ortiz*, 80 TEX. L. REV. 1899, 1904, 1915, 1923 (2002).
[227] *R (Bernard) v Enfield LBC* [2002] EWHC Civ 2282, para 39, cited in Harlow, supra [x], 120–121.
[228] Lord Woolf, *The Human Rights Act and Remedies*, *in* JUDICIAL REVIEW IN AN INTERNATIONAL PERSPECTIVE (M Andenas and D Fairgrieve eds, 2000), cited as authoritative guidance by the Law Commission, 'Damages Under the Human Rights Act 1998', Law Com No 266 (2000), 4.31.
[229] *Id.*

cache of available mechanisms to receive third party claims, chief among them the standing claims commission contemplated in the Model SOFA (and indeed the SOFA between the UN and Haiti), mothballed and ultimately rendered skeletal through disuse. The only standing claims commission thought to have been established in the short history of UN peacekeeping was developed to investigate claims against KFOR and UNMIK in Kosovo, though a Human Rights Watch Report concluded that 'few people… even knew that the body existed, including the majority of UNMIK staff'.[230] More often, there has been a tendency to resolve claims on an *ad hoc* rather than a systematic basis, with the former head of the UN division that routinely handled third-party claims maintaining that such claims 'have usually been amicably resolved – without recourse to arbitration' or resolved through local claims review boards.[231] These internal administrative processes leave the investigation, processing and final adjudication of claims entirely in the hands of the Organization, raising clear questions of independence where, as the UN itself has recognized, the UN 'may be perceived as acting as a judge in its own case.'[232]

It is clear that fresh thinking is needed to address the accountability deficit in UN decision-making. UN accountability is not synonymous with legal responsibility or tort liability. My discussion in this final section focuses in on the values that should underlie any procedural framework. As no mechanisms have yet been created in the Haiti cholera context, discussion can only be aspirational, however in my view this (rather than continuing bouts about the scope of UN immunity) should be the central focus of future detailed inquiry both within the UN and outside it.

3.3.1. Community: The Shift from Public to Publicness

In a model based on accountability, an obvious question requiring an answer is 'accountability to whom'? The answer, far from being obvious in the UN context, is complex. As Donaldson and Kingsbury have recognized, there are major challenges with identifying a clearly defined 'public' for entities operating in the global sphere.[233] The idea that the UN is accountable only to the P5, or to

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[230] Human Rights Watch, *Better Late than Never – Enhancing the Accountability of International Institutions in Kosovo* (Jun. 14, 2007), 18, available at https://www.hrw.org/sites/default/files/reports/kosovo0607web.pdf. See also criticism by Council of Europe, *Opinion on Human Rights in Kosovo: Possible Establishment of Review Mechanisms* (Oct. 8–9, 2004), 13–14.

[231] Bruce C. Rashkow, *Immunity of the United Nations: Practice and Challenges*, 10 INTERNATIONAL ORGANIZATIONS LAW REVIEW 332, 340 (2013); UN Secretary-General, *Administrative and Budgetary Aspects of the Financing of the United Nations Peacekeeping Operation*, UN doc A/51/389, [20]–[25] (Sept. 20, 1996).

[232] UN Secretary-General, *Administrative and Budgetary Aspects of the Financing of the United Nations Peacekeeping Operation*, UN doc A/51/903, [10] (May 21, 1997).

[233] Benedict Kingsbury and Megan Donaldson, *From Bilateralism to Publicness in International Law*, *in* FROM BILATERALISM TO COMMUNITY INTEREST: ESSAYS IN HONOUR OF BRUNO SIMMA 81 (U Fastenrath et al eds., 2010).

member states, is clearly outdated.[234] Yet, the danger of opening up the notion of community to a 'multiplicity of publics' in accordance with a more contemporary conception of international community is that any accountability mechanism risks ending up with the UN beholden to the interests and preferences of the most powerful and organized elites.

Given the disaggregated and unsettled scope of the international community, a more productive line of inquiry is to shift attention from accountability to 'whom' to ask accountability to 'what'? There is often a presumption that accountability processes are founded on a clear agreement about the standards in relation to which the decision-maker is being held to account.[235] However, where accountability is sought outside the context of the democratic state, the process of holding a decision-maker to account entails within it a process of debating what the standards should be.[236] Buchanan and Keohane criticize a 'narrow' form of accountability in the global governance context, without provision for contestation of the terms of accountability.[237] This narrow accountability is insufficient because the legitimacy of global governance institutions depends in part upon whether they operate to facilitate ongoing, principled, factually informed deliberation about the terms of accountability.

The public interest model therefore posits an 'ideal-evolving' conception of community.[238] The focus is not so much on the scope of the public as on the scope of public participation that will enable a panel to gauge what is in the 'public interest'. The important point is that broad participation must be, not merely encouraged, but channelled. The aim is to encourage participants to infuse their claims with a sense of what is good for all, rather than encouraging self-interested claims. It is not enough to leave this to an open pluralist dialogue. Kristina Daugirdas has engaged in an interesting analysis of the power of 'transnational discourse', involving interaction between governments, inter-governmental organizations, NGOs, national courts, experts and stakeholders, invoking its capacity to exact reputational costs.[239] However, for powerless actors who are not the ECJ in *Kadi*, this form of discourse risks collapsing into a form of decaffeinated dignitarianism where the result is not dialogue, but a stonewalled monologue. Indeed, Daugirdas' conclusions ring hollow in the Haiti cholera context, where she recognizes that '[t]here has been no objective or authoritative determination that the UN's conduct in connection with Haiti has violated international law – and there may never be.'[240] Though local trust has been eroded

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[234] THOMAS M. FRANCK, FAIRNESS IN INTERNATIONAL LAW AND INSTITUTIONS 480 (1995).
[235] Elizabeth Fisher, *The European Union in the Age of Accountability*, 24(3) OXFORD J. LEG. STUD 495, 496 (2004).
[236] Fisher, *id.* at 510, discussing CAROL HARLOW, ACCOUNTABILITY IN THE EUROPEAN UNION (2002) and ACCOUNTABILITY AND LEGITIMACY IN THE EUROPEAN UNION (Anthony Arnull and Daniel Wincott eds., 2002).
[237] Buchanan and Keohane, *supra* note 108, 427.
[238] Ian Johnstone's model of an 'interpretive community' as three concentric circles is persuasive: THE POWER OF DELIBERATION: INTERNATIONAL LAW, POLITICS AND ORGANIZATIONS 7, 41 (2011).
[239] Kristina Daugirdas, *Reputation and the Responsibility of International Organizations*, 25(4) EJIL 991 (2015).
[240] *Id.*, 1007.

and animosity toward the UN in Haiti has at times been palpable,[241] ultimately the UN has proved 'too big to f(l)ail', particularly while the vulnerable Haitian population remains reliant on its assistance. It is clear that the UN context would benefit from the creation of a designated forum that ensures, not merely inclusive discourse, but crucially UN responsiveness.

3.3.2. Law: Account-giving, Answerability, Responsiveness

Accountability has been described as 'the ultimate principle for the new age of governance in which the exercise of power has transcended the boundaries of the nation state.'[242] In this study, I am interested not so much in accountability as a virtue or attribute of good governance, but rather as a process. The challenge is to develop a 'vessel for normativity' or a centralized due process mechanism with the capacity to distil appropriate standards responsive to the felt needs of the international public.[243] The model draws on theories of law such as Nonet and Selznick's responsive law, Brunee and Toope's 'interactional theory' of international legal obligation and Johnstone's 'deliberative' model, each complex theories at the heart of which is the recognition that influential norms will not emerge in the absence of processes that allow for active participation of relevant social actors. As with each of these theories, participatory decision-making is the hallmark of the public interest model of due process, where participation acts as 'a source of knowledge, a vehicle of communication, and a foundation for consent' and social pressure acts as an opportunity for self-correction.[244]

Under a public interest model of due process, the challenge is to develop institutional processes that are open and responsive to public participation, through which the public interest can be measured and articulated and, in turn, exposed to public scrutiny. Certain innovative scholars have already begun the process of inquiry.[245] By way of preliminary contribution, I wish simply to draw out the central elements of an accountability mechanism. According to the broader scholarship, account-giving usually comprises at least three elements or stages.[246] First, to qualify as 'account-giving', there must be an information-gathering stage or *public inquiry* in the course of which the panel gathers relevant information, including (though by no means limited to) inquiry into the actor's conduct and justifications for that conduct. Secondly, to build in 'answerability', there must be a possibility for the panel to enter a *reasoned and public judgment* of the

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[241] Deborah Sontag, *In Haiti, Global Failures on a Cholera Epidemic*, NEW YORK TIMES, Mar. 31, 2012.
[242] Fisher, *supra* note 235, 495.
[243] I have borrowed this terminology from Kingsbury and Donaldson, *supra* note 233, 84.
[244] Nonet and Selznick, *supra* note 33, 100.
[245] Florian Hoffmann and Frédéric Mégret, *Fostering Human Rights Accountability: An Ombudsperson for the United Nations?*, 11 GLOBAL GOVERNANCE 43 (2005); Nico Schrijver, *Beyond Srebrenica and Haiti: Exploring Alternative Remedies against the United Nations*, 10 INTERNATIONAL ORGANIZATIONS LAW REVIEW 588 (2013).
[246] See variations on this description in Bovens, Schillemans and Goodin, *supra* note 152; ANNE DAVIES, ACCOUNTABILITY: A PUBLIC LAW ANALYSIS OF GOVERNMENT BY CONTRACT (2011).

account. Third, to build in 'responsiveness', the forum may reach a decision about consequences that arise from such a judgment, including a *fair remedy* where the actor's justification is found inadequate. The challenge for the UN is to devise a forum that builds in these elements of account-giving, answerability and responsiveness.

3.3.3. Values: The Value(s) of Accountability

In the Haiti cholera context, there has been something of an over-emphasis on judicial compensation as the route to UN accountability. Yet in scholarship on mass reparations following human rights violations, scholars argue that what is important is not the level of compensation, but rather the capacity of reparations programs to achieve important goals such as social solidarity, civic trust and recognition.[247] Here, we look in further detail at the processes of public inquiry, public judgment and fair remedy to examine how they might achieve these goals.

In a society as divided and stratified as the international community, a public inquiry can play an important (if modest) role as a catalyst for greater *social solidarity*. A public inquiry provides an important opportunity to give concrete expression to the central commitments and values of international society. The role of such an inquiry must be two-fold, encompassing information-gathering and engagement. In terms of information-gathering, the panel must investigate with relevant parties the nature of the UN's conduct as well as justifications for its conduct. Yet, in addition to seeking direct participation from relevant actors, it must also remain engaged with the multiple public spheres that coalesce around the UN, through which opinions are developed and exchanged. There is a body of empirical work establishing that such networks can be the venue for meaningful and knowledgeable deliberation about decision-making beyond the level of the nation state, including in Europe and globally.[248] The task of digesting these viewpoints is not an arduous one and can be indirect. For example, in the sanctions context, it is a task already routinely carried out by the Analytical Support and Sanctions Monitoring Team. Through information-gathering and engagement, an inquiry becomes a search, not for objectively right answers, but for 'inter-subjective' or collective interpretation of the terms upon which the UN should be held accountable.[249]

Another important goal of any accountability mechanism is the formation or restoration of *civic trust* in the UN as an institution. Local trust has been described as the most important capital for any UN peacekeeper.[250] As Louise Arbour and

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[247] I draw these values from Pablo de Greiff's broad conception of justice in *Justice and Reparations* in THE HANDBOOK OF REPARATIONS (Pablo de Greiff ed., 2006), ch 12.

[248] See, for example, Jürgen Habermas, *Why Europe Needs a Constitution*, 11 NEW LEFT REVIEW 8 (2001); JOHN DRYZEK, DELIBERATIVE DEMOCRACY AND BEYOND: LIBERALS, CRITICS, CONTESTATIONS (2000); James Bohman, *International Regimes and Democratic Governance: Political Equality and Influence in Global Institutions*, 75 INTERNATIONAL AFFAIRS 499 (1999).

[249] Johnstone, *supra* note 238, 22.

[250] See sources cited in Tom Dannenbaum, *Translating the Standard of Effective Control into a System of Effective Accountability*, 51 HARV. INT'L L. J. 113, 121 (2010).

Mac Darrow noted, '[t]he UN has an especially high onus to discharge so as to be taken seriously… [I]ts effectiveness in encouraging compliance with human rights norms lies in the balance, as does its very legitimacy.'[251] Where the UN has engaged in unfair or unlawful action that has caused harm to individuals, a public judgment to this effect serves as an acknowledgement of its wrongfulness and as a spur to the UN against non-repetition. The act of reason-giving serves a 'disciplining function', increasing pressure on participants to justify their claims by reference to the public interest, and producing a judgment that all subject to them can accept, at least in principle.[252]

Where the actor's justification is found to be inadequate, a measure of individual compensation serves as an important *recognition* of those harmed, not only as members of groups, but also as irreplaceable and unsubstitutable human beings.[253] That is not to say that the measure of compensation must always be judicial compensation in proportion to harm. As discussed above, this can have pernicious effects, particularly where scarcity of resources makes it unfeasible to satisfy simultaneously the claims of all victims and of other sectors of society that also require attention. While international law recognizes an individual's right to a remedy for human rights violations,[254] there is a huge contextual gap between affirmation of the legal right and its satisfaction.[255] In the UN context, there are a number of advantages to a well-designed reparations program over judicial compensation, including lower costs, relaxed standards of evidence, non-adversarial procedures and the virtual certainty that accompanies administrative reparations programs.[256] Creative solutions may also be needed to determine how the UN can build capacity to meet these claims in the future.[257]

4. CONCLUSION

This article invites greater attention to the question of due process in UN decision-making, recognizing the issue as one of far greater significance than the

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[251] Mac Darrow and Louise Arbour, *The Pillar of Glass: Human Rights in the Development Operations of the United Nations*, 103 AJIL 446, 461 (2009).
[252] Frederick Schauer, *Giving Reasons*, 47 STAN. L. REV. 633, 641, 657 (1995).
[253] De Greiff, *supra* note 247, 460-461.
[254] Theo Van Boven, *Introductory Note: Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law* (2010), available at http://legal.un.org/avl/ha/ga_60-147/ga_60-147.html.
[255] Richard Falk, 'Reparations, International Law and Global Justice' in Pablo de Greiff, *supra* note 247 at 478, 491. For example, it is clear that most human rights treaties (and indeed scholarship) recognizing a right to judicial compensation are configured to redress human rights violations on an individualized basis rather than *en masse*.
[256] Pablo de Greiff, *supra* note 247, 459.
[257] See Falk's suggestions of a UN voluntary fund or 'Tobin tax' on activities that pollute the commons: Falk, *supra* note 255, 498.

prosaic terminology of 'process' might suggest. Sites in which the UN has assumed decision-making authority affecting individuals are exemplars of an emerging system of international governance. The task of constructing a procedural framework for a new tier of governance represents a far greater theoretical and practical challenge for the international legal order than has so far been acknowledged.

The central tenet of this article is that the task of developing a due process framework has been under-theorized. The great majority of procedural reform proposals have relied on traditional international law source methodology to develop a universal set of due process principles drawing on legal safeguards developed for domestic legal settings. The problem with this classical formalist methodological approach to the development of international legal principles is that it can tend to overemphasize the value of (descriptive) state practice to the detriment of (normative) theoretical appeal. The value of the descriptive route is that it focuses on what state practice has been, and ensures international legal principles correspond to the reality of state conduct.[258] However, the history of due process has largely unfolded in response to domestic legal contexts, a practice that is arguably unsuited to the quite different legal and political context of global governance institutions such as the UN. Rather than working from practice to theory, the inverse is more appropriate, with the principal aim being to provide strong and enduring theoretical foundations to support UN institutional practice.

In this article, I recognize three different procedural models advancing different process values. Applied to the UN context, it can be seen that these models are supported by different procedural frameworks and impact in different ways on conceptions of international community, international law and the international value system. I summarize in the table at the end of this article the major implications of the various models. Though I take the position in both the sanctions and Haiti cholera context that the public interest model is best equipped to advance legitimacy, the significant difference of opinion on the future direction of the international legal order means that minds will legitimately differ over the most appropriate model in different contexts. The aim of this article is not to foreclose debate, but to stimulate thinking against the backdrop of a value-based understanding of due process.

[258] Anthea Roberts, *Traditional and Modern Approaches to Customary International Law: A Reconciliation*, 95 AJIL 757, 761-764 (2001).

Table II. Table summarizing impact of different normative models of due process

	Key Process Value	**Key Participants**	**Theory of International Law**	**Key International Value**	**Key Procedural Actor**
Instrumentalist	Accuracy	Nation States	Classical Positivist	Legal Responsibility	Internationalised Court
Dignitarian	Interest Representation	Stakeholders	Pluralist	Liability	Domestic/ Regional Courts
Public Interest	Public Interest	International Community	Cosmopolitan Constitutionalist	Accountability	UN Ombudsperson (sanctions)/ Reparations Commission (Haiti)