

The General Assembly and the Rule of Law: Daring to Succeed?

– The Perspective of Member States

*Stefan Barriga and Alejandro Alday**

- I. Introduction
- II. Recent General Assembly Decisions regarding the Rule of Law
 1. The World Summit Outcome Document
 2. Inclusion of the Agenda Item *The Rule of Law at the National and International Levels*
 3. General Assembly Resolutions negotiated in the Sixth Committee
- III. Sixth Committee Debates on the Rule of Law
 1. Defining the *International Rule of Law*
 2. The Rule of Law and Human Rights within the United Nations
- IV. Conclusion

I. Introduction

On 13 September 2006, the General Assembly decided to include in its agenda the item entitled *The Rule of Law at the National and International Levels*. The decision was taken without a vote and with broad support by Member States from all regions. There seemed nothing controversial about the proposition that the General Assembly was “uniquely positioned to [...] promote universal adherence to the concept of the rule of law, in particular at the international level”.¹ In fact,

* The views expressed in this article are the authors personal views only.

¹ See Doc. A/61/142 of 22 May 2006, *Request for the Inclusion of an Item in the Provisional Agenda of the Sixty-First Session, The Rule of Law at the National and International Levels*, Letter dated 11 May 2006 from the

it seemed rather surprising that the rule of law had not already for many years been a formal item on the agenda of the General Assembly, given the role assigned to the Assembly under Article 13 of the United Nations Charter for the progressive development of international law and its codification. However, addressing the rule of law as a comprehensive concept is a rather recent phenomenon for the General Assembly.² This development received a decisive boost with the adoption of the World Summit Outcome (WSO)³ on 16 September 2005, following many months of lengthy negotiations. The WSO contains numerous references to the rule of law as well as to international law, and provided a springboard for Member States interested in the rule of law to follow-up on those ideas in the context of the General Assembly. The Sixth Committee's work under the agenda item *The Rule of Law at the National and International Levels* would serve as the center of gravity for these activities.

This article intends to shed some light on the positions of United Nations Member States regarding the rule of law, with particular emphasis on the rule of law at the international level. It examines the General Assembly's work on this issue from the preparations for the 2005 World Summit to the present, as reflected in various debates, negotiations and resolutions. It outlines the extent to which Member States agree on the concept of the rule of law at the international level, and on measures to strengthen the role of the United Nations in this area. Finally, the authors submit some recommendations for the future work of the General Assembly under this agenda item, calling on Member States to focus on the opportunities rather than on the risks of a deeper engagement in rule of law issues.

II. Recent General Assembly Decisions regarding the Rule of Law

1. The World Summit Outcome Document

History has taught us that every successful system of nations requires a strong anchorage in international law for the achievement of the pur-

Permanent Representatives of Liechtenstein and Mexico to the United Nations addressed to the Secretary-General, Annex, para. 7.

² For some of the history in that regard see T. Fitschen, in this Focus.

³ A/RES/60/1 of 16 September 2005.

poses and ensuring the values that inspired its establishment. Whatever the fashion or the recipe has been, international law is the fundamental ingredient. The United Nations cannot be the exception.

The 2005 World Summit was not just another high level meeting. It was originally programmed as a major event to follow up on the Millennium Declaration⁴ and review its implementation, but it was also conceived as a unique opportunity to refresh and update a sixty-year old organization for the 21st century. In fact, the World Summit was the starting point for a reform process that touches each and everyone of the United Nations' components, from the institutional structures to operations on the ground, and even reaching the realm of new ideas and concepts. The only limitation during that process was to preserve and build upon the core values and principles of the United Nations Charter.

In this context, on 21 March 2005, then Secretary-General Kofi Annan proposed a comprehensive framework for consideration by Member States in preparation of the summit, aimed at strengthening the protection and promotion of universal values like democracy, human rights and the rule of law. In Chapter IV of his report *In Larger Freedom*,⁵ entitled "Freedom to Live in Dignity", the Secretary-General proposed to take concrete steps and stronger action to translate the concept of rule of law into a more powerful tool for the international community, having in mind governments as well as individuals, particularly the most vulnerable ones. That freedom to live in dignity would entail the realization of human rights for all; bringing justice to societies emerging from conflict or other violent experiences; real deterrence against future atrocities; and the peaceful settlement of disputes among states, to mention just a few examples.

The course of action suggested by the Secretary-General included many elements, among them: universal participation in multilateral conventions and their proper implementation at the internal level; the creation of more effective domestic legal and judicial institutions; the continuous development of the United Nations' potential in providing rule of law assistance and capacity building to Member States; full cooperation by all states with international tribunals, such as the International Criminal Court and other international and mixed tribunals; and

⁴ A/RES/55/2 of 8 September 2000.

⁵ *In Larger Freedom: Towards Development, Security and Human Rights for All*, Doc. A/59/2005.

a greater use of the ICJ through wider recognition of its compulsory jurisdiction, but also through greater use of its advisory powers.⁶

This was the basic rule of law framework proposed for advancing peace and security, development and human rights – a formula to be coined by the heads of state and governments as the three pillars of the whole UN system.⁷ In addition, one element of the Secretary-General's report deserves a special mention: the proposal to finally fill the gap between the international community's commitments and the bleak reality, when it comes to protecting civilians from mass atrocities. The Secretary-General endorsed the concept of the Responsibility to Protect,⁸ proposed by the International Commission on Intervention and State Sovereignty and subsequently taken up by the High-level Panel on Threats, Challenges and Change.⁹ He called on the wider membership of the United Nations to embrace that Responsibility to Protect and, when necessary, to act on it, based on the principles of international law and the United Nations Charter. A bold call for action, whose chances to succeed would depend greatly upon the balance between questions of security, development and human rights that could eventually be achieved in the final outcome document.

In preparation of the summit, the General Assembly engaged for several months in protracted negotiations. The Secretary-General's recommendations for the advancement of the rule of law were negotiated under the coordination of the Permanent Representatives of Bangladesh and Slovenia as part of the so-called "Cluster III".¹⁰ The process

⁶ Ibid., paras 133 to 139.

⁷ WSO, see note 3, para. 9.

⁸ The rationale provided by the Secretary-General is that this responsibility lies, first and foremost, with each individual state, whose primary *raison d'être* and duty is to protect its population. But if national authorities are unable or unwilling to protect their citizens, then the responsibility shifts to the international community to use diplomatic, humanitarian and other methods to help protect the human rights and well-being of civilian populations. When such methods appear insufficient, the Security Council may out of necessity decide to take action under the Charter of the United Nations, including enforcement action, if so required.

⁹ Note of the Secretary-General transmitting the *Report of the High-level Panel on Threats, Challenges and Change, A More Secure World: Our Shared Responsibility*, Doc. A/59/565 of 2 December 2004, para. 203.

¹⁰ In preparation of the Summit, the General Assembly worked in thematic clusters to consider the report of the Secretary-General *In Larger Freedom*, see note 5.

showed how difficult it can be to agree on language dealing with such a comprehensive concept as the rule of law. Keeping aside the Responsibility to Protect, which contained numerous ingredients for controversy (innovation, politicization, relation to the use of the powers of the Security Council), many Member States reacted positively to the recommendations for action within the United Nations, in particular the proposal for the establishment of a special unit to coordinate UN activities in this field. The real challenges arose when this purely legal approach confronted its ubiquitous opponents: the political interests (from different states, groups and regions), the special status of the permanent members of the Security Council (P-5), and the internal struggles of the organizations' bureaucracy. It is important to underline that for the great majority of countries the structure proposed and the approach taken by the Secretary-General were very welcome. Those countries most interested in and most committed to the issue considered it a particularly strong signal that the rule of law was framed as a special section of the report, and referred to both its national and international dimension. This was also perceived as an excellent invitation for identifying areas for further development and strategies for the better implementation of international law.

The recommendations of the Secretary-General on the rule of law were divided into two big groups of issues. The first one considered the existing link between democracy, human rights and the rule of law. The second group encompassed the traditional notion of the international dimension of the rule of law, including international criminal justice, the role of the ICJ and to some extent, the work and the powers of the Security Council.

For the first set of issues the debate turned out to be balanced. On the one hand, developed countries promoted the need to strengthen the rule of law domestically for the full realization of human rights and consolidation of democracy. They argued that the improvement of these areas at the national level, beyond the domestic benefits, would contribute to the prevention of conflicts at the international level. Furthermore, this would also have a positive impact on the rule of law as an indispensable component for post-conflict situations. On the other hand, developing countries emphasized the link between international cooperation and the rule of law at the national level. From their perspective, international assistance and support are needed to build appropriate domestic institutions to deliver justice and promote human rights. The capacity to fulfill their international obligations, such as those emanating from multilateral treaties, is seen as closely related to

the right to development. Eventually, these two approaches to the rule of law proved to be reconcilable and translated into cross-regional support for the establishment of a rule of law unit within the Secretariat.¹¹

As for the second group of issues, the diverging views of Member States were more difficult to turn into actionable recommendations. The role of the ICJ is a good example. Of course all states praised the work of the ICJ highlighting its role in the maintenance of peace and security; some also suggesting improvements in its work methods. But while a significant part of the membership advocated for strong language in the WSO urging more states to recognize the compulsory jurisdiction of the Court, and encouraging greater use of its advisory jurisdiction, the final text remained on the soft side. It calls upon states “that have not yet done so” to simply “consider” accepting the ICJ’s jurisdiction, which can also be read to mean that those that have already thought about it need not think about it again. The ICJ’s advisory powers did not receive any mention at all.¹²

As regards the rule of law within international organizations, the discussions were mainly focused on what happens in the Security Council and provided another lesson of *Realpolitik*. A small group of states took up the issue of human rights (due process of law) *vis-à-vis* the sanctions regimes (especially in the area of counter-terrorism), arguing on the basis of a simple moral logic: since the United Nations is promoting the universal values of human rights worldwide, common sense dictates that its principal organs should equally abide by them. A second set of countries urged the Security Council to cease its legislative decision-making, and demanded that its resolutions must be clearly based on international law. The countries argued that the Council’s competences must be exercised with utmost diligence, especially in light of Member States’ agreement to accept and carry out decisions of the Security Council according to Article 25 of the Charter. In the same vein, concern was expressed about the Council developing or reinterpreting international law on a case by case basis, given its political nature and limited composition.

Agreeing on concrete language for the WSO on such controversial issues proved to be an almost impossible task. Permanent members of the Security Council in particular could not accept any text references to the way the Security Council exercises its function under the United Nations Charter, almost to the point where the discussion itself was

¹¹ WSO, see note 3, para. 134 (e).

¹² *Ibid.*, para. 134 (f).

seen as incompatible with the Council's authority. It was all the more remarkable that the negotiators found a compromise formula for the issues of sanctions and due process. The solution was to avoid the word "due process", which would have evoked notions of procedural guarantees as they are required under criminal law. Instead the WSO called for "fair and clear procedures" for placing individuals and entities on sanctions lists and for removing them.¹³ Ever since the World Summit, this phrase has provided the basis for an extensive discourse on how to design targeted sanctions in a manner that is compatible with rule of law requirements. And while that process is still ongoing, it has strongly highlighted the need for the Security Council to embrace rule of law principles, such as legality, respect for human rights and transparency, in particular when dealing with the rights of individuals.

The WSO negotiations underlined that in the area of the rule of law, the Member States, as with many other topics, are walking at different speeds. The good news in that respect is that the vast majority of countries perceive the strengthening of the rule of law through the United Nations as an opportunity, linked to the achievement of important goals such as development and human rights. The World Summit prepared the ground for important institutional arrangements for the promotion of the rule of law, and generated much needed food for thought on the issue. The summit also showed that the international community can make some progress on the rule of law, and it paved the way for the more permanent engagement of the General Assembly on this issue, as will be described next.

2. Inclusion of the Agenda Item *The Rule of Law at the National and International Levels*

In the aftermath of the 2005 World Summit, an informal cross-regional group of delegations at UN Headquarters in New York, led by the Permanent Representative of Austria, continued its efforts to promote rule of law activities within the United Nations through awareness-raising and lobbying.¹⁴ This group, among other activities, generated

¹³ Ibid., para. 109. See also Kanetake in this Volume.

¹⁴ The group was purely informal in nature and composed of the Permanent Representatives of Angola, Austria, Bahamas, Belgium, Canada, Cape Verde, Finland, Germany, Latvia, Liechtenstein, Mexico, Morocco, Pa-

the idea of creating a universal and generic discussion forum about the rule of law by including this topic on the agenda of the General Assembly. On 11 May 2006, two member delegations of the group, Liechtenstein and Mexico, addressed a letter to the Secretary-General requesting the inclusion in the provisional agenda of the 61st session of the General Assembly of an item entitled *The Rule of Law at the National and International Levels*. The request was approved by the General Committee¹⁵ and on 13 September 2006 by the plenary of the Assembly itself by consensus.¹⁶ This was a logical next step derived from the prominent place accorded to the rule of law in the Summit Outcome, and generally welcomed by Member States in the first debate on the item.¹⁷ The explanatory memorandum annexed to the letter outlines the rationale for the request, mainly by referring to the WSO, and explains in particular the reference to both the national and international level:

“The international and national dimensions of the rule of law are strongly interlinked. The international legal order serves not only as a framework for peaceful relations and source of rights and obligations for States and other actors, but also as a source of inspiration for the development of national legal standards, in particular in the field of human rights. The strengthening of the rule of law at the international level thus has a direct impact on the rule of law at the national levels.”¹⁸

Earlier informal discussions among members of the group had revolved around the question whether such an item should be limited to the international dimension of the rule of law.¹⁹ While the wording of the agenda item eventually chosen treats both dimensions equally, the request itself places particular emphasis on the international dimension of the rule of law. This is explained with the major improvements already achieved by the United Nations in its rule of law work at the national level, in particular in post-conflict situations, while a considerable

nama, Papua New Guinea, Paraguay, Romania, Senegal, Slovakia, Slovenia, Singapore, Spain, Sweden, Switzerland, and the United Kingdom.

¹⁵ See the Committee's report, Doc. A/61/250.

¹⁶ See Doc. A/61/PV.2, page 17.

¹⁷ See the official records, Docs A/C.6/61/SR.6, SR.7 and SR.20.

¹⁸ Liechtenstein/ Mexico, see note 1, Annex, para. 2.

¹⁹ See for example a discussion paper submitted by Switzerland on 14 March 2006 to the Council of Europe, Committee of Legal Advisers on Public International Law, CAHDI (2006) 11.

gap remains with regard to the international level. The request concludes that the:

“General Assembly, as the United Nations’ chief deliberative, policymaking and representative organ, with its central role in the area of development and codification of international law, is uniquely positioned to fill that gap and to promote universal adherence to the concept of the rule of law, in particular at the international level”.²⁰

The General Assembly also followed the request by Liechtenstein and Mexico to allocate the item “in view of the legal nature of the issue” to the Sixth Committee. This rationale was, albeit not explicitly, also intended to serve as a self-fulfilling prophecy. The potentially extremely broad scope of the agenda item should receive some “natural” delimitations by placing the discussion in the context of the work of the Assembly’s legal Committee. By and large, this prophecy proved to be accurate during the first two years of the Assembly’s consideration of the item.²¹ Most importantly though, the inclusion of the agenda item provided the Assembly with a permanent forum in which issues related to the rule of law can be discussed and pertinent initiatives be advanced without first having to overcome procedural hurdles. The resolutions subsequently adopted under this agenda item, which *inter alia* provided material support to the establishment of the Secretariat’s Rule of Law Unit, serve as a case in point and will be considered in the following.

3. General Assembly Resolutions negotiated in the Sixth Committee

During the first two years of its consideration of the item *The Rule of Law at the National and International Levels*, the Sixth Committee recommended two draft resolutions that were subsequently adopted by the General Assembly in plenary meetings. The first resolution was adopted following relatively short negotiations chaired by Ambassador Juan Manuel Gómez-Robledo, then Deputy Permanent Representative of Mexico to the United Nations and Chairman of the Sixth Committee at the 61st session.²² Despite the broad scope of the topic, resolution

²⁰ Liechtenstein/ Mexico, see note 1, Annex, para. 7.

²¹ See the Chapter on the Sixth Committee debates below.

²² A/RES/61/39 of 4 December 2006, adopted upon recommendation by the Sixth Committee (see the Committee’s report Doc. A/61/456 of 17 November 2006).

A/RES/61/39 ended up being remarkably short, with only six preambular paragraphs and five operative paragraphs.

A look at the preambular part, which in the General Assembly's practice usually reflects the conceptual framework of a resolution, reveals that the delegations negotiating the text strived to remain on safe ground: these paragraphs contain to the greatest extent language taken from the WSO which can be considered of direct relevance to the rule of law, and they also take up some relevant Charter principles. The General Assembly reaffirmed, *inter alia*, its "commitment to the purposes and principles of the Charter of the United Nations and international law";²³ it reaffirmed "that human rights, the rule of law and democracy are interlinked and mutually reinforcing and that they belong to the universal and indivisible core values and principles of the United Nations";²⁴ it reaffirmed "the need for universal adherence to and implementation of the rule of law"²⁵ and its "solemn commitment to an international order based on the rule of law and international law".²⁶ The preamble further emphasizes the link between the rule of law, development, human rights and international security,²⁷ it reaffirms the duty of all states to refrain from the "threat or use of force in any manner inconsistent with the purposes and principles of the United Nations"²⁸ and to "settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered"²⁹, and it also calls upon states to consider accepting the jurisdiction of the ICJ.³⁰ The only genuinely "new", though equally not revolutionary, statement is contained in the last preambular paragraph, which reads:

"Convinced that the promotion of and respect for the rule of law at the national and international levels, as well as justice and good gov-

²³ A/RES/61/39, see note 22, preambular para. 1; based on the WSO, see note 3, para. 2.

²⁴ *Ibid.*, preambular para. 2; based on the WSO, see note 3, para. 119.

²⁵ *Ibid.*, preambular para. 3; based on the WSO, see note 3, para. 134.

²⁶ *Ibid.*, preambular para. 3; based on the WSO, see note 3, para. 134 (a).

²⁷ *Ibid.*, preambular para. 4; based on the WSO, see note 3, paras 11 and 7.

²⁸ *Ibid.*, preambular para. 5; based on the WSO, see note 3, para. 5 and on the United Nations Charter, Article 2 para. 4.

²⁹ *Ibid.*, preambular para. 5; based on the United Nations Charter, Article 2 para. 3.

³⁰ *Ibid.*, preambular para. 5; based on the WSO, see note 3, para. 134 (f).

ernance, should guide the activities of the United Nations and of its Member States”.

The preamble is remarkably short and general, particularly in light of the resolution’s character as an “omnibus” resolution which should – theoretically – deal with all aspects of the item under consideration in one text. This can to some extent be explained by the approach chosen by the chairman and supported by the Committee to focus on uncontroversial elements which can be adopted by consensus, since the Sixth Committee traditionally adopts its draft resolutions without a vote.³¹ The rather focused conceptual framework of the resolution should, however, not necessarily be interpreted as a lack of ambition. It can at least to some extent also be attributed to the fact that the Sixth Committee finds itself only at the beginning of a concerted effort to deal with the promotion of the rule of law. Therefore, the resolution does not address conceptually more challenging questions such as the scope of the term “rule of law”, despite the fact that the Secretary-General had previously provided thorough analysis on the issue which states could have used as the basis for their discussion.³²

The final outcome of the negotiations on the resolution’s preamble was considered to be very “balanced” by all delegations, which explains why this part remained essentially unchanged the following year in resolution A/RES/62/70.³³ Furthermore, there was a general understanding that the General Assembly’s work on the promotion of the rule of law was only at the very beginning, and that more substantive considerations could only be agreed upon after a detailed analysis of the United Nations’ work in this area was available, and once a more thorough discussion on the issue had taken place.

This understanding also explains the rationale for the operative parts of resolutions A/RES/61/39 and A/RES/62/70, which in essence require the Secretariat and Member States to provide, over the course of two sessions, the necessary input with a view to a more substantive consideration of the issue at the 63rd session in fall 2008. The basis of that exercise would be an “inventory of the current activities of the

³¹ See Historical and Analytical Note on the Practices and Working Methods of the Main Committees, Doc. A/58/CRP.5, para. 75.

³² For an extensive analysis of the Secretary-General’s 2004 report on the rule of law see T. Fitschen, in this Focus, there under I.

³³ A/RES/62/70 of 6 December 2007, adopted upon recommendation by the Sixth Committee (see the Committee’s report Doc. A/62/454 of 20 November 2007).

various organs, bodies, offices, departments, funds and programmes within the United Nations system devoted to the promotion of the rule of law at the national and international levels”, mandated for submission by the Secretary-General at the 63rd session.³⁴ An interim report on this mapping exercise was submitted at the 62nd session, and it contains information on the rule of law activities of forty United Nations entities.³⁵ At the time of writing, the Secretariat had just published its final inventory of over 150 pages. The wealth of information listed in the inventory shows the challenge of properly categorizing a myriad of projects and ongoing activities which are difficult to compare in size and scope.³⁶ The General Assembly will hopefully make good use of the wealth of information contained in the report, even though it deliberately omits information on the activities undertaken by intergovernmental bodies.³⁷

The Secretary-General was further mandated to submit a report:

“identifying ways and means for strengthening and coordinating the activities listed in the inventory (...) with special regard to the effectiveness of assistance that may be requested by States in building capacity for the promotion of the rule of law at the national and international levels.”³⁸

At the time of writing of this article, these recommendations were about to be finalized by the Secretariat. However, one crucial measure aimed at coordinating the United Nations’ rule of law activities was already undertaken shortly after the initial request of resolution A/RES/61/39 was made: the Secretary-General, in a report not mandated by the Sixth Committee but submitted as follow-up to the Security Council’s work on the rule of law, announced the establishment of

³⁴ A/RES/61/39, see note 22, para. 2. This request was reiterated in A/RES/62/70, see note 33, para. 2.

³⁵ Doc. A/62/261, para. 10.

³⁶ In this sense see also the statement by Guatemala, Doc. A/C.6/62/SR.14, para. 48.

³⁷ Doc. A/63/64, para. 3. It was in response to this approach, which had already been explained in the interim report, that the Sixth Committee included a paragraph in its subsequent resolution on the rule of law asking the ICJ, UNCITRAL and the ILC to comment, in their next reports to the General Assembly, on their current roles in promoting the rule of law, A/RES/62/70, see note 33, para. 3.

³⁸ A/RES/61/39, see note 22, para. 3. This request was reiterated in A/RES/62/70, see note 33, para. 2.

the *Rule of Law Coordination and Resource Group*, which took up its work only a short time thereafter.³⁹ That report was submitted on 14 December 2006, and thus only a few days after the General Assembly formally adopted resolution A/RES/61/39. The request for recommendations to be submitted two years later, during the 63rd session, was therefore, at least to some extent, almost immediately overtaken by new events. The Secretary-General's decision to establish the *Rule of Law Coordination and Resource Group* – a system-wide consultation and coordination process on rule of law matters – without interfacing with Member States through the Sixth Committee was not without risks, given that resolutions A/RES/61/39 and A/RES/62/70 had envisaged a two-year process of analysis and consultation, with the leading role to be played by Member States: after all, the Secretary-General was asked, in general terms, to “seek the views of Member States on matters pertaining to the issues addressed in the present resolution”,⁴⁰ and more specifically to submit his report on strengthening and coordinating rule of law activities “after having sought the views of Member States”.⁴¹

The procedural disconnect between the Secretary-General's initiative and the Sixth Committee process on the rule of law could have caused serious problems for the negotiations of the second rule of law resolution. In the end, however, the view prevailed that the establishment of the *Rule of Law Coordination and Resource Group* was a sound response to the needs of the United Nations system in this area. Delegations took a pragmatic approach and noted “with appreciation” the Secretary-General's report, and explicitly expressed their support for the group.⁴² One of the arguably most important structural reforms in the United Nations relating to the rule of law was thus endorsed by the General Assembly with relatively little controversy, already at half-time of a process aimed at improving the rule of law architecture. This is an achievement that will be difficult to replicate in the near future.

Finally, the General Assembly also used the two resolutions as vehicles to bring progress to the establishment of the Rule of Law Unit in the Secretariat, mandated to give professional support to the *Rule of Law Coordination and Resource Group*. The establishment of that Unit had already been endorsed by the WSO, but subsequently faced persis-

³⁹ *Uniting our Strengths: Enhancing United Nations Support for the Rule of Law*, Report of the Secretary-General, Doc. A/61/636/-S/2006/980.

⁴⁰ A/RES/61/39, see note 22, para. 1.

⁴¹ A/RES/61/39, see note 22, para 3; and A/RES/62/70, see note 33, para. 3.

⁴² A/RES/62/70, see note 33, para. 4.

tent bureaucratic obstacles in the Secretariat. Resolution A/RES/62/70 put the ball back in the Secretariat's court, demanding the Secretary-General to provide a report about budgetary implications "without delay" for consideration during the spring 2008 sessions of the Fifth Committee (budgetary and administrative matters). At the time of writing, more than half a year later and following further internal problems in the Secretariat, that report had just been issued; too late for consideration before fall 2008.⁴³

The United Nations Secretariat is not alone in experiencing difficulties in the establishment of new structures and procedures aimed at promoting the rule of law. The Sixth Committee itself evidenced a certain degree of uneasiness with the multi-faceted nature of the topic, precisely when trying to make the issue more accessible. Resolution A/RES/61/39 recommended that the Sixth Committee shall, as from the 62nd session and after consultations among Member States, "annually choose one or two sub-topics to facilitate a focused discussion for the subsequent session, without prejudice to the consideration of the item as a whole".⁴⁴ This provision was intended to allow the Committee to bring at least some degree of focus to its annual debates on the item, and was modeled after the practice of the General Assembly in matters pertaining to the law of the sea.⁴⁵ The informal consultations on the choice of topic which took place in October 2007 brought about a great number of suggestions for topics to be chosen for the subsequent session, ranging from the practical (e.g. "Strengthening the Rule of Law through Technical Assistance and Capacity Building") over the conceptual (e.g. "Identification of the Scope of the Rule of Law at the National and International Levels") to a number of more specific sub-areas of rule of law activities (e.g. "Strengthening Criminal Justice at the National and International Levels").⁴⁶ However, the Sixth Committee

⁴³ Doc. A/63/154.

⁴⁴ A/RES/61/39, see note 22, para. 5.

⁴⁵ See most recently A/RES/62/215 of 22 December 2007, para. 141, regarding the United Nations Open-ended Informal Consultative Process on Oceans and the Law of the Sea.

⁴⁶ The informal consultations on the draft resolution, including those on the choice of topic, were coordinated by the authors of this article. The following topics were identified in the course of these consultations, and clustered by the coordinators as follows: Cluster 1 – Strengthening the Rule of Law through Technical Assistance and Capacity Building: a) Strengthening the Rule of Law through Technical Assistance and Capacity Building; b) Better Coordination of UN Assistance Programs in the Rule of Law Area; c) Im-

proved unable to meet the challenge of choosing one or more of the topics suggested for consideration at the subsequent session. The major bone of contention in that respect was the suggestion to discuss the “scope” of the rule of law at the national and international levels. This suggestion was perceived by some to mark the beginning of a process aimed at defining the term “rule of law” and therefore objectionable. Eventually, the Sixth Committee ended these informal consultations without agreement on a topic and without result. Nevertheless, it must be noted that the topic *Strengthening the Rule of Law through Technical Assistance and Capacity Building* was, in any event, expected to be the main focus of the subsequent Sixth Committee session. After all, the comprehensive inventory of United Nations rule of law activities and the report on ways and means to better coordinate and strengthen these

plementation of International Obligations through Technical Assistance and Capacity Building; Cluster 2 – Promoting a Common Understanding of the “Rule of Law at the National and International Levels”: a) Identification of the Scope of the Rule of Law at the National and International Levels; b) Means to respect the Sovereignty of States over their Territory and their Right to choose the Optimal Legal Regime, based on the General Principles of International Law; c) Means of Achieving Democracy at the International Level; Cluster 3 – Promoting the Rule of Law at the International Level: a) The Observance of the International Rule of Law; b) Laws and Practices of Member States in implementing International Treaties; c) Principles followed by Member States in their Interpretation of International Treaties and their Practices in this Regard; d) Peaceful Settlement of Disputes; e) The Impact of Failure to implement the Principle of Equality of All before the Law on Non-Compliance with Resolutions of International Organizations; f) Principle of Territoriality of National Laws and the Effects of a State Imposing its Jurisdiction on Citizens of another State for Crimes committed beyond its Territory, without Support from International Conventions or the Principles of International Law; Cluster 4 – The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies: a) International Criminal Justice (in particular Legacy Issues); b) Strengthening Criminal Justice at the National and International Levels; c) Development of National and International Criminal Systems to end Impunity; d) The Role of International Tribunals; e) Transitional Justice; f) Transitional Justice at the National Level; Cluster 5 – Strengthening the Rule of Law through International Organizations: a) Acceptance of the Jurisdiction of the ICJ; b) The Impact of Failure to implement Resolutions of International Organizations and the Judgments of the ICJ; c) Methods of Work and Adoption of Resolutions by International Organizations to ensure the Application of the Principles of International Law; d) The United Nations as a Rules-Based Organization.

activities was to be submitted at that session, thus presenting a natural focus for the debates. It was also understood that the efforts to choose a topic for subsequent sessions would be continued at the 63rd session.

In sum, the General Assembly's first two resolutions on the rule of law have provided a cautious beginning for what should become, at a later stage and on the basis of the Secretariat's analysis, a stronger involvement of Member States in the process of strengthening United Nations activities for the promotion of the rule of law.

III. Sixth Committee Debates on the Rule of Law

While the Sixth Committee resolutions on the rule of law, as illustrated above, address a rather limited number of substantive issues, the two Sixth Committee debates under this agenda item reflect in more detail the views of Member States on how the General Assembly should promote the rule of law. 32 delegates speaking on behalf of individual states or groups of states, representing over 90 Member States, participated in the first such debate held at the 61st session in fall 2006.⁴⁷ 50 delegates, representing around 160 Member States, participated in the second debate held one year later.⁴⁸ In between these two debates, 15 delegations

⁴⁷ See the summary records of these meetings, Doc. A/C.6/61/SR.6, SR.7 and SR.20. Statements were made by the representatives of Finland (on behalf of the European Union as well as Bulgaria, Romania, Turkey, Croatia, the former Yugoslav Republic of Macedonia, Albania, Bosnia and Herzegovina, Serbia, Iceland, Norway, Ukraine and Moldova), New Zealand (also on behalf of Australia and Canada), Pakistan, Liechtenstein, the Sudan, Switzerland, Mexico, Guyana (on behalf of the Rio Group), Ethiopia, Malaysia, Japan, China, Cuba, Sierra Leone, Zimbabwe, Trinidad and Tobago, South Africa, Tanzania, Thailand, the Republic of Korea, Israel, India, Belarus, Algeria, the Russian Federation, Zambia, the United States, Indonesia, Syria, Iran and Egypt.

⁴⁸ See the summary records of these meetings, Doc. A/C.6/62/SR.14, SR.15 and SR.16. Statements were made by the representatives of New Zealand (also on behalf of Australia and Canada), the Dominican Republic (on behalf of the Rio Group), Portugal (on behalf of the European Union as well as Turkey, Croatia, the former Yugoslav Republic of Macedonia, Albania, Bosnia and Herzegovina, Serbia, Iceland, Ukraine, Moldova, Armenia and Georgia), Cuba (on behalf of the Non-Aligned Movement), Benin (on behalf of the African Group), Liechtenstein, Switzerland, China, Myanmar, Libya, Guatemala, Sudan, Mexico, India, Vietnam, Indonesia, Mozambique, Egypt, Bangladesh, Colombia, Cuba, the Democratic Republic of

submitted their views on this issue in writing.⁴⁹ The areas of conceptual agreement during these two debates can easily be identified by reverting to the preambular language of the two resolutions discussed above. Many delegations introduced their statements by pledging their commitment to the United Nations Charter and to an international order based on the rule of law, by emphasizing the rule of law as an indispensable prerequisite for international peace and security, development and human rights, by referring to basic principles of international law such as *pacta sunt servanda* and the prohibition to invoke internal law as justification for failure to perform a treaty, by stressing Charter principles such as the peaceful settlement of disputes and the obligation to refrain from the threat or use of force, and by acknowledging that the national and international dimension of the rule of law are interdependent and complementary. These areas of commonality are – at least at the conceptual level – of such basic and undisputed nature that these references, while obviously welcome as reaffirmation of the core principles of international law – have little to offer in terms of analytical value. In the following, emphasis will therefore be placed on issues which appear to be more controversial among Member States, namely the question of the scope of the rule of law at the international level, and the issue of the rule of law within the United Nations.

1. Defining the *International Rule of Law*

While the Secretariat has made great strides in developing at least a “common language” of the rule of law,⁵⁰ Member States have so far not embarked on a coordinated exercise of defining the term, and are unlikely to do so in the foreseeable future. Some states cautioned pub-

the Congo, Nigeria, Sierra Leone, Malaysia, Singapore, Thailand, Chile, Algeria, Venezuela, Tanzania, Japan, Tunisia, Republic of Korea, Kenya, South Africa, the United States, Kuwait, Norway, Israel, Pakistan, Iran, El Salvador, the Russian Federation, Morocco, Albania, Syria, Latvia, the Holy See (Observer) and the International Development Law Organization (Observer).

⁴⁹ Doc. A/62/121 and A/62/121/Add.1. These include a number of observations by members of the European Union that did not express themselves in the debates due to the common EU statement.

⁵⁰ See T. Fitschen, in this Focus, there under VI.

licly against attempts aimed at defining the term,⁵¹ while others did so in the context of the closed Sixth Committee consultations on the choice of topic for subsequent debates. Nevertheless, the Sixth Committee debates also showed a desire by a great number of countries from different regions to encourage at least a debate about the definition,⁵² and to put their own views about the concept of the rule of law on record. Some of those who favored the attempt of a definition acknowledged, however, that it could only encompass some common denominators and would not be exhaustive.⁵³ These statements are particularly interesting with regard to the rule of law at the international level, or the “international rule of law”, as some delegations put it.⁵⁴ The question of defining the rule of law at the national level will not be considered separately in this article. Indeed, some delegations considered that even in the absence of any kind of formal agreement, the rule of law was well-defined at the national level.⁵⁵

⁵¹ See e.g. comments submitted by France, Doc. A/62/121, page 16, para. 4: “Given the great diversity of issues addressed under the rubric of ‘the rule of law’ in various organs of the United Nations, it would certainly be useful to examine more closely the notion of ‘rule of law’. France is of the opinion, however, that given the complex theoretical concepts to which this notion has given rise and which have been affirmed in various ways in the different legal systems, it would be best to adopt a pragmatic and practical approach to the question”. See also statement by New Zealand (also on behalf of Australia and Canada), Doc. A/C.6/61/SR.6, para. 93.

⁵² Non-Aligned Movement, Doc. A/C.6/62/SR.14, para. 17; statement by the Dominican Republic (on behalf of the Rio Group), Doc. A/C.6/62/SR.14, para. 19; statement by Switzerland, Doc. A/C.6/61/SR.7, paras 9 and 14, suggesting that the Secretary-General could provide analysis and suggest a definition of the concept of the rule of law at the international level; statement by Egypt, Doc. A/C.6/62/SR.14, para. 69; statement by Iran, Doc. A/C.6/62/SR.16, para. 68; comments by the Netherlands, Doc. A/62/121, page 27, para. 2.

⁵³ Statement by Switzerland, Doc. A/C.6/62/SR.14, para. 32; statement by Mexico, Doc. A/C.6/62/SR.14, para. 51; statement by Iran, Doc. A/C.6/62/SR.16, 68.

⁵⁴ Statement by Switzerland, Doc. A/C.6/61/SR.7, para. 14; statement by Colombia, Doc. A/C.6/62/SR.15, para. 3; statement by the Dominican Republic on behalf of the Rio Group, Doc. A/C.6/62/SR.14, para. 18; statement by China, Doc. A/C.6/62/SR.14, para. 41.

⁵⁵ See e.g. statement by Switzerland, Doc. A/C.6/1/SR.7, para. 9; statement by Mexico, Doc. A/C.6/62/SR.14, para. 51.

The following are some of the more concrete statements made about the definition of the international rule of law: Mexico suggested to define the rule of law as a common denominator of civilized international society, akin to the general principles of law recognized by civilized nations referred to in Article 38 para. 1 (lit.c) of the Statute of the ICJ. At the international level, the rule of law called for “an international order based on compliance by States with international law”.⁵⁶

Colombia stated that the basis of the international rule of law was:

“an international legal system that recognized the legal equality of States and set limits on the exercise of power through checks and balances in order to avoid excesses and arbitrariness”.⁵⁷

Singapore stressed that, at its most basic level, the law set out legitimate expectations of what was “acceptable conduct and what was not”. The rule of law meant that no party, whatever its status or interests, could act in an arbitrary manner.⁵⁸

Austria, in a comment not explicitly framed as part of a definition of the rule of law, referred to “clear and foreseeable rules, adherence to these rules and a system to prevent or sanction violations of rules”.⁵⁹

Iran suggested to identify some common elements based on general principles of international law such as:

“States’ obligation to refrain from the threat or use of force in their international relations, to comply with the principles of universal respect for human rights and fundamental freedoms for all, to respect the equal rights and self-determination of peoples, and the sovereign equality and independence of all States, and not to interfere in the domestic affairs of other States”.⁶⁰

Egypt suggested that a definition of the rule of law must:

“rely on the general principles of law consistent with the foundations of justice, democracy, human rights, the equality of all before the law, respect for State sovereignty, safeguarding the right of legitimate self-defence, avoidance of the misuse of that right, the prohibition of the use of force or the threat thereof and also the safe-

⁵⁶ Statement by Mexico, Doc. A/C.6/61/SR.7, para. 15.

⁵⁷ Statement by Colombia, Doc. A/C.6/62/SR.15, para. 3.

⁵⁸ Statement by Singapore, referring to both the national and international dimension of the rule of law, Doc. A/C.6/62/SR.15, para. 24.

⁵⁹ Comments by Austria, Doc. A/62/121, page 2, para. 2.

⁶⁰ Statement by Iran, Doc. A/C.6/62/SR.16, para. 68.

guarding of the principle of balance between rights and obligations in accordance with the principles of the aforementioned law”.⁶¹

Germany submitted a number of detailed elements which can be summarized as follows: respect for the sovereign equality of all states and for self-determination of peoples; the principle that states must act in good faith and settle any disputes peacefully and must refrain from the threat or use of force in any manner inconsistent with the Charter; the duty of states to fulfill their obligations under international law; an effective multilateral system so as to prevent or sanction violations of international law; full respect for and effective protection of human rights and fundamental freedoms; and the obligation of international organizations to act in accordance with international law.⁶²

For Sweden:

“the international rule of law means that international law constitutes the foundation of international relations, that sovereign equality and the right of self-determination are respected, that States abide by their obligations under treaty law and general international law in good faith, that disputes are settled peacefully, that States have recourse to effective remedies before international institutions, that international organizations and other institutions monitor the implementation of obligations and take effective action, if necessary, that international obligations are fully implemented at the national level, including through effective legal mechanisms, and that the rule of law and human rights prevail nationally.”⁶³

Switzerland suggested that at the international level, the rule of law was based “mainly on international law as the cornerstone of relations between States”,⁶⁴ and later on submitted in writing a detailed catalogue of elements of the international rule of law which also refers to elements related to the Responsibility to Protect as part of the international rule of law.⁶⁵

While there has not been any effort by the Sixth Committee to compile elements such as those cited above and to negotiate an agreed definition, or at least some core elements of the rule of law at the inter-

⁶¹ Comments by Egypt, Doc. A/62/121, page 11, para. 3.

⁶² Comments by Germany submitted in its national capacity, Doc. A/62/121, page 18.

⁶³ Comments by Sweden, Doc. A/62/121, page 31, para. 2.

⁶⁴ Statement by Switzerland, Doc. A/C.6/62/SR.14, para. 32.

⁶⁵ Comments by Switzerland, Doc. A/62/121/Add.1, page 3, para. 8.

national level, the commonalities of these elements, raised by delegations from different regions and with different political interests, are rather striking. Many of these elements are indeed and indisputably core rules of international law, based on the United Nations Charter, general principles of international law, customary international law and treaty law, and have been reaffirmed by Member States on many occasions, including in the World Summit Outcome and, in a more focused manner, in the General Assembly's two rule of law resolutions discussed above. They have also been referred to by a wide range of states from different regions in the Sixth Committee debates. If a synthesis of these elements were to be made, the list of core elements of the international rule of law, as seen through the lens of the General Assembly, should include:

- The commitment to an international order based on international law, in particular the Charter of the United Nations;
- the duty of all states to refrain from the threat or use of force and the duty of all states to settle their disputes by peaceful means;
- the principles of sovereign equality of all states and of self-determination of peoples;
- the principle of *pacta sunt servanda* and the duty of all states to fulfill their obligations in good faith;
- the principle of the supremacy of international law obligations over domestic law;
- the promotion and protection of human rights and fundamental freedoms.

This would, at first sight, support the notion that an agreed definition of the “international rule of law” would not be impossible to achieve, should the General Assembly decide to embark on such an exercise. After all, the real divisions regarding all of the above-mentioned rules and principles relate to their interpretation and application in practice rather than to the realm of ideas and concepts. Nevertheless, it seems inevitable that a number of disputes currently existing between some Member States that raise questions about the non-selective interpretation and application of international law⁶⁶ would enter the discus-

⁶⁶ In that sense see statement by Viet Nam, Doc. A/C.6/62/SR.14, para. 58.

sion, once the stakes would be raised from a mere debate to an exercise of finding a definition of the rule of law.⁶⁷

Indeed, and rather surprisingly, the first two debates on the rule of law in the Sixth Committee saw remarkably few direct expressions of concrete political grievances, framed as violations of the rule of law.⁶⁸ Instead, political grievances occasionally appeared as subtext of statements, usually evidenced by the choice of rule of law principles mentioned most prominently, such as the principle of non-interference in domestic affairs or the rejection of unilateral measures.⁶⁹ It is quite likely that such political divisions would rather quickly jeopardize any negotiations aimed at defining the “international rule of law”, and even if they were successful, such negotiations would only lead to a catalogue of rules and principles which are beyond dispute and well-known.

The protection of human rights and fundamental freedoms could probably be included in such a definition of the international rule of law, however the emerging rule of the Responsibility to Protect might not stand the test of such a delicate exercise. Similarly, another element which would be difficult to agree upon would be the suggestion that the international rule of law requires “effective remedies”⁷⁰ at the inter-

⁶⁷ The extremely difficult negotiations on what has been phrased the “definition of terrorism” in the context of the Sixth Committee’s work on a draft comprehensive convention on international terrorism are a case in point. For further details on that process see M. Hmoud, “Negotiating the Draft Comprehensive Convention on International Terrorism – Major Bones of Contention”, *Journal of International Criminal Justice* 4 (2006), 1031 et seq. Another example for a negotiation process heavily influenced by major political events and grievances concerns the definition of the crime of aggression as foreseen in article 5 (2) of the Rome Statute of the International Criminal Court. For the current status of that process see the upcoming report of the Special Working Group on the Crime of Aggression, ICC-ASP/6/20/Add.1.

⁶⁸ See e.g. statement by Zimbabwe, Doc. A/C.6/61/SR.7, condemning the detention of prisoners at Guantánamo Bay.

⁶⁹ See e.g. statement by Venezuela, Doc. A/C.6/62/SR.16, para. 18; statement by Cuba (on behalf of the Non-Aligned Movement), Doc. A/C.6/62/SR.14, para. 14; statement by Sudan, Doc. A/C.6/62/SR.14, para. 49; statement by Iran, Doc. A/C.6/62/SR.16, para. 71.

⁷⁰ Comments by Sweden, Doc. A/62/121, page 31, para. 2. Similar suggestions were made by Switzerland, Doc. A/62/121/Add.1, page 3, para. 8, referring to “the possibility for every State to have effective recourse against violations of its rights before an appropriate international institution”; and

national level against violations of international law. The precise scope of such an element would certainly be subject to heated debates, given the reluctance of many states to be subject to international adjudication – an obvious precondition to a system of effective remedies at the international level. This is also reflected in the rather weak language on the ICJ contained in the WSO, which merely calls upon states to “consider accepting” the jurisdiction of the court in accordance with its statute,⁷¹ and which does not refer to the ICJ’s advisory powers at all.⁷²

These few examples make it clear that overall the chances of successfully negotiating a “definition” of the international rule of law, going beyond a limited number of well-established core elements, are rather slim. This is not to say that the scope of the international rule of law should not be discussed, quite to the contrary. However, the fear that an open discussion would be the first step toward a negotiation process has, until now, somewhat restricted the debate in the General Assembly on this important question. This trend will hopefully be reversed in future debates.

2. The Rule of Law and Human Rights within the United Nations

While some core elements of the concept of an “international rule of law” are clearly established and undisputed as far as relations between states are concerned, a number of delegations used the Sixth Committee debates to take the road less traveled, airing their views on what could be called the “rule of law at the institutional level”.⁷³

To a great extent, these interventions focused on the question of the powers and competences of the United Nations’ principal organs, in particular the Security Council, and the balance between the Security Council and the General Assembly. Much of that discussion, however,

by Germany, Doc. A/62/121, page 18, referring to “an effective multilateral system so as to prevent or sanction violations of international law”.

⁷¹ WSO, see note 3, para. 134 (f).

⁷² The absence of any reference to the Court’s advisory functions can to some extent be explained as a reaction to some controversial advisory opinions rendered by the ICJ, in particular *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, 2004 ICJ (9 July 2004).

⁷³ See comments by Austria, Doc. A/62/121, page 6, para. 26; statement by Iran, Doc. A/C.6/62/SR.16, para. 71.

was prompted by concern over the “legislative” and “quasi-judicial”⁷⁴ activities of the Security Council in the area of counter-terrorism and non-proliferation in recent years,⁷⁵ but also by the equally recent phenomenon of thematic Security Council activities, such as debates on “Natural Resources and Conflict”⁷⁶ or “Energy, Security and Climate”⁷⁷ and other thematic work.⁷⁸ Especially states members of the Non-Aligned Movement posited that the Security Council’s “encroachment on the traditional areas of competence of the General Assembly and the Economic and Social Council was a cause for concern”.⁷⁹ This ongoing dispute, however, relates in most of the cases to the nuances of the intended balance of activities between the General Assembly and the Security Council rather than to the legal question whether and to what extent the decision-making of these organs is limited by rules of international law. In this context, respect for the mandates and competences of the various United Nations organs as defined in the Charter was frequently demanded⁸⁰ – in itself certainly not a controversial concept, beyond the concrete political context in which such demands are made.

While it is firmly established that the United Nations as an international organization (and thus its organs) are subject to certain rules of international law, in particular its constituent instrument, the United Nations Charter, as well as customary international law (including *jus*

⁷⁴ See most recently I. Johnston, “Legislation and Adjudication in the UN Security Council: Bringing Down the Deliberative Deficit”, *AJIL* 102 (2008), 275 et seq. See statement by Cuba, Doc. A/C.6/62/SR.15, para. 9.

⁷⁵ Though that was criticized as well, e.g. statement by Cuba, Doc. A/C.6/62/SR.15, para. 9; statement by Iran, Doc. A/C.6/62/SR.16, para. 71.

⁷⁶ Security Council Open Debate on 25 June 2007.

⁷⁷ Security Council Open Debate on 17 April 2007.

⁷⁸ See e.g. statement by Algeria, Doc. A/C.6/61/SR.7, para. 90, criticizing the Security Council’s “frequent recourse to thematic resolutions which were inconsistent with the Council’s chief prerogatives as set forth in the Charter of the United Nations”.

⁷⁹ Statement by Cuba (on behalf of the Non-Aligned Movement), Doc. A/C.6/62/SR.14, para. 14.

⁸⁰ E.g. statement by Sudan, Doc. A/C.6/61/SR.7; statement by Cuba, Doc. A/C.6/61/SR.7, para. 51; statement by Iran, Doc. A/C.6/62/SR.16, para. 71. South Africa suggested to examine the “limits of the powers vested in the Council under Chapter VII”, Doc. A/C.6/61/SR.7, para. 61.

cogens) and general principles of international law,⁸¹ the scope of the rule of law within the United Nations becomes less clear when entering the area of human rights. Simon Chesterman diagnosed “a surprising degree of uncertainty as to whether the organization is bound by, for example, the human rights treaties for which it has been the primary vehicle”.⁸² This question has received increasing attention in the work of delegations at UN Headquarters, in particular in the light of recent internal reform efforts regarding the UN’s internal justice system⁸³, and with respect to the Security Council’s targeted sanctions regimes. Not surprisingly though, these discussions were dominated by policy considerations rather than by an analysis of the extent of the organization’s legal obligations, and could only scratch the surface of this vexing question. In the context of the Sixth Committee debates on the rule of law, the Rio Group suggested that the question of the “subjection of international organizations to the rule of law” should be part of future focused discussions on the “observance of the international rule of law”.⁸⁴

While it was frequently observed in rather general terms that the United Nations organs were also subject to the rule of law,⁸⁵ hardly any statements addressed the question of the precise extent to which United Nations organs are bound by international law *beyond* its Charter. Colombia stated that all organs of the United Nations, without exception, were “subject to the principle of legality and to *jus cogens* norms”.⁸⁶

⁸¹ See P. Sands/ P. Klein, *Bowett’s Law of International Institutions*, 2001, 441 et seq.

⁸² S. Chesterman, *An International Rule of Law?*, NYU Law School, Public Law Research Paper No. 08-11, 27.

⁸³ See on this topic the article by A. Reinisch and C. Knahr in this Focus.

⁸⁴ Statement by the Dominican Republic (on behalf of the Rio Group), Doc. A/C.6/62/SR.14, para. 19.

⁸⁵ E.g. statement by Switzerland, Doc. AC.6/61/SR.7, para. 8; statement by Chile, Doc. A/C.6/62/SR.16, para. 9; statement by Colombia, Doc. A/C.6/62/SR.15, para. 4; statement by Cuba, Doc. A/C.6/62/SR.15, para. 9; statement by Iran, Doc. A/C.6/62/SR.16, para. 71.

⁸⁶ Statement by Colombia, Doc. A/C.6/62/SR.15, para. 4. The Colombian delegation also expressed “serious reservations about the theory of implicit powers, which could weaken the principle of legality and result in ultra vires actions taken by international organizations, one of the more common and sometimes subtle ways of undermining the rule of law”, *ibid*. The Court of First Instance of the European Communities has equally argued that the Security Council was bound by *jus cogens*, see *Yassin Abdullah Kadi v. Council of the European Union and Commission of the European*

Austria commented that “strengthening the rule of law at the institutional level requires that rules are fully respected within and by the United Nations and its organs, as well as other international organizations”. Germany submitted that the rule of law entails the “obligation of international organizations to act – internally and in their relations vis-à-vis Member States and the international community – in accordance with, and showing full respect for, international law”.⁸⁷

Such statements hint at, but do not clearly answer the question to what extent United Nations organs are bound by rules of international law beyond the Charter. Further clarifying interventions could have been expected in the context of the reform process of the United Nations’ internal administration of justice, which is driven by Member States’ desire to provide UN staff with a system of justice that lives up to the standards of international human rights. In that process, however, no clear statements have been made to the effect that the internal justice system should be improved in order to abide by an international legal obligation, rather than as a matter of good policy and moral consistency.⁸⁸

In the context of ongoing discussions⁸⁹ about the Security Council’s sanctions listing practice, some Member States have been slightly more outspoken in arguing that the Security Council needs to respect human rights.⁹⁰ Once again, however, these statements do not clearly establish that United Nations organs such as the Security Council should respect human rights as a matter of an international legal obligation,⁹¹ despite

Communities, Case T-315/01, *OJ* (2002), C 56/16 et seq. See in this respect also the article of M. Kanetake in this Volume, pages 152 et seq.

⁸⁷ Comments by Germany, Doc. A/62/121, page 19, para. 3.

⁸⁸ In the words of the Secretary-General, the United Nations should “practice what it preaches”, see Doc. A/61/758, para. 5 (b). See also statement by Chile, Doc. A/C.6/62/SR.16, para. 8.

⁸⁹ This discussion took place largely outside the framework of the Sixth Committee’s work on the rule of law, though some states did refer to this question in the context of the rule of law debate, see statement by Pakistan, Doc. A/C.6/61/SR.6, para. 99; comments submitted by Austria, Doc. A/62/121, page 7, para. 29.

⁹⁰ Such as the right to be informed, the right to be heard, the right to review and an effective remedy; see the Secretary-General’s Letter on this topic reflected in Doc. S/PV.5474, page 5.

⁹¹ See for example a discussion paper on this topic submitted to the Security Council by Denmark, Germany, Liechtenstein, the Netherlands, Sweden and Switzerland, Doc. A/62/891-S/2008/428, which argues mainly on the

some Member States being mindful of the very question.⁹² It seems that the General Assembly's future work on the rule of law could benefit from a thorough debate of this question. The Sixth Committee debates on *The Rule of Law at the National and International Levels* would be the logical forum.

IV. Conclusion

Over the last few years, the General Assembly has re-established itself as a key forum for an international policy debate on the rule of law, as well as for concrete initiatives aimed at strengthening the United Nations' performance in that area. In this respect, the General Assembly has now caught up with the Security Council, which seems to have passed its peak in its thematic work on the rule of law.

At the same time, the General Assembly is only at the beginning of a more concerted effort to discuss and promote the rule of law, and many delegations are still grappling with the large dimension of this undertaking, which is underscored by the massive amount of information contained in the Secretary-General's inventory on rule of law activities.

Nevertheless, the General Assembly has given new impetus to this work and its institutional position in the United Nations. With the new agenda item *The Rule of Law at the National and International Levels*, the General Assembly now has a permanent procedural anchor for further policy discussions and initiatives. There should be no illusions as to how difficult it would be to make further progress on the concept of the Responsibility to Protect, or on agreeing on a definition of the rule of law or some of its sub-sets, such as the international rule of law or the rule of law at the institutional level.

At the same time, the General Assembly remains the one forum of universal membership that bestows unique legitimacy on policy debates and their outcomes. It is therefore hoped that more and more Member States will consider these debates as an opportunity rather than a risk and not shy away from addressing sometimes difficult legal concepts. With the right amount of courage and engagement from delegations, the

basis of the World Summit Outcome's commitment to ensure "fair and clear procedures" for sanctions listings (see Doc. A/60/1, para. 109), rather than on international human rights law.

⁹² See statement by Liechtenstein in the Security Council Open Debate of 22 June 2006, Doc. S/PV.5474 (Resumption 1), page 9.

General Assembly still has much to contribute to the promotion of the rule of law worldwide.