International Law and the Rule of Law under Extreme Conditions

Edited by
THOMAS EGER, STEFAN OETER,
and STEFAN VOIGT

Mohr Siebeck

International Law and the Rule of Law under Extreme Conditions

An Economic Perspective

Contributions to the XIVth Travemünde Symposium
on the Economic Analysis of Law
(March 27–29, 2014)

Edited by

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Preface

While the previous 2012 Travemünde Symposium had already treated the economic analysis of international law, the XIVth Travemünde Symposium on Law and Economics, which took place on 27–29 March 2014, was devoted to "International law and the rule of law under extreme conditions" and featured strong participation of colleagues from Haifa Law School.

The choice of topics owes, on the one hand to the Hamburg focus on the economic analysis of international law, as expressed in the continuation for a second phase of the DFG-funded Graduate School (Graduiertenkolleg) on the "Economics of the Internationalization of the Law". The special focus of the XIVth Travemünde Symposium, however, drives from another linkage. Since 2012, several members of the Hamburg Law Faculty, i.a. the two current speakers of the DFG-Graduiertenkolleg, have been involved as PIs in the Minerva Center on the Rule of Law under Extreme Conditions run by our colleagues at Haifa University. The Center is dedicated to a cluster of extremely important and interesting questions at the interface of international law, comparative law and social sciences that arise as a consequence of natural and man-made disasters. These disasters, such as earthquakes, floods, large fires, drought, pandemics, but also war, terrorism, or a meltdown of the financial system place the legal order, and in particular the rule of law, under severe stress. Legal orders react to such challenges in various ways. Some try to juridify such extreme conditions by providing in advance stringent rules on how to handle emergency situations. Others start from the assumption that it is impossible to regulate emergencies in advance and instead trust the existing institutions to adequately deal with emergencies. The scope of extreme conditions and their degree of foreseeability also differ widely. Some types of disaster occur more or less regularly under specific geographic conditions; this enables societies to develop best responses and to establish certain kinds of emergency rules in the ordinary set-up of the legal order. Other cases, like the outbreak of war, are rare occurrences in most societies, but are provided for to a certain degree in national constitutions. Yet other emergencies may not be foreseeable at all – which means that the legal order either needs a very broad and sweeping general regime of emergency or must leave its institutions some leeway to cope with such extreme conditions ad hoc.

The 2014 Travemünde Symposium was intended to map the ongoing debate on these questions from a law and economics perspective, with a deliberate mix of lawyers and economists dealing jointly with various aspects

of the broad range of questions raised within the topic at hand. In some cases, it was possible to pair lawyers and economists, producing an interesting complementarity of perspectives; in other cases, lawyers critically commented on contributions by other legal academics or economists reviewed the papers of other economists. In general, the exercise proved to be very fruitful, yielding a huge variety of different perspectives on the economics of the rule of law under extreme conditions. The extreme conditions discussed in the contributions can be roughly grouped in three categories – natural disasters, armed conflicts and other types of violent threats to societal security, and economic meltdowns. This volume is structured according to these three clusters

The first contribution by Eli Salzberger entitled *The Rule of Law under Extreme Conditions and International Law: Introductory Notes* presents a survey of the research field surveyed by this volume, and it provides a comprehensive introduction to the cluster of problems that research on the rule of law under extreme conditions has to cope with. Eli Salzberger distinguishes three types of extreme conditions that have been discussed by the literature: (1) belligerency, war, terror and the like; (2) natural and man-made disasters; and (3) political or economic meltdowns. These different types of extreme conditions differ widely with respect to the way in which they affect the rule of law. The contribution sketches the research agenda and presents some preliminary thoughts on the different phenomena of extreme conditions. Even more importantly, though, it offers insights on the theoretical framework required to deal with the changes and adaptations to the rule of law when extreme conditions place the ordinary working of the state and the legal order under stress. The paper first explores the concept of the rule of law, starting with the traditional concept of the rule of law in the context of the state, but then mapping what rule of law might mean in the international arena and how this 'international rule of law' might be affected by the various types of extreme condition. Next, the paper elaborates on the philosophical foundations of the theory of the state, with a particular emphasis on economic theory and its philosophical foundations. This mapping of the state of the art of the theoretical discourse first deals with the foundations of the (economic) theory of the state and then with two aspects of implementing such theory – the aspects of representative democracy and the structure of government, with an emphasis on the separation of power. Concluding the theoretical section, the paper tentatively explores what these foundations might imply for the rule of law in the international arena (and in international law). A third section of the paper discusses how the various forms of extreme conditions might affect the rule of law. For this purpose, the paper first looks at the complex relationship between national and international law. In a second step, a possible concept of the rule of law and its relationship with extreme conditions is developed. In a third step, a law

and economics approach comes into play and a methodological note explores what economic analysis might contribute to the debate on the rule of law and extreme conditions. This part includes a short overview of the models proposed in the literature, distinguishing 'ex ante models', 'during models' and 'ex post models'. In a short conclusion of this introduction, Eli Salzberger stresses that the paper offers neither a coherent model or theory, nor specific policy recommendations. Instead, it attempts to map the general (theoretical) issues of the topic that merit further research and discussion, and to point to some research lacunae deserving further discussion.

The following papers are organized in sections that explore the different types of extreme conditions in a more specific perspective. First, there is a series of contributions on natural disasters. The second paper of the volume, by Hans-Joachim Heintze, deals with *Sovereignty and the "Protection of Persons in the Event of Disasters".* At the outset, this is a piece of classical international law research. The contribution maps the normative frame for international disaster relief operations. Following disasters, states are often reluctant to admit other states or international organizations willing to provide much needed disaster relief. Sovereignty thus often stands in the way of adequate humanitarian assistance, with a subsequent debate as to whether humanitarian needs might override concerns of sovereignty. This normative debate – which is mapped in this paper – has already persisted for a long time. The work of the International Law Commission (ILC) on this topic constitute an important normative starting point for the current legal debate. Heintze further explores the current challenge to the concept of 'sovereignty' and the ensuing politicization of the debate on humanitarian assistance. He also describes current state and UN practice in this regard. The debate leads to the proclamation of a 'right to humanitarian assistance' deduced from human rights. A link to the current development towards a 'Responsibility to Protect'(R2P) further strengthens such normative claims – and even the ILC, a very traditional body with a strong state-focus, cannot altogether reject such normative claims, as the paper demonstrates. For the purpose of such demonstration, Heintze reconstructs in some detail the state of the debate in the ILC on the draft articles protection of persons in the event of disasters. Commenting on this from an economist's perspective, Wolfgang Weigel raises a number of critical questions. An outsider's perspective reveals a plethora of legal distinctions built into any legal attempt to deal with disaster response – legal distinctions arguing for a right to humanitarian assistance in some situations, but excluding it in others. An economic analysis perspective raises question of various kinds. These questions are briefly sketched, but to answer them is beyond the scope of a short comment.

In a third paper, Peter Lewisch deals with *International Catastrophes – An Obligation to Cooperate?* Its starting-point is the discussion on a potential 'obligation to cooperate' in the case of disasters. Such an obligation might

take either of two distinct forms – as an obligation of the state in need to accept or even seek external relief and as an obligation for third parties to offer their assistance. From an economic perspective, the paper discusses whether such an obligation makes sense and what shape would render it most useful. The first substantial part of the paper presents an analytical approach to disaster relief, with a particular focus on issues of "assumed consent", external effects, principal-agent-relationships and a look at the potential obligation to actively provide assistance. Next, the paper gives an overview of the general international law framework dealing with these questions. A third core part explores the ILC draft articles on the topic from an economic analysis perspective. The comment by Matthias Lemke sheds additional light on two basic questions raised by Peter Lewisch – what do we know about the reasons why the law is as it is, and what issues still need to be addressed in further research.

Hans-Heinrich Trute's contribution on *How to Deal with Pandemics* is, in a broader sense, also devoted to forms of natural disaster. Pandemics constitute a very specific kind of extreme condition. Societies and states have been plagued with this challenge since time immemorial, and the law has long since started to address the issue. By way of introduction, Hans-Heinrich Trute provides a sketch of the long tradition of international health law and briefly deals with the question of what constitutes a pandemic. He subsequently focuses on the importance of knowledge, of institutions dealing with pandemics (and the challenge of how to create the necessary knowledge) and with the ensuing needs of international cooperation. The importance of knowledge first finds its expression in the institutionalization of a surveillance scheme, initially at the national level, but soon also at the international level. The paper traces the genesis of the surveillance schemes, while stressing that uncertainty remains a part of the scheme, and sheds some light on the gross inequalities among the schemes, with a huge gap existing between developing and developed countries. The paper then analyses the legal design of the administrative network that ensures international surveillance and international cooperation. At the core of this network, as a kind of central node, is the World Health Organization (WHO). Its 'International Health Regulations' constitute the basic legal framework of international health law on precautionary measures, surveillance and cooperation in combating pandemics. The paper also explores the complementary establishment of a public health network and its structure. As an exemplary case, the papers deals in some detail with the 'Pandemic Influenza Preparedness Framework' and the 'Global Influenza Surveillance Network', including the benefit sharing system that is characteristic of the framework. Also the governance aspects of the complex system of international health law are briefly elucidated. The measures described in the paper comprise not only pharmaceutical measures (anti-virals and vaccines),

but also non-pharmaceutical measures, such as transport restrictions and quarantines. In two further sections, the paper explains the institutionalized response to pandemics at the European dimension and at the national level (with the German set-up as a paradigmatic example). The paper concludes that while some classical rule of law issues are involved, such as restrictions of individual rights in immediate emergencies, most of international health law takes place outside of a frame usually associated with the rule of law. Hard measures are rarely taken in practice. Andreas Nicklisch comments on these findings from an economist's perspective, with a particular focus on the underlying social dilemma, the means to stimulate cooperation, and possible sanctions.

A second cluster of papers is devoted to man-made disasters linked with armed violence, i.e. civil wars, wars and terrorism. The first of them, by Thilo Marauhn, deals with *An Analysis of International Law Applicable to the Use of Drones*. This is a classical legal paper. It first contextualizes the problem, by looking to the public debate on drones and the challenges politics is confronted with. A second contextualization draws on the terminological setting of drones in the framework of public international law, concluding that drones (as aerial vehicles) are not addressed as such by international law. The law only deals with the use of drones. Under the human rights perspective taken in a first step, the use of armed drones can only be perceived as a measure of emergency, with the implicit assumption of a derogation from rules designed for 'normal times'. A deeper look at the structure of international law corroborates this. In situations of armed conflict – be they of an international or a domestic character – the use of drones may be perfectly legal – but armed conflict definitely is a special kind of emergency that departs from assumptions of 'normalcy'. The paper analyses the special legal disciplines that the law of armed conflict creates for the use of drones, and ends with a view on the use of drones outside armed conflicts – a situation where human rights fully apply and where ´targeted killings´ operated by drones can hardly be justified. The comment by Amnon Reichman explores the various externalities caused by the use of drones and the potential institutional reactions to these externalities. As Reichman puts it, drones not only constitute a technical innovation, but may also serve as a catalyst for innovative legal institutions necessary to address the concerns raised by the systems that drones are a part of.

Heike Krieger in her paper makes an attempt at *Conceptualising Cyberwar: Changing the Law by Imagining Extreme Conditions?* At the outset, she ascertains a trend towards 'securitisation' of the risks from cyberspace. The political and academic discourse increasingly focuses, she states, on a military perception of the risks and threats emanating from cyberspace. To illustrate this finding, she first sketches the paradigm change in security policy and the ensuing need to "hype cyberwar". Then she depicts

the impact of this paradigm change on the legal discourse on the use of force. A mapping of the current academic discourse on 'cyberwar' and the use of force reveals increasing interpretative insecurities and a temptation to expand the scope of legitimate countermeasures using armed force, despite a significant problem of attribution that poses a structural challenge in terms of state responsibility. Next, Heike Krieger maps the impact of the 'cyberwar' paradigm on the human rights discourse. In a concluding section, she explores a possible route to escape the traps raised by the issue. In a comment again drafted from an economist's perspective, Jerg Gutmann explores whether 'cyberwar' is really different from other extreme conditions resulting from the use of armed force. The comment provides some hints as to how this question might be tackled.

Terrorism constitutes another severe challenge to modern societies that may be described in terms of extreme conditions. Using economic methodology, the paper by Tim Krieger and Daniel Meierrieks on *How to Deal with International Terrorism* develops some new perspectives on the struggle against terrorism. The authors argue that policy-makers face an enormous challenge when trying to develop sound strategies for fighting terrorist activities. Unfortunately, there is a lack of a universal strategy to counter terrorism, which the authors link, on the one hand, to the diverse and clandestine nature of terrorist groups and, on the other hand, to policy-makers' misperceptions, lack of precise knowledge, and divergent interests and prioritization. The paper then attempts a systematic overview on how to deal with (international) terrorism, assuming a law and economics perspective. At the core of this attempt is an exercise in modeling international terrorism from a rational-choice approach. In a second step, the paper analyses the implication of modeling the rationality of terrorism for counter-terrorism policies, including the question of international policy coordination. The authors also examine how the rule of law – both nationally and internationally (i.e., in terms of international law) – interacts with international terrorism and how it can be preserved under the extreme conditions of terrorism, in particular by raising the costs to terrorists and by improving the environment in terrorism-exporting countries. The comment by Stefan Oeter develops a complementary perspective from a legal point of view, focusing on the definition of terrorism and the difficulties in modeling the ´rationality´ of terrorist actors, on the modes of reaction of states which traditionally prioritized criminal justice and international cooperation in police and justice matters. It is open to debate whether the strong trend towards military answers really offers a better strategy to cope with the strange logic of terrorism.

The challenge of humanitarian interventions and its current successor concept, the 'responsibility to protect' (R2P), are at the focus of the contribution by Martina Caroni, entitled *Legitimate, but Illegal? – From*

Humanitarian Intervention to Responsibility to Protect and Beyond. Starting from the sovereignty-oriented concepts of the era of classical international law, Martina Caroni then describes the transition to modern international law, whose new focus on the rights of individuals logically lead to a heated debate on a right to humanitarian intervention, exercised even without Chapter VII authorization in a unilateral mode. Such an attempt to justify interventionism was gravely attacked by adherents of classical, state-centered concepts. The development towards the paradigm of 'responsibility to protect' tried to escape the futile discussions of the late cold war debate and the academic as well as political quarrels of the 1990s. The 1999 NATO intervention in Kosovo had finally demonstrated that the proclaimed right to (unilateral) humanitarian intervention still met strong resistance by a large majority of states in the world. Thus it seemed wise to concentrate more on the positive duties of states to protect their citizens, with only a subsidiary role for third states. Subsequently, the paper depicts the further developments towards consolidating the R2P concept and its current legal and political status. The final section looks into the recent cases where Security Council practice referred to R2P, and it notes the potential of abuse that has become visible in the Libya case, before summing up the findings of the paper. This primarily legal paper is complemented by Gadi Barzilai's comment on the politics of R2P and its inherent limitations. The comments assume a rather skeptical stance, stressing the neocolonial temptations of a radicalized R2P doctrine. In particular cases like Afghanistan, Iraq and Libya show that foreign interventions resulting in regime change must be accompanied by stringent plans of economic and political reconstruction – otherwise intervention all too easily transforms into a recipe for mere destruction and polit

The last set of contributions is devoted to phenomena of economic meltdowns, and is opened by Roland Vaubel's analysis of *The Breakdown of the Rule of Law in the Euro-Crisis: Implications for the Reform of the Court of Justice of the European Union*. The author commences with a narrative of the Euro crisis, the reaction of Eurozone states attempting to rescue the Euro, and the bailout of the crisis countries required to achieve stabilization. The bailout is portrayed, in accordance with the position assumed by a number of German legal scholars, as a blatant violation of the EU Treaty (and thus as a symptom of the breakdown of European rule of law). Subsequently, the paper concentrates on the role of the European Central Bank (ECB) in the endeavors of macroeconomic policy coordination. Particular emphasis is laid on the ECB's purchase of government bonds and its new competences in the supervision of euro-zone banks of systemic importance. The paper laments the lack of transparency at the ECB and qualifies the policies chosen as drivers of the final breakdown of the rule of law in the EU. The underlying cause of concern is the unwillingness of the European Court of Justice to defend what the author regards as stringent demands of the rule of law.

Consequently, he devotes the second part of the chapter to the question of how to reform the ECJ in order to prevent any collusion of the European judiciary in eroding the rule of law. Diagnosing the status quo of the ECJ's role, Vaubel finds a deep-rooted centralizing bias of the Court that prevents it from seriously controlling the ECB. His final reform proposals concern the question how this centralizing bias might be countered in institutional terms, namely by several rather drastic institutional reforms.

The two comments, both by lawyers (Martin Nettesheim and Michael Fehling), very critically deal with the legal assumptions and arguments of Vaubel's paper. Some of its underlying assumptions are far from self-evident, as Michael Fehling in particular points out. It is more than doubtful, to mention a decisive example, whether the reading of the 'no-bailout-clause' of Art. 125 TFEU as an outright prohibition of bailouts really makes sense in legal terms. Many interpretive arguments speak against such a conclusion. But if the diagnosis of a breakdown of the rule of law is based on one-sided, if not partisan readings of EU law, the stated deficiency indicates a gap between the interpretations chosen and the institutional practice, rather than a systemic breakdown of the rule of law. It then remains open to doubt whether the proposed structural institutional reforms to the ECJ make sense at all, given that they respond to a diagnosis which reflects more the author's preferences in interpretation than a fair picture of the state of law in itself. Both comments converge in their critique – namely that the accusations of illegality (and breakdown of the rule of law) are reached in a rather light-handed manner, without serious investigations into the interpretation of the legal norms at stake, and that the ECJ's propagated 'centralizing bias' is a construct open to debate. Both commentators also decidedly criticize the reform proposals developed in the paper.

The last paper of the volume, authored by August Reinisch, discusses the issue of *Rules for an Orderly Insolvency of States?* It revisits the ongoing debate on an insolvency mechanism for over-indebted states – an issue that has raised quite some interest over the last decades but yielded no result in international legal practice. August Reinisch investigates the reasons for such failure. To do that, he must explore the mechanisms by which states and commercial creditors deal with cases of de facto insolvency of states. A closer look at the institutional interests of the actors involved helps to explain why they tend to ignore the problem, taking refuge in (sub-optimal) surrogate strategies. Enforcement action remains a real option, thus putting severe pressure on insolvent states – with a strong preference in institutional practice for negotiated solutions. The lack of an orderly mechanism for insolvency, however, opens possibilities for hold-up situations and threatens negotiated solutions with the constant peril of breakdown. Thus, there is a strong rationale for an orderly sovereign insolvency procedure. August Reinisch also indicates the basic traits of the preferred treaty solution, with built-in

protection for the fulfilment of core tasks of the insolvent state, a reduction of the outstanding debt burden, equal treatment of creditors (which is so far lacking), and a legally binding effect of the treaty solution. The paper convincingly argues that such a treaty solution is needed to achieve an economically efficient solution to state insolvencies. A brief comment by Hans-Bernd Schäfer accompanies the paper of August Reinisch. The comment addresses two additional questions, namely whether collective action clauses in loan agreements can substitute for a sovereign insolvency procedure, and secondly the gradual emergence of a structured bankruptcy procedure in the Euro zone as a result of the rescue measures taken.

The papers collected in the volume demonstrate the value added of an intense dialogue of legal scholars and economists on such intricate legal issues as the rule of law under extreme conditions. Many of the questions addressed in the volume cannot be understood without recourse to economic models, and in other areas, a complementary economic analysis perspective at least helps to better explore the issues at stake, to understand the incentive structures underlying the legal framework and to improve the legal solutions chosen in response to the problems. The necessary dialogue across the boundaries of disciplines is not always easy, and does not always succeed, even in this volume – but more often than not, the dialogue between legal scholars and economists does prove to be thought-provoking and to facilitate a common understanding of the problems.

The organization of such a symposium requires the help of many. First of all, the organizers would like to thank the German Research Foundation (DFG) for supporting the conference financially. We also wish to thank Christiane Ney-Schönig for much preparatory work required to make the conference a success; Kevin Dünisch, Marek Endrich, Felix Hadwiger, Bulbul Khaitan, Mariia Parubets, Katharina Pfaff, Ines Reith, Agnes Strauß and Junjie Zheng, who summarized the discussions; and, last but not least, Henning Grell, Sönke Häseler, Christina Junker and Stephan Wittig for their invaluable help in formatting the volume. Finally, we are truly grateful for the – as usual – excellent cooperation with Stephanie Warnke-De Nobili and Bettina Gade of Mohr Siebeck publishers and all their assistance in the publication of this book.

Thomas Eger Stefan Oeter Stefan Voigt

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The Rule of Law Under Extreme Conditions and International Law: Introductory Notes

by

Eli M. Salzberger

The 'rule of law' has attracted a lot of scholarly writing as well as political and public rhetoric in recent years. On the one hand, scholars found that adherence to the rule of law can be regarded as the most significant explanatory factor for various measures of a country's success, both in the social – quality of life – realm and in the pure economic realm (e.g. *Ballesteros* 2008; *Haggard* 2010).[1] Hence the growing popular calls to enhance the rule of law, which seem even to substitute, at least partially, the calls for democratization.[2] On the other hand, various governments' responses to terror threats since 9/11, including those of established liberal democracies, brought about a surge in positive and normative writings as well as public debates about the rule of law under extreme conditions (e.g. *Gross and Aolain* 2006; *Johnsen* 2012; *Addicott* 2012) or the deviations from the rule of law, even by the most liberal democracies. However, the international law aspects of the rule of law under extreme conditions constitute a field that has received very little attention yet, and in this respect, the conference held in Travemünde on March 2014 is a pioneering one, as is the present volume of the papers presented there.

Discussing the rule of law under extreme conditions in the international arena from a Law and Economics perspective raises several challenges. First, although the concept of the rule of law as an ingredient of the 'good' state is established (though there is no agreement on its precise definition), the basic definition of the rule of law in the international arena is a much more virgin field (*Deller et al.* 2003; *Chesterman* 2008; *Nollkaemper* 2011). Most of the writings about the rule of law (both normative and positive) relate to the state

[1] Already 70 years ago, *Hayek* (1944) provided a theoretical explanation of the importance of the rule of law to economic success.

[2] One of the more significant examples is the adoption of a resolution to promote the rule of law by the UN as one of its prime goals in post-conflict societies, through both the activities of peace-keeping forces and of the UN Development Program. See the UN Secretary General's report "Rule of law and transitional justice in conflict and post-conflict societies" (2004). For other UN actions in this realm, see www.un.org/en/ruleoflaw.

(the theory or practice of states). The mere concept of the rule of law in the international arena or in international law is vague and requires attention. Second, extreme conditions may challenge the normative and positive analysis of the rule of law (*Criddle and Fox-Decent* 2012). The theory of the state, from which we derive the common understanding of the principle of the rule of law, deals with the regular operation of collective life, institutions and decision-making. Under extreme conditions, most countries establish a different form of the rule of law (an emergency constitution, as phrased by some), compromising some of its essentials during regular times (*Zwitter* 2013). It can be argued on the normative level that this is justifiable; but to what extent and in which format? There is no coherent paradigm yet for the analysis of the desirable as well as the de-facto rule of law "balance" (e.g. state security versus human rights) under extreme conditions.

The third major challenge relates to the definition of those extreme conditions that merit a special look vis-à-vis the rule of law. Three types of extreme conditions have been discussed by the literature: (1) belligerency, war, terror and alike; (2) natural and man-made disasters; and (3) political or economic meltdowns. Are extreme conditions in the international arena identical to extreme conditions in the context of the state? Is the familiar distinction between the three types of extreme conditions referred to in the context of the state applicable to the international sphere?

I will try to contribute a few preliminary thoughts about each of these challenges, highlighting the perspective of Law and Economics. Section 1 will explore the concept of the rule of law in the international arena and in international law; Section 2 will elaborate on the economic philosophical foundations of the theory of the state and will examine their applicability to the international sphere and to extreme conditions; Section 3 will focus on the characterization of extreme conditions vis-à-vis the rule of law, including a short overview of the models put forward in the literature and also some methodological remarks for those who engage in a Law and Economics approach towards this topic.

A. The Rule of Law in International Law, or the Rule of Law in the International Arena

I. The rule of law in the context of the state

Although the idea of the rule of law has ancient roots (*Tamahana* 2004; *Black* 2009), it emerged as a distinct political idea in the 16th century and has become a key component in modern social contract political philosophy or the modern theory of the state shaped during the Enlightenment (*Chesterman*

2008; *Gosalbo-Bono* 2010) and practiced today.[3] The rule of law denotes that every member of the polity is subject to the law and hence it negates the idea that rulers are above the law (such as expressed by the theory of divine right, which was the basis of political theory before the Enlightenment). The rule of law also means governing by laws, as opposed to ruling case-by-case, a practice that can lead to arbitrary rules (*Grimm* 2014). It also implies that all citizens are equal, as they are all subject to the same law and its uniform enforcement (*Raz* 1977; *Fallon* 1997).

The rule of law comprises two layers: formal and substantive (*Craig* 1997). The formal layer means that, on the one hand, individuals are free to pursue any activity they wish save those activities explicitly prohibited by law, and on the other hand, that governments and other authorities (and one can extend this to any unnatural legal person, such as corporations) are not entitled to pursue any activity save those that they are explicitly permitted to undertake by law.

Substantiation of this formal layer means that governments and other officials cannot prevent or sanction individuals' actions, save when they have violated the law, and, likewise, governments and other officials can only use the powers explicitly granted to them by law. Thus, prerogative powers, for example, which rulers assume in the course of extreme conditions, violate the rule of law unless explicitly provided for in the constitution or by some other form of legal empowerment (and this in turn negates the definition of prerogative powers). An implicit condition for achieving the formal layer of the rule of law is equal enforcement of the law. Similarly, to achieve the formal layer, laws must be publicly declared and publicized, with their prospective application, and they must possess the characteristics of generality, equality, and certainty (*Fuller* 1969; *Zimmerman* 2007). This means that there should be a clear identification of the law-making authorities, although democratic election of the legislature is not a condition for the formal facet of the rule of law. In other words, formally, states that do not hold elections for the legislature or for the executive can still maintain the formal facet of the rule of law. What seems to be a structural condition for substantiating the formal facet of the rule of law is the establishment and operation of independent and efficient enforcement agencies, primarily prosecution agencies and courts (*Raz* 1979), without which equal enforcement of the law would not be achieved.

On the theoretical level, corruption is an antithesis to the rule of law, as it means unequal enforcement of the law as well as officials' conduct outside the powers granted to them (*Uslaner* 2010). This can in turn shed light on the

[3] The term "rule of law" and its first modern legal definition were coined by the English constitutional scholar A.V. Dicey in his book *An Introduction to the Study of the Law of the Constitution* (1889).

correlation between the rule of law as defined above and economic success. Governing by clear laws, prospective and equally enforced without corruption, enhances certainty in terms of the ability to plan ahead according to the law and to rely on its precise and equal enforcement. Certainty is crucial for internal and external investment and thus instrumental for economic development and progress. This last insight can also explain why it is in the interest of rational rulers, regardless of whether they are bound by popular will, to maintain the rule of law, and it also transforms the normative analysis of the rule of law into a positive analysis.

However, laws can impose far-reaching prohibitions on individuals, as well as endowing state authorities with extensive powers, all of this in full compliance with the formal facet of the rule of law. To prevent this, the substantive facet has to be incorporated. It denotes substantive limits to prohibitions on individual conduct and to the empowerment of state authorities or officials. While the formal facet of the rule of law only requires that prohibitions on individuals or the empowerment of government be anchored in a prospective, general, clear and equally enforced law, the substantive facet requires that such prohibitions or empowerment does not violate various content-based values. One such substantive limit is a concept of individual rights, which constrains prohibitions on individuals as well as the extensive empowerment of the government. Another constrain is the doctrine of separation of powers, which may (by law) limit the delegation of powers from the legislature to the executive or other officials (*Zimmerman* 2011).

A common mechanism to achieve the substantive facet of the rule of law is judicial review of legislation. Most constitutions include a structural part, which allocates powers to various state authorities, and a substantive part in the form of a bill of rights. Both parts constrain the legislature (and other state powers). The establishment of an effective and impartial enforcement mechanism is a crucial condition for realizing the substantive facet of the rule of law. In many countries, this role is assigned to courts – either a special constitutional court, as in most Civil Law countries (*Perez- Perdomo* 2007), or the general courts, as in most Common Law countries (*Gleeson* 2001). The independence (especially from the other branches of government), trustworthiness and quality of courts are, therefore, essential preconditions for the substantive layer of the rule of law.

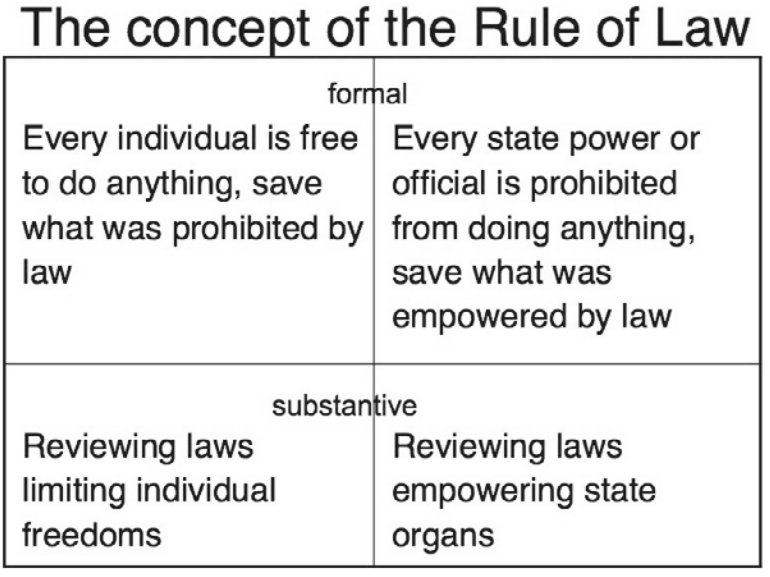

Figure 1: The Rule of Law

II. The rule of law in the international arena

As can be seen from the discussion above, we usually talk about the rule of law in the context of the state or the theory of the state. What does the rule of law mean in the international arena or in international law?

In the recent decade, the rule of law has become a hot topic also in the international arena or in international law (*Kanetake* 2012).[4] Three distinct realms can be identified in this discussion: 1) how international law, collective action and institutions can promote the rule of law in the context of states; 2) what are the relations between international law and national law with respect to the rule of law (monism vs. dualism is part of this realm); and 3) promoting (some will argue constructing) the principle of the rule of law in the international arena itself, or in international law. In what follows, I will focus on the third realm and more specifically on the questions: What does the rule of law mean in international governance or in international law, and can we characterize the international governance system as adhering to the principles of the rule of law?

[4] The UN in 2005 recognized the rule of law as one of its universal and indivisible core values and principles. See UN (2005, para 119).

Dating to the mid-19th century, international law is a very young field of law in relation to other fields (*Anghie* 2005). The major body of international law was developed even later, only in the second half of the 20th century, following the devastation of the two world wars. International law can be seen as comprising two major types of norms. The first category includes norms governing the interaction between states, imposing duties and establishing rights among them. The states are the principle subjects of these norms, their obligations are towards other states, and enforcement or actions are performed on the inter-state level. Examples include international trade treaties, but also some norms that belong to the origins of international law – *jus ad bellum* – i.e. norms that govern the justifications for using force externally or engaging in war.

A second category of international law, which has been developed primarily after WW2, consists of norms that limit states' internal actions or indeed their internal laws by requiring minimum substantive standards regarding human, political and social rights. Like those in the first category, some of these norms are only enforceable between states, but others can also be enforced directly on individuals (and state officials). While *jus ad bellum* regulates the legitimacy and legality of states taking action against other states, *jus in bello* – humanitarian international law – requires states to regulate the behavior of their soldiers during armed conflicts. These norms apply directly to the relevant soldiers or other officials, and their violation can entail legal proceedings against the infringing individuals. The same also applies to the various treaties and customary law requiring the safeguarding of various human, political and social rights, not only in the context of war. These norms address individuals within the jurisdiction of a state.

Traditionally, enforcement of both types of norms has been solely in the hands of international organizations, states or governments, rather than in the hands of individuals (the victims of a violation of international law norms could not have approached international courts), which can explain the fact that the dichotomy between the two types of international law norms that I offered is unconventional. However, in recent decades, international law has been developing towards encompassing duties of individuals, subjecting them directly to judicial enforcement, such as the jurisdiction of the International Criminal Court, and in the future it will possibly enable individuals to approach various means of enforcement and international tribunals directly.

In the past, national sovereignty was one of the core principles of international law (*Hunter* 1998). The applicability of International law norms and enforcement was contingent on the consent of the relevant state. A nation's power within its territory was considered exclusive and absolute. The principle of national sovereignty, however, stands in conflict with the second type of international law norms, which impose duties on governments and officials towards their citizens and others affected by their actions. The

enactment of various international law norms of the second type, alongside developments on the ground, such as NATO's bombing of Yugoslavia, Great Britain's denial of General Pinochet's immunity claims, conditional bailouts by the International Monetary Fund (IMF), and the United Nations' occupation of East Timor, seem to confirm UN Secretary General Kofi Annan's (1999) assertion that "state sovereignty, in its most basic sense, is being redefined [...]".

The principle of national sovereignty is directly connected to the meaning of the rule of law in international law and in the international arena. According to the traditional concept, which regards national sovereignty as the bedrock of international law, the formal facet of the rule of law should mean that, on the one hand, every state is free to engage in any activity save those activities which were explicitly prohibited by international law, and on the other hand, the international community, organs and officials are prohibited from engaging in any activity save those which international law explicitly entitles them to. The substantive facet of the rule of law will mean reviewing the prohibitions on states and the empowerment of international organizations and officials against substantive criteria, such as the principle of state sovereignty.

If we consign the individual as the core subject of the rule of law in international law, as I think ought to be done (in light of the actual developments in international law, alongside the development in the theory of international governance), the meaning of the rule of law in this realm changes considerably. On the formal layer, international law must ensure that individual freedoms and rights are not violated, save by explicit laws. Even if such laws exist, the substantive layer has to examine the compatibility of these laws with various requirements, such as minimal standards of human, political and social rights specified in various international law norms. Likewise, international law has to ensure that international as well as national authorities do not transgress the powers granted to them by law, and such laws have to be examined through the lenses of the substantive layer of the rule of law, including the norms of international law (*Criddle* 2012).

Obviously, the two proposed meanings of the rule of law in international law or in the international arena will have significant consequences on the positive and normative analysis of the rule of law under extreme conditions in international law or in the international arena. A separate question is to what degree the current structure and practices of international governance and law adhere to the principle of the rule of law. I am afraid that the answer to this question is "not much", even regarding merely the formal level of the rule of law. While international law does contain norms that are general, publicly declared, and have a prospective application, they are not effectively enforced and, more importantly, they are not equally and impartially applied. The crucial deficiency regarding equal enforcement is already apparent in the

stage of deciding whether to take a state or an individual to court in the first place. There are no enforcement and prosecution institutions or individuals who operate independently (especially independently of the government they represent). Inequality of enforcement also characterizes the judicial process itself, as international courts lack the crucial ingredients of impartiality and independence exhibited by municipal courts in enlightened countries (*von Bogdandy and Venzke* 2012).

Furthermore, crucial features of the rule of law are also lacking in the norms creation procedures and in the collective decision-making of international governance, as the decisions of international bodies cannot be challenged as violating substantive or formal components of the rule of law. Even the principled question whether international organizations are positively bound by international human rights law is disputable (*Kenetake* 2012).

It seems, therefore, that before one can seriously address the challenges of the rule of international law under extreme conditions, a coherent and agreed upon general concept of the rule of law in the international arena has to be constructed.

B. The Rule of Law and Extreme Conditions: National Law and International Law

The second challenge focuses on the transformation from regular times to extreme conditions vis-à-vis the rule of law, and I think that one of the prime issues here, at least from a Law and Economics perspective, is the theory of collective action, on the level of both normative and positive analysis. Here too, the focus on international law raises interesting and novel questions. In order to examine some of them, we have to resort to some theoretical foundations.

I. The rule of law under extreme conditions and the theory of the state

Recent years have seen growing scholarly discussion about the rule of law under extreme conditions, prompted by the various legal and policy responses in the aftermath of 9/11 and the "war on terror" (e.g. *Gross and Aoláin* 2006). The topic, however, is not a new one (*Svensson-McCarthy* 1998). Already during the Roman Empire one can find a systematic theory and practice according to which war could prompt a declaration of emergency that suspends the regular conduct of government (*Criddle* 2012). The Roman theory allowed for a dictator to take over government for a fixed period of six months. A clear separation between normal and emergency times was created

with mechanisms preventing the dictator from extending his rule or influencing politics after a return to normality (*Ferejohn and Pasquino* 2004).

Modern constitutions prescribe special provisions for times of emergency. Such provisions, for example, allowed the German National Socialists to assume power in 1933. These arrangements and practices prompted fierce criticism from the perspective of political and legal theory and the theory of democracy. Well known is Carl Schmitt's statement that he who decides on the exception is the sovereign, disputing the core ideas that underlie modern liberal democratic theory (*Schmitt* 1934 [2005]). *Giorgio Agamben* (2005) expressed similar criticism regarding the legislative and administrative responses of established democracies to the threat of terror in the last two decades.

Analytically, the debate about the rule of law during extreme conditions implicitly assumes an ideal type of government (and hence an ideal format of the rule of law) designed for regular times, which might be deviated from in times of emergency. Indeed, the ideal type of government (and hence the format of law and the rule of law) is a consequence of modern political theory, social contract theories as the foundation of the modern theory of the state, and the analysis of collective action – all of which are analyzed for normal times. In order to understand the justifications for a shift in the rule of law during extreme conditions, it is therefore crucial to take one step back to these foundations.

II. The normative (economic) theory of the state - foundations

The leading literature providing a normative economic theory of the state (e.g. *Downs* 1957, *Buchanan* 1975) is founded on the basis of the social contract theories of the state (from *Hobbes* and *Locke* to *Rawls*). It departs from consensus or unanimity as the fundamental justification for collective action. It is important to remember that the ultimate normative goal is exogenous to economic analysis (*Salzberger* 2008). However, unanimity or consensual decision-making can be regarded as fulfilling both teleological (consequential) and deontological (governed by natural law) normative foundations.

Although consensus belongs to a set of principles that judge desirability according to the decision-making process rather than its outcome (as in teleological morality such as utilitarianism or wealth maximization) or its external correctness (deontological morality), consensual decision does entail utility enhancement. No-one would consent to a decision or a rule which decreases their utility, and a consensual decision will thus benefit at least one person without harming any other, yielding Pareto improvement or utility enhancement (*Coleman* 1998). Furthermore, in theory (in *Ronald Coase*' terminology: in a world with no transaction costs) every decision which

enhances collective utility can be reached by consensus, as those who benefit from it will compensate those who oppose it to the extent that the later become indifferent.

Consensual decision can also be regarded as a proxy for materializing deontological morality, as the fact that everyone agrees to a certain rule or decision can be considered the best available proof that it is the "right" decision in terms of deontological morality. The inherent problem with deontological morality is how can we know what is the "good" or "moral" course of action? Consensus can be regarded as one of the best proofs to this effect. Consensual decision-making, therefore, can be presented as the meeting point between teleological and deontological moral theories, and this can serve as an explanation of the fact that *Rawls'* theory of the state (1971) is claimed by both natural law and the positivist – social contract – traditions. His term of "overlapping consensus" can point in this direction.

It is important to note that in this sense, consensus is very different from majority decision-making (wrongfully assumed to be at the core of democracy), which lacks any coherent and integral first-order normative justification by both teleological and deontological moralities. A decision or rule reached by majority is neither necessarily utility enhancing (primarily because it fails to take into account the intensity of preferences), nor "right" in a deontological sense.

Based on these foundations of collective action, the economic approach regards the establishment of the state as justified if it the result of a contract to which all future citizens are parties (*Mueller* 2003, p. 57). In political or legal terms, this contract is dubbed "constitution". Some scholars (e.g. *Rawls* 1971, *Posner* 1979) portray this consensual agreement as a hypothetical consent, and indeed we can hardly find historical examples of full consensus regarding the content and wording of the constitution. However, the drafters of constitutions in many cases make a serious attempt to obtain very wide support (as opposed to simple majority) for the document as a condition for its ratification, reflected by the fact that the decision-making rule for the adoption of a constitution or its amendment usually requires some kind of super-majority. This is certainly true of the process by which the oldest modern constitution still in force – that of the United States – was adopted: a unanimous vote of the constituent assembly members and ratification by all future States' legislatures. It is likewise true of the process by which the newest constitutions – those of the countries of Eastern and Central Europe, which have undergone a transition from communism to democracy – were adopted (*Salzberger and Voigt* 2002).

Consensual decision-making also characterizes the international arena or the foundation of positive international law. The source of norms in international law is either treaties, which require unanimous consent of all parties subjected to them, or customary norms, which by definition emerge

from long-term unchallenged actual practices (together with *opinio juris*), i.e. unanimous acceptance. This formulation, however, does not solve the problem of who are the prime subjects whose consent is needed to construct a rule or collective decision – states/governments or individuals – which refers to the major contemporary field of theoretical tension in international law theory, as elaborated in the previous section. This field of tension can at least partly be mitigated if national collective decision-making adheres to the consensus principle. Under such a condition, the powers granted to governments to sign international law treaties bring about consensual decision-making, not only of governments or states, but also of the individuals who are members of the polities of the signatories.

III. The normative (economic) theory of the state – implementation I: representative democracy

The economic theory of the state justifies the establishment of central government and the familiar institutions in modern liberal democracies in the following manner: Although consensus is the first-order justification for collective action, unanimous decision-making cannot be an operative and sufficient principle for the operation of the state because of the immense decision-making costs involved in reaching consensus. Put differently, the initial contract or the constitution obviously cannot foresee every potential future issue meriting collective action, especially if it is designed to be in force for a very long term. By the unanimity rationale, the resolution of new public issues would be to gather everyone whenever such new issue arises, and to decide upon them unanimously. However, the decision-making costs would be prohibitive. This is the most commonly provided justification for the need for a central government in which the power to make collective decisions are deposited or, rather, entrusted. In contractual terminology, the establishment of central government and other state institutions is the result of uncertainties that exist in each individual's mind about the future of the society in which they live and about the future behavior of other members of that society (*Mueller* 2003, p. 61). Extreme conditions are an obvious example of such uncertainties, and thus a good constitution must relate to such conditions, prescribing rules and decision-making procedures that take effect during extreme circumstances.

The same rationale for the establishment of central government is also applicable for establishing the rule of law. First, under the view presented above, the state and its government are not real entities, but rather a mechanism to aggregate individual preferences. Their legitimacy derives from the consent of the polity members. Hence, no official can be above the law or not subjected to the law. Second, the very same rationale for delegating by consensus the daily collective decision-making powers to the

government indicates that it must govern through rules rather than on a case-by-case basis. The general nature of rules significantly reduces decision-making costs, as rules which cover a broad range of concrete situations will have a much better chance of unanimous support than case-by-case decisions, which most likely produce "losers" and thus fail to find unanimous support.

From the analysis above, we can derive that the contract, or the constitution, ought to establish the basic principles guiding the interactions between individuals and state institutions – the protective role of the state – and the basic principles dealing with collective choices – its productive role (*Buchanan* 1975, pp. 68–69). In its protective role, the state merely serves as an enforcement mechanism of the various clauses in the social contract itself, making no 'choices' in the strict meaning of the term. In its productive role, the state serves as an agency through which individuals provide themselves with 'public goods' (*Gwartney & Wagner* 1988, ch. 1). Indeed, constitutions usually include a substantive part – a bill of rights, which corresponds to the protective role – and a structural part – setting institutions and collective decision-making procedures, which mainly correspond to its productive role. The two facets of the rule of law discussed above are a direct reflection of the normative framework discussed here.

The two combined solutions offered by modern democratic theory to the immense costs of maintaining unanimous decision-making in the post-constitution public sphere are *representative democracy and majority decision-making*. Indeed, the Athenians' resort to majority rule and to the appointment of government personnel by lottery were methods to overcome the difficulties, or costs, of consensual decision-making, although the latter remained the ultimate or aspired goal. The same applies to the modern developments of representative democracy and the tools designed to overcome its fallacies, such as the separation of powers. Representatives acting on behalf of their constituents save the costs of frequently ascertaining public preferences regarding each and every issue and the prohibitively high costs of coordinating massive numbers of people. An additional rationale for representative government is the ability of representatives to acquire more information and expertise about the issues to be decided, which also relates to the distinction between preference-aggregating collective decision-making and expertise-aggregating decision-making, on which I will elaborate further in Section 3.3.

From the perspective of economic theory, two important problematic phenomena of representative democracy ought to be mentioned. The first is agency costs, which are associated with decision-making by representatives rather than by principals. These costs are the result of ineffective monitoring of representatives by their voters and the ability of the former to act in a self-interested manner without being penalized by the latter (or where the penalties are smaller than the political or personal gains). The second phenomenon

of representative democracy is the power of interest groups to seek rents at the expense of the general public, and to make gains through pressure on the representatives. Interest groups are able to succeed because of the costs of collective action. These costs allow only small groups to organize – groups whose potential gain from collective action exceeds the costs of organization (*Olson* 1965, and in the legal context see *Farber and Frickey* 1991, ch 1). In our specific context, further research is needed in order to examine (theoretically and empirically) what happens under extreme conditions to agency costs and rent seeking. Such findings might prove significant in prescribing the changing rule of law balance under such circumstances.

A second pillar of the existing liberal-democracy paradigm of the state is majority decision-making. Regardless of the question as to who should operate the state – its citizens in a form of direct democracy or a central government representing the public – there is the important issue of the desirable daily decision-making procedures and rules. The economic rationale for resorting to majority rule rather than consensus is best represented by the model of collective decision-making introduced in *Buchanan and Tullock's* "Calculus of Consent" (1962). This model can be considered one of the classical presentations of a normative analysis of collective decision-making in the framework of the consensus principle. *Buchanan and Tullock* distinguish between external and internal costs of collective decision-making. The former are the total costs to individuals negatively affected by the collective decision. These costs are smaller, the greater the majority that is required for a decision. In unanimous decision-making, external costs are zero, as rational individuals will not consent to decisions that harm them. A dictator's rule inflicts the highest external costs on the members of the community. The internal cost function reflects the costs involved in the decision-making process itself. Its shape is inversely related to the external cost function: Dictatorial rule is the least expensive to operate. The greater the majority required for passing a decision, the greater the costs involved in the decision-making process itself; the consensual rule is the most expensive to operate. The optimal decision-making rule is that which minimizes the sum of the two types of costs. *Buchanan and Tullock* show that in most areas this optimal rule is simple majority, but there may be special types of decisions, e.g. those that concern basic human rights, in which a qualified majority is the optimal decision-making rule.

The Buchanan-Tullock model is one of the few modern justifications for majority rule. However, it can also justify a departure from majority when both types of costs are very high. Decision-making during extreme conditions may constitute such a case. In other words, in times of war, acute natural or man-made disasters or an economic and political meltdown, decisions must be made very swiftly, so that the regular majority decision-making rule may create huge costs due the lengthy time required to reach a decision, which can