

INTRODUCTION TO SYMPOSIUM ON
DEVIKA HOVELL, “DUE PROCESS IN THE UNITED NATIONS”

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Devika Hovell’s “Due Process in the United Nations” returns to the familiar but vexing question of what mechanisms could best provide for UN accountability.¹ Her contribution, as she describes it, is to start with first principles. The article opens by observing that we can neither assess nor try to improve due process mechanisms if we lack a theory of why we need them in the first place: What values underlie the calls for greater transparency and accountability at the United Nations? Why, exactly, should the United Nations provide greater due process at the expense of its budget and agility? The answer, moreover, cannot be assumed to be the same as it is for domestic governments, since the United Nations is a *sui generis* actor working in an entirely unique context.

Hovell’s argument then unfolds in three steps. First, she lays out and compares three possible value-based justifications of due process. Second, she links each justification to a different type of existing due-process mechanism. Thus, for example, if we view due process as a way of ascertaining that positive treaty law, as ratified, be followed accurately, then it would make sense to put in place an international judicial mechanism. On the other hand, if we value due process as a way to ascertain that the interests of those subject to UN authority be given voice, then a mix of regional and national courts may be a better mechanism. But Hovell’s analysis is not only deductive. She acknowledges that different real world contexts will call for different justification-mechanism pairings. Her final step, then, is to explore how each type of due process mechanism has fared in the context of two case-studies: the UN Sanctions regime and the *Haiti Cholera Case*. She concludes that a less judicialized and more open mechanism equipped to consider and advance the public interest, such as an ombudsperson, is the best fit for the current UN context.

Hovell’s argument thus moves from ought to is and back again, striving for a normative analysis that is sensitive to empirical context. By contrast, the three essays in this symposium move in the opposite direction, from the is to the ought. The essayists each examine case studies that are similar to or the same as Hovell’s, but they provide different interpretations of the facts on the ground, thereby challenging Hovell’s account of UN practice and, ultimately, her prescription, each from a different angle.

For Antonios Tzanakopoulos, the problem with Hovell’s argument is her failure to acknowledge that a fairly robust regime of due process has already developed over the past decades.² Moreover, the manner in which it developed belies her argument. He reinterprets the UN sanctions regime to show not only that it has come a long way, but also that it is the result of litigation before diverse national and regional courts that created pressure on the United Nations to put in place, and then fine-tune, the still-evolving ombudsman regime.

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¹ Devika Hovell, *Due Process in the United Nations*, 110 AJIL 1 (2016).

² Antonios Tzanakopoulos, *Theorizing or Negotiating the Law?: A Response to Devika Hovell*, 110 AJIL UNBOUND 3 (2016).

Thus, Tzanakopoulos argues, the work of these national and regional courts should be valued, and not critiqued as an embodiment of the wrong due process values.

Rosa Freedman is more sympathetic to Hovell's argument.³ However, she too faults Hovell for failing to acknowledge developments on the ground. Through a detailed study of the Haiti case, she shows that the due process mechanisms that Hovell favors are already in place, at least formally. The problem in the Haiti case is rather that the United Nations refuses to deploy them. Echoing Tzanakopoulos' argument about the UN sanctions regime, Freedman shows that in the Haiti context, the victims and their advocates turned to litigation not because they preferred or prioritized litigation as a mechanism of accountability, but because their repeated efforts to prompt the United Nations to use other existing mechanisms failed. Courts were the last resort. Freedman adds, contra Hovell, that litigation has nonetheless had positive effects, in particular that of generating public support and political momentum for victims.

Finally, Joy Gordon's essay turns to the elephant in the room.⁴ For Gordon, that the United Nations has failed to develop accountability mechanisms is not an oversight. Nor is the failure due to the fact that the United Nations as an institution is reluctant to take this on, or that we cannot agree on the right mechanism or its normative justification. Rather, the problem is that a lack of oversight can at times behoove certain powerful states. Gordon undertakes two UN case studies of her own, showing how the lack of transparency in, for example, decisions about sanctions exemptions for Iraq in the 1990s, allowed the United States to covertly advance its regime-change-agenda through the UN Security Council. Her essay serves as a reminder that power matters: When a UN regime studiously avoids accountability, there is likely someone that quietly benefits.

It is interesting—and perhaps a symptom of the empirical turn in the study of international law⁵—that all three symposium essayists seem wary of normative theorizing, preferring to grapple with Hovell's argument through analysis of case studies. Of course, it is not an objection to Hovell's typology of justifications that her empirical analysis may have overlooked or underemphasized certain developments on the ground. However, each of these essays explicitly or implicitly questions whether the very endeavor of stepping back to construct a normative theory is as urgent or necessary as Hovell would make it seem. In this way, the Hovell article and three symposium essays, taken together, raise questions not only about UN accountability, but also about the relationship of normative theorizing and empirical study in contemporary international law scholarship.

³ Rosa Freedman, *UN-Accountable?: A Response to Devika Hovell*, 110 AJIL UNBOUND 8 (2016).

⁴ Joy Gordon, *Due Process and the Iraq Sanctions: A Response to Devika Hovell*, 110 AJIL UNBOUND 12 (2016).

⁵ Tom Ginsburg & Gregory Schaffer, *The Empirical Turn in International Legal Scholarship*, 106 AJIL 1 (2012).