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Deformalizing International Organizations Law: The Risk Appetite of Anne-Marie Leroy

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Abstract

Taking on this Symposium's invitation to rethink international organizations law by focusing on scholars and practitioners outside the mainstream, this article explores and evaluates the legacy of Anne-Marie Leroy, the World Bank General Counsel from 2009 to 2016. In her attempt to trade the formal, rigid language of law for the deformalized routine of risk management – described as a 'paradigm shift' from 'rules to principles' – Leroy could be portrayed as an antipode to those who developed or nurtured the discipline of international organizations law. Yet it is precisely by focusing on figures working outside (and against) the diagrams of the discipline that we can gain a critical perspective on the evolving life of law in international institutions. The article specifically focuses on how Leroy's paradigm shift sought to bypass, manage, and overcome problems of operational expansion and institutional accountability to the outside world – perhaps the two frontiers where the conceptual normative confidence of mainstream, functionalist approaches most manifestly hit their limits. In both domains, the article shows, the principled (occasionally prohibitive) posture of liberal legalism instilled by some of Leroy's predecessors had to be traded for an attitude of 'agility' and enhanced 'risk appetite'. This article traces these changes in the professional sensibility and material practice of international law(yering) and critically evaluates the 'new normative architecture' of 'risk' that underpins it. It is by dwelling in this disjunction between familiar doctrinal dilemmas and mundane material practices of lawyering – a space teeming with unexpected rules and routines – that a critical reinvigoration, reorientation, and re-theorization of international organizations law can emerge.

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1 Introduction: Re-theorizing International Organizations Law from Unexpected Places

Taking on the invitation of this symposium to rethink international organizations law by focusing on scholars and practitioners outside the mainstream of the field, this article explores and evaluates the work and legacy of Anne-Marie Leroy, the World Bank General Counsel from 2009 to 2016. In more than one way, this might seem like an odd and unproductive starting point to re-theorize the discipline: in contrast to some of her predecessors, Leroy rarely published on international organizations law (or international law in general) and remained largely absent from the gathering places of the discipline's invisible college. With a degree from the École Nationale d'Administration and professional expertise in public sector governance, Leroy was not a public international lawyer in any traditional sense. In her attempt to trade the formal, rigid language of law for the deformalized routine of risk management – described as a 'paradigm shift' from 'rules to principles' – she could be portrayed as an antipode to those who originally developed or nurtured the discipline of international organizations law.[1]

Yet it is precisely by focusing on figures working outside (and against) the diagrams of the discipline that we can gain a critical perspective on the evolving life of law in international institutions and see how the 'cultural unity' that once defined this field of theory and practice has splintered into diverging professional sensibilities and registers of legal expertise.[2] The notion of 'culture' is central here: the aim of this article is not to theorize changes in the formal legal framework through which the World Bank is governed (such changes have been rather rare) but, rather, to reflect on the implicit assumptions and scripts – what Frédéric Mégret refers to as the 'feel for the game' – that shape legal practice in this institution.[3] While debates on the law of the World

[1] World Bank Legal Vice Presidency, *Annual Report FY 2013: The World Bank's Engagement in the Criminal Justice Sector and the Role of Lawyers in the 'Solutions Bank'* (*LVP Annual Report 2013*) (2013), at 94.

[2] *Cf.* Prost, 'All Shouting the Same Slogans: International Law's Unities and the Politics of Fragmentation', 27 *Finnish Yearbook of International Law* (2006) 1, at 7–9 (referring to the 'cultural unity' of international law as a set of 'shared sensibilities' – a common '*esprit de corps*'). This is an under-examined layer to the doctrinal 'unity within diversity' at the heart of H.G. Schermers and N. Blokker, *International Institutional Law: Unity within Diversity* (2011). *Cf.* Sinclair and Klabbers, 'On Theorizing International Organizations Law: Editors' Introduction', 31 *European Journal of International Law* (*EJIL*) (2020) 489, at 495 (qualifying the quest for 'unity within diversity' as a key challenge 'for any theory of international organizations law'). My notion of 'critique' is inspired by Fleur Johns' ethnographic exploration of international law's 'unruly' life in various unexpected places. F. Johns, *Non-Legality in International Law: Unruly Law* (2012), at 23.

[3] Mégret, 'Thinking About What International Humanitarian Lawyers "Do": An Examination of the Laws of War as a Field of Professional Practice', in W. Werner, M. De Hoon and A. Galan (eds), *The Law of International Lawyers: Reading Martti Koskenniemi* (2017) 265, at 267ff. It is on this level of professional practice, Friedrich Kratochwil observed, that the politics of international law are rewritten. In Kratochwil, 'Practicing Law', in Werner, De Hoon and Galan, *ibid.*, 225, at 226. *Cf.* F. Kratochwil, *The Status of law in World Society: Meditations on the Role and the Rule of Law* (2014).

Bank continue to pivot around familiar doctrinal dilemmas,[4] this socio-legal study thereby reveals how Leroy instilled a radical shift in the professional practices, institutional alliances, aesthetic styles and technical routines that determine how rules are interpreted and enacted – a shift that shows itself to be rather distinct from (and disinterested in) traditional theoretical tropes and tensions.[5] This contribution to the symposium traces, situates and evaluates these changes.

The article thereby also ventures into new methodological terrain. While the quest for 'unity within diversity' has entailed a strong comparative, conceptual and doctrinal orientation in the formation of the discipline, appreciating the vision and influence of Leroy demands a deep dive into the world of practice. In reconstructing the professional prototype of the institutional lawyer that she promoted, this article draws on a wide range of sources gathered during my research stay at the World Bank – from participant observations and an interview with Leroy to the informal legal opinions, managerial strategies, and staff guidance notes that she distributed across the institution. It is on this material level of legal practice and not through coherent conceptual schemes, I argue, that the scripts of international institutional law are being (re)written. Leroy's aim, in this sense, was not to develop a comprehensive theory of international organizations law but, rather, to provide a pragmatic 'paradigm' for legal practice. In developing this 'new normative architecture', as she framed her intervention, debates and narratives on the discipline's ruling rationale are bypassed and displaced: it is not through the dialectics between the logic of functionalism and its constitutionalist antithesis that her project can be understood but in the infusion of legal labour with deformalized and adaptive techniques of risk assessment. This signals an inevitable gap – in the context of the World Bank – between everyday enactments of international institutional law and the debates that dominate the academic discipline (a gap that can be explained, at least in part, by the professional profile of leading lawyers in international organizations – a profile increasingly out of tune with the *esprit de corps* that marked the field's formation).[6] It is by dwelling in this disjunction – a space teeming with unexpected rules and routines – that a critical reinvigoration, reorientation and re-theorization of international organizations law can emerge.

[4] In relation to the human rights debate, for example, Philip Alston (a key protagonist himself) noted that '[i]n too many respects the Bank and the human rights community have become like old and comfortable sparring partners' and stressed the need to let 'fresh air' in. In P. Alston, *Rethinking the World Bank's Approach to Human Rights* (2014), available at www.law.nyu.edu/sites/default/files/Philip_Alston_Annual_Workshop_Keynote.pdf.

[5] Anne-Marie Leroy's explicit aim, as I will explore, was 'to rethink the traditional role played by lawyers in the Bank'. LVP Annual Report 2013, *supra* note 1, at 96.

[6] This is visible when we compare Leroy's profile with that of Ibrahim Shihata. If there has ever been a sociological substrate underlying Schachter's 'invisible college', Shihata was operating at its very centre. As a former law professor with a doctoral degree in international law from Harvard University (supervised by Louis Sohn), Shihata identified as a scholar and published extensively on the law of the World Bank. The professional posture that this entailed did not resonate in Leroy's trajectory. In our interview, Leroy noted that 'Shihata wrote a lot and I didn't' and questioned why: 'I don't know what prompted him to write as much as he did'. Interview with Anne-Marie Leroy (2016).

This article specifically focuses on how the 'new normative architecture' developed by Leroy sought to bypass, manage and overcome problems of operational expansion and accountability to the outside world – perhaps the two frontiers where the conceptual cohesion and normative confidence of mainstream, functionalist approaches most manifestly hit their limits. The proclaimed 'paradigm shift' advocated by Leroy does not seek to resolve these doctrinal dilemmas in axiomatic terms but, rather, to provide tools for their deferral to contextual and adaptive risk management routines. In doing so, Leroy – building on her predecessors and engaging with wider changes in the World Bank – quite radically reconfigured the role of law and lawyers *vis-à-vis* matters of operational expansion and institutional accountability (some of the discipline's central doctrinal themes). In both domains, I will show, the principled (and occasionally prohibitive) posture of liberal legalism instilled by some of Leroy's predecessors had to be traded for an attitude of 'agility' and enhanced 'risk appetite'. This article traces these changes in the professional sensibility and material practice of international law(yering) and critically evaluates the 'new normative architecture' of risk that underpins them.

2 'A Culture of Informed Risk-taking': Rewriting the Script of International Institutional Law

When Leroy arrived as General Counsel in the World Bank in 2009, she immediately noted that the shadow of Ibrahim Shihata – her illustrious predecessor who retired in 2000 – still loomed large. In his long tenure as the institution's leading lawyer, Shihata had published extensively on the law of the World Bank, defended the organization in a variety of international settings, mobilized the political Board of Executive Directors to ask and adopt important legal opinions and instilled a particular culture of lawyering in the legal vice presidency.[7] Shihata's style was stubborn, scholarly, principled and rather prohibitive.[8] This posture was part of a carefully curated trusteeship ideal of the international lawyer, which he articulated in several interviews: 'I have not acted simply as the spokesman for Management. … I have acted as the spokesman for the law'.[9] In Shihata's narration, this selfless attitude verged on the heroic: '[I]f you take that position [of legal integrity], you are not necessarily a very popular person', he lamented, 'but, in the choice between being popular or being credible, I chose the latter'.[10] Faced with institutional controversies, his densely footnoted

7 This is further explored in Van Den Meerssche, 'Performing the Rule of Law in International Organizations: Ibrahim Shihata and the World Bank's Turn to Governance Reform', 32 *Leiden Journal of International Law* (*LJIL*) (2019) 47.

8 His self-declared 'willingness throughout to leave if the rule of law was ignored' was as much a construction of strategic leverage as a cultivated commitment to liberal legalism – 'at the end I speak of reason, otherwise how can I act'. Interview with Ibrahim Shihata, World Bank Oral History Program, May 2000, at 15. The repository of the World Bank Oral History program is available at https://oralhistory.worldbank.org/.

9 *Ibid.*

10 *Ibid.*, at 84.

and sophisticated legal interpretations would always draw a 'bright line' between the permissible and impermissible, the economically 'rational' and politically 'partisan', the 'implied power' and the *ultra vires* act.[11] In the institution's contentious turn to governance reform, for example, Shihata intervened by providing an unsolicited legal opinion setting out the 'outer possible limits' of policies and practices that the World Bank could legally undertake – his 'job', he later observed, demanded him to 'draw a line that can be defended on legal grounds'.[12] This process of 'establishing borderlines' had a clear functionalist orientation: as 'an international organization', he argued, the World Bank's 'legal capacity and mandate are limited by the purposes stated in its articles and by the provisions excluding political considerations'.[13]

I should note here that, throughout this article, I am referring to functionalism as situated and systematized by Jan Klabbers: as a theory that perceives international organizations law as the result of a principal-agent relationship between the member states and the institution, which, as a result, works within a delineated mandate to serve a particular functional goal. It is clear that this understanding of functionalism differs quite strongly from how the concept is understood in international relations theory or social theory more generally.[14] These 'outer limits' and 'borderlines' that Shihata strived to enforce comforted states that feared the organization's unbridled growth and reformist ambitions and made him – as self-declared 'spokesperson of the law' – a trusted advisor to the Executive Directors.[15]

Yet this cultivated posture of loyalty to the 'bright lines' of international law also frustrated those in the institution's management with extensive reformist ambitions. When James Wolfensohn in 1995 traded Wall Street for the World Bank presidency with a program of corporate restructuring and moral reinvigoration – tied together in his 'comprehensive development framework' – he was expecting a lawyer who would do his bidding. In Shihata, however, he found a legal scholar and practitioner who had built his professional identity around a commitment to the 'rule of law' and the belief that it was necessary for the World Bank to operate within its legal confines.[16]

[16] An image that he often used to make this point was that of a 'World Government'. International Bank for Reconstruction and Development (IBRD), *Executive Directors Meeting: Oral Statement by Mr. Shihata during the Discussion of 'A Framework for World Bank Involvement in Situations of Conflict'* (1997) ('[t]he first principle is that the Bank is not a world government … with an unlimited mandate. It is an [international organization] with a mandate defined in its Articles'). *Cf.* Shihata, *supra* note 8, at 82 ('I believe in discipline.

[11] See, e.g., I. Shihata, Legal Memorandum on Issues of Governance in Borrowing Members: The Extent of Their Relevance under the Bank's Articles of Agreement, 21 December 1990, at 80ff. This opinion was published as Shihata, 'The World Bank and "Governance" Issues in Its Borrowing Members', in I. Shihata (ed.), *The World Bank in a Changing World: Selected Essays,* Vol. I (1991) 53.

[12] Shihata, 'The Dynamic Evolution of International Organizations: The Case of the World Bank', 2 *Journal of the History of International Law* (2000) 217.

[13] Shihata, 'Role of the World Bank's General Counsel', 91 *American Society of International Law Proceedings* (1997) 214, at 219.

[14] *Cf.* Klabbers, 'The EJIL Foreword: The Transformation of International Organizations Law', 26 *EJIL* (2015) 9.

[15] It should be noted here that Shihata's conscious positioning of himself as a counterweight to management was also a strategy to enhance his own institutional authority: the requests for formal legal opinions by the Executive Directors made Shihata a pivotal actor in the World Bank during times of institutional change.

Wolfensohn's strategy to push for a more dynamic and deformalized legal practice after Shihata's departure, however, also entailed a particular risk: if the political board would no longer trust the General Counsel because he or she was perceived as standing too close to management, opinions would no longer be as frequently solicited or held in equally high esteem. At the same time, with Shihata's departure, the legal department also found itself in a difficult time of transition, which exacerbated precisely what Wolfensohn sought to counteract: in the absence of a central figure with the institutional authority to generate a new shared understanding of the law, lawyers would tend to stick with the black letter of what Shihata had written. While senior management increasingly demanded a dynamic legal service, in some segments of the legal department, the law had become 'fossilized'. As Shihata's 'scriptures' became dogmas, the legal department faced a moment of disorientation and a risk of institutional marginalization.[17]

This was the context in which Leroy, building on the work of Roberto Dañino (General Counsel from 2003 to 2006), intervened by rethinking the role of the lawyer and the routines of legal practice in the World Bank. In 2010, shortly after her arrival, Leroy co-drafted and distributed a 'strategy, which outlines the road ahead for the Legal Vice Presidency'.[18] As the department 'faced significant turn-over and changes in its upper leadership over the past decade', the strategy explained, 'there is … a need to reaffirm, clarify and reinvigorate our mission and function both among [legal] staff and across the Bank at large'.[19] While the strategy was directed 'at the World Bank more generally', its primary aim was to 'develop a shared understanding among staff within the LEGVP [the legal department]'.[20] Leroy's goal was to articulate new standards of legal practice for those still clinging to old scriptures.

And, you have to respect the rule of law because you cannot advocate it and not respect it internally') and 16 ('it would be the beginning of the end of the Bank if it becomes simply a political instrument'). This does not mean that Shihata was not pragmatic, but he did consistently seek to draw lines between the permissible and the impermissible. This analysis builds on and differs from G. Sinclair, *To Reform the World: International Organizations and the Making of Modern States* (2017).

17 This crisis narrative and trope of 'marginalization' is a recurring one. When Shihata arrived, he, in his words, 'discovered that the Legal Department was very demoralized [and] marginalized'. One of his first acts was a physical relocation of the department back to the main building across the street from where it was. The diagnosis of marginalization was echoed years later by Roberto Dañino who observed that, upon his arrival as General Counsel, he found a department at the 'verge of marginalization'. This diagnosis provides a platform for heroic interventions of revival to take place. See D. Van Den Meerssche, *The World Bank's Lawyers: The Life of International Law as Institutional Practice* (2022).

18 World Bank, *Strengthening the Role of Law to Respond to the Needs and Challenges of the Bank in a Changing World: The Road Ahead for the Legal Vice Presidency* (2010), at iii. Leroy underlined the collaborative nature of this exercise: this paradigm shift had already been embraced in the department and now needed mainstreaming. On the changing role of the lawyer, see also A. Zidar and J-P. Gauci (eds), *Contemporary Roles of Legal Advisers in International Law* (2016).

19 *Ibid.*, at 1.

20 *Ibid.* Leroy's desire to provide a 'shared understanding' can be understood as an attempt to cultivate a shared 'form of life' (*Lebensform*) that would, in Kratochwil's terms, give meaning to concrete instances of 'norm use': to allow actors to 'go to' in the absence of foundations. It is in nurturing a new and shared 'social grammar' of this kind (and not in articulating new legal rules) that the politics of Leroy's intervention is situated. See Kratochwil, *supra* note 3.

The strategy describes the prototypical lawyer as 'a competent and efficient service-provider to our clients' who delivers 'innovative solutions' and contributes to 'risk identification and mitigation'.[21] This lawyer does not provide a counterweight to the organization's operational exigencies but seeks complete immersion: to 'provide timely, proactive, value-added … advice',[22] she or he has to become an 'integral partner and trusted advisor' for the 'clients'; a 'dynamic' agent determined to 'tailor' her or his 'services' to immediate 'operational needs'; an 'innovator' with a 'skill mix' that amplifies 'agility and responsiveness' in a 'demanding environment'; a practitioner emerging from 'consultants' pools' and 'cooperation agreements [with] law firms' who is at home in a 'decentralized', 'diversified' and 'mobile' legal practice.[23] This lawyer no longer has a professional stake in 'ensur[ing] that the Bank's activities at all times are consistent with its purposes as stated in the Articles of Agreement' – as an earlier strategic document of the kind demanded – but facilitates its smooth operational functioning.[24]

Yet it quickly became clear that many in the legal department were reluctant to walk the 'road ahead' that Leroy had set out. To the more 'conservative' lawyers who knew the doctrine of Shihata and shared his principled professional perspective on the role of the lawyers, the reorientation in legal practice demanded by Leroy initially came across as rather unlawyerly. In this struggle or discontent over the criteria of competent lawyering, Leroy advocated a radical 'paradigm shift' in practice that would be reflected in a new approach to the organization's involvement in matters of criminal justice reform – a 'new normative architecture' expressed in a legal opinion and staff guidance note.[25] In an internal note on 'the role of the lawyer in the Solutions Bank', Leroy tied this new 'architecture' to the 'change agenda' that president Jim Yong Kim announced in 2013.[26] This 'ambitious' agenda, she observed, was built on Kim's diagnosis that the institution had a problematic 'risk culture': senior management in the World Bank had to increase their 'risk appetite' and target the 'transformational rewards' promises by 'high-risk' projects.[27] For Leroy, this 'major shift' in institutional orientation demanded a 'shift from a rules-based to a principles-based normative

[21] *Ibid.*, at 5.

[22] *Ibid.*, at v.

[23] *Ibid.* The references are scattered throughout the document.

[24] See Forget and Shihata, 'Legal Aspects of the Bank's Work', in I. Shihata, *The World Bank in a Changing World: Selected Essays*, Vol. II (1995) 739. *Cf.* Interview with I. Shihata, World Bank Oral History Program, May 1994, at 54, 61.

[25] See LVP Annual Report 2013, *supra* note 1, at 90; A.M. Leroy, Legal Note on Bank Involvement in the Criminal Justice Sector (2012), available at https://documents.worldbank.org/en/publication/documents-reports/documentdetail/138001468136794111/legal-note-on-bank-involvement-in-the-criminal-justice-sector; Legal Vice Presidency, Staff Guidance Note: World Bank Support for Criminal Justice Activities (Staff Guidance Note) (2012), available at https://documents1.worldbank.org/curated/en/667701468161103479/text/672430BR0SECM20IC0disclosed03010120.txt.

[26] LVP Annual Report 2013, *supra* note 1, at 90. This agenda clearly accompanied the private turn in the World Bank's financial model. Jim Yong Kim was the World Bank's president from 2012 to 2019 and articulated this strategy early in his tenure.

[27] *Ibid.*, at 91.

approach to operations that encouraged informed risk-taking'.[28] The legal department, from this perspective, had always been an inhibiting factor – an epitome of the 'excessive risk aversion' that paralyzed the institution.[29] While international lawyers have criticized law's complicity in the organization's 'mission creep' and its ever-expanding agenda of 'liberal reform',[30] Leroy's observation was that the 'traditional legal thinking' in the World Bank – as exemplified in the legal opinions of Shihata – entailed a 'risk avoidance approach' that had severely 'constrained' those with a more healthy hunger for risk.[31] While the prior legal practice of 'drawing a "bright line" between the permissible and the impermissible' may once have had some advantages, Leroy believed, it came at a 'cost that many in the Bank … found unacceptable'.[32]

This 'traditional' approach had manifested itself forcefully in relation to programmes of criminal justice reform and engagements with the security sector of states. In 1997, Rigo Sureda – one of the leading figures in the legal department during the tenure of Shihata – had drafted a legal opinion stating that 'police power is an expression of the sovereign, political power of a state' and that, as a result and in light of the political prohibitions clause, 'financing of police expenditures, as a class, would not be consistent with a reasonable reading of the Bank's Articles'.[33] For Leroy, this 'binary' approach and 'blanket prohibition', which had led to a 'complete bar to engagement in the criminal justice sector', signalled precisely the professional posture she was seeking to counteract.[34] 'Everything is political', she believed: '[W]hat is political interference … is a matter of time and circumstance.'[35] In this sense, Leroy advocated, the 'role of the lawyer' is not to draw 'bright lines' between what can or cannot be done but, rather, to assist in the assessment, management or mitigation of the 'risk of political interference'.[36]

This completely different template of legal practice was further elaborated in a staff guidance note, distributed by Leroy with an explicit aim of 'nurtur[ing] a culture of informed risk-taking and building an institutional architecture for informed risk management'.[37] The stated purpose of this note is 'not [to] set out a prescriptive set of instructions [but, rather, to] provide guidance for Bank staff on how to assess the risks involved [in engagement with the criminal justice sector] and how to develop a

[28] *Ibid.*, at 90. It is crucial here to distinguish this 'paradigm shift' from the focus on legal principles in constitutional theory, as articulated, for example, in Alexy, 'On the Structure of Legal Principles', 13 *Ratio Juris* (2000) 294. Leroy's shift from 'rules' to 'principles' is not a plea for comprehensive normative reasoning but, rather, for a process of deformalization aimed at enhancing agility and enacted through new techniques of legal evaluation and interpretation.

[29] LVP Annual Report 2013, *supra* note 1, at 99.

[30] *Cf.* Sinclair, *supra* note 16.

[31] LVP Annual Report 2013, *supra* note 1, at 93.

[32] *Ibid.*, at 94.

[33] A.R. Sureda, Eligibility of Police Expenditures for Bank Financing (1997) (copy on file with author).

[34] LVP Annual Report 2013, *supra* note 1, at 93; Leroy, *supra* note 25, para. 26.

[35] Interview with Leroy, *supra* note 6.

[36] LVP Annual Report 2013, *supra* note 1, at 95; Leroy, *supra* note 25, para. 27 ('[t]he Bank can … avoid such [political] involvement through a series of measures aimed at analyzing the risks thereof and managing them').

[37] LVP Annual Report 2013, *supra* note 1, at 90; Staff Guidance Note, *supra* note 25.

risk-taking and management strategy'.[38] New heuristics were required for this task, such as the Operational and Risk Assessment Framework (ORAF) – a managerial 'tool' for 'rating risks following a linear rating scale'.[39] Not the technicalities of treaty interpretation or the imaginaries of constitutional growth but, instead, the 'iterative process' of 'risk assessment' dictated the terms for this new style of lawyering, where 'boundaries' were traded for 'risk categories' and 'prohibitions' for 'management strategies'.[40]

For Leroy, it was clear that this legal opinion on criminal justice reform instantiated a much broader transformation in the World Bank's 'normative architecture'.[41] The 'new reality' in which the bank found itself, she believed, was one where 'the bread and butter of lawyers – rules – no longer play the same central role'.[42] In an effort to reassert the institutional importance of the legal vice presidency, Leroy claimed that the shift from 'rules to principles' and from 'risk avoidance to informed risk-taking' laid the 'groundwork for a possible paradigm for the future role of Bank lawyers in dealing with Articles' interpretation – one of the Legal Vice Presidency's most important institutional roles'.[43] The 'shift' demanded by Kim's 'change agenda' 'need not spell the end of the lawyers' role in … interpretation or any other aspect of the Bank's work', but it does require a radical change in the 'mindset', 'paradigm' and 'normative architecture' of legal practice: '[L]awyers will still have a crucial role to play … but a different one than before' – a role guided by the '*leitmotiv*' of 'more agile, less regulated decision-making based on informed risk-taking'.[44] In her articulation of the 'role of lawyers in the Solutions Bank',[45] we thereby see the emergence of a new 'culture' of lawyering: a flexible, dynamic, outcome-driven approach attuned to the productivities of uncertainty and the governmentality of risk.

If we want to theorize and evaluate recent changes in the World Bank's legal framework, we should therefore focus not only (or primarily) on its formal rules but also on the style of lawyering through which these are interpreted or enacted. This is, indeed, what is signalled in Leroy's reference to the 'shift' in legal 'culture', 'paradigm' or 'architecture' – a shift that she instilled through informal managerial strategies, memoranda, and staff guidance notes. This shift signals what Andrew Lang more broadly described as the essence of international law's recent metamorphosis: in the move from 'rules to principles' and 'risk avoidance to informed risk-taking', we find

[38] Staff Guidance Note, *supra* note 25, at i.

[39] *Ibid.*, at i–iii. Operational Policy and Country Services (OPCS), Guidance Note on the Operational Risk Assessment Framework (ORAF) (2011), at 2–4. Different scales of risk ('green', 'grey', 'red') implied different routines of monitoring and management.

[40] Staff Guidance Note, *supra* note 25, paras 19–23.

[41] LVP Annual Report 2013, *supra* note 1, at 90.

[42] *Ibid.*

[43] *Ibid.*, at 96.

[44] *Ibid.*, at 92, 96 (adding that 'risk aversion is not an inherent part of a lawyer's mindset'). '[T]he Legal [department] will play a continuing and crucial role in the Solutions Bank', Leroy concluded, 'but one that will be … fundamentally different from the one it has traditionally played'. *Ibid.*, at 96.

[45] *Ibid.*, at 89.

precisely the deformalized and disenchanted 'style' that he perceives as the manifestation of law's gradual merger with registers of neo-liberal expertise.[46]

With Leroy, we find no grand deductive claims, no attempts to draw legal boundaries or find abstract closure to foundational legal questions – there is only the contextual logic of 'time and circumstance'. This entailed a new – facilitative, flexible and adaptive – approach to central questions in international organizations law where the aim is not to draw the categorical contours of the World Bank's mandate, to define what prohibited political interference entails or to set the standards by which the institution could be held accountable but, rather, to provide practical tools for the deferral of these conceptual questions to techniques of valuation and routines of risk assessment that can capitalize on the 'transformational rewards' of the uncertain, contingent and unknown. As the following sections explore, this 'paradigm shift' in the practice of law entailed a new approach to questions of operational expansion (section 3) and internal accountability (section 4) – two contentious topics in international institutional law.

Before engaging in this analysis, however, two important points have to be made that are related, first, to the risk of focusing this analysis solely around the figure of Leroy and, second, to the risk of associating the substantively indeterminate language of both liberal legalism and risk management with particular political preferences and outcomes. In tracing Leroy's legacy, we should avoid both methodological individualism – which would portray her as a 'solitary giant' who instilled legal changes based on her own initiative and idiosyncratic beliefs[47] – as well as the idea that her 'new normative architecture' is inherently tied to specific substantive positions (in relation, for instance, to the institution's mandate or its obligations under international law). An analysis of Leroy's labour should therefore trace broader patterns of professional change while accounting for the inherent indeterminacy of legal language.[48]

In relation to the first point, we observe different lineages of Leroy's 'paradigm shift' from 'rules to principles' both within and beyond the World Bank. First of all, as Leroy noted, this radical 'paradigm shift' had 'already begun' under her predecessor Roberto Dañino. Several years earlier, Dañino had pleaded for a 'change' in 'attitude' in the legal department – moving from a 'why not' to a 'how to' approach to legal practice.[49] This 'radical' professed shift in legal culture was reflected in Dañino's earlier opinion on criminal justice reform, which introduced the rationality of 'risk management' and served as a blueprint for Leroy's later intervention.[50] Leroy's strategic vision on the 'road ahead for the Legal Vice Presidency' was internally supported by those senior

46 A. Lang, 'Global Disordering' (draft paper on file with author).

47 This echoes Frédéric Mégret's concern with Martti Koskenniemi's histories of international law, for example. Mégret, *supra* note 3.

48 This important insight from critical legal studies is most elaborately articulated in the field of international law in M. Koskenniemi, *Form Apology to Utopia: The Structure of International Legal Argument* (reissued, 2005).

49 R. Dañino, 'The World Bank: A Lawyer's Perspective', Presentation at Harvard Law School, 1 November 2004.

50 R. Dañino, *Legal Opinion on Bank Activities in the Criminal Justice Sector* (2006), cited in Leroy, *supra* note 25.

lawyers who worked for Dañino and were inspired by his programme of change that, she noted, 'encapsulat[ed] the evolution in thinking, perhaps a bit too far "before its time"'.[51] The development and dissemination of her 'new normative architecture', in other words, was not a solitary enterprise but, rather, a strategy of enacting, mainstreaming, rationalizing and consolidating emergent changes in international legal practice that predated her.

Second, we can also trace the lineage of Leroy's strategy for legal practice to managerial changes in the institution more broadly. As already noted, the 'new normative architecture' that she promoted was a direct response to President Kim's 'change agenda' and its demand for World Bank staff across all operational branches to increase their 'risk appetite'. We see a reflection of this agenda not only in the changes to the organization's accountability standards and operational ambitions (as discussed in the following sections) but also in the creation of new financial products, such as the programming-for-results instrument that was introduced in 2012.[52] This instrument works on the basis of 'country and program-specific … risk considerations' and involves an 'operational strategy' to 'strengthen or build' national institutions to 'minimize risk'.[53] Around the same time, the institution's main lending instrument – investment project financing – also underwent a 'modernization' in which management outlined a 'reform program that was based on … implementing a risk-based approach for investment lending'.[54] Leroy's vision on the role of the international lawyer, in short, was tied to an understanding that 'the Bank is undergoing certain fundamental changes in its way of doing business',[55] shaped and guided by the presidential call to 'embrace risk' and 'live dangerously'.[56]

Third, the shift from a 'rules-based' order (where concerns regarding mandate, political interference or legal competence are key) to the 'principles-based' practices of risk management and its associated diagnostics (such as the ORAF) aligns with the emergence of a 'risk society' or 'risk commonwealth' in public sector governance more broadly.[57] In its embrace of uncertainty as productive possibility, Leroy's ideal of

[51] LVP Annual Report 2013, *supra* note 1, at 95, n. 35.

[52] This involved the adoption of Operational Policy/Bank Policy (OP/BP) 9.00. Previously, the World Bank had two key lending instruments: Investment Project Financing (regulated in OP/BP 10.00) and Development Policy Financing (regulated in OP/BP 8.60). See 'Operational Manual', *World Bank*, available at https://policies.worldbank.org/en/policies/operational-manual.

[53] OP/BP 9.00, *supra* note 52, paras 5–8. On the mode of regulatory reform in the programming-for-results framework, see Malli, 'Assessing Capacity Development in World Bank "Program-for-Results Financing"', 47 *Verfassung und Recht in Übersee* (2014) 250.

[54] OPCS, Investment Lending Reform: Modernizing and Consolidating Operational Policies and Procedures (2012).

[55] LVP Annual Report 2013, *supra* note 1, at 90.

[56] This is a reference to Michel Foucault's dichotomy between the sovereign (the Oedipal figure) 'who can say no to any individual's desire' and the 'economic-political thought of the physiocrats' for whom the 'problem is how they can say yes to this desire' by finding ways to 'live dangerously' amid the emergent externalities of life. In M. Foucault, *The Birth of Biopolitics: Lectures at the College de France, 1978–1979*, translated by G. Burchell, edited by M. Senellart (2008).

[57] *Cf.* Fisher, 'The Rise of the Risk Commonwealth and the Challenge for Administrative Law', 2003 (Autumn) *Public Law* (2003) 455; M. Power, *Organized Uncertainty: Designing a World of Risk Management* (2007).

the 'solutions bank lawyer' intersects with other professional prototypes in literature. Frank Knight's classic text on uncertainty and profit, for example, refers to the entrepreneurial figure of the 'adventurer' – a figure traditionally associated with corporate life.[58] Yet, as Louise Amoore argued, we see an extension of this 'adventuring spirit' in contemporary practices of global governance where 'the unknowable environment is to be embraced, positively invited, for its intrinsic possibilities'.[59] This is precisely the orientation towards the 'transformational rewards' of an enhanced 'risk appetite' that Leroy sought to promote. The culture of lawyering that she demanded, in short, was attuned to what Michael Power noted as the 'risk management of everything' in public administration more broadly.[60] Based on these layers of influence and inspiration, we can trace Leroy's 'new normative architecture' as an assemblage where multiple institutional and intellectual lineages intersect and a range of material and conceptual elements are tied together – from the holistic managerial reorientation of the World Bank's business model to the mundane operational tools emerging from the post-liberal rationality of risk.

In addition to situating Leroy in a wider network of material and managerial changes, in response to the first point raised above, the second concern relates to the difficulty of associating the 'paradigm shift' in legal language and 'culture' with particularly substantive preferences and outcomes (such as the facilitation on operational growth or the dilution of accountability standards described below). As Martti Koskenniemi famously argued regarding the structure of international law in general,[61] specific rules do not engender specific substantive outcomes but stand to action in a relation of rationalization and justification.[62] In this sense, one could argue, Shihata's principled posture of liberal legalism – attuned to a functionalist tradition in international institutional law – and Leroy's 'normative architecture' of risk management are merely different rhetorical devices through which lawyers could wield influence in a specific institutional context and in service of specific visions on the World Bank's best interest. Within both rhetorical systems, indeed, different positions can be taken and conceptual elasticity can be exploited: while the seemingly rigid functionalist paradigm employed by Shihata allows dynamism through, for example, the implied powers doctrine or the tools of teleological treaty interpretation,[63] the moveable boundaries of Leroy's risk-based approach can crystalize in fixed formal frontiers when political or managerial exigencies so demand (in insulating the World Bank from demands of human rights activists, for example, as the analysis below illustrates). The rhetorical rupture staged by Leroy, from this perspective, could be perceived as an

58 F. Knight, *Risk, Uncertainty and Profit* (1921).
59 L. Amoore, *The Politics of Possibility: Risk and Security beyond Probability* (2013).
60 M. Power, *The Risk Management of Everything* (2004).
61 Koskenniemi, *supra* note 48.
62 *Cf.* Kratochwil, *supra* note 3. Koskenniemi describes this as the disjunction between discovery and justification: '[L]egal arguments do not *produce* substantive outcomes but seek to *justify* them'. Koskenniemi, *supra* note 48, at 570.
63 As elaborated in Shihata, *supra* note 12.

attempt to sustain the institutional relevance of the law rather than as a determinate script for which substantive legal or political choices should be made.

Yet, despite the structural indeterminacy of legal language, it is crucial to account for the performative effects of different discursive and material frames of legal practice – for how they 'highlight[] some aspects of the world while leaving other aspects in the dark'.[64] The conflicting 'paradigms' of 'rules' and 'risks', in other words, are not just empty vessels carrying pre-existing political preferences (the 'things legal realists have always referred to: ambition, inertia, tradition, ideology and contingency').[65] They also enact the world in which the law intervenes – determining what can and cannot be expressed in legal terms; separating what matters and what is excluded from mattering. To understand these important performative effects, we need to move beyond the individual decision-maker as the final site of normative authority, imagination, and intervention, in line with the notes above. While Koskenniemi sees the gap of indeterminacy as a space of individual freedom and responsibility,[66] this perspective misses out on the shared 'social grammar' – the 'feel for the game' – that determines what can be qualified as a 'competent performance'.[67]

It is precisely on this level of professional culture and social grammar that Leroy sought to make an intervention through the managerial strategies, staff guidance notes and 'roadmaps' for institutional change that she continuously disseminated and through which she sought to inspire more 'risk appetite'. When accounting for these 'paradigm shifts' in the logic of practice, the diagnosis of indeterminacy is displaced or dissolved: patterns of professional conduct emerge that can be traced and critically evaluated (as the analysis below indicates). These patterns are also enacted through the technical and material forms of legal practice, where Leroy traded the textual techniques of legal judgment for the managerial metrics, colour codes, rules of thumb and visual heuristics of 'risk analysis'. The '*leitmotiv*' of these changes in professional culture and material practice, Leroy clearly articulated, was to reorient legal interventions from sources of constraint and contestation to an agile mode of expertise attuned to the productive promise of risk and uncertainty. When we appreciate these discursive and material changes – which are situated, as I have argued above, in a longer lineage of professional change – what we notice is not a mere change in rhetorical strategies but, rather, a more profound transformation in the politics of international law: in the 'shared understanding' of what the role of the law(yer) is for and which institutional purposes it can and should serve. In the following sections, I explore this changing logic of practice in relation to two of the most vexing problems in international organizations law: the problem of operational expansion (section 3) and institutional accountability (section 4).

[64] Koskenniemi, *supra* note 48, at 570.

[65] *Ibid.*

[66] *Ibid.*, at 615 (arguing that any legal 'choice will be just that – a "choice" that is "grounded" in nothing grander than a history of how we came to have the preferences that we have').

[67] *Cf.* Kratochwil, *supra* note 3; Mégret, *supra* note 3.

3 'There Is No Real Area That Is beyond the Boundaries': Introducing the Infinite Mandate

The problem of constitutional constraint is one of the most vexing and recurring issues in the law of international organizations.[68] As a principal-agent theory, the functionalist paradigm that has defined this body of law theoretically demands both the delineation of powers – delegated by member states (the principal) to the institution (the agent) – and the exercise of control by the former over the latter.[69] Yet this notion of sovereign control (and the idea that law would provide a meaningful tool to enable such control) has been questioned and contested on conceptual as well as empirical grounds.[70] In the absence of judicial oversight and considering both the flexibility granted by the vague description of institutional functions and the elasticity of the implied powers doctrine, the promise of constitutional constraint remains rather elusive for many agents of global governance. Eyal Benvenisti's observation that international organizations 'have almost unfettered discretion' aligns with Klabbers' dire conclusion that 'the law of international organizations has developed precious little mechanisms to control the behaviour of organizations'.[71] Underlying these statements is both a shared commitment to republican ideals on the relationship of law to institutional power and a recognition that the promise of sovereign control immanent in functionalist theory faces severe theoretical and practical challenges.[72]

In the organizational attitude adopted by Shihata, which I briefly described above, we see a resonance of this commitment to impose legal limits on the World Bank's expansionary drift.[73] His efforts, as reflected in the 1997 criminal justice opinion, to draw legal boundaries (beyond which management would be acting *ultra vires*) and to safeguard the organization from entering the sovereign terrain of partisan politics,

[68] Some of the most sophisticated theoretical accounts in the field revolve precisely around this problem of 'mission creep' – the unmooring of international organizations (IOs) from their constitutional constraints. See, e.g., Marquette, 'The Creeping Politicization of the World Bank', 52 *Political Studies* (2004) 413; J. Alvarez, *International Organizations as Law-Makers* (2005); Venzke, 'International Bureaucracies from a Political Science Perspective: Agency, Authority and International Institutional Law', 9 *German Law Journal* (2008) 1401; E. Benvenisti, *The Law of Global Governance* (2014); Klabbers, *supra* note 14; Sinclair, *supra* note 16.

[69] For a detailed elaboration of functionalism as a principal-agent theory, see Klabbers, *supra* note 14, at 24 ('the basic idea is that states delegate functions to entities they create for this purpose').

[70] See references in note 68 above.

[71] Benvenisti, *supra* note 68, at 114–115; Klabbers, 'Introduction', in J. Klabbers (ed.), *International Organizations* (2016) i, at xiv–xv (for the argument that the law is 'powerless' in this context). *Cf.* Klabbers, 'Two Contending Approaches to the Law of International Organizations', in J. Klabbers and A. Wallendahl (eds), *Research Handbook on International Organizations Law: Between Functionalism and Constitutionalism* (2010) 3, at 10 (on how the dominant functionalist paradigm of IO law fails to 'control' the expansionary drift of IOs); Klabbers, 'Transforming Institutions: Autonomous International Organisations in Institutional Theory', 6 *Cambridge International Law Journal* (2017) 105 (on the general *problématique* of the autonomy of IOs).

[72] *Cf.* Klabbers, *supra* note 14, at 27–28, 34–35.

[73] Shihata often expressed this in a very personal register. See Shihata, *supra* note 8. He saw himself, with Gunther Teubner, as a 'constitutional irritant'. G. Teubner, *Constitutional Fragments: Societal Constitutionalism and Globalization* (2012).

epitomize this functionalist orientation. If Leroy saw her staff guidance note as 'an enabling document',[74] it was precisely to erase the rigidities that this mode of lawyering instilled within the institution. Her 'shift from risk avoidance to risk management' and from 'bright rules to broad principles' implied a direct challenge to Shihata's formal legal limitations. In a section of her opinion titled 'Managing Risks of Political Interference', she set out that the prohibition to meddle with 'sovereign power[s]' of states should be traded for 'measures aimed at analysing the[se] risks [of interference] and managing them'.[75] The label 'political interference' is thus reframed from a limit on the institution's mandate and operational expansion to a contextual risk that can be measured and managed. This 'analytical framework' trades the binary logic of (il) legality ('is this allowed?') for a spectrum of 'risk categories',[76] which is associated with 'mitigation measures as well as capacity-building activities' ('how do we manage this?').[77] From this perspective, there are no policy domains that are categorically beyond the institution's legal remit – only contextual contingencies to be contained.

Partly as a result of Leroy's efforts to mainstream this 'paradigm shift' within the organization – by providing 'guidance notes', organizing 'technical briefings' and holding 'informal consultations'[78] – the displacement of the functionalist legal paradigm by managerial routines of risk management had an almost immediate impact on the World Bank's operational activities – on how projects in the field were designed, assessed, rationalized and evaluated. This is exemplified by the Safer Municipalities project in Honduras and the Rio Grande do Norte: Regional Development and Governance project in Brazil.[79] In light of their direct engagement with national police, both projects would undoubtedly have been prohibited under the prior legal doctrine. Yet, evaluated through Leroy's 'new analytical framework', both initiatives – totalling an amount close to 400 million dollars – were granted legal clearance. They serve as good examples of how the embrace of risk management unfolded in practice.

As the project appraisal document (PAD) notes, the aim of the Safer Municipalities project in Honduras is to 'address the risk factors of crime and violence' by 'improv[ing] the capacities of national and local authorities in violence prevention'.[80] The bank thereby responds to its observation that 'crime and violence is the country's preeminent development obstacle'.[81] In terms of capacity building, the project seeks to construct and maintain an infrastructure for 'high-quality and geo-referenced crime

74 Staff Guidance Note, *supra* note 25, at iii.
75 Leroy, *supra* note 25, para. 27.
76 *Ibid.*, para. 34. See note 39 above.
77 *Ibid*, at 1.
78 Interview with Leroy, *supra* note 6 ('[t]he [note] was not adopted by the Board. It's intended as a guidance for the staff. [W]e did technical briefings, informal consultations. Just to make sure that everyone was comfortable with it and knew what to do').
79 My analysis of both projects is based on their project appraisal documents (PADs). World Bank (International Development Association), Honduras – Safer Municipalities Project, Project Appraisal Document (Honduras Safer Municipalities Project), 15 November 2012; World Bank (IBRD), Brazil – Rio Grande do Norte: Regional Development and Governance Project, Project Appraisal Document (Brazil Rio Grande Project), 20 May 2013.
80 Honduras Safer Municipalities Project, *supra* note 79, at viii.
81 *Ibid.*, at 1.

and violence data' by financing national and municipal 'violence observatories'.[82] Conforming to Leroy's legal opinion, the PAD trades legal concerns regarding the World Bank's mandate and the political prohibitions clause for a risk-based analysis.[83] The involvement of the Honduran national police in the project and the necessity to engage with a repressive and 'dysfunctional criminal justice system' are qualified not as prohibitive legal considerations but, rather, as 'substantial' 'implementing agency risks'.[84]

The PAD states that '[t]his risk will be mitigated by the fact that … the project has carefully defined and limited the scope of activities in which the HNP [Honduras National Police] is involved'.[85] The 'implementation risks' would further be addressed by the fact that the municipal violence prevention committees that the project finances are 'multi-stakeholder spaces with open and participatory meetings that allow for checks and balances' and a 'public record of discussions that enables enhanced civilian oversight of the police'.[86] These risk assessment criteria and risk management strategies are further elaborated in the attached ORAF – the 'live document' for iterative diagnosis and mitigation of risks – which claims that the World Bank's engagement in this 'risky environment' is managed by the project's use of 'transparent, multi-stakeholder decision-making, improved data collection and analysis' and 'capacity building'.[87] This would 'enabl[e] civilian[s] to exercise improved oversight over the police and increas[e] transparency of police activities', while also further ameliorating 'social cohesion'.[88] Or, at least, this is the bet that the World Bank makes and the risk that it is willing to take.[89]

The Rio Grande do Norte project in Brazil starts from the very similar ambition to improve the local 'capacities' of 'security service delivery' by enhancing the 'management and information systems to monitor the incidence of crime and violence in Rio Grande do Norte' and the 'social context within which it is taking place'.[90] The PAD also displays a similar awareness that engaging with the country's 'public security services' encompasses a 'substantial' risk. Yet the document stresses that the project

[82] *Ibid.*, at 3.

[83] The central legal concern, around which Shihata had developed his principled practice of drawing 'borderlines' is the 'political prohibitions clause' in Article IV(10) of the Articles of Agreement: 'The Bank and its officers shall not interfere in the political affairs of any member; nor shall they be influenced in their decisions by the political character of the member or members concerned. Only economic considerations shall be relevant to their decisions.'

[84] *Ibid.*, at 11. The Honduras National Police, it was noted, 'faces transparency and accountability challenges' and therefore forms an exogenous 'risk factor'. World Bank Legal Vice Presidency, Legal Aspects of the World Bank's Involvement in the Security Sector (LVP Annual Report 2014) (2014), at vii–viii.

[85] *Ibid.*, at 12.

[86] *Ibid.*

[87] *Ibid.*, Annex 4, 51.

[88] *Ibid.*; see also LVP Annual Report 2014, *supra* note 84, at vii.

[89] On the governmental technology of risk as a betting device, see Dillon, 'Underwriting Security', 39 *Security Dialogue* (2008) 309, at 320. On the problematic new 'politics of accountability' thereby enacted, see Power, *supra* note 60, at 60 ('[b]eneath the surface of the risk management of everything, and its claims as a value-enhancing practice, lurks a deep fear of the possible negative consequences of being responsible and answerable'). See also Fisher, *supra* note 57.

[90] Brazil Rio Grande Project, *supra* note 79, at 3.

team has undertaken a 'rapid assessment of SESED [the State Secretariat of Security and Social Defence]'.[91] On this basis, it developed a 'risk assessment and mitigation strategy' that, so it claims, is 'in compliance with the Bank's Legal Note for engagement in the criminal justice sector'.[92] In direct reference to Leroy's opinion, the PAD states that 'the risk rating (moderate) falls under the legal note's "grey area"'.[93] The most significant risk is the potential 'misuse' by SESED of 'sensitive information' generated by the modern data infrastructure that the project aims to construct.[94] These 'substantial risks', however, as confirmed by the ORAF, could be 'mitigated by the project's capacity building activities on best practices in security information management … and by continuous and close specialized supervision'.[95] These pivotal risk mitigation challenges, the PAD identifies, would therefore imply 'strengthen[ing] governance mechanisms in the security sector'.[96] These dynamics of measurement and mitigation are part of the 'living' process by which projects are immunized against internal and external sources of 'fragility' through 'capacity building', supervision and reform.

Both the Safer Municipalities project and the Rio Grande do Norte project display how Leroy's 'paradigm shift' from 'rules to principles' enabled engagement with police and security forces, thereby allowing the organization to move into unchartered terrain. The 'management approaches' that sustained these interventions, the staff guidance note explained, would 'vary from country to country and project to project' and be part of an 'iterative process' of learning and adaptation.[97] In this 'iterative process', the two main markers of the World Bank's mandate – the need for an 'economic' orientation and the prohibition on 'political interference' – had merely become factors in the risk calculus.[98] It is essential to pause here with the proclamation in the staff guidance note that 'a positive identification even of substantial risks would not necessarily mean that the Bank cannot or should not support a specific criminal justice initiative'.[99] 'Substantial risks' – where there is a 'weak economic rationale' and 'inherent risk of interference', as the note indicates – are channelled through particular 'mitigation measures' and the obligation to 'seek advice of the criminal justice resource group'.[100] By translating operational expansion as a matter of manageable risk, the staff guidance note envisaged a radical reorientation of legal practice (enacted in the provision of project 'clearance')[101] where questions on the boundaries of the institution's mandate are deflected and deferred to 'case-by-case' risk management routines.

91 *Ibid.*, at 14.
92 *Ibid.* Leroy's 'new normative architecture' is thereby explicitly mobilized as justification.
93 *Ibid.*
94 *Ibid.*, at 14–15.
95 *Ibid.*, at 15, Annex 4.
96 *Ibid.*
97 Staff Guidance Note, *supra* note 25, at i.
98 On how Shihata both mobilized and moved these markers in legitimizing and constraining the World Bank's turn to governance reform, see Van Den Meerssche, *supra* note 7.
99 *Ibid.*, para. 21.
100 *Ibid.*, para. 20, Table 3.
101 *Ibid.*, para. 47 ('the Legal VPU [vice presidential unit] will continue to provide clearance [on] compliance with the Bank's legal framework').

This process of operational expansion, of course, did not need to halt with the criminal justice sector. Soon after the publication of Leroy's 2012 opinion, this logic was employed again to rationalize, legalize and enable the World Bank's forays into new operational terrain. In an internally distributed essay in 2014, Leroy proposed 'extending the risk-based approach used in the Legal Note for interventions in the criminal justice sector to the security sector more broadly, including the military'.[102] While recognizing the difficulties of 'drawing a line between non-political, economic aspects of the security sector … and political considerations', Leroy argued that the 'risk-based analysis used in the criminal justice legal note' could allow the bank to 'avoid political interference' in the security sector 'through a series of measures aimed at analyzing the risks [a]nd managing them, applying special security and care to situations where risks are found to be likely'.[103] This extension of her framework, she believed, enabled operational engagement with peacebuilding, disaster relief and military policy. This explicit turn to the humanitarian domain, which had been categorically off-limits, completed the merging of development and security.[104]

The risk management analytic provided a comprehensive rationality for these institutional interventions: a managerial formula through which a wide range of new operational practices would become possible. This had an interesting inter-institutional aspect: the World Bank, Leroy asserted, could 'rely on the UN as a competent and neutral partner to achieve synergies and mitigate political risks' in a 'post-conflict environment'.[105] If, for Leroy, the functionalist delegation (and delimitation) of mandates no longer had meaning, neither did the functionalist division of labour between the political and economic realms of international institutional life: the UN and the World Bank would find each other in the 'synergies' of post-conflict 'risk management'. This 'humanitarian turn' also entailed an explicit component of monitoring and intervention: 'Non-adherence to the rule of law and past violations of international humanitarian and human rights law by security forces', Leroy believed, 'would have to be factored into this [risk-based] analysis', and, '[w]here necessary to mitigate [such] risks, Bank engagement would most likely include a component to strengthen rule of law and professional conduct in the security sector'.[106] Here, I observe how 'human rights' enter Leroy's 'framework' in the most peculiar way: as a proxy for a particular operational 'risk' that needs to be measured and potentially mitigated. The

[102] LVP Annual Report 2014, *supra* note 84, at vii. In a footnote, the 'security sector' is described holistically as a term to 'describe the structures, institutions and personnel responsible for the management, provision and oversight of security in a country'.

[103] *Ibid.*, at ix.

[104] *Ibid.*, at viii. *Cf.* M. Duffield, *Global Governance and the New Wars: The Merging of Development and Security* (2001); M. Duffield, *Development, Security and Unending War: Governing the World of Peoples* (2007). As is often the case in the World Bank, this course was initially set out in a world development report. World Bank, World Development Report: Conflict, Security and Development (2011).

[105] LVP Annual Report 2014, *supra* note 84.

[106] *Ibid.*, at x.

governmentality of risk thereby again reveals itself as a mode of both internal legal evaluation and external institutional diagnosis or 'rule of law' reform.[107]

At the start of this section, I engaged with the general problem of sovereign control in international institutional law. Klabbers, Benvenisti and many others[108] have lamented the limitations of the law in containing the expansionary drift of international regimes.[109] Yet, despite the ever-present problem of judicial enforcement and the flexibility that the doctrines of 'implied powers' or 'effective interpretation' grant, my account of legal practice in the World Bank displays how functionalism once provided a language or logic for legal prohibition and constitutional constraint. This is expressed, for example, in Shihata's 1990 governance opinion, which stated that the institution 'cannot venture to act beyond its purposes and statutory obligations without the risk of acting *ultra vires*'.[110] Expressing a clear functionalist orientation, he rooted this *ultra vires* concept in 'the basic principle of *pacta sunt servanda*, the cooperative nature of the Bank and the consensual basis of its actions'.[111] At its core, this functionalist paradigm required a link – however tenuous and interpretable – between institutional actions and constituent sources and allowed for the identification of practices that contravened this act of delegation and the prohibitions it pronounced. The structuring device of this framework was the dichotomy between political sovereignty and international interventionism, which resonated with Shihata's image of the World Bank as an intergovernmental entity operating under international law. In this belief system, loyalty to categories of (il)legality and the institutional posture of restraint was seen to, indirectly but inevitably, serve the 'overall interests of the Bank'.[112] Legal doctrines and interpretative techniques operated as genuine markers for what could (and could not) be legally said: 'I may be able to interpret "white" to mean "coloured"', he argued, 'but I cannot interpret white to mean black'.[113] In light of the leverage he wielded, the authority he constructed and the culture he cultivated, this functionalist rationality generated genuine operational restraint.

Leroy's 'new normative architecture', which reflected a completely different approach to the law of international organizations, broke down these functionalist foundations and implemented a radically new way of dealing with matters of operational expansion. Shihata's language of implied powers and teleological treaty interpretation, for Leroy, was not only hopelessly antiquated but also misconstrued the 'role of

[107] On the genealogies and concrete modalities of these risk-based forms of diagnosis and reform, see Van Den Meerssche and Gordon, 'A "New Normative Architecture": Risk and Resilience as Routines of Un-Governance', 11 *Transnational Legal Theory* (*TLT*) (2020) 267.

[108] The most ambitious conceptual and empirical account of international law's servitude to the growth of IOs and their agendas of liberal reform is undoubtedly provided in Sinclair, *supra* note 16. For a splendid analysis on how law was modified and mobilized in the ever-expanding security agenda of the United Nations, see I. Roele, *Articulating Security: The United Nations and Its Infra-Law* (2021).

[109] See note 68 above.

[110] Shihata, *supra* note 11, at 80–81. This seems to contrast with Benvenisti's dire observation that the *ultra vires* doctrine only operates 'in theory'. See Benvenisti, *supra* note 68, at 115.

[111] Shihata, 'Interpretation as Practiced at the World Bank', in I. Shihata, *The World Bank Legal Papers* (2000) xliii, at lvi.

[112] For a more detailed elaboration of this belief system, see note 16 above.

[113] Interview with Shihata, *supra* note 8, at 65.

the lawyer in the Solutions Bank'.[114] Lawyers, she believed, should not erect boundaries or police operational ambitions but, rather, 'enable the institution to adapt' by giving 'creative', 'value-added' advice.[115] Leroy's 'analytical framework', to this end, traded questions of constitutional conformity for adaptive operational processes in which these concerns were qualified as 'risks' to be measured and managed. These material practices were aligned with Leroy's professional belief that 'there is no real area that is beyond the boundaries – there are only circumstances in which you don't do certain things'.[116] The normative architecture of risk management entails an infinite institutional mandate.[117]

Importantly, Leroy's aim was not only to erase legal limits but also to actively spark more risk-taking behaviour in the legal department and the organization more broadly. The shift in legal practice, in this sense, was promoted both materially (through the introduction of new risk assessment templates) and subjectively (through the cultivation of new professional attitudes and postures). She thereby sought to counteract what a former lawyer described as 'bureaucratic behaviour' and an internal 'culture' where people were 'very averse of making a mistake' (when making 'real-time decisions', lawyers 'feel safe by not taking risks').[118] Lawyers should not be roadblocks or passive bystanders but, rather, active agents in Leroy's imaginary of institutional change – hungry innovators driven by an appetite for risk.

4 'It Was Creating a Rupture in the Equilibrium of the Bank': Managing Accountability

If the phenomenon of operational expansion poses conceptual problems for international institutional law, the real 'frontier' of the discipline, Klabbers has argued, 'resides in the borderline between the internal legal order of the organization and the external world'.[119] This problem is particularly acute in the case of the World Bank, considering the many accounts on how its modernist interventions and neo-liberal programs of structural adjustment have inflicted harm and hardship on the vulnerable groups of people affected by its policies and projects.[120] Legal activists at this

[114] See LVP Annual Report 2013, *supra* note 1.

[115] Interview with Leroy, *supra* note 6; LVP Annual Report 2013, *supra* note 1. Interestingly and importantly, this radical change in professional orientation also manifested itself in different hiring practices in the legal department, where the focus moved away from lawyers with a public (international) law background to lawyers more steeped in corporate finance and risk management.

[116] Interview with Leroy, *supra* note 6.

[117] Leroy believed indeed that the 'risk-based approach' would be 'opening a field of possibilities for the Bank'.

[118] For more background on these observations, see Van Den Meerssche, *supra* note 17.

[119] Klabbers, 'The Paradox of International Institutional Law', 5 *International Organizations Law Review* (*IOLR*) (2008) 151, at 164. *Cf.* Klabbers, *supra* note 14, at 34 (on how functionalism 'does not [and cannot] address relations between the organization and the outside world').

[120] For one account among many, see S. Pahuja, *Decolonising International Law: Development, Economic Growth and the Politics of Universality* (2011).

'frontier' have often focused on the institution's obligations under international law and its legal responsibility to comply with human rights standards.[121] Yet these arguments inevitably encounter the issue that the law of international organizations lacks a plausible theory of obligations to substantiate these claims so that every claim regarding the legal permeability of international institutions (for human rights concerns) is vulnerable to the (equally plausible) argument that the ultimate source of legal validity and authority is provided by their founding treaties.[122] The 'constitutional' turn to normativity is countered by the concreteness of international institutions as delineated spaces with their own 'constitutional' logic and foundations. The language of international law, the *cliché* demands, enables these endless doctrinal dialectics.

During the contentious negotiations of the World Bank's 2016 Environmental and Social Framework (ESF) – which sets out the internal substantive safeguards and standards for operational staff – Leroy was drawn into this 'familiar and predictable jousting routine' with human rights activists and scholars.[123] As she recollected in our interview, 'some wanted us to refer [to human rights] in the ESF … to state that we would comply with international law. I insisted very strongly with the Board, saying we are not a party [to these conventions] … so we are not bound'.[124] In this quote, one can observe, as I noted above, how the moveable boundaries of risk can crystalize in fixed formal frontiers. The outcome of this struggle is reflected in the ESF's preambular 'Vision for Sustainable Development', which states that 'the World Bank's activities *support* the realization of human rights expressed in the Universal Declaration of Human Rights' and that, '*in a manner consistent with its Articles of Agreement*', the organization would 'continue to *support its member countries* as *they* strive to progressively achieve *their* human rights commitments.[125] Clearly, as the proponents of a more explicit embrace of human rights in the organization have also lamented, this is

[121] A recent argument along these lines was made by P. Alston, Report of the Special Rapporteur on Extreme Poverty and Human, Doc. A/70/274 (2015). *Cf.* S. Skogly, *The Human Rights Obligations of the World Bank and the International Monetary Fund* (2001); M. Darrow, *Between Light and Shadow: The World Bank, The International Monetary Fund and International Human Rights Law* (2003). I described these registers of human rights critique and the effects that these engender in Van Den Meerssche, 'A Legal Black Hole in the Cosmos of Virtue: An Inquiry into the Politics of Human Rights Critique against the World Bank', 21 *Human Rights Law Review* (2021) 80.

[122] The argument that we lack a plausible theory of obligation to hold IOs accountable for violating international law is expressed on different occasions by Klabbers. See Klabbers, 'Paradox', *supra* note 119; Klabbers, 'Introduction', *supra* note 71, at xv; Klabbers, 'Controlling International Organizations: A Virtue Ethics Approach', 8 *IOLR* (2011) 285, at 286; see also Daugirdas, 'How and Why International Law Binds International Organizations', 57 *Harvard International Law Journal* (2016) 325.

[123] This is the language of Philip Alston himself. See Alston, *supra* note 4.

[124] Interview with Leroy, *supra* note 6.

[125] World Bank, Environmental and Social Framework (ESF Vision Statement) (2017), para. 3 of section 'A Vision for Sustainable Development' (emphases added).

no legal statement – no deontic commitment – but merely a factual assertion on the existing human rights obligations of states.[126]

In stating that the World Bank would only engage with human rights 'in a manner consistent with its Articles', the provision further reproduced the very problems it was asked to resolve: questions on the relation between the World Bank's constituent treaty and international (human rights) law were deliberately deflected.[127] Leroy acknowledged that this painstakingly crafted political compromise lacked a coherent legal vision and remained essentially meaningless. Yet, at the same time, this deferral of foundational questions on the legal position of the World Bank and the negation of its international legal responsibilities also epitomizes Leroy's mindset: in the organization's daily practice – fraught with managerial exigencies or political compromises – both legal formalism and cosmopolitan idealism can easily pose obstacles, which Leroy, as a seasoned public sector specialist, realized all too well. The aim of her legal labour, she believed, was therefore not to solve jurisprudential puzzles or set the political agenda but, rather, 'to improve institutional governance and operational efficiency'.[128] In this sense, the human rights discussion that arose in the context of the ESF was merely a cumbersome controversy to manage and diffuse.

Yet, while the human rights debate has grown polarized and somewhat stale, as others have also noted,[129] the demand for accountability has crystalized in the creation of a particular form of self-regulation: the World Bank's Inspection Panel (IP).[130] Created in 1993, the IP is authorized to hear complaints by people affected by the World Bank's investment projects and to investigate the compliance of these projects with the institution's own safeguard standards (now systematized in the ESF). It is in relation to this internal accountability procedure that Leroy articulated and enforced a particular 'rule-of-law' concept to justify a remarkable series of interventions that would redefine the institutional place and authority of the IP and the substantive standards that it is eligible to apply.

[126] Interestingly, while the ESF could thereby be seen to entail a major setback for the human rights project, some scholars have interpreted it to mean the opposite and applauded the ESF's vision statement. Dann and Riegner, 'The World Bank's Environmental and Social Framework and the Evolution of Global Order', 32 *LJIL* (2019) 537, at 555 ('[i]n a first for the Bank, the ESF Vision statement expresses an explicit commitment to human rights'). Yet Dann and Riegner do provide a highly original and important reading of the ESF as an artefact of contemporary global governance.

[127] In a footnote of the ESF Vision Statement, *supra* note 125, we read that this reference to the World Bank's articles '[e]specially' relates to 'Article III, Section 5(b) and IV, Section 10' of the articles, which contain the 'political prohibition clause'. For lawyers in the department, it was clear that this was an expression of Leroy's strategy to limit the institution's legal responsibility.

[128] Leroy's 'rule-of-law' ideal is elaborated in detail in Leroy, 'Strengthening the Bank's Internal Rule of Law', in World Bank Legal Vice Presidency, Annual Report FY 2011: The World Bank and the Rule of Law (LVP Annual Report 2011) (2011), at 52.

[129] *Cf.* Klabbers, *supra* note 14, at 78; Klabbers, *supra* note 119.

[130] This 'move to accountability', as Klabbers observed, have rendered debates on the basis of legal obligation somewhat of a 'rear-guard battle'. Klabbers, *supra* note 14, at 76. This move, of course, ties in with many theoretical interventions in the field of international institutional law. See, e.g., Kingsbury, Krisch and Stewart, 'The Emergence of Global Administrative Law', 68 *Law and Contemporary Problems* (2005) 15.

Faced with an ambitious (or, for some, 'aggressive') IP that was seeking to widen its jurisdictional reach, its substantive scope and its operational terrain – interpreting its own mandate and working procedures in an increasingly liberal fashion, referring recurrently to the framework of international (human rights) law[131] and actively enlarging the 'circle of stakeholders'[132] that could be brought under its ambit – Leroy felt a need to intervene. As she recalls, in early 2010, the relationship between management and the IP had become full of conflict for reasons that had to do with the influence of certain civil society organizations that Leroy perceived as being 'very hostile to the Bank': '[T]his was a panel that was very much in a *gotcha* mentality.'[133] In early 2009, one month before Leroy joined the World Bank, there has been a report by the panel on a case in Albania, which generated attention by the press and internal managerial changes. For Leroy, the IP had gone beyond the boundaries of its mandate, which she saw as problematic because it had 'created an attitude of risk-aversion in the staff': '[B]ut if you are risk-averse, you don't do anything. Someone had to do something about it.'[134]

The 'risk appetite' that Jim Yong Kim was cultivating and that was at the heart of the 'new normative architecture' that Leroy sought to instil in the legal department was actively inhibited, she believed, by the increasingly assertive stance of the IP. When another case arose in front of the IP in 2010,[135] Leroy felt compelled to restore institutional 'harmony'.[136] Motivated by the idea that the local people were being instrumentalized by civil society organizations and the claim that 'internal disagreements … over jurisdiction and mandates' of 'accountability and review entities' were threatening the 'coherence' and 'operational efficiency' of the institution,[137] Leroy considered that the moment had come to assert the legal authority of her office. Despite concerns about the role of the General Counsel in interfering with the IP, Leroy issued a legal opinion to the Board of Executive Directors in which she concluded that the request

[131] *Cf.* New York University Clinic on International Organizations, The World Bank Inspection Panel and International Human Rights Law (2017), at 7, available at www.iilj.org/wp-content/uploads/2017/08/The-World-Bank-Inspection-Panel-FINAL-REPORT.pdf (concluding that '[t]he Panel plays an important role in protecting human rights'). Remarkable cases include the Inspection Panel, *Chad: Petroleum Development and Pipeline Project* (2001), Case # 22; Inspection Panel, *Cameroon: Petroleum Development and Pipeline Project* (2002), Case # 27; Inspection Panel, *Honduras: Land Administration Project Case* (2007), Case # 38.

[132] LVP Annual Report 2011, *supra* note 128, at 60. For an illuminating analysis of this widening normative prism from the perspective of the actor network theory, see Sinclair, 'Beyond Accountability: Human Rights, Governance and Reform of International Organizations', in N. Bhuta and R. Vallejo (eds), *Human Rights and Global Governance* (forthcoming).

[133] Interview with Leroy, *supra* note 6. The referenced report is World Bank Inspection Panel, Albania Integrated Coastal Zone Management and Clean-Up Project, Report no. 46596-AL, 24 November 2008. In a press release responding to the report, President Zoellick acknowledged that '[f]rom basic project management to interactions with the Board and the Inspection Panel, the Bank's record with this project is appalling' and that '[t]he Bank cannot let this happen again'.

[134] Interview with Leroy, *supra* note 6.

[135] See SDI, *Request for Inspection, the Development Forest Sector Management Project*, 24 September 2010 (accessible via the World Bank Inspection Panel online portal).

[136] LVP Annual Report 2011, *supra* note 128, at 53.

[137] Interview with Leroy, *supra* note 6; LVP Annual Report 2011, *supra* note 128, at 52–53.

was inadmissible on all counts.[138] For Leroy, this constituted a pivotal personal intervention: '[S]omeone had to say "stop it", because there was a body of the Bank that was clearly abusing its authority and that was *creating a rupture in the equilibrium of the Bank*, paralyzing it … and it was not acceptable.'[139] If accountability mechanisms failed to 'observe self-restraint', 'unilaterally redefine[d] [their] mandate' or threatened the 'harmony', 'coherence' and 'operational efficiency' of the institution, she justified her opinion, and the constitutional moment that it implicitly entailed, 'the General Counsel is obliged' to intervene with the aim of 'uphold[ing] institutional effectiveness and cohesion'.[140] In order to sustain the 'risk appetite' of the staff, Leroy believed, it was her institutional responsibility to discipline an increasingly assertive accountability mechanism that was 'taking advantage of its functional autonomy' and failing to 'observe self-restraint'.[141]

Yet, it is not only (her relation to) the institutional authority of the IP that Leroy sought to redefine but also – and perhaps even more importantly – the nature of the substantive standards that the IP can apply. It is on these safeguards (the ESF) that the logic of Leroy's 'new normative architecture' would leave its mark. The essential change in the new ESF lies not in the minor substantive extensions to previously disregarded policy domains or in the ambiguous references to international (human rights) law – two aspects on which literature tends to focus[142] – but, rather, in the shift from *ex ante* deontic standards to a process of downstream contextual assessment and continuous managerial modification (allowing for 'phased-in' compliance at some unspecified moment in the project cycle).[143] 'A key feature of the new framework', Leroy elaborates, is its 'risk assessment approach … a measured shift towards the mitigation and management of risks throughout the life of an operation'.[144] Rather than prohibiting investment projects that stand in violation of the substantive safeguards, the ESF states that the World Bank can support a project that is 'expected to meet' standards

[138] *Ibid.* See Senior Vice President and Group General Counsel, Note on Legal Issues Arising from the Liberia Inspection Panel Eligibility Report, 27 January 2011, referred to in LVP Annual Report 2011, *supra* note 128, at 65 ('if … the Panel's exercise of jurisdiction raises questions about whether it properly construed its constituent resolution, the General Counsel is obliged to bring this matter to the Panel and the Board's attention'). While Leroy was careful to underline that the opinion should not be perceived as an interference with the panel's role and independence, she did stress that the improper exercise of its mandate would embroil the World Bank in internal and international conflicts. Her assertion of institutional authority in this case – founded on an enrolment on the Board of Executive Directors – entailed a particular constitutional moment: it recalibrated the boundaries of the panel's action in relation to the political and operational branches of the institution (stating the aim to 'clarify and restate [the World Bank's] basic normative hierarchy'). LVP Annual Report 2011, *supra* note 128, at 52.

[139] Interview with Leroy, *supra* note 6.

[140] LVP Annual Report 2011, *supra* note 128, at 52–53, 59, 62.

[141] *Ibid.*, at 62, 64.

[142] *Cf.* Dann and Riegner, *supra* note 126.

[143] Van Den Meerssche, 'Accountability in International Organisations: Reviewing the World Bank's Environmental and Social Framework', in E. Sciso (ed.), *Accountability, Transparency and Democracy in the Functioning of Bretton Woods Institutions* (2017) 157, at 175ff.

[144] LVP Annual Report 2013, *supra* note 1, at 92. This shift, she notes, signals the changing 'role of the lawyer' in the 'Solutions Bank'.

'in a manner and within a timeframe acceptable to the Bank'.[145] Prescriptive *ex ante* project evaluation is thereby traded for a process of 'adaptive [risk] management' based on 'downstream monitoring and implementation support'.[146]

This dilution of prescriptive standards into a 'risk management approach' unequivocally complicates the IP's task to evaluate the compliance of the World Bank's management with the new safeguards, as the panel itself has already noted.[147] As a result of this 'risk-based approach', the non-compliance of a project with (one or multiple) safeguard standards does not inherently establish any responsibility on the part of the World Bank's management (as a 'failure … to follow its operational policies and procedures').[148] To hold the institution accountable, the IP now not only needs to affirm that a specific substantive standard has been 'violated' but also that the project should never have been 'expected to meet' the ESF's requirements in an 'acceptable' manner and time frame. This alters the institution's responsibility from 'complying' with the safeguards to a need for proficient qualitative assessments ('expected to meet'), which could be affirmed even in cases of non-compliance. This assessment is easier to establish and relies on a different evaluative methodology: from deontic, requirements-based reasoning to the continuous qualitative evaluation of operational 'risk' (a change that many lawyers feared for introducing significant uncertainty).[149] The 'key feature of the new framework', as Leroy describes it, results in an important transfer of institutional authority from the IP to the World Bank's management, which is responsible both for defining the risk-based evaluative standards that structure the new review process and for articulating the modifications that would allow for 'phased-in' compliance.[150] This 'risk management' approach to matters of accountability can thereby be seen as the latest, and highly effective, attempt to curtail the institutional power of the IP in its contentious relationship with senior

[145] ESF Vision Statement, *supra* note 125, para. 7 (Environmental and Social Policy).

[146] *Ibid.*, paras 39, 44 (Environmental and Social Standard 1).

[147] See Inspection Panel, 'Comments on the Second Draft of the Proposed Environmental and Social Framework', *World Bank* (2015), available at https://consultations.worldbank.org/sites/default/files/documents/Inspection%20Panel%20Comments%20on%202nd%20Draft%20ESF%20-%2017%20June%202015.pdf.

[148] This is necessary for the panel to exercise jurisdiction. See IBRD, IBRD Res. 93-10: The World Bank Inspection Panel (1993), para. 12. The latter provision is reiterated in the resolution that revised the Inspection Panel in 2020. See IBRD, IBRD Res. 2020-0004: The World Bank Inspection Panel (2020), para. 13. This resolution was part of a broader reform that introduced the World Bank Accountability Mechanism, which also entails a new dispute resolution service. This reform, however, does not impact the substantive orientation of the ESF or the turn to 'risk assessment' in the World Bank's accountability processes that are under scrutiny here.

[149] The Independent Evaluation of the Asian Development Bank's safeguards warns for the risks of this approach: '[We] advocate[] the continued use of a *requirements-based safeguards system*'. See Independent Evaluation Asian Development Bank, ADB's Social and Environmental Safeguards, with Improvements, Can Be a Benchmark (2014), available at www.adb.org/news/adb-s-social-and-environmental-safeguards-improvements-can-be-benchmark.

[150] *Cf.* Office of the High Commissioner for Human Rights, Letter to the World Bank President Regarding the Review of the Environmental and Social Framework (2014), available at www.ohchr.org/Documents/Issues/EPoverty/WorldBank.pdf.

management, as the panel itself has observed.[151] This process was perfectly attuned to Leroy's professed preferences of 'principles' over 'rules' and the enabling orientation of her 'normative architecture' – an orientation that did not only enable infinite operational expansion but also sought to manage the disruptive effect of accountability on the institution's 'harmony'.

5 Conclusion

By analysing Anne-Marie Leroy's professed 'paradigm shift' in the World Bank's legal department, this article has explored how the discipline of international organizations law – including its imaginaries of convergence and axioms of theoretical cohesion – can be enriched with empirical accounts of how rules become enacted in concrete legal practices and professional performances. 'If we are interested in how norms matter', Friedrich Kratochwil generalizes, 'we must begin with the problem of praxis'.[152] 'What we need', he observes, 'is an account of the "competent performance" of a common practice'.[153] This article has traced how Leroy rewrote the criteria of competence in the legal department of the World Bank.

In the decade between Shihata's departure and Leroy's arrival, the legal architecture of the World Bank had hardly altered – it was still an institution operating under a limited mandate, prohibited from engaging or interfering in the 'political' domain and regulated through a thick and unorderly web of operational policies, procedures, and guidelines. Looking at the formal constitutional configuration of the bank, it would be a decade of relative consistency, not radical rupture. Yet, when we widen the empirical prism to the professional practices and personal postures through which these legal sources are embodied and enacted, we see how the authority and orientation of law have significantly shifted. These salient changes in the law of international institutions are situated 'at the edges of conventional international legal sightlines' – in the sphere of material routines and professional cultures, not on the level of legal design.[154] It is in this realm that conventional doctrinal categories might hit their limits.

This article's analysis of two opposing modes of lawyering (and the gradual replacement of one by the other) shows a shift in the mindset, technique and everyday enactment of international institutional law – a shift from evaluative registers of legal interpretation to adaptive analytics of risk management. This 'new normative

[151] See Inspection Panel, *supra* note 147. Already in the immediate aftermath of the Inspection Panel's creation, Executive Director Eveline Herfkens worried that the organization was 'rewriting the Operational Directives system in order to make the guidelines and the directives Panel-proof'. See Interview with Eveline Herfkens, World Bank Oral History Program, 8 October 1996, at 35.

[152] Kratochwil, 'How do Norms Matter?', in M. Byers (ed.), *The Role of Law in International Politics: Essays in International Relations and International Law* (2001) 35, at 36.

[153] Kratochwil, *supra* note 3, at 54. We could think of these criteria of competence also in terms of 'style' and 'rhythm' (with Johns) or 'aesthetics' (with Annelise Riles). *Cf.* Riles, 'A New Agenda for the Cultural Study of Law: Taking on the Technicalities', 53 *Buffalo Law Review* (2005) 973; Johns, 'From Planning to Prototypes: New Ways of Seeing like a State', 82 *Modern Law Review* (2019) 833.

[154] Johns, *supra* note 2, at 187. *Cf.* A. Riles, *Collateral Knowledge: Legal Reasoning in the Global Financial Markets* (2011), at 246 (on the need to focus not on 'grand designs' but on 'lived practices and techniques').

architecture' that I have explored reconfigured the role of the lawyer *vis-à-vis* matters of operational expansion and institutional accountability – two defining disciplinary concerns. In both cases, I have traced a 'paradigm shift' in legal practice driven by 'risk appetite' and the desire for agility. In doing so, the argument has also promoted a critical, socio-legal approach that displaces the dialectics between functionalism and constitutionalism as the discipline's main narrative arc. It proposes a re-theorization that starts from how law is concretely exercised and embodied – an approach that avoids the centripetal urge to find 'unity in diversity' and focuses instead on salient changes in the mundane, material and prosaic practices of lawyering. Through these shifts in the professional codes, postures and social grammar of international institutional lawyers, new disciplinary trajectories can be drawn – trajectories less linear and progressive, less prone to capture in intellectual imaginaries of unity, yet more attuned to the evolving life of the law and the political sensibilities it reflects and sustains.

It is also on this level, I believe, that we can find new avenues for analysis and critique. The focus on professional practice and legal materiality advocated here does not aspire to provide a new theoretical perspective on international institutional law as a distinct object of inquiry but, on the contrary, traces the entanglement (or dissolution) of legal forms or practices in newly emergent apparatuses of rule – in what Alain Pottage, via Michel Foucault, described as the 'rhizomatic *dispositifs*' through which law is absorbed and metabolized.[155] The analysis of Leroy's legal labour, in this sense, does not entail a re-theorization of international institutional law – as a particular and presupposed phenomenon to be explained and rationalized – but shows how the professional practices, institutional roles or formal norms once held together under that rubric are reconfigured and recomposed in the governmentality of risk. The 'new normative architecture' that I mapped out thereby entails more than a deformalization or displacement of law – it signals its inscription in new formations of global (un) governance.[156] In these formations, law appears neither as the ideological code of institutional behaviour nor as a promising technique for regulation or restraint – both the ideological critique of (neo)liberal legalism and the commitment to law as a constitutionalizing conduit seem oriented toward prior institutional incarnations of law in the World Bank.[157] My diagnosis of the displacement of concerns for constraint and accountability with professional orientations towards agility and risk appetite is aimed at questioning this reconfiguration – at polemicizing what matters and what is excluded from mattering in contemporary legal practice.

[155] Pottage, 'The Materiality of What', 39 *Journal of Law and Society* (2012) 167, at 170, 181–183.

[156] *Cf.* Desai and Lang, 'Introduction: Global Un-Governance', 11 *TLT* (2020) 219; Johns, *supra* note 153.

[157] Critique on the performativity of international law as bearer of neo-liberal projects can be found in Pahuja, *supra* note 120; Chimni, 'International Institutions Today: An Imperial Global State in the Making', 15 *EJIL* (2004) 1.