



# **RESPONSIBILITY IN INTERNATIONAL RELATIONS**

Edited by  
Hans Köchler and Joël Christoph

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**INTERNATIONAL PROGRESS ORGANIZATION**

*After the end of the Cold War, powerful states repeatedly invoked the “responsibility to protect” to justify the use of force against other states. In many instances, however, those who claimed to act on the basis of a moral or legal obligation refused to bear responsibility, or to be held accountable, for the consequences of their actions. This has been particularly obvious in cases where unilateral interventions resulted in “régime change,” triggering or intensifying domestic conflicts and provoking wider regional destabilization. It has also been obvious in multilateral coercive measures, mandated or “authorized” by the United Nations Security Council.*

*Under the current system of international relations, invocation of “responsibility” is, more often than not, determined by considerations of power politics, and accountability for the consequences, whether intended or not, is almost non-existent.*

(From the introduction)

The texts published in this volume were presented in September 2023 at an international roundtable consultation at Hotel Imperial in Vienna. Scholars and practitioners from Austria, Canada, China, Denmark, France, Germany, Iceland, India, Italy, Serbia, Türkiye, the United Kingdom, and the United States explore and analyze the moral, legal, and social dimensions of “responsibility” in the context of global power relations. The chapters deal with: “Responsibility: From the Moral to the Political,” “United Nations, Rule of Law and World Order,” and “Global Governance and Power Dynamics.”



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# **RESPONSIBILITY IN INTERNATIONAL RELATIONS**

**Selected papers from an international  
roundtable consultation in Vienna**

Edited by  
Hans Köchler and Joël Christoph

Vienna 2024

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## **Editorial Note**

The present volume contains papers submitted in connection with an international roundtable consultation hosted by the International Progress Organization (I.P.O.) at Hotel Imperial in Vienna, Austria. The discussions on 21 September 2023 were held in private. Only those texts are included which the participants have specifically submitted for publication. A brief overview of the entire debate is given in the Executive Summary reproduced in the appendix.

The texts of this selection differ in style and method, depending on whether the author focuses on conceptual analysis, the history of ideas, legal critique, or (international) political advocacy.

Some of the major issues involving international responsibility – such as economic sanctions or the dubious powers of the UN Security Council – were for the first time publicly addressed by the International Progress Organization. It was the delegate of the I.P.O. who – on 13 August 1991 at the Palais des Nations in Geneva – alerted the then United Nations Commission on Human Rights on “a grave and systematic violation of human rights (...), in form and dimension without precedent,” suffered by the people of Iraq as result of the comprehensive economic sanctions imposed by the United Nations Security Council. Subsequently, in 1994, the I.P.O. published an analysis entitled “Ethical Aspects of Sanctions in International Law: Sanctions Policy and Human Rights.” Only almost a decade after the I.P.O. had raised the issue did a working paper prepared by Marc Bossuyt for the Human Rights Commission address (in June 2000) “The adverse consequences of economic sanctions on the enjoyment of human rights.” Also, almost four decades ago, the organization questioned the privileged position of the permanent members of the UN Security Council – incompatible with the sovereign equality of states – at a colloquium to commemorate the

40<sup>th</sup> anniversary of the world organization on 31 October 1985 in New York City. The relevant bibliographical information on these initiatives is attached in the Appendix.

As a non-governmental organization in consultative status with the Economic and Social Council of the United Nations and as a member of the Conference of Non-Governmental Organizations in Consultative Relationship with the United Nations (CoNGO), the I.P.O. is committed to the Purposes and Principles of the world organization. Accordingly, we address the issue of “international responsibility” on the basis of the UN Charter and of the legal instruments and conventions adopted in that framework.

The views expressed in the articles are solely those of the authors and do not necessarily reflect the views or policies of the International Progress Organization.

Vienna, January 2024

## Exposé

In a Declaration on the abolition of the slave trade (8 February 1815), the Congress of Vienna invoked the “principles of humanity and universal morality” (*principes d’humanité et de morale universelle*). Since then, numerous international instruments have been adopted highlighting the responsibility of states for the respect and realization of fundamental rights. The Preamble to the Charter of the United Nations Organization also testifies to this commitment.

After the end of the Cold War, powerful states repeatedly invoked the “responsibility to protect” to justify the use of force against other states. In many instances, however, those who claimed to act on the basis of a moral or legal obligation refused to bear responsibility, or to be held accountable, for the consequences of their actions. This has been particularly obvious in cases where *unilateral* interventions resulted in “régime change,” triggering or intensifying domestic conflicts and provoking wider regional destabilization. It has also been obvious in *multilateral* coercive measures, mandated or “authorized” by the United Nations Security Council.

Under the current system of international relations, invocation of “responsibility” is, more often than not, determined by considerations of power politics, and accountability for the consequences, whether intended or not, is almost non-existent. The United Nations Charter effectively puts the main *enforcers* of the law – the Security Council’s permanent members – *above* the law. The Council’s coercive measures under Chapter VII of the Charter are not subject to legal scrutiny, and they cannot be revised or suspended against the will of a permanent member.

Instead of making states more conscious of their obligations, the “Draft Articles on the Responsibility of States for Internationally Wrongful Acts” were often used by powerful actors to justify unilateral action, including extraterritorial sanctions, against adversaries or competitors. Also, in its present rudimentary state, the system of international criminal justice is highly prone to politicization.

Since the end of the Cold War period, the International Progress Organization (I.P.O.) has been dealing with issues of transnational democracy, the international rule of law, and the role of the United Nations Organization. Among those projects were conferences and roundtables on “Democracy in International Relations” (1985), “The Question of Terrorism” (1987), “The United Nations and International Democracy” (1994), “The Use of Force in International Relations: Challenges to Collective Security” (2005), and “The ‘Global War on Terror’ and the Question of World Order” (2007). The I.P.O. also hosted the Second International Conference on a More Democratic United Nations (CAM-DUN-2) in Vienna, in 1991.

Following the 50<sup>th</sup> anniversary of its foundation, the International Progress Organization would like to discuss the dual aspect of responsibility in international relations: as *obligation* on the part of states and as *accountability* at individual and state level.

Hans Köchler

## Opening Remarks

Dear colleagues,

I am pleased to welcome you at Hotel Imperial, in Vienna's historical center. At long last, we meet at the place we had chosen three years ago – to discuss a topic that has become even more urgent in the circumstances of what some fashionably call *die Zeitenwende* of 2022.

I am glad and grateful that most of the colleagues we invited before the onset of the pandemic are here with us today. Unfortunately, the geographical inclusivity which we hoped for (between East and West) has again become difficult to ensure – not because of a health emergency, but due to new political rifts, globally, and especially in Europe.

This should not discourage us, however, to proceed with the task of clarifying a foundational notion of world order:

“International responsibility” has a dual meaning, and at two distinct levels: namely, as *obligation* and *accountability* – of the *state* as well as of the *individual* – with *moral* and *legal* connotations.

In our projects since the early 1980s, the International Progress Organization has mainly dealt with the *legal aspects* of accountability, with a focus on the *inconsistency* of the existing system of norms: (1) in determining the responsibility of states for their actions, and (2) in defining the criminal culpability of those who have ordered or perpetuated acts that amount to international crimes.

As regards states, there is the concisely drafted text of the International Law Commission (ILC) on “Responsibility of States for Internationally Wrongful Acts” (2001), which was taken note of, but not formally

endorsed, by the General Assembly of the United Nations; and there exists, first and foremost, the United Nations Charter, an instrument that commits all member states to respect the principle of equal rights and to settle their international disputes by peaceful means. While the text of the ILC is a *statement of principles*, including an injured state's right for reparation by the state that has committed an "internationally wrongful act," the United Nations Charter declares it as one of the organization's main "Purposes" to take *effective measures* for the prevention of threats to the peace and for the suppression of acts of aggression. In reality, however, the Charter protects some of the most powerful countries, the Security Council's permanent members, from any enforcement action against their own internationally wrongful acts in the domain of security and peace. Thus, the Charter from the outset has undermined the international rule of law and eroded the concept of state responsibility. Except for acts of, so-to-speak, "moral" condemnation by way of General Assembly resolutions, the United Nations can only stand by idly when a permanent member decides to impose coercive measures or use force unilaterally, in violation of international law. The wording of Article 27, Paragraph 3 of the Charter is antithesis par excellence to the notion of international responsibility. The invasions of Iraq in 2003 and of Ukraine in 2022 are just two of the many examples of the state of anarchy in relations between sovereign states, which our organization has addressed in many conferences and expert meetings in the last four decades.

Power trumps law not only in the domain of state responsibility where an unrestrained drive for dominance has threatened global stability and peace since the early days of intergovernmental organization. To a considerable extent, international criminal justice also has had to operate under the influence and constraints of power politics. This is true for the criminal tribunals established by executive fiat of the Security Council, as it has been the case, again to a considerable extent, for the International Criminal Court (ICC). Its statute is somewhat dysfunctionally connected – or tied – to the dynamics of power in the Security Council, whether in relation to the Court's jurisdiction over the crime of aggression or to the bizarre authority of non-State Parties of the ICC to confer upon the Court jurisdiction over situations on the territory of states that are not Party to the Statute, to mention just two of several loopholes where unaccountable power directly impacts on the Court. Because the linkage effectively inserts double standards in the Court's

operation, it *erodes* the idea of personal criminal responsibility under the Rome Statute. Another loophole is opened by the highly problematic provision of Article 116 of the Rome Statute about so-called *voluntary contributions* “from Governments, international organizations, individuals, corporations and other entities.”

Allow me, on this occasion, a brief historical reminiscence, or digression. In our organization’s meetings in the last half-century, we repeatedly addressed these issues under the aspect of a just and stable world order. As a consultative organization of the Economic and Social Council of the United Nations (ECOSOC), we submitted specific proposals for reform of the UN system all of which are documented in our publications.

On this occasion, I would particularly like to remember the cooperation and support we received from individuals who had attended the founding conference of the United Nations in San Francisco, namely *Élisabeth de Miribel* (personal assistant to General Charles de Gaulle during the wartime years); the great American-Jewish advocate for peace in the Middle East, *Alfred Lilienthal*; and *Harold E. Stassen*, 25<sup>th</sup> Governor of Minnesota and one of the U.S. signatories of the UN Charter in 1945. With his “Draft Charter Suggested for a Better United Nations,” he greatly contributed to our efforts in the 1990s as co-founder of the CAMDUN initiative (“Conferences on A More Democratic United Nations”), the second meeting of which we hosted at the United Nations Office at Vienna in 1991. I also would like to pay tribute to our close friends, the late *Ramsey Clark*, consecutively Assistant Attorney General and Attorney General of the United States in the Kennedy and Johnson administrations, and *Seán MacBride*, Nobel Peace Laureate and President of the International Peace Bureau. They were among the most enthusiastic supporters of our efforts in the field of law and justice. I also vividly remember the contribution of New York lawyer *Mary M. Kaufman* who joined us in an international tribunal and panel of jurists in 1984. Ms. Kaufman did so as advocate of international criminal justice who had made an outstanding contribution as member of the prosecution team of the U.S. Military Tribunal in Nürnberg (in the *I.G. Farben* case). She is also remembered for her contribution to the development of the “Nürnberg Principles” in regard to the concept of individual criminal responsibility.

More than two centuries ago, the Vienna Congress invoked the “principles of humanity and universal morality” as guidelines for what would amount, in today’s language, to the “responsibility of states” and their leaders in a most comprehensive sense. Obviously, the “Concert of Europe,” after 1815, failed to implement these noble principles. In spite of the lofty doctrine of “humanitarian intervention” or “Responsibility to Protect” (R2P), implementation seems to be a step too big even for today’s international community.

If not by the Vienna Congress – the acts of which were, just as those of today’s powers, tainted by what 19<sup>th</sup> century strategists had described as *realpolitik* – we may get inspiration from the more recent Vienna Convention on the Law of Treaties (1969). In view of its affirmation of the *pacta sunt servanda* rule, many consider the Convention an important document also in relation to the concept of state responsibility.

In conclusion, we should not be discouraged by the state of affairs. It is important that we continue the debate under the new geopolitical circumstances, whether diagnosed as “Zeitenwende” or not, and that we can do so – *sine ira et studio* – in a scholarly framework that covers international law, including human rights law, political science, international relations theory, history, and sociology. I look forward to our discussions and thank you again for having accepted our invitation.

# **I**

## **Concept and Foundations of International Responsibility**



**Anthony F. Lang, Jr.**

## **Responsibility: From the Moral to the Political**

### **Introduction**

On 17 March 2023, the Pre-Trial Chamber of the International Criminal Court agreed to issue arrest warrants for Russian President Vladimir Putin and Russian Children’s Commissioner Maria Lvova-Belova. The arrest warrants were requested by Chief Prosecutor Karim Khan on 26 February 2023 following an investigation into allegations that Russia moved hundreds of children from occupied Ukrainian territory to Russia for adoption by Russian parents. The arrest warrants note that these deportations violate the Geneva Convention prohibition on the movement of populations in occupied territories, and that these are considered war crimes in international criminal law.<sup>1</sup> While Ukraine is not a signatory to the Rome Statute, its parliament authorized the ICC to undertake an investigation into war crimes, crimes against humanity and the crime of genocide that may have taken place in its territories since February 2014 (when Russia occupied Crimea).<sup>2</sup> This authorization by the Ukrainian parliament is indefinite in time, and so the March 2023 arrest warrants are allowed by both Ukrainian and international law.

This arrest warrant has, predictably, generated a great deal of discussion. The idea of responsibility for individuals emerged over the course of the 20<sup>th</sup> century, as the international community sought to move

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<sup>1</sup> International Criminal Court, “Situation in Ukraine: ICC judges issue arrest warrants against Vladimir Vladimirovich Putin and Maria Alekseyevna Lvova-Belova,” 17 March 2023, <https://www.icc-cpi.int/news/situation-ukraine-icc-judges-issue-arrest-warrants-against-vladimir-vladimirovich-putin-and>.

<sup>2</sup> International Criminal Court, “Ukraine Situation,” <https://www.icc-cpi.int/situations/ukraine>.

away from punishing states in the post-World War I era due largely to the chaos that engulfed Germany in the interwar period, in large part as a result of reparations demands imposed on the state as a whole by the victorious allied powers. This helped to push the international community toward a focus on individuals, resulting in the Nuremberg Trials and Tokyo Trials following World War II. After the creation of various international tribunals toward the end of the 20<sup>th</sup> century, there was a call for a single international criminal court. When the Rome Statute was ratified by the requisite number of states in 2002, the creation of the International Criminal Court (ICC) brought to fruition this demand to focus on individuals as responsible for international crimes. The three crimes of genocide, war crimes, and crimes against humanity were all defined in the Statute, and the crime of aggression was finally confirmed in 2008 at the Uganda meeting. With these four crimes defined and a court in place, it would seem that individual criminal responsibility had become the prevailing norm.

At the same time, other developments in the international legal system suggest that holding states responsible remains part of the normative architecture of the international system. The 2001 Articles on State Responsibility set out a framework by which states could be held accountable for “delicts,” a lesser category than crimes, but still an important statement by the international legal community concerning state responsibility.<sup>3</sup> When the International Court of Justice considered the case of genocide against Serbia, it drew upon the Articles to assert that states can indeed be held responsible for genocide (though it did not find Serbia guilty of that crime, but of failing to prevent genocide in Srebrenica in 1995). So, while the court did not directly draw on the Articles, by using them to establish the possibility of a state being held responsible suggests that these articles have legal purchase in the international community.<sup>4</sup>

Both international criminal law and state responsibility demonstrate the importance and salience of responsibility as a concept in interna-

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<sup>3</sup> James Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text, and Commentaries*. Cambridge: Cambridge University Press, 2002.

<sup>4</sup> Anthony F. Lang, Jr., “Punishing Genocide: A Critical Reading of the International Court of Justice,” in: Tracy Isaacs and Richard Vernon (eds.), *Accountability for Collective Wrongdoing*. Cambridge: Cambridge University Press, 2011, pp. 92-118.

tional relations. There exists a body of work in legal theory that explores the nature of responsibility and liability. Much of it, however, is about criminal law and procedure.<sup>5</sup> There is also a body of work in international legal and political theory that looks at debates around collective and corporate responsibility.<sup>6</sup> While I will draw on some of the latter literature, I will not look to the former, as it tends to be about individual moral agents rather than seeing agents as part of political communities. So, in order to explore the confusing and conflicting ways in which both individual and state responsibility have emerged and intersect, I propose looking instead to political theory. After connecting responsibility to speech and discourse, I explore its moral meaning. I argue that moral responsibility, while underlying these legal meanings, also fails to connect to politics. Through the philosophies of Aristotle and Hannah Arendt, I propose how responsibility might be better understood as a political concept. I conclude that privileging the idea of political responsibility would greatly benefit how we deploy ideas of responsibility in the international system, and might help to make it a more universalizable concept.

### **Responsibility as a Moral Concept**

The word responsibility in English derives, in part, from the word response, or the ability to speak back to someone who has spoken to you. The Oxford English Dictionary (OED) lists several definitions, the first of which is “Correspondent or answering to something” followed by “answerable, accountable (to another for something); liable to be called to account.” The definitions then turn to the moral: “Morally accountable for one’s actions; capable of rational conduct.” This is then followed by a definition of “responsible government,” i.e., a govern-

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<sup>5</sup> See Philip E. Davis (ed.), *Moral and Legal Responsibility: A Philosophical Legal Case Book*. New York: Appleton-Century-Crofts, 1966. One of the classic texts in this area is H. L. A. Hart and Tony Honoré, *Causation in the Law*. Oxford: Clarendon Press, 1985.

<sup>6</sup> For an excellent overview of some of these debates, see Toni Erskine, “Moral Responsibility – and Luck? – in International Politics,” in: Chris Brown and Robyn Eckersley (eds.), *The Oxford Handbook on International Political Theory*. Oxford: Oxford University Press, 2018, pp. 130-142. For a summary of these debates in international law, see André Nollkaemper and Dov Jacobs (eds.), *Distribution of Responsibilities in International Law*. Cambridge: Cambridge University Press, 2015.

ment that can conduct its affairs for the benefit of its people.<sup>7</sup> The last definition moves in a rather different direction: “of respectable appearance.”<sup>8</sup> Additionally, the OED reveals that it was not until the 18<sup>th</sup> century that the word “respond” first starts to mean replying in words to a normal query. Medieval uses of the term were largely liturgical, as in responding during a Christian service to the calls from the priest.

What does this etymological discussion tell us? First, it reminds us that responsibility is located within language, that is, ultimately about a discourse. Second, this response is intimately related to our moral obligations, and those moral obligations are linked to our ability to be rational. That is, without being rational beings, we cannot be moral beings, and both rationality and morality require that we be able to communicate with others, which means it only makes sense as a concept if we understand ourselves as part of a community. That is, while responsibility begins as a moral term, it soon becomes political, at least if political means it relies on how we communicate with others and that our obligations come from being members of that community.

Connecting the moral dimension of responsibility with its political elements has been addressed in some of the philosophical literature. Peter Strawson links this moral dimension of responsibility with community in his 1963 paper “Freedom and Resentment.”<sup>9</sup> Strawson begins with a debate about the consequences for human behavior for the thesis of determinism. The thesis of determinism – the belief that all actions are determined prior to their taking place and that human beings have no control over those actions in ways that are morally relevant – impacts our understanding of moral responsibility at its core because if determinism is true the concept of responsibility makes no sense. Strawson argues that, even if determinism is true, responsibility still has a role to play in our interpersonal relations. He argues that our attitudes and intentions toward others depend on the assumption that other human beings understand responsibility in a meaningful way. Strawson’s thesis

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<sup>7</sup> Interestingly, this definition has a slight colonial implication; one of the examples given comes from the 19<sup>th</sup> century and is a reference to a British document laying out when colonies can become self-governing when they become “responsible.”

<sup>8</sup> *The Oxford English Dictionary*. Oxford: Clarendon Press, 1989, Volume XIII, p. 742.

<sup>9</sup> Reprinted in John Martin Fischer and Mark Ravizza (eds.), *Perspectives on Moral Responsibility*. Ithaca: Cornell University Press, 1993, pp. 45-66.

highlights that responsibility is not simply about internal dynamics of intentionality but is a communal idea. One could analyze the concept of responsibility without even considering these relationships, but to do so would undermine the central purpose of responsibility in many of our relationships – the ability to react toward others as real persons and not as objects. Even more importantly, Strawson is making the more interesting claim that without responsibility, communities make no sense. In other words, if the concept of responsibility did not exist, we could not have meaningful interpersonal relationships and, *ipso facto*, we could not have meaningful societies and political communities.

Traditionally, a key element of politics and community is the concept of power. Marion Smiley argues in her book *Moral Responsibility and the Boundaries of Community* that moral responsibility cannot be a function simply of our assumptions about will and intentions.<sup>10</sup> Rather, responsibility arises from two factors: one, the social roles that communities establish for individuals, determining whether or not they should be blamed for particular actions; and, two, the power relations that exist between individuals that allow some to blame others and, in so doing, reinforce or create new roles. Individual persons become blameworthy or praiseworthy because of the roles we create for them. Smiley's argument relates to Strawson's point, that there is a relationship between discourses of responsibility and the social and political norms that structure community life. But Smiley provides more precision than Strawson's account by highlighting that responsibility is not just necessary for our interpersonal relationships to work; it structures and is structured by the power relations that exist within that society. Her critical insight on this point is crucial to understanding the ways in which responsibility can and cannot function in international law and politics.

From these two accounts, we can draw the conclusion that responsibility is a moral concept but also a political one. One theorist who helpfully connects morality with politics is the ancient Greek philosopher, Aristotle. Indeed, he concludes his famous work on ethics, the *Nicomachean Ethics*, with a chapter on how important political communities are for

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<sup>10</sup> Marion Smiley, *Moral Responsibility and the Boundaries of Community: Power and Accountability from a Pragmatic Point of View* (Chicago: University of Chicago Press, 1992).

shaping moral individuals.<sup>11</sup> Before turning to his political insights, however, let me briefly note that Aristotle does have an extended discussion of what is sometimes called “voluntariness” in Book III of the *Nicomachean Ethics*. In that text, he explores the distinction between voluntary and involuntary actions. Though his overall ethical approach focuses on states of character rather than individual actions, in this section he does link actions with rational choices that individuals make (or do not make). In that discussion, Aristotle argues that we need to deliberate about our ethical choices, noting that we deliberate about things we can change rather than things we cannot. This deliberation is partly with ourselves, but he makes a qualification about this: “On important issues, we do not trust our ability to decide and call in others to help us deliberate.”<sup>12</sup>

But how does deliberation become political? Before turning to his political writings, a first step is to appreciate what he meant by deliberation and reasoning. In his logical works, Aristotle differentiates scientific reasoning from what he calls dialectical reasoning. The former is not exactly what we would call science today but has been greatly influential in the philosophy of logic and, to a lesser extent, in the philosophy of the sciences. I am less interested in this form of reasoning for this chapter and more interested in the idea of dialectical reasoning. He distinguishes the two types of reasoning in the following passage from *Topics* (one of his logical works):

Now reasoning is an argument in which, certain things being laid down, something other than these necessarily comes about through them. (a) It is a demonstration when the premises from which the reasoning starts are true and primary, or are such that our knowledge of them has originally come through premises which are primary and true; (b) reasoning on the other hand is dialectical if it reasons from opinions that are generally held.<sup>13</sup>

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<sup>11</sup> Aristotle, *Nicomachean Ethics*, translated and edited by Roger Crisp. Cambridge: Cambridge University Press, pp. 197-201.

<sup>12</sup> *Op. cit.*, pp. 42-43.

<sup>13</sup> Aristotle, *The Topics*, translated by W.A. Pickard-Cambridge, in: Richard McKeon (ed.), *The Basic Works of Aristotle*. New York: Random House, 1941, p. 188.

This dialectical form of reasoning can arise from different sources, which means sometimes it is in error and other times it reflects a form of true wisdom. Aristotle does not suggest how we might ascertain whether such forms of reasoning are accurate or not, leaving this form of reasoning less certain than the scientific form. More importantly for my purposes here, Aristotle sees dialectical reasoning as central to ethical and political knowledge.

To understand how this form of dialectical reasoning works in Aristotle, we need to turn to his idea of causation. There are four causes for everything: the material, the formal, the efficient, and the teleological.<sup>14</sup> The material is the material stuff from which something is made, i.e., wood of a table. The formal cause is that class in which a thing belongs; a table is that which has four legs and a flat top. The efficient cause is closest to what we would understand by cause, e.g., that which brings something into existence. In the case of the table, the efficient cause would be the carpenter who built it. The final cause is the teleological, from the word *télos* (τέλος), which means goal or fulfilment. This is one of the more difficult ideas to capture, but it is crucial for understanding Aristotle's wider philosophy. The end or purpose of the table could be multiple: a place to write, a place to eat, or a place to hold artefacts. There are, of course, some things we know a table is not designed for, such as locomotion or weaponry. Of course, we might use the table for such things, but these do not reflect its true purpose for it is not designed for such things; for instance, a better designed weapon would not be so large and unwieldy, and a vehicle would have wheels or sleds on which to move forward. The table's three causes feed into its purpose, its *τέλος*, by making it fit for purpose.

Aristotle uses these four causes not just in understanding natural phenomena, but the human condition as well, which he does in both the *Nicomachean* and *Eudemian Ethics*, and the *Politics*. What structures his ethical and political thought is an understanding of the *telos* of the human person or that, which defines the person in opposition to the rest of reality. In the *Nicomachean Ethics*, Aristotle begins by noting that the ideal to be pursued is happiness. Happiness is not the simple pursuit

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<sup>14</sup> Aristotle, *The Physics*, translated by R. P. Hardie and R. K. Gaye, in: Richard McKeon (ed.), *The Basic Works of Aristotle*. New York: Random House, 1941, pp. 240-241.

of pleasure, but a life lived in accordance with the particular human characteristics that differentiate us from animals or plants. These characteristics provide the basis for what Aristotle calls virtue, in Ancient Greek ἀρετή. In fact, the Greek word *areté* means excellence, for virtue is the practice of an activity in the best possible way. So, the virtue of a joiner is to create the best kinds of wood crafts (or most efficiently fix things in a household, etc.).

While it is a somewhat easy matter to define what constitutes the best possible carpenter or teacher or student, it is more complicated to define what is the best possible person. In modern liberal theory, defining what constitutes a good person is left to individuals to determine. We may believe that certain characteristics are good or bad for persons, but generally today we do not seek to define the best person. Aristotle differs from our approach in this fundamental way. Aristotle proposes two characteristics that differentiate us from the rest of reality, particularly the animal world: we live in organized political communities, and we use our reason. As a result, those virtues which are most important, and which Aristotle details in the *Nicomachean Ethics*, are the practical and the intellectual. The former are those virtues focused on the practice of daily life, particularly those that result from living in a community with others in which we cannot simply pursue our own desires and appetites; living politically requires that we moderate our behavior in ways that allow others to live with us. The latter are those dedicated to the life of contemplation, the task of philosophers. Unlike his teacher Plato, however, Aristotle does not privilege thinking above action; rather, as one commentator notes, philosophy is not complete unless it is political philosophy.<sup>15</sup>

One of the virtues that combine the political and the intellectual is that of prudence, or in Greek φρόνησις (*phrónesis*). This virtue is intimately connected to the very nature of virtue and Aristotle's teleological project, for it is the ability to reason about how to obtain the good. It is the ability to know what is good and to act upon it, thus combining the intellectual with the moral realms. *Phronesis* does not arise from the mere accumulation of factual knowledge but comes from a life lived in

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<sup>15</sup> Mary Nichols, *Citizens and Statesmen: A Study of Aristotle's Politics* (Lanham MD: Rowman and Littlefield, 1992), p. 7.

a community in which individuals must negotiate their differences and come to some common standards of behavior. It draws on that idea of dialectical reasoning, which he explained in the *Topics*.

The *Nicomachean Ethics* concludes with a discussion of how to create a community within which individuals will be able to live virtuous lives. Aristotle uses this conclusion to transition to the *Politics* where he proposes a similar model by using the idea of the purpose of a state to construct an argument for what is the best state. The state is understood as a “natural” thing, something that evolves from the particular needs of humans; he calls man a “political animal” on the very first page of the *Politics*. While human perfection comes through reason, reason expresses itself through speech – the Ancient Greek word λόγος (lógos) means both reason and speech. And speech only exists in community with others. As Mary Nichols explains:

Politics is therefore natural – a way in which we fulfil our natural capacity for reason and speech. Politics involves argument about advantage and justice, deliberation concerning alternatives, choices among them, and action to attain them. Implicit in Aristotle’s presentation of the human good is our need for others, with whom we share our deliberations, choices, and actions. When Aristotle speaks of the human good as the end of our most authoritative association [the state], he indicates that this good comes to us through association – not in isolation from others.<sup>16</sup>

The text of the *Politics* explores the nature of the state, or what is better translated as the city-state, the πόλις (*pólis*). Keeping in mind that the *polis* is the entity that will provide the framework within which human perfection can come about, Aristotle not only explains political life, but he also evaluates it in terms of which kind of state is best for the human person.

So, what does this long detour through Aristotle tell us? First, it tells us that dialogue and speech (or logos) are central to what it means to be a human person. We may think that knowledge about politics or law comes from the accumulation of facts about a particular situation,

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<sup>16</sup> *Op. cit.*, p. 15.

which it most certainly does. But it also comes from a dialectical process of speech and counter speech, or that dialectical form of reason found in his logical works on reasoning. One form of this, which brings us back to responsibility, might be the speech and counter speech that occurs in a courtroom, particularly in the common law system of antagonistic proceedings. However, I want to argue that this is not the only way for us to understand how responsibility and speech intersect. Instead, speech and counter speech in the wider political order is what might better help us to understand responsibility. And it might lead us away from a simplistic causal/moral account toward something more designed to improve our political order rather than simply find individuals guilty or innocent. To make this point, let me now turn to Hannah Arendt.

### **Responsibility, Politics and Hannah Arendt<sup>17</sup>**

From Aristotle, I have concluded that we need to have some conception of speech and deliberation to really understand our political responsibility. To give more specificity to this idea, let me turn to the political theorist Hannah Arendt. She bases her understanding of responsibility on the idea of political agency, which is the status of individuals in a community as being able to participate in the life of that community. That status sometimes results from an official body conferring it, such as in determinations of citizenship. At the same time, political agency does not stop with that official conferment. Rather, it must be continually re-inscribed by engagement in the political, by working with and sometimes against others in a community. Agency then results not just from the actions of others giving one an official status but also from one's own political activity.

This idea of political agency is developed most fully in Arendt's *The Human Condition*.<sup>18</sup> She divides human life into different categories, such as those devoted to daily life and those devoted to longer-term institu-

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<sup>17</sup> This section is drawn in part from Helga Haflidadottir and Anthony F. Lang, Jr., "Responsibility and Climate Change: Reframing Norms, Practices and Community," in: Hannes Hansen-Magnusson and Antje Vetterlein (eds.), *The Rise of Responsibility in World Politics*. Cambridge: Cambridge University Press. 2020, pp. 145-164.

<sup>18</sup> Hannah Arendt, *The Human Condition*. Chicago: University of Chicago Press, 1958.

tions and ideas. That which she calls action is the most important realm in terms of politics, for action is that human activity where human persons reveal themselves in moments of interactions with others. It is the way in which we assert who we are, in which we create ourselves by presenting ourselves in public. Politics, which provides the constructed stage of a parliament or town meeting, provides the paradigmatic instance of moments in which the human person can be revealed. Arendt develops this concept of action in an engagement with Greek and Roman philosophers who sought to define the realm of the political. That realm, combining a Homeric agonal spirit with an Aristotelian notion of speech as the quintessentially human characteristic, results in a public space that allows for competition and conflict. Since Arendt believes that political action is a public presentation of the self, there must be a community to whom this presentation is made. She notes that action occurs within a “web of human relationships,” a place composed both of other people acting and speaking and of the “common world” that surrounds and anchors human interaction: “... most words and deeds are about some worldly objective reality in addition to being a disclosure of the acting and speaking self.”<sup>19</sup> Politics thus requires a public realm, one composed of fellow humans with an agreed upon equality, not one of merit but one of agency.

This brings us to Arendt’s idea of political responsibility. In a colloquium sponsored by the American Philosophical Association in 1968, she presented an argument concerning collective responsibility. She begins by distinguishing between guilt and responsibility: “Guilt, unlike responsibility, always singles out; it is strictly personal.”<sup>20</sup> But while guilt is individual, responsibility can be corporate. She notes that for collective responsibility to make sense two conditions must apply:

I must be held responsible for something I have not done, and the reason for my responsibility must be my membership in a group (a collective), which no voluntary act of mine can dissolve, that is, a membership which is utterly unlike a business partnership which I can dissolve at will.<sup>21</sup>

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<sup>19</sup> *Op. cit.*, p. 182.

<sup>20</sup> Hannah Arendt, “Collective Responsibility,” in: Arendt, *Responsibility and Judgment* edited with an introduction by Jerome Kohn. New York: Schocken Books, 2003, p. 147.

<sup>21</sup> *Op. cit.*, p. 149.

Collective responsibility applies most clearly, according to this conception, in cases where individuals are held responsible for what their governments do. The context of her argument seems to be an attempt to locate the responsibility of individuals who do not support the actions of their government but who are being held responsible for that government's actions.

Arendt takes this point even further, however. Rather than simply stating that collective responsibility is possible in these situations, she argues that simply by living in the current world, one in which we are automatically bound up in a community, we can never avoid responsibility for the actions of our states. To clarify this, she notes that only refugees are innocent of this collective responsibility, precisely because they are outside the boundaries of any community. Arendt claims that political nonparticipation, as a sign of political protest, does not alleviate this responsibility. Simply by the fact that we live in a community, we are responsible for its collective actions.

This vicarious responsibility for things we have not done, this taking upon ourselves the consequences for things we are entirely innocent of, is the price we pay for the fact that we live our lives not by ourselves but among our fellow men, and that the faculty of action which, after all, is the political faculty par excellence, can be actualized only in one of the many and manifold forms of human community.<sup>22</sup>

Political agency and responsibility connect the individual to a wider realm, one in which the human person is celebrated in all her individuality. While it may seem strange to create a collective notion of responsibility when Arendt is so concerned with individuality, her concept of responsibility is about agency, not about an internal will producing morally or legally correct outcomes. Instead, it is a responsibility that arises from an understanding that each action produces the political sphere anew. Because of the emphasis she places on the ways in which agency constructs the public sphere, Arendt's conception of responsibility arises from that participation. If the public sphere is that place where no person is made superfluous, but every person has the opportunity to enact themselves and contribute to the creation of that sphere

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<sup>22</sup> *Op. cit.*, pp. 157-58.

through their deeds, acts that destroy that space will redound on all of us who have acted and continue to act in that space.<sup>23</sup> Constructing and sustaining the public sphere is a joint exercise, and when that sphere is closed down or parts of it are destroyed permanently, we all become responsible.

In her essay, Arendt is thinking of particular communities, and not a global one. Indeed, there is less from Arendt on global politics than domestic politics.<sup>24</sup> I do think, however, that this essay can help us think more carefully about responsibility in global politics. If we accept that we are, in some way, part of an international or global community, then we are obligated to act when harmful events take place. These may not be events that our nation-state or we have caused or brought about. So, it is not a matter of arguing that we need to find guilty parties, whether states or individuals, and hold them responsible. Instead, Arendt is telling us that we need to think about actions that can recreate the world anew, actions that can lead to a different political order (international or global), which will perhaps prevent such events from happening in the future. Arendt's argument, in other words, is a call to future action rather than a search for past guilt.

## **Conclusion**

I have suggested in this short chapter that while we may start with moral and legal responsibility when addressing wrongs in the international order, we cannot end there. I am not denying that we should seek to hold individuals and states accountable for wrongs, whether those be crimes or delicts. Indeed, I believe that the International Criminal Court and the Articles on State Responsibility are important institutional and legal arrangements that can help promote a global rule of law. Rather, I think we need to continually make the case for a form of political

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<sup>23</sup> For an argument about Arendt and her concern with the dangers of individuals becoming superfluous, see Patrick Hayden, "Superfluous Humanity: An Arendtian Perspective on the Political Evil of Global Poverty," in *Millennium*, Vol. 35, No. 2 (2007), pp. 279-300.

<sup>24</sup> For one early attempt to make Arendt more "global," see Anthony F. Lang, Jr. and John Williams (eds.), *Hannah Arendt and International Relations: Reading Across the Lines*. London: Palgrave Macmillan, 2005.

responsibility, one that seeks to create alternatives to existing arrangements. So, for instance, in the debates around conflicts in places like Ukraine and the Middle East, the two most heated conflicts at the time of this writing, we can certainly propose that individuals and states should be held accountable. But what we need ever more urgently is to propose alternatives that may seem “utopian” in moments of conflict. As an example, some years back I proposed that one way to address the Palestinian-Israeli conflict is through a federated parliamentary structure in which both communities could legislate together for the good of the whole. It is not a single state, though come be one. Instead, it is a space that would allow peoples from both sides to come together in a non-violent way to address contemporary problems.<sup>25</sup> I do not mean to say that this will solve the problems of the Middle East; rather, it is to say that there are possible alternatives we may not be able to see now, but which we should still propose. And, in line with Aristotle’s idea of deliberation, if we put forward these ideas, the hope is that debate and engagement around them will lead to some change in the institutional arrangements that structure global politics.

In the end, I do not propose this conceptual framing as the only solution. Instead, it is to highlight one meaning of responsibility that has been neglected in relation to the moral and the legal. My hope in setting out this proposal is that we might think more critically and carefully about international responsibility in the coming years.

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<sup>25</sup> Anthony F. Lang, Jr., “Constructing Equal and Vigorous Citizens: The Role of Legislative Politics.” *EUI Working Papers* RSCAS2014/36. Florence: European University Institute, 2014, <http://cadmus.eui.eu/handle/1814/31452>.

Sean Fleming

## State Crime

State responsibility under international law is reparative rather than punitive. When a state commits a wrongful act, it is obligated “to make full reparation for the injury caused.”<sup>1</sup> But a state cannot be *criminally* responsible for a wrongful act, no matter how serious. As the Nuremberg Tribunal famously declared, “Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced.”<sup>2</sup> The concept of “state crime” is conspicuously absent from the International Law Commission’s (ILC) *Articles on Responsibility of States for Internationally Wrongful Acts*. As it stands, international criminal responsibility is limited to individuals.

Some scholars have argued that international criminal law *should* apply to states. One argument is that the concept of state crime is necessary to distinguish egregious breaches of international law, such as aggression and genocide, from less serious breaches, such as trade violations.<sup>3</sup> Another argument is that it is incoherent to hold states non-criminally responsible for criminal actions. As the ILC’s Special Rapporteur, James Crawford, noted in his First Report on State Responsibility, “Only States can commit aggression, and aggression is characteristically described

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<sup>1</sup> International Law Commission, *Articles on Responsibility of States for Internationally Wrongful Acts* (New York: United Nations, 2001), Article 31.1.

<sup>2</sup> Nuremberg International Military Tribunal, “Judgment,” *American Journal of International Law* 41, no. 1 (1947 [1946]): 172-333, at 221.

<sup>3</sup> Alain Pellet, “Can a State Commit a Crime? Definitely, Yes!” *European Journal of International Law* 10, no. 2 (1999): 425-32, at 426: “the distinction between what is termed ‘delicts’ and what is termed ‘crimes’ answers an indisputable need and must be maintained.”

as a crime.”<sup>4</sup> How, then, could aggressive states not be criminally responsible?<sup>5</sup> Another argument relies on a direct analogy with corporate criminality: if corporations are held criminally responsible under domestic law, then why not hold states criminally responsible under international law?<sup>6</sup>

However, extending international criminal law to the state would not be as simple as it might seem. I have written extensively elsewhere about the theoretical, ethical, and legal problems with holding states criminally responsible.<sup>7</sup> My focus in this chapter is on the legal problems. My aim is to explain three of the most important legal problems with state crime in a brief and accessible way, for scholars and practitioners alike. The first I call the *Intention Problem*: criminal responsibility requires intent, but international law is silent about when (if ever) the intentions of individuals can be attributed to the state. The second I call the *Temporal Problem*: in the absence of a statute of limitations on the most serious international crimes, holding states criminally responsible would raise the possibility of “historical punishment” of centuries-old acts of aggression and genocide. The third I call the *Judgment Problem*: holding states criminally responsible would require a criminal court with jurisdiction over states. My argument is that it would be unwise, even dangerous, to introduce the concept of state crime into the cur-

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<sup>4</sup> James Crawford, “First Report on State Responsibility,” 1998, United Nations doc. A/CN.4/490, 23.

<sup>5</sup> Anthony F. Lang, Jr., “Punishing Genocide: A Critical Reading of the International Court of Justice,” in *Accountability for Collective Wrongdoing*, eds. Tracy Isaacs and Richard Vernon (Cambridge: Cambridge University Press, 2011), 92-118, at 104. See also Lang, “Crime and Punishment: Holding States Accountable,” *Ethics & International Affairs* 21, no. 2 (2007): 239-57; and Lang, *Punishment, Justice and International Relations: Ethics and Order after the Cold War* (New York: Routledge, 2008).

<sup>6</sup> Nina Jørgensen, *The Responsibility of States for International Crimes* (Oxford: Oxford University Press, 2000), 79: “The theories used to justify corporate criminal liability may also be applied to states if the state is viewed as a corporate structure with agents acting on its behalf, and a large population which may be likened to shareholders who are interested in and affected by the acts of the decision-makers.”

<sup>7</sup> Sean Fleming, “Moral Agents and Legal Persons: The Ethics and the Law of State Responsibility,” *International Theory* 9, no. 3 (2017): 466-89, at 479-83; Sean Fleming, *Leviathan on a Leash: A Theory of State Responsibility* (Princeton: Princeton University Press, 2020), 99-105; Sean Fleming, “Leviathan on Trial: Should States Be Held Criminally Responsible?” *International Theory* 13, no. 3 (2021): 427-50.

rent international order. Holding states criminally responsible would require significant legal developments and major institutional reforms.

### **The Lost Article on “International Crimes”**

Before explaining the legal problems with holding states criminally responsible, it is worth briefly discussing the drafting history of the ILC’s *Articles on Responsibility of States for Internationally Wrongful Acts*. The 1976 draft contained a long article regarding international crimes of states.

#### *Article 19*

#### *International Crimes and International Delicts*

1. An act of a State which constitutes a breach of an international obligation is an internationally wrongful act, regardless of the subject-matter of the obligation breached.
2. An internationally wrongful act which results from the breach by a State of an international obligation so essential for the protection of fundamental interests of the international community that its breach is recognized as a crime by that community as a whole constitutes an international crime.
3. Subject to paragraph 2, and on the basis of the rules of international law in force, an international crime may result, *inter alia*, from:
  - (a) a serious breach of an international obligation of essential importance for the maintenance of international peace and security, such as that prohibiting aggression;
  - (b) a serious breach of an international obligation of essential importance for safeguarding the right of self-determination of peoples, such as that prohibiting the establishment or maintenance by force of colonial domination;
  - (c) a serious breach on a widespread scale of an international obligation of essential importance for safeguarding the hu-

man being, such as those prohibiting slavery, genocide and apartheid;

(d) a serious breach of an international obligation of essential importance for the safeguarding and preservation of the human environment, such as those prohibiting massive pollution of the atmosphere or of the seas.

4. Any internationally wrongful act which is not an international crime in accordance with paragraph 2 constitutes an international delict.<sup>8</sup>

Article 19 would have made it possible for states to be held criminally responsible for aggression, colonialism, slavery, genocide, apartheid, and even environmental destruction. However, the term “international crime” was deleted from the *Articles* before they were submitted to the UN General Assembly in 2001. The ILC instead decided to use “serious breach” to designate the most egregious violations of international law.<sup>9</sup>

The decision to replace “international crime” with “serious breach” was a pragmatic compromise that allowed the ILC to move past what proved to be a contentious issue. Yet, the fact that this decision was pragmatic does not mean that it was unprincipled. The idea of “international crime” was contentious in the first place because it stood in tension with the well-established principle that state responsibility “is neither civil nor criminal” but “pure and simply international.”<sup>10</sup> The majority of state delegates to the ILC who objected to the article on “international crime” did so on the grounds that it was inappropriate to introduce a “penal” form of state responsibility into international law.<sup>11</sup> As Crawford observed, “even those Governments which support the retention of article 19 in some form do not support a developed regime

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<sup>8</sup> Text of the 1976 draft of the ILC’s *Articles on Responsibility of States for Internationally Wrongful Acts*, quoted in Marina Spinedi, “International Crimes of State: The Legislative History,” in *International Crimes of State: A Critical Analysis of the ILC’s Draft Article 19 on State Responsibility*, eds. Joseph H. H. Weiler, Antonio Cassese, and Marina Spinedi (Berlin: Walter de Gruyter, 1989), 7-138, at 9.

<sup>9</sup> ILC, *Articles on Responsibility of States*, Articles 40 and 41.

<sup>10</sup> Crawford, First Report on State Responsibility, 13.

<sup>11</sup> Spinedi, “International Crimes of State,” 51.

of criminal responsibility of States, that is to say, a genuine ‘penalizing’ of the most serious wrongful acts.”<sup>12</sup> Using the term “serious breach” was a way of retaining the essential distinction between more-serious and less-serious wrongful acts while avoiding the penal connotations of “crime.”

However, some scholars have argued that the concept of state crime ought to have been retained precisely *because* of its penal connotations. As Anthony Lang says, “For political systems to function properly, especially those that are grounded in some form of constitutionalism or law, those who violate the rules of the system must either be punished or be under threat of punishment.”<sup>13</sup> To label the most serious wrongful acts of state “crimes” without the possibility of punishing states would, in his view, defeat the purpose of the term. But to introduce a genuinely punitive concept of state crime into international law would, as Lang duly acknowledges, raise difficult theoretical, ethical, and legal problems. The main theoretical problem is whether states (and other corporate entities) can be considered agents, “over and above” their individual citizens and officials.<sup>14</sup> The main ethical problem is whether states (lacking bodies or minds) can be punished; and, if they can be punished, how this can be done without causing unjustifiable collateral harm to their citizens.<sup>15</sup> In the following three sections, I discuss what I believe to be the three main legal problems with holding states criminally responsible.

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<sup>12</sup> Crawford, First Report on State Responsibility, 13.

<sup>13</sup> Lang, *Punishment, Justice and International Relations*, 2; Jørgensen, *The Responsibility of States for International Crimes*, also argues for a genuinely punitive notion of state crime.

<sup>14</sup> For a helpful review of the literature on corporate agency, see Samuel Mansell, John Ferguson, David Gindis, and Avia Pasternak, “Rethinking Corporate Agency in Business, Philosophy, and Law,” *Journal of Business Ethics* 154, no. 4 (2019): 893-99. For an alternative way of understanding “acts of state,” see Sean Fleming, “Moral Agents and Legal Persons”; and Fleming, “Artificial Persons and Attributed Actions: How to Interpret Action-Sentences about States,” *European Journal of International Relations* 23, no. 4 (2017): 930-50.

<sup>15</sup> Harry Gould, “International Criminal Bodies,” *Review of International Studies* 35, no. 3 (2009): 701-21; Toni Erskine, “Kicking Bodies and Damning Souls: The Danger of Harming ‘Innocent’ Individuals while Punishing ‘Delinquent’ States,” *Ethics & International Affairs* 24 (3): 261-85.

## The Intention Problem

A crime has two conceptual components: *actus reus* and *mens rea*, or guilty act and guilty mind. In the case of state responsibility, the guilty (or wrongful) act is relatively unproblematic. Although states, as “abstract entities,” cannot act on their own, the actions of their officials or organs can be *attributed* to them. As a general rule, whenever an official performs a state function, such as defense or border control, the actions of that official are attributable to the state. For instance, when a Mexican police officer detains a suspect, that act constitutes an act of state; it can be said that “Mexico” detained the suspect. Even if the officer acts *ultra vires*, or outside of his authority, his actions are attributable to the state, insofar as he “acted using the means and powers pertaining to his public function.”<sup>16</sup> The logic of state responsibility is in some ways similar to that of a principal-agent relationship, where one person acts vicariously through another. Just as the actions of an employee can be attributed to an employer, the actions of an official can be attributed to the state.<sup>17</sup>

Holding states criminally responsible would require “intentions of state” as well as acts of state. To hold a state criminally responsible for genocide would not only require that an act of genocide be attributable to the state, but also that the state had a corresponding genocidal intention. However, it is not clear what would constitute a state intention. Although the *Articles on Responsibility of States* provide detailed rules for determining whether an act is attributable to a state, they are silent about when, if ever, intentions are attributable to a state. Are the intentions of all state organs attributable to the state, or is there some distinction between “physical” and “mental” organs? It is plausible to

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<sup>16</sup> Antonio Cassese, *International Law* (Oxford: Oxford University Press, 2001), 188. The principle that *ultra vires* acts are nonetheless acts of state was affirmed by the *Caire* case. See *Estate of Jean-Baptiste Caire (France) v. United Mexican States*, French-Mexican Claims Commission, 7 June 1929, United Nations, Reports of International Arbitral Awards, Volume V, 516-34. See also Article 7 of the ILC’s *Articles on Responsibility of States*.

<sup>17</sup> I discuss the logic of attribution at length in Fleming, “Moral Agents and Legal Persons,” 472-75; and Fleming, “Causation, Fault and Function in the Rules of Attribution,” in *Theories of International Responsibility Law*, ed. Samantha Besson (Cambridge: Cambridge University Press, 2022), 229-51.

attribute the intentions of high-level organs, such as a general or a president, to the state, but it is less plausible to attribute the intentions of low-level soldiers or civil servants to the state. The fact that a single soldier had a genocidal intention seems insufficient to infer that *the state* had a genocidal intention. This is especially true for rogue officials, who act outside of their authority and, if anything, contrary to the intentions of the state.

Intentions and actions can, and often do, come apart in principal-agent relationships. The fact that an employee was reckless does not necessarily mean that his employer was reckless. The employee's reckless act can be attributed to the employer even if the mental state of recklessness is not. Thus, the employee may be guilty of a criminal offence while his employer, who was not reckless, is vicariously liable for any damage caused. By the same logic, an act of a soldier can be attributable to the state even if the soldier's intentions are not. The soldier may be criminally responsible for war crimes while the state is liable for reparations. In any case, the existing rules of attribution for actions cannot simply be applied to intentions. Introducing the concept of state crime into international law would not only require the reintroduction of something like Article 19 from 1976; it would also require the addition of a whole new chapter to the rules of attribution.

### **The Temporal Problem**

The most serious international crimes are "imprescriptible," which means that their prosecution is not subject to any time-limit.<sup>18</sup> As the Rome Statute says, "The crimes within the jurisdiction of the Court shall not be subject to any statute of limitations."<sup>19</sup> The perpetrators of genocide, war crimes, and crimes against humanity are subject to prosecution for as long as they live. Yet, the prosecution of these crimes is effectively limited by the human lifespan. When the perpetrators of the Holocaust are all deceased, there will be no one left to prosecute.

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<sup>18</sup> Christine van den Wyngaert and John Dugard, "Non-Applicability of Statute of Limitations," in *The Rome Statute of the International Criminal Court: A Commentary*, eds. Antonio Cassese, Paola Gaeta, and John Jones (Oxford: Oxford University Press, 2002), 873-88.

<sup>19</sup> United Nations, *Rome Statute of the International Criminal Court*, Article 29.

But the prosecution of state crimes would have *no* time-limit because states have indefinite lifespans. The legal personality of a state persists despite changes in its territory, generational turnovers in its population, and even revolutions.<sup>20</sup> The Russian Federation is the same legal person as the Soviet Union; the Republic of Türkiye is the same legal person as the Ottoman Empire; and the United Kingdom is the same legal person as the British Empire. Holding states criminally responsible would thus open the door to “historical punishment” of centuries-old crimes.

Historical punishment should not be confused with historical reparations, which involve *compensation* for the wrongdoing of generations past. Claims to historical reparations could conceivably be made under the current international law of state responsibility. Provided that an act was legally wrongful at the time it was committed, it entails reparative obligations, and these reparative obligations, if not met, carry through to the present day. Thus, it could be argued that the Republic of Türkiye has a legal obligation to pay reparations for the Armenian genocide.<sup>21</sup> But the idea of state crime seems to imply that the Republic of Türkiye should not only pay reparations; it should also be *punished*, since genocide is clearly a crime. Similarly, it seems that the United States should be *punished* for slavery, since it maintained slavery for decades after it was internationally outlawed. If the mere passage of time cannot absolve individuals of the crimes of genocide and slavery, then it is difficult to see how it could absolve states. The fact that Türkiye and the United States have evaded prosecution and punishment for so long is, if anything, an aggravating factor.

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<sup>20</sup> On the identity and continuity of the state, see James Crawford, *The Creation of States in International Law*, Second Edition (New York: Oxford University Press, 2007), especially 671-90; Krystyna Marek, *Identity and Continuity of States in Public International Law* (Geneva: Droz, 1968); and Fleming, *Leviathan on a Leash*, 24-28, 38-41, and 110-43.

<sup>21</sup> Vahagn Avedian, “State Identity, Continuity, and Responsibility: The Ottoman Empire, the Republic of Turkey and the Armenian Genocide,” *European Journal of International Law* 23, no. 3 (2012): 797-820. On the limits to legal claims to historical reparations, see Andreas Buser, “Colonial Injustices and the Law of State Responsibility: The CARICOM Claim to Compensate Slavery and (Native) Genocide,” *Heidelberg Journal of International Law* 77 (2017): 409-46.

Yet, even the most ardent proponents of historical reparations would probably balk at the idea of historical punishment. Amidst growing calls for former empires to compensate their former colonies, calls for punishment are conspicuously absent. Historical punishment might be understood as a *reductio ad absurdum* of state crime: if punishing centuries-old crimes is what state crime entails, then maybe the concept of state crime is unsound.

More charitably, historical punishment can be understood as an unintended consequence of introducing the concept of state crime into an international legal system that is ill-equipped to deal with it. What is needed is some principle that justifies placing a time-limit on the prosecution and punishment of states. The most obvious principle – *nullum crimen, nulla poena sine lege* (no crime, no penalty without a law) – rules out only some instances of historical punishment. It might be argued that the United Kingdom cannot be criminally responsible for the colonization of India because colonialism was not a crime at the time. But this principle cannot so easily absolve the United States for the crime of slavery, because there was a customary prohibition of slavery even in the nineteenth century. Even at that time, slavery was often described as a “crime against humanity.”<sup>22</sup> Although it seems necessary to place a time-limit on the prosecution and punishment of states, it is not clear what the time-limit should be, or what legal principle could justify a time-limit.

### The Judgment Problem

Criminal responsibility requires an institutional structure through which the relevant agents can be *held* criminally responsible. There must be an impartial authority that can judge whether a crime has been committed and, if so, what the punishment should be. In the absence of such a judicial authority, “punishment” would be little more than revenge or vigilantism. Corporate criminal responsibility is possible because, in the domestic realm, there are courts with the authority to make criminal judgments against corporations. But there is currently

<sup>22</sup> William Schabas, *Unimaginable Atrocities: Justice, Politics, and Rights at the War Crimes Tribunals* (Oxford: Oxford University Press, 2012), 52.

no international court with the authority to make criminal judgments against states.

The Judgment Problem is quite an old one. Thomas Hobbes's formulation of it is one of the best known. "A PUNISHMENT" he says in *Leviathan*, "is an Evil inflicted by publique Authority, on him that hath done, or omitted that which is Judged by the same Authority to be a Transgression of the Law."<sup>23</sup> Since states are not subject to any higher authority, they cannot be punished. An attempt by one state to punish another would merely be revenge, or "an act of Hostility."<sup>24</sup> Immanuel Kant makes a similar argument in the *Metaphysics of Morals*: "No war between independent states can be a *punitive* one (*bellum punitivum*). For a punishment can only occur in a relationship between a superior (*imperans*) and a subject (*subditus*)."<sup>25</sup> In Kant's view, as in Hobbes's, punishing states is conceptually impossible if there is no sovereign authority that stands above them all.

These classical formulations of the Judgment Problem are overstated. Holding states criminally responsible would not necessarily require a global sovereign or even a global police force. As Lang argues, all that a criminal system of state responsibility would require is a global judicial authority with criminal jurisdiction.<sup>26</sup> The "legislative" function and the "executive" function can both be decentralized: criminal law can be made by treaty or custom, and states can punish each other for violations, such as with sanctions or war. Contrary to what Kant thought, genuine punishment is possible in a system of formally equal states, but *only if* the punitive actions that these states undertake are authorized by an impartial court.

It is worth noting that an impartial court is not necessary for all forms of state responsibility. Even Hobbes thought states could have contractual obligations in a state of nature: "if a weaker Prince, make a disadvantageous peace with a stronger, for feare; he is bound to keep it"

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<sup>23</sup> Thomas Hobbes, *Leviathan*, ed. Noel Malcolm (Oxford: Clarendon Press, 2012), 482.

<sup>24</sup> Hobbes, *Leviathan*, 486.

<sup>25</sup> Immanuel Kant, *Political Writings*, ed. H. S. Reiss (Cambridge: Cambridge University Press, 1970), 168, emphasis in original.

<sup>26</sup> Lang, *Punishment, Justice and International Relations*, 25-44.

– at least until there is a new cause for war.<sup>27</sup> A judicial authority is not conceptually necessary for reparative obligations, treaty obligations, or public debts, though it is desirable for the purposes of adjudicating disputes and coordinating enforcement. However, a judicial authority is conceptually necessary for criminal state responsibility because punishment would otherwise be indistinguishable from vengeance.

The International Criminal Court (ICC) is, at first glance, the most plausible candidate for a judicial body that could try and punish states. But the ICC currently has jurisdiction only over “natural persons.” As the Rome Statute says, “No provision in this Statute relating to individual criminal responsibility shall affect the responsibility of States under international law.”<sup>28</sup> The International Court of Justice (ICJ) seems to be a viable alternative, since it is capable of making judgments against states. But the ICJ does not hear criminal cases, and it lacks compulsory jurisdiction. Another possibility is the United Nations Security Council (UNSC), which already has a quasi-judicial role in the international order.<sup>29</sup> But if the UNSC is a judicial body, it is hardly an impartial one. The state members of the UNSC, and especially the five permanent members, are often judges in their own cases. Further, as Lang and Jørgensen argue, vesting the UNSC with the authority to make criminal judgments against states would result in an illegitimate fusion of executive and judicial authority.<sup>30</sup> State crime thus falls through an institutional gap: the ICC hears criminal cases but not cases against states, the ICJ hears cases against states but not criminal cases, and the UNSC is not sufficiently impartial to be a credible judge in any case.

Holding states criminally responsible would require substantial reforms to international judicial institutions. There are several possibilities. First, as Jørgensen suggests, the jurisdiction of the ICC “could be extended to include states.”<sup>31</sup> Second, the ICJ could be granted compul-

<sup>27</sup> Hobbes, *Leviathan*, 212. See also Noel Malcolm, *Aspects of Hobbes* (Oxford: Oxford University Press, 2002), 438-39.

<sup>28</sup> United Nations, *Rome Statute of the International Criminal Court*, 1 July 2002, UN Doc. A/CONF.183/9, Article 25.1 and 25.4.

<sup>29</sup> Gabriella Blum, “The Crime and Punishment of States,” *Yale Journal of International Law* 38, no. 1 (2013): 57-122, at 107-9.

<sup>30</sup> Cf. Blum, “The Crime and Punishment of States,” 107-9.

<sup>31</sup> Jørgensen, *The Responsibility of States for International Crimes*, 217.

sory, criminal jurisdiction. Third, as Lang proposes, a new international criminal court could be established for states.<sup>32</sup> Fourth, the UNSC could be reformed to make it more impartial – for instance, by requiring its members to recuse themselves when they have a material interest in a case (though the problem with fusing judicial and executive authority would remain).

All these reforms would be protracted and difficult. In the current international order, states would be reluctant to give an international body the authority to declare them criminals. As Blum points out, “Throughout the twentieth century there were several proposals to establish an international criminal court for states.”<sup>33</sup> The fact that none of these proposals succeeded does not mean that none *will* succeed. My point here is only that the difficult task of institutional reform should precede the introduction of the concept of state crime. It might be tempting to introduce the concept of state crime into international law now, in the name of “progressive development,” with the hope that the requisite judicial institutions will grow up around it. As Jørgensen suggests, “it is possible for the concept of state criminality to become established in an initial stage of development, and this could provide the impetus for the creation of a suitable institutional framework.”<sup>34</sup> Instead of “build it and they will come,” the logic is “conceptualize it and someone will build it.”

Even if introducing the concept did have a developmental effect, there would be a dangerous interlude in which the concept of state crime was outside of judicial control. Punishing a criminal state would provide an all-too-easy pretext for military intervention. The risk is that “criminal state” would become an epithet like “rogue state” – but much worse if that label were given legal significance. Imagine a legal system in which heavily armed corporations hold their own trials, declare each other criminals, and punish each other as they see fit. That is essentially the danger of introducing the concept of state crime into the current international order. Prematurely introducing the concept of state crime seems more likely to degrade and tarnish the concept than to spur the development of international judicial institutions.

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<sup>32</sup> Lang, *Punishment, Justice and International Relations*, 138-39, envisions the ICJ as the final court of appeal.

<sup>33</sup> Blum, “The Crime and Punishment of States,” 106.

<sup>34</sup> Jørgensen, *The Responsibility of States for International Crimes*, 230.

It is true, of course, that international criminal law was developed before the International Criminal Court was established to solve the Judgment Problem at the individual level. Most international criminal trials have so far taken place in *ad hoc* tribunals, such as the Nuremberg and Tokyo Tribunals and the International Criminal Tribunals for Rwanda and the Former Yugoslavia. But the Judgment Problem is far more severe at the state level because the risks involved with punishing states are much greater. The worst possible outcome of an *ad hoc* criminal tribunal for individuals is that it becomes a show trial, where hundreds or thousands of innocent people are punished. That, of course, is terrible enough. But the worst possible outcomes of *ad hoc* state punishment are catastrophic: wars, sanctions, and punitive fines that kill or seriously harm millions of innocent people.

Although all forms of state responsibility are hazardous in the absence of a judicial authority, punitive forms of state responsibility are especially hazardous. Reparations and sanctions can easily go too far, even if they are understood in reparative or rehabilitative terms. The effects of the draconian sanctions and reparations against Iraq in the aftermath of its 1990 invasion of Kuwait are well known.

[P]er capita income fell from 3,416 US dollars in 1985 to 1,500 in 1991 and has decreased to less than 1,036 in 1998. Other sources estimate a decrease in per capita GDP to as low as 450 US dollars in 1995. [...] The dietary energy supply had fallen from 3,120 to 1,093 kilo calories per capita/per day by 1994-95. [...] The gravity of the humanitarian situation of the Iraqi people is indisputable and cannot be overstated.<sup>35</sup>

Although the death toll is disputed, there is no doubt that the sanctions caused countless deaths and incalculable harm to millions of Iraqis who were unquestionably innocent. The United Nations Compensation Commission later ordered Iraq to pay \$52.4 billion in reparations, most of which was recovered by garnishing 25 to 30 percent of Iraq's oil rev-

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<sup>35</sup> United Nations, *Report of the Second Panel Established by the President of the Security Council on 30 January 1999 (S/1999/100), Concerning the Current Humanitarian Situation in Iraq*, UN Doc. S/1999/356, 35-46. See also Abbas Alnasrawi, "Iraq: Economic Sanctions and Consequences, 1990-2000," *Third World Quarterly* 22, no. 2 (2001): 205-18.

enue.<sup>36</sup> If these reparations could be justified in terms of compensation, then one can only imagine what could be justified by the idea of punitive damages against states.<sup>37</sup> Punishment is far more open-ended than compensation, which makes it far more dangerous when it is unhinged from judicial authorization. Allowing states to decide for themselves whether a “criminal state” has “paid for its crimes” would invite them to take reparations, sanctions, and military interventions too far.

## Conclusion

I have argued that proposals to extend international criminal law from individuals to states raise three serious legal problems. These problems are not necessarily insurmountable but solving them would require significant legal reforms and major institutional developments. First, there would need to be new rules of attribution that determine what constitutes an intention of the state. Second, there would need to be a time-limit on the prosecution and punishment of states. Third, there would need to be an impartial judicial authority that can judge whether a state has committed a crime and determine the appropriate punishment. To introduce the concept of state crime into international law before the necessary legal and institutional framework exists would not be “progressive development,” but reckless experimentation.

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<sup>36</sup> United Nations Compensation Commission, Summary of Awards, <https://www.uncc.ch/summary-awards> (accessed 10 October 2023). See also Hans Van Houtte, Hans Das, and Bart Delmartino, “The United Nations Compensation Commission,” in *The Oxford Handbook of Reparations*, ed. Pablo de Greiff (New York: Oxford University Press, 2006), 321-90.

<sup>37</sup> On punitive damages, see Jørgensen, *The Responsibility of States for International Crimes*, 187-207.

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## **When Human Needs and Peremptory Norms Are Still Made to Separate: A Call for Ethics Enhancements in the Era of Globalization and COVID-19**

### **1. Some Preliminary and Pertinent Remarks on International Responsibility**

In the case of the Draft Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA), the centrality of peremptory norms of general international law (*jus cogens*) and, furthermore, the adoption of theoretical and doctrinal premises from legal discourse is indisputable.<sup>1</sup> Historically, it is equally indisputable, according to Ulf Linderfalk, that the “remarkable attention” the concept of *jus cogens* has received since the 1990s first and foremost revolves around international criminal law and human rights.<sup>2</sup> Spillovers from this can be found in the

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<sup>1</sup> United Nations (UN), International Law Commission (ILC), Draft Articles on Responsibility of States for Internationally Wrongful Acts, A/56/49 (as approved by General Assembly [GA] resolution 56/83 of 12 Dec. 2001), [https://legal.un.org/ilc/texts/instruments/english/draft\\_articles/9\\_6\\_2001.pdf](https://legal.un.org/ilc/texts/instruments/english/draft_articles/9_6_2001.pdf) [hereinafter ARSIWA].

<sup>2</sup> Ulf Linderfalk, *Understanding Jus Cogens in International Law and International Legal Discourse* 1 (2020) [hereinafter *Understanding Jus Cogens*]. For comparative *jus cogens* doctrine and theory, see Anja Matwijkiw & Bronik Matwijkiw, “Post-Conflict Justice: Legal Doctrine, General Jurisprudence, and Stakeholder Frameworks,” in *Global Trends: Law, Policy & Justice: Essays in Honour of Giuliana Ziccardi Capaldo* 345 (M. Cherif Bassiouni et al eds., 2013) [hereinafter *Post-Conflict Justice*].

ARSIWA,<sup>3</sup> albeit it is also true that the way the 1945 Charter of the United Nations (UN Charter) tries to balance “respect for human rights and for fundamental freedoms for all” with “the principle of the sovereign equality of all its Members” is not geared toward experimenting with the introduction of “international crime/s” or “State crimes,” as the International Law Commission (the Commission or ILC) did in the 1996 penultimate draft version of the ARSIWA.<sup>4</sup> The response from concerned Governments of States was accordingly. Despite changes to the final draft version, as adopted by the ILC on second reading on 3 August 2001, the searchlight was on the replacement category of “serious breaches” and obligations *erga omnes*.<sup>5</sup> Apparently, the *jus cogens* rhetoric promised *too much* in practice for States that did not find it persuasive (... for the same reason). A document entitled “Comments and

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<sup>3</sup> Article 1 of the ARSIWA “covers all international obligations of the State and not only those owed to other States” (thereby also clarifying the scope of Art. 28), including human rights violations and “other breaches of international law where the primary beneficiary of the obligation breached is not a state.” For the “non-exhaustive list” of *jus cogens* examples the ILC “decided to include in an annex” and which contains “substantive rules of conduct that prohibit what has come to be seen as intolerable because of the threat it presents to the survival of States and their peoples and the most basic human values,” *inter alia*, crimes against humanity (CAH), see UN, ILC, Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries, 87, 283 (2001), [https://legal.un.org/ilc/texts/instruments/english/commentaries/9\\_6\\_2001.pdf](https://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf) [hereinafter ARSIWA Commentaries]; UN, ILC, Draft Conclusions on Identification and Legal Consequences of Peremptory Norms of General International Law (*Jus Cogens*), 6 (2022), [https://legal.un.org/ilc/texts/instruments/english/draft\\_articles/1\\_14\\_2022.pdf](https://legal.un.org/ilc/texts/instruments/english/draft_articles/1_14_2022.pdf) [hereinafter CILC]; UN, ILC, Draft Conclusions on Identification and Legal Consequences of Peremptory Norms of General International Law (*Jus Cogens*), with Commentaries, 19 n19, 85 (2022), [https://legal.un.org/ilc/texts/instruments/english/commentaries/1\\_14\\_2022.pdf](https://legal.un.org/ilc/texts/instruments/english/commentaries/1_14_2022.pdf) [hereinafter CILC Commentaries].

<sup>4</sup> Article 19, as adopted on first reading of the 1996 version, made a distinction between international delicts and international crimes. Some Governments of States described this as a “stumbling block” that gave rise to “false implications.” Article 19 and its accessories were deleted on the ILC’s second reading. Historically, one of the factors that have blocked development toward “international crime/s” or “State crimes” can be traced to the compromise from the International Military Tribunal at Nuremberg (IMT) which determined that CAH should be penalized at the international level, if necessary and *on condition* they affect the equal rights of other States through the commission of crimes against peace or war crimes. This procedure of derivative positivization relied on two principles: that internal law normally falls under

Observations Received from Governments” (CORG, 2001) discussed *jus cogens* and *erga omnes* obligations in terms of a “higher value” which was problematized because i) State responsibility applies “more” to this than “less serious” breaches and ii) the category of serious breaches “is only the equivalent of ‘international crime’ barely disguised.”<sup>6</sup> As already alluded to above, the comments and observations were made after a reshuffling and revision process that had sanitized the wording of the articles and purged their content for “what appears to be a special regime for the imposition of punitive damages” in the case of serious breaches – something the United States said it “strongly urges” the rejection of.<sup>7</sup> The point is that *even the clean* articles continue to be “haunted by the ghost” of international crime/s, and both non-Western States (e.g., China) and Western States – including the United States

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the jurisdiction of the State and that “the maxim *nullum crimen sine lege* is not a limitation of sovereignty but is in general a principle of justice.” The IMT’s dual rationale whereby i) violations must affect the interests of the international society because they threaten the peace and security [of humankind] and ii) they must “shock the conscience of humanity” captures the test for norm-recognition, and this is consistent with cosmopolitanism and global constitutionalism if the square brackets [of humankind] are removed. Concerning the ARSIWA, Arts. 3 and 32 are echoes from the IMT, which confirm the supremacy principle that reflects the idea that States must comply with their international legal obligations, notwithstanding potentially contradictory provisions in their internal law. One version of this is encapsulated in the 1969 Vienna Convention on the Law of Treaties (VCLT): “A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty.” See UN, Charter of the United Nations, 1 UNTS XVI, Arts. 1-2, 24 Oct. 1945 [hereinafter UN Charter]; UN, ILC, Comments and Observations Received from Governments, at 64, 69, UN Doc. A/CN.4/515 and Add.1-3 (2001) [hereinafter CORG]; UN, Memorandum of the Secretary-General, *The Charter and Judgment of the Nürnberg Tribunal: History and Analysis*, 4, 43, 70-72, UN Doc. A/CN. 4/5 (Mar. 3, 1949); Ashley S. Deeks, “Consent to the Use of Force and International Supremacy,” 54 *Harv. Int’l L. J.* 1, 6, (2013). For a doctrine that integrates cosmopolitanism (*cf.* the premise that the international society is “no longer a community of states but of mankind as a whole [common humanity]”) as well as basic *cum* individual human rights in considerations of “collective guarantees” as a pillar of international law – and with no-impunity initiatives by States outside of the UN Charter’s Chapter VII framework, see Giuliana Ziccardi Capaldo, *The Pillars of Global Law* 9 (2008).

<sup>5</sup> ARSIWA, *supra* note 1, at Art. 40.

<sup>6</sup> Here we are citing the comments and observations of Japan. See CORG, *supra* note 4, at 67-68.

<sup>7</sup> *Id.*, at 45, 71.

– proceed(ed) as ARSIWA bashers to the extent that the ghost is an inconvenient elephant in the room of more or less tacit supporters of a continuation of the decentralized and “atomistic” legal system, however much in need of modernization according to New Order advocates.<sup>8</sup>

The situation is both simple and complex. States that oppose(d) the use of the pre-2001 crime-terminology recognize that the replacement of “international crime/s” and/or “State crimes” by the concept of “serious breaches” and obligations *erga omnes* “has *not* led to any substantial changes in the law of state responsibility.”<sup>9</sup> At the same time, scholars who continue to appreciate the critical comments and observations of the Government of the United States pertaining to the lack of “qualitative distinctions” point to differences between current Articles

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<sup>8</sup> *Id.*, at 67; Ian Hurd, “The International Rule of Law: Law and the Limit of Politics,” 28 *Ethics & Int’l Aff.* 39, 47 (2014). To secure a less archaic order, the international society needs the equivalent to the internal law “prop,” *viz.*, central authority, government, and legislature. See Peter Wilson, “The English School’s approach to international law,” in: *Theorising International Society: English School Methods* 167 (Cornelia Navari ed., 2008).

<sup>9</sup> Sophie Carlgren, *The Elimination of the Concept of “Crime” from the ILC’s Draft Articles*, 33 (Thesis, 2019).

<sup>10</sup> CORG, *supra* note 4, at 69.

<sup>11</sup> The “famous dictum” from the *Barcelona Traction* case (*cf.* *Barcelona Traction, Light and Power Co. Ltd.* [Belgium v. Spain], I.C.J. 3, 32, Feb. 5. 1970), whereby the decision of the International Court of Justice (ICJ) established that obligations *erga omnes* are “obligations of a State towards the international community as a whole” (a statement that Article 48[1][b] of the ARSIWA is intended to “give effect” to) failed to secure a “clearly articulated” relationship between general principles and *jus cogens* and, furthermore, between *jus cogens* and *erga omnes*, according to Bassiouni who tries to fill the lacuna. See James Crawford, “Responsibility for Breaches of Communitarian Norms: An Appraisal of Article 48 of the ILC Articles on Responsibility of States for Internationally Wrongful Acts,” in: *From Bilateralism to Community Interest: Essays in Honor of Judge Bruno Simma* 224, 229, 232 (Ulrich Fastenrad *et al* eds., 2011) [hereinafter *Responsibility for Breaches of Communitarian Norms*]; M. Cherif Bassiouni, “A Functional Approach to ‘General Principles of International Law,’” 11 *Mich. J. Int’l L.* 768, 807-808 (1990) [hereinafter *A Functional Approach*]; ARSIWA Commentaries, *supra* note 3, at 66, 204, 278, 319, 321; CILC Commentaries, *supra* note 3, at 45, 65 n198, 67. For natural law theory effects of obligations *erga omnes* that “go beyond reciprocal relations among states based on consent,” see Ardit Memeti & Bekim Nuhija, “The Concept of Erga Omnes Obligations in International Law,” 14 *New Balkan Pol.* 31 (2013).

40, 48, and 54.<sup>10</sup> The findings they believe warrant attention are the following: *Only* Article 40 refers, *expressis verbis*, to “serious breaches of obligations under peremptory norms of general international law” (*jus cogens*), whereas Articles 48 and 54 refer to breaches of obligations “owed to the international community as a whole” (breaches of obligations *erga omnes*).<sup>11</sup> This is sufficient, as they see things, to conclude that the terminological change (*cf.* replacing “crime/s” with “serious breach/es”) was not merely cosmetic.<sup>12</sup> Instead, it opens the path for all states in the international community to invoke responsibility and to take countermeasures, even though the breaches are *not* rising to the level of (the 1996 text version’s use of “crime/s” or the 2001 sanitized version’s use of) “serious breach/es.”<sup>13</sup> Even if correct, this cannot alleviate the “frustration” that, according to Maurizio Arcari, stems from Article 40 and the “particular consequences” of serious breaches set forth in Article 41.<sup>14</sup> More precisely, a narrow *jus cogens* circumscription that introduces “a misalignment” with the category of *erga omnes* obligations is inescapable in his opinion.<sup>15</sup> As it happens, it is also possible to argue that the international responsibility bar was raised through breaches that, in one sense, are “less serious” but nevertheless the result of a “systematic failure” by virtue of being reproduced by the very design of a given system.<sup>16</sup> Hence, the typology for violations and the underpinning conflict-causality does not have to be an equivalent to atrocity crimes in the wake of war or political tyrann-

<sup>12</sup> Eric Wyler, “From State Crime to Responsibility for Serious Breaches of Obligations under Peremptory Norms of General International Law,” 13 *Eur. J. Int’l L.* 1147 (2002).

<sup>13</sup> For “other,” “less serious” and “more serious” breaches, *see* CORG, *supra* note 4, at 68-70. For the United States’ view that “the Commission’s definition of ‘injured State’ should be narrowed even further,” *see id.*, at 45.

<sup>14</sup> Maurizio Arcari, “The future of the Articles on State Responsibility: A matter of form or of substance?,” *QIL, Zoom-in* 93, 3, 14 (2022), <http://www.qil-qdi.org/the-future-of-the-articles-on-state-responsibility-a-matter-of-form-or-of-substance/> [hereinafter *The future of the Articles on State Responsibility*].

<sup>15</sup> *Id.*, at 15.

<sup>16</sup> The two main conditions for entering serious breaches into the *jus cogens* category are that they constitute violations of obligations *erga omnes* that i) derive from peremptory norms of general international law (*cf.* character) and ii) involve a gross or systematic failure by the responsible State to fulfill its obligation (*cf.* nature). *See* CILC, *supra* note 3, at 5-6. CILC Commentaries, *supra* note 3, at 16-26; ARSIWA Commentaries, *supra* note 3, at 112-113.

ny; the State responsibility rule of law hook can be extended (from genocide, etc.) to so-called “life integrity violations”<sup>17</sup> as found in hybrid regimes that fail to “deliver the definitive components of liberal democracy.”<sup>18</sup> The use of such a hook in the era of globalization would be a preventive strategy to combat a political governance trend that may not have hybridity as its destination. If hybridity is, as it were, the “modern transition” to consolidated authoritarianism, *jus cogens* violations will be the predictable outcome of autocratic legalism as a practice that has learned to avoid the mistakes that led to the downfall of “the classic twentieth-century dictators.”<sup>19</sup> In the worst case, hybrid rulers stand to win their innovative zero-sum endgame if “less serious” is erroneously trivialized.

Nevertheless, the United States is among those stakeholders that, in 2014, “expressed doubts as to the viability and *appropriateness* of the International Law Commission taking up the topic of *jus cogens*” in its

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<sup>17</sup> Maartje Weedersteijn, “Democracies, Dictatorial Regimes, and Atrocities,” in: *The Oxford Handbook of Atrocity Crimes* 190 (Barbora Holá *et al* eds., 2022). The hybrid crime typology as illustrated by autocratic legalism is common in the region stretching from Central Europe to Central Asia. On Kim Lane Scheppele’s account, autocratic legalism dismantles the constitutional system *by law* in a piecemeal fashion to eliminate core value commitments to liberalism and the independence of the judiciary. Rulers who practice autocratic legalism rely on an appeal to the government’s “electoral legitimacy” (*cf.* brute majoritarianism). They also have strategies with which to “achieve the look of normality” (*e.g.*, by accepting openings of tolerance for political opponents and by *steering clear* of human rights violations on a mass scale while playing the game of democracy [thereby undermining checks and balances, silencing political opponents without annihilating them, and using other “kinder, gentler” but coercive and oppressive tactics]). In response to criticisms of Hungary’s 2013 constitutional amendments, the argument that the government has the right to use its parliamentary mandate to reform a constitution it called “a hang-over from Communist rule” introduced an ideological challenge for democracy supporters who see EU enlargement as a geopolitical security priority in the region. The same challenge applies to Ukraine. According to Freedom House, Ukraine’s “flatline” hybridity is a reality. Furthermore, with Russia’s 2022 transition from hybridity to consolidated authoritarianism, aggression became the “foreseeable” consequence. The predicament these factors created in 2022 (*cf.* the Russia-Ukraine conflict) is now painfully obvious. On the one hand, one complains about “[t]he failure of any hybrid regime to fully democratize” and, on the other hand, one insists that breaches of the prohibition of aggression – for which the Netherlands argued, in 2001, that the “constituent part of the definition” (*cf.* serious) is redundant – are “better left”

program – something it went on to do in 2015 (with Dire Tladi as Special Rapporteur).<sup>20</sup> In this way, the United States continued to subscribe to its 2001 preference to “avoid contentious areas,” as if selectiveness on the basis of certain sensitivities of certain Governments of States could somehow take the controversy out of the international law equation.<sup>21</sup> With the exception of genocide, slavery and torture, the United States saw *both* obligations that fall into the “new category” that the 2001 ARSIWA text “creates” (cf. *jus cogens*) and fundamental human rights as “no consensus” areas.<sup>22</sup> Recent developments indicate that the “no consensus” declaration has deeper layers, and that these make a different response unlikely. More precisely, in 2022, the United States made a sweeping statement on the (appropriate) form of the ARSIWA, whereby it is made clear that “the United States’ position has been, and remains, that the articles are *most valuable* in their current draft form”; consequently, a position against multilateral treaty negotiations follows.<sup>23</sup> With this, the “DNA” of the United Nations is challenged since

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to the Security Council. See Kim Lane Scheppele, “Autocratic Legalism,” 85 *U. Chi. L. Rev.* 545, 569, 573, 575, 578, 581 (2018); Freedom House, *Nations in Transit 2022: From Democratic Decline to Authoritarian Aggression*, 4, 5, 9, [https://freedomhouse.org/sites/default/files/2022-04/NIT\\_2022\\_final\\_digital.pdf](https://freedomhouse.org/sites/default/files/2022-04/NIT_2022_final_digital.pdf) [hereinafter *Nations in Transit 2022*]; CORG, *supra* note 4, at 69.

<sup>18</sup> *Nations in Transit 2022*, *supra* note 17, at 4-5.

<sup>19</sup> Scheppele, *Autocratic Legalism*, *supra* note 17, at 560.

<sup>20</sup> Thomas Kleinlein, “Jus Cogens Re-examined: Value Formalism in International Law,” 28 *Eur. J. Int’l L.* 295, 296 (2017) [hereinafter *Jus Cogens Re-examined*]; UN, Sixth Committee, “Summary Record of the 20th Meeting Held at Headquarters, New York, on Tuesday, 28 October 2014, at 10 a.m.,” para. 13, 36 and 123, UN Doc. A/C.6/69/SR.20, Nov. 10, 2014.

<sup>21</sup> CORG, *supra* note 4, at 48.

<sup>22</sup> *Id.*, at 67, 71, 86.

<sup>23</sup> David Bigge, *Remarks at a Meeting of the Sixth Committee on Agenda Item 74: Responsibility of States for Internationally Wrongful Acts*, United States Mission to United Nations, Oct. 13, 2022, <https://usun.usmission.gov/remarks-at-a-meeting-of-the-sixth-committee-on-agenda-item-74-responsibility-of-states-for-internationally-wrongful-acts/> [hereinafter *Remarks at a Meeting of the Sixth Committee on Agenda Item 74*]; UN, GA, Sixth Committee, Responsibility of States for internationally wrongful acts (Agenda item 73), seventy-seventh session, Oct. 13, Nov. 10 and 18, 2022, [https://www.un.org/en/ga/sixth/77/resp\\_of\\_states.shtml](https://www.un.org/en/ga/sixth/77/resp_of_states.shtml) [hereinafter seventy-seventh session]. For the statement that “the United States believes it would be preferable to finalize the Commission’s work in another form than a convention,” see CORG, *supra* note 4, at 48.

any reluctance to comply with the “virtues of multilateralism and diplomacy” is also a way of undermining a pillar of the international system.<sup>24</sup>

As a foundational concern, the role of ethics in international relations also spills over to democratic methodology. Majoritarian premises for consensus can paralyze progress. E.g., in the months before the adoption of the final text of the ARSIWA, Spain complained that,

[...] the Commission, in the interest of achieving consensus, does not appear to contemplate extending the work beyond 2001. All of this appears to have prejudged the debate on the form that the draft should take and to have disposed many Governments to abandon the attainment of an international convention for the time being.<sup>25</sup>

Notwithstanding, the ARSIWA applies indirect pressure. According to the 2022 document entitled “Draft conclusions on identification and legal consequences of peremptory norms of general international law (*jus cogens*)” (CILC), “[a]cceptance and recognition by a very large and representative majority of States is required for the identification of a norm as a peremptory norm of general international law (*jus cogens*);

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<sup>24</sup> UN, *The Virtues of Multilateralism and Diplomacy*, 2023, <https://www.un.org/en/observances/multilateralism-for-peace-day>.

<sup>25</sup> CORG, *supra* note 4, at 46.

<sup>26</sup> CILC, *supra* note 3, at 3; Thomas Weatherall, *Jus Cogens: International Law and Social Contract* 23 (2015) [hereinafter *Jus Cogens*]. The threat of majoritarian tyranny toward minorities stands (*supra* note 17), just as customary international morality does not necessarily coincide with proper ethics.

<sup>27</sup> “The subject-matter was understood to constitute ‘the interests ... of the international community as a whole’, a point reinforced by obligations *erga omnes*.” In the VCLT debates, the tension between those who stressed the contractual stipulations and those who embraced the restrictions imposed upon State sovereignty and the precedence given to general norms as against the contractual stipulations of States manifested itself in the idea of *jus cogens* as a “dynamic and living” notion. See UN, *Y.B. Int’l L. Comm’n* 248, para. 2 (1966), UN Doc A/CN.4/SER.A/1966/ADD. 1; Ulrich Scheuner, *Conflict of Treaty Provisions with a Peremptory Norm of General International Law*, 29 *ZÄÖRV* 28, 29 (1969). For the ARSIWA’s deemphasis on legal formalism in terms of legal positivism through the fact that the “persistent objector rules” come without an “escape hatch” for peremptory norms, see James A. Green, *The Persistent Objector Rule in International Law* (2016).

acceptance and recognition by all States is not required.”<sup>26</sup> Furthermore, since “[i]t is not the form of a general rule of international law but the particular nature of the subject-matter with which it deals that may, in the opinion of the Commission, give it the character of *jus cogens*,” legal formalism is downplayed.<sup>27</sup> The original 2001 recommendation, as set forth by the ILC, that the General Assembly consider “at a later stage, in the light of the importance of the topic, the possibility of convening an international conference of the plenipotentiaries to examine the draft articles with a view to concluding a convention”<sup>28</sup> continues to compete, however, with a cautionary red flag from the United States: that even rules that are currently “well-accepted” may be jeopardized in the “debate necessary to arrive at a convention.”<sup>29</sup> Instead of constructive steps toward legal certainty (cf. *lex scripta*) and consistency of rule-application, the outcome may be setbacks. All hope of “addressing any remaining outstanding substantive issues,” including a dispute settlement mechanism, may be dashed on behalf of diplomacy, the “handmaiden of law.”<sup>30</sup> Certainly, it is not realistic to expect that the United States will abandon its 2001 strictness when it comes to the role of the ILC: to see to it that the articles do *not* “deviate” from *existing* customary international law and State practice, that the Commission therefore proceeds like a registrar as opposed to a law-maker so as to

<sup>28</sup> UN, ILC, Report of the International Law Commission on the work of its fifty-third session (23 April–1 June and 2 July–10 August 2001), A/56/10\*, 2001, Chap. IV, paras 30–77 (initially distributed as Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 10); UN, *Y.B. Int’l L. Comm’n*. 72, paras. 72-73 (2001), A/CN.4/SER.A/2001/Add.1.

<sup>29</sup> “States may engage in behaviors for a variety of non-legal reasons, including political expedience.” In turn, this is why “*opinio juris* cannot simply be inferred from State practice.” See Ronald Alcalá, “Opinio Juris and the Essential Role of States,” Lieber Institute – West Point, Feb. 11, 2021, <https://lieber.westpoint.edu/opinio-juris-essential-role-states/>; Bigge, Remarks at a Meeting of the Sixth Committee on Agenda Item 74, *supra* note 23.

<sup>30</sup> The ILC “was unable to establish obligatory arbitration between states, to agree on penalties for international crimes, or to establish any formal legal structure with which to oversee legal state responsibility.” See Daniel Warner, “State Responsibility in International Law,” in: *Oxford Research Encyclopedia of International Studies*, <https://doi.org/10.1093/acrefore/9780190846626.013.557> (2020); UN, GA, Sixth Committee, seventy-seventh session, *supra* note 23; C.A.W. Manning, “The Legal Framework in a World of Change,” in: *The Aberystwyth Papers: International Politics, 1919-1969*, 301, 309 (Brian Porter ed., 1972).

make the ARSIWA a trailer rather than a tractor for social reform and for what the law ought to be.<sup>31</sup>

### A. When Push Comes to Shove

Apart from expressing some disappointment with the tendency to overstate “the level of controversy underlying the final text,”<sup>32</sup> Crawford has challenged the United States’ claim that a convention is “not necessary.”<sup>33</sup> But, by noting that the ARSIWA, unlike the Rome Statute of the International Criminal Court (ICC), is not a text that “must be embodied in domestic law to have its effect,” he also opens the door to the mentioned position on, *per* Sean Murphy’s terminology, the “packaging” of the ARSIWA.<sup>34</sup> Crawford anticipated that experts on international law may find his response “bland” but for the 1997-2001 Special Rapporteur it is “not clear what other response can be made.”<sup>35</sup> Be that as it may, the superfluousness argument had already been taken to the extreme when the United States noted, back in 2001, that the regime of the ICC seemed “better suited” to respond to the violations of international obligations that “*the Commission interprets as rising to the level*

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<sup>31</sup> Note “dispute settlement provisions” were among the contentious areas that, according to the United States, had to be omitted to make the articles “amenable to wider agreement during negotiation.” See CORG, *supra* note 4, at 45, 48. For Crawford’s agreement with Bruno Simma that communitarian norms remain “in the world of the ‘ought’ rather than that of the ‘is,’” see Crawford, *Responsibility for Breaches of Communitarian Norms*, *supra* note 11, at 224, 240. For aspirational law and the UN’s post-1945 declaratory tradition to create a body of rules more akin to moral philosophy than positive law, see Dorothy V. Jones, “The Declaratory Tradition in Modern International Law,” in: *Traditions of International Ethics* 42 (Terry Nardin & David R. Mapel eds., 1992).

<sup>32</sup> James Crawford, *The ILC’s Articles on Responsibility of States for Internationally Wrongful Acts: A Retrospect*, 96 AM. J. INT’L L. 874, 889 (2002) [hereinafter *The ILC’s Articles*].

<sup>33</sup> CORG, *supra* note 4, at 48.

<sup>34</sup> Article 56 makes it clear that the ARSIWA is “not intended to constitute a code of secondary rules.” See Crawford, *The ILC’s Articles*, *supra* note 32, at 879-890; Sean D. Murphy, *Codification, Progressive Development, or Scholarly Analysis? The Art of Packaging the International Law Commission’s Work Product*, in: *The Responsibility of International Organizations: Essays in Memory of Sir Ian Brownlie* (Maurizio Ragazzi ed., 2013).

<sup>35</sup> Crawford, *The ILC’s Articles*, *supra* note 32, at 889.

of ‘serious breaches’; and that, more generally, the task of dealing with this category is “better left” to the Security Council, thereby making an attempt to reserve or, even more to the critical point, limit the law of State responsibility to the remaining other obligations or “other breaches” *cum* “ordinary breaches.”<sup>36</sup> Since the implied *requiem* is consistent with William Schabas’ diagnosis of a “hostile attitude” toward the ICC, Martti Koskeniemi’s statements that i) international politics and international law cannot be separated and ii) that international law is used as an instrument by the powerful States to enhance *their role* come to apply.<sup>37</sup> International law may be the “province of States,” but it is – here citing Giuliana Ziccardi Capaldo – “the powerful states which are, realistically speaking, the community’s guiding force.”<sup>38</sup> Hence, the criminalization strategy as such may be kept in check.

In the light of this, it is especially intriguing that the writings of noted publicists like M. Cherif Bassiouni are cited by the Drafters of the ARSIWA. Bassiouni is not only the “father” of modern international criminal law” as well as a co-architect of the ICC; he is also one of the staunchest critics of *realpolitik*, demonstrating its ability to co-opt institutions of peace and justice (like the United Nations) “whenever necessary

<sup>36</sup> CORG, *supra* note 4, at 69-70. (Author’s emphasis).

<sup>37</sup> For existentialists, the conservative realism that negates *jus cogens* is a type of ethics since *submitting* to the current state of affairs and with this, loosing oneself in objectivity is a formal type of engagement. However, if idealism is not able to engage in the real world, its pure moralizing leads to the conclusion that realism promulgates a non-union of politics and ethics. See Simone de Beauvoir, *Existentialisme et la sagasse des nations* (1948); Alain Pellet, “The new draft articles of the International Law Commission on the responsibility of states for international wrongful acts: A Requiem for States’ Crimes?” 32 *Neth. Y.B. Int’l L.* 55 (2001); William A. Schabas, “United States Hostility to the International Criminal Court: It’s All About the Security Council,” 15 *Eur. J. Int’l L.* 701 (2004).

<sup>38</sup> The Security Council is susceptible to accusations of operating as an interest-monopolizing directorate that excludes most of the actors of modern international society from the international legal processes. See Giuliana Ziccardi Capaldo, “The Law of the Global Community: An Integrated System to Enforce ‘Public’ International Law,” 1 *Global Community YILJ* 71, 85, 119 (2002); Alcalá, *Opinio Juris and the Essential Role of States*, *supra* note 29. For a criticism of the democratic “double standard,” see Lucrezia Barbonari, *The United Nations and International Democracy: A Talk by Hans Köchler*, John Cabot University, Mar. 3, 2020, <https://news.johncabot.edu/2020/03/hans-koechler-international-democracy/>.

to serve its purposes,” thereby subsuming *realpolitik* under amoralism.<sup>39</sup> Consequently, States show that they have learned to master the game that consists in *adapting* to goals as “intrinsic moral values” while at the same time managing to avoid real change – thereby also securing (*realpolitik*) outcomes in the form of international power-conservation and reproduction of the legal *status quo*.<sup>40</sup> In addition to treating *realpolitik* as an impunity practice, Bassiouni’s doctrine confirms that there are (violations of) human rights that correspond to (breaches of) *jus cogens* norms *cum* proscriptions of crimes, a constellation that establishes a synergetic concept of public international law, including humanitarian law.<sup>41</sup>

Obviously, if the *jus cogens* skepticism of ARSIWA stakeholders like the United States is pushed, discourse about a bridge-building aspect misses its mark. However, if it is, in fact, too reductionist to assume that “the draft articles reflect secondary rules” – as Crawford argues – and, furthermore, the interpretation from the 1969 Vienna Convention on

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<sup>39</sup> *The Theory and Practice of International Criminal Law: Essays in Honor of M. Cherif Bassiouni* (Leila N. Sadat & Michael P. Scharf eds., 2008). Factors like “selective enforcement, double standards and exceptionalism for the benefit of the powerful and wealthy states, as well as their nations” are on the list of *realpolitik* strategies. The wide schism between values and the norms that embody them, and their effective enforcement is also reflected in “the Security Council’s practices.” See M. Cherif Bassiouni, “Perspectives on International Criminal Justice”, 50 *Va. J. Int’l L.* 270, 283-284 (2010).

<sup>40</sup> *Id.*, at 284. In muting moral reasoning, amoralism still depends upon the morality of others to get ahead.

<sup>41</sup> There are general principles of international law concerning the basic rights of the human person from which i) *jus cogens* norms and *erga omnes* obligations “derive” or “emerged out” and which ii) are creative of international legal obligations under customary international law if “perfected” in accordance with the “axiomatic” criteria for determination whereby one must look “primarily in the actual practice and *opinio juris* of States.” Bassiouni is aware of disagreement. Besides differences in case law, the theoretical controversy relating to interpretation reveals a variety of philosophical premises and methodological approaches, which include views on the “value-oriented goals” to be achieved. Bassiouni remarks that *jus cogens* is *not free* from contradictory outcomes and relativity, e.g., in “cases involving ideological or political issues.” See Bassiouni, *A Functional Approach*, *supra* note 11, at 768-769, 801-802, 805, 817; M. Cherif Bassiouni, “International Crimes: Jus Cogens and Obligatio Erga Omnes,” 59 *L. & Contemp. Probs.* 63, 67, 73-74 [hereinafter *International Crimes*]. Note that Article 38 of the ICJ’s Statute lists general principles of law recognized by civilized nations as well as the writings of the most noted publicists as sources.

the Law of Treaties (VCLT) permeates the ARSIWA, just as Thomas Kleinlein is correct that the ILC “exerted considerable *performative force* on the concept of *jus cogens*” (cf. extending the effects of *jus cogens* to the law on the responsibility of States), discussions of emerging norms and, more generally, candidates for new norm-recognition are relevant on both constitutional and pragmatic grounds.<sup>42</sup> Even in the absence of legal precursors, propositions and precedents, ethics may function as an evolutionary vehicle, which also endeavors to end, *per* Linderfalk, “irrational legal discourse.”<sup>43</sup>

In the context of *realpolitik*, the concept of “ecocide” may be rejected because of “the States’ reluctance to criminalization of the internal conduct of their own government.”<sup>44</sup> In the case of the ARSIWA, the Drafters made a compromise to overcome this barrier, in the form of rules on individual responsibility which extends to Heads of State. Under Articles 5, 7 and 58 of the ARSIWA, a [natural] person “empowered to exercise elements of the governmental authority” – provided the person “is acting in that capacity in the particular instance” – can be held accountable.<sup>45</sup> But, while the ARSIWA upholds the distinction between the international responsibility of States and State criminal responsibility so as to also make it hold that “States themselves do not commit crimes,”

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<sup>42</sup> The fact that the ARSIWA is “inspired” by the 1969 VCLT (especially arts. 53 and 64) implies that peremptory norms of general international law (*jus cogens*) are defined as ones that i) “reflect and protect fundamental values of the international community” – although fundamental values and interests “are not mutually exclusive and they indicate the important normative and moral background of the norm[s] in question;” ii) are “universally applicable;” iii) are “hierarchically superior to other rules of international law”; and iv) are “accepted and recognized by the international community of States as a whole” as norms “from which no derogation is permitted” and which singularly “can be modified only by a subsequent norm of general international law (*jus cogens*) having the same character.” See ARSIWA Commentaries, *supra* note 3, at 17-18, 22, 27, 31, 33, 35; Kleinlein, *Jus Cogens Re-examined*, *supra* note 20, at 315. For the VCLT as “the constitutional law of the international community,” see José Daniel, “The Vienna Convention of 1969 on the Law of Treaties and Humanitarian Law,” *Int’l Rev. Red Cross* 367, 369 (1972).

<sup>43</sup> E.g., taking too much for granted in analysis. See Linderfalk, *Understanding Jus Cogens*, *supra* note 2, at 35.

<sup>44</sup> Bassiouni, *Perspectives on International Criminal Justice*, *supra* note 39, at 296 n85, 304.

<sup>45</sup> Note that Article 25.1 of the Rome Statute, *expressis verbis*, limits the jurisdiction of the ICC to “natural persons.”

other factors having to do with politics or ideology undoubtedly block progress, *inter alia*, taking too much for granted in analysis. E.g., if ecocide is coupled with human rights, this poses several obstacles.

## B. From Bland to Bold

This author is ultimately concerned about the infamous Albert Einstein trap – that it is a case of insanity to expect a different outcome if the strategy is the same. Perhaps the future of law as an instrument would be more promising in the hands of the civil society, as suggested by Kim Lane Scheppele.<sup>46</sup> Another proposal could be to amend the ARSIWA to include a “Presumption of Serious Breaches” provision.<sup>47</sup> Thus, it would be possible to, in effect, pre-establish norms (like on ecocide) that need to be “kick-started” as a consequence of political contentiousness that blocks the legal process despite ethically compelling arguments for the importance of the subject-matter. As pointed out by Bassiouni, interdisciplinary input may promote the *jus cogens* agenda which is pitted against *realpolitik*. The practitioner of the latter believes he “must do what he can, not what he would, in order to secure as nearly as possible the concrete results to meet the needs of his political state” and, in the course of making his choices for policy purposes, he assumes that the opposing loyalty is equally conscientious, thereby creating a link between political realism and relativism *versus* global constitutionalism and the constellation of cosmopolitanism and communitarianism.<sup>48</sup> The role of ethics would be to realign law with the basic needs of mankind. If a presumption to this effect is bold, then boldness is pragmatically justified.

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<sup>46</sup> Scheppele, *Autocratic Legalism*, *supra* note 17, at 583.

<sup>47</sup> For a liberal presumption against law, see Joel Feinberg, *The Moral Limits of the Criminal Law (1987-1990)*. This does not compete with the “innate conservatism” of law-makers. See Mia Swart, ‘The revolution does not happen overnight’: Philippe Sands on ecocide and its links to Nuremberg, *Aljazeera*, June 29, 2021, <https://liberties.aljazeera.com/en/the-revolution-does-not-happen-overnight-aj-speaks-to-philippe-sands-on-ecocide-and-a-life-in-environmental-lawyering/>.

<sup>48</sup> Cosmopolitanism adds an emphasis on basic *cum* individual human rights (*supra* note 4), but the common feature for the constellation is transcendence of sovereignty. Crawford defines communitarian norms as “multilateral rights and obligations, established in the interest of and owed to the international community, entailing a recognized legal interest of each of its members to invoke compliance with it. Other characteristics ... have been identified, universality in the sense of binding force

If the ARSIWA contained the above provision, the articles would not only “complement the system of primary rules of international law and provide for a much needed set of secondary rules” (here citing Slovakia’s comments and observations); it would also serve as a *proactive* facilitator of progressive development.<sup>49</sup> Certainly, in the case of ecocide, the idea of waiting for the crystallization of customary international law or the codification of this in a convention is a risky affair as regards the “substantive rules of conduct that prohibit what has come to be seen as intolerable because of the threat it presents to the survival of States and their peoples and the most basic human values.”<sup>50</sup> If Hee E. Lee and Seokwoo Lee are correct that “the practice of powerful states shaped the content of contemporary international law,” treating the ARSIWA as a “useful guidance” on customary international law provides the same exclusive stakeholder constituency with an opportunity to mastermind the future of State responsibility – by the backdoor.<sup>51</sup> This tool is known as “legal imperialism” and it continues the identification of Western nations with “civilized nations.”<sup>52</sup> The outcome “reproduces the paradoxes and ambivalences of a liberal theory of politics,” including the neutrality of law and the primacy of law over politics and,

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for all States and solidarity in its link to measures of enforcement.” Note Emery’s prophetic proposition for hybridity: “A danger [...] for the future is oppression and injustice from the crowd.” See Henry C. Emery, “What is Realpolitik?,” 25 *Int’l J. Ethics* 448, 461, 468 (1915); Crawford, *Responsibility for Breaches of Communitarian Norms*, *supra* note 11, at 229; Bassiouni, *A Functional Approach*, *supra* note 11, at 802.

<sup>49</sup> CORG, *supra* note 4, at 47. Historically, politics obstructed the first attempt to include ecocide as an atrocity crime in the final drafting stages of the Rome Statute. To reinstate ecocide is the aspiration of the Stop Ecocide Foundation that commissioned the “Independent Expert Panel for the Legal Definition of Ecocide” project.

<sup>50</sup> *Supra* note 3.

<sup>51</sup> Hee E. Lee & Seokwoo Lee, “Positivism in International Law: State Sovereignty, Self-Determination, and Alternative Perspectives,” 16 *Asian Y.B. Int’l L.* 1, 2 (2010), doi: [https://doi.org/10.1163/9789004379695\\_002](https://doi.org/10.1163/9789004379695_002) [hereinafter *Positivism in International Law*].

<sup>52</sup> It is the criminal law common to the major legal systems of the world, in particular the system of the United States, which is among those most frequently examined for the purpose of deriving general principles of international criminal law, both substantive and procedural. See Fabián Raimondo, *General Principles of Law in the Decisions of International Criminal Courts* 183 (2008). Lee and Lee reach a similar assessment in their case law study of self-determination and secession. The ICJ has “generally given preference to relying on the positive acts of dominant states, including treaty making.” See Lee & Lee, *Positivism in International Law*, *supra* note 51, at 7.

therefore, TWAAIL scholars have a platform upon which to criticize, in effect, *their* monopoly on representation (*cf.* hegemony) as an instance of *meta*-illiberalism.<sup>53</sup>

In 2010, the author of this essay designed international ethics recommendations that highlight basic human needs.<sup>54</sup> Law has no superior claim to objectivity, and antiquated distinctions between propositions with cognitive and emotive meaning, which stem from radical legal positivism, cannot push ethics out of the equation as an irrelevancy between (the traditional influence from) politics and (the authoritative knowledge of) natural science. The Ethics Pillar in Stakeholder Jurisprudence advances principles that steer fundamental rights toward global values, including basic human needs.<sup>55</sup> Both efforts are consistent with the notion of an implied social contract for the international level of law, a mode of explanation that Bassiouni uses in his “right rea-

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<sup>53</sup> Third World Approaches to International Law (TWAAIL) address the impact of colonialism on international law.

<sup>54</sup> Insights come from the logic of extensionality of need. See Anja Matwijkwi, “Human Needs and Justice: The Case Against Realism,” 26 *Nordic J. Hum. rts.* 279, 281 (2008) [hereinafter, *Human Needs and Justice*]; Anja Matwijkwi, *Justice versus Revenge: The Philosophical Underpinnings of the Chicago Principles on Post-Conflict Justice*, in: *The Pursuit of International Criminal Justice* 239-241 (M. Cherif Bassiouni ed., 2010).

<sup>55</sup> “E.g., ‘You should not inflict serious harm on other stakeholders defined as parties that are affected by outcomes’ may include non-human beings and organisms and, even more broadly, the environment. Furthermore, the Principle of Stakeholder Consideration that prescribes equal consideration of important stakes is qualified accordingly, meaning that consideration should not be mediated by rational agency and autonomy. The same is true of yet other key principles, such as the Stakeholder Principle of Respect whereby ‘You should treat other stakeholders as ends in themselves and not merely as means.’ The meta-right to decency that follows from this extends to good governance as a stake. In addition, the Fair Stakeholder Opportunity Principle (*cf.* ‘You should not discriminate against others on the basis of characteristics that stakeholders either have little or no control over, meaning that their own preferences as expressed in subjectivist or relativist free choices cannot un-acquire the relevant characteristics, at least not without assuming an unfair burden’) is constitutive of rights *per se* without presupposing that inclusion is narrowly demarcated. The Principle of Stakeholder Participation or Representation (‘Stakeholders whose well-being is substantially affected by the outcomes of decisions, strategies or arrangements should participate or have their stakes represented, in one sense or another’) entails a right to a rule of law as opposed to a rule of might. Finally, the Principle of Special Stakeholder Responsibility

son” account of *jus cogens* norms and obligations *erga omnes*.<sup>56</sup> As both hierarchically and intrinsically superior norms, *jus cogens* norms transcend the will and “purposeful actions of States” to create an advantage for natural law theory narratives on the basis of (higher) “moral-ethical” *cum* “humanistic values” that “are here to remain and ... have to find a way to express themselves” and translate into a person-centric approach that considers human needs.<sup>57</sup>

The next two sections will hone in on those aspects of ecocide that further explicate how the conservative *versus* progressive tension manifests itself in discourse and, in a separate section, in the doctrine of Bassiouni. The last section contains a reflective conclusion for this essay.

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for Rights, whereby ‘You should not use interpretations of law and politics as instruments to undermine stakes that objectively qualify as global values,’ creates a commitment to basic human rights promotion.” See Anja Matwijkiw & Bronik Matwijkiw, “The Emerging Ethics Evolution: The Evasive Connection Between Environmental Crimes, Philosophical Considerations of Public International Law, and the International Criminal Court’s Twentieth Anniversary,” 22 *Global Community YILJ* 717, 743 (2023) [hereinafter *The Emerging Ethics Evolution*]; Anja Matwijkiw & Bronik Matwijkiw, “Bahrain Anno 2017: Peace or Regime Change? The Ongoing Human Rights Dilemma and the Ethics Pillar as a Measurement,” 17 *Global Community YILJ* 131 (2018).

<sup>56</sup> M. Cherif Bassiouni, “The Philosophy and Policy of International Criminal Justice,” in: *Man’s Inhumanity to Man: Essays on International Law in Honour of Antonio Cassese* 83 (Lal C. Vohrah et al eds., 2003).

<sup>57</sup> M. Cherif Bassiouni et al, “Nuremberg: Forty Years After,” 80 *Proc. Ann. Meeting (Am. Soc’y Int’l L.)* 59, 62, 65 (1986); Grotius Centre for International Legal Studies, Professor M. Cherif Bassiouni on the Future of International Criminal Justice, 2015, Siracusa International Institute, [https://www.youtube.com/watch?v=VsRSW8AR\\_ME](https://www.youtube.com/watch?v=VsRSW8AR_ME). For human rights as “a quintessential part of *jus cogens*,” see Andrea Bianchi, *Human Rights and the Magic of Jus Cogens*, *Eur. J. Int’l L.* 491, 495 (2008). For the view that *jus cogens* has its roots in the natural law doctrine and, therefore, is not comprehensible through a strict positivist approach, see Lee & Lee, *Positivism in International Law*, *supra* note 51, at 1; Tomoko Yamashita, “Do Jus Cogens Norms Invalidate State Immunity? International Restorative Justice and Japanese War Compensation Cases,” 31 *Chinese (Taiwan) Y.B. Int’l L. & Aff.* 160, 178-179 (2013); Mary E. O’Connell, “Jus Cogens: International Law’s Higher Ethical Norms,” in: *The Role of Ethics in International Law* 93, 98 (Donald E. Childress ed., 2012) [hereinafter *Jus Cogens*].

## 1. The Complexities Concerning Ecocide

Peremptory norms of general international law (*jus cogens*) belong among the primary rules that establish the foundation for the general conditions of State responsibility, the legal consequences that flow from breaches of obligations, and the modalities for accountability, including, in certain circumstances, countermeasures against a State “not in conformity” with what is required.<sup>58</sup> That said, the issue of the “elusive” definition, content and scope has and continues to lead to “behind the scenes” controversy.<sup>59</sup> In particular, the COVID-19 pandemic confirmed the need for more scrutiny concerning the possibility of future and new norm-recognition with a view to the question of corresponding human rights. Adding the correspondence premise introduces a parallel problem for propositions on (the definition, content, and scope of) human rights, as research on competing legal doctrines can also ascertain. The assumption that *jus cogens* norms *cum* crimes like CAH can be construed as “analogous to serious violations of human rights” has been rejected, *inter alia*, by Christopher Macleod.<sup>60</sup> Apart from making too much of Schabas’ different types of responsibility-ascriptions, he mentions reasons to be “suspicious” toward “positive human rights.”<sup>61</sup> Ironically enough, it is less problematic to pursue a conservative and narrow agenda *without* the correspondence premise since a non-synergetic procedure could censor candidates like grand corruption and mass starvation. A similar socioeconomic sanitization may occur for ecocide.

Certainly, the fact that the COVID-19 pandemic cannot be separated from what has otherwise been deemed the “most credible” candidate for norm-recognition, namely ecocide, reveals deep-rooted differences

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<sup>58</sup> ARSIWA, *supra* note 1, at Art. 12.

<sup>59</sup> This issue is a legacy from Art. 53 of the VCLT. The ICJ, which was “meant to” clarify which norms have reached the status of *jus cogens* together with the method for their identification, has proved itself “reluctant” to undertake the task. See Diana Contreras-Garduño & Ignacio Alvarez-Río, “A Barren Effort? The Jurisprudence of the Inter-American Court on *Jus Cogens*,” in: *The Realisation of Human Rights: When Theory Meets Practice: Studies in Honour of Leo Zwaak* (Yves Haeck et al eds., 2013).

<sup>60</sup> Christopher Macleod, “Towards a Philosophical Account of Crimes Against Humanity,” 21 *Eur. J. Int’l L.* 281, 285 (2010).

<sup>61</sup> *Id.*; William Schabas, “Crimes Against Humanity,” in: *Encyclopedia of Genocide and Crimes Against Humanity* 209, 211, 214-215 (D. L. Shelton, ed. 2005).

in legal expectations.<sup>62</sup> These are behind the legal stalemate that, so far, has kept the serious environmental violations entailed by ecocide out of the catalogue of core international crimes. When the Hague Peace Projects joined the mission of Stop Ecocide International, with the specific goal of including ecocide as the fifth crime in the *ratione materiae* jurisdiction of the ICC, one of the arguments for this engagement consisted in a reference to the cause-and-effect relationship: “the global COVID-19 pandemic is one of the by-products of climate degradation brought about by ecocide.”<sup>63</sup> Hence, if it were possible to stop ecocide, the international community of States would also come into possession of an international criminal justice tool to fight, if not proactively prevent, the harmful impact from a contagious virus like the coronavirus or, for that matter, any similar global health crisis that may result from the implied connectivity. However, according to a recent defense of Legal Process Theory by scholars in the United States, it holds that *even if* ecocide were to be recognized, there is a limit to the function of *jus cogens* norms since these “cannot mandate” the imposition of “programmatic” human rights.<sup>64</sup> Such rights are precluded beforehand because they require that resources be expended or found, just as any possible *jus cogens* proscriptions pertaining to the environment would not “result in” positive duties for Governments of States “to protect the environment, however desirable that may be.”<sup>65</sup> To the extent that *jus*

<sup>62</sup> Phoebe Okowa, “On the Prospect of Adding New Crimes to the ICC’s Jurisdiction,” *International Criminal Court at 20: Reflections on the Past, Present and the Future. Conference marking the 20<sup>th</sup> anniversary of the entry into force of the Rome Statute of the International Criminal Court, July 1, 2022*, <https://www.icc-cpi.int/icc-20a-cpi> [hereinafter “On the Prospect of Adding New Crimes to the ICC’s Jurisdiction”]; UN Environment Programme, *How new laws could help combat the planetary crisis*, 2023, <https://www.unep.org/news-and-stories/story/how-new-laws-could-help-combat-planetary-crisis>.

<sup>63</sup> The Hague Peace Projects, Mission Stop Ecocide, Jan. 25, 2022, <https://thehaguepeace.org/site/mission-stop-ecocide/>. For the “reparation of disconnections” and “relational harms” in the context of international criminal law, see Janine N. Clark, “The COVID-19 Pandemic and Ecological Connectivity: Implications for International Criminal Law and Transitional Justice,” *J. Int’l Crim. Just.*, Dec. 21, 2020, doi: <https://doi.org/10.1093/jicj/mqaa057>.

<sup>64</sup> For Legal Process Theory scholars, *jus cogens* as an international legal category is anchored in a non-separation of law and morality. They use natural law theory in the revival sense to account for the relevant “intrinsically superior” and “higher ethical” norms. See O’Connell, *Jus Cogens*, *supra* note 57, at 78, 97-98.

<sup>65</sup> *Id.*, at 80, 97.

cogens norms can be said to be "similar to rights," they "act as negative rights."<sup>66</sup>

Concerning effects of ecocide, global warming is sometimes perceived as a phenomenon that is as threatening "to the survival of the nation-state" as conventional war.<sup>67</sup> Migrants, i.e., people who flee their country as a result of floods, droughts, or other extreme weather events caused by climate change make open borders "luxuries" and, according to Anatol Lieven, create circumstances where human rights too may be "tossed out."<sup>68</sup> Apparently, emergency situations subtract from solidarity – even if unambiguously anchored in basic human needs.<sup>69</sup> However, the traditional security concern (cf. threat to the particular interests of the nation-state) could be forced to accommodate a globalization factor from armed conflict through the use of nuclear weapons.<sup>70</sup> If so, the environmentally destructive *cum* disastrous effects are not going to obey any isolationist policy that relies on a circle-concentric conceptualization of *us* and *them*.<sup>71</sup> Be that as it may, Richard Falk emphasizes the link between the original development of the concept of ecocide *per se* and environmentally harmful substances with long-term effects used in armed conflicts, such as the use of Agent Orange.<sup>72</sup> As for the idea of making ecocide an ICC crime, he believes that this effort helps to cor-

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<sup>66</sup> *Id.*, at 80.

<sup>67</sup> Boudewijn de Bruin, *Against Nationalism: Climate Change, Human Rights, and International Law*, *Danish Y.B. Phil.* 173 (2022), doi: <https://doi.org/10.1163/24689300-20221060>.

<sup>68</sup> *Id.*, at 186-187; Anatol Lieven, *Climate Change and the Nation State: The Realist Case* (2020).

<sup>69</sup> For solidarity blockers in the form of "nationalistic cultural rights," see M. Cherif Bassiouni, "Human Rights and International Criminal Justice in the Twenty-First Century," in: *Globalization and Its Impact on the Future of Human Rights and International Criminal Justice* 56-57 (M. Cherif Bassiouni ed., 2015).

<sup>70</sup> Luigi Daniele, "Climate Justice in an Unequal World: A Chat with Professor Richard Falk, Ecocide's Legal (Grand)Father," *Opinio Juris*, July 10, 2023, <http://opiniojuris.org/2023/07/10/climate-justice-in-an-unequal-world-a-chat-with-professor-richard-falk-ecocides-legal-grandfather/> [hereinafter *Climate Justice in an Unequal World*].

<sup>71</sup> Ethically, this is the view that most consideration is owed to *our own kind*, the first circle membership whereas shared humanity matters less, if at all, because of the remoteness of The Other or because of the lack of similarities as opposed to differences between *them* and *us*. See Matwijkiw & Matwijkiw, *The Emerging Ethics Evolution*, *supra* note 55, at 737-738; *Exploring Emergent Global Thresholds: Towards 2030* (Richard Falk et al eds., 2017).

roborate the view that deliberate environmental degradation is “a side effect of corporate capitalism.”<sup>73</sup> If so, it is noteworthy that opposition to open borders and free migration is inconsistent with *laissez-faire* free market philosophy, which, despite its radical tenets, refers to unrivalled capacities for inclusion and non-discrimination as justifiers.<sup>74</sup> As the “(Grand)Father” of the concept of legal ecocide, Falk himself incorporates “the logic of capital” in his endeavor to formulate a transdisciplinary jurisprudence.<sup>75</sup> Furthermore, his own vision of global security consists in a type of environmental, ecological and climate justice that extends to non-anthropocentric consideration of living organisms and nature as such and, within the human domain, issues like extreme poverty and health care disparities.<sup>76</sup> However, while Falk concedes that a progressive planetary movement “must relate centrally to political

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<sup>72</sup> Daniele, *Climate Justice in an Unequal World*, *supra* note 70. For Falk’s original definition of ecocide, see Richard A. Falk, *Environmental Warfare and Ecocide: Facts, Appraisal, and Proposals* 4 *Bull. Peace Propos.* 80 (1973).

<sup>73</sup> Daniele, *Climate Justice in an Unequal World*, *supra* note 70. With capitalism as an integral component in the conflict-causality, the conventional categories, *viz.*, violent conflict and political tyranny, are insufficient. In principle, Falk agrees with the philosophy behind Polly Higgins’ 2010 proposal for a definition of ecocide as a crime that covers “the extensive damage to, destruction of, or loss of ecosystem(s) of a given territory, whether by human agency or by other causes, to such an extent that peaceful enjoyment by the inhabitants of that territory has been or will be severely diminished.” See Polly Higgins *et al*, “Protecting the planet after Rio – the need for a crime of ecocide”, 90 *Crim. Just. Matters* 4 (2012); “Stop Ecocide,” *International Supporters of Ecocide Law*, <https://www.stopecocide.earth/supporters>. For a timeline concerning the development of ecocide as a crime, see Jakub Wojsyk, *Ecocide – the genocide of the 21st Century? – Eastern European Perspective*, Center for International Relations and Sustainable Development, Jan. 12, 2022, <https://www.cirsd.org/en/expert-analysis/ecocide-%E2%80%93-the-genocide-of-the-21st-century-eastern-european-perspective>.

<sup>74</sup> Compared to democracy, capitalism performs better in terms of merit-based consideration, thereby giving rise to a pro-market ethics argument. See Milton Friedman, *Capitalism and Freedom* 26 (2002) (1962); Bryan Caplan & Zach Wiener-Smith, *Open Borders: The Science and Ethics of Immigration* (2019).

<sup>75</sup> For the “five logics that co-constitute international law and world order” (capital, territory, nature, culture, law), see B. S. Chimni, *International Law and World Order: A Critique of Contemporary Approaches* 179 (2017).

<sup>76</sup> Javad Heirannia, “Impossible to identify at this point what will be the post-Corona effects: Falk,” *Tehran Times*, Apr. 22, 2020, <https://www.tehrantimes.com/news/447076/Impossible-to-identify-at-this-point-what-will-be-the-post-Corona>. The extensions are accommodated in the Ethics Pillar of Stakeholder Jurisprudence. See *supra* note 55.

economy,” he laments a “missing dimension” in traditional Left thinking that makes socialism unsuited as a solution: the lack of ethical responsibility for “modernity.”<sup>77</sup> Rather than wait for a response to the underlying problem, *viz.*, “individualist ideologies,” Falk looks to science for assistance with urgency pleas in the form of “facts and evidence” before it is too late to do anything at all.<sup>78</sup>

## A. The ICC

The push for ecocide to be recognized as crime at the level of international law leaves a lot to be desired.<sup>79</sup> As pointed out by Jérôme de Hemptinne, ecocide does not even qualify as an international crime under customary international law.<sup>80</sup> Currently, destruction of the environment can only be subsumed under the ICC’s “war crimes” category. More precisely, Article 8(2)(b)(iv) of the Rome Statute provides that a war crime within the context of an international armed conflict and “within the established framework of international law” may have been committed in the event that an accused “[i]ntentionally launch[es] an attack in the knowledge that such attack will cause [...] widespread, long-term and severe damage to the environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated.” To make widespread, long-term, and severe environmental damage applicable in times of peace requires CAH status (cf. Article 7[1]), as pointed out by Stefania Negri. This is a necessary

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<sup>77</sup> Falk criticizes the “focus on class conflict and economistic commentary,” aspects that can be traced to historical materialism. See Richard Falk, “Expanding Our Ambitions,” *Great Transition Initiative: Toward a Transformative Vision and Praxis*, Apr. 2020, <https://greattransition.org/gti-forum/planetize-movement-falk>.

<sup>78</sup> Falk mentions Greta Thunberg as a voice that is “oriented far more toward an Enlightenment insistence on heeding the scientific consensus than on rekindling class warfare.” He overlooks factors like the Fake News movement that questions the scientific trustworthiness of “facts and evidence.” See Falk, *Expanding Our Ambitions*, *supra* note 77.

<sup>79</sup> 13 countries have a national ban on ecocide. In 2023, the EU took steps to consider a ban on ecocide. See European Parliament, Report A9-0087, Mar. 28, 2023, [https://www.europarl.europa.eu/doceo/document/A-9-2023-0087\\_EN.html](https://www.europarl.europa.eu/doceo/document/A-9-2023-0087_EN.html); Matwijkiw & Matwijkiw, *The Emerging Ethics Evolution*, *supra* note 55.

<sup>80</sup> Jérôme de Hemptinne, “Ecocide: An Ambiguous Crime?,” *Blog of Eur. J. Int’l L.*, Aug. 29, 2022, <https://www.ejiltalk.org/ecocide-an-ambiguous-crime>.

step because the relevant breaches take place during times of peace as well as times of war and conflict. Furthermore, widespread, long-term and severe environmental damage during times of peace is often “a crime without intent as it occurs as a byproduct of industrial and other activity” just as it is “associated with” the activity of states.<sup>81</sup> Her own emphasis on human health effects of environmental “determinants” is coupled with a proposal to hold States responsible for climate-induced health risks, as inspired by trends in international litigation practice that focuses on “right to health” arguments.<sup>82</sup>

In the light of Negri’s ICC aspiration, a 2020 test of the ICC’s eco-responsiveness in connection with a criminal complaint received from medical professionals in Brazil concerning health policy and COVID-19 is thought-provoking.<sup>83</sup> In the complaint in question, the medical professionals allege that President Jair Bolsonaro’s “(non-)handling of the coronavirus pandemic constitutes a ‘crime against humanity’.”<sup>84</sup> Despite the fact that the failure could be documented, the Prosecutor’s Office at the ICC did not select the case based on the information provided, in part, because the case itself failed to satisfy the required *chapeau* elements.<sup>85</sup> Other attempts to file similar complaints “against world leaders and the WHO” have been made; and with the same outcome.<sup>86</sup> According to Tobias Ackermann, the violations in Brazil amount to breaches

<sup>81</sup> Anja Matwijkiw & Bronik Matwijkiw, “[Human] Values and Ethics in Environmental Health Discourse and Decision-Making: The Complex Stakeholder Controversy and the Possibility of ‘Win-Win’ Outcomes,” in: *Environmental Health in International and EU Law: Current Challenges and Legal Responses* 13, 21 (Stefania Negri ed., 2019) [hereinafter *[Human] Values and Ethics in Environmental Health Discourse*].

<sup>82</sup> Stefania Negri, “Climate Change and Global Health: Exploring Regime Interaction and the Role of the Right to Health Argument in International Climate Litigation,” 23 *Int’l Community L. Rev.* 219 (2020).

<sup>83</sup> Tobias Ackermann, *COVID-19 at the International Criminal Court: Brazil’s health policy as a crime against humanity?*, Völkerrechtsblog, Aug. 14, 2020, <https://voelkerrechtsblog.org/covid-19-at-the-international-criminal-court-2/>. [hereinafter *COVID-19 at the International Criminal Court*].

<sup>84</sup> *Id.* For Macleod, the implication is a rejection of the *jus cogens*/human rights analogy. See *supra* note 60.

<sup>85</sup> Guénaél Mettraux, *International Crimes: Law and Practice* Vol. II: *Crimes Against Humanity* (2020).

<sup>86</sup> Tim Zubizarreta, *ICC complaint filed against world leaders and WHO over COVID-19*, *Jurist*, May 29, 2020, <https://www.jurist.org/news/2020/05/icc-complaint-filed-against-world-leaders-and-wto-over-covid-19/>.

of Article 12(2)(c) of the International Covenant on Economic, Social and Cultural Rights (ICESCR).<sup>87</sup> The ICESCR requires State parties (like Brazil) to treat and control “epidemic ... and other diseases.”<sup>88</sup> He also explains why the relevant human rights violations are *not serious enough* to be addressed in accordance with the ICC’s residual notion of other inhumane acts (cf. Article 7[1]k). Such acts, Ackermann stresses, “must be interpreted conservatively and must not be used to expand uncritically the scope of crimes against humanity.”<sup>89</sup> Progressive broadness, so it seems to follow, may coincide more with international ethics than international (criminal) law, but this is nevertheless the point at which the ICC must apply its norm-recognition brakes. The argument is at risk of committing the begging the question fallacy, though. If the key premise is explicated, the use of the method of substantive expansion is inappropriate if it deviates from the conventional assumption *cum* axiom that “international crimes are confined to certain violations of civil and political rights to the exclusion of their socioeconomic and cultural counterparts.”<sup>90</sup> Such (uncritical) dogmatism cannot be easily transcended. Bassiouni’s statement from the 1990s that “we will continue to be faced with confusion in this important area of law” unless *jus cogens* is informed by interdisciplinary considerations looks like a self-fulfilling prophecy in the light of the rights confinement.<sup>91</sup> Nevertheless, disciplines like philosophy of law can go after things in the seams and employ analytical tools of correction in the process of conducting general inquiries, as well as contribute to theoretical clarity in a way that “the highly narrow specialist” cannot.<sup>92</sup> The position called Stakeholder Jurisprudence is one example of such critical philosophizing with rights as United Nations stakes.<sup>93</sup>

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<sup>87</sup> Ackermann, *COVID-19 at the International Criminal Court*, *supra* note 83.

<sup>88</sup> Under the ICESCR, these steps are necessary “towards the full realization of the right to health” (cf. Art. 12.2).

<sup>89</sup> Ackerman refers to *Prosecutor v. Francis Kirimi Muthaura et al* (Decision of the Pre-Trial Chamber, No. ICC-01/09-02/11, Jan. 23, 2012), at para. 269, [https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2012\\_01006.PDF](https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2012_01006.PDF).

<sup>90</sup> Hence, violations of economic, social and cultural rights “are beyond the scope of international criminal law.” See Sunčana Roksandić Vidlička, “Systemic Deprivation of Access to Essential Medicine and Medical Care – A Crime Against Humanity?” in: *Biolaw and International Criminal Law: Towards Interdisciplinary Synergies* 159 (Caroline Fournet & Anja Matwijkiw eds., 2021).

<sup>91</sup> Bassiouni, *A Functional Approach*, *supra* note 11, at 802.

<sup>92</sup> *Id.*

It is too early, of course, to say anything conclusive about the implications of the possible criminalization of ecocide under the auspices of the ICC. That granted, there are strong indicators to suggest that *if* the Court were to expand its jurisdiction as regards the prosecution of ecocide as a category on its list of atrocity crimes, *then* it is highly unlikely that all of Negri's recommendations will be met. The ICC's twentieth anniversary in 2022 is one event that shows why there is reason to be pessimistic. The anniversary was marked with a conference where Phoebe Okowa tried to convince the audience that the Rome Statute ought to be amended to accommodate ecocide (by adding Article 8ter) defined in terms of "unlawful or wanton acts committed with knowledge that there is a substantial likelihood of severe and either widespread or long-term damage to the environment being caused by those acts."<sup>94</sup> While the threshold may have been lowered by the (either-or) disjunction, the preferential wrongdoing implied by "wanton acts committed with knowledge" is a methodology for criminal responsibility-ascriptions that accords with *mens rea*.<sup>95</sup> As it happens, Okowa's

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<sup>93</sup> Anja Matwijkiw, "The Dangers of the Obvious but Often Disregarded Details in the International Criminal Law Demarcation Debate: Norm-Integration and the Triple-Thesis 'Argument,'" 20 *International Criminal Law Review* 759 (2020) [hereinafter *The Dangers of the Obvious but Often Disregarded Details*].

<sup>94</sup> Okowa, "On the Prospect of Adding New Crimes to the ICC's Jurisdiction," *supra* note 62.

<sup>95</sup> Note the distinction between simple knowledge and certainty. Furthermore, compared to unlawful acts as a type of *actus reus* where the prosecution can look to internal law breaches, the category of wanton acts "with reckless disregard for damage which would be clearly excessive in relation to the social and economic benefits anticipated" creates a high bar for prosecution. In addition, the wantonness criterion as means to balance socio-economic benefits with environmental damage by view of the concept of sustainable development conveys the problematic message "that society and the economy can benefit from severe and either widespread or long-term environmental damage and obfuscates the inescapable link between the welfare of nature and that of human communities." Finally, there is a risk of overcriminalization through the fact that contributions that collectively lead to a "substantial likelihood" of severe and either widespread or long-term damage to the environment being caused by those acts could be criminalized. This raises normative questions about the scope of liability. See Liana G. Minkova, "The Fifth International Crime: Reflections on the Definition of 'Ecocide,'" 25 *J. Genocide Rsch.* 62, 74 (2023) [hereinafter *The Fifth International Crime*]; Thomas Hamilton & Marc Tiernan, "Who could be held responsible for ecocide under the Rome Statute?," *Rethinking SLIC*, Mar. 21, 2022, <https://rethinkingslic.org/blog/criminal-law/115-who-could-be-held-responsible-for-ecocide-under-the-rome-statute>.

enthusiastic embrace of the definition, which was proposed by the Independent Expert Panel for the Legal Definition of Ecocide in 2021, reflected the fact that its content *repeated* the elements of existing Rome Statute crimes. During her speech, Okowa also added that crimes are likely to be consigned to “the graveyard” *unless* they have a “narrow subject-matter ... to maximize political support.”<sup>96</sup> Nevertheless, Okowa predicted “pushback, *inter alia*, because of the Global South-North divide that manifests itself as a post-colonial obstruction that is also a reaction against “enduring” inequalities and inequities, domination, and exploitation.”<sup>97</sup>

### **B. The Charter of the United Nations: Principle versus Power**

Therefore, it is unfortunate if pro-ethics idealists are correct that the UN Charter addresses responsibility in international relations in a way that may tilt the weight-scales against justice. More precisely, Article 1 is problematic by virtue of the risk of *realpolitik* that follows from the frequent and stronger emphasis on “international peace and security” and the “removal of threats to the peace” *in comparison to* justice. Peace and security, so the argument goes, are *not* values that can and, stronger still, should be pursued for their own sake, as if the reproduction of the order for the sake of conserving it or the cessation of hostilities is sufficient (or sufficiently purposeful). The point is that the limitation presented in the (UN Charter) clause, whereby “conformity with the principles of justice and international law” is stipulated as a requirement, may be (mis)construed along the lines of the distinction between intrinsic and instrumental values, with justice in the role as a *telos*-regulator.<sup>98</sup> This is an inappropriate reductionism, though. Justice is about

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<sup>96</sup> Okowa, “On the Prospect of Adding New Crimes to the ICC’s Jurisdiction,” *supra* note 62.

<sup>97</sup> *Id.* Issues that adversely affect collaboration and have “compromised the effectiveness of international environmental law” span the marginalization of poverty alleviation and debt relief, reinforcing the South’s dependence (e.g., with the Washington Consensus), and skepticism towards the legal architecture of contemporary globalization. See: *International Environmental Law and the Global South* 1-10 (Shawkat Alam *et al* eds., 2015).

<sup>98</sup> UN Charter, *supra* note 4, at Art. 1(1).

more than ending persecution, violence and victimization “as a brief interlude between conflicts” or safeguarding against harmful outcomes of *alleged* conflict-resolution, e.g. a system with “strict law and order” where the original conflict-causality remains in spite of the appearance of normalcy.<sup>99</sup> Justice not only concerns pragmatism (cf. justice as an effective instrument for sustainable peace/security); it is also a prerequisite for legal, political, social, economic, etc. accountability in the form of “restoration of or transition to democracy.”<sup>100</sup> In the context of *jus cogens*, Bassiouni even reasons that if “the substance of law is not bound by higher values and principles, law too easily becomes an instrument for the pursuit of totalitarian power at the expense of the best interest of the collectivity.”<sup>101</sup> However, a “one shoe fits all sizes” is not imposed for conflict-resolution and -management. Holistically, justice is a “tool box” which contains different mechanisms and measures that

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<sup>99</sup> M. Cherif Bassiouni, “Searching for Peace and Achieving Justice: The Need for Accountability,” 59 *L. & Contemp. Probs.* 9, 12-13, 19, 23 (1996) [hereinafter *Searching for Peace and Achieving Justice*]. For hybridity, see *supra* 17.

<sup>100</sup> There “is agreement that the concepts of the rule of law, democracy, and human rights (and increasingly others, such as development) are indivisibly linked,” but there exists “no universally agreed definition of or approach to the concept of democracy.” See Matwijkiw & Matwijkiw, “Bahrain Anno 2017: Peace or Regime-Change? The Ongoing Human Rights Dilemma and the Ethics Pillar as a Measurement,” *The Global Community – Yearbook of International Law & Jurisprudence 2017*, Part 2: Notes and Comments, at 136. – In 1999, the UN Commission on Human Rights adopted a resolution entitled “Promotion of the right to democracy” (CHR Res. 1999/57). This was the only occasion on which the Commission endorsed a specific right to democracy. Later resolutions avoided this language and addressed the relationship between the concepts of human rights and democracy, which became a lightning rod for North-South tensions. “What is clear, however, is that there is a regime of international law currently in place, however thin and fragile, that protects the PoD [principle of democracy] as a *customary international law principle* bearing on states, whether that principle corresponds to an individual right or not and, especially, to a human right or not.” See Hilary Charlesworth, “Is There a Human Right to Democracy,” in: *Human Rights: The Hard Questions* (2013); Samantha Besson, “The Human Right to Democracy in International Law – Coming to Moral Terms with an Equivocal Legal Practice,” in: *The Cambridge Handbook of New Human Rights: Recognition, Novelty, Rhetoric* 484 (2020); see generally Alfred de Zayas, *Building a Just World Order* (2021).

<sup>101</sup> M. Cherif Bassiouni, *Crimes against Humanity: Historical Evolution and Contemporary Application* 16 (2011) [hereinafter *Crimes against Humanity*].

can be used in different country or interstate situations.<sup>102</sup> This flexibility is a concession to the fact, according to idealism, that there can be no peace/security in the wake of conflict *without* justice. This priority also comes with spillovers for the administration of law. Justice cannot be reduced to a formal concept (cf. rule-application), meaning that substantive norm-expansion cannot be set aside. E.g., in 2010, the International Court of Justice (ICJ) ruled progressively in accordance with an “essential interest” to extend environmental concerns to the preservation of, and access to, natural resources.<sup>103</sup> The ICJ is established by the UN Charter (cf. Article 1), whereas the ICC is an independent body with a Relationship Agreement, but the call for a no-impunity policy is a common denominator in the case of violations of *jus cogens* norms.<sup>104</sup>

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<sup>102</sup> Post-conflict accountability beyond traditional legal justice (cf. prosecution/punishment and/or extradition) concerns alternative non-judicial or non-criminal measures, such as truth-seeking processes, reconciliation, memorialization, reparation, vetting/lustration, and restoration of or transition to democracy, thereby endorsing a synergy of retributive and restorative justice to prevent, deter, punish, and rehabilitate but also to rebuild. See: M. Cherif Bassiouni, *The Chicago Principles on Post-Conflict Justice* 1-8 (2008).

<sup>103</sup> Pronouncements of the ICJ signal that a duty to prevent or at least mitigate harm to the environment has become a principle of general international law, which has therefore moved the Court’s jurisprudence beyond the narrow borders of *jus cogens*. E.g., in the Pulp Mills case between Argentina and Uruguay (of Apr. 20, 2010), the ICJ held that, in accordance with a modern practice, States are deemed to be subject to a requirement: “under general international law to undertake an environmental impact assessment when there is a risk that the proposed industrial activity may have a significant adverse impact in a transboundary context.” See: Thomas Tomuschat, *General International Law: A New Source of International Law* (2018). Note that, on 12 July 2010, the ICC’s Pre-Trial Chamber in *Al-Bashir* treated the contamination of water pumps as part of a genocidal policy (cf. Second Decision on the Prosecution’s Application for a Warrant of Arrest, ICC-02/05-01/09-94, para. 38). The fact that the damage only incidentally harms the environment shows that a real “green shift” at the ICC would require a provision (rather than the relevant precedent) that recognizes the gravity of environmental damage as such. See Minkova, *The Fifth International Crime*, *supra* note 95, at 63.

<sup>104</sup> This response was made applicable, in the area of cooperation and international responsibility and to conform to the purposes and principles of the UN Charter, with the UN Resolution on War Criminals (G.S. Res. 2840 [XXVI] 26 U.N. GAOR [Supp. No. 29], 88, UN Doc. 8429 [1971]). Note that the 2012 Declaration on the Rule of Law has a policy of zero tolerance for genocide, war crimes and crimes against humanity. See UN General Assembly (GA), *Declaration of the High-Level Meeting of the General Assembly on the Rule of Law at the National and International Levels*, A/RES/67/1, para. 22 (Nov. 30, 2012) [hereinafter *2012 Declaration on the Rule of Law*].

On the premises of idealism, this is an implication of the principle *ver-sus* power distinction that, in turn, serves to negate the Right is Might dictum from *realpolitik*. In the case of the ARSIWA, the concept of *jus cogens* also provides a legal ground for the action of States not directly damaged, just as the ILC mentions – in its Commentaries on the ARSIWA – “obligations ‘of essential importance for the safeguarding and preservation of the human environment, such as those prohibiting massive pollution of the atmosphere or of the seas’ as peremptory norms of general international law (*jus cogens*),” in accordance with Draft Article 19, as adopted in 1976 during the first reading of the topic.<sup>105</sup> Be that as it may, the “non-exhaustive” list provided in the annex to the 2022 Draft conclusions on identification and legal consequences of peremptory norms of general international law (*jus cogens*) (CILC) contains the following examples:

- (a) The prohibition of aggression;
- (b) the prohibition of genocide;
- (c) the prohibition of crimes against humanity;
- (d) the basic rules of international humanitarian law;
- (e) the prohibition of racial discrimination and apartheid;
- (f) the prohibition of slavery;
- (g) the prohibition of torture;
- (h) the right of self-determination.

According to the drafters, (a)-(h) “is intended to illustrate, by reference to previous work of the Commission, the types of norms that have routinely been identified as having peremptory character, without itself, at this time, making an assessment of those norms.”<sup>106</sup> Critically, this is a rather naïve response to the ILC’s own effort. Both procedurally and substantially, the Drafters endorse standard *lex superior*. In the words of Bassiouni, there is no value-neutral approach.<sup>107</sup> The role of the ILC

<sup>105</sup> CILC Commentaries, *supra* note 3, at 87, 89. The Stockholm Declaration of 1972 and around 150 instruments, which followed, comprise various layers of State responsibility pertaining to international environmental law. See: *Routledge Handbook of International Environmental Law* (Erika Techera et al eds., 2023); Roberto Virzo, “Sea-Level Rise and State of Necessity: Maintaining Current Baselines and Outer Limits of National Maritime Zones,” 2 *Italian Rev. Int’l & Comp. L.* 21 (2022).

<sup>106</sup> CILC Commentaries, *supra* note 3, at 85.

<sup>107</sup> M. Cherif Bassiouni, *International Criminal Law: International Enforcement* 17 (2008).

as a lawmaker as opposed to a registrar does not evaporate, *inter alia*, by stating that “the articles do not purport to specify the content of the primary rules of international law, or of the obligations thereby created for particular States.”<sup>108</sup> The fact that the ARSIWA Drafters place an emphasis on the methodology and process for identifying peremptory norms of general international law (*jus cogens*) (cf. CILC conclusions 4-9) and, for this objective, use the 2022 document entitled “Draft Conclusions on the identification of peremptory norms of general international law (*jus cogens*), with commentaries” to “refer to different materials to illustrate methodological approaches in practice” is evidence of a strategy for *consolidating or cementing* the mainstream way of determining whether a norm of general international law has the peremptory “added quality” (i.e., is accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law [*jus cogens*] having the same character).<sup>109</sup> Philosophically, the strategy is tailored to system-immanent propositions, ones that are (value) compatible with the body of pre-existing norms. What has been routinely identified (cf. mainstream approach) leaves little room for progressive (tractor) pronouncements.

### Behind the Scenes

While experts on the legalese, including legal professionals from the ICC circles, are undeterred by the idea of a broader jurisdictional *cum* prosecutorial mandate – and are backed by a 2016 policy paper on case selection and prioritization which signals the significance of a non-separation of “social, economic and environmental damage” (cf. relational harms) for the purpose of prosecuting Rome Statute crimes “that are

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<sup>108</sup> ARSIWA Commentaries, *supra* note 3, at 59, 123.

<sup>109</sup> CILC Commentaries, *supra* note 3, at 17.

<sup>110</sup> For the views that the derivative argument of the ICC’s OP supports the prosecution of climate crimes, see Reinhold Gallmetzer, “It’s Time To Start Prosecuting Climate Criminals,” *Ecosystem-Marketplace*, July 7, 2017, <https://www.ecosystemmarketplace.com/articles/its-tim/>; Minkova, *The Fifth International Crime*, *supra* note 95, at 63; ICC, Office of the Prosecutor, *Policy Paper on Case Selection and Prioritization*, Sept. 15, 2016, [https://www.icc-cpi.int/sites/default/files/itemsDocuments/20160915\\_OTP-Policy\\_Case-Selection\\_Eng.pdf](https://www.icc-cpi.int/sites/default/files/itemsDocuments/20160915_OTP-Policy_Case-Selection_Eng.pdf).

committed by means of, or that result in the destruction of the environment, the illegal exploitation of natural resources or the illegal dispossession of land”<sup>110</sup> – the part of the debate and dispute that creates division between progressive and conservative stances is also conveyed by legal doctrines that otherwise agree on a link between *jus cogens* norms and human rights. While Crawford sees “influence amid controversy” as an evolutionary vehicle in and of itself,<sup>111</sup> the competing responses to human rights that arguably can be said to correspond to *jus cogens* norms tend to be trends that *disregard* general rights theory, or fail to adequately capture the instructive criteria or features in what amounts to scattered remarks about the scope of human rights, or about the nature of the relationship between human rights and the duties these are correlated with, or all of these. In the place of credentials-checking, the measurement for human rights is assumed to be claim-rights.<sup>112</sup> For advocates of Legal Process Theory, this assumption results in an interpretation whereby *jus cogens* norms are immediately stopped from *compelling* increased human rights protection in effect, as a case of backwards causality. The idea that only negative rights can arguably be said to correspond with *jus cogens* norms is a response that is taking too much for granted about claim-rights. Any “no-rights” implications for the positive counterparts theoretically depend on rights-related arguments that consider *more than* the logical correlation thesis whereby the implied claim to X and claim against another person or party B are premised on the assumption that the duties of B necessarily exist prior to the correlative rights *stricto sensu* (cf. claim-rights) as therefore held contingently by A. If the logical correlation thesis alone were sufficient to preclude positive human rights, outlooks like Ziccardi Capaldo’s Integrative Approach would have reason to reconsider its diametrically opposed response. On comparison, Bassiouni’s position is wedged between the two extremes. In this way, it is very illustrative of the struggles of a reform-friendly thinker who is caught in the tension area between the progressive and the conservative. The author of this essay will concentrate on those of Bassiouni’s views that show how and why there is a philosophical irony at the “deep-theory” level

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<sup>111</sup> Crawford, *The ILC’s Articles*, *supra* note 32, at 889.

<sup>112</sup> Samantha Besson, “Human Rights: Ethical, Political ... or Legal? First Steps in a Legal Theory of Human Rights,” in: *The Role of Ethics in International Law* (Donald E. Childress III ed., 2011).

where Falk's fault detection and diagnosis (cf. individualist ideologies) takes place.<sup>113</sup> A *meta*-methodology that can identify – through a reconstructive interpretation – components from the so-called triple thesis for claim-rights analysis will be applied to pinpoint those parts of the reasoning that are also analytical weaknesses.

### A. Bassiouni's Mixed Theory

In general rights theory, the triple thesis typically entails the law *versus* morality separation thesis, the logical correlativity thesis and the interest-incompatibility thesis working together. In the case of claim-rights, its application cuts across different versions of Interest Theory of Rights and, furthermore, Will or Choice Theory of Rights. The distinction is also relevant for an analysis of the ARSIWA. This contains few indicators for conceptualization, but they fit into one or the other framework. E.g., talk about the “beneficiary of the obligation breached” works as a criterion for the definition of the right-holder in classical Interest Theory of Rights (e.g., Jeremy Bentham) whereas modern Will or Choice Theory of Rights (e.g., Herbert L.A. Hart) equates the holder of a claim-right with a duty-controller, a so-called “small-scale sovereign.”<sup>114</sup> Methodological individualism for rights is consistent with both of the mentioned outlooks, whereas statements like “the rights conferred by international human rights treaties cannot be waived by their beneficiaries” are consistent only with the modern version of the Interest Theory of Rights (e.g., Neil MacCormick), and for reasons that are tied to the relationship between rights and obligations.<sup>115</sup> In particular, the view of rights as *resulting from* obligations, a view which coincides with the logical correlativity thesis, is deconstructed by the link between important human interests and treating the right-holder

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<sup>113</sup> Anja Matwijiw & Bronik Matwijiw, “Between Philosophy and International Criminal Law: Examples of Interdisciplinary Approaches,” 23 *Int'l Crim. L. Rev.* 1, 9 (2023).

<sup>114</sup> ARSIWA Commentaries, *supra* note 3, at 214.

<sup>115</sup> *Id.*, at 177, 234.

<sup>116</sup> Alone, the logical correlativity thesis (for A to have a claim-right, there must necessarily exist another person or party, B, that is the correlative duty-bearer) has the effect of making the existence of rights depend on the prior existence of duties. If fulfillment (cf. “Ought Implies Can”) is added as a criterion, this is an extra-logical step.

as an end.<sup>116</sup> That said, the Drafters of the ARSIWA also make it hold that peremptory norms of general international law (*jus cogens*) “produce” *erga omnes* obligations, with “distinct consequences.”<sup>117</sup> This approach adopts Bassiouni’s non-circular version of the “two sides of one coin” interpretation.<sup>118</sup> The publication that is referenced, *International crimes: jus cogens and obligatio erga omnes*, emphasizes the “non-derogable” or “no derogation” feature of legal consequences of proscriptions on CAH, genocide, and war crimes.<sup>119</sup> It follows that obligations *erga omnes* constitute categorical (justice) imperatives. The absoluteness of non-derogation disqualifies all exceptional circumstances, meaning that obligations arising out of a characterization of *jus cogens* always stand. After this, Bassiouni advances a legal doctrine that also serves as a performance-maximizing model whereby it is made to hold that:

*Jus cogens* implies non-derogable *obligatio erga omnes*, meaning that the obligations “flow to all” irrespective of context, circumstances and legal characterization. In practice, *jus cogens* norms are intended to secure accountability through (1) prosecution/punishment or extradition, (2) non-applicability of statutes of limitations, (3) non-applicability of immunities up to and including heads of states, (4) non-applicability of the defense of “obeying orders”, (5) universal application of (1) to (4) whether in times of peace or war or states of emergency, and (6) universal jurisdiction over perpetrators of *jus cogens* crimes, so as to secure prosecution/punishment or extradition, *etc.* Thus, jurisdiction is applicable irrespective of where the crimes were committed, by whom they were committed (including heads of states), against whatever category of victims, and irrespective of the context of their occurrence (whether they occurred in times of peace, *etc.*), circumstances (*e.g.*, whether they

<sup>117</sup> CILC Commentaries, *supra* note 3, at 66 n200, 67, 72.

<sup>118</sup> *Id.*, at 66 n201.

<sup>119</sup> Thereby making it clear that *jus cogens* does not merely give States “certain rights to proceed.” See Bassiouni, *International Crimes*, *supra* note 41, at 63, 65, 67, 74. For another example of Bassiouni as an authoritative source on *jus cogens* and *obligatio erga omnes*, see Special Rapporteur to the UN GA, *Fourth report on peremptory norms of general international law (jus cogens)*, at 35 n219, A/CN.4/727 (Jan. 31, 2019) (prepared by Dire D. Tladi).

were the result of “obeying orders”), and legal characterization (e.g., whether they were made part of treaty law).<sup>120</sup>

The part of the doctrine that pertains to *jus cogens* as a bottom-line Kantian-type morality informs most areas of Bassiouni’s own scholarship. In his opinion, “there is always going to be a conflict between *realpolitik* and the pursuit of international criminal justice ... if nothing else States will always try to protect their political interest.”<sup>121</sup> There is a small leap from this observation to Clyde Eagleton’s statement, that “States, like individuals, have ever been concerned with their rights rather than their duties.”<sup>122</sup> In connection with *realpolitik*, Bassiouni associates responsibility with secondary enforcement duties rather than the kind of protection that comes from securing the direct objects of rights. Concerning more general considerations of duties and human rights, the “father” of international criminal law *giveth with one hand and taketh away with the other*. As it happens, Bassiouni has more in common with Legal Process Theory than the Integrated Approach pioneered by Ziccardi Capaldo. Like Ziccardi Capaldo, Bassiouni mixes global (norm-recognition) constitutionalism and (norm-enforcement) communitarianism. Both mix a PIL synergetic concept of law with a person-centric perspective on rights, and both do this without specifying anything about credentials-checking for rights *per se*. When it comes to talk about *jus cogens* norms that correspond to human rights, though, Ziccardi Capaldo’s principles of respect for *jus cogens* and post-violation reaction *uti universi* integrates all that Legal Process Theory rejects, including rights to health, a clean and safe environment, and generally,

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<sup>120</sup> Matwijkw & Matwijkw, *Post-Conflict Justice*, *supra* note 2, at 350-351. Note that Brad Roth views Bassiouni as an “archetypical naturalist” who has popularized the term “*jus cogens* crimes” with the effect of presenting “claims about additional legal consequences (such as the purported inadmissibility of amnesty) of certain acts that have been established to incur international criminal liability. Whatever the merit of those claims, the rhetoric has had the effect of leading less careful scholars to conflate *jus cogens* and international crimes-phenomena that do, of course, frequently coincide.” See Brad R. Roth, “Coming to Terms with Ruthlessness: Sovereign Equality, Global Pluralism, and the Limits of International Criminal Justice,” 8 *Santa Clara J. Int’l L.* 231, 243, 280 n257 (2010).

<sup>121</sup> Grotius Centre for International Legal Studies, “Professor M. Cherif Bassiouni on the Future of International Criminal Justice,” 2015 (Siracusa Int’l Ins. Upload), [https://www.youtube.com/watch?v=VsRSW8AR\\_ME](https://www.youtube.com/watch?v=VsRSW8AR_ME).

<sup>122</sup> Clyde Eagleton, *The Responsibility of States in International Law* vii (1928).

a better quality of life.<sup>123</sup> As for Bassiouni, there are considerations that dilute his otherwise “firm moral and legal commitment to fundamental human rights.”<sup>124</sup>

A subtle norm-division accompanied by a tacit bias (thereby taking too much about rights for granted) is the outcome of defending the post-conflict premise that “[r]elying solely on formal legal action generally *fails* to fully address victims’ needs.”<sup>125</sup> Conventional strategies are insufficient. Additional non-criminal measures are necessary to shrink the number of justice outsiders whose dissatisfaction might refuel the conflict. After this, seven principles are presented which mix prosecution/punishment or extradition (cf. *aut dedere aut judicare*) with, *inter alia*, vetting, memorialization, education, sanctions and administrative measures, preservation of historical memory, indigenous and religious approaches to justice and healing, and institutional reform and effective governance, i.e., restoration of or transition to democracy.<sup>126</sup> However, there is another premise in play. This can be derived from Bassiouni’s focus on breaches of *jus cogens* norms, which “often involve significant and systematic violations of fundamental human rights.”<sup>127</sup> With a strict and legal response that equates retributive justice (cf. *aut dedere aut judicare*) with a no-impunity policy for genocide, war crimes and CAH, *other types of accountability* that match the alternative measures with restorative justice are apparently allowed by virtue of *not being tied* to the most basic rights (that correspond to *jus cogens* norms). Given that torture, disappearances, massacres, rape, and mass displacement can be subsumed under “other [serious] crimes against human rights,” these too require a strict and legal response.<sup>128</sup>

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<sup>123</sup> Capaldo, *Pillars of Global Law*, *supra* note 4, at 96, 212 (2008). According to Bassiouni, the jurisprudence of the ICJ is “instructive” to the extent that it “relied on *jus cogens* as a fundamental principle of international law”; cf. *Nicaragua versus the United States: Military and Paramilitary Activities in and Against Nicaragua*. However, the same case also shows a tension between legal principles and ideological or political value judgments for “[e]arlier the ICJ held that the prohibition against genocide is a *jus cogens* norm that cannot be reserved or derogated from.” See Bassiouni, *International Criminal Law: International Enforcement*, *supra* note 107, at 17.

<sup>124</sup> Bassiouni, *The Chicago Principles on Post-Conflict Justice*, *supra* note 102, at 9.

<sup>125</sup> *Id.*, at 3.

<sup>126</sup> *Id.*, at 29-60. See also *supra* 101.

<sup>127</sup> *Id.*, at 1.

<sup>128</sup> *Id.*; Bassiouni, *Crimes against Humanity*, *supra* note 101, at 228.

In his self-understanding as regards “rights norms,” Bassiouni is *not* “legalistic.”<sup>129</sup> Admittedly, Bassiouni mixes components from natural law theory and legal positivism, idealism, and pragmatism – albeit it is also true that informal action is not tantamount to value equality. Rights analysis invokes the “inheritor” factor from “national legal concepts and practices,” just as this finding is not a platform for philosophical exercises or comparisons pertaining to rights that are claimable.<sup>130</sup> Concerning Hart, absolute obligations *erga omnes* rule out talk about real and indeed prior (criminal) rights; but this departure from the Will or Choice Theory of Rights does *not* lead Bassiouni to challenge the underpinning assumption that *only relative* obligations give rise to (negative) civil/political claim-rights, whereas (positive) social/economic/cultural rights are relegated to a lower status – where decency, desert and dignity are not at stake in violations and victim responses according to traditional claim-rights theorists.<sup>131</sup> While Bassiouni does not share this harsh outlook, he is *repeating* one and the same list of doctrinal constants throughout his scholarship: “[I]ife, liberty, personal safety, and physical integrity.”<sup>132</sup> Obviously, Bassiouni’s list is as short as it is narrow. On scrutiny, it also reflects a priority, whereby it is a combination of i) the nature of the stakes themselves (*cf.* intrinsic value argument) and ii) the serious harm that *together* explain how and why core liberal values deserve recognition and protection in the form of the most basic *cum* individual rights that correspond to *jus cogens* norms. In turn, this means that Bassiouni’s position is consistent with the implication of the interest-incompatibility thesis, meaning that the choice of freedom at the expense of welfare is an unhappy fact about the circumstances.<sup>133</sup> Thus, other-directed claims to non-interference capture what is owed *stricto sensu*. At the same time, the pursuit of retributive justice *without inserting any broad variable/s* into the accountability-securing equation is a “sector-specific” approach that jeopardizes post-conflict success.<sup>134</sup> Hence, it is Bassiouni’s “firm commitment to accountability” that is pragmatically extended to a broad(er) justice

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<sup>129</sup> Bassiouni, *The Chicago Principles on Post-Conflict Justice*, *supra* note 102, at 3.

<sup>130</sup> Bassiouni, *Perspectives on International Criminal Justice*, *supra* note 39, at 290.

<sup>131</sup> Joel Feinberg, *Social Philosophy* 58 (1973).

<sup>132</sup> M. Cherif Bassiouni, *The Protection of Human Rights in the Administration of Criminal Justice: A Compendium of United Nations Norms and Standards* xxvi (1994).

<sup>133</sup> Feinberg, *Social Philosophy*, *supra* note 131, at 72.

<sup>134</sup> Bassiouni, *The Chicago Principles on Post-Conflict Justice*, *supra* note 102, at 4.

implementation.<sup>135</sup> E.g., socioeconomic preferences may be negotiated in accordance with basic needs, meaning that victims' rights (to justice, truth and redress) contain elements of (Hart-like) discretion.<sup>136</sup> However, such victim-centeredness comes *without* any elevation effect for economic/social/cultural human rights. Considerations having to do with "limited resources" play a role.<sup>137</sup> Bassiouni's liberal (rights) bias is linked therefore with the argument from economic realism that it is *because* economic/social/cultural rights belong to the positive category that they are weaker or lesser than claim-rights. Thus, "victims (ought to) get as much justice as can be afforded" applies to non-strict measures, whereas "justice must be done" holds for *jus cogens* prosecution/punishment or extradition (*cf.* retributive justice) with a morally-legally stronger degree of necessity.

Mark Allen Gray interprets Bassiouni's writings as having indirectly predicated norm-recognition of ecocide on necessity for survival.<sup>138</sup> This does not commit him (Bassiouni) to much, though. As explained by Mohammed Saif-Alden Wattad, the ICC's choice of crimes was "an explicit manifestation of the Nuremberg experience."<sup>139</sup> Therefore, considerations having to do with historical coherence imply that crimes against the environment *should not* be included, again according to Wattad. Notwithstanding, Bassiouni takes the step of mentioning "the dumping of nuclear and hazardous waste" and "the use of biological substances by individuals and armed groups," i.e., ecocide *narrowly construed*.<sup>140</sup> Activists cannot just leap from idealist proposals to progressive projects, from values to facts, from morality to reality *without due consideration*

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<sup>135</sup> *Id.*, at 8.

<sup>136</sup> *Id.*, at 38-39, 44, 46, 60.

<sup>137</sup> *Id.*, at 8. For "awareness of limitations" and "encouraging reasonable expectations," see *id.*, at 24.

<sup>138</sup> Mark Allen Gray, "The International Crime of Ecocide," 26 *Cal. W. Int'l L. J.* 215, 266, 270 (1996).

<sup>139</sup> Mohammed Saif-Alden Wattad, "The Rome Statute & Captain Planet: What Lies between 'Crime against Humanity' and the 'Natural Environment'?" 19 *Fordham Env'tl. L. Rev.* 265, 273 (2009).

<sup>140</sup> Apart from environmental crimes as candidates, Bassiouni mentions cyberterrorism, which (ideally-)prescriptively belongs "in an expanded *ratione materiae* of a more progressive definition of CAH." See M. Cherif Bassiouni, "Crimes Against Humanity: The Case for a Specialized Convention," 9 *Wash. U. Global Stud. L. Rev.* 575, 590 (2010).

for conventional factors. A line to the past must be established – even if *nucleus* paths in Ziccardi Capaldo’s spider-web system of global law are cut off.<sup>141</sup> In other words, there is more to the stalemate for ecocide than “a variety of economic, practical and political hurdles.”<sup>142</sup> There is the interpretation of norms, including human rights. The ICESCR functions as evidence for the central distinction between rights-recognition and rights-protection which Stakeholder Jurisprudence uses for its refutation of the logical correlativity thesis, as well as for corrections of erroneous propositions and inferences that scholars make under the guise of integrating law and morality.<sup>143</sup> Arguments about the existence of rights that are *realistically* mediated by considerations having to do with resources and the possibility of fulfillment of other-directed obligations are invalid, *both* legally-technically *and* ethically. The logical correlativity thesis does not prescribe any Ought Implies Can that reserves *jus cogens* couplings for those rights the objects of which *cannot realistically* be in scarce supply. The strategy of copying the *imprint of the doctrinal constants* over to the norm-typological variables, thereby giving “all (other) rights” an *as-if* appearance of basic human rights that correspond to *jus cogens* norms, at best, testifies to a patchwork model. This is bound to fall apart, though, because basicness maintains its narrow scope which, in turn, stops socioeconomic analogies from being hooked up with identification under the prevailing legal ideology (cf. historical coherence) and the methodology that matches this, as summarized in Legal Process Theory: only non-interference “merits peremptory treatment.”<sup>144</sup>

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<sup>141</sup> Giuliana Ziccardi Capaldo, “Managing Complexity within the Unit of the Circular Web of the Global Law System: Representing a ‘Communal Spider Web,’” 11 *Global Community YILJ* xvii (2011- I).

<sup>142</sup> Bassiouni, *Introduction to International Criminal Law* 155 (2012).

<sup>143</sup> “Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized ...” See International Covenant on Economic, Social and Cultural Rights, UN Doc. A/6316 Dec. 16, 1966, 993 U.N.T.S. 3, at art. 2 (entered into force Jan. 3, 1976).

<sup>144</sup> O’Connell, *Jus Cogens*, *supra* note 57, at 98. In human rights litigation, “[m]ost courts are not supporting claims expanding the body of *jus cogens* norms or claims for greater procedural impact for the norms.” See *id.*, at 92.

## 2. Conclusion: Connecting the Conservative Dots

Bassiouni's Mixed Theory exacerbates the obstacles that block the transition from legal expectations to legal reality by virtue of disconnecting the expansive effect of Ziccardi Capaldo's Integrated Approach from the case of positive human rights, thereby stifling *jus cogens* as a "dynamic and living" notion (cf. backwards causality).<sup>145</sup> Thus, ecocide may translate into an empirically unprecedented accumulation of harmful effects (deepened socioeconomic inequities, mass displacement from climate migration, mass starvation, etc.) that, in turn, may not only cause a collapse of judicialization as an effective strategy,<sup>146</sup> but also result in an artificial divorce from the "all human rights" approach *required* by modern rule of law philosophy.<sup>147</sup> According to this, unchecked conservatism imposed on law as a kind of superstructure is, at best, a perversion of the pursuit of international peace and security. E.g., in requiring sustainable peace [and justice], the 2012 "Declaration of the High-level Meeting of the General Assembly on the Rule of Law at the National and International Levels" prescribes a broad standard that encompasses "equitable relations" between States, "just, fair and equitable laws," inclusive economic growth and sustainable and equitable development, together with recognition of the rule of law, all human rights and democracy as "mutually reinforcing" values.<sup>148</sup> If it is true that the Charter of the United Nations "provides the foundation" for a comprehensive approach [to conflict prevention] "as based on an expanded concept of peace and security" and, consequently, can be construed as offering a dual-aspect interpretation of values that entails "solutions to international economic, social, health and related problems," then the assumption that peace/security and justice are on different tracks and without the same pull is proportionally weakened. Instead, a bridge can be said to have been created between the UN Charter, other instruments that affirm the commitment to its Purposes

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<sup>145</sup> *Supra* note 27.

<sup>146</sup> Thierry Cruvellier, Mark Drumbl, "Law cannot solve the biggest problems we face," *Justiceinfo.net*, July 16, 2019, <https://www.justiceinfo.net/en/41932-mark-drumbl-law-cannot-solve-the-biggest-problems-we-face.html>.

<sup>147</sup> 2012 Declaration on the Rule of Law, *supra* note 104, at paras. 6-7.

<sup>148</sup> *Id.*, at Preamble, para. 2, paras. 5-8. For response "to the needs and rights of all individuals," see *id.*, at para. 11.

and Principles, and the ARSIWA.<sup>149</sup> Unsubstantiated rights-conceptualizations that can be traced to the historical coherence thesis can be corrected with consistency at the level of international law.

Positive rights are too easily dismissed, but it may still be true that, *inter alia*, equal access to public goods, health, education, and environmental protection requires “a new social contract,” especially if they “clash with a liberal capitalist system.”<sup>150</sup> If so, the ethics of linking individual freedom with individual responsibility should no longer be permitted to exclude positive norms as claim-rights (which is the liberal capitalist trade-off). To see individual responsibility as a separate challenge is a *mauvaise foi* strategy of buying into bourgeois idealism, according to Marxist logic. This has no revolutionary potential. The substantiation problem and the challenge that Falk points to may or may not be related. But there is still one irony that is noteworthy in the context of *jus cogens* and corresponding human rights. Because the Mixed Theory tilts its weight-scales toward the Legal Process Theory, consideration of private property as a candidate is appropriate in principle *provided* it is disconnected from positive obligations – to mimic the obligations from

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<sup>149</sup> In the case of Responsibility to Protect (R2P), the 2001-2003 stage was so broad as to include clusters of “soft threats,” to which persistence of extreme poverty, the disparity of income between and within societies, and the spread of infectious diseases belong together with climate change and environmental degradation as well as phenomena that are conflict-diagnostically geared towards “deep-rooted structural problems,” *inter alia*, the lack of “economic opportunities” and “economic deprivation.” Between 2005 and 2009, however, the “narrow but deep” approach trumped its alternative counterpart. Hence, State responsibility currently incorporates R2P to the extent that this acknowledges “the responsibility of the international community to react if a State is unable or unwilling to assume its primary responsibility to protect its own population against genocide, war crimes, ethnic cleansing, and crimes against humanity.” The learning lesson is that a conservative “narrow but deep approach” is more likely to succeed than a progressive and broader program: “Since stretching the concept to apply to other phenomena has frayed political support, R2P advocates are keen to dispel impressions that R2P applies to anything other than the four enumerated crimes and violations. Thus, the preventive aspects of R2P should be tightly linked with these crimes.” See Matwijkiw & Matwijkiw, *The Emerging Ethics Evolution*, *supra* note 55, at 736.

<sup>150</sup> Harvard Carr Center for Human Rights Policy, *Reimagining Rights and Responsibilities in the U.S.*, 22, Oct. 8, 2020 (Report), [https://carrcenter.hks.harvard.edu/files/cchr/files/201007\\_rr-executive-summary.pdf?m=1602106101](https://carrcenter.hks.harvard.edu/files/cchr/files/201007_rr-executive-summary.pdf?m=1602106101).

negative market freedoms.<sup>151</sup> Given the various ecocide effects, the predictable alienation of the masses will not be conducive to an increased social responsibility for environmental issues on behalf of the individual – which summarizes Falk’s individualist ideologies. To the contrary.

If the connection between justice and “all human rights” can be circumvented in the *jus cogens* context, this conclusion is as paradoxical (because *jus cogens* violations refer to the most basic human rights) as it is ethically problematic and objectionable (for the same reason). If certain rights, *inter alia*, to a healthy environment are *ex ante* precluded from the category of intrinsically superior ethical norms, *however basic* from the person-centric perspective that considers human needs, the idea of thinking “the question of rights has been resolved” begins to look like a subtle move against socialized *jus cogens* theory. If advocates of Legal Process Theory were to make an argument in their own defense, they would probably resort to features that borrow from the VCLT and argue along the lines of theorists like Thomas Weatherall who is equating “non-derogation clauses in human rights treaties with non-derogability of *jus cogens*.”<sup>152</sup> However, this is a theoretical stance that must be substantiated beyond a purely declaratory statement. Admittedly, the subsumption of human rights under peremptory norms of general international law (*jus cogens*) is supported by case-law, e.g., in the argument that “customary rules aiming to protect inviolable human rights did not permit derogation because they belonged to peremptory international law or *jus cogens*.”<sup>153</sup> This sends the signal that protection is not allowed to fail. However, there is a significant difference between the claim that absolute guarantees of protection constitute a prerequisite for the definition of inviolable human rights and the claim that inviolable human rights generate obligations to effectively protect – as regards both fulfillment and enforcement – against instances of non-compliance that would be tantamount to internationally wrongful acts. Furthermore, all human rights, be they inviolable or “only” inalienable, are indivisible, interdependent, and interrelated. Considerations having to do with rights-protection must be seen in the light

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<sup>151</sup> O’Connell, *Jus Cogens*, *supra* note 57, at 92.

<sup>152</sup> Kleinlein, *Jus Cogens Re-examined*, *supra* note 20, at 305; Weatherall, *Jus Cogens*, *supra* note 26, at 88-89.

<sup>153</sup> ARSIWA Commentaries, *supra* note 3, at 178; CILC Commentaries, *supra* note 3, at 32 n74.

of this United Nations principle, which is also consistent with a dual-aspect interpretation of values. E.g., life covers both survival (through negative non-interference) and subsistence (through positive provision). Furthermore, it is noteworthy that Alcalá is skeptical about the influence from case-law. Concerning the judicial pronouncements of international courts and tribunals, particularly with respect to customary international law, these should be regarded *cautiously*.<sup>154</sup> Article 38(1) (d) notwithstanding, their work is “not legislative in nature.”<sup>155</sup> Kleinlein also remarks that “legal technique theory risks being idiosyncratic” *on account of* its lack of “philosophical dimensions,” thereby emphasizing the role of *jus cogens* scholarship.<sup>156</sup> Too much reliance on judicial pronouncements is “unsatisfactory for the very fact that it is one of the ILC’s aims to guide judges.”<sup>157</sup> In this way, Kleinlein lets the analysis come full circle.

Returning to Bassiouni, he is skeptical of the role that scholarship plays for the practice of States. The enormous enforcement deficits prove that *realpolitik* continuously trumps justice, but he is also aware of the “Big Bang-like” spread of norms with the capacity of binding all States.<sup>158</sup> Once again, however, guarantees of protection are not part of the credentials-checking for human rights conferred by the United Nations (*cf.* rights-recognition *versus* rights-protection). Furthermore, propositions like “negative rights only entail negative obligations” have long been disconfirmed and replaced by “all rights entail both negative and positive obligations.”

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<sup>154</sup> Alcalá, *Opinio Juris and the Essential Role of States*, *supra* note 29.

<sup>155</sup> *Id.*

<sup>156</sup> Kleinlein, *Jus Cogens Re-examined*, *supra* note 20, at 314.

<sup>157</sup> *Id.*

<sup>158</sup> *Id.*; Bassiouni, *A Functional Approach*, *supra* note 11, at 785, 802, 808, 817-818.

## **II**

# **United Nations, Rule of Law and World Order**



Berdal Aral

## **Rule of Law and the Effective Decisions of the UN Security Council after the Cold War**

### **Introduction**

The United Nations (UN) Security Council (SC) has long been suffering from a bad image due to a gradual loss of legitimacy. There is a plethora of problems, which render the Council questionable as the “fist” of the UN for the maintenance of international peace and security. The issues that surround this UN body range from its unrepresentative composition through the flawed nature of its decision-making to the failure to act in the majority of international or regional crises that endanger, or lead to a breach of, peace and security. This paper draws on cases in which the Council imposed sanctions or authorized military enforcement action against the targeted states. It specifically addresses practices that are legally dubious. Those are either linked to the Council defying the principles of the separation of powers, to its *ultra vires* actions, or to *ex post facto* resolutions that are intended to give a semblance of legality to military occupations, which actually constitute a crime of aggression. The paper also deals with serious breaches of human rights and *jus cogens* norms arising out of adverse humanitarian consequences of UN-imposed sanctions and of military enforcement actions involving the deployment of multinational troops.

While a minority of states, mostly from the affluent West, tend to hold a positive view of the SC, others, in particular those from the global South, generally have a negative perception. This is because it is the developed states that benefit most from the existing international order, one of whose key actors is the UN. States that consider that they have

been victimized by UN sanctions or military enforcement action appear to be more hostile towards the Council than others.<sup>1</sup>

After the Cold War, the SC tended to act as if it was not bound by any legal or political constraints. It still conceives itself as the ultimate arbiter of its own competences and seems to think that the colossal powers it arrogated in the domain of international peace and security fully emanate from the Charter of the UN. This “legal hegemon” now dares, for instance, to ask a sovereign state to backtrack from its decision to withdraw from an international treaty. The Council’s “bullishness” prompts Daniel Joyner to alert us about “considering how the international legal system can protect states from the authoritarian Security Council, which the end of the Cold War, and the beginning of the War on Terror, have unleashed.”<sup>2</sup>

Respecting the rule of law is a prerequisite for the orderly conduct of the SC’s mission. The UN and its organs came into existence by an international treaty. The competencies, which the SC enjoys, derive from the world’s most important treaty, the Charter of the United Nations. This suggests that, *inter alia*, the Council is under an obligation to comply with the terms of the Charter, in addition to general international law.

The gap between the initial competences, as stipulated in the UN Charter on the one hand, and the expansion of the Council’s authority since the early 1990s on the other, has given cause for ample debate about the legality and legitimacy of the practices of the Council. Today, on grounds of combating threats to international peace and security, the Council has arrogated powers under Chapter VII to decide on issues ranging from climate change to certain epidemics.<sup>3</sup>

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<sup>1</sup> Martin Binder and Monika Heupel, “The Legitimacy of the United Nations Security Council: Evidence from Recent General Assembly Debates,” *International Studies Quarterly*, Vol. 59, 2015, pp. 244-245.

<sup>2</sup> Daniel H. Joyner, “The Security Council as a Legal Hegemon,” *Georgetown Journal of International Law*, Vol. 43, 2011, p. 227.

<sup>3</sup> Sherif A. Elgebeily, *The Rule of Law in the United Nations Security Council Decision-making Process: Turning the Focus Inwards* (Routledge, London and New York, 2017), p. 11.

This paper investigates the following parameters, which, *inter alia*, constitute aspects of the rule of law as applicable to the UN SC's performance since the early 1990s. As mentioned in a 2004 report of the UN Secretary-General on the SC, the rule of law requires

“measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, [...] avoidance of arbitrariness and procedural and legal transparency.”<sup>4</sup>

This paper evaluates the degree of compatibility between the principles that constitute the rule of law on the one hand and the Council's Chapter VII resolutions, both in substance and by reference to their execution.

A *sine qua non* of the rule of law is **equality before the law**. It suggests that the Council should act similarly in analogous situations that constitute a breach of the peace or a threat to international security. Wherever there is war, aggression, or military intervention in any part of the world, the Council should be mobilized to coerce and defeat the aggressor. Selective use of its powers based on arbitrary motives would imply that the Council does indeed discriminate between crises of security. This would also be an affront to consistency. **Predictability** is another pillar of the rule of law. It is the absence of arbitrariness in the Council's actions, observance of law in decision-making, and the fair implementation of its resolutions. States should be able to anticipate how the Council will react in crisis situations. **Human rights** are also indispensable for the existence of the rule of law in the current international order. The Council is bound to pay due attention to the human rights and humanitarian consequences of sanctions it imposes and military enforcement actions it authorizes. The Council should act in conformity with the norms of *jus cogens* and human rights as they emanate from international treaties and customary international law. While observing international peace and security, it should not treat hu-

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<sup>4</sup> Report of the Secretary-General, “The rule of law and transitional justice in conflict and post-conflict societies,” 23 August 2004, UN Doc S/2004/616, para. 6, <http://archive.ipu.org/splz-e/unga07/law.pdf>.

man rights violations as an unintended consequence of UN operations and should thus avoid viewing them simply as “collateral damage.” The principle of **separation of powers** is a further crucial aspect of the rule of law. It suggests that the SC should accept a limited role for itself as an executive body in the area of international peace and security and in the specific context of a particular crisis. Should the Council transcend its authority, contrary to the terms of the UN Charter, as in cases when it acts as legislator or judge, this would mean hijacking competences from the General Assembly or the ICJ. Finally, in the specific case of the SC and within the confines of the specific intent of this paper, the last principle associated with the rule of law is **accountability**. It is the principle upon which one could measure the extent of the Council’s adherence to the rule of law. This requires a mechanism that can identify the instances when the Council acts illegitimately.<sup>5</sup>

Scholars have been pointing to a wide range of problems associated with the SC as they came to the fore more pressingly after the Cold War: the unrepresentative nature of its composition in a world in which there are nearly 200 states; the malaise of its decision-making procedure which is subverted in particular by the veto power of the permanent members; not infrequent trade-offs behind closed doors among some members of the SC, in particular permanent ones, on the eve of the adoption of some “important” resolutions; Western (particularly, the United States’) hegemony in the Council; lack of judicial review of Council resolutions; the Council’s largely discretionary expansion of its tasks and its almost open-ended definition of “threats to” and “breaches of” international peace and security.

However, this paper specifically draws on four areas, mostly overlooked by scholars, which are indicative of some other problems in the practice of the Council. There are four areas, broadly linked to the SC’s failure to observe the rule of law: First: cases in which a “coalition of the willing” that undertook to conduct military enforcement action on the basis of a Chapter VII (of the UN Charter) resolution went beyond the terms of that resolution, thus committing an *ultra vires* act. Second: cases in which, in the course of the enactment of a resolution, the SC acted as prosecutor, judge, and/or legislator. Third: there have been situations

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<sup>5</sup> Elgebeily, *op. cit.*, pp. 40-45.

in which the SC sought to “legalize” military occupation, which had been undertaken unilaterally by some states, by passing *ex post facto* resolutions. Fourth: in numerous cases when the SC either imposed sanctions and/or authorized military enforcement action against a targeted state, the embargoes or military interventions were attended by serious breaches of general international law and, in particular, of the law of international responsibility, human rights, humanitarian law and *jus cogens* norms.

Finally, a note is due on the use of the term *ultra vires*. In this paper, the term refers to two types of situations. First, when the SC acts rather like a legislative body (such as the General Assembly) or – when issuing quasi-judicial decisions about the behavior of states – as a court of law (like the ICJ) (in breach of the principle of the separation of powers); second, when states, on the basis of an authorization for the use of force, conduct the military operation in a way that goes far beyond the terms of the resolution in question.

### **The conduct of UN-mandated military operations as *ultra vires* acts**

Today, the SC appears constantly to straddle between empire and paralysis. When the Council members, particularly the permanent ones, are divided about the desirability of dealing with a particular crisis that threatens regional or international peace, the Council tends to remain inert. When, by contrast, the political climate is ripe for the mobilization of the Council in the face of a crisis, the Council is able to act decisively. In such moments, the Council can be extremely threatening, as Hurd puts it:

At such moments, it is reasonable to worry about the “imperial Council”, a body unchecked by other institutions and empowered by law and the control of resources to impose itself anywhere in the world.<sup>6</sup>

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<sup>6</sup> Ian Hurd, “The UN Security Council and the International Rule of Law,” *The Chinese Journal of International Politics*, 2014, p. 9.

The UN military intervention in Libya in 2011 is a case in point. The SC opted for an unassuming role during the Arab Spring which set off in the closing days of 2010 when peaceful uprisings for freedom, justice, and better living conditions were forcibly quashed by dictatorial minority regimes in Egypt, Yemen, Syria, and a host of other Arab countries. However, somewhat astonishingly, the SC immediately alerted itself to the street protests, which erupted in early 2011, against the Gaddafi regime in Libya. Accordingly, the Council paid much attention to the unfolding crisis in Libya on account, *inter alia*, of the mass killings of protestors by security forces. This human tragedy prompted the SC to invoke the doctrines of humanitarian intervention and Responsibility to Protect to mandate coercive action in Libya. It wasn't long before the Council adopted two Chapter VII resolutions to weaken and coerce the Libyan regime and provide some support to the civilians. The first of these resolutions (Resolution 1970<sup>7</sup> of 26 February 2011), while demanding an end to violence, imposed a series of measures that were bound to cripple the Libyan regime: an arms embargo; the freeze of funds and other assets belonging to the Gaddafi family; a travel ban on some key figures of the regime; and referral of the Libyan case to the International Court of Justice.

Roughly, three weeks after the adoption of the first resolution, the SC, prompted into action particularly by its Western members, hastily adopted another resolution on the Libyan crisis, condemning "acts of violence" by the Libyan authorities. Resolution 1973<sup>8</sup> established a no-fly zone over Libya, imposed a flight ban on Libyan planes, authorized UN troops to use force in order "to protect civilians and civilian populated areas under threat of attack," and expanded the list of individuals subject to an asset freeze and travel ban.

The way in which Resolution 1973 was drafted indicated that some of the prominent members of the Council, namely China, India, Russia, Brazil, and Germany, were uneasy about the possible abuse of this resolution for calculations of realpolitik. That is why they sought to put clear limits to the upcoming operation. The resolution's authori-

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<sup>7</sup> Resolution 1970, 26 February 2011, <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N11/245/58/PDF/N1124558.pdf?OpenElement>.

<sup>8</sup> Resolution 1973, 17 March 2011, <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N11/268/39/PDF/N1126839.pdf?OpenElement>.

zation of the use of force was in particular motivated by the fear of an impending massacre of civilians who had been trapped in Benghazi, then under siege by forces loyal to the Gaddafi regime.<sup>9</sup> The fears of likely abuse were proven right since the Libyan operation, which began two days after the adoption of Resolution 1973, was conducted in a much-distorted way, as noted by Falk:

But once underway, the NATO operation unilaterally expanded the mission as authorized, and almost immediately acted to help the rebels win the war and to make non-negotiable the dismantling of the Qaddafi regime without any special attention to the protection of Libyan civilians.<sup>10</sup>

Hence, it was clear that forces conducting the NATO operation went far beyond the objectives set out in Resolution 1973. Indeed, NATO's military intervention in Libya turned out to be a campaign for waging an open war against the regime forces. The intervening armies eventually ousted the Gaddafi regime and furnished the conditions for the killing of Muammar Gaddafi in October 2011.

The UN military intervention in Libya was far from bringing peace to Libya. On the contrary, the country was dragged into a messy civil war between the supporters of the Gaddafi regime and the forces loyal to the National Transitional Conference (aided by NATO troops) following the NATO intervention. The U.S., U.K., and France had opted for stretching the goals of Resolution 1973 to escalate the scope of the operation and thus, *inter alia*, to oust the Gaddafi regime from power.<sup>11</sup> The *ultra vires* abuse of Resolution 1973 in the course of the NATO operation was harshly criticized by some members of the SC. They complained that this operation undermined peace negotiations in Libya, and drew attention to the impending tragedy of mass civilian suffering because of the all-out war. In their view,

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<sup>9</sup> Richard Falk, "Preliminary Libyan Scorecard: Acting Beyond the U.N. Mandate," *Foreign Policy Journal*, September 8, 2011, <https://www.foreignpolicyjournal.com/2011/09/08/preliminary-libyan-scorecard-acting-beyond-the-u-n-mandate/>.

<sup>10</sup> *Ibid.*

<sup>11</sup> Marcos Tourinho, Oliver Stuenkel & Sarah Brockmeier, "Responsibility while Protecting: Reforming R2P Implementation," *Global Society*, Vol. 30, No. 1, 2016, p. 136.

NATO went beyond the mandate to enforce a no-fly zone and protect civilians and instead engaged in open warfare, including through the transfer of arms to rebel groups in the country, a violation of the arms embargo. These differences in perspective led to a profound polarisation in the SC.<sup>12</sup>

The motives behind the tragedy of Libya, which pointed to the hypocrisy of the intervening states and their appetite for economic booty, were poignantly exposed by Tariq Ali soon after the start of the NATO military operation:

The NATO bombing of Libya was an attempt by the west to regain the “democratic” initiative after its dictators were toppled elsewhere. It has made the situation worse. The so-called pre-empting of a massacre has led to the killing of hundreds of soldiers, many of whom were fighting under duress ... Here one has to say that whatever the final outcome, the Libyan people have lost ... [possibly] the west will take out Gaddafi and control the whole of Libya and its huge oil reserves. This display of affection for “democracy” does not extend elsewhere in the region.<sup>13</sup>

Richard Falk likewise hints that the real purpose of the Libyan operation was for Western countries to get the political and military upper hand in Libya to enjoy a privileged share of Libya’s huge petroleum resources, which would first and foremost benefit “various corporate and financial interests.”<sup>14</sup>

Apparently, those who undertook the Libyan military operation in 2011 were all too ready – for the sake of widening the scope of military intervention – to exploit the phrase “to take all necessary measures.” Accordingly, they interpreted the task of effective enforcement of the No-Fly Zone in a broad manner. The all-out assault against the Libyan regime was far beyond what had been envisaged during debates in the SC. Falk argues that the UN mandates to use force ought to be

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<sup>12</sup> *Ibid.*

<sup>13</sup> Tariq Ali, “Who Will Reshape the Arab World: its People, or the US?” *Guardian*, April 29, 2011, <https://www.theguardian.com/commentisfree/2011/apr/29/arab-politics-democracy-intervention>.

<sup>14</sup> Falk, *op. cit.*

interpreted strictly to limit the departure from Charter goals and norms, but the record even before Libya has been disappointing, with geopolitics giving states a virtually unlimited discretion that international law purports to withhold.<sup>15</sup>

The course of the Libyan crisis in 2011 made obvious the SC's usurpation by a few states, which twisted a "legal" military operation into an "illegitimate" one on account of its *ultra vires* conduct, messy consequences, and its attendant humanitarian tragedies.

The "Libyan debacle" of 2011 was apparently a sequel to the "Operation Poised Hammer," which was launched by a U.S.-led alliance allegedly in reliance on SC Resolution 688<sup>16</sup> of 5 April 1991 that sought to mitigate the humanitarian crisis in northern Iraq. This resolution was enacted soon after the defeat of Iraq by a broad coalition of multinational forces, which had armed themselves with SC Resolution No. 678<sup>17</sup> of 29 November 1990 that was the Council's response to Iraq's occupation of Kuwait in August 1990. Following the withdrawal of Iraqi troops from Kuwait after their defeat, the U.S. and some of its allies incited Kurds to an armed insurrection against the brutal regime in Iraq. The Kurdish groups took up this "invitation" and waged an armed rebellion in northern Iraq, which was ultimately quashed by forces of the regime. Accordingly, hundreds of thousands of Iraqi Kurds fled the country to seek refuge in Iran and Türkiye. Hence, the main rationale of Resolution 688, possibly one of the earliest instances of the doctrine of humanitarian intervention, was the desire to sort out this humanitarian crisis. The *raison d'être* of the resolution is explained in the preamble:

Gravely concerned by the repression of the Iraqi civilian population in many parts of Iraq, including most recently in Kurdish-populated areas, which led to a massive flow of refugees towards and across international frontiers and to cross-border incursions which threaten international peace and security in the region (...)

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<sup>15</sup> *Ibid.*

<sup>16</sup> Resolution 688, 5 April 1991, <http://unscr.com/en/resolutions/doc/688>.

<sup>17</sup> Resolution No. 678, 29 November 1990, <https://documents-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/575/28/PDF/NR057528.pdf?OpenElement>.

In addition to condemning Iraq's repression of the Kurds, this resolution made two demands of Iraq: first, it should end repression; second, it asked Iraq to permit the delivery of international humanitarian aid to those who were in need.

With this resolution in mind, the coalition forces under U.S. command established a powerful military presence in southeast Türkiye as part of "Operation Provide Comfort," declaring a no-fly zone north of the 36<sup>th</sup> parallel within the Iraqi territory in June 1991. Although the coalition forces seemed to rely on Resolution 688, their claim was not corroborated by the terms of the resolution. This is noted by Silliman:

the SC did *not* state anywhere in the resolution that it was acting pursuant to Chapter VII of the Charter, a phrase oftentimes found when coercive measures are being authorized, nor did it contain any authorization for protection of humanitarian relief efforts.<sup>18</sup>

Therefore, we could at least point to two cases of coercive involvement of multinational forces, first, in northern Iraq (1991), and then, in Libya (2011), that were allegedly based on SC resolutions, but in fact went beyond their limited scope, constituting *ultra vires* acts. The failure of NATO forces to observe the limits prescribed in Resolution 1973 to their mandate in Libya led Brazil to introduce a new concept in 2011, called "Responsibility while Protecting," as a guiding principle of enforcement operations authorized by the SC. This concept was intended to emphasize the primacy of political and diplomatic strategies as non-coercive methods for the solution of international crises. It also sought to delineate the legal limits to the use of military force for the protection of civilians. Third, it was intended to establish an effective mechanism to monitor the whole process surrounding the implementation of military enforcement actions empowered by the UN SC.<sup>19</sup>

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<sup>18</sup> Scott L. Silliman, "The Iraqi Quagmire: Enforcing the No-Fly Zones," *New England Law Review*, Vol. 36, 2002, p. 769.

<sup>19</sup> Tourinho et al., *op. cit.*, p. 148. Also, see Kai Michael Kenkel and Cristina G. Stefan, "Brazil and the Responsibility While Protecting Initiative: Norms and the Timing of Diplomatic Support," *Global Governance*, Vol. 22, No. 1, 2016, pp. 41-58.

## **Cases in which the SC acted as prosecutor, judge, and/or legislator**

The Council is empowered to enact binding resolutions and to monitor the behavior of states only in cases relating to international peace and security. The progressive development of international law is not an area which is allotted to the Council; rather, this is a task reserved for the General Assembly. Similarly, evaluating as to whether a particular act of a state is or is not a breach of international law, or, more specifically, whether a state complies with a particular international treaty, is a task which ought to be shouldered by the ICJ. Yet, since the early 1990s, the Council has gradually encroached upon the competences of the General Assembly and the ICJ on a host of issues, which are reviewed here.<sup>20</sup>

### **The case of Libya (1992)**

A judicial investigation conducted by an American jury, after an investigation lasting for three years (December 1988 – November 1991), resulted in the indictment of two Libyan suspects, Abdel Basset Ali Al-Megrahi and Lamem Khalifa Fhimah, for allegedly planting a bomb that led to the explosion of a Pan American plane (Flight 103) on December 21, 1988, which resulted in the death of 259 people on board the plane. A parallel investigation with a similar finding was conducted in Britain.<sup>21</sup> The U.S., alongside the U.K. and France, submitted the Libyan case to the SC and the General Assembly in 1991. In choosing to go along with the U.S., the Council acted as prosecutor and judge, in addition to its ordinary function as executive, when condemning Libya to comprehensive sanctions in 1992 for allegedly involving in terrorist acts against, *inter alia*, American nationals who lost their lives in the Lockerbie air crash. Failing to provide clear evidence and refusing to apply to the ICJ or to any other impartial international court for a ruling on this controversy, the U.S. and Britain insisted that Libyan agents detonated the bomb on board of Pan Am flight 103 that exploded over

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<sup>20</sup> Elgebeily, *op. cit.*, p. 135.

<sup>21</sup> Michael Plachta, "The Lockerbie Case: The Role of the Security Council in Enforcing the Principle *Aut Dedere Aut Judicare*," *European Journal of International Law*, Vol. 12, No. 1, 2001, p. 126.

Scotland. They demanded the surrender of the two agents who were allegedly behind the incident.

Acting on the presumption of guilt in its treatment of the Libyan agents, in January 1992 the SC adopted Resolution 731,<sup>22</sup> which obliged Libya to fully cooperate with the above states concerning allegations about terrorism. Upon Libya's refusal to hand over the suspected criminals, the SC adopted Resolution 748<sup>23</sup> (1992), based on Chapter VII of the UN Charter. It imposed a military embargo and a flight ban on all Libyan planes, prohibited the sale of aircraft and aircraft components to Libya, and ordered diplomatic sanctions that obliged Libya to reduce the number of staff in its embassies and consulates. In the following year, the Council tightened and expanded sanctions against Libya by adopting Resolution 883<sup>24</sup>, which, *inter alia*, put a freeze on Libyan assets abroad.

In the course of 1992, Libya challenged the imposition of sanctions, which, it claimed, was based on allegations not ascertained by any independent court. It thus asserted that these coercive resolutions against Libya were breaches of international law and went beyond the competences of the SC. The demand for the surrender of alleged bomb planters was contrary to existing international treaty law and Libya's international obligations. Therefore, Libya applied to the ICJ for provisional measures designed to protect Libyan interests in the face of unjustified sanctions. In Libya's view, the sanctions against itself would be a breach of international treaty law, in particular, the Montreal Convention.<sup>25</sup> However, in its ruling of April 1992, the ICJ refused to order provisional measures against Council resolutions imposing sanctions on Libya, which meant that it did not challenge the legality or the binding character of the said UN resolutions. In other words, the ICJ maintained that it had no judicial authority to review the resolutions of the SC that are based on Chapter VII of the UN Charter. This meant that the SC was beyond legal or judicial control by any other body.

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<sup>22</sup> Resolution 731, 21 January 1992, <http://unscr.com/en/resolutions/doc/731>.

<sup>23</sup> Resolution 748, 31 March 1992, <http://unscr.com/en/resolutions/doc/748>.

<sup>24</sup> Resolution 883, 11 November 1993, <http://unscr.com/en/resolutions/doc/883>.

<sup>25</sup> Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, Montreal, 23 September 1971, <https://treaties.un.org/doc/Publication/UNTS/Volume%20974/volume-974-I-14118-english.pdf>.

In the first resolution on the Libyan case, 731 (1992), based on Chapter VI of the UN Charter, the SC acted like a dispute settlement body, opting in favor of one of the parties, namely in support of the U.S., U.K. and France against Libya. According to Article 27(3) of the Charter, when a dispute is brought before the SC under the provisions of Chapter VI, the parties involved in the dispute are barred from voting. However, in the Libyan case, the states that moved against Libya voted in the Council, although this was a *legal* dispute arising out of the differing interpretations of the Montreal Convention. Libya's objections were met with deafening silence on the part of the sponsors of Resolution 731.<sup>26</sup> Besides, it is difficult to agree with the Council that Libya's refusal to hand over the two suspects or its refusal to recognize the compensation claims of the U.S. and its associates constituted threats to international peace and security.<sup>27</sup>

It is not a matter for the SC to punish a government because it deems that it poses a threat to international peace and security. The Council is only mandated to determine whether a *particular action* undertaken by a state constitutes a threat to international peace and security. As to whether a government lacks legitimacy is a matter principally decided by the people of that state, and not by the SC. Therefore, whether a particular government is an affront to international peace and security is a matter outside the purview of the SC.<sup>28</sup>

### **International terrorism (2001) and the proliferation of weapons of mass destruction (2004)**

The UN SC began to assume excessive powers after the Cold War to the extent that, in addition to being an executive organ, it has seized wider powers, which *inter alia* have resulted in a quasi-legislative role for this body on a host of issues. This is particularly the case about Council Resolution 1373<sup>29</sup> of 2001, adopted immediately after the Sep-

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<sup>26</sup> Bernhard Graefrath, "Leave to the Court What Belongs to the Court: The Libyan Case," *European Journal of International Law*, Vol. 4, No. 2, 1993, pp. 187-188.

<sup>27</sup> *Op. cit.*, p. 196.

<sup>28</sup> *Ibid.*

<sup>29</sup> Resolution 1373, 28 September 2001, <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N01/557/43/PDF/N0155743.pdf?OpenElement>.

tember 11 terror attacks, on international terrorism, and Resolution 1540<sup>30</sup> of 2004 on the prevention of the proliferation of weapons of mass destruction. Resolutions 1373 and 1540 impose a general obligation with unlimited duration to all the addressees, i.e. the member states of the UN. However, it should be recalled that the SC has been given the authority to order coercive measures only in dealing with threats to international peace and security, and within a particular time frame. This means that the Charter does not permit the Council to use its powers “as a gateway to effect permanent change in the norms of international law or domestic legislation.”<sup>31</sup> In spite of repeated warnings about a breach of international law due to its encroachment upon the competences of other UN organs and the sovereignty of states, the Council has thus far declined to change its posture, and thus has continued to act as a legislative organ in some key areas.

### **The cases of North Korea (2009) and Iran (2006)**

That the SC began to act as a judicial body surfaced with the adoption of Resolutions 1874<sup>32</sup> (2009) and 1929<sup>33</sup> (2010), targeting North Korea and Iran respectively.<sup>34</sup> Resolution 1874 denounced North Korea’s announcement, made in 2003, of withdrawal from the Non-Proliferation Treaty of 1968<sup>35</sup>, demanded that it should return to the treaty, and ordered it to “abandon all nuclear weapons and existing nuclear programs.” Resolution 1929, *inter alia*, prohibited Iran to engage in the purchase of nuclear materials from other countries. In its Resolutions 1737 and 1929 on Iran’s nuclear program, the SC urged Iran to cooperate with the IAEA. Such stipulations are in fact contrary to the

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<sup>30</sup> Resolution 1540, 28 April 2004, <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N04/328/43/PDF/N0432843.pdf?OpenElement>.

<sup>31</sup> Elgebeily, *op. cit.*, p. 135.

<sup>32</sup> Resolution 1874, 12 June 2009, <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N09/368/49/PDF/N0936849.pdf?OpenElement>.

<sup>33</sup> Resolution 1929, 9 June 2010, <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N10/396/79/PDF/N1039679.pdf?OpenElement>.

<sup>34</sup> Joyner, *op. cit.*, p. 226.

<sup>35</sup> Treaty on the Non-Proliferation of Nuclear Weapons, 1 July 1968, <https://treaties.unoda.org/t/npt>.

principle of the sovereignty of states and the norms concerning the law of treaties.<sup>36</sup>

More pointedly, in the case of Iran, the SC acted not only as an executive organ, but also played the role of prosecutor and judge, in violation of the principle of the separation of powers. This particularly was the case with Resolution 1929 which deals with a dispute between Iran and some states (in particular permanent members of the SC), resulting from a controversy over Iran's new nuclear facilities, on the interpretation of the Safeguards Agreement<sup>37</sup> of 1973 which had been signed between Iran and the IAEA. Although this is a *legal* question that could be settled, *inter alia*, by the ICJ, the SC instructed Iran to act in tandem with the views of the IAEA. Joyner rightly remarks that, "The Council made what can only be described as a judicial decision, accepting one legal argument or interpretation as more persuasive than another."<sup>38</sup>

The peaceful use of nuclear technology is recognized by the Treaty on Non-Proliferation. Analogous to individuals who are said to enjoy inherent human rights by virtue simply of being human, states also possess the right to exercise sovereignty. Independence, as an attribute of states, is an extension of sovereignty in the international realm. At a more practical level, states have the right to pursue their own goals and strategies, e.g., in energy or technology. If this were not the case, i.e., if the SC could coerce some states into accepting choices and modes of behavior in their dealings with other international actors, then international law would lose much of its relevance in relations between states.

In principle, under international law no state is under any duty to apply the terms of an international treaty unless it is a party to it. If this prerogative, and, some would say, fundamental right, is neglected by the SC, it would be meaningless to speak about the independence of states.

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<sup>36</sup> Elgebeily, *op. cit.*, p. 146.

<sup>37</sup> *Agreement between Iran and the International Atomic Agency for the Application of Safeguards in Connection with the Treaty on the Non-Proliferation of Nuclear Weapons*, 19 June 1973, <https://www.iaea.org/sites/default/files/publications/documents/infcircs/1974/infcirc214.pdf>.

<sup>38</sup> Joyner, *op. cit.*, pp. 247-248.

As discussed above, the SC does have broad authority to act under the pertinent articles of Chapter VII when it determines the existence of a threat to, and breach of, international peace and security, and acts of aggression. However, this authority is not without limits. We ought to bear in mind that the Council is obligated by Article 25 to act in accordance with the Charter of the UN. The Council, in this way, has a duty to respect the scope and limits of competence granted by the instrument from which it draws its authority. Where, as in Articles 36 and 92, the Charter clearly delegates a role and authority to a separate UN organ, the ICJ, the SC cannot legally usurp the authority so delegated, and arrogate it to its own use.

### **The SC's *ex post facto* "legalization" of military occupations**

As said above, after the Cold War the SC in some instances did not only infringe on the rule of law by posing as a court of law or legislative authority, but also was complicit in how its Chapter VII resolutions were seized and manipulated by a "coalition of the willing." In both of these circumstances, the Council acted *ultra vires*. A third case where members of the SC abuse their dominant position are decisions by which the Council "legalizes" – *ex post facto* – military occupations that constitute a crime against peace, or multinational military interventions launched in the absence of a resolution by the SC. The failure to observe international law in such situations is potentially more threatening for orderly international relations and the sovereignty of states than in other instances involving the mishandling and manipulation of resolutions.

### **Kosovo (1999)**

It is apt to review the case of Kosovo which is another example of the SC acting as "notary" to approve military interventions by powerful states in some weak or fragile states. In 1999, NATO decided to iron out a solution to the problem in Kosovo where the Albanian majority was under the imminent threat of an all-out Serbian assault and a wave of ethnic cleansing against Albanians. A group of Western states led by the U.S. failed to muster a Chapter VII resolution due to the objection of the permanent members Russia and China. Subsequently, members of

NATO decided to launch a military intervention in Kosovo without a SC mandate. This operation, conducted in the period March-June 1999, was justified on the humanitarian grounds of protecting a people from mass murder and ethnic cleansing. It was a view of the Kosovo crisis which the rest of the world largely shared. Hence, here was an instance of “legality” versus “legitimacy.” The danger with the Kosovo exception, however, was the risk of this reasoning being abused by some hegemonic actors to create “legal” precedent. The military occupations of Afghanistan and Iraq are a case in point.

### **Afghanistan (2001)**

In the wake of the events of September 11, the U.S. immediately declared a “war on terror.” Although the acts in New York, Washington DC and Pennsylvania were clearly part of a “terror attack” whereby all the plotters were killed, the U.S. coined them as “war” against the U.S., which meant that it considered those acts as some form of “armed attack.” Although it was difficult to justify it based on the UN Charter, the U.S. moved along this rationale all the way, until it occupied (with the U.K.) Afghanistan in October 2001. The crisis unleashed by the September 11 terror attacks was immediately submitted by the U.S. to the SC and the NATO Council. Both bodies held that the attacks were a threat to international peace and security. NATO claimed that the U.S. and its NATO allies had a right of self-defense, although it did not identify “against whom.”<sup>39</sup> SC Resolution 1368<sup>40</sup>, adopted the day after the September 11 attacks, “recognizing the inherent right of individual or collective self-defense in accordance with the Charter,” calling “on the international community to redouble their efforts to prevent and suppress terrorist acts,” and expressing “its readiness to take all necessary steps to respond to the terrorist attacks of 11 September 2001,” did not confer on the U.S. the requisite mandate to attack Afghanistan.<sup>41</sup>

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<sup>39</sup> Statement by the North Atlantic Council, 12 September 2001, <https://www.nato.int/docu/pr/2001/p01-124e.htm>.

<sup>40</sup> Resolution 1368, 12 September 2001, <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N01/533/82/PDF/N0153382.pdf?OpenElement>.

<sup>41</sup> On the legally precarious nature of the U.S. occupation of Afghanistan in 2001, see Ryan T. Williams, “Dangerous Precedent: America’s Illegal War in Afghanistan,” *University of Pennsylvania Journal of International Law*, Vol. 33, No. 2, 2012, pp. 1-49.

Nonetheless, the U.S. went along with the occupation of Afghanistan whose regime, the Taliban, it accused of supporting Al-Qaida terrorists allegedly behind the September 11 attacks. Soon after the onset of the military intervention, the occupying forces overthrew the Taliban regime, *inter alia*, for refusing to surrender Osama bin Laden, the head of Al-Qaida, based in Afghanistan. They replaced the Taliban with the puppet regime of the Northern Alliance consisting of anti-Taliban forces. The U.S. (and its allies) held sway in Afghanistan for twenty years (2001-2021) during which time thousands of mostly civilians were killed, wounded, maimed or tortured. The case of Afghanistan was brought on the agenda of the UN SC by the U.S. and its accomplices soon after the occupation of Afghanistan was complete. Resolution 1378<sup>42</sup> and a string of other resolutions sought to justify the presence of the occupying forces and bring about some normality and recognition to the puppet government.<sup>43</sup> The following quote from Resolution 1378 is an expression of the intention to “legalize” an otherwise illegal military campaign by virtue of an *ex post facto* resolution: “[SC] calls on Member States to provide support for such an administration and government.”

### **Iraq (2003)**

From the second half of 2002, the U.S. administration under the Bush Presidency disclosed its intention to attack Iraq – with or without a UN resolution – allegedly for failing to eliminate its arsenal of weapons of mass destruction, declining to fully cooperate with UN inspectors, and for supporting international terrorism. All these justifications appeared flimsy and thus incurred strong opposition from most other states. When a new draft resolution was put by the U.S. before the Council that would furnish legal justification for the impending occupation of Iraq, it was withdrawn as the threat of veto hung over the proposed resolution. However, the U.S. was undeterred by all this. Against the opposition of

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<sup>42</sup> Resolution 1378, 14 November 2001, <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N01/638/57/PDF/N0163857.pdf?OpenElement>.

<sup>43</sup> Resolution 1413, 23 May 2002, <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N02/397/33/PDF/N0239733.pdf?OpenElement>; Resolution 1444, 27 November 2002, <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N02/713/91/PDF/N0271391.pdf?OpenElement>; Resolution 1563, 17 September 2004, <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N04/514/61/PDF/N0451461.pdf?OpenElement>.

the other permanent members of the SC (except the U.K.), and most UN members, the U.S., Britain, and a few other U.S. allies went along with the military occupation of Iraq in March 2003, in the absence of a SC mandate. This was an unprovoked and ghastly military aggression against a small non-Western state by an imperialistic power and its accomplices. In referring to the concept of pre-emptive self-defense upon which the U.S., *inter alia*, justified its occupation of Iraq, the then UN Secretary-General Kofi Annan drew on the dangers of this (aggressive) doctrine during a speech at the UN General Assembly in 2003:

This logic represents a fundamental challenge to the principles on which, however imperfectly, world peace and stability have rested for the last 58 years. My concern is that, if it were to be adopted, it could set precedents that resulted in a proliferation of the unilateral and lawless use of force, with or without justification.<sup>44</sup>

Following the onset of the military operation, the occupying armies devastated the infrastructure of Iraq, killed and wounded hundreds of thousands of Iraqis, forcibly brought down the regime, destroyed the institutions of the state, and sowed the seeds of hatred among different communities within Iraq by means of covert operations and acts of terrorism. The entire Iraqi campaign, from 2003 to 2011, was marred by the commission of international crimes, namely, crimes against peace, war crimes and crimes against humanity.

That the actors behind the destruction of Iraq have all the while enjoyed impunity for their deeds has irrevocably destroyed the receding trust in international law and the UN system. To add to their abuses of international law and human rights, the U.S. and its allies sought to obtain a pretense of legality (some say, legitimation) *after* the occupation of Iraq through *ex post facto* affirmation or recognition of the occupation by the SC (namely a kind of “retrospective” or “implied” authorization). The U.S. and its accomplices pursued this through the enactment of Resolution 1472<sup>45</sup> a few days after the start of the occupation. The stated goal of the resolution was to provide humanitarian assistance to the people

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<sup>44</sup> Kofi Annan, *The Secretary General's Address to the General Assembly*, 23 September 2003, <https://www.un.org/sg/en/content/sg/speeches/2003-09-23/adoption-policy-pre-emption-could-result-proliferation-unilateral>.

<sup>45</sup> Resolution 1472, 28 March 2003, <http://unscr.com/en/resolutions/doc/1472>.

of Iraq. The next resolution on Iraq came roughly two months after the adoption of Resolution 1472. It was “bolder” than the previous one in several respects. Resolution 1483<sup>46</sup> of May 2003 calls on states to affirm and engage with the occupying powers which it calls “the Authority”: “recognizing the specific authorities, responsibilities, and obligations under applicable international law of these states as occupying powers under unified command.” The resolution was intended to “legalize” the military venture in Iraq. Frustratingly, however, even previously objecting states like Russia, France, China, and Germany chose to go along with the U.S. or at least decided not to prevent attempts at “normalizing” the military campaign in Iraq. The resolutions served the U.S. goal of obtaining international support to bring some stability to Iraq. The military aggression against Iraq was not only an aberration from international law and a mockery of the principle of sovereignty, but also portended a return to the hapless days of colonialism. The fact that the rest of the SC members went along with these resolutions has been as disappointing as the occupation itself. The Iraqi tragedy thus became a bitter reminder of the age of the Crusades, the Mongolian Hordes, and colonialism.

The Council performed poorly during the occupation of Afghanistan (2001) and Iraq (2003). The failure of the Security Council was not only evident in its embarrassing silence in the face of the brutality of the occupation, which was obvious in mass killings, widespread torture, and attacks on civilian settlements. The Council also failed to condemn these two cases of aggression at the outset. (At least some members of the Council could have attempted to introduce a motion for a condemnatory resolution.) The SC was also complicit in the *ex post facto* affirmation of the status of the occupying forces the goal of which was to gloss over the obscenity of occupation. This shameful episode in the history of the UN is described by Aral as follows: “The Council thus served as a forum for ‘cleansing’ the indignity of international aggression in these two cases of occupation, which in fact constituted ‘crimes against peace.’”<sup>47</sup>

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<sup>46</sup> Resolution 1483, 22 May 2003, <http://unscr.com/en/resolutions/doc/1483>.

<sup>47</sup> Aral Berdal, “The World is Bigger than Five’: A Salutory Manifesto of Turkey’s New International Outlook,” *Insight Turkey*, Vol. 21, No. 4, Fall 2019, p. 90.

## **Human rights violations during UN-authorized military operations and the implementation of sanctions**

### **Military operations**

In the aftermath of the Cold War, the U.S. at times managed to obtain the support of some of the permanent members through some form of bribery, to get the Council members' consent to resolutions authorizing the use of force.<sup>48</sup> Among the pertinent questions regarding multinational military operations based on a SC mandate is, first, whether the troops involved in these operations are legally accountable in cases of the killing of civilians, torture, and other crimes, and, second, whether the SC itself enjoys impunity for crimes committed in the course of these operations.

Human rights violations are also a major problem in peacekeeping operations on the basis of Chapter VI of the UN Charter. There have been numerous instances where UN peacekeeping forces committed crimes against the people whom they were supposed to protect. The extent of the problem is described by an observer:

Some peacekeepers harm those they are meant to help. In the Central African Republic, Congo, and Somalia, they have engaged in torture. In Bosnia, Haiti, and Kosovo, they have been implicated in sex-trafficking rings. In fact, over the past 12 years, the UN has received nearly 1,000 allegations of sexual abuse and exploitation by peacekeepers. Those who commit such horrible acts are a minority, but the bad apples have done grave harm to the UN's reputation.<sup>49</sup>

Talal Asad draws on the existing defects of humanitarian law and human rights law with reference to the failure to hold to account the perpetrators of, e.g., U.S. aerial bombardments in Somalia that have caused a large number of civilian deaths. In the jargon of the SC, the suffering of victims of UN-authorized military operations is coined as

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<sup>48</sup> Erik Voeten, "The Political Origins of the UN Security Council's Ability to Legitimize the Use of Force," *International Organization*, Vol. 59, No. 3, July 2005, pp. 527-557; p. 532.

<sup>49</sup> Séverine Autesserre, "The Crisis of Peacekeeping: Why the UN Can't End Wars," *Foreign Affairs*, January/February 2019, pp. 101-116; p. 108.

“collateral damage,” or unfortunate side effects of war. However, the heart of the matter is that mass killings of innocent civilians in war are serious breaches of the Geneva Conventions on the law of armed conflict<sup>50</sup> (1949). The perpetrators of crimes (e.g., torture) in those operations against civilians could, at least in some limited cases, be held accountable and tried in court. Asad notes that some Canadian and Belgian soldiers were charged with acts of torture during the UN military operation in Somalia. The impunity in this case is due to two factors: first, individual accountability can be whitewashed by anonymizing mass killings under the guise of so-called “collateral damage”; second, the orders for e.g. the U.S. helicopter attacks in the Somali incident were given by higher authorities.<sup>51</sup>

The question of the impunity of the SC is as important a matter as that of the criminal responsibility of soldiers, decision-makers, and states. In a statement issued by the President of the SC in 2010, the SC gave assurances that it was fully committed to remove immunity in cases of war crimes and crimes against humanity. However, there is nothing in the text to suggest that the standards applied to states should equally be applicable to the Council itself. The statement held that the SC “emphasizes the responsibility of States to comply with their relevant obligations to end impunity and to thoroughly investigate and prosecute persons responsible for war crimes, genocide, crimes against humanity or other serious violations of international humanitarian law.”<sup>52</sup> Thus, the Council continues to deny accountability for the military operations mandated by it.

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<sup>50</sup> *The Geneva Conventions of 1949 and their Additional Protocols (1977)*, <https://www.icrc.org/eng/war-and-law/treaties-customary-law/geneva-conventions/overview-geneva-conventions.htm>.

<sup>51</sup> Talal Asad, *Formations of the Secular: Christianity, Islam, Modernity* (Stanford University Press, 2003), pp. 127-128.

<sup>52</sup> Statement by the President of the SC, S/PRST/2010/11, 29 June 2010, <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N10/429/48/PDF/N1042948.pdf?OpenElement>.

Under the present state of international law, international criminal courts are not empowered to prosecute crimes, which are committed during the conduct of military operations ordered or authorized by the United Nations. This means that individual victims of UN operations are bereft of judicial remedy.<sup>53</sup> There is a lack of human rights enforcement mechanisms when it comes to the use of armed force, peacekeeping operations, or economic and financial sanctions authorized by the SC. Why is this so? First, breaches of human rights or humanitarian law are – in principle – imputable only to states, which have a duty to observe international treaties to which they are a party, and to abide by the norms of customary international law. In contrast, the UN, as a legal entity, is not party to human rights conventions. Secondly, states are duty-bound to observe human rights conventions within their jurisdiction, i.e. on their territory. *Legally*, SC members are not under any duty to observe the human rights of the nationals of states, which are targets of UN sanctions or military operations.<sup>54</sup>

Nonetheless, one could at least refer to the peremptory norms of international law. In an age when human rights, human dignity and collective rights have become essential issues of international law, failure to penalize members of armed forces for breaches of peremptory norms in the course of UN operations would indeed be a contradiction in terms.<sup>55</sup> In a recent case reviewed by the European Court of Justice, involving certain individuals and non-state entities (Yassin Abdullah Kadi, Ahmed Ali Yusuf and Al Barakaat International Foundation) who were put into the list of targeted sanctions lodged by the SC, the Court stated

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<sup>53</sup> Paolo Palchetti, “The allocation of responsibility for internationally wrongful acts committed in the course of multinational operations,” *International Review of the Red Cross*, Vol. 95, No. 891/892, 2013, p. 742.

<sup>54</sup> Stephen P. Marks, “Economic Sanctions as Human Rights Violations: Reconciling Political and Public Health Imperatives,” *American Journal of Public Health*, Vol. 89, No. 10, 1999, p. 1510.

<sup>55</sup> Andrea Bianchi, “Assessing the Effectiveness of the UN Security Council’s Anti-terrorism Measures: The Quest for Legitimacy and Cohesion,” *The European Journal of International Law*, Vol. 17, No. 5, pp. 881-919; p. 887.

that the SC “must observe the fundamental peremptory provisions of jus cogens.”<sup>56</sup>

The impunity enjoyed by the SC for crimes committed in violation of international human rights and humanitarian law during UN-mandated military interventions is an affront to the principle of the rule of law.<sup>57</sup> The existing culture of impunity within the UN is deeply disturbing and legally problematic. According to Palchetti, since the Council is the source from which springs the legal right to use force, it ought to be held responsible for soldiers who have committed crimes during military operations. This is because the Council exercises “a form of

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<sup>56</sup> Case T-315/01, *Kadi v Council and Commission*, Judgment of the Court of First Instance, 21 September 2005, para. 230, <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:62001TJ0315&rid=6>. The SC adopted resolution No. 1267 in 1999 allegedly to stem the tide of international terrorism, which, it claimed, was supported by the Taliban regime in Afghanistan. The resolution, *inter alia*, imposed an asset freeze on those who were directly or indirectly linked to the Taliban, as expressed in para. 4: “Freeze funds and other financial resources, including funds derived or generated from property owned or controlled directly or indirectly by the Taliban, or by any undertaking owned or controlled by the Taliban, as designated by the Committee established by paragraph 6 below, and ensure that neither they nor any other funds or financial resources so designated are made available, by their nationals or by any persons within their territory, to or for the benefit of the Taliban or any undertaking owned or controlled, directly or indirectly, by the Taliban, except as may be authorized by the Committee on a case-by-case basis on the grounds of humanitarian need.” (UN Doc S/RES/1267 [1999], 15 October 1999, <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N99/300/44/PDF/N9930044.pdf?OpenElement>) A Sanctions Committee was established to monitor the implementation of sanctions and other measures intended to root out terrorism. In October 2001, the Sanctions Committee published an updated list of individuals and companies that would face censure for their liaison with the Taliban, among whom were the plaintiffs that appeared before the European Court of Justice. The series of UN sanctions and the targeted list of persons were regularly reviewed by the Sanctions Committee after 1999. In the *Kadi v. Council and Commission* case, the Court challenged the prevailing view that SC resolutions are immune from the domestic jurisdiction of UN member states. It thus upheld the right of the plaintiffs to appeal to a court against the relevant resolutions. However, this ruling remained an isolated instance that did not change the main currents of thinking in this area.

<sup>57</sup> Hans Corell, “The Mandate of the United Nations Security Council in a Changing World,” in: Jonas Ebbesson, Marie Jacobsson, Mark Adam Klamberg, David Langlet, and Pål Wrangé (eds.), *International Law and Changing Perceptions of Security* (Brill, 2014), p. 44.

‘normative control’ over the state ... [Therefore] it must bear the consequence of its contribution to the wrongful act.”<sup>58</sup> It would be senseless to think that the SC is somewhat *above* the law or that it is not in any way bound by fundamental human rights. Judge Giorgio Malinverni remarked in the *Nada* case, as adjudged by the European Court of Human Rights (*Nada v. Switzerland*, 2012-II Eur.Ct.H.R.1961), that “one does not need to be a genius to conclude that the SC itself must also respect human rights, even when acting in its peace-keeping role.”<sup>59</sup>

## **Sanctions**

One of the major problems, which seems to be taken lightly in UN circles, is the negative humanitarian consequences of UN economic and financial sanctions. Drawing on the potential social devastation of sanctions in targeted countries, Asad claims that sanctions could be as injurious to ordinary people as military interventions authorized by the SC. He deplores that the human suffering caused by sanctions among citizens of poor states is never addressed as “human rights violation.”<sup>60</sup> One major problem about the UN sanctions is that states at the receiving end of sanctions are almost always outside the apparatus of decision-making in the SC.<sup>61</sup>

The tragic case of the devastating sanctions against Iraq is a case in point. It is a harrowing reminder of how coercive economic and financial measures of the UN can have calamitous consequences for the sovereignty, economic self-determination, and human rights of the people in the targeted states. UN sanctions were first imposed on Iraq in August 1990; they remained in force until May 2003. They were lifted two months after the U.S. (and British) invasion of Iraq. SC Resolution

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<sup>58</sup> Palchetti, *op. cit.*, p. 738.

<sup>59</sup> Kushtrim Istrefi, “The Application of Article 103 of the United Nations Charter in the European Courts: The Quest for Regime Compatibility on Fundamental Rights,” *European Journal of Legal Studies*, Vol. 5, No. 2, Autumn/Winter 2012/13, pp. 81-93; p. 85. For the *Nada* case, see *Case of Nada v. Switzerland*, 12 September 2012, <https://hudoc.echr.coe.int/fre#%22fulltext%22:%22Nada%22,%22itemid%22:%22001-113118%22>}.

<sup>60</sup> Asad, *op. cit.*, p. 128.

<sup>61</sup> The same is true for other punitive actions such as the SC’s authorization of military interventions.

No. 661<sup>62</sup> was adopted on 6 August 1990 in the immediate aftermath of the Iraqi occupation of Kuwait on 2 August of that year. The Security Council imposed a fully-fledged trade and financial embargo on Iraq. Resolution 687,<sup>63</sup> enacted in April 1991 following the defeat of Iraq in the Gulf War, maintained the comprehensive economic sanctions, with the addition of a commitment of Iraq to eradicate its alleged stocks of weapons of mass destruction. The deadly sanctions largely remained in force although the Council was compelled, out of international outrage about their cruelty, to permit Iraq to sell its petroleum for a limited quota (1.6 billion dollars worth annually), as expressed in Resolution 706<sup>64</sup> of August 1991. This was intended to reduce the human suffering due to the “serious nutritional and health situation of the Iraqi civilian population” as described in the report, and in view of “the risk of a further deterioration of this situation.” However, such limited concessions did not in any tangible way relieve the huge humanitarian crisis in Iraq.

The collective suffering of ordinary citizens, and more specifically the death and acute health disorders affecting children and babies, alerted sections of international society to this shameful episode in the history of the UN. Eventually, when the SC could no longer ignore warnings about the deadly consequences of sanctions, the Council enacted Resolution 986<sup>65</sup>, which, *inter alia*, initiated the “Oil for Food” program in 1995. In its preamble, the resolution declared that the Council was “concerned by the serious nutritional and health situation of the Iraqi population, and by the risk of a further deterioration in this situation.” It accordingly permitted Iraq to export petroleum “sufficient to produce a sum not exceeding a total of one billion United States dollars every 90 days” to increase its earnings which, as mentioned in the resolution, “shall be used to meet the humanitarian needs of the Iraqi population.” (Para. 8) To be more specific, the resolution held that the revenues from the sale of petroleum would have to be used to import “medicine,

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<sup>62</sup> Resolution 661, 6 August 1990, <https://documents-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/575/11/PDF/NR057511.pdf?OpenElement>.

<sup>63</sup> Resolution 687, 3 April 1991, [https://peacemaker.un.org/sites/peacemaker.un.org/files/IQ%20KW\\_910403\\_SCR687%281991%29\\_0.pdf](https://peacemaker.un.org/sites/peacemaker.un.org/files/IQ%20KW_910403_SCR687%281991%29_0.pdf).

<sup>64</sup> Resolution 706, 15 August 1991, <https://documents-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/596/42/PDF/NR059642.pdf?OpenElement>.

<sup>65</sup> Resolution 986, 14 April 1995, <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N95/109/88/PDF/N9510988.pdf?OpenElement>.

health supplies, foodstuffs, and materials and supplies for essential civilian needs.” (Para. 8)

Yet, due to the colossal scale of economic, social, health, nutritional and educational problems, Resolution 986 did not noticeably ease the suffering of civilians in Iraq. Although the comprehensive sanctions, designed to bring Iraq on its knees, had achieved their purpose when Iraq had been defeated and forced to evacuate Kuwait in 1991 as a result of the Gulf War, those who held the upper hand in the SC insisted on maintaining the sanctions on the pretext of Iraq’s alleged weapons of mass destruction program (which was later proven to be non-existent) and of securing a settlement of the border dispute between Iraq and Kuwait and Iraq’s payment of compensation to Kuwait. The devastating sanctions against Iraq, which led to the death of hundreds of thousands of Iraqis, also caused serious illness on a huge scale and threw the bulk of Iraqi society into poverty. The sanctions constituted human rights violations on a massive scale.<sup>66</sup> The tragedy that resulted from these punitive measures should be called “mass murder by design,” and not simply the “unintended and unfortunate effect of sanctions.” Some even labeled these ruthless sanctions as “genocide” against the Iraqi people.<sup>67</sup> We can at least classify these sanctions as “crimes against humanity.”

It is estimated that the sanctions against Iraq led to the death of one million Iraqis.<sup>68</sup> The following words by Gordon are a dramatic description of the most disquieting aspect of the tragedy behind the Iraqi sanctions:

The “perfect injustice” of the situation in Iraq lies not so much in the fact that the imposition of extreme and indiscriminate measures on a civilian population has continued more or less unabated after

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<sup>66</sup> On this, see Marks, *op. cit.*

<sup>67</sup> See, for instance, Abdul Haq al-Ani & Tarik al-Ani, *Genocide in Iraq: The Case Against the UN Security Council and Member States* (Clarity Press, 2013); Denis J. Halliday, “The Deadly and Illegal Consequences of Economic Sanctions on the People of Iraq,” *The Brown Journal of World Affairs*, Vol. 7, No. 1, Winter/Spring 2000, 229-233.

<sup>68</sup> On the devastating humanitarian consequences of the UN sanctions against Iraq, see Hans-Christof Graf von Sponeck, *A Different Kind of War: The UN Sanctions Regime in Iraq* (New York, Oxford, 2006).

more than a decade. The perfect injustice lies in the relative success of the United States in making the atrocity at once invisible and good. Perfect injustice occurs ... when principles of morality and legality have been successfully invoked as authorization for unlimited human damage, of unboundaried duration.<sup>69</sup>

Another case of coercive measures, which did not attract much attention at the time, was the imposition of economic and military sanctions against Haiti in June 1993. The process, which led to the internationalization of the crisis in Haiti, began when Jean-Bertrand Aristide became Haiti's first elected president after winning the two rounds of elections in December 1990 and January 1991 respectively. He assumed office on February 7, 1991. To the disillusionment of his supporters, he was overthrown by a coup d'état in September 1991. To express its rejection of the illegal junta, the Organization of American States imposed economic and diplomatic sanctions against Haiti. They proved not to be effective particularly because of loose implementation. Soon after Bill Clinton became president of the United States in 1993, his administration set about developing strategies to uproot the junta and reinstall Aristide, especially to stem the tide of Haitian refugees seeking entry to the U.S. Clinton found it wise to engineer a SC resolution that would broaden the application of sanctions.

In response to the military junta preventing the UN Mission to enter the country, the SC adopted Resolution 841 in June 1993, imposing an arms and oil embargo and putting a freeze on Haitian assets abroad.<sup>70</sup> The sanctions were further tightened when the Council adopted Resolution 917<sup>71</sup> in May 1994 in response to the junta's failure to abide by the Governors Island Agreement whose goal was to settle the Haitian crisis. The new resolution prohibited trade with Haiti and imposed a flight ban on Haitian planes.

Subsequently, the U.S. began to champion for more robust Council action that would settle the problem in Haiti once and for all. By this

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<sup>69</sup> Joy Gordon, "When Intent Makes All the Difference in the World: Economic Sanctions on Iraq and the Accusation of Genocide," *Yale Human Rights and Development Law Journal*, Vol. 5, No. 1, 2002, p. 83.

<sup>70</sup> Resolution 841, 16 June 1993, <https://digitallibrary.un.org/record/168120>.

<sup>71</sup> Resolution 917, 6 May 1994, <https://digitallibrary.un.org/record/186367>.

time, the U.S. had come to advocate military enforcement action, referring to the fledgling doctrine of “humanitarian intervention.” Eventually, following some debate, the U.S. succeeded in obtaining the Council’s blessing, after it agreed to give China and Russia financial and political concessions respectively.<sup>72</sup>

The literature on the Haiti crisis remains largely silent about the devastating effect of sanctions on the lives of the people in Haiti. These measures did hurt mainly the poor. Although in later resolutions the SC removed food and medicines from the sanctions list, this did not substantially alleviate the condition of the country’s health services. Financial sanctions prevented the delivery of much-needed humanitarian assistance. Those who were hardest hit were vulnerable groups like women and children. As regards the economy, the assembly industry was most acutely affected. The unemployment rate spiked to 80 percent in 1994. The economic decline was coupled with a sharp increase of inflation. The setbacks triggered by the sanctions resulted in a thirty percent fall in real wage earnings in Haiti in the mid-1990s.<sup>73</sup>

A new consensus emerged in the UN at the turn of the century in favor of less comprehensive but more “focused” sanctions, calculated to target institutions and individuals that are key to the states that are found to be in breach of international peace and security, while minimizing the humanitarian cost. The “new” type of sanctions was men-

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<sup>72</sup> Voeten, *op. cit.*, p. 532. SC Resolution 940, adopted in July 1994, authorized the dispatch of a multinational force, which, by means of the phrase “to use all necessary means,” was given the requisite power to overthrow the illegal junta in Haiti (Resolution 940, 31 July 1994, <http://unscr.com/en/resolutions/doc/940>). However, a settlement with the junta was brokered before the UN forces were dispatched to Haiti. Neither the motives of the U.S. nor those of the rest of the permanent members appeared altruistic. For the U.S., the crucial issue was to stem the tide of refugees and to maintain its economic ties with Haiti. Russia obtained U.S. support for the peacekeeping role of the forces of the Commonwealth of Independent States in the Republic of Georgia. China, for its part, got U.S. backing for a World Bank loan in return for its advocacy of military action in Haiti. (Aidan Hehir, “The Permanence of Inconsistency: Libya, the Security Council, and the Responsibility to Protect,” *International Security*, Vol. 38, No. 1, Summer 2013, pp. 137-159; p. 143.)

<sup>73</sup> Felicia Swindells, “U.N. Sanctions in Haiti: A Contradiction Under Articles 41 and 55 of the U.N. Charter,” *Fordham International Law Journal*, Vol. 20, No. 5, 1996, pp. 1878-1960.

tioned in the Annual Report of the Secretary-General in 2000, which held that “smart sanctions” would be more effective and would bring about speedier results.<sup>74</sup> Possibly reassured by its “new” strategy on sanctions, the SC, in one of its official statements (2010), claimed that it is committed to a fair implementation of sanctions: “The Council reiterates the need to ensure that sanctions are carefully targeted in support of clear objectives and designed carefully so as to minimize possible adverse consequences ...”<sup>75</sup>

Is this claim duly supported by subsequent UN practice? The heavy economic and financial sanctions, which the SC instituted against Iran for ten years (2006-2016), indicate that UN sanctions continue to inflict serious harm on ordinary individuals. The case of Iran was brought to the limelight when the International Atomic Energy Agency (IAEA), under relentless pressure from the U.S. and a few other Western states, decided to refer the case of Iran’s nuclear program to the Council in 2006. This was astonishing because there was no evidence to suggest that Iran was violating its treaty obligations under the Non-Proliferation Treaty of 1968. The SC adopted Resolution 1696<sup>76</sup> in July 2006, which referred to Chapter VII of the UN Charter that regulates collective countermeasures against breaches of and threats to international peace and security. Acting under Article 40 of the Charter<sup>77</sup>, the Council ordered Iran to “suspend all [uranium] enrichment-related and reprocessing activities, including research and development, to be verified by the IAEA.” In addition, in case of non-compliance, Iran was threatened with sanctions as stipulated in Article 41 of the Charter. Iran, predictably, refused to halt its uranium enrichment activities, claiming that this was an activity permitted by Article 4 of the Non-Proliferation Treaty of 1968, which reads:

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<sup>74</sup> Secretary General’s Annual Report, Press Release, 12 September 2000, SG/2067, <https://press.un.org/en/2000/20000912.sg2067.doc.html>.

<sup>75</sup> Statement by the President of the SC, 2010, *loc. cit.*

<sup>76</sup> Resolution 1696, 31 July 2006, <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N06/450/22/PDF/N0645022.pdf?OpenElement>.

<sup>77</sup> “In order to prevent an aggravation of the situation, the Security Council may, before making the recommendations or deciding upon the measures provided for in Article 39, call upon the parties concerned to comply with such provisional measures as it deems necessary or desirable.”

Nothing in this Treaty shall be interpreted as affecting the inalienable right of all the Parties to the Treaty to develop research, production and use of nuclear energy for peaceful purposes without discrimination.

The Iranian counterclaims were flatly rejected by the U.S. and its allies. Iran's determined stance on the nuclear issue, emphasizing its inalienable rights as a sovereign state, led to a new cycle of resolutions whose goal was to force the country into capitulation on the nuclear issue. Accordingly, the Council passed Resolution 1737<sup>78</sup> in December 2006, imposing trade restrictions whose goal was to debilitate Iran's ability to engage in uranium enrichment and to develop other aspects of its nuclear program. The resolutions, which ensued after Resolution 1737, included ever tighter and expansive measures. Resolution 1929 of June 2010 contained a set of draconian embargoes and restrictions, including a travel ban on selected individuals, freeze of assets outside the country, and the prohibition of Iranian banking and financial activities outside Iran.

The UN sanctions against Iran have been among the most crippling of punitive embargoes ever imposed by the world organization. Their deleterious consequences have not been confined to the state but have had a combined impact on all sectors of the Iranian economy, non-state entities, companies, and individuals. They resulted in a large array of side effects and have permeated to the very core of Iranian society. As noted in a survey,

These sanctions have caused or contributed to a wide range of negative macroeconomic outcomes including rapid currency devaluation, severe trade and fiscal deficits, elevated inflation, and rising poverty rates. Iran has been unable to truly mitigate or resist the economic pressures exerted by sanctions.<sup>79</sup>

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<sup>78</sup> Resolution 1737, 23 December 2006, <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N06/681/42/PDF/N0668142.pdf?OpenElement>.

<sup>79</sup> Mohammad Reza Farzanegan and Esfandiyar Batmanghelidj, "Understanding Economic Sanctions on Iran: A Survey," *The Economists' Voice*, published online June 22, 2023, p. 2.

The negative consequences of sanctions on the Iranian health system have been far more injurious than is generally assumed: According to a report, “[t]hey restricted access to healthcare services. Additionally, sanctions degraded Iran’s health system with negative outcomes in the availability of medicines, vaccines, treatments, and other medical and public health products.”<sup>80</sup>

Therefore, it is far from truth to claim that smart sanctions enacted by the SC have not been harming the lives of ordinary individuals. On the contrary, the comprehensive sanctions against Iran – in spite of their being labeled “smart” – have victimized a large section of Iranian society, have increased poverty, and generated serious health problems. They are tantamount to serious human rights violations.

### **Legal constraints on the competencies of the SC**

No one can deny that the SC is mainly a “political” body that has been given considerable discretion as to whether a particular case of aggression, conflict, or crisis is to be evaluated as “threat” to or “breach” of international peace and security. This means that it is entirely up to the Council whether to bring a matter on its agenda. The Council also has leeway to decide what measures to take to resolve a crisis. However, that the Council is mainly a political body does not mean that it is beyond the province of the law. First, the Charter of the UN is the most important international treaty. Treaties being the primary sources of international law, the *legal* value of the Charter should not be underestimated. Second, there is no sensible reason to suggest that the Council, as an international legal person, is not bound by international law. On the contrary, like other actors such as states and international organizations, the Council is obliged to observe international law. Third, Article 1 of the UN Charter, which lists the Purposes of the UN, holds (without explicitly mentioning, but implying it) that the SC is given the task

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<sup>80</sup> Haniye Sadat Sajadi *et al.*, “The human cost of economic sanctions and strategies for building health system resilience: A scoping review of studies in Iran,” *The International Journal of Health Planning and Management*, 2023, p. 6.

to bring about by peaceful means, and in conformity with the principles of *justice* and *international law* [emphasis B.A.], adjustment or settlement of international disputes or situations which might lead to a breach of the peace.

Fourth, Article 2 of the Charter explicitly states one of the most fundamental principles of international law: “The Organization is based on the principle of the sovereign equality of all its Members.” Therefore, the Council, in adopting resolutions, particularly those that require effective action, ought not to dismiss the sovereignty of states as something which is dispensable. Finally, evolving norms of human rights and humanitarian law, and in particular peremptory norms of international law, should be considered as guiding principles for the Council.

Accordingly, the Council’s extensive powers under Chapter VII of the UN Charter are subject to various legal limitations. Otherwise, we would have to accept that the SC, unchecked by any legal or political constraints, has become a Leviathan devouring any prey in its way. If this were to be the case, the Council would be a threat to the existing international order and would bleak the future of humanity. The right approach to the competencies of the Council is aptly spelled out by Joyner:

There must be limits to the Council’s Article 39 “powers of appreciation” and resulting authoritative discretion, lest the Council become a legal hegemon, unbound by law in the exercise of its Chapter VII powers.<sup>81</sup>

Alongside its unrepresentative composition and the much-criticized veto power of the permanent members, the SC’s refusal to accept legal restraints to its authority would further diminish its legitimacy in the view of most states.<sup>82</sup>

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<sup>81</sup> Joyner, *op. cit.*, p. 246.

<sup>82</sup> *Ibid.*

## Summary

It is well known that the SC has a propensity to decide not on the basis of the *legal aspects* of a particular crisis that constitutes a threat to, or breach of, international peace and security, but rather depending on the political calculations of its permanent members. The Council's broad-based discretionary power has meant that, when adopting coercive measures under Chapter VII, it evaluates similar situations differently.

The practice of the SC after the Cold War appears to defy the rule of law in four different contexts, which have been under review in this paper. Firstly, there have been cases where multinational military operations authorized by the SC went beyond the legal confines of the Council's resolutions. These *ultra vires* operations constitute serious breaches of the principles of predictability and accountability. Secondly, in some instances when a situation has been deemed to threaten international peace and security, the Council, acting as prosecutor, judge and/or legislator, tended to encroach on the competence of other UN bodies such as the General Assembly or the ICJ. This is in contravention to the principle of the separation of powers as an indispensable part of the rule of law. Thirdly, there have been situations in which the SC sought to "legalize" and thus "normalize" military occupation undertaken unilaterally by some states. The Council did so by passing *ex post facto* resolutions that called on the members of the international community to cooperate with the occupying powers and/or with puppet governments. Such practice is without doubt a serious challenge to the rule of law, and in particular to the principles of accountability and predictability. Finally, coercive resolutions based on Chapter VII of the UN Charter, and imposing economic and/or financial sanctions or authorizing multinational military interventions, have in certain instances had irreparable humanitarian consequences. They have at times resulted in mass death of civilians, injuries on a grand scale, widespread torture, and the descent of millions into the abyss of poverty. While in such instances, involving serious breaches of the law of international responsibility, international human rights, and humanitarian law, the SC and the states involved in these violations enjoyed impunity, the grievances of victims have almost never been redressed. Serious human rights violations caused by UN-authorized sanctions or military interventions are in no way compatible with the rule of law.

The principle of the rule of law also requires that the SC be guided by the same principles and standards of behavior in the handling of any international crisis. The Council has failed to meet this criterion. The double standards and lack of consistency have nowhere been more visible than in the Council's conduct in dealing with the wars, conflicts and threats to international peace and security in the Middle East during and after the Cold War. The key actor that "used" the Council as an instrument of its economic and geopolitical interests has been the U.S. According to Corell, the U.S.'s perception of the Middle East largely emanates from its imperial greed. Its dominance in the Council thus has led to decisions that are unsuitable for bringing peace to the region. The Council's track record in the Middle East has indeed been "disastrous."<sup>83</sup> It bears a great deal of similarity to the mishandling of crises by the Council in the larger Muslim world. The SC's misconduct in the cases of Iraq, Libya, Afghanistan, and Iran as well as its inconsistent treatment of the humanitarian crises that erupted during the Arab Spring are witness to its failure in fulfilling its mission. This leads one to question as to whether the SC can effectively serve the cause of peace, as noted by Aral:

The decisions as to whether a particular crisis should be dealt with in the Council and, after having been incorporated into the agenda, whether it is "grave" enough to call for effective action are largely shaped by the permanent members' self-interest and considerations of power. In such an environment, the specific *legal* context of a particular crisis is less important than the identity of the aggressor and the victim. Insofar as the Muslim world is concerned, it appears that the UNSC has, let alone serving as the guarantor of peace and security, even become a major security threat to peace.<sup>84</sup>

It is widely recognized that the SC is under an obligation to act in conformity with the Purposes and Principles of the United Nations as enshrined in Articles 1 and 2 of the Charter of the UN. In addition, there is broad agreement, at least in doctrinal terms, that the Council has no authority to violate peremptory norms of international law (*jus cogens*).

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<sup>83</sup> Corell, *op. cit.*, p. 55.

<sup>84</sup> Aral, *op. cit.*, pp. 90-91.

Today, the legitimacy of the Council is at rock bottom. First, as noted above, the substance and/or the actual conduct of SC resolutions adopted on the basis of Chapter VII of the UN Charter often clash with the rule of law. Second, the SC, particularly in the non-Western world, has come to be viewed mostly as an obstacle to, rather than as a guarantor of, international peace and security. The accumulation of powers by the SC after the Cold War has turned it into a kind of Hobbesian Leviathan. Apart from the problematic nature of its composition and decision-making mechanism, which already existed during the Cold War era, the Council's claim to impunity and its rejection of any legal or political restraints defy the principle of checks and balances that is generally observed in democratic systems. As a consequence, its institutional, legal, and practical defects have turned the Council into a *problem* in today's world.

**Ramachandra Byrappa**

## **Resilience and Responsibility in the UN and the Feudal Infiltration**

### **Introduction and conceptual framework**

Most national and international problems stem from the fact that the concept of sovereignty is poorly understood and poorly implemented. At its inception, the United Nations Organization was dominated by the USA, an overwhelming economic and military power, Britain and France, two feudal colonial powers, Russia, an ideologically antagonistic power, and China, a territorially dislocated power. It becomes crystal clear that sovereignty as a medium of political power would be handicapped and the UN system would suffer consequently. For all intents and purposes, sovereignty became a technical formality rather than an active and practical institutional tool.

The UN's agenda was to achieve a robust world architecture of sovereignty, scaling up from the individual to the global level in a progressive and concerted effort, in a bottom-up process. The underlying belief of the designers of the UN system was that states and societies would value the world institutional order, the practical hierarchy, for the obvious civilizational benefits that this order provides. It was hoped that a transparent transfer of sovereignty to institutions would lead to clear lines of responsibility in national and international relations. This would reduce the level of conflict and the risk of war in the international system.

Today, after almost 80 years of the UN, this once promising system seems to have been hijacked and instrumentalized to misinterpret the institutional order for the benefit of private individuals and organizations. In the process, real sovereignty is being appropriated by entities that have neither territorial nor democratic legitimacy. This amounts to nothing less than a feudal appropriation of sovereignty at all levels,

especially at the global level. The result is obvious: structural resilience is reduced to zero and responsibility becomes very blurred. Things happen, but we do not know who is behind them. Wars are declared and fought, hundreds of thousands of soldiers and civilians lose their lives, but no one can say clearly and unequivocally in whose national interest all this is happening. One wonders, therefore, to what extent the Westphalian notion of state sovereignty has been allowed to deplete since 1945, when the UN became the authority that was to pave the way for the restoration of this true and practical sovereignty for those who had lost it.

John Agnew of UCLA argues that *de facto* sovereignty is the only thing we should focus on because *de jure* sovereignty, which most people take as reality, does not exist, and never has.<sup>1</sup> He argues that *de facto* sovereignty is effective sovereignty, that sovereignty in theory is far from sovereignty in practice: “Indeed, across a number of fields – from geography to law and sociology – there is a shared sense that the conventional understanding of sovereignty as unlimited and indivisible rule by a state over a territory and the people in it is in need of serious critical scrutiny.”<sup>2</sup> There is a lot of truth in what John Agnew says, but I think that rather than taking this for granted, we should be asking why this is so: why is there a growing gap between what we think of as the nominal and the real? What are the factors or processes that are causing the trajectories to diverge rather than converge? And in whose interest are these processes diverging?

In early modern European absolutism, sovereignty went as far as to include physical control over the population, either directly or through feudal allegiance since people were part of the territorial fabric. In this context, gaining and accumulating sovereignty meant keeping a firm grip on a given territory and conquering new ones. In Europe, the Enlightenment and democracy introduced the notion of individual choice and freedom. This inevitably led to the idea of movement and change. In the process, the nature of the acquisition of sovereignty by the state and the political status changed from “control” to “compliance” and

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<sup>1</sup> John Agnew, “Sovereignty Regimes: Territoriality and State Authority in Contemporary World Politics,” *Annals of the Association of American Geographers* 95, no. 2 (2005), p. 437.

<sup>2</sup> *Ibid.*

“consent.” Sovereignty and legitimacy became the result of free will. But in the mentality of the European elites, the ideas of state and sovereignty continued to be those of feudalistic control. The way they regained control over the masses was through extreme nationalism.

Ideally, nationalism is the result of love and attachment to a cultural community. But in reality, the message is “you belong here” and “you don’t belong here,” which amounts to a kind of enforced feudal segregation. People have accepted this coercion if they have received some degree of empowerment in exchange for this ideological control, but with the principle of “conditional belonging” at the heart of it, at least in democracies. What this means is that the idea of “transactionality” is introduced: I give you my legitimacy (through my vote) if you provide me with a favorable socio-economic environment in which I can assert myself. This transactionality further introduces competition and strengthens the market mechanism and the constant search for better or safer alternatives. So, sovereignty has moved from absolutism to market anarchy (no negative connotations intended). It has moved from being immobile to being mobile and transferable.

It is on this aspect of transferability of sovereignty that the “international civil society” bodies have based and built up their business model – the idea that nation-states no longer have the monopoly over violence and sovereignty. The idea is that states have no right to monopolize power because it does not correspond to today’s complex society. “Territoriality, the use of territory for political, social, and economic ends, is widely seen as a largely successful strategy for establishing the exclusive jurisdiction implied by state sovereignty. But effective sovereignty is not necessarily so neatly territorialized.”<sup>3</sup> The state is one among many other players, the soft argument goes. But the crusader activism of these international civil society organizations goes further, they portray the state and its institutions as the main culprit in committing human rights abuses. The remedy that is advocated is the reduction in the scope of state action and power. The strategy is to create tensions, dissatisfaction, and sometimes the outright rejection of the state.

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<sup>3</sup> *Ibid.*

Conveniently, the social media platforms built their business model on the same principles, rejecting traditional communities before building alternative relations and communities on the social media platforms. In other words, they have created new forms of territoriality in the digital realm. The existence of the individual and his or her activities are increasingly shared between the physical territory and the digital territory. From this perspective, the territorial state cannot lay claim to digital existence because it takes place in the digital territory of another entity. In such cases, we can speak of “shared sovereignty.”<sup>4</sup> The territorial state would like to regain the lost ground, but it is an uphill struggle. Cultural control and taxation of digital activities are increasingly difficult. National elites, unable to compete for mobile sovereignty and at the same time unable to adequately empower citizens, have resorted to fiscal extraction and feudal appropriation of public funds. This is a downward spiral that takes sovereignty back to a feudal-authoritarian-absolutist configuration, with the aim of curtailing democracy and the “free adherence” model. Sovereignty has entered a period of fiscal instability, loss of clarity of responsibility and identification.

At the national level, when sovereignty or legitimacy is abused, there are politicians and officials who can be held accountable, but we cannot say the same about abuses in the digital sphere. The leaders of a territorial entity can theoretically be prosecuted for war crimes, but the same cannot be said of the owners of digital spaces; it is very difficult to hold them accountable. If member states have problems with sovereignty, it is obvious that the United Nations suffers from the same structural problems. It is made up of states, but the sum of their sovereignty does not add up to the global sovereignty that is supposed to be the basis of the organization’s legitimacy.

Finally, the transactional aspect of sovereignty gives rise to a perverse and dangerous phenomenon that strikes at the very heart of the United Nations – mercenarism. Portability and transactionality have a profound impact on two fundamental elements of the nation-state, namely loyalty and patriotism. Once the individual has gained freedom of choice through liberal democracy and the expansion of the market mechanism, he is no longer conditioned by state and tradition, but by

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<sup>4</sup> *Op. cit.*, p. 441.

transactionality. Structurally, there is no incentive to develop loyalty and feelings of patriotism toward fixed structures such as institutions and traditions because their transactional value is constantly changing. The law of transactionality of sovereignty takes precedence over all others. This means that both national patriotism and national institutional loyalty will be replaced by varying degrees of mercenarism, where the medium of transaction need not always be monetary; it could be ideological. This development will have a profound impact on the UN system, across the board and at all levels, by multiplying the potential for conflict. International civil societies will fracture and state and society will disintegrate into incompatible pieces of “floating cloud sovereignty.” The only viable elements in international society will be predatory communities and mercenaries of all kinds. In this way, the UN will have to deal with a chaotic cauldron of sovereignty, but this time without its main allies, the nation-states.

The key to understanding sovereignty therefore is empowerment in its multi-dimensional sense. We should focus on the expression of sovereignty and its custodians. Where does the practical, day-to-day, empowerment come from? Who controls the effective flows of empowerment? We also must apprehend the position of fixed institutions and floating sovereignty in relation with the dynamics of the international economy. The careful analysis of sovereignty and its fluidity will help us understand how the “feudal infiltration” happens and how it legitimizes itself. It also must be said that this infiltration is possible because the Westphalian state structure itself is feudal. The young people in the streets are not fighting or contesting the democratic system, they are fighting the hidden monster that is seeding deep in the structure, state and beyond. They do not yet know that it is feudalism, but they are getting to terms with the main characteristics of the monster.

## Part I: Sovereignty and the dangers of feudalism<sup>5</sup>

In this section, the idea is to see how local and national sovereignty is transformed into a global sovereignty. The understanding of this process will allow us to see how feudalism seeps into the international and national arenas, since national institutions fall prey to international or global agendas. The question is: how does one become the vehicle for someone else's doctrine? The key to understanding this is to look at the way or ways in which sovereignty and autonomy are conceived, perceived and concretized. It is also important to mention that the issue of national interest is directly linked to the notions of sovereignty and autonomy. In some contexts, sovereignty is synonymous with providing some sort of empowerment, legal and material. In today's global context, states show a minimal propensity to provide either of these. The state is a disguised quasi-property of certain predator ethnic groups. This points to a juxtaposition and not holistic integration. It seems that although both are interdependent, popular sovereignty and state sovereignty are two different things and largely detached from one another. Lack of state consolidation and tangible empowerment means that most of the citizens become part of the "floating" sovereignty community. Since this "float" community is in search of a secure state framework and empowerment, it is sensitive to what happens internationally, on the receiving side; and on the giving side, those who can provide public goods and empowerment have easy "colonial" access to the "float" sovereignty.

In his "Books of the Republic" (*Les Six Livres de la République*), Jean Bodin dedicates three chapters to the topic of sovereignty.<sup>6</sup> From the beginning, his intention was not just theoretical; he wanted to arrive at a definition that was practical and easy to understand. In chapter XIX he gives a very simple definition of sovereignty: "Sovereignty is a power absolute, perpetual, independent: these three conditions make it pos-

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<sup>5</sup> Parts of this section are taken from my earlier research on the concept of global sovereignty ("Yellow Peril Traditions in India?") published in: Gerd Kaminski, Hannes A. Fellner and Wang Xigen (eds.), *China Threat: Fake or Fact?* Bacopa Verlag, Schiedlberg, 2023, pp. 237-246.

<sup>6</sup> *Abrégé de la République de Bodin* (London: Chez Jean Nourse, 1755), Vol. 1, pp. 161-205.

sible for it to be born.”<sup>7</sup> Jean Bodin also points out another important aspect of sovereignty, namely that it is always derived from the people: “*The sovereignty that resides in the body of the people is the most extensive that we know of. Sovereignty is absorbed in the people...*”<sup>8</sup> This implies at least two things. People are beholders of sovereignty, meaning that without people it does not exist. And consequently, territory and institutions have no realistic sovereignty without the interaction of a group of people. A territory and its institutions are therefore legitimated by the people. How they legitimate their institutions and at what intervals is another matter. Jean Bodin’s sovereignty clearly attributes a central position to “people” or to a “community of people.”

From a structural point of view, in essence, what he is saying is: follow the path of the people to trace the structure of that people’s sovereignty. This interpretation is very significant for the territorial aspects of sovereignty. But how do we attach the people’s sovereignty to a specific territory? People falsely think that it is globalization that induced great movements of people geographically, but in reality, the movement of people was one of the essential characteristics of Human Civilization. People were either sedentary or on the move. How does our conception of sovereignty evolve with this dual status of the people? Jean Bodin does not have a specific answer to this question: “*It appears at first that Sovereignty cannot be shared; that if it is divided, it is diminished; that if it is diminished, it is no longer power. It has even been thought that of nature it is indivisible.*”<sup>9</sup> But he says this is nonsense: “*Not only can sovereignty be divided, but each of its parts can still be divided.*”<sup>10</sup> For reasons of efficiency in the workings of a political community, which defines all other forms of communities, the share of sovereignty must be distributed according to the importance given to each level of institutions – because without sovereignty there cannot be authority. From this it becomes evident that the exercise of power derived from this shared sovereignty is “the coactive power.” In the words of Jean Bodin: “*la puissance coactive,*” meaning shared and combined action of different bodies.<sup>11</sup>

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<sup>7</sup> *Op. cit.*, p. 161.

<sup>8</sup> *Op. cit.*, p. 162.

<sup>9</sup> *Op. cit.*, p. 196.

<sup>10</sup> *Op. cit.*, p. 197.

<sup>11</sup> *Op. cit.*, p. 198.

Another important factor in the debate on sovereignty is the transfer of it to a political entity. When a person moves from one territorial entity to another, how does the transfer happen? Is there an element of transactionality? And, more importantly, does the retention of sovereignty that is not given to either the host territory or that of departure feed a float community? Due to the nature of uncertainty and temporariness, sovereignty, in the possession of an individual, can be divided into three approximative segments: roots, host and floating. In effect, one is unwilling to retrieve all the sovereignty from the “roots” or territory of origin because one does not know what will happen in the future, one does not know if the departure is permanent or temporary. In the same manner and for the same reasons one is not willing to transfer immediately all the sovereignty to the host – just that much which is required; which means that the most important part of natural sovereignty is floating.

One of the first reasons why people move and create float sovereignty is because it yields no tangible consequences in their everyday life in its existing territorial context. Professor Dora (Theodora) Kostakopoulou, specialist in public policy, argues that sovereignty has become superficial: “Sovereignty has legitimized state power by linking authority, territory and population and creating congruence between the rulers and the ruled. It has successfully done so by being groundless and hollow.”<sup>12</sup> (She most probably agrees with me when I argue that this hollowness is due to the lack of the empowerment aspect in state action.) She says that the correlation between sovereignty and state is so marginal that it fails to nail down sovereignty territorially or institutionally. Thus, it acquires a “floating character.”<sup>13</sup> Kostakopoulou also argues that: “The thin relation between sovereignty and the state, on the other hand, implies that sovereignty is neither necessary for the evolution of the state nor constitutive of its existence.”<sup>14</sup> Authoritarian and colonial state structures seem to fall into this category. She further concludes by saying that: “The world order is no longer intelligible on the basis of Hobbesian realism and sovereignty can no longer exhaust the *raison d’être* of the democratic state. The relativization of sovereignty involves the acceptance of its float-

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<sup>12</sup> Dora Kostakopoulou, “Floating Sovereignty: A Pathology or a Necessary Means of State Evolution?” *Oxford Journal of Legal Studies* 22, no. 1 (2002), p. 147.

<sup>13</sup> *Op. cit.*, p. 148.

<sup>14</sup> *Op. cit.*, p. 149.

ing nature.”<sup>15</sup> We can add to this that this floating nature means that there is a lack of structures or institutions to which it can adhere. This gives an opening to any feudalistic structure pretending to be an entity capable of providing empowerment.

Jürgen Habermas, the German philosopher and social theorist, also substantiates the float aspects of sovereignty and how “international civil society” penetration can happen. For his part, he argues that citizen autonomy, the float aspects of it, should be one of the fundamental characteristics of any civil society and political community. We can interpret his arguments as saying that the laws and institutions should reflect the wishes of the people (popular sovereignty) at any given moment: “*These laws draw their legitimacy from a legislative procedure based for its part on the principle of popular sovereignty. The paradoxical emergence of legitimacy out of legality must be explained by means of the rights that secure for citizens the exercise of their political autonomy.*”<sup>16</sup> He later mentions that the citizens need to “*actualize their autonomy,*” meaning that the retention of sovereignty is compulsory before “renewed” adherence can happen.<sup>17</sup>

Another specialist on state structure and public policy, Jayan Nayar, explains that sovereignty as a base element that regulates state-society is not functioning: “*We observe that at the root of the crisis of sovereignty, and of the sovereign subject, is a perceived betrayal, an abandonment even, of ‘man,’ as ‘subject,’ as the ontological originary figure of Eurocentric Enlightenment mythology. Central to this crisis of the ‘subject’ is the realization that the state, as the bounded expression of sovereign will, appears to be neither the protective, emancipative receptacle vehicle for Man’s historical march toward the future, nor the supreme actor in defining the actualities of global sociopolitical and legal relations.*”<sup>18</sup> He also points out the persistent realities of “porosity.”<sup>19</sup> This porosity means the international feudal entities can make their entry and create a myth

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<sup>15</sup> *Op. cit.*, p. 156.

<sup>16</sup> Jürgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (Cambridge: MIT Press, 1996), p. 83.

<sup>17</sup> *Op. cit.*, p. 126.

<sup>18</sup> Jayan Nayar, “On the Elusive Subject of Sovereignty,” *Alternatives: Global, Local, Political* 39, no. 2 (2014), p. 125.

<sup>19</sup> *Op. cit.*, p. 125.

of self-legitimation. Jürgen Habermas would agree to this when he argues: “*Proceduralized popular sovereignty and a political system tied into the peripheral networks of the political public sphere go together with the image of a decentered society.*”<sup>20</sup> Sovereignty is no longer synonymous with the all-encompassing state. There is a noticeable decoupling between state and society. Without empowerment, the state loses all its monopolistic legitimation over the society that it pretends to serve.

This failure is probably since, in line with the arguments proposed by Habermas, there is simply not enough democratically and morally legitimated institutional framework or infrastructure to host the sovereignty. “*A popular sovereignty that is internally laced with individual liberties is interlaced a second time with governmental power, and in such a way that the principle that ‘all governmental authority derives from the people’ is realized through the communicative presuppositions and procedures of an institutionally differentiated opinion and will-formation.*”<sup>21</sup> The territory-population-state equation on which classical sovereignty is defined upon is no longer possible because there is not enough structure to receive it or host it. This is what Raf Geenens, from the Catholic University of Leuven, explains: “*So the perspective of sovereignty cannot be assumed as a given. The presence of this perspective is conditional: it depends on whether the necessary infrastructure is in place to sustain this perspective.*”<sup>22</sup> This deficiency might not be readily noticeable in developed countries like Austria or Germany, but it is very much present in many other countries in Europe and across the globe. As we will see, this institutional deficiency provides opportunity to parasitic and feudal entities to immerse themselves into the sovereignty calculus.

There are two noticeable consequences of this structure. The three-part segmentation clearly builds a channel (or a bridge) between the host and the root territories and it clearly establishes an extra-territorial aspect to natural sovereignty. This evolution further influences and distinguishes the territorial status of citizens – the world is composed of citizens that totally abandon their sovereignty and those who partially abandon it. As we saw earlier, the partial abandonment of sovereignty

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<sup>20</sup> *Op. cit.*, p. 298.

<sup>21</sup> *Ibid.*

<sup>22</sup> Raf Geenens, “Sovereignty as Autonomy,” *Law and Philosophy* 36, no. 5 (2017), p. 505.

comes with uncertainties. Most citizens would rather have stability and hold zero sovereignty. But this said, partial retention of natural sovereignty provides a degree of structural autonomy, where the individual becomes the citizen of the “floating” realm. The contexts are different. In the case of the sedentary citizen, the state, to a degree, becomes a feudal lord while the context of the citizen in movement is of greater autonomy and liberty. Thus, international relations and the intercourse between nations are composed of two types of spheres, constrained and relatively unconstrained. This distinction is significant because the “relatively unconstrained sphere” is more sensitive to changes in the global order or issues pertaining to it than the “constrained sphere,” simply because any change in the “floating” sphere will have an impact on its status and its ability to project its action. The so-called national democracies will be dominated by two distinctive orientations, one local and one global. Both can create systemic disruptions giving a possibly greater role for international feudal elements in these national democracies.

The main part of the floating elements is diasporas, persecuted communities, but increasingly there is an addition of socially displaced or rejected individuals, “marginals.” The gender questions and sexual orientation debates have brought women rights groups and the LGBTQ communities to acquire the same format as the float community. The main reason is that they refuse to legitimize a system that persecutes, discriminates and disregards them in general. These communities’ sovereignty is therefore displaced to the float sphere, although with some reservation. Women and LGBTQ communities can be victims of abuse but that does not mean that they themselves are not abusers toward foreigners and so forth. During the last decade, the Anglo-Saxons have come in support of LGBTQ, gender issues and human rights. And there is a good reason for this. All three elements contribute to the enlargement of the float sphere, underlining the strategic aspect of it.

Until the 1990s, the nation-state’s control or grip on national sovereignty was relatively well consolidated, although the hegemony of the American culture was quietly creeping from the margins into the core. National identifications were positive and non-discriminatory, everyone was proud of their origins, and loyalty to national institutions followed the same lines. Since the administration of President Bill Clinton in the United States and the premiership of Tony Blair in Britain, things have begun to change. During the Cold War, the consolidation of national

sovereignty was seen as a necessity in the fight against Soviet Russia, but after the fall of the Berlin Wall things took a different turn. This time, a different kind of communism invaded the West, where consolidated national elements were seen and portrayed as anathema; society and social bonds became the ultimate evil. The new trend proclaimed democracy, human rights, and libertarianism as the core principles of a new ethic. National societies had to be defeated in a constant war of attrition to create a new morality that would be borderless and global. But this borderless sovereignty and morality could also make civilization impossible, plunging us into a new Middle Ages and leaving feudalism as the only option.

For the next few decades, this trend de-consolidated much of national sovereignty and created considerable disorientation in the West, the birthplace of the concept of the “nation-state.” By priming nation-state over civilization, Europe had lost its larger protective crust. If the nation-state falls, structurally all will come crashing down. In a civilizational state, there is place for everyone, allowing an unhindered movement of people, goods, capital and especially ideas. The main advantage of a civilizational state is that it keeps discrimination and feudal tendencies to a minimum. And in terms of the political community, there is equality of all ethnicities and nations nested within the civilizational perimeters.

Disorientation has a devastating effect on nation-states. They are built on a clearly defined and regularly reaffirmed “national” identity, culture, and interests. These three elements can be great engines of cohesion and consensus-building, but they can also easily degenerate into confusion, contestation, and conflict. In moments of disorientation, the nation-state seems to move toward the lowest common denominator, leaving many on the outside. In short, this leads to a myriad of silent and isolated civil wars on any given day. There is restlessness and clashes between individuals, communities, and cultures. This disintegration can also happen when the state structure is conquered by predatory communities and loses its neutral position as arbiter between all social actors. In this way, the state becomes a participant in an almost volcanic state-society turmoil. All this will result in weak borders, loss of real state stature and fractured sovereignty. Thus, cooperative environments are nudged and pushed into adversarial and then into becoming conflictual environments.

The renowned Israeli sociologist Shmuel Noah Eisenstadt explained how a worldwide phenomenon could slowly grow from the loosening up of civilizations and large-scale geographical entities:

“The common core of these processes was the growing dissociation of major social, economic, political, family and gender roles, organizations, and relations from the hitherto broader macro formations, especially from the hegemonic formations of the nation and revolutionary states, and from the broad ‘classical’ class relations; the development of multiple networks and clusters which cut across many organizations and ‘societies’ a growing dissociation between political centers and the major social and cultural collectivities.”<sup>23</sup>

What he describes as “growing dissociation” can also be interpreted as “disaffection” in much of the world. A good example is India, where a very few can fit into a narrowly defined frame. As the 19<sup>th</sup> century British philosopher David Hume wrote: “*The mind is a kind of theatre, where several perceptions successively make their appearance; pass, re-pass, glide away, and mingle in an infinite variety of postures and situations. There is properly no simplicity in it at one time, nor identity in different; whatever natural propension we may have to imagine that simplicity and identity.*”<sup>24</sup> It is almost impossible to squeeze a rich and diverse civilization into nationalism, a return to identities frozen in time.

As Shmuel Noah Eisenstadt further explains:

“Although there arose in India small and large states and semi-imperial centers, there did not develop any single state with which the cultural tradition was identified. Classical Indian religious thought did of course have a lot to say about the problem of policy, about the behavior of princes, and the duties and rights of subjects. But, to a much higher degree than that in many other historical civilizations, politics was viewed in secular terms, which emphasized its distance from the ideological center of the civilization, its traditions, and

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<sup>23</sup> S. N. Eisenstadt, “The Reconstitution of Collective Identities and Inter-Civilizational Relations in the Age of Globalization,” *The Canadian Journal of Sociology* 32, no. 1 (2007), p. 114.

<sup>24</sup> David Hume, *A Treatise of Human Nature* (Oxford: Clarendon Press, 1888), p. 253.

identity. This fact gave Indian civilization its internal strength and explained its capacity to survive under alien rule.”<sup>25</sup>

Now the situation seems to be more problematic. Disaffection will become generalized, and if there is no other local receptacle to host and secure these disaffected elements of sovereignty, they will be sensitive to exogenous entrapment strategies from feudalistic entities.

Globalization is not only about international trade, but also about how people live and relate to each other. In the world system described by Fernand Braudel, we witnessed a world of inter-mingling through juxtaposition, with slow and prolonged adaptation.<sup>26</sup> The globalization after 1945 is different in that whole scale changes are sweeping fast and deep. As Eisenstadt describes it: “*The contemporary era, often described as the era of globalization, is characterized by far-reaching changes in the constitution of nation-states and in the constitution of collective identities and inter-civilizational relations.*”<sup>27</sup> If the nation-states understand the new evolutions of sovereignty and its relation to empowerment, then there is a chance that the United Nations will indirectly become more resilient. If things go in the opposite direction, then the increased resilience of national and international feudalism will dictate the place of the UN in global politics. The uniqueness of feudalism is that it does not believe in institutional morality. It has its own references and oriented morality, which keeps changing according to the needs of the leaders in the feudal domain. It is therefore very important to understand the function and place of morality in global governance.

## **Part II: The global system of morality and its evolution**

The international system is often presented as anarchic, devoid of rules or any codes of conduct. The argument goes that in the absence of a rules-based international system the national interest becomes the dominant factor. As David Jayne Hill wrote: “We have grown accus-

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<sup>25</sup> S. N. Eisenstadt, *Revolution and the Transformation of Societies: A Comparative Study of Civilizations* (New York: Free Press, 1978), p. 117.

<sup>26</sup> Fernand Braudel, *Civilization and Capitalism – 15th-18th Century – The Wheels of Commerce* (London: William Collins Sons & Co Ltd., 1983), Vol. II, pp. 114-117.

<sup>27</sup> “The Reconstitution of Collective Identities ...,” *op. cit.*, p. 113.

tomed to the statement that international law, since it lacks an effective sanction, is in reality not law in any true and proper sense, but merely a code of ethics.”<sup>28</sup> This perception of laws upholding the good conduct of relations between nations is in my opinion misconstrued when it is compared to reality. It is similar to attributing order within the nation-state to the existence of a legal system. The reality is that in both contexts, national and international, the behavior of individuals and nations is governed by “socialized morality,” as a system of “self-restraint.” Until and unless we recognize this fact it will be difficult to understand the channels through which New Feudalism is seeping through at all levels. Like individuals, countries in the global system are “socialized” to restrain themselves from actions considered unworthy of civil and civilizational behavior. It is on this aspect of restraint that the new feudalism is battling its way in. It does not break national laws or international norms; it creates confusion on the nature and place of self-restraint. Laws need to be enforced by a system of overwhelming violence. Morality on the other hand has the advantage of being self-enforcing, it is based on self-restraint. In this manner, new feudalism purports to create a new system of morality at national and international levels.

Let us see how the notion of international morality evolved before succumbing to the power of new feudalism. Most of the experts on international morality take the individual as the point of departure. As regards the aggregation of groups of individuals at various levels – up to the global community – there can be a vast range of intermediary levels. But the main question and often contention is how do we link the various levels together. Some argue that from the individual to the nation-state level there should be one kind of consolidation and beyond that another kind of consolidation, and that the structure of morality should follow the same pattern. Most of the time, the reasons given look arbitrary because there appears to be a sudden break in the outward aggregative process, which is characterized by a process of confluence. In the evolution of international morality, the sudden breaks and disruptions in this confluence create arbitrariness, discrimination, and ambiguity. Most of the experts directly or indirectly point to the

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<sup>28</sup> David Jayne Hill, “International Morality,” *The North American Review* 201, no. 715 (1915), p. 853.

interruption in the socializing aspects of aggregation that leads to a dysfunctionality in the creation of morality at the global level.

Thomas Hobbes, the English philosopher, argues that morality does not come naturally; it must be fostered by force. He argues that moral restraint is not a given in free men. He says relations by nature are conflictual:

“To this war of every man against every man, this also is consequent; that nothing can be unjust. The notions of right and wrong, justice and injustice, have there no place. Where there is no common power, there is no law; where no law, no injustice. Force and fraud are in war the two cardinal virtues. Justice and injustice are none of the faculties neither of the body nor mind. If they were, they might be in a man that were alone in the world, as well as his senses and passions.”<sup>29</sup>

He does not even allow for the possibility that morality can result from socializing. He argues that cultures and customs differ, making it impossible to have stable common denominators:

“Good and evil are names that signify our appetites and aversions, which in different tempers, customs, and doctrines of men are different: and diverse men differ not only in their judgement on the senses of what is pleasant and unpleasant to the taste, smell, hearing, touch, and sight; but also of what is comfortable or disagreeable to reason in the actions of common life.”<sup>30</sup>

In this chaotic and conflictual pattern of relations the only guarantee of good conduct is to have a strong (absolute) sovereign power which will make laws that impose a certain conduct in public life:

“For the differences of private men, to declare what is equity, what is justice, and is moral virtue, and to make them binding, there is need of the ordinances of sovereign power, and punishments to be

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<sup>29</sup> Thomas Hobbes, *Leviathan* (London: Andrew Crooke, 1651), p. 79.

<sup>30</sup> *Op. cit.*, pp. 97-98.

ordained for such as shall break them; which ordinances are therefore part of the civil law.”<sup>31</sup>

Hobbes considers that it is an illusion to think that there can be morality without laws backed by force or overwhelming violence.<sup>32</sup>

In essence, what Hobbes wants to provoke in the individual is obedience and not the moral sense of restraint of which he says that it does not exist. In other words, the results of moral behavior are uncertain while those of laws and obedience are certain. His position makes logical sense but is poor on detail; he rubbishes others for not being empirical, but he remains very theoretical in his arguments. If fear of punishment leads to obedience, then fear can also be instilled by other bodies than the absolute sovereign. God, family, friends are few that one can fear punishment from. Moreover, some may be willing to break laws to protect their families, gods, and friends. Obeisance to law is not that certain since laws are often broken or circumvented, at times even by those who make them. It is impossible to put a policeman behind each citizen. In comparison, restraint does not need the burden of an overwhelming force behind each action. It is built into one’s behavior, it is socialized.

The Dutch humanist Hugo Grotius is of this opinion. He sees human conduct as a continuous aggregation built on an outward motion. Moving from one level to another level of aggregation of moral conduct, built on the existing human behavior is an incremental process of socialization, leading to an equation where the moral conduct of a nation is in concordance with that of the individual within that nation. Projected on to the global level, the same process applies. Grotius puts it in the following way:

“As nations are but larger aggregations of individuals, each with its own corporate coherence, the accidents of geographic boundary do not obliterate that human demand for justice which springs from the nature of man as a moral being. There is, therefore, as a fundamental bond of human societies, a Natural Law, which, when

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<sup>31</sup> Thomas Hobbes, *Leviathan* (London: Andrew Crooke, 1651), p. 164.

<sup>32</sup> *Op. cit.*, p. 418.

properly apprehended, is perceived to be the expression and dictate of right reason.”<sup>33</sup>

By definition, state structures cannot have morality of their own, they embody that of a state’s people.<sup>34</sup> The morality of the state is not that of individuals collectively, but it is that which transcends it to become the morality of public good.<sup>35</sup> The public good comes through across our everyday action and conduct. It is here that we must constantly be vigilant to make the right decision. Morality is this vigilance: “For in the moral world the nature of things is known from their operations.”<sup>36</sup> Sometimes the choice between good and bad is operationalized as a choice between action and restraint.<sup>37</sup> Furthermore, in contradiction to Hobbes, Grotius argues that: “On some occasions when it is said, that men may lawfully do a thing, the expression only means that doing such act will not subject them to human and legal penalties, but it by no means indicates that the action is strictly conformable to the rule of religion and morality.”<sup>38</sup> His argument is simple and clear: since all human beings are moral beings, the international environment is propitious for moral action and restraint.

Arthur Ponsonby (1871-1946), a member of the British Parliament and moralist, thinks that moral restraint is a reality that has often been overlooked. He wrote the following at the start of WWI: “A moral sense rests in the state somewhere. The question is how it can be reached, in what way can it be influenced and stimulated, and how may it be made to respond to its equivalent in other states.”<sup>39</sup> As a pertinent observer of his times, Ponsonby argues that there was exponential increase of socialization between people due to technology but at the same time there was a process of centralization by states in the opposite direction, creating dysfunctionality in the moral connectivity: “But, side by side

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<sup>33</sup> Hugo Grotius, *The Rights of War and Peace: Including the Law of Nature and of Nations*. Trans. A. C. Campbell (New York: M. Walter Dunne, 1901), p. 10.

<sup>34</sup> *Op. cit.*, p. 11.

<sup>35</sup> *Op. cit.*, p. 20.

<sup>36</sup> *Op. cit.*, p. 72.

<sup>37</sup> *Op. cit.*, p. 278.

<sup>38</sup> *Op. cit.*, p. 324.

<sup>39</sup> Arthur Ponsonby, “International Morality,” *International Journal of Ethics* 25, no. 2 (1915), p. 144.

with this, there has been no change whatever in the methods of diplomacy or in the means adopted, even in the most democratically-governed countries, to make a nation articulate.”<sup>40</sup> Arthur Ponsonby argues that this dislocation is structurally leading to a moral catastrophe: “The protest against this growing inconsistency and want of sympathy between voice and sentiment has been feeble, and confined to the few who foresaw the dangers that might arise from it.”<sup>41</sup> In short, Ponsonby argues that the crisis of morality manifests itself when governments refuse to articulate the morality of their citizens. Wars are allowed to happen because there is a moral dislocation between people and their governments.<sup>42</sup> Similar to Hugo Grotius, Ponsonby argues:

“Even if international morality is different from individual morality, the difference is one of degree, not of quality, because it is founded on the moral sense of a body of individuals, and, in proportion as that moral sense progresses and develops in the process of civilization, the corporate morality must in turn progress, more slowly, perhaps, owing to the difficulty of its finding proper means of expressing itself.”<sup>43</sup>

He believes that greater interaction between people and nations will lead to resilience of morality at the global level.

Hans Joachim Morgenthau, a German-American jurist and political scientist who holds a prominent place in the study of international relations, has an interesting explanation on morality and its evolution. Morgenthau is firmly in the camp of Thomas Hobbes and his perception of an anarchical international environment: “International politics can be defined as a continuing effort to maintain and to increase the power of one’s own nation and to keep in check or reduce the power of other nations.”<sup>44</sup> However, he also agrees with both Grotius and Ponsonby that socialization and civilization can give primacy to morality and restraint: “Such removals are still as desirable and feasible as they always

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<sup>40</sup> *Op. cit.*, p. 145.

<sup>41</sup> *Op. cit.*, pp. 145-146.

<sup>42</sup> *Op. cit.*, pp. 160-161.

<sup>43</sup> *Op. cit.*, p. 162.

<sup>44</sup> Hans J. Morgenthau, “The Twilight of International Morality,” *Ethics* 58, no. 2 (1948), p. 80.

were. What has changed is the influence of civilization which makes what is desirable and feasible ethically reprehensible and, hence, normally impossible of execution.”<sup>45</sup> This said, he sees the advent of liberal democracy as the main obstacle to it. He says that it takes us back to the Hobbesian jungle of everything goes.

When compared to 20<sup>th</sup> century diplomacy, Morgenthau thinks that the centuries before were much more successful, one big reason being that a moral system was created by the socialization of the elites in most regions of the world, especially in Europe. He goes far in his explanations starting with the Romans. He explains that the Romans did not hesitate to physically eliminate Carthage, without referring to any morality or restraint:

“... Cato would end his every speech by proclaiming: ‘*Ceterum censeo Carthaginem esse delendam*’ (‘As for the rest, I am of the opinion that Carthage must be destroyed’). With her destruction, the Carthaginian problem, as seen by Rome, was solved forever, and no threat to Rome’s security and ambition was ever again to rise from that desolate place that once was Carthage.”<sup>46</sup>

From then onwards, Morgenthau explains, there was a “tendency toward the humanization of warfare (...). The International Red Cross is both the symbol and the outstanding institutional realization of those moral convictions.”<sup>47</sup> What is important to understand is that moral restraint was built into relations even during war.<sup>48</sup>

Writing in 1948, a few years after WWII, Morgenthau suggests that the build-up of ethical and moral restraint came crumbling in the 20<sup>th</sup> century. Two things have changed. Firstly, technology is increasingly making the perimeters of the battlefield disappear: “Thus the character of modern war, drawing its weapons from a vast industrial machine, blurs the distinction between soldier and civilian.”<sup>49</sup> Secondly, all wars very quickly become total wars: “... there are, however, factors in the pres-

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<sup>45</sup> *Op. cit.*, p. 81.

<sup>46</sup> *Op. cit.*, p. 82.

<sup>47</sup> *Op. cit.*, pp. 83-84.

<sup>48</sup> *Op. cit.*, pp. 84-85.

<sup>49</sup> *Op. cit.*, p. 85.

ent condition of mankind which point toward a definite weakening of those moral limitations.”<sup>50</sup> This is the result of two evolutions according to Morgenthau. The first is “substitution of democratic for aristocratic responsibility in foreign affairs,” and the second is the “substitution of nationalistic standards of action for universal ones.”<sup>51</sup> In other words, the aristocratic elite, across Europe, socialized while the democratically elected elite did not necessarily do so. This has an immediate impact on the capacity of restraint.<sup>52</sup> He makes it crystal clear: “In one word, this transformation within the individual nations changed international morality as a system of moral restraints from a reality into a mere figure of speech.”<sup>53</sup> In democracies, personal responsibility is not readily identifiable. In a government where aristocrats dominate, individual moral conscience and responsibility for conduct can be identified. Morgenthau has no qualms in declaring that: “While the democratic selection and responsibility of the government officials destroyed international morality as an effective system of restraints, nationalism destroyed the international society itself within which that morality had operated.”<sup>54</sup> For him it becomes clear that it is not national interests that stop the creation and maintenance of international morality; it is democracy and nationalism. Paradoxically, both destroy the instinct of human association.<sup>55</sup>

William Ritchie Sorley, the Scottish philosopher and educationist, diverges from Morgenthau in the sense that he argues that there is no equality among the actors in the international system. Some members of the international society are stronger than others, and this might not be a bad thing, he suggests: “Powerful nations are not unused to playing the part of mentor to their neighbors; and advice given in this way by a powerful state has commonly been found to end in some sacrifice of independence or integrity on the part of its weaker neighbor.”<sup>56</sup>

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<sup>50</sup> *Ibid.*

<sup>51</sup> *Op. cit.*, p. 88.

<sup>52</sup> *Ibid.*

<sup>53</sup> *Op. cit.*, p. 91.

<sup>54</sup> *Op. cit.*, p. 93.

<sup>55</sup> G. P. Gooch, *Studies In Diplomacy and Statecraft* (London: Longmans, Green & Co., 1942), p.300.

<sup>56</sup> W. R. Sorley, “The Morality of Nations,” *International Journal of Ethics* 1, no. 4 (1891), p. 441.

Sorley also argues that self-interest can push states toward mutual trust.<sup>57</sup> Furthermore, he argues that a group of nations can join hands to restrain a powerful and aggressive state from fulfilling its ambitions. This for him is proof of the existence of international morality, however partial it might be.<sup>58</sup> Sorley's idea that a hegemonic power should find ways to mentor lesser nations into a moral system is interesting. He suggests that major powers must be proactive in laying the foundation of a morally enhanced global community of nations. This is a valid idea because it concurs with the civilizational functions. It was exactly what the Indian empires did in Asia, Indo-Europe, and East Africa. His analysis however has a weakness. He does not explore the possibility that hegemonic powers might not always be altruistic and universalist in their outlook. Hegemonic powers can simply have the same ethic as any other "uncivilized" nation. In 1917, when it entered the Great War, the United States was not considered as a lead civilization, but it managed to topple the European hegemonic rule over the world, stressing that colonial ethic was not the appropriate moral foundation for a new global society. It promised to liberate oppressed peoples from morally corrupt empires. The history of the 20<sup>th</sup> century, and probably the 21<sup>st</sup>, is about keeping this promise. However, the main moral dilemma seems to come from the need to enhance one's own national interest and at the same time protect that of the others.

Writing in 1932, Frederick L. Schuman thought that this dilemma does not really exist because the U.S. is advancing its national interests behind a façade of do-goodism.<sup>59</sup> However, he goes on to saying that the dilemma is not exclusive to the United States; it is felt across the Western state system: "The means to the ends achieve only successive frustrations because the ends are envisaged in exclusive national terms in an interdependent and integrated world in which these ends can be successfully served only when they are envisaged as parts of a greater whole."<sup>60</sup> Schuman argues that the dilemma between the pursuit of the national interest and the strengthening of international institutions lies at the heart of the "whole problem of an international morality."

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<sup>57</sup> *Op. cit.*, p. 443.

<sup>58</sup> *Op. cit.*, p. 445.

<sup>59</sup> Frederick L. Schuman, "The United States and International Morality," *International Journal of Ethics* 43, no. 1 (1932), p. 3.

<sup>60</sup> *Op. cit.*, pp. 3-4.

He says that the result is a selfish and competitive environment.<sup>61</sup> The global community can build a global network of institutions but is not able to operate them efficiently because there is a lack of international morality. Seen from this perspective, with the creation of the United Nations, humanity hoped that we were close to having a global moral community, but the expectations were not fulfilled.

One reason could be that the United States who was the main initiator of the process did not use its dominant position to achieve this goal. Even during the existence of the League of Nations, the United States was obstructionist.<sup>62</sup> Schuman seems to suggest that the U.S. suffers from a structural problem because in most cases it is unable to handle the earlier mentioned dilemma. He concludes: "That an international morality demands the abandonment of competitive imperialistic aggrandizement in the service of selfish profit-and-power interests is a truism too obvious to require demonstration."<sup>63</sup> Over the 20<sup>th</sup> century, the United States as the main hegemonic power had the resources and countless opportunities to create the basis for a system of international morality, but it chose not to.<sup>64</sup> Schuman thinks that instead of grand plans for change, one should promote a process of gradual change towards "moralizing' the world-society through a progressive transformation of values and ideologies which will make the common good the good of each in place of the traditional standards which pretend that the pursuit by each of selfish individual goods can serve the whole."<sup>65</sup> Through his reasoning Schuman gives us a good insight into how international morality may be created in the future.

A group of strong states has been unable to create it, and even the most powerful hegemon is unwilling to commit itself to it. So, the question is, who will fill the gap. And what kind of morality will it be? To answer these questions, we must turn to the process of globalization, which opened the floodgates to changes in the way we see sovereignty and morality. This process allowed the hidden force in the Western state system – feudalism – to become a generalized phenomenon, imposing

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<sup>61</sup> *Op. cit.*, p. 4.

<sup>62</sup> *Op. cit.*, p. 9.

<sup>63</sup> *Op. cit.*, p. 10.

<sup>64</sup> *Op. cit.*, p. 18.

<sup>65</sup> *Op. cit.*, p. 19.

a new morality in competition with that of nation-states and the United Nations.

### **Part III: The new feudal lords in the international system**

Globalization is often presented as an opportunity, but it could as well be seen as an ambiguous phenomenon. My purpose here is not to take sides, but rather to contextualize globalization in the development of the Westphalian state system. Until the 1990s, with the end of the bipolar structure of international relations, the Westphalian principles were meant to maintain the primacy of the territorial state. At regular intervals and in the course of major crises, the model was reformed and refined to keep in pace with European and universal human enlightenment. The search for better governance never questioned the central position or authority of the state. The advent of the United Nations did not change this approach. The UN was the extension of the same principle, meaning that the UN-backed institutions have primacy over all others as far as global relations and interactions are concerned. Fundamentally speaking, the Westphalian state system and the United Nations were structured to reinforce each other. Consequently, any process that purported to weaken the Westphalian system would inevitably weaken the United Nations system at the global level.

Globalization soon became an intrusion and an element of disruption for both. It disrupted the dialectic of reform and progress in both the Westphalian state and the United Nations. In short, it was an attack on institutional order at the national and international levels. The development seems to be aimed at weakening sovereignty by disorientation, splinter it and then transform it to new structures. On the surface, all these structures look disconnected and anarchical, but they could also be part of a subterranean layer of a hegemonic grand strategy aimed at replacing the global institutional framework without pulling it down. The aim seems to be to domesticate state institutions so that they do what the superstructure wants them to do. Most were fooled into thinking that globalization was about economic integration only, but it turned out to be much more than that.

In his address to a Joint Session of Congress and the American People on 20 September 2001, President George W. Bush declared: “And we

will pursue nations that provide aid or haven to terrorism. Every nation, in every region, now has a decision to make. Either you are with us, or you are with the terrorists. From this day forward, any nation that continues to harbor or support terrorism will be regarded by the United States as a hostile regime.”<sup>66</sup> Reacting to this, Michael J. Boyle wrote: “The declaration of a global war on terror in the aftermath of the attacks of 11 September 2001 constituted the single most ambitious re-ordering of America’s foreign policy objectives since the Second World War. Alongside this re-evaluation of foreign policy priorities came a stark warning to the rest of the world.”<sup>67</sup> Prioritizing American national security over the security concerns of all other states was a direct attack on the construction of the Westphalian state system. In one stroke, the centrality of national sovereignty and sovereign equality of states was brushed aside. The United States was empowering itself to interfere in any state in any way it wishes. The war on Iraq (2003) was a perfect illustration of this new international “morality.” In Europe, this also meant that the U.S. had primacy over sovereignty of countries in that region. Michael Brenner explains how citizens were dragged to Guantanamo by the U.S.: “In Germany, as we have learned, the Chancellery and the Interior Ministry were complicit in the rendition of German citizens/nationals and resisted accepting their release when innocence was established.”<sup>68</sup> Even more concerning was that the “war on terror” catapulted mercenaries on both sides (along U.S. forces or as terrorists) into a central role, further destabilizing the Westphalian system. The fundamental element of state authority – the monopoly of violence – was no longer a privilege of the state; it became externalized. What the strategy of the “war on terror” did was to fracture the shell, the strong outer casing of state systems everywhere. Once the shell crumbles, all types of parasitic elements can seep into the inner structure.

On the surface, the new international feudalism presents itself as benevolent, but the reality is much darker and complex. It is a well-organized crusade against established institutions and traditional instances

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<sup>66</sup> Office of the Press Secretary, *Address to a Joint Session of Congress and the American People*, 2001.

<sup>67</sup> Michael J. Boyle, “The War on Terror in American Grand Strategy,” *International Affairs* 84, no. 2 (2008), p. 191.

<sup>68</sup> Michael Brenner, “The ‘War on Terror,’” in *Toward a More Independent Europe* (Egmont Institute, 2007), p. 26.

of authority and order. The strategy is to castigate and draw a shadow of doubt over these institutions and to transform them into centers of conflict and contestation. The legitimacy of these traditional bodies of authority is eroded or quite simply negated. The United Nations – as organization at the pinnacle of the established institutional order – is the ultimate victim of this process of de-legitimization. A myriad of non-state organizations is created for this purpose. Their primary function is to disestablish institutions of the legal realm of the targeted states and intergovernmental organizations. These groups use huge sums of money to change the momentum and tip the balance in their favor, both nationally and internationally. Their purpose is to create anti-state narratives. The message is then relayed onto transnational media platforms intended to empower socio-cultural transformation. The main problem is that special interest groups are increasingly hijacking international dialogue, the state process, and civil society, trying to assume the position of schoolmaster and distribute points.<sup>69</sup> Their actions appear intended to create a new “feudal morality” at the global level, aimed at appropriating sovereignty.

## Conclusion

The UN privileges state actors because it gives priority to the established institutional order. It is based on a top-down process while the nation-state is rooted in a bottom-up process. This structural set-up provides the international system with much needed legitimation. As the world went through ever more integration, individualism got a technological reinforcement, and nation-states were weakened. A new international feudalism is emerging, putting in danger the existence of well-entrenched international institutions. Today, feudalism is recreated in the form of capitalism, and it has increasingly become a global phenomenon. The feudal upsurge creates disorientation, deconsolidates sovereignty and loyalty towards the established authority. This obviously contributes to the defiscalization of the Westphalian state as an economic model. The state is ever less able to finance change and provide empowerment. Liberalism and international feudalism seem to

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<sup>69</sup> Jana Puglierin and Pawel Zerka, “European Sovereignty Index – European Council on Foreign Relations,” *ECFR*, 8 June 2022.

go hand in hand in undermining the sovereign structure of the Westphalian state. This is also reflected in the erosion of the authority of world institutions like the United Nations. It was thought that in the absence of law, morality of some kind would dictate the conduct of states. However, dislocation of sovereignty inevitably reduces the ability to control one's destiny.



Alfred de Zayas

## **Unilateral Coercive Measures in the Light of International Law**

The UN General Assembly and the UN Human Rights Council, the UN Special Rapporteur on Unilateral Coercive Measures, the Special Rapporteur on international solidarity, and the Special Rapporteur on the right to development have explained why and how unilateral coercive measures (UCMs) contravene the UN Charter, customary international law, the sovereign equality of States, the right of self-determination of peoples, the UN prohibition of the use of force, the prohibition of interference in the internal affairs of States, as well as numerous treaties that codify *inter alia* the right to life, food, water, shelter, health, education, development, privacy and property.

Demonstrably, UCMs violate free trade agreements, principles of freedom of trade and freedom of navigation, numerous resolutions of the UN General Assembly, including the 1965 Declaration on the Inadmissibility of Interference in the Internal Affairs of States,<sup>1</sup> the 1970 Friendly Relations Resolution,<sup>2</sup> Resolution 3281 (XXIX), in particular article 32 thereof, “no State may use or encourage the use of economic, political or any other type of measures to coerce another State in order to obtain

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<sup>1</sup> UN General Assembly, Resolution 2131 (XX): “Declaration on the Inadmissibility of Intervention and Interference in the Internal and External Affairs of States,” UN General Assembly, Resolution 2131 (XX), accessed at [https://legal.un.org/avl/pdf/ha/ga\\_2131-xx/ga\\_2131-xx\\_e.pdf](https://legal.un.org/avl/pdf/ha/ga_2131-xx/ga_2131-xx_e.pdf).

<sup>2</sup> UN General Assembly Resolution 2625 (XXV), “Declaration on the Inadmissibility of Intervention and Interference in the Internal Affairs of States” (accessed at <http://un-documents.net/a25r2625.htm>). “No State or group of States has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other State. Consequently, armed intervention and all other forms of interference or attempted threats against the personality of the State or against its political, economic and cultural elements, are in violation of international law.”

from it the subordination of the exercise of its sovereign rights and to secure from it advantages of any kind,”<sup>3</sup> and the Outcome Document of the 2005 General Assembly Summit.<sup>4</sup>

UCMs contravene the prohibition of “collective punishment” contained in the Hague and Geneva Conventions. As has been abundantly demonstrated: *UCMs kill*, just as much as live ammunition in armed conflict, because they dislocate the economies of States, resulting directly and indirectly in death through economic chaos, food insecurity, scarcity of medicines, and medical equipment. The deliberate economic and moral harm caused by UCMs raises many issues of State responsibility, both civil and penal. Indeed, they constitute prohibited “use of force” within the meaning of Article 2, Paragraph 4, of the UN Charter, and because of their lethal impacts, they can be seen as “crimes against humanity” for purposes of Article 7 of the Rome Statute.<sup>5</sup> Some have suggested because of their “intent” to “destroy in whole or in part,” they constitute a form of genocide under Article 2 (c) of the 1948 Genocide Convention, which specifically prohibits “deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part.”<sup>6</sup> That is precisely what UCMs do, and because the effects are predictable, the criminal intent or *mens rea* is imputable to the State imposing the UCMs. Moreover, UCMs and financial blockades cause the collapse of many enterprises, bankruptcies, and widespread unemployment, leading directly to mass-emigration, as has been the case in countries targeted by UCMs including Cuba,

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<sup>3</sup> UN General Assembly, Resolution 3281 (XXIX), accessed at [https://legal.un.org/avl/pdf/ha/cerds/cerds\\_ph\\_e.pdf](https://legal.un.org/avl/pdf/ha/cerds/cerds_ph_e.pdf).

<sup>4</sup> UN General Assembly, Resolution A/RES/60/1, “2005 World Summit Outcome” (accessed at [https://www.un.org/en/development/desa/population/migration/generalassembly/docs/globalcompact/A\\_RES\\_60\\_1.pdf](https://www.un.org/en/development/desa/population/migration/generalassembly/docs/globalcompact/A_RES_60_1.pdf)): “We rededicate ourselves to support all efforts to uphold the sovereign equality of all States, respect their territorial integrity and political independence, to refrain in our international relations from the threat or use of force, ... to uphold ... the right to self-determination of peoples ..., non-interference in the internal affairs of States ...”

<sup>5</sup> Rome Statute of the International Criminal Court, accessed at <https://www.icc-cpi.int/sites/default/files/RS-Eng.pdf>.

<sup>6</sup> “Convention on the Prevention and Punishment of the Crime of Genocide,” accessed at [https://www.un.org/en/genocideprevention/documents/atrocity-crimes/Doc.1\\_Convention%20on%20the%20Prevention%20and%20Punishment%20of%20the%20Crime%20of%20Genocide.pdf](https://www.un.org/en/genocideprevention/documents/atrocity-crimes/Doc.1_Convention%20on%20the%20Prevention%20and%20Punishment%20of%20the%20Crime%20of%20Genocide.pdf).

Nicaragua, Syria, and Venezuela.<sup>7</sup> These unregulated mass exoduses have also led to the deaths of thousands of desperate economic migrants.

Besides violating universal norms, UCMs also violate regional international law. Regarding UCMs aimed against Cuba, Nicaragua, and Venezuela, these undoubtedly contravene Articles 19 and 20 of the OAS Charter:

Article 19

*No State or group of States has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other State. The foregoing principle prohibits not only armed force but also any other form of interference or attempted threat against the personality of the State or against its political, economic, and cultural elements.*

Article 20

*No State may use or encourage the use of coercive measures of an economic or political character in order to force the sovereign will of another State and obtain from it advantages of any kind.*

The principle of non-intervention in the internal affairs of sovereign states and the right of self-determination of peoples are equally reaffirmed in Article 3 of the OAU Charter.<sup>8</sup>

Notwithstanding the above, the press and corporate media in Western States try to justify UCMs as legitimate measures to “persuade” governments to change some of their policies. It is particularly grotesque

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<sup>7</sup> “Por qué más sanciones no ayudarán a Venezuela,” *Foreign Policy*, January 12, 2018, accessed at <https://foreignpolicy.com/2018/01/12/por-que-mas-sanciones-no-ayudaran-a-venezuela/>; “The Impact of Syria-Related Resolutions on Economic Measures,” accessed at <https://assets.documentcloud.org/documents/3115191/Hum-Impact-of-Syria-Related-Res-EcoMeasures-26.pdf>; Patrick Cockburn, “US and EU sanctions are ruining ordinary Syrians’ lives, yet Bashar al-Assad hangs on to power,” *The Independent*, accessed at [www.independent.co.uk/voices/syria-syrian-war-us-eu-sanctions-bashar-al-assad-patrick-cockburna7350751.html](http://www.independent.co.uk/voices/syria-syrian-war-us-eu-sanctions-bashar-al-assad-patrick-cockburna7350751.html).

<sup>8</sup> “OAU Charter,” *Organization of African Unity*, 1963, accessed at [https://au.int/sites/default/files/treaties/7759-file-oau\\_charter\\_1963.pdf](https://au.int/sites/default/files/treaties/7759-file-oau_charter_1963.pdf).

that the governments that impose UCMs invoke alleged human rights violations in the countries concerned as a legitimate reason to “punish” them. However, government pronouncements in the U.S. and elsewhere show that the real purpose of the UCMs is to induce chaos with an expectation to achieve “regime change.”

To any objective observer, UCMs cause far more violations of human rights than they are supposed to correct. The medicine proves worse than the disease, *aegrescit medendo* (Vergilius, *Aeneid*). Indeed, many of the alleged violations of human rights in Cuba, Nicaragua, Syria, Venezuela can be addressed and alleviated through international humanitarian assistance accompanied by the provision of advisory services and technical assistance, which are offered by UNDP and the Office of the UN High Commissioner for Human Rights to those States that request it. None of the countries targeted by UCMs reject help from UN agencies. It is only necessary to organize and coordinate that assistance in the spirit of the UN Charter and international solidarity. The purpose of UCMs, however, is not to help improve the “human rights record” of the targeted States, but rather and unabashedly to provoke “colour revolutions” that will overthrow targeted governments and enable the installation of puppet regimes acceptable to the countries imposing the UCMs. Far from being “democratic,” these UCMs are yet another weapon in the neo-colonial arsenal of hegemonic countries.

Notwithstanding the normative toxicity of UCMs, their use has proliferated over the past twenty years, and government lawyers have waged a campaign to create the false impression that international law allows UCMs and that because so many Western states impose UCMs, a new “customary international law” has emerged that legitimizes these UCMs. This is not at all the case. As any first-year law student knows, no right arises from a wrong (*ex injuria jus non oritur*), but the Western media, think tanks and journalists financed by the military-industrial-financial-digital complex do not cease attempting to create a perception of legitimacy and even an emerging acceptability of UCMs.

It bears repeating that customary international law can only arise from continued state practice by most states, for a long period of time, combined with *opinio juris* and in the absence of persistent objectors. UCMs cannot emerge as legal, because the General Assembly and the Human Rights Council adopt with very large majorities yearly resolutions con-

demning UCMs. Obviously, a minority of Western States cannot impose new rules on the global majority.

What must be recognized is that violations of international law do not and cannot change international law. Even if hitherto the perpetrators have gone unpunished, the general principle of law of estoppel stipulates that from illegality no new legality can arise. What we conclude is that in the “collective West” there is a culture of impunity, which the world does not accept but must endure, because there are no effective UN enforcement mechanisms.

This is why the General Assembly, which already adopts anti-UCM resolutions with more than two-thirds majority, should elevate the question of the illegality of UCMs to the International Court of Justice pursuant to Article 96 of the UN Charter and request an advisory opinion on several legal questions, *inter alia*:

1. What international treaties are breached by UCMs?
2. What general principles of law and customary international norms apply?
3. What are the legal consequences of the extra-territorial application of domestic laws and regulations?
4. Which UCMs, if any, could be considered legal “retorsion” or “countermeasures” in international law?
5. Under what limited conditions can measures of “retorsion” be justified and what review mechanisms must be in place to monitor and mitigate the “collateral effects” generated by such measures?
6. What legal measures can third parties undertake to protect their interests from the effects of UCMs?
7. Whether the primary and secondary effects of UCMs, including the breakdown of supply chains, lack of access to affordable energy, and the threat to food security require immediate action by the UN General Assembly, Security Council, and other UN agencies?

8. Whether the deliberate destabilization of States through UCMs and financial blockades constitutes a threat to or breach of the peace for purposes of Article 39 of the UN Charter, which could lead to the outbreak of hostilities and unleash a humanitarian catastrophe in targeted countries?
9. What is an appropriate level of compensation that States imposing UCMs must pay to aggrieved countries and other victims?
10. Under what conditions can UCMs be considered crimes against humanity within the meaning of Article 7 of the Rome Statute, in view of their massive impacts on life, health, and food security?

As will be shown below, UCMs have caused the deaths of tens of thousands of human beings throughout the planet. States Parties to the Rome Statute have an *erga omnes* obligation to ensure that crimes against humanity are investigated and prosecuted. Hence, they must refer the matter to the ICC Prosecutor and urge him to open an investigation and indict those government officials responsible for the mounting deaths resulting from UCMs.<sup>9</sup> In the absence of an ICC investigation, civil society should organize Peoples' Tribunals with a view to collecting evidence and testimony to document the gross violations of human rights resulting from UCMs.

### **UCMs are not “sanctions”**

I have not used the term “sanctions” in connection with UCMs. This is because since the entry into force of the UN Charter on 24 October 1945, sanctions can only be imposed by the Security Council under Chapter VII. UCMs are not “sanctions” and must be seen as a form of hybrid or non-conventional warfare, and ultimately as an illegal use of force in contravention of Article 2, Paragraph 4, of the UN Charter.

When the drafters of the UN Charter meant to refer to military force, they used the terms “military force,” “armed attack,” or “armed force”

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<sup>9</sup> See A. de Zayas, *The Human Rights Industry* (Clarity Press, Atlanta, 2023), Chapter 4.

(Preamble, Articles 41, 51, etc.). By contrast, Article 2(4) plainly prohibits all “use of force,” without restricting its application to military means. Consequently, and considering the deaths resulting from economic warfare, naval blockades and financial blockades, the application of UCMs unquestionably constitutes “use of force,” even in the absence of a formal declaration of war. The realities of the 21<sup>st</sup> century demonstrate that UCMs are powerful weapons that can asphyxiate the economies of targeted countries and lead to chaos and humanitarian catastrophes. *Hybrid war is war and constitutes the “use of force.”*

There is an additional problem with the use of the term “sanctions,” which implies that the State imposing them has the legal and moral authority to punish other States. This is not the case. The word “sanctions” wrongly suggests the legitimacy of the measures, which is precisely what must be justified. Thus, the use of the word “sanctions” begs the question. It is a logical fallacy, a form of circular reasoning.

By the same token, it is wrong to speak of “compliance” or “overcompliance” with UCMs. The verb “comply” implies that the measures in question are legitimate and should be complied with. That again prejudices the merits of the case. GA Resolution 77/214 and HR Council Resolution 52/13 both condemn UCMs as illegal. Hence, there is an obligation NOT to follow them, exactly the opposite of what is suggested using the verb “comply” or the term “overcompliance.” The correct verbs that reflect the real situation are, to submit, succumb, bow or bend to the will of the more powerful States that bully, intimidate and blackmail. Yet, the mainstream media continues to dwell on “compliance,” conveying the wrong impression that one should obey the “law,” although here we have to do with the naked use of force.

### **Applicable international law norms**

The UN Charter is akin to a world constitution and, pursuant to the “supremacy clause” (Art. 103), it is superior to all other treaties, superior to the Treaty on European Union, superior to the North Atlantic Treaty. States are bound to implement its provisions in good faith, in particular its Purposes and Principles enunciated in the Preamble and Articles 1 and 2.

It becomes immediately obvious that UCMs are incompatible with the UN Charter. Already the Preamble stipulates the determination “to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained,” further “to employ international machinery for the promotion of the economic and social advancement of all peoples.” Article 1(2) formulates the purpose “to develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples,” further Article 1(3) commits member States to the goal “to achieve international co-operation in solving international problems of an economic, social, cultural or humanitarian character.” Pursuant to Article 2(4), “All members shall refrain in their international relations from the threat or use of force.”

Among the treaties that pursuant to the Charter must be upheld are the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR), Article 1 of which stipulates the right of self-determination of all peoples, by virtue of which “they freely determine their political status and freely pursue their economic, social and cultural development.” Article 1(2) goes on to state that “All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit ... In no case may a people be deprived of its own means of subsistence.”<sup>10</sup>

In this context, it is important to recognize that UCMs destabilize countries and disrupt their economies with the result that these states cannot fulfil their obligations under the ICCPR and ICESCR, thus impeding the enjoyment of civil, cultural, economic, political, and social rights by the populations targeted. As the Committee on Economic, Social and Cultural Rights stated in its General Comment Nr. 8, even concerning sanctions imposed by the Security Council:

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<sup>10</sup> “International Covenant on Civil and Political Rights,” accessed at <https://www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-civil-and-political-rights>.

*Economic sanctions are being imposed with increasing frequency, both internationally, regionally and unilaterally. The purpose of this general comment is to emphasize that, whatever the circumstances, such sanctions should always take full account of the provisions of the International Covenant on Economic, Social and Cultural Rights. The Committee does not in any way call into question the necessity for the imposition of sanctions in appropriate cases in accordance with Chapter VII of the Charter of the United Nations or other applicable international law. But those provisions of the Charter that relate to human rights (Articles 1, 55 and 56) must still be considered to be fully applicable in such cases.*

*While the impact of sanctions varies from one case to another, the Committee is aware that they almost always have a dramatic impact on the rights recognized in the Covenant. Thus, for example, they often cause significant disruption in the distribution of food, pharmaceuticals, and sanitation supplies, jeopardize the quality of food and the availability of clean drinking water, severely interfere with the functioning of basic health and education systems, and undermine the right to work. In addition, their unintended consequences can include reinforcement of the power of oppressive élites, the emergence, almost invariably, of a black market and the generation of huge wind-fall profits for the privileged élites which manage it, enhancement of the control of the governing élites over the population at large, and restriction of opportunities to seek asylum or to manifest political opposition. While the phenomena mentioned in the preceding sentence are essentially political in nature, they also have a major additional impact on the enjoyment of economic, social, and cultural rights.<sup>11</sup>*

This raises the separate issue whether sanctions imposed by the Security Council under Chapter VII could be *ultra vires* and invalid pursuant to Article 24(2) of the Charter, which delimits the powers of the

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<sup>11</sup> UN Doc. HRI/GEN/1/Rev.9 (Vol. I), 27 May 2008, General Comment No. 8: *The relationship between economic sanctions and respect for economic, social and cultural rights*, pp. 43-44.

Security Council.<sup>12</sup> Indeed, even the Security Council cannot impose sanctions that contravene the Charter, violate international law, cause death, and unleash humanitarian crises, as occurred with the murderous Iraq sanctions of 1991-2003, which caused an estimated one million deaths among the Iraqi population<sup>13</sup>. For this reason, two Assistant Secretaries-General of the UN, the humanitarian coordinators for Iraq, resigned in protest. Denis Halliday called the sanctions “a form of genocide.” Hans Graf von Sponeck wrote a book about them.<sup>14</sup>

Regarding the right of all peoples of self-determination, UCMs are precisely aimed at frustrating their free choice of government and inflicting collective punishment on populations that do not submit to the will of the country imposing the UCMs. In this context, it is pertinent to refer to para. 135 of General Assembly Resolution 60/1 of 24 October 2005, which stipulates:

*We reaffirm that democracy is a universal value based on the freely expressed will of people to determine their own political, economic, social and cultural systems and their full participation in all aspects of their lives. We also reaffirm that while democracies share common features, there is no single model of democracy, that it does not belong to any country or region, and reaffirm the necessity of due respect for sovereignty and the right of self-determination. We stress that democracy, development and respect for all human rights and fundamental freedoms are interdependent and mutually reinforcing.*

Accordingly, it is inadmissible for a State to impose UCMs on another state to force that country to adopt a different form of government or a different model of democracy.

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<sup>12</sup> Article 24(2) of the UN Charter stipulates: “In discharging these duties the Security Council shall act in accordance with the Purposes and Principles of the United Nations.” In other words, the Security Council cannot impose sanctions that directly result in massive violations of human rights, death, and humanitarian catastrophe. These would violate the three purposes of the organization: peace, human rights, and development.

<sup>13</sup> “Sanctions Have Caused 1.6 Million Deaths in Iraq, Claims,” *CBC News*, accessed at <https://www.cbc.ca/news/world/sanctions-have-caused-1-6-million-deaths-iraq-claims-1.269576>.

<sup>14</sup> Hans-C. von Sponeck, *A Different Kind of War: The UN Sanctions Regime in Iraq* (Bergahn Books, Oxford, 2006).

Bearing in mind that the sovereign equality of States is a cardinal principle of the UN Charter, UCMs and the extra-territorial application of domestic laws in other jurisdictions violate their sovereignty.

The 2000 Report of the Sub-Commission on the Promotion and Protection of Human Rights, drafted by the Rapporteur, Professor Marc Bossuyt,<sup>15</sup> President of the Constitutional Court of Belgium, remains a landmark document and as valid today, as it was when it was produced.

The 2012 thematic report of the UN High Commissioner for Human Rights, Navi Pillay, on unilateral coercive measures (A/19/33) is an indispensable guideline to understand the adverse impacts of UCMs. The High Commissioner concluded:

*States must refrain from adopting unilateral coercive measures that breach their human rights obligations under treaty or customary international law. All States Members of the United Nations should avoid the application of any coercive measures having negative effects on human rights, particularly on the most vulnerable. Where such measures are imposed, explicit safeguards to protect human rights are imperative. States are urged to adopt measures ensuring that essential supplies, such as medicines and food, are not used as tools for political pressure, and that under no circumstances should people be deprived of their basic means of survival. These considerations should also apply in the case of an armed conflict, in accordance with international humanitarian law. As overly broad coercive measures may breach the most basic human rights, every effort must be made to limit such measures.*<sup>16</sup>

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<sup>15</sup> Marc Bossuyt, “UN Sanctions Reports” (accessed at <https://archive.globalpolicy.org/security/sanction/unreports/bossuyt.htm>); Marc Bossuyt, “Workshop on Unilateral Coercive Measures” (accessed at [https://www.ohchr.org/sites/default/files/Documents/Events/WCM/MarcBossuyt\\_WorkshopUnilateralCoerciveSeminar.pdf](https://www.ohchr.org/sites/default/files/Documents/Events/WCM/MarcBossuyt_WorkshopUnilateralCoerciveSeminar.pdf)).

<sup>16</sup> A-HRC-19-33, “Report of the Special Rapporteur on Unilateral Coercive Measures” (accessed at [https://www.ohchr.org/sites/default/files/Documents/HRBodies/HRCouncil/RegularSession/Session19/A-HRC-19-33\\_en.pdf](https://www.ohchr.org/sites/default/files/Documents/HRBodies/HRCouncil/RegularSession/Session19/A-HRC-19-33_en.pdf)).

In 2015, the Human Rights Council created the function of Special Rapporteur on UCMs. The two mandate holders, Dr. Idriss Jazairy<sup>17</sup> and Professor Alena Douhan,<sup>18</sup> have issued pertinent reports that clearly establish their illegality and the civil and penal responsibility of countries imposing UCMs.

### **Other intellectually dishonest justifications**

To make UCMs more palatable to a democratic public, Western governments systematically demonize and defame their rivals. This strategy is nothing new. Already Tacitus described the mechanism: *Proprium humani ingenii est odisse quem laeseris* (*Agricola*, 42). (“It is a principle of nature to hate those whom you have injured.”) You can interpret it further as “it is natural to generate hatred against those you intend to destabilize.” This, however, is precisely what Article 20 of the ICCPR specifically prohibits: “incitement to discrimination, hostility or violence shall be prohibited by law.” Notwithstanding the hypocrisy of it, this is what the U.S. government and media have been practicing for decades against Cuba, Nicaragua, Syria, Venezuela, and other peoples targeted for regime change.

To try to justify UCMs in (ostensibly) democratic countries, it is necessary to make the citizens believe that the targets are “bad people,” and thus the government and the media depict the targeted governments and their leaders as gross violators of human rights. One could consider this strategy as primitive or unconvincing, but if the population of the UCM-imposing countries has been sufficiently brainwashed and conditioned to believe that we in the Western democracies “mean well,” that we are good and the targeted countries are bad, it is possible to get away with it, as hitherto has been the case.

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<sup>17</sup> Idriss Jazairy, former Special Rapporteur on the Negative Impact of Unilateral Coercive Measures (accessed at <https://www.ohchr.org/en/special-procedures/sr-unilateral-coercive-measures/mr-idriss-jazairy-former-special-rapporteur-negative-impact-unilateral-coercive-measures>).

<sup>18</sup> Professor Alena Douhan, Special Rapporteur on the Negative Impact of Unilateral Coercive Measures (accessed at <https://www.ohchr.org/en/special-procedures/sr-unilateral-coercive-measures/professor-alena-douhan-special-rapporteur-negative-impact-unilateral-coercive-measures>).

Some States also try to camouflage UCMs as legal countermeasures. In its Draft Articles on State Responsibility the International Law Commission writes:

*Though coercion for the purpose of article 18 is narrowly defined, it is not limited to unlawful coercion. As a practical matter, most cases of coercion meeting the requirements of the article will be unlawful, e.g. because they involve a threat or use of force contrary to the Charter of the United Nations, or because they involve intervention, i.e. coercive interference, in the affairs of another State. Such is also the case with countermeasures. They may have a coercive character, but as is made clear in article 49, their function is to induce a wrongdoing State to comply with obligations of cessation and reparation towards the State taking the countermeasures, not to coerce that State to violate obligations to third States. However, coercion could possibly take other forms, e.g. serious economic pressure, if it is such as to deprive the coerced State of any possibility of conforming with the obligation breached.<sup>19</sup>*

In the relevant articles 49 and 50 the ILC stipulates:

*49. Object and limits of countermeasures: 1. An injured State may only take countermeasures against a State which is responsible for an internationally wrongful act in order to induce that State to comply with its obligations under Part Two. 2. Countermeasures are limited to the non-performance for the time being of international obligations of the State taking the measures towards the responsible State. 3. Countermeasures shall, as far as possible, be taken in such a way as to permit the resumption of performance of the obligations in question.*

*50. Obligations not affected by countermeasures: 1. Countermeasures shall not affect: (a) the obligation to refrain from the threat or use of force as embodied in the Charter of the United Nations; (b) obligations for the protection of fundamental human rights; (c) obligations of a humanitarian character prohibiting reprisals; (d) other obligations under peremptory norms of general international law.*

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<sup>19</sup> United Nations, “Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries” (accessed at [https://legal.un.org/ilc/texts/instruments/english/commentaries/9\\_6\\_2001.pdf](https://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf)).

It becomes evident that the UCMs against Cuba, Nicaragua, Syria, Venezuela, and other countries do not qualify as legal countermeasures.

### **Pertinent General Assembly resolutions**

Every year the General Assembly adopts a resolution calling for the lifting of the U.S. embargo against Cuba. On 3 November 2022 the 30<sup>th</sup> such resolution was adopted<sup>20</sup> by a vote of 185 in favor, 2 against (U.S. and Israel) and 3 abstentions. Resolution 77/7 refers to all prior resolutions and reaffirms “among other principles, the sovereign equality of States, non-intervention and non-interference in their internal affairs and freedom of international trade and navigation, which are also enshrined in many international legal instruments.”

It recalls “the statements of the Heads of State or Government of Latin America and the Caribbean at the Summits of the Community of Latin American and Caribbean States regarding the need to put an end to the economic, commercial and financial embargo imposed against Cuba.”

It emphasizes its concern “about the continued promulgation and application by Member States of laws and regulations, such as that promulgated on 12 March 1996 known as the ‘Helms-Burton Act,’ the extraterritorial effects of which affect the sovereignty of other States, the legitimate interests of entities or persons under their jurisdiction and the freedom of trade and navigation.”

It takes note “of declarations and resolutions of different intergovernmental forums, bodies and Governments that express the rejection by the international community and public opinion of the promulgation and application of measures of the kind referred to above.”

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<sup>20</sup> United Nations, “Adopting Annual Resolution, Delegates in General Assembly Urge Immediate Repeal of Embargo on Cuba, Especially amid Mounting Global Food, Fuel Crises,” November 3, 2022 (accessed at <https://press.un.org/en/2022/ga12465.doc.htm>).

In its operative paragraphs the Resolution reiterates

*its call upon all States to refrain from promulgating and applying laws and measures of the kind referred to in the preamble to the present resolution, in conformity with their obligations under the Charter of the United Nations and international law, which, inter alia, reaffirm the freedom of trade and navigation.*

It further urges “States that have and continue to apply such laws and measures to take the steps necessary to repeal or invalidate them as soon as possible in accordance with their legal regime.”<sup>21</sup>

In the light of the above language, it is obvious that the proliferation of UCMs in no way has changed international law on the subject and that such UCMs are rejected nearly unanimously by the international community. The strongest GA resolution on the subject was Resolution 71/5, which was adopted during the last year of the Obama administration, by a vote of 191 in favor, none against and two abstentions (U.S. and Israel).<sup>22</sup>

In the same vein, but with a less overwhelming majority, the yearly General Assembly resolution on UCMs condemns them as a violation of the Charter and demands their immediate lifting. Resolution 77/214 of 15 December 2022 was adopted by a vote of 130 in favor, 53 against, and 1 abstention. Among others, the General Assembly

*Rejects all attempts to introduce unilateral coercive measures, and urges the Human Rights Council to take fully into account the negative impact of those measures, including through the enactment and extraterritorial application of national laws that are not in conformity with international law, in its task concerning the implementation of the right to development;*

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<sup>21</sup> UN General Assembly, Resolution A/RES/77/214 (accessed at <https://www.undocs.org/Home/Mobile?FinalSymbol=A%2FRES%2F77%2F214&Language=E&DeviceType=Desktop&LangRequested=False>).

<sup>22</sup> <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N16/344/54/PDF/N1634454.pdf?OpenElement>.

*Requests the United Nations High Commissioner for Human Rights, in discharging his functions relating to the promotion, realization and protection of the right to development and bearing in mind the continuing impact of unilateral coercive measures on the population of developing countries, to give priority to the present resolution in his annual report to the General Assembly;*

*Underlines the fact that unilateral coercive measures are one of the major obstacles to the implementation of the Declaration on the Right to Development and the 2030 Agenda for Sustainable Development, and in this regard calls upon all States to avoid the unilateral imposition of economic coercive measures and the extraterritorial application of national laws that run counter to the principles of free trade and hamper the development of developing countries, as recognized by the open-ended Working Group on the Right to Development of the Human Rights Council.<sup>23</sup>*

This Resolution is reflected in the yearly resolution of the Human Rights Council, the last Resolution being 52/13 of 3 April 2023,<sup>24</sup> adopted by 33 votes in favor, 13 against and one abstention, in which the Human Rights Council:

*Urges all States to stop adopting, maintaining, implementing or complying with unilateral coercive measures not in accordance with international law, international humanitarian law, the Charter of the United Nations and the norms and principles governing peaceful relations among States, in particular those of a coercive nature with extraterritorial effects, which create obstacles to trade relations among States, thus impeding the full realization of the rights set forth in the Universal Declaration of Human Rights and other international human rights instruments, in particular the right of individuals and peoples to development;*

(...)

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<sup>23</sup> UN General Assembly, Resolution A/RES/77/214 (accessed at <https://www.undocs.org/Home/Mobile?FinalSymbol=A%2FRES%2F77%2F214&Language=E&DeviceType=Desktop&LangRequested=False>).

<sup>24</sup> UN General Assembly, Resolution A/HRC/RES/52/13 (accessed at <https://undocs.org/Home/Mobile?FinalSymbol=A%2FHRC%2FRES%2F52%2F13&Language=E&DeviceType=Desktop&LangRequested=False>).

*Strongly urges all States to refrain from imposing unilateral coercive measures, also urges the removal of such measures, as they are contrary to the Charter and norms and principles governing peaceful relations among States at all levels, and recalls that such measures prevent the full realization of economic and social development of nations while also affecting the full realization of human rights;*

*Urges States to resolve their differences through dialogue and peaceful means and to avoid the use of economic, political or other measures to coerce another State with regard to the exercise of its sovereign rights;*

*Strongly objects to the extraterritorial nature of those measures which, in addition, threaten the sovereignty of States, and in this context calls upon all States neither to recognize these measures nor to apply them, and to take effective administrative or legislative measures, as appropriate, to counteract the extraterritorial application or effects of unilateral coercive measures;*

*Strongly condemns the continued unilateral application and enforcement by certain powers of such measures as tools of pressure, including political and economic pressure, against any country, particularly against least developed and developing countries, with a view to preventing these countries from exercising their right to decide, of their own free will, their own political, economic and social systems.*

## **Consequences of UCMs**

### **UCMs against Cuba**

Every year the UN adopts a resolution demanding the lifting of the embargo against Cuba, supported by a Secretary-General Report on the consequences of the embargo and a detailed documentation. The 2022 SG report,<sup>25</sup> A/77/358, reads in part:

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<sup>25</sup> UN General Assembly Resolution, A/77/358 (accessed at <https://undocs.org/Home/Mobile?FinalSymbol=A%2F77%2F358&Language=E&DeviceType=Desktop&LangRequested=False>).

*The combined effects of a multidimensional global crisis in the energy, food, environmental and transportation sectors, and the cumulative impact of two years of the coronavirus disease (COVID-19) pandemic, have brought about a complex international context. Enmeshed in this reality, Cuba has also had to face the unprecedented tightening of the United States blockade, which includes additional highly aggressive measures imposed during the Trump Administration and which, for the most part, remain in force, thus prolonging the policy of maximum pressure against the country. Since 2019, the blockade has escalated to a qualitatively more harmful and inhumane level, with a reinforced extraterritorial component. Lawsuits filed under Title III of the Cuban Liberty and Democratic Solidarity (Libertad) Act of 1996 (Helms-Burton Act); the prosecution of companies, ships and shipping companies that send fuel supplies to the country; the arbitrary and unjustified inclusion of Cuba on the United States Department of State's list of State sponsors of terrorism; the attack on all sources of income and foreign currency inflows to the country; and the intimidation of third parties and greater pressure on Governments, banking institutions and business people around the world have become an essential part of the United States strategy to isolate Cuba and cause its economic collapse.*

The Secretary-General's report concluded that:

*The blockade constitutes a massive, flagrant and systematic violation of the human rights of the Cuban people. The blockade is an act of economic warfare in times of peace. It is the primary impediment to the country's economic and social development, and to the implementation of the 2030 Agenda for Sustainable Development and its Goals. Its purposes are illegitimate and illegal and violate the Charter of the United Nations and international law. (...)*

*Three decades since the first United Nations General Assembly resolution against the blockade, the Government of the United States persists in ignoring the Assembly's many pronouncements calling for it to unconditionally eliminate its failed, unilateral and criminal policy against Cuba.*

It is impractical for this lecture to continue quoting from the litany of horrors that the UCMs cause in Cuba and other nations. What is important is to understand the U.S. strategy of inducing regime change through chaos. The U.S. has shown no sensitivity for the right to life, to food, to water, to development. The intent is clear – to subvert the Cuban democracy and re-establish the pre-1959 conditions of neo-colonialism and imperialism. The Cuban report goes on to substantiate this:

*The impacts of the blockade cannot be addressed without considering the serious human detriment this policy causes, aimed at creating uncertainty in the minds of Cubans, thwarting their hopes for development and inciting civil unrest. Such human harm cannot be quantified, but it is nonetheless real and substantial.*

*The blockade seeks to destroy a social project that was built from the start for the benefit of the underprivileged, by using hardship as a means of triggering social upheaval.*

*Cubans at home and abroad suffer the devastating consequences of the blockade. Several generations have been born and lived under siege by this illegal policy, brutally and intentionally applied to assail the most sensitive economic and social sectors.*

Evidence of this is found in the memorandum of the Deputy Assistant Secretary of State for Inter-American Affairs of the United States Department of State, Lester Mallory, who observed as early as 1960:

*The majority of Cubans support Castro ... The only foreseeable means of alienating internal support is through disenchantment and disaffection based on economic dissatisfaction and hardship ... every possible means should be undertaken promptly to weaken the economic life of Cuba ... a line of action which, while as adroit and inconspicuous as possible, makes the greatest inroads in denying money and supplies to Cuba, to decrease monetary and real wages, to bring about hunger, desperation and overthrow of government. Since then, the strategy of the United States towards Cuba has been to cause deprivation of resources, hence chaos, defenselessness, unrest, and the dissatisfaction of*

*Cubans with their living conditions, while frustrating their legitimate aspirations to prosperity and development.*<sup>26</sup>

In November 2023, the UN General Assembly will debate a new resolution on the lifting of the U.S. embargo on Cuba. The Secretary-General's 2023 report provides the documentation upon which the debate will be held. It concludes:

*The continuation of the United States financial and commercial blockade against Cuba for more than 60 years and the inclusion of Cuba in the list of State sponsors of terrorism are incompatible with an international system grounded in law and are a blatant manifestation of the exercise of political and economic power in clear violation of human rights, including the right to development. The negative effects of these measures are as obvious as they are inadmissible under the Charter of the United Nations and the principles of international law. Despite this, Cuba has continued to demonstrate its commitment to solidarity through South-South cooperation and also, in the critical time of the pandemic, its ability to contribute to addressing global problems such as access to medical treatment and vaccines.*

*The situation in Cuba only confirms the need to dismantle unilateral coercive measures that undermine sovereign rights, the realization of human rights and the achievement of the Sustainable Development Goals. The signatory countries of resolution 77/7 should continue to cooperate to put an end to the unjust denial of the right of Cuba to self-determination and development.*<sup>27</sup>

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<sup>26</sup> United States, Department of State, *Memorandum*, "The Decline and Fall of Castro." SECRET, April 6, 1960. [Written for Roy Richard Rubottom, Jr., Assistant Secretary of State for Western Hemisphere Affairs.]

<sup>27</sup> The comprehensive SG report further documents in 172 pages the concrete impacts of the UCMs on Cuba and the statements by many organizations including the Community of Latin American and Caribbean States (CELAC), the Interparliamentary Union, etc. (UN doc. A/78/84).

## UCMs against Venezuela

I was the first UN independent expert to visit Venezuela in 21 years. My mission in November/December 2017 encouraged the country to invite two other rapporteurs. The visit by the rapporteur on UCMs was conducted in 2021 and other invitations are pending. My visit and those by other UN rapporteurs, the adoption of new MOUs enhancing the cooperation of the government of Venezuela with UN agencies including UNHCR, FAO and WHO, and the release of a considerable number of detainees paved the way to the opening of an Office of the UN High Commissioner for Human Rights in Caracas and a personal visit by the then UN High Commissioner Michelle Bachelet. My report was submitted to the 39<sup>th</sup> session of the Human Rights Council<sup>28</sup> and stated in part:

*While arms sales embargoes may be justifiable against some countries, especially to facilitate dialogue and peace-making, economic sanctions that hurt innocent populations contravene the spirit and letter of the Charter of the United Nations. Over decades, United Nations bodies have condemned unilateral coercive measures<sup>29</sup>, notably in the landmark 2000 study of the Sub-Commission on the Promotion and Protection of Human Rights,<sup>30</sup> documenting the adverse human rights impact of those measures. Multilateral sanctions, even those imposed by the Security Council under Chapter VII of the Charter, can also cause suffering and death. In the 1990s, two United Nations Assistant Secretary-Generals, Denis Halliday and Hans-Christof von Sponeck, quit their Humanitarian Coordinator functions in Iraq to protest against sanctions, which had caused more than a million deaths among Ira-*

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<sup>28</sup> “Report of the Independent Expert on the Promotion of a Democratic and Equitable International Order” (accessed at <https://www.ohchr.org/en/documents/country-reports/ahrc3947add1-report-independent-expert-promotion-democratic-and-equitable>).

<sup>29</sup> The Movement of Non-Aligned Countries has also repeatedly condemned sanctions. See [www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=22072&LangID=E](http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=22072&LangID=E); see also <https://venezuelanalysis.com/analysis/12896>.

<sup>30</sup> Sub-Commission on Human Rights, Resolution 2000/25, [www.ohchr.org/Documents/Events/WCM/MarcBossuyt\\_WorkshopUnilateralCoerciveSeminar.pdf](http://www.ohchr.org/Documents/Events/WCM/MarcBossuyt_WorkshopUnilateralCoerciveSeminar.pdf).

qis, particularly children<sup>31</sup>, and which they qualified as a form of genocide.<sup>32</sup> (...)

*Sanctions can amount to crimes against humanity under Article 7 of the Rome Statute of the International Criminal Court.<sup>33</sup> An investigation by that Court would be appropriate, but the geopolitical subservience of the Court may prevent this.*

*Modern-day economic sanctions and blockades are comparable with medieval sieges of towns with the intention of forcing them to surrender. Twenty-first century sanctions attempt to bring not just a town, but sovereign countries to their knees. A difference, perhaps, is that twenty-first century sanctions are accompanied by the manipulation of public opinion through “fake news,” aggressive public relations and a pseudo-human rights rhetoric so as to give the impression that a human rights “end” justifies the criminal means. There is not only a horizontal juridical world order governed by the Charter of the United Nations and principles of sovereign equality, but also a vertical world order reflecting the hierarchy of a geopolitical system that links dominant States with the rest of the world according to military and economic power. It is the latter, geopolitical system that generates geopolitical crimes, hitherto in total impunity. It is reported that the United*

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<sup>31</sup> UNICEF, “UNICEF Statement on the Humanitarian Impact of Sanctions on Iraq” (accessed at [www.unicef.org/newsline/99pr29.htm](http://www.unicef.org/newsline/99pr29.htm)).

<sup>32</sup> “Former UN Official Says Sanctions Against Iraq Amount to Genocide” (accessed at <http://news.cornell.edu/stories/1999/09/former-un-official-says-sanctions-against-iraq-amount-genocide>). In a 1996 interview, when asked about reports that half a million children had died in Iraq owing to the sanctions, the United States Secretary of State, Madeleine Albright, replied “we think the price is worth it” (accessed at <https://fair.org/extra/we-think-the-price-is-worth-it/>).

<sup>33</sup> “Trump’s Crimes Against Venezuela Must Be Brought Before the International Criminal Court” (accessed at <https://libya360.wordpress.com/2018/04/11/trumps-crimes-against-venezuela-must-be-brought-before-the-international-criminal-court/>). – Patrick Cockburn, “Por qué más sanciones no ayudarán a Venezuela” (accessed at <https://foreignpolicy.com/2018/01/12/por-que-mas-sanciones-no-ayudaran-a-venezuela/>); <https://venezuelanalysis.com/analysis/13332>. – “Humanitarian Impact of Syria-Related Resolutions and Sanctions” (accessed at <https://assets.documentcloud.org/documents/3115191/Hum-Impact-of-Syria-Related-Res-EcoMeasures-26.pdf>); [www.independent.co.uk/voices/syria-syrian-war-us-eu-sanctions-bashar-al-assad-patrick-cockburna7350751.html](http://www.independent.co.uk/voices/syria-syrian-war-us-eu-sanctions-bashar-al-assad-patrick-cockburna7350751.html).

*States is currently training foreign lawyers in how to draft legislation to impose further sanctions on the Bolivarian Republic of Venezuela to asphyxiate Venezuelan State institutions.<sup>34</sup>*

*The Banco Central de Venezuela informed the Independent Expert that the sanctions, besides hindering access to external financing and international payments, had affected the normal performance of the national productive apparatus, resulting in a reduction in the supply of local goods and services. For the previous year and a half, the bank had been experiencing difficulties with the correspondent investment of high-level banks; from a total of 33 correspondent accounts, it currently had 14, which operated under a discretionary compliance system, with many limitations that resulted in certain operational restrictions, mostly focused on public debt payments. The problems had worsened relating to the operation of correspondent banks, mainly Citibank, Commerzbank, and Deutsche Bank, which currently handled only public debt payment. The situation was resulting in obstacles to the realization of public sector payments (i.e. foods and medicines).*

*Economic asphyxiation policies are comparable to those already practised in Chile, the Democratic People's Republic of Korea, Nicaragua, and the Syrian Arab Republic. In January 2018, Middle East correspondent of The Financial Times and The Independent, Patrick Cockburn, wrote on the sanctions affecting Syria: There is usually a pretence that foodstuffs and medical equipment are being allowed through freely and no mention is made of the financial and other regulatory obstacles making it impossible to deliver them. An example of this is the draconian sanctions imposed on Syria by the US and EU which were meant to target President Bashar al-Assad and help remove him from power. They have wholly failed to do this, but a UN internal report leaked in 2016 shows all too convincingly the effect of the embargo in stopping the delivery of aid by international aid agencies. They cannot import the aid despite waivers because banks and commercial companies dare not risk being penalized for having anything to do with Syria. The report quotes a European doctor working in Syria as saying that "the indirect effect of sanctions ... makes*

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<sup>34</sup> [www.mcclatchydc.com/news/politics-government/white-house/article207971169.html](http://www.mcclatchydc.com/news/politics-government/white-house/article207971169.html).

*the import of the medical instruments and other medical supplies immensely difficult, near impossible.*<sup>35</sup>

*In short: Economic sanctions kill.*

My report concludes with numerous concrete, pragmatic, and implementable recommendations, including:

*The solution to the Venezuelan “crisis” lies in good faith negotiations between the Government and the opposition, an end to the economic war, and the lifting of sanctions. In pursuance of the principle of international solidarity<sup>36</sup> United Nations agencies should provide advisory services and technical assistance to the Government. The Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence may wish to address the interplay between State crime and international order, both from the positive and the natural law perspective, and formulate recommendations concerning reparations due to populations affected by sanctions and economic war.*

In its 34-page comments on my report,<sup>37</sup> the Venezuelan government contributed additional information on the impact of the UCMs:

*Some States, cynically claiming the need to protect human rights, establish these unilateral coercive measures that violate international law and transgress precisely the human rights of the Venezuelan people. (...) It is a fact that 90% of the currencies (foreign currencies) that Venezuela receives come from its oil industry, so the application of selective sanctions on PDVSA not only prevents it from carrying out*

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<sup>35</sup> “The Impact of Syria-Related Resolutions on Economic Measures,” accessed at <https://assets.documentcloud.org/documents/3115191/Hum-Impact-of-Syria-Related-Res-EcoMeasures-26.pdf>; Patrick Cockburn, “Syria: Why US and EU sanctions are not ‘smart’,” *The Independent*, accessed at [www.independent.co.uk/voices/syria-syrian-war-us-eu-sanctions-bashar-al-assad-patrick-cockburna7350751.html](http://www.independent.co.uk/voices/syria-syrian-war-us-eu-sanctions-bashar-al-assad-patrick-cockburna7350751.html).

<sup>36</sup> See A/HRC/35/35.

<sup>37</sup> A/HRC/39/47/Add.2. English translation available but not uploaded. For the shorter Spanish version see: <https://www.undocs.org/Home/Mobile?FinalSymbol=A%2FHRC%2F39%2F47%2FAdd.2&Language=E&DeviceType=Desktop&LangRequested=False>.

*its commercial activities properly, but it also violates the human rights of the more than 30 million Venezuelans who depend on it.*

*The application of unilateral coercive measures is a clear violation of the principle of non-interference in the internal affairs of States. They are coercive measures that are intended to change the policy and sovereign will of Venezuela, to develop its domestic policy as it may decide.*

As has been recognized by many countries and academics, my result-oriented mission facilitated the release of hundreds of persons in detention and paved the way to subsequent constructive cooperation with the OHCHR:

*The Venezuelan Government values the efforts of the Independent Expert to show, in a balanced manner, in his report the information, data, and statements that he obtained in full and absolute freedom.*

The findings of my 2018 report were subsequently confirmed by UN Special Rapporteur Alena Douhan, who was the second UN rapporteur to visit Venezuela. She submitted a comprehensive report on her February 2021 mission to the 48<sup>th</sup> session of the Human Rights Council:<sup>38</sup>

*The Special Rapporteur underlines the inadmissibility of applying sanctions extraterritorially and urges the Government of the United States to end the national emergency regarding the Bolivarian Republic of Venezuela, revise and lift sectoral sanctions against the country's public and private sectors, review and lift secondary sanctions<sup>39</sup> against third-State parties, and refrain from imposing sanctions on diesel supplies that may precipitate an even deeper crisis.*

*The Special Rapporteur urges all interlocutors (States, international organizations, banks, private companies and civil society) to avoid coercion, threats, zero-risk policies or any other act that may result in overcompliance, and to interpret limitations in the narrowest possible*

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<sup>38</sup> UN Human Rights Council, A/HRC/48/59/Add.2, accessed at <https://undocs.org/Home/Mobile?FinalSymbol=A%2FHRC%2F48%2F59%2FAdd.2&Language=E&DeviceType=Desktop&LangRequested=False>.

<sup>39</sup> UN Human Rights Council, A/HRC/48/59/Add.2.

way before the lifting of unilateral sanctions, taking due account of the guidance issued previously by the Special Rapporteur in December 2020.<sup>40</sup>

*She calls on all relevant States to review and lift targeted sanctions in accordance with the principles of international law and the rule of law so as to guarantee State officials, such as the Attorney General, the possibility of representing the State on the basis of the principle of sovereign equality of States, and to guarantee the rights of targeted individuals to the presumption of innocence, procedural guarantees and access to justice and other fundamental rights.*

In 2021 Professor Jeffrey Sachs of Columbia University in New York and Mark Weisbrot, Director of the Centre for Economic and Political Research in Washington, published a study entitled “Economic Sanctions as Collective Punishment: The Case of Venezuela.”<sup>41</sup> Their study found that:

*One result of the sanctions, as described above, is to deprive the Venezuelan economy of many billions of dollars of foreign exchange needed to pay for essential and life-saving imports. The sanctions implemented in 2019, including the recognition of a parallel government, accelerated this deprivation and also cut off Venezuela from most of the international payments system, thus ending much of the country’s access to these essential imports including medicine and food – even those that could normally be bought with available dollars. There is no doubt that all of these sanctions since August 2017 have had severe impacts on human life and health. According to the National Survey on Living Conditions (ENCOVI by its acronym in Spanish), an annual survey of living conditions administered by three Venezuelan universities, there was a 31 percent increase in general mortality from 2017 to 2018. This would imply an increase of more than 40,000 deaths.*

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<sup>40</sup> See [www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=26589&LangID=E](http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=26589&LangID=E).

<sup>41</sup> “Economic Sanctions as Collective Punishment: The Case of Venezuela” (accessed at <https://cepr.net/images/stories/reports/venezuela-sanctions-2019-04.pdf>).

They concluded that:

*these sanctions would fit the definition of collective punishment of the civilian population as described in both the Geneva and Hague international conventions, to which the US is a signatory. They are also illegal under international law and treaties which the US has signed.*

Bearing in mind that the U.S. has augmented and intensified the UCMs against Venezuela in the years 2020-23, it can be feared that the death toll attributable to UCMs well exceeds one hundred thousand. This is undoubtedly a crime against humanity and raises urgent issues of civil and penal State responsibility.

Since the International Criminal Court is not likely to prosecute any official of the UCM-imposing States, it is for a Peoples' Tribunal to be organized with a view to collecting verifiable and comprehensive evidence for the time when an ad hoc tribunal with appropriate jurisdiction can be established by the United Nations.

### **Academic debate**

Although there has been considerable academic debate on UCMs, more is necessary. Particularly important was a symposium held at Yale University which produced several very useful analytical papers. I especially adhere to the views of Professor Michael Fakhri of the University of Oregon School of Law, under the title "Situating Unilateral Coercive Measures within a Broader Understanding of Systemic Violence."<sup>42</sup> Professor Fakhri is the current UN Rapporteur on the Right to Food; he states, *inter alia*:

*That unilateral coercive measures are an ineffective international policy tool has been known for decades. Unilateral measures, usually in the form of blockades or economic sanctions, are deployed with the intent to economically weaken an opposing national regime and gen-*

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<sup>42</sup> "Situating Unilateral Coercive Measures within a Broader Understanding of Systemic Violence" (accessed at <https://www.yjil.yale.edu/situating-unilateral-coercive-measures-within-a-broader-understanding-of-systemic-violence/>).

erate domestic pressure to induce the regime to concede to foreign demands. In reality, they often create or worsen a protracted crisis by collectively punishing people in target countries. Countries sometimes aim to only impose sanctions against designated individuals or groups. These types of sanctions, however, still usually produce side effects that disrupt local, regional, and international food systems and economies, especially if the targeted people play a powerful role in the food system. Humanitarian exemptions in unilateral sanctions are usually ineffective due to the absence of regular monitoring and the broad, often haphazard effect of sanctions on the economy. Moreover, financial institutions tend to over-comply with unilateral sanctions to reduce the legal and business risks associated with inadvertent violations. This inhibits aid and magnifies harm.

## Conclusion

Since I have already formulated my conclusions at the beginning of this paper, it suffices to express my profound disappointment with those institutions and organizations that are entrusted with the protection of our human rights, in particular the right to life, the right to food, the right to health, the right to development, because they have failed to effectively protect the rights of the hapless millions of human beings subjected to egregious violations of their human rights by countries imposing UCMs on them.

*Quis custodiet ipsos custodes?* (Juvenalis, 6<sup>th</sup> Satire) (Who guards over the guardians?) What can we do when we are forced to recognize the fact that the institutions that should be defending our rights fail to do so effectively, and in some cases actually betray us?

How many persons in the U.S. or Europe are aware of the emergence of a vast human rights industry that, with the complicity of the mainstream media, serves the interests of Washington and Brussels and not the interests of humanity? Only those who have worked within the system for many years realize that a vicious information war is in progress, a hybrid war characterized by intellectual guerilla tactics, cognitive warfare, toxic psychological operations, perception manipulation and a growing “Orwellization” of language. War is presented as necessary for peace and submission to the hegemon as a precondition

to freedom. 1984 is today, or perhaps a more subtle version of Aldous Huxley's *Brave New World*.

What can we do when we come to understand that Human Rights Watch, Amnesty International and many other large non-governmental organizations, far from condemning UCMs attempt to whitewash or justify them? This is fraud on human rights, fraud on the "values" that the United States and the European Union pretend to defend. The mainstream media systematically suppresses information on the catastrophic impacts of these UCMs on the most vulnerable. The crimes are sanitized, trivialized, or even denied.

Yes, there have been brilliant UN rapporteurs like Dr. Idriss Jazairy and Professor Alena Douhan who have documented and denounced UCMs as fundamentally immoral, illegal – and ineffective. They are very few in the "club" of UN rapporteurs, most of whom are anything but independent. Indeed, there are other UN rapporteurs who plead for more UCMs and thus support the continuation of the suffering of billions of human beings worldwide.

There is no escaping it. The system has been hijacked, and only *we* can be the guardians. We must push back against institutions that have betrayed their mandates.

Allow me to end with this thought. Suppose that comprehensive UCMs and financial blockades as those imposed against Cuba and Venezuela were applied to your country. Imagine as an intellectual exercise, how Austria or Switzerland could possibly survive the onslaught? There would be hunger, despair, death, and uncontrolled migration flows.

There is much concern about the arrival of masses of immigrants into Europe. We should recognize that the migration waves from Afghanistan, Iraq, Libya, Syria, and now Ukraine are directly linked to the wars that we have waged on them (or through our proxies). In the cases of the first four countries mentioned above, mass-exoduses have been demonstrably the consequence of the impacts of the UCMs imposed on them.

When UCMs devastate a country's economy, it is evident that there will be unemployment, hunger, and desperation. This invariably trig-

gers emigration because of the artificially created humanitarian crises. Washington and Brussels bear a heavy responsibility for the catastrophe that is unfolding and will continue to unfold unless we demand of our governments to stop their military interventions and their economic use of force against those countries whose governments have a different worldview than ours.

It bears repeating: Article 1, Paragraph 1, of the UN Charter stipulates among the Purposes of the United Nations:

*To maintain international peace and security, and to that end, to take effective collective measures for the prevention and removal of threats to the peace ... to bring about ... adjustment or settlement of international disputes or situations which might lead to a breach of the peace.*

Undoubtedly UCMs constitute “situations which might lead to a breach of the peace.” Hence, it is our obligation to continue demanding that UCMs be immediately lifted and that the States imposing them be held accountable and required to pay reparations to the victims.

# **III**

## **Global Governance and Power Dynamics**



Zhipeng He

## “Impossible Trinity for Great Powers” in the International Rule of Law\*

### I. Introduction

“International rule of law” means the legalization of international relations by way of promoting sound law and good governance in international affairs.<sup>1</sup> Sound law requires the formation of international legal norms with appropriate values, clear and unified content. Good governance means establishing due process in international affairs, ensuring universal and just protection of the rights and obligations of the state, and achieving standards of openness, transparency, and fairness in the determination, operation, and implementation of law, as well as compliance with legal norms.<sup>2</sup> Rule of law is a paramount goal of the international society and has been advocated and recognized for a long time at the United Nations level. In recent years, China has also shown a high degree of recognition and promotion of the international rule of law, committing herself to abide by international law based on the UN Charter and the basic principles of international law and international relations.<sup>3</sup>

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\* Translated from Chinese.

<sup>1</sup> Zeng Lingliang, “国际法治与中国法治建” [The Rule of Law in International Relations and the Construction of Legal Governance in China], *Chinese Social Sciences* no. 10 (2015): 135-146.

<sup>2</sup> He Zhipeng, “良法”与“善治”何以同样重要 - 国际法治标准的审思“ [The Equal Importance of “Good Law” and “Good Governance”: A Reflection on the Standards of the Rule of Law in International Law], *Journal of Zhejiang University (Humanities and Social Sciences Edition)* no. 3 (2014): 131-149.

<sup>3</sup> Wang Yi, “中国是国际法治的坚定维护者和建设者” [China as a Firm Defender and Builder of International Rule of Law], *Guangming Daily* (October 24, 2014), sec. 2; Zeng Lingliang, “Rule of Law in China and Its Close Connection with International Rule of Law [法治中国与国际法治紧密相连],” *Legal System and Social Development* no. 5 (2013): 31-32; Wang Ziyang, Luo Chao, and Li Hejia, “国际法治的革新者: 中国的角色转换与策略“ [Innovators of the International Rule of Law: The Role Transformation and Strategy of China], *Wuhan University International Law Review* no. 1 (2012): 237-251; Tao Nanyang, “论国际法治研究的西方中心主义视角与中国视角“ [On the Study of International Rule of Law from the Perspective of Western Centrism and Chinese Perspective], *Legal System and Social Development* no. 3 (2020): 188-206.

In the process of promoting the international rule of law, great powers obviously are put into a more important position.<sup>4</sup> In many cases, more is expected of great powers in the development of the international rule of law. The reason why great powers receive particular attention regarding the international rule of law is not only that they have a clear advantage in its establishment and development, but also because they possess the ability to shape and lead international affairs. It also means that the actions of great powers largely indicate the international society's attitude towards international law and guide the direction of the international society's approach to the rule of law. Therefore, major countries have a more comprehensive responsibility for the rule of law and need to adopt a more serious attitude.<sup>5</sup>

The fundamental guidance in matters of the international rule of law lies in the requirements of morality.<sup>6</sup> Moral requirements in the field of the rule of law essentially mean planning for the global public interest. The essence of morality in human society, whether it is a relatively small civil society composed of individuals as basic actors or a large-scale international society of sovereign states, lies in contributing to the public interest, especially safeguarding the interests of the weak, with altruism as the basic symbol of virtue. In this way, when advocating the principle of the rule of law in the international society, it is inevitable to demand that great powers contribute their material resources and institutional wisdom to international public affairs. These moral requirements of the rule of law will obviously constrain and affect the development of the interests of major countries themselves. Therefore, precisely due to the capabilities possessed by great powers and the expectations of the international society towards them, these powers often face a dilemma between their own interests and global interests in foreign affairs, especially in the construction of the rule of law.<sup>7</sup>

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<sup>4</sup> Cai Congyan, “国际法上的大国问题” [The Problem of Great Powers in International Law], *Legal Studies* no. 6 (2012): 188-206.

<sup>5</sup> Gerry Simpson, *Great Powers and Outlaw States: Unequal Sovereigns in the International Legal Order* (Cambridge University Press, 2004).

<sup>6</sup> Cao Gang, “人类命运共同体与全球伦理和国际法治” [The Community of Human Destiny and Global Ethics and Rule of Law in International Law], *Peking University Journal (Philosophy and Social Sciences)* no. 2 (2019): 33-41.

<sup>7</sup> Bear F. Braumoeller, *The Great Powers and the International System: Systemic Theory in Empirical Perspective* (Cambridge University Press, 2013).

Furthermore, countries maintaining particularly close relationships with great powers<sup>8</sup> may find it difficult to balance their own interests, global justice, and friendship with allies. The dilemma of great powers – advocating and promoting the international rule of law while at the same time pursuing their core interests in international affairs and maintaining alliance relationships – can result in the “impossible trinity for great powers.”<sup>9</sup> This impossible trinity among interests, justice, and friendship is an important inspiration for us to delve into the theory of the international rule of law. It also has strong implications for the establishment of a good system and operating mode of international organizations, for shaping and developing international legal norms, and for the value-orientation and policies of great powers.

## **II. The Objective Elements of the Impossible Trinity of Great Powers**

The “impossible trinity for great powers” in international relations and international law refers to the fact that a dominant power cannot fully satisfy the following three goals: strictly adhering to moral ideals such as justice in international affairs; pursuing its own interests in the reality of everyday politics; and maintaining close relations with friendly countries or allies.

### **1. Situations where great powers harm their own interests for the sake of world justice and the needs of allies**

Self-interest determines the fundamental behavior of a country. Therefore, safeguarding one’s core national interests in international relations,<sup>10</sup> especially ensuring survival and development, is a natural tendency of any country. Accordingly, generally speaking, a country will not harm its own interests. However, it cannot be ruled out that at some critical moments, countries may sacrifice their own property and devel-

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<sup>8</sup> Qin Yaqing, 世界政治的关系理论 [Theory of Relations in World Politics], Shanghai People’s Publishing House, 2021 edition, pp. 201-242.

<sup>9</sup> See Chi Lo, *China’s Impossible Trinity: The Structural Challenges to the “Chinese Dream”* (Palgrave Macmillan, 2015).

<sup>10</sup> Song Wei, 位置现实主义：一种外交政策理论 [Positional Realism: A Theory of Foreign Policy], Shanghai People’s Publishing House, 2021 edition, pp. 72-91.

opment opportunities for the public interest and the moral norms of the international society, and the alliance between countries. The most representative of such cases is the Pearl Harbor incident. During World War II, the United States was attacked by Japan at Pearl Harbor because of its support to the anti-fascist alliance in its struggle against the Axis powers. The United States actively participated in the war against the Axis powers thereafter. Providing weapons and supplies to allies or directly participating in armed operations, the United States suffered significant losses in terms of material interests and personnel. It sacrificed its own interests to support and participate in the war, met the demands of its allies, and at the same time fulfilled its commitment to the international society, thus achieving only two goals among the three.

When the Soviet Union discussed the outbreak of the Korean War in the United Nations Security Council and dispatched troops to North Korea, it could not take care of the needs of its ally North Korea and at the same time meet its commitments to the international society. The Soviet Union was faced with the dilemma of respecting the authority of the United Nations to ensure collective security while safeguarding its own security interests and ensuring its position in the communist camp. Consequently, the Soviet Union was absent from meetings of the United Nations Security Council, which escalated the Korean War into an international war with involvement of the United States, and which meant a heavy war burden for China.

Similarly, China's foreign aid after the establishment of the People's Republic of China safeguarded the interests of its allies in the same camp and upheld the ideology actively promoted by China, but at the same time, this also caused significant material losses to the country. This made China adjust the basic principles of foreign aid after the 1980s. After the dissolution of the Soviet Union, Russia faced many problems in the international society, mainly because its own security and national interests were always under the threat of traditional hostile factions (essentially Soviet opponents). Against this background, the country looked forward to making its own contributions to the development and progress of international law. Russia hopes to gain more support from its allies around the world, but its neighboring countries are always being drawn in by NATO, leaving it in an unstable state.

## **2. The situation of great powers abandoning global justice for their own interests and ties with their allies**

Researchers in international relations are aware of the differences between alliance and cooperative relationships. An *alliance* is equivalent to an agreement that binds relationships and interests. It means that countries advance, retreat, enjoy prosperity and face adversity together. *Cooperation*, on the other hand, is a relatively loose contractual relationship where countries merely coordinate policies or provide convenience to each other in certain aspects and fields of a common interest or goal. Cooperation in this sense does not imply significant constraints on the identity, policies, and behavior of countries. In contrast, an alliance relationship, due to its special and close nature, brings a lot of pressure and constraints for the countries participating in it. Choosing an alliance relationship means that a country's independent decisions and actions are constrained by its allies, which may affect that country's pursuit of its own interests and its commitments to the international society. Thus, the vast majority of countries will be very cautious in choosing alliance relationships. Through the concept of the “Thucydides's Trap,” international relations scholar Graham Allison pointed out a common mindset among great powers in the development of international relations, namely, to be concerned about other countries becoming more powerful and thus challenging their dominant position.<sup>11</sup> There are many examples of this in the history of international relations. In contrast, some Chinese scholars have proposed the “Du Mu Trap,”<sup>12</sup> which refers to the assertion mentioned by Du Mu in his “Epang Palace Fu” that “those who destroy the Six Kingdoms are the kingdoms themselves but not Qin,” and believe that the decline of a country is mainly caused not by external threats, but by its own unfavorable development. This way of thinking in international relations will encourage countries to pay attention to their own interests, strive to enhance their own strength, and thus prevent various possible risks. By combining suspicion towards other countries with a strong belief in one's own country, it is not difficult to draw the conclusion that in the process of building and developing a country, it is always necessary

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<sup>11</sup> Graham Allison, *Destined for War: Can America and China Escape Thucydides's Trap?* (Houghton Mifflin Harcourt, 2017).

<sup>12</sup> Hu Jian, “大国成长的困惑：‘修昔底德陷阱’还是‘杜牧陷阱?’” [The Puzzle of Great Power Growth: The “Thucydides Trap” or the “Du Mu Trap”?], *Social Sciences*, no. 2 (2021): 3-17.

to pay special attention to its own survival, security, and core interests. Only after their basic needs are fully met will countries consider providing public goods to the world.<sup>13</sup> In this way, the resources that a country can provide to the world will inevitably be limited.

If a major country intends to strengthen and expand its power – whether in terms of military or economic strength, territory, or population size at the material level, or regarding its influence, appeal, and ability to mobilize resources at the non-material level – this will inevitably affect that country’s concern for the global common good. A country can only consider international public interests when its own interests are fully protected. This may lead the country to adopt unilateralist and hegemonic policies.<sup>14</sup> Similarly, certain countries are unwilling to continue the process of globalization which they advocated in the past,<sup>15</sup> thus initiating a wave of de-globalization.<sup>16</sup> Some scholars nonetheless believe that this does not mean that they really abandon globalization; in the view of these scholars, they simply create a new version of globalization. It is worth noting that the basic attribute of globalization is the swift and unimpeded global movement of people, goods, and information. When a country begins to set various barriers to this free flow, no matter how much it tries to sugarcoat its actions, that country is essentially abandoning its commitment to the global common good in favor of pursuing its own goals.

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<sup>13</sup> Shi Jingxia, “‘一带一路’ 倡议与国际法 – 基于国际公共产品供给视角的分析” [The “Belt and Road” Initiative and International Law: An Analysis from the Perspective of the Provision of International Public Goods], *Chinese Social Sciences*, no. 1 (2021): 156-179; Liu Xiaohong, “国际公共卫生安全全球治理的国际法之维” [The Dimension of International Law in Global Governance of International Public Health Security], *Law Science*, no. 4 (2020): 19-32; Wang Kongxiang, “试论国际法的‘公共物品’属性” [On the “Public Goods” Nature of International Law], *Hebei Law Science*, no. 1 (2009): 36-38.

<sup>14</sup> Yu Sui, “单边主义—大国关系—多极化” [Unilateralism – Great Power Relations – Multipolarization], *Contemporary World*, no. 10 (2003): 14-17.

<sup>15</sup> Anthea Roberts and Nicolas Lamp, *Six Faces of Globalization: Who Wins, Who Loses, and Why It Matters* (Harvard University Press, 2021); George Ritzer and Paul Dean, *Globalization: A Basic Text* (2<sup>nd</sup> ed., Wiley-Blackwell, 2015).

<sup>16</sup> Walden Bello, *Deglobalization: Ideas for a New World Economy* (Zed Books, 2004); Walden Bello, *Capitalism’s Last Stand? Deglobalization in the Age of Austerity* (Zed Books, 2013); Karamjeet Kaur, *Globalization & Deglobalization* (Sapatrishi Publications, 2020).

### **3. Great powers choose isolationism to maintain a balance between their own interests and world justice**

It is not difficult to deduce the above assertion from the importance of the two antagonistic elements, national interests and international justice. In the basic logic of the impossible trinity for great powers, a country's first choice is to abandon its allies. The reason for this is very simple. Interests are the foundation of a country's survival while justice is the general ideal. If “interests – justice – friendship” cannot be achieved simultaneously, it is inevitable that friendship between countries, no matter how valuable and desirable, may risk being sacrificed. Even if a country sometimes forms a positive relationship with other countries, it is often more appropriate to understand this not as an alliance relationship, but as a temporary (opportunistic) “friendship” with potential or real opponents or enemies. This kind of “friendship” not only cannot last long, but a country engaging in such a relationship will also be unwilling to sacrifice too much for it.

When the various goals of a country cannot be fully met, priority can only be given to safeguarding the basic national interests while putting friendship aside. This can explain why e.g. Britain has implemented an isolationist policy for a considerable period and was willing to serve as Europe's overseas balancing hand. On the one hand, Britain was committed to maintaining European order, and on the other, it strove to ensure its own interests and status. However, such a policy will inevitably exclude lasting alliances. This also helps us understand why the United States chose not to interfere in European affairs and why it later developed the “Monroe Doctrine,” which became the source of American isolationism. So far, the United States also has demonstrated a greater sense of national pride, which means that it has a stronger sense of alienation from other countries. After the 1980s, China proposed the idea of non-alliance, which was the result of accumulated historical experiences and lessons, and this happened to be an important factor for China to become a world power.

### **III. A Theoretical Explanation of the Impossible Trinity for Great Powers**

The current international society is far from a mature, institutionalized, and organized social state. Despite the existence of legal norms and some kind of order in international relations, a country's strength continues to remain the most fundamental criterion for its survival. Under the overall structure of today's global environment, international society needs to balance many considerations, and countries face substantial constraints in their choices. Specifically, when a country moves towards the rule of law, the "impossible trinity for great powers," i.e. of "interests – justice – friendship," arises from the following six factors:

#### **1. Anarchy in international relations**

For a considerable period of time, international society has been in a state of anarchy. We will not get rid of it in the foreseeable future. Despite the existence of certain ethical norms and standards of action even in an anarchic society, the lack of public authority is its distinguishing feature. In its absence, national security has always been an indispensable consideration in inter-state relations. This also means that advocating behavioral standards and moral norms in international society cannot guarantee full recognition and adherence by all countries. The effective implementation of international law mainly depends on the will and strength of the actors themselves. In an anarchic international system, people tend to assume that great powers are always struggling for power<sup>17</sup> and that the rise of great powers poses a threat to existing ones.

Great powers should consider providing public goods in international society to build an overall pattern of world peace and shoulder the responsibility of a great power. At the same time, however, there is concern that the continuous provision of public goods by a great power will lead to the weakening of its strength as a state, resulting in the loss of great power status. This puts great powers in a delicate position where they have to balance between the public good and domestic in-

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<sup>17</sup> Hans J. Morgenthau, *Politics Among Nations: The Struggle for Power and Peace* (Alfred A. Knopf, 1948), pp. 21-25.

terests. The presence of allies with differing interests, ways of thinking, and behavioral patterns renders decision-making by great powers even more difficult.

## 2. The weak legal status of international law

International law is not a written record of existing rules,<sup>18</sup> but a constantly evolving system of action in national practice.<sup>19</sup> To properly understand the specific forms and functioning of international law, one should not just look at international treaties and documents, but rather at the actual norms of action reflected in international relations. The decentralized structural characteristics of the international society determine the limitations of international law.<sup>20</sup> In most cases, international legal norms are “soft law” that cannot compel States to take action. When facing other countries that violate international law and cause them losses, countries often resort to legal proceedings to resolve the disputes. However, such proceedings in many cases are not as effective as a direct settling of disputes between the parties concerned. Hans Kelsen, the international law scholar, asserted that such self-help could also be seen as a form of legal coercion.<sup>21</sup> He viewed international law as a primary legal order, which is a certain improvement in comparison to Austin’s view of international law as empirical morality rather than law in a strict sense.<sup>22</sup> However, overall, he still clearly sees the weaknesses of international legal norms, a position which Hart further developed.<sup>23</sup>

While international law can affect the definition and assertion of a country’s interests,<sup>24</sup> it will not be decisive when it comes to a country’s

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<sup>18</sup> Shirley V. Scott, *International Law in World Politics: An Introduction* (3<sup>rd</sup> ed., Lynne Rienner, 2017).

<sup>19</sup> Rosalyn Higgins, *Problems and Process: International Law and How We Use It* (Clarendon Press, 1994).

<sup>20</sup> Hans J. Morgenthau, *Politics Among Nations*, pp. 296-299.

<sup>21</sup> Hans Kelsen, *General Theory of Law & State* (Harvard University Press, 1949), pp. 327-339.

<sup>22</sup> John Austin, Wilfrid E. Rumble (ed.), *The Province of Jurisprudence Determined* (Cambridge University Press, 1995), p. 112.

<sup>23</sup> H. L. A. Hart, *The Concept of Law* (3<sup>rd</sup> ed., Oxford University Press, 2012), p. 227.

<sup>24</sup> Adam Bower, *Norms without the Great Powers: International Law and Changing Social Standards in World Politics* (Oxford University Press 2017).

core interests or its very survival. Undoubtedly, great powers will have a stronger influence on the development of international law within their own sphere of influence. This particularly applies to the right of self-determination.<sup>25</sup> The United States focuses on “legal security,” with an “offensive” and at the same time, “defensive” use of international law in mind.<sup>26</sup> Specifically, the U.S. aims to define the concepts of international law according to its own criteria; it also tries to create new legal concepts. As a decentralized system that lacks top-down enforcement, the impact and effectiveness of international law are highly questionable. In this situation, the international rule of law remains largely an unenforceable ideal, at least for the foreseeable time. Thus, a country must strive to ensure its survival with its own strength. In a legal environment where good behavior may not necessarily be rewarded and transgressions may not necessarily be punished, countries are likely to resort to the assertion of self-interest and to neglect the needs of allies or the global public interest altogether.

### **3. Need of national survival under conditions of resource scarcity**

The resources of the international society are limited. The scarcity of resources is one of the main factors in the development of relations between states.<sup>27</sup> No country can ignore this reality. We only have one Earth, and most resources are finite. Even if humans can obtain some meteorites or related materials from the moon or other celestial bodies, these are only experimental objects, not large-scale resources that can be used in daily life. At the same time, due to the development of science and technology, the impact of humans on the natural environment has increased significantly. To enable all countries to work together and effectively utilize resources has become a quite difficult task. If

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<sup>25</sup> Milena Sterio, *The Right to Self-determination Under International Law: “Selfistans,” Secession, and the Rule of the Great Powers* (Routledge, 2012).

<sup>26</sup> Shirley V. Scott, *International Law, US Power: The United States’ Quest for Legal Security* (Cambridge University Press, 2012).

<sup>27</sup> Dennis Pirages and Ken Cousins (eds.), *From Resource Scarcity to Ecological Security: Exploring New Limits to Growth* (The MIT Press, 2005); Colin H. Kahl, *States, Scarcity, and Civil Strife in the Developing World* (Princeton University Press, 2006); Shlomi Dinar, *Beyond Resource Wars: Scarcity, Environmental Degradation, and International Cooperation* (The MIT Press, 2011); Sendhil Mullainathan and Eldar Shafir, *Scarcity: Why Having Too Little Means So Much* (Times Books, 2013).

500 years ago the world could still be seen as a resource system that could be freely accessed by all countries, this premise<sup>28</sup> no longer holds under today's conditions. The principle of the freedom of the oceans (*mare liberum*) envisioned by Grotius is no longer viable.<sup>29</sup> We have to face the extreme scarcity of resources of the Earth. Under existing conditions, promoting prosperity for all countries has become an enormous challenge. In many countries, people suffer from hunger, and under conditions of insufficient food and clothing, the goal of global prosperity and development is clearly difficult to achieve. This inevitably will lead to tensions between countries in terms of their development aspirations.

The global rule of law needs to address the issue of how to make effective choices in the face of resource scarcity. When laws cannot clearly define the principles and methods of resource allocation, countries will strive to secure their own resources and ensure their basic survival at their own risk. This unavoidably creates antagonism and competitive relationships between one country and another, as well as between any country and the world.

#### **4. The realistic background of national action**

John Mearsheimer introduced the paradigm of "the tragedy of great power politics." He describes and critically analyzes the dominant influence of great powers in international society.<sup>30</sup> Under the theoretical concepts of "security dilemma"<sup>31</sup> and "Thucydides's Trap," many crises can be identified in the politics of great powers. Notwithstanding the many diverse descriptions in international relations theory and the

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<sup>28</sup> Hugo Grotius, Ralph Van Deman Magoffin (trans.), *The Freedom of the Seas* (Batoche Books Limited, 2000), pp. 24-29.

<sup>29</sup> Francisco Orrego Vicuña, *The Changing International Law of High Seas Fisheries* (Cambridge University Press, 1999), pp. 4-5.

<sup>30</sup> John Mearsheimer, *The Tragedy of Great Power Politics* (Updated Edition, W. W. Norton & Company, 2014).

<sup>31</sup> John H. Herz, "Idealist Internationalism and the Security Dilemma," *World Politics* 2 (1950): 157-180; Ken Booth and Nicholas J. Wheeler, *The Security Dilemma: Fear, Cooperation and Trust in World Politics* (Palgrave Macmillan, 2008); Ye Jiang, "试析大国崛起与'安全困境'的关系" [An Analysis of the Relationship Between the Rise of Great Powers and the Security Dilemma], *World Economy and Politics*, no. 2 (2005).

ways in which countries think and act at different times, each country's actions are essentially determined by the logic of realism. That is to say, no country can fail to consider its own security, economic, social, and cultural needs in the process of development. The evolution of a country is inevitably shaped by competition with other countries. Competing for relative benefits indeed constitutes the basis of a country's actions in the international society. Against this background, the tension between the public good and national interests is the core contradiction in international relations and the main obstacle to the emergence of global order.<sup>32</sup>

### 5. The “suspicion chain” between countries

People often compare the relationship between countries to personal relationships and relate a country's vision of other countries to how an individual views the actions of other individuals. In relations between states, neither friendship nor hostility is permanent. The long-term policy of a country is oriented towards the pursuit of its own interests. There exists indeed a complex, conflictual relationship of cooperation and distrust between countries that are allies, and even more so between countries outside of an alliance.

The state of controversy and even hostility that China and the Soviet Union entered into during the 1950s and 1960s is a pertinent example of the difficulties in stabilizing an alliance relationship. The conflicting positions of the United States and Japan during the period of relatively stable relations are further proof of this.

### 6. Greater international social responsibility of great powers

Why is it less likely that a small country faces a conflict between national interests and friendship? From the perspective of a small country, foreign policy can be regarded as pursuit of international morality. In the human moral system, “supporting the weak and restraining the strong” is a recognized principle. In contrast, making the strong stronger and

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<sup>32</sup> Yi Xianhe, “国家主权平等与‘领袖型国家’的正当性” [The Equality of State Sovereignty and the Legitimacy of “Leader States”], *Journal of Xi'an Jiaotong University (Social Sciences)* 2007, no. 5, pp. 54-72.

the weak weaker is often considered immoral. In other words, although the basic laws of natural selection and survival of the fittest – strong vs. weak – also determine human society, it is often believed that the strong should be restrained to a certain extent while the weak should receive sufficient attention and support. Therefore, the weak countries’ assertion of their own interests, or the formation of an alliance by the weak, will be considered legitimate. In this regard, the Group of 77 and the Association of Southeast Asian Nations are often seen in the international society as coalition systems of weak states trying to assert themselves vis-à-vis powerful countries. This assertion is perceived as a manifestation of international justice. Therefore, small countries will not face the dilemma of large countries that – due to their power and influence – will be subject to many constraints on their actions. The latter’s positions are often the focus of attention of the international society, and actions they take to safeguard their own interests will be considered as contrary to the public good. Only actions at the expense of themselves will be considered moral. If large countries intend to accumulate more power, it will be considered as selfish unilateralism. Accordingly, conflicts may arise between the public good and those countries’ national interests. Thus, large and powerful countries face much more international criticism and pressure than small countries.<sup>33</sup>

For any country, giving up its own interests is a highly irrational choice. Survival is the very essence of all the needs of a country. Moreover, if a country pursues any altruistic goals, it must do so on the premise of its own existence and development. It is difficult to imagine that a weak and poor country would be able to aid other countries, and it is even more difficult to imagine that a country struggling to survive would be able to provide public goods to the international society. In contrast, a major country will consider taking on global obligations in the course of its growth and providing public goods to the international society. Major powers pay special attention to their responsibility – and the significance of their policies – for global order. Any country attempting to become a major power must make a difference in international affairs.

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<sup>33</sup> Cao Yang, “国际秩序中‘大国责任’的困境与重构” [The Dilemma and Reconstruction of “Great Power Responsibility” in the International Order], *当代世界* [Contemporary World], no. 11 (2010): 48-50.

## **IV. Theoretical Enlightenment and Practical Guidance on the Impossible Trinity for Great Powers**

Every country has grown from experiences and lessons learned. The impossible trinity for great powers will require countries not only to carefully balance their own setting of goals in relations between states, but also to promote a more nuanced and rational definition of the purposes and principles of the international rule of law by the community of states.

### **1. The ambiguity of values in international law**

In the domain of international law, a proper understanding of the self-interest of a country is important to avoid a one-sided idealistic misconception and to ensure a harmonious development of international norms. These norms must always be in conformity with the needs of a country's survival and development.

If the international rule of law is to be universally recognized, it must be constituted as an inclusive and open legal system, which requires major countries to actively provide public goods and modify their definition and mentality of self-interest. For many great powers, especially those that have always held a leading position, this goal is difficult to achieve.

In the current game of great powers, it is also obvious that countries are suspicious of each other, which makes it difficult for them to build a relationship of trust and constructive cooperation. Many international relations scholars believe that there is a trend of a power shift from the United States to China.<sup>34</sup> It can also be further inferred that the global standards that great powers attempt to enforce are often defined on a selective basis. Countries that are in good terms with great powers will benefit from a more tolerant, friendly, and supportive treatment. On

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<sup>34</sup> Enrico Fels, *Shifting Power in Asia-Pacific? The Rise of China, Sino-US Competition and Regional Middle Power Allegiance* (Springer, 2017); Zhiqun Zhu, *US-China in the 21st Century: Power Transition and Peace* (Routledge, 2006); Steve Chan, *China, the US and the Power-Transition Theory: A Critique* (Routledge, 2007); G. John Ikenberry, Wang Jisi, Zhu Feng (eds.), *America, China, and the Struggle for World Order: Ideas, Traditions, Historical Legacies, and Global Visions* (Palgrave Macmillan 2015).

the contrary, towards countries with political systems and ideologies that great powers are unwilling to accept those powers will adopt an attitude of exclusion and avoidance. This is obvious not only in the political and military domain, but also in the formulation and operation of trade policies. As a result, major countries have built their own circle of friendly nations.

In many instances, the global ethics and universal values which great powers advocate will not be endorsed or accepted by all countries around the world. This may be due to the exclusive ideas and behavior of great powers themselves, or it may be because of the fear and suspicion of other countries. On the one hand, international law advocates global ethics and a commitment to the global common good; on the other hand, it emphasizes the priority of national interests, rooted in the aim of survival and security of every state. International law cannot coordinate properly between the two domains. Under these circumstances, it needs to respect the autonomy of actors and regard national self-defense as a priority and prerequisite. Nonetheless, international law is also oriented towards universally binding regulations. This is obvious in the norms regarding the international use of force in the United Nations Charter.

## **2. The discontinuity of time and space in the discourse of international law**

The impossible trinity for great powers in the international society further leads to the spatiotemporal discontinuity of international law discourse. Great powers should pursue a relatively sustained and consistent discourse in international affairs. However, the impossible trinity for great powers means that they will inevitably advance different opinions in different situations, which will diminish the reputation of great powers in the international society and reduce their influence.

International law is relatively weak when it comes to substantive rights and obligations and has a rather small impact on the material interests of states. However, it has a relatively large impact on the discourse and image of a state. Therefore, great powers should carefully consider how to use their words in international legal affairs. At certain times, they may emphasize self-interest; at other times, they may focus on global ethics; and, in special cases, they may advocate regional alliances.

These goals are mutually exclusive, which is the reason why countries face great difficulties in trying to form a consistent discourse in matters of international law. For instance, in cases where there are distinct regions within a country, we witness significant inconsistencies in the positions of the United States and Western countries. This has been obvious in how these countries deal with the question of independence of Kosovo and Crimea. Their approach is often referred to as “policy of double standards.” If a major country cannot express its position in a consistent mode, its approach may be easily dismissed by the international society. Thus, major countries should pay greater attention to how to establish a balance between their own interests and global interests, as well as to how to assert their interests in a bilateral context.

Also, it is necessary that a country thoroughly assess the policies of its allies to avoid detrimental consequences from the actions of an ally. This means that great powers should be very cautious in selecting their allies to avoid that the latter’s moves and propositions affect their hard-earned reputation and positive image as members of the international society, committed to the rule of law.

### **3. International rule of law as a compromise, and its fragility**

The impossible trinity for great powers means that, in terms of sound law, one cannot demand too much from the behavior of a great power. One may assume that a great power acts on the basis of the standards of *realpolitik*, i.e. of a realistic and rational assessment of its interests, rather than relying on standards that are morally sound and completely altruistic. Thus, the international rule of law is still an amalgam of minimum standards of inter-state behavior rather than the expression of a perfect legal system. However, the operation of international law inherently carries a force of legitimacy,<sup>35</sup> so countries that violate the law may face negative evaluations and moral pressure from public opinion.

In human history, state practice has repeatedly proven that every idealistic design of the rule of law ultimately collapses due to the pursuit

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<sup>35</sup> Nikolas M. Rajković, Tanja E. Aalberts, and Thomas Gammeltoft-Hansen (eds.), *The Power of Legality: Practices of International Law and their Politics* (Cambridge University Press, 2016).

of national interests. Both, the League of Nations, established in 1919, and the World Trade Organization, established in 1994, were faced with the dilemma that some countries sacrificed global ethics for their own interests. This ultimately led to the paralysis of the system. The normative design of the international rule of law is still weak in the face of the needs, interests, and capabilities of states. International law is not yet a system of enforceable rights and obligations. Those cannot exceed the de facto structure of the international society.

As far as great powers are concerned, the development of the international rule of law has been characterized more by a power game between countries than by an elaboration of sound legal principles. This has resulted in many exceptions in institutional design. It also means that the interests of great powers will not be decisively constrained by any of the existing arrangements under the rule of law. The principle of consensus among great powers in the United Nations Security Council is clear evidence of this. On issues related to international peace and security, the five permanent members of the United Nations Security Council have always made use of their veto power. Even when dealing with disputes in which they themselves are a party they do not need to abstain from voting. This ensures that the interests of great powers are always at the highest position of international law and are not diluted by concerns for the global public interest. In contrast, the international legal system advocated by small countries is more directed towards the common good of the international society. Examples are the concept of "common heritage of mankind" proposed in the Law of the Sea, the "New International Economic Order" proposed in the field of commerce, and the comprehensive prohibition of nuclear weapons proposed in the area of security. At international conferences, countries advocate and support good governance in the ocean and propagate the rule of law in the domain of the Internet, proposing a series of noble concepts. This broad and multilateral approach towards justice has no moral fault. The problem is that these concepts will often not be implemented because major countries will only pay lip service to these goals and not provide their full support. Thus, in real life, the international rule of law is quite fragile. If there is even a slight mistake, this may be misinterpreted and exploited by great powers and become an excuse for hegemonism. This predicament reflects the difficulty in achieving a balance between self-interest and justice.

The insistence of great powers on their exceptional role in the domain of international law indicates a tension between the public good and national interests. Advocacy of and compliance with international law are considered the standard for any country that is committed to upholding the ethical principles of international society.<sup>36</sup> Countries advocating this position believe that the international legal system is primarily established for small and medium-sized countries. Great powers find ample reasons to place themselves outside these legal arrangements.<sup>37</sup> Cai Congyan believes that China's exceptionalism is also a problem worth serious consideration.<sup>38</sup>

## V. Conclusion

Opting for the rule of law is obviously desirable, but it is also difficult in the perspective of individual states. It is not easy to fulfill all the criteria of the rule of law. For a major country advocating for the rule of law in the international realm, it is necessary to strike a careful and meticulous balance between global public and domestic interests. Also, history has proven that great powers that strive to shoulder global responsibility must be very cautious in choosing allies. Indeed, they may adopt a policy of non-alignment. Alliances are likely to undermine the global public good or may affect a country's own development.

The impossible trinity for great powers is not a China issue, but it is always related to China. At a time when China was not yet a significant and highly anticipated power in the world, the impossible trinity for great powers did not apply to it. There were not many issues China needed to grapple with before the 1990s. At that time, China could still hide its light and remain in the shadow of great powers. However, Chi-

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<sup>36</sup> Markus Burgstaller, *Theories of Compliance with International Law* (Brill Nijhoff, 2004).

<sup>37</sup> Scholars have demonstrated this exceptionalist attitude towards international law; cf., Zeng Lijie, “国际法领域的美国例外主义” [American Exceptionalism in the Field of International Law], *Contemporary World and Socialism*, no. 4 (2006): 91-94; Anu Bradford and Eric A. Posner, “Universal Exceptionalism in International Law,” *Harvard International Law Journal* 52, no. 3 (2011).

<sup>38</sup> Congyan Cai, *The Rise of China and International Law: Taking Chinese Exceptionalism Seriously* (Oxford University Press, 2019).

na has become one of the focuses of global attention today. Research is undertaken on China-U.S., China-Europe, China-Japan, and China-India relations.<sup>39</sup> This requires China to seriously address the impossible trinity in international relations and deal with the central contradiction it faces as a major power. As an emerging developing country that has entered the center of the world stage, a country at the core of global governance, China needs to make crucial choices as to how to build and promote the rule of law in a world full of risks and challenges.

For China and any other major country, how to balance the three values of the “trinity” we described here will be a decisive test in the process of continuous growth and development, as well as a challenge to its wisdom. China has proposed the common values of “peace, development, fairness, justice, democracy, and freedom” for all humanity. These are different from the “universal values” proposed by the West. Promoting and realizing the international rule of law, China inevitably finds itself in a position where it must identify and define the priorities in terms of national sovereignty, security, and development interests – all under the aspect of the “human community with a shared future” that China advocates. At the same time, China must carefully consider how to treat its strategic partners and shape a good national image in its development process. Fully absorbing and drawing on the concepts and judgments of unique traditional Chinese culture, advancing a conceptual system of international relations with Chinese characteristics, and effectively supporting a diplomatic approach while promoting the sound development of China’s discourse and policies on the international rule of law – these are currently the main areas of capacity-building that China must focus on strengthening.

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<sup>39</sup> See, e.g., James Gregor, *Marxism and the Making of China: A Doctrinal History* (Palgrave Macmillan, 2014); Timothy Cheek, *Mao Zedong and China’s Revolutions: A Brief History with Documents* (Palgrave Macmillan, 2002). For observations and conjectures on China’s foreign policy decisions, see Gilbert Rozman (eds.), *China’s Foreign Policy: Who Makes It, and How Is It Made?* (Palgrave Macmillan, 2012); Lukas K. Danner, *China’s Grand Strategy: Contradictory Foreign Policy?* (Palgrave Macmillan, 2018).



Dušan Proroković

## **Intergovernmental Organizations and Great Powers in the Multipolar World The Issue of Confidence and the Impact on International Relations**

### **Introduction: Covid-19 Pandemic, War in Ukraine, and the New World Order**

Many influential individuals already said that the world will look very different after the pandemic. According to Henry Kissinger, “The Coronavirus Pandemic Will Forever Alter the World Order.”<sup>1</sup> Richard Haass agrees, but at the same time points out that changes will not be radical: “Most argue that the world we are entering will be fundamentally different from what existed before. Some predict the pandemic will bring about a new world order led by China; others believe it will trigger the demise of China’s leadership. Some say it will end globalization; others hope it will usher in a new age of global cooperation. And still others project that it will supercharge nationalism, undermine free trade, and lead to regime change in various countries – or all the above. But the world following the pandemic is unlikely to be radically different from the one that preceded it.”<sup>2</sup> In any case, changes are expected, but at this moment, there are no clear predictions as to their scope or intensity. In international relations whose main characteristic is anarchy, predictions are unreliable. Nevertheless, Joseph Stiglitz offers some general observations: “As has been obvious since the outset, the COVID-19 pandemic is a global problem that demands a global solution. In John Donne’s immortal words, ‘No man is an island ...’ nor is any country

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<sup>1</sup> Henry A. Kissinger, “The Coronavirus Pandemic Will Forever Alter the World Order,” *Wall Street Journal*, April 3<sup>rd</sup>, 2020, <https://www.wsj.com/articles/the-coronavirus-pandemic-will-forever-alter-the-world-order-11585953005> (retrieved May 9, 2023).

<sup>2</sup> Richard Haass, “The Pandemic Will Accelerate History Rather Than Reshape It. Not Every Crisis Is a Turning Point,” *Foreign Affairs*, April 7<sup>th</sup>, 2020, <https://www.foreignaffairs.com/articles/united-states/2020-04-07/pandemic-will-accelerate-history-rather-reshape-it> (retrieved May 11, 2023).

– as the COVID-19 crisis has made abundantly clear. If only the international community would get its head out of the sand. (...) But global action is also a matter of self-interest.”<sup>3</sup> Is the international community able to come to a unanimous answer? Will countries sacrifice their self-interest? What kind of role can international or, more precisely, intergovernmental organizations play in this constellation?

All these questions became even more relevant after February 2022. Looking at things from the point of view of the transformation of the system of world politics and the role of international organizations, with the escalation of the Ukrainian crisis, the effects of the pandemic on international relations have only multiplied. Not only did all the predicted consequences become more pronounced, but numerous new ones also appeared. Among other things, we witness an increasing polarization between the “collective West” and the “non-Western bloc.” This division is not identical to that of the Cold War; it is often difficult to determine the “lines of demarcation.” In these circumstances, Joseph Stiglitz’s warning that “a global problem demands a global solution” seems pointless. How to look for global solutions when, due to the increasingly noticeable polarization, even partial solutions that would lead to an end of hostilities and peace in Ukraine cannot be found?

The paper analyzes the current state of international relations as well as its implications for international organizations. A neo-realistic theoretical framework is used for this analysis. Among the basic postulates of the theory of neo-realism in international relations are the following theses: predominance of the principle of self-help; establishment of a balance of power; and selfishness of states in an anarchic international environment.<sup>4</sup> The time frame of the research is limited to the period from the beginning of the pandemic to the time of writing in Fall 2023.

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<sup>3</sup> Joseph E. Stiglitz, “Internationalizing the Crisis,” *Project Syndicate*, April 6, 2020, <https://www.project-syndicate.org/commentary/covid19-impact-on-developing-emerging-economies-by-joseph-e-stiglitz-2020-04> (retrieved May 9, 2023).

<sup>4</sup> Kenneth Waltz, *Theory of International Relations*. Waveland Press: Long Grove, 1979.

## **Intergovernmental organizations: impact on international relations**

According to the definition of the Economic and Social Council of the United Nations, intergovernmental organizations are “organizations established by interstate agreement whose members are states.”<sup>5</sup> Charles Kegley and Eugene Witkopf state that they are “institutions that are created by governments and in which the governments of the states participate, giving them the power to make collective decisions regarding specific global problems. (...) In principle, intergovernmental organizations are defined not only by the fact that states are their members, but also by their permanence and institutional organization; intergovernmental organizations meet at relatively regular intervals and have special decision-making procedures, as well as a permanent secretariat or staff at headquarters.”<sup>6</sup>

Michael Wallace and David Singer establish three criteria defining intergovernmental organizations: 1) that their members are at least two states; 2) that they hold regular plenary sessions at least once every ten years; 3) that they have a secretariat that will technically manage the activities of the organizations.<sup>7</sup> On the other hand, Alexander Kuteynikov (Александр Кутейников) states that “the characteristics according to which intergovernmental organizations are recognized are: 1) compliance of the organization with the norms of international law; 2) that they are established by at least three countries; 3) that to a certain extent, they acquire the status of a subject of international law.”<sup>8</sup> Kuteynikov distinguishes six functions of intergovernmental organizations: normative, control, intermediary, advisory, operational, and informative. Intergovernmental organizations are also character-

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<sup>5</sup> United Nations, Economic and Social Council, *Resolution 288 (X)*, New York, 1950.

<sup>6</sup> Čarls Kegli, Judžin Vitkof, *Svetska politika – trend il transformacija*, CSES – Diplomatska akademija, Beograd, 2004, pp. 224 – 225. (Translated by the author.)

<sup>7</sup> Michael Wallace, David Singer, “Intergovernmental organizations in the Global System, 1815 – 1964: A Quantitative Description,” *International Organization*, 24(2), 1970, pp. 239-245.

<sup>8</sup> Aleksandr Kuteynikov [Кутейников, Александр Евгеньевич], “Международные межправительственные организации: социологический подход,” *Журнал социологии и социальной антропологии*, том II, выпуск 4, 1999, p. 81. (Translated by the author.)

ized by the fact that they have international legal personality. They are actors of international relations; they have rights and obligations, and their decisions have legal effect in the international system. Intergovernmental organizations are classified according to the geographical distribution of the members; they are divided into global and regional organizations, and according to their proclaimed goals – and they are divided into organizations with multiple and unique goals, as shown in Table 1.<sup>9</sup>

Table 1: Simple classification of intergovernmental organizations

	<b>Scope of the declared objectives</b>	
Geographical scope	<b>Multiple goals</b>	<b>Unique goals</b>
<b>Global</b>	United Nations World Trade Organization Organization of the Islamic Conference	World Health Organization International Labor Organization World Postal Union
<b>Regional</b>	European Union OSCE Organization of American States Organization of African Unity Arab League ASEAN	European Space Agency Nordic Council NATO International Olive Oil Council International North Pacific Coffee Organization African Peanut Council

The *normative function* implies the possibility to determine formal norms and, through them, the rules of conduct in international relations. The *control function* implies any activity aimed at determining the actual situation and assessing whether in the observed case everything is in accordance with legal norms or not. The *mediation function* is usually reserved for the Secretary-General, or a special envoy authorized

<sup>9</sup> Čarls Kegli, Judžin Vitkof, *Svetska politika – trend i transformacija*, CSES – Diplomatska akademija, Beograd, 2004, p. 225.

by him. The *advisory function* is about the preparation of certain recommendations for member states and is often linked to the normative function. The *operational function* differs from all others, as it relates to situations where the intergovernmental organization itself realizes the goals it has set, without the participation of the members, relying on its own human and material resources. Finally, the *information function* is reflected in the fact that the intergovernmental organization is the largest user and “broadcaster” of information, but also the channel for their distribution.<sup>10</sup> Intergovernmental organizations are evolving in a wide variety of directions. “The expansion of intergovernmental organizations has created a complex network of intertwined international organizations that work together to address different global issues.”<sup>11</sup> In the period before the pandemic (perhaps it is more accurate to say during the first decade of the 21<sup>st</sup> century), intergovernmental organizations were seen as fora for solving global and interstate problems, operating in multilateral formats that can affect collective security.

States enter these organizations to improve their position and ultimately increase their own power potentials, but after some time and in certain situations it turns out that the result is different, and that in this way neither national interests nor national security can be achieved. Anyway, states remain in these intergovernmental organizations, accept their recommendations, respect their advice and enter various arrangements with them, because they estimate that it is riskier to abruptly withdraw from membership than to negotiate.<sup>12</sup>

However, this time, when the stability of the global economy and, consequently, of international relations was hampered by a pandemic, influential countries began to talk about the purposefulness of intergovernmental organizations. Although, formally, in some intergovernmental organizations, all countries are equal (within the EU, it is even possible for the smallest countries to block certain decisions), the rule “one member – one vote” usually exists only in theory. As the power of

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<sup>10</sup> Dušan Proroković, *Era multipolarnosti*, Službeni glasnik, Beograd, 2018, pp. 193-195.

<sup>11</sup> Čarls Kegli, Judžin Vitkof, *Svetska politika – trend i transformacija*, CSES – Diplomatska akademija, Beograd, 2004, p. 226.

<sup>12</sup> Dušan Proroković, *Era multipolarnosti*, Službeni glasnik, Beograd, 2018, p. 198. (Translated by the author.)

a state depends on its military, economic and political capacities, it is effectively the great and, to a certain extent, regional powers that govern intergovernmental organizations.

### **Multipolar world: transformation of the structure of the system of world politics and the role of intergovernmental organizations**

The system of world politics is determined by the power potential of states. The structure can be unipolar, bipolar, or multipolar.<sup>13</sup> There are always certain asymmetries, however. The interests of states, as key players in international relations, are the constant factor. Alliances survive only as long as their function is in accordance with the proclaimed interests. For example, although both China and the Soviet Union were part of the communist bloc, their relations during the Cold War became increasingly complex over time, and even resulted in a short-lived armed conflict. Or, although Türkiye has been a member of NATO and a strategic partner of the U.S. for several decades, after the escalation of the Ukrainian crisis, the interests of the two countries increasingly collided. Türkiye not only refused to impose sanctions on Russia, but also showed interest in becoming a member of BRICS.<sup>14</sup>

Periodically, as the power potentials change, so transforms the structure of the global system. During the Cold War period, the order was bipolar, with two dominant centers of power – the U.S. and the Soviet Union. The Cold War was followed by a two-decade period of absolute U.S. dominance. The subsequent transition from a unipolar to a multipolar constellation has been analyzed by many authors. The ongoing transformation can be traced back to 2008.<sup>15</sup> The system of world

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<sup>13</sup> John Mearsheimer, *The Tragedy of Great Power Politics*. New York: W.W. Norton, 2001; Karl W. Deutsch and David Singer, "Multipolar Power Systems and International Stability," *World Politics*, 16 (3), 1964, pp. 390-406; William Wohlforth, "The Stability of a Unipolar World," *International Security*, 24 (1), 1999, pp. 5-41.

<sup>14</sup> Sinem Cengiz, "Building BRICS: Why are Saudi Arabia, Egypt and Turkey considering joining the group?," *Arab News*, July 22, 2022, <https://www.arabnews.com/node/2127586> (retrieved July 11, 2023).

<sup>15</sup> Dušan Proroković, "Geopolitičke posledice eskalacije Ukrajinske krize," *Sociološki pregled*, LVI, no. 3, 2022, pp. 746-749.

politics is no longer unipolar. On the one hand, it can be assumed that the pandemic and the war in Ukraine induced the transformation of the structure. On the other hand, it can also be argued that the events during the pandemic and especially the war in Ukraine are the logical consequences of a transformation that started much earlier. Countries that consider themselves as great powers, which China and Russia undoubtedly are, expect recognition of their status from other actors as well. Certainly, several other candidates see themselves as actual or potential great powers, India being the first. The United States was not prepared to accept China and Russia as equal great powers. For this reason, mistrust arose in their relationship.<sup>16</sup> The U.S. began to view China and Russia more and more as a threat because of the increasingly ambitious and aggressive behavior of these actors. In turn, China and Russia increasingly began to view the U.S. as a threat because their perception was that the U.S. was restraining and limiting them in the international arena. Mistrust spilled over to intergovernmental organizations that became hostages of this process.

If within global intergovernmental organizations there is no trust between the key actors – which the three mentioned countries certainly are – then those intergovernmental organizations cannot perform their assigned role. When the perceptions of key actors are diametrically opposed, intergovernmental organizations are no longer a place to search for solutions, but rather an arena of conflict.

### **The era of the pandemic: United States against the WHO, problems faced by the EU, and consequences for relations with China and Russia**

Secretary of State Mike Pompeo said: “The World Health Organization in its history has done some good work. Unfortunately, here it didn’t hit the top of its game, and we need to make sure that we push through efforts to fundamentally change that or make a different decision that says we’re going to do our part to make sure that these important world health obligations, things that frankly keep Americans safe too, actually

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<sup>16</sup> Dušan Proroković, “Položaj Rusije u multipolarnom svetu I strateške opcije Srbije,” *Srpska politička misao*, XXX (79), 2023, p. 46.

function.<sup>17</sup> A week later, he specified that a fundamental reform of the WHO is necessary, and warned that the United States (as the largest donor to the WHO) may never resume the funding of the organization. On the order of President Donald Trump, the United States stopped paying the dues to the WHO. Trump was not satisfied because the U.S. pays 400 million to 500 million USD each year while China only contributes around 40 million USD. The White House was also dissatisfied with several other things, in particular the methodology of the WHO: “In an interview with Sean Hannity on March 4, Trump also claimed that the death rate published by the WHO was false, that the correct fatality rate was less than 1 percent, and said, ‘Well, I think the 34 percent is really a false number’.”<sup>18</sup>

It turned out that this was just a preparation for the continuation of a wider campaign of the American president. In early May, Donald Trump openly accused the Chinese authorities of being responsible for the spread of the infection, alluding to the fact that the virus was artificially made at the Wuhan Institute of Virology, saying: “We are investigating where and when the virus came from, how it happened.”<sup>19</sup> It is in this context that Trump looked at the role of the WHO, which he suspected of hiding or falsifying data on the characteristics and spread of the infection and, thus, ultimately helping the Chinese in several ways.

The World Health Organization (WHO) is a specialized agency of the United Nations responsible for international public health. The WHO has 194 member states. These are all the member states of the Unit-

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<sup>17</sup> Betsy Klein, Jennifer Hansler, “Trump halts World Health Organization funding over handling of coronavirus outbreak,” *CNN*, April 15<sup>th</sup>, 2020, <https://edition.cnn.com/2020/04/14/politics/donald-trump-world-health-organization-funding-coronavirus/index.html> (retrieved May 20, 2023).

<sup>18</sup> David Jackson, *USA Today*, March 5, 2020, <https://www.usatoday.com/story/news/politics/2020/03/05/coronavirus-trump-disputes-world-health-organization-death-rate/4961519002/> (retrieved May 21, 2023).

<sup>19</sup> Ksenija Pavkov, “Tramp prebacuje odgovornost za virus, Peking se predstavlja kao lider u borbi,” *N1*, May 5, 2020, <http://rs.n1info.com/Svet/a596331/Tramp-prebacuje-odgovornost-za-virus-Peking-se-predstavlja-kao-lider-u-borbi.html> (retrieved May 20, 2023).

ed Nations except for Liechtenstein, the Cook Islands, and Niue.<sup>20</sup> The functions of the WHO are mostly informative and advisory (according to the previously given classifications). During the pandemic, the WHO collected, processed, systematized, and then presented data on the character and consequences of the disease, the geographical spread of the virus, the number of patients, and also gave recommendations to the states about the required preventive measures. The role of the WHO in these kinds of situations is important but not decisive, since the organization has no normative function. As a result, the political power of the WHO is limited – especially, if we keep in mind the possibility of opposing the United States. In the case of the pandemic, the WHO seems to have fallen victim to the deteriorating bilateral relations between the United States and China. There appears to be a certain strategy behind the actions of the President of the United States and the State Department. Namely, the “decision to withdraw funding from the WHO follows a pattern of skepticism of world organizations that began well before the coronavirus pandemic. Trump has questioned U.S. funding to the United Nations, withdrawn from global climate agreements and lambasted the World Trade Organization – claiming all were ripping off the United States.”<sup>21</sup> It seems that the American administration (mis)used the pandemic not only to continue the showdown with China, but also to implement its policy of (partial?) suspension of certain international norms that constrain its freedom of action. The conspiracy theories circulating on social networks and alternative media (about Bill Gates and an artificially induced pandemic that should reduce the world’s population to a “golden billion”) helped Donald Trump to implement his “isolationist agenda.” The accusations against China caused a series of reactions from Beijing, which triggered further responses of the U.S. Bilateral relations between the United States and China entered a spiral of mutual accusations, which resulted in a complete loss of trust. The confrontation played out in numerous intergovernmental organizations.

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<sup>20</sup> World Health Organization, “Basic documents: forty-ninth edition (including amendments adopted up to 31 May 2019), Appendix 1 (on 31 May 2009),” *World Health Organization*, Geneva, 2020, pp. 169-172, <https://apps.who.int/gb/bd/PDF/bd47/EN/members-en.pdf> (retrieved May 23, 2023).

<sup>21</sup> Betsy Klein, Jennifer Hansler, “Trump halts World Health Organization funding over handling of coronavirus outbreak,” *CNN*, April 15, 2020, <https://edition.cnn.com/2020/04/14/politics/donald-trump-world-health-organization-funding-coronavirus/index.html> (retrieved May 22, 2023).

At the same time, during March and April (2020), a real drama was taking place both in Italy (the country that was most affected by the spread of the infection) and in the relations between Rome and Brussels. There was no EU response to Italy's calls for help in the pandemic. "Italy's prime minister, Giuseppe Conte, has warned that the European Union risks failing if leaders cannot work together to fight the coronavirus, as members of the world's largest trading bloc squabble over the economic burden of the pandemic."<sup>22</sup> Also, it seems that these events did not impress public opinion in some other EU member states. An online poll of 1,500 adults in Germany "found that 45 percent of respondents agree that coronavirus problems faced by Spain and Italy are 'primarily due to their poor governance.' Only 22 percent disagree with the statement."<sup>23</sup> While the Italians blamed the EU for the lack of reaction, the Germans shifted the responsibility to the Italian institutions. This could not go unnoticed. "Political fragmentation is intensifying in Italy as the coronavirus pandemic gives new ammunition to anti-establishment parties and challenges its European membership."<sup>24</sup> In a public opinion poll conducted by the Piepoli organization on April 9-10 on behalf of the Italian national television RAI, as many as 71% of respondents thought that the EU could fall apart due to a pandemic. In the same interval, according to a survey conducted for the Italian agency *Dire*, the trust of Italians in European institutions dropped, "and now more than 40 percent of respondents believe that Italy should withdraw from the Union, while 26 percent had such an attitude two years ago."<sup>25</sup>

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<sup>22</sup> Isabel Togoh, "Risk Of Failure Is Real: Italy's PM Warns That The Coronavirus Pandemic Could Break The European Union," *Forbes*, April 9, 2020, <https://www.forbes.com/sites/isabeltogoh/2020/04/09/risk-of-failure-is-real-italys-pm-warns-that-the-coronavirus-pandemic-could-break-the-european-union/?sh=70b8803e5029> (retrieved May 26, 2023).

<sup>23</sup> Joshua Posaner, "Half of Germans blame Italy, Spain pandemic woes on 'poor governance': pool," *Politico*, April 8, <https://www.politico.eu/article/half-germans-blame-italy-spain-pandemic-poor-governance-poll-coronavirus/> (retrieved May 25, 2023).

<sup>24</sup> Silvia Amaro, "Coronavirus deepens political fragmentation in Italy as anti-EU sentiment rises," *CNBC*, April 21, 2020, <https://www.cnb.com/2020/04/21/italys-political-fragmentation-rises-amid-coronavirus-pandemic.html> (retrieved May 25, 2023).

<sup>25</sup> "Posle Bregzita sledi Italegzit? Sve više Italijana za izlazak iz EU," *Blic*, April 20, 2020, <https://www.blic.rs/vesti/svet/posle-bregzita-sledi-italegzit-sve-vise-italijana-za-izlazak-iz-eu/gcye96x> (retrieved June 1, 2023) (translated by the author).

At the political level, there were also disagreements between the “southern” and “northern” members. Due to opposing views, EU finance ministers have barely been able to reach an agreement on an economic response to the crisis. The first group was led by Italy with the view that funds from the credit line of the European Stabilization Mechanism should be approved unconditionally, and the second by the Netherlands (with the support of Germany, Austria and Finland), which insisted that strict conditions must apply to all.<sup>26</sup> We have to bear in mind that the European Union is an intergovernmental organization, which has both a normative and an executive role. It remains to be seen whether this has helped or hindered member states in dealing with the consequences of the pandemic. The controversy has triggered a debate about trust in the EU, which further highlighted disagreements within the organization.

As with the example of the United States, it is important to stress, also in this case, that the crisis within the EU did not start with the pandemic, just as trust in the EU did not begin to decline with the spread of the infection. It is a continuing process that can be traced over the past ten years. The pandemic contributed to its acceleration.

Ivan Krasnev presumes that one of the lessons from the coronavirus “relates to trust in expertise. The financial crisis and the 2015 refugee crisis generated a great deal of popular discontent with experts. This shift, which has been one of the major successes of populist politicians in the past ten years, will be reversed by the coronavirus. Most people are very open to trusting experts and heeding the science when their own lives are at stake. One can already see the growing legitimacy that this has lent to the professionals who lead the fight against the virus. Professionalism is back in fashion.”<sup>27</sup> Yuval Noah Harari points out that, after the pandemic, countries will have to choose between “nationalist isolation” and “global solidarity”: “Humanity needs to make a choice. Will we travel down the route of disunity, or will we adopt the path of

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<sup>26</sup> Nikola Radišić, “Dogovor o ekonomskom paketu pomoći u EU bez pominjanja korona obveznica,” *N1*, April 10, 2020, <http://rs.n1info.com/Biznis/a587533/Ekonomski-paket-EU-za-sanaciju-posledica-koronavirusa.html> (retrieved May 25, 2023).

<sup>27</sup> Ivan Krastev, “Seven early lessons from the coronavirus,” *European Council on Foreign Relations*, March 18, 2020, [https://www.ecfr.eu/article/commentary\\_seven\\_early\\_lessons\\_from\\_the\\_coronavirus](https://www.ecfr.eu/article/commentary_seven_early_lessons_from_the_coronavirus) (retrieved May 29, 2023).

global solidarity? If we choose disunity, this will not only prolong the crisis, but also will probably result in even worse catastrophes in the future. If we choose global solidarity, it will be a victory not only against the coronavirus, but against all future epidemics and crises that might assail humankind in the 21st century.”<sup>28</sup>

Is it correct to say that “professionalism is back in fashion” if we look at the continuous implementation of the “isolationist agenda” of the United States that is embodied in the termination of WHO funding and questioning of the professionalism and credibility of its employees? Is it possible to talk at all about the (utopian) concept of “global solidarity” that will save the world if we have in mind all the events in and around Italy during the pandemic? “European solidarity” within the EU is in question – solidarity within an organization that, so far, has served as an example in terms of searching for answers and solutions that will benefit everyone. Restoring trust in experts would certainly strengthen the role of specialized international organizations some of which might, in the process, acquire a normative and executive function, in addition to their informative and advisory role.

Should awareness of the necessary “global solidarity” prevail, organizations of global governance would also become more significant. However, the big question is whether that will happen at all. What we saw during the pandemic was quite the opposite. On the one hand, doubts were expressed about the credibility and sincerity of the intentions of a specialized UN agency. On the other hand, states have demonstrated their usual selfishness in trying to save their national systems, not paying much attention to their neighbors and allies. The development of the situation since the end of the pandemic showed that the assumptions of Krasnev and Harari were totally wrong.

The causes of the escalation of the Ukrainian crisis are numerous and complex, they cannot be reduced to banal explanations offered by the U.S. and the EU.<sup>29</sup> However, the war in Ukraine served to further “ho-

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<sup>28</sup> Yuval Noah Harari, ““The world after coronavirus,” *Financial Times*, March 20, 2020, <https://www.ft.com/content/19d90308-6858-11ea-a3c9-1fe6fedcca75> (retrieved June 1<sup>st</sup>, 2023).

<sup>29</sup> Dušan Proroković, “Geopolitičke posledice eskalacije Ukrajinske krize,” *Sociološki pregled*, LVI, no. 3, 2022, pp. 749-753.

mogenize” the collective West. The “mainstream” of Russian policy related to actions in Ukraine is to a considerable extent defined by the assumption that there can be no guarantees from the U.S. on strategic stability (after the failed negotiations in Geneva between Joseph Biden and Vladimir Putin in June 2021), as well as that Russia can no longer protect its interests and ensure its own security by acting through intergovernmental organizations. In declarations of Russian officials it is often stated that the Minsk agreements remained “dead letter,” that the two resolutions of the UN Security Council that directly resulted from the Minsk agreements were not implemented by the Ukrainian side at all, and that such a position was encouraged by the United States.<sup>30</sup>

The weak and disunited EU, whose major deficiencies became apparent during the pandemic, joined with the U.S. in the project of containing Russia. This happened partly under U.S. pressure (in terms of the strategic interests of the U.S. and the preservation of NATO, the weakening of the EU and its eventual disintegration are a first-rate threat), and partly because it represented the only way to create much-needed unity (all disagreements are put aside since the EU sees itself existentially threatened by Russia).

In comparison to the United States’ absolute distrust of Russia, the approach of the European Union is more differentiated. The EU is a regional international organization with a very complex structure, without a clear center of power that could shape a cohesive foreign and security policy. The EU’s weaknesses were exploited to great advantage by the U.S., which not only used its influence in bilateral relations, but also through NATO as a platform to impose its strategy and get the EU to accept banal explanations about the causes of the escalation of the Ukrainian crisis. Thus, the EU became the agent of a uniform foreign and security policy of the collective West, designed by the United States. The result of that policy was Russia’s withdrawal from the Council of Europe on 16 March 2022. (It would otherwise have been expelled from this “pan-European organization.”) At the same time, the membership of Belarus was suspended. (It was not a full member anyway due to not

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<sup>30</sup> Fyodor Lukyanov, “Biden-Putin meeting shows Russia-US relations are set for a return to the Cold War-era. Strangely, that might be an improvement,” *Russia in Global Affairs*, 2021, June 2, 2021, <https://eng.globalaffairs.ru/articles/biden-putin-meeting-shows/> (retrieved June 23, 2023).

having acceded to the European Convention on Human Rights.) Russia has suspended contributions to the 2023 budget of the Parliamentary Assembly of the OSCE after its delegation was not allowed to participate in the regular annual session in Warsaw in November 2022. Due to the conflict between Western European members and Russia, and because of the peculiarities of decision-making within the OSCE, this organization too is practically paralyzed. While on the one hand the EU is being homogenized, on the other hand regional intergovernmental organizations of a pan-European character are being dismantled.

Since, as already noted, states differ according to their power potential, and Russia's power potential is colossal in every respect, the events affecting the Council of Europe and the OSCE cannot be underestimated or trivialized by vague assurances that withdrawal or dissatisfaction of one member would not disrupt the work of these organizations. The goals of both organizations were to eliminate "Cold War animosities" and harmonize the policies of all European countries, those in the EU and those that will never become EU members. Now, we witness a return to "Cold War animosity." There is no coordination of policies. Confrontation has replaced cooperation. In this scenario, regional intergovernmental organizations of a pan-European character will essentially either become another platform for the implementation of a unified foreign and security policy of the collective West, or simply disappear.

### **The response of China and Russia: strengthening BRICS and opposing the collective West**

Under conditions when global intergovernmental organizations have become fundamentally dysfunctional and when the United States uses all regional organizations of "Western orientation" (Euro-Atlantic, European, North Atlantic) as a platform for confrontation with Russia and China, these two countries implement a "reciprocal strategy." The Strategic Concept adopted at the NATO Summit in July 2022<sup>31</sup> can serve as an illustration of the intensification of the U.S. conflict with China and

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<sup>31</sup> Rachel Ellehuus, Robin Allers, Johannes Gullestad Rø, Paul O'Neill, Christian Mölling, Claudia Major, *NATO's 2030 Reflection Process and the New Strategic Concept: Views from Berlin, London, Oslo, and Washington*, Forschungsinstitut der Deutschen Gesellschaft für Auswärtige Politik e.V., Berlin, 2022, pp. 2-15.

how, in this context, the United States makes use of regional intergovernmental organizations. The document contains elements that indicate a fundamental change in the Alliance's strategic orientation.<sup>32</sup> As expected, Russia is designated as "the most significant and direct threat to the security of the allies when it comes to peace and stability in the Euro-Atlantic zone." Accordingly, the members are urged to allocate more resources for military purposes, and the rapid reaction forces on the "eastern front" will be increased from 40,000 to 300,000 soldiers. The Secretary-General of the Alliance, Jens Stoltenberg, explains that, unlike in the previous document of the same title, adopted in Lisbon in 2010, there are no longer any guidelines on cooperation with Moscow, not even in the areas of arms control, the fight against terrorism, or drug trafficking.

The change in strategic orientation, projected in the medium term, primarily concerns relations with China. "The rapprochement of China and Russia is contrary to the interests of the Alliance," because "China is trying to undermine the existing world order by controlling international logistics and the economy." Hence, the conclusion that "NATO plans to strengthen cooperation with partners in the Indian and Pacific Oceans." American dismantling of the EU-China investment agreement, open support for protesters in Hong Kong, repeating the thesis of "Chinese genocide" against the Uyghurs, constant provocations in the waters of the South China Sea, the "knockdown" of the Belt and Road project, and especially the dismantling of the "17+1" framework for cooperation,<sup>33</sup> all of these steps have made evident even before the adoption of the new Strategic Concept that China is seen not just as a challenge, but increasingly a threat to NATO. With the adoption of the Concept, China formally became one. In terms of NATO's strategic documents, as of 2022, China is in the same position as Russia was in 2014. Could the epilogue be different?

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<sup>32</sup> *NATO 2022 Strategic Concept Adopted by Heads of State and Government at the NATO Summit in Madrid, 29 June 2022*, [https://www.nato.int/nato\\_static\\_files2014/assets/pdf/2022/6/pdf/290622-strategic-concept.pdf](https://www.nato.int/nato_static_files2014/assets/pdf/2022/6/pdf/290622-strategic-concept.pdf) (retrieved June 21, 2023).

<sup>33</sup> In view of the ever more extreme rhetoric around the Taiwan issue, including the visit of Nancy Pelosi to Taipei, but also the creation of the AUKUS format, the framework can practically no longer function, probably will not continue to formally exist either.

At the beginning of February 2022, Xi Jinping and Vladimir Putin signed the Joint Statement of the Russian Federation and the People's Republic of China on the International Relations Entering a New Era and the Global Sustainable Development.<sup>34</sup> The importance of this document is also reflected in its timing. It was published less than three weeks before the start of the Russian offensive in Ukraine. Was it possible for Vladimir Putin to keep silent to his Chinese interlocutor about a military action of such proportions and with such consequences for international relations? One may assume that Vladimir Putin secured Chinese support for his move well in advance. The Joint Statement reads: "Some actors representing but the minority on the international scale continue to advocate unilateral approaches to addressing international problems and resort to force; they interfere in the internal affairs of other states, infringing their legitimate rights and interests, and incite contradictions, differences and confrontations, thus hampering the development and progress of mankind against the opposition from the international community." It is obvious to whom the term "minority" refers. The Chinese-Russian "reciprocal strategy" is aimed at establishing a balance of power vis-à-vis the U.S. and the countries of the collective West that participate in the implementation of a unified foreign and security policy designed in Washington.

The "reciprocal strategy" is implemented through coordinated Sino-Russian foreign policy initiatives in regional intergovernmental organizations such as the Shanghai Cooperation Organization (SCO).<sup>35</sup> At the summit in Samarkand in September 2022, Chinese President Xi Jinping underlined that he "wants a stable world." He said that he does not see the escalation of the Ukrainian crisis as a cause of global destabilization, and he proposed a kind of "legalization of multipolarity." The Chinese president emphasized that "today's chaotic world needs order," adding that China wants to "provide positive energy" and "assume its role as a great power" together with Russia. China recognizes Russia as

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<sup>34</sup> President of Russia, "Joint Statement of the Russian Federation and the People's Republic of China on the International Relations Entering a New Era and the Global Sustainable Development," February 4, 2022, <http://en.kremlin.ru/supplement/5770> (retrieved July 2, 2023).

<sup>35</sup> Shanghai Cooperation Organization, "The Samarkand Declaration of the Council of the Heads of State of Shanghai Cooperation Organization," Samarkand, 2022, pp. 1-19.

a great power, and vice versa. In China's assessment, a chaotic world arises because the U.S. still does not want to accept multipolarity. They don't want a deal. A smaller trilateral Russia-Mongolia-China summit was held on the sidelines of the big meeting – another confirmation of the strategic direction of Moscow and Beijing and a hint at new joint megaprojects. On the sidelines of the SCO summit, the Prime Minister of India, Narendra Modi, also held bilateral talks with Vladimir Putin.

Never in the history of trade in energy products has the import of one product increased 33 times in less than twelve months. This happened with the increase of the import of Russian crude oil to India. In December 2022, Indian buyers ordered 1.2 million barrels per day, in stark contrast to December 2021 when the amount was about 35,000 barrels. Also, the two great powers agreed on the construction of a transport corridor from western Indian ports (Mumbai, Kochi, and in Gujarat) through Iran and the Caspian area to the Russian High North and the Arctic Ocean. Intergovernmental organizations with a focus on Eurasia serve to improve cooperation on which the collective West no longer has any great influence. However, the intensification of Sino-Russian initiatives (which in this case is also supported by India) is also manifested at the global level thanks to BRICS. Since 2006, the creation of an “informal association” with the aim to harmonize policies to increase mutual exchange has led to the establishment of a whole new series of bodies such as the New Development Bank, and to “opening the door” to new members, with the emergence of “BRICS Plus.”<sup>36</sup> In just a decade and a half, “giant steps” were taken towards the constitution of an alternative decision-making center in international relations. Although still, from the outside, its structure appears “motley” and “inhomogeneous,” the impression can be misleading. Three recognized and two potential great powers initiated the formation of BRICS (Brazil is also a formal founder, and the Republic of South Africa joined in 2010), and now several regional powers have demonstrated interest in joining (among which there are also countries that can be classified as potential great powers). Iran, Egypt, Saudi Arabia, the United Arab Emirates and Ethiopia have already been admitted. Algeria, Türkiye, Bangladesh, In-

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<sup>36</sup> Yaroslav Lissovolik, “BRICS-Plus: the New Force in Global Governance,” *RIAC*, April 17<sup>th</sup>, 2023, <https://russiancouncil.ru/en/analytics-and-comments/comments/brics-plus-the-new-force-in-global-governance/> (retrieved June 30, 2022).

Indonesia, Kazakhstan, Nigeria, and Thailand have expressed interest in joining the organization. Among those are some of the most populous countries, with huge markets, countries with incredible resource potential. BRICS already generates half of the planetary growth and makes up a third of the global gross domestic product; over 40 percent of the world's population lives in BRICS countries. The growing membership of BRICS will bring about a new balance of power at the global level. One of the main factors in that process is the de-dollarization of the global economy.

China and Russia are contributing to the unity and homogenization of the non-Western world both through regional and global intergovernmental organizations. While it can be assumed that there is no trust left in relations between the collective West and the Sino-Russian axis, trust within the non-Western bloc around that axis is increasingly noticeable and is bolstered by new initiatives. This has resulted in a new kind of antagonism in international relations, which is manifested, for now, at the political and economic level. Sooner or later, it may manifest itself on the military level as well. Whereas traditional intergovernmental organizations are largely dysfunctional or paralyzed, new ones are emerging that will fill the void. In response to the "reciprocal strategy" of Russia and China, the U.S. attempted to initiate a new global intergovernmental organization. So far, two annual "Democracy Summits" have been held, but the fate of this multilateral configuration is rather uncertain. If it were to further develop, it would certainly represent a challenge to BRICS and strengthen the impression that international relations are moving towards a kind of new duality or parallelism.

## **Conclusion**

Intergovernmental organizations have produced a large number of norms and rules, which have become an integral part of the legislative framework in most countries. However, states are selfish, mostly guided by their narrow and short-term interests, or simply trying to protect national security in the best possible way. The events during the pandemic and after the escalation of the Ukraine crisis have demonstrated that trust in global intergovernmental organizations has been seriously shaken. If this trend continues, it could have long-term consequences for international relations. Inter-state organizations were not

only creators of norms and rules, but also provided a framework for negotiations (*mediation function*) and for resolving complex issues and crises through dialogue, just as they contributed to international security (*operational function*). The weakening of their role will undermine trust between states, which ultimately may lead to increased tensions and, consequently, more frequent conflicts.

The risk of further conflict is also obvious in the homogenization within regional intergovernmental organizations in opposing camps. Russia is either no longer part of pan-European organizations or it has rendered their work meaningless, which is a consequence of the growing distrust between itself and the collective West. At the same time, Russia, together with other partners, is building significant Eurasian organizations. At the global level, the collective West (including the American “Alliance for Democracy” project) faces BRICS Plus, which indicates the creation of “parallel worlds” that will function according to their own rules and in accordance with their own interests. What role can the United Nations play in this new constellation? What will be the role of other global intergovernmental organizations? The transformation of world order occurs through confrontation and the establishment of a functional and institutional balance of power between states. Obviously, there is not a slice of trust left between the key actors, the great powers. Thus, the multipolar world will function in a completely different way than that we are used to. It will be shaped by global organizations with diametrically different goals and interests.



**Christopher Black**

## **Global Power Politics and the Criminal Tribunals**

### **Introduction**

The proliferation of international organizations since 1945, accelerating after the collapse of the Soviet Union, is an expression of the constant attempts of transnational capital to control the world for its benefit. Military, economic, financial, social, health, and human rights organizations as well as criminal tribunals play a role in this attempt. They constitute a web of control and influence, effectively accountable to no one, but making sovereign nations and individuals accountable to them. They are, despite some societal benefits from some of their work, about which their public relations organs constantly brag, a world structure that limits democracy and degrades and finally eliminates the sovereignty of nation states.

The United Nations is one of the central organizations in this complex web since many of its functions and organs are controlled by transnational capital through private financing and through control of the governments which maintain the hegemony of the Western powers and their allies, so that the UN is too often a tool of the hegemon and the transnational capital that controls its economic and military power, instead of a forum for resolving issues of peace and security and advancing the principles of the UN Charter.

Alongside the myriad of international economic, scientific, technical, financial and human rights organizations established between nations, either by treaties or agreements, are the countless “non-governmental organizations” that have been created to complement the governmental organizations, many of which are NGOs in name only, since they receive government funding either directly or indirectly, and whose role is to influence every facet of society, to mould the world to suit the

interests of the hegemon and transnational capital whose champion the hegemon is.

Indeed, Professor B.S. Chimni, in his 2004 paper described these developments as, taken together, “an imperial global state in the making.”<sup>1</sup>

The treaties and agreements that create these organizations are generally lacking any mechanism to hold them accountable for their actions, and none of them permit persons who direct and control these organizations to be held accountable, as individuals, either in civil or criminal courts for their actions and decisions. Their public relations departments are expert at fending off actions against them or placating the offended with offers of more “transparency” or promises of better behaviour. They are protected by the organizational structure, just as the corporate veil protects the shareholders and executives of those organizations from liability for their harmful actions.

Yet, while those organizations are structured to protect the individuals involved, we have also witnessed the creation of quasi-legal criminal tribunals by the United Nations which have assumed the right to punish individuals, the leaders who get in the way of this world project of domination, their administrative officials, their military officers, cultural figures, intellectuals who supported them, so that in the case of sovereign nations, the hegemon claims to have the right, and claims that the United Nations, as its agent, has the right, to ignore the sovereignty of nations, to ignore customary law and claim the power to accuse, detain, condemn and imprison leaders of nations which never agreed to be subject to such a process, or to the creation of tribunals purporting to judge them, which have no jurisdiction over them known to law, except that of victor over the vanquished. These tribunals are in fact directly controlled by the hegemon which attacked those nations and which, itself, claims to be above the law and judgement.

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<sup>1</sup> B.S. Chimni, “International Institutions Today: An Imperial Global State in the Making,” *European Journal of International Law* 15, no. 1 (2004), pp. 1-37.

## The historical perspective

At this point a brief history of international criminal law is useful to understand the present context.

The history of international criminal law is a long one with many advances and setbacks. St. Augustine in the 4<sup>th</sup> century and Thomas Aquinas a thousand years later spoke of just and unjust wars, but the ancient debate about whether a war was unjust and to be condemned, or was just and to be approved, slipped away in the 16<sup>th</sup> century as the ability to discriminate between just and unjust wars became more difficult when nations waged wars on pretexts claimed to be just or in which all parties to the war claimed to be engaged in just actions. The exercise of identifying acceptable reasons for going to war was abandoned and replaced by efforts to regulate the way war was conducted and its effects.

Indeed, as World War I began, war was seen as a valid instrument of foreign policy, or as von Clausewitz stated in his famous book, *On War*: “War should never be thought of as autonomous but always as an instrument of policy,” and, “We see therefore that war is not merely an act of policy but a true political instrument, a continuation of political intercourse, carried on with other means.”<sup>2</sup>

The effort to evaluate the morality or justice of a war transformed into the view that to do so was too difficult and efforts were instead directed at “humanizing” the means and methods of warfare, which gave rise to the fields of international humanitarian law, the law of armed conflict and attempts to codify, through international conventions and treaties, limitations on the methods that can be used in war, the treatment of civilians, prisoners of war, and so on, which culminated in the debates at the peace conferences held in The Hague in 1899 and 1907. Various protocols were signed at the 1899 conference codifying and governing different aspects of the conduct of war. To address issues that had not yet arisen – new methods of war, new weapons then unforeseen – an important provision – called the Martens Clause, after the Russian delegate who proposed it – was added stating that customary law would fill any lacunae in the agreed to protocols. It states,

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<sup>2</sup> Carl von Clausewitz, *On War*, Book 1 (Chapter 1), pp. 32-34.

“Until a more complete code of the laws of war is issued, the High Contracting Parties think it right to declare that in cases not included in the Regulations adopted by them, populations and belligerents remain under the protection and empire of the principles of international law, as they result from the usages established between civilized nations, from the laws of humanity and the requirements of the public conscience.”

The clause appears in the preamble to both the 1899 and 1907 Hague Conventions, and in a different form in the 1949 Geneva Conventions and the 1977 Additional Protocols. It is important because it makes reference to the legal and moral bases of humanitarian obligations during war and the idea of natural law, incorporates customary law, that is law not included in any treaty or international convention, into codified law and implies a role for tribunals to enforce the principles of international law and assign responsibility for violations.

The 1949 Geneva Conventions and the 1977 Additional Protocols further codified what was acceptable or unacceptable in national and international armed conflicts. But the problem then was, as it remains today, enforcement of the rules of war. This entails the questions: who should be held responsible for “grave breaches” of these rules as set out in the various Conventions and Protocols; what are the motivations for charging some accused and not others; can fair trials take place in view of the inherently political nature of such prosecutions; against whom should charges be made; and what should the consequences be for those condemned?

In customary law only state responsibility was assigned to breaches of the laws of war or for unjust wars, so that breaches of the rules of war could only be compensated with reparations or other civil remedies. There was no precedent for holding individuals responsible and making them subject to criminal prosecution. The first treaty mention of individual criminal liability for breaches of the laws of war is found in the work of the Brussels Conference of 1874, which produced a final protocol that was signed by 15 European states but never ratified. Paragraph III stated:

“The laws and customs of war not only forbid unnecessary cruelty and acts of barbarism committed against the enemy; they demand

also, on the part of the appropriate authorities, the immediate punishment of these persons who are guilty of these acts, if they are not caused by an absolute necessity.”

This begs the question we must still answer: Who are the “appropriate authorities?” For as history shows us, it has been the victors who have deemed themselves to be the “appropriate authorities.”

The aftermath of World War I heralded what was to follow in the 20<sup>th</sup> century and what we see now in this century. The powers that were victorious in 1918 set up a Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties, to inquire into criminal conduct of the defeated states. It was mandated to consider the propriety and feasibility of asserting criminal jurisdiction over individuals accused of breaches of the laws of war. There were arguments for and against this idea. Some argued it would prolong wars if prosecution was hanging over the heads of participants. It is notable that the United States of America objected to breaking the principle of sovereignty of nations to hold heads of state and other state actors liable for collective actions of their sovereigns, and they pointed out that there was no precedent for such jurisdiction.

The Americans – despite their support of various international criminal tribunals that they since then were involved in setting up against their enemies – still maintain this position today with respect to themselves and their leaders’ violations of the laws of war and humanitarian law. Against themselves, and their allies, no prosecutions can ever be conducted so that the fundamental basis of the law – that it be applied equally to all – does not exist in modern international criminal law except as a principle to be ignored.

In 1919 the Commission presented its report. It concluded that war crimes should be prosecuted before an international high tribunal composed of the victors of the war, and that the tribunal should prosecute acts which provoked the war, but not the act of aggression itself since that entailed complex political considerations and it had never been regarded as a crime before. The Commission stated,

“The premeditation of a war of aggression, dissimulated under a peaceful pretence, then suddenly declared under false pretexts, is

conduct which the public conscience reproves and which history will condemn but by reason of the purely optional character of the institutions at The Hague for the maintenance of peace ... a war of aggression may not be considered as an act directly contrary to positive law, or one which can be successfully brought before a tribunal.”

The United States (in Annex II) advanced four fundamental reservations to the report’s recommendations. First, it objected to the proposal of creating an international criminal tribunal for which, it argued, there was “no precedent, precept, practice, or procedure,” instead of coordinating existing national military tribunals. Second, it invoked the limitations of jurisdiction when it argued that nations could not legally take part in the prosecution of crimes committed against the subjects of other nations. Third, it rejected the notion that any court of law could prosecute violations of the “laws or principles of humanity,” on the ground that such violations were moral rather than legal breaches and were, as such, non-justiciable. Fourth, it argued that to prosecute a head of state outside of his national jurisdiction would violate basic precepts and privileges of sovereignty. The Americans indicated their intention not to participate in any international trial.

Despite their objections, however, the final Treaty of Versailles called for the establishment of an international tribunal to try Kaiser Wilhelm II, to which the Americans, against their own stated policy, but for political reasons, agreed. But the Kaiser fled to the Netherlands, and no trial took place. Similar trials were proposed against the Turks but failed to do much.

Of course, the role of the Allied Powers in provoking World War I and the methods of warfare they used were ignored completely so that, whether or not the defeated powers were guilty of crimes against peace and war crimes, the selective prosecution of only the defeated powers rendered the exercise meaningless and riddled with hypocrisy.

The same problem arose again after World War II with the Nuremberg and Tokyo Tribunals that prosecuted only one side in the war while the crimes of the Allied Powers were left unpunished. This, in turn, gave the Allies, especially the Americans, a sense of impunity from prosecution and punishment for their crimes. Their war crimes, such as the firebombings of German cities and the use of nuclear weapons on Jap-

anese cities, purely as a demonstration of their power to the Soviets, were crimes demanding the people involved be held accountable, but no one has been or ever will be held accountable.

The Nuremberg trials are considered a cornerstone of international criminal law. Indeed, they produced the principle that aggressive war is the supreme crime against peace from which all others follow, a noble and logical conclusion. But what did it mean to produce that legal principle when the trials themselves were a massive case of selective prosecution, when the role of the USA and Britain, for example, in encouraging the Germans to attack the USSR was ignored, when the American policies and actions provoking Japan into its war with the USA were ignored, when, even before the war was concluded, the British and Americans began preparing for a new war against the USSR?

At the Nuremberg trials, there were no judges willing to state the obvious. But in the Tokyo trials, there was a jurist who had the courage of his convictions, Judge Radhabinod Pal, from India, who voted to acquit all the Japanese officers and officials accused of war crimes.

While he concluded that the evidence was overwhelming that atrocities were perpetrated by the members of the Japanese armed forces against the civilian population of some of the territories occupied by them and against prisoners of war, he produced a judgment questioning the legitimacy of the tribunal and its rulings. He held the view that the legitimacy of the tribunal was suspect and questionable because the spirit of retribution, and not impartial justice, was the underlying criterion for passing the judgment.

He concluded: "I would hold that every one of the accused must be found not guilty of every one of the charges in the indictment and should be acquitted on all those charges."

I cite him further because the problems with international criminal tribunals he raised then are still with us today. He argued that the United States had clearly provoked the war with Japan and expected Japan to act as it did. He stated,

"Even contemporary historians could think that as for the present war, the Principality of Monaco, the Grand Duchy of Luxembourg,

would have taken up arms against the United States on receipt of such a note as the State Department sent the Japanese Government on the eve of Pearl Harbour.”

He also noted that,

“Questions of law are not decided in an intellectual quarantine area in which legal doctrine and the local history of the dispute alone are retained and all else is forcibly excluded. We cannot afford to be ignorant of the world in which disputes arise.”

He refers to the Tribunal as a “sham employment of legal process for the satisfaction of a thirst for revenge.”

Furthermore, he believed that the exclusion of Western colonialism and the use of nuclear weapons by the United States from the list of crimes, as well as the exclusion of judges from the vanquished nations on the bench, signified the “failure of the Tribunal to provide anything other than the opportunity for the victors to retaliate.”

Publication of his dissenting judgement was suppressed for many years, but it is an important one and should be paid more attention to, because he raises in it not only the hypocrisy of these tribunals but also the illegitimacy of ad hoc tribunals such as the ICTY and ICTR, created under Chapter VII of the UN Charter.

Pal wrote, in the conclusion to his long judgement, that,

“Chapter VII of the UN Charter provides for action with respect to threats to the peace, breaches of the peace, and acts of aggression. The provisions of this chapter do not contemplate any steps against individuals. It may safely be asserted that the coercive actions envisaged by Chapter VII would not be invoked individually against those who might be responsible for the functioning of the offending collective entity. (...) As a judicial tribunal, we cannot behave in any manner which may justify the feeling that the setting up of the tribunal was only for the attainment of an objective which was essentially political though cloaked by a juridical appearance.”

He also wrote,

“It is indeed a common experience that, in times of trial and stress like those the international world is now passing through, it is easy enough to mislead the people’s mind by pointing to false causes as the fountains of all ills and thus persuading it to attribute all the ills to such causes. For those who want thus to control the popular mind, these are the opportune times; no other moment is more propitious for whispering into the popular ear the means of revenge while giving it the outward shape of the only solution demanded by the nature of the evils. A judicial tribunal, at any rate, should not contribute to such a delusion.”<sup>3</sup>

### **The present day: UN and NGO tribunals and the ICC**

To return to the present day, we now have criminal tribunals created by the United Nations and we have the International Criminal Court, created by the Rome Treaty, but which has limited jurisdiction due to the refusal of the major powers to adhere to the Treaty, and whose prosecutors have exercised a policy of very selective prosecutions of persons who oppose or are in the way of Western interests. Further, what are termed hybrid tribunals (“hybrid” as they were UN tribunals operating within a national legal framework) were created for Sierra Leone, Cambodia, Lebanon – the Hariri Tribunal – and are also largely controlled by and serve Western interests.

We must also include so-called “peoples’ tribunals” created by NGOs and individuals that present to the public the face of concerned humanitarians, but which are wholly financed and controlled by and serve the interests of Western intelligence services. Regarding the latter I refer to the so-called China Tribunal<sup>4</sup> and the London (or Uyghur) Tribunal,<sup>5</sup> both headed by the British lawyer Geoffrey Nice, who prosecuted a concocted case against President Milošević at the ICTY, and both of

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<sup>3</sup> Radhabinod Pal, “Dissentient Judgment of Justice Pal,” *International Military Tribunal for the Far East*, Kokusho-Kankokai, Inc., Tokyo, 1999, p. 700, [http://www.sdh-fact.com/CL02\\_1/65\\_S4.pdf](http://www.sdh-fact.com/CL02_1/65_S4.pdf).

<sup>4</sup> “Who We Are,” *China Tribunal*, <https://chinatribunal.com/who-we-are/>.

<sup>5</sup> “Uyghur Tribunal,” <https://uyghurtribunal.com>.

which targeted China, and to the grandiosely named “Court of the Citizens of the World,”<sup>6</sup> another “peoples’ tribunal” set up by the Cinema for Peace Foundation and Ukraine’s Center for Civil Liberties, but really the project of Stephen Rapp, the former U.S. Ambassador-at-Large for War Crimes and former prosecutor at the Rwanda and Hariri tribunals. The tribunal was created to target Russia, concerning the conflict in Ukraine, and has purported to pass judgement on President Putin.

My experience at the ad hoc UN criminal tribunals for Yugoslavia and Rwanda requires me to focus my remarks on the Kafkaesque nature of these quasi-legal tribunals using the examples of three men who were dragged before these tribunals, treated wrongfully, unjustly, and who have no possibility of ever obtaining real justice for themselves and their families, their people, or of obtaining any admission of responsibility for the wrongs done to them, any apology, any redress, or compensation. I could have cited many other cases, but these three are prominent and can stand for the others. I will also refer to the notorious case of President Gbagbo of Côte d’Ivoire whose ten-year ordeal as a prisoner of the French and the ICC, detained on charges that were invented out of whole cloth, as the judges so found, ended only recently on his return home to his country.

To understand the source of the injustice of the UN ad hoc tribunals, what I have termed “the criminalisation of international criminal justice,”<sup>7</sup> we must have some understanding of the creation and financing of the tribunals and the objectives they serve in global power politics.

They were created *ultra vires*, that is, outside the powers of the Security Council under Chapter VII of the UN Charter, which concerns international peace and security. Chapter VII does not permit the creation of judicial bodies to try individuals for criminal actions as a means of maintaining international peace and security.

Yet, the Tribunals and their supporters – in what one can call a “transcendental transformation” – argue that they have legal status merely

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<sup>6</sup> “The Court of the Citizens of the World,” <https://www.the-court.eu>.

<sup>7</sup> Christopher Black, *The Criminalisation of International Justice: Anatomy of a War Crimes Trial*, <https://christopher-black.com/the-criminilisation-of-international-justice-anatomy-of-a-war-crimes-trial/>.

on the basis that the Security Council resolutions establishing them provide them with legal status – even though Chapter VII does not envisage or permit their creation. In other words, they argue that legality is created out of illegality.

The controversy about their creation and legality has been addressed by many commentators, including this writer,<sup>8</sup> and was raised time and again by the counsel defending the accused before the tribunals. In that regard, special attention should be given to Dr. Köchler's seminal book on the subject, the title of which perfectly summarizes the true nature of the tribunals in question, "Global Justice or Global Revenge?"<sup>9</sup> But we are focused on the responsibility for their actions as well as their role in world power politics, and to best illustrate the problem with the complete lack of accountability, of responsibility for the wrong-doings of these tribunals, and the political role they played, we only need to look at the four cases I referred to above: that of President Milošević of Yugoslavia, General Ndindiliyimana and Prime Minister Kambanda of Rwanda, and lastly of President Gbagbo of Ivory Coast who was falsely detained for a decade by the ICC.

## **The four cases**

### **President Milošević**

On March 11, 2006, President Slobodan Milošević died in a NATO prison. No one has been held accountable for his death. In the years since the end of his struggle to defend himself and his country against the false charges invented by the NATO powers, the only country to demand a public inquiry into the circumstances of his death is Russia. Russian Foreign Minister Sergey Lavrov stated that Russia did not accept the Hague Tribunal's denial of responsibility and demanded that an impartial and international investigation be conducted. Instead, the NATO tribunal made its own investigation, known as the Parker Re-

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<sup>8</sup> "The International Criminal Tribunal for Yugoslavia, Impartial?" *Mediterranean Quarterly* 11, no. 2 (Spring 2000), pp. 29-40.

<sup>9</sup> Hans Köchler, *Global Justice or Global Revenge: International Criminal Justice at the Crossroads* (Vienna/New York: Springer, 2003).

port<sup>10</sup>, and as expected, exonerated itself from all blame. But his death cannot lie unexamined, the many questions unanswered, those responsible unpunished.

To understand why his death has been brushed under the carpet of history, it is necessary to understand who controls the ICTY. I refer to my above-cited paper in the *Mediterranean Quarterly*, where it is stated, in part,

“In a statement to the Secretary-General of the United Nations, Mr. Boutros Boutros-Ghali, on January 21, 1994, Antonio Cassese made the Tribunal’s political character clear when he said about the role of the Tribunal, ‘The political and diplomatic response [to the Balkans conflict] takes into account the exigencies and the tempo of the international community. The military response will come at the appropriate time.’ In other words, the Tribunal is considered a political response. He went on to state, ‘Our tribunal will not be simply ‘window dressing’ but a decisive step in the construction of a new world order.’”

Its control by the United States and allies for political purposes is established by the direct funding of the Tribunal by the USA and by a web of international organizations and NGOs. To cite the same paper again,

“The governing statute of the Tribunal states in Article 16 that the Prosecutor shall act independently as a separate organ of the Tribunal and shall not seek or receive instructions from any government or any other source. Article 32 states that the expenses of the Tribunal shall be borne by the regular budget of the United Nations. Both of these provisions have been openly and continuously violated.

The Tribunal itself, through its senior officials, openly brags about its particularly close ties to the American government. In her remarks to the United States Supreme Court in Washington, D.C. on April 5th of this year, Judge Gabrielle Kirk McDonald, President

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<sup>10</sup> Kevin Parker, *Report to the President: Death of Slobodan Milošević*, May 30, 2006, [https://www.icty.org/x/cases/slobodan\\_milosevic/custom2/en/parkerreport.pdf](https://www.icty.org/x/cases/slobodan_milosevic/custom2/en/parkerreport.pdf).

of the Tribunal, and an American, stated, 'We benefited from the strong support of concerned governments and dedicated individuals such as Secretary Albright. As the permanent representative to the United Nations, she had worked with unceasing resolve to establish the Tribunal. Indeed, we often refer to her as the 'mother of the Tribunal.'

If she is the mother then Bill Clinton is the father, as Louise Arbour confirmed by her action of reporting to the President of the United States the decision to indict Milošević two days before she announced it to the rest of the world, in blatant violation of her duty to remain independent. Further, she and the current prosecutor have made several public appearances with U.S. officials, including Madeleine Albright, and both have openly stated that they rely on NATO governments for investigations, governments which have a great interest in the undermining of the Yugoslavian leadership.

In 1996, the Prosecutor met with the Secretary-General of NATO and the Supreme Allied Commander in Europe to 'establish contacts and begin discussing modalities of cooperation and Assistance.' On May 9th, 1996, a memorandum of understanding between the Office of the Prosecutor and Supreme Headquarters Allied Powers Europe (SHAPE) was signed by both parties. Further meetings have taken place since, including that of the president of the Tribunal with General Wesley Clark. The memorandum of May 9th spelled out the practical arrangements for support to the Tribunal and the transfer of indicted persons to the Tribunal. In other words, NATO forces became the gendarmes of the Tribunal, not UN forces, and the Tribunal put itself at the disposal of NATO. This relationship has continued despite the Tribunal's requirement to be independent of any national government and, therefore, group of national governments.

The Tribunal has received substantial funds from individual States, private foundations, and corporations in violation of Article 32 of its Charter. Much of its money has come from the U.S. government directly in cash and donations of computer equipment. In the last year for which public figures are available, 1994/95, the United States provided \$700,000 in cash and \$2,300,000 worth of equipment. That same year, the Open Society Institute, a foundation established by George Soros, the American billionaire financier,

to bring ‘openness’ to the former East Bloc countries, contributed \$150,000, and the Rockefeller family, through the Rockefeller Foundation, contributed \$50,000. There have also been donations from corporations such as Time Warner and Discovery Productions, both from the United States. It is also important to know that Mr. Soros’ foundation not only funds the Tribunal, it also funds the main KLA newspaper in Pristina, an obvious conflict of interest that has not been mentioned once in the Western press.

The Tribunal also receives money from the United States Institute for Peace for its Outreach Programme, a public relations arm of the Tribunal set up to overcome opposition in the former Yugoslav republics to its work and the constant criticisms of selective prosecution and the application of double standards – objections which have obvious merit, and which are never answered by anyone at the Tribunal or by any of its sponsors. The Institute for Peace is stated to be ‘an independent, non-partisan federal institution created and funded by Congress to strengthen the nation’s capacity to promote the peaceful resolution of international conflict.’ Established in 1984 under Ronald Reagan, its Board of Directors is appointed by the President of the United States.

The Tribunal also receives support from the Coalition for International Justice whose purpose is also to enhance public opinion of the Tribunal. The CIJ was founded and is funded by, again, George Soros’ Open Society Institute and something called CEELI, the Central and East European Law Institute, created by the American Bar Association and lawyers close to the U.S. government, to promote the replacement of socialist legal systems with free market ones.”

These groups also have supplied many of the legal staff of the Tribunal. In her speech to the Supreme Court, Judge McDonald said, “The Tribunal has been well served by the tremendous work of a number of lawyers who have come to the Tribunal through the CIJ and CEELI ...” It is also interesting to note that the occasion of Judge McDonald’s speech was her acceptance of an award from the American Bar Association and CEELI. In the same speech she also said, “We are now seeking funding from states and foundations to carry out this critical effort.”

At a press conference on September 30, 1999, the new Prosecutor, Carla Del Ponte, thanked the Director of the FBI for assisting the Tribunal and stated, "I am very appreciative of the important support that the U.S. government has provided the tribunal. I look forward to their continued support." This support and influence were constant through the years of the Tribunal and remains so with the Residual Mechanism.

The same facts can be stated with regard to the ICTR, the Rwanda Tribunal, which is financed in the same manner as the ICTY (by NATO countries and private Western corporations) and is directly controlled by the U.S. and its Canadian and European allies. It uses interchangeable personnel and also has an "Outreach" or, if you will, a propaganda arm, to assure support and to promote its role.

This is the context in which the illegal arrest and then show trial of President Milošević took place. The events of that show trial are well known but the trial was never concluded since President Milošević died during his defence, and under very suspicious circumstances.

The death of Slobodan Milošević was clearly the only way out of the dilemma the NATO powers had put themselves in by charging him before the Hague Tribunal. The trial was necessary from NATO's point of view to justify the aggression against Yugoslavia and the putsch of October 5<sup>th</sup>, 2000, by the Otpor (Resistance) and DOS (Democratic Opposition of Serbia) forces in Belgrade supported by NATO, by which democracy in Yugoslavia was finally destroyed and Serbia reduced to a NATO protectorate under a vassal regime. His illegal arrest, by NATO forces in Belgrade, his illegal detention in Belgrade Central Prison by the NATO-installed regime, his illegal rendition to the former Gestapo prison at Scheveningen, near The Hague ("illegal" as it violated the law of Yugoslavia and was ruled illegal by the Constitutional Court on the day Milošević was taken in chains to an RAF plane and taken by force to the Netherlands), and the show trial that followed were all part of the drama played out for the world public, and it could only have one of two endings, the conviction, or the death, of President Milošević.

Since the conviction of President Milošević was clearly not possible after all the evidence was heard, his death became the only way out for the NATO powers. His acquittal would have brought down the entire

structure of the propaganda framework of the NATO war machine and the Western interests that used it as their armed fist.

The Parker Report, made by the ICTY judge of that name assigned to conduct an internal investigation, contains facts indicating that, at a minimum, the NATO tribunal engaged in conduct that was criminal regarding Milošević's treatment and resulted in his death. The Tribunal was told time and again that he was gravely ill with heart problems that needed proper investigation, treatment, and complete rest before engaging in a trial. However, the Tribunal continually ignored the advice of the doctors and pushed him to keep going with the trial, denied him a three-day procedure to insert a stent that was to be done in Moscow (with guarantees from Russia that he would be returned immediately after the procedure), knowing full well that the stress of the trial would certainly kill him.

Also, there are several unexplained facts contained in the Parker Report that need further investigation before ruling out poison or drugs designed to harm his health: the presence of the drugs rifampicin and droperidol in his system being the two key ones. No proper investigation was conducted as to how these drugs could have been introduced into his body. No consideration was given to their effect. Their presence combined with the unexplained long delay in getting his body to a medical facility for tests raises serious questions that need to be answered but which until today remain unanswered.

The Parker Report, despite its illogical conclusions, exonerating the NATO tribunal from blame, provides the basis for a call for a public inquiry into the death of President Milošević. This is reinforced by the fact that the Commandant of the UN prison where President Milošević was held, a Mr. McFadden, was, according to leaked documents, supplying information to the U.S. authorities about Milošević throughout his detention and trial. It is further reinforced by the fact that Milošević wrote a letter to the Russian Embassy a few days before his death stating that he believed he was being poisoned.

All these facts taken together demand that a public international inquiry be held into the entirety of the circumstances of the death of President Milošević, not only for his sake and the sake of his widow Mira Marković who died in exile in Moscow, and his son, but for the sake of

all of us who face the constant aggressive actions and propaganda of the NATO powers. Justice requires it. International peace and security demand it. But no such inquiry will ever be held.

But who could be held responsible for his death? The list of those that can be considered responsible includes not only the ICTY, but also the Dutch government which hosted the Tribunal and which failed to hold a public inquest into his death; NATO, that directed and controlled his arrest and prosecution; the UN Legal Office which nominally had oversight over the Tribunal; and it includes the member states of the Security Council that created and maintained the Tribunal, and the entire membership of the UN states that supported the Tribunal.

Even if it were possible to fix some or all these entities with responsibility, no individuals will be held to account – neither the persons who made the decisions and carried out the policies nor those who created, tolerated and were otherwise complicit in the injustice inflicted on him.

The only time I came close to any of them admitting responsibility occurred when, on behalf of the Milošević family, I met with a Russian deputy foreign minister in Moscow, who told me that the Russian government regretted the establishment of the ICTY, which occurred under the Yeltsin regime, that they had lost control of it to the NATO elements – to the USA and its allies – and that they also suspected Milošević was murdered. All they could do for the family was to promise to ask the ICTY to allow an independent international investigation, and this they did, but the request fell on deaf ears, and nothing was done. No one has been held accountable.

### **General Ndindiliyimana**

On January 28, 2000, General Augustin Ndindiliyimana, the former Chief of Staff of the Rwanda Gendarmerie and most senior ranking Rwandan military officer in 1994, was arrested in Belgium based on an indictment issued by Carla Del Ponte, then Prosecutor of the International Criminal Tribunal for Rwanda, the ICTR. He had fled to Belgium in June 1994 after receiving threats on his life. His entry into Belgium was authorized by the then Belgian Foreign Minister, Willy Claes, later Secretary General of NATO, who stated at the time that he had saved the lives of many Rwandans.

It is with the arrest that the criminality of the Tribunal begins to appear. It was speculated in the Belgian press at the time that it was for political reasons and indeed, 11 years later, this speculation was confirmed when the trial judges delivered their judgement in which they accepted that the charges against him were politically motivated.<sup>11</sup>

General Ndindiliyimana was considered a political “moderate” during the Rwanda War of 1990-94, a Hutu respected by Tutsis and Hutus alike, and as attested to by many witnesses including witnesses for the prosecution, his gendarmes did not commit crimes against civilians but tried to protect them where they could. So why was he arrested?

Because he was a potential leader of the country, because he refused to cooperate with the RPF regime installed by the United States after the war, because he knew too much about what really happened in Rwanda and who was really responsible for the violence, because he knew that UN and American forces, despite Clinton’s denials, were directly involved in the final RPF offensive of 1994 and the murder of President Habyarimana. Former Secretary-General Boutros-Ghali stated to a Canadian historian in 2004 that “the genocide in Rwanda was 100 per cent American responsibility.”<sup>12</sup> All these reasons were no doubt involved in his arrest, but it quickly became clear that the Prosecutor used his arrest to pressure him to give false evidence against Colonel Théoneste Bagosora, the former Deputy Minister of Defence in Rwanda who was their primary target, the “big fish” of the prosecution.

The criminal methods used against him began immediately on his arrest. They were many, and no injustice was left unused to try to convict the general. But none of them worked and the judges were finally forced to acquit him after 14 years of detention during which his son died of cancer. He was not permitted to attend the funeral. I was informed later by one of the judges that they were pressed to convict him by the Americans despite the evidence in his favour, and that the Americans also pressured the judges to remove the clause in the judgement

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<sup>11</sup> Ndindiliyimana Judgement, ICTR-Case-00-56, Para 2191.

<sup>12</sup> Robert Philpot, *Rwanda and the New Scramble for Africa* (Montreal: Baraka Books, 2013).

about the case being a political one, but that they resisted. Indeed, just before his judgement of acquittal was delivered, I received a message from the lead prosecutor in the case when he was first arrested, a U.S. Air Force colonel and lawyer, who wrote to me that she hoped he was acquitted as “[i]t was never meant to go that far.”

For these reasons we had a case for compensation for wrongful detention, false imprisonment, perversion and obstruction of justice, perjury, slander, and ill treatment. But we soon found out, as did other prisoners who were exonerated, that there was no means to obtain any redress whatsoever. Several of them filed claims with the “Mechanism,” the residual organ of the ICTR and ICTY. Every claim was rejected on the grounds that UN resolutions creating the Tribunal and the statute of the Tribunal contained no article giving them jurisdiction to deal with the issue. I raised the issue with the Mechanism about his case and received the same response. It was not a matter for them. They suggested approaching the UN Legal Office. So, I wrote to that office and asked for a meeting to discuss the matter but received the reply that it was not for them to provide redress or compensation, it was a matter for the Mechanism. They wanted us going in circles.

I replied to the UN Legal Office, in part, in my letter of May 28, 2015, to Mr. Andreas Vagt, referring to my earlier letter:

“In that correspondence you suggested that we proceed with this claim before the MICT [Mechanism for International Criminal Tribunals]. Unfortunately, there is nothing in the Statute of the ICTR or the succeeding provisions setting up the MICT that provides it with the competence to award compensation for wrongful imprisonment, wrongful conviction and all the damages that flow therefrom as set out in our original correspondence.

Further, it is our position that to ask the claimant to return to the very body that is the source of the damage caused to him is to fail to understand our position. It is our position that the entire system at the ICTR from the prosecution to the registry to the judiciary was responsible for what happened to General Ndindiliyimana and therefore they are all interested parties and therefore highly unlikely to act in favour of the claimant.

We note that the Prosecution states, in its reply to the motion filed by Major Nzuwonyemeye, now pending before the MICT, seeking compensation, that the MICT has no jurisdiction to award compensation, and, in essence, all such claims must be rejected.

General Ndingiyimana is in a unique position unlike that of any other prisoner held by any of the ad hoc tribunals or hybrid tribunals. He was wrongfully arrested to put pressure on him to testify against Colonel Bagosora, and the trial judges in their judgement so found. That is a unique finding in any of the trials at these tribunals. The judgement also detailed the known facts on his arrest, that in fact he was one of the heroes of the Rwandan events of 1994 and he and his subordinates saved lives wherever they had the means to do so. The prosecutor knew this when he was indicted and arrested. He was kept for 4 years in prison while they concocted a case against him for a trial when he refused to give false testimony against Bagosora, and then invented out of whole cloth the most outrageous allegations that stained his reputation and caused him and his family great distress.

The judges did not examine the file properly when the indictment was confirmed and denied all relief prior to and during the trial and then despite the fact he was completely innocent he had to wait until 2014 to be exonerated.

The fact the trial judges were compelled to acquit on all substantive charges in 2011 and the Appeal Chamber was compelled to acquit on the remaining charges in 2014 is no credit to the trial or appeal chambers. The case was so obviously an outrage against justice that they had to acquit or lose all credibility.

In the common law jurisdictions, compensation for wrongful convictions is dealt with by the government concerned, not the judicial system that caused the problem, since many jurisdictions do not provide the courts a mechanism to award compensation. The awards are made *ex gratia* as recognition of the injustice done and that ultimately, the state was responsible.

In this instance the state is the United Nations. It is the United Nations that set up the ICTR and controlled its functions.

This is not a matter for the ICTR or the MICT. The trial judgement already found that the charges against General Ndindiliyimana were politically motivated. That is determined. There is no need for my client to go back before the MICT to establish that he has suffered damages when that has already been established.

The United Nations has an obligation to adhere to the International Covenant on Civil and Political Rights, Article 14, section 6, which states:

‘When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him.’

Since the United Nations has failed to provide a mechanism for the award of compensation in the statute of the ICTR, or in the resolutions establishing the MICT, the only means by which General Ndindiliyimana can be compensated under that section is for the United Nations to face up to its responsibilities in this miscarriage of justice and designate an officer with authority who can engage in positive discussions that can lead to a satisfactory conclusion to him and his many friends and supporters including former members of the UN peacekeeping force in Rwanda, the Belgian and other ambassadors, and other dignitaries.”

No reply to that letter has been received, despite the following Memorandum for the ICC by one of its legal advisers, Robert Bliss:

“Though most world States have ratified the ICCPR, the International Criminal Tribunal for Rwanda (ICTR) and the International Criminal Tribunal for the former Yugoslavia (ICTY) contain no provision creating a right to compensation for the unlawfully detained. The creation of the ICTY and ICTR without including a statutory provision enabling them to compensate the unlawfully detained and convicted was a troubling development in the attempt to cre-

ate an international framework for the protection of human rights. However, these were the first UN created ad-hoc tribunals and the violation of the rights of detainees may not have been fully contemplated at their creation.”<sup>13</sup>

### **Prime Minister Kambanda**

The same problem pertains to Prime Minister Jean Kambanda of Rwanda who was denied even a trial and has no possibility of obtaining justice before the ICTR or the Mechanism. His experience should shock the world.

Jean Kambanda is the only head of government arrested by a United Nations international tribunal, held incommunicado on his arrest, denied a trial, denied access to counsel, and then pressured, threatened and tricked into a court appearance in which he was found guilty and sentenced to a life sentence, for crimes he never committed, by agents of the same United Nations Organization that purports to maintain peace and security in the world.

Prime Minister Kambanda was arrested on July 18, 1997, in Nairobi, by two Canadian former police officers, working for the Tribunal, with the assistance of Kenyan police, taken to Arusha, Tanzania, the seat of the Tribunal, and kept incommunicado in a safe house for a month, where he was daily interrogated without the presence of a lawyer. He was kept isolated from other prisoners, then taken to Dodoma, the capital of Tanzania, several hundred kilometers from the Tribunal, and kept in custody there, again incommunicado, without access to a lawyer, and pressured daily to confess to crimes he had never committed. He demanded a particular lawyer but was told he could not have that lawyer. Instead, they imposed a lawyer on him who was a relative of a prosecutor and whom he never saw during the time he was held incommunicado, and who, just before his court appearance, acted on their behalf to convince him to attend the court, and to plead guilty.

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<sup>13</sup> Robert C. Bliss, “Article 85: if someone is wrongfully detained or convicted, what recourse does he have? What compensation is he entitled to? Is this monetary, and if so, where does the money come from? What should the court take into consideration when deciding on compensation?” *War Crimes Memoranda*. no. 8 (2006), [https://scholarlycommons.law.case.edu/war\\_crimes\\_memos/8](https://scholarlycommons.law.case.edu/war_crimes_memos/8).

Kambanda refused to cooperate but faced daily coercion by the two Canadian policemen who had arrested him. They threatened him and they threatened to harm his family unless he “cooperated,” at one point telling him that if he did not do what they wanted his family would be dumped in the Egyptian desert. This daily treatment lasted 9 months during which he was not brought before a judge for his initial appearance after arrest as required by the Rules of Procedure of the Tribunal. He was not even presented with an indictment against him. He was not told what the charges were against him. He was just told, repeatedly, “to confess.”

The Rules of the Tribunal state,

*Rule 62.1: Initial Appearance of Accused and Plea*

Upon his transfer to the Tribunal, the accused shall be brought before a Trial Chamber or a Judge thereof without delay and shall be formally charged.

Instead, he was kept in secret detention for those nine months and only brought before a judge for his initial appearance on May 1, 1998, and instead of that being the commencement of the case against him, it was arranged, by the prosecutors, to be his last day in “court.”

It is interesting to note as well that a formal indictment was filed only in October 1997, months after his arrest, and on the same day an arrest warrant was issued so that, in fact, his initial arrest was also illegal as no arrest warrant existed when he was arrested, nor had any charges been laid against him at the time of arrest.

The judgement and sentence<sup>14</sup> filed in the case states that on the day of his initial appearance the Prime Minister pleaded guilty to the charges against him and that they verified the validity of the plea by asking him,

- (i) if his guilty plea was entered voluntarily, in other words, if he did so freely and knowingly, without pressure, threats, or promises;

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<sup>14</sup> *Prosecutor v. Kambanda*, Case No. ICTR 97-23-S, Judgment and Sentence (Sept. 4, 1998).

- (ii) if he clearly understood the charges against him as well as the consequences of his guilty plea; and
- (iii) if his guilty plea was unequivocal, in other words, if he was aware that the said plea could not be refuted by any line of defence.

The judges then stated,

“7. The accused replied in the affirmative to all these questions. On the strength of these answers, the Chamber delivered its decision from the bench as follows:

‘Mr. Jean Kambanda, having deliberated and after verifying that your plea of guilty is voluntary, unequivocal and that you clearly understand its terms and consequences,

Considering the factual and legal issues contained in the agreement concluded between you and the Office of the Prosecutor and that you have acknowledged that both you and your counsel have signed, the Tribunal finds you guilty on the six counts brought against you.’”

However, the statement by the judges is false. Kambanda stated in answer to the judges’ questions that the so-called “confession” and “plea” were not voluntary, but obtained by duress, threats, and being held incommunicado for several months in Dodoma and all the time denied counsel of his choice. He stated that he was not guilty of any crimes and understood that the agreement he signed under pressure, and which the prosecutors claimed to be a “confession,” was only an acceptance of his responsibility for the actions of his government, not a confession of guilt of the crimes charged (genocide). He also stated that he never understood the document he signed to be anything more than accepting that he was the Prime Minister and clearly had responsibility for his actions as such, but that those actions did not entail any crimes, and he told the judges that the prosecutor had assured him he could attach his own document setting out at length what he had done during the conflict.

He did write such a document, a document of 60 pages. Yet when he appeared in “court” that day, that essential document was missing. He

raised it before the judges, and stated that it was an entire defence of his action and his government. The Prosecution told the judges it was not significant and so it had been removed from the file. The judges acquiesced. Kambanda protested. The judges simply ignored him. He filed an appeal against their actions.

I was a witness to the appeal hearing, which was another farce. I was present in the courtroom to watch the proceedings from the visitors' gallery at the Rwanda Tribunal in Arusha, Tanzania in 2000 when he sought to have the so-called guilty plea he had been pressured and tricked into making withdrawn so he could have a proper trial and present his defence and tell the world what the real facts were about the events of the Rwanda War.

I remember very clearly the scene: Prosecution staff gloating at the spectacle of the packed gallery, while the few defence counsel who were there looked on grimly as Jean Kambanda was deliberately humiliated, mocked, and finally denied the trial he demanded and should have had.

Prime Minister Kambanda tried time and again to explain to the judges of the Appeals Chamber what had transpired, what had led him to sign a document they claimed was a guilty plea. But each time he spoke, the judges just sat there, stone-faced, and the Canadian Prosecutor James Stewart, again and again, asked if Kambanda had signed the "plea" document, or not.

When the Prime Minister stated he had been denied counsel of his choice, he was asked it. When he stated he was held incommunicado in Dodoma, breaking all the rules of detention at the tribunal and all civilized norms, he was asked it. When he stated that he was worked on every day for nine months by two Canadian police officers in that remote location, he was asked it. When he recounted that his family's lives were threatened, he was asked it. When he stated that he was tricked, after nine months of insisting on stating the real facts, into believing that the "plea" document was simply a statement accepting political responsibility for the actions of his government, he was asked it. When he informed them that he was told he could add his own statement to that document about what really happened in Rwanda, that his government had committed no crimes, he was asked it.

The psychological torture he had endured all those months in Dodoma, and more in Arusha and in The Hague, was applied once again in the courtroom, one slap in the face after another. Then the Appeals Chamber judges, without one question to him, and based on the simple fact that his signature was on the so-called “confession,” denied his request and sent him back to prison for life. The prosecution staff cheered. The Defence Counsel sat there in silence and shock at what they had just witnessed: the judicial lynching of a head of government by a tribunal that was supposed to render justice.

In any common law or civil law jurisdiction, if a prisoner of the state informs the judges that his “guilty plea” was not voluntary, not intended, and obtained by tricks, deceit, and coercion, they would not hesitate to quash the plea and guilty verdict and order a retrial. It should have been the decision in this case and even more importantly because he was the Prime Minister of the country and could inform the world of many things during his trial that the world needed to learn. But they clearly did not want him to talk. They wanted him silenced, so they silenced him, and he remains imprisoned to this day.

### **President Gbagbo**

On 15 January 2019, Trial Chamber I, by a majority, acquitted Laurent Gbagbo of all charges of crimes against humanity allegedly committed in Côte d’Ivoire in 2010 and 2011.

On 31 March 2021, the Appeals Chamber confirmed, by majority, the acquittal decision of 15 January 2019.

The ICC summary of the trial judgement states,<sup>15</sup>

“Having thoroughly analysed the evidence, the Chamber concluded by majority that the Prosecutor failed to demonstrate several core constitutive elements of crimes against humanity as charged: in particular, the existence of the alleged common plan to keep Mr Gbagbo in power, which included the commission of crimes against civilians; the existence of the alleged ‘policy to attack a civilian

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<sup>15</sup> ICC-Q&A-CDI-04-02/19\_Eng, July 16, 2019.

population’ and the existence of patterns of violence from which it could be inferred that there was a ‘policy to attack a civilian population’; that Mr Gbagbo or Mr Blé Goudé knowingly or intentionally contributed to the commission of the alleged crimes or that their speeches constituted ordering, soliciting or inducing such crimes.

These are key elements in the crimes as charged by the Prosecutor. When they are not demonstrated, the persons charged with such crimes must be acquitted.

Thus, the Chamber considered by majority that Mr Gbagbo’s and Mr Blé Goudé’s responsibility for the alleged crimes was not adequately supported by evidence.”

The trial judgement itself states,

“In the view of the Majority, one of the fundamental flaws of the Prosecutor’s case was that it presented an unbalanced narrative, which was built around a unidimensional conception of the role of nationality, ethnicity, and religion (in the broadest sense) in Côte d’Ivoire in general and during the post-electoral crisis in particular and which ignored essential information without which it was not possible to fully understand what happened and certainly not what motivated key political actors in this case. Without making any findings in this regard, the Majority was of the view that the picture emerging from the evidence appeared to differ substantially from the one painted by the Prosecutor. The Majority also explains why it is of the view that the tendered evidence, most of which was circumstantial, was too weak to be capable of supporting the inferences the Prosecutor asked the Chamber to draw.”

In fact, it is reported that Fatima Bensouda, who assumed office after Mr. Ocampo as ICC Prosecutor, said to Central African Presidential candidate Pascal Bida Koyagbele that “[t]here is nothing serious against Gbagbo, it’s political pressure coming from France, and I can do nothing.” According to South African columnist on foreign affairs Shannon Ebrahim, in her article “French hand in Gbagbo’s fall,” Bensouda’s com-

ment was made in October 2015, just three months before the trial began in 2016.<sup>16</sup>

This is a surprising statement from a person who is supposed to have the highest integrity. There are two things she could have done: firstly, ignore the French pressure or, secondly, resign in protest over it. But evidently her position and money were more important than doing the right thing. But then again, she was also one of the prosecutors involved in the case of General Ndindiliyimana and part of the prosecutorial group trying to frame him during his trial at the ICTR. And we remember that Carla Del Ponte also claimed to have been pressured to continue the policy of selective prosecution of Hutus at the ICTY, when, she claims, she wanted to also charge the other side in the war in Rwanda, but to which pressure she acquiesced.

Then, why was Gbagbo arrested in the first place? A clue is contained in the following statement by French President Sarkozy: “We took Laurent Gbagbo out and installed Alassane Ouattara, without any controversy, nothing.”<sup>17</sup> This statement is confirmed by the leak of a number of emails<sup>18</sup> between French government officials and the ICC prosecutor and French and UN diplomats in which it was revealed that Mr. Ocampo and the French discussed how to remove President Gbagbo from power after he was confirmed as President after the national elections. It was finally agreed that the French would remove him from power and that Ocampo would then arrange for his transfer to the ICC detention, despite the fact that Ivory Coast was not a party to the Rome Statute, despite the fact that no ICC investigation had begun about events in the country, no arrest warrant issued, and despite the fact that no crimes had been committed by him within ICC jurisdiction.

In other words, Ocampo, at French request, assured them he would help them remove Gbagbo from power and, on the pretext of laying

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<sup>16</sup> *IOL Independent Online*, South Africa, February 12, 2016, <https://iol.co.za/news/opinion/french-hand-in-gbagbos-fall-1983585>.

<sup>17</sup> Nicoletta Fagiolo, “The Gbagbo Case: When International Justice Becomes Arbitrary,” *Reset Dialogues*, February 24, 2016; Nathalie Schuck and Frédéric Gerschel, *Ça reste entre nous, hein?: Deux ans de confiance de Nicolas Sarkozy* (Paris: Flammarion, 2014).

<sup>18</sup> Fanny Pigeaud, “The Devious Maneuvers behind ex-Ivorian Leader Laurent Gbagbo’s Trial at the ICC,” *mediapart.fr*, November 16, 2017.

future charges against him, which remained to be concocted, keep him detained for as long as he could. And so, Gbagbo was transferred from his illegal detention by the French and opposition forces in Ivory Coast to the ICC where he was kept detained for a decade, despite the judges of the ICC telling the Prosecutor in 2013 that no evidence had been presented to them of any crimes and that he should be released. But the Prosecutor managed to manipulate the judges into agreeing to continue his detention while he promised to buttress his case. It was all a sham simply to keep him detained as long as possible.

We are then faced with a situation in which the elected president of a sovereign nation was removed from power by force of arms, by France and his political opponents. He was kidnapped, falsely imprisoned, falsely charged and slandered, and held in a prison for a decade, all with the connivance and assistance of the prosecutors of the ICC who chose to serve the political interests of one nation, who were complicit in the overthrow of democracy in Ivory Coast and who deliberately kept a popular leader out of power and exiled from his country instead of serving the interests of international justice. The ICC acted as a tool of French colonialism, of French aggression, and while so doing covered up the crimes against civilians by the French and Gbagbo's political rival whom the French installed in power.

In the case of the ICC, compensation to an accused is possible under Article 85. Robert Bliss, in his 2006 memorandum to the ICC on the possibility of compensation at the ad hoc tribunals and the ICC, explains:

“Article 85 of the Rome Statute of the Permanent [sic!] International Criminal Court (‘ICC’) contains a provision guaranteeing a right to compensation for the unlawfully detained and convicted. However, the Rome Statute lacks a statutory provision explaining how the ICC is to raise or distribute funds, what amount of compensation can be expected, and whether the ICC should be responsible for abuses by third parties acting as agents to the ICC in the capture and detention of the accused. Because no procedure for funding compensation for the unlawfully detained and convicted is enumerated in the Rome Statute, the ICC may face opposition to how it distributes funds to the unlawfully detained. This may be avoided if the ICC pays for restitution or compensation from its general operating budget, or if it sets up an endowment to pay for its breaches

with the funds of member states that are willing to contribute specifically to that cause. The ICC could also face opposition if it pays for the unlawful acts of its third party contractors and should avoid such liability by informing third parties of international standards to which they must comply.”<sup>19</sup>

Even if Laurent Gbagbo could be personally compensated,<sup>20</sup> who will compensate the people of Ivory Coast who had their elected leader taken from them, and for the policies imposed on them by France and the French-installed leader? Who will compensate the world for the degradation of international justice?

Who will compensate the people of Yugoslavia, or of Rwanda, for the destruction of democracy by the arrest of their leaders, for the lost years without their presence in the political life of their people? Who will compensate the people of China for the slanders generated by the London Tribunals led by Geoffrey Nice, or those directed at Russia by Stephen Rapp, and their corporate and Western intelligence partners? It seems, as Professor B.S. Chimni says, “nobody.”

## Conclusion

The various criminal tribunals play their role in the global power structure by serving the interests of the West, by presenting a false narrative about the wars that these tribunals concern themselves with, by presenting scapegoats as the guilty, and by covering up the actions and crimes of the West in those wars. They state that they are concerned with individual responsibility, but their selective prosecutions are a form of collective punishment of nations in which the accused stand in for the nation and its people. It is difficult to see how any justice can come out of these international organizations for those targeted by them. But, of course, that is not their purpose.

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<sup>19</sup> *Op. cit.*

<sup>20</sup> It is necessary to note that his co-accused, Charles Blé Goudé, Minister of Youth and Culture of Ivory Coast, who was arrested for the same reasons and suffered the same ordeal, was denied compensation by the ICC.

The General Assembly Draft Rules set out in Resolution 56/83<sup>21</sup> are of no assistance since they concern only the international responsibility of states and not international organizations as such, and further, Article 57, which has been used to justify aggression by powerful states against weaker ones, states,

*“Responsibility of an international organization*

*These articles are without prejudice to any question of the responsibility under international law of an international organization, or of any State for the conduct of an international organization.”*

This contains a contradiction since states are involved in the creation of many international organizations such as the ad hoc tribunals and act through them. Leaving those organizations outside the proposed framework renders them and a state’s involvement immune from any remedial action or responsibility and of course leaves the situation of international organizations entirely up in the air.

Further, Article 58 leaves the issue of individual responsibility “without prejudice,” providing no guidance or means of establishing individual responsibility on a universal basis when this is one of the most crucial requirements to ensure fairness and justice for those facing these tribunals.

Professor Chimni suggested one remedy in the paper referred to above:

*“Perhaps the time has also come to recognize the need for judicial review of Security Council actions by the International Court of Justice, the principal judicial organ of the UN, to ensure that it acts in conformity with the UN Charter.”*

But this is highly unlikely to be permitted and in any case would not serve to remedy the wrongs done to those who are the victims of these tribunals.

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<sup>21</sup> United Nations General Assembly, “Responsibility of States for Internationally Wrongful Acts,” *Resolution 56/83*, 2001, <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N01/477/97/PDF/N0147797.pdf?OpenElement>.

We are left with a situation in which individuals who are victims of these tribunals have no effective remedy whatsoever. No one is responsible. No one is to blame. No one cares. Nothing is done. And if we ask the famous question, what is to be done, we can only be met with a tyrannical silence.

The history of international criminal tribunals has been a history of injustice, a history of “justice” reduced to the interplay of global power politics, for even the Nuremberg and Tokyo trials were the wielding of power over the vanquished. But I will end with the wise words of Justice Radhabinod Pal of India in his dissenting judgement in the Tokyo trials:

“It has been said that A VICTOR CAN DISPENSE TO THE VANQUISHED EVERYTHING FROM MERCY TO VINDICTIVENESS; BUT THE ONE THING THE VICTOR CANNOT GIVE TO THE VANQUISHED IS JUSTICE. At least, if a tribunal be rooted in politics as opposed to law, no matter what its form and pretences, the apprehension thus expressed would be real, unless justice is really nothing else than the interest of the stronger. (...) The name of Justice should not be allowed to be invoked only for the prolongation of the pursuit of vindictive retaliation. The world is really in need of generous magnanimity and understanding charity. The real question arising in a genuinely anxious mind is, ‘can mankind grow up quickly enough to win the race between civilization and disaster?’”<sup>22</sup>

That question still faces us today.

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<sup>22</sup> International Military Tribunal for the Far East, *Dissenting Judgment of Justice Pal* (Tokyo: Kokusho-Kankokai, Inc., 1999). The capitalized words appear in the original judgment.

Ögmundur Jónasson

## **Time to Step Out of a Colonial World Why International Institutional Frameworks Must Be Reconstructed**

### **Real politics and values – real and not so real**

We are sometimes told that in Ukraine a war is being fought over values. “We are defending Western values” is often exclaimed in Washington and Brussels while in Ukraine this is being echoed, sometimes in a chilling way: You provide the weapons, we the blood on the battlefield, the then Ukrainian Defense Minister, Oleksii Reznikov said on television on January 5<sup>th</sup> this year, and he added: “We are carrying out NATO’s mission today. They aren’t shedding their blood. We’re shedding ours. That’s why they’re required to supply us with weapons. My colleagues, the defense ministers, now say, ‘you are protecting the entire civilized world, the entire West, you are the real shield of civilization.’”<sup>1</sup>

These are big words and given the circumstances difficult to stomach – but nonetheless not to be ignored. The workings of the global institutional world, which is at issue here today, must always be seen in the context of an ever-changing political environment. In other words, it is not merely a question of understanding the mechanics of the international world, but the political environment within which institutions operate must also be taken account of – and thereby values.

But which values? You may be acquainted with the reaction of Mother Theresa in response to the American billionaire who encountered her tending the sick in the gutters of Kolkata. When he exclaimed in horror

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<sup>1</sup> Aaron Maté, Twitter post, January 11, 2023, 9:13 AM, “Ukrainian Defense Minister Oleksii Reznikov: ‘We are carrying out NATO’s mission today. They aren’t shedding their blood. We’re shedding ours. That’s why they’re required to supply us with weapons.’” At <https://twitter.com/aaronjmate/status/1613086637571080192>.

that he would not do this for a million dollars, there came her reply, “neither would I.”

If we now ask which of them, Mother Theresa or the billionaire, would be the most fitting proponent of Western values, not to mention civilization at large to use the words of the Ukrainian Defense Minister, we will need to qualify our answer.

### **The ingredients of change**

I stand on the left in politics. My father on the other hand was on the right. But when I come to think of it, I am saying the same things, which I remember him saying half a century ago.

What has happened?

The political pendulum, at least amongst the political class in the West, has swung to the right. U.S. president Dwight D. Eisenhower, a Republican, made publicly known his concerns regarding what he called the “military-industrial complex,”<sup>2</sup> namely, that it needed strict democratic control, while Democrat Joe Biden today applauds ever more lethal weapons being produced by that same complex, to be employed in far-away lands.

On social issues, things have also changed drastically. Naturally, we ask ourselves how it could be that something, which was inconceivable yesterday, is possible today. Have political attitudes changed so drastically or has apathy set in, even resignation?

A mixture of all, I think.

How should it be otherwise with politicians saying one thing and then doing another? David Cameron, criticizing China while British Prime Minister, becoming their employee after leaving office; former German

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<sup>2</sup> *President Dwight D. Eisenhower’s Farewell Address, 17 January 1961*. National Archives, Washington DC, <https://www.archives.org/milestone-documents/president-dwight-d-eisenhowers-farewell-address>.

Chancellor Schroeder, working for the Russians; Gro Harlem Brundtland, Social Democratic Prime Minister of Norway and then head of the World Health Organization, receiving money from Pepsi Cola on her retirement; Tony Blair advising despotic governments for large sums of money after leaving office as U.K. Prime Minister; former U.S. Presidents seemingly never opening their mouth without pay ... How can you take such people seriously when they tell you of their concern for ethical conduct, social justice, and respect for democracy?

I started my working career as a TV reporter and analyst at Icelandic State TV. This was around 1980 when Thatcher had come to power in the U.K. I will do away with monopolies, she said, and start with the worst monopoly of all, the labor unions, and I will give every citizen a stake in capitalism by tax reduction to investors, also the small ones. And of course, she added, I will privatize and cut away the fat from the state. This was the essence of what she said.

And all this she did. But unemployment rose because of her economic policies, from five hundred thousand to a million, and from one million to a million and a half, and when there were two million unemployed, I started to predict Thatcher's downfall. But it never came even when unemployment rose to three million. What I forgot was that even if there were three million people unemployed in Britain there were many more millions at work and happy with their lot. And then I realized that society was changing or rather the way society was thinking was changing. This could not have happened in the post-war years – society would not have allowed it. And remember, Thatcher had said that there was no such thing as society, only individuals competing. Many of us saw this at the time as wishful thinking on her behalf; her supporters thought the prophet had spoken. And to some extent, they were right.

Of course, Mother Theresa is still with us somewhere, but the billionaire has a stronger voice today than only a few years ago.

### **Capitalism and globalization hand in hand**

International trade negotiations of recent times bear this witness, e.g., GATS, TTIP, TISA, CETA (some of which were never ratified), whether organized under the auspices of formal institutions like the World Trade

Organization or in a cooperative packet between states and international capital. They have tended to undermine democratic structures and transfer control, whether political or juridical, from sovereign states to bodies where commercial interests play an ever-increasing role.

UN institutions are likewise on an increasing scale becoming dependent on corporate money, and here of course we are reminded of the dictum of the marketers, that there is no such thing as a free meal.

All this is part of the promised land of Klaus Schwab and friends who established the World Economic Forum just over fifty years ago, in 1971, meeting regularly in Davos in Switzerland, and step by step becoming more and more visible and vocal on the international stage. There is no beating about the bush in their statements, e.g., that the sovereign state is said to be “obsolete” and, furthermore, that a globalized world is best managed by a coalition of multinational corporations, governments and civil society organizations.

This of course reminds us that the colonial world, dominated by capitalist interests, has not left us. It merely presents itself in different disguises. This is where we are heading, and it is very much in line with other social and political developments – although it will be interesting to follow radical movements in Africa, Latin America and elsewhere.

BRICS raises many interesting questions, but in the industrial part of the world, the trend has been in the same direction: Democracy is on the defensive, struggling against capitalism; morality is being undermined by markets, cooperation is giving way to competition, empathy to indifference, principled politics to politics without principles, humanism to geopolitical interests, Aristotle to Machiavelli.

### **Marcus Tullius Cicero and George Walker Bush**

More than two thousand years ago the Roman philosopher and statesman Cicero said that in times of war the law falls silent, “*inter arma enim silent leges.*” And we might add, so does the truth. Also, the truth is silenced.

George Bush junior may not have been a philosopher nor Dick Cheney, Donald Rumsfeld, John Bolton, or Condoleezza Rice, but they all understood Cicero's dictum when they declared global war on terrorism. This enabled them to do things which hitherto were not possible – enact a law on “homeland security,” have their Guantanos and spy on all those who were seen to be a terrorist threat – and such a threat was seen to be everywhere, wherever there was a critical voice. Remember, we were at war!

Across the Atlantic, in Russia, Vladimir Putin was thrilled – as he was at the time fighting what he called the terrorist threat in Chechnya and elsewhere in the vast lands of Russia; he said he was at one with George Bush junior and wanted to join NATO.

Indeed, steps had been taken to improve relations between Russia and NATO with the establishment of the *Permanent Joint Council* – in essence the North Atlantic Council and Russia – to be chaired in rotation by Russia and NATO in line with the *NATO-Russia Founding Act* from 1997.

### **Partners or adversaries?**

George Robertson, former Secretary General of NATO, recalls that Putin had said to him that he wanted Russia to become part of Western Europe; “it is our destiny,” he had said according to Robertson. He also recalled that Putin had said that Russia should not have to stand in line for NATO membership with a “lot of countries that don't matter.”<sup>3</sup>

What I find worth giving a thought is that seemingly U.S. President Clinton was intent on improving relations with Russia while other forces within the U.S. hierarchy may have been opposed, and although this remains pure speculation, one cannot but recall Dwight D. Eisenhower's warnings about the “military-industrial complex” which always seems to take a confrontational stance.

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<sup>3</sup> Elisabeth Braw, “When Putin Loved NATO,” *Foreign Policy*, January 19, 2022, <https://foreignpolicy.com/2022/01/19/putin-russia-ukraine-nato-george-robertson/>.

But soon NATO became busy invading Afghanistan, and then Iraq was invaded and later came regime change and attempts at regime change in other countries. And then of course there were other considerations, which are ever relevant – considerations, which have to do with power politics and raw materials.

### **Achievements must be recognized**

Now this is our world. But as Pope Francis reminds us in his encyclical *Laudato si'* where he addresses the flaws and evils in the world society, injustice must never be seen to be invincible, because it is not.<sup>4</sup>

Indeed, hope for the better is a good companion. It should not be forgotten that even though the United Nations and its institutions are not always as we wish they were and not up to our expectations, there have nevertheless been achievements to be proud of and outstanding individuals operating within the realm of the United Nations who are worthy of much praise.

From our discussions at this roundtable, it is my understanding that as regards structure it is generally agreed that the global institutional framework reflects far too much geopolitical realities of past and present power politics or colonialism as I would still call it, since democracy comes second place.

### **Changes needed**

I think, an enlargement of the Security Council is needed to remedy this somewhat. The best thing of course would be to do away with the Security Council, but then we run the danger of the same thing happening as with the UN's predecessor, the *League of Nations*, which was made impotent by the big powers boycotting and ignoring it.

So, this is my first point: *Enlarge the Security Council!*

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<sup>4</sup> *Encyclical Letter LAUDATO SI' of the Holy Father Francis on Care for Our Common Home*. Given in Rome at Saint Peter's, 24 May 2015, Chapter II, Par. 74.

My second point is of no less importance and has to do with the mandate of the Security Council now being above the law, de facto able to ignore international conventions and agreements if it so desires: *The mandate of the Security Council must in other words be limited.*

Thirdly, *the Security Council must be made accountable*, its decisions always having to be subject to consent in the General Assembly.

In the fourth place, heed should be taken of what Christopher Black describes as a web of “quasi-legal structures unaccountable to anyone but which make sovereign nations and individuals accountable to them, and despite some good work,” he goes on to say, “result in the limitation of democracy and sovereignty of nation states.” The institutions Christopher Black thus refers to are military, economic, financial, social, health, and human rights organizations as well as criminal tribunals.<sup>5</sup> In my mind, it is imperative that these institutions be made accountable in some way. This of course is easier said than done as we know for instance in the case of the International Criminal Court where the main perpetrators, globally, do not recognize the mandate of the Court. Here again there must be some kind of settlement or agreement, bringing the military powers to the table.

### **No more private financing**

We now await some kind of binding directives from the World Health Organization. Here we are on a slippery ground with corporate interests embedded in the financing of the institution. It is of essential importance to get rid of all private financing for the WHO and other UN institutions.

To go a step further with the story of the billionaire who told Mother Theresa that he would not so much as lift a finger to do what she was doing for the victims of leprosy in the Kolkata gutters even for a million dollars, it must be said that not a million dollars are needed to alleviate

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<sup>5</sup> Christopher Black, *Abstract for the Round Table Consultation of the International Progress Organization on Responsibility in International Relations*, Vienna, 21 September 2023.

the plight of the poor in the world, but billions and trillions of dollars, together with fundamental structural changes. But even if we had such sums at our disposal, the question would remain what should be the guiding principles and values.

Here the institutional world has been divided since the Cold War period on whether to draw a line between civil and political rights on the one hand and social, economic, and cultural rights on the other. This dividing line materialized in different conventions on human rights established within the framework of the United Nations. It is not unlikely that these conventions will gradually become fully integrated. It is important that this integration takes place in an acceptable and balanced way, respecting social, economic, and cultural rights no less than civil and political rights.

But changes in conventions, institutions and frameworks do not take us far unless there is social and political support. In that regard, some fundamental changes have been taking place in the world, and all too often not in a positive direction – changes that do not make the work of the social engineer easy.

### **The world map must be redrawn**

If I were an engineer with unlimited power to maneuver I would suggest that the map of the world be redrawn, thinking that 50 states would be better than one United States, and I would disintegrate all the big powers – China, Russia, India if not more of the large states – and the entire map of Africa and Middle East would need to be redrawn not to mention Western Europe where there are aspirations to make the European Union a big power block, paramount to a superpower. I would hastily revert such ideas and revoke a good idea from some years ago of a Europe of the regions, within a looser union; a Europe with more flexible boundaries accommodating for an independent Catalonia and Scotland, Basque country, all according to popular will.

The one (if not the only) thing all the states of the world can agree on is the status quo of present boundaries, however arbitrarily these boundaries came into being. One only must look at the map of Africa and the Middle East to be reminded that most of the borders were drawn – by

the use of a ruler – in London, Paris, and other seats of colonial power. Most of these boundaries are there irrespective of culture, language, and historical heritage.

The problem with the permanence or unchangeability of boundaries is that they reflect a frozen status quo from some point in history. Not only is it to be taken into account that this particular status quo was, as a rule, forced upon societies, often from outside, but, as Erica Daes, former UN Special Rapporteur on Indigenous Peoples, has rightly stated: “Social and economic conditions are ever-changing in our complex world, as are the cultures and aspirations of all peoples. For different peoples to be able to live together peacefully, without exploitation or domination – whether it is within one state or two neighboring states – they must continually renegotiate the terms of their relationships.”<sup>6</sup>

### **“Responsibility to Protect” reformulated**

The danger always remains that the institutional world will reflect geopolitical power as it stands and hence the likelihood is that the world continues to be a victors’ world. The core principle of the idea of Responsibility to Protect should never be abandoned. The world should of course see it as its duty to protect people from war crimes and genocides, within the boundaries of states, as was the original idea. But democratic rights of societies and states should also be protected. Thus, the principle of Responsibility to Protect should never be allowed to become a tool of geopolitics as indeed has been the case in reality, with brutal regime changes or attempts at these on false premises (in Iraq, Libya and many other countries). Hence, what is needed, in the words of Alfred de Zayas, is a reformulation or broadening of the principle in order that it may “protect populations from war, military interventions and structural violence.”<sup>7</sup> In other words, the principle should offer protection against intervention and manipulation of geopolitical stakeholders.

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<sup>6</sup> Quoted from Alfred de Zayas, *Building A Just World Order*. Atlanta: Clarity Press, 2021, p. 117.

<sup>7</sup> *Op. cit.*, p. 208.

## **Not another Versailles!**

Now the idea is to punish Putin before the International Criminal Court and make Russia pay war reparations for the invasion of Ukraine. Of course, it is not Vladimir Putin who will pay but the Russian people. Does this not remind us of Versailles in 1919 where the Germans were forced to accept that all crimes committed in the First World War and the war itself were their fault and nobody else's and that they – and they alone – had to pay for it? We all read in our history books how this helped the Nazis and created a fertile soil for them to tell the German people that they were up against an unjust world and that now they had to fight back.

At their summit in Reykjavik last spring leaders of the member states of the Council of Europe decided to have another go at Versailles, this time exchanging Germans for Russians.

If it is felt that international organizations, including, and not the least, international courts, operate on the command of those who are victorious, who are *winners*, at any given period, then we will not achieve what is meant to be achieved by any such court, namely, to turn vengeance into just retribution. On the contrary, vengeance will be the end product; prejudice and hatred will prevail.

We will never be able to remedy flaws in the international institutional world unless we restore respect for democracy – and that we will not do unless we have the billionaire from Kolkata step aside and give humanitarian, egalitarian and democratic considerations the floor.

# **IV**

## **Appendix**



Fabian Klose

## **Human Security and Responsibility to Protect in Historical Perspective**

(Abstract)

Since 2001, the concepts of “human security” and “responsibility to protect” have become increasingly influential as a framework in international relations for addressing global inequalities and vulnerabilities. The influential work and reports of the *Commission on Human Security* (in 2003) and the *International Commission on Intervention and State Sovereignty* (in 2001) are significant examples for this development. Centered on the well-being of people rather than nation-states, these approaches take a comprehensive view of global challenges – and their solutions. Emphasizing the complex links between extreme poverty, violence and armed conflict, hunger, natural hazards and climate change, adverse health outcomes, and other threats to human welfare and fundamental human rights, they also demand that we address these issues in a holistic fashion. However, when we study crucial reports on “human security” and “responsibility to protect,” it is rather surprising that historical dimensions are very often neglected or even completely missing. For instance, the 400 page *Supplementary Volume of the ICISS Report* only refers very briefly on two pages to the history of the idea of humanitarian intervention, even though this concept has a long and deep history of over 200 years. As “human security” and “responsibility to protect” become paradigms that are more dominant in international affairs, it is essential for policymakers, practitioners, and scholars to understand their historical evolution and current uses. When and where did the idea of both entangled concepts originate? Why and how did a constellation of issues related to human well-being coalesce into our modern understanding of “human security”? And finally, how might we constructively critique these concepts, both as a theory and as practiced, in contemporary global affairs? In tackling these questions, the aim is to sharpen the historical understanding of both concepts in order to critically engage with them and develop them further.



Lyal Sunga

**Is the ICC Indictment of President Vladimir Putin for War Crimes a Step in the Right Direction for the International Rule of Law or Instead a Deeply Unfair Manifestation of Realpolitik, Western Hypocrisy and Double Standards?**

(Abstract)

The Charter of the United Nations reaffirms the basic principle that every state, regardless of its population size, wealth, natural resources, geo-strategic influence or military strength, is sovereign and equal to every other. Strict sovereign equality among states obviously conflicts with the privileged position the Charter grants the five permanent members of the UN Security Council (China, France, Russia, United Kingdom and the United States) because of the power of each permanent member to veto any Council draft resolution to determine the existence of any threat to or breach of the peace, or act of aggression. The legal authority of each of the permanent members to block action to address a threat to international peace and security, even if all other 192 members of the UN supported such action, grievously offends the international rule of law, and not just in theory. In practice, since 1945, each of the permanent members has liberally disregarded the interests of the international community as a whole by casting vetoes wherever convenient to protect themselves and their friends from condemnation or coercive measures the Security Council otherwise could have taken against lawbreaker states in line with Charter Articles 39, 41 and 42, despite the *nemo iudex in causa sua* principle (“no one can be a judge in his own cause”). Not only have the Council’s permanent members routinely stymied collective security action to stop armed conflict that has cost millions of lives since 1945, but also in effect they have placed themselves beyond the rules of state responsibility and international criminal law, which impose consequences for breaking the law.

Despite a perennially blocked UN collective security apparatus, and the continued irresponsibility of the more powerful of states, the international community has made remarkable progress in developing a system of international criminal justice, most evident in the establishment of the International Criminal Court. In March 2023, the ICC for the first time issued an arrest warrant for the serving head of state of a permanent member of the Security Council, namely, Russian President Vladimir Putin, for war crimes allegedly perpetrated in Ukrainian territory. Given the Security Council's failure to intervene in so many armed conflicts from 1945 to the present because of permanent member veto, including the 2003 illegal invasion of Iraq, many, not least Vladimir Putin himself, no doubt consider the ICC's action an obvious expression of Western hypocrisy, double standards, and the inevitable culmination of vicious anti-Russian bias. This situation begs the question: is the ICC indictment of President Vladimir Putin for war crimes a step in the right direction for the international rule of law or instead a deeply unfair manifestation of realpolitik, Western hypocrisy and double standards?

## Executive Summary

At a critical juncture of international politics, a panel of experts from Austria, Canada, China, Germany, Iceland, India, Serbia, Türkiye, the United Kingdom, and the United States, supported by academic team members from France and Italy, gathered in Austria's capital to address the theme of "Responsibility in International Relations." Continuing its long-standing tradition of addressing crucial issues in international affairs, the International Progress Organization convened the one-day meeting at Vienna's Imperial Hotel.

In his opening remarks, Professor Hans Köchler, President of the International Progress Organization, emphasized the significance of responsibility – as foundational principle of international relations – in an era fraught with the dynamics of a changing global power constellation. He distinguished the dual aspect of responsibility as states' obligations, on the one hand, and accountability at both the individual and state level, on the other. Introducing the topic of the conference, the president focused on the *legal* aspects of accountability, both in terms of states' liability to compensation and individual criminal responsibility. He illustrated the problems by highlighting a basic inconsistency in the UN Charter that proclaims "sovereign equality of states" as fundamental principle, but effectively shields the permanent members of the Security Council from being held accountable for their violations of international law. Professor Köchler concluded his introduction with observations on the role of *realpolitik* since the time of the Vienna Congress.

Professor Anthony F. Lang from the University of St Andrews (Scotland) spoke on "Responsibility: From the Moral to the Political," laying the philosophical groundwork for the subsequent debates. His presentation included a semantic analysis of the terms dialogue, rationality and responsibility, followed by the analysis of responsibility at the moral, legal and political levels. He concluded his remarks with an analysis of the relationship between the concepts of responsibility and universality.

Dr. Seán Fleming from the University of Nottingham (U.K.) critically examined the contentious topic of punitive sanctions against states, elaborating ethical problems of coercive measures in the international realm and emphasizing that, in the present intergovernmental system

embodied by the UN, international criminal law does not apply to states but only to individuals. He also explained that “state crimes” couldn’t be meaningfully prosecuted without the necessary institutional infrastructure at the global level.

The historical depth of the debate was enhanced by Professor Fabian Klose from the University of Cologne (Germany) who provided insights on “Human Security and Responsibility to Protect in Historical Perspective.” Describing in detail the evolution of the concept of humanitarian intervention since the 19<sup>th</sup> century, he drew the panel’s attention to the national and geopolitical interests that have often driven interventions since the colonial era.

Delving into the complexities of the United Nations system, Professor Ramachandra Byrappa (India) of Eötvös Loránd University and HIIA, Hungary, analyzed the challenges faced by the UN vis-à-vis what he described as “feudal infiltration” stemming from the geopolitical context of the Cold War and from feudal global structures inherited from European empires. He argued that the design of the UN is good, but the construction is dysfunctional because of an inadequate interpretation of sovereignty at different levels.

Professor Berdal Aral from Istanbul Medeniyet University, Türkiye, examined the extent to which the UN Security Council’s resolutions have been carried out responsibly. He particularly focused on the wide range of the Council’s enforcement actions, including the imposition of massive economic sanctions and the use of armed force or authorization of the use of force, pointing to the tragic human consequences of many such interventions and emphasizing the incompatibility of such measures with basic human rights. He concluded his presentation by outlining what a “responsible” UN security system should look like.

Shifting the lens to the interplay between international organizations and global power politics, Christopher Black (Canada), an international criminal lawyer who served as Defense Counsel at several international criminal tribunals, shared his experiences from the Milošević trial at the Yugoslavia tribunal, as well as from the Rwanda and Sierra Leone tribunals. The speaker analyzed false narratives that can influence judicial systems as well as public opinion, and the tendency to subject members of defeated parties to discrimination or abuse.

Professor Alfred de Zayas (USA), a former Senior Lawyer at the Office of the UN High Commissioner for Human Rights and UN Independent Expert on the Promotion of a Democratic and Equitable International Order, followed with his testimony of the influence – and interference – of state actors in international legal contexts. He also highlighted the illegality of unilateral economic sanctions, explaining that such punitive measures often amount to massive human rights violations, punishing the people rather than the government the sanctioning state claims to target.

In a particularly poignant moment, Professor Lyal S. Sunga, affiliated with the John Cabot University of Rome and the Raoul Wallenberg Institute of Human Rights and Humanitarian Law in Lund (Sweden), analyzed the indictment of Russian President Vladimir Putin by the International Criminal Court, inviting reflections on the balance between the international rule of law and geopolitical manoeuvrings. He argued that the symbolic power of the ICC's indictment should not be underestimated despite practical and jurisdictional challenges. Underlining the importance of consensus on basic principles of international law, he said that one should not adopt only one single narrative in matters of the Ukraine-Russia conflict and the war crimes committed by both sides. Finally, he emphasized that the ICC was not simply a Western tool, pointing to the fact that out of 123, only 25 State Parties are from the West. The speaker concluded by declaring that international legal organs are certainly not flawless but that the ICC indictment represents a step in the right direction for the international rule of law.

In the subsequent session, Professor Zhipeng He of Jilin University, China, led a discussion on the “Impossible Trinity for Great Powers,” meaning challenges to the international rule of law due to the antagonism between (1) national interests, (2) the demands of global ethics, and (3) the expectations of a state's allies. The speaker focused on the inevitable distrust of great powers towards international legal organizations, as the former are usually not prepared to put their national interests aside. The presentation was concluded with a reflection on how self-interest shapes the behavior of great powers in international organizations.

Professor Dušan Proroković, Senior Research Fellow at the International Institute of Politics and Economics in Belgrade (Serbia), provided

insights into the role of intergovernmental organizations in an evolving multipolar landscape. His thesis was based on Structural Realism and focused on the growing polarization between the “Collective West” and the rest of the world. Evidence was brought on how several great powers and members of the Security Council not only push forward their antagonizing positions but also perceive each other as threats. The speaker further described the growing mistrust in international organizations and how the multipolar world is shaped mostly by confrontations over national interests.

Bringing the roundtable to a close, Ögmundur Jónasson, a former Minister of Interior and representative of Iceland at the European Commission against Racism and Intolerance, made a compelling case for dismantling colonial legacies within international institutional frameworks, advocating for a transformative approach. Mr. Jónasson analyzed the power of a narrative of values in the ongoing geopolitical conflicts and described the current global scene as divided between national interests and humanistic principles. The presentation included many historical parallels that backed the speaker’s thesis.

In the course of an intense debate, with diverse yet interconnected views and analyses, the participants highlighted, each in their scholarly domain, the nature of responsibility in international relations. Addressing both, historical developments and contemporary challenges, the discussions revolved around the tension between sovereign rights and global responsibilities. Among all the differences of approach, there was consensus on the imperative to reform existing intergovernmental organizations and develop new international frameworks that reflect current global realities.

**Publications and documents of the  
International Progress Organization related to issues  
of international responsibility**

- *The Principles of International Law and Human Rights: The Compatibility of Two Normative Systems*. Studies in International Relations, Vol. V. Vienna: International Progress Organization, 1981.
- *The Legal Aspects of the Palestine Problem with Special Regard to the Question of Jerusalem*. Studies in International Relations, Vol. IV. Vienna: Braumüller, 1981.
- *Le conflit des Malouines*. Studies in International Relations, Vol. IX. Vienna: International Progress Organization, 1984.
- *The Reagan Administration's Foreign Policy: Facts and Judgment of the International Tribunal*. Studies in International Relations, Vol. XI. London/Vienna: Third World Centre, 1985.
- *Democracy in International Relations*. Studies in International Relations, Vol. XII. Vienna: International Progress Organization, 1986.
- *Terrorism and National Liberation*. Studies in International Relations, Vol. XIII. Frankfurt a.M./Bern/Paris/New York: Peter Lang, 1988.
- *The Human Rights Situation in Palestine: Reports by the Delegations of Inquiry on Behalf of the International Committee for Palestinian Human Rights*. Vienna: International Progress Organization, 1989.
- *The International Meeting of Experts on the Exchange of Prisoners of War between the Islamic Republic of Iran and the Republic of Iraq: Preliminary Documentation*. Geneva, 29-30 May 1989. Vienna: International Progress Organization, [1989].
- *The Voting Procedure in the United Nations Security Council: Examining a Normative Contradiction and its Consequences on International Relations*. Studies in International Relations, Vol. XVII. Vienna: International Progress Organization, 1991.

- *The United Nations and the New World Order: Keynote addresses from the Second International Conference On A More Democratic United Nations*. Studies in International Relations, Vol. XVIII. Vienna: International Progress Organization, 1992.
- *Democracy and the New World Order*. Studies in International Relations, Vol. XIX. Vienna: International Progress Organization, 1993.
- *Ethische Aspekte der Sanktionen im Völkerrecht: Die Praxis der Sanktionspolitik und die Menschenrechte*. Studies in International Relations, Vol. XX. Vienna: International Progress Organization, 1994.
- *The United Nations Sanctions Policy and International Law*. Penang (Malaysia): Just World Trust (JUST), 1995.
- *Democracy and the International Rule of Law: Propositions for an Alternative World Order – Selected Papers Published on the Occasion of the Fiftieth Anniversary of the United Nations*. Vienna/New York: Springer, 1995.
- *سياسة الأمم المتحدة في فرض العقوبات والقانون الدولي* [The United Nations Sanctions Policy and International Law / Arabic]. Vienna: Jamahir Society for Culture and Philosophy, 1997.
- *Economic Sanctions and Development*. Studies in International Relations, Vol. XXIII. Vienna: International Progress Organization, 1997.
- *Globality versus Democracy? The Changing Nature of International Relations in the Era of Globalization*. Studies in International Relations, Vol. XXV. Vienna: International Progress Organization, 2000.
- *The Concept of Humanitarian Intervention in the Context of Modern Power Politics: Is the Revival of the Doctrine of “Just War” Compatible with the International Rule of Law?* Studies in International Relations, Vol. XXVI. Vienna: International Progress Organization, 2001.
- *التدخل الإنساني المشروعية والإبعاد* [Humanitarian Intervention: Legal and Political Dimensions / Arabic]. Series “Bayt al-Hikma [House of Wisdom] Dossiers,” No. 3. Baghdad: Bayt al-Hikma, 2001.

- *The Lockerbie Trial: Documents Related to the I.P.O. Observer Mission.* Studies in International Relations, Vol. XXVII. Vienna: International Progress Organization, 2002.
- *Global Justice or Global Revenge? International Criminal Justice at the Crossroads – Philosophical Reflections on the Principles of the International Legal Order Published on the Occasion of the Thirtieth Anniversary of the Foundation of the International Progress Organization.* Vienna/New York: Springer, 2003.
- *The Iraq Crisis and the United Nations: Power Politics vs. the International Rule of Law. Memoranda and declarations of the International Progress Organization (1990 – 2003).* Studies in International Relations, Vol. XXVIII. Vienna: International Progress Organization, 2004.
- *The Use of Force in International Relations – Challenges to Collective Security.* Studies in International Relations, Vol. XXIX. Vienna: International Progress Organization, 2006.
- *The “Global War on Terror” and The Question of World Order.* Studies in International Relations, Vol. XXX. Vienna: International Progress Organization, 2008.
- *World Order: Vision and Reality – Collected Papers Edited by David Armstrong.* Studies in International Relations, Vol. XXXI. New Delhi: Manak, 2009.
- *The Security Council as Administrator of Justice?* Studies in International Relations, Vol. XXXII. Vienna: International Progress Organization, 2011.
- *Force or Dialogue: Conflicting Paradigms of World Order – Collected Papers Edited by David Armstrong.* Studies in International Relations, Vol. XXXIII. New Delhi: Manak, 2015.
- *MMXXII – War or Peace: Speeches and Thoughts in a Pivotal Year.* Studies in International Relations, Vol. XXXVIII. Vienna: International Progress Organization, 2023.



## About the Contributors and Editors

**Berdal Aral** received his PhD in 1994 from the University of Glasgow, focusing his dissertation on “Türkiye and International Society from a Critical Legal Perspective.” His research and teaching interests center on international law and human rights. Aral has authored four books in Turkish: “The Right of Self-Defence under International Law” (1999), “Collective Rights as Third Generation Human Rights” (2010), “From Global Security to Global Hegemony: The UN System and the Muslim World” (2016), and “Perpetual Betrayal: The Palestinian Problem and International Law Under the Shadow of Imperialism” (2019). Additionally, he has published numerous articles in both English and Turkish on issues related to international organizations, integration in the Muslim world, Turkish foreign policy, and broader topics in international law. His writing has been featured in publications including the *European Journal of International Law*, *Human Rights Quarterly*, and the *Journal of the History of International Law*. Currently, Professor Aral teaches in the Department of International Relations at Istanbul Medeniyet University.

**Christopher Black** is a Canadian lawyer with four decades of experience in international and criminal law. He spent ten years as associate counsel with the Air Canada-CN Corporate Group and the TransCanada Pipelines Oil and Gas Group, handling regulatory cases nationally and abroad. Black then transitioned to a criminal law practice for twenty years as trial counsel in Canadian courts at all levels, including several murder trials. Recently his work has focused on cases before international tribunals. He was member of the international legal team for President Slobodan Milošević before the International Criminal Tribunal for the former Yugoslavia (ICTY) and defended General Augustin Ndindiliyimana, Chief of Staff of the Rwandan Gendarmerie, before the International Criminal Tribunal for Rwanda (ICTR). The case resulted in multiple acquittals of genocide charges in 2014. Black is on the defense counsel list at the International Criminal Court. He is a member of the Ontario Law Society, the International Criminal Bar Association, and the National Lawyers Guild of the United States.

**Ramachandra Byrappa** left India early in life to study in Western Europe. He won scholarships to pursue his education in France and later completed his A-levels in Oxford. With an interest in international re-

lations, Byrappa moved to the University of Kent for a BA degree. After brief economic studies at the University of Düsseldorf, he attained a Master's Degree in Economics and Finance from the Institut d'Etudes Politiques (Sciences Po) in Paris. Following various management positions, Byrappa returned to academia, earning a PhD from Eötvös Loránd University in Budapest in 2014. He soon began lecturing on contemporary Asian history and geopolitics there. From 2017-2021, Byrappa also taught courses on modern India at Pázmány Péter Catholic University in Budapest. In 2023, he was appointed as a member of the Hungarian Institute of International Affairs. His main research interests include structural resilience of institutions, civilizational compatibility, the British Empire, Eurasian geopolitics, diasporas and frontierism.

**Joël Christoph** is a PhD researcher in Economics at the European University Institute (EUI), having received doctoral scholarships from the French government and the EUI. His academic training in economics includes a Bachelor's degree from University College London, a Master's degree from the Barcelona School of Economics, and a Master's of Research from the EUI. His professional experience includes positions at organizations such as the World Bank, Oxford University's Future of Humanity Institute, Carnegie Endowment for International Peace, and other research organizations. Christoph has contributed to several academic publications related to technology, energy, and international policy.

**Alfred de Zayas** is a lawyer, historian, and former UN Independent Expert on the promotion of a democratic and equitable international order (2012-2018) who has worked extensively with the Office of the UN High Commissioner for Human Rights. He holds a JD from Harvard Law School and a PhD in modern history from the University of Göttingen, where he was a Fulbright Scholar. De Zayas is a retired member of the New York and Florida Bar Associations and has authored over 200 scholarly articles and nine books. He is a past president of PEN International – Centre Suisse Romande and a winner of the 2022 International Book Award for Law.

**HE Zhipeng** is a professor of law at Jilin University in China, where he earned his PhD in law. He serves on the standing councils of the Chinese Society of International Law and the China Society for Human Rights Studies, and is Vice President of the China Society of Interna-

tional Economic Law. Zhipeng He has authored over a dozen books on topics related to international law, human rights, legal education, and international economic law, published by presses such as Springer, Tsinghua University Press, and Peking University Press. His research interests include international law, human rights, and legal education.

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**Ögmundur Jónasson** is an Icelandic historian and former Member of Parliament (1995-2016). He earned a history degree from the University of Edinburgh and worked as a foreign news correspondent at Icelandic State TV prior to entering politics. Jónasson held several ministerial positions during his parliamentary tenure, including the portfolios of Health and Interior. Since retiring in 2016, he has served as an Honorary Associate of the Parliamentary Assembly of the Council of Europe and represents Iceland on the European Commission against Racism and Intolerance. Maintaining an active career as a writer and commentator, Jónasson is also part-time lecturer of history at the University of Iceland.

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## List of Acronyms

ARSIWA	Articles on Responsibility of States for Internationally Wrongful Acts
ASEAN	Association of Southeast Asian Nations
AUKUS	Australia, United Kingdom, United States (trilateral security partnership)
BRICS	Brazil, Russia, India, China, South Africa (intergovernmental organization)
CAH	crimes against humanity
CAMDUN	Conferences on A More Democratic United Nations
CARICOM	Caribbean Community
CBC	Canadian Broadcasting Corporation
CEELI	Central and East European Law Institute
CELAC	Comunidad de Estados Latinoamericanos y Caribeños / Community of Latin American and Caribbean States
CETA	Comprehensive Economic and Trade Agreement
CHR	Commission on Human Rights (United Nations)
CIJ	Coalition for International Justice
CILC	Conclusions on Identification and Legal Consequences of Peremptory Norms of General International Law ( <i>Jus Cogens</i> )
CN	Canadian National (Transportation Services)
CNBC	Consumer News and Business Channel (USA)
CNN	Cable News Network (USA)
CoNGO	Conference of Non-Governmental Organizations in Consultative Relationship with the UN
CORG	Comments and Observations from Governments
COVID-19	Coronavirus Disease 2019
CSES	Center for Southeast European Studies
DOS	Democratic Opposition of Serbia
ECFR	European Council on Foreign Relations
ECOSOC	Economic and Social Council (United Nations)
ENCOVI	Encuesta Nacional de Condiciones de Vida / National Survey on Living Conditions (Venezuela)
EU	European Union
EUI	European University Institute
FAO	Food and Agriculture Organization of the United Nations

FBI	Federal Bureau of Investigation (USA)
GA	General Assembly of the United Nations
GATS	General Agreement on Trade in Services
GDP	gross domestic product
IIIA	Hungarian Institute of International Affairs
HR	Human Rights
HRI	Human Rights Instruments (United Nations)
IAEA	International Atomic Energy Agency
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICISS	International Commission on Intervention and State Sovereignty
ICJ	International Court of Justice
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugo- slavia
ILC	International Law Commission (United Nations)
IMT	International Military Tribunal (at Nuremberg)
IOL	Independent Online (South Africa)
IPB	International Peace Bureau
IPO	International Progress Organization
IU	Indiana University (USA)
JSTOR	Journal Storage
KLA	Kosovo Liberation Army
LMU	Ludwig-Maximilians-Universität (Munich)
MICT	Mechanism for International Criminal Tribunals
MIT	Massachusetts Institute of Technology
MOU	Memorandum of Understanding
N1	N1 TV channel (CNN International)
NATO	North Atlantic Treaty Organization
OAS	Organization of American States
OAU	Organization of African Unity
OEC	Organization of Eastern Caribbean States
OED	Oxford English Dictionary
OHCHR	Office of the UN High Commissioner for Human Rights
OP	Office of the Prosecutor (ICC)

OSCE	Organization for Security and Co-operation in Europe
PDVSA	Petróleos de Venezuela, S.A.
PIL	Public International Law
PM	Prime Minister
PoD	principle of democracy
QIL	Questions of International Law
R2P	Responsibility to Protect
RAF	Royal Air Force (U.K.)
RAI	Radiotelevisione Italiana
RIAC	Russian International Affairs Council
RPF	Rwandan Patriotic Front
SC	Security Council (United Nations)
SCO	Shanghai Cooperation Organization
SG	Secretary-General
SHAPE	Supreme Headquarters Allied Powers Europe (NATO)
SLIC	secondary liability for international crimes
TISA	Trade in Services Agreement
TTIP	Transatlantic Trade and Investment Partnership
TWAIL	Third World Approaches to International Law
UCLA	University of California, Los Angeles
UCM	unilateral coercive measures
UK	United Kingdom of Great Britain and Northern Ireland
UN	United Nations
UNDP	United Nations Development Program
UNHCR	United Nations High Commissioner for Refugees
UNICEF	United Nations Children's Fund
UNODC	United Nations Office on Drugs and Crime
UNSC	United Nations Security Council
UNTS	United Nations Treaty Series
US / USA	United States of America
USSR	Union of Soviet Socialist Republics ("Soviet Union")
VCLT	Vienna Convention on the Law of Treaties
WHO	World Health Organization
WWI	First World War
WWII	Second World War
ZAÖRV	Zeitschrift für ausländisches öffentliches Recht und Völkerrecht



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