Re-Imagining the International Legal Order

Description

International law is usually conservative, lawyers and judges do not like change, they emphasize consistency, stability and predictability as the major advantages of the law. Even legal scholars often do not dare to challenge the status quo, to suggest adopting new, and even amending current laws, advocating just to focus on the implementation of what already exists. This collection stands different. It shares the authors' discomfort with the present legal order and some of its institutions and courts, and dives into either a corrective, or a profound re-imagination of these, so that they can address better the rising global challenges. Leading experts in their area present their new and cutting-edge perspectives. Divided into six parts, the volume paints a vast yet solid thematic landscape of unique and critical approaches. The book invites and allows for a deep engagement with a wide range of opinions from across the world. It enables a free, courageous, and detached from the endless feasibility skepticism, reimagining of the international legal order. The work will be a fascinating reading for students, academics and researchers working in the areas of International Law and International Relations.

ACKNOWLEDGEMENTS

Justice, justice you shall pursue (Deut. 16:20)

To our beloved grandparents, parents, siblings and children

To work on this book project was both an immense toil and an enjoyable co-operative experience. It was born out of a provocative assumption that the international legal order is aging, too static, inefficient and, therefore, in need of a visionary re-imagination. We were privileged to have a large group of distinguished academics and practitioners, who first committed to give a lecture to the newly established Jindal Society of International Law in the Centre for the Study of United Nations, and then very kindly agreed to transform their lectures into book chapters. We are also thankful to many others, who accepted to write chapters and did so brilliantly within tight deadlines.

It takes a village to complete a book of such calibre and ambition, and many people helped us. Transcribing the audio lectures into texts was done by Aditi Motani, Ahan Gadkari, Arudra Ravindran, Arjan Chonker, Arya Anand, Aryan Tulsyan, Aryan Agrawal, Ayman Khan, Bhavya Sehajpal, Dhruv Bonavate, Harsh Chudawala, Ila Nath, Jayantika Singh, Kevin Alexander, Maanasee Hatkar, Jagdish Phulara, Manshaa Nagpaal, Mehar Mandher, Nivedita Pundale, Priyanshi Bhardwaj, Rahul Pravin Desarda, Perlina Patel, Ravi Yadav, Reva Satish Makhija, Saurabh Samraat, Sara Sachin, Syama Bala Sri Pragna Yenduri, Surabhi Bhandari, Viraja Shah. The conversion of the speeches into texts was very useful for the authors then to develop their chapters.

After we edited the chapters, Megha Sharma and Faizan Ahmed, with support from Himanshu Dubey and Dev Agrawal, and coordination from Sonu Nimmatoori, went through all texts, checking citations, punctuations, size-formatting and all other minor but important details, necessary to match the publisher's guidance to complete the manuscript. We acknowledge all students' time spent to help us on top of their personal commitments, and remain deeply appreciative for their willingness and promptness.

This book would have been impossible without the support of O.P. Jindal Global University's Vice Chancellor, Professor Dr. C. Raj Kumar, and the Executive Dean, Professor Dr. S.G. Sreejith, who allowed us the time and space to focus on such a mega task and complete this timely work. We are eternally grateful to many other colleagues, who in the process shared ideas, commented, expressed encouragement and supported us.

PREFACE

By Richard Falk, Albert G. Milbank Professor of International Law and Practice, Emeritus at Princeton University,

The Russian aggression in Ukraine has reawakened interest in international law as a source of constraint and behavior guidance in an international situation of heightened tension between geopolitical rivals. This tension has also brought to an abrupt halt, at least temporarily, decades of complacency about nuclear dangers. In such a global setting it is entirely fitting to welcome this gathering of diverse scholarly perspectives on the role, disappointments, and potential of international law and the United Nations. The editors, Vesselin Popovski and Ankit Malhotra, are to be congratulated for bringing together some of the best minds in the field, and devoring attention to a wide range of topics of crucial relevance during this period of renewed turbulence and unprecedented global challenges to the future well being of humanity as well as the viability of ecological habitat.

For most people, including foreign policy elites, the litmus test of the role of international law is assessed almost exclusively in relation to the war and peace agenda of policy concerns, with the recent addition of climate change. To some extent this is a serious systemic mistake that result in undervaluing the international legal order. It overlooks the extent to which the millions of daily transnational interactions take place within a reliable network of laws, procedures, and institutions. Diplomacy, trade, investment, tourism, and communications would be impossible without a generalized confidence that that law will be respected in the practice of states, however otherwise hostile to one another. Also overlooked is the extent to which all law is subject to manipulation, interpretation, and violation even in the best governed states, and yet we for a variety of reasons lose confidence in the efficacy of domestic law because of its shortcomings, and tend to demand more law rather than give in to lawless behavior.

It should not be forgotten that international law, like any regulatory framing of legitimate and illegitimate behavior, reflects the disproportionate influence, for better and worse, of the most powerful actors. In fact, international law takes overt account of this imperfection by giving the winners in World War II a right of exception by way of the veto in the United Nations Security Council. Likewise, it diminishes the authority of the International Court of Justice by labeling its response to questions of legality as ‘Advisory Opinions’ and making recourse to the Court by disputing member states discretionary.

There are two kinds of weakness that do pertain to international law more than to law within a well-governed territorial sovereign state. Above all, international law hardly pretends to extend its reach to what used to be called ‘Great Powers’ and since 1945 are better described as ‘geopolitical actors’. Reinforcing this geopolitical voluntarism is the deference enjoyed by sovereign states, the only full members of international society, which remains a state-centric form of world order. International law affirms the juridical fiction of the equality of states

that collided in institutional settings with existential inequality, giving way to making international law a matter of voluntary adherence whenever legal obligations clash with vital strategic interests. Of course, given the realities of international life adherence to international law is subject to enforcement by geopolitical initiatives as in the case of preventing the proliferation of nuclear weapons to certain states, even if not all.

It is against this background, that this rich and diverse volume, poses the challenge of 're-imagining.' This is not generally a congenial task for international jurists who are more comfortable looking to the past for 'precedents' and limiting the present meaning of specific norms to the *text* rather than delving into matters of *context*, which might encourage a more adventurous jurisprudential blending of past, present, and future. Although academicians are not bound by such stringent blinders, the pedagogy of legal education and the profession is overwhelmingly conservative, making such a volume a vocational challenge as well as intellectual venture for this distinguished group of contributors.

Few volumes so valuably stimulate thought about the nature and future of the international legal order. Hopefully, it will be read in the same spirit as it was conceived!

FOREWORD

Karim A. A. Khan KC, Chief Prosecutor, International Criminal Court, The Hague

Anticipating and adapting to change is not a simple undertaking: even when all the variables are considered, unexpected events can halt expected progress. And yet, these unforeseen difficulties need to be taken into consideration when preparing for the future. International law is not impervious to this reality.

The current state of global affairs tests its adaptability perhaps more than ever before. Events such as the COVID-19 pandemic, as well as the emergence of technology and the digital footprint left behind by every aspect of modern life could not have been fully anticipated for 50 years ago. The cumulative effect of the foreseen and unforeseen resonates in the law and will periodically bring it to a crossroads. We have come to such a turning point. A point when we must ask ourselves if the institutions and procedures of international law are fully up to the task that they were envisaged to deliver or whether the rethinking of key aspects of our approach is necessary for it to achieve its main purposes.

Re-imagining the International Legal Order characterizes the implications of this dilemma as the sunset or new dawn of international law, as noted in chapter XXI in reference to Debussy's famous remarks on Wagner. It is indeed a time for reflection and, in my opinion, for the strengthening of our collective resolve. I am delighted to have been invited to provide a Foreword to this work, in which various eminent experts have detailed their ideas for the betterment of our collective understanding of the upcoming challenges and opportunities that we must seize together.

Current criticism of the state of international law and its capabilities is not unjustified; as it is, its standing is not without reproach. Challenges in ensuring the enforceability of the law and delivering on the legitimate demands of those harmed by violations of the law has deflated the hope in what it – and we – can achieve, in particular when looked at from the viewpoint of the citizens who look to it for protection, justice and equity. As we seek to overcome disillusionment, as Professor John Dugard puts it, we must maintain the highest degree of respect for victims' legitimate concerns. When assessing our progress, when considering solutions to render our common work more effective, our yardstick should always be the lived experience of those to which the law seeks to provide security and dignity. This means embracing a realistic, practical approach that can demonstrate results, that the law is with all those who are on the frontlines, fearing for the days ahead.

Our process of reinvigoration should also underline that the principles of international law are universal in nature, and must be respected by all. Today, we see examples of the law being invoked as a strategic mean to fulfil an unlawful end. International peace and security relies on the law being an equal yardstick for all actors' actions to be measured by. This discipline and its values belong to humanity as a whole, consequently it is a shared collective responsibility to promote, support, and uphold them under any circumstances. It is essential that we, collectively, cling to the law that we have. If not, the international system and the stability it provides can begin to drift. The principles and values of international law are not rhetoric to be switched on and off as it suits the petitioner.

While the law can provide an anchor in these turbulent times, it would be unreasonable to ask it to contemplate all future scenarios that could entail complexity. The international community as a whole, from legal practitioners

and law-makers to students and state actors, must be willing and ready to contemplate the legal implications of never-before seen scenarios and to put the law to work in the future that started yesterday. *Re-imagining the International Legal Order* aids in charting the course for our common efforts. It proposes stimulating ideas for the evolution of the law and presents interesting questions on the possible paths of development for this field in the future. Its various contributing authors come from a wide arrange of backgrounds which enriches diversity in the discipline and keeps the conversation surrounding the future of the law more thorough and complete. The reader will find collected perspectives in this work that present innovative arguments, from analysis on how private law can aid in achieving the 2030 sustainable development goals to studying the implications of the Security Council veto power towards the responsibility to protect. All of which will serve to deepen understanding some of the current complexities within different fields within international law.
The ideas included in this work build on the growing momentum for global accountability efforts on part of all stakeholders aimed at making this discipline effective and impactful in everyday life. I am confident that those reading this work will find it fascinating and enlightening. The changing momentum in the international legal order requires stakeholders across discipline to be involved in more creative ways than ever before.

Re-imagining the International Legal Order can challenge and inspire us to collaborate more deeply and in innovative ways on our collective efforts to ensure the continuing relevance of the law in all our lives. The law belongs to all of us, and it is only by opening up the dialogue that it can rise to the occasion of a new dawn and meet the extraordinary circumstances of our time.

FOREWORD
By Judge Hilary Charlesworth, International Court of Justice, The Hague
International lawyers are keenly aware of the limits of their field. The international legal order enshrines many ambitious commitments – to international peace and justice, for example – and yet it does not seem able to deliver on these promises in a consistent or convincing manner. Attempts to reform or rethink the discipline of international law have, then, become an important feature of its literature. These attempts range from proposals for new international legal principles or instruments, to institutional reform, all the way through to conceptual re-thinking.
This volume is a valuable contribution to the continuing project of re-imagining the international legal order. It responds to our current situation where we are faced with dizzying rates of technological change, intractable armed conflict, the deepening of climate change and profound global inequalities. What can international order do in such circumstances? The chapters present an abundant array of ideas. Some emphasise the need to shore up existing institutions of the international legal order. Others encourage institutional restructure, or marshalling of political support for international law. Some authors address the functioning of international law in particular national legal systems and in particular regions. Others examine the operation of particular areas of international law. Some even express doubt about the value of re-imagining international law, predicting that it might undermine the value of the system. The collection also gives insight into the lives of several significant figures in modern international law, sometimes in their own words. From all these, we can see the power of ideas in shaping the discipline.
The contributions in this tome considered as a whole remind me of Raymond Williams' brilliant account of keywords, his investigation of cultural and social meaning of words and the way this changed over time. Williams distinguishes between two meanings of the keywords: the first is 'strong, difficult and persuasive words in everyday usage … persuasive simply by being uttered'; and the second is 'words which, beginning in particular specialised contexts, have become quite common in descriptions of wider areas of thought and experience'[1].
I think that international law constitutes a keyword in both senses identified by Williams: it is a term persuasive simply by being uttered, as well as a term that originated in a specialised field, but that has developed a resonance more broadly. A keyword contains a certain ambivalence, as well as ambiguity, a susceptibility to controversy and interpretation. As these chapters show, international law fits both senses very well. However, the standard definitions of international law - for example the Oxford Dictionary: 'body of rules established by custom or treaty and recognized by nations as binding in their relations with one another' - gives nothing of this complexity. This collection illustrates the ways that the use of the international law has changed over time and how it is constantly reforming. Although it is often said that international law offers the world a common juridical

[1] Raymond Williams, *Keywords: A Vocabulary of Culture and Society* (Fontana 1988), p. 14.

language, the chapters here suggest that there are many languages of international law. The institutions of international law are embedded in a political context, but while international law has opened up certain ways of thinking about global politics, it has also made others harder to imagine.
The principles of international law do not themselves resolve problems; rather they allow us to make certain arguments. We learn from this volume that international law provides a framework for the articulation of certain demands and interests, while excluding others. International lawyers have considerable power in shaping the way problems are identified, categorised and resolved at the international level. In this way, international law can be seen as one thread in a tapestry of effective regulation, of changing the course of events. But the thread can break if too much weight is placed on it alone, and its strength depends on it being woven with other types of regulation.[2] These might include institutional and political pressures, publicity, and activism as well as art and literature.
I congratulate Vesselin Popovski and Ankit Malhotra for bringing so many expert voices to the ongoing task of re-imagining international law and I wish this rich volume a global readership.

FOREWORD

By Claudio Grossman, Professor and Dean Emeritus, R. Geraldson Scholar for International and Humanitarian Law, Washington College of Law, American University, Washington DC

"Re-Imagining the International Legal Order" is an important collection of essays, both because it includes some of the top thinkers in international law, and due to its variety of themes covered, such as the Russian aggression in Ukraine, the response to Covid-19, trends in labor law and environmental law, and relevant issues of sovereignty, responsibility, and the future of international legal order. While this by itself would be enough for the book to be an essential point of reference for those that are interested in international law, the book is much more than a collection of valuable chapters written by authoritative scholars and practitioners. The point of departure of all texts is one unifying theme, namely, the extent to which international law, courts, and judges are challenged by the changes that come with rapidly evolving international relations, including due to advances in technology and global inter-connectedness. Further, the book is enriched by analysis that encompasses the theoretical development, the dynamics of law and change resorting to the history of the interplay between social and political changes, together with current specific challenges in the environmental, peace and security, technological, and other domains.

An analysis as rich and diverse as the one presented, unsurprisingly does not arrive to a unified conclusion. The spectrum of answers provided by the different authors run from an entire reimagining of international law, starting from the current needs of the international community, to other approaches that require addressing the tension between transformation and status quo. This tension is not an issue restricted to international law, and a key factor is whether it could be managed or addressed, and to what extent, with the existing norms of international law or whether there is a need to re-visit and re-think these norms. While the approaches are diverse it is not unlikely that the readers will come to the conclusion that the transformations are required in some cases by the existential nature of some of those challenges e.g. the destruction of the environment, strengthened due to the absence of realistic alternatives. A big issue remains, however, whether existential threats currently faced by humanity can be addressed only retroactively after they have taken place. The historic legal experiences seem to lead to the conclusion that law is more reactive than preventative, as is the case with human rights law that was born from the ashes of the World War II. Should humanity wait for irreparable and widespread environmental damages in order to react? Equally, should humanity wait for a nuclear holocaust in order to adopt measures to prevent the spread of nuclear weapons and a reduction in nuclear arsenals?

This book appears after the invasion of Ukraine by Russia, when even basic norms on the use of force in international law, including Art. 2/4 of the UN Charter, are being flagrantly violated, and when the right of veto accorded to the permanent members of the Security Council avoids swift and effective action by the international community, when those norms are violated. This inability to act in the face of flagrant violations of existing

[2] John Braithwaite, 'Conclusion: Hope and Humility for Weavers with International Law' in Brett Bowden, Hilary Charlesworth & Jeremy Farrall eds, *The Role of International Law in Rebuilding Societies after Conflict* (Cambridge University Press 2009) pp. 270-276.

norms shows that facing the challenges posed by new developments cannot be done in light of the old distribution of power, inherited from World War II. From that perspective, the book exposes the existing difficulties and, to a great extent, stresses the need for constantly presenting the issues, dangers, and the needs to promote the values of international law as an existential requirement.

Finally, alongside the important material to understand the current dynamics, taking place in the international community and its relationship with international law, another most important contribution of the book seems to be that it makes people think. Because of the quality and diversity of the chapters, the reader is required not only to choose between the different approaches, but to think creatively as to the path forward. It is said that the best way to forecast the future is to contribute to its shaping. From that perspective, this book is showing us the dimensions and the gravity of the current challenges facing international relations and the need for individual and collective action. This in itself is a call for action.

BOOK ENDORSEMENTS (alphabetically listed)

Jean d'Aspermont, Professor of International Law, Sciences Po Law School and University of Manchester
The exercise of re-imagination does not come naturally to international lawyers. Caught in the many constraints of their discourse, they often find themselves re-imagining the already imagined. It is thus with great merit that the authors of this spectacular edited collection, under the leadership of Vesselin Popovski and Ankit Mallhotra, successfully turned the hurdles of the international legal discourse over their head to offer the reader the most ambitious imaginative reinterpretations of international law and international institutions. The result is not only rich and impressive, but also constitutive of an entirely new imaginative space for anyone eager to rethink what international law does to the world and how it does it.

Marcelo Cohen, Professor of International Law, Graduate Institute of International and Development Studies, Geneva
In times of crisis it is normal to question the existing international law, which sometimes is even accused of 'complicity' with conduct that severely injures people or the environment. In doctrinal circles, the quest for originality leads to open-ended discussions about what international law really is, i.e., whether it is 'law', or 'international', or something else than a pure illusion. This collection is a contribution to these discussions not only at the general level, but also in key areas that are at the core of the international legal system, such as multilateralism and the UN, adjudicative bodies and - in a world in which the use of force is regrettably increasing - the law of armed conflict. Readers will find a wealth of ideas in this regard, although being invited to make their own reflections about international law and the manner to face the deep crisis in which the world is submerged today.

Malgosia Fitzmaurice, Chair, Public International Law, Department of Law, Queen Mary University of London
One of the most significant recent publications on international law and international relations, this book will have a very long shelf life due to its breadth and holistic approach. It is stimulating and thought-provoking in analyzing almost all areas of international law from contemporary perspective. Most distinguished international lawyers share their in-depth, personal reflections on legal theories, humanitarian law, human rights law, environmental law, international organizations, international courts, and other areas.

Sir Christopher Greenwood, GBE, CMG, KC, Master of Magdalene College, Cambridge
This collection of essays on whether, how and to what end international law can or should be re-imagined is a welcome addition to the debate, containing as it does contributions from a wide variety of standpoints.

Maja Groff, Senior Treaty Advisor at Integrity Initiatives International, Convenor, Climate Governance Commission

The UN Secretary General has recently raised the alarm that we face a stark choice between breakdown or breakthrough. The international legal order and its further evolution is the key vital tool in our shared efforts to rise to the occasion at this historic crossroad and to push forward towards the next generation of international legal practice and institutional arrangements. This volume is a valuable contribution to this crucial conversation.

Edward Newman, Head of the Graduate School, Faculty of Social Sciences
Professor of International Security, School of Politics and International Studies
University of Leeds
The existing legal, normative and institutional apparatus designed to manage collective global challenges is under severe stress in a changing international order. This excellent collection, situated at the interface between International Law and International Relations, explores the precarious state of the 'rules-based order' and provides genuinely innovative, fresh thinking and forward-looking solutions. It is highly recommended!

Martins Paparinskis, Professor of Public International Law at University College London and Member designate of the International Law Commission
Can international law be re-imagined? Should it? Should it perhaps be first imagined? And can one imagine an international society without international law? Those reflecting on these hard questions will be greatly assisted in their intellectual journey by the stellar contributions ably collected and edited in this volume.

August Reinisch, Professor of International and European Law, University of Vienna
It is always exciting to reimagine one's professional framework. If this is done by such an excellent group of writers, like in this book, it also provides deep thought provocations.

Gerry Simpson, Chair in Public International Law at the LSE and Fellow of the British Academy
Popovski and Malhotra have brought together a rich array of perspectives on re-imagining international law. Expertly edited chapters open up new vistas on the field.

Samuel Wordsworth KC, Arbitrator/Counsel at Essex Court Chambers
A hugely important book for all those asking whether international law is still fit for purpose.

Dire Tladi, Professor of International Law, Faculty of Law, University of Pretoria
A tour de force, bringing together who's who in international law, answering the central question where is international law going and whether it will be capable of addressing the myriad of challenges facing the world. The editors invite to think whether international law can do better and chart a path towards a brave new world. The themes reflect everything that has occupied international lawyers in modern times, including conceptual questions concerning deficiencies in the system and the law-making. With failures of the collective security system, it is certainly timely to ponder about the role, place and future of international organizations, this 'heartbeat' of modern international law. While one might have expected a spotlight on international courts, it is domestic courts that are also given pride in the book, given that much adjudication of international law takes place in domestic courts in large part because of the lack of a compulsory system of adjudication in international law. A most timely book which I definitely recommend.

Helmut Tuerk, Judge Emeritus, Former Vice-President of the International Tribunal for the Law of the Sea
Truly worthwhile reading, particularly in the current situation where the validity of important international legal norms seems to be increasingly questioned, if not at all disregarded. It should thus also be taken to heart by policy makers all over the globe. Vesselin Popovski and Ankit Malhotra edited a substantial number of contributions by most eminent jurists from different geographical regions, covering diverse areas of public and private international law in a highly thoughtful manner. They not only outline the present situation in the respective fields of law but set forth innovative ideas as to how the international legal order could be improved to overcome existing deficiencies, to better cope with current challenges, as well as with those that may arise in the future.

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CHAPTER I: INTRODUCTION: INTELLIGENCE OF A FUTURE DAY

If someone living in 1875 would have tried to imagine what the world may look like a century later, in 1975, it would have been challenging, but not difficult. Many progressive minds would have predicted faster economic development, scientific achievements, new medicines to combat deadly diseases, end of slavery, de-colonisation and advent of human rights. However, if someone in 1975 would have attempted to guess what the world would look like just a half of a century later - in 2025 - that would have been much more difficult. If the life of our grand-parents was very similar to the life of their grand-parents (often they would live in the same city and even do the same jobs), no babies born today would be doing their grand-parents' jobs, or living in the same towns.

The speed and intensity of changes have increased significantly with the rise of globalisation, spread of internet, mega-data, mobile technology, artificial intelligence and all other human progresses, that made the world on one hand deeply interconnected and inter-dependent, but on another hand also much more uncertain, hesitant, non-predictable. It is a mystery how we know today much more than a century ago, but also how less we are able to predict the future, as in the past.

The dynamism of a future change, if these tendencies continue, will develop, and systemic transformations may happen even faster, sometimes within the same generation. The main task of this book is to address a provocative assumption that the international legal order is aging, too static and often in-efficient, to address the rapid changes and therefore there is a need and, hopefully, desire to re-imagine the international legal order. Will international law, institutions, courts and judges adapt to the growing uncertainty and the many new challenges? And if so, how? Are the current conventions, institutions and courts fit for their purposes and can they deliver the expectations trusted upon them? If not, do we need new regimes, or rather do we need new efforts to make existing laws enforceable? These are essential questions that require brainstorming, analysis, conversations, debates, writing and publishing.

The authors in this book undertook the ambitious task to address the above questions. They admirably examine in their chapters either general tendencies, or specific fields and phenomena. They acknowledge where progress has been made, but also share dissatisfaction with deepening gaps and lack of ambitions to develop international legal order. The idea of re-imagination, as a title of the book, is akin to resistance and frustration with the status quo, it invites fresh approaches, nudging a complete or narrow overhaul. The narrowness commands surgical precision to achieve the outcome of what the law has to be, and what it ought to be.

We know from international judicial processes, that dissent of a judge destroys the illusion of unanimity, certainty, and judicial infallibility, but we accept that and there should be no reason to deplore the destruction of an illusion. Opinions differ, not only among academics, but also among judges, and that difference is essential for an honest and realistic re-imagination. Reasonable disagreements exist in every field of human knowledge "from the production of a cobalt bomb to the mixing of a dry martini to the process of judging."[3] The legal order, after all, is not an exact science, it must be constantly tested by reason. The quest for re-imagination challenges and exposes existing norms to a reasoned dissent, compelling the subjects to re-examine established rules to the process of evolution. The re-imagination does not change the legal order immediately, but it "may salvage for tomorrow the principle that was sacrificed or forgotten today."[4] In the words of Charles Evans Hughes "Dissent

[3] Stanley H. Fuld, "The Voices of Dissent " (1962) 62 Columbia Law Review 927.
[4] William 0. Douglas, " The Dissent: A Safeguard of Democracy " (1948) 32 Journal of the American Judicature Society.

in the Court of last resort is an appeal to the brooding spirit of the law, to the intelligence of a future day, when a later decision may correct the error into which the dissenting judge believes the Court to have been betrayed".[5]

This book is about how the disagreement with, and the re-imagination of, the international legal order would give us exactly that "*intelligence of a future day*" which will make the humanity not only succeed, but prosper. The disagreement and re-imagination - in the opinions of the International Court of Justice (ICJ) – result "not out of disrespect for the Court, but out of respect for one of its great and important traditions, that, when necessary, express disagreement with its conclusions."[6] The legal order is not divine and static, it needs to be subjected to disagreement, commentary and debate, as to produce evolution.

This book brings together international scholars and practitioners, most of whom kindly supported the Lecture Series of the Jindal Society of International Law, established in November 2020 within the Centre for the Study of the United Nations at Jindal Global Law School. It is a compendium of chapters on general and specialized areas of international law, international organisations and courts from a diverse set of perspectives. They represent original recent accounts, based on many years of legal expertise and practical experience. The diverse range of topics is discussed with academic freedom, rigour and honesty. The chapters represent a non-partisan approach to modern challenges, such as armed conflicts, climate change, rise of populism and fake news, fragility of state institutions, corruption, pandemics, loss of biodiversity and many other uncertainties. The purpose of the book is to sharpen the legal and logical thinking in addressing these challenges, to delve into deliberations as to what legal amendments are necessary, and how can states and international organisations adopt and implement these amendments.

The book is divided in six parts. The first part "Re-Imagining International Law" starts with John Dugard's chapter "Overcoming Disillusionment with International Law", who warns that the failure to enforce international law remains a serious problem. The uncertainty as to what regime governs states makes international law potentially replaceable by an elusive notion of 'rules-based order'. It is a deeply personal text: Dugard lived under the discriminatory repressive apartheid regime in South Africa, where justice was absent, and he sought to restore it, using international law as a tool. The granting of independence to Namibia, the end of apartheid and the Good Friday Agreement were all hailed as victories for human rights. In 1998 the dream of an International Criminal Court was realized. The new century however demonstrated slips back to unlawful use of force and the big powers paralyzing the UN Security Council. Therefore, Dugard advocates for authority shifting to other organs, for example an increase in the powers of the UN General Assembly, as one such shift.

Michael Wood's chapter "Re-Imagining International Law: What Might Have Been, What Might Be" reminds that the re-imagination might not always translate into actual change. Referring to the writings of Robert Jennings, Christopher Greenwood and Jan Klabbers, and comparing these to Hugo Grotius, the chapter illustrates the significant changes that international law has undergone on issues of state responsibility, use of force, individual criminal responsibility and humanitarian intervention. In justifying the NATO intervention over Kosovo in 1999, the United Kingdom applied a narrow doctrine of humanitarian intervention and repeated it in 2013, following the use of chemical weapons in Syria. Such exceptional right of humanitarian intervention, Wood argues, has gained limited traction, and has been transformed into 'Responsibility to Protect' ('R2P'), which is no longer a right, rather a responsibility. Wood expresses scepticism to the idea of a global environmental court, and to a potential court of human rights, described by Philip Alston also as 'a truly bad idea'[7]. Other initiatives, such as international constitutional court, or permanent investment court are also seen by many as unrealistic, inefficient, costly bodies. In Wood's opinion, the new courts may tend to fragment international law – often artificially - into separate fields, each with its own approach, experts, enthusiasts and detractors. He cautions that the re-imagination of international law, similarly to the progressive development of international law and various international law-making processes, needs to be carried out carefully and responsibly. The re-imagination has to

[5] Hughes, C. E. (2000). The Supreme Court of the United States: Its Foundation, Methods and Achievements. United States: Beard Books, Incorporated.

[6] South-West Africa Cases (Ethiopia v. South Africa; Liberia v. South Africa); Preliminary Objections, International Court of Justice (ICJ), 21 December 1962.

[7] Philip Alston, 'A Truly Bad Idea: A World Court For Human Rights' (*openDemocracy*, 2014) <https://www.opendemocracy.net/en/openglobalrights-openpage-blog/truly-bad-idea-world-court-for-human-rights/.>.

be consistent with the basis and structure of international law, with well-known sources reflected in the case-law of the ICJ and the work of the International Law Commission (ILC). Change is not necessarily for the better; it can also be destructive. Looking at past developments, such as freedoms in high sea, or still missing compulsory jurisdiction of an international court, a drive change can be envisaged, but with the caveat that it may not come about.

The next chapter by Arnold Pronto, "Change in International Law" follows nicely after, in illuminating how managing change is increasingly a characteristic of the modern legal systems. His exploration underscores the types of change that may occur in and through international law, and the processes driving them. Pronto draws a distinction between paradigmatic change to the structure of international law itself and change in the form of modification to existing rules of international law, which is largely context-driven. He- makes the distinction between change from Proposition A to Proposition B; change from no specific rule to Proposition A; and partial change, that can be achieved by amendment of a legal text, or by adoption of protocols to treaties. He also distinguished between changes in the treaty law and the customary law. The final assessment is that contemporary international law is constantly evolving, the change is 'baked' into the law, which reserves for itself the right to determine the rules and procedures to effect change.

Giuditta Cordero-Moss in the chapter "Fragmentation and Fertilisation of International Law" traces the landscape of courts of general jurisdiction that have been flanked by special courts dealing within specific areas. The process of such fragmentation asks the question whether public international law can remain a unitary system of law, or whether it can split in separate regimes. This raises a further inquiry as to whether it is possible or advisable to cross-fertilise among already separate self-contained regimes or even between regimes outside of international law. Could principles, values and mechanisms that have been developed under one regime be useful to another regime? The author gives two examples: First, how the investment arbitration considerably wiped out the classical dichotomy between inter-state legal disputes and commercial disputes. The borders among different areas of law became increasingly blurred, paving the way to possible cross-fertilisation within public international law. Host country agreements, which form part of the constituting documents of international organisations, usually provide immunity from jurisdiction of the host county's courts. At the same time, increased specialization may lead to parochial attitudes – developing sources and methodologies for a specific area independently of sources and methodologies of general application that could be relevant. Second, in area where case law tends to concentrate on sources developed within the borders of a specific field, that of international administrative tribunals for example, those deciding disputes on employment issues between international organisations and their employees. The author reminds the ILC report on fragmentation, which insisted that the international law must be looked upon as a unitary legal system where one should harmonise the sources within that system. However, when *lex specialis* applies, divergence instead of harmonisation is fully acceptable. Self-contained regimes with their own rules may have an important role in some situations and in other situations there may be reasons for cross-fertilisation among the regimes. Coping with fragmentation does not need to be one-model-fits-all, it is necessary to understand underlying interests, including opposing interests, and see whether it is possible to transpose a solution from one system to another. Everything depends on the contextual appreciation and there is no automatic answer, whether fragmentation should be enhanced or cross-fertilisation should be preferred.

In the next chapter, "Re-Imagining Private International Law", Hans van Loon primarily discusses the role of private international law in achieving the Sustainable Development Goals (SDGs). It has become more evident that public international law and private international law have to work hand-in-hand and while there is clear consensus on the role of public international law with respect to the SDGs targets, references on the role of private international law are nearly absent. The chapter explores the emergence of the SDGs, their origins, nature and challenges in implementation. It also discusses how private and commercial laws play an influential role in the management of the SDGs. The author emphasises the significance of private international law in cross-border cooperation between courts and administrative authorities in relation to civil and commercial matters. By analysing certain targets, he makes reference to identity and family relations, contract law, tort law, cross-border civil and commercial litigation, which very much assert the function of private international law while governing certain goals, such as clean water, decent work and climate change. Conclusively, the author states that private international law is an indispensable link for the realization of Agenda 2030 and the growth and strengthening of the global society.

The second part of the book is discussing the re-imagination of international organisations. It starts with the chapter "Does the UN have a Future?" by Malcolm Shaw. The author makes a brief historical voyage as to the emergence of international organisations, sketches out briefly the evolution and nature of the UN and identifies some of the leading contemporary evolutions: First, the changing focus from states exclusively to states plus various non-state bodies, individuals, groups, bodies claiming statehood, multi-state organisational activities, and multinational corporations. Second, the move from a comprehensive resolution of differences to a more restrained and focused functionalism in international endeavors, shifting from a state-centred peaceful settlement to a more realistic functional approach. Third, the challenge of modern technology utilized by both the good and the evil. Fourth, the concern with globalisation, its advantages and its shortcomings. In view of these, does the UN have a future? With regard to its primary function, the maintenance of international peace and security, it has not proved a great success, saddled with its political context and composition. The UN needs to find a way to build confidence in its endeavours and to work around the inherent and growing political pressures and demands. With regard to more specific UN functions, although politicization is ever-present, it is possible to feel a little more optimistic. The examples chosen, such as the challenge of climate change, show that the UN has a role in professionalizing the context and dealing with targeted issues in a targeted manner, but its conduct has been variable and sometimes tardy.

In the next chapter "The Role of the UN in the Codification and Progressive Development of International Law", Atilla Tanzi examines the role of the UN principal organs, directly or indirectly, in the codification and progressive development of international law, the evolution and the shortcomings of this process. The author sets out an overview of the roles of the General Assembly and the Security Council along with a brief study of the contributions of the Economic and Social Council. The role of the International Law Commission (ILC) along with its contribution to customary international law is analysed to understand the different approaches taken by the ILC over the years in the form of 'conventional' and 'soft-law' forms of codification and the gradual change from the former to the latter. The chapter also covers the contributions of the ICJ and other international adjudicative bodies such as International Tribunal for the Law of the Sea, the International Criminal Tribunal for the former Yugoslavia and the International Criminal Court in the development and interpretation of international law. The author suggests that understanding the international law-making process within the UN is the key as to what the future of international law may hold, at least in the short term. Reflecting on the conventional and soft law approaches to international law-making, the author also puts forth certain policy considerations and notes that the legal methods used for the development of international law are driven by underlying social process as well. Long-term the two approaches may come together to form an integrated part of larger international law-making. As the UN Member States are the driving factors in the codification, lack of societal homogeneity in international community may diminish the legal order. Considering the current global challenges that the world is facing, it is important for the UN, its principal organs and its Member States to adopt a coherent and systematic approach towards codification and progressive development of international law.

The chapter "Pluralism in International Organizations" by Ian Johnston argues that in its nature the international community is diverse and as a result pluralism forms the very part of international law and international order. With the development of international law, international order has become seemingly more pluralistic. The chapter illustrates how international organisations act as mechanisms for managing pluralism. The COVID-19 pandemic tested the international organisations, the way they manage pluralism and how deliberations offer a way of facing and responding to the global challenges. The chapter discusses five dimensions of pluralism: multipolarity (distribution of power among states), multiple legal fields, multiple levels of governance, multiple stakeholders and multiple normative orders. It analyses how in the face of COVID-19, international organisations dealt with the tensions created by pluralism considering each of these dimensions. The author points out that while it is difficult to maintain coherence due to pluralism that inevitably exists in international society, it is a challenge for international organisations to acknowledge and deal with it in a systematic and constructive manner. Nevertheless, the pluralism in international orgnizations is essential and should not be eradicated.

Raja Karthikeya in the chapter, "Multilateralism in the UN", examines the significant role of multilateralism in international diplomacy and international law. The rise of terrorism, the financial crisis 2008-2009, the COVID-19 pandemic, and ever-increasing challenge of climate change have underscored the need to strengthen

multilateralism at the heart of international diplomacy. Multilateralism is the most predominant approach in international decision-making, that indicates predictability and trust in norm-building. However, in recent years multilateralism has been seriously tested due to factors such as geopolitical tensions, rapid technological change, breakdown of social cohesion and globalisation. If non-binding instruments have always acted as normative guidance to States even without ratification, there is now an unfortunate tendency to defect on soft-law instruments, such as the 2015 Paris Climate Accord. This is a matter of concern as multilateral treaties form the core foundation of international order and States' non-adherence is causing a level of uncertainty and risks. Overcoming the crisis of multilateralism requires not only governments but also citizens to work in cohesion with each other. If predictability and inclusivity do not hold a strong ground in international order, people around the world may not thrive, prosper and flourish. Therefore, it is not only for States but also for the civil society to nurture and promote multilateralism in the most effective way.

In "The Role of Public Diplomacy in the Modern World", Alan Henrikson primarily addresses the international legal framework within which public diplomacy should be conducted. Firstly, he discusses the meaning, origin, and evolution of public diplomacy as a concept. Secondly, he ranges the public diplomacy in its practice from 'advocacy' to 'relationship building', explores recent changes within the field, and suggests that the practice of public diplomacy is varying with the respective country size, geography, population and power. Thirdly, he examines whether there is an existing normative framework for public diplomacy and observes some organisational foundations, either explicit or implicit, through various international treaties such as the Vienna Convention on Diplomatic Relations, the Universal Declaration of Human Rights, or at national level. Fourthly, the biggest challenges that the progressive development of public diplomacy is facing today are the structure of the international political system, the jamming of the global communications space, blocking of websites, hacking, limits on access to information or explicit disinformation. The author offers responses to these challenges to the public diplomacy and considers their likely effectiveness. He proposes potential contributions in the practice of public diplomacy that would strengthen the international legal order.

The chapter, "Re-Imagining the UN Security Council" by Vesselin Popovski refers to the most extensive recent study on implementation of international treaties which concludes, ironically, that the purpose of international law is achieved more significantly by means of socialisation and normativity, not so much by legal processes. The codification and implementation of international law, when not developed and functioning in parallel, create a gap where enforcement mechanisms and sanctions are needed, but these are inconsistent and often missing due to the infective functioning of the UN Security Council. The chapter demonstrates how the vetoes applied by some permanent members of the Security Council prevent the organisation from exercising its primary role in restoring and maintaining international peace and security efficiently. The only organ empowered to impose mandatory sanctions – the Security Council - is exactly the organ, most paralyzed by the vetoes of its permanent members. The article goes through several proposals already made to reform the Security Council or abolish the veto, re-assess them in terms of feasibility and desirability, and expresses pessimism that these can be achieved. Accordingly, the concluding argument is for establishing a new global organization, to replace the United Nations. Some say this is unrealistic, but for the author it is much more unrealistic to expect the current permanent members to ratify an amendment to the UN Charter to abolish the veto. Do we want to continue to see situations, such as those in Syria, Yemen, Gaza, Myanmar, Ukraine, vetoed by permanent members, where many thousands die? If not, the majority of states in the world should create a new organization without veto, start meeting there annually instead of in New York, and compel even the most powerful states to join the new organization. Very similar to what happened in 1945 with the establishment of the UN and the dismissal of the League of Nations.

In the chapter "Re-Imagining the European Institutions", Maria Stoicheva discusses narratives put forth by scholars examining the history of European unification and determining its future. The author applies the concept of 'imaginary' deriving from Castoriadis' ontological status of imagination and maintains that the European unification is an institutionalisation of a radically new imaginary. She further studies the symbolic network constituting European institutions and the deficit of the EU that jeopardizes its functionality, which in turn impacts the unification process as a whole. The author appeals that the answer to the symbolic deficit lies in the narrative of Europe and explains the ineffectual bond between the citizens and the Union. She further discusses the notion of European identity and national identity, the balance between the two, and the so called 'banal Europeanism', the feeling of belonging to European identity at everyday level. The concept of banalization of

European identity aids in understanding the extent of identification, sense of collectivity and transformation, that can be effectuated in the potential for re-imagining the EU. Addressing some recent shortcomings, the author states that re-imagining in this sense is interpreted as a process of re-ordering of existing social significations, and instituting new imaginaries as social significations which impose new meanings and new values. The chapter concludes by pointing out the significance of the notion of European identity in the process of re-imagination and challenges that the EU is currently facing and the need for European institutions to revive under the challenge of democratic accountability.

The third part of the book "Re-Imagining Courts and Tribunals" starts with the chapter "International Law and Indian Courts", authored by Gopal Subramaniam. It discusses how engraved international law is in the day-to-day functioning of lawyers and municipal courts in India, thereby establishing the interconnectedness between domestic and international law in time of globalisation. While identifying the significant influence of the function of municipal courts in international law, he states that it is important for municipal courts to respect the obligations of the international courts. India, the author argues, remains true to such obligations, making references to early decisions of the Supreme Court of India on international law. Inheriting not the monist, but the dualist Anglo-Saxon approach to international law, India has made a shift from the doctrine of transformation to the doctrine of incorporation. The author asserts that in a time when the international community is facing serious global challenges, there is hope for a better future, as long as national courts remain impartial and independent, free of the influence of international politics, and ensure that the international law and its principles are not undermined.

In the next chapter, "The Role of International Law in the United Kingdom", Peter Goldsmith also discusses the two approaches by national courts towards international law – dualism and monism - and propounds that though the UK is generally regarded as a dualist system, in effect its approach can be defined as a hybrid one. There is a degree of tension between the Parliamentary Sovereignty and the Royal Prerogative, which makes the system rather nuanced. The UK's relationship with international law is varying based on the form of international legal obligations. Although under the dualist approach for international obligations or treaties to be applied to the citizens, these first need to be incorporated into the domestic law, in the UK there have been instances of some influence of unincorporated treaties on the courts' approach, due to the judiciary's efforts to ensure that domestic law conforms with international law, especially in the field of human rights. Furthermore, there is a contrast in the approach of the judiciary when it comes to customary international law, as it is considered directly applicable in English common law and is therefore, primarily a monist approach. The author concludes that such a hybrid approach of the UK to international law seems likely to endure.

The chapter "Plurality of International Legal Proceedings in an Era of Multiple Courts and Tribunals" by Laurence Boisson de Chazournes examines how the plurality of international courts and tribunals has become an intrinsic characteristic of the international legal order. She observes the course of international litigation in recent time to understand the reasons behind the plurality, shedding light on its advantages and disadvantages. The author further presents the plurality in international dispute settlement, including in specialised area of international law, such as WTO, wherein different approaches to dispute settlement are offered. The existence of such plurality has positively reflected the interactions of international courts and tribunals to each other. While discussing the risks associated with plurality of international courts and tribunals, the author emphasises that judicial dialogue plays a critical role along with other legal tools offered by procedural law which would aid the courts to manage and coordinate certain risks that ensue from plurality. She states that with the proliferation of international courts and tribunals, the growth of pluralism in the area of international dispute settlement is inevitable. Moreover, the duty to maintain a coherent system of international dispute settlements in the face of pluralism lies with all stakeholders of the system: the states, the litigants, including non-state actors, all variety of courts and tribunals. When all actors fulfil their responsibilities, the benefits of plurality in international legal proceedings can be safeguarded and the risks associated - mitigated.

Vasuda Sinha in her chapter, "Pursuit of Domestic Remedies for Claims in International Law" examines domestic courts as potential fora for the resolution of international law disputes. For this purpose, she looks into the decision of the Supreme Court of Canada in *Nevsun Resources Ltd. v Araya* in which the plaintiffs pursuing civil remedies against a parent company, alleged violations of human rights and other international law arising from the conduct of a subsidiary abroad. In addition to pleading domestic torts, the plaintiffs also claimed violations

of customary international law, including prohibitions against forced labour, slavery, cruel, inhuman/degrading treatment, and crimes against humanity. The decision of the Supreme Court is claimed to be controversial due to the international law arising, such as the 'doctrine of adoption' which allows the domestic law to adopt customary international law (CIL) automatically, as long as it does not conflict with any existing legislation of Canada incl. whether CIL norms are binding on corporate entities. The chapter presents also a comparative study on where domestic remedies fit analytically in the continuum of litigation under the US *Alien Tort Statute* and recent litigations in the UK and the Netherlands against parent companies for the conduct of their subsidiaries where human rights and international law feature to varying degrees in the claims alleged. Observing that the domestic laws of these countries vary and the application of international law in different domestic jurisdictions is diverse, the author states that there is an increase in litigation of international law issues in domestic courts due to the rising focus on environmental, social and governance issues at domestic level. She concludes that the opportunities and challenges brought upon by such broad approach across diverse jurisdictions can only be determined as to how domestic courts will adapt and balance the procedural and substantive framework of domestic law while dealing with claims arising out of international law.

Sergey Sayapin´s chapter "Rethinking Humanitarian and Human Rights Institutions for Asia" examines a few institutional models employed in Asia to promote and protect human rights, some developments in the Arab League, the Association of Southeast Asian Nations (ASEAN), and in Central Asia, and makes policy proposals for the future. Asia does not have a regional human rights court, like those in Europe, the Americas, or Africa, and there is a ground for building regional institutions for the protection of human rights. In Europe and Latin America, such common ground includes the Christian religion and the continental legal systems. In turn, Africa has experienced pagan, Christian, and Islamic influences and has Islamic, common law, civil law, and traditional legal systems. Asia´s political and legal map, however, is very complex. The chapter highlights the role of human rights in the current humanitarian activities of the International Committee of the Red Cross (ICRC) and discusses the significance of these in China and Afghanistan. The author shows how the 2006 ICRC Doctrine on the invocation of international human rights law has had a solid impact on subsequent humanitarian action. In Afghanistan, the author argues, the ICRC should focus on the rights of women, non-Muslims, and other minority groups. In China, it would be crucial for the ICRC to visit persons detained in the "counter-extremism centers", exclusively for humanitarian purposes and strictly under its humanitarian mandate. China, by giving a positive response to the ICRC visits, shows its commitment to humanitarian principles. The author suggests that Asian challenges require Asian solutions, since Asia is huge and diverse, a single human rights court for Asia would not be feasible. Therefore, sub-regional human rights committees could be established. Where a committee does not seem feasible, at least a human rights commission with oversight functions could be put in place. The ICRC sometimes is the last and only international institution to stay in the most challenging contexts, and often embodies the only hope left to affected communities, therefore it is vital for the ICRC to maintain dialogue with all stakeholders throughout Asia, so that the fundamental rights of people are respected.

The fourth part of the book "Re-Imagining Specific Jurisdictions" starts with "Ecocide as International Crime" written by Christina Voigt. An Independent Expert Panel in 2021 proposed a definition of 'Ecocide', with the objective to initiate a debate on incorporating ecocide as the fifth international crime in the Rome Statute of International Criminal Court (ICC). The chapter lays out the considerations of the Expert Panel and discusses the primary considerations for the proposed definition, such as taking a realistic approach, precedent in terms of key terms and concepts to be traced in legal sources, deference and respect to the existing provisions of the Rome Statute and existing literature on ecocide, environmental integrity of the definition and legal effectiveness. She emphasises the *ratione materiae* jurisdiction of the ICC over the most serious crimes of concern to the international community, to begin a discourse and pave the way to accept ecocide as an international crime and take cognisance and action to realise its importance as a global challenge.

In the next chapter, "Public Interest and the Ascent of Human rights, Labour Law and Environmental Law in Investment Arbitration", Monica Feria-Tinta reflects on the increase in claims of environmental protection, labour rights, health and other human rights issues in the area of investment arbitration. The author suggests that such claims are likely to increase in both international investment agreements and trade agreements. She discusses the growing incidence of public law or public interest issues in the arbitral processes, which primarily deals with

private rights and private interests. The chapter then moves to illustrate practices through which human rights, environmental protection and other public law areas may be brought into the realm of the investment law. Through illustrations of various cases pertaining to such claims in investment arbitration, the author concludes by advocating a reconciliation of the "commercial", "public law" and "international law" elements in investment arbitration.

Harish Salve in "Re-visiting Jadhav Case: Due Process in International Law", discusses this case in the ICJ, following the arrest of the Indian former Navy officer by Pakistani military court. The author states that this case brought forth concerns with respect to the practice and interpretation of international law, underscoring that basic principles of international law confer responsibility on all states that must be adhered to. The author discusses the background and the geopolitics of the case to emphasise the significance of the claims of the parties to the dispute and the precedents referred to in the judgement. He also sheds light on the shortcomings of military courts pointing at lack of due process and procedural compliance by military courts. The ICJ ruled in favour of India and directed Pakistan to 'ensure that Mr Jadhav is not executed pending the final decision in the proceedings'. The author points also to some gaps between national and international law following the ICJ decision that leaves uncertainty with respect to the adherence of the court order by Pakistan while also pointing out the differences in procedural laws that raises ambiguity and suggests the needs to address these gaps.

The next chapter "Family Law: British and Indian Perspectives" written by William Longrigg and Anil Malhotra illustrates how family law concerns are becoming more prevalent as a result of the globalisation. The authors discuss the difficulties and concerns associated with international family law from both Indian and English law perspective. The chapter addresses the legal standing of various areas branching out of family law in respective domestic jurisdictions such as marriage, divorce, adoption, overseas succession, surrogacy, relocation and wrongful removal of children and cohabitation. Both India and the UK are facing specific challenges in the field of family law, pertinent to the social processes and the diversity of their procedural and substantive laws. The chapter also reflects the need for an increased cooperation and collaboration among states on certain areas of family law that would benefit the international community.

In the fifth part, "Re-Imagining the Laws of War", the chapter "Ukraine: A Sunset or a New Dawn for International Law?" by Upendra Baxi discusses the ramifications of the Russian aggression in Ukraine for international law in an age of propaganda society and modern technology. Noting how Russia falsely claims to have international law on its side, the author argues how 'my international law' has become a weapon in the arsenal against 'your international law'. As a result of the weaponization of the rhetoric of international law, the reality becomes concealed. The author asks whether the sanctions imposed against Russia are effective and understood unanimously by all countries. He concludes by asking whether some romanticizing of a new international law might emerge from the war in Ukraine.

The next chapter authored by Oona Hathaway and Scott Shapiro "Transformation of International Law through the Outlawry of War" traces the old world order, or the classical international law, and moves to the legal regime that European states adopted in the 17th century, and imposed on the rest of the globe. The old world order did not just sanction war, it relied on and rewarded it. States were permitted to wage war to right any legal wrong, and the right of the victors to extract territory and treasure from the losers was legally guaranteed. That all changed when the nations decided to outlaw the war with the 1928 Kellogg-Briand Pact. As a result, the rules governing international behaviour have transformed radically — indeed, they are the polar opposite of what they once were. The chapter describes the decision to outlaw war and the transformation it unleashed in the world order generally, and in international law specifically. This simple but perplexing fact—that modern international law prohibits states from using force— is key to understanding international law and state behaviour in the modern era.

In the next chapter "From Legal Ambiguity and Strategic Clarity to Legal Clarity and Strategic Ambiguity", Charles Sampford starts with the idea that many leaders and ambassadors – especially in the US, the UK and Australia - highlighted and acclaimed international rule of law. Although the Kellogg-Briand Pact and the Nuremberg and Tokyo Tribunals were led mainly by these powers, their role in the years following in practice of international law was highly contentious. In the instance that the US, the UK and Australia were contemplating invasion of Iraq in 2002-2003, the role of international lawyers came into play as they were approached with the

task to legally validate the invasion. The author points out that the international law should not be determined by first or second group of lawyers, but by adjudicating courts. He suggests that if in Iraq 2003 the position has been legal ambiguity and strategic clarity, currently in Ukraine it is the opposite - legal clarity but strategic ambiguity. In conclusion, he argues that the legal-strategic discourse must lie not with respect to new ways of war, but rather with respect to new ways to achieve peace through international law.

The final chapter in this part, "Sovereignty as Responsibility: Understanding the Legal Parameters of the Veto" by Jennifer Trahan addresses the limits of the UN Security Council, and especially the veto of the permanent members in the face of atrocity crimes, as major obstacles to achieving international peace and security. The chapter addresses the emergence of the doctrine of R2P as part of 'Sovereignty as Responsibility'. Although the R2P is considered soft law, the author points out that there are related hard law legal obligations underlying it, such as the obligation to prevent genocide and crimes against humanity, and to ensure that Geneva Conventions violations do not occur. The chapter discusses the role of the veto power and how it has hindered the objective of maintaining international peace and security. Time and again, the veto has been abused and has set back the effectiveness of one of the principal organs of the UN and in turn undermined the doctrine of 'Sovereignty as Responsibility'. The author asserts that the threat and use of veto in the face of atrocity crimes not only suggests failure to abide by international legal obligations but also facilitates the atrocity crimes being committed. She appeals for 'Sovereignty as Responsibility' and R2P to be applied to the practice of the Security Council in order to resolve the Council's ineffectiveness and failures in the face of genocide, crimes against humanity, and war crimes.

The sixth part of the book is in memoriam of James Crawford, Antônio Trindade and Soli J. Sorabjee in honour of their tremendous contributions to international law. The authors identified and drawn attention to the writings of the three distinguished international lawyers and to credible developments made by them in international law. The chapters also addressed limitations that warrant re-imagination and put forth potential considerations of reform, review and amendment respectively. The armour of reform, dissent, amendment and review in any legal system plays an indispensable role in the progression of law and order while struggling to maintain a harmonious relationship with social change. Therefore, the ability to re-imagine helps create reasonable and informed thought and create sight of broader perspectives that help a society to grow towards progressive development of legal system that is running along with the progression of the time.

As discussed by the authors in this book, the international law is different from domestic law, and the processes of reform may also stand different due to states being primary actors with their sovereignty and interests to be protected. Due to the very nature of international legal order, as it deals with matters that are primarily greater in magnitude set in place for betterment of international community as a whole for primarily maintaining peace and security through cooperation, there also exists a certain level of moral and ethical analysis due to emphasis on human rights, sustainability, environmental protection and justice against atrocity crimes.

Jeremy Bentham, known for his undertakings as a reformist, said in his view of the law of England that it was, 'fathomless and boundless chaos made up of fictions, tautology and inconsistency, and the administrative part of it a system of exquisitely contrived chicanery which maximized delay and denial of justice'. The international law may have moved out of such 'fathomless and boundless chaos' and reached a point in time where many developments have been made, general principles of law have been solidified, fundamental rights and freedoms recognised at least, if not fully respected. However, as for the administrative part, it would not be unfounded to agree with Bentham's view when applied to the international legal order. We have come a long way and the laws of nations and of international community have seen changes and reforms that we have come to know as an elegant web of the structures present today. In order to maintain and further develop both the structures and their functioning, one must consider the significance of what would be relevant at this point of time, therefore, understanding history and social processes are also crucial in the re-imagination towards the highly necessary 'intelligence of a future day'.

Institutions such as the UN Security Council and World Health Organization, falling short in their responsibility to take action due to deficiencies in their foundational structures, were created on a certain level of power imbalance that resided in a post-war cloud. Irrefutably, this might have been a necessary beginning to a regime

that the world needed at the time, but the world today demands better health, future and prosperity. There is a need for re-imagination to convert the system from the past to the present, and based on the foundations of peace rather than on the war calling.

Vesselin Popovski

Ankit Malhotra

CHAPTER II: OVERCOMING DISILLUSIONMENT WITH INTERNATIONAL LAW[8]

John Dugard[9]

Abstract

Faith in international law was vindicated by events of the 1990's. The Cold War came to an end and for a brief moment the Russian Federation and the West collaborated in the maintenance of international peace. Apartheid was abolished in South Africa and Namibia. Accountability for international crimes received new attention and the International Criminal Court was established. The new millennium saw the end of this idealism, beginning with the invasion of Iraq in 2003 and culminating in Russia's invasion of Ukraine. The present failure of international law is not to be attributed to poor methods of enforcement. Rather it is because the West has increasingly abandoned its faith in international law and instead turned to a "rules-based international order." The meaning of this concept is uncertain. It seems to reflect an interpretation of international law reflecting the national interest of States belonging to the Western Alliance, particularly the United States. Violations of international law, such as Russia's invasion of Ukraine, should be judged by international law and the Charter of the United Nations rather than by an amorphous "rules-based international order" which threatens to replace international law.

Introduction

The thrust of this lecture was that the rules of international law are well developed and generally accepted but that the enforcement mechanisms are defective. Naively I suggested that enforcement was the main problem facing international law. Subsequent events, and a more careful consideration of recent past events and literature, have compelled me to re-assess my position. I now believe that enforcement is only part of the problem. More important is the fact, illustrated by events over the past twenty years, that many major States – that is the political leadership of such States comprising politicians, aided and abetted by their law advisers – do not accept that the most fundamental principles of international law are binding on them or their close friends. Worse still, it is doubtful whether these States and their legal advisers accept that international law, as I know it, continues to exist today. It seems that they believe that the international law that has existed for centuries and is reflected in the Charter of the United Nations has been replaced, at least for them and their friends, by an elusive notion of 'rules-based order' which reflects international law as understood and interpreted by them. The failure to enforce international law remains a serious problem but to this must be added the problem that there is uncertainty as to which legal order governs States.

In this chapter I will seek to do three things: first, to explain why I failed to understand what was happening to international law; second, why I now believe that some important States no longer accept the foundational elements of the international legal order; and third, what, the implications of this state of affairs are for the United Nations and international lawyers.

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[8] I delivered a lecture – virtually, thanks to the Covid pandemic – at the Centre for the Study of the United Nations of the Jindal Law School on 28 April 2021. I wish to thank Ankit Malhotra for the invitation to deliver this lecture. The title of my lecture was 'Re-Imagining International Law by Creating an Effective Enforcement Mechanism'.

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Failure To Understand What Was Happening To International Law

Let me confess that I am a believer in what may be described as the traditional notion of international law. I believe in the international law of Grotius and Lauterpacht, a system that has been in existence for four to five centuries. I believe in international law as proclaimed by the Charter of the United Nations, with its commitment to international peace, the peaceful settlement of disputes, the prohibition of the use of force, the self-determination of peoples, the equality of States and people and decolonization. From my student days, I was a believer in the capacity of this system of international law to build a better world in which peace would prevail and the equality of States and of human beings would be recognized. I had to believe in international law because I lived in South Africa under a discriminatory and repressive regime. The idealism and justice that was absent in South African law I sought in international law. And I was rewarded for my naïve beliefs. The international community made it clear that South Africa's racial policy of apartheid was unacceptable and contrary to the values and expectations of the international community. Slowly but surely, acting through the United Nations, it destroyed apartheid. By persistent concern, condemnation and later sanctions it undermined the legitimacy of the apartheid State, encouraged the liberation movement and ultimately secured the freedom of South Africa.

International law, as I understood it, was the weapon the international community used to achieve this goal. International human rights law set the standards, and the expectations of the international community; and international institutional law, reflected in the Charter of the United Nations, provided the machinery for censure and sanction. Many factors and forces brought an end to apartheid in South Africa in 1994 but there can be no doubt that the post-war legal order with its emphasis on racial equality, decolonization and human rights served to deprive apartheid of its legitimacy as a policy and to arm the international community with the legal means to take concerted action against the apartheid regime. As a law professor and director of a legal centre committed to challenging apartheid using research, advocacy and litigation I used international law as a tool to achieve this end. My academic scholarship was almost entirely devoted to contrasting apartheid with international human rights standards, condemning apartheid for failure to satisfy the standards of international human rights law and suggesting arguments that might be raised to challenge apartheid. In the end, we did overcome. International law prevailed over the apartheid legal order.[10]

South Africa's incorporation of Southwest Africa, a League of Nations mandate, into South Africa was another issue that fell within my professional and academic concerns. Here international law was an even more powerful weapon as the continued existence of the Mandate after the dissolution of the League of Nations raised complicated questions of international law and the Mandate's obligation to promote the well-being of the indigenous inhabitants brought South Africa's application of apartheid in the territory into the human rights arena. As a scholar and practising lawyer, I invoked international law to undermine the South African administration.[11] In 1990, South West Africa attained independence as the State of Namibia in another triumph for international law.

Heralded by the fall of the Berlin Wall in November 1989, the 1990s was a wonderful decade for international law and served to fuel my optimism in a new world order. The Cold War was brought to an end and there was evidence of a new spirit of cooperation among the Great Powers, which allowed a coalition of States to receive authorization from the Security Council to expel Iraq from Kuwait.[12] This was further evidenced by the blessing given by the Security Council to what was seen as some sort of humanitarian intervention by Western Powers to protect Kurds in Northern Iraq from the savagery of Saddam Hussein in 1991.[13] Humanitarian intervention was again pleaded by the Western Powers, acting under the mantle of NATO, to justify their bombing of Yugoslavia in 1999, although the Security Council resolutions on which it relied[14] failed to authorize the use of force. The granting of independence to Namibia in 1990, the end of apartheid in 1994, the Oslo Accords between Israel and

[10] See further, John Dugard, *Confronting Apartheid. A Personal History of South Africa, Namibia and Palestine* (Jacana 2018).
[11] Ibid.
[12] Security Council Resolution 1990, p 678.
[13] Security Council Resolution 1991, p 688.
[14] Security Council Resolution 1998, p 1199, 1203.

Palestine in 1993 and the Good Friday Agreement of 1998 that sought to end the troubles in Northern Ireland, were all hailed as victories for international law.

This was also the decade of a new determination to hold violators of international humanitarian law accountable for their crimes. The Security Council established two ad hoc international criminals law tribunals – the International Criminal Tribunal for the Former Yugoslavia and the Rwanda Tribunal – and other ad hoc tribunals were established for Cambodia, Sierra Leone and, later, Lebanon. In 1998, the dream of an International Criminal Court was realized. In addition, the principle of universal jurisdiction was invoked with new vigour to try international criminals in national courts.

There was an important development at the International Law Commission, of which I became a member in 1997. Under the leadership of James Crawford, the Commission succeeded in adopting a set of Draft Articles on the Responsibility of States for Internationally Wrongful Acts, which saw the recognition of a two-tier system of State responsibility that accorded supremacy to peremptory norms and provided for collective responses to internationally wrongful acts.

In short, to paraphrase, the words of the English poet, William Wordsworth:

> "*Bliss was it in that dawn to be alive*
> *But to be an international lawyer was very heaven*."

The Writing On The Wall

The advent of the new millennium brought with it signs of change that made it clear that the euphoria of the 1990s had come to an end. The bombing of the Twin Towers in New York on 11 September 2001 had the reverse effect of the fall of the Berlin Wall which marked the beginning of the 1990s. It ushered in an international paranoia which led the United States to create of new species of self-defence known as self-defence against terrorism which was invoked to justify the invasion of Afghanistan and the indefinite incarceration of some 780 detainees in appalling conditions at Guantanamo Bay, despite the fact that many were members of the Taliban (as opposed to Al-Qaeda) and entitled to prisoner-of-war status.[15] This accorded with the determination of the legal advisers of the United States to engage in 'creative interpretations' of international humanitarian law – interpretations that more closely reflected the national interest of the United States.[16]

That new rules of conduct that departed from the accepted rules of international law were now to govern the approach of the United States and the United Kingdom to their national interest was soon apparent in the invasion of Iraq in 2003. Here the US and UK invaded Iraq without Security Council authorization and no action on the part of Iraq that might remotely justify an argument based on self-defence. Their specious justifications for the unlawful use of force were generally dismissed as far-fetched.[17] Despite this unlawful action, the United States continued to administer Iraq as a belligerent occupant until 2011.

A further rebuke to international law was administered by the United States to international law when it actively opposed the advisory opinion of the International Court of Justice on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory.*[18] The Court's Opinion that the wall Israel was building in the territory of Palestine and resulted in the seizure of ten per cent of Palestinian land in the West Bank was illegal was a major assertion of international law on a number of key issues, including the finding that the Fourth Geneva Convention regulated the military occupation of the territory. The Opinion was approved by the General Assembly in a resolution that included member States of the European Union. The United States, however, opposed it and prevented it from obtaining the approval of the Security Council, thereby making sure that the Opinion would not

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[15] See George Aldrich, 'The Taliban, Al-Qaeda, and the Determination of Illegal Combatants' [2002] 96 AJIL 891.
[16] See generally, Craig Jones, *The War Lawyers: The United States, Israel and Juridical Warfare* (OUP 2020).
[17] See Vaughan Lowe, 'The Iraq Crisis: What Now?' [2003] 52 ICLQ 859, Memorandum of the Legal Department of the Ministry of Foreign Affairs of the Russian Federation in [2003] 52 ICLQ 1059.
[18] [2004] ICJ Reports 136.

guide the United Nations in its handling of the Palestine question. No legal reasons were given for this political decision.

In 2001 I became actively engaged in the Palestine/Israel conflict, first as Chair of the Commission of Inquiry into Israel's violations of human rights during the Second Intifada which commenced in 2000,[19] and, secondly, as Special Rapporteur to the Human Rights Council on the Human Rights Situation in the Occupied Palestinian Territories from 2001 to 2008. My biannual reports to the Human Rights Council and Third Committee of the General Assembly on Israel's violation of human rights and international humanitarian law, as understood by international law, were generally well-received by States, except Israel and, more particularly, the United States. The United States made it clear that international law was not relevant where Israel was concerned.

The complete subservience of the United States to Israel was apparent in its response to Israel's attack on Gaza in 2008-2009, code-named Operation Cast Lead, which resulted in the killing of over 1,400 Palestinians, including at least 850 civilians (of which 300 were children and 110 women), and wounding of over 5,000 Palestinians. Four Israeli civilians were killed by Palestinian rocket fire and ten soldiers were killed and 148 were wounded. Three thousand homes were destroyed and 11,000 seriously damaged in Gaza. Fifteen hospitals, ten schools and 30 mosques were destroyed or seriously damaged. Israel used sophisticated weapons supplied by the United States to bombard Gaza from air, land and sea. I chaired an independent fact-finding mission established by the League of Arab States which visited Gaza in early 2009 and produced a report finding that Israel had committed war crimes and crimes against humanity in its onslaught. This report[20] was largely ignored by States, probably because it was from the Arab League. Such a course was not possible in respect of a similar report to the Human Rights Council by a Commission chaired by Judge Richard Goldstone. This report, which also found that Israel had committed war crimes and crimes against humanity,[21] was warmly received by most States. Some saw in it a vindication of their views on Israel's occupation of Palestine; European States found it troubling and insisted that Israel conduct an inquiry into the conduct of Israel's security forces, and the General Assembly approved it and called on Israel to investigate the findings of the Goldstone Commission. Not surprisingly Israel rejected it. So did the United States. Judge Goldstone was personally vilified as a self-hating Jew. The US House of Representatives condemned the report by 344 votes to 36, describing it as biased and unworthy of further consideration. The Obama administration condemned it as 'unbalanced, one-sided and unacceptable.'[22]

Subsequent attacks by Israel on Gaza in 2014, 2018 and 2021[23] were justified by the United States as legitimate acts of self-defence, a knee-jerk response parroted by the United Kingdom. No attempt was made by these States to explain this argument in legal terms. How did operations that on the face of it appeared to be policing operations designed to enforce Israel's occupation of Gaza become acts of self-defence? Surely some explanation was warranted, particularly when the International Court of Justice had raised doubts about the invocation of the right to self-defence on the part of Israel in its occupation of Palestine?[24] The support of the United States for Israel was emphasized when it appeared that President Biden, at the request of Israel, deliberately refused to intervene to call for an early ceasefire in the May 2021 operation.[25]

The United States has rightly condemned Russia's annexation of Crimea, which has been condemned by the General Assembly.[26] On the other hand, President Trump's recognition of Israel's annexation of East Jerusalem and the Golan Heights, which have been condemned by the Security Council,[27] has been allowed to stand by the Biden administration. On almost every front, the United States has displayed a willingness to exonerate Israel

[19] For the Report of this Commission, see *Report of the Human Rights Inquiry Commission Established Pursuant to Commission Resolution 5/1of 19 October 2000, E/CN,42001/121 (*16 March 2001).
[20] *No Safe Place. Report of the Independent Fact-Finding Committee on Gaza,* League of Arab States (April 2009).
[21] *A/HRC/12/48* (15 September 2009).
[22] For an account of this episode, see Dugard, op cit n1, p 245-255.
[23] ibid 255-259.
[24] *The Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory,* fn 9, para 138-139.
[25] Julian Borger,'Biden expresses support for Israel-Gaza ceasefire as pressure on US rises' *The Guardian,* (18 May 2021).
[26] Resolution 68/262 (27 March 2014).
[27] See Resolution 1980, p 476, 478, and Resolution 1981, p 497.

from any blame for its clear violations of international law. It has used its veto power generously to achieve this. And it continues to fund Israel in the sum of $3.8 billion each year for military assistance.

In 2008, Kosovo declared its independence from Serbia and the United States was the first State to recognise it. This action was opposed by Russia and many other States which had firmly supported the territorial integrity of Serbia.[28] This hasty recognition of Kosovo stood in sharp contrast to the persistent refusal of the United States to recognise Palestine, despite its recognition as a State by the General Assembly.[29]

The second decade of the millennium produced other signs that all was not well with the commitment of States to international law. The uprisings, conflicts and civil wars of the Arab Spring were characterized by serious violations of international law relating to the law governing intervention in civil strife, international humanitarian law, human rights law and self-determination. The NATO intervention in Libya was particularly troubling as it was, as the attack on Iraq in 2003, justified on the basis of a dubious Security Council resolution[30] with the clear goal of regime change.[31] The use of drones to assassinate alleged terrorists and their families was justified by the Obama administration by means of an expanded version of self-defence. [32]

In all these cases, and more, new versions of international law designed to suit the political needs of the actor State were advanced. The notion of a 'rules based order' to justify these actions was increasingly invoked, particularly by the United States and its allies in the West.

Russia's Attack On Ukraine

Russia's attack on Ukraine in February 2022 is the inevitable consequence of events of the kind described above. Precedent is seized upon by political leaders in much the same way that it is invoked by counsel in legal proceedings. And there is precedent, albeit on a smaller scale, for Russia's invasion of Ukraine in the actions of the West in the past two decades. The United States and the United Kingdom attacked Iraq without just or legal cause in 2003; NATO attacked Libya with very dubious justification in 2011; the United States, has condoned, funded and supported with its veto, Israel's attacks on Gaza, repression of Palestinian in the whole of Occupied Palestine, and continued occupation of the territory. It has acquiesced in Israel's annexation of East Jerusalem and the Golan Heights, an annexation less justifiable than Russia's annexation of Crimea.[33] It was the first State to recognise Kosovo when it seceded from Russia's close ally, Serbia in 2008. The United Kingdom and the other European States have happily gone along with the United States in these actions. Moreover, the United States has shown scant respect for human rights or international humanitarian law in many of its operations, ranging from Guantanamo Bay to Afghanistan, Iraq, Libya and Syria.

The attack on Ukraine violates the most basic principles of the UN Charter: the prohibition on aggression and the use of force, the obligations to settle disputes by peaceful means, to advance self-determination, to respect human rights and international humanitarian law and so on. The Preamble of the UN Charter declares that 'We the peoples' of the world are committed to saving the planet from 'the scourge of war.' Russia, a permanent member of the Security Council, has deliberately and calculatedly embarked on a military campaign premised on indulgence in the scourge of war which seeks to destroy a sovereign nation, seize its territory and subjugate its people by means of a brutal and cruel military occupation that will cause untold suffering. Attempts to justify this action on the grounds of self-defence or action to protect the inhabitants of Donbas from genocide or 'nazification' are unsupported in law or in fact.[34]

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[28] For an examination of this matter, see John Dugard, 'The Secession of States and their Recognition in the Wake of Kosovo' [2013] 357 Recueil des Cours 10.

[29] Resolution 67/19 (2012).

[30] Security Council Resolution 1973 (2011).

[31] See Rosalyn Higgins et al, *Oppenheim's International Law. United Nations* (OUP 2017), vol 2, p 1023-1024.

[32] See Marko Milanovic, 'Harold Koh and Targeted Killings' (EJIL Talk 27 March, 2016).

[33] Some 65 per cent of the population of the Crimea were Russian and a referendum was held to approve the annexation. In the case of Israel's annexation of East Jerusalem, the overwhelming majority of the population were Palestinians and no referendum was held on the annexation .See SF van den Driest, 'Crimea's Separation from Ukraine. An Analysis of the Right to Self-Determination and (Remedial) Secession' [2015] 62 Netherlands International Law Review 329.

[34] See Marko Milanovic, 'What is Russia's Legal Justification for Using Force against Ukraine EJIL Talk (24 February 2022).

Precedent does not excuse or mitigate Russia's actions. They are completely inexcusable and unforgivable. *Tu quoque* is not a defence in any legal system. But precedents do serve to show that disrespect for the law on the part of one State will licence another State to follow suit – even if on a larger and more egregious scale. This was made apparent in President Putin's speech justifying the invasion of Ukraine on 24 February 2022 when he argued that the United States had been responsible for the bombing of Yugoslavia in 1999, the invasion of Iraq in 2003, the illegitimate use of force against Libya in 2011 ('a perversion of all decisions of the UN Security Council') and intervention in the Syrian civil war without the consent of the Syrian government or the Security Council.[35] To this he might have added support for Israel's assaults on Gaza and acceptance of the annexation of East Jerusalem and Golan.

The Implications Of Russia's Attack On Ukraine For The Future Of The United Nations And International Lawyers.

Implications For The United Nations

It is difficult to predict the outcome of the war against Ukraine. Whether the United Nations in its present form will survive such a repudiation of the Charter by a permanent member State remains to be seen. On the optimistic assumption that it will survive it is clear that it will be a very different institution.

The credibility and reputation of the Russian Federation will undoubtedly suffer in the eyes of the West and it will take a long for it to recover the authority it previously had. Indeed it seems that the strategy of the West is to 'weaken' Russia for the foreseeable future.[36] On the other hand, the developing world has remained largely aloof from the conflict in Ukraine and refused to join Western demands to sanction Russia's economy and isolate it diplomatically. According to Trita Parsi, executive vice-president of the Quincy Institute, many States of the Global South 'see flagrant hypocrisy in framing the Ukraine war in terms of the survival of the rules based order. From their vantage point, no other country or bloc has undermined international law, norms or the rules-based order more than the US and the West.'[37] This probably means that the Global South will not celebrate a victory of the West and will rather seek to equate the reputation of the United States with that of the Russian Federation. The implication of this is that two of the most powerful States in the Security Council, with permanent membership and hence the power of veto, will lack the authority to command the respect of the non-permanent members of the Council and members of the United Nations at large.

The alternative is that the United States will emerge as the victor and assume the role of hegemon in the United Nations. If this does happen, we still face the problem that the Security Council will be unable to act because of the Russian veto.

From this, it would seem to follow that the Security Council will become a lame duck, with two embittered veto-wielding permanent members unable to agree on anything or to exercise authority or leadership. Unless there is a revolution on the part of UN member States which leads to a new world order, it seems likely that this unhappy state of affairs will continue for the foreseeable future. In this situation what is to be salvaged?

First, the new political climate may be more favourable to reform of the Security Council. To date proposals to increase the size of the Security Council to include permanent members from regions other than Europe and to abolish the veto power have been obstructed by Article 108 of the Charter which provides that amendments may only be made by two-thirds of the General Assembly and that this two-thirds majority shall include all the permanent members of the Security Council. In a situation in which the Security Council is unable to operate

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[35] ibid <https://www.spectator-co.uk/article/full-text-putin-s-declaration-of-war-on-ukraine>.

[36] See the comments by US Defense Secretary Lloyd Austin in the course of a visit to Ukraine (26 April 2022): ' A Risky Call to Weaken Russia' *New York Times, International Edition* (26 April 2022).

[37] 'Why Non-Western countries tend to see Russia's war very, very differently' <https://www.msnbc.com/opinion/msnbc-opinion/ukraine-russia-war-looks-very-different-outside-west-n1294280>.

positively, veto-wielding States *may* be prepared to sacrifice their veto right. However, this must be seen as unlikely. Altruism is not a feature of State behaviour.

Second, the new dispensation will see more authority shifting to other organs of the United Nations as they fill the lacuna created by the downgrading of the Security Council. An increase in the powers of the General Assembly is the most likely course as the Charter either permits this or has been interpreted to allow it.

The General Assembly has the power of only recommendation and has no power to make binding decisions compelling States to adopt a particular course of action. The recommendation is an important instrument in the hands of the General Assembly but has been used sparsely. It was used frequently and effectively in the case of apartheid South Africa from 1962 until the end of apartheid to recommend an arms embargo, the termination of diplomatic relations, a ban on ships and aircraft entering South African ports and airports, the boycott of all South African goods and the suspension of sporting educational and cultural ties.[38] These resolutions were not legally binding but they served to delegitimize the policy of apartheid and to make it clear that the international community would not tolerate apartheid. Ultimately these recommendations contributed to the downfall of apartheid. Other situations have not been subjected to such severe recommendations. A probable reason for this is that States in the General Assembly have deferred to the Security Council for meaningful international measures to restore international peace. The new dispensation resulting from the demise of the Security Council may embolden developing nations and even some European states to recommend firmer action to ensure respect for human rights on the part of States that display a pattern of human rights violations.

It is also possible that greater use may be made of the Uniting for Peace Resolution[39] which allows the General Assembly to exercise a residual power to take action when the Security Council is unable to take action to maintain international peace and security by reason of the exercise of the veto power in the Security Council. More frequent recourse to the advisory jurisdiction of the International Court of Justice is another possibility. Advisory opinions not only assist the General Assembly by providing it with guidance on its approach to situations which raise legal issues., but, in addition, such opinions may contribute to the political resolution of a conflict. The General Assembly has the power to establish subsidiary organs in terms of Article 7(2) of the Charter, as shown by its creation of the Human Rights Council as a subsidiary organ in 2006. Freed from the restraining hand of the Security Council,[40] the General Assembly might establish more subsidiary organs to address particular problems facing the world – such as climate change.

Implications For Lawyers

International lawyers will have to address the question whether they owe allegiance to international law as it is declared in Article 38 of the Statute of the International Court of Justice or whether they see it as a legal order in which the most important decisions affecting the future of the planet are governed by a 'rules-based order' and only less vital issues are regulated by the law of Article 38 of the Statute - that is, the body of law based on the agreement of States from all continents of the world expressed in treaties, custom and general principles of law reflecting the values of the international community as a whole.

There are many difficulties arising from the concept of 'rules-based order', a concept that has entered international discourse in recent years and seems to be on the way to replacing international law as it is generally understood. – at least for some States. [41]These difficulties include its uncertain content, how it is made and by whom, whether it is intended to govern all areas of international relations or only those affecting the security of States, whether all States are equal under this regime or whether some States are more equal than others and whether its rules are subject to third-party settlement - that is adjudication – or whether they are to be enforced by coercion.

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[38] See in particular General Assembly Resolutions 1761(XVII) of 1962, 39/72 (13 December 1984).
[39] Resolution 377A(V) (November 1950).
[40] Resolution 60/251.
[41] See Stephen Walt,'China wants a rules-based international order ,too', *Foreign Policy,* 31 March 2021; Richard Falk, '"Rules-based international order". A new metaphor for US Geo-Political Primacy', *Eurasia Review,* 1 June, 2021; Malcolm Jorgensen, The jurisprudence of the rules-based order. The power of rules consistent with but not binding under international law', 2021 (22) *Melbourne Journal of International Law* 221.

Difficulties of the above kind arise because the concept has not been defined by those who use it – mainly the United States and its Western allies. It may be harmless and simply be an attempt to include soft law within the meaning of international law or it may be a more sinister attempt to 'universalize a "one-sided Western project" of the world order.'[42] Whatever the purpose of those who use the term 'rules-based order' may be, it is difficult not to agree with a group of Russian scholars who state that however the dependence of the concept on the meaning given to it by those who refer to the concept makes the concept vulnerable to discursive political manipulation.[43]

No satisfactory explanation has been provided for what 'rules-based order' means or why it is necessary to use this term instead of 'international law' in describing the legal obligations of States. Until this is done the suspicion will inevitably exist that this is essentially a name for an American perception of international law which sees international law as a system of rules developed by the United States to reflect an interpretation of international law that accords with its national interest.

The challenge confronting international lawyers is to persuade politicians to stop describing the international legal order as a 'rules-based order' and to insist on the use of the term 'international law' to describe the legal order governing relations between States. And more important to insist that States are bound by international law and not a 'rules-based order.' International lawyers who do not advise States will have little difficulty in doing this. This means that the challenge is essentially one that confronts government law advisers or private practitioners employed to advise States. Those who see themselves as 'hired guns,' bound to execute the wishes of their masters will have little difficulty. They will assist their masters to interpret the law creatively, with skill and imagination, to bend it to reflect the master's national interest. New interpretations of self-defence will be devised to justify aggression and the violation of international humanitarian law and human rights law. New interpretations of self-defence will be concocted to justify the use of the new weapons technology to satisfy the greed of their makers. New meaning will be given to annexation, occupation, self-determination, colonialism, asylum etc. This means that this challenge is directed at lawyers who advise governments and do not see themselves as hired guns, who place their commitment to *real* international law above loyalty to their masters. This will be hard – remember that only one Foreign Office lawyer, Elizabeth Wilmshurst, had the courage to resign rather than be a party to Tony Blair's decision to attack Iraq.

The role of the lawyer is not easy. There will be times when the lawyer must decide which master she or he serves and to which legal regime he or she owes allegiance. The choice is between international law or a 'rules-based order' which threatens the peace of the world.

[42] *Alexander Vylegzhanin, Boris Nefedor, Evgeny Voronin, Olga Nagomedova, Polina Zotova*,'The Concept of "Rules-Based Order in International Legal Discourses' [2021] 2 Moscow Journal of International Law 35. https://doi.org/10.24833/0869-0049-2021-2-35-60.
[43] ibid; See: Stefan Talman, 'Rules-Based Order v International Law,' *German Practice in International Law,* (20 January 2019) DOI:10.1717.6/20220106-133832-0.

CHAPTER III: RE-IMAGINING INTERNATIONAL LAW: WHAT MIGHT HAVE BEEN, WHAT MIGHT BE

*Sir Michael Wood**

Abstract

'Re-imagining' international law needs to be approached with care, lest it weaken the law. This may be particularly so when the exercise disregards the basis and structure of international law that has been built up over centuries. Change is not necessarily for the better; it can sometimes be destructive. We may learn from examples of past developments (such as the introduction of freedom of the high seas or the prohibition of the use of force), and of change that was envisaged but did not come about (such as the universal jurisdiction of a general international court). Imagined change that goes with the grain of the existing international legal system may come about; that which does not or is artificial is likely to go nowhere.

In this contribution, I *first* give a few examples from the past of ideas that have not been taken up into international law, ideas that have not gained traction (to use another 'fashionable' word), at least not yet. These may remind us of some ways that international law could have developed; of roads not taken. *Second*, I then point briefly to some ideas that have indeed prospered, that remind us that the law can and does change, for better (or for worse). *Third*, I then look at a couple of current ideas for new or different international law, followed by some conclusions.

Introduction

Words like 're-imagining' are in fashion in various contexts, even in the field of law, where one might think that re-imagination has little place.[1] The practice of law is not like that of a novelist or a painter, and it is not at all obvious that lawyers should be in the business of 're-imagining' or 'reconceiving' law. Moreover, even though 're-imagine' is in fact a rather neutral term, it seems to be used as if it inherently implies a better outcome, suggesting that the present law needs radical revision. The mental exercise of 're-imagining' international law calls, therefore, for caution. It brings to mind the memorable words of Sir Robert Jennings, former Whewell Professor of International Law at Cambridge University and judge and president of the International Court of Justice (ICJ), who wrote:

> "*It is undeniably important that scholars with imagination and vision should publish ideas for better international law. Good ideas, if they are timely and blessed by good fortune, possibly accomplish as much as, or more than, the diplomatic conferences, with their promising drafts of articles, so beloved by those who seek to further the 'progressive development' of international law. Yet it is important not to carry the campaign for a 'new' international law so far as possibly to weaken the authority and respect which our present international law enjoys. And it is still important to distinguish between* lege lata *and proposals* de lege ferenda*; not merely as a technical matter but because of the trap into which the layman so easily falls of supposing all international law to be a proposal*."[2]

These words are as true today as they were in 1990. Lawyers may well put forward new ideas, particularly when engaged in academic study; proposing changes in the law or even in the legal system is a well-recognized function

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[1] Already in 1995, Anne-Marie Slaughter sought to 'reimagine international law from the perspective of Liberal international relations theory in a hypothetical world of liberal States' and thus to 'generate a hypothetical model of international law based on a set of assumptions about the composition and behaviour of specific States': 'International Law in a World of Liberal States' (1995) 6 EJIL 503-538. The American Society of International Law entitled its 2021 (virtual) Annual Meeting 'Reconceiving International Law: Creativity in Times of Crisis'.

[2] Robert Y. Jennings, 'An International Lawyer Takes Stock' [1990] 39 ICLQ 513, 527-528.

of writers in the field of law. But if they are not being wholly speculative, and straying well beyond the limits of their profession, lawyers should build upon the law as it is; they should not dream about some wholly new discipline. It has taken centuries to build up the system of public international law that we have for our benefit today. To seek to start again is unlikely to be constructive – or indeed of any consequence.

This is a point worth stressing particularly these days, when theoretical writings on international law have increasingly acquired a bad name, often being seen as detached from reality and self-referential, and of no particular interest to practitioners or others engaged in international affairs.[3] Sir Christopher Greenwood, for example, has warned that there are 'distressing signs of a rift between the study and the practice of international law'. He explained that '[w]riters on international law should never be the mere scribes of state practice but there are worrying indications of a trend in international legal scholarship that is both ignorant of and determinedly detached from the practice of international law'.[4] Klabbers has similarly observed that '[i]nternational law, in the academy, is no longer about what states do, but has become about what international lawyers do. We have lost touch with legal practice, and the discipline has become transfixed by methodological debates, …'.[5]

It is equally well to remember that the progressive development of international law is a recognized task not just of lawyers but of the international community more broadly. Article 13.1(a) of the United Nations Charter, the bedrock of the International Law Commission (ILC), expressly entrusts a political organ, the General Assembly, with initiating studies and making recommendations for the purpose of the progressive development of international law and its codification. This modest provision has no doubt served as an impetus for 're-imagining' the law over the last several decades, and for developing it in various significant respects.

What Might Have Been

An interest in history can often be helpful to international lawyers,[6] and it seems useful to start by looking back and recalling what might have been. From the past we can learn what ideas and propositions had failed, and try to understand why that was the case.

Mare Clausum Versus Mare Liberum

As a first example, which may serve as a reminder that sometimes it is actually the present that may be the better alternative, one may look to a basic tenet of international law that is nowadays taken largely for granted as a starting point for the consideration of law of the sea matters: the freedom of the high seas (especially freedom of navigation). In fact, we could have quite easily ended up in a world where the high seas, and not just the land mass, were divided up and owned by various States to the exclusion of others.

The story is well-known.[7] The Dutch jurist Hugo Grotius championed freedom of the sea in his advice to the Dutch East India Company following the seizure by it, as prize, of a Portuguese ship in 1603. He sought, based on humanist considerations, on ancient Greek thought, on Roman law, and on natural law, to challenge the Spanish–Portuguese monopoly in the Indian Ocean. Under the title *Mare Liberum,* Grotius rejected the idea of the sovereignty of the sea and wrote that some things are common to all and proper to none; that the sea was so infinite that it cannot be possessed and applied to all uses, whether concerning navigation or fishing. This doctrine

[3] Michael Wood, 'International Law in Practice', IX *Courses of the Summer School on Public International Law* (International and Comparative Law Research Center 2022) 27-45 (dealing with 'Practice and Theory – The Place of Teachings').
[4] Christopher Greenwood, 'The Practice of International Law: Threats, Challenges, and Opportunities [2018] 112 Proceedings of the ASIL Annual Meeting 161, 167.
[5] Jan Klabbers, 'On Epistemic Universalism and the Melancholy of International Law' [2018] 29 EJIL 1057, 1062 (the 2018 Melland Schill lecture).
[6] For the suggestion that 'history—the history of international relations—is the most important beacon for any judge who seeks to chart the difficult shoals of customary international law', see José A. Cabranes, 'Customary International Law: What it is and What it is Not' [2011] 22 Duke Journal of Comparative & International Law 143, 152.
[7] See Andree Kirchner, 'Law of the Sea, History of' (2007), in A. Peters (2021) and R. Wolfrum (2004–2020) (eds.), *Max Planck Encyclopedia of Public International Law* (OUP <https://opil.ouplaw.com/home/mpil>), on which much of this paragraph relies; and Albert J. Hoffmann, 'Navigation, Freedom of' (2011), in A. Peters (2021) and R. Wolfrum (2004–2020) (eds.), *Max Planck Encyclopedia of Public International Law* (OUP <https://opil.ouplaw.com/home/mpil>).

was of concern not only to Spain and Portugal but also to Great Britain, which sought to preserve fishing rights off the English coast to itself. Thus in 1635, with the blessing of the King Charles I, the English jurist John Selden published a treatise under the title *Mare Clausum*, to defend the principle that 'any kind of sea whatsoever may by any sort of law whatsoever be capable of private dominion'. Here he characterized Grotius as a man of great learning and extraordinary knowledge, but also of interest – that of his own country. Due to the exceptional scientific work done by Selden, and most importantly due to the political and economic circumstances of the 17th century, the doctrine of *Mare Clausum* became, shortly after its publication, very popular; and it seemed at the time that the Selden–Grotius controversy had a winner in Selden. The triumph of Grotius's idea of the freedom of the seas beyond territorial waters was far from secure. By the end of the 18th century, however, it was in the interest of all the European Powers to keep the sea open to trade and navigation, bearing in mind the creation of colonial empires and the need for free trade of goods and raw materials following the Industrial Revolution. Grotius's freedom of the high seas thus became a widely accepted principle that underlies much of the law of the sea until today.

The Repeated Rejection Of Compulsory Jurisdiction For The World Court

Another idea fought and lost is that of a world court having compulsory jurisdiction over all international (legal) disputes. This was an unrealistic idea much beloved by idealists at the beginning of the 20th century who put their faith in 'world peace through law'. The Advisory Committee of Jurists that in 1920 laid down the plan for the Permanent Court of International Justice had extensive discussions on this matter, and, eventually, '[w]ith but one dissenting voice … was of opinion that a State belonging to the League of Nations should, on its own initiative, be able to summon another State, also belonging to the League, before the Permanent International Court of Justice, to litigate a juridical question …'.[8] Certain States at the Council and the Assembly of the League objected strongly to this proposal, recalling that the League Covenant contemplated that the Court would only deal with disputes which are voluntarily submitted to it by the States concerned, and that the framers of the Covenant never intended that one party to a dispute should compel another party to go before the court. Those opposing compulsory jurisdiction feared that they might be tying themselves too much. Be that as it may, the opposition to the inclusion of obligatory jurisdiction was said to be based not upon principle, but upon caution.[9] Some argued that international law (then mostly customary in nature) was too uncertain; and that only once the Court was in operation and had shown that it fulfilled expectations, could the possibility of compulsory jurisdiction be accepted. As an alternative, the Optional Protocol was conceived, by which States have the option to accept or not to accept the Court's jurisdiction and to do so in a time-limited manner and under terms and conditions they determined for themselves. In other words, no State was bound to subject itself to the jurisdiction of the Court under the Statute, but any State might voluntarily make a declaration subjecting itself to the jurisdiction of the Court under the Statute.

The question of the compulsory jurisdiction of the World Court again proved controversial after the Second World War, but the idea of inaugurating 'a new era in international law' was again defeated. Even though the States assembled in San Francisco could agree to make all the Members of the United Nations *ipso facto* parties to the Statute of the International Court of Justice, and despite some successes of the Permanent Court of International Justice, compulsory jurisdiction again failed to be adopted, not least because of opposition on the part of the United States of America and the Union of Soviet Socialist Republics.[10] The Conference at San Francisco could not go beyond the Statute of the Court as it had been drafted in 1920. Some at that time seemed to have no doubt that compulsory jurisdiction between States would become a reality at some point in the future. But the limited number and limited scope of acceptances of the Optional Protocol shows that that time is still far

[8] James Brown Scott, *The Project of a Permanent Court of International Justice and Resolutions of the Advisory Committee of Jurists: Report and Commentary* (Carnegie Endowment 1920) 98 (referring to legal disputes concerning the (very broad) matters listed in what became Article 36 of the Statute). For a valuable collection of essays, see Lori Fisler Damrosch (ed.), *Peaceful Resolution of Disputes* (Brill 2022).

[9] B.C.J. Loder, 'The Permanent Court of International Justice and Compulsory Jurisdiction' [1921-1922] 2 BYIL 6, 22 (referring to Mr. Balfour).

[10] Manley O. Hudson, 'Compulsory Jurisdiction of the International Court of Justice' [1946] 40 Proceedings of the ASIL Annual Meeting 12-21.

away.[11] The requirement of consent to jurisdiction remains fundamental to the international legal system – although it does not seem to be fully respected in all instances.[12]

This is not to say that the idea of compulsory jurisdiction may not prosper in particular fields, as with the World Trade Organization's dispute settlement arrangement, though even here all has not been plain sailing.

No To A World Legislature

Another idea which did not prosper at the San Francisco Conference was that of a world legislature – of a general assembly of States whose resolutions would be in and of themselves law in a way that would be similar to the enactments of national parliaments. Perhaps that is what Tennyson had in mind in the oft-cited passage from *Locksley Hall*:

> *"Till the war-drum throbb'd no longer, and the battle-flags were furl'd*
> *In the Parliament of man, the Federation of the world.*
> *There the common sense of most shall hold a fretful realm in awe,*
> *And the kindly earth shall slumber, lapt in universal law."*[13]

While the UN General Assembly emerged from the debates at San Francisco a stronger organ than it appeared to be in the Dumbarton Oaks Proposals,[14] it was given no legislative power. The Philippines delegation suggested that the General Assembly should be vested with the legislative authority to enact rules of international law which should become effective and binding upon the Members of the Organization after such rules had been approved by a majority vote of the Security Council. This suggestion was rejected by 26 votes to 1.[15] That does not mean, of course, that all recommendations of the General Assembly are devoid of juridical consequence; but it is clear that they are not as such binding. Suggestions by some to make more of resolutions, for example, by having them give rise, of themselves, to 'instant custom', have been rejected – including in the ILC's 2018 conclusions on *Identification of customary international law*.[16]

The Notion Of 'State Crime' Dropped By The ILC

One curious notion that was discarded, but nevertheless survived in what has been referred to as a ghostly form, is that of 'State crimes'. It concerns what was perhaps the most obviously controversial question addressed by the ILC during its decades-long work on State responsibility, which culminated in the adoption of the 2001 articles on *Responsibility of States for Internationally Wrongful Acts*.[17] That question was whether certain breaches of international obligations by States were more severe than others – so severe, that they may be labelled 'international crimes'. Article 19 of the draft articles adopted by the Commission in 1976 and again in 1996—in both cases unanimously within the Commission—stated that '[a]n 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'. But it then asserted that '"[a]n internationally wrongful act which results from the breach by a State of an international obligation so essential for 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'. The Commission went on to provide that an international crime might result, inter alia, from a serious breach of an international obligation of essential importance (a) for the maintenance of international peace and security, (b)

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[11] By way of examples of the far-reaching reservations of States that have made declarations under the Optional Clause accepting the compulsory jurisdiction of the ICJ, see the United Kingdom Declaration of 22 February 2017 and that of India of 18 September 2019.
[12] The requirement was central to the December 2020 ICJ Judgment on jurisdiction in the Arbitral Award case of *Guyana* v. *Venezuela*.
[13] Alfred Lord Tennyson, *Locksley Hall*, lines 226-230.
[14] Clyde Eagleton, 'The United Nations: Aims and Structure' (1946) 55 Yale Law Journal 974, 985.
[15] F. Blain Sloan, 'The Binding Force of a Recommendation of the General Assembly of the United Nations' [1948] 25 BYIL 1, 6-7.
[16] *Report of the International Law Commission on the work of its seventieth session (30 April–1 June and 2 July–10 August 2018)*, UN Doc. A/73/10, p 122, 147-149 (Conclusion 12 of the Conclusions on 'Identification of customary international law' and the accompanying commentary). The UN General Assembly took note of the Conclusions (the text of which was annexed to the resolution, with the commentaries thereto), brought them to the attention of States and all who may be called upon to identify rules of customary international law, and encouraged their widest distribution: UNGA Res 73/203 (20 December 2018).
[17] YILC (2001) Vol II, Part 2, 31-142.

for safeguarding the right of self-determination of peoples, (c) for safeguarding the human being, or (d) for the safeguarding and preservation of the human environment. Other violations of international law, which were considered less severe, were to be classified as international delicts.[18]

Following a lengthy and hard-fought debate both within and outside of the Commission, the word 'crime' did not appear in the final text adopted by the ILC in 2001; according to one insider, it was 'carefully banished'.[19] The text proceeds from the idea that international responsibility is neither civil nor criminal. It avoids in this way inappropriate domestic criminal law analogies and other penal implications, as well as the institutionalization of binding mechanisms for the infliction of sanctions on the responsible State.

On closer inspection, however, it seems that the ideas that underlay draft article 19 did find some reflection in the Commission's final text. The substance of the Commission's original draft was indeed largely maintained through the replacement of the term 'crime' by the notion of a 'serious breach' of *jus cogens*, a revision that some depicted as a 'cosmetic change'. The text adopted on second reading refers therefore to 'serious', as opposed to what might be called 'ordinary' breaches, and to the concepts of peremptory norms of general international law (*jus cogens*) and obligations owed to the international community as a whole (*erga omnes*). In the event of a 'serious breach', as was the case in the event of a 'crime', all States have a recognized legal interest – as members of the international community – in defending legality. While the possibility of aggravated or punitive damages in the case of breaches of this type was dropped, an aggravated regime of responsibility with particular consequences did survive. It serves to show that progress may sometimes be achieved in subtle ways.

The question whether a State, as such, may commit crimes has in a way made a cameo appearance in recent debates on whether acts such as torture or crimes against humanity can be considered 'official acts'. Either way, international responsibility for serious breaches may well entail criminal consequences, at least for individuals.

Ideas That Proved Timely And Were Blessed By Good Fortune

International law does change, of course, for better or for worse. Its rules, even the most fundamental, are constantly tested in the everyday life of inter-State relations and beyond. When they do not change—and this is important to bear in mind—that may sometimes be a sign that they are working well. One example is the rules of international law governing diplomatic and consular relations, which the ICJ referred to as 'the edifice of law carefully constructed by mankind over a period of centuries, the maintenance of which is vital for the security and well-being of the complex international community of the present day'.[20] The idea of seeking changes in diplomatic law following the fatal shooting of a policewoman in London (from an automatic weapon fired through the window of the Libyan People's Bureau in St James' Square), for example, was not taken forward. That said, looking back at such changes as occurred may be of much value to any attempt at 're-imagining' the law. For one, it shows that the exercise of re-imagining the law may indeed lead sometimes to the law's development for the better.

Prohibiting The Use of Force

One dramatic way in which international law has changed in the not-too-distant past concerns the use of force. The UN Charter fundamentally altered the position of war, which was once a permissible extension of politics by other means. After centuries of bloodshed, States now have a clear obligation to settle their disputes by peaceful means and to refrain from the threat or use of force in international relations. Military action is permissible only in exercise of the right of individual or collective self-defence, or when authorized by the Security Council to maintain or restore international peace and security. Those who initiated the modern outlawry-of-war movement during World War I, as Quincy Wright has written, did not anticipate that the general acceptance of their proposal, finally effected by the Kellogg-Briand Pact of 1929, would have any immediate

[18] YILC (1996) Vol II, Part 2, 60.
[19] Alain Pellet, 'The New Draft Articles of the International Law Commission on the Responsibility of States for Internationally Wrongful Acts: A Requiem for States' Crime?' (2001) 32 Netherlands Yearbook of International Law 55, 58.
[20] *United States Diplomatic and Consular Staff in Tehran, Judgment* (I.C.J. Reports 1980) 43, para 92.

effect on the frequency or magnitude of international hostilities.[21] They were thinking in terms of generations, not of decades. They continually referred by analogy to the legislation outlawing the duel in most European States since the sixteenth century, and to the slight immediate effect of this legislation in stopping duelling. The atrocities of the Second World War, however, soon introduced new international law 'to save succeeding generations from the scourge of war'.[22] Its measure of success is, of course, an altogether different matter, and it is not always unambiguous; but binding law it is, both conventional and customary, and it has certainly changed international discourse as well as practice.

From Absolute to Restrictive Sovereign Immunity

Another well-known example of change in international law concerns the scope of State immunity from the jurisdiction of foreign courts. By the nineteenth century, it was well established that the courts of one sovereign would not exercise jurisdiction over another State absent its express consent. In time, however, such absolute immunity, which applied independently of the nature of the acts involved, was seen as an instrument of injustice. The perception in many States, especially those of Western Europe and the United States, was that the justifications for granting sovereign immunity were inapplicable when a sovereign departs from its political and governmental roles and enters into the realms of commerce and industry. To a large extent through municipal court decisions that did not occasion any discernible protest, step-by-step absolute immunity was replaced by a restrictive doctrine of sovereign immunity that covers acts *jure imperii* and not acts *jure gestionis* (i.e., acts essentially governmental and not acts essentially commercial).

The Exclusion of Secret Treaties

Yet another noteworthy change concerns the practice of concluding secret treaties. For centuries, States concluded with one another secret agreements to conceal actions they desired to take but sought to keep away from the public eye. Hostility towards such agreements grew when the Russian Bolshevik revolutionaries disclosed various agreements entered into between the former Russian Government and other Powers, showing that such treaties were employed for domination and deceit. This hostility prompted President Wilson to advocate, following the Great War, '[o]pen covenants of peace, openly arrived at, after which there shall be no private international understandings of any kind but diplomacy shall proceed always frankly and in the public view'.[23] An innovative commitment soon incorporated in the Covenant of the League of Nations prescribed that every treaty or international engagement entered into by any Member of the League would be registered with the Secretariat and published by it; and, moreover, that it would not be binding until so registered. Such a commitment (although in a somewhat diluted form) was carried over into the Charter of the United Nations. Even if in practical terms it has not always been complied with, and secret agreements persist, even in liberal democracies,[24] there is no doubt that the general obligation of publicity has fundamentally altered the conduct of international intercourse. McNair wrote that 'it is just as impossible for a world seeking to organize its life on the basis of law to dispense with a published collection of treaties as it would be for a civilized State to dispense with a Statute Book'.[25]

What Might Be: Some Current Ideas

Additional examples could be given to illustrate the great changes that international law has undergone over time. An obvious one is the rise of individual criminal responsibility under international law, even of holders of the highest offices in a State, and the rise of international criminal courts and tribunals, including a permanent international criminal court. But it is now time to consider, very briefly, a few ideas that have not yet taken root,

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[21] Quincy Wright, 'The Outlawry of War and the Law of War' [1953] 47 AJIL 365, 369.
[22] Charter of the United Nations, Preamble.
[23] President Woodrow Wilson's Fourteen Points, 8 January 1918, available at <https://www.nationalarchives.gov.uk/pathways/firstworldwar/transcripts/aftermath/fourteen_points.htm>.
[24] See Megan Donaldson, 'The Survival of the Secret Treaty: Publicity, Secrecy, and Legality in the International Order' [2017] 111 AJIL 575-627.
[25] Arnold McNair, *The Law of Treaties* (Clarendon Press 1961) 179.

and perhaps never will. These confirm that 're-imagining' is in fact very much still with us; but also that it remains difficult to translate into actual change – sometimes for good reason.

A Right of Humanitarian Intervention?

One example of an attempt to lay down new law may be found in the notion of humanitarian intervention. In justifying the NATO intervention over Kosovo in 1999, the United Kingdom relied upon a strictly limited doctrine of humanitarian intervention by which, in some cases, 'a limited use of force was justifiable in support of purposes laid down by the Security Council but without the Council's express authorisation when that was the only means to avert an immediate and overwhelming humanitarian catastrophe'.[26] This line has been pretty consistently repeated. In 2013, for example, following the use of chemical weapons in Syria, the British Prime Minister's Office said that a legal justification for intervention may well be available. But even such an exceptional international legal right of humanitarian intervention has gained limited traction. Attention passed instead to the so-called 'Responsibility to Protect' ('R2P'). This has not, however, been recognized as a new right; instead, it is understood as a possible cause for Security Council action under the existing framework of Chapter VII of the UN Charter.

Suggestions For New Permanent Courts

Moving on to another example, several ideas have been put forward for new permanent international courts. The idea of a world environmental court has been around for some time but seems to get nowhere. Likewise, proposals for a world court of human rights, described by Philip Alston as 'a truly bad idea',[27] and for an international anti-corruption court are unlikely to prosper anytime soon. And then there are the recent initiatives for an international constitutional court (a very odd notion indeed), and – somewhat more plausibly – for some form of a permanent investment court, with an appellate level. There are obvious difficulties with such proposals, which may be seen as utopian. Many will also see them as unrealistic, inefficient, and immensely costly – and as proposing quite unpredictable and largely uncontrollable bodies. The same could have been said—perhaps still is in some quarters—about the International Criminal Court. An important consideration is that such institutions, for example, in fields like the environment, may tend to divide international law artificially into a host of separate fields, each with its own approach, its own experts, its own enthusiasts, its own detractors. The same may happen when a court or tribunal has jurisdiction under a particular treaty (though, in some cases, such as that of the World Trade Organization, such a dispute settlement body may seem entirely justified).

Further Contraction Of Immunities?

One further example concerns attempts to question immunities accorded under international law, in particular immunities of State officials *ratione materiae*. These have been brought to the fore in light of the discussions within the ILC, in the context on its work on *Immunity of State officials from foreign criminal jurisdiction*, as to whether there are exceptions for such immunity, that would allow domestic courts to entertain criminal proceedings against foreign State officials for certain conduct. Two related points are particularly noteworthy in this regard. First, well-meaning as some attempts to curb immunities may be, they need to recognize that immunities have significant justifications, serving as they do to facilitate international intercourse, prevent antagonisms between States, and maintain peace. Sometimes, the present state of the law is in fact quite satisfactory; and, as the ICJ has explained, immunity does not mean impunity.[28] Second, seeking to change the law should be done openly and honestly: in particular, *lex ferenda* ought to be clearly distinguished from the *lex lata*.

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[26] UK Parliamentary Debates, Lords, 16 November 1998, WA140 (Baroness Symons).
[27] Philip Alston, 'A truly bad idea: a World Court for human rights', available at <https://www.opendemocracy.net/en/openglobalrights-openpage-blog/truly-bad-idea-world-court-for-human-rights/>.
[28] Arrest Warrant of 11 April 2000: *Democratic Republic of the Congo* v. *Belgium* (I.C.J. Reports 2002) 25, para 60.

By Way Of Conclusion

'Re-imagining' rules of international law has its place; that is why we have the familiar notion of progressive development of international law and the various international law-making processes. But 're-imagining' needs to be carried out carefully and responsibly, and not so as to weaken the existing law. The risk of undermining the law, and indeed the legal system as a whole, may be particularly obvious when those concerned disregard the basis and structure of international law; when they propose ways of changing the law that have little to do with the well-known sources of international law accepted by States and reflected in the case-law of the ICJ and in the work of the ILC.

It should further be recalled that change is not necessarily for the better; it can also be destructive. We may learn from examples of positive developments (such as the introduction of freedom of the high seas or prohibition of the use of force), and of change that was envisaged but did not come about (such as the universal jurisdiction of an international court). Imagined change that goes with the grain of the existing international law and legal system may come about; that which does not or is artificial is likely to go nowhere.

CHAPTER IV: CHANGE IN INTERNATIONAL LAW

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Abstract

Managing change is increasingly a characteristic of modern legal systems, not least international law. This essay explores some of the types of change that may occur in and through international law, and the processes driving them. A distinction is drawn between 'paradigmatic' change, to the structure of international law itself, and change in the form of modification to existing rules of international law, which is largely context-driven. The premise is that contemporary international law is constantly evolving, and that it reserves for itself the right to determine the rules and procedures to effect change.

Introduction

Law is employed as the common language of interaction between societal actors. At its core, it seeks to balance interests and minimize conflicts. Whether it is successful in such endeavours is, in turn, a function of the extent to which it reflects the underlying socio-political reality of the society in question. In this lies one of the great challenges facing all legal systems: how to manage the inevitable political, social and economic changes that all societies undergo, while still ensuring a degree of continuity and stability.

As a basic proposition, change is inimical to stability. And yet, it is rarely possible to have stability in the absence of change. Indeed, history has shown the risks of attempting to impose stability through law (typically as a tool of veiled force) without the possibility of outlets for change. Today, most societies are located somewhere in the continuum between stability and change. Managing change is increasingly a characteristic of modern legal systems, to the extent that they are, in many respects, themselves agents of change. In modern times change is more often than not effected through law (either through its application, modification or creation).

This applies with equal force to international law, which has over several centuries survived through much political and societal upheaval, and undergone significant change, not the least that which has occurred in the post-war era. International law is to some degree constantly evolving. For as long as international law has existed, including (but not limited to) in its modern guise, international lawyers have had to grapple with the challenges brought about by change. The examples are numerous. During the inter-war period, there was much handwringing among international lawyers about the challenges of ensuring 'peaceful change'. The rupture of the Second World War brought with it significant change in the form of a new international architecture for the balancing of the interests of the super-powers, which emphasized peaceful coexistence by means, *inter alia*, of interaction regulated by law.

Such events in turn set the stage for significant change in the structure of international society during the second half of the twentieth century. While the prospect of mutual nuclear annihilation is usually cited as a key driver of change during this period, other historical events can also be referred to. For example, the onset of the decolonization period brought with it new claims of changes in international law. The regulation of the impact of human activities on the environment, including in spaces (both terrestrial and extra-terrestrial) beyond the established jurisdictional reach of states, has similarly been accompanied by the rhetoric of change. Likewise, the post-war economic expansion, most recently accelerated by globalization and the establishment of a global trading legal system has also given rise to a whole new set of claims of change. It is hard to conceive of an area of international law today that has not been the subject of change in one form or other at some point. The same process is presently underway as the international community seeks to confront the enormity of the climate crisis.

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This essay will present some thoughts on the types of changes in international law that may occur as well as the processes that drive change. A further distinction to be drawn is between structural change, to the system of international law itself, and change in the form of modification to existing applicable rules of international law.[2] Needless to say, the position taken herein is that in most cases claims of fundamental change (referred to below as 'paradigmatic' change) do not hold up to closer scrutiny. As a general proposition, the rules of international law do change, sometimes relatively frequently, even if changes to the structure of international law itself are rare.

Change Of International Law – A Typology

It is possible to identify common patterns of changes that rules of international law can undergo, leading to a shift in the prevailing legal position. Doing so also reveals the existence of a range of possible processes for implementing change in international law.

Change From Proposition A To B

Perhaps the most common type is the change from proposition A to proposition B. For example, the limit of the territorial sea was changed from three miles (as previously established under customary international law) to twelve through the adoption of the United Nations Convention on the Law of the Sea, of 1982.[3] As a general rule, when coming to positive obligations to do or refrain from doing something, wholesale change of an existing rule is usually undertaken through a quasi-legislative process (such as the conclusion of a treaty or by a decision of an international organization binding on the parties, and sometimes even that of an international court), as opposed to development through practice which, until transformed into law, may constitute breach. In some circumstances, the positive rules of international law expressly constrain subsequent change taking place gradually through opposing practice or at least make it very difficult. For example, under article 53 of the Vienna Convention on the Law of Treaties, of 1969,[4] peremptory norms can only be modified 'by a subsequent norm of general international law having the same character'.[5]

Change From No Specific Rule To Proposition A (And Vice-Versa)

Change also occurs in circumstances where a rule is established to regulate a situation for which no express rule previously existed, as a matter of positive law. Instead of amendment or revision of an existing rule, an entirely new rule is established. There are at least two, if not more, scenarios where this can happen. The classical example relates to the existence of a gap (*lacunae*) in the law, which is filled by the newly established rule. This may not amount to a real change in the law because even if there is no specific rule to guide the decision-maker, the legal position might nonetheless still be covered by a general principle of law, even if presented at a higher level of generality. Another clearer example is that of the development of new rules in response to technological developments. For example, the adoption of specific rules regulating activities undertaken in outer space arose only once it became technically possible for humans to do so. In the early 2000s, the United Nations sought to prohibit, as a matter of international law, the cloning of human beings, a possibility not even contemplated just a short few years before. Numerous other examples can be cited of technical developments leading to the commensurate development of new rules of international law. Indeed, the Charter of the United Nations grants the General Assembly a specific mandate, under Article 13(1)(a), to progressively develop international law, which involves precisely the development of new rules.

The opposite is also possible, namely the obsolescence of a rule of international law owing to disuse (*desuetude*).[6] Here the position is that of a rule (or rules) regulating a specific situation changing to that of no specific rule. For

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[2] See: F. Berman, "What Does 'Change' Mean? International Law vs. the International Legal System", *Austrian Review of International and European Law* (2003) vol 8, pp 11–16.
[3] United Nations, *Treaty Series*, vol 1833, p 3.
[4] ibid vol 1155, p 331 (hereinafter 'Vienna Convention').
[5] art 53.
[6] See: A. Aust, *Modern Treaty Law and Practice* (3rd edn, Cambridge University Press 2013) 270; and R. Kolb, *The Law of Treaties: An Introduction* (Edward Elgar 2016) 240–241.

example, international rules established in the nineteenth century regulating communication by telegraph are no longer in use owing to the emergence of new methods of communication. Many such rules have been set aside or superseded by processes undertaken to establish entirely new rules. Technological developments have been at the source of several major revisions of the rules applicable to the international regulation of, for example, postal services, telecommunications, the control of the spread of contagious diseases, health and sanitary conditions, international trade, the suppression of trafficking in narcotic drugs, and so on. In the process of doing so, many previously established rules were discontinued.

Partial Change

In practice, a technical distinction is drawn between different varieties of change, including, amendment, modification *inter se* and revision. Each requires specific processes to be undertaken and relates to the extent to which the rule in question is merely being modified or replaced in its entirety. Revision deals with the scenario of wholesale change from one proposition to another, dealt with above. Amendment, on the other hand, deals with partial change where the rule itself is maintained, albeit in a modified form such that the obligations flowing therefrom are different. It is quite common for treaties to establish dedicated amendment procedures, distinct from wholesale revision, aimed at allowing room for gradual change within the legal regime established by the treaty. Treaty amendment is likely the most common method of changing international law.

Then there is partial change in the form of modification of a rule *inter se* by agreement between a subset of the parties to a treaty. Such an outcome is specifically anticipated by the Vienna Convention,[7] which deals with such modification in the context of deviation from the rule(s) in the form of non-application of a specific obligation arising from the rule(s) or doing so to a lesser extent. Such type of modification is only permissible if the treaty expressly allows for it or does not prohibit it. There is a different type of modification, namely where some of the parties undertake, on their own accord, or by agreement with other parties *inter se*, to apply a stricter set of obligations than that required by the treaty. In such circumstances, since there is no deviation from the obligation established by the treaty *stricto sensu*, such modification is permitted, even if implicitly.

Partial change can also be achieved in other ways. One (common) example is the adoption of protocols to treaties. Here it might be useful, even if somewhat tentatively, to distinguish between those seeking to further elaborate the rules established in the parent treaty and protocols seeking to modify such rules, by, for example, adopting new, stricter, compliance requirements. An example of the latter is to be found in the series of protocols adopted under the United Nations Framework Convention on Climate Change, 1992.[8] In such cases, one might be more clearly in the presence of the establishment of new rules, as discussed above. Alternatively, some protocols, such as those to the various international human rights treaties, do not seek to change the rules established in the parent treaty *per se*, but rather establish dedicated international procedures for reviewing the implementation of such rules.[9] In doing so, they impose additional obligations on the subset of parties to the parent treaty which also opt to join the protocol(s). Such arrangements are established precisely to permit a degree of variation in the legal obligations that might arise under the treaty regime as a whole.[10]

Change Of Customary International Law

The focus thus far has been on treaties for the reason that the possibility of changing treaty-based rules has been extensively considered, particularly by the Vienna Convention.[11] Nonetheless, customary international law can also be changed, in whole or in part, and entirely new customary rules can and do emerge. Indeed, there was a

[7] art 41. See: M.E. Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties* (Martinus Nijhoff 2009) 534–535.
[8] United Nations, *Treaty Series*, vol 1771, p 107.
[9] See, e.g., the Optional Protocol to the International Covenant on Civil and Political Rights, 1966, United Nations, *Treaty Series*, vol 999, p 171.
[10] A similar outcome can also be achieved through the adoption of entire separate treaties. For example, the Agreement relating to the implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982, adopted in 1994, United Nations, *Treaty Series*, vol 1836, p 3, is specifically intended to modify aspects of the 1982 convention.
[11] See also Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (21 March 1986) UN Doc A/CONF129/15.

time when most new international rules were typically first established as rules of customary international law, reflecting the general practice of states (and which accepted such practice as being required by operation of law). Some such customary rules would then be further incorporated (codified) into treaties, and sometimes (more recently) into formally non-binding texts, in an expository manner. Such a process is admittedly less prominent in contemporary international law, in which many situations have come to be regulated *de novo* through the adoption of treaties.

Having said so, it is a particular feature of international law, arising as a consequence of its open-textured nature, that treaty rules can exist side-by-side with rules of customary international law; such that State A can have a particular matter regulated by treaty in relation to State B, but by customary international law with State C (by virtue of the latter not being a party to the treaty). Indeed, the possible impact on the continued application (and by extension the further development) of customary international law is frequently considered by negotiators of multilateral 'law-making' treaties; and it is relatively common for such treaties to make express provision for their relationship with customary international law. The interaction between the two types of rules, existing notionally side-by-side, gives rise to complex legal considerations requiring an analysis of their respective scopes of application and involving tricky questions of priority, precedence and predominance etc.

Suffice it to indicate, however, that change can also arise precisely from the interaction between treaties and custom. This is because of the particular feature of customary international law that it requires a certain generality of acceptance among states. Thus, systematic practice arising from widely ratified treaties may itself generate the existence of a parallel customary rule (notionally applicable to non-parties to the treaty). The existence of applicable treaties could also, in a sense, contribute to the process of super-charging certain rules of customary international law such that they acquire the status of peremptory norms of general international law (*jus cogens*), or that they (the treaties) can provide evidence of the peremptory character of the respective customary rules.

New rules established by a treaty can also result in the modification of existing customary international law[12]. As the treaty regime becomes dominant such that the practice of states (particularly that of non-parties) increasingly aligns with the treaty's rules, the legal basis of a conflicting customary rule becomes unstable, leading to the customary rule either being superseded by a new rule or modified to align with the prevailing position (as reflected in the treaty rules). Such has been the fate of the customary international law rules relating to the law of the sea, and for that matter concerning the law of treaties, both of which have undergone change owing to the gravitational pull exercised by major multilateral treaties, which many states have become parties to or have come to consider as generally reflecting customary international law. Such normative impact is not exclusive to treaties (even if it is primarily the case). A similar process is presently underway regarding the impact of the articles on the responsibility of states for internationally wrongful acts, adopted by the International Law Commission in 2001,[13] which, despite not having been subsequently codified in a treaty, are increasingly considered (by many states, international tribunals and commentators alike) *in toto* (i.e. including 'new' rules which the Commission introduced by way of the progressive development of international law), as generally reflecting the position under customary international law.

The process of codifying rules of customary international law can itself also result in their modification, in the partial sense, even if in a subtle way. Customary international law, being an agglomeration of the practice of states, is notoriously imprecise and subject to different understandings and interpretations. The very act of attempting to systematize and clarify the rules, during the process of reducing them to writing, invariably involves a modicum of adjustment. At times, sides on doctrinal disputes have to be taken. In other cases, rules are modernised through, *inter alia*, the exclusion of dead-letter aspects and by employing modern terminology, which may inadvertently give rise to new interpretations and disputes (such as to the scope of application). In other cases, the imperative to reach consensus results in a text that is relatively laconic, or even deliberately ambiguous, to accommodate different views, thereby modifying the rule in question. Sometimes, the very inclusion of customary rules in a written text, alongside other such rules, as a part of a broader scheme gives rise to new interpretations as to, for example, the interaction between rules themselves and the relationship with other bodies

[12] See Conclusions on Identification of Customary International Law, draft conclusion 11(1)(c), International Law Commission (2018); General Assembly resolution 73/203 of 20 December 2018, annex.
[13] See General Assembly resolution 56/83 (12 December 2001) annex.

of rules of international law (customary or treaty-based) – a frequent consideration in the work of the International Law Commission.

The Distinction Between Permissible And Impermissible Change

Some types of change are specifically regulated or even not permitted, either by the rule itself or because of their particular status (as in the case of peremptory norms). Likewise, some types of change processes are expressly not permitted either by a specific rule to that effect or by the operation of law. For example, an act committed contrary to a rule, undertaken without intention to modify the rule (to the extent that is even permitted by law) merely amounts to breach. If the conflicting action amounts to change, the activity in question conforms with international law and is therefore lawful. However, when there is a breach the rule stays intact, and the act, to the extent that it deviates from the obligation contained in the rule, is *prima facie* wrongful. Nonetheless, as with most general rules, there are exceptions. For example, persistent objection during the formation of a customary rule is recognized by some authorities as modifying the rule *vis a vis* the objecting State, rendering its actions lawful.

The key reflection is that as international law reserves for itself the right to determine the nature and content of a rule of international law so too does it claim the prerogative to determine the validity of a claim that change has occurred. Valid change can only occur in accordance with processes expressly provided for by international law. Indeed, international law is replete with examples of processes, some accompanied by very specific procedures, designed to provide avenues for change. That some such processes set a particularly high bar (for example, for the amendment of treaties) has no direct bearing on the overall legal position, but rather reflects a specific policy choice of the treaty negotiators (to favour stability by making change less easy to achieve).

Understanding The Drivers Of Change In International Law

Most discussions on change focus on the procedures undertaken to effect change. However, it is useful to go further upstream and consider the underlying processes driving the need for change in the first place. Doing so helps establish a frame of reference for the decision-maker considering embarking on a path of change. Broadly speaking there are at least two types of drivers of change: context-driven change and paradigmatic change. With the former, change occurs as a deliberate choice to modify the law, typically in response to ongoing processes external to the law. Paradigmatic change, on the other hand, pertains to a shift in the structure or foundational concepts underpinning international law (and which may or may not come about deliberately).

Context-Driven Change

It is a hallmark of contemporary international society that there exists a reservoir of confidence in international law as a vehicle for undertaking change. Calls for action at the international level are frequently framed in legal terms. States, in turn, regularly seek to collaborate with other states in confronting transnational (and sometimes global) challenges through the vehicle of international law in its various guises. It bears recalling that such hubris marks a departure from the past when international law was typically viewed more as a means for entrenching the *status quo*, than a natural avenue for effecting change. Such shift in the perceived potential of international law has arisen not only as a consequence of the overall political evolution of the international community but also as the result of increased flexibility and adaptability of the contemporary corpus of international law, which has, largely as a matter of necessity, developed dedicated processes for making change happen.

At a basic level, change is more often than not reactionary, in the sense that it is typically initiated in response to a perceived need or other exogenous factors. The same can be said for changes undertaken by law, including international law. In other words, the context in which the law operates plays a central role in driving and shaping change by and through international law. There exist many examples of the impulse to effect change at the international level through law, both in the sense of change undertaken by modifying existing international law as well as that undertaken through existing or new rules of international law.

At the widescale level, the progress made over the last century in the human condition, accompanied by the political transformation and economic development of the international community, including through greater integration, has led to much change to international law, sometimes precisely because such changes were effected

through international law. Numerous other, more specific, factors continue to drive change today. For example, as mentioned earlier, rapid industrial and technological advances are quickly rendering existing rules inadequate and even obsolete or giving rise to the need for the development of entirely new sets of rules. Some changes are more subtle. For example, a shift in the prevailing international political climate can provide (or bring to a close) windows of opportunity to make change happen. The shift in focus among international actors from coexistence to cooperation,[14] and in more recent times to coordination, has brought with it new demands for change.

Crisis is also a major driver of change. For example, armed conflict frequently leads to change, sometimes significantly so, including to the applicable rules of international law. A similar point can be made for other types of crisis, such as that arising from economic collapse, or the onset of major disasters as well as the looming climate crisis. All have brought, and no doubt will continue to be accompanied by, calls for change (including through international law). What emerges then is a picture of a multitude of exogenous factors which have a catalytic effect driving a process which is continuously reshaping international law.

Paradigmatic Change

As indicated earlier, paradigmatic change is concerned with the modification of the structure of the law itself. Like context-driven change, paradigmatic change might also be accompanied by changes to existing rules and the creation of entirely new sets of rules. However, while context-driven change operates within the existing framework, paradigmatic change is concerned with (claims of) change to the framework itself, to how the law functions, including to the distribution of authority in the international system to effect change.

As a general proposition, most change is context-driven, in the sense defined herein. On the other hand, and notwithstanding occasional claims of seismic changes to international law, shifts in the governing paradigm are, almost by definition (even by design), infrequent and are not always sustained. This is not to deny the importance of major developments in the history of international law, such as the abolition of slavery in the nineteenth century, the emergence of international rules regulating the conduct of hostilities (into what is known today as international humanitarian law), the adoption of the Charter of the United Nations, the recognition of the right of self-determination giving rise to the political and legal phenomenon of decolonization, and so forth (many others could be added). The point is that, notwithstanding their historical significance, very few such events have resulted in a change to the governing paradigm of how the law functions. Instead, the existing framework of the law was able to absorb (and sometimes survive) many of the changes just mentioned (among others).

However, paradigmatic change does occur and has occurred. It bears recalling that the current state-centred system of international law was itself a product of a shift in paradigm from a prior manifestation of what one might call international law. Identifying potential candidates necessarily involves a degree of speculation and is largely a matter of opinion. It is also probably best ascertained in hindsight once the effects of the change have come to be established and are more discernable. Nonetheless, one might point to a few illustrative possibilities drawn from the modern era.

The prohibition on the resort to force, encapsulated in Article 2, paragraph (4), of the Charter of the United Nations is included herein as a possible candidate to the extent that it led to a re-orientation of international law (already underway pre-1945) to dealing primarily with the law of peace and thereby removing the distortions in the law which arose from the fact that war and conquest were not *prima facie* unlawful.

Another possible paradigm shift took place in the post-war period with the emergence of the focus on the plight of individuals, and in particular the recognition, as a matter of international law, of their inalienable human rights. Previously, in the (relatively few) scenarios where international law concerned itself with individuals (for example, the protection of aliens, particularly investors, and questions of nationality) it was typically at the inter-state level (such that an injury to an alien was, and still is, considered an injury to the state of nationality). This changed when international law increasingly became concerned with the question of the protection of the individual, including from the acts of her or his state of nationality. This resulted in the emergence of a new body of rules focusing on individuals: regulating various categories of human rights, providing for special protection

[14] W. Friedmann, *The Changing Structure of international law* (Stevens & Sons, London 1964).

of specific categories of persons (refugees, internally-displaced persons, diplomats and other internationally protected persons etc) and even some regulating the acts of individuals (for example, international criminal law and anti-terrorism rules). The argument being made here is that placing the individual at the heart of international law has led to its 'gentrification'. While the transformation is not yet complete, in the sense that individuals are not yet full subjects of international law the same way states are, nonetheless the question of the protection of individuals continues to be a major concern today. There is a second, more technical, dimension to this claim. Protection of individuals has required a greater emphasis on the vertical relationship between the international and national. Today, it is common for treaties to establish detailed requirements for implementation under national law. Such arrangement was to a certain extent pioneered (or perhaps perfected) by the early treaties establishing, as a matter of international law, national protections for individuals.

The emergence of such 'verticality' in international law has gone in the other direction as well. The structure of international law is presently changing from one predominantly regulating the bilateral relations between states to one in which communitarian values, embodied in obligations owed to the international community as a whole (*erga omnes*), are increasingly also recognized (by courts and tribunals and in treaties). This has been accompanied by increasing disaggregation of the law, through the recognition of priority (e.g. Article 103 of the Charter of the United Nations) and predominance (the emergence of a special category of norms, designated as 'jus cogens', from which no derogation is permitted). Hierarchy is increasingly a feature of the structure of international law – the consequences of which are still being worked out.[15]

No doubt, other potential claims of paradigmatic change could be mentioned. Some are more technical. For example, the adoption of Article 102 of the Charter of the United Nations introduced a 'sunshine' clause into the system, which, together with Article 1(a) of the Vienna Convention (envisaging international agreements between States being in written form), transformed international law as an activity no longer primarily undertaken between sovereigns, behind closed doors. Today international law is (mostly) conducted in the open, and (while more likely can be done) involves a wide variety of actors.

Conclusion

Change is inevitable. It is in many ways a defining feature of our history. The significant political development of the international community in the post-war era has been accompanied by the unparalleled growth and evolution of international law. Change is, in a sense, baked into the law. Indeed, it is one of the hallmarks of modern international law that it seeks to reserve for itself the right to determine the rules and procedures for its change and that it is solely in accordance with such rules and procedures that the existence and extent of such change are to be determined.

[15] Draft Conclusions on Identification and Legal Consequences of Peremptory Norms of General International Law (*jus cogens*), Report of the International Law Commission (*Official Records of the General Assembly, Seventy-Seventh Session, Supplement No. 10* (A/77/10), ch IV E, para 43.

CHAPTER V: FRAGMENTATION AND FERTILISATION OF INTERNATIONAL LAW

Giuditta Cordero-Moss[1]

Introduction

Fragmentation is a term used to describe a situation in which different branches of public international law exist as if they were self-contained regimes - they develop on the basis of their own assumptions without necessarily reflecting the fact that they are a part of the larger system of public international law.[2] As a consequence of fragmentation, public international law, which was originally and at least in principle a unitary system of law, may consist of separate regimes. This raises the question of whether it would be possible or advisable to cross-fertilise among these self-contained regimes or even between regimes outside of the public international law. Could principles, values and mechanisms that have been developed under one regime be useful to another regime?

In this chapter, I will discuss two branches of international law to illustrate the advisability of cross-fertilisation in the first case study and its inadvisability in the second. I hope to show that there is no single correct answer to this debate – it all depends on the situation.

Firstly, I will examine international administrative law. As previously mentioned, there are different regimes within public international law. Different courts also give the impression that the various regimes are separate and self-contained. Until 2020 I was a judge at the Administrative Tribunal of the European Bank for Reconstruction and Development (EBRD), where I also served as the President for a few years. I will draw upon that experience to show how cross-fertilisation can sometimes be useful. Subsequently, I will discuss international commercial law, which is not necessarily public international law. Still, it demonstrates the pitfalls in considering international commercial law as part of the public international law system, as it sometimes is.

An Example of Cross-Fertilisation: International Administrative Law

By way of introduction, the EBRD was founded at the beginning of the 90s pursuant to the changes that occurred in the aftermath of the collapse of the Soviet Union. Following this historically important occurrence, an international bank was established, similar to the World Bank, but to aid the reconstruction and development of the former Soviet Union.

International organisations have many different kinds of immunity. The Headquarters Agreement of the EBRD, which is one of the documents that established the EBRD, is an agreement between the EBRD and the United Kingdom, where the seat of the EBRD is located. Article 4 of this agreement lays down that the EBRD, as an international organisation, has immunity from judicial proceedings within the scope of its official activities. There are some exceptions, but they are not relevant to the topic at hand.

The Bank may need immunity to enhance its functioning as an international organisation, which is desirable. However, there is a flip side to it. Among other things, immunity means that the employees of the Bank who have a claim against the Bank in connection with their employment may not initiate court proceedings against the Bank. However, under the European Convention of Human Rights Article 6, everyone is entitled to a fair and

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[2] The literature on fragmentation is vaste. See, for example, the 2006 Report of the Study Group of the International Law Commission*: Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law* < https://legal.un.org/ilc/documentation/english/a_cn4_l702.pdf >; and Conclusions of the work of the Study Group on the Fragmentation of International Law: *Difficulties arising from the Diversification and Expansion of International Law 2006*. < https://legal.un.org/ilc/texts/instruments/english/draft_articles/1_9_2006.pdf> .

public hearing. This exists side-by-side with immunity. How do we reconcile this contradiction? The solution to this dilemma lies in establishing the so-called international administrative tribunals. International administrative tribunals have been established by the World Bank, the United Nations, the IMF, the ILO and many other international organisations. The EBRD has an international administrative tribunal as well.
What is the scope of jurisdiction of these tribunals? It is to decide disputes between the employees of the international organisation and the international organisation itself. An employee who has a claim against the EBRD cannot go to court due to the immunity the Bank enjoys. Nonetheless, employees have a human right to access the court. An international administrative tribunal is a special purpose international court that permits access to justice, while at the same time respecting the immunity of the Bank.

The EBRD administrative tribunal is part of the Bank's internal justice system, which in turn consists of a complex set of rules on internal administrative review procedures and appeals.[3] Among other things, there is a directive contained in Section 2.01 of the appeals process entitled the Right of Appeal, which provides that a staff member may submit to the Tribunal an appeal against an administrative decision. What is important to note here is that the Administrative Tribunal exists for a staff member or a former staff member: one has to be an employee to present a claim before the Administrative Tribunal, a point to which I will shortly return. Additionally, there are rules on the law applicable by the Administrative Tribunal. In considering an appeal, the Tribunal shall base its decision on the provision of the staff members' contract of employment, the internal law of the Bank and generally recognised principles of international administrative law.[4] In sum, these are the sources applied by the Administrative Tribunal.

Our first case study is based on a decision taken by the Administrative Tribunal in 2019.[5] This decision was taken when I was the Chair of the panel, which consisted of three judges. The decision on this appeal was taken against the background of a series of previous decisions. In brief, an individual had been working for the EBRD for many years, not as a formal employee but as an independent consultant. He was an IT consultant who had established his own company for the sole purpose of supplying his consultancy services. This company had entered into a contract with an agent, and the agent had entered into a contract with the EBRD. There was no agreement of employment between the Bank and the consultant. However, he worked full-time rendering services to the EBRD for many years. He was subject to instructions by the Bank and was treated as if he were an employee, despite not formally being one. Therefore, when he was informed that his consultancy contract would be terminated, he expected to be treated as an employee and receive severance. The Bank claimed that he was not an employee and was thus not entitled to severance, to which he responded that he was a de facto employee: not in form, but in fact.

The question that then arose was whether the Administrative Tribunal had jurisdiction in such a situation. The power of the Tribunal is limited to hearing appeals submitted by staff members. The contract between the appellant and the Bank said: "Nothing contained in these conditions or in the contract shall be construed as establishing or creating any relationship other than that of independent contractor between the bank and the agent." There was no formal employment agreement. The question was whether the appeal was admissible, given that under the directive on appeals, the tribunal only has jurisdiction when the appellant is a staff member.

The Tribunal then had to decide if it should rely on form, and focus on whether the appellant was formally an employee, or whether it should rely on substance, and examine the underlying reality. This is a very controversial question in international administrative law in general, and within the Administrative Tribunal of the EBRD in particular. There were five or six cases on this question, all of which had dissents because there was no unitary understanding of the law in this area.

In the case at hand, the Tribunal had in a previous decision determined that it falls within its jurisdiction to evaluate whether the appellant was a staff member or not.[6] The decision that will now be examined began by recalling the aforementioned controversial issue of jurisdiction and then dwelled on the law applicable to the

[3] Available at Microsoft Word - Rules of Procedure.doc (ebrd.com).
[4] Directive on Appeals Process, art 3.02.
[5] Case EBRDAT 2019/AT/06 <https://www.ebrd.com/who-we-are/corporate-governance/administrative-tribunal.html>.
[6] Case EBRDAT 2018/AT/02 <https://www.ebrd.com/who-we-are/corporate-governance/administrative-tribunal.html >.

substance in this case. As already mentioned, the constituent documents of the Administrative Tribunal specify which law shall be applied: the staff members' contract of employment, the internal law of the Bank (which comprises the staff regulations and the Bank's administrative practice), and the generally recognised principles of international administrative law. It is in connection with this last issue, the generally recognised principles, that the notion of cross-fertilisation could be very useful.

After having looked at the contract and the internal law of the Bank, the Tribunal considered the generally recognised principles of international administrative law. Not of *public* international law in general, but, more specifically, of international *administrative* law. Here, international administrative law could either be seen as a self-contained regime, with its own generally recognised principles that are completely isolated from the rest of public international law, or it could be seen as a constituent unit of public international law. The decision said that it is possible to draw a parallel between generally recognised principles in public international law and generally recognised principles in international administrative law. The article on the applicability by the Tribunal of generally recognised principles can be seen as a parallel of Article 38 of the statute of the ICJ, which lists the sources of public international law. Whatever is found in the literature and case law relating to the principles of public international law. Particularly to the method for determining whether a principle can be deemed to be a generally recognised principle, can be applied analogically to international administrative law, to the extent that these two regimes are compatible.

There, is, however, no automatic correlation. It must be ascertained what the principles that have been developed in connection with public international law are, and whether they can be applied correspondingly in international administrative law. Therefore, we need a mechanism for understanding how Article 38 of the ICJ is to be interpreted.

The decision went on to examine what at the time was the latest source available on this issue: the First Report on General Principles of Law, adopted by the 71st session of the International Law Commission in 2019. According to the Report, generally recognised principles can be principles that are formed within the international legal system, or they can be principles that are derived from national legal systems. This distinction was followed in the decision. Principles that are formed within the international legal system include treaties, customs, and jurisprudence from other comparable international courts.

Another point of discussion is what would be deemed as comparable international courts. Case law from other administrative tribunals is routinely referred to in the jurisprudence of international administrative tribunals. Decisions rendered any other international courts are usually not considered. Therefore, international administrative law is treated as if it were a self-contained, completely isolated system. The jurisprudence of other administrative tribunals is important; however, that does not mean that the jurisprudence of other international courts would be completely irrelevant. There is no jurisprudence directly on this point; however, a comparable international court could be the European Court of Human Rights, or any other court to the extent that its decisions correspond to interests that are also present in the case at hand.

As previously alluded to, in the case law of international administrative tribunals in general, and of the Administrative Tribunal of the EBRD in particular, there are broadly two approaches, which I designate as the "formal approach" and "substance approach." The former is the approach that looks at the label given to the legal relationship in the contract. If the contract denies an employment agreement, the appellant would not be deemed a staff member. This approach is prevailing in the practice of international administrative tribunals.[7] The latter approach would look beyond the fact that the contract states that there is no employment agreement, and examine the reality of the situation more closely. The decisions of international administrative tribunals have predominantly adopted the "formal approach", but a few have adopted the "substance approach" as well.[8]

Principles Derived From National Legal Systems

[7] ILOAT 4045, ILOAT 3459, ILOAT 3551, ILOAT 67, UNAT 233, IMFAT 1999-1.
[8] ILOAT 701, ADBAT 24, WBAT 215, ILOAT 122, EBRDAT 2018/AT/02.

The other source of generally recognised principles relies, as was seen above, on national legal systems – that is, principles existing within a sufficiently large number of national legal systems to be relevant on an international level.
It is important to note that it is not sufficient to count the number of legal systems with one approach and, on the basis of that result, conclude that that approach is 'generally recognised' as an international principle. You must also find out whether these principles can be applied at the international level. Transposing national principles to international law means that the values that underlie a regulation common to numerous systems are elevated to the level of international law. In order to transpose a principle, you must make sure that it is adequate, so that it is a principle that reasonably can also be elevated to the level of international law.

These principles can be found in the national administrative law, civil service law or labour law, which is what the decision did. The decision looked at general labour law and found a principle according to which the employer shall not abuse its position and deprive the employee of employee protection. This was a principle found in a *plurality* of systems. The decision considered recent comparative research of labour law in Europe.[9] Based on a comparative exercise, the research concluded that there is a principle according to which there must be 'primacy of the facts'. So, it's the substantive approach, and not the formal approach, that prevails.

The substance is, therefore, a restriction to the freedom of contract. You cannot just rely blindly on what is written in the contract. You have to look at what is the substance, what the facts show, despite what the form affirms. This comes as a result of a comparative exercise in the European Law and in the US case law - formal circumstances cannot shield from employer liability. It's less clear in the US than in Europe, but there are references in the decision to case law showing that.[10] On this basis, it was concluded that there is the principle of the 'primacy of the facts' in a sufficiently large number of legal systems.

Conflicting Interests between the National and International Sphere

The next step is to determine whether this principle can be elevated to the international level: whether there is transposability. The decision makes this assessment on the basis of balancing of the conflicting interests in the national sphere and in the international sphere.

In the national sphere, the conflicting interests are, on the one hand, the free exercise of entrepreneurial autonomy, as well as the freedom of contract, and, on the other hand, the protection of the weaker party. For example, the employee or the person who is doing the work may be forced by the circumstances to accept some terms of the contract that they would never have accepted if they had had stronger bargaining power. In the national sphere, balancing these conflicting interests is generally resolved with the principle of the primacy of fact.

At the international level, the conflicting principles would be the managerial discretion of the organisation on the one hand, and the principle of avoiding abuse of power, on the other hand.

Having seen that these two principles have to be balanced also in the international sphere, it is possible to transpose the solution that is found at the national level and also to the international level. This exercise shows that there is a general principle that is also applicable in an international context.

The conclusion in the decision was that, on the one hand, there is a presumption in favour of the wording of the contract; on the other hand, and exceptionally, the wording of the contract may be disregarded to privilege the substance. However, the threshold for disregarding the terms of the contract is very high, and it assumes that there is no functional justification for the arrangement that has been made, that the organisation is abusing its power and depriving the employee of its protection, or that there is a very clear divergence between the situation in fact and the contractual regulation.

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[9] Bernd Waas, Guus Heerma van Voss, *Restatement of Labour Law in Europe "The Concept of Employee,"* (Hart Publishing 2017) vol 1.
[10] Browning-Ferris Industries of California, Inc., d/b/a BFI Newby Island Recyclery *and* FPR-II, LLC, d/b/a Leadpoint Business Services *and* Sanitary Truck Drivers and Helpers Local 350, International Brotherhood of Teamsters 362 NLRB 1599 (2015).

In this case, the outcome of the decision was negative for the employee. The reasoning explained above was meant to confirm the Tribunal's power to decide whether there is, in the particular situation, an employment relationship even though there is no formal employment contract. If there is a de facto employment relationship, the appellant qualifies as an employee and has access to the Bank's internal justice system. If there is no de facto employment relationship, the appellant does not qualify as an employee, and the Tribunal does not have jurisdiction on the dispute. Therefore, the reasoning mentioned above was necessary to verify the Administrative Tribunal's jurisdiction on this issue. In the specific case, the Administrative Tribunal found that there was no employment relationship, and that therefore the appeal had to be dismissed.

There is, of course, a difference between affirming, in theory, the power to decide on a certain issue, and deciding the merits of the particular case. In this particular case, the appellant was not an employee, and this led to the dismissal of the appeal. The conclusion of the panel was unanimous, but there were two concurring opinions. All judges agreed on the conclusion that the appellant was not an employee, and that therefore the Tribunal had no jurisdiction. However, the two concurring judges did not agree on the necessity to carry out the above-mentioned reasoning and to verify whether the appellant was a de facto employee. They considered the reasoning about generally recognised principles to be irrelevant and looked at the international administrative law as a self-contained legal system that only needs to regard case law by international administrative tribunals. Consequently, there was no room for cross-fertilisation between public international law and administrative law.

An Example Of Fragmentation: Contract Law

Above, we have seen an example of a situation where cross-fertilisation may be desirable. Let's now look at another example, where cross-fertilisation is not desirable

The example can be found in a database organised by the University of Cologne, Germany on transnational commercial law: "Translex".[11] Transnational commercial law deals with commercial contracts. Commercial contracts do not necessarily have to be entered into between private parties - also states or public entities can enter into a commercial contract. Irrespective of who are the parties, the contract would be qualified as commercial on the basis of its content and the quality in which the parties act – as opposed to concessions, production sharing agreements or other relationships in which the state exercises its administrative powers, in commercial contracts both parties stand on equal footing. Translex is a database of different principles that they consider to be generally recognised in the international commercial field and can be considered as a soft law source for commercial contracts. It is written in the form of a restatement of the transnational commercial law.

The very first article, article I.1.1, affirms the duty of the parties to act in accordance with good faith and fair dealing in international trade. I was very intrigued when I first saw the phrase 'good faith', and was looking forward to a uniform, transnational definition of the principle of good faith. My activity within international commercial law and comparative law had actually shown that good faith has so many different meanings.[12] There is, first of all, the very well-known divide between the common law and the civil law: English law does not know good faith as a general principle. Even within civil law, where generally good faith plays an important role, there are so many different understandings of what good faith implies. So, when Translex lists good faith as the most important principle of international commercial law, I was interested in the sources upon which the principle relies and the definition of its content.

One of the sources cited in Translex is court decisions, both national and international. Among these, an ICJ decision caught my attention: *Nuclear Tests Case* of Australia v. France.[13] The decision was rendered in the context of a dispute between Australia and France, in which Australia, among other things, alleged that France had not complied with a declaration it had earlier rendered, that it would not carry out nuclear experiments in areas close to Australia. The ICJ decision is referred to in Translex as a support of the principle of good faith in commercial contracts. In particular, the following quote is highlighted:

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[11] <www.translex.org>.
[12] See, for references, Giuditta Cordero-Moss, *International Commercial Contracts*, (Cambridge University Press 2014) ch 2, s 4.
[13] *Nuclear Tests Case: Australia v. France* [1974] ICJ 267.

> "*One of the basic principles governing the creation and performance of legal obligations, whatever their source, is the principle of good faith.[…] Just as the very rule of pacta sunt servanda in the law of treaties is based on good faith, so also is the binding character of an international obligation assumed by unilateral declaration. […].*"

The International Court of Justice refers here to the rule of *pacta sunt servanda*, and affirms that, in the law of treaties, it is based on good faith. So also, is the binding character of an international obligation assumed by unilateral declaration. In other words, in public international law, if a country assumes by unilateral declaration an obligation, that obligation is binding because of the principle of good faith in international law. This applies to public international law. The question is whether the same can also be applied in contract law. Does the principle of public international law create a basis to assume that unilateral declarations are binding in commercial contracts all over the world?

There are no obstacles to considering a unilateral offer to be binding in civil law systems. This corresponds to the quote in the ICJ decision – therefore, there is no contradiction between the ICJ decision and civil law systems, although it does not mean that the source for this contract law principle is to be found in public international law. In contrast, in the common law system, and particularly in English law, the doctrine of consideration prevents the enforceability of unilateral promises.[14] Therefore, lacking consideration, a unilateral offer is not necessarily binding under English law. Hence, the ICJ's statement does not correspond to English contract law.

What does this divergence imply? Does English contract law infringe public international law? Is the ICJ wrong in its statement? None of these alternatives, of course, is correct: the ICJ was not expressing an opinion on domestic contract law – it was expressing an opinion on public international law. At the international level, unilateral declarations are binding. In commercial relationships governed by English law, the doctrine of consideration leads to the conclusion that the unilateral offer or declaration is not binding. Public international law and contract law are different spheres, and it is not necessarily possible to cross-fertilise.

Conclusion

Let us now come back to the International Law Commission. The ILC released a report on fragmentation with numerous conclusions[15] on how to interpret international law in this fragmented picture. According to the Report, international law must be looked upon as a legal system that should be considered as a unitary system. There is a principle of harmonisation, and one should try to harmonise the sources within that legal system. However, you also have the principle of *lex specialis*. When the principle of lex specialis applies, divergence is fully acceptable, and it is not necessary to attempt harmonisation. When divergence is the expression of a lex specialis, and when harmonisation shall be sought, it is a question that requires a contextual appreciation. You have systemic integration issues, general principles, and *lex posterior* issues. You have many different mechanisms of interpretation that you can use to obtain a reasonable solution. Self-contained regimes may have an important role in some situations. There may be very good reasons for having an isolated regime that has only its own rules. In other situations, there may be reasons for cross-fertilisation among the different regimes. The whole point is that you do not have *one way* of dealing with and coping with fragmentation. It will be necessary to understand the underlying interests, the balance between the possibly opposing interests, and see whether it is possible to transpose a solution from one system to another. Therefore, everything depends on the contextual appreciation of the specific question. There is no automatic answer to the question that we posed initially, whether fragmentation should be enhanced or cross-fertilisation should be preferred.

[14] fn 12.
[15] fn 2.

CHAPTER VI: THE PRIVATE SIDE OF TRANSFORMING OUR WORLD – THE ROLE OF PRIVATE (INTERNATIONAL) LAW IN ACHIEVING THE SUSTAINABLE DEVELOPMENT GOALS 2030

Hans Van Loon

Introduction

At first sight, the theme of this Chapter may seem to stand apart from other contributions to this volume which tends to deal with public international law. Indeed, "international law" is usually identified with public international law. But it is becoming increasingly clear that the two disciplines, public and private international law, need and complement each other. That has always been recognised by the *Institut de Droit International*/the International Law Institute founded in 1873[1] – which, for example, in 2021 adopted the *Resolution on the interaction between Human Rights and Private International Law*[2] – and the Hague Academy of International law[3], which for almost a century now has organised courses in both disciplines, public and private international law.

The book, *The Private Side of Transforming our World – UN Sustainable Development Goals 2030 and the Role of Private International Law*[4] published in November 2021, preceded by a Conference held in Hamburg from 9-11 September 2021[5], explores the role of private international law in achieving the Agenda 2030 of the United Nations (UN) with its 17 Sustainable Development Goals (SDGs), unanimously adopted by the UN General Assembly (GA) on 21 October 2015. [6] Whereas the SDGs' targets often refer to instruments and institutions in the realm of *public* international law, there is a near-complete absence of any reference to the role of *private*, including commercial law, and the role, in cross-border situations, of private international law in our global economy and emerging world society. Yet, most transactions, investments, and destruction of our environment happen through private action, and are governed not exclusively by public law, but also by private (international) law.[7] Moreover, Agenda 2030 is not just aimed at public actors, i.e., "Governments as well as parliaments, the UN system and other international institutions, local authorities [,but also at] indigenous peoples, civil society, business and the private sector, the scientific and academic community – and all people"[8], who generally interact through private and commercial law.

Sustainable Development

It was the Report, *Our Common Future*, prepared by the World Commission on Environment and Development (also referred to as the Brundtland Report after its Chair), which coined the term "Sustainable Development": "development that meets the needs of the present without compromising the ability of future generations to meet their own needs". [9] Initially, in the years following the publication of the Report, the emphasis was on the need to meet "the essential needs of the world's global poor, to which overriding priority should be given". [10] The eight Millennium Development Goals (MDGs) 2000-2015 adopted by the UN GA[11] focused on the needs of

[1] 'Institut de Droit International – Justitia et Pace' <https://www.idi-iil.org/en/> accessed 18 November 2022.
[2] Fausto Pocar, 'Human Rights and Private International Law' (Institut de Droit International 2021).
[3] 'The Hague Academy of International Law' (*The Hague Academy of International Law*) <https://www.hagueacademy.nl/> accessed 18 November 2022.
[4] Hans van Loon, Verónica Ruiz Abou-Nigm, and Ralf Michaels, *The Private Side of Transforming Our World: UN Sustainable Development Goals 2030 and the Role of Private International Law* (Intersentia 2021); (open access), hereinafter, 'The Private Side'.
[5] '9 to 11 September 2021: The Private Side of Transforming Our World | Max Planck Institute for Comparative and International Private Law' <https://www.mpipriv.de/conference-sdg-2030> accessed 18 November 2022.
[6] UNGA Res A/RES/70/1 (2015) 17th Session, 15, 116.
[7] The Private Side (n 4); p 9.
[8] Res A/RES/70/1 (n 6) Declaration adopted by the Heads of States, p 12, para 52.
[9] World Commission on Environment and Development, *Our Common Future* (OUP 1987) 43.
[10] ibid.
[11] UNGA Res. A/Res/55/2 (2000) 55th Session.

developing countries. Agenda 2030 incorporates the MDGs, but goes beyond them, and concerns all nations, all people and indeed our planet. While pursuing "development", the Agenda's aim is fundamentally qualified by "sustainability". Many new Goals have been added aimed at "protect[ing] the planet from degradation, including through sustainable consumption and production, sustainably managing its natural resources and taking urgent action on climate change".[12]. Human activity has become a dominant force on our planet, with unanticipated adverse consequences for the Earth's life-support systems, thereby exceeding planetary boundaries, with potentially irreversible catastrophic effects for future generations and for ecosystems. Human beings are now shaping every aspect of the biosphere: our planet has entered the Anthropocene. [13]

Therefore, overarching the SDGs is the notion of global interconnectedness, from which follows a responsibility of the "Global North" for the "Global South" that goes beyond mere distribution of wealth. Many targets aim at improving living and environmental circumstances in developing countries, sometimes further specified as "especially least developed countries and small island developing states".[14] They also insist on enhanced representation and voice for developing countries in decision-making in global institutions[15], sometimes specifying that developed countries should take the lead and honour their development assistance commitments.[16] This principle of "common but differentiated responsibilities" (in particular between the "Global North" and "Global South") was already expressed in the 1997 Kyoto Protocol to the 1992 United Nations Framework Convention on Climate Change, and appears again in the 2015 Paris Agreement[17].

It is clear that the SDGs are faced with a dilemma here. On the one hand, efforts must continue and intensify to spur economic development to reduce poverty, end hunger, prevent and cure diseases, promote quality education and gender equality, etc., in particular in developing countries. To that end, SDG 8.1. calls for "at least 7 per cent gross domestic product growth per annum in the least developed countries". On the other hand, economic development with its usage of carbon fuels and land resources, is having devastating effects on the planet, which is why SDG 8.4 is a call to "endeavour to decouple economic growth from environmental degradation". Agenda 2030 does not resolve this dilemma, although it gives some hints, such as "Rationalize inefficient fossil-fuel subsidies that encourage wasteful consumption…." (SDG 12.c), or – as a means to increase monitoring and accountability – "Develop measurements of progress on sustainable development that complement gross domestic product …" (SDG 17.19). Thus, it is for all actors, not least States and businesses, to find responsible solutions to this dilemma.

Aspirational Nature of the SDGs

The SDGs are not legally binding. They articulate aspirations, and set out procedures to achieve them, with benchmarks, including "Indicators", to measure and assess progression towards accomplishment. This is a governance strategy that differs from traditional rulemaking, which is rather aimed at enabling and regulating human behaviour through norms that usually remain in place until they are replaced by new ones. Private or civil law, including commercial law, does so by defining rights and obligations of actors – persons, corporations and other entities – directly. Private *international* law does so mostly indirectly, by determining which courts and authorities have jurisdiction regarding civil and commercial legal issues arising in cross-border situations and how conflicts of jurisdiction are resolved, what law applies to such issues (choice of law) and whether and under what conditions the courts of one country will give effect to foreign decisions and official acts of another country relating to such issues. The aspirational nature of the SDGs allows them to encompass an exceptionally "broad and universal policy agenda"[18].

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[12] Res A/RES/70/1 (n 6) Preamble to the SDGs, p 2.

[13] 'Research - Stockholm Resilience Centre' <https://www.stockholmresilience.org/research.html> accessed 18 November 2022.

[14] See, e.g., SDG 1.a., 2.a, 3.b-d, 4.b. (adding African countries), 4.c,6.a,7.b (adding landlocked developing countries), 8.a.,9.2.9.3,9.5, 9.a (adding African countries and landlocked developing countries),9.b,9.c, 10.a (referring expressly to the principle of special and differential treatment for developing countries), 10.b (adding African countries and landlocked developing countries), 11.c, 12.a, 12.c, 13.a, 13 b, 14.6,14.7,14.a, 15.b, 16.a,17.1, 17.3-5, 17.7-9,17.11,17.12,,17.16,17.18, 17.19.

[15] 10.6,12.1, 16.8.

[16] E.g. 8.4, 17.2.

[17] Conference of the Parties, Adoption of the Paris Agreement, U.N. Doc. FCCC/CP/2015/L.9/Rev/1 (Dec. 12, 2015).

[18] Res A/RES/70/1 (n 6) Declaration adopted by the Heads of States, p 6, para 18.

Moreover, the SDGs, as we have seen, are not only addressed to Governments and other public bodies, but also seek the moral, theoretical and practical support for their achievement from a variety of private actors, including businesses, through an array of disciplines, including law.

The: broad scope of Agenda 203i is apparent from the short titles of the SDGs. The first five SDGs were in essence already included in the MDGs: SDG 1: End poverty, SDG 2: End hunger, SDG 3: Ensure good health and well-being, SDG 4: Ensure quality education, SDG 5: Achieve gender equality, including gender orientation[19]. Then follow: SDG 6: Ensure availability of clean water and sanitation, SDG 7: Ensure access to affordable and clean energy, SDG 8: Promote decent work and economic growth, SDG 9: Build resilient infrastructure, promote sustainable industrialization and innovation, SDG 10: Reduce inequalities within and among countries, SDG 11: Make cities and communities sustainable, SDG 12: Ensure responsible consumption and production, SDG 13: Combat climate change, SDG 14: Conserve and sustainably use the seas and marine resources, SDG 15: Protect and promote sustainable use of land, SDG 16: Promote peaceful and inclusive societies, provide access to justice and build effective institutions, and SDG 17: Strengthen implementation and global partnerships for sustainable development.

Each SDG is further elaborated by Targets, and, for each Target Indicators are provided, which are continuously reviewed. They make it possible to measure the progress being made on each of these 17 SDGs.

However, it must also be established that Agenda 2030 lacks a robust institutional monitoring framework: "Follow-up and review processes …will be voluntary and country-led…".[20] The body overseeing progress at the global level is the "high-level political forum" under the auspices of the UN GA and the Economic and Social Council. [21] To compensate for this weakness, other agencies have accepted (co-)responsibility for certain SDG Indicators. For example, "UNICEF is responsible for 7 SDG indicators and either supports or is a co-custodian for a further 12".[22] The OECD has developed an Action Plan on the SDGs[23] and, "to help countries achieve [the] objective [of access to justice for all, as enshrined in SDG 16], the OECD People-Centred Justice Framework and Principles sets out elements of a government-wide strategy for people-centred justice…".[24] The European Union monitors and reports on the implementation of the 2030 by the EU and its Member States, taking care to "[engage] civil society, the private sector, and other stakeholders".[25]

The Role of Private International Law in Achieving Agenda 2030

While the governance strategy of the SDGs is essentially based on a quantitative approach, much of the work to be done requires *qualitative* changes in human behaviour. Norm promotion and rule-making, therefore, remain crucially needed – as complementary or implementation strategies to achieve SDGs. Through the lens of law our world is a patchwork of legal orders and legal systems, in constant flux, governing human activity. Private international law makes it possible to coordinate and connect those orders and systems in respect of civil and commercial issues, and mediate between them. It also enables direct cross-border cooperation between courts and administrative authorities of different legal orders., as noted, Agenda 2030 nowhere refers to private (international) law. Although even a quick look at the SDGs shows its relevance:

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[19] Although SDG 5 does not explicitly address sexual orientation, SDG 4.a calls for "educational facilities that are… gender sensitive", SDG 10.2 for "social, economic and political inclusion of all…irrespective of …sex… or *other status*", and SDG 16.9 presupposes respect for identity.

[20] Res A/RES/70/1 (n 6) Declaration adopted by the Heads of States, p 31, para 74.

[21] ibid, p 11, para 47; and for the high level political platform, 'High-Level Political Forum .:. Sustainable Development Knowledge Platform' <https://sustainabledevelopment.un.org/hlpf> accessed 18 November 2022.

[22] 'SDGs for Children - UNICEF Data' <https://data.unicef.org/sdgs/> accessed 18 November 2022.

[23] OECD, 'Better Policies for 2030 An OECD Action Plan on the Sustainable Development Goals' <https://www.oecd.org/dac/Better%20Policies%20for%202030.pdf>.

[24] 'Executive Summary | OECD Framework and Good Practice Principles for People-Centred Justice | OECD ILibrary' <https://www.oecd-ilibrary.org/sites/cdc3bde7-en/index.html?itemId=/content/publication/cdc3bde7-en> accessed 18 November 2022.

[25] 'Sustainable Development in the European Union — Monitoring Report on Progress towards the SDGs in an EU Context — 2021 Edition - Products Flagship Publications - Eurostat' <https://ec.europa.eu/eurostat/web/products-flagship-publications/-/ks-03-21-096> accessed 18 November 2022.

1. Regarding *personal status and family relations*, SDG 16.9: "By 2030, provide legal identity for all, including birth registration" and SDG 5.3: "Eliminate… forced marriage…", both address well-known issues of private international law in cross-border scenarios[26].

2. Regarding *contract law*: On the one hand, the SDGs encourage freedom of contract with their call to "correct and prevent trade restrictions and distortions in world agricultural markets"… (SDG 2.b), or "promote the development, transfer, dissemination and diffusion of environmentally sound technologies to developing countries on favourable terms… as mutually agreed" (SDG 17.7). These objectives are certainly furthered by the principle of party autonomy in private international law allowing the parties, in a cross-border context, to choose themselves the court that will resolve any contractual disputes that may arise and/or the law that applies to their contractual relationship.

On the other hand, several SDGs require restrictions to party autonomy, for example, where they require the "immediate and effective" eradication of forced labour, "modern slavery" and child trafficking (SDGs 8.7, 16.2); or "by 2030 significantly reduce illicit financial and arms flows"…(SDG 16.4); or "substantially reduce corruption and bribery in all their forms" (SDG 16.5). Private international law may assist workers by giving them access to nearby courts even where the employer has stipulated a different court, and by providing that the law which applies to the employment contract is accessible to the worker, notwithstanding any other law stipulated in the employment contract.

More generally, to give effect to important provisions implementing SDGs, private international law provides legal techniques to set aside choice of court and choice of law clauses that stand in the way of achieving the SDGs. Through *public policy* or *internationally overriding mandatory rules*, contractual arrangements may thus be broken open to combat, e.g., exploitation of workers, illicit selling of arms, or bribery.

3. Regarding *tort law*, private international law can promote the achievement of SDGs 6, 13, 15 in cross-border situations, by providing access to courts and applicable law rules that further environmental protection and combat climate change.

4. Regarding *cross-border civil and commercial litigation*, the call to "promote the rule of law …and ensure equal access to justice for all" (SDG 16.3) has traditionally been understood as equal treatment within a single system. But as a global Goal it also requires global equality of access to justice in *cross-border* situations. This has multiple implications in the sphere of cross-border civil procedure: example admissibility of global class actions and public interest actions, jurisdiction of the courts, and recognition and enforcement of judgments concerning corporate social and environmental responsibility.

To provide equal access to justice across borders, institutional measures are needed. SDG 16 calls for "effective, accountable and transparent institutions at all levels" and "strengthen[ing] relevant national institutions, including through international cooperation…". In the field of private international law, the Hague Conference on Private International Law and its Hague Conventions, many of which provide for cross-border cooperation, respond to this call. And so do its sister organisations, UNIDROIT, the International Institute for the Unification of Private Law, and UNCITRAL, the United Nations Commission on International Trade Law, and regional institutions, such as the European Union (hereinafter: EU), the Organisation of American States, MERCOSUR, the Common Market of South America and OHADA, the Organisation for the Harmonisation of Business Law in Africa, and their legislative work.

[26] Hans van Loon, Verónica Ruiz Abou-Nigm, and Ralf Michaels (n 4), SDG 1: No Poverty (Benyam Mezmur) and SDG 16 (Sabine Corneloup and Jinske Verhellen).

The foregoing already shows that private international law cannot be viewed separately from the values it may or may not serve. There is a close link between private international law and human rights, as recently emphasised by the *Institut de Droit International* in its aforementioned Resolution of 4 September 2021.[27]

India and Private International Law

Private international law in most countries is still mainly a matter of national law. India is no exception, and its private international law system is marked by a strong continuing influence of English law[28]. In 2008 India joined the Hague Conference on Private International Law. Currently, India is Party to four Hague Conventions. Three of these deal with cross-border cooperation between administrative authorities and courts in civil and commercial matters generally: Abolishing Legalisation (the "Apostille Convention") (1961) [29], Service of Documents Abroad (1965)[30], and Taking of Evidence Abroad (1970)[31]. The fourth Hague Convention which India has joined deals with the welfare of children: Intercountry Adoption (1993)[32].

India is not (yet) Party to, among others, the Hague Conventions on International Access to Justice (1980)[33], International Child Abduction (1980)[34], Child Protection (1996)[35], Recovery of Child and Family Support (2007)[36], Recognition of Divorces (1970)[37], Validity of Marriages (1978)[38], Protection of Adults (2000)[39], Choice of Court (2005)[40] and Recognition and Enforcement of Judgments (2019). [41] Nor has India incorporated in its laws the Hague Principles on Choice of Law in Commercial Contracts (2015). [42]

The 1980 *Hague Access to Justice Convention* provides for equal treatment of foreigners and nationals regarding legal aid and security for costs in civil proceedings. By joining this Convention India would complete the trio of Conventions on cross-border judicial cooperation: Service Abroad, Taking of Evidence Abroad and Access to Justice. Together, they constitute basic legal infrastructure for transnational proceedings, thus making a concrete contribution to the promotion of SDG 16.3.

The 1980 *Hague Child Abduction Convention* gives effect to Articles 9, 10 (2), 11 and 35 of the UN Convention on the Rights of the Child (UNCRC). Nevertheless, India "has steadfastly opposed the Convention dealing with intercountry child abduction. One of the core objections which India has highlighted … is the absence of explicit mechanisms to protect women who flee with their children from the habitual residence due to domestic violence"[43]. There may be a misunderstanding here: the Hague Conference has clearly identified domestic violence against the child and/or the taking parent as an issue that may give rise, under Article 13 1 (B) of the Convention, to a refusal to order the child's return[44]. The Child Abduction Convention thus contributes to the

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[27] Fausto Pocar (n 2).
[28] P. Diwan and P. Diwan, *Private International Law: Indian and English* (4th edn, 1998); F.E. Noronha, *Private International Law in India* (2nd edn, 2013); S. Jolly and S. Khanderia, *Indian private international law* (2021).
[29] Hague Convention, *Abolishing the Requirement of Legalisation for Foreign Public Documents* (No. 7625, 5 October 1961).
[30] Hague Convention, *Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters* (GSR 24e 15 November 1965).
[31] Hague Convention, *Taking of Evidence Abroad in Civil or Commercial Matters* (EUR-Lex - 32001R1206, 18 March 1970).
[32] Hague Convention, *Protection of Children and Cooperation in Respect of Intercountry Adoption* (29 May 1993).
[33] Hague Convention, *International Access to Justice* (25 October 1980).
[34] Hague Convention, *Civil Aspects of International Child Abduction* (25 October 1980).
[35] Hague Convention, *Jurisdiction, Applicable Law, Recognition, Enforcement and Cooperation in Respect of Parental Responsibility and Measures for the Protection of Children* (19 October 1996).
[36] Hague Convention, *International Recovery of Child Support and Other Forms of Family Maintenance* (23 November 2007).
[37] Hague Convention, *Recognition of Divorces and Legal Separations* (1 June 1970).
[38] Hague Convention, *Celebration and Recognition of the Validity of Marriages* (14 March 1978).
[39] Hague Convention, *International Protection of Adults* (13 January 2000).
[40] Hague Convention, *Choice of Court Agreements* (30 June 2005).
[41] Hague Convention, *Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters* (2 July 2019).
[42] Hague Principles, *Choice of Law in International Commercial Contracts, non-binding, but unanimously approved by the Members of the Hague Conference, including India* (19 March 2015).
[43] S. Jolly and S. Khanderia (n 28) p 304.
[44] Hague Conference on Private International Law, *1980 Child Abduction Convention, Guide to Good Practice,* Part VI, pp. 37-39.

promotion of SDG 5.2 "Eliminate all forms of violence against all women and girls in the public and private spheres, including trafficking and sexual and other types of exploitation".

Complementing the Child Abduction Convention, the *1996 Hague Child Protection* establishes a jurisdictional basis for the court of the State to which the child has been taken, to impose accompanying measures where it orders the return of the child, to protect the child and the taking parent. Those measures must be recognised and enforced in the State from which the child was taken.[45]

Likewise, India would benefit from joining the 2007 Hague Convention on the Recovery of Child and Family Support, which provides efficient and cost-effective procedures for the recovery of child and family support across borders. The 2007 Convention gives nuts and bolts to Articles 3 and 27 (4) of the UNCRC, and promotes SDGs 1 "End poverty", and SDG 2 "End hunger".

The 1970 *Hague Divorce Convention* facilitates the recognition of divorces obtained in another State Party, and assures divorced spouses that their new status receives the same recognition abroad as in the State where they obtained their divorce. The Convention thus simplifies the possibility of remarriage and clarifies the legal relationship of the couple concerned, which also can prove very important for the dependent children of the new relationship. Already in 1975, the Supreme Court of India, in Satya v. Teja Singh, 1975 AIR 105, 1975 SCR (2) 97 recommended the Convention as a possible model for the Indian legislator to follow. [46]

Likewise, the 1978 *Hague Marriage Convention* is based on the *favor matrimonii*. It facilitates both the celebration of marriages between spouses of different citizenship, and the recognition of marriages concluded abroad. The Law Commission of India has indicated in its 2009 report on legislative reform regarding non-resident Indians that India should join the Convention.[47] Both these Hague Conventions contribute to promoting gender equality and empower women (SDG 5).

With ageing, but mobile, populations, the need for the protection of adults across borders increases. It is vital, e.g., to ensure that powers of representation granted by an adult to be exercised when they are no longer in a position to protect their interests, are given effect when at that time they are living in a different country than that where these powers were granted. The 2000 Hague Protection of Adults Convention provides such certainty and predictability in this and other cross-border situations. The Convention assists in the implementation of the 2006 *UN Convention on the Rights of Persons with Disabilities*, to which India has been a party since 2007, including its Articles 12 on equal recognition before the law, 13 on access to justice, 32 on international cooperation, and also promotes SDG 16.

Finally, India would benefit from joining the 2005 Hague Choice of Court Convention as well as the 2019 Hague Judgments Convention. "Unlike the vague and convoluted principles on the subject that exist under Indian law, the [Choice of Court Convention] and the Judgments Convention strive to enhance predictability by enabling interested parties to know in advance the grounds on which a foreign decision in a civil or commercial matter which has been pronounced in the court of a Contracting State may be recognized and enforced in the territory of another Contracting State… The [Choice of Court Convention].. reinforces access to justice and facilitates the free movement of judgments arising from [exclusive choice of court] contracts…It is suggested that India ratifies both Hague Conventions to promote predictability and access to justice…". [48] Both instruments clearly promote SDG 16.3. This also applies to the *2015 Hague Principles on Choice of Law in International Commercial Contracts*: India would benefit from incorporating these Principles in its laws. [49]

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[45] See also the reference to this Convention in the Preamble to the Second Protocol to the UNCRC on the Sale of Children, Child Prostitution and Child Pornography

[46] See para 53: "Our legislature ought to find a solution to such schizoid situations as the British Parliament has, to a large extent, done by passing the "Recognition of Divorces and Legal Separations Act, 1971". Perhaps, the International Hague Convention of 1970 which contains a comprehensive scheme for relieving the confusion caused by differing systems of conflict of laws may serve as a model." The Court might have mentioned that the UK Act is based on the 1970 Hague Convention, to which the UK is Party.

[47] S. Jolly and S. Khanderia (n 28), p 128.

[48] ibid 275, 278.

[49] ibid 217, 225-227.

Clean Water, Decent Work and Climate Change: Three Further Examples of the Relevance of Private International Law to the SDGs

SDG 6: Clean Water

As Richard Oppong explains, the activities of states and private companies may affect water resources and sanitation, resulting in SDG 6 related claims engaging private international law before arbitral tribunals and national courts[50]. The following cases illustrate his point.

In *Urbaser v. Argentina*[51], the arbitral tribunal ruled that a counterclaim filed by the host state Argentina, based on human rights violations by investor Urbaser may fall within the jurisdiction of the investment tribunal, and that state regulations providing access to water may take precedence over the rights of investors in investment arbitration.

Recent judgments in the English and Dutch courts have opened up jurisdictional avenues for claimants from the "Global South" to hold multinational corporations in the "Global North" accountable for human rights violations and environmental damage, including damage to water resources. Noteworthy in relation to SDG 6 is the case of *Four Nigerian Farmers against Royal Dutch Shell.* [52] The farmers' claim related to large-scale oil spillage caused by Shell's subsidiary in Nigeria which had made their farmlands and fishponds in the Nigerian delta unusable. The Hague Court of Appeal found that it had jurisdiction both regarding parent company Royal Dutch Shell (RDS), then headquartered in the Netherlands, and its subsidiary in Nigeria. The court based its jurisdiction regarding RDS on Article 4 of the Brussels I Regulation, which according to the case law of the European Court of Justice prohibits the application of the *forum non conveniens* doctrine. Regarding the Nigerian subsidiary the court applied the Dutch rules on jurisdiction which are aligned to Article 8 (1) of the Brussels I Regulation.

Regarding the substance of the claim, the court applied Nigerian common law, under which English precedent has persuasive authority. Here the Hague Court of Appeal referred to the recent judgments of the UK Supreme Court in *Vedanta v. Lungowe*[53] and *Okpabi v. Royal Dutch Shel*[54]*l*, which had found that under English common law a parent company owes a duty of care to victims of their subsidiary companies if it exercises a sufficient level of control over their activities.

Oppong comments that, although these arbitral and court rulings may vindicate the rights of local communities, the relief they provide is mainly limited to monetary compensation for damage. "Compared to the courts of a host country, a foreign court or an international arbitral tribunal is in a very weak position to compel policy or legislative changes in another country".[55] He contrasts this with the recent Kenyan case of *KM v. Attorney General.*[56] There, the environment and land court at Mombasa not only awarded damages, but also ordered measures to clean up the soil and water.

SDG 8 : Decent Work for All

SDG 8 calls for "decent work for all women and men, including for young people and persons with disabilities, and equal pay for work of equal value" (SDG 8.5.) , for "immediate and effective measures to eradicate forced labour, end modern slavery and human trafficking and secure the prohibition and elimination of the worst forms of child labour…." (SDG 8.7), and for the protection of "labour rights and promote safe and secure working

[50] Hans van Loon, Verónica Ruiz Abou-Nigm, and Ralf Michaels (n 4), SDG 6: Clear Water and Sanitation (Richard Frimpong Oppong).
[51] Case No. ARB/07/26, ICSID, *Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. The Argentine Republic* (6 December 2016).
[52] *ECLI:NL:GHDHA:2021:1825, Gerechtshof Den Haag, 200126804/01 200126834/01* [2021] Hof Den Haag ECLI:NL:GHDHA:2021:1825.
[53] [2019] UKSC 20.
[54] [2021] UKSC 3.
[55] Hans van Loon, Verónica Ruiz Abou-Nigm, and Ralf Michaels (n 4) p 215.
[56] Petition No 1 of 2016 (Environment and Land Court, Mombasa 2020): *KM v. Attorney General*, [2020] eKLR, ibid 212.

environments of all workers, including migrant workers, in particular women migrants, and those in precarious circumstances" (SDG 8.8).

These objectives are linked to the system of international labour standards with a focus on fundamental labour rights, developed by the International Labour Organisation (ILO) in many Conventions and Recommendations, and defined in its 1998 *Declaration on Fundamental Principles and Rights at Work*[57]. Private international law is needed to ensure that these rights can be assured in cross-border settings, thereby also providing access to justice (SDG 16).

To some extent, ILO instruments such as the *Labour Clauses (Public Contracts) Convention* No. 94 (not ratified by India) apply in cross-border situations and thus, interact with private international law. Also, transnational company agreements can concretise labour rights in such situations.

In the EU, specific private international law rules protect workers under individual employment contracts. They do so regarding jurisdiction of the courts and cross-border enforcement of the resulting judgment[58], as well as regarding the law applicable to the contract[59]. Moreover, EU Member States must ensure that, whatever the law applicable to the employment relationship, companies guarantee workers posted to their territory[60] the terms and conditions of employment covering, for example, maximum work periods and minimum rest periods, minimum rates of pay, safety, and equality of treatment between men and women. [61]

However, a globally unified system of private international rules on employment contracts, and labour relations generally, is very much needed. At the global level, the legal position of posted workers, in particular, is weak. As Ulla Liukkunen points out, "in addition to jurisdiction and choice of law, questions of enforcement of judgments and cross-border cooperation between authorities are of particular importance for enhancing access to labour rights in mobile work.".[62] She, therefore, proposes an initiative by the Hague Conference on Private International Law to draft uniform global private international law rules on employment contracts and labour relations[63].

SDG 13: Climate Action

Around the world, a growing volume of lawsuits deal with climate change. The majority of cases are brought against governments, with a trend showing that the number of plaintiff NGOs using litigation as a strategic tool to mitigate, adapt to, or compensate for losses from, climate change is increasing. Such lawsuits are also on the rise against private corporations.

An archetypical example of such climate lawsuits is the case of *Lliuya v. RWE*[64]. The claimant, Saúl Lliuya, was a Peruvian farmer and mountain guide in the Peruvian Andes. As the glacier behind his village was melting, causing a rise of the lake behind his village, he had to construct pipelines to avoid the risk of floods. Claiming that the melting of the glacier was the result of human caused global warming, he sued the German energy giant company RWE before the German courts, with the support of a German NGO. He argued that a half percent of global warming since the beginning of industrialisation could be ascribed to the Co2 emissions into the global atmosphere by RWE, and claimed by way of damages a half percent of the costs incurred to protect his village.

In light of the firm jurisdictional basis of Article 4 of the Brussels I Regulation, suing RWE in Germany, rather than in Peru, was not a difficult choice. Regarding the applicable law, both German private international law and

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[57] 'ILO Declaration on Fundamental Principles and Rights at Work (DECLARATION)' <https://www.ilo.org/declaration/lang--en/index.htm> accessed 18 November 2022.
[58] Brussels I Regulation (L351, 20 December 2012, p 1-32) art 20-22, ch III.
[59] Rome I Regulation (Regulation (EC) No 593/2000) art 8.
[60] i.e. employees sent by their employer to carry out a service in another State than where they normally work.
[61] Postings Directive 2020/1057
[62] Hans van Loon, Verónica Ruiz Abou-Nigm, and Ralf Michaels (n 4) SDG 8: Decent work and economic growth (Ulla Liukkunen) 245-281, p 279.
[63] ibid, p 281.
[64] 'The Climate Case: Saúl versus RWE | Germanwatch e.V.' <https://www.germanwatch.org/en/rwe> accessed 18 November 2022.

the EU Rome II Regulation allow victims of environmental damage to choose between the law of the place where the damage occurred and that of the place where the damage was caused. Lliuya elected German law, which therefore became decisive for issues relating to causality, height of damage claims, limitation periods, etc.

The Court of first instance, the District Court Essen in Germany dismissed the claim. In its view, there was no direct causal link between RWE's emissions and the damage claimed. The Court of Appeal, the Higher Regional Court Hamm however, admitted, in principle, the possibility that a company is exposed to liability for its part in causing climate change, and ordered an examination by experts of the factual question of whether or not there is a serious threat of impairment to the Lliuya's property. If this question is answered positively, the next evidence issue will be RWE's part of responsibility for such impairment. At this point, the case is still pending before the Court of Appeal

Conclusion

The UN 2030 Agenda for Sustainable Development is "a plan of action for people, planet and prosperity"[65] for the remaining years of this decade. As "an Agenda of unprecedented scope and significance"[66], it is the only all-encompassing roadmap for our times for our planet, to which the world leaders committed in 2015 and for the realisation of which they are accountable. But the Agenda also addresses private actors, companies, other entities and individuals. So, all actors, public and private, must play their part in the implementation of the SDGs.

While the SDGs refer to instruments and institutions in the field of *public* international law, references to the role of *private (international)* law in achieving the economic, social and environmental dimensions of the SDGs are lacking. This is a serious shortcoming which the book *The Private Side of Transforming our World*[67] seeks to expose and supplement. Building on this book, this Chapter, following an explanation of the governance strategy of the SDGs, has sought to disclose the hidden actual and potential role of private international law in achieving UN Agenda 2030. Indeed, the SDGs touch on legal issues regarding cross-border personal status and family relations, contracts and torts and civil and commercial litigation. International instruments, in particular the Hague Conventions on private international law, are available to resolve many of these issues. Many countries, and their citizens, could benefit from them to a much larger extent than they presently do. As this Chapter argues, India is a case in point. By joining the Hague Conventions mentioned, India could avoid a considerable amount of practical human problems, save efforts by courts and administrative authorities, and develop cooperation with other jurisdictions.

The Chapter concludes by giving three further examples of the (potential) relevance of private international law to the SDGs, relating to SDG 6: Clean Water, SDG 8: Decent Work and SDG 13: Climate Change. It may be stated, therefore, that private international law is an indispensable link for the realization of Agenda 2030 for our emerging global society.

CHAPTER VII: DOES THE UNITED NATIONS HAVE A FUTURE? IF SO, WHAT MAY THAT BE?

Malcolm N Shaw KC[68]

Abstract

This chapter sketches out briefly the evolution and nature of the UN and focuses on three specific areas, the law of outer space, cyber activities, and Covid-19, where although the UN has been active to a varying extent, the need for further action in law creation and enforcement is urgent. The move from a focus on a state-centred peaceful settlement to a more realistic functional approach in the work of the UN is noted and approved.

[65] UNGA Res A/RES/70/1 (n 6), p 1.
[66] UNGA Res A/RES/70/1 (n 6), Declaration adopted by the Heads of States, (n 6), p 3, para 5.
[67] Hans van Loon, Verónica Ruiz Abou-Nigm, and Ralf Michaels (n 4).
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Introduction

The UN was, and remains, an ambitious experiment. In many ways, the culmination of the process of increasing international institutional cooperation has gathered achievements but marked up failures. We should be alive to both and constantly reevaluate both. It is, thus, necessary to commence with some comments on the evolution of the modern nation-state and the consequent development of an international order founded upon a growing number of independent and sovereign territorial units but increasingly turning to international cooperation. The United Nations marks the meeting place of these two approaches, linked as they are in an uneasy relationship.

The first major instance of organised international cooperation occurred with the Peace of Westphalia in 1648, which ended the thirty-year religious conflict between Western and Central Europe and formally established the modern secular nation-state arrangement of European politics. Over a century later the Napoleonic wars concluded with the Congress of Vienna in 1815, marking the first systematic attempt to regulate international affairs using regular international conferences. The Congress system lasted, in various guises, for practically a century and institutionalised not only the balance of power approach to politics but also a semi-formal international order. The nineteenth century also witnessed a considerable growth in international non-governmental associations, such as the International Committee of the Red Cross (founded in 1863) and the International Law Association (founded in 1873). These private international unions demonstrated a wide-ranging community of interest on specific topics, and an awareness that cooperation had to be international to be effective. The work done by these organisations was, and remains, of considerable value in influencing governmental activities and stimulating world action. They mark, perhaps, the commencement of the functionally oriented process.[69]

The most important legacy of the 1919 Peace Treaties from the point of view of international relations was the creation of the League of Nations. The League consisted of an Assembly and an executive Council but was crippled from the start by the absence of the United States and Executive Union for most of its life and remained a basically European organization and executive et have certain minor successes with regarded, it failed when confronted with determined aggressors. Japan invaded China in 1931 and two years later withdrew from the League. Italy attacked Ethiopia, Germany embarked unhindered upon a series of internal and external aggressions. The Soviet Union, in a final gesture, was expelled from the organisation in 1939 following its invasion of Finland. Nevertheless, much useful groundwork was achieved by the League in its short existence, and this subsequently helped to consolidate the United Nations in later years.

The Establishment of the UN

The United Nations was established following the conclusion of the Second World War and in the light of Allied planning and intentions expressed during that conflict. The purposes of the UN as set out in article 1 of the Charter included the maintenance of international peace and security, the development of friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples and the achievement of international co-operation in solving international problems of an economic, social, cultural or humanitarian character, and in promoting and encouraging respect for human rights for all.

While these purposes are certainly wide-ranging, they are prioritized and legal obligations primarily focused upon the first purpose and the establishment of machinery to achieve this. While the emphasis on decolonisation, self-determination and apartheid mirrored the growth in UN membership and the dismantling of the colonial empires, the Charter originally saw these issues in terms of political aspirations rather than binding legal commitments.

We may thus identify some of the leading contemporary themes in international law. First, the changing focus from states exclusively to states plus various non-state bodies, ranging from individuals to groups and from bodies

[69] Note also the rise in public international unions as functional associations linking together government departments for specific purposes and established by treaty. Examples would include the international commissions established for the more efficient functioning of such vital arteries of communication as the Rhine and Danube rivers, the International Telegraphic Union set up in 1865 and the Universal Postal Union set up in 1874.

claiming statehood to various forms of multistate organizational activity and through to multinational corporations. Secondly, the move from a comprehensive resolution of different approaches to more restrained and focused functionalism in international endeavours. Thirdly, the challenge of modern technology for both good and evil. Fourthly, the concern with globalization, its advantages and its shortcomings.

The Move from State Exclusivity

The UN is an organisation composed of nation-states. Membership is restricted to states. Voting is by state. The purposes and principles of the UN are predicated upon the acceptance of the sovereignty and independence of states, buttressed by core rules as to non-intervention, domestic jurisdiction and the protection of the territorial integrity and political independence of states.[70]

However, the UN has over the decades become more receptive to the role that may be played in the international system by the variety of non-state actors that have arisen. First and foremost, individuals and groups. The UN Charter refers in Article 55 to respect for the principle of equal rights and self-determination of peoples and human rights, but this was in the context of peaceful and friendly relations among nations and was aspirational, not at all normative. In 1960, the UN General Assembly adopted the Colonial Declaration declaring that all peoples have the right to self-determination and that by virtue of that right, they freely determined their political status and freely pursue their economic, social and cultural development.[71] The International Court in the *Chagos Advisory Opinion* in 2019 held that this Declaration had a normative character about the right.[72] Other general and specific declarations and resolutions followed rapidly and together with the International Court's approach in cases such as *Namibia*,[73] *Western Sahara*,[74] *East Timor*,[75] *Construction of a Wall*,[76] *Kosovo*[77] and *Chagos*, it had become clear that self-determination was indeed a legal right of peoples. What it meant, however, was another matter that, however, is beyond this chapter.

Together with the establishment of this right, the UN has also focused on the human rights of individuals. The work of the expert Human Rights Committee under the International Covenant on Civil and Political Rights[78] and other expert committees under an increasing number of specialist treaties dealing with questions ranging from women to children to migrants to disabled persons and other matters have proved productive and constructive.[79]

The UN Human Rights Council which is composed of state representatives has had a more checkered experience. While dealing with conceptual issues, such as the disappeared or arbitrary executions or religious discrimination, it has produced valuable source material, albeit sometimes of variable quality.[80] However, in certain matters, the Council has opened itself up to charges of undue politicization and accusations of bias and its credibility has been challenged.[81] Regional conventions on human rights have played pivotal roles in the protection of human rights, well away from the UN, such as the European Convention on Human Rights, the Inter-American Convention on

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[70] See R. Higgins, P. Webb, D. Akande, S. Sivakumaran and J. Sloan, *Oppenheim's International Law United Nations* (vol 2, Oxford University Press 2017) and *The Charter of the United Nations* (eds. B. Simma, D.E. Khan, G. Nolte and A. Paulus, 3rd edn, Oxford University Press 2017).

[71] General Assembly resolution 1514 (XV).

[72] *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, Advisory Opinion,* (I.C.J. Reports 2019) 95.

[73] *Legal Consequences for States of the Continued Presence of South Africa in Namibia (Southwest Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion* (I.C.J. Reports 1971*)* 16.

[74] *Western Sahara, Advisory Opinion* (1.C.J. Reports 1975) 12.

[75] *East Timor (Portugal v. Australia), Judgment* (1.C.J. Reports 1995) 90.

[76] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion* (1.C.J. Reports 2004) 136

[77] *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion* (1.C.J. Reports 2010) 403.

[78] See e.g. P.M. Taylor, *A Commentary on the International Covenant on Civil and Political Rights* (Cambridge University Press 2020).

[79] See e.g. M. O'Flaherty, *Human Rights and the UN: Practice Before the Treaty Bodies* (2nd edn, Nijhoff 2002).

[80] See e.g. R. Freedman, *The United Nations Human Rights Council: A Critique and Early Assessment* (Routledge 2015).

[81] See e.g. 112 **(**American Journal of International Law 2018) 745.

Human Rights and the African Charter on Human and Peoples' Rights.[82] And one must also mention the importance of specialized agencies in such matters.

The move away from the exclusive focus on states has also been manifested concerning other bodies. Some entities claim statehood but have yet failed to obtain an international consensus about their claims for various reasons. Controversial examples abound, such as Taiwan, Palestine, Somaliland, Northern Cyprus, Transnistria, South Ossetia, and Abkhazia. These will not be discussed individually, but the point can be made that international law from time to time has sometimes to make some form of accommodation with them. The General Assembly, for example, granted observer status to the PLO and then in resolution 67/19 accepted Palestine as a "non-member observer state". What this means in fact or law is unclear either for the UN or for its members or other bodies or states. However, it has enabled Palestine to obtain membership in specialist bodies that have a more flexible approach to statehood in so far as their work and context are concerned.[83]

Indeed, the International Court itself, the parties to which can only be states, has on occasion felt the need to draw in non-state bodies. In the *Construction of a Wall* case in 2004, the Court was able to hear the representatives of Palestine (then very clearly not a state), while in the *Kosovo* case in 2010, the Court was able to hear the representatives of the "authors of the unilateral declaration of independence".[84] Both cases, it should be noted, were requests for advisory opinions and not contentious matters as such.

From a Comprehensive Resolution Model to Functionalism

A move from a comprehensive resolution model to more focused functionalism in international law can be identified, that is the evolution of the mechanisms of international society from the all-embracing focus on restraining the use of force by states and the peaceful settlement of disputes between states to concern with more specialized and conceptual issues such as health, economic development, trade and so forth.

The Security Council was intended to operate as an efficient executive organ of limited membership, functioning continuously. It was given primary responsibility for the maintenance of international peace and security. The Security Council consists of fifteen members, five of them being permanent members (USA, UK, Russia, China and France). These permanent members, chosen based on power politics in 1945, have the right to exercise a veto. The other ten members are elected for two-year terms by the General Assembly.[85] The Council, thus, is concreted into the 1945 geo-political situation. It no longer constitutes an accurate reflection of state power. The US, China and Russia remain great powers, but the UK and France are no longer in this category, other countries are rising in importance and need to be accommodated within a contemporary perception of power and influence.

Until the end of the Cold War, the Council generally did not fulfil the expectations held of it, although resolution 242 (1967) did lay down the basis for negotiations for a Middle East peace settlement and is still an authoritative expression of some of the key principles to be taken into account. With the development of the *glasnost* and *perestroika* policies in the Soviet Union in the late 1980s, increasing co-operation with the US ensued and reached its highest point as the Kuwait crisis evolved. After the terrorist attacks on the United States on 11 September 2001, further activities ensued, including the adoption of resolutions 1368 and 1373 of 2001 condemning international terrorism, reaffirming the right of self-defence, and establishing a Counter-Terrorism Committee.[86] However, the failure of the Council to agree upon measures consequent to resolution 1441 (2002) concerning Iraq's possession of weapons of mass destruction contrary to earlier resolutions precipitated a major division within the Council. The United States and the United Kingdom commenced military operations against Iraq in

[82] See e.g. Shaw, *International Law,* p 292 and following.
[83] See e.g. J. Crawford, *Creation of States* (2nd edn, Oxford University Press 2006) 442 and following; J. Quigley, *The Statehood of Palestine* (Cambridge University Press 2010); R. Barnidge, *Self-determination, Statehood and the Law of Negotiation: The Case of Palestine* (Oxford University Press 2016); and J. Vidmar, 'Palestine and the Conceptual Problem of Implicit Statehood', 12 (Chinese Journal of International Law, 2013) 19.
[84] See fn 10 and 11.
[85] See Higgins, *op. cit.*, ch 3.
[86] 'Security Council - Counter-Terrorism Committee (CTC) | Counter-Terrorism Committee Executive Directorate (CTED)' (*Un.org*) <https://www.un.org/securitycouncil/ctc/> accessed 17 August 2022.

late March 2003 without express Security Council authorization and against the opposition of other permanent members.[87]

Despite this crisis, the Council began to assume a more proactive role in certain areas. The effect of resolutions 1373 (2001) and 1540 (2004) with the establishment of monitoring committees with significant authority, together with the increasing use of sanctions against specific states, led some to talk of a form of legislative activity. Nevertheless, recent years have seen a return to the rivalry of the leading powers. The US, China and Russia are conducting increasingly hostile moves with recognized while rising concern with global issues and non-state entities constitute a further level of complication.

This sketches out the original intentions concerning the UN: essentially focused upon the maintenance of international peace and security while asserting a wide range of general principles ranging from self-determination and human rights to international development. The Security Council was to constitute the executive arm, seeking binding decisions to sustain international peace. As is known, many of these general principles became concretised over time. The vague words as to self-determination and human rights were firmed up and rendered legally obligatory by a combination of UN resolutions, declarations, international agreements and general state practice.

Has the UN been a success in these terms? To some extent but only to some extent. Major international conflicts were often not resolved by the Security Council and in many cases, the Council was simply bypassed. The Middle East conflict was not resolved or even mitigated by the UN. The Indo-Pakistani hostilities were not eased; the Vietnam war was barely addressed; the Russian invasion of Afghanistan proceeded as did the US-UK intervention in Iraq in 2003. The Iran-Iraq war carried on for some 8 years with casualties in the millions. The long Afghan war appears perhaps to be over at last. The rising tension in the East and South China Seas continues to mount, while the current crisis concerning the Russian invasion of Ukraine is a sad example of this absence of capacity to deal with egregious problems involving major powers.[88] In these and other situations, the UN role has been at best peripheral. So, in this key primary function of the UN, does it have a future?

The answer can be no more than maybe. It depends. It depends upon the configuration of the leading world powers, particularly the US, China, Russia, the EU, Japan and India, and how they wish to pursue their interests. The UN is a rules-based international system which requires states to accept that there are some constraints on how they seek to attain their goals. Current indications are not particularly encouraging. Several states appear no longer to believe in a rules-based international order.

It is indeed ironic to note that the only signs of hope in the Middle East with the signing of agreements between Israel and several Arab states have had absolutely nothing to do with the UN.[89]
But this is not the whole story. The UN has a role, even if a truncated one in a more avowedly operative context. For example, it has produced and developed the concept of peacekeeping forces which do have an important role in mitigating the pressures to return to hostilities and may bridge that gap between fighting and resolution even if only in part.[90] Flexibility and regional cooperation do point a way forward, but it is hesitant, and controversial and success is far from assured.

The UN is on stronger grounds with regard to carefully circumscribed activities of a more specific functional and less overtly political nature. The Specialised Agencies on the whole have been a success and although

[87] See e.g. Shaw, *International Law, op.cit.,* p 1101 and following.
[88] See e.g. 'Security Council Holds Emergency Meeting On Ukraine: Major Conflict Must Be 'Prevented At All Costs'' (UN News 2022) <https://news.un.org/en/story/2022/02/1112412> accessed 17 August 2022.
[89] See 'The Abraham Accords - United States Department Of State' (*United States Department of State*) <https://www.state.gov/the-abraham-accords/> and Blinken A, 'At The One Year Anniversary Of The Abraham Accords: Normalization Agreements In Action - United States Department Of State' (United States Department of State, 2021) <https://www.state.gov/at-the-one-year-anniversary-of-the-abraham-accords-normalization-agreements-in-action/> and Vakil S, 'The Abraham Accords One Year On: A Missed Opportunity For Biden?' (Chatham House – International Affairs Think Tank, 2021) <https://www.chathamhouse.org/2021/09/abraham-accords-one-year-missed-opportunity-biden>.
[90] See e.g. Higgins, *op.cit.,* ch 27 and *Oxford Handbook of United Nations Peacekeeping Operations* (ed. J. Koops and N. MacQueen, Oxford University Press 2015).

politicization has raised its disruptive head from time to time, in the main the work of these organisations proceeds apace.[91]

Some examples may be taken here.

Outer Space

Four events in late 2021 emphasised the growing importance of the law governing outer space. First, on 22 September 2021, it was reported that the International Space Station was obliged to conduct a 150-second reboot to avoid possible conjunction with an unknown piece of space debris. Because of the late notification of the possible conjunction, the three Expedition 63 crew members had to move to the Russian segment of the station to be closer to their Soyuz MS-16 spacecraft as part of the haven procedure. The manoeuvre raised the station's orbit out of the predicted path of the debris, which was estimated to come within 1.39 kilometres of the station. The space station has had to conduct 26 debris avoidance manoeuvres since 1999.[92]

More seriously in mid-November that year, it was reported that a Russian missile had destroyed a Russian satellite creating debris that forced the ISS astronauts to take cover in their capsules again. It seems that over 1, 500 pieces of trackable debris were produced plus hundreds of thousands of much smaller pieces.[93] This produced diplomatic protests. Third, it was announced that Amazon had applied to launch a further 4, 538 satellites into low earth orbit, in addition to the 3, 236 satellite launches already approved by the UN Federal Communications Commission. This project is intended to provide competing broadband service to Elon Musk's SpaceX, which has launched more than 1, 700 satellites and has permission for a further 7, 500.[94]

At the other end of the scale, fourthly, during the same month, NASA launched its Dart mission which is intended to test the ability to neutralize a sizeable space rock headed for Earth. The spacecraft will attempt to crash into an object called Dimorphos to see how much its speed and path can be altered. It is the first attempt to deflect an asteroid to learn how to protect Earth, though this particular asteroid presents no threat.[95]

The initial structure of outer space law was laid down in several General Assembly resolutions following the advent of the satellite era in the late 1950s. General Assembly resolution 1962 (XVII), for instance, adopted in 1963 and entitled the Declaration of Legal Principles Governing the Activities of States in the Exploration and Use of Outer Space, laid down a series of applicable legal principles including the provisions that outer space and celestial bodies were free for exploration and use by all states on a basis of equality and under international law, and that outer space and celestial bodies were not subject to national appropriation by any means.[96]

This did not suffice and in 1967 the Outer Space Treaty was adopted. This reiterates that outer space, including the moon and other celestial bodies, is not subject to national appropriation by any means (article II) and emphasises that the exploration and use of outer space must be carried out for the benefit, and in the interests, of all countries (Article I). Article IV of the Outer Space Treaty provides that states parties to the Treaty agree:
not to place in orbit around the earth any objects carrying nuclear weapons or any other kinds of weapons of mass destruction, install such weapons on celestial bodies, or station such weapons in outer space in any other manner.

There are, however, disagreements as to the meaning of this provision. The article bans only nuclear weapons and weapons of mass destruction from outer space, the celestial bodies and from orbit around the earth, but the

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[91] See e.g. Higgins, *op.cit.,* ch 7.
[92] 'Station Boosts Orbit To Avoid Space Debris – Space Station' (Blogs.nasa.gov, 2020) <https://blogs.nasa.gov/spacestation/2020/09/22/station-boosts-orbit-to-avoid-space-debris/>.
[93] 'Russian Anti-Satellite Missile Test Draws Condemnation' (BBC News, 2021) <https://www.bbc.com/news/science-environment-59299101>.
[94] *The Times* (9 November 2021) 6.
[95] Rincon P, 'Nasa Dart Asteroid Spacecraft: Mission To Smash Into Dimorphos Space Rock Launches' (BBC News, 2021) <https://www.bbc.com/news/science-environment-59327293> accessed 17 August 2022.
[96] See generally *Handbook of Space Law* (ed. F. von der Dunk with F. Tronchetti, Elgar 2015) and S. Hobe, *Space Law: A Handbook* (Oxford University Press 2019). See also the UN Office for Outer Space Affairs and United Nations, *International Space Law: United Nations Instruments* (UN 2017).

article I does emphasise that the exploration and use of outer space 'shall be carried out for the benefit and in the interests of all countries' and some have argued that this can be interpreted to mean that any military activity in space contravenes the Treaty.[97]

The Moon Treaty 1979 provides for the demilitarisation of the moon and other celestial bodies and establishes the principle in article 3 that the exploration and the use of the moon shall be the province of all mankind and should be carried out for the benefit of all. Article 11 emphasises that the moon and its natural resources are the common heritage of mankind and are not subject to national appropriation by any means. That important article emphasises that no private rights of ownership over the moon or any part of it or its natural resources in place may be created, although all state parties have the right to exploration and use of the moon. The state parties also agreed under articles 11(5) and (7) to establish an international regime to govern the exploitation of the resources of the moon, when this becomes feasible.

However, the Moon Treaty currently has only 18 parties and these do not include the US, UK, Russia, China, India, Japan or France. Accordingly, its value is to that extent diminished. It is difficult to see that this treaty can be taken as reflecting customary international law given the attitude adopted by the leading space powers. This has led to uncertainties in the relevant law at a time when the technology to explore and exploit has accelerated. In addition, the Declaration on International Co-operation in the Exploration and Use of Outer Space adopted in resolution 51/126, 1996, called for further international co-operation, with particular attention being given to the benefit for and the interests of developing countries and countries with incipient space programmes stemming from such international co-operation conducted with countries with more advanced space capabilities. Such resolutions constituted in many cases and, dependent on the circumstances, expressions of state practice and *opinio juris* and thus part of customary law.

Further, concern also currently revolves around the increasing number of satellites orbiting the earth, with functions including navigational and observational missions, and the evolution of small satellites in low orbits,[98] while the development of anti-satellite weapons by the major powers is a major source of destabilisation. The US, Russia, China and India are all believed to have tested anti-satellite missiles,[99] while in July 2020, Russia was alleged to have launched an anti-satellite missile from a satellite already in space.[100] Specific legal regulation is lagging, although attacking the satellite of another state may well constitute an armed attack in the context of the law governing the use of force, and more generally, activities in outer space are governed by the rules of international law, including the UN Charter and international humanitarian law.[101]

An issue of special concern relates to plans for the increasing commercialisation of activities, including the mining of natural resources, on the moon and in outer space, which does not appear to be consistent with the Moon Treaty or with the concept of the Global Commons. One may mention here the US Commercial Space Launch Competitiveness Act, 2015 and the US Presidential Executive Order on Encouraging International Support for the Recovery and Use of Space Resources, 6 April 2020, the Luxemburg Loi sur l'exploration et l'utilisation des resources de l'espace, N° 674 du 28 Juillet 2017 and the UAE Federal Law No. 12 of 2019 on the Regulation of the Space Sector. At the least, there is confusion as to the legal position, as the continuing debates in the Legal Subcommittee of the UN Committee on the Peaceful Uses of Outer Space demonstrate.[102]

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[97] See e.g. C.Q. Christol, *The Modern International Law of Outer Space* (Pergamon Press 1982), pp 25–6. See also Goedhuis, 'Legal Issues Involved in the Potential Military Uses of Space Stations', in *Liber Amicorum for Rt Hon. Richard Wilberforce* (ed. M. Bos and I. Brownlie, Oxford University Press 1987) 23.

[98] See e.g. <https://www.ucsusa.org/resources/satellite-database>, giving a number of 2,666 satellites, of which half are from the US and the others from a wide range of countries and international organisations, see <https://www.n2yo.com/satellites/?c=&t=country>.

[99] See e.g. <https://www.thespacereview.com/article/3927/1>; <https://www.space.com/russia-anti-satellite-missile-test-2020.html>; <https://swfound.org/media/9550/chinese_asat_fact_sheet_updated_2012.pdf> and <https://carnegieendowment.org/2019/04/15/india-s-asat-test-incomplete-success-pub-78884> respectively.

[100] <https://spaceflightnow.com/2020/07/23/u-s-officials-say-russia-tested-a-new-anti-satellite-weapon/>

[101] See e.g. US Department of Defense, *Law of War Manual* (Department of Defense 2016), para. 14.10.2.2 and *Oslo Manual on Select Topics of the Law of Armed Conflict* (ed. Y. Dinstein and A. W. Dahl, Springer 2020) 3 (Rule 3).

[102] Note the 'Artemis Accords', 'NASA: Artemis Accords' (*NASA*) <https://www.nasa.gov/specials/artemis-accords/index.html> accessed 17 August 2022 regarding the exploitation and use of space resources. The European Space Agency is also formulating plans, reportedly, for the mining of natural resources on the moon, Lauren Kent C, 'The European Space Agency Plans To Start Mining For

As noted above, the increasing problem of space debris poses a growing danger to all space vehicles, including the International Space Station and other spacecraft with humans aboard, such as SpaceX's Crew Dragon. NASA has a set of guidelines on how to deal with each potential collision threat to the space station. These guidelines, part of a larger body of decision-making aids known as flight rules, specify when the expected proximity of a piece of debris increases the probability of a collision enough that evasive action or other precautions to ensure the safety of the crew are needed.[103]

Further, there is the question of the legal regulation of non-state private activities such as space tourism and the use of private corporations in the process of accessing and exploiting outer space. For example, NASA has opened the International Space Station to commercial opportunities and private astronauts,[104] while private corporations are now conducting an increasing number of launches into space, including high-profile visits involving leading entrepreneurs.[105] The range of private or public-private space activities is rapidly expanding. Such activities require consideration of the integration of international and national space law, as well as clarification and development of the former.

The UN Secretary-General produced a Report in July 2021 on "Reducing space threats through norms, rules and principles of responsible behaviours", summarising submissions from a variety of States plus the EU.[106] The Report concluded that:

> "The normative and legal framework governing outer space is not sufficiently developed to prevent these trends [of strategic competition], including any arms race, or to protect against their undesirable consequences. Possible solutions to outer space security can involve a combination of binding and voluntary norms, rules, and principles. Work in both of these areas should be further pursued. It is encouraging that the Member States reaffirm that voluntary norms, rules, and principles, including non-binding transparency and confidence-building measures, can form the basis for legal measures. It is hoped that work in each of these areas can continue to be pursued in a progressive, sustained, and complementary manner."

It is clear that there is much to be done here and while the UN is engaged, such engagement does need to move into the space age.

Cyber Activities

The extraordinarily speedy development of the internet and consequential activities in what is becoming known as the 'cybersphere' is beginning to pose particular challenges, as well as opportunities, within the context of international law.[107] Cyber techniques have evolved and continue to progress with unprecedented rapidity and in a global context with participants (and victims) ranging from states to international organisations, individuals, corporations, and other non-state actors. The issue of information security has been on the UN agenda since 1998 and in 2002 the UN General Assembly created a Group of Governmental Experts. This has had limited success, although there was agreement that international law, particularly the UN Charter, and the principles of

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Natural Resources On The Moon' (*CNN* 2019) <https://edition.cnn.com/2019/01/22/europe/mining-on-moon-trnd/index.html> accessed 17 August 2022. As are other countries, see e.g. K. Vazhapully, 'Space Law at the Crossroads: Contextualizing the Artemis Accords and the Space Resources Executive Order, *OpinioJuris (*22 July 2020). See also the Vancouver Recommendations on Space Mining, produced by the Outer Space Institute (20 April 2020) <http://Www.Outerspaceinstitute.Ca/Docs/Vancouver_Recommendations_On_Space_Mining.Pdf> (*Outerspaceinstitute.ca* 2020) <http://www.outerspaceinstitute.ca/docs/Vancouver_Recommendations_on_Space_Mining.pdf> accessed 17 August 2022.

[103] See e.g. 'Space Debris' (*NASA*) <https://www.nasa.gov/centers/hq/library/find/bibliographies/space_debris> accessed 17 August 2022 and 'ARES | Orbital Debris Program Office | Debris Mitigation' (*Orbitaldebris.jsc.nasa.gov*) <https://orbitaldebris.jsc.nasa.gov/mitigation/> accessed 17 August 2022.

[104] See 'NASA Opens International Space Station To New Commercial Opportunities' (*NASA*, 2019) <https://www.nasa.gov/press-release/nasa-opens-international-space-station-to-new-commercial-opportunities-private> accessed 17 August 2022.

[105] See e.g. Amos J, 'Spacex Launch: Nasa Astronauts Begin Historic Mission On Private Spaceship' (*BBC News*, 2020) <https://www.bbc.com/news/science-environment-52855029> accessed 17 August 2022.

[106] A/76/77.

[107] See generally K. Kittichaisaree, *Public International Law of Cyberspace* (Springer 2017); F. Delerue, *Cyber Operations and International Law* (Cambridge University Press 2020); International Group of Experts, *Tallinn Manual 2.0 on the International Law Applicable to Cyber Operations* (2nd edn, Cambridge University Press 2017); and J. Jolley, *Attribution, State Responsibility and the Duty to Prevent Malicious Cyber-Attacks in International Law*, 2017 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3056832>.

sovereignty and non-intervention apply to cyberspace. In 2018, the UN established two processes to consider relevant issues: an Open-ended Working Group and a Group of Governmental Experts on Advancing Responsible State behaviour in cyberspace in the context of international security.

The essential factor about cyber activities is that they invariably cross frontiers and are difficult to identify. The core principle remains that of state sovereignty, that is that states retain their sovereignty over any cyber infrastructure located on their territory and associated activities while being able to exercise control and jurisdiction over the same. Similarly, a state remains internationally responsible for any unlawful act involved, provided attribution can be demonstrated. The paradox is that while cyber activities may range over multiple countries, they commence from one state that has the competence to exercise jurisdiction and thus in principle the legal problems faced concerning the high seas or outer space do not apply.

Applying the traditional rules of international law, therefore, a state which conducts cyber activities violating the sovereignty of another state or otherwise infringing the norm of non-intervention would be responsible for any internationally wrongful acts. Further, a state is under an obligation not to allow its territory or the cyberinfrastructure it controls to be used for operations that affect the rights of other states and it must thus exercise due diligence in this respect. The basic rules of international responsibility remain the same. However, there remain many difficult problems, including proof. By its very nature, cyber activities range widely and occur instantaneously, and it may be extremely difficult to prove whence they came. In many cases, the state in question wishes to conceal its activities and in the absence of admission, it may be very difficult to proceed in terms of responsibility. Other difficulties relate to the definition of wrongful acts and enforcement.

There are indeed an increasing number of examples of damage caused to states by cyber activities in circumstances where no other state accepts responsibility. Such examples would include the attack by the Stuxnet virus on Iranian nuclear facilities discovered in 2010 and allegedly introduced by Israel and the US, Russian cyber-attacks on Estonia, Georgia and Ukraine, and the claimed Iranian attack on the water system of Israel in 2020 and the response against port facilities in Iran. In all these cases, no express admission of responsibility was made and thus attribution was difficult to prove. A relatively recent development has been the establishment by several states of cyber offensive as well as defensive capabilities and agencies. Three areas, in particular, have been the focus of very recent concern: the use of force and the conduct of hostilities; activities disruptive of domestic elections and constitutional processes; and actions that have arisen as a consequence of the COVID-19 pandemic that began at the end of 2019 and became a global threat in 2020. It has become a priority to establish a clear legal framework and relevant rules, and enforcement methods.

Bodies outside of the UN have become very active in this area. The International Committee of the Red Cross has, for example, proposed a rule requiring that states should not conduct or knowingly support cyber activity that would harm medical services or medical facilities, and should take measures to protect medical services from harm.[108] There have also been important private initiatives, such as the unofficial but authoritative Tallinn Manual and the Oxford Statement on the International Law Protections against Cyber Operations Targeting the Health Care Sector, of May 2020.[109]

Important legal issues, however, remain to be resolved. First, the extent of harm or damage necessary to generate responsibility. Second, the extent of responsibility where the harm or damage is caused by the activities of a non-state actor on the territory of the state in question without the knowledge of that state and the question as to whether responsibility is absolute or fault based. Third, to what extent is responsibility depending on the precise form or degree of harm caused? Fourthly, in such circumstances how flexibly may, the concept of attribution be defined?

[108] See 'Norms For Responsible State Behavior On Cyber Operations Should Build On International Law' (*INTERNATIONAL COMMITTEE OF THE RED CROSS*, 2020) <https://www.icrc.org/en/document/norms-responsible-state-behavior-cyber-operations-should-build-international-law> accessed 17 August 2022.
[109] (EJIL:Talk! 21 May 2020).

In this area, one has the impression that the UN is lagging in the process of developing the law. It was not until June 2021, for example, that the Security Council debated the question of maintaining international peace and security in cyberspace.

The COVID-19 Crisis

Finally, a few words about the Covid crisis engulfing the world and from which no individual, no group, and no state have been immune.

Issues concerning state sovereignty, international cooperation, individual privacy, and economic considerations have abounded given the extraordinary measures that have been needed to be taken to deal with the disease, ranging from various forms of quarantine or lockdown to regulating social distancing and the wearing of masks and to the various surveillance measures taken to control movement and thus the spread of the disease.

The large-scale shutdown of industries and shops have taken together with the closing of schools and places of worship have underlined the unprecedented interference with rights in the circumstances. Faced with the global crisis, the various human rights bodies have issued guidance led by the UN Human Rights Committee, which declared in April 2020 that states parties confronting the threat of widespread contagion may, temporarily, resort to exceptional emergency powers and invoke their right of derogation from the Covenant, subject to certain conditions such as strict necessity and proportionality of any derogating measure taken; the conformity of measures taken with other international obligations; and the prohibition on derogating from certain non-derogable rights.[110] The other human rights bodies issued similar statements.[111]

More generally, the crisis focused on the right to health in international law and the role of the World Health Organisation (WHO).[112] The recognition of a right to health may be traced to the preamble of the Constitution of the WHO, 1946 and article 25(1) of the Universal Declaration on Human Rights, 1948. Article 12(1) of the International Covenant on Economic, Social and Cultural Rights, 1966, recognized the right of everyone to the enjoyment of the highest attainable standard of physical and mental health. This is reviewed by the Committee established under the Covenant. In General Comment No. 14, the Committee analysed article 12 in detail, noting that it included entitlements to a system of health protection which provides equality of opportunity for people to enjoy the highest attainable level of health, taking into account both the individual's biological and socio-economic preconditions and a state's available resources. The Committee noted that the right to health was an inclusive one and extended to the underlying determinants of health, such as access to safe and potable water and adequate sanitation, an adequate supply of safe food, nutrition and housing, healthy occupational and environmental conditions, and access to health-related education and information. Several relevant principles were noted, including availability, accessibility, acceptability, and quality.[113]

Article 12(2) of the Covenant continues by providing that the steps to be taken by the states parties to achieve the full realization of this right shall include those necessary for *inter alia* '(c) The prevention, treatment and control of epidemic, endemic, occupational and other diseases; and (d) The creation of conditions which would assure to all medical service and medical attention in the event of sickness'. Several other general conventions refer to the right to health either generally or concerning specific groups, as do several regional conventions. A Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health was appointed in 2002 and their mandate has been extended and expanded subsequently.[114]

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[110] CCPR/C/128/2.

[111] For example the Economic, Social and Cultural Rights Committee, E/C.12/2020/1 on 17 April 2020, and the statements of the Committee on the Elimination of Discrimination against Women, the Committee on the Rights of the Child and the Committee on the Rights of Persons with Disabilities, <https://www.ohchr.org/EN/HRBodies/Pages/COVID-19-and-TreatyBodies.aspx> See also the wide-ranging guidance provided by the Office of the UN High Commissioner for Human Rights, <https://www.ohchr.org/EN/NewsEvents/Pages/COVID19Guidance.aspx>.

[112] See e.g. J. Tobin, *The Right to Health in International Law* (Oxford University Press 2011) and *Human Rights in Global Health* (ed. B. M. Meier and L. O. Gostin, Oxford University Press 2018).

[113] E/C.12/2000/4, adopted on 11 August 2000.

[114] See Commission of Human Rights resolution 2002/31 and Human Rights Council resolutions 6/29 of 14 December 2007; 15/22 of 6 October 2010, 24/6 of 8 October 2013, and 33/9 of 6 October 2016.

The Assembly of the WHO adopted binding International Health Regulations in 2005 (revising those adopted in 1969) and subsequently amended them in 2014. The purpose of the Regulations is: 'to prevent, protect against, control and provide a public health response to the international spread of disease". The Regulations are not limited to any specific disease and provide for certain minimum core public health capacities; oblige states parties to notify the WHO of events that may constitute a public health emergency of international concern, and establish procedures for the determination by the Director-General of such emergency and the issuance of temporary recommendations. Many criticisms, however, have been made of the WHO's response to the COVID-19 crisis, including that of excessive politicization, particularly at the beginning of the crisis. [115]

The need for international cooperation to deal with the crisis has been glaringly apparent as has been the focus of each state on its own needs, particularly concerning the acquisition, distribution and use of the vaccines that have become available. The phenomenon known now as vaccine nationalism has appeared as has the increasing gap between those states able to afford to purchase the large numbers of vaccines required and those that are not. The UN through its various human rights organs has pointed out the relevant principles while the WHO has to some extent been successful, but the gaps have become apparent and the needs stark.

Conclusion

International organisations have now become indispensable. In a globalised world, they facilitate cooperation across state frontiers, allowing for the identification, discussion and resolution of difficulties in a wide range of subjects, from peacekeeping and peace enforcement to environmental, economic and human rights concerns. This dimension of the international legal system permits the relatively rapid creation of new rules, new patterns of conduct and new compliance mechanisms. Indeed, if there is one paramount characteristic of modern international law, it is the development and reach of international institutions, whether universal or global, regional or subregional. However, international law is still founded ultimately and essentially upon the sovereign state.

So, does the UN have a future? Concerning its primary function, the maintenance of international peace and security, it has not proved a great success. It is saddled with its political context and composition. It needs to find a way to build confidence in its endeavours and to work around the inherent and growing political pressures and demands.

Concerning its other more specific functions, although politicization is ever-present, it is possible to feel a little more optimistic. The three examples chosen in this brief lecture and others such as the challenge of climate change show that the UN has a role in professionalizing the context and dealing with targeted issues in a targeted manner. But its conduct has been variable and sometimes tardy.

The future of the UN, in short, lies in maximizing its great potential in specific functional areas, both in encouraging states and other actors of the need to act and in organizing and concertizing that action. A more conscious re-orientation of its work towards practical functionalism in discrete areas of overwhelming human concern is required as a matter of urgency, coupled with mechanisms for dealing with such issues in a timely and efficient manner. This may ensure the future of the UN.

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[115] See e.g. 'Coronavirus: What Are President Trump's Charges Against The WHO?' (*BBC News*, 2020) <https://www.bbc.com/news/world-us-canada-52294623> accessed 17 August 2022 and 'Listings Of WHO's Response To COVID-19' (*Who.int*, 2021) <https://www.who.int/news-room/detail/29-06-2020-covidtimeline> accessed 17 August 2022. See also E. Benvenisti, 'The WHO-Destined to Fail? Political Cooperation and COVID-19 Pandemic', University of Cambridge Legal Studies Paper Series, No. 24/2020; and S. Besson,'COVID-19 and the WHO's Political Moment' (EJIL:Talk! 25 June 2020).

CHAPTER VIII: THE ROLE OF THE UN IN THE CODIFICATION AND PROGRESSIVE DEVELOPMENT OF INTERNATIONAL LAW

Attila M. Tanzi[1]

Introduction

Today, it is unanimously considered as a matter of course that, despite the UN not being conceived as a 'legislative body,'[2] they are – and have been all along – the leading agent for the codification and progressive development of international law.[3]

At the bare minimum, following the relatively short and unsuccessful interlude of the League of Nations,[4] the UN has represented the political and legal forum where the Member States engage in multilateral diplomatic practice and *opinio juris* originates, intersects, clashes or combines with one another to create, modify, uphold or repeal international obligations.[5] This contextual role for the UN has been vividly emphasised, more than thirty years ago, by George Abi-Saab with respect to the formation of customary international law (CIL).[6] He saw the UN as a catalyst for a centralised form of codification and the orderly and 'conscious' development of CIL,[7] stressing how:

> 'l'universalisation de la communauté internationale, plutôt que d'accroître à son image l'hétérogénéité du processus coutumier, a conduit paradoxalement à sa centralisation et à sa concentration dans le cadre du système des Nations Unies.'[8]

In the context of development and growth lasting long after the post-war reconstruction period, the East-West and North-South tensions prevailing then had indeed not prevented, but rather prompted, this process of centralisation of international law-making in search for newly shared legal parameters that would govern international relations in a divided world.[9] Times have changed, and are still fast-changing in terms of challenging the primacy of multilateral diplomacy. Against this background, it seems appropriate to take stock of the evolution of the forms and shapes of international law making through and by the UN over more than 75 years of life, also with a view to appreciate the prospects of the way forward.

As the point of departure, reference is to be made to the provisions of the UN Charter which expressly lay down the role of the UN in the codification and progressive development of international law.[10] Art 13(1) provides that:

> 'The General Assembly shall initiate studies and make recommendations for the purpose of:

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[2] See for all, Oscar Schachter, 'United Nations Law' [1994] 88 AJIL 1.

[3] See Rosalyn Higgins, *The Development of International Law Through the Political Organs of the United Nations* (OUP 1963) re-edited as 'The Development of International Law by the Political Organs of the United Nations' in Rosalyn Higgins (ed), *Themes and Theories* (OUP 2009) 153. See also Carl-August Fleischhauer and Bruno Simma, 'Article 13' in Bruno Simma and others (eds), *The Charter of the United Nations: A Commentary* (vol I, 3rd edn, OUP 2012), 527ff.

[4] On the contribution of the League of Nations to the codification and development of international law, see Shabtai Rosenne, 'Codification Revisited after 50 Years' [1998] 2 Max Planck YB United Nations L 1, 2-3.

[5] See Higgins (n 3) 153ff.

[6] Georges Abi-Saab, 'Course générale de droit international public' (1987) 207 Recueil des Cours 15, 173ff.

[7] ibid 177.

[8] ibid 177-178. See also René-Jean Dupuy, 'Coutume sage et coutume sauvage' in Charles Rousseau (ed), *La communauté international: Mélanges offerts à Charles Rousseau* (Pedone 1974) 84ff.

[9] The point was well captured by Antonio Cassese since the first edition of his seminal textbook *International Law in a Divided World* (Clarendon Press 1986).

[10] Charter of the United Nations (adopted 26 June 1945, entered into force 24 October 1945) 1 UNTS XVI (UN Charter).

a) promoting international co-operation in the political field and encouraging the progressive development of international law and its codification;
b) promoting international co-operation in the economic, social, cultural, educational, and health fields, and assisting in the realisation of human rights and fundamental freedoms (…).'

Attention is usually exclusively paid to para 1(a), and the International Law Commission (ILC) together with the outcome of its work.[11] However, it would be wrong to assume that this covers the role of the UN exhaustively in promoting the codification and development of international law on the whole spectrum of areas referred to under para 1(b). Indeed, para 2 adds that 'the further responsibilities, functions and powers of the GA with respect to matters mentioned in para 1(b) above are set forth in Chapters IX and X.' As to Ch IX, it may be recalled that Art 55 provides that:

'[T]he United Nations shall promote:
a) higher standards of living, (…) economic and social progress and development;
b) solutions of international economic, social, health, and related problems (…); and
c) universal respect for, and observance of, human rights and fundamental freedoms (...)'

The main takeaway from the combination of these two provisions is that, next to the General Assembly (GA), all the other principal organs of the UN – more or less directly – partake in the codification and progressive development of international law. By way of anticipation, one is to recall the Secretary-General (SG), with his authoritative reports on the widest range of areas, from the maintenance of peace and security to sustainable development; the Economic and Social Council (ECOSOC), especially through its resolutions in the field of human rights; the Security Council (SC), eg in the development international criminal law with the adoption of the Statutes of international ad hoc tribunals established under Ch VII resolutions; and the International Court of Justice (ICJ), primarily, but not exclusively, through its *obiter dicta* in contentious cases and advisory opinions.[12]

Further to this introductory section, the present contribution is organised in four parts. First, it will provide an overview of the contribution of the UN principal organs to the codification and progressive development of international law. This part will be divided into two legs: the first one will consider the contribution of the GA and, to a minor extent, of the ECOSOC, while the second one will briefly address the contribution of the SC.

Secondly, the analysis will focus on the ILC and the forms of codification stemming from its work. Here the blurred nature of the dividing line between 'codification' and 'progressive development,' as enshrined in the ILC Statute, will be emphasised.

Thirdly, the contribution will refer to the role of the ICJ and other UN-related international adjudicative bodies, with special regard to the International Tribunal for the Law of the Sea (ITLOS), the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Court (ICC) in the elucidation and development of CIL.

Finally, a few general considerations will be made pulling the strings of the analysis of the existing practice on the role of the UN in the field, also with a view to considering the prospects for the way forward at a time of enhanced instability and a major concern for the common interests of Nation-States and peoples in the International Society.

The Contribution of UN Principal Organs to the Codification and Development of International Law

[11] See, *inter alia*, The United Nations (ed), *Seventy Years of the International Law Commission: Drawing a Balance for the Future* (Brill 2021). And see Alan Boyle and Christine Chinkin, *The Making of International Law* (OUP 2007), 171ff and Thomas M Franck and Mohamed Elbaradei, 'The Codification and Progressive Development of International Law: A Unitary Study of the Role and the Use of the International Law Commission' [1982] 76 AJIL 630.

[12] The role of the UN specialized agencies in the development of a large area of international regulation should also not be forgotten, see Schachter (n 2) 5-6.

The GA (and the ECOSOC)

Since its inception, the GA has drawn general attention as epitomising the impact of international organisations, and their resolutions, on the consolidation and development of international law.[13] This is no accident, given its near universal participation and its power to address virtually any matter.[14]

From a cumulative perspective, GA resolutions unquestionably partake in the creative and developing process of international law as – at one and the same time – authoritative pieces of multilateral diplomatic practice and the expression of *opinio juris* by those States that have positively taken part in their adoption. As the late Judge James Crawford put it:

> '[W]hen [GA resolutions] are concerned with general norms of international law, acceptance by all or most members constitutes *evidence* of the opinions of governments in what is the widest forum for the expression of such opinions.'[15]

The ICJ, amongst other international adjudicative bodies, has consistently corroborated this view. It may be worth recalling how, addressing the customary nature of the prohibition of the use of force in *Nicaragua v United States of America*, it observed that

> '[*O*]*pinio juris* may, though with all due caution, be deduced from, *inter alia*, the attitude of the Parties and the attitude of States towards certain General Assembly resolutions (…).'[16]

In this particular instance, the Court was concerned with the assessment of an attitude corroborating the existence of a given custom. However, States' attitude vis-à-vis the adoption of a GA resolution may, by the same token, be instrumental in generating a new piece of custom as long as the resolution in question cajoles widespread State practice in conformity with its contents in the long run.

This amounts to saying that the well-known threefold possibility of coincidence between CIL and a convention, as spelled out by the ICJ in the 1969 the *North Sea Continental Shelf* case – that is, the custom-evidentiary, crystallising, and generating functions[17] – applies to GA resolutions just as well as with regard to codification conventions.[18] As also pointed out by Sir Michael Wood, when it comes to the identification of CIL, there is no relevant distinction between treaties and resolutions, since '[s]uch written texts may [both] reflect already existing rules of customary international law (codification of *lex lata*); they may seek to clarify or develop the law (progressive development); or they may state what would be new law.'[19]

This is not at odds with the general statement, reiterated by the ILC in its *Draft conclusions on identification of customary international law*, to the effect that 'a resolution adopted by an international organisation (…) cannot, by itself, create customary international law.'[20] Indeed, no custom-evidentiary, crystallising or generating function would be performed by a GA resolution in and of itself, but only in combination with other widespread elements of practice and *opinio juris* consistent with the conduct recommended in the relevant resolution, or resolutions.

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[13] From Yuen-Li Lang, 'The General Assembly and the Progressive Development of International Law' [1948] 42 AJIL 66 to Brian D Lepard, 'The Role of the United Nations General Assembly Resolutions as Evidence of *Opinio Juris*' in Brian D Lepard, *Customary International Law: A New Theory with Critical Applications* (CUP 2012) 208ff.

[14] See UN Charter, art 10.

[15] James Crawford, *Brownlie's Principles of Public International Law* (9th edn, OUP 2019), 40 italics added.

[16] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* (Merits) [1986] ICJ Rep 14 [188].

[17] *North Sea Continental Shelf* [1969] ICJ Rep 3 [63].

[18] See also Higgins (n 3) 158-59.

[19] Third Report on identification of customary international law by Michael Wood, Special Rapporteur, ILC 67th Session (2015) UN Doc A/CN.4/682, 45, para 28.

[20] Report of the ILC on the work of its Seventieth session, UN GAOR 73rd Session Supp No 10 UN Doc A/73/10 (2018), 121, Conclusion 12(1).

Another truism which, nonetheless, seems often overlooked, is that GA resolutions, in addition to indicating States' *opinio juris* on the existence of a certain custom, may also provide terms of reference for ascertaining the *specific content* of such custom.

Again, the most authoritative statement to that effect is to be found in the *Nicaragua v United States of America*. Here, the Court relied on the *Declaration on the principles of international law concerning friendly relations and cooperation among States*, annexed to GA Res 2625 (XXV) of 1970, in order to assess the scope of the customary ban on the use of force as encompassing the organising, training, funding and arming of irregular forces with a view to carrying out acts fuelling civil war or terrorism in a foreign State.[21]

The ICJ ruling of 1997 in the *Gabčíkovo-Nagymaros* project seems to have gone very much in the same direction. Here, the Court invited the parties to reinterpret the 1977 Treaty on a joint infrastructural project on the Danube having regard to:

> '[N]ew norms and standards [that] have been developed, set forth in a great number of *instruments* over the last two decades. Such norms have to be taken into consideration, and such new standards given proper weight, not only when States contemplate new activities but also when continuing with activities begun in the past. This need to reconcile economic development with protection of the environment is aptly expressed in the concept of sustainable development.'[22]

Here the Court clearly referred also to legally non-binding 'instruments' in the field of international environmental law which were produced under the aegis of the UN, as complemented by other elements of international practice, including articulated conventional practice. Such instruments – with special regard to the seminal Rio Declaration adopted at the end of the 1992 UN Conference on Environment and Development –[23] gave rise to substantiated new norms which constitute the building blocks of the then emerging principle of sustainable development.[24]

One may also recall how GA resolutions have formidably contributed to the codification and progressive development of human rights law. Suffice to recall the *Universal Declaration on Human Rights*, almost unanimously adopted by the GA in 1948,[25] and which served as the drafting basis for the two 1966 UN Covenants;[26] the 1963 *Declaration on the Elimination of All Forms of Racial Discrimination*[27] which played the same role with respect to the homonymous 1966 Convention;[28] the 1967 *Declaration on the Elimination of Discrimination against Women*[29] in relation to the 1979 *Convention on the Elimination of All Forms of Discrimination against Women*;[30] the 1975 *Declaration on the Protection of All Persons from being Subjected to Torture and Other Inhuman Treatment or Punishment*[31] in relation to 1984 *Convention against Torture*;[32] and the 1959 *Declaration of the Rights of the Child*[33] in relation to the much-awaited 1989 *Convention on the Right of the Child*.[34]

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[21] *Nicaragua v United States of America* (n 16) [188], [191].
[22] *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)* [1997] ICJ Rep 7, [140] italics added.
[23] See Report of the United Nations Conference on Environment and Development (3-14 June 1992) UN Doc A/CONF.151/26 (vol I), Annex I.
[24] See, for all, Philippe Sands and Jacqueline Peel, *Principles of International Environmental Law* (4th edn, CUP 2018) 21ff.
[25] UNGA Res 217 (III) (10 December 1948) UN Doc A/RES/217(III). Out of the 58 Member States, 48 voted in favour, 8 abstained from voting and 2 were absent.
[26] International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 and International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 April 1976) 993 UNTS 3.
[27] UNGA Res 1904 (XVIIII) (20 November 1963) UN Doc A/RES/1904(XVIII).
[28] (Adopted 7 March 1966, entered into force 4 January 1969) 660 UNTS 1.
[29] UNGA Res 2263 (XXII) (7 November 1967) UN Doc A/RES/2263(XXII).
[30] (Adopted 18 December 1979, entered into force 3 September 1981) 1249 UNTS 1.
[31] UNGA Res 3452 (XXX) (9 December 1975) UN Doc A/RES/3452(XXX).
[32] (Adopted 10 December 1984, entered into force 26 June 1987) 1465 UNTS 85.
[33] UNGA Res 1386 (XIV) (20 November 1959) UN Doc A/RES/1386(XIV).
[34] (Adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3.

Another interesting example pertains to the way in which the body of international law on the treatment of aliens has been gradually reshaped by the adoption of a series of ECOSOC and GA resolutions throughout the 1950s, '60s and '70s,[35] setting then the framework for a New International Economic Order (NIEO).[36] The cumulative effect of such resolutions led to the conditional lawfulness of expropriation, subject to the avoidance of discrimination and arbitrariness and the payment of some kind of appropriate compensation, possibly falling short of the full value of the expropriated assets. Against the traditional so-called 'Hull formula' requiring 'full prompt and effective compensation' for expropriation,[37] the countervailing principle, upheld at the time by the increasing majority in the plenary UN organ, was that of permanent sovereignty over natural resources and of the right for States to autonomously regulate economic activities on their territory, without exception for those carried out by foreign companies.[38]

The fall of the Berlin Wall, with the disruption of the former Soviet Union, and the new attitude of a large number of developing States, geared towards attracting foreign investments curbed, even reversed, the impact of the NIEO resolutions on the CIL process on the treatment of foreign direct investments starting from the 1990s.[39]

Over the last two decades, an increasing number of study reports by special representatives of the SG in different areas, from economic law to human rights law, and debates and negotiations in UN subsidiary organs, including United Nations Commission on International Trade Law Working Groups, seem to reflect a new change of the attitude of States in the matter which is formidably reminiscent of the NIEO debate and, possibly, of its impact on the customary discourse on the topic.[40]

These brief considerations show how the drafting and adoption of GA resolutions, or even just officially recorded debates within the context of plenary UN organs, may reflect – or even give impulsion to – the swinging pendulum of the dynamics which determine international law-making progress, if only eliciting States' *opinio juris* (including *opinio necessitatis*).

The SC

Despite its limited membership and specific competence in the field of international peace and security, the SC contribution to the progressive development of international law, or even its consolidation, should not be underestimated.[41] SC resolutions, especially those legally binding under Ch VII on all member States, may boast high probative value as evidence of existing international obligations, and may provide the foundation for custom.[42]

One may recall the *Tadić* case, where the Appeals Chamber of the ICTY observed that:

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[35] See, *inter alia*, UNGA Res 1720 (XVI) (19 December 1961) UN Doc A/RES/1720(XVI), UNGA Res 1803 (XVII) (14 December 1962) UN Doc A/RES/1803(XVII), UNGA Res 3201 (S-IV) (1 May 1974) UN Doc A/RES/3201 and ECOSOC Res 1956 (LIX) (25 July 1975) UN Doc E/RES/1956.

[36] See, for all, Robin C A White, 'A New International Economic Order' (1975) 24 ICLQ 542.

[37] On the 'Hull formula' see Ursula Kriebaum, Christoph Schreuer and Rudolf Dolzer, *Principles of International Investment Law* (3rd edn, OUP 2022), 4ff.

[38] On this point see ibid, 6.

[39] See, extensively, Doreen Lusting, 'From the NEIO to the International Investment Law Regime' in Doreen Lusting, *Veiled Power: International Law and Private Corporation 1886-1981* (OUP 2020), 179ff.

[40] See, for instance, United Nations Commission on International Trade Law, 'Report of Working Group III (Investor-State Dispute Settlement Reform), Forty-first session, UN Doc A/CN.9/1086 (13 December 2021) and Human Rights Council, 'Protect, Respect and Remedy: A Framework for Business and Human Rights. Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie' UN Doc A/HRC/8/5 (7 April 2008).

[41] On this point see Gregory H Fox and others, 'The Contribution of the United Nations Security Council Resolutions to the Law of Non-international Armed Conflict: New Evidence of Customary International Law' (2018) 67 American U L Rev 649. And see Boyle and Chinkin (n 11) 229ff.

[42] Higgins (n 3) 159. On the 'law-making function' of the SC see, *inter alia*, Stefan Talmon, 'The Security Council as World Legislature' (2005) 99 AJIL 175 and Jan Wouters and Jed Odermatt, 'Quis Custodiet Consilium Securitatis? Reflections on the Lawmaking Powers of the Security Council' in Vesselin Popovski and Trudy Fraser (eds), *The Security Council as Global Legislator* (Routledge 2014), 71ff.

> 'Of great relevance to the formation of *opinio juris*, to the effect that violations of general international humanitarian law governing internal armed conflicts entail the criminal responsibility of those committing or ordering those violations, are certain resolutions unanimously adopted by the Security Council.'[43]

Similarly, in its 2008 advisory opinion on the *Unilateral Declaration of Independence in Respect of Kosovo*, the ICJ referred to the SC practice to corroborate the non-existence under CIL of a general prohibition against unilateral declarations of independence.[44]

Other important law-making contributions emerging from the SC practice relate to human rights obligations of non-State actors, the status of Peace Agreements ending non-international armed conflicts, and issues regarding post-conflict reconstruction, especially with respect to 'democratic transitions.'[45]

The SC has also unquestionably contributed to the progressive development and consolidation of international criminal law.[46] The actual establishment of the ICTY and International Criminal Tribunal for Rwanda (ICTR), through Ch VII legally binding resolutions,[47] was not only so very politically remarkable, but the adoption of the Statutes of those Tribunals, attached to the resolutions in point represented a key contribution to the codification of international criminal law paving the way to the adoption of the ICC. Those Statutes laid down rules which at the time could be said to pertain to the progressive development of international criminal law, procedural and substantive, with special regard to certain crimes against humanity. This achievement was all the more remarkable when one considers that, back then, a first codification project of international crimes had been hanging for decades between the ILC and the GA.[48]

Further to such direct contribution, two indirect forms of contribution to the consolidation and development of international criminal law stemming from these resolutions should be considered. The first one flows from the case law which the ICTY and the ICTR have developed over the years – especially in the elaboration and finessing of international criminal procedural law – which derive their authority from Ch VII based resolutions.[49]

The second indirect contribution can be said to have operated by contrast. Namely, in the sense that the piecemeal approach to international criminal law and justice by setting up ad hoc tribunals has prompted by contrast the need for a permanent and treaty based international criminal court. One which was actually established under the aegis of the UN and whose Statute largely benefitted from the lessons learned from the experience of the operation of both ICTY and ICTR.[50]

The Contribution of the ILC to the Codification and Development of CIL

Importance of the ILC Work and Its Relations with International Case Law

[43] *Prosecutor v Tadić* (Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction) ICTY-94-1 (2 October 1995) 133
[44] *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo* (Advisory Opinion) [2010] ICJ Rep 403, [81].
[45] See Fox and others (n 41) 671ff.
[46] See David Scheffer, 'The United Nations Security Council and International Criminal Justice' in William A Schabas (ed), *The Cambridge Companion on International Criminal Law* (CUP 2015) 178ff.
[47] Respectively, UNSC Res 827 (25 May 1993) UN Doc S/RES/827 and UNSC Res 955 (8 November 1994) UN Doc S/RES/955.
[48] Reference is here made to the *Draft code of crimes against the peace and security of mankind (Part I)*. The project was basically suspended already in the mid '50s, see UNGA Res 1186 (XII) (11 December 1957) UN Doc A/RES/1186.
[49] See, for instance, Ivan Simonovic, 'The Role of the ICTY in the Development of International Criminal Adjudication' [1999] 23 Fordham Intl L J 440.
[50] Reference is obviously made to the Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 3. On the relationship between the ICTY and the ICTR and the International Criminal Court, see further Staurt Ford, 'The Impact of Ad Hoc Tribunals on the International Criminal Court' in Milena Sterio and Michael Sharf (eds), *The Legacy of Ad Hoc Tribunals in International Criminal Law: Assessing the ICTY's and ICTR's Most Significant Legal Accomplishments* (CUP 2019), 307ff.

As anticipated, Art 13(1)(a) of the UN Charter mandates the GA to 'initiate studies and make recommendations for the purpose of (…) encouraging the progressive development of international law and its codification.' In order to follow up on this provision, in 1947 the GA established the ILC,[51] whose mandate bestows particular value to its work when it comes to affirming the existence and content of CIL. It is, therefore, no wonder that international courts and tribunals frequently rely on the ILC work as a key authority for the purposes of identifying and corroborating pieces of CIL in a wide range of areas of international law.

By way of example, one may recall the ICJ in *Nicaragua* v *United States of America* regarding the existence and scope of the customary ban on the use of force,[52] *Gabčíkovo-Nagymaros*, concerning the application criteria of the state of necessity,[53] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* with regard to individual responsibility under international law,[54] *Jurisdictional Immunities of the State* as to State immunity and the doctrine of intertemporal law;[55] the ITLOS, especially in *Activities in the Area*, with respect to State responsibility and liability under international law;[56] the European Court on Human Rights in *Behrami and Saramati v France* and the Inter-American Court on Human Rights in *Gutiérrez and Family v Argentina* with respect to the attribution of States' conducts;[57] and ICSID tribunals, for example, in *Conoco Phillips v Venezuela* concerning 'full reparation' and compensation.[58]

Most interestingly for our purposes, reference to the ILC work, and the level of authority accorded thereto, is usually made irrespective of the format of the end product of its work, with special regard to the circumstance of whether it was reviewed and adopted at a diplomatic conference as a codification convention, or simply attached to a GA resolution endorsing it as such.[59] The Commission's commentary to its draft articles is also often relied upon.

This naturally enhances the authority of the ILC, despite concerns being raised by some States over the lack of their express consent to any given ILC product.[60] Having special regard to the ILC work resulting in the adoption of instruments attached to GA resolutions, the same caution applies which was expressed by Sir Michael with respect to GA resolutions as a means to identify customary law, to the effect that 'the circumstances surrounding the[ir] adoption [are also important]. These include, in particular, the method employed for adopting the resolution; the voting figures (where applicable); and the reasons provided by States for their attitude toward the resolution in question, *i.e.*, during the negotiation, or in an explanation of vote, or another kind of statement.'[61]

On a separate, but related point, it has occurred that judicial reference to ongoing ILC work would inhibit its progress. This is what happened when in *Gabčíkovo-Nagymaros* the ICJ referred to Draft Art 33 of the law of

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[51] UNGA Res 174 (II) (21 November 1947) UN Doc A/RES/174.

[52] *Nicaragua v United States of America* (n 16) [190].

[53] *Gabčíkovo-Nagymaros Project* (n 22) [50].

[54] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (*Bosnia and Herzegovina v Serbia and Montenegro)* [2007] ICJ Rep 43, [173]

[55] *Jurisdictional Immunities of the State (Germany v Italy: Greece intervening)* [2012] ICJ Rep 99, [55]-[56], [58], [64], [69], [77], [89], [93].

[56] *Responsibilities and obligations of States with respect to activities in the Area* (Advisory Opinion of 1 February 2011) ITLOS Reports 2011 10, [169].

[57] *Behrami and Behrami v France and Saramati v France, Germany and Norway* [GC] (Decision on Admissibility) Apps Nos 71412/01 and 78166/01 (ECtHR, 31 May 2007), [28]-[34] and *Case of Gutiérrez and Family v Argentina* (Merits, reparation and costs) Inter-American Court of Human Rights Series C No 271 (25 November 2013), [78], fn 163.

[58] *ConocoPhillips Petrozuata B.V., ConocoPhillips Hamaca B.V. and ConocoPhillips Gulf of Paria B.V. v Bolivarian Republic of Venezuela*, ICSID Case No ARB/07/30, Decision on Jurisdiction and Merits (3 September 2013), [339].

[59] As predicted by Sir Hersch Lauterpacht already in 1949, see Fernando Lusa Bordin, 'Reflections of Customary International Law: The Authority of Codification Conventions and ILC Draft Articles in International Law' [2014] 63 ICLQ 535, 542-543.

[60] Danae Azaria, ''Codification by Interpretation': The International Law Commission as an Interpreter of International Law' [2020] 31 EJIL 171, 173. In particular, see the position of China, in the sense that 'in order for (…) the draft guideline[s] to apply (…) there would need to be pre-existing rules of international law,' UN Doc A/C.6/72/SR.23 (17 November 2017), 9, para 55; the position of Spain, in the sense that 'the Commission should always make it clear whether it was acting on a *lex lata* or *lex ferenda* basis, and it should avoid giving the impression of creating law,' UN Doc A/C.6/72/SR.24 (30 November 2017), 7, para 41; and the position of Switzerland, in the sense that, given its authority, 'the ILC should be careful in distinguish between codification and progressive development of CIL as clearly as possible,' UN Doc A/C.6/72/SR.22 (27 November 2017), 12, para 86.

[61] Third Report on identification of customary international law by Michael Wood (n 19) para 49.

State responsibility on state of necessity as evidentiary of CIL.[62] That reference 'froze' the very restrictive configuration of the general rule on state of necessity – in Draft Art 25, then, now Draft Art 33 – thus preventing the ILC from amending the text on second reading in more flexible terms, as it was mined to do.[63]

Comparative Considerations, in Functional Terms, between 'Conventional' and 'Soft-Law' Forms of Codification by the ILC

Art 15 of the ILC Statute provides that:

> '[T]he expression "progressive development of international law" is used for convenience as meaning the preparation of draft conventions on subjects which have not yet been regulated by international law or in regard to which the law has not yet been sufficiently developed in the practice of States. Similarly, the expression "codification of international law" is used for convenience as meaning the more precise formulation and systematisation of rules of international law in fields where there already has been extensive State practice, precedent and doctrine.'[64]

As it has been emphasised by the very ILC, the distinction between codification and progressive development has 'proved unworkable and could be eliminated in any review of the Statute.'[65] As put it by Sir Robert Jennings, 'codification properly conceived is itself a method for the progressive development of the law.'[66]

Indeed, whenever CIL is transcribed and consolidated, it is inevitably interpreted and specified, and this inevitably affects its content.[67] This ties in with the considerations made above on the different relationships between CIL and written instruments, as spelled out by the ICJ in relation to codification conventions.[68] Namely, those of recognition, crystallisation or generation of CIL. The dilemma thus arises as to which format – whether 'conventional' or 'soft' – would be best for the ILC end-products. One would suggest two basic methodological considerations that might drive this choice.[69]

The first one refers to the inadequacy of any *a priori* preference between the two options. This translates into a rejection of any rigid 'natural law' or 'legal positivist' approach to codification.[70] A natural law approach to the sources of law considers legal rules as 'natural' when the actors in a given society are brought together by a relative homogeneity of interests, uses and customs. Accordingly, all members of that society would naturally feel bound by those uses and customs, regardless of their separate consent to them. In a divided society, or in areas where that society is divided, a positivist-voluntarist approach is naturally followed, whereby the process of formation, or consolidation of CIL becomes a negotiated law-making process.[71]

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[62] *Gabčíkovo-Nagymaros Project* (n 22) [50]-[53].

[63] On this point see Attila Tanzi, 'Necessity, State of' (January 2021) in Anne Peters (ed) *Max Planck Encyclopedia of Public International Law* (online edn).

[64] Resolutions adopted by the General Assembly during its 2nd session, UN GAOR 2nd Session UN Doc A/159 (1948), 109.

[65] Report of the ILC on the work of its Forty-eight session, UN GAOR 51st Session Supp No 10 UN Doc A/51/10 (1996), 84, para 147(a).

[66] Robert Y Jennings, 'The Progressive Development of International Law and its Codification' [1947] 24 British YB Intl L 301, 302. See also Hersch Lauterpacht 'Codification and Development of International' [1955] 49 AJIL 16, 29: 'Codification of international law must be substantially legislative in nature.'

[67] As the late Judge Roberto Ago emphasised: 'Codifer le droit a toujours signifié le modifier en partie, et parfois même profondément,' 'La codification du droit international et les problèmes de sa réalisation' in Maurice Batteli and others (eds), *Recueil d'études de droit international en hommage à Paul Guggenheim* (Institut Universitaire de Hautes Études Internationals 1968), 94.

[68] Ibid.

[69] The author previously formulated these considerations in Attila Tanzi, 'Le forme della codificazione e sviluppo progressivo del diritto internazionale' in Giuseppe Nesi and Pietro Gargiulo (eds), *Luigi Ferrari Bravo. Il diritto internazionale come professione* (Editoriale Scientifica 2015), 151ff.

[70] See Wolfgang Friedmann, *The Changing Structure of International Law* (Columbia UP 1964), 78: 'Any attempt to stamp a particular social order as being consonant with nature, and correspondingly, another as being contrary to nature, is a disguised way of giving the halo of perpetuity and sacrosanctity to a particular political or legal philosophy.'

[71] On this point, see the lucid and highly topical reflections on the distinction between customary and treaty law in Eduardo Jiménez de Aréchaga, 'Custom' in Antonio Cassese and others (eds), *Change and Stability in International Law-making* (Gruyter 1988), 1ff.

The second methodological consideration, which flows from the first one – and is akin to that alluded to in relation to the relative authority of GA resolutions according to the circumstances of their adoption and their contents –[72] points at the need to take into account all the relevant circumstances pertaining to the ILC work on any given topic, at any given point in time. One such circumstance may depend on whether the ILC is pursuing a codification exercise proper, or aims at facilitating the interpretation and application of previously codified rules. Another circumstance may pertain to the subject matter being dealt with and the degree of development and consolidation of CIL in that area.

Most importantly, an account should be taken of the historical-political context existing at the time when the process of codification is being carried out**.** That is to say that any *a priori* choice as to which would be the best approach in the matter should give way to a pragmatic approach to be calibrated according to the effective, or perceived, needs of consolidation of any given body of international law by the International Society at any given point in time, which largely depends on the attitude of States at that time about international regulation in general.

The initial phase of the life of the UN was marked by the majority of Western Countries in the GA and a prevailing common law approach to international law-making. This translated into a prevailing taste, at the time, for non-conventional forms of codification. This is epitomised by the Western reliance on the GA *Universal Declaration on Human Rights*[73], not only as 'a common standard of achievement,' as enunciated therein, but also as a piece of consolidation of the body of international human rights law, under the legal umbrella of Arts 1 and 55 of the Charter.[74]

The swing pendulum in the 'codification trends' of the work of the ILC confirms the inherent relativity of the choice of the most appropriate format – whether 'conventional' or 'soft.'[75] By definition, the swinging changes are of a gradual nature and never hard and fast, but they are nonetheless detectable. As to the original taste for soft-law instruments by the ILC, one may recall the *Draft declaration of the rights and duties of States* (1948),[76] the *Principles of international law recognised in the Charter of the Nürnberg Tribunal* (1950)[77] the *Report on reservations to multilateral conventions* (1951),[78] and the *Model rules on arbitral procedure* (1958).[79] Even though, as we shall see, the ILC had already begun working preparing draft articles in view of the conventional outcome of its work, one may detect a shift towards the increasing voluntaristic trend at the end of the 1950s. This is epitomised by its work on treaty law. While, until 1959, under the guidance of Sir Gerald Fitzmaurice as Special Rapporteur on the topic, the prevailing view was to finalise a non-conventional, principles-based 'code of a general character,'[80] just two years later, following the appointment of Sir Humphrey Waldock as Special Rapporteur, the ILC announced that 'its aim would be to prepare draft articles on the law of treaties intended to serve as the basis for a convention.'[81]

Thus, in accordance with such voluntaristic trend, from the 1950s to the 1970s the most employed form of codification was that of draft articles, possibly geared toward the adoption of a codification convention. Among the first examples in that direction, one may recall the *Draft Convention on the Elimination of Future*

[72] Ibid.
[73] fn 25.
[74] This position was strongly supported by one of the 'fathers' of the Declaration, René Cassin, see 'La Déclaration Universelle et la mise en œuvre des Droits de l'Homme' (1955) 79 Recueil des Cours 290ff. On this point see also, more generally, Antonio Cassese, *Human Rights in a Changing World* (Temple UP 1990).
[75] On this point, see also Lusa Bordin (n 59) 538ff.
[76] Report of the ILC on the work of its First session, UN GAOR 4th Session Supp No 10 UN Doc A/CN.4/13 and Corr. 1-3 (1949), 286ff.
[77] Report of the ILC on the work of its Second session, UN GAOR Fifth Session Supp No 12 (A/1316) UN Doc A.CN.4/34 (1950), 374ff.
[78] Report of the ILC on the work of its Third session, UN GAOR Sixth Session Supp No 9 (A/1858) UN Doc A/CN.4/48 and Corr.1 & 2 (1951), 125ff.
[79] Report of the ILC on the work of its Tenth session, UN GAOR 13th Session Supp No 9 (A/3859) UN Doc A/CN.4/117 (1958), 83ff.
[80] Report of the ILC on the work of its Eleventh session, UN GAOR 14th Session Supp No 9 (A/4169) UN Doc A/CN.4/SER.A/1959/Add.1 (1959), 91.
[81] Report of the ILC on the work of its Thirteenth session, UN GAOR 16th Session Supp No 10 (A/4843) UN Doc A/CN.4/41 (1961), 128.

Statelessness (1954),[82] the *Draft Articles concerning the law of the sea* (1956),[83] the *Draft Articles on diplomatic intercourse and immunities* (1958),[84] and the *Draft Articles on the law of treaties* (1966).[85] All these ILC works eventually served as the bedrock for the negotiation and adoption of a number of significant UN codification Conventions.[86]

In the following decades, while continuing to resort to the adoption of draft articles mainly, the ILC – often upon impulsion by the GA – has enhanced the combination between codification of existing progressive development of CIL, especially since the waning of the Cold War through the 1980s and after its end. Examples from that period include the *Draft Articles on the law of treaties between States and international organisations, or between international organisations* (1982),[87] the *Draft Articles on the law of the non-navigational uses of international watercourses* (1993),[88] the *Draft Articles on State Responsibility* (2001),[89] and the *Draft Articles on prevention of transboundary harm from hazardous activities* (2001).[90] The former two were further negotiated and adopted as codification Conventions,[91] whereas the latter two where endorsed by GA resolutions.[92]

Interestingly, the authority of either set of instruments as evidentiary of CIL has been very much considered on a par with each other, irrespective of their conventional, or non-conventional format. On the one hand, suffice to recall how the 1997 UN *Convention on the Law of Non-Navigational Uses of International Watercourses*, with special regard to the equitable and reasonable utilisation principle, was relied upon by the ICJ only four months after its adoption,[93] thus, long years before its entry into force, so much so that the latter has been considered uninfluential for the purposes of its function of consolidation of customary international water law.[94] On the other hand, one may mention the innumerable times in which international courts and tribunals, as well diplomatic practice, have referred to the *Draft Articles on State Responsibility* as plainly evidentiary of customary law.[95]

At the turn of the 1980s and 1990s, moreover, with the establishment of a Western legal and cultural hegemony, the conventional format also began to appear obsolete in the face of the (momentary) homogeneity of values within the International Society. Already in 1988, Roberto Ago had prophesied that:

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[82] Report of the ILC on the work of its Sixth session, UN GAOR 9th Session Supp No 9 (A/2693) UN Doc A/CN.4/88 (1954), 140ff.
[83] Report of the ILC on the work of its Eight session, UN GAOR 11th Session Supp No 9 (A/3159) UN Doc A/CN.4/104 (1956), 253ff.
[84] Report of the ILC on the work of its Tenth session, UN GAOR 13th Session Supp No 9 (A/3859) UN Doc A/CN.4/117 (1958) 78ff.
[85] Report of the ILC on the work of its Eighteenth session, UN GAOR 21st Session Supp No 9 (A/6309/Rev.1) UN Doc A/CN.4/191 (1966) 169ff.
[86] Respectively: Convention on the Reduction of Statelessness (adopted 30 August 1961, entered into force 13 December 1975) 989 UNTS 175, the four 1958 Geneva Conventions on the Law of the Sea (Convention on the Territorial Sea and the Contiguous Zone (adopted 29 April 1958, entered into force 10 September 1964) 516 UNTS 205, Convention on the High Seas (adopted 29 April 1958, entered into force 30 September 1962) 450 UNTS 11, Convention on Fishing and Conservation of the Living Resource (adopted 29 April 1958, entered into force 20 March 1966) 559 UNTS 285, Convention on the Continental Shelf (adopted 29 April 1958, entered into force 10 June 1964) 499 UNTS 311), the Vienna Convention on Diplomatic Relations (adopted 18 April 1961, entered into force 24 April 1964) 500 UNTS 95 and the Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331.
[87] Report of the ILC on the work of its Thirty-fourth session, UN GAOR 37th Session Supp No 10 UN Doc A/37/10 (1982) 17ff.
[88] Report of the ILC on the work of its Forty-sixth session, UN GAOR 29th Session Supp No 10 UN Doc A/49/10 (1994) 89ff.
[89] Report of the ILC on the work of its Fifty-third session, UN GAOR 56th Session Supp No 10 UN Doc A/56/10 (2001) 26ff.
[90] ibid 145ff.
[91] Respectively, the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organization (adopted 21 March 1986, not entered into force yet) (1986) 24 ILM 543 and the Convention on the Law of Non-Navigational Uses of International Watercourses (adopted 21 May 1997, entered into force 17 August 2014) 2999 UNTS 77.
[92] Respectively, UNGA Res 56/83 (28 January 2002) UN Doc A/RES/56/83 and UNGA Res 56/82 (18 January 2002) UN Doc A/RES/56/82.
[93] *Gabčíkovo-Nagymaros Project* (n 22) [58].
[94] On this point see Attila Tanzi, 'The UN Convention on International Watercourses as a Framework for the Avoidance and Settlement of Waterlaw Disputes' (1998) 11 LJIL 441.
[95] In addition to the cases already mentioned above, it is possible to recall *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v Serbia)* [2015] ICJ Rep 3, [102]-[105], *Ilaşcu and others v Moldova and Russia* [GC] (Judgment) App No 48787/99 (ECtHR, 8 July 2004) [319]-[321] and *CMS Gas Transmission Company v The Republic of Argentina*, ICSID Case No ARB/01/8, Decision of the ad hoc Committee on the Application for Annulment of the Argentine Republic (25 September 2007) [149]. The identification between CIL and the ILC's work on State responsibility is such that, as James Crawford observes, 'The ILC Articles represent the modern framework of state responsibility,' *State Responsibility: The General Part* (CUP 2014) 45.

> '[I]l n'y a plus aujourd'hui de raisons pour que le droit international abandonne ses structures ouvertes traditionnelles pour se réfugier dans le cadran clos d'un droit entièrement conventionnel. [U]n vaste horizon s'ouvre encore devant la poursuite, de nos jours, de la codification du droit international. Celle-ci changera vraisemblablement de formes et de méthodes. Elle n'en sera pas moins précieuse pour autant.'[96]

However, the distinguished jurist could not foresee that the end of the clash of ideologies, instead of favouring the comeback of a natural law approach to international law, would end up in an even more complex and multipolar world. Accordingly, today it seems that the choice between formally legally-binding and non-binding instruments has been stripped of any ideological-political connotation in favour of functional needs, which – as already alluded – pertain to the socio-political need and circumstances existing at the time and to the subject matter the ILC is dealing with. In the present context, over the last two decades, the diminished resort to the conventional format, no longer reveals a time of shared values in the International Society, but rather flags an alarming low rate of willingness among the international actors to assume fresh obligations. Already in 2006, while questioning the role of the ILC, Christian Tomuschat observed:

> 'States seem to have become rather tired of the tight network of international obligations which progressively restrict their sovereign freedom of action. Therefore, they do not hasten to bring new treaties into force, rather being inclined to watch for a considerable number of years what advantages they may expect of formal acceptance of the instrument concerned.'[97]

As a matter of fact, since the beginning of the century, the ILC appears to have more openly embraced the role of an informal 'progressive developer' of CIL. This is reflected in two empirical factors. The first one is that, even when using the draft articles model, the ILC has sometimes explicitly specified that the subject matter of codification did not necessarily correspond to the already settled CIL.[98] Examples include the *Draft Articles on the responsibility of international organisations* (2011)[99] and the *Draft Articles on the protection of persons in the event of disaster* (2016).[100] In the commentary to the *Draft Articles on the expulsion of aliens* (2014), the ILC even admitted that 'the entire subject area does not have a foundation in customary international law or in the provisions of conventions of universal value.'[101]

One may question the convenience for the ILC to push its own 'progressive development' agenda and draw up provisions in the absence of a clear practice that expresses a widely shared *opinio juris.*[102]

At the same time, it must be borne in mind that the ILC does not operate in a vacuum, but through constant interaction with the GA Sixth Committee.[103] This circumstance, also explains why the work of the ILC cannot be regarded as a mere subsidiary means for the 'determination of the rules of law,' of the kind of a scholarly

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[96] Roberto Ago, 'Nouvelles réflexions sur la codification du droit international' (1988) 92 Revue générale de droit international public 539, 573, 576.

[97] Christian Tomuschat, 'The International Law Commission: An Outdated Institution?' [2006] 49 German YB Intl L [77], [91].

[98] See further Yifeng Chen, 'Between Codification and Legislation: A Role for the International Law Commission as an Autonomous Law-Maker' in The United Nations (ed) (n 11) 249-250, fns 73, 77.

[99] 'It may occur that a provision in the articles on State responsibility could be regarded as representing codification, while the corresponding provision on the responsibility of international organizations is more in the nature of progressive development. In other words, the provisions of the present draft articles do not necessarily yet have the same authority as the corresponding provisions on State responsibility,' Report of the ILC on the work of its Sixty-third session, UN GAOR 66th Session Supp No 10 UN Doc A/66/10 (2011) 69-70, General Commentary, para 5.

[100] 'The draft articles contain elements of both progressive development and codification of international law,' Report of the ILC on the work of its Sixty-eight session, UN GAOR 71st Session Supp No 10 UN Doc A/71/10 (2016) 17-18, General Commentary, para 2.

[101] Report of the ILC on the work of its Sixty-sixth session, UN GAOR 69th Session Supp No 10 UN Doc A/69/10 (2014) 18, General Commentary, para 1.

[102] As Sir Ian Sinclair puts it: 'A codification convention that does not enjoy the support or approval of a significant group of states whose assent is necessary to the effective implementation of the convention is hardly likely to be regarded as being expressive of existing international law or general new law,' *The International Law Commission* (Grotius Publications Limited 1978) 215.

[103] On the 'organic relationship' between the ILC and the GA Sixth Committee, see Franklin Berman, 'The ILC within the UN's Legal Framework: Its Relationship with the Sixth Committee' [2006] 49 German YB Intl L 107.

forum, under Art 38(1)(d) of the ICJ Statute, but enjoys the greater normative authority. Besides, nothing prevents ILC draft articles from having a significant impact on States' conduct in the future, thereby setting in motion a CIL-generating process. And indeed, as Bertrand Ramcharan pointed out already in the 1970s, the ILC works may well facilitate and accelerate the formation of new customary rules in relation to the topic under consideration.[104]

The second element which is worth emphasising is that the increased combination of existing customary rules and progressive development of international law in the ILC work has coincided with the devising of an array of new forms of codification. True, the ILC work had resulted in non-conventional-aimed end-products well before the end of the Cold War, but this choice was mainly due to the fact that the subject matter did not suit a codification by 'articles.' Examples include the already mentioned *Draft declaration of the rights and duties of States* (1948)[105] and the *Model rules on arbitral procedure* (1958).[106] On the other hand, one may recall how over the last two decades the ILC has increasingly produced work which was purportedly not geared towards the adoption of conventional instruments irrespective as to whether the subject matter was suitable for conventional consolidation or not, through different formats, such as (*guiding*) *principles* (*applicable to unilateral declarations of States capable of creating legal obligations* (2006),[107] *on the allocation of loss in the case of transboundary harm arising out of hazardous activities* (2006)[108] and *on the protection of the environment in relation to armed conflicts* (under consideration);[109] *conclusions* (*on fragmentation of international law* (2006),[110] *on identification of customary law* (2018)[111] and *on subsequent agreements and subsequent practice in relation to the interpretation of treaties* (2018);[112] *guides to practice* (*on reservations to treaties* (2011),[113] *guidelines* (*on protection of the atmosphere* (under consideration)[114] or *issue papers* (*on sea-level rise in relation to international law*) (under consideration).[115]

This declining resort to the draft articles model can therefore be ascribed to the already alluded increased recalcitrance by States to engage in processes leading towards the creation of clear-cut rights and duties for the acceptance or rejection of which they would become publicly accountable. Indeed, over the last three decades, only two codification conventions have resulted from the work of the ILC.[116] Namely, the United Nations Watercourses Convention,[117] and the United Nations Convention on Jurisdictional Immunities of States.[118] Separately, one may add the Rome Statute.

The decline of the draft articles format is no surprise. It is the logical consequence of widespread 'treaty fatigue,'[119] whereby States are much less inclined to conclude large codification agreements than in the past. Conversely, recourse to more flexible forms is functional to the current international political scenario, largely characterised by States' inertia in the field of international law-making.

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[104] Bertrand G Ramcharan, *The International Law Commission: Its Approach to the Codification and Progressive Development of International Law* (Martinus Nijhoff Publishers 1977), 23-24.
[105] Report of the ILC (n 76) 286ff.
[106] Report of the ILC (n 79) 83ff.
[107] Report of the ILC on the work of its Fifty-eight session, UN GAOR 61st Session Supp No 10 UN Doc A/61/10 (2006), 366ff.
[108] Ibid, 110ff.
[109] See Report of the ILC on the work of its session, UN GAOR 69th Session Supp No 10 UN Doc A/69/10 (2014), 249ff.
[110] Report of the ILC (n 107), 403ff.
[111] Report of the ILC (n 20), 119ff.
[112] ibid, 12ff.
[113] Report of the ILC (n 60) 19ff.
[114] See Report of the ILC on the work of its Seventy-second session, UN GAOR 76th Session Supp No 10 UN Doc A/76/10 (2021), 9ff.
[115] See Report of the ILC on the work of its Seventieth session, UN GAOR 74th Session Supp No 10 UN Doc A/74/10 (2019), 340ff.
[116] Chen (n 98) 252.
[117] See above fn 91.
[118] United Nations Convention on Jurisdictional Immunities of States and Their Property (adopted 2 December 2004, not entered into force yet) [2005] 44 ILM 801.
[119] Laurence Boisson de Chazournes, 'The International Law Commission in a Mirror: Forms Impact and Authority' in The United Nations (ed) (n 11) 141.

In this context, it is interesting to observe how international scholarship is re-interpreting and re-qualifying the work and role of the ILC, often emphasising, and sometimes overemphasising, its importance.

The recent decision by the GA to ask Member States their comments about the ILC draft articles being considered with a view to adopting a convention based on the ILC draft articles on *Protection of persons in the event of disasters, adopted by the GA at its 75th session in 2020, appears as a welcome development, based on the prevailingly positive response by the Member States.*[120] *One would wish that this would signal a revival of the awareness of the need for* multilateralism and international cooperation as a response to the increasing challenges against global security, including in the area of disaster prevention and relief. The COVID-19 pandemic could have served – together with the increasingly apparent impact of climate change worldwide – as a catalyst in that direction. A small, but significant indication of that effect may be drawn from the view expressed by some delegations that pandemics should qualify as a 'disaster' in accordance with the definition provided in Draft Art 3(a).[121]

Qualifying the ILC Work: A Critical Appraisal

Traditionally, the work of the ILC has been compared to a 'subsidiary means for the determination of rules of law,' pursuant to Art 38(1)(d) of the ICJ Statute. In particular, due to the composition of the body, the ILC work has been equated to the 'teaching of the most highly qualified publicists of the various nations.'
For instance, in the last edition of the *Brownlie's Principles of Public International Law*, James Crawford wrote that:

> 'A source analogous to the writings of publicists, and at least as authoritative, is the work of the ILC, including its articles and commentaries, reports, and secretariat memoranda.'[122]

Interestingly, this 'classic' approach was adopted by Sir Michael Wood himself in drafting the conclusions on the identification of CIL. In fact, in assessing the role of the ILC in this regard, he noted that:

> '[A]mong writings, special importance may be attached to collective works, in particular the texts and commentaries emerging from the work of the International Law Commission.'[123]

This stance, however, was not uncontroversial. A number of members of the ILC expressed the view that qualifying the work of the ILC as a mere subsidiary means does not adequately reflect its actual impact on the international customary making process.[124]

The latter view seems to have gained the upper hand. In the commentary to Part Five (*Significance of certain materials for the identification of customary international law*) of the *Draft conclusions on the identification of customary international law*, the ILC stated that:

> 'The output of the International Law Commission (…) merits special consideration (…). This flows from: the Commission's unique mandate [(…) to promote the progressive development of international law and its codification]; the thoroughness of its procedures [including the consideration of extensive surveys of State practice and *opinio juris*]; and its close relationship with the General Assembly and States (including receiving oral and written comments from States as it proceeds with its work).'[125]

However, this statement was somewhat mitigated by the following language:

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[120] The need for an ad hoc convention on the protection of persons in the event of disaster has been reiterated by the GA (Res 73/209 (20 December 2018) UN Doc A/RES/73/209), including its Sixth Committee (Un Doc A/C.6/76/SR.12, 13 and 29), and the SG (Protection of persons in the event of disasters, Report of the Secretary-General (21 July 2020) UN Doc A/75/214).
[121] See the remarks by the representatives from Singapore, Colombia, Portugal, China, El Salvador, Nigeria and Thailand offered during the GA 76th Session as reported in UN Doc GA/L/3640 (18 October 2021).
[122] Crawford (n 15) 41.
[123] Third Report on identification of customary international law by Michael Wood (n 19) para 65
[124] See further Azaria (n 60) 195ff
[125] Report of the ILC (n 20) 142, para 2

> 'The weight to be given to the Commission's determinations depends, however, on various factors, including the sources relied upon by the Commission, the stage reached in its work, and above all upon States' reception of its output.'[126]

Be that as it may, the work of the ILC unquestionably enjoys a privileged position among the authorities relied upon in diplomatic practice and in international case law. Professor Boisson de Chazournes has recently observed that 'the International Law Commission enjoys an authority *per se* (…) [and] is socially recognised as "the leading body with expertise in international law".'[127] She added that:

> '[The ILC] final products are often qualified as falling under article 38, paragraph 1 (d) of the Statute of the International Court of Justice, i.e. "highly qualified publicists". However, authority is dynamic in nature. It can be gained, it can be lost. It can increase, it can decrease over time. Nothing is set in stone. The Commission and States are the custodians of this authority, in the short-term but also in the longer term.'[128]

Other authors have gone one step further and provided new qualifications of the role of the ILC.

For instance, Danae Azaria has elaborated the thought-provoking idea of a 'codification-by-interpretation' paradigm in which she places the ILC in a special position.[129] According to this author, the ILC would be tasked with the mandate to interpret CIL where 'it cannot be presumed that interpretation is singularly an aspect of codification or exclusively one of progressive development.'[130] This supposedly 'new function,' however, would not entail providing a binding or authentic interpretation, but rather making an 'interpretative offer,' primarily to States, with a view to prompting their reaction within and outside the UN system.[131] To recall Danae's own words:

> 'The ILC's '*codification-by-interpretation*' paradigm takes the form of documents intended from their inception to remain non-binding, involves the *interpretation* of an existing treaty (…) and aims to reaffirm and develop the content of treaty rules over time and, through this process, to reaffirm and develop the content of CIL.'[132]

One cannot agree more on this relativistic approach to the ILC contribution to international law making as depending on the positivistic analysis of the changing attitude of States to the international law process in different international political junctures, in line with the present author's view expressed in 2015.[133] Such a relativistic approach to the matter in point seems all the more justified as the result of a legally positivistic analysis of the international social process in the light of the accelerated and abrupt tensions between fits of nationalistic unilateralism and the awareness of the need for enhanced multilateralism and international cooperation since then.

Another, more radical view, propounded by Yifeng Chen, goes so far as to qualify the ILC as an 'autonomous law-maker.'[134] Its alleged ultimate mission would be that of 'pursuing international *lex scripta* and the international rule of law'[135] separately from other UN, more *political* bodies. Basically, the idea would be that the ILC has increasingly resorted to progressive development as a tactic to develop new laws, and to keep itself occupied and relevant. As the same author puts it:

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[126] ibid
[127] Boisson de Chazournes (n 119) 151.
[128] ibid 152-153.
[129] Azaria (n 60) 188ff.
[130] ibid 188.
[131] ibid, 190ff.
[132] ibid 200.
[133] ibid, (n 62).
[134] Chen (n 98) 233ff.
[135] ibid 257.

> 'The legislative function of the International Law Commission could be appreciated in light of constitutionalisation of international law, where the constitutional role of the Commission could possibly be construed as *a trustee for the development of the international rule of law* (…).'[136]

Three general remarks largely intertwined with each other can be made with respect to these new daring postures. The first one is that the work of the ILC is certainly more authoritative than the teaching of the most highly qualified publicists.[137] This is due to the intrinsic authority of the ILC, to the persuasiveness of its works – always supported by a thorough analysis of international practice – and to the widespread reference that other actors on the international stage, especially international courts and tribunals, make to its work.[138] As already noted, the ILC does not act in a vacuum, and its work is directed and shaped throughout the interaction with the GA Sixth Committee. Thus, it benefits, at least in part, from a unique governmental 'consensual halo.'

The second remark, which flows from the last consideration, is that no theory on the normative value of the work of the ILC can downplay the importance of the role of States' consent in codifying, developing or even interpreting CIL, which is regarded nas o less important a matter by States. So much so that they leave it for themselves or to international adjudication based only on consensual jurisdiction.

Lastly, one cannot help the diminished role of the ILC in the codification of international law. Its prominently driving function from the 1950s, throughout the 80s, drew its *raison d'être* on a number of factors that nowadays have lost ground, or even waned.

Firstly, the then new East-West and North-South divisions at the time of the Cold War and decolonisation required the renegotiation of fundamental bodies of international law involving key international legal institutions, such as those on treaty law, the law of consular and diplomatic relations, all of which were essential in order to ensure the coexistence between States in a divided International Society.

Secondly, next to the codification of such basic international legal institutions, increasingly new issues emerged, whose international regulation was felt necessary by the UN Members States together with an enhanced need for retaining the political negotiation ownership from the beginning of the process, thus subtracting it from the ILC. A number of reasons contributed to that effect, especially, new awareness of the policy importance for the substantive exercise of national sovereignty and the non-exclusively legal, but also scientific and economic, relevance of a number of issues requiring codification and progressive development, thus involving governmental expertise beyond that from the legal services of the Ministries of Foreign Affairs. This accounts, for example, for the UN codification of the law of the sea to have taken place outside the ILC,[139] after the adoption of the four 1958 Geneva Conventions,[140] just like the ongoing negotiation process on the 'Biodiversity Beyond National Jurisdiction.'[141] The same considerations apply to much of process of consolidation of international environmental law through key UN authoritative conferences and conventions.[142] This holds true despite the ILC

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[136] ibid 264, italics added.

[137] 'Viewing codification conventions and ILC draft articles as individual instances of State practice or the work of law professors does not fully account for the role that these texts play in international legal argument,' Lusa Bordin (n 59), 537. See ibid, 546ff

[138] See ibid, 549ff

[139] See extensively Robert R Churchill, 'The 1982 Convention on the Law of the Sea' in Donald R Rothwell and others (eds), *The Oxford Handbook of the Law of the Sea* (OUP 2015), 26ff. See also Tullio Treves, 'Law of the Sea' (April 2011) in Anne Peters (ed) *Max Planck Encyclopedia of Public International Law* (online edn): 'The approach adopted in the procedure was that of consensus on ever broadening 'package deals.' The objective was to maintain the unity of the law of the sea by producing a single convention on which there would be universal consensus and to which reservations would not be permitted,' para 19.

[140] Convention on the Territorial Sea and the Contiguous Zone (adopted 29 April 1958, entered into force 10 September 1964) 516 UNTS 205, Convention on the High Seas Zone (adopted 29 April 1958, entered into force 30 September 1962) 450 UNTS 11, Convention on Fishing and Conservation of the Living Resources of the High Seas (adopted 29 April 1958, entered into force 20 March 1966) 559 UNTS 285 and Convention on the Continental Shelf (adopted 29 April 1958, entered into force 10 June 1964) 499 UNTS 311.

[141] See UNGA Res 72/249 (19 January 2018) UN Doc A/RES/72/249.

[142] Such as the Stockholm Declaration (Report of the United Nations Conference on the Human Environment (Stockholm 5-16 June 1972), UN Doc A/CONF.48/14/Rev.1 (1973) 21) and the Rio Declaration (n 23).

having been tasked in recent years with the consolidation of basic legal principles also pertaining to general, or specific, aspects, of international environmental law.[143]

Thirdly, in the historical period under consideration, the task of codification and progressive development of international law would naturally fall on the ILC as a prominent legal UN body, against the background of scant jurisprudential elucidation and application, let alone development of international law at the time, apart from the previous activity of the Permanent Court of International Justice, inevitably constrained in time by the limited number of States accepting its jurisdiction. The case could be made that the increased reliance on international adjudication and arbitration, together with the proliferation of international adjudicative forums since the 1980s has increasingly produced authoritative jurisprudential statements that are widely relied upon by States in their diplomatic claims and defences, which are reminiscent of the kind of flexible legal process in common law systems when consolidation of the law was not felt so much necessary through legislation.

The Role of 'UN Courts and Tribunals'

In line with these last remarks, it seems appropriate to make a quick reference to the role of the ICJ as the 'principal UN judicial organ,'[144] as well as of other UN-related international courts and tribunals, in the codification and progressive development of CIL. This is a stand-alone *locus classicus* of international scholarship and would deserve a full-length discussion.[145] The analysis will be confined here to very few selective considerations.

First of all, it is worth recalling that nowhere in the UN Charter – nor in the ICJ Statute, which is an integral part thereof[146] – is the Court endowed with any international law-making or consolidation power, acting as a source of international rights and duties for all UN Member States. First of all, under Art 38(1) of the ICJ Statute, its function 'is to decide in accordance with international law such disputes as are submitted to it,' while, under Art 59, its decisions 'has no binding force except between the parties and in respect of that particular case.' *Mutatis mutandis*, this applies to all UN related, or unrelated, international adjudicative bodies.

However, this does not mean that the Court does not contribute to the codification and development of international law. In particular, the 'developmental value' of ICJ judgments is usually to be found in the so-called *obiter dicta*, that is statements or passages that do not directly affect the resolution of the dispute before it. Thus, in the famous 1970 *Barcelona Traction* dictum, the ICJ took the opportunity, *a latere*, to put its seal on the existence of *erga omnes* obligations as 'the obligations of a State towards the international community as a whole.'[147] In so doing, the ICJ substantively complemented the overly abstract language of Art 53 of the 1969 Vienna Convention on the Law of Treaties on *jus cogens*. Also, in its *ratio decidendi*, the ICJ may well have brought about significant development of the law, despite some understandable criticism about this approach in a legal system deprived of the *stare decisis* principle.

Be that as it may, the ICJ contribution is undeniable to maritime delimitation parameters, so much so that States have generally relied upon them, both by incorporating them into the United Nations Convention on the Law of the Sea,[148] and accepting its jurisprudential interpretation, on a case-by-case basis. One may refer to the case law

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[143] See especially the *Draft Articles on prevention of transboundary harm from hazardous activities* (n 90), *the Guiding principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities* (n 108), the *Guidelines on protection of the atmosphere* (n 114), *the Guiding principles on the protection of the environment in relation to armed conflicts* (n 109) and the *issue papers on sea-level rise in relation to international law* (n 115).

[144] See UN Charter, art 92 and Statute of the ICJ, art 1.

[145] See, for instance, Hersch Lauterpacht, *The Development of International Law by the International Court* (Stevens & Sons 1958) as re-printed by CUP in 2011. See also Philippe Cahier, 'Le role du juge dans l'élaboration du droit international' in Jerzy Makarczyk (ed), *Theory of International Law at the Threshold of the 21st Century: Essays in Honour of Krzystof Skubiszewski* (Kluwer Law International 1996), 353ff and Christian J Tams and James Sloan (eds), *The Development of International Court by the International Court of Justice* (OUP 2013).

[146] UN Charter, art 92.

[147] *Barcelona Traction, Light and Power Company, Limited* [1970] ICJ Rep 3, [33].

[148] See arts 15, 74 and 83.

started by the landmark *North Sea Continental Shelf* case[149] and continued, amongst others, in *Fisheries Jurisdiction* cases,[150] *Continental Shelf (Tunisia/Libya)*[151] and *Continental Shelf (Libya/Malta).*[152] The ICJ's more recent case law in maritime delimitation embedded in equity is also worth noting, with special regard to *Jan Mayen,*[153] *Maritime Delimitation in the Black Sea,*[154] *Territorial and Maritime Dispute,*[155] and *Maritime Dispute.*[156]

The ICJ has also contributed to the development of CIL in the exercise of its advisory function[157]. One may recall, for instance, how the *Genocide Convention* advisory opinion significantly elaborated on new criteria for the admissibility of reservations to treaties, despite that lack of an express provision to that effect in the Convention.[158]

The contribution of UN international courts and tribunals to the elucidation and development of international law is not limited to the ICJ. Over the last 25 years of activity, the ITLOS has contributed to the progressive development of the law of the sea and international environmental law in areas such as freedom on the high seas, illegal unreported and unregulated fishing, and the environmental impact assessment obligation and the principle of sustainable development.[159]

The ICTY can well be said to have laid out the foundations of contemporary international criminal law. Among others, special mention is to be made to the *Tadić* case, where Judge Cassese – presiding the Appeals Chamber – basically 'forged' the customary rules of international humanitarian law governing non international armed conflict.[160]

As already alluded to, judicial activism raises legitimacy concerns since, lacking the *stare decisis* principle in international law, international adjudicative bodies are not formally endowed with the power of 'developing law.'[161] And they are well aware of this. Thus, the ICJ has repeatedly stated that:

> '[T]he Court, as a court of law, cannot render judgment *sub specie legis ferendae*, or anticipate the law before the legislator has laid it down';[162]

and that:

> '[T]he Court['s] task is to engage in its normal judicial function of ascertaining the existence or otherwise of legal principles and rules (...). [I]t states the existing law and does not legislate.'[163]

Leaving aside this controversial problem,[164] it should not be forgotten that the codification/progressive development potential of UN international courts and tribunals is always dependent on how States will react to

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[149] See fn 17, [157]ff.
[150] *Fisheries Jurisdiction (United Kingdom v Iceland)* (Merits) [1974] ICJ Rep 3 and *Fisheries Jurisdiction (Germany v Iceland)* (Merits) [1974] ICJ Rep 175.
[151] *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)* (Merits) [1982] ICJ Rep 18.
[152] *Continental Shelf (Libyan Arab Jamahiriya/Malta)* (Merits) [1985] ICJ Rep 13.
[153] *Maritime Delimitation in the Area between Greenland and Jan Mayen* [1993] ICJ Rep 38.
[154] *Maritime Delimitation in the Black Sea (Romania v Ukraine)* [2009] ICJ Rep 61.
[155] *Territorial and Maritime Dispute (Nicaragua v Colombia)* (Merits) [2012] ICJ Rep 624.
[156] *Maritime Dispute (Peru v Chile)* [2014] ICJ Rep 3. Having regard to land delimitation, see *Frontier Dispute* [1986] ICJ Rep 554
[157] See, generally, Teresa F Mayr and Jelka Mayr-Singer, 'Keep the Wheels Spinning: The Contributions of Advisory Opinions of the International Court of Justice to the Development of International Law' (2016) 76 Zaörv 425.
[158] *Reservations to the Convention on Genocide* (Advisory Opinion) [1951] ICJ Rep 15, 27.
[159] See, generally, Kriangsak Kittichaisree, 'ITLOS's Jurisprudential Contributions: Present and Future' in Kriangsak Kittichaisree, *The International Tribunal for the Law of the Sea* (OUP 2021)175ff.
[160] *Prosecutor v Tadić* (n 43) [96]ff. See further, Michael P Scharf, 'How the Tadic Appeals Chamber Decision Fundamentally Altered Customary International Law' in Sterio and Sharf (eds) (n 50) 59ff.
[161] See, generally, Alain Pellet and Daniel Müller, 'Article 38' in Andreas Zimmermann and others (eds), *The Statute of the International Court of Justice: A Commentary* (3rd edn, OUP 2019) 945ff.
[162] *Fisheries Jurisdiction* (n 150) [45]
[163] *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) [1996] ICJ Rep 226 [18]
[164] See, for instance, Alain Pellet, 'Decision of the ICJ as Sources of International Law?' (2018) 2 Gaetano Morelli Lecture Series 7.

judgments. That is, ultimately, to the manifestation of their will, either expressly or – as it is often the case – tacitly.

Concluding Remarks

I will conclude with a few strictly legal comparative considerations about going down, either the soft-law or conventional route,[165] and few general policy considerations.

Among the advantages of going for the adoption of a soft-law instrument it would seem to figure its expeditiousness. However, similar diplomatic exercises often prove to be as lengthy and complex as the negotiation of a treaty.[166] Awareness by the negotiators of good faith considerations and the principle of estoppel account for extreme caution even in a soft-law drafting context.

Secondly, the choice of a non-binding instrument would seem more agile and faster also for the purposes of its implementation, modification and termination. Such instruments do not require ratification, but the diffused practice of provisional application of treaties may partly mitigate the comparative advantage of the former kind of instruments. Besides, sidestepping the domestic legislator may involve public law problems of lack of transparency and publicity of the instrument in question. This may involve difficulty in providing domestic budgetary support for implementation purposes, when needed.

As to modification and termination, aside from the avoidance of cumbersome treaty-making procedures through the adoption of soft-law instruments, the fact remains that a unilateral change of policy may not justify the instant reverse of the good faith obligations of non-contradiction or estoppel, and, anyhow, may not allow for the derogation from customary obligations when enshrined in the soft-law instrument in question.

As to the general policy dimension of the choices in question, I will avoid recapitulating the salient aspects of the contribution to the codification and progressive development of international law by the GA – including through the ILC –, the ECOSOC, the SG, the SC, the ICJ, as well as by other UN-related courts. It is worth emphasising, however, how any achievement in this area is hardly the product of the UN as an independent international actor, but as the forum and catalyst for the expression of the attitude of Member States.

Accordingly, reflecting on the international law-making process within the UN may be key, not only to understanding the current state of health of the International Society, but also to catching a glimpse through the crystal ball of what the future of international law holds, at least in the short-medium term.

Cyclically, all legal systems experience periods of crisis that reflect critical phases of the underlying social process. As mentioned, the shift from a more value-homogeneous to a more ideologically divided International Society impacts the choice of the kind of legal methods for the development of the international legal process, favouring a more legal positivist, or voluntarist, attitude, as opposed to a more jus-naturalistic one. different approaches to the matter have been followed in different historical periods. However, in the long term, the two approaches seem to flow into a common terminus in the wider course of international law-making.

Today's worldwide critical social and political juncture appears to be – at one and the same time – produced and aggravated by the States' difficulty to find sufficiently widely shared societal values, both between and within themselves. The fact that, against this lack of societal homogeneity, the legal process is marked by a high degree of openness to the negotiation and adoption of soft-law instruments may be somewhat confusing unless it is explained, as above, with the recalcitrance by States to assume new legal obligations, while betraying a significant degree of awareness of the need for regulation of an international response to global threats to the international peace and security, including non-military ones. Such threats are generally shared and feared, contrary to the

[165] See further elaboration by the present author on the point at issue in *Introduzione al diritto internazionale contemporaneo* (6th edn revised and amended, CEDAM 2022) 176-181.
[166] See Christine Chinkin, 'The Challenge of Soft Law: Development and Change in International Law' [1989] 38 ICLQ 850

ways and means for their solution. Over the last few decades, the unilateral proactive pursuit of perceived shortcuts, or negligent inertia, has prevailed.

This situation is worrisome, especially in the light of the new, and old, global challenges that the International Society is increasingly facing. As to the new ones, suffice to think of the still dragging pandemic, climate change and its multifaceted detrimental effects, unbalanced demographic growth and the finite character of natural resources essential to an adequate standard of living for all. Against this backdrop, the UN has become the depositary of the goodwill and normative aspirations of its often two-faced Members, which are torn between nationalism and international cooperation.

In such vein, the UN organs, especially the ILC, with its non-governmental composition, venture towards the codification and development of international law against the oscillating attitude of States. The choice of the topics of its recent and ongoing endeavours – the *protection of the atmosphere* (under consideration),[167] the *protection of the environment in relation to armed conflict* (under consideration),[168] the *protection of persons in the event of disaster* (2016)[169] and the *sea-level rise* (under consideration)[170] – is no coincidence.

States' increasing recalcitrance to assume new legal obligations which they fear to lack the capacity to live up to accounts for the need for the ILC work to take a different path from the 'conventional' forms of codification, rather opting for general studies, possibly combined with operative language in terms of 'principles' or 'conclusions.' The ILC recommendation to the GA on the elaboration of a convention on the protection of persons in the event of a disaster on the basis of the relevant draft articles epitomises its full awareness that States and their consent still command the international legal process, especially where the topic under consideration is characterised by a lack of practice or a fragmented legal framework.[171]

Obviously, aside from the exception of Ch VII SC resolutions, the UN, including the ILC, do not, and cannot, create international law in and of themselves. However, they participate in shaping the contents of an authoritative 'normative offer' addressed to the UN Members States. From such a perspective, the UN legal process provides a more coherent systematisation and generalisation of previous practice and can channel the efforts to ensure that the International Society may address issues of particular urgency.[172] Ultimately, it is for States, individually, to take up or turn down such normative offers.[173]

Responsible, reasonable and equitable national civil societies may hold the government accountable for their choices, or the lack of them. Inevitably, disoriented and fragmented civil societies would leave the International Society disoriented and fragmentated, just as well. Though, civil societies may exert such a positive, or negative, impact on governments only where the rule of law, through representative and participatory constitutional democracy, is upheld.

This provides sufficient reason for scholars and practitioners to continue their engagement in their professions and disseminating the rule of law in its reasonable and equitable configurations, keeping conscious though, that the legal process does not produce the social process, but *vice versa*.

[167] See Report of the ILC (n 114) 84ff.
[168] See Report of the ILC (n 109) 249ff.
[169] Report of the ILC (n 100) 12ff.
[170] See Report of the ILC (n 115) 340ff.
[171] See Report of the ILC (n 61) 13, para 46
[172] For instance, apart from the ILC, the need for an ad convention on the protection of persons in the event of disaster has been reiterated by the GA (Res 73/209 (20 December 2018) UN Doc A/RES/73/209), including its Sixth Committee (Un Doc A/C.6/76/SR.12, 13 and 29), and the SG (Protection of persons in the event of disasters, Report of the Secretary-General (21 July 2020) UN Doc A/75/214).
[173] Schachter (n 2) 5

CHAPTER IX: PLURALISM IN INTERNATIONAL ORGANIZATIONS: THE RESPONSE TO COVID-19[*]

Ian Johnstone[**]

Introduction

The COVID pandemic and response thereto illustrates a change to international order that has been apparent for the last 10-20 years: it is becoming increasingly pluralistic. That pluralism has five dimensions: the distribution of hard power among states is more multipolar; many fields are developing specialized bodies of law, leading to a more fragmented legal order; governance is occurring at multiple levels, from small cities to global organizations with supranational powers; multiple stakeholders are influential at each layer of governance, not only government officials and international civil servants, but also thinktank and academic experts, non-governmental organizations, the private sector and philanthropies; and multiple normative orders operate in parallel, including legal and moral orders, as well as religion, customary traditions, and professional codes of conduct.

These five dimensions of pluralism can be a source of tension, making it difficult to manage international and transnational affairs. On the other hand, they open opportunities for a greater range of perspectives, expertise and authority to be brought to bear on global public policy challenges. Moreover, pluralism is a fact of life, not something that can be willed away in the interest of creating a more coherent international system or body of international law. In this chapter, I focus on international organizations as mechanisms for managing pluralism. I begin by explaining each of the five faces of pluralism in more detail, tying them to bodies of relevant scholarly literature. I then turn to a case study of COVID-19 to illustrate both how the pluralism plays out in international organizations, and how deliberation in international organizations offers a way of managing the tensions these different forms of pluralism create.

The Many Faces of Pluralism

Multipolarity

The most obvious form of pluralism in the international system is multipolarity. The bipolar distribution of power that characterized the Cold War gave way to a moment of seeming unipolarity, with the US dominating by almost every conceivable measure. Today, power is distributed more widely. The US leads, but China is catching up quickly. Russia is still a force to be reckoned, as the invasion Ukraine aptly illustrates. The EU has been weakened by departure of the UK, but cooperation among its remaining members may deepen – including in the areas of foreign and security policy. Japan is still a global economic power and not likely to stand by as China seeks to consolidate its grip on Asia. India's global stature continues to grow. Other members of the G20 have outsize influence in their regions and global influence through that forum and other international institutions.

Meanwhile, all states bring different perspectives to the development and application of international law, and distinctive expectations about what international organizations can and should do. Sometimes these perspectives and understandings converge within a region or among a like-minded grouping of states. Thus many European states share a broad vision of the values the EU should be promoting in global affairs; Southeast Asian states subscribe loosely to the ASEAN Way, characterized by consultation, consensus and non-interference; members of the African Union are increasingly determined to find "African solutions to African problems."

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The emerging field of "comparative international law" (CIL) takes the study of this kind of pluralism a step further.[1] In direct response to the idea of an "invisible college of international lawyers",[2] CIL scholars see a "divisible college" in which international law is "understood, interpreted, applied and approached" differently in different places.[3] Some claim that the approaches are so fundamentally different it is not accurate to speak of a single international law.[4] While one can question CIL's conflation of different interpretations of international law, with different "approaches" -- it is one thing to say the US and China, or even the global North South interpret international law differently, it is another to claim their very conceptions of international law are different – the literature highlights a dimension of pluralism that has been with us since the founding of the nation-state. Different states and grouping of states co-habit the international legal system and the tensions between them play out in international organizations.

Multiple Legal Fields

A second face of pluralism is among different areas of law: trade, investment, environment, human rights, law of the sea, etc. The issue here is not the existence of specialized areas of law *per se*, but that there is no overarching mechanism or principle of international law to resolve conflicts among the fields, resulting in fragmentation.[5] This fragmentation exists not only in the *substance* of international law, but also the proliferation of international tribunals: the International Court of Justice, the WTO dispute settlement mechanism, the International Criminal Court, the Law of the Sea Tribunal, all operating alongside multiple judicial and quasi-judicial bodies at regional and sub-regional levels.[6] Some have broad jurisdiction and others are more specialized, but even the specialized tribunals are continually being confronted with disputes that encompass more than one area of law (for example, environmental issues arising in a case before the WTO).

The lack of coherence and unity is problematic from the point of view of legal certainty, and the basic principle that like cases ought to treated alike. If the divergences and conflicts between the discrete bodies become so great, not only are those virtues undermined, but one wonders whether "the concept of international law retains any meaning" at all.[7] Yet an International Law Commission study concludes that the need for coherence must be balanced against the reality of pluralism:

> *Coherence is…a formal and abstract virtue. For a legal system that is regarded in some respects as unjust or unworkable, no added value is brought by the fact of its being coherently so. Therefore, alongside coherence, pluralism should be understood as a constitutive value of the system. Indeed, in a world of plural sovereignties, this has always been so.*[8]

Conflicts among different areas of law are inevitable in a pluralistic society and there is no hierarchical meta-system available to do away with them. The best we can hope for is to manage them in IOs and elsewhere.

Multiple Levels Of Governance

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[1] See generally Anthea Roberts et al. (eds), *Comparative International Law* (OUP 2018); 'Symposium on Comparative International Law', [2015] 109 American Journal of International Law 467; M. Koskenniemi, 'The Case for Comparative International Law' [2011] 20 Finnish Yearbook of International Law 1.

[2] Oscar Schachter, 'The Invisible College of International Lawyers' [1977] 72 Northwestern University Law Review 217

[3] Anthea Roberts et al, "Conceptualizing Comparative International Law", in Anthea. Roberts et al. (eds.), *Comparative International Law* (OUP, 2018), 3-31*;* David Kennedy, 'One, Two, Three, Many Legal Orders: Legal Pluralism and the Cosmopolitan Dream' (2007) 31New York University Review of Law and Social Change 641, 656.

[4] Anthea Roberts, *Is International Law International?* (OUP 2017) 2

[5] International Law Commission, Report of the Study Group on *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*", UN General Assembly document A/CN.4/L682 (13 April 2006), para 8

[6] On the proliferation of tribunals, see Karen Alter, *The New Terrain of International Law: Courts, Politics, Rights* (Princeton University Press 2014); Karen Alter, Cesare Romano and Yuval Shany (eds.), *Oxford Handbook of International Adjudication* (OUP 2014)

[7] Paul Stephan, 'Comparative International Law, Foreign Relations Law and Fragmentation: Can the Center Hold?', in Anthea Roberts et al (eds), *Comparative International Law* (OUP, 2018) 63.

[8] ILC Report, *supra* n 5, para 491. See also Tomer Broude, 'Keep Calm and Carry On: Marti Koskenniemi and the Fragmentation of International Law', [2013] 27 Temple International and Comparative Law Journal 279*;* Harlan Grant Cohen, 'Fragmentation', in Jean d'Aspremont and Sahib Singh (eds.), *Concepts of International Law: Contributions to Disciplinary Thought* (Edgar Elgar 2019) 315

A third face of pluralism is multiple levels governance. At least two bodies of literature address this: studies of multi-layered governance that began with the European Union have been extended to global governance generally; and the literature on "legal pluralism", which encompasses different legal and quasi-legal regimes governing the same people in the same territory. In the 1990s, European integration prompted interest in how authority was coming to be shared between national governments, the EU above, and sub-national levels of government below.[9] These layers of governance are interconnected, and not entirely hierarchical. Power is exercised at all levels and the channels between them flow in multiple directions. Layered on top of the EU or global organizations with supranational powers, sometimes competing with the European and national authorities, illustrated by the targeted sanctions regimes imposed by the UN Security Council.[10]

The term "legal pluralism" is used to describe different legal systems that co-exist in one place, for example colonial law and the indigenous law of colonized communities, or other forms of "official" and "unofficial law."[11] As with the fragmentation literature, some scholars applaud this kind of pluralism. Paul Schiff Berman argues that it provides alternative ideas and generates discourse among multiple community affiliations.[12] Nico Krisch sees it as creating space for weaker actors to contest the law of their more powerful counterparts, building checks and balances into the international legal order. [13] The relationships between them are fluid and left to be determined through political, not rule-based processes.

What these strands of literature on multi-level governance and global legal pluralism suggest is that the multiplicity of layers of law and governance cannot be wished away – and that seeking to harmonize them in a unified legal system may be normatively problematic. It is better to resolve or manage the tensions between the layers through deliberative politics carried out in IOs.

Multiple Factors and Stakeholders

A fourth face of pluralism concerns the multiple actors and stakeholders who participate in the making, interpretation and implementation of international law. [14] While national governments are the key players, international civil servants, trans-governmental networks, non-governmental organizations, business associations, and organs of civil society also play a role. These non-state actors may participate directly in treaty-making processes, or indirectly by serving as watchdogs, advocates and norm entrepreneurs. Another way in which both NGO and IGO staff affect the development of international law is through operational activities such as peacebuilding and election monitoring. These activities can have a law-making effect by giving content to inchoate norms.[15]

Transnational networks also participate in deliberations with and within international organizations. The most salient of these are tri-sectoral alliances of government agencies, international bureaucracies, and non-states actors (both corporations and elements of civil society). These networks benefit from "the strength of weak ties": precisely because the participants are not closely tied to one another, they bring diverse perspectives and expertise.[16] The Global Alliance for Vaccines and Immunization (GAVI) is a good example. It is governed by a

[9] Gary Marks, Liesbet Hooghe and Kermit Blank, 'European Integration from the 1980s: State-Centric and Multi-level Governance' [1996] 34 Journal of Common Market Studies 341.

[10] See generally Andreas Follesdal, Ramses Wessel and Jan Wouters (eds.), *Multi-level Regulation and the EU: The Interplay between Global, European and National Normative Processes* (Martinus Nijhoff 2008).

[11] Paul. S. Berman, 'Global Legal Pluralism' [2007] 80 Southern California Law Review 1155, 1161. For a critique of the concept of global legal pluralism as being "radically ambiguous", see William Twining, 'Normative and Legal Pluralism: A Global Perspective' [2010] 20 Duke Journal of Comparative and International Law 473, 515.

[12] Paul S. Berman, 'Can Global Legal Pluralism Be Both 'Global' and 'Pluralist'' [2019] 29 Duke Journal of Comparative and International Law 381.

[13] Nico Krisch, *Beyond Constitutionalism: The Pluralist Structure of Postnational Law* (OUP 2010) 78-89 and 103.

[14] Ian. Johnstone, 'Law-Making by International Organizations: Perspectives from International Law/International Relations Theory', in Jeffrey Dunoff and Mark Pollack (eds.), *Interdisciplinary Perspectives on International Law and International Relations: The State of the Art* (CUP 2013) 266, 270.

[15] Ian Johnstone, 'Law-making Through the Operational Activities of International Organizations' [2008-09] 40 George Washington International Law Review 87.

[16] Wolfgang Reinicke, 'The Other World Wide Web: Global Public Policy Networks' [1999] 117 Foreign Policy 44, 55.

board composed of representatives from ten governments, three international organizations, two pharmaceutical industries, one health institute, one civil society organization, the Gates Foundation and nine individuals.

The jury is still out on the legitimacy of this growth of non-state influence in the international legal order. On the one hand, they can help to bring down the democratic deficit in international organizations, amplifying the voices of groups whose interests would not otherwise be accounted for.[17] Moreover, the ability of NGOs to monitor what government representatives say and do in IOs creates a "transnational civil society channel of accountability."[18] On the other hand, large well-funded NGOs from the Global North tend to have greater capacity to participate than those from the Global South. Some NGOs derive legitimacy from their broad-based membership, but that does not apply to smaller, single-issue NGOs funded by a few large donors. When for-profit entities are brought into the equation, it raises even more troubling questions about motivations.

Multiple Normative Orders

Finally, law is but one type of normative order – defined as "a set of norms or social practices oriented towards ordering relations between members of a community or group where this set is more or less established, more or less integrated, with more or less defined boundaries".[19] There are others: social norms, religious norms, traditional customs and morality to name a few. [20] These norms stem from a multitude of sources, some more easily identified than others. [21] The Bible or Quran are evident sources of religious orders. What constitutes a social norm is harder to pinpoint; what constitutes morality, even harder.[22] We think we know what the sources of law are, but if one includes soft law, it becomes fuzzier.

Without getting bogged down in definitional complexities, it is easy to see that international law is not the only order that informs deliberations in international organizations. There is the internal law of the organization (for example, rules on the independence of international civil servants), there are professional codes of conduct (for example, ethical obligations of lawyers), there are institutional practices (for example equitable geographical distribution in working groups), and there is morality. In some institutions, the OIC for example, religious norms matter. In others, the norms of the marketplace dominate (the WTO and regional trade regimes).

Normative orders often come into conflict. An influential commission determined that NATO's intervention in Kosovo in 1999 was illegal but "legitimate".[23] The lack of intervention in Rwanda in 1994 was criticized as blind adherence to outdated peacekeeping norms in the face of genocide.[24] In peace-making processes, the rights of women are often given short shrift when they bump up against traditional norms of patriarchal societies. In the

[17] Klaus Dingwerth and Patricia Nanz, 'Participation', Jacob Katz Cogan, Ian Johnstone and Iand Hurd (eds.), *The Oxford Handbook of International Organizations* (2016) 1126, 1139.
[18] Alan Buchanan and Robert Keohane, 'The Legitimacy of Global Governance Institutions' [2006] 20 Ethics and International Affairs 405, 406; David Held and Mathias Koenig-Archibugi (eds.), *Global Governance and Public Accountability* (Oxford: Blackwell 2005)
[19] William Twining, 'Normative and Legal Pluralism: A Global Perspective' [2010] 20 Duke Journal of Comparative and International Law 473, 475.
[20] In trying to make the concept of normative pluralism analytically useful to understanding legal pluralism, Brian Tamahana suggest six types of normative order: official legal systems; customary normative systems; religious/culture normative systems; economic/capitalist normative systems; functional normative systems; and community/cultural normative systems. Brian Tamahana, 'Understanding Legal Pluralism: Past and Present, Local to Global', [2008] 30 Sydney Law Review 375, 399.
[21] Jan Klabbers and Piiparinen define a normative order as "a set of related commands, injunctions, 'dos and donts' that stem from the same source or a multitude of similar sources". Jan Klabbers and Touko Piiparinen, 'Normative Pluralism: An Explanation', Jan Klabbers and Touko Piiparinen (eds.) *Normative Pluralism and International Law: Exploring Global Governance* (CUP 2013) 13-34, 21.
[22] ibid 21.
[23] Independent International Commission on Kosovo, *The Kosovo Report: Conflict, International Response, Lessons Learned* (OUP 2008). See also B. Simma, "NATO, the UN and the Use of Force: Legal Aspects" [1999] 10 European Journal of International Law 1-22.
[24] The UN's Independent Inquiry on Rwanda spoke of "an institutional ideology of impartiality, even when confronted with genocide". UN Security Council Report 1257, Conclusion 19, S/1999/1257 (15 December 1999).

World Bank and IMF, especially in the heyday of structural adjustments, market-driven economics typically trump human rights.[25] For better or worse, international law often gets "overruled" by other normative orders.[26]

COVID-19 and Pluralism

I turn now to the role of IOs in managing these five dimensions of pluralism, illustrated by the response to COVID-19. Most international organizations are thought of as venues for reducing the tensions inherent in pluralism, not for embracing it. Yet because pluralism cannot be willed away, that is what many organizations do. In this section I will describe how each dimension of pluralism is implicated in responses to COVID-19. It is too soon to draw firm conclusions about the impact of deliberations in international organizations. Clearly they have not resolved all conflicts let alone generated a coherent response to the pandemic. But the case does show that international organizations are places where the five dimensions of pluralism play out, and that the tensions created by them can lead to outcomes that accommodate the interests of multiple actors.

Multipolarity

The UN, WHO and Group of Twenty (G20) have all been venues for the US-China rivalry to play out. It paralyzed the SC for several months. It inhibited a collective response among the G20. And it put the WHO in a quandary. In the May annual meeting of the World Health Assembly (WHA), two issues pitted the US and China against each other: the participation of Taiwan as an observer, and the call for an inquiry into the origins of COVID-19. Taiwan's attempts to join the WHO (like the UN) have been stymied by China's opposition for decades. From 2009 to 2016 it was invited to participate in the work of the WHA as an observer, but the invitation was not extended in 2017. The US led calls for a renewed invitation in 2020, but matter was never put to a vote because Taiwan, claiming it did not want to take time away from discussing COVID-19 in the shortened Assembly, agreed to delay debate on its participation to meetings later in the year. As Minister of Health Joseph Wu put it: "After careful deliberation, we have accepted the suggestion from our allies and like-minded nations to wait until the resumed session before further promoting our bid."[27]

On the call for an inquiry on the response to the pandemic, the US wanted to focus on China's role and the WHO Director-General's overly deferential attitude. China opposed any kind of inquiry. The EU brokered a compromise resolution co-sponsored by 130 states and adopted by consensus that called for an independent evaluation of the global response, including, but not limited to, WHO's performance. China was not mentioned by name in the resolution.

Yet China, the US and the EU (three 'poles') have not been the only major players. From October 2020, India and South Africa led the charge in the WTO for a temporary waiver of the intellectual property rights protections for technologies needed to prevent, contain, or treat COVID-19, including vaccines. More than 100 low-income countries supported this proposal. It was opposed by the European Union (EU), the UK, Japan, Canada, Australia and – initially – the US. In May, 2021, the Biden administration came around to expressing support. And China did so shortly thereafter. But those 'superpowers' did not drive the debate – initially it was India/South Africa on behalf of the Global South *versus* EU. They made the proposals and counter-proposals in the WTO TRIPS Council, and have been pushing the matter towards a resolution.[28]

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[25] Galit Sarfaty, "Why Culture Matters in International Institutions: The Marginality of Human Rights at the World Bank" [2009] 103 American Journal of International Law 647.

[26] Klabbers and Piiparinen, 'Normative Pluralism: An Explanation', ibid (n 21, 28).

[27] "Taiwan: Won't Press for World Health Assembly Participation" (Associated Press 18 May 2020) <https://abcnews.go.com/Health/wireStory/taiwan-press-wha-participation-70738350>.

[28] In March 2022, the US, EU, India and South Africa reached agreement on a text to be submitted to the WTO <https://www.reuters.com/business/healthcare-pharmaceuticals/us-eu-india-s-africa-reach-tentative-pact-covid-vaccine-ip-waiver-sources-2022-03-15/>.

Multiple Legal Fields

This brings us to the second form of pluralism: the intersection (and perhaps fragmentation) of multiple fields of infectious-disease related law. The International Health Regulations are the centerpiece. They impose a number of binding obligations on WHO members, including the requirement to notify the WHO of all "unexpected or unusual" health events on their territories that could pose a risk of the spread of disease to other states, and to share information about the situation with the WHO (Article 6). It also imposes a more long-term obligation on states to build core capacity in their health systems both to detect infectious disease outbreaks and to be able respond effectively (Articles 5 and 13). Parties to the IHR are expected though not obliged to follow WHO recommendations, but can take "additional measures" they deem necessary (Article 43).

Various human rights are also integral. The right to health requires at a minimum that a state use the "maximum available material resources" to provide adequate health care to its citizens during an infectious disease outbreak. Civil liberties such as the freedom of movement and the right to privacy are impinged upon by lockdowns, travel restrictions and contact tracing. Human rights law permits some curtailment of these civil liberties during a public health emergency, but only to the extent necessary to meet the public health objective and in a non-discriminatory manner. The response to COVID-19 – in democratic and non-democratic countries alike – has generated a well-founded fear that "emergency powers" are being invoked for ulterior motives and will not be relinquished when the emergency is over.

In addition to the IHR and human rights law, many other areas of law are implicated by COVID-19: trade and intellectual property law, biosecurity and biosafety law, environmental law, refugee law, wildlife law, aviation law, the law of state responsibility and the defenses thereto (force majeure, necessity, and distress).

Clearly the law that relates global health law is pluralistic. Is it also fragmented? One of the major criticisms of the global response to COVID-19 is that there is no coordinating mechanism to provide coherence in how the relevant law is implemented.[29] The negotiation of a pandemic treaty or other instrument, which began in November 2021, may bring some coherence but that will take a time. Until then, the most we can expect is better management of the legal pluralism, perhaps through some sort of Coordinating Council, or a "Global Health Threat Council," as proposed by the Independent Panel for Pandemic Preparedness and Response.[30] The proposal is for a Council of 18 members -- two from each of the UN's five regional groups, plus three from civil society, three from the business sector and two prominent global citizens or experts. This is an example of multi-stakeholderism (see below) as well as a way of addressing the fragmentation of law.

Multiple Levels of Governance

This type of pluralism is about the various layers of governmental authority that characterise the contemporary world order, with the nation state still being the main locus of power, but sharing authority with global and regional organizatiosn above and sub-national actors (provinces, cities) below.

In the realm of global health, the main global institutions are the WHO, the World Bank/IMF, the WTO, the UN Human Rights Council, and the UN Security Council (SC). The SC has dealt with a number of health crises in the past. It held meetings on HIV/AIDS in the 2000s (over the objections of China), it declared the Ebola outbreak in West Africa a threat to international peace and security and authorized peacekeeping missions to help address it in 2014. COVID-19 clearly has security implications: it can aggravate conflicts, be exploited by bad actors, hurt peace-making and peace-keeping efforts, and add to the vulnerability of already desperate groups, such as refugees and internally displaced persons. It can also create opportunities for peace (as illustrated by the Secretary-General's call for a global cease-fire) and it highlights the importance of building resilient and equitable health care systems in peace-building efforts. Yet the SC was missing in action for a full 111 days after COVID-

[29] Dapo Akande et al (hosts), Gian Luca Burci (guest), 'WHO let the bats out?' (EJIL: The Podcast! 5 May 2020) < https://www.ejiltalk.org/ejil-the-podcast-who-let-the-bats-out/>.

[30] Independent Panel for Pandemic Preparedness and Response, *COVID-19: Make it the Last Pandemic* (2021) < https://theindependentpanel.org/wp-content/uploads/2021/05/COVID-19-Make-it-the-Last-Pandemic_final.pdf>.

19 was declared a global pandemic, when it finally adopted a resolution demanding a cessation of hostilities in all conflict situations and calling or a humanitarian pause to enable the delivery assistance.[31]

At the regional level, the EU has been an influential actor in crafting a response to both the health and socio-economic crisis in Europe. The African Union has done the same in Africa, including through the work of its African Centers on Disease Control and Prevention. ASEAN worked to coordinate a response in South East Asia. And the regional development banks have all prioritized post-pandemic recovery.

The authority of these inter-governmental organizations is fairly weak in relation to national authorities, and that of national governments is often weak in relation to local authorities. In the US, over 2684 governing bodies have public health responsibilities.[32] The US Constitution empowers the federal government to act on matters that impact international and inter-state commerce. But governors and mayors hold most police and public welfare powers, so they make rules on quarantines for example. The situation in India is similar, with authority shared between the Central Government, State/Union Territory governments, and municipalities.

Among the topics of conversation around COVID-19 is whether IOs should be empowered to do more. Ironically, President Trump condemned the WHO for lacking "teeth" suggesting it ought to be given those teeth. Australia's Prime Minister even proposed that the WHO should have the power to deploy investigators like the weapons inspectors the Security Council sent to Iraq. [33] At the other end of the spectrum were fights in the US between city mayors, state governors and the Federal Government on who gets to decide on things like mask and vaccination mandates.

Multiple Stakeholders

Related to the multiple levels of governance, many actors are involved in preventing and responding to COVID-19 pandemics: elected politicians at the central government level, as well as the ministries and health institutes that manage the response; and state governors, provincial leaders, city mayors and the professionals who support them. At the international level, we see the diplomats in international organizations, and the secretariats and health professionals who manage the day-to-day work. NGOs are significant actors, as implementing partners and advocates. Large philanthropies, pharmaceutical companies, medical equipment manufacturers and other health industry representatives have a seat at the table, figuratively if not literally. In some organisations, such as GAVI, they have a literal seat.[34]

Deliberations around development of and access to a vaccine have involved all of these stakeholders. So for example, the Access to COVID-19 Tools Accelerator (ACT accelerator) was launched by group of global health organizations (including the WHO, GAVI and CEPI) working with private sector partners and NGOs. [35] The group was later joined by the International Red Cross and Red Crescent Movement and the International Federation of Pharmaceutical Manufacturers. And at an on-line pledging conference several countries and philanthropies pledged support for the $8.2 billion campaign, including the EU, UK, Norway, Saudi Arabia, Germany, France, Japan, Canada, Israel, Turkey, South Africa, Malaysia and the Gates Foundation. The US, Russia and India did not attend. China was represented by a low-level official.

Multiple Normative Orders

[31] UN Security Council Resolution 2532, 1 July 2020. This was reiterated in a later resolution, that also called for international cooperation to facilitate access to vaccines in conflict zones. UN Security Council Resolution 2565 (26 February 2021).
[32] Polly Price, "A Coronavirus Quarantine in America Could be a Giant Legal Mess", *The Atlantic* (16 February 2020).
[33] Malcolm Farr, "Australian PM Pushes for WHO overhaul, including the power to send investigators akin to weapons inspectors", *The Guardian* (22 April 2020) <https://www.theguardian.com/australia-news/2020/apr/22/australian-pm-pushes-for-who-overhaul-including-power-to-send-in-investigators>.
[34] GAVI is governed by a board composed of representatives from ten governments, three international organizations, two pharmaceutical industries, one health institute, one civil society organization, the Gates Foundation and nine individuals.
[35] WHO, "Access to COVID-19 Tools (ACT) Accelerator: A Global Collaboration to Accelerate the Development, Production and Equitable Access to New COVID-19 diagnostics, therapeutics and vaccines" (24 April 2020).

Finally, international law is just one of the normative orders that informs global health governance. Social distancing (and the sense of collective responsibility that goes along with that) is a social norm. Beyond the broad injunction implied in the right to health, helping the most vulnerable is not a legal norm but rather a question of morality (as well as self-interest).

Religious norms are certainly impacted: in Senegal, the 95% Muslim population was told not to go to the mosque on Fridays, to pray at home; in the US, restrictions on public gatherings prompted church services in parking lots. Economic norms, ranging from the strictures of global supply chains to the dignity of work to the practices of the informal economy, are very much a part of the equation.

Organizations also have cultural norms that impact how they function: the WHO Secretariat is acculturated to think of itself as a technical, non-political body, not in the habit of naming and shaming states. Calling out China for its apparent violation of Article 6 of the IHR, or the US for its shambolic response to the pandemic, are not in the culture of the organization.

A good illustration of how these various normative orders intersect in a constructive way is the discussion around whether to consider the vaccine a global public good. The term itself is contested. The term was coined by an economist (Paul Samuelson) who described such goods as having two characteristics: non-rivalry and non-excludability. First, there is no rivalry between potential users of the good: one person can use it without diminishing its availability to others. Secondly, people cannot practically be excluded from using the good - it is available to everyone, regardless of whether they contributed to producing it. The more common, popular usage is simply goods that should be made available to all those in need. That idea has legal, political, moral and religious connotations, and has become a rallying cry in many international organizations.[36] The term was used repeatedly by government leaders, as well as the DG of the WHO and SG of the UN.[37] At an African Union virtual conference June 2020, African Ministers of Health also invoked the concept by insisting that the vaccine should be accessible to all.[38] It has become part of the rhetoric of the European Commission.

Conclusion

Pluralism both complicates the work of international organizations and makes it more important. It complicates by generating tension across all five dimensions: poles of power compete with each other, bodies of law conflict, levels of governance vie for jurisdiction control, stakeholders clash, and normative orders push in different directions. These tensions make it difficult to produce coherent responses to global public policy challenges. On the other hand, as observed by the International Law Commission study group, coherence at any cost can be normatively problematic. Hegemons can generate coherence through centralized control, but at the expense of diversity and, ultimately, legitimacy. No international organizations is empowered to exercise that degree of centralized control, not even the European Union. What they do offer is a shared frame of reference. Joining an IO and participating in its activities, even if only by paying lip service to its constitutive act, can generate enough of a shared frame of reference to help manage the tensions and conflicts that are inherent in any society – including international society. This neither eradicates pluralism, nor celebrates it. It simply acknowledges that pluralism in all its dimensions is a fact of contemporary international life.

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[36] See United Nations, *Our Common Agenda: Report of the Secretary-General* (2021), paras 64-71; Independent Task Force on Global Public Goods, *Meeting Global Challenges: International Cooperation in the National Interest* (2006). On the implications of treating the vaccine as a global public good, see Ngozi Okonjo-Iweala, 'Finding a Vaccine is only the first step: no-one will be safe without the whole world being safe', Foreign Affairs (30 April 2020).

[37] For example, at the Africa Dialogue Series organized in collaboration with the AU, the UN SG said African countries should also have quick, equal and affordable access to any eventual vaccine and treatment, which must be considered as global public goods." UN Press Release, SG/SM/22089 (20 May 2020) <https://www.un.org/press/en/2020/sgsm20089.doc.htm>.

[38] AU/African CDCs , "Covid-19 Vaccine Development and Access Virtual Conference" (24-25 June 2020) <https://africacdc.org/news-item/covid-19-vaccine-development-and-access-virtual-conference/>.

CHAPTER X: MULTILATERALISM IN THE UNITED NATIONS

Raja Karthikeya[1]

Abstract

Global crises since the start of this millennium such as the Global Financial crisis, the COVID-19 pandemic, the rise of Transnational terrorism, and the ever-increasing challenge of Climate Change have underscored the need to keep Multilateralism at the heart of international diplomacy. However, multilateral approaches to decision-making are under unprecedented stress today due to a range of factors. This chapter explores the risks faced by Multilateralism and posits that Multilateralism is not only an approach to international decision-making. It is also a form of signaling in the international system that induces predictability, trust and norm-building. Overcoming the crisis faced by Multilateralism requires not only governments but also citizens to work in cohesion with each other.

Introduction

The world today can be described as a jigsaw puzzle. If any one piece is missing, the entirety remains incomplete. Global crises that have emerged since the start of this millennium – from the 2008 Global Financial crisis, the COVID-19 pandemic, the rise of Transnational terrorism, and the ever-increasing challenge of Climate Change – have highlighted the need for the governments and people of the world to act as one. The recognition of this reality is the driving force for Multilateralism in foreign policy today. This paper posits that Multilateralism is not only an approach to international decision-making. It is also a form of different forms of signaling in the international system. Multilateralism today is facing unprecedented challenges, which we can only overcome by working together.

Defining Multilateralism

Multilateralism can best be described in Alexandre Dumas' words: "All for one, and one for all". Concerted action by all peoples to solve the challenge of any one people, and by corollary, each people thinking of the interest of all peoples in their actions – this is the very definition of Multilateralism.

The Alliance for Multilateralism launched in 2019 by 30 governments, following an initiative by Germany and France among others has outlined a strong rationale to adopt multilateral approaches to solve the world's problems today. The Alliance holds that "States cooperate in order to promote common objectives and balance and regulate competing interests. They do this because they know that, ultimately, all states reap the greatest gains if they work together and agree on rules. Such cooperation relies on certain principles and values being shared by all parties. In the age of globalisation, almost all countries on Earth are interconnected. Conflicts raging thousands of miles away may have a direct impact on people's lives. Phenomena such as climate change cause problems that do not stop at any borders, which is why multilateral cooperation is more important than ever today."

The principles and values stated above would almost certainly include Respect for Sovereignty; Respect for Commitments; Equity; Consent; Consensus; and a core belief that multilateralism is essential for international cooperation.

Multilateralism is the very bedrock of the post-WW2 world order. And yet, one could argue that it was the end of the Cold War that highlighted the need for multilateral approaches. In 1991, when Saddam Hussein's invasion of Kuwait drove up global oil prices, it seemed like a faraway war…until the cascading effect of oil prices on

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transportation of essential commodities created a national paucity of onions across the ocean in India! No one can seriously argue today that a civil war or a natural disaster in another part of the world does not affect them. The inter-connectedness of supply chains and markets was highlighted for our generation most recently in the global manufacturing delays induced by the COVID-19 pandemic. But, the globalized nature of the world is just one argument for multilateralism. As the UN General Assembly noted in 2020, "Multilateralism is not an option but a necessity as we build back better for a more equal, more resilient, and more sustainable world."

Admittedly, over the past two decades, the international community has incrementally cooperated in the face of some crises including transnational terrorism and climate change. The international community has however been hesitant to cooperate in the face of more immediate challenges such as the global financial crisis and the COVID-19 pandemic. The pandemic in particular, with travel restrictions and vaccine nationalism, bred a crisis of trust and revealed how far multilateralism still has to go.

Why Multilateralism Matters

When a Nation State adopts a Multilateral approach to foreign policy decision-making, it sends three signals to the other Nation States: that the State is predictable, trustworthy, and ready to align with international norms. These three signals are critical for stability in the international order.

Predictability: Multilateral approaches, especially in treaty-making, require Nation-States to reveal their positions in the course of negotiations, even to other States that have yet to decide on their position. This induces a sense of certainty and predictability about the State's posture.

Trustworthiness: The embrace of multilateralism by several nation states creates a form of reputational pressure on each of them to confirm any deal struck between them. This leads to more sustainable deals. Also, multilateral approaches enable the formation of coalitions of like-minded States. Their collective bargaining power is enhanced. In addition to the need to secure their interests, Reputational pressure inhibits States from dropping out of their coalitions. This in turn enhances their trustworthiness in the eyes of other states.

Norm-creation: Multilateral approaches signal widespread acceptance of a specific position by several States. Thus, the collective position has the potential of turning into a norm. For example, the Chemical Weapons Convention is not only a multilateral body, it also signifies an international norm that encourages the Member States to shun chemical weapons as an immoral form of warfare.
Interestingly, when a large number of States adopt multilateral approaches to an issue, their position can turn the issue from a Legal discussion into a Moral one. Moral positions are likely to inhibit defections from agreed positions far better than legal positions. This allows for a rules-based international order to come into place, where the rules can be tacit. In turn, a rules-based international order[2] allows States to focus on their domestic priorities.

Multilateralism in Crisis

So why has multilateralism in recent years been in a state of crisis? Several factors may be responsible for this.

Geopolitical tensions: The shifts in the global balance of power since the Cold War have led today to the emergence of a multi-polar world[3]. Power is expressed by States not only in terms of their military coercive capabilities or their ability to dictate the economic policy of other States. It is also expressed in who gets to set the norms and whose norms prevail regionally and globally.

Rapid technological change: The strides in technology in recent years from the internet to the metaverse have led to two noticeable changes. There is now a dire need for speedy consensus, given that diplomatic disagreements

[2] Vylegzhanin, A. & Nefedov, B. & Voronin, E. & Magomedova, Olga & Zotova, P.. (2021). The Term "Rules-based International Order" in International Legal Discourses. Moscow Journal of International Law, p 35-60. 10.24833/0869-0049-2021-2-35-60.
[3] Wade, Robert H. "Emerging world order? From multipolarity to multilateralism in the G20, the World Bank, and the IMF." *Politics & society* 39, no. 3 (2011) 347-378.

can spiral into political standoffs in no time through social media.[4] Technology has also empowered citizens to a level where there is less reverence for States than before.[5] This appears to have compelled States to take on assertive stances on multilateral fora.

The challenges of globalization: At the start of this millennium, Globalization was celebrated. It was widely believed that when sources, supply chains and markets for goods and services are geographically-dispersed and without barriers, it would create a new world – in which people would be closer than ever before. This however only partially came true. Globalization did not deliver for people in all parts of the world. This has strengthened protectionist impulses.

Breakdown of social cohesion: The polarization of societies based on religious and ethnic identity in recent years has been fueled by political actors pursuing power in an increasingly uncertain world. A commitment to pluralism is indicative of a commitment to multilateralism. Conversely, political actors who turned their backs on pluralism and are unwilling to preserve the norms of social cohesion within their societies have also been noted to turn their back on multilateral norms.

Beyond these factors, some inherent vulnerabilities of the multilateral process allow States to turn their backs on multilateralism today. For a State that perceives itself to be the weaker party in a negotiation, there is always the temptation to cut a bilateral deal with a stronger counterpart[6]. On the other hand, when States with weaker negotiating capacity come together to bargain collectively, the stronger State across the table has the temptation to divide them and negotiate bilaterally with them to get a better deal.

The pull of populism[7] in domestic politics compels leaders – especially in democracies – to take intransigent positions that make multilateral negotiations almost impossible. A multilateral process in which all participating parties are unwilling to make concessions can either lead to a breakdown of the process or lead to a very weak deal in the form of a collective compromise. The slow and sometimes tedious nature of the multilateral process and the uncertainty in terms of coalitions during any such process can tempt a State to opt for a bilateral deal which may be weaker but is more predictable in terms of negotiation. Last but not least, since no one size can fit all, States can find that negotiating bilaterally or outside the multilateral process can help them achieve a deal that is better aligned with their very specific national interests.

The Challenge of Centrifugality

Given the above phenomena, we cannot afford to turn a blind eye to the grave crisis in which multilateralism finds itself today. The challenges faced by multilateralism in fact precede the pandemic and go to the heart of the international system. A desire to break free from the multilateral approach, in the hope that others would follow – a centrifugality of sorts – has started to become evident. Over the past two decades, a rising sense of sovereignty paralleled by a quest for regional integration in many parts of the world has led many States to put their energies into regional solutions to their problems. Regional Organizations have also emerged as the affirmation of regional identity. As such, there is a preference for "regional solutions for the region's problems". Even where this may have happened at the expense of multilateral solutions, regional solutions are preferable given that they are better informed and more sustainable in the long run. The only challenge is a side-effect of the preference for regional solutions for a region's conflicts, i.e. regional solutions have less weight than multilateral solutions when it comes to holding to account the major powers who may be involved in the conflicts.

Defection on non-binding instruments has increased in recent years. For decades, non-binding instruments were supposed to provide normative guidance to the Nation States and get them to follow a norm without the pressure

[4] Narlikar, Amrita. "Emerging Narratives and the Future of Multilateralism." *Raisina Files 2021* (2021): 11.
[5] Rao, Nirupama. "Diplomacy in the Age of Social Media "The Wire (19 July 2017) <https://thewire.in/diplomacy/foreign-relations-diplomacy-social-media>
[6] Renard, Thomas. "Partnerships for effective multilateralism? Assessing the compatibility between EU bilateralism,(inter-) regionalism and multilateralism." *Cambridge Review of International Affairs* 29.1 (2016) 18-35.
[7] Rewizorski, M. (2020). Multilateralism in Peril? Murky Protectionism and the Populist Backlash Against Globalisation. In: Rewizorski, M., Jędrzejowska, K., Wróbel, A. (eds) The Future of Global Economic Governance. Springer, Cham.

of ratification (that a binding accord would have entailed). However, we now see an increasing tendency to avoid or to defect on non-binding instruments such as the Paris Climate Accords. This has heightened uncertainty among the Nation States. Governments question if their effort in persuading domestic stakeholders to sign a non-binding accord is worth it if the accord is not going to be adhered to by other governments that signed it.

The information revolution has made people far better informed about foreign policy and international developments than ever before. However, the same glut of information may now be turning more citizens cynical about the multilateral system's ability to deliver solutions jointly to the world's problems. Citizens no longer have the patience to listen to their States' appeal for time to resolve complex problems, nor do they always trust the intentions of their leaders.

Foreign aid reached a record USD 161.2 billion in 2020[8] (partly due to COVID-19 spending). However, the bulk of this aid is delivered bilaterally. In other words, even as international development agenda such as the SDGs is devised collectively/multilaterally, the actual delivery of international development assistance is done bilaterally. The competition between donors has led to the over-prioritization of some issues to the peril of others.

Multilateral treaties are the bedrock of the international order. Yet, we find today that different approaches among the Nation States in terms of adherence to treaties. Traditionally, we had a case wherein a Nation State either signed and adhered to a treaty, or did not sign or adhere to a treaty. However, today we have unique situations in which some Nation States sign treaties but do not adhere to them. Some adhere but do not sign the treaties. This paradox has been in the limelight in the case of the Convention on the Law of the Seas (UNCLOS). Key international treaties such as the Biological Weapons Convention (BWC) have seen many signatories but without a verification mechanism, adherence to the convention remains a question[9]. The emergence of large multinational trading blocs has come to overshadow the global free trade regime promised at the advent of the World Trade Organization (WTO). Free trade has effectively been reduced to fragmented trade. Such instances are introducing uncertainty into multilateral treaties, arguably the most important means of bringing order to the international system.

How the World is Responding to the Crisis

While all of us are responsible for the crisis of multilateralism, we are also all affected by it. Hence, Nation States have taken at least three different approaches to address the erosion of trust and predictability that has upset the multilateral system.

The schisms in the international system run in multiple directions – North vs Global South, East vs West, and beyond ideology, they are based on identity. Thus the multilateral arena today is replete with organizations formed based on regional identity (such as the EU and the AU), religious identity (such as the Organization of Islamic countries), linguistic identity (such as the Francophonie and Lusophony). Never before in world history have we had so many international organizations and yet have we so lacked coherence and consensus in our efforts for humanity. And yet, these very organizations provide room for the development of consensus and for the rooting of norms that can then filter up to be debated and embraced at the multilateral level.

There has been a proliferation of informal platforms from the Davos summit which has evolved from being a forum for businesses to talk about policy into a multipronged event on the sidelines of which businesses, governments, and civil society brainstorm, debate and even make informal agreements on approaches to global challenges. These informal platforms can throw up potential solutions at a far more rapid pace than traditional inter-governmental negotiations. While the solutions may lack the legitimacy of an inter-governmental effort, they come across as being more inclusive given the parity given to civil society and businesses in creating the solutions. Several other forums have now come up - often hosted by thinktanks - to provide informal opportunities for world leaders to state their positions and listen to others. These forums such as the Shangri-La

[8] OECD press release (13 April 2021) <https://www.oecd.org/newsroom/covid-19-spending-helped-to-lift-foreign-aid-to-an-all-time-high-in-2020-but-more-effort-needed.htm>

[9] Tucker, Jonathan, "Biological Weapons Convention Compliance Protocol"<https://www.nti.org/analysis/articles/biological-weapons-convention-bwc/>

Dialogue, Munich Security Forum, Doha Forum and Boao Forum for Asia play a critical role for the Nation States to clarify positions and build trust without the pressure of negotiating anything.

The creation of a multipolar world has both strengthened and affected multilateralism in different ways. The emergence of a Multipolar world has made multilateral negotiations more equitable. On the other hand, a multipolar world has also fostered a plurilateral system in which the weakest States have reduced say in decisions taken by major powers. Some Nation States have responded to this by forming coalitions such as the Forum of the Small States or the forum for Landlocked and Least-Developed States, which have amplified their bargaining power in the multilateral system.

How To Address the Crisis of Multilateralism

The crisis of Multilateralism is not one for just governments to solve. It concerns all of us as citizens. For any people in the world to thrive, prosper and flourish, predictability and inclusivity in the international order are critical. This in turn is only possible through Multilateralism.

It is time that we have a platform where Regional Organizations - which play a key role in seeding and nurturing norms at the regional level - negotiate with each other to create new norms at the global level. A negotiation between regional organizations can help reduce much of the animosity and distrust that exist between the Nation States. Such a negotiation between regional organizations can also diminish domestic political pressures that otherwise overshadow purely bilateral negotiations between the Nation States.

It is time multilateral processes were simplified – allowing for easier accession to multilateral treaties. More robust verification mechanisms which make no exceptions for the influential Nation States would go far in rebuilding trust in the multilateral approach.

The consciousness of being part of the human species – one that faces overwhelming threats like climate change – needs to be seeded among citizens through the media and policymakers' speeches. This will foster greater public support for multilateral endeavours by governments.

Last but not least, Multilateralism needs to move out of the confines of the diplomatic lexicon and international organizations' negotiating rooms. Civil society worldwide needs to embrace and promote it as the most legitimate way for the Nation States to negotiate and work together. To this end, each of us needs to visualize the picture that will form when the pieces of the jigsaw puzzle of the world finally come together.

CHAPTER XI: THE ROLE OF PUBLIC DIPLOMACY IN THE MODERN WORLD

Alan K. Henrikson[10]

Abstract

Public diplomacy, while conducted mainly by governments, requires understanding of the nature of diplomacy, if not its specific modalities, among the general public—the people. Public diplomacy is *not* merely instrumental. It is *purposeful* as well. It can, and should, serve to enlighten public opinion. After giving an account of the origin of 'public diplomacy' ('PD'), the phrase and its historically evolved meaning, and describing its institutional embodiments and professional employments, this chapter explores, as its central question: whether there is a higher normative context—a set of principles—that both inspires and constrains practitioners of Public Diplomacy, which can be non-governmental as well as governmental. Thus, within the United Nations Charter, Vienna Convention on Diplomatic Relations, Constitution of UNESCO, Universal Declaration of Human Rights and, at the regional level, the European Convention on Human Rights and the Helsinki Final Act, it finds normative elements that can have an important bearing on public diplomacy. There are many impediments to the free flow of ideas and information: radio jamming, blocking of websites, restrictive regulation and licensing, hacking, disinformation, and 'hybrid' warfare. Governments and international organizations are actively taking steps to protect the integrity of international communication and promote the stability of cyberspace. Public diplomacy itself can contribute to 'information disarmament' by moving away, in its discourse, from the competitive production of 'narratives' to the cooperative discovery of factual and even moral truth. A re-imagined public diplomacy is a normatively instructed and guided PD.

Although not a lawyer, but, rather, a diplomatic historian, I am keenly interested in international law and 'the normative ecosystem' of international relations, which includes the concept and the conduct of diplomacy. Among the various kinds of diplomacy, one of the newest to be designated with a distinct name is *public diplomacy* (PD). This is a supportive function. The *public diplomat*, like an actor in the theatre, plays a part. It may be a significant part, but rarely if ever is it the 'lead'. PD assists leaders and senior officials of governments and of international organizations by presenting and explaining their policies and, more broadly, managing the communications aspects of their strategies.[11] PD work, the role of which is mainly informational, nowadays has included cultural interaction and educational exchange as well. For some countries, those functions have been handled somewhat separately, even at 'arm's length', from political representation and policy promotion.[12]

Public diplomacy is *not*, I wish to emphasize, merely instrumental, a means to any end. It is a *purposeful* activity, with qualities that are inherent, the aims of which are not arbitrarily chosen. There are objective standards in the world, including those of natural science and scholarly knowledge, to which it may owe its convincingness. Because PD operates in the judgmental realm of popular opinion, which in the globalized world of today is more and more universal in scope, it must, in order to be effective, appeal to the reason, tastes, values, and aspirations of peoples of different traditions in distant societies—over whom no political authority is held or control exercised. Its objectives must be achieved noncoercively and for the most part openly, through public media and transparent private communication. It works primarily through persuasion and attraction, rather than by command, employment of force, or subterfuge.[13] That is not to deny that manipulation can occur, as with military 'information operations'.[14] Insofar as public diplomacy succeeds in assisting a government or an organization to achieve its purposes, it is, despite its noncoerciveness, powerful. Influence over minds, from the level of the

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[11] Alan K. Henrikson, What Can Public Diplomacy Achieve?, *Discussion Papers in Diplomacy*, No. 104, September 2006 (The Hague: Netherlands Institute of International Affairs 'Clingendael', 2006).

[12] Cases in point are the British Council, Alliance Française, Goethe Institut, Instituto Cervantes, and Confucius Institute.

[13] Pauline Kerr, 'Diplomatic Persuasion: An Under-Investigated Process', *The Hague Journal of Diplomacy* 5, issue 3 (January 2010); Joseph S. Nye, Jr., *Soft Power: The Means to Success in World Politics* (New York: PublicAffairs, 2004).

[14] Matthew Wallin, *Military Public Diplomacy: How the Military Influences Foreign Audiences*, White Paper, ASP American Security Project, February 2015, https://www.americansecurityproject.org/wp-content/uploads/2015/02/Ref-0185-Military-Public-Diplomacy.pdf.

individual to that of society, is an ultimate arbiter. 'Public opinion,' as Napoleon Bonaparte famously advised, 'is the thermometer a monarch should constantly consult.' Today's authoritarian leaders, no less than democratic leaders, can rise or fall according to it.

My particular question in this investigation is: What, if any, is the international legal framework within which public diplomacy is, and should be, conducted? Is there a higher normative context—a set of principles—that both inspires and constrains practitioners of public diplomacy, that both elevates and guides them? In short, does it have a conscience, a shared sense of right, a collective ethos that influences those engaged in it? Having sounded out a number of persons experienced and well versed in the field of public diplomacy, I find that this—PD's 'normative ecosystem'—is a relatively unexplored area of inquiry.[15] Thus, in undertaking to explore it, I may be embarking on a new and potentially instructive path, one with lessons for the making of world order today.

My interrogation of the subject in what follows will proceed in five interrelated steps, the middle one—the third—being, with regard to the question I have posed, substantively the pivotal one. The first step will be to present the term 'public diplomacy', recounting briefly its origins and explicating its historically evolved meaning, and how it became governmentally established. A second step will be to describe the range of PD activity and review major changes that have occurred within it, and also how the incidence and role of public diplomacy can vary with country size. The third, the central step, is to examine, partly through documentary and institutional analysis, the legal-normative bases and also some of the organizational foundations on which public diplomacy is, and arguably should be, conducted, nationally and internationally. The fourth step will be to identify the challenges within structures of the existing international political system and also in today's global communications space that complicate, and may even counteract, the progressive development of public diplomacy. My fifth and final step is to consider current responses to these challenges, to gauge their possible effectiveness, and to suggest corrections and contributions that could be made in the conduct of public diplomacy that would strengthen the international legal order, foster comity among nations, and promote human enlightenment.

Public Diplomacy: The Term, Its Origin, Its Meaning, And Its Establishment

The term 'public diplomacy', as it is commonly used today by the American and other governments, originated with the creation in 1965 of the Edward R. Murrow Center for the Study and Advancement of Public Diplomacy at The Fletcher School of Law and Diplomacy, whose dean at the time was Ambassador Edmund A. Gullion. A professional diplomat, Gullion had served during the administration of President John F. Kennedy as American ambassador to the recently independent Congo. I as a young Fletcher School faculty member who joined the School in 1971 greatly admired him—a gracious, imaginative, cultured, well-read man with a particular regard for language and its subtle distinctions. He is known to have said that he might have used the word 'propaganda', instead of 'public diplomacy', for the Center he was establishing but for the reality that for anyone then (or even today) the strong negative connotations the word 'propaganda' has.[16] It would conjure up images of Joseph Goebbels and the hateful discourse of the Nazi regime in Germany. The word 'propaganda', of course, has a richer, deeper history—in the centuries-old missionary work of Christian churches—of which Gullion no doubt was aware. The 'doctrinal' implication of the word could also have been a deterrent to his using it. The identification of 'public diplomacy' with propaganda has been very stubborn. It is a repurposing of a term that sometimes had been used for describing 'what Russian diplomats did', as an expert on the history of the subject Matthew Armstrong observes.[17] For Geoffrey Berridge, a traditionalist scholar of diplomacy, public diplomacy is 'the modern name for white propaganda'—distinguishable from the black variety for being essentially truthful and for 'admitting its source'.[18]

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[15] Phillip C. Arceneaux, 'International Law Provides New Context for Public Diplomacy Scholarship', *CPD Blog*, USC Center on Public Diplomacy, 17 September 2020m, https://uscpublicdiplomacy.org/blog/international-law-provides-new-context-public-diplomacy-scholarship. For this reference to a prescient essay by a young scholar, I am indebted to Bruce Gregory. I am grateful as well to other practitioners and scholars of public diplomacy who helpfully responded to my 'sounding' of them.

[16] Quoted in Richard T. Arndt, *The First Resort of Kings: Cultural Diplomacy in the Twentieth Century* (Washington, DC: Potomac Books, Inc., 2005), 480.

[17] Matthew C. Armstrong, 'Operationalizing Public Diplomacy', in *Routledge Handbook of Public Diplomacy*, 2nd ed., Nancy Snow and Nicholas J. Cull (New York: Routledge, 2020).

[18] G.R. Berridge, *Diplomacy: Theory and Practice*, 4th ed. (London: Palgrave Macmillan, 2010), 179.

As for the origin of the phrase 'public diplomacy', Professor Nicholas Cull's careful analysis 'bears out that Gullion was the first to use the phrase in its modern meaning'. He found, when doing a word-search, that the phrase itself appears in the London *Times* in 1856. In that context its meaning was, essentially, just civility—whether in international or in domestic speech. 'The statesmen of America must recollect,' the *Times* suggested, referring to US president Franklin Pierce, 'that, if they have to make, as they conceive, a certain impression upon us, they have also to set an example for their own people, and there are few examples so catching as those of public diplomacy.'[19] With the arrival a half century later of Woodrow Wilson later as the American president, the term 'public diplomacy' took on a broadly systemic meaning, indicating almost a new philosophy of international relations. There were to be no exclusive alliances or secret agreements. Governments' intentions and policies would be straightforwardly and honestly declared—and in public. Wilson's concept was most memorably expressed in the first of his Fourteen Points outlined before a joint session of Congress on 8 January 1918: 'I. Open covenants of peac openly arrived at, after which there shall be no private international understandings of any kind but diplomacy shall proceed always frankly and in the public view.'[20] When German Chancellor, Count von Hertling responded to his programme, Wilson, again speaking to Congress, retorted: 'He is jealous of international action and international counsel. He accepts, he says, the principle of public diplomacy, but he appears to insist that it be confined, at any rate in this case, to generalities and that the several particular questions of territory and sovereignty', upon whose settlement the acceptance of peace by the twenty-three states now engaged in the war must depend, be'discussed and settled, not in general council, but severally by the nations most immediately concerned by interest or neighborhood.'[21] That clearly would exclude the United States of America, and Wilson's novel idea of diplomacy only by public conference. As the principal US negotiator at the Paris Peace Conference in 1919, Wilson's actual methods were of necessity a mixture of private, even secret, and public diplomacy.

The idealism of the Wilsonian conception of diplomacy continued in the 1920s with, as Professor Cull notes, J. Roscoe Drummond of the *Christian Science Monitor* stressing in an essay on 'The Press and Public Diplomacy' the moral duty of the news media to report international affairs accurately and dispassionately, to reduce tensions.[22] In *Foreign Affairs*, the journal of the newly established Council on Foreign Relations, former Republican Secretary of State Elihu Root identified as 'A Requisite for the Success of Popular Diplomacy' the responsibility of the general public itself. 'We have learned', he wrote, 'that war is essentially a popular business.' So, too, should be diplomacy, 'if democracies are to conduct their own destinies'. It thus is important

> that the democracy which is undertaking to direct the business of diplomacy shall learn the business. The controlling democracy must acquire a knowledge of the fundamentals and essential facts and principles upon which the relations of nations depend. Without such a knowledge there can be no intelligent discussion and consideration of foreign policy and diplomatic conduct. Misrepresentation will have a clear field and ignorance and error will make wild work with foreign relations.[23]

Thus not only governments but also the journalist profession and the citizenry—the 'public'—should know, or learn to know, what diplomacy is.[24]

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[19] Nicholas J. Cull, '"Public Diplomacy" Before Gullion: The Evolution of a Phrase', *CPD Blog*, USC Center on Public Diplomacy, 18 April 2006, https://uscpublicdiplomacy.org/blog/public-diplomacy-gullion-evolution-phrase. See also Cull's chapter on this subject in *Routledge Handbook of Public Diplomacy*, 2nd ed.

[20] President Wilson's Fourteen Points, 8 January 1918, https://avalon.law.yale.edu/20th_century/wilson14.asp.

[21] President Wilson's Address to Congress, Analyzing German and Austrian Peace Utterances, delivered in Joint Session, 11 February 1918, http://www.gwpda.org/1918/wilpeace.html.

[22] Cull, '"Public Diplomacy" Before Gullion'.

[23] Elihu Root, 'A Requisite for the Success of Popular Diplomacy', *Foreign Affairs* 1, no. 1 (September 1924): 3-10.

[24] This point is increasingly being emphasized by scholars of diplomacy. See, for example, Paul Sharp, *Diplomacy in the 21st Century* (New York: Routledge, 2019), especially his chapter, 'Diplomacy and bad followers', and Alisher Faizullaev, *Diplomacy for Professionals and Everyone* (Leiden: Brill, 2022). See also Faizullaev, 'On Social Diplomacy', *The Hague Journal of Diplomacy* 17 (2022): 1-12.

In the 1930s, partly owing to a remarkable generation of American foreign correspondents, the people in the United States did learn more of what was happening in the world, if not necessarily of the modalities of diplomacy itself.[25] Their reportage of overseas events of that decade—Manchuria 1931, Ethiopia 1935, Spain 1936, the *Anschluss* and Czechoslovakia 1938, Poland 1939—was frightening. Newspapers and, increasingly, radio broadcasts brought home to Americans, safe as they thought they were, dangers that might soon have to be faced.[26] In these circumstances, and during the Second World War itself, the term 'public diplomacy' was seldom used, Cull found. International communication then largely was a battle of ideas, militantly expressed, by both sides.[27] Wilsonian thinking was confined mostly to long-term planning for the better organization of a postwar world.[28]

Despite a brief revival of the spirit of 'open covenants of peace, openly arrived at' after the war, when the United Nations Organization was being established, the rapid deterioration of relations between the Western powers and the Soviet Union changed the context of international public communication for the worse. The columnist Walter Lippmann, who had been involved in opinion-influencing efforts in both world wars, observed that some diplomats now 'might argue that practice of public diplomacy and of propaganda and of psychological warfare had become such a plague' that key Soviet-American talks should be held in private.[29] However, international public altercation, being easier, prevailed. Public diplomacy, as conducted in the debates at the United Nations, was losing its utility. UN Secretary-General Dag Hammarskjöld, in an attempt to restore it, said in a 1958 address: 'The value of public diplomacy in the United Nations will depend to a decisive extent on how far the responsible spokesmen find it possible to rise above a narrow tactical approach to the politics of international life, and to speak as men for aspirations and hopes which are those of mankind.'[30]

As the above brief review of its history shows, Dean Gullion did not coin 'public diplomacy'. Although not perhaps 'an established phrase', as Professor Cull suggests, it clearly had been used before. Gullion did however give it, Cull acknowledges, 'a fresh use'.[31] He did something more, I would argue. With the establishment of the Murrow Center he *institutionalized* it, not just at the Fletcher School itself. The term 'public diplomacy' was picked up in Washington by the US government, particularly within the United States Information Agency (USIA), an entity created in 1953 by the administration of President Dwight Eisenhower. Despite early efforts after the war during the presidency of Harry Truman, the Department of State had not succeeded in confirming its responsibility in the global public affairs area.[32] Further recognition of 'public diplomacy' came with the 1975 Report of the Panel on International Information, Education, and Cultural Relations chaired by CBS President Frank Stanton. Its preface began: '"A decent respect to the opinions of mankind," wrote Thomas Jefferson in 1776. "Diplomacy should proceed always frankly and in the public view," said Woodrow Wilson in 1918. Concern for foreign opinion and a commitment to the ideal of public diplomacy have been at the heart of American policy for two centuries.' It explained: 'Public diplomacy is a central part of American foreign policy simply because the freedom to know is such an important part of America.'[33] Additional backing for the idea and the term came from House Foreign Affairs Committee Chairman Dante Fascell who in 1977 held nine days of hearings on 'Public Diplomacy and the Future'. He also gave the United States Advisory Commission on Public Diplomacy its name. Through a process of emulation and bureaucratic replication, 'public diplomacy' was adopted by other, mostly like-minded governments, and also by some international organizations. The North

[25] John Hohenberg, *Foreign Correspondence: The Great Reporters and Their Times*, 2nd ed. (Syracuse, NY: Syracuse University Press, 1995).
[26] Manfred Jonas, *Isolationism in America, 1935-1940* (Ithaca, NY: Cornell University Press, 1989).
[27] Davd Welch, *World War II Propaganda: Analyzing the Art of Persuasion During Wartime* (Santa Barbara, CA: ABC-CLIO, 2017).
[28] Ruth B. Russell and Jeanette E. Muther, *A History of the United Nations Charter: The Role of the United States, 1940-1945* (Washington, DC: Brookings Institution, 1958).
[29] Walter Lippmann, 'Today and tomorrow: Talking about talking', *Washington Post*, 19 November 1953; Dominique Trudel, 'Revisiting the Origins of Communications Research: Walter Lippmann's WWII Adventure in Propaganda and Psychological Warfare', *International Journal of Communication* 11 (2017), https://ijoc.org/index.php/ijoc/article/view/6881.
[30] Quoted in Cull, '"Public Diplomacy" Before Gullion'.
[31] Cull, '"Public Diplomacy" Before Gullion'.
[32] Armstrong, 'Operationalizing Public Diplomacy'.
[33] *International Information, Education, and Cultural Relations: Recommendations for the Future* (Washington, DC: Center for Strategic and International Studies,1975), https://history.state.gov/historicaldocuments/frus1969-76v38p2/d103. Among the members of the Stanton Panel was Edmund A. Gullion, Dean of The Fletcher School of Law and Diplomacy, who in a letter to Stanton of 7 March 1975 dissented from the Panel's organizational recommendations.

Atlantic Treaty Organization (NATO), for instance, has a Public Diplomacy Division, aimed mainly at the populations of its own membership. When in 1999 the USIA, under reformist and congressional pressure, was folded into the Department of State, much of its work, along with that of the State Department's Bureau of Cultural and Educational Affairs, has been managed by the newly created position of Under Secretary of State for Public Diplomacy and Public Affairs. The USIA's broadcasting functions were taken over for a time by a new Broadcasting Board of Governors (BBG). 'Public Affairs', an older name for the State Department's work of informing Americans and others of US policies and international relationships and actions, was kept. Officers abroad are still known as Public Affairs Officers working in Public Affairs Sections. For technological and other reasons, the distinction between internal and external public communication has become blurred. For many countries, not only the smaller ones, the *domestic* aspect of PD—letting their people know of their diplomacy and its effects—can be almost as important as its international aspect. Diplomacy begins—and ends—at home, as the Polish scholar Katarzyna Pisarska has emphasized.[34] Effective PD, known at home as well as abroad, can be a means of enhancing a nation's self-identity and cohesive strength and political unity.

The linguistic and organizational adoption of the idea of Public Diplomacy has seemed to fill a need. 'The "real need" for the new label', comments Matthew Armstrong, 'was the public relations campaign to recast USIA.'[35]According to Nicholas Cull's interesting interpretation of the American government's acceptance of it, the United States Information Agency, after a dozen years of its life, needed 'an alternative to the anodyne term information or malignant term propaganda: a fresh turn of phrase upon which it could build new and benign meanings'. Gullion's innovative use of 'public diplomacy', Cull writes, 'covered every aspect of USIA activity and a number of the cultural ad and exchange functions jealously guarded by the Department of State'. The phrase 'gave a respectable identity to the USIA career officer, for it was one step removed from the "vulgar" realm of "public relations" and by its use of the term "diplomacy" explicitly enshrined the USIA along side the State Department as a legitimate organ of American foreign relations'.[36] The integration of the USIA into the State Department, while causing regret beyond just nostalgia among former USIA officers over a felt loss of agency and even integrity, arguably has strengthened the *diplomatic* character of the PD practitioner. Public Diplomacy now is formally one of the five career tracks, or professional 'cones' (along with Consular Affairs, Economic Affairs, Management Affairs, and Political Affairs) of the United States Foreign Service. It has gained similar professional recognition within other ministries of foreign affairs (MFAs) with PD officers on their less-specialized, and usually smaller, rosters. In recent years, however, with increased recognition of the need for 'multifunctional competence' in foreign ministries, the categorization of jobs, including the State Department's cone system, has fallen out of favour.[37] 'Public diplomacy' is assumed to be a core competency of a multifunctional diplomatic service.[38]

The Range Of Public Diplomacy And Recent Changes Within It, And The Variation Of The PD Role With Country Size

What, exactly, does a practitioner of public diplomacy do? There is no standard definition of the concept or of the function. It understandably has been called, at by the cultural diplomacy specialist Richard Arndt, a 'portmanteau' phrase.[39] Edmund Gullion's own definition of 'public diplomacy', as given in a Fletcher School brochure, is actually more of a description. It is rather good, as far as it goes: 'Public diplomacy deals with the influence of public attitudes on the formation and execution of foreign policies. It encompasses dimensions of international relations beyond traditional diplomacy; the cultivation by governments of public opinion in other countries; the interaction of private groups in one country with another; the reporting of foreign affairs and its

[34] Katarzyna Pisarska, *The Domestic Dimension of Public Diplomacy: Evaluating Success through Civil Engagement* (London: Palgrave Macmillan, 2016). She argues that governments today would be wise to treat their people as 'strategic publics', as genuine partners in conducting their international relations.
[35] Armstrong, 'Operationalizing Public Diplomacy'.
[36] Cull, '"Public Diplomacy" Before Gullion'.
[37] Nicholas Burns, Marc Grossman, and Marcie Ries, *A U.S. Diplomatic Service for the 21st Century*, Report, Belfer Center for Science and International Affairs, Harvard Kennedy School, November 2020, https://www.belfercenter.org/sites/default/files/2020-11/DiplomaticService.pdf.
[38] Issue #104, Bruce Gregory's Resource List, Issue #104, 7 December 2020, Institute for Public Diplomacy and Global Communication, The GW School of Media and Public Affairs, https://ipdgc.gwu.edu.
[39] Arndt, *The First Resort of Kings*, 480.

impact on policy; communication between those whose job is communication, as diplomats and foreign correspondents; and the process of intercultural communications.'[40]

Public diplomacy, as Gullion personally knew and lived it, was not so much the organized international communications effort of an entire government as it was the individual performance of the nation's authorized representative. He once described the diplomat as a 'man of the occasion'. This encompassed not only the public ceremonial roles that a diplomat often performs but also the handling of extraordinary demands, including those of the media, in critical situations. A subsequent Fletcher School of Law and Diplomacy dean, Stephen W. Bosworth, served as American ambassador in the Philippines during its People Power Revolution of February 1986 and later in South Korea. During his deanship he also was President Barack Obama's special representative for North Korea policy and the US negotiator in the Six Party Talks on denuclearization of the Korean peninsula. Dealing with reporters about these matters was a regular part of his job. 'I really do not know what "public diplomacy" is', he once said to me in conversation, adding: 'The ambassador can do a lot.' Walter Roberts, a legendary USIA official and counselor for public affairs in the Foreign Service who taught as diplomat-in-residence at The George Washington University, often referred to ambassadors as 'the new PAOs'.[41]

For many professional diplomats, not only the older ones or those at the ambassadorial level, public diplomacy is an aspect of *diplomacy itself*, not something separate from it.[42] I myself am sympathetic to that view. PD, nonetheless, has come to be understood as a distinct practice, with differentiated activities and roles within it. It has emerged as an academic field as well.[43] A former senior Canadian career diplomat, Mark McDowell, who after serving as as counselor for Public Diplomacy at Canada's embassy in Beijing was appointed Canadian ambassador to Myanmar, has offered a graphic depiction of Public Diplomacy. In a presentation during the 100th Anniversary Edward R. Murrow Memorial Conference held at the Fletcher School in April 2008, he described a government's PD activities as a pyramid that has three levels. At its peak, McDowell placed *advocacy*.[44] This merits special comment, as 'advocacy' is not one of the 'functions' listed in the Vienna Convention on Diplomatic Relations (1961). While openly advocating for a government's interests and positions of course is something that diplomats long have long done, the explicit adoption of 'Advocacy' as a formally assigned task appears to be a Canadian innovation. In April 2004 Prime Minister Paul Martin announced the establishment at the Embassy of Canada in Washington, DC, of a public advocacy and legislative secretariat. Its first head, as 'minister of advocacy', was Colin Robertson. He explained his job as involving a measure of agitation: 'Advocacy is as much about getting attention as getting your message across. Get attention and your message follows.'[45] Such assertiveness may not be needed. As McDowell acknowledges, 'advocacy can often be achieved by conventional diplomacy alone'. Ministers, and ambassadors too, can usually be heard. However, PD can play 'a supporting or leading role in advocacy by mobilizing popular support' in the target country (country B) and/or by 'enlisting civil society from country A to make a more persuasive case'. The Canadian government's coordinated effort, which in the end proved unsuccessful, to win American government agreement to the Ottawa Convention banning anti-personnel landmines is illustrative.[46]

In McDowell's PD pyramid beneath Advocacy, which tends to be focused and short term, there is a second layer that he describes as Relationship Building' which is broader and more diffuse. It includes the cultivation of ties with decision makers and opinion leaders as well as strategic networking with the various sectors of society. It is

[40] Quoted in Cull, '"Public Diplomacy" Before Gullion'.
[41] Bruce Gregory to Alan Henrikson, email message, 27 September 2022.
[42] In a telephone conversation a US Foreign Service officer, an advocate of reform in the State Department, memorably said to me of 'public diplomacy': 'It's *diplomacy*, stupid'—an allusion to Bill Clinton's political strategist James Carville's 1992 campaign mantra, 'The economy, stupid'.
[43] Bruce Gregory, 'Public Diplomacy: Sunrise of an Academic Field', in *Public Diplomac in a Changing World*, ed. Geoffrey Cowan and Nicholas J. Cull, *The Annals* of The American Academy of Political and Social Science, 616 (March 2008), 274-290.
[44] Mark McDowell, 'Public Diplomacy at the Crossroads: Definitions and Challenges in an "Open Source" Era', *The Fletcher Forum of World Affairs*, Special Edition, 32, no. 3 (2008): 7-19.
[45] Colin Robertson, 'Getting Noticed in Washington: The Hard Part of Canada's Job', *Policy Options*, Institute for Research and Public Policy (IRPP), November 2005.
[46] McDowell, 'Public Diplomacy at the Crossroads': 15, 17n; John English, 'The Ottawa Convention on Anti-Personnel Landmines', in *The Oxford Handbook of Modern Diplomacy*, ed. Andrew F. Cooper, Jorge Heine, and Ramesh Thakur (Oxford: Oxford University Press, 2013), 797-809.

medium-term in its time horizon. The bottom layer of the pyramid is Branding, Programming, Events. These are the most 'public' aspects of PD. It covers cultural programmes and academic exchanges along with special events such as film festivals.[47] The goal of this wider work of PD is familiarization, and even the occasional production of delight—cumulatively, a long-term effect, and a civilizing one

As the basic description of Public Diplomacy given above indicates, PD has become more operational. This is the result of its progressive institutionalization as a practice embedded in the expanding bureaucracies of governments, and also of rapid advances in the technology of communication including the digital revolution. 'Digital diplomacy' now is being practiced by most of the world's governments.[48] At the same time, there has been a decline in what might be called the 'grand strategy' of the subject. The two trends are related. Bureaucratization, with the internal organizational and personal contests that sometimes accompany it, can 'kill' strategic vision, replacing policy with process—e.g., 'engagement'.[49]

In the United States in the late 1940s, foreign policy was highly strategic. The country then was providing aid for the rehabilitation of Europe through the Marshall Plan—the European Recovery Program (ERP). There was the following natural thought: 'We're spending all this money, taxpayers' money, giving it to European in their interest, and ours too, so maybe we should explain why we're doing it.' That is, in a way, the origin of public diplomacy, in a grand strategic sense, although as Matthew Armstrong has shown, the State Department when reorganizing at the end of the war already had begun, in effect, to engage in public diplomacy with the creation of the Office of Public Information and then the position of Assistant Secretary of Pulblic and Cultural Relations, first held by Archibald MacLeish.[50] During the Cold War public diplomacy continued to have a strategic role in support of the containment doctrine, the liberation policy, and NATO enlargement. Later, when Secretary of State Condoleezza Rice spoke of 'transformational diplomacy', the promotion of democracy within foreign societies became a declared objective.[51] The 'Global War on Terror' launched following the Al Qaeda attacks on the World Trade Center and the Pentagon on 11 September 2011 was a slogan without much of a strategy. It was not accompanied by plans or procedures for its effective realization.[52] American public diplomacy seemed stymied.

With the disrupting spread of globalization and the fragmentation of the world political order that has been occurring, there are more and more centres of consciousness, even of agency. The ease of communications has empowered these many centres, not only governments of sovereign states, to have a PD presence. For many, the smaller states especially, it is a matter of establishing and maintaining identity. In a further graphical representation of the role of PD today, Mark McDowell depicted three green-colored circles; a small one (S), a middle-sized one (M), and a large one (L), representing countries. Within each of the ovals he placed a red dot—somewhat like a pimiento pepper in a stuffed olive—representing the size of the country's PD apparatus. Naturally, the dot—the Public Diplomacy bureaucracy—'grows' with movement from smaller to larger country-circles, but *not* proportionately to the overall size of the country.[53] The essential point is: for the world's many small states and also for middle powers (such as Canada or Norway) the importance the role of country's official PD apparatus may be *much* greater than for larger countries (such as the United States or India) with their large economies, open societies, heterogenous populations, and myriad diaspora and other links abroad.[54] What

[47] McDowell, 'Public Diplomacy at the Crossroads': 15.
[48] Corneliu Bjola and Marcus Holmes, *Digital Diplomacy: Theory and Practice* (London; Routledge, 2015); Eyton Gilboa, 'Digital Diplomacy', in *The SAGE Handbook of Diplomacy*, ed. Costas M. Constantinou, Pauline Kerr, and Paul Sharp (Los Angeles, CA: SAGE Publishing, 2016), 504-551.
[49] Alan K. Henrikson, 'United States Contemporary Diplomacy: Implementing a Foreign Policy of "Engagement"', in *Diplomacy in a Globalizing World: Theories and Practices*, 2nd ed., ed. Pauline Kerr and Geoffrey Wiseman (New York: Oxford University Press, 2018), 269-288.
[50] Armstrong, 'Operationalizing Public Diplomacy'.
[51] Henrikson, What Can Public Diplomacy Achieve?.
[52] Carnes Lord, *Losing Hearts and Minds?: Public Diplomacy and Strategic Influence in the Age of Terror* (Washington, DC: Praeger Security International, 2006).
[53] McDowell, 'Public Diplomacy at the Crossroads': 12-13.
[54] Alan K. Henrikson, 'Niche Diplomacy in the World Public Arena: The Global "Corners" of Canada and Norway', in *The New Public Diplomacy: Soft Power in International Relations*, ed. Jan Melissen (London: Palgrave Macmillan, 2005); 67-87; Arjit Mazumdar, 'India's Public Diplomacy in the Twenty-First Century: Components, Objectives and Challenges', *India Quarterly: A Journal of International Affairs*, 17 February 2020, https://journals.sagepub.com/doi/full/10.1177/0974928419901188.

Hollywood or Bollywood, or Microsoft or Infosys, can do to project themselves internationally may at times eclipse what the American or Indian government's PD practitioners can do.

Can private corporations and non-governmental organizations (NGOs) participate in public diplomacy? Or is PD, not just by lexical definition, *governmental*, inevitably and properly so? The matter has long been, and remains, a matter of debate. Robert O. Keohane and Joseph S. Nye, Jr., early proponents of greater attention to the rise of 'transnational relations', observed in 1970 that for most political scientists and for many diplomats 'a state-centric view of world affairs prevails'.[55] Who 'owns' public diplomacy, as the question might be posed, the State or the People—in whose name diplomacy presumably is conducted, and who might wish to do it themselves? The answer, in my view, depends on whether those various entities (companies, NGOs, affinity groups, and even individual persons) have a serious and well-considered interest in matters of international public policy—in actual rule-making and international governance—and are actively engaged in advancing it, and are doing so publicly. A more radical view is that of, for example, the sociologist Manuel Castells, author of *The Theory of the Network Society* (2006). In an essay, 'The New Public Sphere: Global Civil Society, Communication Networks, and Global Governance', Castells, who envisions 'de facto global governance without a global government', logically contends that 'public diplomacy' is, quite simply, 'the diplomacy of the public'.[56] That PD is, or should be, 'People's Diplomacy' is rhetorically attractive. It is not merely utopian. For Americans especially, from the time of Benjamin Franklin through the Revolution, foreign policy has been appropriately that of the People, not of the State.[57] What this concept—the republican ideal—should require, however, is that the People (general public) themselves, as Elihu Root urged in 1923, learn what diplomacy—informed and civilized discourse, premised on mutual respect, about larger issues of public policy, both between societies and within them—actually is. To learn the business, and engage responsibly in it.

Normative-Legal Bases And Organizational Foundations Of Public Diplomacy

This brings me to the central question of whether there is an existing international normative framework for public diplomacy, 'norm' here indicating a general rule of morally acceptable social conduct which may be specified in 'law', formalized, and made obligatory as a control of behaviour. Or whether it takes place in a moral void. A starting point is the Charter of the United Nations (1945), a document that expresses in its Preamble the determination of 'THE PEOPLES' of the United Nations 'to practice tolerance and live together in peace with one another as good neighbours', and 'to ensure, by the acceptance of principles and the institution of methods, that armed force shall not be used, save in the common interest'.[58] The organizational structure of the United Nations itself, when established, was a mechanism for peace. The historically older institution of Diplomacy, somewhat regulated since the Congress of Vienna, was given newly codified form by the United Nations Conference on Diplomatic Intercourse and Immunities which was held in Vienna in 1961.[59] Although negotiated during a period of high East-West tension, the resulting Vienna Convention on Diplomatic Relations (VCDR) has stood the test of time remarkably well. Controversial matters of inclusion or non-inclusion—regarding the People's Republic of China, e.g.—were put aside, with finesse. Indian representative Arthur Lall allowed that 'his delegation did not intend to question the adequacy of the invitations to the Conference . . . but considered that the Republic of China, which had been invited to the Conference, could only be represented by the effective government of China'.[60] The principle in question, which endured, was universality of representation.

The text of the VCDR expressed a belief that the Convention would 'contribute to the development of friendly relations among nations, irrespective of their differing constitutional and social systems'. More concretely,

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[55] Robert O. Keohane and Joseph S. Nye, Jr., eds., *Transnational Relations and World Politics* (Cambridge, MA: Harvard University Press, 1970).

[56] Manuel Castells, 'The New Public Sphere: Global Civil Society, Communication Networks, and Global Governance', in *Public Diplomacy in a Changing World*, ed. Cowan and Cull, 78-93.

[57] Thomas A. Bailey, *A Diplomatic History of the American People* (New York: Appleton-Century-Crofts, 1964); Alan K. Henrikson, 'American Diplomacy', in *The SAGE Handbook of Diplomacy*, ed. Constantinou, Kerr, and Sharp, 319-335.

[58] For this and subsequent references to its text, see United Nations Charter, https://www.un.org/en/about-us/un-charter/full-text.

[59] Vienna Convention on Diplomatic Relations, Done at Vienna on 18 April 1961, http://legal.un.org/ilc/texts/instruments/english/9_1_1961.pdf.

[60] *United Nations Conference on Diplomatic Intercourse and Immunities*, volume I, 1961: Summary Records, 1st Plenary Meeting, 3.

Article 3(1) on 'The functions of a diplomatic mission' includes on its list, as the final item: 'Promoting friendly relations between the sending State and the receiving State, and developing their economic, cultural and scientific relations'. While a 'function' is not a mandate, the verb 'promote' and adjective 'friendly' are dynamic and positive in meaning, and connote an intention if not an obligation.

There is nothing in the VCDR about communicating with the public—i.e., 'public diplomacy'. At the time, amidst the Cold War, such openness would hardly have been generally welcomed. The gathering of information, implicitly including intelligence, was accepted, however—within limits. Included on the Article 3(1) 'functions' listing is: 'Ascertaining by all lawful means conditions and developments in the receiving State, and reporting thereon to the Government of the sending State.' What were 'lawful means' would be decided by the host country. A diplomatic mission, in order to fulfill its purpose could not, of course, be precluded from contact with its own government. Article 27 of the VCDR thus requires the receiving State to 'permit and protect free communication on the part of the mission for all official purposes', with the further provision that 'in communicating with the Government and the other missions and consulates of the sending State, wherever situated, the mission may employ all appropriate means, including diplomatic couriers and messages in code or cipher. However, the mission may install and use a wireless transmitter only with the consent of the receiving State.'

This last provision, as the leading scholar of diplomatic law, Eileen Denza, points out, touches upon the International Telecommunication Convention, which accords host governments supervisory authority over the use of wireless facilities located within their territories. The VCDR provision reflected anxiety within some delegations that 'diplomatic wireless' might lead to radio broadcasting which, if done from within the space of the host country, could much more easily reach its domestic population than the state of technology at the time permitted.[61] Radio Free Europe and Radio Liberty (RFE/RL) were then located on the Western side of the Iron Curtain at Munich in Germany. A further provision of the VCDR that carries a potential for restricting a sending State's exercise of Public Diplomacy is Article 11, which allows the receiving State to 'require that the size of a diplomatic mission be kept within limits considered by it to be reasonable and normal'—a plausible legal basis for the expulsion, without needed explanation, of members of an embassy or consulate. When this occurs, it can lead to the well-known pattern of 'tit for tat' retaliation by the sending State. Although a negative rather than a positive expression of reciprocity, it is an effective means—a 'diplomatic' means—of enforcing the VCDR, and has helped to give it endurance.

More broadly and less technically, when considering the 'normative ecosystem' within which PD is practiced, one should note the language of the founding, in November 1945, of the United Nations Educational, Scientific and Cultural Organization (UNESCO). In the Preamble to its Constitution, the participating States Parties on behalf of their peoples declare: 'That a peace based exclusively upon political and economic arrangements of governments would not be a peace that could secure the unanimous, lasting and sincere support of the peoples of the world, and that the peace must therefore be founded, if it is not to fail, upon the intellectual and moral solidarity of mankind.' Accordingly, 'believing in full and equal opportunities for education for all, in the unrestricted pursuit of objective truth, and in the free exchange of ideas and knowledge', the States Parties 'are agreed and determined to develop and to increase the means of communication between their peoples', and in consequence 'create the United Nations Educational, Scientific and Cultural Organization'.[62] UNESCO was assigned the lead role for the United Nations system in 'The Dialogue among civilizations and cultures', a multi-faceted programmatic effort aimed at 'attaining justice, equality and tolerance in people-to-people relationships'.[63] Without using the name, this is an ambitious multilateral commitment and undertaking in public diplomacy.

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[61] Eileen Denza, 'Freedom of Communication', ch. 25 of her treatise, *Diplomatic Law: Commentary on the Vienna Convention on Diplomatic Relations*, 4th ed. (Oxford: Oxford University Press, 2016), http://opil.ouplaw.com/view/10.1093/law/9780198703969.001.0001/law-9780198703969-chapter-25.

[62] Constitution of the United Nations Educational, Scientific and Cultural Organization, adopted in London on 16 November 1945, http://www.unesco.org/en/legal-affairs/constitution.

[63] The Dialogue among civilizations and cultures: UNESCO's strategic approaches and programmatic focus, UNESCO, Executive Board, 179th, 179 EX/INF.18, Paris, 14 April 2008, https://unesdoc.unesco.org/ark:/48223/pf0000159171.

Especially noteworthy as well in the present context is the Universal Declaration of Human Rights (1948), Article 19 of which articulates the norms of intellectual freedom and unrestricted access to information. It reads: 'Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media or regardless of frontiers.'[64] The principle of Freedom of Information (FOI) earlier had been recognized by the United Nations General Assembly when in 1946 it adopted Resolution 59. 'Freedom of information', implying 'the right to gather, transmit and publish news anywhere and everywhere', was affirmed as 'an essential factor in any serious effort to promote the peace and progress of the world'. Furthermore: 'It requires as a basic discipline the moral obligation to seek the facts and to spread knowledge without malicious intent.'[65] Factuality and benignity thus were made imperative.

The Freedom of Information principle is embedded in many international legal instruments, including regional ones. The Council of Europe, founded in 1949, in 1950 adopted the European Convention on Human Rights. Its implementation is overseen by the European Court of Human Rights in Strasbourg. Ratification of the Convention is a prerequisite for Council of Europe membership. The Russian Federation, having signed up to the terms of the Convention, became the 39th member of the Council in 1996, although at present its status and participation are uncertain. Article 10 of the Convention states: 'Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.' However, it goes on to say: 'This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.' Moreover, since the exercise of these freedoms 'carries with it duties and responsibilities', it may be

> subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.[66]

These various qualifications obviously leave a lot of room for 'interference by public authority', entirely at a host government's discretion without reference to the human-rights norms of the Convention.

The Helsinki Final Act, signed on 1August 1975 at the closing of the third phase of the Conference on Security and Co-operation in Europe (CSCE) in which 35 states participated, was and remains a significant normative framework for international intercourse of all kinds, with important implications also for public diplomacy. Within its so-called Third Basket, under the heading 'Information', there is recognition of the importance of 'the dissemination of information' *from* participating states and of 'the better acquaintance with such information' *within* them, with a specific emphasis on 'the essential and influential role of the press, radio, television, cinema and news agencies of the journalists working in those fields'. Cooperation between such entities working in the field of information on the basis of 'short or long term agreements or arrangements' is expressly encouraged.[67] Considering the close, even symbiotic, relationship that diplomats can have with foreign correspondents, as Edmund Gullion experienced professionally and noted in his description of 'public diplomacy', one may conclude that the 1975 Helsinki Accords, a goal of which was more openness of diplomatic interaction in East-West relations, are part of a normative, even legal, framework for PD, still today. The terms of the Accords have rightly been used, often with effect, by various Helsinki watch groups to hold the signatory governments' feet to the fire with regard to the commitments they have made.

With globalization, the state has become 'disaggregated', argues Anne-Marie Slaughter, an international lawyer and professor who served as director of the Policy Planning Staff in the US Department of States under Secretary Hillary Clinton. Governments are not, however, necessarily weaker as a result, for networks of government

[64] Universal Declaration of Human Rights, https://www.ohchr.org/en/human-rights/universal-declaration/translations/english.
[65] 59 (I.) Calling of an International Conference on Freedom of Information, United Nations General Assembly, 65th plenary meeting, 14 December 946, https://documents-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/033/10/PDF/NR003310.pdf?OpenElement.
[66] European Convention on Human Rights, https://www.echr.coe.int/documents/convention.eng.pdf.
[67] Conference on Security and Co-operation in Europe, Final Act, https://www.osce.org/files/f/documents/5/c/39501.pdf.

specialists in various functional fields (finance, health, climate, civil aviation, data protection, judicial cooperation, and others), are working transgovernmentally, in collaboration with the relevant international institutions and also private sector entities, to create regulatory regimes, with normative guidelines and even enforcement mechanisms. Examples, among many that may be cited, are the Financial Stability Forum, the International Organization of Securities Commissioners (IOSCO), and the International Network for Environmental Compliance and Enforcement (INECE). Such expert networks, taken together, may come to constitute 'a new world order', a more effective model of global governance than the Westphalian nation-state system.[68]

Reflecting on this new category of norms and law, the public diplomacy scholar Bruce Gregory observes of these networked practitioner communities:

> With little control or guidance from their national governments, they create knowledge, negotiate regulations, solve problems, and monitor compliance with transnational rules and agreements. They collaborate with non-state actors. They represent state interests, but they wear their national identities lightly. The line between diplomacy and governance is blurred, because they are representing principals at home, creating global governance rules and regulations, and persuading publics of their value.[69]

It is at the level of national legislation and governmental administration that the most strictly *binding* terms of reference for international communication, including public diplomacy activity, exist. In the United States it is the Smith-Mundt Act—formally, the U.S. Information and Educational Act of 1948 (Public Law 80-402)—that is the most relevant, controlling instrument. Congress declared its objectives to be 'to enable the government of the United States to promote a better understanding of the United States in other countries, and to increase mutual understanding between the people of the United States and the people of other countries'. The following reference to the international framework is noteworthy: 'In carrying out the objectives of this Act, information concerning the participation of the United States in the United Nations, its organizations and functions, shall be emphasized.'[70]

The Smith-Mundt Act, which supported exchanges in many fields including those of the Fulbright Program, is known partly for what has been described, somewhat misleadingly, as a 'de facto ban' on the domestic distribution of State Department programming and materials developed for foreign audiences.[71] A specific intention behind the Act's provision that such materials be made available 'on request' and 'at all reasonable times' was the State Department's concern that it could be administratively burdened by blanket requests.[72] A broader concern was fear that the US government might seek to 'propagandize' its own people. Another reason no doubt was congressional deference to American private economic interests, notably companies in the communications business. The Smith-Mundt Act provided that 'whenever possible' existing reputable agencies should be used. Such companies were presumed to be able and also willing and to inform the American public about what was happening abroad—including what the US government was doing and saying elsewhere. In 1972 the Act was amended to allow for government-developed materials to be made available 'for examination only'

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[68] Anne-Marie Slaughter, *A New World Order* (Princeton, NJ: Princeton University Press, 2004); Kanishka Jayasuriya, Breaking the 'Westphalian' Frame: Regulatory State, Fragmentation, and Diplomacy, *Discussion Papers in Diplomacy*, No. 90, January 2009 (The Hague: Netherlands Institute of International Affairs 'Clingendael', 2009).

[69] Bruce Gregory to Alan Henrikson, email message, 27 September 2022. Gregory's article, 'Mapping Boundaries in Diplomacy's Public Dimension', in *The Hague Journal of Diplomacy* 11 (2016): 1-25, is a comprehensive description and analysis of 'radical changes' in diplomacy's global environment, types of diplomatic actors, and forms of public communication. A pioneering study of the concept of 'regimes' is John Gerard Ruggie, 'International Regimes, Transactions, and Change: Embedded Liberalism in the Postwar Economic Order', *International Organization* 36, no. 2 (1982): 379-415.

[70] US Information and Educational Exchange Act of 1948, Public Law 80-402, 62 Stat. 6, Passed Congress/Enrolled Bill: Jan 27, 1948, https://www.usagm,gov/who-we-are/oversight/legislation/smith-mundt/.

[71] Weston R. Sager, 'Apple Pie Propaganda? The Smith-Mundt Act Before and After the Repeal of the Domestic Dissemination Ban', *Northwestern Law Review* 109, no. 2 (January 2015): 511-549.

[72] This is a corrective point made by Matthew Armstrong in 'The Incompleteness of the Fulbright Paradox', MountainRunner.us, https://mountainrunner.us/2021/06/the-imcompleteness-of-the-fulbright-paradox/.

by the media and academia and by Congress. The Smith-Mundt Modernization Act of 2012 allowed for greater availability of the materials within the United States.

By then, owing to rapidly advancing technology and the resulting greater ease of communication, the distinction between 'foreign' and 'domestic' audiences was further breaking down. The essential purpose of the Smith-Mundt legislation, it should be remembered in retrospect, was not the prevention but the *promotion* of the official flow of information from the United States abroad. It is a purpose today carried out by the U.S. Agency for Global Media (USAGM) and the five regionally-focused civilian broadcast networks under its purview.[73] National legislation by the British, French, German, Russian, Chinese and many other the governments, similarly, have established official media organizations. Much of this has occurred under—sometimes well beneath—the normative umbrella of the existing, if not everywhere prevailing, international legal order.

Challenges In the International Political System and The Global Communications Space

The most fundamental 'challenge' to the unconstrained practice of public diplomacy is the structure of the international political system itself—its interstate character, the segmentation of the globe by borders. As the political scientist David Held observes in *Democracy and the Global Order*, 'Territorial boundaries demarcate the basis on which individuals are included in and excluded from participation in decisions affecting their lives (however limited that participation might be) . . .. The implications of this are considerable . . ..'[74] One implication of this divided jurisdictional reality is that it is usually through diplomacy, including public diplomacy, that decision making in other countries can be influenced, whether in support of 'democracy' or for any other positive—or negative—purpose. As Mark McDowell reminds us, 'PD is by nature transparent, but it cannot be contrasted with traditional diplomacy as an activity which by definition serves only good ends.'[75]

The present international legal order, which mirrors the political map (whose pattern it has helped to shape), is a further constraint on international communication, notably anything that could be deemed 'interference' in the internal affairs of sovereign states. Article 2, paragraph 7, of the UN Charter lays down this limiting condition clearly, with the exception of possible collective-security action:

> Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII.

Only if and when a majority of the fifteen members the Security Council, including its five (veto-holding) 'permanent members', decide upon enforcement measures, can 'intervention' in a country's internal affairs be considered legally valid—however 'legitimate' it, nonetheless, might be viewed by much of the world.[76] Article 2(7) provides member states with a 'normative' justification for resistance to outside influences and pressures, including those that might be exerted by means and methods of public diplomacy. Article 2(7) is reinforced by Article 51 of the Charter which recognizes 'the inherent right of individual or collective self-defence'—an inalienable right of self-help that cannot be impaired, except as a result of a Security Council decision to authorize 'measures necessary to maintain international peace and security'.

More immediate challenges to the exercise of public diplomacy are many. Some of them are not new. First of all there is **jamming**. The Russian government during the Cold War jammed broadcasts, not sent directly from the United States but from Radio Free Europe and Radio Liberty from transmitters located in West Germany. The Voice of America, also sometimes jammed, was popular among the Russian people, partly because of its jazz

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[73] U.S. Office for Global Media, https://www.usagm.gov.
[74] David Held, *Democracy and the Global Order: From the Modern State to Cosmopolitan Governance* (Stanford, CA: Stanford University Press, 1995), 18.
[75] McDowell, 'Public Diplomacy at the Crossroads': 11.
[76] Alan K. Henrikson, 'The Constraint of Legitimacy: The Legal and Institutional Framework of Euro-Atlantic Security', in *Alliance Politics, Kosovo, and NATO's War*, ed. Pierre Martin and Mark R. Brawley (New York: Palgrave Macmillan/St. Martin's Press, 2001), 40-55.

programme hosted by Willis Conover, a long-time VOA contractor with a slow delivery and accessible English. The Voice of America, a basic purpose of which was to *counter* propaganda, may have seemed to listeners in the Eastern bloc somewhat propagandistic itself, but less so than RFE and RL, which arguably were aimed at liberation.[77] Jamming by Moscow continued for many years, despite agreed-upon language in the Helsinki Accords supporting 'expansion of the dissemination be of information broadcast by radio'. The Soviet government regarded jamming as a legally justified response to Western broadcasts that it considered contrary to the Accords' purpose of meeting 'the interest of mutual understanding among peoples and the aims set forth by the Conference'. It also held that the Accords required only the facilitation of the flow of information, not the implementation of it.[78] During the current Russia-Ukraine war, both sides are jamming each other's communications.[79] A novel legal question arose during the 1994 civil violence in Rwanda, partly incited by Radio Télévision Libre du Milles Collines (RTLM), as to whether jamming could be internationally authorized, on humanitarian grounds, as a collective counter to 'genocide'.[80] The question has not been resolved.

Then there is **physical violence** against diplomatic facilities themselves, such as occurred with the student demonstrators' takeover of the US embassy during the Iranian revolution in 1979 and, more recently, with the Taliban victory in Afghanistan, which led to the abandonment by the US government of most of its assets there. **Blocking of websites** is a more calculated obstructive measure, favoured by some governments notably those of North Korea and of China, with its 'Great Firewall' of censorship. It is a practice as well of the Russian government, which also limits access to information by the use of restrictive **regulation and licensing**. A Russian law of 2012 required non-profit organizations that receive foreign donations and that engage in 'political' activity to register and to declare themselves as 'foreign agents'. The law, since expanded, is a severe barrier to NGO entry and activity in Russia.[81] Even the British Council, which had long been established in Russia where it offered its typical educational and exchange programmes, was affected. In March 2018 it announced, with profound disappointment, that it had been notified that it would have to cease operations. 'It is our view that when political or diplomatic relations become difficult', it stated, 'cultural relations and educational opportunities are vital to maintain on-going dialogue between people and institutions. We remain committed to the development of long-term people-to-people links with Russia as we do in over 100 other countries.'[82]

A more aggressive form of disruption is **hacking**, the unauthorized breaking-into of computer network security systems so as to gain control of them for illicit purposes, including the sowing of political confusion. Outright **disinformation** and its spread, by electronic and other means, is an especially pernicious challenge to the norms of public diplomacy. At present, during the military conflict between Russian and Ukraine, a country supported by the United States and most other Western countries, this has amounted to **'hybrid' warfare**. The conscious spread of outright lies, conspiracy theories, and charges of 'fake news' has entered in the realm of diplomacy. The Russian exploitation of the recent meeting in Geneva of the 184 signatories of the Biological Weapons Convention (1975) further to publicize the falsehood that the United States is secretly manufacturing biological weapons in Ukraine, as well as in other places around the world, is illustrative.[83] As Nicholas Cull has wisely suggested, what we need is 'disarmament' in the field of public diplomacy, similar to that developed earlier in the field of arms control, along with positive confidence-building measures. He contends that 'just as an excess

[77]Alban Webb, 'Cold War radio and the Hungarian Uprising, 1956', *Cold War History* 13, issue 2 (2013): 221-238; Mark G. Pomar, *Cold War Radio: The Russian Broadcasts of the Voice of America and Radio Free Europe/Radio Liberty* (Washington, DC: Potomac Books, 2022).

[78] Rochelle B. Price, 'Jamming and the Law of International Communications', *Michigan Journal of International Law* 5, issue 1 (1984): 398, https://repository.law.umich.edu/mjil/vol.5/iss1/39/.

[79] Oleksandr Stashevskyi and Frank Bajak, 'They're jamming everything: How secretive electronic warfare shapes war in Ukraine', *The Times of Israel*, 3 June 2022, https://www.timesofisrael.com/they're-jamming-everything-secretive-electronic-warfare-shapes-war-in-ukraine/; James Careless, 'BBC World Service Revives Shortwave to Russia, Ukraine', *Radio World*, 7 March 2022, https://www.radioworld.com/global/bbc-world-service-revives-shortwave-to-eastern-europe; Benjamin J. Sacks, 'Why the BBC World Service's New Ukrainian Shortwave Service Matters', 25 March 2022, https://www.rand.org/blog/2022/03/why-the-bbc-world-services-new-ukrainian-shortwave-service.html.

[80] Jaime Frederic Metzel, 'Rwandan Genocide and the International Law of Radio Jamming', *The American Journal of International Law* 9, no. 4 (October 1997): 628-651.

[81] 'Putin Signs Expanded "Foreign Agents" Law', *The Moscow Times*, 14 July 2022.

[82] Statement from the British Council on Russia, 17 March 2018, https://www.britishcouncil.org/contact/press/statement-british-council-russia?_ga=2.2136657492.1429925224.1632885881-735811990.1632885881.

[83] Steven Lee Myers, 'Russians Use Bioweapon Lie To Smear U.S.', *The New York Times*, 5 September 202

of conventional arms requires a disarmament process, so the weaponization of media should be met with an information disarmament process'.[84]

Responses To the Challenges Facing Public Diplomacy, And Their Possible Effectiveness in Contributing To World Order

Now for the final step in this exploration of the role of public diplomacy in the modern world, particularly the legal and normative context in which PD, in its many manifestations, is being conducted, I must consider, first, defensive responses, aimed at the protection of information and networks through which it is increasingly being communicated. This must be undertaken initially at the domestic level, by national governments. The response of the United States, during the administration of President Joseph Biden, has given high priority to cybersecurity, which is the designated responsibility of the Cybersecurity and Infrastructure Security Agency (CISA).[85] At the regional level, the European Union also has acted firmly, with the establishment of the European Union Agency for Cybersecurity (ENISA) and, through the passage of the European Union Cybersecurity Act, a strengthened Code of Practice on Disinformation. The North Atlantic Treaty Organization has made Cyber Defense one of the NATO's core tasks of 'collective defense'. At the global level, too, efforts have been made to contribute to cybersecurity resilience. The International Telecommunication Union (ITU) is now offering Cybersecurity Certificates through a training programme. The United Nations Office of Counter-Terrorism (UNOCT) conducts a Cybersecurity and New Technologies programme. A Global Commission on the Stability of Cyberspace (GCSC), chaired initially by the Estonian diplomat Marina Kaljurand, is committed to 'promoting stability in cyberspace to build peace and prosperity'. It has defined a set of 'Principles' with supplementary 'Norms', the first of which is non-interference with 'the public core' of the internet, the general availability and integrity of which being essential to the stability of cyberspace.[86]

There obviously is positive purpose as well in these protective efforts. This is not only to facilitate international communication but also to build trust and foster cooperation. The development and maintenance of *relationships* is the proper object of diplomacy, including public diplomacy. Too often it is just the defense and promotion of *interests*, national and even international, that is considered to be what diplomacy is for and mainly what diplomats do. Diplomacy, not just in the conduct of negotiations, is inherently relational.[87] It involves, more broadly, management of 'relations of separateness', as the diplomatic theorist Paul Sharp has argued.[88]

This fundamental fact can be obscured by the current emphasis, almost a fashion, on 'narrative'. The trend is especially evident in discussions of PD. A seminal study in 1999 by John Arquilla and David Ronfeldt of the RAND Corporation titled 'The Emergence of Noopolitik: Toward an American Information Strategy' posited that it is no longer military or economic power that prevails in international competition. Rather, it is a matter of 'whose story wins'.[89] 'Stories', while they can indeed be somewhat inclusive of others, are basically told from a single point of view—a nation's, a government's, or even an individual political leader's perspective. An example is the narrative that the current Russian leader, Vladimir Putin, is telling about the origin of Russia as lying within present-day Ukraine, which he does not consider to be 'a real country'.[90] The Ukrainians of course have their own national narrative.[91]

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[84] N. J. Cull, 'The forgotten process: Information disarmament in the Soviet/US rapprochement of the 1980s', *Vestnik of Saint Petersburg University International Relations* 14, Issue 3 (2021): 251-272, https://doi.org/10.21638/spbu06.2021.301. This is an exceedingly informative and suggestive article about mutual efforts that were made, including a textbook review project, citizen-to-citizen conferences, and satellite television links. Such measures are the opposite of 'direct and public incitement to aggression'—propaganda for war—a continuing concern of international lawyers. Michael G. Kearney, *The Probition of Propaganda for War in International Law* (Oxford: Oxford University Press, 2007).

[85] Cybersecurity & Infrastructure Security Agency, https://www.cisa.gov.

[86] Global Commission on the Stability of Cyberspace, https://cyberstability.org.

[87] Leonard Greenhalgh, 'Relationships in Negotiations', *Negotiation Journal* 3, no. 3 (July 1987): 235-243.

[88] Paul Sharp, *Diplomatic Theory of International Relations* (Cambridge: Cambridge University Press, 2009), 10-11.

[89] Their ideas are further developed in David Ronfeldt and John Arquilla, *Whose Story Wins: Rise of the Noosphere, Noopolitik, and Information-Age Statecraft* (Santa Monica, CA: RAND Corporation, 2020), https://www.rand.org/pubs/perspectives/PEA237-!.html.

[90] Article by Vladimir Putin 'On the Historical Unity of Russians and Ukrainians', 12 July 2021, http:en.kremlin.ru/events/president/news/66181.

[91] Serhii Plokhy, *The Gates of Europe: A History of Ukraine*, rev. ed. (New York: Basic Books, 2021).

The identity of Ukraine as a nation has been greatly strengthened by the invasion of its territory by the Russian army on 26 February 2022. Although clearly it was the Russia side that made the first, aggressive move, the Russian government has represented its action as 'defense' against the expansion of NATO, even against Russia itself. This continues a line of argument developed by the Russian government during the Crimean crisis of 2014.[92] A one-sided narrative such as this, if backed by power, can be bought into and bolstered by others who, for their own reasons, may choose to accept (if not believe) it as truth. Thus at a three-way summit in Tehran in July 2022 at which the Iranian supreme leader, Ayatollah Ali Khamenei, met with Russian president Putin and Turkish president Recep Tayyip Erdogan, and reportedly said to Putin: 'War is a violent and difficult endeavor, and the Islamic Republic is not at all happy that people are caught up in war. But in the case of Ukraine, if you had not taken the helm, the other side would have done so and initiated a war.' The NATO alliance is a 'dangerous entity', Khamenei asserted. 'If the road is clear for NATO, they know no boundaries or limits'.[93] The Russian narrative of the war's causation thus was, by this addition, not only confirmed, it was augmented. Thus built upon by Iran, the Russian 'story' of pre-emptive defense was internationally stronger.

The Iranian government does have a basis for complaint. Along with the severe economic sanctions being applied to Iran by the United States and its NATO allies, there evidently has been a disruptive social media campaign being directed against it. The White House, concerned about decisions by Facebook and Twitter to remove, as ostensibly 'coordinated inauthentic behavior', some accounts attributable to the Trans-Regional Web Initiative of the Defense Department, instructed the Pentagon to conduct a review. The White House concern, as reported by the *New York Times*, was that 'clandestine programs could undermine American credibility even if the material being pushed was accurate'. The top Pentagon spokesman, Brig. Gen. Patrick Ryder, said that it was the Department of Defense's policy to conduct information operations in support of 'national security priorities'. He further stated: 'These activities must be undertaken in compliance with U.S. law and D.O.D. policy. We are committed to enforcing those safeguards.'[94] The very fact of the White House concern and the Pentagon audit being reported, first by the *Washington Post*, and brought to the public's as well as congressional attention, increased the likelihood of stories told abroad by the Pentagon henceforth being both authentic and accurate, if not also governed by international norms.

Narrative and power are closely related. The former can be a 'cover' for the latter, its presence or its absence. In the lexicon of diplomacy, in my judgment, the word power, even in the benign term 'soft power', is badly out of place. In international as well as interpersonal relationships, if they are genuine, the word rarely is mentioned, whatever inequalities there actually may be within them. True relationships involve dialogic interaction, continous two-way conversation. Thereby facts are tested, and truth is determined as well. As Edward R. Murrow said when he headed the USIA, 'truth is the best propaganda'.[95] Public diplomacy, if there is a too-heavy emphasis on 'messaging', can devolve into monologue, even solipsism. This is a danger, too, in the current focus on 'narrative', which may be interesting, but not actually engaging. The emphasis of public diplomacy, as with diplomacy generally, should be on engendering cooperation.

That is possible. There is an existing framework for it: the international legal order. Principles relating to the flow of ideas and information that are found in the Charter of the United Nations, the Vienna Convention on Diplomatic Relations, the Constitution of UNESCO, the Universal Declaration of Human Rights, the European Convention on Human Rights, the Helsinki Final Act, and also some of the functionally-focused transgovernmental regulatory regimes can be seen to provide partial answers to the question of the existence of a normative framework for public diplomacy. So, too, can national legislation including, in the United States, the Smith-Mundt Act and actual and proposed measures to control the scope and content of state media and

[92] Alisher Faizullaev and Jérémie Cornut, 'Narrative practice in international politics and diplomacy: the case of the Crimean crisis', *Journal of International Relations and Development* 20 (2017): 578-604.
[93] Anton Troianovski and Farnaz Fassihi, 'Putin Finds a New Ally in Iran, a Fellow Outcast', *The New York Times*, 19 July 2022.
[94] Julian E. Barnes and Sheera Frankel, 'Pentagon Orders Review of Its Overseas Social Media Campaigns', *The New York Times*, 19 September 2022; Ellen Nakashima, 'Pentagon opens sweeping review of clandestine psychological operations', *The Washington Post*, 19 September 2022.
[95] Nancy Snow, *Truth is the Best Propaganda: Edward R. Murrow's Speeches in the Kennedy Years* (McLean, VA: Miniver Press, 2013).

government influence operations.[96] The more that publicly sponsored international communication, as well as policy-oriented 'transnational' communication whether by private corporations, NGOs, academic institutions, or interested individuals, is guided, even inspired, by international law and the higher principles and norms surrounding it, the more likely it is that cooperation will result, and the planet as well as the people on it will benefit.

[96] Jennifer M. Grygiel and Weston R. Sager, 'Unmasking Uncle Sam: A Legal Test for Defining and Identifying State Media', *UC Irvine Law Review* 11, issue 2 (2020): 383-431; Dale Stephens, 'Influence Operations & International Law', *Journal of Information Warfare* 19, no. 4 (2020): 1-16; Justin Malzac, 'Expanding Lawful Influence Operations', *Harvard National Security Journal Online*, Harvard Law School (12 April 2022), https://harvardnsj.org/2022/04/expanding-lawful-influence-operations/.

CHAPTER XII: REIMAGINING THE UNITED NATIONS SECURITY COUNCIL

Vesselin Popovski[1]

Abstract

This chapter addresses a central problem in international legal order – the vetoes applied by some permanent members of the United Nations (UN) Security Council, preventing the Organization from exercising its primary role in restoring and maintaining international peace and security efficiently. It starts by presenting the gap between codification and implementation in international law, especially wide where enforcement mechanisms and sanctions are not envisaged in the treaties or where a veto allows avoiding sanctions. The only organ empowered to impose mandatory sanctions – the Security Council - is the organ most paralyzed by the vetoes of its permanent members. The article goes through several proposals already made by the author, re-assess them in terms of feasibility and desirability, and discusses how the UN Security Council can be reimagined.

Effectiveness of International Law

The most comprehensive ever study on the effectiveness of international law, examining over 250,000 international treaties, found that these mostly failed to produce their intended effects[2]. The results of this study challenged the widely considered conventional wisdom that international treaties are the best mechanisms for states to make mutual commitments and to implement these for the benefit of all. Why did states sign and ratify 250,000 agreements if they made minimal efforts afterwards to comply with them? The study was systematic and evidence-based and included a search of 24,096 records, out of which 224 primary studies met the inclusion criteria. From them, 82 studies reported sufficient data for meta-analysis and meta-regression analysis. These 82 studies evaluated 53 treaties and included 199 unique quantitative estimates that could facilitate comparisons across treaties, policy domains, accountability mechanisms, institutional contexts, and study characteristics. The treaties covered six areas of international law: environment, human rights, humanitarian crises, maritime issues, security, and international trade/finance. The only exception from otherwise disappointing outcomes are treaties governing international trade and finance, which produced intended effects.[3].

Ironically, the only positive news in the study does not speak well for international law either. It stresses "evidence that impactful treaties achieve their effects through socialization and normative processes, rather than longer-term legal processes."[4]. Treaty-making can be helpful, but not necessarily because of properly enforced legal obligations, but rather more as a result of gathering together, socializing, sharing ideas and drafting the treaties.

This is not something we did not know. Louis Henkin started his famous book *How Nations Behave* by asserting that almost all nations observe almost all laws almost all of the time, further explaining that they do so not because of the threat of sanctions but also because they think this is the moral thing to do, would like to maintain friendly relations with others, and do not like to be the subject of criticisms.[5]. Even when states do not implement rules, this might not necessarily be because of ignorance, malign intentions or bad faith, but because of a lack of information or lack of capacity[6].

The gap between codification and implementation of international law was addressed in this author's previous writings, especially on climate change[7]. If in domestic law, the codification, interpretation and implementation

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[2] International treaties have mostly failed to produce their intended effects, Stephen Hoffman et al. (1 August 2022) <https://www.pnas.org/doi/10.1073/pnas.2122854119>.
[3] Note above, Abstract, p 1.
[4] Note above, Abstract, p 1.
[5] Louis Henkin, *How Nations Behave* (Columbia University Press 1979) 1.
[6] Note above, p 2.
[7] Vesselin Popovski (ed), *The Implementation of the Paris Agreement on Climate Change* (Routledge 2019).

are undertaken by three branches of power: legislative, judicial and executive, and they check and balance each other; in international law, there is no separation of powers - states legislate, negotiate and adopt treaties, they interpret these treaties, and also they are those who are supposed to execute these treaties. If states do not care much to comply with the signed treaties, very little can be done. Accordingly, the significant codification of international law over the last century has not been paralleled with similar progress in implementing international law.

This gap is vast when enforcement mechanisms and sanctions are not envisaged in international treaties. The environmental agreements are treaties, often called 'soft law.'[8] - where the implementation depends entirely on the goodwill of the parties. The 'soft law' is easier to negotiate and adopt, as states do not want to face sanctions in case of non-compliance. For example, the Paris Agreement on Climate Change became possible because it included facilitation mechanisms, not sanctions. The lack of sanctions could be a reason for the lack of sufficient ambitions to reduce CO2 emissions, especially among large emitters, resulting in over-heating the planet, melting the ice, raising the ocean levels, endangering species, and producing devastatingly extreme weather events – fires, floods, cyclones.

The United Nations (UN) Security Council is primarily responsible for restoring and maintaining international peace and security. Five of its member-states are privileged with permanent membership (P-5) and the right of veto. The Security Council is the only organ, empowered to impose mandatory sanctions, including military measures, but also is the organ, most paralyzed by the vetoes of its permanent members. As it turned out, the P-5 – especially the Russian Federation (the Soviet Union before 1991) and the USA - committed the worst acts of aggression and applied their vetoes to avoid accountability for these aggressions. Not only that, but the P-5 also used or abused their vetoes to shield responsibility from other states for aggressions and mass atrocities.

From 1998-1999 China and Russia threatened with veto and protected the Serbian regime of Milosevic from legally binding global sanctions, and as a result, it could commit mass atrocities in Kosovo with free hands. In 2003 the USA and Britain brutally invaded Iraq, knowing that their vetoes will shield them from any international accountability. In 2011 after the Syrian government unleashed murderous repressions on its population, Russia and China used vetoes a dozen times to avoid not only sanctions but even a condemnation of these atrocities. As a result of these vetoes over the next decade, half of the Syrian population was displaced, and more than half a million civilians died. The USA repeatedly vetoed any attempts for international accusation and investigations of several massive Israeli strikes on Gaza, killing civilians and destroying homes. The regime in Myanmar 'enjoyed' the threat of the Chinese veto when undertaking its genocidal campaigns against the Rohingya minority. The Yemen civil war continues with a very high death toll, resulting from the mass starvation of the population. Any attempt to sanction Iran for supporting the Houthis rebels faces the Russian veto. Reciprocally, any attempt to sanction Saudi Arabia for supplying deadly military assistance to the government also faces a potential veto.

The problems with the Security Council are not only directly related to the veto. Often long, protracted deadly conflicts, such as those in Vietnam in the 1960s-70s, Iraq-Iran (1980-1988), Cambodia, Guatemala, Somalia, DR Congo, Sudan, Afghanistan etc. exemplify perfectly the dysfunctionality of the Security Council, unable to stop continuous bloodsheds either because of total ignorance, or lack of political will to engage with practical measures, or – worse – with some of the P-5 exploiting the conflicts for their geo-political games.

This significant gap in international legal order, existing for many decades, became even more comprehensive and dangerous after Russia not only brutally invaded Ukraine, in a flagrant violation of everything in both *jus ad Bellum* and *jus in belli* but also went as far as to make direct threats to use nuclear weapons and to blackmail with nuclear power stations.

Reform of the Security Council

The UN Security Council reform has been debated continuously over many decades with only one progress achieved: in the 1960s, after the number of the UN Member-States doubled from the original 51 in 1945, the

[8] Note above, (Ch II "Hard" and "Soft" Law on Climate Change) pp 19-41.

General Assembly accepted the initiative of the Non-Aligned Movement (NAM) and adopted a resolution to expand the Security Council members from 11 to 15 members. Curiously, even if four of the P-5 initially either abstained or voted against in the General Assembly, they all later ratified the amendment of the UN Charter, extending the non-permanent seats from 6 to 10. They felt the pressure of the constantly increasing number of new independent states from the South and supported the change so as not to end isolation from the rest of the world.

In 1993 the UN General Assembly, again triggered by the NAM, initiated the process of expanding the Security Council and created an Open-Ended Working Group on Equitable Representation.

In 2005 ex-Secretary-General Kofi Annan proposed two options for expansion of the Security Council's membership: Model 'A' with six new permanent members; and Model 'B' with longer-term renewable members.

However, the P-5 showed zero interest in reforming the Council's composition, and the world was divided roughly in two between the two options. Therefore neither of the two models could get a 2/3 majority in the General Assembly to be adopted.

Model 8 + 8 + 8

In 2015 this author proposed a formula that combines models 'A' and 'B', known as 8 + 8 + 8[9]. The idea was to have 8 permanent, 8 semi-permanent and 8 non-permanent members of the Security Council. In the middle category, the 8 semi-permanent members serve for 8 years, with possible immediate renewal, or potentially serving 8 + 8 + 8 (second meaning of the name) years. The total number of 24 members makes it convenient for each member to be a President of the Council once every two years. Regional organizations can be given permanent membership: for example, the European Union (EU) and the African Union (AU) can join Brazil, China, India, Japan, Russia, and the USA, making 8 permanent members.

The second category of renewable 8 seats is shared between large and well-capacitated countries, such as Germany, Britain, France, South Africa, Nigeria, Italy, Canada, Egypt, Mexico, Argentina, Pakistan, Indonesia, South Korea, Australia, Turkey and others, who serve for 8 years with possible immediate renewal and contribute to peace and security with the extra budget, mediators, peacekeeping forces, seconded personnel, etc.

This model is very beneficial for small countries for two reasons. First, because 20+ big countries move into the first two categories and no longer compete for 2-year seats, these countries can get more frequent 2-years membership. Second, as African and European (and potentially ASEAN in the future) countries enjoy permanent collective representation in the AU and EU regional permanent seats, they will frequently feel less of the need to knock on the door for a 2-year membership.

The formula 8 + 8 + 8 satisfies everyone. It gives Africa more than what Africa aspires for: instead of 2 permanent members – something Africa wanted but never specified who these two would be – it gets a permanent AU seat, plus two constant long renewable seats rotating between large African countries. Imagine South Africa and Nigeria serving for 8 years, replaced by Egypt and Kenya for the next 8 years, and this is in addition to a separate permanent forever seat for the entire AU.

Asia also wins. Instead of just permanent seats for India and Japan (its current ambition), the model provides for 2 or 3 large Asian countries with extended renewable membership in the Security Council. Imagine Pakistan, South Korea and Indonesia serving for 8 years. The first two are replaced by Bangladesh and Turkey, whereas the Indonesian seat becomes an all-ASEAN seat in the next 8 years, and all these are in addition to the permanent

[9] Popovski, V., 'Win-win Formula for Reforming the Security Council' in *The Global Community: Yearbook of International Law and Jurisprudence*, vol 1 (Oxford University Press 2016).

seats of China, India and Japan. There could not be a better representation of the most populous continent in the world.

In Latin America, in addition to Brazil in the permanent seat, Argentina and Mexico agree to rotate in membership every 8 or every 16 years, adding practically a second constant Latin American seat in the Council. This is also larger than what Latin America currently wants. Similarly in Europe, where in addition to the permanent EU membership, 2 or 3 semi-permanent seats rotate in the amicable agreement between large countries, well-capacitated to contribute to international peace and security.

Crucially, the current permanent five (P-5) also benefit. They remain full permanent members with the only change that they will pay much less money after a large group of new contributors join the Council.

Presenting the model 8 + 8 +8 worldwide, this author never heard a single robust and meaningful objection. Once a German diplomat expressed unhappiness, and he was asked to imagine a Council where Germany is present for 16 consecutive years, sitting next to an EU permanent member (possibly also a German diplomat, therefore having effectively 2 of the 24 votes), and to compare this with the current situation, where only once in every 12 or 14 years Germany can be a member and just for 2 years.

The model helps also because it makes the regional organizations more responsible and coherent. The privilege of a permanent seat comes with the responsibility of the AU and the EU to be more proactive and coordinated, to integrate and demonstrate their common security and defence policy, something they often repeat they aspire. The 8 + 8 + 8 will be instrumental not only for the UN but also for the internal harmonization and strength of the AU and the EU.

Accurate, with the 8 + 8 + 8 model the veto will not disappear, but it will become very costly. The five new permanent members can make a collective commitment never to use the veto, a strong message for the other three, which will now face a powerful coalition of 23 members around the horse-shoe table, incl. two large regional organizations, the AU and the EU. Finally, 8 + 8 + 8 also changes the perception of the Council. It no longer reflects the privileges from the past but instead the responsibilities for the future. It will no longer be the club of the victors of World War II. Instead, it will be a burden-sharing community, where members join efforts and skills to serve global interests.

Multiple Security Councils

In 2020 seeing no progress with the Security Council's reform, this author came up with a different re-imagination. Assuming that the P-5 will not accept a reform, what else could be done? This author suggested creating additional 'Security Councils' - Peacebuilding Council, Climate Security Council, and Health Security Council - using the authority of the General Assembly to establish subsidiary organs under Article 22 of the UN Charter and the spirit of the 1950 "Uniting for Peace" resolution. These new Councils have more comprehensive representation, and considerable emerging powers can join, bring their ideas and capacities, and contribute to eliminating threats, such as the re-emergence of armed conflicts, climate change and health pandemics.

The new Councils can take tasks either if the current Security Council refers such or (if the Security Council is divided or silent) under their initiative and resources to go ahead without waiting for referrals. This will not limit the powers of the current P5, who can be permanent members in all three new Councils.

The Peacebuilding Council, the Climate Security Council, and the Health Security Council can unite the forces of both old and newly emerging powers in decision-making and problem-solving. They can engage the World Bank, International Monetary Fund, regional organizations, development banks, and other relevant stakeholders, who can bring ideas, expertise, funds, determination and human resources to solve peacebuilding challenges, climate change and global health. The new Councils will not antagonize. Instead, co-operate with the Security Council, effectively alleviating its heavy agenda to focus on complicated security issues and Chapter VII actions. The new Councils do not need to be established simultaneously, they can emerge one by one, depending on

feasibility, importance, and urgency. Over time, the P-5 realized that the new Councils, also permanent members, increased rather than reduced their power.

Peacebuilding Council

The Peacebuilding Commission (PBC) was established in 2005 as an organ to address the lack of interest to continue long-term involvement in post-conflict zones, as a result of which conflicts may re-ignite and escalate. The PBC started slowly but found its modalities and strengths over the years and made severe contributions to peace and security. The fact that Liberia, Burundi, and Sierra Leone are now peaceful and democratic countries with responsible governments is to be acknowledged as an achievement for the PBC. Also, the interaction between the Security Council and the PBC demonstrates burden-sharing and coordination opportunities, which can be further enhanced. Issues such as prevention, early warning, security sector reforms, re-building institutions and the rule of law can come comfortably under the purview of a new Peacebuilding Council instead of burdening the agenda of the Security Council. Once the demobilization and disarmament advance and all parties co-operate, the Security Council can leave the Peacebuilding Council to deal with the rest of the tasks of reconciliation, economic recovery, and democratic governance and focus its full attention on other situations where military hostilities and uncooperative parties on demand Chapter VI and Chapter VII measures. This division of labour already happens, but a powerful, upgraded, and well-capacitated Peacebuilding Council can monitor the transition to peace long-term so that the situation never returns to the Security Council agenda. As mentioned above, the P-5 lose nothing with this change, remain a permanent member of the upgraded Peacebuilding Council, and fully participates in its decision-making. They will not have the veto there, but they also do not have the veto in the current PBC because all actions are expected to be entirely taken in cooperation with the governments where engagement happens.

The composition of the Peacebuilding Council can generally inherit the current membership of the PBC, including significant contributors, allowing them closer and direct participation in international peace and security. These large countries might not regret being left out of the Security Council's permanent membership by getting involved in a significant peacebuilding role. For example, for a country like Japan, which cannot constitutionally undertake military engagements abroad, this would be a perfect opportunity to become a global leader without burdening its mind with military security decision-making and asking for permanent membership in the old and divisive Security Council.

A further rationale for having a Peacebuilding Council is that it can become an organ to unite most of the preventive tasks and operations in one place—currently spread among several offices. Every Secretary-General repeated how vital prevention is, but none has established a united institutional framework for it. The Peacebuilding Council can become such a natural anchor of prevention efforts, not less because successful peacebuilding means *par excellence* preventive activities, disallowing conflicts to re-emerge.

Climate Security Council

Climate change will be the primary threat to human survival for a long time to come. The Security Council had some thematic debates on climate change in the past, but these did not produce much, apart from very general Presidential statements. Several times the Security Council mentioned climate change in the preamble of its resolutions, to signal the climate effects as a reason for the deterioration of a country's situation, but this does not help much the failure or mitigating the CO2 emissions. The author sympathizes with the voices of the global civil society to urge the Security Council to take climate change more seriously. However, on the other hand, one does not see a point in over-expecting the current Security Council to address climate change efficiently, not only because the current atmosphere between the P-5 is poisoned but also because its mandate is very different and triggered only by visible emergencies, not from long-term gradually deteriorating threats.

Therefore, the UN Member States can create a new Council to focus specifically on the security implications of climate change. This will unify already existing efforts and structures to tackle these security implications. Such Council can also address broader environmental concerns, such as loss of biodiversity, land degradation, deforestation, plastics in oceans, air pollution and their security impact. The Climate Security Council does not

need to be simply a state-based organ, it can involve non-state actors, the business community, city mayors, indigenous groups, philanthropists etc. There are several proposals: to create a Global Resilience Council, an International Environmental Agency, or an Emergency Platform, and these go hand-in-hand with above mentioned Security Council proposal. Deserving attention is also creating a 'Climate Club', where members receive proportionate privileges depending on their climate change contributions and eliminate the free-riding problems within the current voluntary, non-binding arrangements. Similar to the Peacebuilding Council, this new Council will not affect all the powers of the P-5, they can fully and permanently participate in this Council too, and they can decide to refer situations from its agenda to the new organ, etc.

Health Security Council

In the past, the Security Council adopted consensual resolutions on HIV/AIDS (2000) and Ebola (2014). However, the failure to adopt a quick and decisive consensus on COVID-19 raised the demand for creating a Health Security Council, which can bring together political bodies, such as the Secretariat and the Security Council, with functional bodies, such as WHO, UNDP, World Bank, and IMF. The bridge between the political and functional parts of the UN could be crucial because blame has often been put on the ineffectiveness of the political part. In contrast, the UN has had significant functional successes in global health, like eradicating smallpox, polio, leprosy and other diseases. The distinction between the political and functional helps to understand complex and multi-layered institutions. However, it matters little in practice where political and functional issues are increasingly and inextricably interlinked.

COVID-19 emerged as a combination of both natural and manufactured disasters. It triggered profound re-considerations due to disruptions of various prevention and mitigation risk systems and infrastructural interdependencies, manifesting deeply intertwined political and functional interests. These disruptions spill over in unpredictable ways and may ultimately have severe global impacts. COVID-19 is a wake-up call that compels the UN to make fundamental adjustments in the ways it anticipates global threats, and monitors and assesses how these threats should be handled. There are few integrated analyses of potential crisis drivers, and the Health Security Council can fill this gap. Previous projects have been typically sector-based one-offs, rarely looking beyond the immediate challenge, and too sensitive to the predilections of Member States. A Health Security Council can create a holistic approach and—similarly to the other Councils—engage many states, regional organizations, and academic and business communities.

Suppose the Security Council continues to be inefficient, unrepresentative and blocked in the face of global challenges. In that case, the new Councils can fill the gap, co-operate with the rest of the UN, enjoy the UN's global convening power, innovate and create platforms to draw upon the best expertise in the world, and develop the integrated analytical capacity that the UN currently does not possess, identify potential short-term and long-term threats, anticipate and monitor not merely the drivers of crises, but also how these crises can be prevented or mitigated. The Councils focus on specific threats but engage widely with various systems to ensure that mitigating measures work in a holistic and connected manner.

The major global concerns—re-emergence of armed conflicts, climate change and pandemics— can find their well-furbished and capacitated houses. Managing global challenges is a task that goes beyond the capacities of any group of Member-States. Emerging powers, middle and small states, and non-state actors can contribute and offer expertise, solutions, commitment, and human resources.

New Global Organization

The continuing impasse and lack of reform of the Security Council not only disappoints because it keeps the international legal order unjust and unfair and destroys the international legal fabric. The bigger and more pressing problem is that millions of people may continue to suffer and die because of the veto or the missing or inadequate engagement of the Security Council. Back in 1945 many of the UN founding members (Australia, Poland, and most Latin American countries) shared unhappiness with the veto. They considered it a temporary measure to be tested in the first 10 years of the UN's existence. They insisted in the UN Charter on a specific text for a Review Conference to happen no later than in 1955 (Art. 109 of the Charter). Such a review conference has

never been convened since. Nevertheless, even if it can be convened now, and even if the General Assembly can agree with the two-thirds majority to eliminate the veto, the revised UN Charter can enter into force only upon all P-5 ratifications. It is unrealistic, even delusional, to expect Russia and China to agree to abandon the veto.

The choice is obvious and straightforward, keeping the current UN Charter where each P-5 continues to use the veto, and more people suffer and die, or states create a new organization with a new Charter without a veto. The Ukrainian President Volodymyr Zelensky, in an address to the Security Council on 5 March 2022, equalized the right to veto with the 'right to die' and invited the UN Member States to consider creating a new organization. The right of veto marks and signifies the repeated failures of the Security Council to prevent conflicts and atrocities. The world has witnessed for too long how millions of people died and may continue to die because at any moment. A P-5 member may feel offended, over-proud, selfish or disinterested and raise a hand against a decision to stop atrocities. The abuses of the veto damage the whole UN system, which otherwise could be well-structured and capacitated to undertake extensive life-saving efforts.

There were attempts to reduce and eliminate the abuse of the veto. For example, France and Mexico drafted a Political Declaration on Suspension of Veto in Cases of Mass Atrocity in 2015. Like-minded states formed the group 'Accountability, Coherence, Transparency' (ACT). They developed a Code of Conduct, urging the P-5 to refrain from using the veto in mass atrocities, and 122 states currently sign it. In March 2022, the UN General Assembly adopted the 'Veto Initiative', proposed by Liechtenstein and 80+ member-states. Now every veto triggers a special emergency session, where the GA can demand an explanation from the veto-imposing member(s), and even adopt the same texts from the vetoed resolution and make it part of its mandate. The expectation is that these emergency sessions will increase the reputational cost of the veto.

All efforts listed above are admirable. However, they cannot entirely annul the abuses of the veto. There are two ways to abolish the veto: (1) through the UN Charter amendment; and (2) by creating a new organization. Many think the second option is unrealistic, but the first option is even less realistic. Can we imagine Russia or China ratifying a Charter amendment to eliminate the veto? Certainly not.

Nevertheless, we can imagine 140+ countries, those who condemned the Russian aggression in Ukraine, creating a new Global Organization. Do we want in 2045 (the UN 100 anniversary) to look back over the last twenty years and see more aggressions, genocides and mass atrocities, with tens of millions displaced because of veto abuses? If we do not want these, we better create a new world organization to replace the current United Nations.

Two arguments are usually given against the creation of a new Organization. The first is that the current UN still does good work on many other issues, different from peace and security, for example, humanitarian assistance, protection of refugees, education, health, prevention of diseases, etc. True, but none of these will be forgotten, and there is no reason why the new Organization cannot continue doing all its excellent work until now. Re-drafting the Charter and starting a new organization would allow us to re-think and reform many other parts, not only in the Security Council. It would be an excellent chance for all other organs and agencies to change, innovate, improve and benefit from a new 'San Francisco moment'. Some long-serving bureaucrats in New York and Geneva may worry about their jobs. However, if they cannot compete and re-offer their services for the new Organization, they should better take their retirement money.

The second argument is that major powers like China and Russia may refuse to join the new Organization. It can be expected, but this will not be a big drama. The UN 1945 came into existence with just 51 initial members. The rest entered later. Imagine China, one day facing the choice between joining 150+ states in a new Organization, participating fully and benefiting from all opportunities and programs, or remaining isolated with Russia, Belarus, Syria and a few others outside the new Organization. The choice is there to make, but on balance, nothing is more significant than the UN. Even a large country like China would benefit more from being inside a global organization than staying outside.

CHAPTER XII: RE-IMAGINING THE EUROPEAN INSTITUTIONS

Maria Stoicheva

Abstract

The rise of economic inequality, the respect for national identity, and the altered social environment in which new ordering of significations in the actual imaginaries that form the framework of our understanding of the world and society we inhabit can have a substantial impact on the legitimacy of institutions. The European institutions must demonstrate that they are acutely aware of the need for revitalization in light of the ongoing problem of democratic accountability. At the outset of European union, the ultimatum "or else" was a significant point of reference. The issue may be raised as to whether this necessity has been replaced with the assumption that we are successful if we adhere to the processes. I do not advocate the "technique of universal scepticism" in this article. The ardent optimism over the future of European unity and the role of the institutions in securing the best for all Member States and people must be tempered with some scepticism and pessimism. It might urge elected politicians and all those devoted to working for European institutions to caution decision makers at the European level using Cromwell's rule in probability theory or the words of Oliver Cromwell himself: "Consider the possibility that you may be incorrect."

Introduction

In 1995 Tony Judt gave lectures at the John Hopkins Center in Bologna and subsequently published the book with the title *A Grand Illusion? An Essay on Europe* – a 'skeptical and passionately argued reflection on the state of Europe'.[1] Twenty years later Ivan Krastev in his book *After Europe* reflects on 'the future of Europe – and its potential lack of future'. Judt's confession that he is 'enthusiastically European' and Krastev's first chapter title 'We the European' seem to contrast to their pessimistic view of the future of the European project. Their pessimistic view is not just linked to specific current contexts related to crises, enlargements, globalization, but to their doubt that the European project 'intellectually rooted in the idea of "the end of history" might be desirable but very unlikely possible in order to wisely and uncritically insist upon it.[2] Both of them ask different questions that United Europe faced, related to the context of when they were written, but essentially and in their core, these are questions related to what defines "Europe" and how we *imagine* its future, where the concept we share today can be projected in the future in a sustained way. Judt's choice of the term '*illusion'* well correlated to the discourse on the grand narrative of Europe at a period when the European union was just formed as a major step in its unification – becoming one from many[3], when Europe faced the prospect of unification after the fall of the Berlin Wall, when identity studies were at their peak. There was time when the discourse of the Grand Narrative of Europe conceived as a continuity of a series of events in which there is consciousness of the prior members of the series was forming the notion of the narrative identity of Europe and potentially of Europeans. Illusions arise from real stimuli but lead to incorrect impressions or perceptions as is the case with the European unification, as Judt says, in a context of existence of "embattled, mutually antagonistic circle of suspicious and introverted nations" (p. viii) where according to Krastev, Europeans are "unsettled by a future globalized world".[4] The achievements and the grand success of the process of European unification cannot be neglected, this is a reality, which, however, produces the unlikely illusion that it is likely to persist and sustain.

When we talk about the European unification and the European Union in particular, there is a constant reference to the way it actually came about, to exploration the EU history with a magnifying glass in order to find the small steps, which in a teleologically explained process has led to the Europe that we know today. In this the emphasis

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[1] Judt, T. (2011). A Grand Illusion? An Essay on Europe. New York and London: New York University Press.

[2] Krastev, I. (2020). After Europe. University of Pennsylvania Press.

[3] From European Communities to the European Union. Treaty of Establishing of the European Union, Maastricht 1992. Pg 6.

[4] Id 10. Pg. 18.

seems to be laid on another concept, which we cannot avoid mentioning, when we endeavor to reflect on re-imagining the EU, its future and institutions, namely the role of *visionary* leaders who inspired the creation of the European Union. To a large extent the public presentation of the history of the European unification can be paralleled largely to paying tribute to their contribution to modern-day Europe, to their energy and motivation, courage and commitment, presenting them as champions of the fundamental values upon which the EU is founded. These are visionary leaders that, often regrettably we consider missing in our contemporary reality.

But I feel inclined to agree with Tony Judt that "it is an understandable mistake to suppose, in retrospect, that postwar Western Europe was rebuilt by idealists for a united continent'.[5] It is not a statement that such people did not exist, but rather a critical observation of a historian that their impact in real-world and European unification was clearly and effectively "discernible". If it was not idealism that drove Europeans in those years (after WWII – my remark), nor was it the manifest imperatives of historical destiny."[6]

Willingly or unwillingly when we define these leaders (the founding fathers of the European integration as often named) we presuppose that they experienced some sort of a visionary state, similar to the medieval saints when they 'see' the future or at least they are attributed a clear and distinctive vision of the future as something exceptional for them and unachievable by the majority of people. Neither of these concepts are part of what this chapter aims to deal with as it is not an undertaking in a visionary exercise, nor we should hastily interpret the seemingly adequate cues of lack of deep popular loyalty to the European Union as indication of an illusionary phenomenon. Here we apply the concept of *imaginary*, understood along the lines of Castoriadis' seminar work The Imaginary Institutions of Society in 1975: The social world is constituted as a function of the imaginary significations and 'these significations exist, once they have been constituted, in the mode of what we called the *actual imaginary* (or the *imagined*).[7] These imaginary significations refer less to an understanding of separate actions or practices but in a way lies beneath them as a framework of "how we stand to each other, how we got to where we are, how we relate to other groups, and so on" often referred to as the notion of a 'moral or metaphysical order'.[8]

Therefore, a society has its social imaginaries, either endorsed pre-existing social imaginaries or instituted new imaginaries as a particular cognitive way of presenting their being together in the form of narrative or myths. The European unification is an institutionalization of a radically new imaginary. Has time arrived for re-imagining the European unification process and its institutionalization or the actual imaginary of our current state of European unification articulates meaning, makes effective distinctions concerning what does or does not possess value and what should and should not be done? Re-imagining in this sense is interpreted as a process of re-ordering of existing social significations and instituting new imaginaries as social significations which impose new meanings and new values.

Following the argument above, we start with the symbolic as "everything in the social-historical world and in the history of European integration is inextricably bound to the symbolic"[9] and in some sense is impossible outside a complex changing dominance of trends and significances. It also plays a driving force in shaping in turn the identity of the European Union and the identity of EU citizens. Imaginaries are 'shared' by members of a society and thus the 'imagined community' is formed.[10]

On the Symbolic Deficit of the European Union

[5] Id 9. Pg 14.

[6] Id 10. Pg. 5.

[7] Castoriadis, C. (1975). The Imaginary Institution of Society. Cambridge: Polity Press. Pg. 146.

[8] Unarticulated and not conceived rationally, but imagined or represented in images and of symbolic fibre. Taylor. C. (2004. Modern Social Imaginaries. Duke University Press. Pg. 25.

[9] Id. Pg. 117.

[10] Anderson, B. (2006). Imagined Communities. Reflections on the Origin and Spread of Nationalism. London & New York: Verso.

It might seem that when we reflect on the future of the EU and the potential transformation, if need be, of its institutions, their symbolic load is irrelevant as the functionalist view draws our attention predominantly to the apparent situation that the role of the institutions is vital in organisation of society, its economy, in the case of the EU in structuring a wider European market and potentially an economic territorial unity.

When we consider the symbolic aspects of the EU institutions we refer both to the existing myths and their transformation in the process of European integration and the awareness and the extent of their being perceived by the EU citizens. The focus on the symbolic deficit reflects the perceived need for a mythological dimension of contemporary Europe, which shadows contradictions, divisions and conflicts and impacts the understanding of the scope and limits of forming of European identity. The symbolic as the notion of imaginaries have a profound impact on the way Europeans make sense of the unification process, which constitutes a myriad of narratives, often competing[11], flowing in people's lives. How do the particular imaginaries constituting the national identities correlate with imaginaries of European unification? It is much less predictable than in the process of nation formation where there is a self-evident sense which is shared with the members of the imagined community and produces shared sense of their particular practices?

By referring to the symbolic deficit of the EU it is not claimed that that European identity as a legitimizing power for European institutions is weak. It is possible to accept a purely political mythology, as for example the narratives of the founding fathers of the European Communities, or if we look back for symbolic material to the 'imperial myths of the Carolingian and Ottonian Holy Roman Empire and to the medieval urban civilization centred on the Rhine as their models of a 'golden age' of European Christendom'.[12] But both of these trends seem equally unproductive because we live in a secular age and also because the imperial form of myth creation deeply contradicts the democratic values and spirit of united Europe. Moreover, there is the risk of firmly situating of the European unification creation myths in a particular part of Europe excluding other parts, which could reinforce a deep division on the continent before the Fall of the Berlin Wall. However, in imagining the European unification the specific national imaginaries continue to form the framework, which means that if we consider European identity for example as producing the bonding power of the contemporary political order in Europe, then it should be conceived as collective cultural identity. The modern European project of unification has to be grounded not just on myths, be they political myths, but on historical political mythology, embedded in the collective memories of European communities.

The political myth that European integration has brought peace to the continent clearly correlates to a period of unprecedented stability in post-war Europe and this has coincided with the creation of the European Union. But our contemporary situation with a war raging in European periphery, which cannot be detached from what European means and is associated with, might contest the causal link between the two factors. The myth that the European Union is responsible for the peace, prosperity and democracy on the continent has the features of a primary myth.[13] The role of this political myth is related to telling us what our values are, who we are and why European peoples are together. The question is whether the myth of the EU as the driver for peace can sustain and serve its various functions including providing for a general imaginary framework creating a sense of belonging and more importantly, legitimizing European institutions, generating consensus or the use of political power by them and mobilizing support for the European project.

Then the symbolic deficit of the EU has its impact on the institutions and their functionality and to the process of European unification as a whole. To a large extent the deficit is related to the fact that myths as cognitive frameworks for gaining understanding and sense are linked tightly to the history of a continent torn apart by conflicts and wars. The narratives and the stories told about creation and about values to be sustained open space for imagining of something which has not happened yet or is perceived in a process of becoming, but it is logically located in the natural continuity of the narrative or which could be possible to happen. In this interpretation we could try to avoid both the essentialist interpretation of the reality of Europe today (looking backwards for

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[11] Stoicheva, M. (2020). The present of the Past: The Plurality of Competing Narratives in the EU Context. Journal of Human Values 26(1) 50–63, 2020.

[12] Smith, A. (1992). National Identity and the Idea of European Unity, International Affairs, 68(2), 55-76.

[13] Della Sala, V. (2010). Political Myth, Mythology and the European Union, Journal of Common Market Studies, 48 (I), 1-19.

sustained features and characteristics defining what is European and what is not) and the nihilistic interpretation, which does not give a future day for European unification either because of nationalistic or ethno-cultural particularism or because of proclamation of its democratic deficit.

The EU is not a nation state, rather it is usually defined as a post-national and in this sense a postmodern political entity and telling and re-telling this in describing a reality of our times presents 'a polity that has gone beyond the conventional forms of understanding governing', 'a polity based on rationality and functional interests'.[14] It has never been associated with the process of formation of a new nation. However, the Union introduces and uses 'myths of creation' very similar to those of the nation state.[15] Fontaine's[16] "Europe in 12 lessons", first published in 2006 and followed by several updated versions, keeps a clear reference as a starting point for learning about and understanding the EU to the claim that:

> *…the idea of a united Europe was just a dream shared by philosophers and visionaries,… inspired by humanistic ideals.*[17]

Next comes the specific context after the Second World War and resistance to totalitarianism and the richly symbolic dimension of creating 'the conditions for lasting peace' by turning the raw materials of war[18] into instruments of reconciliation and peace'.[19] It is this dream that us presented as continuous in the intellectual history of Europe, which was 'shattered by the terrible wars that ravaged the continent during the first half of the 20th century'.[20] Added to this is the inevitable personification in the figures of 'brave statemen' among whom including Robert Schuman, Konrad Adenauer, Alcide De Gasperi and Winston Churchill 'persuading their peoples to usher in a new era'. These are the founding fathers. The myth[21] of new era for Europe, born in the aftermath of the Second World War in some sense manages to produce a feeling of belonging and a sense of identification but in some particular contexts. But 'it has rarely assumed the features of a geographically spread full-fledged myth'.[22]

The narrative of Europe is a possible answer to the 'symbolic deficit', which inevitably impacts the functioning of the European institutions (internally as an arena of still conflicting interests of Member States) and is often used as an explanation of the lack of effectual bond between citizens and the Union. As time has gone and the devastation of Europe is more and more becoming a fact of history which can be discovered in manuscripts and other sources, not sufficiently felt in reality, this proto-myth of Europe created for lasting peace leaves people less emotionally engaged and hardly fulfil the need of symbolic representation in the community. The narrative of the European unification project, as already pointed out, is included in other metanarratives (grand narratives) in which it can find its meaning and justification. For example, the narratives of the nation formation, or the narrative of the Enlightenment, of democracy, of humanism and recently more and more acutely in the Globalization narrative. The European project needs a metanarrative and it seems it has been created and turned into an imaginary. Yet the various national narratives are still dominant and the European narrative functions as a micronarrative (petits récits) – a localized representation of limited areas.

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[14] Id.

[15] Id.

[16] Former assistant to Jean Monnet. European Commission, Directorate-General for Communication, Fontaine, P., *Europe in 12 lessons*, Publications Office, 2018, **https://data.europa.eu/doi/10.2775/206900**

[17] Id. Pg. 5.

[18] The reference here is to the creation of the European Coal and Steel Community, proposed by Jean Monnet on the 9th May 1950.

[19] Id.

[20] Id.

[21] Rather a narrative repeated throughout the process of European unification, used both as an argument for its very creation and an outcome of it being established. Bottici and Challand (2013) use the term narrative instead of myth emphasizing on the different between them. A narrative is a systematic recitation of a series of events or an event while a myth gains the status of a traditional story accompanied by a belief regarding facts and phenomenon of experience. A narrative might never, despite of its being told and retold, turn into a myth as a significant component of individual's identification and sense of belonging.

[22] Bottici, C. and Challand, B. (2013). Imagining Europe. Myth, Memory, and Identity. Cambridge: Cambridge University Press. Pg. 167.

Re-Imagining the role and function of the EU

The first generations founders of the European Union shared the vision (at least in the political rhetoric) that one day Europe will be politically united. "The pooling of coal and steel production should immediately provide for the setting up of common foundations for economic development as a first step in the federation of Europe" envisioned Schuman in his Declaration in May 1950.[23] However, as Tony Judt remarks, "The makers of postwar Europe were driven instead by realistic, national motives of the most conventional and traditional kind".[24]

And then he adds that 'they could only *imagine* the alternatives facing them after 1945 in the light of earlier experiences and mistakes and plan accordingly'. This is hardly surprising, in his words, as 'most of them had grown up in a world of nation-states and alliances, their earliest adult memories dating back before the First World War'. The proposal was 'unthinkable' just a few years earlier and in Judt's view it is compared to taking an '*imaginative* leap'. Similar attempts were proposed before, namely looking for a 'European solution' to specific dilemmas, threats and issues European nation-states had to resolve. The point Judt makes, with which I tend to agree, was that the created European entity in the 1950s, which today is studied as the beginning of the process of European unification, was an 'accident' (in a sense that it was not the point on the agenda), but was an instrument for solving other dilemmas and threats. It was a pragmatic solution to acute issues related to the relations between states (winners and losers at the end of the war). It was difficult to say whether there was a public vision and support for the unification process, 'the Schuman Plan, signed into life on April 18, 1951, was really a sort of de facto peace treaty between France and West Germany'[25] institutionalizing mutual economic interdependence between them. This picture reveals a framework of political significations linked to the interests and ambitions of the participating states, into which a new imaginary was introduced instrumentally, namely the effectiveness of the so-called "European solution'. Projected backwards, this and the subsequent stages of the process of European unification can be loaded with visionary passion but only in hindsight. For the time when they occurred, they could be described as effective solutions to acute problems or a trade-off between benefit and loss, which led to 'astonishing recovery and subsequent prosperity of Western Europe'.[26]

The discourse of the EU, and who Europeans are, is located between the immediate presence and indefinite future. The Communities appropriated the name 'European' because there was the prospect of uniting the whole of Europe from the initial six states. 'European' did not just describe the initial six countries, but contained the expectation of unification of whole Europe, as it was imagined in those days. The identification with Europe, and European identity, is a kind of project identity. This produces a special difficulty in formation of European identity as in certain circumstances and environment, one could be European only if one is projected into a world which does not yet exist, or which cannot be easily understood by the classical notions and imaginaries of political science. There is tension (rather a hesitation) between the openness of the entity and the structural uncertainty of the future of the European unification.

The Constitutional project was taken very far with a highly optimistic ambition, with the belief on behalf of politicians and all participating in the preparation stages of the draft Constitutional Treaty that consensus was reached and that the citizens would support political authorities' decisions. However, two crucial referenda failed to support the high-level decision. For many citizens it looked very much like a major step in creating a new state – a superstate; which did not have any reference to how they imagined the order of the world around them, it did not have any reference in their actual imaginary. History has shown that creating a state is not an easy task. It seems that at no moment of the negotiations for the draft Constitutional treaty there was a feeling the whole undertaking could fail. At least this was not clearly communicated to the public. The reality, however, is different. The order of the EU demonstrates a unique example of supranational constitutionalism which grew out of the

[23] The reference here is to the Schuman Declaration proposing the creation of the European Coal and Steel Community, whose members would pool coal and steel production. It was presented by France's Foreign Minister Robert Schuman on 9 May 1950.

[24] Id 9.

[25] Id.

[26] Id 9. Pg. 24.

initial intention to provide for the creation of a common economic area where free-trade can be carried out. It gradually became a legal order with its primary and secondary legislation on a limited part of the territory of the continent Europe. Although contested by the wide public in major referenda and also by Brexit, the constitutionalisation of the European Union did happen. However, in order to become a part of the material world around us it requires an 'imaginative leap' concerning more the process of taking decisions, felt to be taken for the benefit of some and detriment of other Members. And this is a question of how European institutions function, whether the decisions they take can actually deliver what is expected by the citizens.

The failure of the Draft Constitutional Treaty was not the beginning but a result of a manifestation of the reinvigorated interest in nations and nationalism in social sciences and in political discourse. The 1980s are considered as a turning point in social science, in which 'fully fledged literature on nationalism appeared and the debate on nationalism was taken to a whole new level'. In 1999 Anthony Smith noted the 'remarkable resurgence' of nationalism and in particular the ethnic nationalism and more importantly on the European continent, which has flourished more widely and powerfully than at any period since the Second World War':

> *The last ten years have witnessed a phenomenal growth in the practice and study of nationalism. Since the unravelling of the Soviet Union, some twenty new states have been created, claiming to represent 'nations' which had been suppressed within empires and federations.*[27]

The foretelling of the decline of nations did not fulfill and now is clearly considered as miguidedobserves that "the term 'national identity' has gained momentum" not only in politics but also in law. [28] There is a 'heightened tendency' in adoption of new fundamental laws to have am emphasis on nations and national identity, including the European Court of Justice has expressly mentioned the duty of the Union to respect the national identities of its Member States. The term 'constitutional identity', which refers to the conceptional framework of national identity, has also been instrumental and has 'found firm ground in the case law of constitutional courts in Europe. The question is also to what extent the current EU can sustain its image of *'so prosperous, so free and so secure'*[29]. This quote from the Global Strategy of 2003 is an example of another myth about the European unification as a source for well-being for its citizens. 'Welfare', according to Judt, 'in its multiple forms, is the great West European achievement of recent years'.[30] The markets of the European Communities and the United State were an example of abundance compared to the countries across the Iron curtain and a flow of novel and compelling opportunities, services, and goods were offered.

The counter argument to the close link between the EU and the welfare state is the regulation of social welfare - an area in which the Member states retain major competence, and the competences of the EU are indirect and relatively minor. There are substantial differences in the way social welfare is regulated and delivered in each Member State. A counterargument to this is that the EU and the EU legislation in particular has had a considerable impact on the laws and practices of the Member States in the area of welfare.[31] Additionally, the European institutions consciously use a language which suggests the existence of a logical link between the EU and the welfare or an articulated European welfare dimension. Whether we can talk about an EU welfare policy in principle is rather distinct from the fact in the actual imaginary there is the image and the consequences of this image in the citizens' expectation of a 'social Europe'.

While the 'European social model' is a term normally used to refer to the existence of common principles and features characterizing the range of different national welfare systems in Europe, rather than to a collective or single model promoted at European level, the EU has also built on this discourse and has arguably exploited the

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[27] Smith, A. D. (1998a) *Nationalism and Modernism: A Critical Survey of Recent Theories.*

[28] Cloots, E. (2015). National Identity in EU law. Oxford University Press.

[29] European Security Strategy. A Secure Europe in a Better World. 2003, Brussels 12 December 2003. https://www.consilium.europa.eu/media/30823/qc7809568enc.pdf

[30] Id 9. Pg. 97.

[31] De Búrca, G. (ed.) (2005). EU Law and the Welfare State: In Search of Solidarity (Collected Courses of the Academy of European Law, XIV/2) Oxford/New York, Oxford University Press.

ambiguity of the term.[32] The EU has been conceived as a club of the rich by those outside. It has also been a powerful 'cue' used by the representatives of the EU in their public addresses in the course of negotiation processes for joining of the EU.[33] This adds seductive appeal to the prospect of becoming a Member-State, catching up with the advanced regions, economies and markets of Western Europe and escaping from the provincial backwardness. Ultimately, it is the prospects of entering an imaginary European Garden of Eden. This image of welfare was much to the contrast to the other part of Europe behind the Curtain or the periphery to the east and to the south. However, times have changed with Europe entering a series of crises – economic, political, energy, health, which acts contrary to fulfilling expectations and attaining immediate outcomes. Additionally, affluence has its challenges too and their impact on feeling of well-being is not clearly predictable. No one of these challenges can be considered disasters on the scale of the challenges of postwar Europe and its reconstruction or even of the scale of the fall of the Soviet Union. But their combination is felt clearly and questions about the future of the Union and its purposes are raised.

What we know from the history of the European integration is a process of steady expansion of powers of the EU, a gradual and incremental extension of policy capacity covering areas conceived as a 'core of national sovereignty'. The very process of creation of the internal market and the imposed EU economic rules challenge the boundaries of welfare and protection, and leads to the creation of the image of an architecture of social rights at EU level, a solidarity space or social citizenship dimension of the European unification. This becomes particular acute in times of crises, which have been abundant in the past years and the end of the series is not yet within sight. In re-imagining of the European institutions, it had better avoid both the pessimism towards European integration and understating its achievements and the EUphoria as an intense feeling of well-being and happiness. Acknowledging the reality of the European Union as a 'political continental entity of a new order', it also means we accept as valid the fact that peoples and nations of Europe become in some sense more European. This is well observed in the extensive literature on European identity and the typologies proposed in it. All of the theories on European identity outline various areas of transformation and indicate components of sharing that cannot be limited to either political or economic aspects, even less to interests. Clearly the topic of European identity become a widely applied reference in policy and at everyday level. It is a key term in 'the vernacular idiom of contemporary politics'.[34] The notion has transcended political discourses and is an issue discussed, contested or proclaimed in everyday life. To a certain extent this is enabled by the 'super meaning' which the term incorporates in its scope, the many ways in which we can define Europe and European and the reality of the European Union purporting to embody the sense of European. We cannot easily denounce the term as analytically void despite of its vagueness, ambiguity, and variability of use in different contexts. It is because in its many faces the term succeeds in sewing up together different discourses of our contemporary circumstance and condense visions for the future. Thus, there is a context and environment of re-creation of visions for the future, of understanding the 'spirit' of Europe which allows for negotiation of identities. This process has its internal and external parameters, which require prioritization of some dimensions of unifications, salience of others and reconsideration of still other. Europe can be defined by what it *is* but also to a large extent by what it is *not*. European identity as different from the identification with the EU bear the character of a projection of future identity. Exploring European identity can show the limitations and the boundaries of the actual imaginary or of what are the limits of the transformation and transition to be brought about.

There is a specific character of the emerging European identity, which is wider than the identification with the EU. European institutions often misconceive the Europeanisation and the emerging European identity (registered in Eurobarometer polls and the orientation of parties in the national political party spectrum) as identification with the EU and its institutions. There is aa process, observable of re-configuration of identities, of acceptance of the unification as a significant component of the way we perceive and understand the world around us. A process of redefinition of the identification with the territory and the people inhabiting it is clearly taking place. For reasons both external and internal, Europeanization is experienced as a significant transformation. Internally, it is linked to the exercise of competences and political power by the European Union – organizational,

[32] Id.

[33] I can share personal experiences of EU officials comparing salaries and suggesting a significant rise of income as a result of joining the EU in the 1990s.

[34] Brubaker, R. and Cooper, F. (2000). Beyond „Identity", Theory and Society, Vol. 29 (1): 1-47.

administrative, agenda setting, value prioritization. From limited economic goals set with the European Coal and Steel Community, the EU now has the 'effects of fundamentally reorganizing territoriality and peoplehood'. Externally, this re-orientation is spurred by global process of deterritorialization as a result of freedom of movement or making it easier and desirable, the reality of transnationalisation as economic globalisation and *economic, political, and cultural processes that extend beyond the boundaries of nation-states or generally in a context of increasing globalisation of work, economy and politics.*

We know from history of political philosophy that retaining power could be a more difficult task than gaining it, not to speak about effective governance and ensuring prosperity. It is true that welfare state is a remarkable achievement of Western European unification but times are changing with a series of crises encompassing the continent. Growth (enlargement) is not the ready solution for overcoming them. Welfare has its challenges as well, which could impact policies as the costs of maintaining the welfare state in its maximal form cannot be carried indefinitely.[35] *The population of Europe is aging which impacts state budgets faced with clear expectations for continuation of social services. And there is the immigrant question and their successful integration in view of their expectation for social support and care. In a rather pessimistic tone Krastev describes the changing times as deeply affecting our imaginaries:*

> *As it was a century ago, European today are living at a moment when paralyzing uncertainty captures a society's imagination. It is a moment when political leaders and ordinary citizens alike are torn between hectic activity and fatalistic passivity, a moment when what was until now unthinkable – the disintegration of the union – begins to be perceived as inevitable.*[36]

There is this general perception that it is a moment in which a new imaginary is finding its place in our worldview, a new imaginary which shakes 'the narratives and assumption that only yesterday guided our actions.'[37] *The European Union is promoted and conceived as a community based on values among which the rule of law is high on the significations value list. It was the main driving force for the first steps of European unification in the proposal to make it a common denominator for all participants in the initial six-nation community 'that would share and regulate production and consumption of coal and steel under an autonomous international authority.*[38] *United Europe and the rule of law were viewed and adopted as a way to counter the horrific consequences of nationalism. Since the memory and the threat of its revival of a line of action triggered by the unfettered nationalism was vivid, the national identity rhetoric was hardly used and even conceived as an effective political instrument. Times have changed, national loyalties have not withered away. The European institutions beside its focus on rule of law as a core value for the whole European unification construction are also subjected to pay heed to the Member States' national identities as an expression of the 'compelling interest' of the individual members of a national community 'in the respectful treatment of their nation'.*[39]

How interests in European integration and respect for national identity can be reconciled is a question about a new 'imaginative leap'. The first step in European unification is an example of an ingenuous trade-off between the interests and ambitions of individual states and the collective interest of making a new war inconceivable on the European continent. From a political point of view the rule-based style of decision making is central to functioning of the EU. But this principle can be manifested and implemented in many forms and guises. Clearly, the decisions taken at EU level are evaluated and accepted as legitimate with reference to an actual imaginary or order of significations, which have very much at the top of the list respect for national identity.

There are a number of signals in today's political discourse and practice that European integration is reaching wider and deeper than ever. This is confirmed by collective actions to deal with the pandemic, the energy crisis, the political discourse of deepening integration in the area of capacity for collective defence, border control, migration and in the coordination of common sanctions and expression of political decision towards the war that

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[35] Id 9. Pg. 101.

[36] Krastev, I. (2020). After Europe. University of Pennsylvania Press.

[37] Id.

[38] Id 9. Pg. 13.

[39] Id 36. Pg. 356.

Russia fights against Ukraine. However, there is a new mode of perceiving of all done at European level. Despite the preset fascination with national identity and sovereignty, it is imagined that the European institutions have to and potentially have the capacity to react timely and fast in the face of any potential crisis that might strike. The issue of legitimacy is emphasized but it is also related to this capacity for proposing pragmatic and effective solutions, which is a capacity to deliver common solutions. The 'ever closer union' as a finalité of the process of European integration seems less related to the centrality of the European institutions, the procedures they follow, but also to their capacity to unite territorially a Union, which has superseded the idea that they are central to the space within which it acts. With Brexit, globalization and the polycrisis we are in, it is the moment for the EU to reconnect with its roots – rule-based order, pragmatism and effective solutions to challenges and working towards deeper understanding that:

> *'As a Union of medium-to-small sized countries, we have a shared European interest in facing the world together' and in dealing with crises.*[40]

The rise of economic inequality, the respect for national identity, the changed social environment in which new ordering of significations in the actual imaginaries that create the framework of our understanding of the world and society we live in, can be critical factors in impacting the legitimacy of institutions. European institutions need to show that they are well conscious of the need for revivification under the continuous challenge for democratic accountability. The imperative of 'or else' was a major reference point in the beginning of the European unification. The question can be asked whether this imperative has been replaced by a belief that we are doing well if we follow the procedures. I do not proclaim the 'method of universal doubt' here. But there is the need of some doubt and pessimism to the enthusiastic optimism in re-imagining of the future of the European unification and the role of the institutions ensuring the best for all Member States and citizens. It might prompt elected politicians, and all committed to work for the European institutions to warn decision makers at European level using the Cromwell's rule in probability theory or the words of the historical figure Oliver Cromwell himself: "Think it possible you may be mistaken".[41]

[40] Shared Vision, Common Action: A Stronger Europe. Global Strategy for the European Union's Foreign and Security Policy, 2016. https://www.eeas.europa.eu/sites/default/files/eugs_review_web_0.pdf

[41] http://www.olivercromwell.org/Letters_and_speeches/letters/Letter_129.pdf

CHAPTER XIV: INTERNATIONAL LAW IN INDIAN COURTS

Gopal Subramanium[42]

Litigators tend to view international law as a collection of esoteric concepts that are of little use in legal practice. "Real" lawyers must know evidence, interpretation and procedure. They must have a command over the Constitution, over company and criminal law, contracts and torts. International law is for the academic, best left to bookshelves and armchair discussions. This is far from the truth. As Lord Bingham perceptively remarked:

> *"Times have changed. To an extent almost unimaginable even thirty years ago, national courts in this and other countries are called upon to consider and resolve issues turning on the correct understanding and application of international law, not on an occasional basis, now and then, but routinely, and often in cases of great importance."*[43]

In practice, lawyers and municipal courts regularly engage with international law in some form. To state only a few examples:

- Courts frequently turn to multilateral treaties whenever they are called upon to protect individual liberties. The same is true in matters involving rights to intellectual property.
- Courts are called upon to interpret and enforce the terms of bilateral investment treaties between nations while enforcing awards made in investor-state arbitrations
- Principles of Public International Law such as territoriality and sovereignty interact with Private International Law when domestic courts issue worldwide asset freezing orders, thereby controlling the actions of defendants in foreign countries. Such issues also arise in cases of defamation or copyright infringement on the internet, where courts are required, for example, to determine whether they can order a foreign company to take down web pages in a foreign jurisdiction.
- Interaction with international instruments of what is sometimes termed 'soft law' is also common. Courts are, for instance, called upon to construe the International Bar Association's Guidelines on Conflict of Interest in International Arbitration while hearing challenges to arbitrators.

Clearly, the scope of interaction between domestic and international law is vast. This is only natural considering the increasingly connected world we live in. Globalisation demands constant engagement between States and their legal systems.

The role of municipal courts in international law is sometimes overlooked. Increasingly, municipal courts are showing less deference to executive decisions on matters of foreign policy and scholars have noted that they even rely on international law to challenge executive action.[44] Decisions of municipal courts are also evidence of State practice and thus relevant to determining the content of customary international law.[45] Where such decisions are based on widely accepted principles, they may be seen as sources of general principles of international law.

In dealing with public international law, with which this chapter is concerned, Indian courts have performed a law-enforcing and a law-making function. They have ensured that India remains true to its obligations under

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[42] Senior Advocate, Supreme Court of India. This chapter is based on The Soli Sorabjee Memorial Lecture delivered at the Jindal Global Law School (13 August 2021)

[43] Lord Bingham, 'Foreword' in S Fatima, *Using International Law in Domestic Courts* (Hart Publishing, Oxford, 2005) (as cited in Anthea Roberts, 'Comparative International Law? The Role of National Courts in Creating and Enforcing International Law' [2011] 60 International & Comparative Law Quarterly 57.

[44] EE Benvenisti, 'Judicial Misgivings Regarding the Application of International Law: an Analysis of the Attitudes of National Courts' [1993] 4 European Journal of International Law 159

[45] Ingrid Wuerth, 'International Law in Domestic Courts and the *Jurisdictional Immunity of the State* Case' [2012] 13 Melbourne Journal of International Law 1, 3

public international law and, in certain instances, have forced compliance. It is imperative that municipal courts do this to enable States to respect their international law obligations. Indian courts have also laid down principles of covering several areas of public international law, particularly in the context of sovereignty and State-formation.

This chapter will discuss the treatment by Indian courts of public international law, which, for simplicity, I will refer to as international law. The chapter begins a description of some early decisions of the Supreme Court of India on international law and the principles laid down in them. It will then analyse the relationship between international and municipal law and, in particular, India's acceptance of the dualist theory and its shift from the doctrine of transformation to the doctrine of incorporation. Finally, the chapter will briefly consider the future of international law in municipal courts.

Early Interactions with International Law

The first interactions of India's courts with international law occurred in the context of the Princely States, a set of several hundred independent nations whose merger with a British colony formed the Union of India. The creation of the Indian Republic was an outcome of actions taken through instruments of international law.

A brief background is necessary. Formally, India became a colony after the UK Parliament passed the Government of India Act in August 1858, bringing India under Britain's direct control. Territories formerly in possession or under control of the East India Company were vested in the Crown, in whose name India was to be governed. These territories did not include much of what comprises India today. India was made up of two distinct political units – British India and the Indian or Princely States. British India included the territory directly governed by the Crown through the Governor-General of India.[46] The Princely States, however, were territories under the suzerainty of the Crown though governed by Indian Rulers. In international law, suzerainty described a relationship where a country controlled the foreign relations of another country but allowed it autonomy over its domestic affairs. While the Princely States retained such autonomy, they remained subordinate to the 'paramount' power, the Crown. This arrangement with the Princely States was established through treaties they executed over decades, first between themselves and the East India Company, and later with the Crown.[47]
Come the 20th century, only about 52% of Indian territory was under Britain's direct control. The remainder lay with over 560 Princely States.[48] As the likelihood of independence for India increased, the Princely States presented a problem. Before suzerainty was established, each of these States was a sovereign nation in international law. Britain's departure from the sub-continent necessarily entailed a restoration of status quo ante. If India was to be formed as a single independent nation, the sovereignty of the Princely States would have to be returned to them and, subsequently, each of them would have to agree to come together to form a single nation, the Union of India.

British India was declared independent on 15 August 1947. And, in an event known as the 'Lapse of Paramountcy', sovereignty returned to the Princely States on the same day. Most States signed Instruments of Accession, ceding law-making powers on certain issues to India. These issues included defence and external affairs. However, the States retained their sovereignty. Several events followed. Some States entered covenants, merging with each other to form new nations. Others gave up their sovereignty entirely and merged with India.

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[46] Interpretation Act 1889, s 18(4).

[47] A notable example involves the State of Jammu and Kashmir. The territory of Kashmir was part of Maharaja Ranjeet Singh's Sikh Empire. Following Ranjeet Singh's death in 1839, British forces defeated the Sikh Army in the First Anglo-Sikh War in 1846. On 9 March 1846, the British Government and Ranjeet Singh's seven-year-old son, Maharaja Duleep Singh, executed the Treaty of Lahore. Through this treaty Duleep Singh ceded Kashmir to the East India Company. Later, on 16 March 1846, the British Government executed the Treaty of Amritsar with Maharaja Gulab Singh of Jammu. This treaty created the Princely State of Jammu and Kashmir and, through article 10 of the Treaty, Gulab Singh acknowledged the supremacy (suzerainty) of the British Government over his territories. Then, on 1 November 1858, Queen Victoria issued a Proclamation to the Princes of India stating: 'We hereby announce to the Native Princes of India that all Treaties and Engagements made with them by or under the authority of the Honourable East India Company as by Us accepted, and will be scrupulously maintained.': See Proclamation by the Queen in Council to the Princes, Chiefs and people of India (published by the Governor-General at Allahabad 1 November 1958) (British Library, IOR/L/PS/18/D154). Suzerainty as established by the Treaty of Amritsar thus continued until India's independence in 1947.

[48] Report of the Joint Select Committee on Indian Constitutional Reform, vol 1 (Part I) (1934) 1-2.

By 26 January 1950, when independent India's Constitution came into force, most Princely States had transferred their sovereignty in India's favour.[49]

The first interactions of India's newly formed Supreme Court with international law concerned the legal effect of changes in sovereignty that had occurred in the preceding years. Principles laid down in many of these cases are based on widely accepted opinions. They can be regarded as 'general principles of law recognised by civilised nations' and, as such, may be applied as international law.[50]

Treaties Executed By A State Terminate Upon Its Absorption Into Another State

Dr. Babu Ram Saksena v State[51] was a case that involved an extradition treaty the Princely State of Tonk had with the British Government. In April 1948, several Princely States including Tonk signed a Covenant and integrated into one State, a new sovereign nation called the United State of Rajasthan. The question before the Supreme Court was whether Tonk's extradition treaty survived this integration. Speaking for the Court, Justice BK Mukherjea said:

> *"27. The question now is how far the Extradition Treaty between the Tonk State and the British Government was affected by reason of the merger of the State into the United State of Rajasthan. When a State relinquishes its life as such through incorporation into or absorption by another State either voluntarily or as a result of conquest or annexation, the general opinion of international jurists is that the treaties of the former are automatically terminated. The result is said to be produced by reason of complete loss of personality consequent on extinction of [the State's] life. The cases discussed in this connection are generally cases where independent States have ceased to be such through constrained or voluntary absorption by another with attendant extinction of the former's treaties with other States. Thus the forceable incorporation of Hanover into the Prussian Kingdom destroyed the previous treaties of Hanover. The admission of Texas into the United States of America by joint resolution extinguished the Treaties of the Independent Republic of Texas. The position is the same when Korea merged into Japan. According to Oppenheim, whose opinion has been relied upon by Sir Alladi, no succession of rights and duties ordinarily takes place in such cases, and as political and personal treaties presuppose the existence of a contracting State, they are altogether extinguished. It is a debatable point whether succession takes place in cases of treaties relating to commerce or extradition but here again the majority of writers are of opinion that they do not survive merger or annexation."*[52]

As far as the Tonk State was concerned, the Court noted that, strictly speaking, it had not extinguished its personality entirely. Instead, several States had 'voluntarily united together and integrated their territories so as to form a larger composite State of which every one of the covenanting parties was a component part'.[53] However, all subjects of the Tonk State had become subjects of the United State of Rajasthan. This was significant as the treaty dealt with the extradition of 'Tonk subjects', a category that did not exist following integration. Further, the Ruler of the Tonk State could not 'independently and in his own right exercise any form of sovereignty or control over the Tonk territory.'[54] The integration made it impossible for the Tonk State to act in accordance with the extradition treaty for it had lost its sovereign rights over its territory and '[w]hen as a result of amalgamation or merger, a State loses its full and independent power of action of the subject-matter of a treaty previously concluded, the treaty must necessarily lapse'.[55] The extradition treaty was thus declared void and inoperative.

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[49] The total number of international legal instruments that were made to facilitate the formation of the Indian Republic is unknown, though even conservative estimates would place the figure at around one thousand. These instruments were viewed by Indian courts as Acts of State and any violation of their terms could not 'form the subject of any action in any municipal court': *Nawab Usman Ali Khan v Sagarmal* AIR [1965] SC 1798 [12]; *Draupadi Devi v Union of India* [2004] 11 SCC 425 [44]. In fact, Article 363 of the Constitution expressly bars courts from deciding disputes under most of these instruments.

[50] Statute of the International Court of Justice, art 38(1)(c). See also M Cherif Bassiouni, 'A Functional Approach to "General Principles of International Law"' [1990] 11(3) Michigan Journal of International Law 768.

[51] AIR [1960] SC 155.

[52] ibid 27.

[53] ibid 28.

[54] Ibid.

[55] Ibid.

The judgement in *Dr. Ram Babu Saksena* is important for two reasons. Firstly, it concludes that the treaties of a State automatically terminate when it relinquishes its life through incorporation into or absorption by another State. Secondly, it demonstrates that where a treaty becomes inoperable, Indian courts have the power to declare it void.

Contracts Of Service Terminate Upon A Change Of Sovereignty

Another early decision was made in *Rajvi Amar Singh v State of Rajasthan*[56]. The case dealt with the status of contracts of service (such as those involving judicial appointments) executed by a State after that State's absorption into another State. The Supreme Court found that when a State was absorbed into another, by voluntary means or through the use of force, 'all contracts of service between the prior Government and its servants automatically terminate and thereafter those who elect to serve in the new State, and are taken on by it, serve on such terms and conditions as the new State may choose to impose'.[57]

Upon A Change Of Sovereignty, Only Rights Recognised By The New Sovereign May Be Enforced Against It In Municipal Courts

In *Virendra Singh v State of Uttar Pradesh,*[58] the Rulers of the Princely States of Sarila and Charkhari had, in exercise of their power as absolute sovereigns, granted certain villages to the Petitioners before the Supreme Court. Thereafter, a set of thirty-five States, including Sarila and Charkhari, chose to unite themselves into a new nation, the United State of Vindhya Pradesh. A year later, the covenant by which this new nation was established was abrogated and the United State of Vindhya Pradesh merged with the Dominion of India. After the Constitution of India had come into force, the grants made to the Petitioners were revoked. This gave rise to an important issue, one which has confronted the Supreme Court on several occasions since – upon a change of sovereignty, what is the status of rights granted by the old sovereign?

The Court in *Virendra Singh* recognised that there were two competing views on the subject. The first was the view of the Privy Council, which states that upon a change of sovereignty, only those rights that the new sovereign has recognised may be exercised against it in courts it has established. This view was articulated most notably by Lord Dunedin in *Vajesingji Joravarsingji v Sec. of State for India in Council*[59]:

> *"…But a summary of the matter is this: when a territory is acquired by a sovereign state for the first time that is an act of state. It matters not how the acquisition has been brought about. It may be by conquest, it may be by cession following on treaty, it may be by occupation of territory hitherto unoccupied by a recognized ruler. In all cases the result is the same. Any inhabitant of the territory can make good in the municipal Courts established by the new sovereign only such rights as that sovereign has, through his officers, recognized. Such rights as he had under the rule of predecessors avail him of nothing. Nay more, even if in a treaty of cession it is stipulated that certain inhabitants should enjoy certain rights, that does not give a title to those inhabitants to enforce these stipulations in the municipal Courts. The right to enforce remains only with the high contracting parties…"*

The second view was that private rights did not cease on a change of sovereignty. As Chief Justice John Marshall of the United States Supreme Court said in *United States v Percheman*:

> *"It may not be unworthy of remark that it is very unusual, even in cases of conquest, for the conqueror to do more than to displace the sovereign and assume dominion over the country. The modern usage of nations, which has become law, would be violated; that sense of justice and of right which is acknowledged and felt by the whole civilised world would be outraged, if private property should be*

[56] AIR [1958] SC 228.
[57] ibid 16.
[58] AIR [1954] SC 447; [1955] 1 SCR 415.
[59] 51 Indian Appeals 357, 360.

> *generally confiscated, and private rights annulled. The people change their allegiance; their relation to their ancient sovereign is dissolved; but their relations to each other, and their rights of property, remain undisturbed. If this be the modern rule even in cases of conquest, who can doubt its application to the case of an amicable cession of territory? … A cession of territory is never understood to be a cession of the property belonging to its inhabitants. The king cedes that only which belonged to him. Lands he had previously granted were not his to cede. Neither party could so understand the cession. Neither party could consider itself as attempting a wrong to individuals, condemned by the practice of the whole civilised world. The cession of a territory by its name from one sovereign to another, conveying the compound idea of surrendering at the same time the lands and the people who inhabit them, would be necessarily understood to pass the sovereignty only, and not to interfere with private property."*[60]

While the Supreme Court in *Virendra Singh* accepted that the two views above existed, it did not expressly support either, concluding that neither was applicable to the facts before it. However, in subsequent decisions, it is the view of the Privy Council that has prevailed. Thus, as a matter of Indian law, rights granted by a sovereign will not, upon a change of sovereignty, be exercisable against the new sovereign in its courts unless the new sovereign recognises them.[61]

Application of the Geneva Conventions Following An Annexation of Foreign Territory

Reverend Monterio v State of Goa[62] was an important decision on the law of occupation and annexation. The Princely States were territories that had a legal relationship with Britain. India also had territories that belonged to other European nations, such as France[63] and Portugal. The region of Goa, for instance, had been a Portuguese colony for 450 years when, in December 1961, India annexed it through a short military action. Reverend Father Monterio was a Portuguese citizen who lived in Goa. Following the annexation, he was given the option of becoming an Indian citizen or retaining his Portuguese citizenship. He chose the latter. He received a temporary permit to remain in India. However, he continued to stay in India after this permit expired. Orders were then made demanding that he leave India, orders which he disobeyed. He was prosecuted and sentenced to 30 days' imprisonment.

Before the Supreme Court, the Reverend claimed that he was protected by the Geneva Conventions of 1949[64], which had been given effect to by the Geneva Conventions Act 1960 (IN). These Conventions barred the deportation of certain persons during a period of occupation. The Reverend argued that the order requiring him to leave India was an order of deportation and, consequently, violated the Conventions.

The Court noted that the Conventions only applied in an occupied territory during a military occupation. Military occupation was a 'temporary de facto situation' that did not deprive the occupied power of its sovereignty or statehood.[65] Conversely, annexation occurred when sovereignty was transferred to the occupying power, which acquired and made the territory its own. In the Court's words, '[a]nnexation gives a de jure right to administer the territory'.[66]

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[60] [1832] 32 U.S. 51

[61] *Dalmia Dadri Cement Co. Ltd. v Commissioner of Income Tax* 1959 SCR 729; *State of Gujarat v Vora Fiddali Badruddin Mithibarwala* [1964] 6 SCR 461; *Draupadi Devi v Union of India* [2004] 11 SCC 425

[62] *Reverend Mons Sebastio Fransisco Xavier Dos Remedios Monterio v The State of Goa* [1969] 3 SCC 419

[63] Control over most French territories was vested in India by the 'Agreement Between the Government of India and the Government of France Providing for De Facto Transfer of Administration of the Territory of French Establishments in India' (21 October 1954). Then, by the 'Treaty Between the Republic of France and India Establishing Cession by the French Republic to the Indian Union of the French Establishments in India' (28 May 1956) France ceded to India 'in full sovereignty' the territories of Pondicherry, Karikal, Mahe and Yanam.

[64] Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (12 August 1949), Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (12 August 1949), Geneva Convention Relative to the Treatment of Prisoners of War (12 August 1949), Geneva Convention Relative to the Protection of Civilian Persons in the Time of War (12 August 1949).

[65] ibid 21.

[66] ibid 23.

The Court held that at the time the order requiring the Reverend to leave India was made, Goa was not under occupation. It had been fully annexed, conquered and subjugated. Sovereignty had thus been transferred from Portugal to India. As occupation ceased once annexation was complete, the Geneva Conventions did not protect the Reverend. The national status of subjects of a subjugated State was a matter for that subjugating State which could, if it liked, grant and refuse rights as those which its citizens enjoyed.[67] The Court concluded:

> *The Geneva Conventions ceased to apply after December 20, 1961. The Indian Government offered Rev. Father Monterio Indian nationality and citizenship which he refused and retained his Portuguese nationality. As a Portuguese national he could only stay in India on taking out a permit. He was, therefore, rightly prosecuted under the law applicable to him. Since no complaint is made about the trial as such, the appeal must fail. It will be dismissed."*[68]

The Relationship Between International and Municipal Law

We've seen that municipal courts can deal with international law. This can often lead to a clash between international and municipal law. Which prevails in such circumstances, or more particularly, how do municipal courts treat international law? Two leading theories offer answers.

The Dualist and Monist Theories

The first of these is the dualist theory, sometimes referred to as Pluralism. It suggests that international and municipal law are different systems of law that regulate different subject matter. International law governs the relations between States. Municipal law applies domestically, governing the relations of citizens with each other and with the State. Neither law has any power to alter the other. Where the two are in conflict, municipal law prevails. If international law is to apply domestically, it can only do so through domestic law. For example, before the United Kingdom left the European Union, the EU treaties and law prevailed over UK law. This was not because international law automatically applied domestically, it was because a municipal law – the European Communities Act of 1972 – permitted it to do so. Section 2(1) of this Act provided:

> *All such rights, powers, liabilities, obligations and restrictions from time to time created or arising by or under the [EU] Treaties, and all such remedies and procedures from time to time provided for by or under the [EU] Treaties, as in accordance with the [EU] Treaties are without further enactment to be given legal effect or used in the United Kingdom shall be recognised and available in law, and be enforced, allowed and followed accordingly…*

Recognising the constitutional position created by the European Communities Act 1972, the Supreme Court of the United Kingdom noted:

> *60. Many statutes give effect to treaties by prescribing the content of domestic law in the areas covered by them. The 1972 Act does this, but it does considerably more as well. It authorises a dynamic process by which, without further primary legislation (and, in some cases, even without any domestic legislation), EU law not only becomes a source of UK law, but actually takes precedence over all domestic sources of UK law, including statutes…*
>
> *61. In one sense, of course, it can be said that the 1972 Act is the source of EU law, in that, without that Act, EU law would have no domestic status. But in a more fundamental sense and, we consider, a more realistic sense, where EU law applies in the United Kingdom, it is the EU institutions which are the relevant source of that law. The legislative institutions of the EU can create or abrogate rules of law which will then apply domestically, without the specific sanction of any UK institution…*[69]

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[67] Ibid 29.
[68] Ibid.
[69] *R (on the application of Miller and Anr) v Secretary of State for Exiting the European Union* [2017] UKSC 5.

A piece of domestic legislation thus enabled international legal instruments to apply domestically and prevail over national laws. For the same reason, it has been said that '[t]here can be no such thing…as a self-executing treaty; enabling legislation would be required in every case in order to make the provisions of an international agreement operative upon persons and corporations within the state'.[70]

The second approach is called Monism, expounded by great jurists including Hans Kelsen and Hersch Lauterpacht. Monistic theorists argue that there is 'no absolute borderline between national law and international law'[71] and no essential difference between the subjects of the two. Both served to regulate human conduct. For Kelsen, 'international law was law in its own right'[72], and international and domestic law did not operate in distinct spheres; they were really part of the same system of norms. In his words:

> *The unity of national and international law is an epistemological postulate. A jurist who accepts both as sets of valid norms must try to comprehend them as parts of one harmonious system.*[73]

Lauterpacht argued in favour of the supremacy of international law in all spheres, including domestic. He distrusted the State as a protector of human rights and believed international law to be the best moderator of human affairs. He eloquently wrote:

> *An international legal system which aims at effectively safeguarding human freedom in all its aspects is no longer an abstraction. It is as real as man's interest as a rational and moral being. International law, which has excelled in punctilious insistence on the respect owed by one sovereign State to another, henceforth acknowledges the sovereignty of man. For fundamental human rights are rights superior to the law of the sovereign State. The hope, expressed by Emerson, that 'man shall treat with mas as a sovereign state' may be brought nearer to fruition by sovereign States recognising the duty to treat man with the respect which traditional law exacted from them in relation to other States. To that vital extent the recognition of inalienable human rights and the recognition of the individual as a subject of international law are synonymous. To that vital extent they both signify the recognition of a higher, fundamental law not only on the part of States but also, through international law, on the part of the organised international community itself. That fundamental law, as expressed in the acknowledgment of the ultimate reality and the independent status of the individual, constitutes both the moral limit and the justification of the international legal order. Through them, it implies the promise that the organised international society will not, in turn, degenerate into a tyrannical accumulation of power.*[74]

Dualism in India

India has always leaned towards the dualist approach. A notable illustration can be found in the Supreme Court's judgement in *Jolly George Varghese v Bank of Cochin*[75]. The appellant was ordered to be arrested and detained in civil prison for his failure to pay certain dues to the respondent bank. He argued that provisions of Code of Civil Procedure that permitted detention in civil prison were in conflict with India's obligations under the International Covenant on Civil and Political Rights. Article 11 of the ICCPR provided that 'No one shall be imprisoned merely on the ground of inability to fulfil a contractual obligation'. Faced with this apparent conflict with Indian law, the appellant argued that the ICCPR should prevail.
Speaking for the Court, Justice Krishna Iyer rejected the argument, noting that:

> *6. …until the municipal law is changed to accommodate the Covenant, what binds the Court is the former, not the latter. A.H. Robertson in Human Rights in National and International Law rightly points out that*

[70] Oscar Svarlein, *Introduction to the Law of Nations* (New York McGraw-Hill 1955) 63.
[71] Hans Kelsen, *General Theory of Law and State* (Anders Wedberg (tr), Harvard University Press 1949) 235.
[72] Charles Leben, 'Hans Kelsen and the Advancement of International Law' [1998] 9 European Law Journal 287, 288.
[73] Hans Kelsen (n 30) 373.
[74] Hersch Lauterpacht, *International Law and Human Rights* (Stevens and Sons Ltd 1950) 70-71.
[75] [1980] 2 SCC 360.

> *international conventional law must go through the process of transformation into the municipal law before the international treaty can become an internal law.*

Justice Krishna Iyer also referred to an earlier decision of the Kerala High Court which dealt with the same issue, that is, the conflict between provisions of the ICCPR and the Code of Civil Procedure. This was the case of *Xavier v Canara Bank*[76] where the High Court had held:

> *The remedy for breaches of International Law in general is not to be found in the law courts of the State because International Law per se or proprio vigore has not the force or authority of civil law till, under its inspirational impact, actual legislation is undertaken…*

Doctrines of Transformation and Incorporation

Following what is called the doctrine of transformation, these decisions seem to place India squarely in the domain of the dualist theory. International law needs to go through a process of transformation before it can be enforced by municipal courts. Once so transformed, it is not international law at all; it is, in fact, domestic law and can be construed and applied as such. The 'transformation' Justice Krishna Iyer spoke of can be undertaken under Article 253 of the Constitution, which enables Parliament to make laws to implement 'any treaty, agreement or convention with any other country or countries or any decision made at any international association or other body.' Parliament also has exclusive authority under the Seventh Schedule to the Constitution to legislate on matters concerning the United Nations Organisation[77], the implementation of decisions made at international conferences[78], and to enter and implement treaties and agreements with foreign countries[79]. However, as the Executive's power is co-extensive with that of Parliament[80], decisions on such matters can also be made by the Union Executive provided they do not restrict or infringe citizens' rights or modify any existing legislation.[81]

It is important for us to bear in mind that the Doctrine of Transformation did not prevent courts from referring to India's obligations under international law. Courts could and frequently did rely on international law as an aid to the construction of domestic law. This is because of Article 51 of the Constitution, a Directive Principle that requires the State to 'foster respect for international law and treaty obligations in the dealing of organised peoples with one another'.[82] As Chief Justice Sikri said in *Kesavananda Bharti*:

> *151. …[I]t seems to me that, in view of Article 51 of the directive principles, this Court must interpret language of the Constitution, if not intractable, which is after all a municipal law, in light of the United Nations Charter and solemn declaration subscribed to by India.*[83]

Perhaps the most famous instance of the Supreme Court using international law to interpret domestic law is the case of *Vishaka v State of Rajasthan.*[84] The Supreme Court laid down guidelines to prevent sexual harassment and abuse at workplaces. In the absence of any domestic law in the field, the contents of international conventions were, in the Court's words, 'significant for the purpose of interpretation of the guarantee of gender equality, right to work with human dignity in Articles 14, 15, 19(1)(g) and 21 of the Constitution'.[85]

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[76] [1969] KLT 927.
[77] Constitution of India 1950, Schedule VII, List 1 Entry 12.
[78] ibid. List I Entry 13: 'Participation in international conferences, associations and other bodies and implementing of decisions made thereat'.
[79] ibid. List I, Entry 14: 'Entering into treaties and agreements with foreign countries and implementing of treaties, agreements and conventions with foreign countries'.
[80] Constitution of India 1950, art 73(1)(a). See also CH Alexander, 'International Law in India' [1952] 1(3) International and Comparative Law Quarterly 289, 295.
[81] *Maganbhai Ishwarbhai Patel v Union of India* [1970] 3 SCC 400 (Shah J).
[82] Constitution of India 1950, art 51(c).
[83] *Kesavananda Bharti v State of Kerala* [1973] 4 SCC 225.
[84] [1997] 6 SCC 241.
[85] ibid 7.

Clearly, even with the decision in *Vishaka*, international law did not apply *proprio vigore*. It had to be read into domestic law, thus forming part of it. As such, it was really domestic law that the Court was applying and enforcing.

Indian jurisprudence on the subject is, however, not without conflict. As a substitute to the Doctrine of Transformation, international law offers us the Doctrine of Incorporation. Under this doctrine, international law is to be considered part of domestic law and enforced as such. International law is deemed to have been incorporated into domestic law so long as it is not inconsistent with any domestic law. Conformity with the Dualist Theory remains insofar as the supremacy of domestic law is untouched. In India's case, this would also mean that the Constitution would always reign supreme for neither domestic nor international law can stand in its way.

Support for the Doctrine of Incorporation is found most famously in *Gramophone Company of India v Birendra Bahadur Pandey.*[86] The Supreme Court found that the comity of nations required 'that rules of international law may be accommodated in the municipal law even without express legislative sanction provided they do not run into conflict with Acts of Parliament'.[87] Where conflict arose, municipal law would prevail.

While decisions in support of the Doctrine of Transformation have not been overruled, the Supreme Court seems to have moved in the direction of the Doctrine of Incorporation. Most recently, the doctrine finds acceptance in the decisions in *NALSA*[88], where the Supreme Court upheld the rights of transgenders, and in the *Puttaswamy*[89], where the Court found that there was a right to privacy under India's Constitution. It must be stressed, however, that even while supporting the Doctrine of Incorporation, the Supreme Court does not say that international law is directly effective or enforceable in India. In reality, courts only use international law as an aid to interpret domestic law, at times to fill gaps and at times to find implied meaning. In *NALSA* and *Puttaswamy*, for instance, they used international conventions to interpret fundamental rights in the Constitution. As such, it is really domestic law that the courts continue to apply, just as they did under the Doctrine of Transformation.

Proof of International Law

Acceptance of the Doctrine of Incorporation does, however, have ramifications in legal practice. As Ian Brownlie notes, the Doctrine of Incorporation 'represents a practical rather than theoretical policy in the courts'.[90] Among its greatest practical benefits is in matters of evidence. Since international law is deemed to have been incorporated into domestic law, courts can safely treat it as law and not as fact.

In the UK, India, and several other common law jurisdictions, foreign law (that is, the domestic law of a foreign nation) is not law; it is fact. An English judge is not, for instance, considered competent to apply French law as he would English law. Nor are English lawyers competent to argue French law as though they were French lawyers. Questions regarding what the law of a foreign nation says on an issue are, therefore, questions of fact that must be proved through evidence. This has been the settled legal position for centuries, one that can be traced back to Lord Mansfield's famous judgement in *Mostyn v Fabrigas* in 1774.[91] In India, courts are required under the Evidence Act to take judicial notice of all Acts of the UK Parliament.[92] The laws of all other nations must be proved. In practice, however, Indian courts tend to be more flexible and often take judicial notice of legislation and court rulings from most foreign nations unless their meaning is disputed.

The case is the same before international courts, which treat domestic law as fact. International courts do not take judicial notice of a State's domestic laws. They require evidence of it. Borrowing from the civil law tradition

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[86] [1984] 2 SCC 534.
[87] ibid 5.
[88] *National Legal Services Authority v Union of India* [2014] 5 SCC 438.
[89] *Justice K.S. Puttaswamy (Retd.) v Union of India*, [2017] 10 SCC 1.
[90] Ian Brownlie, *Principles of Public International Law* (7th edn, OUP 2008) 41.
[91] *Mostyn v Fabrigas* 1 Cowp. 161, 174 (K.B. 1774). *See* Arthur Nussbaum, 'The Problem of Proving Foreign Law' [1941] 50 Yale Law Journal 1080.
[92] Indian Evidence Act 1872, s 57.

where the process is not adversarial, judges may also undertake their own research to determine what a nation's domestic law says on an issue.[93]

When it comes to the application of international law in Indian courts, however, the case is different. Courts will take judicial notice of international law though expert evidence can still be sought to settle disputed questions. And in construing international law courts will be, as the Supreme Court rightly noted in *NALSA*[94], guided by Articles 31 and 32 of the Vienna Convention on the Law of Treaties. Courts must interpret treaties in good faith and in light of their object and purpose. They may also rely upon connected instruments, subsequent practice in the application of the treaty, preparatory work of the treaty and the circumstances of its conclusion. Indian courts often also rely upon commentaries by leading authorities in international law.

The Future Of International Law In Municipal Courts

The fate of the international legal order has been uncertain in recent years. The inward-looking thinking that both led to and followed Brexit and the election of Donald Trump gave one sufficient cause to believe that it was under threat. The Covid-19 Pandemic followed, and many were forced to see the necessity of international cooperation. It was the first time in a generation that we realised how the fate of one nation was the fate of all. And, just as the devastation of the Pandemic had started to subside, Ukraine was invaded by the Russian Federation in February 2022. In some form, uncertainty will likely remain. However, as long as a nation's judiciary is impartial and independent, we can be hopeful that international law will endure in municipal courts.

Courts in modern democracies are not easily swayed by changes in foreign policy. Diplomatic relations between two nations might deteriorate, political discourse between them might become unpleasant, but it is likely that their courts will still treat each other with respect. Courts in Pakistan, for instance, despite that country's strained relations with India, happily rely on Indian judgments, always showing laudable deference.[95] Independent judicial branches have preferred to progress on their own terms, unmoved by the politics that surround them. Thus, even if national governments adopt a politics of seclusion, municipal courts can be trusted to ensure the that the majesty of international law in not undermined. Precisely because their authority is not subject to public opinion, judges have the freedom to interact with foreign and international law even if leaders in their nations reject ideas of international cooperation. This gives one reason to look optimistically to the future. As long as international legal arrangements exist among nations, courts will engage with them, unaffected by any uncertainty that might engulf international politics.

For the same reasons, any active attempts made to strengthen international law in the future must recognise the pivotal role municipal courts can play. International law has long been criticised for its lack of 'teeth'- for being incapable of enforcement. When international law obligations exist between nations, there is little national courts can do to enforce them. It is doubtful that a nation will submit itself to the jurisdiction of a foreign court and unlikelier still that it will accept its decisions. Municipal courts can, however, enforce the international law obligations of a State to its citizens, both of whom are bound by municipal court orders. Such mechanisms provide citizens with an easy remedy against the State, one that is otherwise absent in international law. Steps can certainly be taken to enable such mechanisms under municipal law, though international recognition for them is only likely to preserve international law in a post-pandemic, post-Ukraine future.

[93] Ian Brownlie (n 41) 39.
[94] National Legal Services Authority (n 39) 56.
[95] *Pakistan International Freight of Forwarders Association v Province of Sindh* [2017] PTD 1; *Government of Sindh v Dr Nadeem Rizvi* [2020] SCMR 1; *Orient Power v Sui Northern Gas Pipelines* [2021] CLD 1069 (SC).

CHAPTER XV: THE ROLE OF INTERNATIONAL LAW IN THE UNITED KINGDOM

Lord Peter Goldsmith, KC, PC[96]

Abstract

The legal system of the United Kingdom is generally regarded as taking a dualist approach to international law obligations, requiring that international law obligations affecting the state must first be incorporated into domestic law by domestic statute before they can give rise to any rights or obligations for individuals on the domestic plane, or be enforced in the UK's courts. However, a closer examination, particularly in the sphere of internationally recognised human rights, reveals that the UK's approach is a hybrid one, with international law obligations arising under treaties capable of having some effect even before they are fully incorporated into domestic law, and customary international law being of direct application in many cases.

Contrasting Approaches To International Law Obligations: Monism and Dualism

Traditionally, the mechanisms by which States implement their international legal obligations fall into two broad types.

The first, monism, is the theory that public international law and domestic law should be viewed as a unified system of norms.[97] Consequently, monism places the responsibility for securing compliance with international legal obligations not only on the state but also directly on its internal organs, its courts and its administrative bodies.[98]

The second, dualism, by contrast, is arguably more sovereignty-centric,[99] viewing international law as a legal system that operates only on a 'horizontal level' between sovereign states, on a different level to the state's separate and distinct municipal or domestic law.[100] On this approach, international law has no direct effect on a state's domestic law, but can only be applied within a domestic legal system where the sovereign state explicitly consents thereto.[101] Where international law and domestic law conflict, national courts can only apply national law. Inherently, then, dualism excludes individuals and domestic courts from general participation in the formation of international law.[102]

As a very rudimentary rule of thumb, common law jurisdictions (the UK, the US and many Commonwealth nations) typically adopt a dualist approach to the implementation of international legal obligations, whereas civil law jurisdictions (particularly European nations) tend to adopt a monist approach.

Two key consequences flow from a state's choice of dualism over monism. The first is that the citizens of a state will not be bound by an international legal obligation unless the state has explicitly recognized or adopted it. The second consequence—as a corollary—is that a dualist state will need to adopt domestic legislation to incorporate international legal norms. If no such adoption occurs, domestic courts are, ordinarily, unable to give effect to those international legal norms.[103] To an extent, it is arguable that dualist systems sit at odds with developments in international law in the eight decades since World War II, which have seen the explosive proliferation of

[96] The author is grateful for the assistance of Gavin Chesney (International Counsel, Debevoise & Plimpton LLP) and Sara Ewad (Associate, Debevoise & Plimpton LLP) in the preparation of this chapter.

[97] Hans Kelsen, 'Sovereignty', reprinted in S.L. Paulson and B.L. Poulson (eds.), *Normativity and Norms. Critical Perspectives on Kelsenian Themes* (1998) 525, 527.

[98] David Feldman, 'Monism, Dualism and Constitutional Legitimacy' [1999] YBIL 105, 105.

[99] Jonathan Turley, 'Dualistic Values in the Age of International Legisprudence', [1992] 44 Hastings LJ 185, 195.

[100] Jeremy Bentham, *An Introduction to the Principles of Morals and Legislation* (J.H. Burns & H.L.A. Hart (eds) (Athlone Press 1970) (1789) 296-297.

[101] Rosalyn Higgins, *Themes and Theories*, (OUP 2009) 927.

[102] Harold Hongju Koh, *Transnational Public Law Litigation*, [1991] 100 Yale LJ 2347, 2349.

[103] Torben Spaak, 'Kelson on Monism and Dualism', in Marko Novakovic (ed.) *Basic Concepts of Public International Law – Monism and Dualism* (Belgrade 2013) 3.

international legal agreements, both 'hard' law treaties and 'soft' law instruments, that oblige States to confer rights directly upon individuals, alongside mechanisms to enforce such rights.

Why a particular State adopts one legal tradition over another is a question that can usually be answered (at least in part) by examining that State's constitutional arrangements. The focal point of this chapter is the role of international law in the courts of the UK, particularly the courts of England and Wales. To understand that role, consideration is first given to the way that the UK implements its international legal obligations, which has historically been understood as following the dualist tradition. This chapter then explores the treatment of incorporated and unincorporated treaties in English law and contrasts this with the treatment by the English courts of customary international law. In doing so, the chapter concludes that, although rooted in a strict dualist approach, the modern UK system is more of a hybrid, showing elements of monism in its approach to treaties and international law obligations in contrast to some strict remaining dualist positions.

One important point must be noted at the outset. The UK is not a monolithic legal entity but consists of four separate nations that each has its own legal system. Certain matters have been devolved by His Majesty's Government in London to the Scottish Parliament, the National Assembly for Wales, and the Northern Ireland Assembly. Nonetheless, the UK's executive retains sole treaty-making competency for all four nations, and the decisions of the UK Supreme Court on issues both of statutory interpretation and common law are final as regards the treatment of international legal obligations, even in the legal systems of Scotland and Northern Ireland. Consequently, this chapter, in referencing the position in the 'UK', principally focuses on the position under the laws of England and Wales.

Dualism In The UK – The History

A full exploration of the UK's complex and multifaceted constitution is beyond the scope of this chapter. For present purposes, it suffices to provide a summary. Broadly speaking, there are five core constitutional principles:

a. The rule of law: that all persons and entities within the state's jurisdiction (whether public or private) are bound by and entitled to the benefit of laws as promulgated by the legislature and administered by the courts.[104]
b. Separation of powers: in general terms, separation of powers entails that the three principal institutions of the state—the executive, legislature, and judiciary—should be divided both in person and in function, to safeguard liberties and guard against tyranny that may result from a concentration of power.[105] In the UK, the doctrine is more fluid than it is, for example, in the US, which strictly delineates the powers of the President (the executive), the judiciary, and the legislative (the Senate and House of Representatives). In the UK, the executive and legislature are closely entwined, with the Prime Minister and most government ministers also being Members of Parliament sitting (usually) in the House of Commons—an approach sometimes regarded as prioritising efficiency over concerns about tyranny.[106] With that said, constitutional reforms over the past decades have reinforced the separation of powers between the judiciary and the legislature. Previously, the final appeal court of the UK was formed as a committee of the House of Lords, the second chamber of the legislature, although in practice the committee was fully independent of the legislative house and its decisions were reached independently of the executive and the legislature like any court. In 2009, this anomaly was resolved and an independent UK Supreme Court was instead established.
c. Independence of the judiciary: individual judges and the judiciary as an institution are required to be impartial and independent of all external pressures, and of each other, such that litigants who appear before them and the public as a whole can have confidence that cases will be decided fairly and in accordance with the law. In the UK, this principle dates back to the Act of Settlement of

[104] Bingham, Rule of Law 2010.
[105] Montesquieu, Charles de Secondat, baron de. The Sprit of Laws (c1748). Translated and edited by Anne Cohler, Basia Miller, Harold Stone. (New York: Cambridge University Press 1989).
[106] Richard Benwell and Oonagh Gay, *The Separation of Powers*, Parliament and Constitution Centre, SN/PC/06053, available at: https://researchbriefings.files.parliament.uk/documents/SN06053/SN06053.pdf.

1701, following which judges hold office through good behaviour (rather than purely at the monarch's pleasure), and can only be removed through formal removal mechanisms.

d. Royal prerogative powers: these are powers that, historically, were exercised solely by the monarch. As the UK evolved away from an absolute monarchy to a constitutional monarchy, almost all of those powers were delegated to Government ministers, and their use became restricted either by legislation or by 'constitutional conventions'. These prerogative powers, importantly, include ministers' competence to make[107] and ratify[108] treaties.

Parliamentary sovereignty: under this principle, Parliament has the right to make or unmake any law whatever; and, further, no person or body, including the monarch or the courts, has the right to override or set aside Parliamentary legislation. The power to 'make or unmake' any law necessarily implies the power to pass an Act of Parliament in direct conflict with the UK's international obligations.[109]

As relevant to the UK's international legal obligations, there is a degree of tension between the Royal prerogative and Parliamentary sovereignty: Parliament is supreme and it would be a violation of Parliamentary sovereignty for ministers to be able to bind Parliament unilaterally through the use of the Royal prerogative. However, the prerogative to conduct the UK's foreign affairs and to bind the UK to obligations on the international plane belongs exclusively to the executive.

That tension is, ostensibly, resolved by the implementation of a dualist system. The question has arisen before the courts. In the *International Tin Council* case, the House of Lords summarised the system in the UK as follows:[110]

> *"It is axiomatic that municipal courts have not and cannot have the competence to adjudicate upon or to enforce the rights arising out of transactions entered into by independent sovereign states between themselves on the plane of international law … On the domestic plane, the power of the Crown to conclude treaties with other sovereign states is an exercise of the Royal Prerogative, the validity of which cannot be challenged in municipal law ... That is the first of the underlying principles. The second is that, as a matter of the constitutional law of the United Kingdom, the Royal Prerogative, whilst it embraces the making of treaties, does not extend to altering the law or conferring rights upon individuals or depriving individuals of rights which they enjoy in domestic law without the intervention of Parliament. Treaties, as it is sometimes expressed, are not self-executing. Quite simply, a treaty is not part of English law unless and until it has been incorporated into the law by legislation."*

That is, the executive is free to make treaties on the international plane, but on the domestic plane only Parliament can alter the law to confer or remove rights.

Thirty years later, Lord Mance in the Supreme Court case in *R (Yam) v Central Criminal Court* described the position even more succinctly (and perhaps more broadly), stating that "*the United Kingdom takes a dualist approach to international law*".[111]

Arguably, however, this is an oversimplification. The system is more nuanced and depends upon the form of international legal obligation. Those obligations can be categorised as follows:

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[107] *Halsbury's Laws of England* (5th edn, 2014) vol 20, para 557.

[108] This is subject to the Ponsonby rule: a convention whereby all treaties must be laid before Parliament for 21 days before it can proceed to ratification. This has now been codified by s21 of the Constitutional Reform and Governance Act 2010. However, there is no statutory requirement for a debate or vote, and Parliament cannot amend treaties.

[109] This principle only applies within the domestic context, however. Although Parliament may, as a domestic matter, unmake any obligation that the UK may owe under a treaty, there may still be consequences on the international plane. The principle of *pacta sunt servanda* as contained in art 26 of the Vienna Convention on the Law of Treaties UNTS 1155, 331, which states that "every treaty in force is binding upon the parties to it and must be performed by them in good faith", must be considered.

[110] *JH Rayner (Mincing Lane) Ltd v Department of Trade and Industry* [1989] 3 WLR 969, per Lord Oliver.

[111] *R (Yam) v Central Criminal Court and another* [2015] UKSC 76, as per Lord Mance, p 35.

a. Incorporated treaties: The ratification of treaties in the UK is insufficient for the treaty to have effect in the domestic law of the UK. What is needed is explicit incorporation into domestic law, usually through an Act of Parliament. Such "incorporated treaties" become domestic law by virtue of that incorporation, and create no further controversy.
b. Unincorporated treaty obligations: On occasion, the UK Government will sign and ratify a treaty on behalf of the UK, but incorporation does not then follow for some time, or at all. A question arises, then, whether (if at all) any obligations in the unincorporated treaty are to be applied in English domestic law.
c. Customary international law ("**CIL**"): international law has numerous components, of which CIL is one. If treaties give rise to formal (written) obligations, CIL encompasses those (unwritten) obligations arising from "*general practice[s] accepted as law*",[112] consisting of the general practice of states ("state practice") and *opinio juris* (the belief that it is necessary to comply with an obligation because it is seen to be binding).[113] CIL is considered part of the common law in England & Wales, to be applied and interpreted by the judiciary as appropriate in their decision-making.[114]

The treatment of these different categories belies the traditional view of the UK as a dualist system. Although unincorporated treaties are subject to dualist principles, over the past decades they have increasingly influenced domestic law, particularly the development of the common law and statutory interpretation, most noticeably in the field of human rights. The approach to CIL, by contrast, is arguably monist in the sense that CIL has increasingly been received into English law without the need for legislation.[115]

Incorporated Treaties

Any law duly enacted by Parliament becomes the law of the UK (or its relevant constituent part), and in this way Parliament can adopt obligations from treaties or international law by passing a corresponding domestic law. There are several ways in which that 'incorporation' can occur. The treaty (or its provisions) can be copied into a schedule to a statute, so that the treaty is effectively enacted wholesale, as occurred with the Human Rights Act 1998 ("**HRA**"; enacting the European Convention on Human Rights, "**ECHR**"). Alternatively, a statute can refer to a treaty that is to be complied with, as for the Asylum and Immigration Act 1996, which makes numerous references to the Geneva Convention relating to the Status of Refugees 1951.[116] While, of course, there may be ambiguities in the statutory language (or that of the original treaty) such that the precise scope of the rights conferred under a treaty or its incorporating language is unclear, what is unambiguous in such cases is the Parliamentary intention that the obligations form part of domestic law.

Unincorporated Treaties

Two general principles apply to unincorporated treaties, shaping the role the obligations contained within such treaties play in the domestic legal context. The first, as outlined in the seminal *International Tin Council* case,[117] is that the English courts do not have the jurisdiction directly to apply or interpret those treaties; they are non-justiciable. English courts will generally refuse to determine the meaning of international instruments that only operate on the horizontal international plane between states.[118]

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[112] ICJ Statute, art 38(1)(b).
[113] *North Sea Continental Shelf* (Federal Republic of Germany v the Netherlands) [1969] ICJR 3, [75]-[77]. For domestic acceptance of this approach, see *JH Rayner (Mincing Lane)*, fn**Error! Bookmark not defined.**, 513.
[114] *JH Rayner (Mincing Lane)*, Op Cit, fn 15.
[115] *Trendtex Trading Corp.* v *Central Bank of Nigeria* [1977] 2 W.L.R. 356 (CA).
[116] E.g. s167 of that statute, which defines a "*claim for asylum*" as "a claim that would be contrary to the United Kingdom's obligations under the Refugee Convention for the claimant to be removed from, or required to leave, the United Kingdom".
[117] *JH Rayner (Mincing Lane) Ltd v Department of Trade and Industry* [1990] 2 AC 418 (HL) 510.
[118] *R (Campaign for Nuclear Disarmament) v Prime Minister of the United Kingdom* [2002] 126 ILR 727 [47(i)] This was qualified to some extent in *Republic of Ecuador v Occidental Exploration and Production Co.* [2006] 2 W.L.R. 70 (CA), where Lord Mance found that if a treaty confers a right to arbitration to both individuals and companies, courts could exercise supervisory and interpretative functions.

The second principle is that, since unincorporated treaties are not part of domestic law, they have no direct effect in English law and cannot create directly enforceable rights, or directly abrogate rights existing within the domestic system.[119]

However, despite these two 'hard lines' drawn by the judiciary, in deference to the legislature and the executive, unincorporated treaties have for some time exerted influence on the courts in their approach to both the common law and statutory interpretation. That influence arises from the judiciary's policy of ensuring, to the greatest extent possible, that domestic law conforms with international law.[120]

There are three primary ways in which this judicial policy manifests: (i) in interpreting the scope or application of rights under the ECHR; (ii) as an aid to statutory interpretation (outside of the ECHR context); and (iii) in the development of the common law.

Interpretation of the ECHR

As the ECHR is an international treaty, it is subject to interpretation in accordance with the Vienna Convention on the Law of Treaties 1969 ("**VCLT**"). This includes Article 31(3)(c) of the VCLT, requiring interpretation of a treaty to take into account "*any relevant rules of international law applicable in the relations between the parties*". The European Court of Human Rights ("**ECtHR**") itself has frequently relied upon the VCLT to find that the ECHR cannot be "*interpreted in a vacuum*", but should instead be interpreted "*in harmony with other rules of international law of which it forms part*".[121]

In the UK, the ECHR takes effect through the HRA, section 2(1) of which requires that courts determining "*a question which has arisen in connection with a Convention right must take into account*" decisions of the ECtHR. In one sense, it could therefore be said that section 2(1) incorporates the decisions of the ECtHR into domestic law. However, the provision does not quite go as far as to say that UK courts are bound to follow ECtHR decisions. Instead, it provides a clear route for decisions on the interpretation of the ECHR (an international law instrument) to have a significant influence on the HRA (a domestic law instrument). Moreover, where the ECtHR has relied upon international obligations that are not incorporated into UK law, those can nevertheless influence the English courts.

An illustration of this approach is found in *R (SG and others) v Secretary of State for Work and Pensions* ("***SG***").[122] The Government at the time had implemented secondary legislation, the Benefit Cap (Housing Benefit) Regulations 2012, capping the amount of state benefits non-working households could receive at a sum equal to average weekly earnings in the UK. The policy was said by critics to have a disproportionate impact on single mothers: they had reduced earning potential, and the benefits that were capped included housing and child benefits. Judicial review proceedings were launched challenging the reasonableness of the policy, alleging it to be incompatible with Article 1 Protocol 1 to the ECHR (the right to property), read together with the anti-discrimination provision in Article 14 ECHR. The claimants placed significant emphasis on the (largely)[123] unincorporated UN Convention on the Rights of the Child ("**UNCRC**"), and, in particular, on Article 3(1) UNCRC, which provided that "*in all actions concerning children… the best interests of the child shall be a primary consideration*". The claimants argued that the UK Government was required to take account of this provision in assessing whether the new benefits policy was proportionate in its impact (as required by Article 14 ECHR).

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[119] *JH Rayner (Mincing Lane) Ltd v Department of Trade and Industry* [1990] 2 AC 418 (HL) 500; *R v Lyons* [2003] 1 AC 976 [13]. (Lord Bingham); *Thomas v Baptiste* [2000] 2 AC 1 (PC) [23B] (Lord Millett).

[120] *A v. Secretary of State for the Home Department (No. 2)* [2006] 2 AC 221, as per Lord Bingham, p 27.

[121] *Al-Adsani v. UK* [2001] 34 EHRR 273 [55]; *Loizidou v. Turkey* [1996] 23 EHRR 513 [43].

[122] *R (SG and others) v Secretary of State for Work and Pensions* [2015] UKSC 16, [2015] 1 W.L.R. 1449.

[123] The "spirit, if not the precise language" of Article 3(1) UNCRC has been found to have been incorporated into s11(2) of the Children Act 2004 – per *SH (Tanzania) v Secretary of State for the Home Department* [2011] 2 AC 166 [23].

The Supreme Court, by a majority, dismissed the appeal, finding the prohibition on discrimination between men and women did not necessarily entail consideration of the best interests of children.[124] Nonetheless, the majority did agree that the UNCRC could "*be relevant to questions concerning the rights of children under the ECHR*".

The minority went further. Lord Kerr, in his dissent, directly called for recognition that "*the time has come for the exception to the dualist theory in human rights conventions*".[125] Relying on Lord Steyn's statement from *Re McKerr*,[126] Lord Kerr questioned the rationality of denying citizens the rights proclaimed in treaties ratified by the UK,[127] especially in light of the "*extensive and enlightened consideration*"[128] of such treaties. Lord Kerr said he considered that the provisions of the UNCRC, albeit part of an unincorporated treaty, were "*directly enforceable in United Kingdom domestic law*", and should have formed part of the Government's assessment in implementing its benefits policy.[129]

Lord Kerr was in the minority in *SG*, and there have been no cases subsequently that have given further substantial consideration to his position. It remains to be seen whether this view of the role of international law in the field of human rights will garner further judicial support. However, even the decision of the majority, with its confirmation of the relevance of unincorporated treaty obligations, marks a change in tone over the five decades since the *International Tin Council* case.

Statutory interpretation

There is a *prima facie* assumption in English law that Parliament will not have intended to legislate in a way that contradicts treaty obligations that the executive has entered into,[130] even where that treaty has not yet been incorporated into domestic law. This presumption usually arises in cases where a statute is ambiguous,[131] and where there is some sort of link between the ambiguous legislation in question and the relevant unincorporated treaty.[132] The presumption may extend to treaties pre-ratification[133] and even policy guidance documents.[134] Indeed, if there are two possible ways in which to interpret statutory language, the interpretation that should be chosen is the one that "*better complies with the commitment*" to the relevant unincorporated treaty.[135]

This principle is not immutable: the presumption can, of course, be displaced if it is clear that Parliament did intend to legislate in a manner contrary to the UK's international obligations,[136] and courts would be bound to follow Parliament's intention notwithstanding the treaty obligations in such case. However, the principle does show a departure from a strict dualist approach in the UK to international law obligations, giving international treaties a degree of effect and influence even when they have not been incorporated into domestic law.

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124 *R (SG and others) v Secretary of State*, p 87.
125 *R (SG and others) v Secretary of State*, p 254 (Lord Kerr).
126 *In re McKerr* [2004] UKHL 12.
127 *R (SG and others) v Secretary of State* fn 122, p 255-256 (Lord Kerr).
128 Ibid.
129 ibid 258 (Lord Kerr).
130 *Assange v. Swedish Prosecution Authority* [2012] 2 AC 471, Lord Dyson JSC at [122]: "there is no doubt that there is a 'strong presumption' in favour of interpreting an English statute in a way which does not place the United Kingdom in breach of its international obligations."
131 *R v Secretary of State for the Home Department, Ex parte Brind* [1991] 1 AC 696 (HL), at [747H]-[748A] (Lord Bridge).
132 *Salomon v Commissioners of Customs and Excise* [1967] 2 QB 116, 144 in which Lord Diplock states that "one must not presume that Parliament intends to break an international convention merely because it does not say expressly that it is intending to observe it".
133 *Boyce v The Queen* [2005] 1 AC 400 [25]-[26].
134 *Sultan Abid Mirza v Secretary of State for the Home Department* [1996] Imm AR 314 (CA), p 318.
135 *Smith v Smith* [2006] UKHL 35, [2006] 1 WLR 2024 [78] (Baroness Hale).
136 *R v Secretary of State for the Home Department, Ex parte Bhajan Singh* [1976] QB 198 (CA), 207D-207H (Lord Denning).

Common law

The presumption in favour of interpreting the law in accordance with the UK's unincorporated treaty obligations also extends to the common law.[137] Courts may look to unincorporated treaties for guidance on common law questions, both where rights at common law are otherwise clear[138] and where there is ambiguity.[139]

Most of the cases in which unincorporated treaty obligations have impacted the common law have arisen in the context of fundamental human rights. The weight given to unincorporated treaties in this context can be significant. In *Ex parte McQuillan*, a case concerning Articles 2 (right to life) and 3 (the right not to be subjected to inhuman treatment) of the ECHR (which at that point had not yet been incorporated into UK domestic law), Sedley J remarked that it would be "*potentially unjust*" for common law standards to diverge from those articulated in international instruments.[140] Similarly, in the context of judicial review, itself a creation of the common law, additional safeguards have been implemented by the courts where the exercise of executive power in question concerns fundamental human rights. These include the application of "particularly anxious" scrutiny to potential interferences with fundamental rights, [141] requiring "*nothing less than an important competing public interest*" as justification for any restrictions on fundamental rights.[142]

More controversially, an emerging area of the common law concerns the question of whether the exercise of the Royal prerogative to enter into treaties that purport to confer rights on individuals gives rise to a 'legitimate expectation' on the part of individuals, that the organs of the state must, as far as possible, adhere to the obligations imposed by the treaty, even before that treaty has been incorporated into domestic law. The principle has developed from decisions of the High Court of Australia, particularly the case of *Minister for Immigration and Ethnic Affairs v Teoh*.[143] where it was held that Australia's ratification of the UNCRC amounted to a binding promise, by Australia's executive, to comply with that treaty. The Court further found that there was no intrinsic reason to exclude treaties on grounds of their unincorporated status,[144] and therefore the act of ratification carried weight on both domestic and international planes. As a result, there was a legitimate expectation that domestic decision-makers would consider the best interests of the children affected by their decisions, as required by the UNCRC.

Teoh has had a mixed reception in the English courts. In *Chundawadra v Immigration Appeal Tribunal*, a case brought before the enactment of the HRA, the claimants argued that every citizen had a legitimate expectation that, if the ECHR was relevant to a matter under consideration, Government ministers should take the treaty into account when deciding how to exercise their powers. However, the Court of Appeal refused to accept this argument, holding that it was not appropriate to introduce the ECHR into domestic law through the "*back door*" in this way.[145]

Shortly thereafter, however, a different division of the Court of Appeal came to the opposite conclusion, adopting the spirit of *Teoh*. In *R v Secretary of State for the Home Department, Ex parte Ahmed and Patel*, Lord Woolf remarked that:[146]

> "*the entering into a treaty by the Secretary of State could give rise to a legitimate expectation on which the public in general are entitled to rely… this legitimate expectation could give rise to a right*

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[137] *R v Lyons* fn **Error! Bookmark not defined.**, p 27 (Lord Hoffmann); *A v Secretary of State for the Home Department* [2005] 1 WLR 414 [266] (Laws LJ); *Westland Helicopters Ltd v AOI* [1995] QB 282, 307-308 (Colman J).

[138] *Derbyshire CC v Times Newspapers* [1992] QB 770 (CA) 812 (Balcombe LJ).

[139] *R v Secretary of State for the Home Department, Ex parte Hargreaves* [1997] 1 WLR 906 (CA).

[140] *R v Secretary of State for the Home Department, Ex parte McQuillan* [1995] 4 All ER 400 (QBD) 421 (Sedley J).

[141] See the statement of Lord Bridge in *Bugdaycay v Secretary of State for the Home Department* [1987] A.C. 514 (HL) 531, in which it was stated that the right to life was the 'most' fundamental right, which would be subjected to the "most anxious scrutiny".

[142] *Ex parte Brind*, p 749.

[143] [1995] 183 CLR 273.

[144] ibid 292.

[145] [1998] Imm AR 161, ref.

[146] [1998] I.N.L.R 570 (CA).

> *to relief, as well as additional obligations of fairness, if the Secretary of State, without reason, acted inconsistently with the obligations this country had undertaken*."[147]

The development of the doctrine of legitimate expectations in this way remains, in the words of the Supreme Court in *SG*, "*controversial*".[148] Nonetheless, the English judiciary has, over time, shown a willingness to recognise the possibility of legitimate expectations arising in cases concerning fundamental human rights.[149] It has been suggested that this may be due to a desire on the part of the judiciary to avoid giving "*judicial sanction to the executive's cavalier attitude to the significance of ratification*",[150] which may be particularly relevant in the context of international human rights treaties aimed at safeguarding individuals against the state.[151]

However, whatever force the argument for legitimate expectations has is significantly weakened where unincorporated treaties were ratified a significant period of time ago,[152] and/or where there is evidence demonstrating that Parliament does not intend to legislate to incorporate the treaty at all. One such notable example is the International Convention on Economic, Social and Cultural Rights ("**ICESCR**"), which was ratified by the UK in 1976. To date, the ICESCR remains unincorporated; indeed, the UK government has informed the ICESCR monitoring body that "*the ICESCR has not been and is not expected to be incorporated into domestic law*",[153] with compliance instead being said to be achieved through "*the policies, laws and practices of the welfare state*".[154] Claimants hoping to rely on rights protected under the ICESCR in the absence of a corresponding existing right in English domestic law are unlikely to succeed.

The Application Of Customary International Law In English Law

As addressed above, while it would be wrong to say that the UK's approach to international treaties is strictly dualist, it is clear that there remain limits on the extent to which unincorporated treaties can have an impact on domestic law. CIL provides a stark contrast. Even though most CIL obligations exist solely upon the international plane and operate only horizontally between states, as far back as 1934, it was recognised that CIL had "*taken firmer hold, [and] expanded its sphere of operation*" in the English common law.[155]

As such, CIL is considered directly applicable in English domestic law, so long as it is consistent with "*domestic constitutional principles, statutory law and common law rules which the courts can themselves adapt without… Parliamentary intervention or consideration*".[156] This is (somewhat confusingly) known as the doctrine of incorporation,[157] and it permits changes in international law to be reflected in domestic law without requiring previous rules of CIL to be explicitly overruled.[158] Put another way, CIL amounts to a source of English law which is not assented to by Parliament: instead, it applies directly in English law except to the extent to which Parliament chooses explicitly to legislate to the contrary of a CIL principle.[159] Where Parliament has not acted, a presumption of compatibility applies, allowing the courts to construe domestic legislation in accordance with

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147 ibid 684.
148 SG, p 246.
149 *R (Lika) v Secretary of State for the Home Department* [2002] All ER (D) 230 (Dec) [26] (Latham LJ).
150 Murray Hunt, *Using Human Rights Law in English Courts* (Hart Publishing 2002) 257.
151 *In re McKerr* [2004] 1 WLR 807 [49]-[50] (Lord Steyn).
152 *R v DPP, Ex parte Kebilene* [2000] 2 AC 326 (DC), 338D (Lord Bingham CJ): "it cannot plausibly be said that ratification… so long ago gives rise to any legitimate expectations today".
153 Fifth Periodic Report from the United Kingdom, July 2007 E/C.12/GBR/5, [74]-[75]. Note that there is no positive obligation on a state to arrange its internal legal system in line with treaty obligations. Rather, the obligation is negative, in the sense that a state cannot rely on its domestic law to justify breaching an international obligation. See for example Articles 3 and 32 of the Articles on the Responsibility of States for Internationally Wrongful Acts, adopted by the UN General Assembly in Resolution 56/83.
154 Joint Committee on Human Rights, *Implementation of the Right of Disabled People to Assisted Living* (2010-12, HL 257, HC 1074) para 56. This was reiterated in the Sixth Periodic Report from the United Kingdom, E/C.12/GBR/6, at [11].
155 *In re Piracy Jure Gentium* [1934] AC 586 (PC) 592-593 (Viscount Sankey, LC).
156 *Keyu v Secretary of State for Foreign & Commonwealth Affairs* [2015] 3 W.L.R. 1665 [150] (Lord Mance).
157 *Trendtex*, fn115, 533.
158 Shaheed Fatima, 408.
159 *Cheney v Conn (Inspector of Taxes)* [1968] 1 WLR 242 (ChD) 245 (Ungoed-Thomas LJ).

CIL obligations.[160] The same applies to CIL rules of international human rights law, which are to be "*observed and enforced… as part of the common law*".[161]

This treatment of CIL in the English domestic context is striking. The objections levelled against unfettered reliance on unincorporated treaties can similarly be made against reference to CIL; indeed, *a fortiori* CIL is generally less certain and precise than treaty provisions, and states have far less control over the form and substance of a norm of CIL than they do over the wording of their negotiated treaties. CIL is also subject to change over time, yet such changes can be given direct effect in England without legislation.[162]

The difference in treatment between CIL and unincorporated treaties can also appear artificial when it is considered that many treaties codify the rules of CIL. For example, the right to free public primary education as codified by the ICESCR[163] is arguably a norm of customary international law. However, the current approach of English law means that a distinction is maintained between the two sources of international law for its application in common law. Consequently, it may often be necessary to demonstrate that a rule exists *independently* as a rule of CIL, rather than that it arises out of, or is ancillary to, an unincorporated treaty obligation.[164] It is not clear that there is any real value in this distinction. Ultimately, its continuation appears to be more of an accident of its history, of the tension between the Royal prerogative granting the executive the power to bind the state internationally and Parliamentary sovereignty requiring that Parliament retain exclusive rights of approval for changes in domestic law, in circumstances where no similar concerns ever arose with respect to CIL.

Conclusion

It can be seen, therefore, that it is not wholly accurate to describe the modern UK approach to international law obligations as being dualist. While the core principle remains that international law obligations arising from treaties are not directly enforceable in UK domestic courts unless and until they have been incorporated into UK domestic law, there are many ways in which even unincorporated treaties can influence both statute and common law, and it would perhaps be fairer to describe the UK's approach to CIL obligations as being predominantly monist.

Judgments such as the dissent of Lord Kerr given in the *SG* case, together with comments from other senior judges and commentators, indicate that there is an appreciation that the distinctions in treatment between international law obligations from different sources could be ripe for reconsideration. However, any significant alteration to the traditionally dualist position – that only Parliament can introduce or amend domestic law, irrespective of the actions of the executive on the international plane – would require a substantial re-writing of the constitutional balance of powers between the executive, legislative and judicial branches of the state. The present UK position, a hybrid of dualist and monist positions, seems likely to endure.

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[160] *Salomon v Customs and Excise Commissioners*, fn 132, p 143 (Diplock LJ).
[161] *R. v Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte (No. 1)* [2000] 1 A.C. 61 [89-90] (Lord Lloyd).
[162] *The Philippine Admiral* [1977] AC 373 (PC) .
[163] art 13(2)(a) ICESCR.
[164] Shaheed Fatima, fn**Error! Bookmark not defined.**, p 417; *R v Lyons* [39] (Lord Hoffmann); *R (CND) v The Prime Minister* [2002] All ER (D) 245 (Dec) [61] (Simon Brown LJ).

CHAPTER XVI: ARE "TWO HEADS BETTER THAN ONE"? ANALYSING THE INCREASING MULTIPLE INTERNATIONAL LEGAL PROCEEDINGS IN AN ERA OF MULTIPLE COURTS AND TRIBUNALS

*Laurence Boisson de Chazournes**

Abstract

The plurality of courts, tribunals and legal proceedings in international order has become an intrinsic characteristic of international dispute settlement. At the end of the 1990s, the perceived risks associated with plurality started to attract more debate. The chapter aims to throw light on the whys and wherefores of plurality in international legal order. Drawing observations from the recent practice and trends in international litigation, the chapter demonstrates that States actively use plurality to resolve their disputes. Moreover, the plurality of international courts and tribunals, and the ensuing number of international legal proceedings has increasingly led to fruitful interaction among the international courts and tribunals. The chapter also underlines the importance of judicial dialogue and the use of procedural law tools to coordinate and manage the perceived risks of plurality. The emphasis is also placed on the role of judicial actors and stakeholders of the international dispute settlement system in the plural world of international courts and tribunals.

Introduction

Over the course of the nineteenth and twentieth centuries, the international legal order has witnessed the phenomenon of 'proliferation' of international courts and tribunals and international legal proceedings. States and other non-State actors have used the international courts and tribunals with ever-increasing frequency. The plurality of courts and tribunals and legal proceedings in international order has become an intrinsic characteristic of international dispute settlement.[1] At the end of the 1990s, the perceived risks associated with plurality started to attract more debate. Despite those risks, the plurality of dispute settlement mechanisms is not contested. This chapter aims to explore the whys and wherefores of plurality in international legal order and show that the risks associated with it can be mitigated.

The chapter will begin by shedding light on the reasons behind plurality and by observing the recent practice in international litigation in which the plurality of courts and proceedings was actively used by States (**Part II**). Subsequently, the chapter will draw attention to the positively increasing interaction among the international courts and tribunals in the age of plurality (**Part III**). Against this backdrop, the chapter will underscore the need for judicial dialogue, and the use of legal tools available, to manage the perceived risks of 'plurality' (**Part IV**). The chapter concludes with a few remarks on the role that could be played by judicial actors and stakeholders of the dispute settlement system in the plural world of international courts and tribunals. (**Part V**).

The Plurality Of International Courts And Tribunals And Proceedings – How Did We Reach Here?

[1]* Professor of International Law at the University of Geneva; Director of the LLM in International Dispute Settlement (MIDS). This chapter builds upon the previous works of the author. See Laurence Boisson de Chazournes, 'Plurality in the Fabric of International Courts and Tribunals: The Threads of a Managerial Approach' (2017) 28 (1) EJIL 13; Laurence Boisson de Chazournes, 'Plurality in the Fabric of International Courts and Tribunals: The Threads of a Managerial Approach: A Rejoinder – Fears and Anxieties' [2017] 28 (4) EJIL 1275; Laurence Boisson de Chazournes, 'The proliferation of courts and tribunals: navigating multiple proceedings - 5th EFILA annual lecture 2019' [2019] 5 European Investment Law and Arbitration Review Online 447
Mary Ellen O'Connell and Lenore VanderZee, 'The History of International Adjudication' in Cesare PR Romano, Karen J Alter, and Yuval Shany (eds), *The Oxford Handbook of International Adjudication* 60 (OUP 2013)

International dispute settlement has always been characterised by its plurality. In fact, the legal history and architecture that surround the dispute settlement mechanisms in international law reveal that plurality was not only intended but often facilitated rather than restricted.[2] Right from the 19th century which witnessed the flourishing of international arbitration for the resolution of legal disputes,[3] international legal order has come a long way. Since the United Nations (UN) Charter, which established the International Court of Justice (ICJ), multiple international courts and tribunals have been established. To name a few, the Appellate Body of the World Trade Organisation (WTO)[4], the International Tribunal of the Law of the Sea (ITLOS)[5], the International Criminal Court (ICC)[6] and the *ad hoc* International Criminal Tribunals for the Former Yugoslavia (ICTY) and Rwanda (ICTR).[7] Furthermore, the trust in multiple international courts and tribunals is also evidenced with the adoption of the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (ICSID)[8] and the Iran-US Claims Tribunal, which has been operating since 1980.[9]

The age of plurality ushered in a new international order through the UN. A clear testament to this effect is Article 33 of the UN Charter which obligates the UN Member States "to resolve a dispute […] by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice."[10] In the *Arbitral Award of 3 October 1899 (Guyana v Venezuela)*, the ICJ recognised that Article 33 "includes, on the one hand, political and diplomatic means, and, on the other, adjudicatory means such as arbitration or judicial settlement"[11]. Furthermore, the Court acknowledged the freedom of choice of States to settle their dispute by any peaceful means, as it observed that "both Guyana and Venezuela accepted that good offices were covered by the phrase 'other peaceful means of their own choice', which appears at the end of the list of means set out in Article 33, paragraph 1, of the Charter."[12]

Additionally, the UN Charter while establishing the ICJ did not introduce any hierarchy between international courts and tribunals, which in turn facilitated the plurality in international law. Although Article 92 of the UN Charter recognises that "[t]he International Court of Justice shall be the principal judicial organ of the United Nations", the use of the word "principal" suggests that there may be other judicial organs.[13] It could be also argued that the word "principal" also suggests some form of hierarchy. While the ICJ enjoys special importance (especially within the UN system), it is fair to say that no hierarchy has ever been envisaged.[14] The idea that there should be a plural world of dispute settlement is also included in Article 95 of the UN Charter, which allows the UN Member States to submit "their differences to other tribunals by virtue of agreements already in existence or which may be concluded in the future".[15]

Two recent examples from international litigation exemplify the interest for the plurality of courts and proceedings. The first example concerns the ongoing mufti forum international legal proceedings between Ukraine and Russia.[16] The legal disputes in these proceedings broadly relate to the annexation of the Crimean Peninsula in 2014 and the alleged Russian support to the armed groups in Ukrainian territory (particularly in

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[2] Boisson de Chazournes, Plurality in the Fabric of International Courts and Tribunals (n 1).
[3] Robert Kolb, *The Elgar Companion to the International Court of Justice* (Elgar 2014) 5.
[4] Understanding on Rules and Procedures Governing the Settlement of Disputes, Annex 2, of the Marrakesh Agreement Establishing the World Trade Organization (signed 15 April 1994, entered into force 1 January 1995) 1869 UNTS 401.
[5] United Nations Convention on the Law of the Sea (signed 10 December 1994, entered into force 19 November 1994) 1883 UNTS 3.
[6] Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002), 2187 UNTS 3.
[7] The ICTY was established by United Nations Security Council Resolution 827 on Establishing an International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia. See UNSC Res 827 (25 May 1993), UN Doc S/Res/827; The ICTR was established by United Nations Security Council Resolution 955 (1994) Establishing the International Tribunal for Rwanda. See UNSC Res 955 (8 November 1994) UN Doc S/Res/955
[8] Convention for the Settlement of Investment Disputes between States and Nationals of Other States (signed 18 March 1965, entered into force 14 October 1966), 575 UNTS 159.
[9] The Iran-US Claims Tribunal was established pursuant to the Algiers Accords of 19 January 1981, 20 ILM 224.
[10] Charter of the United Nations (signed 26 June 1945, entered into force 24 October 1945) 1 UNTS 16, art 33.
[11] *Arbitral Award of 3 October 1899 (Guyana v. Venezuela), Jurisdiction of the Court, Judgment* (ICJ Reports 2020) 83.
[12] ibid 98.
[13] Boisson de Chazournes, Plurality in the Fabric of International Courts and Tribunals (n 1) 22.
[14] ibid; See also, *Prosecutor v. Kvocka (Judgment)*, IT-98-30/1, Appeals Chamber (25 May 2001) 15.
[15] Charter of the United Nations (n 10).
[16] For a detailed study on the Ukraine and Russia dispute, See Lawrence Hill-Cawthorne, 'International Litigation and the Disaggregation of Disputes: Ukraine/Russia as a Case Study' [2019] 68 (4) International and Comparative Law Quarterly 779.

eastern Ukraine in Donetsk and Luhansk). Before the ICJ, Ukraine has instituted proceedings alleging violations of the International Convention for the Suppression of the Financing of Terrorism and the International Convention on the Elimination of All Forms of Racial Discrimination (CERD).[17] It has also instituted two arbitral proceedings before the Annex VII tribunal, constituted under the UN Convention on the Law of Seas (UNCLOS)[18] and five proceedings before the European Court of Human Rights (ECtHR).[19] In July 2021, Russia also filed an inter-State complaint against Ukraine before the ECtHR.[20] Both the States are also litigating against each other in five disputes before the WTO.[21] Apart from inter-State disputes, multiple individual complaints have been lodged against Russia before the ECtHR.[22] Additionally, in April 2014, a preliminary examination into the situation in Crimea and eastern Ukraine was conducted by the Office of the Prosecutor of the International Criminal Court (ICC), which concluded that there was a reasonable basis to believe that war crimes and crimes against humanity were committed.[23]

In 2022, the relations between Ukraine and Russia dramatically worsened following the invasion of Ukraine by the Russian Federation, which has led to a severe armed conflict. Amidst the war, Ukraine has launched a legal counteroffensive by instituting various legal proceedings against Russia. It has submitted an application instituting proceedings, and a request for provisional measures, under the 1948 Convention on the Prevention and Punishment of the Crime of Genocide.[24] A number of State parties to the Rome Statute have referred the situation in Ukraine to the ICC Prosecutor for investigation of alleged crimes committed by Russia following its invasion in Ukraine.[25] According to the Prosecutor, the referrals by States enables "an investigation into the Situation in Ukraine from 21 November 2013 onwards", which includes "within its scope any past and present allegations of war crimes, crimes against humanity or genocide committed on any part of the territory of Ukraine by any person".[26] Moreover, the Ukrainian Foreign Minister, Dmytro Kuleba, is also campaigning for the establishment of a Special Tribunal to adjudicate the alleged crimes of aggression committed by Russia, which is not within the jurisdiction of the ICC in this dispute.[27]

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[17] *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine v. Russian Federation), Preliminary Objections, Judgment* (ICJ Reports 2019) 55.

[18] *Dispute Concerning Coastal State Rights in the Black Sea, Sea of Azov, and Kerch Strait (Ukraine v. the Russian Federation), PCA Case No. 2017-06, Award Concerning the Preliminary Objections of the Russian Federation* (21 February 2020) <https://pca-cpa.org/en/cases/149> accessed 3 March 2022; *Dispute Concerning the Detention of Ukrainian Naval Vessels and Servicemen (Ukraine v. the Russian Federation), PCA Case No. 2019-28, Procedural Order No. 2 (Bifurcation)* 27 October 2020 <https://pca-cpa.org/en/cases/229> accessed 3 March 2022.

[19] *Ukraine v. Russian Federation (re Crimea)* (no. 20958/14); *Ukraine v. Russian Federation (VII)* (no. 38334/18); *Ukraine and the Netherlands v. Russian Federation* (nos. 8019/16, 43800/14 and 28525/20); *Ukraine v. Russian Federation (VIII)* (no. 55855/18); *Ukraine v. Russian Federation (IX)* (no. 10691/21); See also, *Russia v. Ukraine* (no. 36958/21).

[20] ECHR Press Release, *Inter-State application brought by Russia against Ukraine* [2021] ECHR 240.

[21] WTO, *Russia – Measures affecting the importation of railway equipment and parts thereof* (5 March 2020) WT/DS499/AB/R; WTO, *Russia – Measures Concerning Traffic in Transit* (26 April 2019) WT/DS512/R; WTO, *Russia – Measures Concerning the Importation and Transit of Certain Ukrainian Products* (13 October 2017) WT/DS532/1; WTO, *Ukraine – Anti-Dumping Measures on Ammonium Nitrate* (30 September 2019) WT/DS493/AB/R; WTO, *Ukraine – Measures relating to Trade in Goods and Services* (19 May 2017) WT/DS525/1; See also, Lawrence Hill-Cawthorne (n 16).

[22] Lawrence Hill-Cawthorne (n 16) (Around 10 investor-State arbitrations have also been launched against Russia by Ukrainian investors).

[23] ICC, 'Statement of the Prosecutor, Fatou Bensouda, on the conclusion of the preliminary examination in the situation in Ukraine' (11 December 2020) <https://www.icc-cpi.int/Pages/item.aspx?name=201211-otp-statement-ukraine> accessed 3 March 2022.

[24] See *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation), Application instituting proceedings* (27 February 2022) < https://www.icj-cij.org/en/case/182 > accessed 3 March 2022; *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation), Request for the indication of provisional measures* (27 February 2022) < https://www.icj-cij.org/en/case/182 > accessed 3 March 2022; *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation), Order* (16 March 2022) < https://www.icj-cij.org/en/case/182> accessed 18 March 2022.

[25] ICC, 'Statement of ICC Prosecutor, Karim A.A. Khan KC, on the Situation in Ukraine: Receipt of Referrals from 39 States Parties and the Opening of an Investigation' (2 March 2022) <https://www.icc-cpi.int/Pages/item.aspx?name=2022-prosecutor-statement-referrals-ukraine> accessed 3 March 2022.

[26] Ibid.

[27] Cristina Gallardo, 'Ukraine calls for Nuremberg-style tribunal to judge Vladimir Putin' (4 March 2022) <https://www.politico.eu/article/ukraine-calls-for-nuremberg-style-tribunal-to-judge-vladimir-putin/> accessed 3 March 2022

A similar trend of plurality can be witnessed from the recent litigation between Qatar, on the one hand, and Saudi Arabia, the United Arab Emirates (UAE), Bahrain, and Egypt (the 'Quartet'), on the other hand. After the Quartet severed its economic and diplomatic ties with Qatar and imposed restrictions on airspace and maritime space, and travel bans on Qatari nationals[28] . Qatar instituted legal proceedings against the measures adopted by the Quartet before the ICJ[29], the WTO[30], and the Universal Postal Union[31]. In addition, Qatar also instituted two conciliation proceedings against Saudi Arabia and UAE respectively before the Convention on the Elimination of All Forms of Racial Discrimination (CERD) Committee.[32]

Both situations demonstrate the menu of options that States have, at their disposal, to resolve their international disputes. They also provide an insight as to why States have been keen to preserve the choices they have, and resort to them for protecting their rights and promoting their interests in the overall context of their disputes.

The plurality of proceedings is often played as a lawfare strategy by States and other non-State actors. This new form of international litigation involves the breakdown of a dispute between States into multiple different disputes, or "discrete legal claims" that are often brought before different international courts and tribunals.[33] Plurality can be seen as a reason for such litigation since it led to the establishment of different courts and conferred on them jurisdiction and competence over specific matters, such as the WTO, the ICC, or the human rights bodies. This strategy has both yin and yang features. States deploy this strategy not only to resolve the dispute but also to expose to the Court or the public the alleged cases of international law violations.[34] They can also use it to score political points[35] or to build pressure on other disputing States that can be advantageous in settlement negotiations. For instance, the dispute between Qatar and the Quartet witnessed multiple proceedings across different forums yet the parties reached a settlement, through the conclusion of the *Al Ula Declaration*.[36] The discontinuance of multiple proceedings was probably used as a bargaining chip by Qatar during the settlement. Section 2 of the *Al Ula Declaration,* as provided in the *ad hoc* CERD Conciliation Commission Decision, specifically provides that "[a]ll lawsuits, complaints, measures, protests, objections and disputes shall automatically terminate on the first anniversary of the signing of this Declaration, provided such lawsuits, complaints, measures, protests, objections and disputes under review by the relevant entities (domestic, regional, and international courts, bodies, committees, authorities, etc.) shall be suspended or stayed within one week from the date of signing this Declaration".[37]

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[28] Alexandra Hofer, 'Sanctioning Qatar: the Finale?' (16 June 2021) <https://www.ejiltalk.org/sanctioning-qatar-the-finale/> accessed 3 March 2022.

[29] ICJ, *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v. United Arab Emirates) Preliminary objections (Judgment of 4 February 2021)* <https://www.icj-cij.org/en/case/172/judgments> accessed 3 March 2022.

[30] WTO, *Saudi Arabia — IPRs* (16 June 2020) WT/DS567/R; WTO, *Saudi Arabia — Measures Relating to Trade in Goods and Services, and Trade-Related Aspects of Intellectual Property Rights* (31 July 2017) WT/DS528/1; WTO, *Bahrain— Measures Relating to Trade in Goods and Services, and Trade-Related Aspects of Intellectual Property Rights* (31 July 2017) WT/ DS527/R; WTO, *United Arab Emirates — Measures Relating to Trade in Goods and Services, and Trade-Related Aspects of Intellectual Property Rights* (31 July 2017) WT/DS526/R; WTO, *Qatar — Certain measures concerning goods from the United Arab Emirates* (28 January 2019) WT/DS576/R.

[31] PCA, *Arbitration pursuant to Article 32 of the Constitution of the Universal Postal Union (The State of Qatar v. The United Arab Emirates)*, PCA Case No. 2020-28 (20 September 2018) <https://pca-cpa.org/en/cases/253/#:~:text=In%20a%20notice%20to%20initiate,Union%20or%20the%20responsibility%20imposed> accessed 3 March 2022.

[32] *See* United Nations Human Rights, Office of the High Commissioner, 'Inter-state communications', <https://www.ohchr.org/EN/HRBodies/CERD/Pages/InterstateCommunications.aspx> accessed 3 March 2022.

[33] Lawrence Hill-Cawthorne (n 14) 781, f.n. 9. ("Each claim is often not merely a different way of framing the broader dispute but a specific legal claim arising from that broader dispute and existing in parallel with other specific legal claims".)

[34] Tullio Treves, 'Litigating global crises. Setting the scene: Legal and political hurdles for State-to-State disputes' [2021] 85 Questions of International Law 5, 9.

[35] ibid.

[36] Qatar Ministry of Foreign Affairs, 'Qatar Welcomes Al-Ula Declaration' (5 January 2021) <https://www.mofa.gov.qa/en/statements/qatar-welcomes-al-ula-declaration> accessed 3 March 2022.

[37] Committee on the Elimination of Racial Discrimination, *Decision of the Ad Hoc Conciliation Commission on the Request for Suspension Submitted by Qatar Concerning the Interstate Communication Qatar v Kingdom of Saudi Arabia*, footnote 1, (15 March 2021).
< https://tbinternet.ohchr.org/Treaties/CERD/Shared%20Documents/1_Global/Decision_9382_E.pdf> accessed 3 March 2022.; See also, Committee on the Elimination of Racial Discrimination, *Decision of the Ad Hoc Conciliation Commission on the Request for*

The flip side of this strategy is that it could make an effective exercise of an international court or tribunal's judicial function difficult as adjudicating a part of a dispute might not solve the whole dispute between States, or might require a court or tribunal to adjudicate on a part of a claim that falls outside its subject matter jurisdiction or expertise.

There are, however, other reasons why the plurality of proceedings can be found in various areas of international law. First, several instruments may apply to the same situation, each with its own dispute resolution mechanism.[38] Second, in international law, particularly under international investment instruments such as bilateral investment treaties, protection is afforded to both direct and indirect investors, so that several entities within a same corporate structure can be protected investors for a single investment. As a result, each entity in the chain may potentially seek to challenge the same measures taken by the host State and claim compensation for the same damage.[39] Lastly, the potential for multiple claims does not only concern proceedings before international courts. Domestic courts are also part of the plurality phenomenon. For instance, in the 'Enrica Lexie' dispute between Italy and India, while Italy had instituted international legal proceedings before ITLOS and UNCLOS Annex VII arbitral tribunal, both Italy and India had also instituted proceedings before their respective national courts.[40] ITLOS, however, had ordered both to "suspend all court proceedings" and "refrain from initiating new ones".[41]

In this context of multiple international courts and tribunals and the ensuing number of proceedings, judicial actors increasingly play a prominent role as "guardians of the fabric of international dispute settlement by ensuring its coherence through coordination."[42] This raises the question of how the a-hierarchical relationship between different courts and tribunals influenced the interactions between them.

Increasing Judicial Interaction Of International Courts And Tribunals Toward Each Other

The rise in multiple courts and tribunals did not negatively impact the interaction of different dispute settlement bodies toward each other. Courts and tribunals have explicitly recognized the plurality of mechanisms in the fabric of international dispute settlement. For example, the ICTY has stated:

> *"[i]nternational law, because it lacks a centralized structure, does not provide for an integrated judicial system operating an orderly division of labour among a number of tribunals [...]".*[43]

In some circumstances, awards and decisions from one judicial mechanism have been the object of a dispute before another forum. This allowed for a space to have a judicial dialogue based on respect for the jurisdiction of the other courts and tribunals. For instance, in 1953, the ICJ in the *Ambatielos* case recognized that the parties to that dispute, Greece and the United Kingdom, had concluded an arbitration agreement according to which they were under an obligation to resort to arbitration. The ICJ noted in that case:

> *"[t]he Court must refrain from pronouncing final judgment upon any question of fact or law falling within 'the merits of the difference' or 'the final validity of the claim'. If the Court were to undertake to decide such questions, it would encroach upon the jurisdiction of the Commission of Arbitration."*[44]

Suspension Submitted by Qatar Concerning the Interstate Communication Qatar v United Arab Emirates (15 March 2021) < https://tbinternet.ohchr.org/Treaties/CERD/Shared%20Documents/1_Global/Decision_9381_E.pdf > accessed 3 March 2022.

[38] PCA, *Atlanto-Scandian Herring Arbitration (The Kingdom of Denmark in Respect of the Faroe Islands v. The European Union) Termination Order, PCA Case no 2013-30* (23 September 2014) < https://pca-cpa.org/en/cases/25/> accessed 3 March 2022.; WTO, *European Union – Measures on Atlanto-Scandian Herring* (21 August 2014) WT/DS469/1.

[39] *Ronald S. Lauder v. Czech Republic, Award* (3 September 2001) <https://www.italaw.com/sites/default/files/case-documents/ita0451.pdf> accessed 3 March 2022; *CME Czech Republic B.V. v. The Czech Republic, Final Award* (14 March 2003) <https://www.italaw.com/sites/default/files/case-documents/ita0180.pdf> accessed 3 March 2022.

[40] PCA, *The 'Enrica Lexie' Incident (Italy v. India) PCA Case no 2015-28, Award* (21 May 2020) 13 < https://pca-cpa.org/en/cases/117/> accessed 3 March 2022.

[41] *"Enrica Lexie" (Italy v. India), Provisional Measures, Order of 24 August 2015* (ITLOS Reports 2015) 141.

[42] Boisson de Chazournes, Plurality in the Fabric of International Courts and Tribunals (n 1) 14.

[43] See *Prosecutor v. Tadić* (Judgment) IT-94-1 (15 July 1999).

[44] *Ambatielos (Greece v. UK) Judgment, 15 June 1939*, (ICJ Reports 1953) 16.

Plurality exists not only across regimes but also within a specialized regime of international law. For instance, the WTO has a variety of options for States to settle their trade disputes.[45] Articles 4 to 20 of the WTO Dispute Settlement Understanding (DSU) set out in great detail the procedures that have been predominantly resorted to in practice, including consultations, the possibility of establishing a panel, and recourse to the Appellate Body before it was defunct.

The parties to a dispute can, rather or at the same time, agree to resort to other means of dispute settlement, of a more diplomatic nature, such as negotiations,[46] good offices, conciliation, and mediation[47], as well as arbitration.[48] In the DSU, arbitration, under Article 25, appears as a stand-alone procedure.[49] Not only it can be seen as a procedure complementing the mainstream dispute settlement procedures but in fact, in recent times Article 25 has helped States to mitigate the consequence of the ongoing WTO Appellate Body crisis. Since the Appellate Body of the WTO is currently defunct and as a result, there is no forum to appeal the reports of the Panels, some WTO Members have referred to Article 25 of the DSU to create an interim solution. On 27 March 2020, these WTO Members agreed on the Multi-party Interim Appeal Arbitration Agreement Pursuant to Article 25 of the DSU (the MPIA). The MPIA allows States to appeal the reports of the Panels "as long as the Appellate Body is not able to hear appeals of panel reports in disputes among them due to an insufficient number of Appellate Body members."[50] In this way, plurality is not only endorsed within the regime but also provide a way to deal with a crisis.

Additionally, other Member States have agreed to resort to appeal in the application of Article 25 of the DSU outside of the MPIA. A notable example is the recent agreement concluded between the US and the EU through which the parties have suspended the two panel proceedings[51] initiated against each other and resorted to arbitration. As per the Agreed Procedures for Article 25 arbitration, the parties have deviated from the DSU to provide more flexibility. While the arbitrators are the panel members of the two suspended proceedings, once the appointment of arbitrators is concluded the arbitration will remain suspended unless one of the parties unilaterally "notifies the arbitrator of the resumption of the arbitration."[52]

This provides an interesting example of plurality within the DSU. It also highlights that the flexibility to settle disputes is a positive and useful characteristic of plurality. It will be interesting to see how the judicial dialogue plays out in case the options, in these different types of situations i.e., the MPIA and others, are effectively resorted to by the parties.

Judicial Dialogue And Legal Tools Available To Manage The Perceived Risks Of 'Plurality'

International courts and tribunals, in a time of global multilateral crisis, are witnessing signs of a backlash. A losing State dissatisfied with the ruling of a court or tribunal could refrain from engaging with the dispute settlement mechanisms altogether. The recent WTO Appellate Body crisis squarely illuminates the threat. It is thus important for international courts and tribunals to steer clear from the political resistance and campaigns that are launched after they exercise their judicial function in a particular way. Plurality can also expose the vulnerability of international courts and tribunals, since risks exist with the multiplicity of international legal

[45] See Laurence Boisson de Chazournes, 'Arbitration at the WTO: A Terra Incognita to Be Further Explored' in Steve Charnovitz, Debra P. Steger and Peter Van den Bossche, Universiteit Maastricht, Netherlands (eds), *Law in the Service of Human Dignity: Essays in Honour of Florentino Feliciano* (CUP 2005).
[46] DSU (n 3) art 3.7.
[47] ibid, art 5.6.
[48] ibid, art 25.1.
[49] Boisson de Chazournes, Arbitration at the WTO (n 44).
[50] WTO, 'Multi-party Interim Appeal Arbitration Agreement Pursuant to Article 25 of the DSU' (30 April 2020) JOB/DSB/1/Add.12 <https://trade.ec.europa.eu/doclib/docs/2020/april/tradoc_158731.pdf> accessed 3 March 2022.
[51] WTO, *EU — Additional Duties* (16 July 2018) WT/DS559/1; WTO, *US — Steel and Aluminium Products (EU)* (1 June 2018) WT/DS548/1.
[52] EU — Additional Duties (n 50) WT/DS559/7 [3]; US — Steel and Aluminium Products (EU) (n 50) WT/DS548/19 [3]; See also Caroline Glockle 'Guest Post: Agreed Procedures under Art. 25 DSU in the US and EU Steel and Aluminum Disputes' (26 January 2022) <https://ielp.worldtradelaw.net/2022/01/guest-post-agreed-procedures-under-art-25-dsu-in-the-us-and-eu-steel-and-aluminum-disputes.html> accessed 3 March 2022.

proceedings.[53] It can lead to contradictory interpretations or decisions, or give rise to issues of double recovery. It also has a cost that can be misused by the parties to the dispute. At times, the plurality can affect the very integrity of one of the proceedings. This is why it is important to assess the tools that are available to courts and tribunals to avoid these risks and any existential threats that might follow.

Judicial actors have pursued coherence in the system through various tools of communication, such as cross-referencing of awards and decisions or other forms of judicial dialogue.[54] In a world of plural dispute settlement, judges have come to recognise their role in achieving unity of law and dispute settlement through a judicial dialogue or interaction. As Judge Greenwood said in *Ahmadou Sadio Diallo* case between Guinea and Congo:

> *"[i]nternational law is not a series of fragmented specialist and self-contained bodies of law, … it is a single, unified system of law and each international court can, and should, draw on the jurisprudence of other courts and tribunals.*[55]

Judicial dialogue not only helps in the development of substantive aspects of international law but also assist in cross-fertilization of specialised regimes in international law. It also offers judges solutions and valuable resources to both new and old legal problems that they may face during adjudication. For instance, in the *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)*, the ICJ while determining whether the "salaries of government officials dealing with a situation resulting from an internationally wrongful act are compensable" referred to the practice of the United Nations Compensation Commission and the ITLOS.[56] Similarly, in the recent *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)* the Court had a challenging task of determining reparations in the context of armed conflict. The Court considered it "helpful to refer to the practice of other international bodies" such as the Eritrea-Ethiopia Claims Commission (EECC) and the ICC. The EECC had acknowledged the difficulty that surrounds the "questions of proof in its examination of compensation claims for violations of obligations under the jus in bello and jus ad bellum committed in the context of an international armed conflict."[57] The ICC, on the other hand, in the *Katanga* case had ordered reparations in the context of conflict between DRC and Uganda. The ICC had observed that "the Applicants were not always in a position to furnish documentary evidence in support of all of the harm alleged, given the circumstances in the DRC".[58] This *inter alia* allowed the Court to introduce some flexibility in the standard of proof in the reparations phase of the case.[59] This type of judicial dialogue, in form of cross-fertilization, has been conducted by other courts too.[60] It helps international courts and tribunals to not only bolster its decision and reasoning but also provide more legitimacy to their decisions.[61] As the Court noted in the *Diallo* case:

> *"Although the Court is in no way obliged, in the exercise of its judicial functions, to model its own interpretation of the Covenant on that of the Committee, it believes that it should ascribe great weight to the interpretation adopted by this independent body that was established specifically to supervise the application of that treaty. The point here is to achieve the necessary clarity and the essential consistency of international law, as well as legal security, to which both the individuals with guaranteed rights and the States obliged to comply with treaty obligations are entitled."*[62]

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[53] Boisson de Chazournes, The proliferation of courts and tribunals: navigating multiple proceedings (n 1) 463.
[54] Boisson de Chazournes, Plurality in the Fabric of International Courts and Tribunals (n 1) 36.
[55] *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo), Compensation, Judgment*, (ICJ Reports 2012) 8, Declaration of Judge Greenwood.
[56] *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua), Compensation, Judgment* (ICJ Reports 2018) 101.
[57] ICJ, *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda), Compensation, Judgment* (9 February 2022) <https://www.icj-cij.org/en/case/116/judgments> accessed 3 March 2022 [123].
[58] Ibid.
[59] Ibid 124.
[60] *Delimitation of the maritime boundary in the Bay of Bengal (Bangladesh/Myanmar), Judgment* (ITLOS Reports 2012) 233
[61] Boisson de Chazournes, Plurality in the Fabric of International Courts and Tribunals (n 1) 41-42.
[62] *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo), Compensation, Judgment* (ICJ Reports 2012) 66

Procedural law is another source that offers tools judges can resort to for managing and coordinating multiple proceedings. Some of these tools come into play at the start of the proceedings. They are provided by the text of the constitutive instruments containing dispute settlement mechanisms. These tools require choosing between the different dispute resolution mechanisms proposed. Once the choice has been made, resorting to the other means is usually not possible.[63]

Whenever proceedings are initiated by a party, the court or tribunal has the possibility to establish whether such a step is taken in good faith by the parties or it simply serves as a pretext to evade obligations and frustrate the rights of the other party. A good faith requirement can provide a means of sanctioning any party that abuses the plurality of options at its disposal.[64] The principle of good faith can take multiple forms such as the doctrine of estoppel, abuse of rights, or a possibility for a tribunal to dismiss claims that are frivolous or vexatious.[65] A frivolous claim can be defined as one "without legal basis or value", "not serious" or "without reasonable cause".[66] The constitutive instrument of a court or tribunal could include such a possibility. For example, Article 8.32 of the EU-Canada Comprehensive Economic and Trade Agreement (CETA) permits the Tribunal to dismiss at the outset a claim that is "manifestly without legal merit".[67] In the absence of such a possibility one may consider that the court or a tribunal may have a "right to take similar action, on similar grounds, as being part of the inherent powers or jurisdiction of the Court as an international tribunal".[68]

Amongst procedural tools, the election clause, also known by its Latin nickname of *electa una via*, is a legal tool aimed at assisting in ordering, *ab initio*, the multiplicity of proceedings. Its purpose is to bar multiple litigations in the same legal order. In practice, the claimant is offered a right to choose between different fora of the same jurisdictional system. Once made, the choice is irrevocable.[69] An example of an *electa una via* rule can be found in the trade area, in Article 31.3 of the USMCA.[70]

Another set of tools can be resorted to after the interconnected legal proceedings are instituted. They are available for courts and tribunals to coordinate multiple proceedings and ensure that the same case is not litigated twice. *Res judicata* and *lis pendens* count among them. Both these tools have the effect of precluding an international court and tribunal from acting.[71]

Res Judicata occurs when a claim has already been litigated. As a result, it cannot be reopened if the subsequent proceedings concern the same object, legal grounds, and parties.[72] As the ICJ noted in its decision in the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*:

> *"[t]he underlying character and purposes of the principle [of res judicata] [is] the stability of legal relations requires that litigation come to an end… [and] … it is in the interest of each party that an issue which has already been adjudicated in favour of that party be not argued again. Article 60 of the Statute articulates this finality of judgments. Depriving a litigant of the benefit of a judgment it has already*

[63] Boisson de Chazournes, The proliferation of courts and tribunals: navigating multiple proceedings (n 1) 452.
[64] ibid; *See Transglobal Green Energy llc and Transglobal Green Panama S.A. v. Republic of Panama, ICSID Case No arb/13/28, Award* (2 June 2016) 118 <https://www.italaw.com/sites/default/files/case-documents/italaw7336.pdf> accessed 3 March 2020
[65] Boisson de Chazournes, The proliferation of courts and tribunals: navigating multiple proceedings (n 1) 456.
[66] BA Garner (ed.) *Black's Law Dictionary*, (8th edn, Thomson West 2004) 692.
[67] See European Commission, 'Comprehensive and Economic Trade Agreement' (signed 30 October 2016). < https://ec.europa.eu/trade/policy/in-focus/ceta/ceta-chapter-by-chapter/> accessed 3 March 2022, ch VIII, art 8.32.5. ("The respondent may, no later than 30 days after the constitution of the division of the Tribunal, and in any event before its first session, file an objection that a claim is manifestly without legal merit.").
[68] *Northern Cameroon (Cameroon v UK), Preliminary Objections, Separate Opinion of Judge Fitzmaurice* (ICJ Reports 1963) 106-107
[69] Boisson de Chazournes, The proliferation of courts and tribunals: navigating multiple proceedings (n 1) 454.
[70] See Agreement between the United States of America, the United Mexican States, and Canada (signed 30 November 2018, entered into force 1 July 2020) <https://ustr.gov/trade-agreements/free-trade-agreements/united-states-mexico-canada-agreement/agreement-between> accessed 3 March 2022, Chapter Thirty-one, Dispute Settlement, art 31.3: Choice of Forum; See also North American Free Trade Agreement (signed 17 December 1992, entered into force 1 January 1994) 32 I.L.M. 289 and 605, Chapter Twenty, art 2005.
[71] Boisson de Chazournes, The proliferation of courts and tribunals: navigating multiple proceedings (n 1) 453.
[72] *Interpretation of Judgments Nos. 7& 8 Concerning the Case of the Factory at Chorzow, Dissenting Opinion of Judge Anzilotti* [1927] PCIJ Series A 13, 23.

> *obtained must in general be seen as a breach of the principles governing the legal settlement of disputes."*[73]

While there are some cases where the doctrine has been applied, its non-application generally prevails[74] as the triple identity test that is usually not met.[75]

The second situation in which a tribunal may be precluded from acting is where the same dispute is pending before another court. This is a situation arising out of *lis pendens*. The doctrine of *lis pendens* requires the combination of three elements – first, the parties must be the same; second, the cause of action should be identical; third and the last, the object of the dispute must coincide.[76]

The *lis pendens* rule suffers from a scarce and rather chaotic application. Moreover, its strict application[77] calls into question the appropriateness and efficacy of the triple identity test, which like *res judicata* is difficult to meet. The criteria of the identity of the parties and the cause of action should be approached flexibly to improve the use of this rule.[78]

What happens if the principles of good faith, *res judicata,* or *lis pendens* fail to regulate the situation of multiple proceedings arising out of a dispute between the parties? In such a situation, the focus should be on active cooperation between various international courts and tribunals. This call for active cooperation is not mandatory and is only discretionary. It depends on the awareness of judicial bodies in the sense of how they locate themselves in the jurisdictional fabric and if they require coordinated action. In this respect, the application of considerations of comity is a striking example, which comes into play "when it appears that proceedings exist before another court and that it may have an impact on the resolution of the claim"[79]. As Judge Rüdiger Wolfrum, former President and Judge of the International Tribunal for the Law of the Sea (ITLOS) stressed:

> *"[j]udicial comity among courts and tribunals should encourage them to cooperate and to act rigorously within their own jurisdictional powers."*[80]

Comity, however, is a discretionary power of the "first seized court, and cannot prevent every possible jurisdictional clash."[81]

A principle similar to comity which deserves to be mentioned at this juncture is the principle of *connexité* (related actions). This principle applies when there is a risk of a related question being decided in a contradictory manner by different judicial fora.[82] The intention behind this principle is to avoid decisions that could be irreconcilable.[83] As a result, the application of this principle will lead to suspension of the proceedings in one of the two courts or

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[73] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment* (ICJ Reports 2007) 116.

[74] *Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 Nautical Miles from the Nicaraguan Coast (Nicaragua v. Colombia), Preliminary Objections, Judgment* (ICJ Reports 2016) 58.

[75] CME v. Czech Republic (n 39) 432–436.

[76] Boisson de Chazournes, The proliferation of courts and tribunals: navigating multiple proceedings (n 1) 460.

[77] Lauder v. Czech Republic (n 39) [171–175]; CME v. Czech Republic (n 39) 409-412; See *UNCLOS Annex VII Tribunal, Southern Bluefin Tuna Case between Australia and Japan and between New Zealand and Japan, Award on Jurisdiction and Admissibility, Decision of 4 August 2000*, XXIII RIAA 1 [52 & 59].

[78] Boisson de Chazournes, The proliferation of courts and tribunals: navigating multiple proceedings (n 1) 461.

[79] ibid 462.

[80] ITLOS, 'Statement by H.E. Judge Rüdiger Wolfrum, President of the International Tribunal for the Law of the Sea, to the Informal Meeting of Legal Advisers of Ministries of Foreign Affairs' (29 October 2007) 9 <https://www.itlos.org/fileadmin/itlos/documents/statements_of_president/wolfrum/legal_advisors_291007_eng.pdf> accessed 3 March 2022; See *MOX Plant Case (Ireland v. United Kingdom), PCA Case no. 2002-01, Order no. 3 Suspension* (24 June 2003) 28 <https://pca-cpa.org/en/cases/100/> accessed 3 March 2022.

[81] Mohamed Bennouna, 'How to Cope with the Proliferation of International Courts and Coordinate Their Action' in The Late Antonio Cassese (ed), *Realizing Utopia: The Future of International Law* (OUP 2012) 290.

[82] Boisson de Chazournes, The proliferation of courts and tribunals: navigating multiple proceedings (n 1) 463

[83] ibid

tribunals until the decision is rendered in the other forum.[84] Consolidation of proceedings is another device available when the claims are linked with each other. It results in the combination of the different proceedings, or parts of the proceedings, into one single set of proceedings. Cooperation among courts can take a more informal dimension. For example, in the case of the *Bay of Bengal Maritime Boundary* Arbitration between Bangladesh and India, the Annex VII arbitral tribunal granted extensions in the filing of written pleadings to allow the parties to consider the ITLOS judgment also concerning the Bay of Bengal between Bangladesh and Myanmar.[85]

Concluding Remarks

With the proliferation of international courts and tribunals, the plurality of proceedings was and will continue to be inevitable. The legal architecture of the international dispute settlement is conducive for the multiplication of proceedings. To coordinate multiple proceedings, judicial actors have interpreted and devised various procedural law tools. Moreover, judicial dialogue, in the form of cross-referencing in awards and decisions, or through principles of comity or *connexité* is also a way to pursue coherence and coordination of multiple proceedings. But we need another set of discourse as well, one that involves other architects of the dispute settlement system – States and litigants. They play an important part in the management of multiple proceedings. States, in particular, can play a useful role in not only organising and regulating "ex-ante (during the drafting of a treaty)" the relationship between multiple courts and tribunals but can also undertake "ex-post evaluations" in the event of conflicting decisions or interpretations. Litigants, including non-state actors such as investors, can also contribute to the coherence. Some of the risks that are associated with plurality arise only when parties have an effective opportunity to initiate proceedings before different courts and tribunals.[86] As a result, it puts all concerned actors in a position to contribute towards the coordination of a plurality of proceedings. International courts and tribunals have taken proactive measures to coordinate the multiple proceedings and ensure coherence in the dispute settlement system. It is, however, also for the parties to think about how to preserve the benefits and mitigate the risks arising from the plurality of courts and proceedings.

CHAPTER XVII: THE PURSUIT OF DOMESTIC REMEDIES FOR CLAIMS IN INTERNATIONAL LAW[87]

Vasuda Sinha

Abstract

This paper examines the role of domestic courts as potential fora for the resolution of international law disputes. It starts with a review the 2020 decision of the Supreme Court of Canada in Nevsun Resources v Araya, in which the Court cracked open the door to plaintiffs pursuing civil remedies against a parent company for alleged violations of human rights and other international law arising from the conduct of a subsidiary abroad. It then

[84] See *In the Matter of a Conciliation before a Conciliation Commission Constituted under Annex V to the 1982 United Nations Convention on the Law of the Sea between the Democratic Republic of Timor-Leste and the Commonwealth of Australia, PCA Case No 2016-10, Decision on Australia's Objections to Competence* (19 September 2016) 88-89 <https://pcacases. com/web/sendAttach/1921> accessed 3 March 2022

[85] *Bay of Bengal Maritime Boundary Arbitration (Bangladesh v. India), PCA Case no. 2010–16, Award* (7 July 2014) 27-36 <https://pcacases.com/web/sendAttach/383>

[86] Boisson de Chazournes, Plurality in the Fabric of International Courts and Tribunals: The Threads of a Managerial Approach: A Rejoinder – Fears and Anxieties (n 1) 1277.

[87] Vasuda Sinha. The views expressed herein are strictly those of the author and do not reflect the views of Freshfields Bruckhaus Deringer LLP or any of its affiliates.
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examines the Nevsun case from a comparative perspective, focussing on where it fits analytically in the continuum of litigation under the Alien Tort Statute in the U.S. and recent developments in litigation in the U.K. and Netherlands against parent companies for the conduct of their subsidiaries where human rights and international law feature to varying degrees in the claims alleged. It concludes by noting that while litigation in the space is likely to increase hand-in-hand with the focus on ESG issues generally, at the moment there is no consistency in how such litigation is being run in and addressed by domestic courts. This divergence across jurisdictions creates a host of challenges and opportunities for disputes at the intersection of corporate liability and international legal norms.

Introduction

The pursuit of private law remedies for claims raising issues of human rights or international law is complex and ever-evolving. In the particular case of claims alleging the liability of a parent company for the conduct of a foreign subsidiary or joint venture, there is no uniformity in the approach taken by the courts in jurisdictions that have seen such litigation. Courts diverge on a range of questions, including regarding the relationship between international and domestic law, which corporate defendants (if any at all) may be properly party to such litigation, the import and effect of State involvement in the underlying facts and the correct forum for such litigation. In 2020, in its decision in *Nevsun Resources Ltd. v Araya*,[88] the Canadian Supreme Court distinguished itself in relation to these questions and cracked open the door to plaintiffs pursuing civil remedies against a parent company for alleged violations of human rights and other international law arising from the conduct of a subsidiary abroad. The decision was complex and controversial. It had the support of a narrow majority (five to four) and was accompanied by two separate dissenting opinions.[89] It also reflected analysis that was international in its scope – looking to understand where the case fit in the global context and the treatment of key legal issues in other jurisdictions – but ultimately domestic in its focus, concerned with pronouncing only on the relevant state of Canadian law and the proper role of Canadian courts in the development of tort law. Although the decision touched on a number of interesting issues, this paper focuses on the Canadian Supreme Court's treatment of the specific issues arising from the plaintiffs' tort claims based on human rights and international law violations, and how it compares with the approaches of other courts in similar cases.

The Nevsun case

British Columbia-incorporated Nevsun Resources Ltd. (**Nevsun**) concluded a joint-venture (**Bisha Mining Share Company**, or **BMSC**) with State-owned Eritrean National Mining Company, to develop a gold, copper and zinc mine located in Bisha, Eritrea. Nevsun indirectly owned 60% of BMSC, with the remaining 40% being owned by the Eritrea National Mining Corporation.[90] To manage the construction of the mine, BMSC hired a South African contractor (**SENET**), which in turn entered into subcontracts with companies owned by the Eritrean military and Eritrea's only political party respectively.[91] Both Eritrean subcontractors used local workers from the national military conscription program. These workers were allegedly forced to provide labour at low wages in "*harsh and dangerous conditions*" for an indefinite tenure[92] and were confined to camps and not allowed to leave unless authorised to do so. They also claimed to have suffered severe punishments while working at the mine.[93] These allegations lay at the heart of the claim against Nevsun.

Three of the conscripted miners escaped the mine and subsequently introduced class action proceedings in British Columbia against Nevsun. The plaintiffs pleaded domestic torts including conversion, battery, false

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88 *Nevsun Resources Ltd. v Araya, et al* [2020] SCC 5. The case settled before it was determined on its merits. The terms of the settlement are confidential. *See* <https://www.theglobeandmail.com/business/article-canadian-miner-nevsun-resources-settles-with-african-workers-over-case/> accessed 7 March 2022

89 The majority decision was authored by Justice Abella; Justices Brown and Rowe dissented in part and Justice Côté (with Moldaver J. concurring) agreed with their partial dissent and authored a further dissent.

90 *Nevsun Resources Ltd. v Araya, et al*. (n 1) 7.

91 ibid 8.

92 ibid 11.

93 ibid 11-12.

imprisonment, conspiracy and negligence, in addition to seeking damages for violations of customary international law including prohibitions against forced labour, slavery, cruel, inhuman or degrading treatment, and crimes against humanity.[94]

Nevsun filed a series of motions seeking early dismissal or a stay of the proceedings based on a variety of including (i) the *forum non conveniens* principle; (ii) the *Act of State* doctrine; and (iii) that violations of customary international law did not provide a cause of action in Canadian common law.[95] The preliminary motions to dismiss or stay were rejected by the court of first instance (**Chambers Judge**)[96] and the British Columbia Court of Appeal (**BCCA**).[97]

In a motion to strike, Nevsun argued that the plaintiffs did not have a private cause of action because Canadian law did not provide a tort remedy for the alleged breaches of customary international law (**CIL**)[98] and that CIL-based claims were unnecessary in any event given the availability of analogous torts under domestic law, such as battery and false imprisonment (which the plaintiffs had also pleaded).[99] The context in which Nevsun advanced its argument – a motion to strike – was key to the decisions of both British Columbia courts. Citing Justice Wilson in the Supreme Court of Canada case *Hunt v Carey Canada Inc*., the Chambers Judge considered that "[…] *where a statement of claim reveals a difficult and important point of law, it may well be critical that the action be allowed to proceed.*"[100] He further noted that at such an early stage of the proceedings "*the inquiry is limited to whether Nevsun has established that the customary international law claims have no reasonable chance of success and are bound to fail.*"[101] While acknowledging that the plaintiffs would face obstacles in pursuing such claims, the BCCA approved this reasoning, ruling that it did not *"believe it can be said the plaintiffs' claims are 'bound to fail'.*"[102] The BCCA also identified the case as an opportunity to take an "*incremental first step*" in the development of the law governing private law remedies for breaches of international law.[103]

It is against this background that Nevsun appealed to the Canadian Supreme Court the BCCA's decision as it related to, *inter alia*, the CIL-based claims. The result was a split decision – a five to four majority led by Justice Abella upheld the BCCA ruling, with two separate dissenting opinions – reflecting the uncertainty regarding the legal issues implicated by the plaintiffs' case.[104]

On the specific question of violations of CIL giving rise to tort claims against Nevsun under Canadian law, the majority examined the issue through two questions: (i) first, whether the claims based on prohibitions against forced labour, slavery, cruel, inhuman or degrading treatment, and crimes against humanity can be ground claims for damages under Canadian law; (ii) second, whether CIL norms may bind corporate entities. Here, the majority was careful to note the procedural context, namely Nevsun's motion to strike. At this preliminary stage, the Court's task was limited to determining whether it was "*plain and obvious*" that the plaintiffs' claims would fail, rather than determining whether and how CIL-based torts definitively formed a part of Canadian law.[105]

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94 ibid 4.

95 ibid 16.

96 *Araya v Nevsun Resources Ltd.* [2016] BCSC 1856.

97 *Araya v Nevsun Resources Ltd*. [2017] BCCA 401.

98 *Nevsun Resources Ltd. v Araya, et al*. (n 1) 17.

99 ibid 177-178; *Araya v Nevsun Resources Ltd*. (n 9) 423.

100 *Araya v Nevsun Resources Ltd*. (n 9) 476.

101 ibid 481. The Chambers Judge subsequently concluded "*Nevsun has not established that the inclusion of the CIL claims in the NOCC constitutes a radical defect, has no reasonable chance of success and is bound to fail*" at p 484.

102 *Nevsun Resources Ltd. v Araya* (n 10) 197.

103 ibid 196.

104 *Nevsun Resources Ltd. v Araya* (n 1) 134-266 (Brown and Rowe JJ.) 267-313 (Côté J. with Moldaver J. concurring).

105 ibid 64.

With this in mind, the majority first acknowledged that the claims were all for violations of *jus cogens*, and thus part of CIL.[106] The Court then reviewed the process according to which CIL norms become part of Canadian common law. According to the "*doctrine of adoption*", customary international law[107] is automatically adopted into Canadian domestic law in the absence of conflicting legislation.[108] Finding no such legislation, Justice Abella considered that prohibitions against crimes against humanity, slavery, forced labour, and cruel, inhuman and degrading treatment should be respected as the law of Canada, and be treated accordingly.[109]

The majority then addressed Nevsun's argument that even accepting the existence of such customary international law norms in Canadian law, they would not apply to corporations. While it acknowledged that international law norms pertained to interstate relations in their origins, the majority also noted the evolution of such norms since the mid-1900s.[110] According to Justice Abella, with the development of human rights law, international law has shifted towards a more human-centric approach such that international human rights obligations cannot be limited to only states.[111] She observed that "[t]*he context in which international human rights norms must be interpreted and applied today is one in which such norms are routinely applied to private actors*."[112] In this light, and although it was left to the trial judge, the task to determine whether Nevsun *could* and should be held liable for the breach of CIL norms, the majority nonetheless considered that it was not "*plain and obvious*" that corporations today "*enjoy a blanket exclusion under customary international law from direct liability or indirect liability for their involvement the violations of 'obligatory, definable, and universal norms of international law'*". [113]

Finally, the majority also addressed Nevsun's argument that existing domestic torts pleaded by the plaintiffs would be sufficient to address the plaintiffs' claims or whether recognising "*the possibility of a remedy*" for violations of CIL that had been adopted into Canadian law was necessary.[114] In this regard it considered that conventional domestic torts and the human rights breaches alleged by the plaintiffs were inherently different, and that the former would fail to describe the specific public nature of those norms and to adequately address the heinous nature of the harm alleged to be caused.[115]

As noted above, the majority's willingness to extend the scope of CIL to corporations and to accept the potential development of domestic remedies for the breach thereof was controversial. Justices Brown and Rowe dissented on these points, concluding that it was "*plain and obvious*" that corporations are excluded from direct liability under customary international law.[116] The dissent centred on two main arguments: the legal import of customary international law and the justification for accepting new torts.

On the first point Justices Brown and Rowe disputed that CIL (even *jus cogens*) could convert automatically into civil liability rules.[117] Citing Professor Crawford, the dissent emphasised that corporate liability for human rights violations had not been recognised under customary international law.[118]

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[106] ibid 100-103.

[107] Those that satisfy the twin requirements of general practice and *opinio juris*; *see Nevsun Resources Ltd. v Araya* (n 1) 94.

[108] *Nevsun Resources Ltd. v Araya* (n 1) 90, citing *R. v Hape* [2007] SCC 26; [2007] 2 S.C.R. 292 [39].

[109] ibid 95, [100-103, 114].

[110] ibid 107.

[111] ibid 110.

[112] ibid 111, citing Beth Stephens, 'The Amorality of Profit: Transnational Corporations and Human Rights' [2002] 20 Berkeley J Int'l L 45, 73.

[113] ibid 113.

[114] ibid 117-118.

[115] ibid 125.

[116] ibid 189 (Brown and Rowe JJ.) [267] (Côté J. and Moldaver JJ. concurring).

[117] ibid 192-213 (Brown and Rowe JJ.).

[118] ibid 190 (Brown and Rowe JJ.), citing James Crawford, *Brownlie's Principles of Public International Law* (9th edn, Oxford University Press 2019) 630.

Second, Justices Brown and Rowe strongly disagreed that there was a need to recognise new nominate torts derived from CIL as pleaded by the plaintiffs.[119] In this regard, they found that the "*proposed tort of cruel, inhuman or degrading treatment fails the necessity test, since any conduct captured by this tort would also be captured by the extant torts of battery or intentional infliction of emotional distress*", and that the "*proposed tort of 'crimes against humanity* […] *is too multifarious a category to be the proper subject of a nominate tort.*"[120] As regards the slavery and forced labour claims, Justices Brown and Rowe accepted that there may be a need to create related torts, but that the *Nevsun* case was not the appropriate opportunity to do so.[121] Keeping in mind the "motion to strike" context, they concluded that even if such torts were created, the plaintiffs' claims on their basis would be doomed to fail. Here the analysis of Justices Row and Brown was driven by the foreign location of the impugned conduct. That is, in their view, a trial court would ultimately either find that Eritrean, rather than Canadian, tort law should apply at all (making new nominate torts in Canadian law moot) or would be faced with the task of "*developing Canadian law based on conduct that occurred in a foreign state*",[122] which lay outside the proper purview of the courts. According to the dissent, the majority decision would result in the courts effecting more than incremental change to tort law, which would be inappropriate.

The dissents notwithstanding, the majority opinion in *Nevsun* implied a judicial willingness in Canada to consider the development of domestic remedies for the breach of CIL, including as against corporations. In doing so, the Canadian Supreme Court distinguished itself, as evidenced by a brief discussion of some similar cases litigated in other jurisdictions.

A Comparative Approach To Nevsun

Litigating breaches of international law in the U.S.

For years, the United States (US) was a privileged venue for plaintiffs alleging breaches of human rights law overseas.[123] The Alien Tort Statute (**ATS**)[124] granted U.S. district courts original jurisdiction over "*any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.*"[125] In providing U.S. jurisdiction over torts committed in violation of CIL or U.S. treaties,[126] the ATS ostensibly linked public international law to tort law for the purposes of subject matter jurisdiction.[127] Absent analogous laws in other go-to common law jurisdictions such as England and Wales, Canada, or Australia, the U.S. became a preferred forum for alleged victims of transnational human rights abuses to pursue private law remedies.[128]

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[119] ibid 214-223 (Brown and Rowe JJ.).

[120] ibid 245-246 (Brown and Rowe JJ.).

[121] ibid 247 (Brown and Rowe JJ.).

[122] ibid 253-254 (Brown and Rowe JJ.).

[123] *See eg*, Beth Stephens, 'The Curious History of the Alien Tort Statute' [2014] 89 Notre Dame L Rev 1467; Hassan M. Ahmad, 'Transnational Torts against Private Corporations: A Functional Theory for the Application of Customary International Law Post-Nevsun' [2021] 54 UBC L Rev 299; Rachel Chambers, 'Parent Company Direct Liability for Overseas Human Rights Violations: Lessons from the U.K. Supreme Court' [2021] 42 U Pa J Int'l L 519.

[124] The Alien Tort Statute (also known as the Alien Tort Claims Act,) [2006] 28 U.S.C. 1350. Congress enacted the ATS in 1789, as part of the Judiciary Act that established the new federal court system. Judiciary Act 1789, ch. 20, § 9, 1 Stat 73, 76-77 (codified as amended at [2006] 28 U.S.C. 1350).

[125] Alien Tort Statute, [2006] 28 U.S.C. 1350.

[126] ibid. The ATS states in full: "*The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.*"

[127] Rachel Chambers, 'Parent Company Direct Liability for Overseas Human Rights Violations: Lessons from the U.K. Supreme Court' [2021] 42 U Pa J Int'l L 519, 535. The ATS has been described as a provision that is "*unlike any other in American law*" and "*unknown to any other legal system in the world.*" *See Kiobel v Royal Dutch Petroleum Co*. 621 F 3d 111, 115 (2d Cir 2010) *aff'd on other grounds*, [2013] 569 U.S. 108.

[128] Rachel Chambers, 'Parent Company Direct Liability for Overseas Human Rights Violations: Lessons from the U.K. Supreme Court' [2021] 42 U Pa J Int'l L 519, 527.

This development started in the *Filártiga v Peña-Irala* case.[129] The U.S. Court of Appeals for the Second Circuit allowed Paraguayan plaintiffs (**the Filártigas**) to sue Americo Norberto Peña-Irala, a former Paraguayan police officer. The Filártigas alleged that Peña-Irala wrongfully caused the death of the plaintiffs' son by the use of torture. The plaintiffs contended that torture was a clear violation of the law of nations, providing the U.S. courts with jurisdiction under the ATS. In a landmark ruling, the Court agreed. It stated that "*we believe it is sufficient here to construe the Alien Tort Statute, not as granting new rights to aliens, but simply as opening the federal courts for adjudication of the rights already recognized by international law*" because "*law of nations forms an integral part of the common law*".[130] That is, the Appeal Court's view was that norms of CIL, such as a human rights-based prohibition on torture, "*the nations have made it their business, both through international accords and unilateral action* [citation omitted] *to be concerned with domestic human rights violations of this magnitude*", such that "*federal jurisdiction may properly be exercised over the Filártigas' claim*".[131] At the same time, the Court was careful to delineate between its analysis for jurisdiction under the ATS and the substantive law applicable to the dispute. To that end – as did Justices Brown and Rowe in *Nevsun* – it noted the possibility of the District Court deciding that local (Paraguayan) law should apply to the substance of the dispute, in which case U.S. courts would "*not have occasion to consider what law would govern a suit under the Alien Tort Statute where the challenged conduct is actionable under the law of the forum and the law of nations, but not the law of the jurisdiction in which the tort occurred.*"[132] One of the effects of the decision was to trigger a number of claims against both state and non-state actors for alleged violations of international human rights law in various U.S. courts.[133]

One case that arose in the long shadow of *Filártiga v Peña-Irala* was *Doe I v Unocal Corp*.[134] In *Unocal*, villagers claimed to have suffered forced labour, extrajudicial killings, torture, and rape at the hands of Myanmar's military in the course of the construction of a gas pipeline. Fourteen villagers sued, *inter alia*, the California-based parent that held an interest in the company operating the pipeline for complicity in the subject conduct.[135] The plaintiffs alleged that Unocal conspired to cause human rights violations including coerced labour, the forced removal of villagers, murder, rape, and other torture giving rise to ATS liability.[136] Unocal disputed the legal merits of the claim, including by arguing that the U.S. courts lacked subject matter jurisdiction. On appeal, the Ninth Circuit Court of Appeals confirmed the District Court's positive finding regarding jurisdiction. It held that the ATS conferred jurisdiction in respect of claims against corporations where the impugned conduct was alleged to be conducted by private and state actors working in concert with one another.[137] It went even further, to state that "*private actors may be liable for violations of international law even absent state action*" in certain circumstances.[138] Following *Unocal*, numerous ATS-based claims were filed by foreign plaintiffs against U.S.-based corporations for extraterritorial violations of international human rights law.[139]

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[129] *Filártiga v Pena-Irala*, 630 F.2d 876 (2d Cir 1980).

[130] ibid 37.

[131] ibid 50.

[132] ibid 51.

[133] *See eg*, Hassan M. Ahmad, 'Transnational Torts against Private Corporations: A Functional Theory for the Application of Customary International Law Post-Nevsun' [2021] 54 UBC L Rev 299, 319; Jonathan Hafetz, 'Holding Corporations Accountable: Corporate Liability for Human Rights Violations' [2013] 13 Insights on L & Soc'y 27, 28; Rachel Chambers, 'Parent Company Direct Liability for Overseas Human Rights Violations: Lessons from the U.K. Supreme Court' [2021] 42 U Pa J Int'l L 519, 535.

[134] *Doe I v Unocal Corp*. 395 F.3d 932, 962 (9th Cir 2002) *vacated* 395 F.3d 978 (9th Cir 2003).

[135] ibid 33.

[136] The plaintiffs sought damages for more than seventeen claims including forced labor; crimes against humanity; torture; violence against women; arbitrary arrest and detention; cruel, inhuman or degrading treatment; wrongful death; battery; false imprisonment; assault; intentional and/or negligent infliction of emotional distress; negligence per se; negligent hiring; conversion; negligent supervision; and violation of California Business & Professions Code § 17200; *see eg*, Jennifer Lynn Peters, 'The Unocal Litigation' [1999] 10 Colo J Int'l Envtl L & Pol'y 199, 210; Mark D. Kielsgard, 'Unocal and the Demise of Corporate Neutrality' [2005] 36 Cal W Int'l LJ 185, 189.

[137] *Doe I v Unocal Corp*. (n 51) 39-107.

[138] *Doe I v Unocal Corp*. (n 51) 49, 69.

[139] Hassan M. Ahmad, 'Transnational Torts against Private Corporations: A Functional Theory for the Application of Customary International Law Post-Nevsun' [2021] 54 UBC L Rev 299, 319; *see also* Curtis A. Bradley, 'Customary International Law and Private Rights of Action' [2000] 1 Chi J Int'l L 421, 426.

That is, almost twenty years before the *Nevsun* decision, the U.S. courts were considering the possibility of interactions between international law and civil remedies against corporations. However, the *Unocal* decision was neither universally endorsed nor followed. The decision sparked intense academic debate as to whether corporations could or should be held accountable for breaches of CIL.[140] Moreover, less than two years after it was issued, the U.S. Supreme Court's ruling in *Sosa v Alvarez Machain* marked a first shift towards a stricter understanding of the ATS.[141] The opinion penned by Justice Souter found that only a "*narrow set of violations of the law of nations*", can give rise to jurisdiction under the ATS, insofar as the underlying conduct gave rise to torts recognised by domestic law. [142] It further stated that "*federal courts should not recognize private claims under general common law for violations of any international law norm with less definite content and acceptance among civilized nations than the historical paradigms familiar*" when the ATS was enacted.[143] That is, the opinion was clear in its view that the ATS neither created nor permitted the creation of any international law-based causes of action through the common law.[144]

A further narrowing of the ATS was introduced by the 2013 *Kiobel v Royal Dutch Petroleum* Supreme Court decision.[145] That case involved twelve Nigerian nationals suing three oil companies for being instrumental in the alleged violation of *jus cogens* by the Nigerian military. The plaintiffs claimed that the corporate defendants provided transportation to and compensated Nigerian military soldiers who allegedly committed gross human rights violations by "*shooting, killing, beating, and raping* [Nigerian citizens] *and destroying and looting property.*"[146] While the Appeal Court below had focused mostly on the possibility for corporations to be sued under the ATS for a violation of CIL,[147] before the U.S. Supreme Court the case turned on whether the presumption against extraterritoriality of federal statute-based claims applied to the ATS.[148] The majority (lead by Chief Justice Roberts) seized this occasion to reverse a thirty-year tradition of allowing extraterritorial jurisdiction under the ATS. The Court decided that unless the legislature expressly conferred the extraterritorial reach of a statute, the presumption against extraterritoriality should apply, because of "*the danger of unwarranted judicial interference in the conduct of foreign policy*".[149] This presumption could only be reversed when the plaintiffs could demonstrate that the claims "*touch and concern the territory of the United States ... with sufficient force*".[150] The resulting "touch and concern" test drastically reduced the scope of the ATS, and set a challenging threshold for plaintiffs seeking parent-company liability for the conduct of downstream companies located outside of the U.S.

Notably the Court did not unanimously endorse the "touch and concern" test. Rather, in a concurring opinion, Justice Breyer stated that he "*would not invoke the presumption against extraterritoriality*" and would instead find jurisdiction under the ATS where "*(1) the alleged tort occurs on American soil, (2) the defendant is an American national, or (3) the defendant's conduct substantially and adversely affects an important American*

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[140] Beth Stephens has reported that 4,244 academic publications referenced the ATS between 1980 and 2014, and more than 3,300 publications after 2010. *See* Beth Stephens, 'The Curious History of the Alien Tort Statute' [2014] 89 Notre Dame L Rev 1467, 1468; *see also* Stephen R. Layne, 'Corporate Responsibility for Human Rights Violations: Redressability Avenues in the United States and Abroad' [2015] 18 Gonz J Int'l L 1, 21.

[141] *Sosa v Alvarez Machain* [2004] 542 U.S. 692.

[142] ibid 36.

[143] ibid 63.

[144] As reflected in the Supreme Court's discussion of *Sosa v Alvarez Machain* in *Kiobel v Royal Dutch Petroleum*, 621 F.3d 111 (2d Cir. 2010) 116, this was distinct from the issue of new causes of actions being legislated.

[145] *Kiobel v Royal Dutch Petroleum* 621 F.3d 111 (2d Cir. 2010), cited in [2013] 569 U.S. Reports - Preliminary Prints 108

[146] ibid 113.

[147] The Second Circuit Court of Appeals reasoned that it had to find a norm of customary international law to find the corporations liable under the ATS; *see Kiobel v Royal Dutch Petroleum Co*. (n 64) 148-149.

[148] *Jolane T. Lauzon, 'Araya v. Nevsun Resources:* Remedies for Victims of Human Rights Violations Committed by Canadian Mining Companies Abroad' [2018] 31 Rev Quebecoise de Droit Int'l 143, 164.

[149] *Kiobel v Royal Dutch Petroleum* (n 63) 116.

[150] ibid 124-125.

national interest, and that includes a distinct interest in preventing the United States from becoming a safe harbor (free of civil as well as criminal liability) for a torturer or other common enemy of mankind."[151]

That is, Justice Breyer's opinion suggests a wider berth for the ATS-based jurisdiction of U.S. courts in cases involving human rights or international law given the potential severity of the underlying conduct. In some ways, although related to jurisdiction, rather than applicable law, this position rings similar to that of Justice Abella in *Nevsun* on the question of whether violations of CIL merited new nominate torts in Canada. There, she contemplated that "*appropriately remedying*" violations of *jus cogens* and norms of customary international law may require "*different and stronger responses than typical tort claims, given the public nature and importance of the violated rights involved, the gravity of their breach, the impact on the domestic and global rights objectives, and the need to deter subsequent breaches*."[152] That is, the opinions of both Justice Abella and Justice Breyer suggest that there are circumstances in which the courts should permit themselves to be used to adjudicate human rights – or international law – related claims for no other reason than the egregiousness of the underlying conduct.

Notwithstanding the Court's divided reasoning, after *Kiobel* the U.S. Supreme Court further tightened the scope of the ATS, with regards to corporate defendants. A year later, in *Daimler AG v Bauman,*[153] where Argentinian residents alleged that the Argentinian subsidiary of Germany-incorporated Daimler had committed several human rights violations, the U.S. Supreme Court held that even in the case of claims under the ATS, the personal jurisdiction of U.S. courts over transnational corporations was limited to those headquartered or incorporated in the state where sued (that is, the subject matter jurisdiction conferred by the ATS was not independent of the courts' personal jurisdiction over a defendant).[154] Four years later, in *Jesner v Arab Bank,*[155] a plurality of the Supreme Court held that the ATS could not be used to pursue claims against foreign companies.[156] Focusing on the specific facts in play, the decision reflected a policy-based concern with allowing plaintiffs to rely on the ATS to bring foreign defendants under the jurisdiction of the U.S. courts. In this regard, the opinion authored by Justice Kennedy stated that "[a]*t a minimum, the relatively minor connection between the terrorist attacks and the alleged conduct in the United States illustrates the perils of extending the scope of ATS liability to foreign multinational corporations like Arab Bank*."[157] Justice Sotomayor dissented on the basis that the "*text, history, and purpose of the ATS, as well as the long and consistent history of corporate liability in tort, confirm that tort claims for law- of-nations violations may be brought against corporations under the ATS. Nothing about the corporate form in itself raises foreign-policy concerns that require the Court, as a matter of common-law discretion, to immunise all foreign corporations from liability under the ATS, regardless of the specific law-of-nations violations alleged.*"[158] Here too (as with Justice Breyer's opinion in *Kiobel*) there are parallels between the analysis opposing a strict reading of the ATS and Justice Abella's decision in *Nevsun*, this time on the question of whether CIL or the law-of-nations could give rise to corporate civil liability.[159]

These analytical echoes are not merely academic. They highlight that a potential consequence of the *Nevsun* decision may be that it (and Canadian courts) become a gap-filler for the ATS jurisprudence of the last 10-15 years (arguably a period which saw an increase in the relevance of human rights and international law to the governing private or public-private relationships) that significantly limited its scope and the potential recourse to the U.S. courts by prospective plaintiffs with international law – or human rights – based tort claims. Such a gap-

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[151] ibid 127.

[152] *Nevsun Resources Ltd. v Araya, et al*. (n 1) 129.

[153] *Daimler AG v Bauman* [2014] 571 U.S. 117, cited in [2014] 571 U.S. Reports - Preliminary Prints 117.

[154] ibid 139, note 19; *see eg*, Vivian Grosswald Curran, 'Harmonizing Multinational Parent Company Liability for Foreign Subsidiary Human Rights Violations' [2016] 17 Chi J Int'l L 403, 414.

[155] *Jesner v Arab Bank Plc.* [2018] 138 U.S. 1386, cited in [2018] 584 U. S. Reports - Preliminary Prints, 1.

[156] ibid 29. At the outset, Justice Kennedy also noted the substantive limitation of the ATS. Referring to *Sosa v Alvarez Machain*, it stated that the ATS "*does not by its own terms provide or delineate the definition of a cause of action for international-law violations*"; *see* ibid 8.

[157] *Jesner v Arab Bank, Plc.* (n 73) 25.

[158] *Jesner v Arab Bank, Plc.* (n 73) (Sotomayor, Ginsburg, Breyer, Kagan JJ.) 1.

[159] *Nevsun Resources Ltd. v Araya, et al*. (n 1) 104-116.

filling role may also arise when the *Nevsun* analysis is considered in light of recent cases involving extraterritorial civil liability and human rights – or international law – related issues in other jurisdictions.

Developments in the U.K. and the Netherlands

Since the mid-2010s, English courts have shown increased willingness to entertain claims against parent companies for the allegedly tortious conduct of their foreign subsidiaries. This tendency is particularly palpable in their responses to arguments presented by plaintiffs to address the challenge to parent-company liability that arises from the corporate veil. In this regard, plaintiffs have sued U.K.-incorporated parent companies for the breach of their own statutory duty of care.[160] This involved a significant paradigm shift for those courts: the parent is not sued for the acts of its subsidiary, but for its own allegedly negligent supervision therefore.[161] Thus, plaintiffs seek to circumvent the corporate veil rather than an attempt to pierce it.[162]

An early example is *Chandler v Cape*,[163] in which the plaintiff (**Chandler**) sued his employer's holding company for health damages related to the production of asbestos. The Court of Appeal (upholding the decision below)[164] set out a methodology for determining whether "*the law may impose on a parent company responsibility for the health and safety of its subsidiary's employees*."[165] The decision sought to recognise and account for a factual relationship between a parent and subsidiary in the specific context of the harm alleged in order to determine whether the former should be sued for the latter's conduct.

Although *Chandler* is not framed in terms of human rights, it is no doubt relevant in the human rights context, as it arguably "*places tort law at the service of the human rights cause.*"[166] At the same it did not address the question of whether a parent company could owe a duty of care to the wider community in an extraterritorial context. That question was addressed in *Lungowe v Vedanta Resources Plc*.[167] The case involved claims brought by 1,826 Zambian farmers against the U.K.-incorporated mining company, Vedanta Resources (**Vedanta**), and its Zambian subsidiary, Konkola Copper Mines Plc. (**KCM**), for the polluting impact of KCM's activities in Zambia. The plaintiffs argued that the watercourses they used as drinking water and to irrigate crops had been contaminated by toxic mining discharged from a Vedanta-owned mine. The claims were based on common-law negligence and breach of a statutory duty of care by Vedanta.[168] Following a failed attempt by the defendants to have the case struck out for lack of a triable issue on the basis that Vedanta was no more than an indirect owner of KCM (which was a foreign defendant and argued to be the only proper party),[169] in 2019, the U.K. Supreme Court issued its decision. The Court referred to *Chandler* and noted that it did not establish "*the liability of parent companies in relation to the activities of their subsidiaries*" as a "*distinct category of liability in common law negligence*."[170] Rather, the Court observed that:

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160 Anil Yilmaz Vastardis & Rachel Chambers, 'Overcoming the Corporate Veil Challenge: Could Investment Law Inspire the Proposed Business and Human Rights Treaty' [2018] 67 Int'l & Comp LQ 389, 395.

161 Doug Cassel, 'Vedanta v. Lungowe Symposium: Beyond Vedanta-Reconciling Tort Law with International Human Rights Norms', Opinio Juris (19 April 2019).

162 Anil Yilmaz Vastardis & Rachel Chambers, 'Overcoming the Corporate Veil Challenge: Could Investment Law Inspire the Proposed Business and Human Rights Treaty' (2018) 67 Int'l & Comp LQ 389, [397]. This approach has also been preliminary accepted in Canadian proceedings. *See eg, Garcia v Tahoe Resources*, [2017] BCCA 39.

163 *Chandler v Cape Plc.* [2012] EWCA Civ. 525; [2011] EWHC 951.

164 The Court referred to the three-stage test established in *Caparo Industries Plc. v Dickman* [1990] 2 AC 605 for determining whether a situation gives rise to a duty of care. *See Chandler v Cape Plc.* (n 86) 32.

165 *Chandler v Cape Plc.* [2012] EWCA Civ. 525 [80].

166 Fatemeh Bagherzadeh, 'Multinational Corporations' Responsibility for Tortious and Human Rights Violations: A Comparative Study' [2021] 4 Cardozo Int'l & Comp L Rev 857, 874.

167 *Vedanta Resources Plc. v Lungowe* [2019] UKSC 20; [2017] EWCA Civ 1528; [2016] EWHC TCC 975.

168 *Vedanta Resources Plc. v Lungowe* [2016] EWHC TCC 975 [31]-[32].

169 *Vedanta Resources Plc. v Lungowe & Ors v Vedanta Resources Plc. & Anor* [2017] EWCA Civ 1528.

170 *Vedanta Resources Plc. v Lungowe* [2019] UKSC 20 [49].

> *Direct or indirect ownership by one company of all or a majority of the shares of another company (which is the irreducible essence of a parent/subsidiary relationship) may enable the parent to take control of the management of the operations of the business or of land owned by the subsidiary, but it does not impose any duty upon the parent to do so, whether owed to the subsidiary or, a fortiori, to anyone else. Everything depends on the extent to which, and the way in which, the parent availed itself of the opportunity to take over, intervene in, control, supervise or advise the management of the relevant operations (including land use) of the subsidiary. All that the existence of a parent subsidiary relationship demonstrates is that the parent had such an opportunity.*[171]

That is, it confirmed that tort liability may arise as between a parent company and third parties presumed to have a more direct relationship with its subsidiary, but only where this was merited based on ordinary, general principles of the law of tort regarding the imposition of a duty of care.[172]

At the same time, the U.K. Supreme Court did not shed light on what specifically should be taken into account when assessing a parent company's involvement in the subsidiary's conduct for the purposes of determining tort liability. That clarification came in 2021 with the Supreme Court's decision in *Okpabi v Royal Dutch Shell Plc*.[173] The case related to claims brought by two local communities in Nigeria against U.K.-incorporated Royal Dutch Shell Plc. (**Shell**) and its local subsidiary, Shell Petroleum Development Company of Nigeria (**Shell Nigeria**). The plaintiffs were comprised of local communities who argued that oil spills along the Nigerian coastline had caused severe environmental damage for which Shell was liable to them.[174] They alleged that the parent company had violated the duty of care it owed them because it exercised significant control, or assumed responsibility, over material aspects of its subsidiary's operations and had failed to protect them from the risk of foreseeable harm arising from them. Although both courts below had held that the plaintiffs had not satisfactorily established sufficient proximity between the parties to demonstrate that the U.K.-parent company had a duty of care to the plaintiffs,[175] the Supreme Court disagreed. On the back of the *Vedanta* decision, it highlighted that the liability of parent companies in relation to the activities of their subsidiaries was not a novel category of liability in common law negligence, and therefore should be assessed according to general principles of tort law and whether a duty of care existed between the plaintiffs and defendants.[176] It also built on the guidance that the *Vedanta* decision offered on the nature of the relationship between a parent and subsidiary that may give rise to tort liability as between the parent and third parties. In particular, it suggested that *de jure* control may not be sufficient, and that the "*issue is the extent to which the parent did take over or share with the subsidiary the management of the relevant activity*".[177] That is, it confirmed that the jurisdictional issue had to be determined for each case on its own facts.

A similar approach was taken by the Dutch Court of Appeal in the Hague in the related case of *Akpan v Royal Dutch Shell Plc.*[178] That case involved allegations that Shell and Shell Nigeria had violated Nigeria's Oil Pipelines Act (**OPA**) and committed the tort of negligence, nuisance and trespass to chattel under Nigerian Law, and by extension English Law.[179] The plaintiffs argued that Shell was liable in tort because it was aware of

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[171] ibid 49.

[172] ibid 49. Francesca Farrington, 'Developments in Corporate Accountability across the Irish Sea: Okpabi v Royal Dutch Shell Plc. [2021] UKSC 3 ; [2021] 20 Hibernian LJ 170, [170].

[173] *Okpabi v Royal Dutch Shell Plc.* [2021] UKSC 3; [2018] EWCA Civ 191; [2017] EWHC 89.

[174] *Okpabi v Royal Dutch Shell Plc.* [2021] UKSC 3 [49]. Francesca Farrington, 'Developments in Corporate Accountability across the Irish Sea: Okpabi v Royal Dutch Shell Plc [2021] UKSC 3; [2021] 20 Hibernian LJ 170, [170].

[175] *Okpabi v Royal Dutch Shell Plc.* [2018] EWCA Civ 191 [16-22].

[176] *Okpabi v Royal Dutch Shell Plc*. (n 93) 151.

[177] *Okpabi v Royal Dutch Shell Plc.* (n 93) 147.

[178] *Akpan et al v Royal Dutch Shell Plc.* Gerechtshof Den Haag ECLI:NL:GHDHA 2021: 134 (Jan. 29, 2021). This was one of a number of parallel cases in the Dutch court arising from similar facts.

[179] ibid 4.6. The law governing non-contractual obligations for compensation in Nigeria is based on English common law, and English judgements occurring after the State's independence remain persuasive. For further details *see* Lee James McConnell, 'Establishing Liability for Multinational Corporations: Lessons from Akpan' [2014] 56 Int'l JL & Mgmt 88, 94.

frequent oil spills in Nigeria and that it failed to induce its subsidiary to prevent the oil spills, to respond adequately to the oil spills, to clean the oil pollution adequately by issuing guidelines and ensuring compliance with guidelines, and to ensure that Shell Nigeria had sufficient financial resources and technical expertise to perform such activities adequately. The District Court of the Hague, referring to *Chandler*,[180] noted that "*in certain circumstances, a parent company is held responsible for those affected by the activities of its subsidiaries*"[181] but nevertheless dismissed the claims against Shell for lack of proximity.[182] This decision was however overturned in 2021.[183] The Hague Court of Appeal found a limited duty of care in relation to the parent company's response to the spill (although not its cause).

The developments in the U.K. and Dutch courts are seen favourably by prospective plaintiffs insofar as they reflect a willingness to entertain claims aimed at parent-company liability for the conduct of foreign subsidiaries or operating companies. At the same time, those decisions also reflect a more restrained approach to the litigation of the array of issues raised by such cases. For example the *Vedanta* and *Okpabi* decisions involved the Supreme Court twice examining an issue that had been taken for granted at the outset in the *Nevsun* case, where there was no jurisdictional issue raised on the basis that Nevsun was a 60% shareholder of BMSC (for whom the plaintiffs had worked).[184] Additionally, while the U.K. and Dutch cases raised the spectre of human rights – or international law – related issues, they did not feature in the same way as in the *Nevsun* case (as a novel argument) or in ATS cases (by virtue of its text). The U.K. Supreme Court in *Okpabi* noted that "[o]*n the appeal we also received written submissions from the International Commission of Jurists and the Corporate Responsibility (Core) Coalition Ltd. (the first and second interveners). These drew to the court's attention international and domestic standards relating to the responsibilities of business enterprises in relation to human rights and environmental protection and some comparative law jurisprudence.*"[185] The Dutch District Court found that human rights based claims were not feasible in the context of negligence, and "*that in so-called horizontal relationships like the one at issue* [between the plaintiffs and Shell Nigeria]*, this cannot be designated as an infringement of a human right*."[186] Thus, there is an open question as to how courts following these decisions will address claims against local companies based on violations of international legal norms rather than only domestic torts.

Given the settlement of the *Nevsun* case, the answer to this question in the Canadian context is currently no more certain than in any other jurisdiction.[187] The only certainty is that the increasing focus on Environmental, Social and Governance issues generally will be accompanied by an increase in litigation raising human rights and international law- related issues. At the moment, it appears that the space between the treatment of these issues across jurisdictions may be too wide to eventually result in uniform treatment. However, that is not surprising, particularly as the relevant legislative environments evolve in different ways.[188] Nor is it necessarily undesirable,

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[180] *See eg*, Liping Huang, 'Establishing Extraterritorial Jurisdiction of Home State for Investor Accountability: English and Dutch Anchoring Mechanism and an IIA Complement or Alternative' [2021] 16 Asian J WTO & Int'l Health L & Pol'y 393, 401.

[181] *Friday Alfred Akpan v Royal Dutch Shell Plc.* Rechtbank Den Haag, ECLI:NL RBDHA [2013] BY9854 (30 January 2013) 4.3.

[182] Ibid 4.33-4.34; *see also* Rachel Chambers, 'Parent Company Direct Liability for Overseas Human Rights Violations: Lessons from the U.K. Supreme Court' [2021] 42 U Pa J Int'l L 519, 568.

[183] *Akpan et al v Royal Dutch Shell Plc.* (n 96).

[184] As noted in the Supreme Court decision "[t]*he Chambers Judge, Abrioux J., observed that since it controlled a majority of the Board of the Bisha Company and Nevsun's CEO was its Chair, Nevsun exercised effective control over the Bisha Company. He also observed that there was operational control: "Through its majority representation on the board of [the Bisha Company, Nevsun] is involved in all aspects of Bisha operations, including exploration, development, extraction, processing and reclamation*"; *see Nevsun Resources Ltd. v Araya, et al*. (n 1) 17; *see fn* 76.

[185] *Okpabi v Royal Dutch Shell Plc*. (n 93) 73.

[186] *Friday Alfred Akpan v Royal Dutch Shell Plc.* 4.56.

[187] Similar issues have been raised but not definitively resolved in other cases before Canadian courts. *See Choc v Hudbay Minerals Inc*. [2013] ONSC 1414; Rachel Chambers, 'Parent Company Direct Liability for Overseas Human Rights Violations: Lessons from the U.K. Supreme Court' [2021] 42 U Pa J Int'l L 519

[188] For example, with the development of due diligence law in Europe. The Sapin 2 Law in France imposed a duty of care obligations on corporations to monitor and prevent serious human rights abuses committed by their subsidiaries. Switzerland initiated a referendum to extend liability over international human rights abuses and environmental harm caused by major Swiss companies and the firms they control abroad. Despite popular support, this referendum initiative however failed to be enacted as a law on regional grounds. *See* Brenna Hughes Neghaiwi, Swiss Firms Narrowly Avoid "Responsible Business" Liability as Vote Divides Nation, Reuters: Env't (29 November 2020 3:51 AM) <https://www.reuters.com/article/us-swiss-vote-companies-

as each jurisdiction will offer its own array of opportunities and challenges for potential plaintiffs and defendants alike. Nevertheless, a key variable defining those opportunities and challenges will be whether and how jurisdictions hosting such litigation will adjust their procedural and substantive frameworks to facilitate the advancement of claims expressly based in international law norms or whether this will be done primarily by courts adjusting the boundaries of domestic-law based remedies.

idUSKBN2890EM> The EU is also planning a Europe-wide due diligence law; *see* 'Just and sustainable economy: Commission lays down rules for companies to respect human rights and environment in global value chains" <https://ec.europa.eu/commission/presscorner/detail/en/ip_22_1145> accessed 16 March 2022; *see also* U.K. Modern Slavery Act 2015 (c. 30) <Modern Slavery Act 2015 c. 30 | Westlaw UK> accessed 16 March 2022 (subscription required); UK Environment Act 2021 (c. 30) <Environment Act 2021 c. 30 | Westlaw UK> accessed on 16 March 2022 (subscription required).

CHAPTER XVIII: INTERNATIONAL COMMITTEE OF THE RED CROSS A FRAMEWORK FOR AN ASIAN COURT OF HUMAN RIGHTS[1*]

Sergey Sayapin[2**]

Abstract

The chapter considers some of the institutional models employed in Asia to promote and protect human rights, at the example of relevant institutional developments in the Arab League, the Association of Southeast Asian Nations (ASEAN), and in Central Asia, and makes policy proposals for the future. The chapter also highlights the current role of human rights in the humanitarian action of the International Committee of the Red Cross (ICRC), and discusses the significance of the ICRC action in Asia, with a focus on China and Afghanistan.

Introduction

To start with, a few disclaimers will be in order. First, I will discuss a few ideas pertaining to humanitarian and human rights institutions in Asia, but it is certainly understood that the discussion, however comprehensive it may be, will not be complete. Asia is an incredibly diverse region hosting 49 countries, including the largest country in the world (Russia).[3] Among the world´s 20 most populous nations, 12 are Asian. Four of the world´s five most populated countries are in Asia – China, India, Indonesia, and Pakistan. Asia´s population amounts to approximately 59.76% of the world´s total population.[4] Asia is home to all of the world´s major religions, and all major legal systems. Given the economic potential and political influence of this region, I am prepared to take Parag Khanna´s argument underlying his famous book even further,[5] and claim that not only the future is Asian but the present already is Asian. Yet, given Asia´s size and diversity, I cannot claim that my chapter will include all aspects, which are potentially relevant. Instead, I hope to raise some questions for discussion, some of which might be answered not today but, in the years, to come.

Next, I am based in Central Asia, and my understanding of the topic is inevitably informed by Central Asian perspectives. As you will see, I will give you examples from my region, and compare, to a reasonable extent, the Central Asian experiences with those from other places. But I understand that humanitarian or human rights action should be contextualised and suited to the realities of each and every country.

And finally, it is understood that I will focus on *international* humanitarian and human rights institutions, and not on domestic ones. No one doubts the role and significance of national institutions such as, for example, interdepartmental commissions on human rights or humanitarian law, or relevant non-governmental organisations. However, they are too numerous and diverse to attempt discussing them within a single chapter. Instead, I will focus on a few international and regional mechanisms, which may contribute to improving the quality of humanitarian and human rights action in Asia.

[1*] The chapter is based on a lecture delivered by the author on 15 September 2021 in the framework of a public lecture series organized by Jindal Society of International Law. It draws on the author´s material previously published in the *Human Rights Law Review* (2009) and in D. Rogers, (ed.), *Human Rights in War* (Springer Singapore 2022) 217-236. Permissions to use published material are gratefully acknowledged.

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[3] For an excellent multidisciplinary overview of all Asian States, see M. Porsche-Ludwig and Ying-Yu Chen (eds.), *Handbook of Asian States: Geography – History – Culture – Politics – Economy* (LIT Verlag 2021).

[4] See *Worldometer* (Countries in the world by population 2022) <https://www.worldometers.info/world-population/population-by-country/> accessed 4 July 2022.

[5] See *passim* P. Khanna, *The Future is Asian* (Simon & Schuster 2019).

I will start by discussing some of the main trends in regional human rights protection in Asia. The key questions there will be the absence of a regional human rights court in Asia, and the feasibility of alternative institutional mechanisms. I will then proceed to talk about the prominent role of the International Committee of the Red Cross (ICRC) in some Asian contexts, and about the ICRC´s evolving attitude with respect to international human rights law. I will conclude by offering a few policy recommendations.

A Regional Human Rights Court for Asia?

Obviously, Asia does not have a regional human rights court, like those in Europe, the Americas, or Africa. I think it would be fantastic to have one but the reasons for not having such a court must be really complex. They must be more complex than, for example, simply the number of countries in Asia. The Council of Europe now has 46 members – just three States fewer than there are States in Asia.[6] On the other hand, the African Union now has 55 Member States – more than Asia has.[7] I believe the linguistic diversity is not a reason for not having an Asian human rights court either. According to some estimates, Asia is home to about 2300 languages.[8] However, for comparison, the situation in Africa is not significantly easier in linguistic terms. Africa has more than 2150 languages,[9] and yet, this was not in itself an obstacle to the establishment of the African Court on Human and Peoples´ Rights.[10] Rule 27 of the Court´s current Rules of Procedure lays down that the Court´s official languages include Arabic, English, French, Portuguese, Spanish, Kiswahili and any other African language, and the working languages are Arabic, English, French, and Portuguese.[11] If there were an Asian human rights court, the linguistic issue could be solved, for example, by making the major Asian languages plus a few European languages the working languages of the Court. This is not a major issue. Actually, languages such as Arabic, Bahasa Malay, Chinese, English, Hindi, Persian, and Russian might serve as unifying, and not divisive, factors. The real obstacles to the establishment of an Asian human rights court appear to include political, ideological, and legal differences between Asian States. And these are more difficult to overcome.

In Europe, the Americas, and even Africa, there is more common ground for building regional institutions, including for the protection of human rights, than there is in Asia. Especially in Europe and Latin America, such common ground includes the Christian religion, and the continental legal systems. In turn, Africa has experienced pagan, Christian, and Islamic influences in terms of religion, and has Islamic, common law, civil law, and traditional legal systems. Asia´s political and legal map is even more complex than that.

I think religion and political ideology are the two main factors exercising decisive influences on a State´s attitudes towards human rights. If I am right, then it would be quite utopian to hope for the establishment of a single human rights court that would be acceptable, at the same time, for example, to Arab States, China, India, Iran, Israel, the States of Central Asia, and especially North and South Korea. If the Court were ever established, as an experiment, it would be a massive and heavy bureaucratic machine, difficult to operate, and even reach out to geographically. Where would the Court be based? In Istanbul? Dubai? New Delhi? Beijing? Singapore? Tokyo? Anywhere else? Answers to such questions are so difficult that it is no wonder that the Court has not been established yet.

Actually, there *is* one way to establish an Asian human rights court, if this utopian project were ever to materialise. A human rights court for Asia *might* work, if it were composed of several chambers – for example, for the Muslim States (except the Arab States, please see below for more details), for the Far East, and for Central Asia – and these chambers would be based in the respective sub-regions. Obviously, members of such sub-regional groups might more easily agree on mutually acceptable approaches to the organisation and operation of their respective chambers. Likewise, such chambers would be more easily accessible to individuals from the respective sub-regions. Each chamber could be modelled after the current setup of the European Court of Human Rights – that

[6] For the current membership of the Council of Europe <https://www.coe.int/en/web/about-us/our-member-states> accessed 4 July 2022
[7] For the current membership of the African Union <https://au.int/en/member_states/countryprofiles2> accessed 4 July 2022.
[8] See Ethnologue, "Asia": <https://www.ethnologue.com/region/asia> accessed 4 July 2022.
[9] See Ethnologue, "Africa": <https://www.ethnologue.com/region/Africa> accessed 4 July 2022.
[10] See the official website of the Court at: <https://www.african-court.org/wpafc/> accessed 4 July 2022.
[11] For the Rules of the Court <https://www.african-court.org/wpafc/wp-content/uploads/2021/04/Rules-Final-Revised-adopted-Rules-eng-April-2021.pdf> accessed 4 July 2022.

is, without the intermediary of a Commission – or with a Commission tasked with the preliminary consideration of applications, like in the Americas or in Africa. Alternatively, other sub-regional enforcement mechanisms could be put in place – and I will now turn to possible alternatives.

Alternative Human Rights Enforcement Mechanisms for Asia

In order to see what could be done to improve the human rights enforcement machinery in Asia, let us briefly consider what already is in place, what the relative advantages and disadvantages of the existing mechanisms are, and then discuss, at some length, how those mechanisms could be reinforced, without the formal establishment of an Asian human rights court. I suppose this course of action would be easier, cheaper, and quicker.

The Arab States already have an Arab Charter on Human Rights based on Islamic Law. Its first edition was adopted already in 1994 but did not enter into force. A subsequent edition of the Charter was adopted 10 years later, in 2004, and was more successful in that it entered into force on 15 March 2008.[12] Article 45 of the revised Charter established an Arab Human Rights Committee consisting of 7 members.[13] In accordance with Article 48 of the Charter, the Committee considers State reports, which are to be submitted within a year of the Charter entering into force for a State Party, and then periodic reports must be submitted every three years. The Committee also submits annual reports to the Arab League, and has the authority to interpret the Charter.[14] Overall, the Arab Human Rights Committee has been modelled after the ICCPR Human Rights Committee, and although it currently lacks the competence to receive individual communications, it does represent an important step. In 2014, the Statute of the Arab Court of Human Rights was adopted but needed seven ratifications to enter into force. The Statute has been criticised by Western commentators for not permitting individual access to the Court, and restricting it to States and accredited NGOs. However, it should be recalled that the regional human rights courts in Europe and the Americas had similar histories, and the Arab Court of Human Rights might, over time, also be transformed into an institution receiving individual communications.[15] For the time being, though, it may be assumed that Arab nations would not be interested in a "big" Asian human rights court anymore, since they are constructing their sub-regional human rights system.

Let us now fly to the geographically opposite part of Asia, and see what the Association of South East Asian Nations (ASEAN) does for the promotion of human rights. Indeed, as Rhona Smith observes, ASEAN´s focus is on the promotion, rather than protection, of human rights.[16] The ASEAN Charter was adopted in November 2007, and entered into force in December 2008. In 2012, the ASEAN member States adopted a Declaration on Human Rights. This Declaration received mixed reviews, given the perceived "low impact" compliance opportunities.[17] This is largely due to the absence of an individual communications mechanism, which follows from ASEAN´s commitment to the principle of non-interference in the internal affairs of Member States.[18] Instead, ASEAN established an Intergovernmental Commission on Human Rights, which periodically examines issues of common concern to governments such as migration and labour issues.[19]

As far as Central Asia where I am living and working is concerned, let me quote a few conclusions from my recent book chapter:

> *[…] Most recently, the COVID-19 pandemic exposed numerous practical human rights issues in the region, and not only with respect to healthcare as such. Access to information was not always consistent, statistical methods employed were at times contradictory, the legal status of regulations issued by the Chief Sanitary Doctors was uncertain, and the legal challenges posed by the state of emergency regime were plentiful. The transfer of education online was not a satisfactory solution, in terms of quality, for*

[12] See R. K. M. Smith, International Human Rights Law (9th edn, Oxford University Press 2020) 77.
[13] See: <https://adsdatabase.ohchr.org/IssueLibrary/ARAB%20HUMAN%20RIGHTS%20COMMITTEE.docx> accessed 4 July 2022.
[14] Ibid.
[15] Smith, *fn* 10.
[16] ibid 79 – 80.
[17] ibid 80.
[18] Ibid.
[19] Ibid.

> *families with many children where there was not enough hardware to let children attend classes simultaneously. Defence lawyers reported that online – civil but, especially, administrative and criminal – trials via WhatsApp were not a good solution either, among other things, due to the limited number of participants in a session, and difficulties related to the examination of evidence. The consequences of these ad hoc solutions are yet to be seen. But there are also useful lessons to be learnt.*[20]
>
> *The Central Asian States should invest, as a matter of urgency, in the digitalisation of administrative procedures, and other State services. Doing so will increase the efficiency and speed of such procedures, significantly reduce corruption risks, and visibly improve the quality of dialogue between Governments and civil society. Instead of introducing new rules, regulatory barriers should be taken down, wherever possible, especially in the field of economy. Greater transparency and accountability should be achieved in political decision-making. As a result of such reforms, economic and political systems will be modernised, and the quality of life will grow.*[21]
>
> *[…] International human rights are closely linked with all areas of life, and respect for human rights is an important indicator both for international investors and policymakers, for it testifies to the stability, predictability, and trustworthiness of a State´s judiciary and law enforcement system. Judges – especially those dealing with criminal and administrative cases – and law enforcement agents should be trained on the application of domestic and international human rights law, and States should genuinely align their law enforcement practices with their obligations under applicable human rights instruments. Importantly, international human rights treaties and constitutional provisions on human rights should be made directly applicable in domestic legal systems. Resolute measures must be taken to combat torture and other forms of ill-treatment. The legal status and influence of national human rights institutions should be elevated, and they should be staffed by individuals with professional knowledge of international human rights law, international humanitarian law, and international criminal law. Regular dialogue with the UN human rights organs, international and domestic human rights NGOs will be helpful. The cumulative effect of such measures will benefit individuals, society, and States alike.*[22]

At a subregional level, the Central Asian States could envisage the establishment of a Central Asian human rights court or another appropriate mechanism. The idea of a Central Asian Union has been in the air for a few years now, and if it ever materialises, the new integration project could provide for a Central Asian human rights mechanism.

The Evolving Role of the International Committee of the Red Cross (ICRC)

And now, I will, with your permission, proceed to discuss the evolving role of the International Committee of the Red Cross (ICRC). I joined the ICRC in September 2000, and worked there until June 2014. The institution has changed quite a lot over those years. I joined the ICRC after getting an LLM in International Human Rights Law from the University of Essex in the UK, and it took me some time to get used to my first boss at the ICRC repeatedly telling me not even to mention human rights in public, "so that the ICRC would not be confused with human rights organisations". In my early years at the ICRC, quite a few things seemed surprising to me. For example, among international colleagues visiting places of detention in Uzbekistan, there was a mathematician, a former musician, and even an opera singer – all of them lovely people but I could not grasp the utility of their skills for the purpose of the ICRC humanitarian visits. I *could* understand why the ICRC teams would include medical doctors specialising in torture, or psychologists, but not people of those more "exotic" professions. But then, things suddenly started changing, and the changes I started noticing at the Delegation in Tashkent were not accidental. They meant that the ICRC started changing at the global level. For example, it started appointing positions of authority qualified individuals from all over the world, and not only from Switzerland or the Western

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[20] S. Sayapin, "Human Rights in Post-Soviet Central Asia", in L. Leontiev and P. Amarasinghe (eds.), *State-Building, Rule of Law, Good Governance and Human Rights in Post-Soviet Space* (Routledge 2022) 135 – 149, p 142 (references omitted).
[21] Ibid.
[22] ibid 143 (references omitted).

world. I believe this new approach helped the International Committee of the Red Cross to become truly more "international", and more professional.

But there was also another reform, which was really groundbreaking, because it affected the very core of the ICRC humanitarian action, and its public image. I mean the ICRC´s institutional decision to make some use of international human rights law, in order to improve the quality of protection and assistance it renders to victims of armed conflicts and other situations of violence.

The decision was made in 2006 when the ICRC adopted a comprehensive Doctrine entitled "The Invocation of International Human Rights Law by the International Committee of the Red Cross". The new approach should have enabled the ICRC "to use human rights, where appropriate, in its humanitarian work, while ensuring that it remains distinct from doing human rights advocacy, thereby maintaining the ICRC's unique identity".[23] It is understood that under this approach, the ICRC still has no legal or institutional responsibility to invoke human rights law or to work for its faithful application. Accordingly, the ICRC may decide not to refer expressly to any rule of human rights law when it considers that such invocation would harm its operational activities, and ultimately the persons it strives to assist and protect. In such cases, the ICRC would prefer to use more general expressions, such as "the principles of humanity" or "internationally recognised standards".[24] However, in any event, now, my first boss at the ICRC would not be able to tell me not to speak of international human rights law anymore. And I think, it is better so.

Let me say a few words about the substantive rights, which the ICRC may now address in its humanitarian action. You will notice that these are mainly the so-called "non-derogable" rights. They are fundamental to the preservation of human life and dignity, and as such, they are a key part of the ICRC mission.[25]

The first substantive right is the right to non-discrimination. The ICRC believes that this right is integral to the fulfilment of other human rights and as such underlies all other humanitarian guarantees.[26]

Next, armed conflicts threaten, first and foremost, the right to life. The lives and health of persons are threatened by indiscriminate attacks, unlawful use of weapons, summary executions, deprivation of medical care, not to mention less controllable dangers such as communicable diseases or natural disasters.[27]

The prohibition of torture or other forms of cruel, inhuman or degrading treatment or punishment is another fundamental human right. In line with applicable international law, the ICRC's position is clear: it firmly rejects any recourse to torture and other forms of ill-treatment. The ICRC also works to prevent particular forms of ill-treatment, such as mutilation, unlawful medical or scientific experiments, rape and other forms of sexual violence. Finally, the ICRC may invoke the principle of *non-refoulement*, which consists of the prohibition of transferring a person to a place where they risk facing torture or another form of ill-treatment.[28]

Next, as part of its visits to prisoner-of-war camps, civilian internment camps and places of detention, the ICRC monitors conditions of detention and, where necessary, makes recommendations as to their improvement.[29]

Slavery and forced labour are prohibited by human rights law. Under all major human rights law regimes, the prohibition of slavery is non-derogable and may not ever be suspended. In the context of international humanitarian law, the prohibition of slavery and forced labour is pertinent in at least two respects: the labour of prisoners of war and civilians, and the crime of sexual slavery. In 2013, the ICRC observed in a Statement addressed to the Third Committee of the United Nations General Assembly that:

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[23] S. Sayapin, "International Committee of the Red Cross and the Use of International Human Rights Law", in D. Rogers (ed.), *Human Rights in War* (Springer Singapore 2022) 217 – 236, p 218.
[24] ibid 218 – 219.
[25] ibid 219.
[26] ibid 219 – 220.
[27] ibid 220 – 221.
[28] ibid 221 – 222.
[29] ibid 222 – 224.

> *The ICRC strives to respond to sexual violence in armed conflict and other situations of violence in a multidisciplinary manner. It provides medical and psychosocial care and economic support to victims, engages in activities to minimise risk, and works to prevent sexual violence.*[30]

With respect to the recruitment of children into the armed forces, the ICRC "places a great deal of emphasis on prevention [...] The ICRC will continue to promote the principle of not recruiting children and support the development and application of international humanitarian law at the field level, in the hope that one day there will be no more child soldiers, and that humanity and justice will prevail".[31]

In extreme circumstances of an armed conflict, it is very important that there be a framework for a competent and, to the extent possible, impartial judicial revision of decisions, and that persons protected under international humanitarian law have a chance to have their case heard and arguments taken into account by the authorities in whose power they may find themselves. The ICRC attaches particular importance to two aspects of the due process of law: the possibility of judicial revision of grounds for detention; and respect for judicial and other procedural guarantees.[32]

Next, the ICRC is strongly committed to working, together with its partners in the International Red Cross and Red Crescent Movement, for the sake of reuniting family members separated by armed conflicts and other situations of violence. A common violation in such situations is the crime of enforced disappearance. The ICRC considers enforced disappearance a crime under international law and endeavours to prevent its occurrence.[33]

Unlike most human rights provisions analysed above, rules on the freedom of movement are not non-derogable, and may be restricted in times of public emergency. However, the substance of these human rights provisions is mirrored in humanitarian law, inasmuch as the prohibition of the deportation or transfer of civilians in international armed conflicts has long been considered a serious violation of the laws and customs of war. In non-international armed conflicts, the displacement of the civilian population is prohibited.[34]

And last but not least, the ICRC recalls that private property enjoys protection as such and may not be confiscated, destroyed or seized, except in situations of imperative military necessity. Whilst under human rights law, the right to own property is an economic right related to the welfare of an individual, humanitarian law protects property not so much as a matter of material wealth but as a factor helping protected persons to survive. In circumstances where money nearly always loses its pre-conflict value, the worth of food, water, medicines, clothing and shelter, on the contrary, increases evermore, as they become indispensable to the wounded, sick and shipwrecked combatants, prisoners of war and civilians.[35]

By this time, you may be asking yourselves why I am telling you all these things except that they are academically interesting. I believe this discussion is relevant to the current situation in at least two Asian contexts, and the ICRC could play an increasingly important role there in the years to come.

Obviously, the first one is Afghanistan. Despite that the Taliban is now assuring everyone that its new rule would be more moderate than 20 years ago, there are good reasons to be concerned especially about the rights of women, non-Muslims, and other minority groups. Although Afghanistan ratified some key human rights treaties – including both International Covenants (in 1983), Convention against Torture (in 1987), Convention on the Rights of the Child (in 1994), Convention on the Elimination of All Forms of Discrimination against Women (in 2003), and others – most Optional Protocols to those Conventions relative to individual communication procedures have not been ratified. Two notable exceptions are the Optional Protocols to the Convention on the Rights of Persons with Disabilities (ratified in 2012), and to the Convention against Torture (ratified in 2018). Given that the

[30] ibid 224 – 226.
[31] ibid 226 – 227.
[32] ibid 227 – 230.
[33] ibid 230 – 232.
[34] ibid 232 – 233.
[35] ibid 233 – 234.

international human rights treaty bodies´ capacity to act is very limited, I submit that the ICRC´s role in securing the rights of the most vulnerable groups, through bilateral and confidential dialogue, will be important. The ICRC has been present on the ground in Afghanistan since 1987, and has working contacts with local and high-level leaders. Importantly, the ICRC works in close contact with the Afghan Red Crescent Society, and has the trust of all parties to the conflict. What it does not currently have is enough money. In a statement of 17 August 2021, Robert Mardini, Director-General of the ICRC, said that the ICRC had a funding shortfall of about 33 million USD, out of a budget of approximately 86 million USD, and appealed to donors for immediate additional funding to support the ICRC work, including in the medical field and at the physical rehabilitation centres.[36] Hopefully, the ICRC will be able to secure the necessary funding continuously.

The second context is also very complex. There is no armed conflict there but the situation is nonetheless quite alarming. I mean the reported situation of Muslims in Western China. In August 2018, the United Nations reported that at least a million Uighurs had been detained in "counter-extremism centres" in China's Xinjiang province.[37] The report also revealed that a further two million Uighurs had been "forced into so-called re-education camps for political and cultural indoctrination" since 2017.[38] In June 2021, Amnesty International called these measures "draconian", and said they amounted to crimes against humanity.[39] China has rejected the allegations, saying that its policies towards the Uighurs and other Muslim minorities are necessary to fight "extremism" and "terrorism".[40]

According to the ICRC website, the ICRC Regional Delegation for East Asia covers China, North and South Korea, and Mongolia.[41] The website mentions that "[t]he delegation's main focus is to promote awareness and implementation of international humanitarian law […] The delegation also aims to familiarise governments, experts, National Red Cross Societies and civil society with the ICRC's humanitarian work and emergency response around the world. Joint ICRC-National Red Cross Societies physical rehabilitation projects in China and in the DPRK provide direct services to vulnerable groups".[42] However, and this is important, we don´t know whether the ICRC intends to visit some of those "re-education camps" in Western China in accordance with its own modalities. And I think the ICRC should at least attempt to discuss this possibility with Chinese authorities.

Actually, dialogue with the ICRC leading to possible humanitarian visits would be in China´s own interest. If the stated goal of China´s policy is to "fight extremism", then individuals undergoing "re-education" might well qualify as "security detainees", in the language of the ICRC. The ICRC visits such detainees in many other countries of the world, exclusively for humanitarian purposes. Both the dialogue leading to such visits, and the visits themselves, would be confidential, and the ICRC would not report its findings to the mass media, or publish them otherwise. The ICRC recommendations would be transmitted directly to Chinese authorities, and the public would just know that so-and-so many humanitarian visits were carried out to so-and-so many facilities. That´s all. By proposing and, possibly, carrying out such visits, the ICRC would exercise its strictly humanitarian mandate. And China, by giving a positive response to the ICRC initiative, would show its commitment to humanitarian principles. I think that only one other option would be better than this – if China itself invited the ICRC to visit. Let us see if any of these options is possible.

Conclusion

And now, in conclusion, let me suggest a few policy recommendations based on my reflections.

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[36] See Statement by Robert Mardini, Director-General of the ICRC, on Afghanistan: <https://blogs.icrc.org/new-delhi/2021/08/17/statement-by-robert-mardini-director-general-of-the-icrc-on-afghanistan/> accessed 4 July 2022.

[37] Al Jazeera, "One million Muslim Uighurs held in secret China camps: UN panel", see: <https://www.aljazeera.com/news/2018/8/10/one-million-muslim-uighurs-held-in-secret-china-camps-un-panel> accessed 4 July 2022.

[38] Ibid.

[39] Amnesty International, "China: Draconian repression of Muslims in Xinjiang amounts to crimes against humanity", see: <https://www.amnesty.org/en/latest/news/2021/06/china-draconian-repression-of-muslims-in-xinjiang-amounts-to-crimes-against-humanity/> accessed 4 July 2022.

[40] Embassy of the People´s Republic of China in the Kingdom of the Netherlands, "Things to know about all the lies on Xinjiang: How have they come about?", see: <https://www.mfa.gov.cn/ce/cenl/eng/xwdt/t1872300.htm> accessed 4 July 2022.

[41] See: <https://www.icrc.org/en/document/regional-delegation-for-east-asia-leaflet> accessed 4 July 2022.

[42] Ibid.

Here is probably the most important conclusion: Asian challenges demand Asian solutions. International experience is useful but how things are done, for example, in Latin America may simply not be compatible with the legislation of Uzbekistan. If there is an issue, it should be understood and analysed in a local context, and proposed solutions must suit that local context.

Since Asia is huge and diverse, a single human rights court for Asia is not feasible. The Arab States´ effort to establish the Arab Court of Human Rights testifies to this, and the other Asian sub-regions should probably follow that example. The format of a human rights court is ideal, from my perspective. Yet, where States decide not to create a court, a human rights committee with or without the power to consider individual communications can be established. In turn, where a committee does not seem feasible, at least a human rights commission with oversight functions could be put in place.

The role of the International Committee of the Red Cross will remain important in Asia. The ICRC sometimes is the last and only international institution to stay in the most challenging contexts, and often embodies the only hope left to affected communities. It is now vital that the ICRC maintain dialogue with all stakeholders throughout Asia, so that the fundamental rights of people are respected. I also hope that the ICRC will continue internationalising itself, including by employing qualified staff from Asia. Let me encourage young international lawyers in Asia to apply for jobs at the ICRC, in their own countries or abroad. The ICRC will benefit from their expertise, and they will benefit from the opportunities offered by the ICRC.

CHAPTER XIX: ECOCIDE AS AN INTERNATIONAL CRIME: PERSONAL REFLECTIONS ON OPTIONS AND CHOICES[1]

*Dr Christina Voigt[2]**

Abstract

On 22nd June 2021, the "Independent Expert Panel for the legal Definition of Ecocide" proposed the following legal definition of "ecocide": For the purpose of this Statute, "ecocide" means 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." The objective was to spark a debate on a possible amendment the Rome Statute of the International Criminal Court (ICC) to add a 5th international crime that addresses severe environmental destruction. In the aftermath of the launch of the definition, such critical debate has certainly been taking place; primarily in academic circles. This paper aims at explaining the considerations that laid the ground for the expert panel when arriving at the proposed definition and hopes to address some of the concerns and criticisms launched at the definition.

Introduction

On 22nd June 2021, the "Independent Expert Panel for the legal Definition of Ecocide" – on which I had the honour to serve – launched a proposal for a legal definition of "ecocide" to amend the Rome Statute of the International Criminal Court (ICC) with the addition of a 5th international crime. The definition is as follows:

> *Article 8 - Ecocide*
>
> *"1. For the purpose of this Statute, "ecocide" means 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.*
>
> *2. For the purpose of paragraph 1:*
>
> *a. "Wanton" means with reckless disregard for damage which would be clearly excessive in relation to the social and economic benefits anticipated;*
>
> *b. "Severe" means damage which involves very serious adverse changes, disruption or harm to any element of the environment, including grave impacts on human life or natural, cultural or economic resources;*
>
> *c. "Widespread" means damage which extends beyond a limited geographic area, crosses state boundaries, or is suffered by an entire ecosystem or species or a large number of human beings;*

[1] This article is inspired by the following Article: *Voigt, C.*, "Ecocide" as an International Crime: Personal Reflections on Options and Choices (3 July 2021) EJIL: Talk! <https://www.ejiltalk.org/ecocide-as-an-international-crime-personal-reflections-on-options-and-choices/>

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d. "Long-term" means damage which is irreversible or which cannot be redressed through natural recovery within a reasonable period of time;

e. "Environment" means the earth, its biosphere, cryosphere, lithosphere, hydrosphere and atmosphere, as well as outer space."[3]

In the following, I attempt to set out some of the choices the panel made against the options that were considered. In doing so, I share my personal reflections and am writing in my capacity only, not on behalf of other panel members. We were 12 international lawyers with different backgrounds and areas of expertise. The discussions we had over 6 months were intellectually stimulating as well as challenging and led us to consider diverse options, but they united us in support of the proposed definition. The proposed definition has since stimulated academic discussion and debate.[4] This is something that the panel had hoped to ignite. Fully aware of the wide range of possible choices to define the crime of "ecocide", the work on the definition was guided by certain considerations. While not agreed specifically, it is my understanding that they can broadly be described as 1. pragmatism and realism, 2. precedent, 3. deference and respect, 4. environmental integrity, and 5. legal effectiveness. An overall guiding element was ICC´s *ratione materiae* jurisdiction over the "most serious crimes of concern to the international community as a whole». These parameters guided the work toward the proposed definition and certainly informed my choices, yet many other options and views exist.

Some Considerations When Conceptualizing "Ecocide"

1. Taking a *realistic* approach was important, as it was considered necessary to propose a definition that (at least conceptually) could stand a chance to be considered by state parties to the Rome Statute as an attempt to conceptualize "ecocide". In other words, it was important that the definition did not venture beyond the boundaries of legal concepts which states are already familiar with in international law. In my view, a definition adopting an exclusively eco-centric approach or an explicit reference to planetary boundaries could perhaps have given a stronger environmental signal but might have been detrimental to the likelihood of being adopted. Fully aware of the procedural and diplomatic challenges and the uphill battle that any proposal for amending the Rome Statue[5] would face, it was an important choice to put forward a definition that seemed pragmatic and therefore not unrealistic. Other views are, of course, possible.

2. Another guiding element was *"precedent";* understood not in its narrow legal definition but as an attempt to being able to trace back key terms and concepts in the proposed definition to authoritative, legal sources. Again, while not putting a straitjacket on its work, the panel carefully analysed and drew inspiration from the jurisprudence of international courts including the ICC, ICJ, ITLOS, and existing international treaty law and custom. The only exception is the definition of the "environment", which currently does not exist in international law, and which was therefore based on scientific sources, adapted to a legal context.

3. The work was further conducted with *deference and respect* to the existing crimes in the Rome Statute, as well as to the existing work on "ecocide", done by many scholars and proponents over decades. An amendment of

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[3] <https://static1.squarespace.com/static/5ca2608ab914493c64ef1f6d/t/60d7479cf8e7e5461534dd07/1624721314430/SE+Foundation+Commentary+and+core+text+revised+%281%29.pdf >.

[4] See, for example, Jérôme de Hemptinne, "Ecocide: an Ambiguous Crime?" (EJIL: Talk! 29 August 2022) <https://www.ejiltalk.org/ecocide-an-ambiguous-crime/> accessed 4 September 2022; Darryl Robinson, «Ecocide — Puzzles and Possibilities", *Journal of International Criminal Justice*, vol 20, issue 2 (May 2022) 313–347; Donna Minha, 'The Proposed Definition Of The Crime Of Ecocide: An Important Step Forward, But Can Our Planet Wait?' (EJIL: Talk! 2021) <https://www.ejiltalk.org/the-proposed-definition-of-the-crime-of-ecocide-an-important-step-forward-but-can-our-planet-wait/?utm_source=mailpoet&utm_medium=email&utm_campaign=ejil-talk-newsletter-post-title_2> accessed 3 September 2022, Mrinalini Shinde, 'Opinion: The New Legal Definition Of "Ecocide" Could Be A Gamechanger For The Environmental Movement - Climatetracker' (Climate tracker 2021) <https://climatetracker.org/new-legal-definition-ecocide-gamechanger-environment/> accessed 3 September 2022 and Kevin von Heller, 'Skeptical Thoughts On The Proposed Crime Of "Ecocide" (That Isn'T)' (Opinio Juris 2021) https://opiniojuris.org/2021/06/23/skeptical-thoughts-on-the-proposed-crime-of-ecocide-that-isnt/ accessed 3 September 2022.

[5] Kai Ambos, 'Protecting The Environment Through International Criminal Law?' (EJIL: Talk! 2021) <https://www.ejiltalk.org/protecting-the-environment-through-international-criminal-law/?utm_source=mailpoet&utm_medium=email&utm_campaign=ejil-talk-newsletter-post-title_2> accessed 3 September 2022.

existing crimes was for this reason, not an option to be pursued. The four crimes currently listed in the Rome Statute all have a long and difficult history. Bringing them under the jurisdiction of the ICC was no small feat. Any amendment to those crimes could potentially open them up to further negotiations. It is my understanding that this was a risk the panel was not willing to propose.

Moreover, three of the existing crimes require human harm, either in the intent to destroy in whole or in part a national, ethnical, racial or religious group (genocide, art. 6), an attack on a civilian population (crimes against humanity, art. 7), or an act against the territorial integrity of a state (crime of aggression, Art. 8 bis). While the impact on humans caused by environmental damage was to be included in the crime of "ecocide"; it was agreed that this should not be an exclusive condition. Rather, it was considered important to capture certain categories of damage, including damage to the environment *per se*, independent from harm to human life. None of those three existing crimes seemed to provide a conceptual basis for such purely environmental damage.

War crimes (art. 8), on the other hand, do. They potentially include an attack in the knowledge that such an attack will cause widespread, long-term and severe damage to the natural environment which would be excessive concerning the concrete and direct overall military advantage anticipated (Art. 8, paragraph 2(b)(iv)). The attack, however, has to occur in the context of an international armed conflict. Also, in war crimes, the natural environment is protected because it is seen as a civilian object. This was considered too limiting since much of the most severe environmental destruction occurs during peacetime. The panel was therefore undivided in its intention to address non-military-related environmental damage. For the reasons above, the choice fell on the proposal of a new, additional crime; Art. 8 *ter* Having said this, there are some cases (in peace or war) where the same situation involves both severe environmental damage and serious human harm. In those circumstances, the prosecutor could potentially use the existing international crimes. In fact, as a matter of case selection policy, the Prosecution has indicated to prioritise cases where crimes (within the Statute) are committed employing, or that result in, the destruction of the environment, the illegal exploitation of natural resources or the illegal dispossession of land.[6]

4. It was further important to ensure what I call "*environmental integrity"* of the definition; a solution that would meaningfully address the specific challenges posed by environmental destruction. This led to several choices. First, it informed the architecture of the proposed crime which consists of two paragraphs: the first setting out the crime and the second providing definitions for key terms. An alternative would have been to provide a catalogue of various acts covered by the crime. Even though such a catalogue would not be exhaustive, there was the fear that it would be too limiting, and potentially carry the notion of "justifying" acts that are not explicitly listed. The architectural choice fell therefore on a definition which is dynamic, abstract, and general and thereby would capture a wide range of possible perpetrators and acts; some of them might not even be foreseeable from our current state of knowledge. Second, environmental damage is based on two disjunctive thresholds: "severe and widespread" or "severe and long-term". This deviates from the requirement in Art. 8, paragraph 2(b)(iv), but is more in line with the use in the ENMOD Convention (although there the thresholds are fully disjunctive). A conjunctive threshold, while appropriate for environmental harm during military attacks, was considered too high for the crime of ecocide. While the harm always must be severe, a spatial or a temporal dimension of that harm – but not a combination of both – was considered sufficient. Third, and perhaps most importantly, "ecocide", as explained above, includes pure environmental damage. This required a definition of the environment, which was successively provided in paragraph 2 (e). This definition is new, as "environment" is not legally defined in international law (with the exception perhaps of the statement of the ICJ in its Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons*). To ensure that all aspects of the environment, including its interlinkages and interconnections, are included, an earth-system science definition was adopted, based on the five main spheres of the earth. Environmental integrity also guided the panel´s work in the definitions of (i) "severe" – for example by including "any" element of the environment; (ii) of "widespread" by recognizing the

[6] The Office of the Prosecutor, 'Policy Paper On Case Selection And Prioritisation' (International Criminal Court 2016) <https://www.icc-cpi.int/sites/default/files/itemsDocuments/20160915_OTP-Policy_Case-Selection_Eng.pdf> accessed 3 September 2022 and also Richard Rogers, 'ICL And Environmental Protection Symposium: The Environmental Crisis–Cases For 'Particular Consideration' At The ICC' (Opinio Juris 2020) <https://opiniojuris.org/2020/06/01/icl-and-environmental-protection-symposium-the-environmental-crisis-cases-for-particular-consideration-at-the-icc/> accessed 3 September 2022.

interconnectedness and un-bound(ary) nature of the environment, as well as the adoption of an ecosystem approach; and (iii) of "long-term" by recognizing irreversible damage as well as natural resilience and recovery. All these aspects are defined such as to allow, at any time, for the use of the best available science to provide more specific clarification, on a case-by-case basis.

5. Perhaps the most difficult choices were informed by the requirement of *legal effectiveness*, or, in other words, by aiming to ensure that the definition "works". First, is the issue of lawfulness. The challenge concerning environmental damage – as compared to the existing crimes in the Rome Statute – is that much of the damaging behaviour (acts and omissions) is not criminalized, and only partly prohibited under international law, national law, or both. At the minimum, the definition captures illegal acts, if they meet the other thresholds mentioned above. The more difficult issue, however, was how to deal with acts that are not prohibited and where the perpetrator acted lawfully. Also, lawful acts can entail severe, widespread, or long-time environmental harm, but in some cases, such serious damage might be legitimate for reasons of social or economic development. In the latter case, particular situations in the global south were given consideration. Other views are, of course, possible.[7] But the panel was cautious of a definition that would "leapfrog" any and every act that causes severe and either widespread or long-term environmental damage to the level of an "international crime of ecocide". With respect for the ICCs jurisdiction over the most serious crime of concern to the international community, and for reasons of clarity, predictability, and legitimacy, but also to address this challenge with a certain degree of realism, the choice was made for lawful acts, the wantonness of the act would be the "criminalizing" element. In this situation, an additional, "unjustifiability" threshold was included: the disproportionality or excessiveness of the environmental damage concerning anticipated social and economic benefits, and the reckless disregard for such.

Another effectiveness consideration that led to the proposal of *mens rea* is knowledge of a substantial likelihood of environmental damage. The requirement of intent was considered too narrow, as perpetrators may not necessarily mean to cause environmental damage, but rather take it knowingly into account. The requirement of knowledge is understood as "awareness"[8] (see the panel´s commentary) of the significant likelihood of serious damage in the sense of being aware or could have been aware based on publicly accessible information and data.

Way Forward

As mentioned in the beginning, the proposal for a definition of "ecocide" as put forward by the panel, is one of many different, thinkable alternatives. Being guided by the abovementioned parameters, it is, however, the one the panel found most suitable as a suggestion for states to consider. The discussion and discourses it has initiated are hopeful signs of engagement with it. Such engagement is crucial for the concept of "ecocide" to take shape and gain a foothold, hopefully on the radar of states, too.

In order to initiate a formal amendment procedure, as a first step, *any* State Party to the Rome Statute may propose the text of an amendment. In order to do so, it needs to submit the textual proposal to the Secretary-General of the United Nations, who shall promptly circulate it to all States Parties. [9]

Of course, the way to a formal adoption is longer than that. It requires further that a majority in the assembly of member state decides to take up the proposal. If this happens, any textual proposal would then be subject to multilateral negotiations, which without doubt will change it. Whatever text might be agreeable in the end, it would need to be adopted by consensus, or if consensus cannot be reached by a two-thirds majority of States Parties. If adopted, the amendment would only enter into force for those state parties that have ratified or accepted it.

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[7] Kevin von Heller, 'Ecocide and Anthropocentric Cost-Benefit Analysis' (Opinio Juris 2021) <https://opiniojuris.org/2021/06/26/ecocide-and-anthropocentric-cost-benefit-analysis/> accessed 3 September 2022.

[8] 'Mens Rea' (Independent Expert Panel for the Legal Definition of Ecocide 2022) <https://static1.squarespace.com/static/5ca2608ab914493c64ef1f6d/t/60d7479cf8e7e5461534dd07/1624721314430/SE+Foundation+Commentary+and+core+text+revised+%281%29.pdf> accessed 3 September 2022.

[9] Rome Statute, art 121, para 1.

The potential time frame for this procedure is hard to estimate. It all depends on whether or not there is sufficient political will and motivation behind such amendment. We won´t know until the first step is taken. For this, the definition by the expert panel could serve as inspiration for a textual proposal to be sent to New York. Any takers?

CHAPTER XX: PUBLIC INTEREST IN INVESTMENT ARBITRATION: THE RAPID ASCENT OF HUMAN RIGHTS, LABOUR LAW AND ENVIRONMENTAL LAW IN INVESTMENT ARBITRATION

Monica Feria-Tinta[10]*

Abstract

Much of the thinking on the relevance of human rights law in investment arbitration has arisen in the context of reflections on what has been referred to as a "systemic crisis" or "legitimacy crisis" in the system of investment arbitration, albeit questions concerning the extent to which States' human rights or environmental obligations may come into play in arbitration under International Investment Agreements, has attracted interest in the literature since the early 2000's. A tension between an understanding of the arbitral process in investment arbitration as fundamentally concerned with private, merely consensual rights (the commercial arbitration model), as opposed to one that discerns "the international law" (in a pivotal role), and what have been called the public law strands, in addition to the commercial strand in the arbitral process, runs through the literature on the relationship between investment law and human rights, as a *leitmotiv*.

This piece looks into the growing incidence of human rights (including labour rights) and environmental protection issues in the context of investment claims. It argues that the investment arbitration regimes are coming of age in their communication with "other laws" (to borrow a term used by the International Law Commission). It is submitted that the 'right to regulate', environmental protection, human rights, labour rights, are likely to be increasingly present in trade agreements as the new generation of trade agreements show. It examines the various manners how 'other law' is becoming relevant in the decision-making of arbitral tribunals.

Introduction

Much of the thinking on the relevance of human rights law in investment arbitration has arisen in the context of reflections on what has been referred to as a "systemic crisis" or "legitimacy crisis"[11] in the system of investment arbitration, albeit questions concerning the extent to which States' human rights or environmental obligations may come into play in arbitration under International Investment Agreements, has attracted interest in the literature since the early 2000's.[12]

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[11] See for example, T. Landau, "Rethinking the Substantive Standards of Protection Under Investment Treaties" (Response to the Report), pp 367-372, p 367 in "Flaws and Presumptions Rethinking Arbitration Law and Practice in a New Arbitral Seat". The Mauritius International Arbitration Conference 2010, Papers from the joint conference of the Government of Mauritius UNCITRAL, PCA, ICSID, ICC, ICCA and LCIA held in Mauritius on 13 and 14 December 2010; M Toral and T Schultz, "The State, A Perpetual Respondent in Investment Arbitration? Some Unorthodox Considerations" pp 577-602, in M. Waibel, A. Kaushal, K-H Liz Chung and C Blachin (eds), *The Backlash Against Investment Arbitration*: *Perceptions and Reality* (Kluwer Law, The Hague, 2010); B. Simma, "Foreign Investment Arbitration: A Place for Human Rights?" ICLQ vol 60 (July 2011) 573-596, p 575; T. Gazzini, "States and Foreign Investment: a Law of the Treaties Perspective" pp 23-48 in S. Lalani and R. Polanco Lazo (eds), *The Role of the State in Investor-State Arbitration* (Brill Nijhoff, 2015) p 23.

[12] United Nations Conference on Trade and Development, *Selected Recent Developments in IIA Arbitration and Human Rights*, IIA Monitor No. 2 (2009) International Investment Agreements, United Nations, 2009. UNCTAD/WEB/DIAE/IA/2009/7, p 2-3. In particular note the work, for example, of the United Nations High Commissioner for Human Rights (High Commissioner for Human Rights, Liberalization of Trade in Services and Human Rights, 25 June 2002, (E/CN.4/Sub.2/2002/9) <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G02/141/14/PDF/G0214114.pdf?OpenElement> accessed on 20 November 2021; UN High Commissioner for Human Rights, Report on Human Rights, Trade and Investment, 2 July 2003

A tension between an understanding of the arbitral process in investment arbitration as fundamentally concerned with private, merely consensual rights (the commercial arbitration model)[13], as opposed to one that discerns "the international law" (in a pivotal role), and what have been called the public law strands, in addition to the commercial strand in the arbitral process, runs through the literature on the relationship between investment law and human rights, as a *leitmotiv*.

As pointed out by Christopher Greenwood, "[i]n marked contrast to 'ordinary' commercial arbitration", in which the legal basis for the arbitrators' jurisdiction is usually an agreement between the two parties to the arbitration, in investment treaty arbitration that jurisdiction is derived from a treaty between two States to which the investor is not a party."[14] In other words, even if seen as possessing a *sui generis* or an hybrid character, [15] investment arbitration is essentially grounded in a treaty and the "interpretation of the extent of the arbitrator's jurisdiction and the rules which the treaty enjoins them to apply, requires recourse to the public international law rules on treaty interpretation rather than the contractual principles with which many arbitrators will be more familiar."[16]

Seen from a practical perspective on the other hand, (i.e. the arbitrator's point of view), in investment arbitration, as put by Toby Landau, your mandate "unlike commercial arbitration" is "to review the exercise of discretion by a sovereign by way of its executive, its legislative even its judiciary."[17] In this exercise moreover, "[y]ou are tasked […] with applying extremely broadly worded standards."[18] Often investment treaties would be silent about human rights. Yet, the 'beyond the immediate parties' elements of investment arbitration can be well summarized in Landau's own observations:

> *You are supposedly to rule upon the interest of an individual investor and yet in doing so, you may well impact upon a whole community. If you are going to rule that a carbons emission quota system is contrary to a Bilateral Investment Treaty ("BIT"), in order to safeguard the interest of a particular coal-fired power plant in a country, then, you may well be impacting upon a whole environment policy of an entire nation. If you are going to rule on the rights of an investor in the water system of Tanzania, you may well be affecting 350 000 water users in Dar Es Salaam. If you are going to question and rule upon South Africa's policy in favour of black economic empowerment, in order to safeguard the interest of the individual mining interest before you the wider impact is obvious. And, you do so with the ability to impose damages unlike many public law municipal systems and those damages may be significant. You have the power to affect the most extraordinary allocation of public funds.*[19]

Against that backdrop, it is not surprising that arbitrators with jurisdiction over international investment disputes are increasingly confronted with human rights arguments.

This piece looks into the growing incidence of human rights (including labour rights) and environmental protection issues in the context of investment claims. It takes my original reflections surrounding the question

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(E/CN.4/Sub.2/2003/9)<(https://documents-dds-ny.un.org/doc/UNDOC/GEN/G03/148/47/PDF/G0314847.pdf?OpenElement> accessed on 20 November 2016.

[13] See Van Harten's observation that "there is a general tendency in investment treaty arbitration in favour of a commercial arbitration approach", G. Van Harten, *Investment Treaty Arbitration and Public Law*, OUP (2007) 121 as cited in R. Castro de Figueiredo, "Fragmentation and Harmonization in the ICSID Decision-Making Process" pp 506-530 in J E. Kalicki and A. Joubin-Bret, *Reshaping the Investor-State Dispute Settlement System, Journeys for the 21st Century*, Brill Nijhoff (2015) 511

[14] C. Greenwood, "Rethinking the Substantive Standards of Protection Under Investment Treaties" (Response to the Report), pp 373-378, p 373 in "Flaws and Presumptions Rethinking Arbitration Law and Practice in a New Arbitral Seat". The Mauritius International Arbitration Conference 2010, Papers from the joint conference of the Government of Mauritius UNCITRAL, PCA, ICSID, ICC, ICCA and LCIA held in Mauritius on 13 and 14 December 2010.

[15] Z. Douglas "The Hybrid Foundations of Investment Treaty Arbitration" British Yearbook of International Law, 2003, vol 74 (issue 1) 151-289, p 151.

[16] C. Greenwood, "Rethinking the Substantive Standards of Protection Under Investment Treaties" (Response to the Report), op cit, p 374.

[17] T. Landau, "Rethinking the Substantive Standards of Protection Under Investment Treaties" (Response to the Report), op cit, p 367.

[18] Ibid.

[19] ibid 367-368. Footnotes omitted.

"*Are human rights arbitrable within an investment claim*?" addressed in a 2016 Article entitled "Like Oil and Water? Human Rights in Investment Arbitration in the Wake of Philip Morris vs. Uruguay"[20] a stage further. I submit that the investment arbitration regimes are coming of age in their communication with "other laws" (to borrow a term used by the International Law Commission). The 'right to regulate', environmental protection, human rights, labour rights, are likely to be increasingly present in trade agreements as the new generation of trade agreements show. If the question in the past put simply, in the words of former ICJ Judge Bruno Simma, was "are a State's obligations to its own population to be weighed against investor rights under BITs?",[21] today it is rather the various manners how 'other law' becomes relevant in the decision-making of arbitral tribunals. What follows is a sketchy discussion of some of the different ways in which human rights, environmental protection and public interest issues may be subject to determination in the context of investment arbitration cases

A New Wave Of Bilateral Investment Treaties And Free Trade Agreements

A new generation of Bilateral Investment Treaties and Free Trade Agreements is seeking to expressly enforce human rights law, environmental law and other relevant public law in the context of investment law. As noted by Briercliffe et al, for example, "*a number of "new-generation" [International Investment Agreements] (or proposed International Investment Agreements) are starting to include direct and binding human rights obligations on companies*".[22] Notable instances -as observed -are the 2012 South-African Development Community Model bilateral investment treaty, the 2016 draft Pan-African Investment Code, and the 2016 Morocco-Nigeria BIT. Specific references to human rights obligations assist an arbitral tribunal in the interpretation of investment treaties in harmony with those primary rules. Further examples in which human rights and environmental obligations are set out for investors in an investment instrument can be seen in Annex II of the Brazilian-Angolan co-operation Agreement for the Promotion of Investments as follows:

> *Investors and their investments will use their best efforts to observe the following voluntary principles and standards for responsible and consistent business conduct with the laws adopted by the State Party receiving the investment:*
>
> *i. Respect the protection of the environment and sustainable development and encourage the use of technologies that do not harm the environment, in accordance with the national policies of the Parties, in order to encourage economic, social and environmental progress;*
>
> *ii. Respect the human rights of those involved in the activities of these companies, in accordance with the international obligations and commitments of the receiving Party*[23]

The same applies to environmental protection.

Ways In Which Human Rights, Environmental Protection And Other Public Law Areas May Be Brought Into The Realm Of Investment Law Treaty

There are at least three ways in which human rights, environmental protection and other public law areas are being brought into the realm of investment law via this new generation of treaties. By way of (1) Preambular dispositions (2) Protecting the "*right to regulate*" using general exception clauses; and (3) carving out these areas.

Preambular disposition

[20] Journal of International Arbitration, vol 34, issue 4 (2017) 601-630.
[21] B. Simma, op cit, p 591.
[22] N Briercliffe et al, "Human Rights-based Claims by States and "New Generation" International Investment Agreements (*Kluwer Arbitration Blog*, 1 August 2018).
[23] Author's translation. In Portuguese, in the original < https://www.acerislaw.com/wp-content/uploads/2021/04/Brazilian-Angola-Investment-Agreement.pdf> accessed on 4 June 2022.

An example of a preambular disposition in which environmental protection is brought into the ambit of the treaty so that this is interpreted consistently with sustainable development and environmental protection and conservation is the Australia-Chile Free Trade Agreement (FTA) of 2008 which entered into force on 6 March 2009. The relevant passage in the preamble reads:

> *Implement this Agreement in a manner consistent with sustainable development and environmental protection and conservation"*[24]

Another example in the same vein, is the preamble of the 2018 EU-Singaporean Free Trade Agreement[25] which provides that the parties must "*regard to the principles articulated in The Universal Declaration of Human Rights adopted by the General Assembly of the United Nations on 10 December 1948*"[26]

The preamble of a treaty sets out the object and purpose of the treaty and thus it is relevant for the interpretation of the treaty as per the Vienna Convention on the Law of Treaties.[27]

General Exception Clause

An example of introducing "right to regulate" powers including with respect to environmental matters, is Article 12(3) of the United States Model Bilateral Investment Treaty (BIT) of 2012:

> *The Parties recognize that each Party retains the right to exercise discretion with respect to regulatory, compliance, investigatory, and prosecutorial matters, and to make decisions regarding the allocation of resources to enforcement with respect to other environmental matters determined to have higher priorities. Accordingly, the Parties understand that a Party is in compliance with paragraph 2 where a course of action or inaction reflects a reasonable exercise of such discretion, or results from a bona fide decision regarding the allocation of resources.*[28]

Carve-Out

By contrast to the above, some trade agreements rather carve-out from the spectrum of possible breaches, measures intended to ensure human rights obligations, environmental protection, labour obligations and other rights, to regulate matters. An example of a carve-out provision is contained in the Belgium/Luxembourg-Colombia BIT (Article IX((Expropriation and Compensation) (3)(c)) as follows:

> *Except in rare circumstances, such as when a measure or series of measures are so severe in the light of their purpose that they cannot be reasonably viewed as having been adopted and applied in good faith, non- discriminatory measures of a Party that are designed and applied for public purposes or with objectives such as [...] environment protection, do not constitute indirect expropriation.*[29]

Labour Rights in international trade law instruments

The inclusion of labour law provisions within international trade law instruments is also now a growing phenomenon, in the protection of transnational labour rights. The Dominican Republic-Central America Free Trade Agreement (CAFTA-DR), a treaty between the Central American countries and the Dominican Republic

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[24] Available here <https://www.dfat.gov.au/trade/agreements/in-force/aclfta/fta-text-implementation/Pages/preamble> accessed on 3 June 2022.

[25] <https://www.acerislaw.com/wp-content/uploads/2021/04/2018-EU-Singaporean-Free-Trade-Agreement.pdf>.

[26] Ibid.

[27] Vienna Convention on the Law of Treaties, art 31(1): "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."

[28] Available here < https://ustr.gov/sites/default/files/BIT%20text%20for%20ACIEP%20Meeting.pdf> accessed on 5 June 2022.

[29] BLEU (Belgium-Luxembourg Economic Union) - Colombia BIT (2009), Available on <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/342/download> accessed on 8 July 2022.

with the USA, is instructive in that sense. The *USA vs. Guatemala*[30] dispute under CAFTA-DR, was *"the first instance in which a labor law complaint was disputed under the arbitration mechanisms of a free trade agreement".*[31] It was the first case of breach of labour rights that was aired within the framework of a free trade agreement.

In the CAFTA-DR treaty (in force since 2005) the economic, commercial, social and labour objectives constitute an inseparable whole and all its commitments are mandatory. The commitments assumed in labour matters as well as in the environmental aspect, are not accessory or secondary issues of the agreement, but aspects whose good progress affects the other aspects contemplated in the agreement, among them, trade and access to markets.

The State of Guatemala assumed commitments in labour matters and even before the entry into force of CAFTA-DR its authorities recognized several of the necessary changes to be made and received international cooperation for so doing.

The treaty states that both Parties "reaffirm their obligations as members of the International Labor Organization (ILO) and their commitments under the *ILO Declaration on Fundamental Principles and Rights at Work and its Follow-Up (1998)* (ILO Declaration)" and "shall strive to ensure that such labour principles and the internationally recognized labor rights set forth in Article 16.8 are recognized and protected by its law",[32] which includes provisions relating to right of association, collective bargaining, forced labour, child labour, acceptable working conditions regarding minimum wages, hours of work and security and occupational health. The treaty also states that each Party "shall not fail to effectively enforce its labor laws" (Article 16.2.1(a)) In addition, the signatory countries undertake not to fail to effectively apply their labour legislation, in a way that affects trade between the Parties (Art. 16.2.1).[33]

That is to say, the State of Guatemala undertook to respect its own legislation contained in the Political Constitution, in the International Conventions that it has ratified and in national legislation, and to ensure adequate administrative and judicial mechanisms so that workers have access to fair and transparent procedures. However, as argued by the Unions, "it has severely failed to comply with these elementary obligations for a long time. According to Chapter 20 of DR-CAFTA, the State of Guatemala assumed the consequences of a sustained or recurring breach of its own labour legislation, which can cause significant monetary sanctions and even suspension of tariff benefits".[34]

Since 2008, Unions (from different employment sites in sectors including shipping, agriculture, and textile manufacturing) have filed several cases alleging that Guatemala has failed to effectively enforce its domestic labour laws with regard to freedom of association, the right to organize and bargain collectively, and acceptable working conditions.[35] As put by Ricardo Changala the adviser to the Unions that initiated the process, "after a long process of promises from the Governments of the day to make the necessary changes to meet the commitments assumed in the DR-CAFTA, on 9 August 2011, the United States requested the establishment of an arbitration panel (Arbitration Group) under article 20.6 in relation to the lack of effective application of labour legislation by the Guatemalan government".[36] The lack of progress since that date, led to the fact that on 26 April 2013, the governments of the United States and Guatemala signed the 18-point Execution Plan, which included concrete actions with specific deadlines with which Guatemala had to comply within six months, so as to improve the application of labour legislation. Among other commitments, Guatemala had promised to strengthen labour

[30] CAFTA-DR Panel Report, *In the Matter of Guatemala- Issues Relating to the Obligations Under Article 16.2.1 (a) of the CAFTA-DR.*

[31] Phillip Paiement, "Leveraging Trade Agreements for Labour Law Enforcement: Drawing Lessons from the US-Guatemala CAFTA Dispute" *Georgetown Journal of International Law*, vol 49 pp 675-692. Available on: <https://www.law.georgetown.edu/international-law-journal/wp-content/uploads/sites/21/2018/08/GT-GJIL180022.pdf accessed on 1 May 2022>

[32] art 16.1.1.

[33] < https://ustr.gov/sites/default/files/uploads/agreements/cafta/asset_upload_file320_3936.pdf >.

[34] Interview with Ricardo Changala, adviser to the unions that filed the complaints (2008) that originated the process (date of the interview, 25 May 2015).

[35] Ibid.

[36] Ibid.

inspections, streamline and simplify the process of sanctioning employers, increase compliance with labour legislation by companies involved in export activities, improve supervision and compliance with court orders, reinstate workers fired for trying to organize unions, publish labour information and legislation, and establish mechanisms to ensure that workers are paid when factories close.[37]

Finally, on 3 November, 2014, the USA presented the formal claim to be examined by an Arbitration panel that was formed and that, since that date, was receiving arguments from both parties but also from non-governmental organizations interested in the matter.[38]

In April 2015, the Unions presented their Memorial. On 14 June 2017, the Panel issued a report deciding on the case.[39] As noted by Parliament, "while the United States was successful in demonstrating that the Guatemalan government had failed to enforce its labor laws on a number of occasions and at a number of enforcement sites, the United States ultimately failed to prove that these actions affected trade between the two countries, and thus lost the dispute".[40]

While Parliament observes that the arbitral panel's decision in the Guatemalan example demonstrates "the limitations that arbitration poses for the participation of labour advocates and the constraints that arise from the 'affecting trade' provisions in [Free Trade Agreements]",[41] the trend today shows that the direction of travel, however, is towards the inclusion of labour matters in Free Trade Agreements. By way of example, see the Republic of Korea-EU BIT.[42] In a recent arbitration arising from labour related matters under that BIT, Korea cited as authority the labour dispute under the Dominican Republic-Central America- US Free Trade Agreement seen above, and argued that '[t]hat panel in essence took the view that the failure to comply with or enforce labour laws does not necessarily and automatically result in trade diversions or distortions or affect trade flows'[43] The arbitral tribunal, however, found otherwise, and held that the Republic of Korea was in breach of labour commitments under the Free Trade Agreement with the EU. In its reasoning, the Tribunal *inter alia* stated:

> *65. The language of 'fundamental rights' in the context of the ILO Constitution and 1998 Declaration directly conflicts with Korea 's contentions in relation to a 'trade-relatedness' limitation: '(u)niversality of its standards is a fundamental part of the ILO's approach'. In replicating the language of the 1998 Declaration, the Parties give direct expression to this universality principle. For example, the text of Article 13.4.3 refers to 'the elimination of all forms of forced or compulsory labour', which is unequivocal in its universal scope. The key principle of the fundamental right of freedom of association is that every worker and employer has the right to join an association of their own choosing, with only limited exceptions as determined through the relevant processes of the ILO. The Parties have drafted Article 13.4.3 in such a way as to exclude the possibility that this domestic commitment to achieve or work towards these key international labour principles and rights exits only in relation to trade related aspects of labour.*
>
> *66. One outcome, if Korea's position were correct, would be that Article 13.4.3 would permit a Party to institute a form of slavery or child labour for workers who were deemed not to fall within the category of 'trade-related labour'. This is clearly antithetical to the unambiguous meaning of the text of Article 13.4.3, which refers to elimination of such practices with no express exceptions.*[44]

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[37] Ibid.

[38] All the documentation known to date in relation to the claim can be found on the following website <http://portaldace.mineco.gob.gt/node/89>.

[39] CAFTA-DR Panel Report, *In the Matter of Guatemala- Issues Relating to the Obligations under art 16.2.1 (a) of the CAFTA-DR.*

[40] Phillip Paiement op cit, p 676.

[41] ibid 676-677.

[42] Panel of Experts Proceeding Constituted under Article 13.15 of the EU-Korea Free Trade Agreement. Report of the Panel of Experts (Jill Murray, Professor Laurence Boisson de Chazournes, Professor Jaemin Lee) 20 January 2021 < https://trade.ec.europa.eu/doclib/docs/2021/january/tradoc_159358.pdf> accessed on 15 June 2022.

[43] Ibid, as per Korea's arguments, para 58.

[44] Report of the Panel of Experts op cit, paras 65, 66.

As per the EU's publicising of this decision, "*The independent panel concluded that the Republic of Korea needs to adjust its labour laws and practices and to continue swiftly the process of ratifying four fundamental International Labour Organization (ILO) Conventions in order to comply with the agreement.*"[45]

The Panel of experts found that Republic of Korea had "to adjust its labour laws and practices to comply with the principle of freedom of association" and "agreed that the commitment to take steps towards the ratification of fundamental ILO Conventions requires ongoing and substantial efforts".[46]

Interpretative Route

The "Master Key" To International Law (Or The Principle Of Systemic Integration)

But even treaties in which there is no mention of human rights or the environment (or other law) may require engaging with such topics. Public interest via primary rules of human rights or environmental law, may be relevant to the interpretation of investment treaties if one is to conceive investment law as part of a system.

To the question: are substantive human rights standards within the BIT necessary for an arbitral tribunal to be competent to rule on human rights issues or environmental issue? The answer would be yes; unless "those [rights] related to the protection of the investor's property may at the same time constitute a breach of a particular treaty obligation and hence fall within the realm of the tribunal's competence,"[47] or "if and to the extent that the human rights violation affects the investment, it will become a dispute "in respect of" the investment and must hence be arbitrable."[48]

Two key questions in that context are: Is there a presumption of coherence within existent international law even if "to be handled with care, and on a case by case basis"?[49] Moreover, does party autonomy have a limit (i.e. *jus cogens*, multilateral obligations owed to third parties)? These two fundamental questions underline some of the thinking on the subject produced by Simma. He remarked in that sense that whilst Article 31 (3) (c) of the Vienna Convention on the Law of Treaties (VCLT)[50] would indeed enshrine this presumption of coherence within existent international law, a principle held in the *Oil Platforms* case[51] by the ICJ,[52] party autonomy would find its limits "in the presence of *jus cogens* (as was the case in *Oil Platforms*) or of certain multilateral obligations owed to third parties".[53]

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[45] European Commission, "Panel of Experts confirms the Republic of Korea is in breach of labour commitments under our trade agreement", 25 January 2021 <https://ec.europa.eu/commission/presscorner/detail/en/ip_21_203>.

[46] Ibid.

[47] C. Reiner & C. Schreuer, "Human Rights and International Investment Arbitration" in PM Dupuy, F Francioni & EU Petersmann (eds), *Human Rights in International Investment Law and Arbitration*, p. 83. As in *Biloune and Marine Drive Complex Ltd v Ghana Investments Centre and the Government of Ghana* (UNCITRAL), Award on Jurisdiction and Liability, 95 ILR 184 (27 October 1989).

[48] C. Reiner & C. Schreuer, op cit p 84.

[49] B. Simma, op cit. p 584.

[50] art 31 of the VCLT reads:

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

2. The context for the purpose of the interpretation of a treaty shall comprise in addition to the text, including its preamble and annexes: […]

3. There shall be taken into account, together with the context:

(a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;

(b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;

(c) **any relevant rules of international law applicable in the relations between the parties**. (Emphasis added)

[51] *Oil Platforms (Islamic Republic of Iran v United States of America)* Judgment [2003] ICJ Rep paras 73-78. See in particular para 41 of the judgment citing VCLT art 31(3)(c)

[52] B Simma, op cit, pp 583-584.

[53] ibid584. As noted by McNair, indeed "It is difficult to imagine any society, whether of individuals or of States, whose law sets no limit whatever to freedom of contract", *Lord A.D. McNair,* The Law of Treaties (Oxford: Clarendon Press, 1961) 213-214.

The interpretative gate draws on from the work of the International Law Commission (ILC)[54] on "Fragmentation of International Law", which termed Article 31 (3) (c) of the VCLT to be "the *master key to international law*",[55] or the solver of "a systemic problem – an inconsistency, a conflict" [56] between different rules, often as a consequence of the emergence of the functional specialization of regulatory regimes in international law (i.e. "trade law", "human rights law"). The ILC held in that sense that "[i]n International Law, there is a strong presumption against normative conflict".[57]

There are four fundamental propositions which relate to the notion of 'the master key to international' from the work of the International Law Commission (ILC) on fragmentation of international law. These are: (a) conflict-resolution and interpretation cannot be distinguished from each other (b) International law is understood as *a system*. (c) All international law exists in a systemic relationship with other law (therefore in interpreting a rule one ought to look into the *normative environment* of a treaty) (d) A limited jurisdiction does not imply a limitation of the scope of the law applicable in the interpretation and application of the treaty. I shall look at each one in turn.

Conflict Resolution And Interpretation Cannot Be Distinguished From Each Other

As pointed out by the ILC, Article 31 of the VCLT "has helped to place the problem of treaty relations in the context of treaty interpretation".[58] Although authors like Simma himself have warned "[a]s against such enthusiasm, I would advise keeping in mind what the provision was designed to be, namely a principle for the interpretation of treaties, nothing more",[59] and stated "[w]hat can article 31 (3) (c) yield as an entry point for international human rights law in the interpretation of an investment treaty? […] it can only be employed as a means of harmonization *qua* interpretation, and not for the purpose of modification, of an existing treaty",[60] the fact is that the mere notion of "conflict" implies already an *interpretation* exercise.

Thus, the ILC has stated in that regard that "contrary to what is sometimes suggested, conflict resolution and interpretation cannot be distinguished from each other. […] Rules appear to be compatible or in conflict *as a result of* interpretation."[61]

International Law Understood As A System

Article 31 of the VCLT would be a reflection of the principle of "systemic integration" or "a guideline according to which treaties should be interpreted against the background of all the rules and principles of international law-in other words, international law *understood as a system*."[62] The question of the relationship of different rights or obligations "could only be approached through a process of reasoning that makes them appear as parts of some coherent and meaningful whole".[63]

All International Law Exists In Systemic Relationship With Other Law

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[54] ILC, Fragmentation of International Law: Difficulties Arising from the Diversification Expansion of International Law, Report on the Study Group of the International Law Commission (Finalised by Martti Koskenniemi), para 37, A/CN4/L682 (13 April 2006).

[55] ibid, para 420. As noted by Simma, the "term was coined by the ILC member (now ICJ Judge) Xue Hanqin during a more recent commission debate on the significance of art 31 (3) (c)". B. Simma, op cit, p 584.

[56] ILC, Fragmentation of International Law: Difficulties Arising from the Diversification Expansion of International Law, para 420.

[57] ibid, para 37.

[58] UN Report of the International Law Commission, Fifty-seventh session (2 May-3 June and 11 July-5 August 2005), GA Sixtieth session, A/60/10, para 467.

[59] B. Simma, op cit, p 584.

[60] Ibid.

[61] ILC, Fragmentation of International Law: Difficulties Arising from the Diversification Expansion of International Law, op cit, para 412.

[62] UN Report of the International Law Commission, Fifty-seventh session (2 May-3 June and 11 July-5 August 2005), GA Sixtieth session, A/60/10, para 467.

[63] ILC, Fragmentation of International Law: Difficulties Arising from the Diversification Expansion of International Law, para 414.

The ILC noted that "[i]t is sometimes suggested that international tribunals or law applying (treaty) bodies are not entitled to apply the law that goes "beyond" the four corners of the constituting instrument or that when arbitral bodies deliberate the award, they ought not to take into account rules or principles that are not incorporated in the treaty under dispute or the relevant *compromise*. But if, […], *all international law exists in systemic relationship with other law*, no such application can take place without situating the relevant jurisdiction endowing instrument in its normative environment."[64] In the words of the ILC, this means that "although a tribunal may only have jurisdiction in regard to a particular instrument, it must always *interpret* and *apply* that instrument in its relation to its normative environment- that is to say "other international law."[65]

An instructive example of the application of such a principle when looking into State obligations under two different regimes such as investment law and human rights law, can be found in the *Sawhoyamaxa Indigenous Community v Paraguay*,[66] a case adjudicated by the Inter-American Court of Human Rights, in which the State alleged obligations under a BIT as a defence for breaches of the American Convention. The Court stated in that regard:

> *140. Lastly, with regard to the third argument put forth by the State, the Court has not been furnished with the aforementioned treaty between Germany and Paraguay, but,* ***according to the State, said convention allows for capital investments made by a contracting party to the condemned or nationalized for a "public purpose or interest", which could justify land restitution to indigenous people. Moreover, the court considers that the enforcement of bilateral commercial treaties negates vindication of non-compliance with State obligations under the American Convention; on the contrary, their enforcement should always be compatible with the American Convention,*** *which is a multilateral treaty on human rights that stands in a class of its own and that generates rights for individual human beings and does not depend on reciprocity among States.*[67] *[Emphasis added]*

The judgment of the Inter-American Court prompted Paraguay's passing Law No. 5194 which called for the expropriation of specific foreign-owned land, whilst providing for compensation to be set via an official appraisal. As two affected landowners sought a challenge to the constitutionality of the legislation, the matter was referred to Paraguay's Supreme Court which found the transfer of the expropriated land to the indigenous community to be a 'public interest purpose' for the purposes of the Paraguay Constitution.[68]

Coming back to the ILC work, it is to be noted that it emphasized that "[t]he way in which 'other law' is 'taken into account' is quite crucial to the parties and to the outcome of any single case.[69] But moreover, the principle of systemic integration would "look beyond the individual case" and make sure that "the outcome is linked to the legal environment".[70] In this analysis, the legal environment would be other obligations relevant to the interpret the investment law dispute. The dangers of "isolating" legal institutions from one another was referred to by the ILC as follows:

> *To hold those institutions as fully isolated from each other and as only paying attention to their own objectives and preferences is to think of law only as an instrument for attaining regime-objectives. But law is also about protecting rights and enforcing obligations, above all rights and obligations that have a backing in something like a general, public interest. Without the principle of 'systemic integration' it*

[64] ibid, para 423.
[65] Ibid.
[66] Inter-American Ct. of Human Rights, *Case of the Sawhoyamaxa Indigenous Community v. Paraguay*, Judgment of March 29, 2006 (Merits, Reparations and Costs).
[67] Ibid, para 140.
[68] Sentencia de la Corte Suprema de Paraguay, "Acción de Inconstitucionalidad: Kansol S.A. y Roswell Company S.A. C/ La Ley No 5194 que declara de interés social y expropia a favor del Instituto Paraguayo del Indígena (INDI), 30 Septiembre 2014 <https://elaw.org/es/system/files/_caso-sawhoyamaxa-rechazo-de-inconstitucionalidad_0.pdf>.
[69] ILC, Fragmentation of International Law: Difficulties Arising from the Diversification Expansion of International Law, para 480.
[70] Ibid.

would be impossible to give expression to and to keep alive, any sense of the common good of humankind, not reducible to the good of any particular institution or 'regime".[71]

(d) A limited jurisdiction does not imply a limitation of the scope of the law applicable in the interpretation and application of the treaty

Finally, from this perspective, whether a tribunal would be able to look into "other law" is not a jurisdictional matter but rather a matter of substantive law (law applicable in the interpretation and application of the treaty). The ILC asserted in that connection: "The jurisdiction of most international tribunals is limited to particular types of disputes or disputes arising under particular treaties. *A limited jurisdiction does not, however, imply a limitation of the scope of the law applicable in the interpretation and application of those treaties*."[72] The ILC noted, that in the WTO context for example, "a distinction has been made between two notions, jurisdiction and applicable law".[73]

Having set out the above, I turn to some practical examples in which human rights and environmental law have arisen (in some cases, quite successfully so) in investment law claims.

Human Rights And Environmental Law In The Defence Of A Claim Via Interpretation Of A Treaty

The tension between investment law and human rights has been particularly felt in the Latin American region. The last decades have witnessed what has been referred to as "an explosion in Latin American investment arbitration"[74] Latin America has after all, more bilateral investment treaties than any other region in the world.[75] Some of these disputes have arisen from regulatory measures involving matters of public interest such as health, environment or economy.[76] Take the case of *Metalclad*,[77] in which a waste management business sued Mexico for expropriation after it was denied permission to operate a landfill it had constructed. In its submissions, the government had described the claimant's landfill to be a "threat to health and safety" because it was in fact a hazardous waste landfill.[78] Furthermore, Mexico adopted an ecological decree declaring the area where the company was seeking to operate the waste landfill, to be a natural reserve. An arbitral tribunal constituted under Chapter Eleven of the North America Free Trade Agreement (NAFTA) found that the government had taken a measure tantamount to expropriation and ordered Mexico to pay nearly $16.7m -later reduced to $15.6m- in compensation. To some, this result was the "reverse of the established tenet of environmental policy: the principle that polluters should bear the cost of their pollution rather than be paid not to pollute."[79]

By contrast, the United States has been successful in a case against Canadian investors, *Glamis Gold v United* States,[80] an arbitration under NAFTA, using as defence, the respect for the rights of indigenous peoples and environmental rights.

A turning point in investment arbitration in Latin America and the willingness of investment arbitration to engage

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[71] ibid, para 481.

[72] ibid, para 45 Emphasis added.

[73] Ibid.

[74] J. Hamilton, "A Decade of Latin American Investment Arbitration" pp 69-82 in M Mourra & T Carbonneau (eds), *Latin American Investment Treaty Arbitration: The Controversies and Conflicts,* Wolters Kluwer (2008) 71.

[75] As observed by Mourra by 2008, "Over the past two decades, Latin American States signed more than five hundred bilateral investment treaties with countries around the world." M. Mourra & T Carbonnau (eds), *Latin American Investment Treaty Arbitration: The Controversies and Conflicts,* Wolters Kluwer (2008) 1.

[76] ibid 2.

[77] *Metalclad Corporation v. The United Mexican States*, ICSID Case No. ARB(AF)/97/1, Award (30 August 2000).

[78] *Metalclad Corporation v. The United Mexican States*, ICSID Case No. ARB(AF)/97/1, Respondent's Countermemorial (22 May 1998) paras 32-33.

[79] "Private Rights, Public Problems: A Guide to NAFTA Controversial Chapter on Investor Rights", International Institute for Sustainable Development, Canada, 2001, p. 33, cited in UN High Commissioner for Human Rights, Report on Human Rights, Trade and Investment, 2 July 2003 (E/CN.4/Sub.2/2003/9), op cit at para 35.

[80] *Glamis Gold LTD v United States of America* before the Arbitral Tribunal constituted under Chapter 11 of the North American Free Trade Agreement (8 June 2009).

with "other law" (i.e human rights obligations) in the context of investment claims was yet to come much later with the case of *Philipp Morris v Uruguay* case.[81] On 8 July 2016 the award in the *Philip Morris v Uruguay* case was delivered. The case brought to centre stage the right to health in investment arbitration in the context of the examination as to whether tobacco-control measures introduced by Uruguay in compliance with international agreements amounted to expropriation under a BIT. Unlike earlier cases in which human rights arguments have been made but not dealt with centrally by the tribunals, the arbitral tribunal in this case directly engaged with the arguments raising the conflicting obligations of Uruguay under the BIT (the investors' rights) and the right to health of its population under external rules (other international agreements). In a majority vote, the Tribunal composed of Prof Piero Bernardini (Presiding), Gary Born and Judge James Crawford, found that Uruguay had not violated its international obligations under the BIT.

Another example of a successful defence raising environmental protection arguments is the case of *Pac Rim Cayman LLC v. Republic of El Salvador*[82] The investor had sought green light for the El Dorado mine or approximately US$300 million in compensation in its arbitration claim. The Centre for International Environmental Law, submitted an amicus in the case stating, "the implementation by the State of a normative framework designed to protect these rights against the risks posed by extractive industries is supported by international human rights obligations. Especially in a country like El Salvador, which suffers from high population density and scarcity of water resources, the application of legal requirements and administrative processes are indispensable tools for the State to safeguard the rights threatened by extractive industries."[83] The tribunal did not engage with CIEL submissions. Yet, El Salvador won the arbitration on the basis that the investor had failed to meet key regulatory requirements relating to environmental protection, namely (i) environmental impact study; (ii) a feasibility study; and (iii) land title and permission-to mine requirements.

The trend of cases in investment arbitration raising environmental issues is to continue and grow. Since 2012, "*more than 60 investment disputes filed … have had some environmental component."*[84]

Investors Bringing Up Public Law (I.E. Environmental Protection) Issues As Part Of Their Claim

At times, investors also resort to environmental law. In the case of *Allard v Barbados*[85], a Canadian investor argued that Barbados had breached its treaty obligations under a Canadian-Barbados BIT, by failing to enforce environmental laws. Allard claimed that he had suffered loss and damage as a consequence of the environmental degradation at his eco-tourism site. The Tribunal found that there had not been any indirect expropriation, failure to protect foreign investment or unfair or inequitable treatment under the Canada-Barbados BIT. The case is nevertheless of note, because environmental considerations may be at the basis of a potential investment claim, say in the context of harm caused by inaction within climate change scenarios. This could potentially be an area of disputes.

Take also the *Biloune v Ghana* paradigm in which an investor requested redress also for violations of human rights in the context of an investment arbitration, as referred to before. The case concerning *Al Jazeera Media Network v Arab Republic of Egypt*[86]*, a* $150m international arbitration claim arising from the enforced closure of Al Jazeera business in Cairo and the arrest and alleged harassment of its journalists, is a further example of investors' invoking human rights standards in an investment arbitration case.[87] Al Jazeera is alleging breaches

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[81] *Philip Morris Brands Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A*. v *Oriental Republic of Uruguay,* ICSID Case No. ARB/10/7, Award (8 July 2016).

[82] *Pac Rim Cayman LLC v. Republic of El Salvador (ICSID Case No, ARB/09/12)*.

[83] ibid, para 3.29.

[84] Kate Parlett and Sarah Ewad, "Protection of the Environment in Investment Arbitration – A double Edge Sword", Kluwer blog (22 August 2017).

[85] *Allard and the government of Barbados*, PCA Case No 2012-06, Award (27 June 2016).

[86] *Al Jazeera Media Network v Arab Republic of Egypt*, ICSID Case No ARB/16/1 <http://investmentpolicyhub.unctad.org/ISDS/Details/700>.

[87] "Al-Jazeera takes legal action against Egyptian government", The Guardian (27 January 2016) <https://www.theguardian.com/media/greenslade/2016/jan/27/al-jazeera-takes-legal-action-against-egyptian-government.>

of the Qatar-Egypt bilateral investment treaty, including breaches of human rights obligations such as freedom of expression.[88]

Human Rights And Environmental Law In A State Counter-Claim Against Investors In A Claim Initiated By An Investor

The turning point discussed above, which was marked by the *Philip Morris v Uruguay case* has been taken further, by the recent decision in *Urbaser v Argentina*,[89] relating to a concession for water and sewage services to be provided in the Province of Greater Buenos Aires, delivered in December 2016. Not only did the *Urbaser* Tribunal engage with human rights arguments, but it did so quite centrally: It had an entire section on the BIT's relation to international and human rights, as well as a section on the human right to water in the framework of the concession in the case. The Tribunal dismissed all allegations of breach of the Argentina-Spain BIT made by the investors (Urbaser S.A. and *Consorcio de Aguas Bilbao Bizkaia* (CABB)) with the exception of a breach of the Fair and Equitable Treatment standard, in relation to the renegotiation of the Concession Contract in the period between 2003 and 2005. There are three key aspects to note in this case in relation to human rights in investment arbitration: (i) *human rights in a counter-claim*- This is the first case in which a Tribunal addresses the merits of a counter-claim (relating to human rights) brought by the State in the context of investment arbitration; (ii) *private parties' human rights obligations* - human rights obligations are brought up not only at the vertical level (State obligations) but also at the horizontal level (human rights obligations on the part of the private sector); and (iii) *widening of the spectrum of human rights instruments referred to*. References to human rights standards are broad and include not only the European Convention on Human Rights, but also other binding and non-binding human rights instruments such as the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the Universal Declaration on Human Rights.

Counterclaims by a State against an investor are possible under some investment treaties. There can be jurisdiction for counter-claims even in the absence of specific treaty provision (via interpretation). A counter-claim may be possible nevertheless in the following scenarios: (i)Agreed arbitration rules permit counterclaims (i.e. Article 46 of the ICSID Convention); (ii)Parties consent to the tribunal taking jurisdiction over counterclaims; and (iii) Dispute resolution clause in a BIT may permit claims to be brought by a State.

Agreed Arbitration Rules Permit Counterclaims

An example of this is Article 46 of the ICSID Convention) which reads:

> *Except as the parties otherwise agree, the Tribunal shall, if requested by a party, determine any incidental or additional claims or counter-claims arising directly out of the subject-matter of the dispute provided that they are within the scope of the consent of the parties and are otherwise within the jurisdiction of the Centre.*[90]

Parties Consent To The Tribunal Taking Jurisdiction Over Counterclaims

This was the case in *Burlington Resources v Ecuador*,[91] in which Ecuador was awarded USD 41 million in counter-claim against U.S. oil and gas company Burlington Resources, in compensation for environmental and infrastructure damage.

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[88] Ibid.

[89] *Urbaser S.A. and Consorsio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa and The Argentine Republic,* ICSID Case No, ARB/07/26, Award (8 December 2016).

[90] Convention on the Settlement of Investment Disputes between States and Nationals of Other States <https://icsid.worldbank.org/sites/default/files/ICSID%20Convention%20English.pdf> accessed on 3 June 2022.

[91] *Burlington Resources v Ecuador*, ICSID Case No. ARB/08/5 Decision on Ecuador's Counterclaims (7 February 2016).

In *Burlington* as in *Perenco,*[92] another case involving Ecuador, environmental counterclaims were brought by Ecuador on the basis of domestic environmental law.

The applicable BIT may require that the investment be made and maintained in accordance with host State law.[93] Investment contract may explicitly provide that an investor has to comply with applicable host State law.[94] In such instances, the investor is obliged to comply with domestic laws of the host state governing environment protection. In the case of *Burlington*, it was found a breach of the Ecuadorian Statutory environmental regulation regime. In the case of *Perenco v Ecuador* the operation of the concession had had a negative effect on the environment. In this case Ecuador also brought counterclaims.

Dispute Resolution Clause In A BIT May Permit Claims To Be Brought By A State

An example of a BIT permitting claims to be brought by a State is the Argentina-Spain BIT. A practical application of this clause in the Argentina-Spain BIT arose in *Urbaser v Argentina.*[95]

"We must ask ourselves how, in which situations and to what extent the state is legally capable, and politically and economically likely, to act as a claimant"[96] Toral and Schultz wrote back in 2010. The *Urbaser v Argentina* case is an instance in which a State successfully lodged a counter-claim and thus the award provides a reasoning which clarifies the position as to the situations in which a counter-claim can succeed.

The *Urbaser* Tribunal rejected the Claimant's position that the asymmetric nature of BITs prevented a host State from invoking any right based on such a treaty including through the submission of a counter-claim. Rather, analysing the wording of the BIT under examination it found that both investor or the host State could be a party submitting a dispute in connection with an investment to arbitration.[97] In this particular instance, Argentina had filed a counter-claim relating to the human right to have access to drinking water and sanitation. The Tribunal identified two situations in which a counter-claim was likely to fail: (i) narrowly drafted arbitration clauses (ii) lack of close connection of counter-claims based on domestic law.

One of the Claimant's main objections was that Argentina's counter-claim "had no connection with Claimant's claim under the BIT".[98] The Tribunal disagreed. It held as under:

> *The Tribunal observes that the factual link between the two claims is manifest. Both the principal claim and the claim opposed to it are based on the same investment, or the alleged lack of sufficient investment, in relation to the same Concession. This would be sufficient to adopt jurisdiction over the counterclaim as well. The legal connection is also established to the extent the Counterclaim is not alleged as a matter based on domestic law only. Respondent argues indeed that Claimant's failure to provide the necessary investments caused a violation of the fundamental right for access to water, which was the very purpose of the investment agreed upon in the Regulatory Framework and the Concession Contract and embodied in the protection scheme of the BIT. It would be wholly inconsistent to rule on Claimant's claim in relation to their investment in one sense and to have a separate proceeding where compliance with the commitment for funding may be ruled upon in a different way. Reasonable administration of justice cannot tolerate such a potential inconsistent outcome.*[99]

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[92] *Perenco Ecuador Ltd v Republic of Ecuador*, ICSID Case No. ARB/08/6, Interim Decision on the Environmental Counterclaim (11 August 2015).
[93] Kate Parlett, op cit.
[94] Ibid.
[95] *Urbaser v Argentina*, ICSID Case No.ARB/07/26, Award (8 December 2016).
[96] M Toral and T Schultz, "The State, A Perpetual Respondent in Investment Arbitration? Some Unorthodox Considerations", in M Waibel, A Kaushal, K-H Liz Chung and C Blachin (eds), *The Backlash Against Investment Arbitration*: *Perceptions and Reality* (Kluwer Law, The Hague, 2010) pp 577-602, p 578.
[97] *Urbaser v Argentina*, *supra* 10, para 1143.
[98] Ibid, para 1151.
[99] Ibid.

From this perspective, that of a counter-claim, the question of whether the Tribunal could address the merits of the State's submissions (human rights arguments) came through a jurisdictional gate. The Tribunal found it had the jurisdiction to see the merits of Argentina's counter-claim. In an important passage of the award, the tribunal held that:

> *international law accepts corporate social responsibility as a standard of crucial importance for companies operating in the field of international commerce. This standard includes commitments to comply with human rights in the framework of those entities' operations conducted in countries other than the country of their seat or incorporation.*
>
> *(a) Avoid causing or contributing to adverse human rights impacts through their own activities, and address such impacts when they occur;*
>
> *(b) Seek to prevent or mitigate adverse human rights impacts that are directly linked to their operations, products or services by their business relationships, even if they have not contributed to those impacts. (No 13)"*[100]

The Tribunal further held that "[…] The BIT has to be construed in harmony with other rules of international law of which it forms part, including those relating to human rights."[101]

Private Companies' Human Rights Obligations

In "*The State, a Perpetual respondent in Investment Arbitration? Some Unorthodox Considerations*" Toral and Schultz explored the topic of corporate actors or private parties' obligations under human rights norms, and their relevance under the terms of BITs.[102]

In *Urbaser v Argentina* this became central-stage. Argentina quite boldly made submissions alleging that the private companies' failure to guarantee provision of water and sewage services breached the human right to water (although it did not state that such an obligation on the part of the investors was based on international law). Whilst the Tribunal did not agree with the investors that private parties had "no commitment or obligation for compliance in relation to human rights"[103] the Tribunal concluded that the duty as a guarantor of the right to water lay with the State, in line with international human rights doctrine. It supported this view on General Comments of the Committee of Experts under the ICESR. The Tribunal held:

> *The human right to water entails an obligation of compliance on the part of the State, but it does not contain an obligation for performance on the part of any company providing the contractually required service. Such obligation would have to be distinct from the State's responsibility to serve its population with drinking water and water services.*[104]
>
> *1209. This obligation, as all others retained in the Covenant referred to above, "imposes a duty on each State party to take whatever steps are necessary to ensure that everyone enjoys the right to water, as soon as possible." This includes establishing "accountability mechanisms to ensure the implementation of the strategy" The necessary step is therefore that a host State accepting investments in the domain of the provision of water relies on the BIT to have the investor participating to its obligation under international law. It thus complies with the conclusion of the UN Committee on Economic, Social and Cultural Rights that "States parties should ensure that the right to water is given due attention in international agreements". This includes the possibility to consider matters related to the human right to water in the dispute resolution mechanisms provided for in such agreements. However, the investor's obligation to*

[100] *Urbaser*, para 1195.
[101] *Urbaser*, para 1200.
[102] See M Toral and T Schultz, "The State, A Perpetual Respondent in Investment Arbitration? Some Unorthodox Considerations", op cit.
[103] *Urbaser v Argentina*, *supra* 10, para 1193.
[104] Ibid, para 1208.

ensure the population's access to water is not based on international law. This obligation is framed by the legal and regulatory environment under which the investor is admitted to operate on the basis of the BIT and the host State's laws.

1210. Whilst it is thus correct to state that the State's obligation is based on its obligation to enforce the human right to water of all individuals under its jurisdiction, this is not the case for the investors who pursue, it is true, the same goal, but on the basis of the Concession and not under an obligation derived from the human right to water. Indeed, the enforcement of the human right to water represents an obligation to perform. Such obligation is imposed upon States. It cannot be imposed on any company knowledgeable in the field of provision of water and sanitation services. In order to have such an obligation to perform applicable to a particular investor, a contract or similar legal relationship of civil and commercial law is required. In such a case, the investor's obligation to perform has as its source domestic law; it does not find its legal ground in general international law. The situation would be different in case of an obligation to abstain, like a prohibition to commit acts violating human rights would be at stake. Such an obligation can be of immediate application, not only upon States, but equally to individuals and other private parties. This is not a matter for concern in the instant case.[105]

The Widening Of The Spectrum Of Human Rights Instruments Referred To In Investment Cases

Most notably, the *Urbaser* Tribunal stated that the BIT "[could] not be interpreted and applied in a vacuum" and that it had to be "construed in harmony with other rules of international law of which it forms part including those relating to human rights"[106] It found evidence in the BIT itself, that it "[was] not framed in isolation but placed in the overall system of international law."[107] In effect, in this way the Tribunal applied a systemic interpretation of the rules in the case. These rules included human rights rules contained broadly in relevant human rights treaties (i.e. the ICESCR) But even further, the Tribunal made reference to non-binding instruments and reports such as the UN Special Representative John Ruggie's Final Report on "Guiding Principles on Business and Human Rights",[108] and General Comments of Committee experts under the ICESCR. It demonstrated that the sources for resolving a BIT dispute could well include human rights obligations.

Conclusion

Public interest such as health, environment, labour rights, right to water, and other human rights are fast ascending in importance in the area of investment law. Some of the disputes surveyed in this chapter have arisen from regulatory measures involving such matters of public interest. In the name of that public interest, tribunals are also increasingly accepting third party interventions or Amicus briefs on the basis that these provide an independent perspective on the matters in the dispute and contributed expertise from "qualified agencies". This took place in the case of *Philip Morris*, and said amicus was relied on by the Tribunal – at various points of its factual and legal analysis- in finding against the investor. In accepting these submissions the *Philip Morris* Tribunal noted that given the "public interest involved in this case" the Amicus briefs would "support the transparency of the proceeding".

The examples covered in this Chapter namely environmental, human rights, and labour issues in the context of investment claims, attest to the possibility of reconciling the "commercial" "public law" and "international law" elements in investment arbitration.[109]

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[105] ibid, paras 1209-1210. Footnotes omitted.
[106] ibid, para 1200.
[107] ibid, para 1201.
[108] UN Special Representative's John Ruggie's Final Report on "Guiding Principles on Business and Human Rights: Implementing the United Nations, 'Protect, Respect and Remedy' Framework" (A/HRC/17/3), March 21, 2011.
[109] As Christopher Greenwood thought it should be. C. Greenwood, "Rethinking the Substantive Standards of Protection Under Investment Treaties" (Response to the Report), op cit p 376

CHAPTER XXI: RE-VISITING THE KULBUSHAN JADHAV CASE: DUE PROCESS IN INTERNATIONAL LAW

Harish Salve[1]

The 'detention and trial of an Indian National,' Kulbhushan Sudhir Jadhav, by the Pakistani Government, created a new chapter in International legal implications and Indo-Pak relations. Transpiring into the ICJ jurisdiction at India's behest, the outcomes of this matter raise questions and concerns on the practice and interpretation of international law. Its dimensions of relevance for Indians are manifold as well. It has dimensions of foreign policy, dimensions of the court as an institution and how it functions under pressures of geopolitics. It reflects the evolution of law and the growing influence of human rights, and the strong influence of human rights in the area of diplomatic relations. It underscores the growing understanding that there are certain basic principles which civilized countries must live by and there are certain standards to which civilized countries must adhere and they are at a level above and beyond national law and domestic law.

The exploration of the background and substance of the *Jadhav case*[2] is very interesting. India and Pakistan have never agreed to the jurisdiction of the International Court of Justice. Generally, we have a carve-out, in what is called compulsory jurisdiction in relation to disputes between Commonwealth countries. India has always rejected attempts by countries such as Pakistan to use the Commonwealth Clause in the statement under Article 36(2) of the ICJ's Statute to refer any bilateral dispute to the ICJ.[3] The jurisdiction of the Court is recognised as "compulsory" in this declaration, which is made unilaterally by the involved state.[4] The word Commonwealth itself has now become an anachronism; there is hardly anything in common between us and at least some Commonwealth countries. Looking around us, we stand as an island of democracy; on one side, we have Burma and Sri Lanka which struggle with democracy. Above us and to our western side, the picture is just as bleak. It is India and now Bangladesh which stands apart as islands of democracy. Yet we have this Commonwealth exclusion that stems from a general reluctance and distrust from India over allowing any western institution to intervene in any capacity in India's diplomatic relations. We have problems with Pakistan on multiple levels, be it the military, be it the police, be it borders, or be it trade. Consequently, we have always stayed away from international institutions resolving any disputes between Pakistan and us. The only other case in which the ICJ rendered a judgment in a dispute between India and Pakistan took place in 1971, concerning the jurisdiction of the International Civil Aviation Organization in relation to the sharing of airspace.[5] The *Jadhav case* points to the necessity for India to lean more heavily on international law as an instrument of state policy, especially in circumstances where the use of force is ruled out as an option.

To the credit of the institution, they asked Pakistan to hold their hands on Jadhav's death sentence pronounced by the Pakistan military court. Since they did not get an unequivocal reply, they put provisional measures in place that at least saved Jadhav from certain execution. We then hoped we would be able to resolve this matter bilaterally which did not materialize.

The reason I hoped that it could be bilaterally resolved is that this area was occupied by two earlier judgments commonly known as the *Avena case*[6] and the *LaGrand case*.[7] In both of those cases, while the ICJ came to the

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[2] *Jadhav case: India v. Pakistan* (I.C.J. Reports 2019) Judgment (17 July 2019).

[3] Appeal Relating to the Jurisdiction of the ICAO Council, *India v. Pakistan* [1972] I.C.J. 46 (Order of Aug. 18).

[4] Id.

[5] Appeal Relating to the Jurisdiction of the ICAO Council, *India v. Pakistan* [1972] I.C.J. 46 (Order of Aug. 18).

[6] *Avena and Other Mexican Nationals: Mexico v. United States of America* (I. C. J. Reports 2004) Judgment (31 March 2004).

[7] *LaGrand case: Germany v. United States of America* (I. C. J. Reports 2001) Judgment (27 June 2001).

conclusion that there was a breach of the Vienna protocol, the ultimate relief they gave was not of any substance. The relief of review and reconsideration almost seemed a Pyrrhic victory for the winning state.

The *Avena* and *LaGrand* precedents

In the *LaGrand* case, two German nationals, Walter and Karl LaGrand were arrested for murder and armed robbery in the US and sentenced to death. The German consul had not been informed of their arrest, nor were the Lagrands informed that they had the right to communicate with the German consulate upon their arrest, as required under Article 36(1)(b) of the Vienna Convention on Consular Relations (hereafter VCCR) which states:

> *"…(b) if he so requests, the competent authorities of the receiving State shall,* ***without delay****, inform the consular post of the sending State if, within its consular district, a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner. Any communication addressed to the consular post by the person arrested, in prison, custody or detention shall be forwarded by the said authorities without delay. The said authorities shall inform the person concerned without delay of his rights under this subparagraph;"*[8]

On the failure to resolve the issue through diplomatic channels, Germany moved the ICJ for provisional measures, alleging that the US was in breach of the VCCR. Agreeing with Germany's contentions, the ICJ found the US to be in violation of the VCCR, as well as the individual rights of the Lagrands, as vested in them by Article 36. However, this was of no avail to the Lagrands as they were executed pending the decision of the ICJ.

The *Avena* case unfolded along similar lines. It concerned a number of Mexican nationals who had been tried and sentenced to death in the United States. Mexico objected to this on the grounds that the United States' had omitted to inform the detainees that they had the right to communicate with the Mexican consul and request assistance, in violation of its obligations under the VCCR. Mexico filed proceedings before the ICJ seeking provisional measures from the Court to have America desist from executing the Mexican nationals and to review and reconsider their sentences. The ICJ instructed the following to both state and federal courts in the US:

> *"in cases where the breach of the individual rights of Mexican nationals under Article 36, paragraph 1 (h), of the Convention has resulted, in the sequence of judicial proceedings that has followed, in the individuals concerned being subjected to prolonged detention or convicted and sentenced to severe penalties, the legal consequences of this breach have to be examined and taken into account in the course of review and reconsideration."*[9]

The *Avena case* has an interesting subsequent history. Attempts were made by the President to implement the ICJ decision at the level of the state courts. A memorandum to the Attorney General was issued from the President's office to ensure

> "*that the United States will discharge its international obligations under the decision of the International Court of Justice in the Case Concerning Avena and Other Mexican Nationals (Mexico v. United States of America) (Avena), 2004 ICJ 128 (Mar. 31), by having State courts give effect to the decision in accordance with general principles of comity in cases filed by the 51 Mexican nationals addressed in that decision*."[10]

This was the only course of action available to the President; the federal government could not legislate on this as it was within the purview of states' rights. This was challenged before the Supreme Court in *Medellin vs*

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[8] Vienna Convention on Consular Relations (24 April 1963) 596 U.N.T.S. 261.

[9] *Avena and Other Mexican Nationals: Mexico v. United States of America* (I. C. J. Reports 2004) Judgment (31 March 2004) para 140.

[10] Memorandum from President George W. Bush to the Attorney General (28 February 2005) <https://georgewbush-whitehouse.archives.gov/news/releases/2005/02/20050228-18.html>.

Texas.[11] In this case, Medellin, one of the Mexican nationals convicted in the *Avena case*, appealed his conviction in a Texas state-court citing the *Avena* decision and the President's Memorandum to the Attorney General. The Supreme Court held that

> "*the Avena decision—a decision that flows from the treaties through which the United States submitted to ICJ jurisdiction with respect to Vienna Convention disputes—constitutes an international law obligation on the part of the United States. But not all international law obligations automatically constitute binding federal law enforceable in United States courts."*[12] *Self-executing treaties are automatically translated into binding domestic law whereas non-self-executing treaties, such as those underpinning the Avena decision, are judicially enforceable only upon legislative action from Congress. In the absence of Congressional approval, the President lacked the authority to "unilaterally make treaty obligations binding on domestic courts*."[13]

Therefore, the *Avena* case came to naught, as did the *LaGrand* case before it.

Distinguishing the *Jadhav* case from *Avena* and *LaGrand*

It is important to note that the *Avena* and *LaGrand* cases occurred in different circumstances than the ones in which we moved the court. *Avena* was about certain nationals who were arrested in the U.S. for serious crimes and put to trial. They were convicted and it was realized *ex post facto* that they were Mexican nationals. America stated that if it had known this at the time, it would have provided them with consular access. Nothing would have turned on this fact; the defendants received full legal aid, fought their case and were convicted.

Similarly, in the *LaGrand* case, people who looked like ordinary Americans were charged with serious crimes and were convicted. However, it turned out that they were German citizens, which again resulted in an inadvertent breach of consular obligations. Despite this, the court insisted that America fulfill its consular obligations. On the other side, America argued that their "domestic law provides stringent due process protections not dependent on consular notification, access or assistance, and the guarantees and the domestic law are amongst the strongest and most expansive in the world."[14]

The ICJ accepted America's argument that its criminal justice system was fully compliant with due process, which is why the relief granted was confined to review and reconsideration. India argued that in Jadhav's case, the remedy of review and reconsideration was highly inadequate and instead sought the annulment of Jadhav's conviction instead.

Procedural Unsoundness of Military Trials

In seeking this remedy, we leaned heavily on the point of how far military trials are compliant with minimum due process standards. It was our submission that minimum due process is today a part of settled principles of public international law, and by any standard that is applied, a military trial does not fulfill the requirements of minimum due process. There is a great deal of literature in international law that has reiterated this point and condemned military trials and we put evidence before them highlighting this. We drew attention to the Report of the International Commission of Jurists to the UN Human Rights Committee which noted that "159 out of the 168 civilians (95%) whose convictions have been publicly acknowledged by the military have allegedly 'confessed' to the charges. Family members of some of those individuals convicted by military courts petitioned the Supreme Court of Pakistan, in which they, amongst other things, questioned the voluntariness of the 'confessions.'"[15]

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[11] *Medellín v. Texas,* 552 U.S. 491 (2008).
[12] Ibid 8.
[13] Ibid 31-32.
[14] *Jadhav case*: *India v. Pakistan* (Memorial of the Republic of India 13 Sep 2017) para 162.
[15] Ibid, para 113.

As an Indian lawyer, I found it baffling that the allegations made by Pakistan were founded on Jadhav's confession, especially since there's reasonable doubt whether he confessed of his own volition. The YouTube video of his confession is a rambling narrative of how he has generally engaged in espionage activities on behalf of India, not one incident is clearly spelled out. A confession such as this would normally not be admitted to a criminal court and would have to state specific details such as his whereabouts, the exact activities he partook in, who were the persons involved in the incident, etc. Now if he were the mastermind, the mastermind's confession must state precisely how he gave effect to his criminal intent.

Secondly, if there is a spy who has committed six or seven different incidents of espionage and terrorism, there would have to be six or seven trials. One cannot try a person, we try a crime. Pakistan's CrPC is an outdated iteration of the one we have in India. Our new CrPC is a revised version of the old CrPC in which one of the cardinal principles is that you try a crime, you do not try a person. This is why it is not necessary to name anybody in an FIR, you need to name the crime. Whereas this was a trial of a person for multiple crimes and to date, the charge sheet against him hasn't seen the light of day. It is literally a military secret in Pakistan what the charges against him are. It was in these circumstances that we filed our case. Pakistan had two very interesting cases- the first is that they claimed that they had seized a passport from Jadhav bearing a false name, therefore India had equipped him for espionage. We asked how that was relevant to consular access. Has he been convicted for an offense under the Passport Act for possessing two passports? If he had an Indian passport, would they have acquitted him? If he didn't have a second passport, would they not have charged him with espionage? What is the relevance, other than theater?

The second interesting case that Pakistan argued had two limbs. First, that India has not established that Mr. Jadhav is an Indian citizen so as to engage his rights under the Vienna Convention. Secondly, they claimed the right to deny him consular access because he was a navy commander from India engaging in espionage.[16]

With respect to the claim that his Indian citizenship hadn't been established, Pakistan had acknowledged that he was an Indian navy commander; his Indian citizenship is therefore axiomatic since in no country can there be a navy commander who is a citizen of some other country. Interestingly, in several communications which we received from them, they would refer to him as 'your citizen' or 'your navy commander'.

In sum, a number of important legal principles that came out of the attempts by Pakistan to try and find a defense to an indefensible case. My biggest concern was that they would simply admit to making a mistake, provide consular access and try him once again. After that, I don't think there's much we could have done about it but the circumstances were fortuitous. Instead, they chose to say, first of all, that India is guilty of abuse of process. The reason they claimed that India is guilty of abuse of process is that India obtained provisional measures without exploring other mediation procedures. The judges were unlikely to be persuaded by this line of argumentation. The notion of having mediation procedures with Pakistan was unrealistic. Pakistan had refused to give an assurance to the president of the ICJ that they would not execute a person in relation to whom a petition has been filed. The second point is a very important takeaway of this judgement. They put it in two different ways. They claimed that India had come with unclean hands because India itself is guilty of violation of international law on account of various instances of sabotage that India had allegedly orchestrated in Pakistan. Apart from there being no proof for any of these pleadings, the ICJ clearly said that none of that was material to the issue at hand, which was compliance with the Vienna Convention on Consular Relation and that this *tit for tat* argument was not a principle which civilized countries could accept. Retribution is not a defense in public international law. The International Court of Justice was created to prevent countries from taking law into their own hands. Therefore, that argument was squarely rejected.

Application of the VCCR to Espionage

The second claim made by Pakistan was that the principle of consular relations cannot apply to spies. Now that is a very dangerous principle. In normal cases, governments have no problem in complying with such obligations; it is only in dealing with sensitive cases that these issues arise. To make allegations is fine. But let us be clear,

[16] *Jadhav case India v. Pakistan* (Counter-Memorial of The Islamic Republic of Pakistan 13 Dec 2017) 72, 29.

this is at the stage when a person is arrested, this is not a post-conviction. Hence, you are at a very initial stage where the first flush of allegations is being made. Now if you say, if I *allege* espionage for which I may later apologize, consular relations fail to have relevance. The interesting part to me was that Pakistan must have expended a lot of effort on getting expert opinions and other material. We were not concerned with this because we were arguing on the principle of plain construction. They had all the *travaux préparatoires*, which really helped us because the issue of espionage was expressly raised. According to the Vienna Convention on Consular Relations, Article 36 (1) b states:

> "…(b) if he so requests, the competent authorities of the receiving State shall, *without delay*, inform the consular post of the sending State if, within its consular district, a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner. Any communication addressed to the consular post by the person arrested, in prison, custody or detention shall be forwarded by the said authorities without delay. The said authorities shall inform the person concerned without delay of his rights under this subparagraph;"[17]

The possibility of espionage was discussed and the drafters of the treaty held that there could not be a blanket exception. Then they held that in some cases, if the person spying is arrested and the home country is immediately informed of this, the spy's accomplices will be alerted. Thus, if a government is attempting to bust a spy ring, the whole purpose will be defeated. All of this was discussed when the treaty was being drafted and that's how the phrase informing "without delay" replaced the former "informing immediately". So if the authorities need a few days to do the initial investigation the treaty provides that elbow room.[18] It was convenient that Pakistan gave all this material readily to us so that we could demonstrate to the court the irrelevance of this exception because in fact those who drafted it discussed it and rejected any such blanket exception because the phrase "without delay" suffices for such situations. Thus the court found in para 86 of the judgement that "*Article 36 does not exclude from its scope certain categories of persons, such as those suspected of espionage*."[19]

Borrowing from the Vienna Convention on the Law of Treaties, the court applied the principle of "good faith and plain language" in interpreting the Vienna Convention on Consular Relations. This is an important principle, which I think, strengthens the convention. Pakistan claimed that the detenu must *request* consular access. Again, if the court were to accept that principle, it is very easy for a state to deny consular access under the pretext that they were never requested and it is the word of the detenu versus the word of the state. Hence, the ICJ held that the state has to proactively *offer* it to him, and establish that they have offered it to him.[20] The second principle is that consular access is not just the right to the detenu, but also the right of his home state, their right to meet their own citizen. Thus, an important dilution of the Vienna Convention on Consular Relations was rejected by the court. The next important dilution which they rejected was Pakistan's assertion that in any case, consular access has to be as provided for in domestic law. Taken to its logical consequence, it would mean that if consular access is taken away by domestic law, the treaty is written on water. Unsurprisingly, this deeply unattractive submission was rejected. Another instance which Pakistan pointed to as India approaching the court with unclean hands was as follows. They were under apparently pressure to cooperate with India to investigate the Bombay terror attack, where they had given a long list of people they wanted to interrogate, whom they claimed had been named by Mr. Jadhav.

India roundly dismissed that request. Pakistan argued that India, by refusing to cooperate, was in breach of its international obligations and therefore, should not be allowed to complain of the violation of the Vienna Convention. This argument was rejected by the Court as well. I read the judgment as instructing Pakistan not to make prisoners political pawns and not to repress the rights of detinues on account of the differences they have with countries. So establishing breach was easy. Next came the question of remedy. The judgment of the court has taken *Avena* and *LaGrand* forward. We juxtaposed the remedy of "reviewing and reconsidering" granted in

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[17] Vienna Convention on Consular Relations (24 April 1963) 596 U.N.T.S. 261.

[18] See full discussion by Special Rapporteur Prof. Jaroslav Zourek (ILC Yearbook 1961) 288, vol I, para 71- 73; See also Official Records of the United Nations Conference on Consular Relations, vol I (summary records of plenary meetings and of meetings of the First and Second Committees) 338, para 8-9.

[19] *Jadhav case: India v. Pakistan* (I.C.J. Reports 2019) Judgment (17 July 2019), paras 72-86.

[20] Ibid, paras 106-109.

Avena and *LaGrand* against the problem in our case. My submission was that the fairness of the American system was not moot in those cases. In our case, the fairness of the Pakistani system is moot. It would have entailed sending him back to a military tribunal, a relief not befitting the ICJ. We stuck with this argument and we brought into play the ICCPR, the International Covenant on Civil and Political Rights, in particular, the right to a fair trial. The ICJ said that their jurisdiction is limited to the protocol attached to the Vienna Convention on Consular Relations. Therefore, the court would have jurisdiction for only disputes regarding the interpretation of the Vienna Convention on Consular Relations, but they said that in interpreting it, they would keep in mind the ICCPR. The seed had been sown.

The second important change is that while they did not reject wholesale the Pakistani system of military trials and did not discuss it, they did run through Pakistan's arguments about what would happen if they went back to the military court, which they pronounced was not good enough. Their clemency would not be good enough, and judicial review on narrow grounds is not good enough. Thus, they must provide for effective review and reconsideration. In paragraph 139 the court says, "*a special emphasis must be placed on the need for the review and reconsideration to be effective*". Furthermore, after reviewing Pakistan's uncertainty on the possibility of judicial review of a military court for violation of the Vienna Convention, and Pakistan's clemency process, the court pointed out that –

> *"respect for the principles of a fair trial is of cardinal importance in any review and reconsideration, and that, in the circumstances of the present case, it is essential for the review and reconsideration of the conviction and sentence of Mr. Jadhav to be effective. The Court considers that the violation of the rights set forth in Article 36, paragraph 1, of the Vienna Convention, and its implications for the principles of a fair trial, should be fully examined and properly addressed during the review and reconsideration process. In particular, any potential prejudice and the implications for the evidence and the right of defence of the accused should receive close scrutiny during the review and reconsideration"*[21]

If they had accepted Pakistan's view that the military trial is a fair trial, there would have been no occasion to say all this. They close by saying the relief and reconsideration must take into account two things: the implications for the defense of the breach and the implications for the evidence.

One of our submissions was that if the linchpin of this case was his confession, and that was regarded as being recorded in breach of the Vienna Convention, then they would have to disregard the confession. They would have to give him full consular access, and then see if he still confesses. If that happens the conviction would not stand, and that is where Pakistan is stuck. The Court enjoined them to take all measures to implement this, if necessary by enacting legislation.

Military Trials and Due Process in International Law

Pakistan also filed expert evidence on how military trials were perfectly good, where they further attempted to internationalize the issue. There was potential for the ICJ to perhaps discern this and criticise military trials. Thus, this may be seen as a missed opportunity for at least four of the judges, who have echoed that a fair trial today is axiomatic, and it is a value system with which human beings cannot live with. This has to become an axiom of international law, that a country that has military trials simply is below the standards. The moment that one inflicts this on their own citizens is cruelly disagreeable, but to subject foreign nationals to this treatment would be a violation of international law. In self-reflection and comparison, India has dealt with Pakistani spies and terrorists showing that the same Criminal Procedure Code, can work with terrorism and espionage. Hence, the need for a military trial is hardly self-evident, let alone necessary. After weighing the facts of the case, the parties' arguments, its own precedent, and a variety of other criteria, the ICJ concluded that "Pakistan shall take all measures at its disposal to ensure that Mr Jadhav is not executed pending the final decision in these proceedings and shall inform the Court of all the measures taken in implementation of the present Order."[22]

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[21] Ibid, para 145.
[22] *Jadhav case: India v. Pakistan* (I.C.J. Reports 2019) Judgment (17 July 2019).

In this regard, the separate opinions serve a great purpose. It elicited that while everybody was aligned with what all the judges had said, some felt that the court was not going far enough. The separate opinions bring human rights jurisprudence into public international law. For example, Judge Trindade says, we have not gone far enough, the majority does not go far enough. He says you have to move beyond *Avena* and *LaGrand.* He remarked "*With all the more reason, in the present case of Jadhav (2019), the ICJ has before itself the ineluctable interrelationship — which it should have acknowledged — between the right to information on consular assistance, and the human rights to due process of law and fair trial, with all legal consequences ensuing therefrom."*[23]

After many cases with regard to this Convention, perhaps there was an opportunity to evolve this jurisprudence. Therefore, if there is still no compliance from Pakistan, this would no longer be a favorable route and one may need to consider other means on how to comply with the judgement.

What Has Pakistan Done For Implementing The Judgment?

Pursuant to the outcome of the ICJ judgment, legal development in Pakistan provides that a petition would lie to the court for effective review and reconsideration of the conviction and sentencing of Mr. Kulbhushan Jadhav. However, it is unclear as to what this would entail, and whether such is in fact a judicial review in some sense. Thus, the question beckons: may it be argued before the court, when they have the same judicial review principles as ours, that on account of the want of consular access, the confession was illegal? This hardly seems right, given the mixing up of two legal systems. One is municipal law while the other is public international law. The need to create a system in which somebody could resolve this issue was paramount. The fact that the Convention was violated is self-evident, so there has to be an effective review and reconsideration, and this question does not require further consideration in front of a Pakistani Court. What would be of essence is a system in which there was power to put all this to one side, and conduct on trial with full assistance from India. The answer to the plausibility of such is negative. Thus, it would seem that Pakistan is continuing to shadow box throughout its exchanges with India, providing that it must appear. To respond in a simple manner, India has no compulsion to appear in a Pakistani court, where the ICJ has not obliged us to do so. I hope someday that Pakistan sees the light and rectifies this matter. Otherwise, this case might possibly be re-litigated before the ICJ in the future.

Conclusion

The judgment is very significant, where India today was bold enough to take this measure and to take Pakistan to court and get this judgment. I believe this to have had resonance in the United Nations. In the address which the President of the ICJ gave to the U.N. General Assembly, he mentioned this is one of the important judgments of the ICJ.

As to why Pakistan is not complying with it, that seems to be more of a political question, though I was somewhat surprised when Pakistan said they had won the case. I thought perhaps I had misheard the judgment. Perhaps I heard "dismissed" instead of "allowed" or "allowed" instead of "dismissed". However, we have established that we are now unafraid of international institutions. We are parties to certain conventions, where we will assert our rights. We will go forth and we have our own jurisprudence. We have people within India who understand our jurisprudence, and we will fight for it. I think that message is what had such an effect on the Indian emotional psyche. The fact that for one single man, India was willing to risk everything. We were willing to risk things going wrong, we were willing to step out of our comfort zone of bilateralism, step onto the world arena, and wrestle with Pakistan. We came out successful, and we have established that one Indian life is worth more than the misgivings of the doomsayers. Hence, this is a new India that we have to learn to live in.

[23] ibid, Separate Opinion of Judge Cançado Trindade, para 42.

CHAPTER XXII: GLOBAL FAMILY LAW – BRITISH AND INDIAN PERSPECTIVE

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Challenges to International Family Law: Indian Perspectives

Family Law issues for Global Indians:

As per Government of India statistics, an estimate of over 3.4 Million non-resident Indians have registered as Overseas Citizens of India (OCIs) to acquire lifelong visa-free entry to India. Their actual numbers may be more than 30 million. These global Indians have inhabited, settled and thrived in almost 150 countries across the globe. Undoubtedly, these international Indians are a unique nationality by themselves. They propel a dire need for a global law to govern their conflicts. The link and retention of their ties with their extended families in India and abroad have found expression in issues relating to nationality, citizenship, marriage, divorce, spousal maintenance, alimony, inter-parental child removal, custody and guardianship of children. Besides this, it is in the division of matrimonial property, inter-country adoptions, succession and inheritance of Indian property and last but not least in surrogacy arrangements, the link prevails. And, issues relating to dual nationality, passports and citizenship, NRI property problems, wills, succession and their possible solutions are also looked into. Domestic violence in abusive marriages of international couples has created a new jurisprudence. Foreign Courts and overseas law practitioners are at sea attempting to resolve these problems for lack of any updated or amended Indian laws or reasoned interpretation of the law on these subjects. Conflict of laws galore, parallel and simultaneous adjudications in different jurisdictions create anomalous situations which compound legal dilemmas relating to human relationships. Applicability of foreign laws, the validity of judgments pronounced overseas and verdicts of Indian Courts which need exposition are consequential issues requiring interpretation and expert opinion. Indian Courts perform a herculean task in carving individual solutions in complex litigations under outdated Indian legislation.

Nationality, Citizenship & Overseas Citizenship of India

The Constitution of India does not allow holding Indian Citizenship and Citizenship of a foreign country simultaneously. Upon voluntary acquisition of the citizenship of another country, a person ceases to be an Indian citizen. A child born to foreign citizens of Indian origin cannot be a citizen of India, as neither of his parents is an Indian national. Therefore, by amending the Constitution, a new category of citizenship i.e. OCI was created in 2005, as a compromise to dual citizenship with limited privileges and no rights of Indian citizens. Both the Constitution of India and Citizenship Act, 1995 (CA, 1955) categorically prohibit dual citizenship and holding of two nationalities simultaneously in two different countries. CA specifically prohibits political and other rights to OCIs, who have only multiple entry life-long visa facilities for visiting India for any purpose at any time.

Indians, Foreigners and Deportation

Even though the Parliament has enacted The Passports Act, 1967, CA, 1955 and in 2005, created OCI, to date we still rely on The Passport (Entry into India) Act, 1920, The Registration of Foreigners Act, 1939, (FA, 1939) and Foreigners Act, 1946, (FA, 1946) for various purposes. Most of such archaic legislations made during colonial

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rule are redundant, do not stand the test of principles of natural justice, and confer unfettered, arbitrary and draconian powers, which seriously require them to be taken off the statute book.

The Passports Act, 1967, which is a comprehensive and wholesome law relating to the issue of passports and travel documents, provides a statutory safeguard procedure for variation, impounding and revocation of passports with rights of appeal to aggrieved persons against offences and penalties levied under this Act. However, the simultaneous existence of the Passport (Entry into India) Act, 1920 and FA, 1946, conferring absolute and unlimited powers to remove or deport a person from India summarily without following the due process of law, are anathema and an antithesis to the rule of law in a democratic nation with ample scope for judicial review. Powers of house arrest, detention, solitary confinement and summary removal from India under these 1920 and 1946 Acts infringe the fundamental rights of life and personal liberty guaranteed by the Indian Constitution. The reasons, therefore, to retain these pre-independence laws seem to be misplaced and defy fundamental freedoms. Today, persons of Indian origin have matters relating to matrimonial differences between spouses of global origin or nationality issues arising out of foreign domiciles. Accordingly, deportation or removal of a person to a foreign jurisdiction would be an abject surrender to a foreign dominion.

Adoption of Children in India

According to UNICEF, India has over 30 million orphaned and abandoned children. Initiatives of the Supreme Court from 1984 onwards, led to the amended enactment of The Juvenile Justice (Care and Protection of Children) Act, 2015 (JJ Act). The JJ Rules, 2016 and the statutory Adoption Regulations, 2017 (AR), amended in 2021, followed to create the Central Adoption Resource Authority (CARA), as a statutory body to regulate, monitor and control all Intra and Inter-country adoptions. Furthermore, the role of CARA became pivotal in granting a NOC in all inter-country adoptions, according to India becoming a signatory to the Hague Convention on Protection of Children and cooperation in respect of Inter-country Adoptions. India also is a signatory to the United Nations Convention on the Rights of the Child, and protections afforded to children became a legal mandate of all authorities and Courts in India.

The JJ Act, being a secular law, all persons are free to opt to adopt children under this law. However, persons professing the Hindu religion are free to adopt under the Hindu Adoption and Maintenance Act, 1956 (HAMA). Rehabilitation of all orphaned, abandoned and surrendered children is regulated by the strict mandatory procedures of AR. Children of relatives can also be adopted under the JJ Act if desired. Only such children declared legally free for adoption under the JJ Act by prescribed procedures, can be adopted. Any person or organisation offering, giving or receiving such children for adoption in violation of the JJ Act and AR, invites punishment of up to three years and rupees one lakh fine.

Overseas Indians Succession Issues

The Global Indian Diaspora has some problems on the home soil which need intercontinental solutions. In this perspective, the disposition of property of an NRI living in a foreign domicile, when such property is located partly in India and partly situated abroad, often poses awkward questions.

Two distinct Indian legislations addressing these questions exist. The Hindu Succession Act, 1956 (HSA) contains the codified law relating to intestate succession among Hindus. The Indian Succession Act, 1925 (ISA) consolidates the law applicable both to intestate and testamentary succession applicable to persons other than Hindus. To begin with, for an NRI, it is advisable to execute a written Will and get it witnessed and registered to avoid any intricate problems of succession and inheritance. With the abundance of problems of NRI properties in India, natural succession in the absence of a Will may pose problems for third-party claimants. An NRI ought to Will his property by choice to his natural heirs or others and thus eliminate speculation or bogus claims from claimants and pave a smooth succession. Thus, what ought to follow naturally must be better confirmed by a Will also. In the event of there being no Will, natural succession among the category of heirs as per the order of succession will flow as per the HSA. Then, speculation, outsider claims, disputes among heirs and third-party rights are rife. Hence, it is in the best interest of an NRI to pen a Will and put down his wishes and leave nothing to doubt.

In light of the non-application of HSA outside India, it is strongly recommended that NRIs of Hindu origin having immovable assets in different countries should execute a joint composite Will about all their immovable properties located in different jurisdictions. For NRIs, execution of separate Wills for separate immovable properties in different countries is not advisable. Establishing the genuineness of a composite Will is easier than proving multiple Wills. It is also recommended that the NRI must register the Will separately in every jurisdiction even though it is optional in India to do so. It may be mentioned that the registration in a particular country may hold good in respect of properties of the NRIs in that jurisdiction. Accordingly, separate rules of registration of different countries ought to be complied with as per the rules of the foreign domicile of the NRI. It is also advisable that the NRI should specifically appoint an executor to execute the Will in the particular jurisdiction where the property is situated.

The Removed Child and The Law in India

Child custody and the vexed question of cross-border inter-parental child removal not finding any legislative definition, remain a subject of varying judicial interpretation of the Supreme Court from time to time. India is not a signatory to the Hague Convention on Civil Aspects of International Child Abduction, 1980, acceded to by 105 other countries. Thus wrongful removal and retention of a child by a parent defy recognition and acceptance under codified Indian law, even though it is an offence internationally. A corpus of 30 million NRIs living globally in 195 countries with multifarious relationships, creates immense potential for unresolved child custody disputes upon a parent relocating to India by violating the other parent's rights in a foreign jurisdiction.

The Hindu Minority and Guardianship Act, 1956 (HMGA), declares that the natural guardian of a Hindu minor boy or an unmarried girl shall be the father, and after him, the mother, provided that the custody of a minor who has not completed 5 years of age, shall ordinarily be with the mother. The HMGA does not contain any independent, statutory or procedural mechanism for adjudicating custody rights or declaring Court appointed guardians. The reference to the word "Court" in the HMGA relegates a parent or any other person seeking appointment as a "guardian" to invoke the provisions of a 130-year-old colonial law i.e. the Guardian and Wards Act, 1890 (GWA), and wherein the parent is constrained to seek exclusive temporary custody of his biological offspring during the pendency of such hearing. Sad, but true, child custody issues between parents are thus to be determined under GWA, upon a natural parent wanting to be declared as an exclusive guardian to his natural-born child.

India is a signatory to the United Nations Convention on the Right of the Child (UNCRC). Consequently, the definition of the "best interest of the child" has been implanted from the UNCRC in the JJ Act to mean "the basis for any decision taken regarding the child, to ensure fulfilment of his basic rights and needs, identity, social well-being and physical, emotional and intellectual development". Axiomatically, Courts in India, are now duty bound to ensure the true import of this meaning to full expression.

The writ of Habeas Corpus for seeking implementation of child rights where the parents are fighting for the custody of their offspring was settled by the Supreme Court in *Gohar Begum*,[3] by following principles applicable to such writs in England to deliver custody of infants. In *Nil Ratan Kundu*,[4] following English and American Law, the Supreme Court held that "the basis for issuance of a writ of Habeas Corpus in a child custody case is not an illegal detention", but "the primary purpose is to furnish a means by which the court, in the exercise of its judicial discretion, may determine what is best for the welfare of the child, and the decision is reached by a consideration of the equities involved in the welfare of the child, against which the legal rights of no one, including the parents, are allowed to militate".

In 2019 the Supreme Court in *Lahari Sakhamuri*[5] took note of the expression "best interest of the child" given in the JJ Act, and in a child-centric jurisprudence held that "it cannot remain the love and care of the primary

[3] AIR [1960] SC 93.
[4] AIR [2009] Supp. SC 732.
[5] [2019] 7 SCC 311.

caregiver, i.e. mother". Thereby, the Court in its wisdom shattered the glass ceiling of gender preference and provided neutrality to parents', on the welfare of the child principle. Earlier, in 2017, Justice A.K. Sikri in *Vivek Singh v. Romani Singh*[6] discussed the concept of Parental Alienation Syndrome and held that "a child-centric human rights jurisprudence that has evolved over some time is founded on the principle that public good demands proper growth of the child, who are the future of the nation." The law declared by the Supreme Court shall be binding on all courts. In the absence of a clear codified law on cross-border inter-parental child removal issues, the much-needed clearer path of judicial precedent will continue to guide litigants and courts.

Limping Marriages

Irretrievable breakdown of marriage is not a ground for divorce in India which follows strict proof on fault grounds. This process is tedious and cumbersome. Divorce by mutual consent requires both spouses to jointly file the petition in the Court and maintain the unanimous decision to part for at least six months from the date of the first hearing before the competent Court. In *Amardeep Singh v. Harveen Kaur,*[7] the Supreme Court held that where the Court dealing with the matter is satisfied, the statutory period of one-year separation of parties before filing the petition and the second statutory period of six months waiting before filing the second motion can be waived if all efforts of mediation/conciliation have failed and parties have genuinely settled their differences including alimony besides child custody issues. In *Shilpa Sailesh v. Varun Sreenivasan*[8], a Constitution Bench of the Supreme Court is examining the jurisdiction of the Apex Court under Article 142 of the Constitution to dissolve a marriage between consenting parties without referring them to the Family Court, to wait for the mandatory period prescribed under Section 13-B, HMA. However, when a traditional marriage of a Global Indian breaks up overseas, the anxiety to dissolve it expeditiously is preferred to be done in the foreign matrimonial home of the spouses. The vexed question which then crops up frequently before Indian marital Courts is whether to accord recognition to such foreign divorce decrees or not as invariably such overseas dissolution is based on the ground of *irretrievable breakdown of marriage* which is not a ground for divorce under HMA.

The Apex Court in its celebrated decision in *Y. Narashimha Rao's*[9] *case* had laid down authoritative principles for recognition of foreign matrimonial judgments by settling that "*the jurisdiction assumed by the foreign Court as well as the grounds on which the relief is granted must be per the matrimonial law under which the parties are married."* In another perspective, the Supreme Court in *Sondur Gopal's*[10] *case* has whilst interpreting the extraterritorial application of the HMA, authoritatively held that where both parties are Hindu by religion and have a permanent domicile in India, a matrimonial cause of action would be maintainable in India even if they reside outside India.

In *Sivasankaran v. Santhimeenal*,[11] the Supreme Court held that "living together is not a compulsory exercise" when a couple had not lived together for a single 20 years of their marriage and used its powers under Article 142 of the Constitution to note that divorce was "inevitable" to do complete justice to the parties. In earlier decisions in *R. Srinivas*[12] case and *Munish Kakkar v. Nidhi Kakkar,*[13] the Supreme Court-dissolved marriage under Article 142 to grant a divorce to litigating parties. The Apex Court in the case of *Vishnu Dutt Sharma,*[14] and *Neelam Kumar,*[15] have held that since the irretrievable breakdown of marriage is not a ground for divorce recognised by statutory law, no marriage can be dissolved on this ground under the HMA and it is for Parliament to enact or amend the law on the subject.

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[6] [2017] 3 SCC 231.
[7] AIR [2017] SC 4417.
[8] TP (C) No. 1118 of 2018.
[9] Ibid.
[10] Ibid.
[11] Decided on 13 September 2021.
[12] [2019] 9 SCC 409.
[13] Decided on 17 December 2019.
[14] JT [2009] 7 SC 5.
[15] AIR [2011] SC 193.

Therefore, any foreign court matrimonial decree dissolving a Hindu marriage on the breakdown principle does not find recognition in India. Consequently, whenever any such foreign divorce decree is thrust before an Indian matrimonial court in an attempt to avoid matrimonial litigation of a divorce petition preferred by the local spouse on conventional fault grounds under HMA, the lack of maintainability has to be tested on judicial principles settled by the Apex Court. Invariably, attempts to avoid divorce trials in India based on a foreign matrimonial decree do not find favour.

With the influx of foreign matrimonial judgments being thrust before Indian Courts by a 30 million NRI population in 195 countries abroad, Parliament in its wisdom could well consider enacting a simplified irretrievable breakdown ground hedged with safeguards if one or both parties are resident abroad. This would also resolve the application of personal law issues being adjudicated by competent courts in India without a conflict of jurisdictions.

Surrogacy, Inequality and The Law

On November 4, 2015, surrogacy for foreign nationals in India had been banned according to a mandate issued by the Ministry of Home Affairs. The Surrogacy (Regulation) Act, 2021 (SRA) and the ART (Regulation) Act, 2021 (ART), have come into force in India on January 25, 2022, as notified by the Central Government for actual enforcement and implementation. The SRA though amended has now proposed that surrogacy shall be available only to infertile Indian married couples and single widowed/divorced women, but all other categories of persons including single men, foreign nationals and foreign couples have been excluded.

Anomalous and inconsistent as it may seem, in the matter of inter-country adoptions, the Ministry of Women and Child Development, has a diametrically opposite policy. It statutorily propagates inter-country adoptions from India for foreigners. Juvenile Justice Act, 2015 (JJA), allows a Court to give a child in adoption to foreign parents irrespective of the marital status of a person. The latest guidelines governing the adoption of children notified on January 4, 2017, known as the Adoption Regulations, 2017 have streamlined inter-country adoption procedures, thereby permitting single-parent adoptions except for barring single male persons from adopting a girl child. Provisions of Transgender Persons (Protection of Rights) Act, 2019, also fall foul of ART, 2021.

Supreme Court in *Shafin Jahan's*[16] case recognises the right to choose one's life partner as an important facet of the right to life, further holding that social approval of intimate personal decisions should not be the basis for recognising them. Supreme Court in *K.S. Puttaswamy*[17] held that a promise of a right of privacy is embedded in Article 21 of the Constitution. In *Navtej Johar,*[18] Section 377 of the Indian Penal Code which criminalised consensual homosexual relationships was read down and declared unconstitutional. The Supreme Court liberalizes equality and equal protection of laws whilst the Legislature restricts it.

Commercial surrogacy in vogue for foreigners for over ten years has been completely banned by the SRA, in 2021. Tripartite constitutional fundamental rights of stakeholders stand violated in the process. Commissioning foreign parents as persons enjoy the protection of the equality of law and the right to life under Articles 14 and 21 of the Constitution, which cannot be taken away except according to the procedures established by law. The right to reproductive autonomy and parenthood, as a part of the right to life of a foreign person, cannot be circumvented by an executive Order, especially when Parliament by law already permits parenthood by inter-country adoptions from India by foreigners. The SRA 2021, proposes to completely ban surrogacy for foreigners in India except for PIOs/OCIs. Even medical professionals can no longer practice surrogacy for foreign parents, thereby imposing an unreasonable restriction. Surrogate mothers too may claim deprivation of a right of livelihood. All these diverse rights have been curtailed in an undemocratic fashion. 27 million infertile couples are in the lurch.

[16] AIR [2018] SC 1933.
[17] [2019] 1 SCC 1.
[18] AIR [2018] SC 4321.

The ART 2021, proposes a complete ban on commercial surrogacy, restricting ethical altruistic surrogacy to legally wedded infertile Indian married couples. The husband must be between 26 to 55 years of age and the wife must be between 23 to 50 years of age. Overseas Indians, foreigners, unmarried couples, single parents, live-in partners, and LGBTQIA are barred from commissioning surrogacy.

The rational approach would be to control and coordinate by a selective screening process of checks and balances. A similar parallel exists in matters of adoptions. CARA, a statutory body under the JJ Act functions smoothly to regulate all adoption matters. A regulated, defined and effective procedural mechanism rules out all possible unapproved adoptions. Law steps in to check but not to bar eligible persons from adopting children. Hence, a similarly balanced approach in matters of surrogacy requires serious introspection. Surrogacy in vogue for over a decade cannot be stamped out of existence by law. Its practice ought to be regulated and coordinated without offending equality of law and equal protection of laws to persons and not only citizens in a democratic society.

Some Family Law Issues From An English Perspective

Introduction

Family law in England and Wales has seen some significant change in recent years and practice has developed and evolved to reflect societal changes, besides Brexit and pandemic propelling online procedures. Introduction of two key pieces of legislation: the Divorce, Dissolution and Separation Act 2020 and the Domestic Abuse Act 2021, will fundamentally impact and reframe the approach of family lawyers. No fault divorce is being introduced in April 2022 and we are also to see potential significant reform in our surrogacy laws with final recommendations and a draft bill due to be announced in Autumn 2022.

Aside from the difference in legalities concerning approaches to maintenance and nuptial agreements, another more fundamental example of this is that the English court will consider financial and children matters separately – whereas other countries, for example, France, will consider all matters holistically.

That said, practitioners are certainly seeing and feeling trends which are moving away from the more traditional aspects of our laws such as privacy for parties and the historically generous maintenance awards. In addition to this, there is real encouragement from the courts to resolve disputes in alternative forums, such as through mediation or arbitration. This begs the question, and one of the key issues looking forward is, whether the English court will retain its title as the 'divorce capital of the world'.

The Challenge Of Providing An Element Of Certainty For A Client In The Context Of Judicial Discretion

One of the more difficult issues and biggest challenges for family lawyers is being able to provide certainty in a discretionary area of law. The discretion in all financial remedy cases stems from the various factors set out in Section 25 of the Matrimonial Causes Act 1973. Judges have a wide ambit and can exercise their discretion, of course concerning the factors prescribed by statute, in different ways. Maintenance and children's welfare is always the court's paramount consideration. Therefore, a lawyer needs to advise by reference to reasonable parameters of this exercise of the court's discretion as clients expect and need some certainty and guidance from their lawyers as to the likely outcome.

Conflicts Of Law And Jurisdiction Battles

Many international family lawyers, particularly those working in the EU, will have many tales of jurisdiction battles and 'jurisdiction races'. Before Brexit, under Brussels IIa[19], whichever court of the EU was first seized, would have jurisdiction to hear the case – this is known as the 'lis pendens' rule. This can be incredibly beneficial, particularly when considering the financial outcome and approaches of the different jurisdictions – which can

[19] Regulation (EC) No 2201/2003 on jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility.

make the difference of millions of pounds in certain cases thus the race was certainly on and fast action was needed.

Since Brexit, the position has changed considerably and since the UK is no longer part of the EU, the same rules which apply to jurisdiction battles with any other country of the world apply to cases with EU countries. The English court now has to consider the position much more holistically and will look at a variety of factors to determine the best forum to hear the divorce – this is known as the 'forum conveniens' principle.

Relocation And Wrongful Removal Of Children

In a globalised world with more and more international families, these issues are becoming more common. Upon the breakdown of marriages or relationships, one of the most natural and compelling feelings can be for a parent to want to return *home* particularly if they have been living in a different country for work or reasons connected with their spouse or partner resulting in relocation and wrongful removal of children.

One nuance of English law concerns is our legal construction of *domicile*. This is very subjective, and we all have a domicile of origin when we are born but this can be flexible and change over time. Additionally, we can have a domicile of choice – i.e. where we *want or choose to remain permanently or indefinitely.* These legal constructions can have real prominence, particularly in surrogacy cases where currently one of the criteria for the granting of a parental order is that one of the intended parents is domiciled in England and Wales.

That said what constitutes *home* for a child can be complex and the legal concept of habitual residence is very relevant, particularly in wrongful removal cases. In relocation cases, compared with many other jurisdictions, the court of England and Wales has been, ready to allow children to go back to their mother's country of origin. This has caused some controversy in the past but because of societal norms shifting and our seeing much more balance and equity in parenting – it is thought that it is probably becoming less likely than before that a court will allow a child to relocate when opposed. That said, any application is always considered in the best interests of the child.

Financial Provision After Overseas Divorce

Again, with the increase of international families, we have seen some very high-value cases in English court dealing with a former spouse's financial claims following a divorce which has been granted overseas in another jurisdiction. This is dealt with under Part III of the Matrimonial and Family Proceedings Act 1984, and this was enacted to give the English court the power to grant financial relief after marriage had been dissolved in a foreign country and the financially weaker spouse has received very little or no financial provision'.

In *Agbaje v. Akinnoye-Agbaje*[20], the court has been clear that it is not to allow any aggrieved spouse a '*second bite of the cherry,'* i.e. an opportunity to have a second try at getting a better deal. The court's powers are wide under this statute and they can make any one or more of the orders that they could make under Part II of the Matrimonial Causes Act 1973 upon a decree of divorce. Again, the court has a wide discretion to consider the circumstances of a case and factors relating to maintenance and child welfare under Section 25 of the Matrimonial Causes Act 1973.

Ongoing Maintenance – Will It Survive?

It is one of the more interesting aspects of family law, particularly international family law, that spousal maintenance can be alive and well in one jurisdiction (England and Wales) and virtually non-existent in another (Scotland). In some countries, formulaic and predictable maintenance orders are made whereas in our jurisdiction this is a matter of discretion and based on various factors stipulated in Section 25 of the Matrimonial Causes Act.

Over the past decade, there has been a sea-change in this regard; and the trend in financial remedy cases seems to be a move away from *joint lives* maintenance orders to *term* orders. There has been a gradual evolution and

[20] [2010] UKSC 13.

Justice Mostyn in the important case of *SS v. NS*[21] highlighted the basis and rationale for orders to award maintenance. It seemed slightly revolutionary at the time and is a very important judgment regarding the appropriateness of ongoing maintenance. The ethos of the judgment moved away from what had been a trend of long-lasting, generous awards, and the basis and almost ethical approach to maintenance were set out with clear guidance and key principles in judgment, *SS v. NS*[22].

However, the current position is that awards of ongoing spousal maintenance very much need to be justified and there is a clear overarching aim of an immediate clean break or certainly working towards a clean break and financial independence. This approach was solidified in the case of *Waggott v. Waggott*[23] (known colloquially in the press as the '*meal ticket for life*' case). In this case, the husband's net income was substantial – above £3 million net per annum. The wife's income needs were assessed at £175,000 per annum and the court at first instance had assessed those life needs. It was held on appeal that the husband's earning capacity was not an asset capable of sharing and additionally the maintenance was subject to a term bar expiring on March 1, 2021 – and the wife could not apply to extend this. It was found that she would be able to adjust without undue hardship. Again, this approach shows that the court, notwithstanding the husband's very high earnings, will now take a pragmatic approach to any maintenance award.

There is currently a Bill to amend the Matrimonial Causes Act 1973 to make provisions in connection with financial settlements following a divorce – the Divorce (Financial Provision) Bill.[24] One of the proposals is that if any maintenance was payable by one of the spouses this should be for not more than five years from the date of divorce. Importantly, it is recognised that transitioning to financial independence may involve some hardship – which is acceptable as far as the court is concerned – but how this will be applied in the context of the overriding position that the award needs to be fair, remains to be seen.

Nuptial Agreements: A Future Perspective

Pre-nuptial agreements did not exist three decades ago. Things have changed dramatically. It's partly because so many people from civil law jurisdictions live in the UK, particularly in London; for example, pre-Brexit it was thought around 600,000 French people were living in London. London has a population of 8 million and so 600,000 is a significant proportion of this.

In *Radmacher v. Granatino*[25], the seminal case which confirmed the approach to nuptial agreements, the court held that '*the court should give effect to a nuptial agreement that is freely entered into by each party with a full appreciation of its implications unless in the circumstances prevailing it would not be fair to hold the parties to their agreement.'* It is fair to say that we have seen a sharp increase in the number of parties entering into nuptial agreements – they are seen as a useful and valid tool for wealth protection and planning. They are not just for ultra-high net worth couples as they can provide a degree of certainty for couples in an otherwise discretionary area of law.

Nuptial agreements also have a role to play in more emotive cases, for example, the protection of inheritance, family wealth or wealth acquired or generated before the marriage. They also encourage openness and honesty as to parties' finances, at least at the time of the marriage. Both parties must intend for the nuptial agreement to be legally binding, should have had independent legal advice and there must be no duress or pressure to agree. Ideally, it should be signed not less than 28 days before the marriage for it to have the strongest possibility of being upheld. Looking forward, it can be seen that nuptial agreements are increasingly popular and no longer 'taboo' or indeed contrary to public policy. The trend seems to be moving away from them being viewed as unromantic and they are often seen as a pragmatic and astute approach to providing clarity in the event of a potential future divorce.

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[21] [2014] EWHC 4183.
[22] [2014] EWHC 4183 (Fam) .
[23] [2018] EWCA Civ 727.
[24] Divorce (Financial Provision) Bill [HL] - Parliamentary Bills - UK Parliament.
[25] [2010] EWSC 427.

Transparency of the Court

In 2021, the President of the Family Division of Royal Courts of Justice, Sir Andrew McFarlane, released his Transparency Review. His overall conclusion on transparency is that: '*the time has come for accredited media representatives and legal bloggers to be able, not only to attend and observe Family Court hearings but also to report publicly on what they see and hear. Reporting must be subject to very clear rules to maintain both the anonymity of the children and family members who are before the court and confidentiality concerning intimate details of their private lives. Openness and confidentiality are not irreconcilable and each is achievable. The aim is to enhance public confidence significantly, whilst at the same time firmly protecting continued confidentiality.*[26]'

It has always been considered that the veil of privacy surrounding family law proceedings, particularly financial remedy proceedings, has been an additional attraction to litigating in the courts of England and Wales. However, there is going to be a sharp shift in the approach to this, with the general feeling that unless there are significant reasons or justifications, we will move away from anonymisation in financial remedy cases. Gone are the days where cases would routinely be referred to as, for example, *A v. A, K v. K, BT v. CU* and moving forward the intention is that parties are specifically named.

In BT v. CU,[27] Justice Mostyn has made his stance clear by stating, '*it should be clearly understood that my default position from now on will be to publish financial remedy judgments in full without anonymization, save that any children will continue to be granted anonymity. Derogation from this principle will need to be distinctly justified by reference to specific facts, rather than by reliance on generalisations.'*

There is a clear emphasis on opening up the Family Courts and lifting a veil of privacy coupled with a push for more judgments to be published, whilst children's details are kept protected – this is quite a delicate balance. One interesting and very recent application of this was the case of *Griffiths v. Tickle*[28]. The father appealed against a decision that a fact-finding hearing judgment in proceedings under the Children Act 1989 where findings including rape and coercive control were made against him, could be published. The Court of Appeal found that the judgment could be made public and one of the key reasons for this was *public interest*.

Cohabitation

Cohabitees' rights have been considered by many family lawyers an area of law which needs clarification and reform. There are many myths surrounding cohabitation and its links with family law in England and Wales. For example, cohabitees often mistakenly refer to themselves as 'common law spouses' – thinking that they have similar legal rights to married couples or those in civil partnerships.

There are also other notable differences in the position of married couples, for example, the acquisition of parental responsibility for an unmarried father. A married father automatically acquires parental responsibility on the birth of a child, but a cohabitee or unmarried father would need to be registered on the birth certificate or enter into a parental responsibility agreement with the mother (or have it granted by the court) to obtain parental responsibility for the child. Cohabitees do not have obligations or claims in respect of ongoing financial support from another should they separate.

Cohabitees' rights are currently restricted to any claims they may have against each other under their children (for example, claims under Schedule 1 of the Children Act 1989) or by way of rights according to property law principles – in particular under the Trusts of Land and Appointment of Trustees Act 1996 (TOLATA).

[26] Confidence and Confidentiality: Transparency in the Family Courts (judiciary.uk).
[27] [2021] EWFC 87.
[28] [2021] EWCA Civ 1882.

It has long been recorded that cohabiting family structures are on the rise and that the law needs to evolve to reflect this. Cohabiting couple families '*were the second-largest family type at 3.5 million (18.4%)*'[29] in 2019. This is an increase from 15.3% in 2009 and reflects the growing trend of cohabiting families [30]. An inquiry was launched in 2021[31] by the Women and Equalities Committee into the potential legislative reform for and approach to cohabiting couple families. Cohabiting couple families are the '*fastest growing type of family'* [32] and adequate legal recognition and reflection are going to be crucial. Until now, these families have fallen back on the various separate pieces of legislation set out above which are disjointed; clarity is going to be needed.

Looking forward, and particularly whilst the law is under review, it is thought that cohabitation agreements will become significantly more common. Perhaps ironically these agreements are more likely to be seen by a court as binding than a nuptial agreement, particularly regarding property rights. They will allow couples to set out intentions regarding assets and financial arrangements should they separate. Therefore, a clear law definition of cohabitation is required and what that ultimately means for families in terms of their legal position.

Surrogacy

The law concerning surrogacy has long been considered unfit for purpose and not protective of those involved in surrogacy arrangements; reform is long overdue. The Law Commission is currently reviewing surrogacy as part of the 13th Programme of Law Reform and the project – which will consider '*the legal parentage of children born via surrogacy, the regulation of surrogacy more widely, and the international context of surrogacy*'[33]- has been running for longer than initially expected but a final report with recommendations and a draft bill is expected in Autumn 2022.

The parental order process, which is dealt with under Section 54 of the Human Fertilisation and Embryology Act 2008, is a post-birth court application; it is this transformative order which extinguishes the legal parentage of the surrogate (as the birth mother she is always considered to be the legal mother) and in some cases, the surrogate's spouse. This can leave a child in legal limbo until the parental order has been granted and, for example, the intended parents may not have the parental responsibility to make important decisions on behalf of their child.

Attitudes and public policy considerations concerning surrogacy have evolved and the case law shows that the courts have always applied the law intending to ensure the child's welfare needs are met. For example, following *Re Z (a child) (2015)*[34] and *Re Z (no 2) (2016)*[35] – the court made a declaration that the law was incompatible with the Human Rights Act, 1998 as single parents through surrogacy could not apply for a parental order. Following this, Parliament, further through a remedial order which came into effect in January 2019, changed the law-making parental orders available for single parents.

The Law Commission has made provisional proposals pending the finalisation of their report, but these proposals include, creating a new surrogacy pathway, introducing specific regulations for surrogacy arrangements & safeguards, and allowing international surrogacy arrangements.[36] The law governing surrogacy dates in part from the 1980s and looking forward, the law has to change to reflect modern attitudes to families and how they are created. The proposal concerning international arrangements potentially being recognised indicates a move towards increased cooperation and collaboration on an international level and when based on the interests of children, can only be a positive step.

[29] Families and households in the UK - Office for National Statistics (ons.gov.uk).
[30] Families and households in the UK - Office for National Statistics (ons.gov.uk).
[31] The Rights of Cohabiting Partners - Committees - UK Parliament.
[32] The Rights of Cohabiting Partners - Committees - UK Parliament.
[33]Surrogacy | Law Commission.
[34] [2015] EWFC 73.
[35] *Re Z (A Child) (No 2)* [2016] EWHC 1191 (Fam).
[36] Surrogacy | Law Commission.

CHAPTER XXIII: UKRAINE: A SUNSET OR A NEW DAWN FOR INTERNATIONAL LAW?

Upendra Baxi[1]

Introductory Remarks

Charles Debussy famously writing on Wagner has said that his compositions posed a question of questions: were they sunset or a beautiful dawn? [1] I used this phrase in a 1966 title of a manuscript criticizing Professor Julius Stone, who wrote praising judge Stephen Spender's opinion in *South West Africa Case*.[2] it has stayed with me ever since and as I scan the discourse on the Ukraine war, the phrase again begins to haunt me. I see some discussion that leans towards the 'sunset' view of public international law, regulation-- the slow but steady demise of international law, some on regulation of armed hostilities actress borders- and some on the possibility of a new dawn—a normative juristic 'architecture' of a European , and international, law for world peace and good order.

There are many difficulties talking about the 'legality' of an ongoing war. One major difficulty is brought about by the intensification of 'propaganda society' that today permeates (precedes, accompanies, and follows) the conduct of belligerent hostilities. Fierce war propaganda has always been an aspect of the conduct of hostilities and war. [2] To its arsenal is now to be added the notion of a 'propaganda society', usefully enunciated by Professor Gerald Sussman[3] who formulates the notion of informational society that '…requires a greater emphasis on consumerism, as the prevailing "religion", the "opening up of more and more of the spaces of everyday life to promotional activity…." and branding of goods, services, and even nations.[3] This leads to a 'PR state rooted in advertising and political marketing' and incites 'visceral and mostly negative responses to government, while cultivating affective responses to commodities that are generally associated with the gratification of desires'; thus occurs also a commoditization 'of consciousness'.[4] Marshall McLuhan's notion that 'media is the message' was never more true than now in the digital surveillance society. In any event, both states of 'subjugation' and 'surveillance' characterize postmodern societies of 'information civilization' with which both peace and wars are waged.[5] Stories about media imperialism are precious and probably more accentuated in times of war than peace

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[2]While originally derived this quote from some history of operatic music, William W. Austin's essay on 'Debussy, Wagner, and Some Others 19th-Century Music , Summer, 1982, 6 : 2 ,82-911 (Summer, 1982), is full of interesting materials and insights. A contemporary meditation is offered by Gerald James Larson, 'A Beautiful Sunset . . . Mistaken for a Dawn': Some Reflections on Religious Studies, India Studies, and the Modern University, Journal of the American Academy of Religion, 72: 4, 1003-1019 (2004). Invoking the triple characterization in Indian cosmic thought, -analytic scheme from traditional Indic cosmology, namely, the Adhidaivika (the cosmic realm), the Adhibhautika (the social realm), and the Adhyatmika (the personal realm) – Larson interestingly maintains that rather than 'thinking in terms of progress and advance, a more apt characterization of what has been happening to the human community is one of serious decline' now 'are in need of new conceptual frameworks in terms of cosmology (theology), social order, and self-understanding that may enable us to overcome the decline.'

[3] For a more detailed account, see Arvind Narrain, Lawrence Liang, Sitharamam Kakarala, Sruti Chaganti (ed.), *Conversations with Upendra Baxi: Law and Life,* ch 4 (Delhi, Orient Black Swan 2022).

[4] Gerald Sussman , 'Systematic Propaganda: Branding Democracy: U.S. Regime Change in Post-Soviet Eastern Europe' in Nadia Kaneva (ed), *Branding Post-Communist Nations: Marketizing National Identities in the "New" Europe*, 23-48 at …. (New York, Taylor and Francis 2012). See, the path breaking work of Professor B.S. Murty, among the handful of Third World law pioneers to focus on the specific theme of international regulation, *Propaganda and World Public Order: The Legal Regulation of the Ideological Instrument of Coercion (*New Haven: Yale University Press 1968).

[5] Marshall McLuhan, *Understanding Media,* (New York, McGraw Hill 1964); Marshal McLuhan, & Quentin Fiore, *The Medium is the Massage:* A*n Inventory of Effects* (New York, Bantam Books 1967). See now, Shoshana Zuboff, 'Big Other: Surveillance Capitalism and the Prospects of an Information Civilization', *J Inf Technol* 30, 75–89 (2015). See, however, the important perspectives offered in Khaled Ali Beydoun, 'The New State of Surveillance: Societies of Subjugation', *Washington and Lee Law Review*, 79:2, 769-845 (2022)

but for that reason alone we cannot overlook the continuum of forces that delineate both subjugation and surveillance. [6]

A Bit of History: 'Your International Law' v 'My International Law'

I derive this contrast between your and mine international law from Ferdinand Feldbrugge.[7] Writing about annexation of Crimea by the Russian Federation, he insists that the present crisis is due to that 'Western and Russian leaders both claim that international law is on their side, but there is no world court or voice from heaven to establish (*authoritatively*) what international law demands and to secure (*effectively*) the enforcement of its dictum'; put another way, 'international law is usually not knowable, in the way in which national law is'. What 'then happens is that 'my international law' and 'your international law' become weapons in the arsenals of the conflicting parties and in fact contribute to the aggravation of the conflict'.[8] The hyperreality of weaponization of rhetorics of international law of the conceals the reality of international law which lies in facilitating, changing, and even thwarting the conduct of international relations; the normativity of international law remains an important dimension in prescribing standards of conduct that statecraft ought to always follow, even when some of these tend to show an excessive regard for the sovereignty of the nation- state.

The problems with authority and effectiveness have always been recognized, and even accentuated, by international law theorists and practitioners. It illustrates deeply the Adam and Eve situation—a story often told by Professor Julius Stone (with whom I had the privilege to co-teaching at Sydney). When Eve, feeling very romantic, snuggled against Adam and persisted in seeking his respose to the question 'please tell me why you chose me', ultimately his answer was 'Darling, did I have any another choice?' That answer should here suffice: howsoever difficult, there are normative international law standards which facilitate the decision between *Meum* and *Teum* questions, and provide institutional means and ways for deciding disputes and the quarrels between 'mine' and 'thine' international law.[9]

How much of 'history' is relevant to international law, and how much of international law is relevant to making and unmaking 'history 'is a very large and vexed question which is worth exploring but I do not attempt it here. [10] But two brief observations are in order. First, I do not think that any serious student of recent history may entirely ignore that the Russian federation shares a vast, and some would say integral, relation with the old Russia and the erstwhile Soviet Union, although the Russian federation acquiesced and recognized an independent state of Ukraine in 1991. And second the annexation of Crimea in 2014 bears a family resemblance to the war now against Ukraine. The first factor has played a large role in history of the relationship between Russia and Ukraine; after centuries of being an integral part of Russia, Ukraine declared sovereignty and independence only in 1991.[11]

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[6] It would be an egregious error to think that media imperialism, an aspect of cultural imperialism, is limited to liberal Euro american States. For example, Vitaliy Tereshch notes that that In 2014 - year of "Revolution of dignity" — the 'share of Russian content on Ukrainian television exceeded 40%, which actually equaled the volumes of Ukrainian content and almost 2.5 times exceeded content from other countries'p.88, see 'The Problem of Media Imperialism in Current Conditions' at <https://www.researchgate.net › publication › 324390424> (2017). See also, *Media Imperialism: Continuity and Change* (London, Rowman and Littlefield 2020; Oliver Boyd-Barrett and Tanner Mireless, ed.).

[7] 'Ukraine, Russia and International Law', *Review of Central and East European Law*, 39: 95-97 (2014)

[8] ibid (emphasis in original).

[9] I must let go the other aspect of the question—the conditions of 'knowability' of municipal or domestic law. That law is equally indeterminate, as students of epistemology of law and of legal hermeneutics know very well.

[10] See, Bardo Fassbender, Anne Peters (ed.*), The Oxford Handbook of the History of International Law* (Oxford, Oxford University Press 2012)*;* Charles Henry Alexandrowicz *An Introduction to the History of the Law of Nations in the East Indies: (16th, 17th and 18th Centuries), (*Clarendon Press Oxford 1967*); see also* ibid, *The Afro-Asian World the Law of Nations: Historical Aspects* [1968] 123 *Recueil des cours* 117–214, p 123–4; and the text and reference materials cited in Upendra Baxi, 'India -Europe' in *Oxford Handbook,* at 744–763. See, further, Erik Ringmar, 'The relevance of international law: a Hegelian interpretation of a Peculiar Seventeenth-Century Preoccupation', *Political* Marti Koskenniemi, 'Why History of International Law Today?', *Rechtsgeschichte - Legal History Science Review of International Studies* , … ; Anne Orford , 'The Past As Law Or History? The Relevance of Imperialism For Modern International Law ',ILJ Working Paper 2012/2 (History and Theory of International Law Series) Finalized June 2012, (www.iilj.org); B. S. Chimni, *International Law and World Order: A Critique of Contemporary Approaches (ILWO)*,(Delhi, Cambridge University Press 2017).

[11]See, Mykhailo Minakov, Georgiy Kasianov, Matthew Rojansky (eds.), *From "The Ukraine" to Ukraine: A Contemporary History, 1991-2021* (Stuttgart, Deutschen Nationalbibliothek. Ibidium Verlag 2021); Jicki L. Birchfield and Alasdair R. Young (ed), *Diplomacy*

And the new state has never shed its sovereign equality status in international law since then. Further, it issued a 'nonpaper' which noted that the Russian deployments entailed a breach of Russia's international obligations. inter alia, of the Treaty on Friendship, Cooperation and Partnership of May 31, 1997,87 and the Black Sea fleet basing arrangement. Nor did it help to refer to Article 6 of the Agreement Between the Russian Federation and Ukraine on the Status and Conditions of the Russian Federation Black Sea Fleet's Stay on Ukrainian Territory, which stipulated respect for the sovereignty of Ukraine. .[12] Regardless of this, on April 2, 2014, following the annexation of Crimea, the Russian Federation unilaterally declared the four treaties terminated. The annexation was, alleged, 'conducted it in haste, in a period of public crisis, and in the absence of third-party observation action by forcible means on the plea of self-determination'.[13] Nor does that plea help here because even granting such a right or principle extended at all in the Crimean situation 'nothing about the 'situation invited an armed takeover of the territory by another state'.[14]

Given the illegality of the annexation, one can gauge the brittle respect President Putin has for principles prohibiting use of force against another sovereign state. Yet I hazard a guess that a grudging regard (even if of a smokescreen variety) when he chooses to call a 'special military operation' against Ukraine.[15] He has specifically penalized the usage of the word 'war' by criminal law legislation for citizens in Russia. Nor is 'annexation' of Ukraine is a specific chosen goal of the state policy. Calling the hostilities not war' has certainly tactical advantages even in contemporary law of war under which a formal declaration is not necessary; but such advantages accrue for what are described as 'non international armed interventions' where the distinction between combatants and non -combatant civilians does not rigorously apply. The usual result is that such civilians are treated as criminals and even the Common Article 3 of the Geneva Conventions and Additional Protocol II, only provide for the 'minimum standard of treatment of fighters in non-international armed conflicts.[16]

Among the United States, The European Union, and The Russian Federation: Responses To The Crisis In Ukraine'(London, Palgrave 2018). See also, Martin Åberg · Mikael Sandberg, *Social Capital and Democratisation: Roots of Trust in Post Communist Poland and Ukraine* (Burlington, Vt.: Ashgate Publishing 2003); (Washington, DC: Brookings Institution 2003); Lennart Brunkert, Stefan; Kruse, Christian Peter Welzel,' Tale of Culture-Bound Regime Evolution: The Centennial Democratic Trend and Its Recent Reversal.', Democratization, 26, L3, 422-443. (2910).; Paul J. D'Anieri, Robert S. Kravc, Politics and society in Ukraine, (London: Routledge 2018); H.nry E. Hale, *Patronal Politics: Eurasian Regime Dynamics In Comparative Perspective* (Cambridge University Press 2014); Bohdan Harasymiw, *Post-Communist Ukraine* (Cambridge, Cambridge University Press 2017); amuel Phillip Harrington,. 'The Third Wave: Democratization', <https://www.semanticscholar.org › paper › The-Third-Wave:-Democratization; Anders Åslund and Michael McFaul, (ed.), *Revolution in Orange: The Origins of Ukraine's Democratic Breakthrough*, (Wah DC, Carnegie Endowment 2006).

[12] See, the authoritative analysis by Thomas D Grant, 'Annexation of Crimea', *American Journal of International Law*, 109:1, 68-95 at 78-90 (2015). See also, Sergey Sayapin, Evhen Tsybulenko (ed), *The Use of Force against Ukraine and International Law: Jus Ad Bellum, Jus In Bello, Jus Post Bellum*'. See, especially ch 2, 3, 13, (Berlin, T.M.C. Asser Press by Springer-Verlag Heidelberg 2018), hereinafter referred to simply as 'Use of Force against Ukraine'.

[13] See, Grant, fn 11, p 85. Also see, Umut Qzsu 'Ukraine, International Law, and the Political Economy of Self-Determination', who advises international lawyers to 'confront the class dimensions of the concept of collective self-determination rather than continuing to conceive it as a purely national, or ethno-national, project of recognition or emancipation'.

[14]See, Grant, fn 11, p 85

[15] See, Dmitry Kurnoso , 'A War By Any Other Name: How Russian Law Shapes Language and Instills Silence', *Verfassungblog: On Mattters Constitutional* accessed 8 August 2022

[16] See, Sandesh Sivakumaran, *The Law of Non-International Armed Conflict* (Oxford University Press: Oxford, 2012) who concludes that the 'law of non-international armed conflict bears a heavy burden, tasked as it is with regulating a situation which gives rise to many of the worst atrocities committed today,' p 570; Camille Marquis Bissonnette, 'The Definition of Civilians in Non-International Armed Conflicts: The Perspective of Armed Groups *Journal of International Humanitarian Legal Studies*, 7:1, 129-155 (2008). We may note in passing that the 2014 action of the Investigative Committee of the Russian Federation instituting prosecution of a number of Ukrainian nationals of charges of genocide of "a national group of Russian-speaking persons" in eastern Ukraine, suffered from several infarctions international legality. It is very doubtful that Russia had any jurisdiction regarding such alleged acts committed on the territory of Ukraine. Russia 'also abused the notion of genocide in that it included within the range of groups protected by the Convention on the Prevention and Punishment of the Crime of Genocide, and by its own Criminal Code, a group that is not covered by the definition of genocide'. See, Sergey Sayapin, 'An Alleged "Genocide" of Russian-Speaking Persons" in Eastern Ukraine: Some Observations on the "Hybrid" Application of International Criminal Law by the Investigative Committee of the Russian Federation', in *The Use of Force against Ukraine*, p 314- 326. See also see in the same volume the fine analysis of the ongoing prosecutorial investigations by the International Criminal Court, Beatrice Onica Jarka, 'Triggering the International Criminal Court's Jurisdiction for Alleged Crimes Committed Across Ukraine, Including in Crimea and Donbas', in the same volume at p 355-385.

All this is not to gainsay that considerable violence did not occur. It did as has been noted: 'The Donbas conflict produced a significant number of human rights violations. First and foremost, by the end of 2016, the conflict resulted in 9,733 people killed and 22,720 injured. For the first time since independence, Ukraine has faced the problem of internally displaced persons. The number is estimated

There will always be partisan political presentations of the past and histories will be re-written to suit cross - border regime policies, aided by accumulations of hard power and soft power. In this sense, the plea of listening to all sides, while not a guarantee of solution to conflicted power positions, at least may provide new pathways of diplomacy amidst warfare. It makes good sense to say that the Russian Federation's positions should be fully taken into any understanding of the Ukrainian conflict. While this may be done without necessarily fully endorsing these positions , is there is any need also to romanticize the 'new' international law as might emerge from the present conflict? This is accomplished by Elena Chachko and Katerina Linos, in their introduction to a volume published in 2022 (on behalf of the American Society of International Law). They conclude by saying that: 'The war in Ukraine injected much needed energy into an international system of norms and institutions that had lost much of its vigor. The international response to the war involved a set of significant actions across a range of international law disciplines. It also generated ideas and illuminated pathways for long overdue reforms or future development of emerging legal areas'.[17] One can only say 'Amen' for the underlying enthusiasm is laudable!

'*Hybrid War'*

Although the concept of 'hybrid wars' emerged specifically in the context of Chechnya war , its anticipations may be traced with earlier military conflicts (such as Viet Nam, Afghanistan, Iraq and Lebanon.[18] Ever since the NATO's official adaptation of the term, it has been described this has been described as belligerent hostile action which combines ' a wide range of overt and covert military, paramilitary, and civilian measures [...] employed in a highly integrated design'.[19] Such combinations of means and methods have , however always existed; perhaps what is distinctive are the ways in which there are now combined in modern absolute or 'full spectrum war' and, as Nemeth concludes. 'the hybrid's ability to employ modern technology against its enemies as well as its ability to operate outside the conventions governing war, which continually restrains its modern foe'.[20] One may add here, in passing, that while technologies of war may now be ultra-modern, the former superpower itself now emerges as a hybrid state and society. Further, it is scarcely a new sociological insight to say that all plural states and societies are hybrid and when military stratifies are to be viewed as socio-cultural organizations and practices a certain pattern of hybridity attaches to all wars and conflicts.

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to oscillate around 1:4 million persons': see, Gerhard Kemp and Igor Lyubashenko, 'The Conflict in Ukrainian Donbas: International, Regional and Comparative erspectives on the Jus Post Bellum Options' (The Use of Force against Ukraine) 330-355, p 343. The hard international law question is whether the violations are tantamount to 'genocide'.

[17] *Elena Chachko and Katerina Lenos, International* Law After Ukraine: Introduction to the Symposium', <https://papers.ssrn.com › sol3 › papers.cfm?abstract_id=410685413/05/2022>

[18] The concept emerged with Major William J. Nemeth in aa master of arts thesis for the Monterey Naval Postgraduate School in 2002, entitled *Future War and Chechnya: A Case of Hybrid Warfare* Thesis, Naval Postgraduate School, Monterey, California (June 2002) <http://calhoun.nps.edu/bitstream/handle/10945/5865/02Jun_Nemeth.pdf?sequence=1> accessed 8 August 2022, and was based on the war in/on Chechnya. His principal aim was to decolonize knowledge of war in 'pre'-state' societies which enables Western theorists' o overlook the inherent strengths of a pre-state or devolving society, as all that is seen to the Western eye is anarchy and despotic rule' (p 1). Using a somewhat novel conception of 'devolving society., Nemeth prefers to educate us in thinking about as 'societies [which] are bringing with them an eclectic mix of modern technology as well as political and religious theory and institutions as they devolve' (p 2). While one may question Nemeth's distinctions between 'pre-state' and 'state societies (which approximates John Rawls's proposed hierarchy of five types of society in terms of well-ordered and outlaw societies: see, (The Law of Peoples, Mass Harvard 1993), pertinent remains his emphasis on military organization as a social organization—a culturally embedded and socially determined 'war machine' (to deploy here a favorites notion of Georges Deleuze and Felix Guttari). See also. *Russia's Hybrid War Against Ukraine: Braking the Enemy's Ability to Resist* (Final Report, The Finland Institute of Foreign Affairs, 30-34 (12022). After examining the 'main features and characteristics of Russia's hybrid warfare as conducted in Ukraine? Derived from the first, the learned author proceeds to explore the allied question 'focused on the operational prerequisites for the Russian hybrid war. In other words, is the Russian hybrid war a universal warfare method deployable anywhere or is it more country or region-specific'? The value of the study, engaging the annexation of Crimea, is that it extends equally well to the present war in Ukraine.

[19] See: Andras Rácz, fn 16, p 40.

[20] See: Nimeth, fn 16, p 70.

But we may not entirely overlook how international languages and concepts have been used differently in the 'post-Soviet space' and how these uses may influence/impact on lived life. Although she does not address the latter dimension, Cindy Wittke's analysis provides us with inaugural critical insights into how international law languages and concepts have been deployed to fashion hegemony (Russian exceptionalism) as well as subaltern resistance and social action [21] and are generating ongoing 'hybrid wars' which move beyond old stale, pale, and male binaries distinguishing state of peace from those of war. She recognizes that the 'vigorous denunciations of contemporary violations of the norms of international law may rule buttresses compliance with the central tenets of international legal order' but this in 'the long run is a poor consolation to the present-day victims of the conflict'. The emphasis on victim narrative analysis is important, lest we forget that what we call 'peace' may be in fact be 'war' by another means (as Clausewitz suggested). [22]And she counsels that instead 'of focusing its gaze exclusively on the long run, international legal analysis should devote its energy towards facilitating peaceful political settlements, here and now'.[23] Certainly, the very notion of 'victory' sounds strange in the context of Ukraine, even when we may view it as a war of annexation. All this is true enough, but are there also many disciplinary threshold among diplomacy, international relations, international organizations, and strategic theory sites and arenas, here being overcome? [24]

Sanctions

This is scarcely a place for discussing elaborately the question of sanctions and the law of state responsibility. But some reiteration of well-known facts and perspectives for any discussion of the present programme of sanctions by the US and the EU on the Russian Federation in the course of the Ukraine war. The facts are:

[1] sanctions are an international socioeconomic relation with the sender(S) and the target (T) state;
[2] The sender and targeted state may be a single state or a group of states;
[3] While there is scope for positive sanctions [rewards, promises], negative sanctions predominate;
[4] 'globally 67 sanction regimes were imposed at an average rate of 7 per year, and among them, the USA was responsible for two-thirds of the total imposed sanctions'[25];
[5] it has been estimated that 170 twentieth-century sanction regimes and showed that only one-third of 7% them achieved their targeted goals'[26]; and

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[21] See: 'The Politics of International Law in the Post-Soviet Space: Do Georgia, Ukraine, and Russia 'Speak' International Law in International Politics Differently?', *Europe-Asia Studies*. 72:2, 180–208 (2020).

[22] See his magnum opus *On War (*Vom Kriege*)* published by his wife in 1832, after Clausewitz's death from cholera the previous year. See, Eric Fleur. '. War By Other Means: An Examination of Clausewitz and Modern Terrorism': <https://thestrategybridge.org/the-bridge/2019/11/18/a-war-by-other-means>

See also, Rupert Smith, The *Utility of Force: The Art of War in the Modern World,* (New York: Vintage, 2008). The 'the real value of Smith's work '(Fleur rightly maintains) is to 'challenge our basic conception of victory, which has largely persisted despite significant adjustments in tactical doctrines'.

[23] ibid 456.

[24] For example, religious pluralism is at the heat of Ukraine common citizenship project. Tymofii Brik and José Casanova outline ways in which religious revival tended to sahpe new religious identities, often manifested by attending church, believing in God, trusting in the church, and losing trust in science. These changes also tested Ukraine's adherence to pluralism and tolerance. More eloquently, it is maintained that: 'Kyiv has become a city hosting "three Romes": the Ukrainian Greek Catholic Church, associated with the First Rome, the new Orthodox Church of Ukraine, associated with the Second Rome (Istanbul or Byzantium), and the Ukrainian Orthodox Church of the Moscow Patriarchate, associated with the Third Rome'. See, Mykhailo Minakov, Georgiy Kasianov, Matthew fn 10, Rojansky (eds.), Introduction, and ch 9 for rich detail. The question to be more fully discussed is this: how the social organization of three Romes affected military strategies and practices of the present 'hybrid' war and associated conflict. To what extent the violence of the present war is to be related to the steady and slow erosion of 'pluralism', both constitutional and social?

[25] Hassan Hakimian (World Economic Forum 9 May 2019) <https://www.weforum.org/agenda/2019/05/seven-fallacies-of-economic-sanctions/> accessed 9 August 2022 (in the context of US sanctions against Iran, which are deeply violative of human right to life among other rights). See also, Marc Bossuyt (President of the Constitutional Court of Belgium), 'The Adverse Consequences of Economic Sanctions on the Enjoyment of Human Rights', Sub-Commission on the Promotion and Protection of Human Rights. Commission on Human Rights, Economic and Social Council', 2 Commission on Human Rights, Economic and Social Council Working Paper No E/CN4/Sub 33(2000).

[26]25 Md. Toriqul Islam,' Economic Sanctions Under International Law: An Overview', 3:32 at 2 referring to Gary Clyde Hufbauer, Jeffrey J. Schott, Kimberly Ann Elliott, and Barbara Oegg Hufbauer, *Economic Sanctions Reconsidered* 50 (Third Edition, Washington,

[6] whenever economic sanctions are especially to arrest gross mass violations of contemporary human rights norms and standards, the effects, although there remain many problems of measurement and definition, do not very often result in stopping these.[27]

Even the sanctions against Russia, imposed in light of its 2014 annexation of Crimea were said to present' a monumental challenge to policymakers' as 'never before has such a powerful and strategically-important target been sanctioned to this degree'. However, its 'high level of integration in the global economy facilitates sanctions circumvention, while heightening political stakes'. Russia's 'retaliatory counter-sanctions have proven divisive in Europe and led to calls by some member states and business lobbies for their lifting, irrespective of a political settlement'. Yet even at that time, the study urged that: 'Closer coordination between sanctions and other policy instruments could be beneficial, including closer synchronisation with mediation efforts, referrals to legal tribunals and more creative use of assistance to member states and sectors negatively affected by sanctions. A more strategic use of the threat of sanctions could also be useful'.[27] Much the same may be said with equal justification of the more far reaching and comprehensive program of sanctions since the present Russian war (ongoing since February 24, 2022) against Ukraine. Since then the USA, the other states (Japan, Singapore, Australia), and of course Ukraine have adopted a complex regime of sanctions against Russia including financial, import/export, trade support, and individual.[28] The Russian Federation have announced counter-measures in

DC 2009). The author refers to even a lower figure of 'success rates' below 5%, drawn from Robert A Pape, 'Why Economic Sanctions Do Not Work') 22 International Security 90 (1997). But see Dursan Peksen, 'When Do Imposed Economic Sanctions Work? A Critical Review of the Sanctions Effectiveness: A Critical Review of the Sanctions Effectiveness Literature', *Defense and Peace Economics*, 30:6, 634-647 (2019).

[27] See the Bossuyt paper cited Note 24, supra. See also, Steven P. Marks, 'Economic Sanctions As Human Rights Violations: Reconciling Political and Public Health Imperatives', *Am J Public Health*, 89:10:1509-13 (1999); Kristoffer Fretland Øygarden, 'Assessing the Impact of Economic Sanctions on Human Rights Violations in Targeted Countries' (a doctoral thesis, submitted to University of Oslo May 2017); <http://urn.nb.no/URN:NBN:no-60371>; Craig Martin, 'Economic Sanctions Under International Law: A Guide for Canadian Policy', Rideau Institute on International Affairs, (2021); Gordon A Christenson, 'The Jurisprudence of Sanctions in International Law', *Human Rights Quarterly*, 31:4 (Nov., 2) 1086-1134 (2009). The question of sanctions having any effects on gross, continuing, and flagrant violations of basic or core human rights remains unsettled but unsettling.

[28] See, the briefing by Clifford Chance entitled 'Ukraine: The Latest Global Sanctions and Export Controls' (as of March, 2022). I rely on this information and statistics hereafter. On 24 February 2022, Russia launched an undeclared war against Ukraine, a country Russia first invaded and partially occupied in 2014. Many countries have condemned Russia's 'unprecedented military aggression"' as "unprovoked and unjustified,' On 2 March 2022, the U.N. General Assembly by 141-5 votes demanded that Russia "immediately, completely, and unconditionally withdraw" from Ukraine (47 countries, including China and India, abstained or refrained altogether from voting.) The USA Full blocking sanctions (including restrictions on transactions and access to U.S.-based property or interests in property) on specific decision-makers as Individuals and bodies, public and private banks, banks and sovereign fund, major state-owned defense, industrial, and technology conglomerates; Alrosa, the world's largest diamond-mining company; and Severstal, a major steel producer; Nord Stream 2 AG, the parent company for a natural gas pipeline project; members of Russia's Kremlin-connected business elite (sometimes referred to as oligarchs), family members, and business executives. dozens of aerospace and defense-industrial firms, disinformation and propaganda operations, sanctions evaders, and virtual currency mining companies. The regime also extended to Belarusian individuals and entities, transactions with Russia's central bank, and transactions with Russia's Ministry of Finance and National Wealth Fund, export controls on trade with Russia and Belarus, including restrictions on "sensitive U.S. technologies produced in foreign countries using U.S.-origin software, technology, or equipment." Export controls target Russia's defense, aerospace, and maritime sectors; energy production; and 'a wide range of commercial and industrial operations', suspension of normal trade relations with Russia and Belarus, and ban on the U.S. import of Russian crude oil, petroleum products, liquefied natural gas, coal, gold, diamonds, seafood, and alcoholic beverages., ban on the export of U.S. luxury goods and dollar-denominated banknotes and the provision of certain accounting, legal, and consulting services, bans on new U.S. investment in Russia, Russian aircraft and vessels, entering and using U.S. airspace, ad U.S. ports, restrictions on secondary-market transactions by U.S. financial institutions in Russian sovereign debt (previous restrictions applied to primary-market transactions), restrictions against new equity investment and financing for companies including , Gazprom (a state-owned energy company and Russia's largest firm); Sovcomflot, Russia's largest maritime and freight shipping firm; and Russian Railways. For additional information, see Congressional Research Service ,' Russia's 2022 Invasion of Ukraine: Overview of U.S. Sanctions and Other Responses', <https://www.everycrsreport.com/files/2022-04-22_IN11869_fb2e2b0f… · PDF file>.

response to the sanctions regime .[29] These new sanctions are described as complex, multilateral and continue to be incrementally changing in real time in response to the developments on the ground in Ukraine'.[30]

Any assessment of the effect of sanctions of the Western sanction must at least take besides the adverse economic and social impact on the parties at War, the sanctioning countries themselves, and other parts of the world—a task further rendered more complex by the symbolic and instrumental aspects of sanctions regimes and by problems with periodization (immediate, median, and long term global change) and what are known as the 'known unknowns (or the Black Swan effect of decisions and events.[31] These are beyond the scope of the present exploration but it must be said, without any far of contradiction, that any expectation that the sanctions regime will be backed by a rational unanimity of all countries and society , or that it would have the desired impact on the senseless and devastating conduct and events of the present war is both naive and fallacious.[32]

The devastation is almost daily and harrowing on both sides, but unequally for Ukraine as the daily images on media bring us. These relates to aerial shelling and pounding of cities and sites; killing of innocents civilians; mass migration of Ukranian to Poland, Hungary and near regions; the commission of war crimes and crimes against humanity (though often against Ukraine, too) and all devastation of environment and nature in the process of land, naval, and aerial warfare. Added to the travails of war are the perils of nuclear vulnerability, and not just at the dysfunctional and old Chernobyl nuclear plant but also at Ukraine's 15 nuclear power reactors and spent-fuel pools, present a real-time menace (entailing an immense release of radioactive elements). haunt speculation. There is yet no norm of international law that prohibits attacks, during the war or warlike situation, on the nuclear installations. As Bennett Ramberg says 'Russia's Scorched-Earth war of aggression in Ukraine poses a threat to nuclear reactors unlike anything the world has ever seen. After decades of inaction, the international community can no longer afford to rely on loosely defined norms and warring parties' own self-restraint'[33] How long the balance of terror can earn world peace will remain a matter of intense retrospection among powers that rule the world and speculation among global subalterns everywhere

Towards A Conclusion

No conclusion in the middle of a raging war is possible. Waging peace is certainly a possibility amidst both warfare and lawfare and one should welcome little signs of hope, such as temporary suspensions of hostilities,

[29] These include the Russian obligor's liability towards a foreign creditor from a jurisdiction taking unfriendly steps towards Russia ("creditor from unfriendly jurisdiction"); the Russian obligor can open a special "Type C" account with a Russian bank in the name of such "creditor from unfriendly jurisdiction", the currency which the "Type C" account must be in Russian Roubles, and the regime of the "Type C" account is to be determined by the Board of Directors of the Central Bank of Russia. Further, a number of currency restrictions have been imposed on Russian citizens in regard to 80% of currency proceedings sale. It, more importantly, includes the threat to supply Russian gas and electricity, on which many EU countries are divided. See, William Seitz & Alberto Zazzaro, 'Sanctions and public opinion: The case of the Russia-Ukraine gas disputes', *The Review of International Organization*s, 15:817–843(2020); 'Lasse Boehm, Members' Research Service, 'Russia's War On Ukraine: Implications For EU Energy Supply',(EPRS | European Parliamentary Research Service, <https://www.europarl.europa.eu › ... › 2022 › 729281 › EPRS_ATA(202… · PDF file>; also see concerning Ukraine's "energy sovereignty", Margarita Balmaceda and Andrian Prokip,' The Development of Ukraine's Energy Sector .'in Mykhailo Minakov, Georgiy Kasianov, Matthew Rojansky, *From "the Ukraine" to "Ukraine* , ibid 137-168.

[30] fn 27.

[31] See, Nassim Nicholas Taleb who explores the problematic accumulation of unintended or latent effects. See his well-known works, *The Black Swan: The Impact of the Highly Improbable* (New York, Radom House 2007); *Fooled by Randomness: The Hidden Role of Chance in Life and in the Markets* (London, Penguin 2007); and Anti-*Fragile: Things that Gain by Disorder* (Penguin 2013).

[32] See, Dmytro Chumak ,'The Implications of The Ukraine Conflict For National Nuclear Security Policy', *Non-Proliferation Papers* 53 (2016) reviewing the nuclear security situation in the ongoing conflict, particularly examining three 'nuclear security conditions': (a) classic nuclear security threats, (b) threats from occupied/uncontrolled territories; and (c) 'hybrid war 'threats. See also Anya Loukianova Fink and Olga Oliker, 'Russia's Nuclear Weapons in a Multipolar World: Guarantors of Sovereignty, Great Power Status & More', *Meeting the Challenges of a New Nuclear Age*, *Daedalus*, 149: 2, 37-55 (2020).
Alarm bells began sounding with the recent aerial shelling of Europe's largest plant (round the Zaporizhzhia plant in southeastern Ukraine which posed (in the words of the head of the International Atomic Energy Agency, Rafael Mariano Grossi,)' a dire threat to public health and the environment in Ukraine and far beyond its borders'. Rocket attacks at Zaporizhzhia power plant raise fears of 'nuclear catastrophe': see, John Hudson, Jennifer Hassan, Jennifer Hassan - *The Washington Post*, <https://www.washingtonpost.com/people/jennifer-hassan> accessed 7 August 2022.

[33] 'The Danger of Nuclear Reactors In War', <https://www.project-syndicate.org/> accessed 5 August 2022.

the Ukraine- Russia talks in intense hostilities[34], the foodgrain agreement that allows Ukraine some leeway of export,[35] and the little homilies by the UN Security General. [36]

Yet one must conclude this paper, in keeping with its limits of finitude. I try to do so with only one large remark concerning pedagogic violence before, during, and even after hostilities. That, in a manner of speaking, returns us to both history and future. Collective violence is a performance that seeks to reenvision both. The defining idea of inter-state pedagogic violence that it is instantly justified by teaching a lesson mocks at the idea of restraints on power, whether set by constitutions in national laws or by the UN Charter, and associated discursivity, in international law. Russia engages in such violence by seeking to keep Ukraine family within its orbit, if not integrated in a dream of a mighty successor at the world stage of former Soviet empire. Alternatively, she seeks that Ukraine return to its civilizational roots within Russia, and refrain from joining the EU or NATO. Ukraine, on the other hand, is protecting its sovereign equality as an independent state, constrained only by some version or vision of the rule of law and democracy. The Other, the alliance of States led by EU and the US, also engages in pedagogic violence by the varied menus of continuing and widespread sanctions regime sanctions regimes that constitute economic warfare, even if aiding flow of arms, other materials, and money to fight the war in the name of just self-defense waged in a 'symbolic exchange' of biological and social death.[37] Put another way. All war and military conflicts constitute an 'excess' of violence, and even the contemporary doctrines (the doctrines just wars) must be held bound by new standards of *jus bello* which require reasonable and appropriate force. The idea of total, absolute, or hybrid wars mocks these standards in wars of self-determination, self - defense, or the use of pedagogical violence, The modern international law does not allow unlimited warfare, such that justifies recourse to any means of violence. Whatever may wish to call 'material war',[38] does not normatively justify aggression, belligerence, conflict, hostilities or war that is waged against a sovereign state which violates the basic principle of sovereign equality of nations and disallows indiscriminate use of force. We can do no better than end with the not too often quoted yet profound observation of Martin Luther King Jr., 'the potential destructiveness of modern weapons totally rules out the possibility of war ever again achieving a negative good. If we assume that mankind has a right to survive then we must find an alternative to war and destruction'.[39]

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[34] While President Zelensky says that 'It's very difficult, sometimes confrontational,' he said. "But step by step we are moving forward', even amongst the worst humanitarian crisis faced by besieged city of Mariupol, a third round of talks. After the meeting, Russian delegation head Vladimir Medinsky said, Our expectations from negotiations were not fulfilled. We hope that next time we will be able to take a more significant step forward' but the Russian perspective was that little progress was achieved: see, *Al Jazeera* (23 March 2022) .

[35] On 22 July 2022, Ukraine and Russia reached a widely hailed an agreement (brokered by Turkey and the United Nations, to allow exports of grain and other agricultural products to resume from selected Ukraine Black Sea ports after months of Russian blockade. at a time when storage capacity is reaching its limits, with the approximately 20 million metric tons of grains and oilseeds harvested in 2021 remaining in storage.

[36] On the last see, the outpouring of just indignation by António Guterres, has described the record profits of oil and gas companies as immoral and urged governments to introduce a windfall tax, using the money to help those in the most need. He condemned the "grotesque greed" of the fossil fuel companies and their financial backers had led to the combined profits of the largest energy companies in the first quarter of this year hitting almost $100bn (£82bn). "It is immoral for oil and gas companies to be making record profits from this energy crisis on the backs of the poorest people and communities, at a massive cost to the climate," he said. See (The Guardian 3 August 2022).

[37] Jean Baudrillard, *Symbolic Exchange and Death* (London, SAGE 1993). Symbolic exchange maintains and organizes social relations and hierarchies. Symbolic exchanges are not aimed at establishing equivalence (equal value) between two exchanged tokens, as in the exchange of money for goods or services. Akin to notions of a primitive society (an anti-economic model), both (as Douglas Kellner has summarized) that' Bataille and Baudrillard presuppose here a contradiction between human nature and capitalism. They maintain that humans "by nature" gain pleasure from such things as expenditure, giving. waste, festivities, sacrifices, and so on, in which they are sovereign and free to expend the excesses of their energy (and thus to follow their "real nature"). The capitalist imperatives of labor, utility, and savings by implication are "unnatural," and go against human nature'; See, Douglas Kellner <http://www.gseis.ucla.edu/faculty/kellner/.>

[38] For a general concept, not noticed in international law discussions, see Julius Kovesi, *Moral Notions* (New York, Routledge 1968). See also, Alan Tapper and T. Brian Moone (ed), *Meaning and Morality: Essays on the Philosophy of Julius Kovesi (*Leiden, Brill 2012). See as applied in the context of war, see the comprehensive literature, here contextualizing the formal/material distinction, Johan M.G. van der Dennen, *On War: Concepts, Definitions, Research Data -A short Literature Review And Bibliography* at <https://core.ac.uk/download/pdf/12857871.pdf · PDF file> accessed 11 August 2022.

[39] Martin Luther King, Jr, 'Pilgrimage to Nonviolence' (13 April 1960) <www.patheos.com/blogs/anabaptistrevisions/2022/01/my-pilgrimage-to-nonviole…> accessed 11 July 1922.

CHAPTER XXIV: INTERNATIONAL LAW AND ITS TRANSFORMATION THROUGH THE OUTLAWRY OF WAR

Oona A. Hathaway[1] *& Scott J. Shapiro*[2]

The outbreak of the First World War was unremarkable from a legal point of view. It started with a legal wrong. On Sunday morning, 28 June 1914, Bosnian Serb Gavrilo Princip assassinated Archduke Franz Ferdinand and his wife Sophie. Austria-Hungary responded to this wrong by issuing an ultimatum to Serbia to investigate the plot behind the assassination and prosecute the conspirators. Serbia agreed to meet all but one of the demands. To Austria-Hungary, however, less than complete compliance was unacceptable and, on 28 July, it issued a declaration of war. The rest of Europe, together with Japan and the Ottoman Empire, quickly lined up on one side or the other. The United States stayed out of the fray until 6 April 1917, when, citing Germany's U-boat campaign as a violation of the legal rules of neutrality and freedom of the seas, it too declared war.

On the surface, the conclusion to the First World War was similarly unremarkable. To the victors went the spoils. Britain and France demanded indemnification for the costs that Germany had imposed on them, just as Germany had demanded 5 billion francs in gold as indemnification at the end of the Franco-Prussian War of 1871. The victors also carved up the territory of the losing states.

The First World War was the last great war of what we have called the Old World Order—the legal regime that European states adopted in the seventeenth century and spent the next three centuries imposing on the rest of the globe. This order formed the basis of what we now call 'international law', but that law differed starkly from the law that governs today. The Old World Order did not just sanction war, it relied on and rewarded it. States were permitted to wage war to right any legal wrong, and the right of the victors to extract territory and treasure from the losers was legally unassailable.

In the century since the close of the First World War, the rules governing international behaviour have changed radically—indeed, they are now the polar opposite of what they once were. This chapter draws and builds on the argument made in our book, *The Internationalists: How a Radical Plan to Outlaw War Remade the World*, to tease out the implications for international law of the decision to outlaw war in the 1928 Kellogg Briand Pact. It begins by describing the Old World Order. Then it describes the decision to outlaw war and the transformation it unleashed in the world order generally and in international law specifically. Finally, it considers the consequences of this transformation for international law today. We argue that a simple but perplexing fact—that international law prohibits states from using force to enforce international law—is key to understanding international law in the modern era.

The Old World Order

To understand how much has changed in the international legal order, it is necessary first to understand what the legal order once was. The Old World Order was defined first and foremost by the belief that war is a legitimate means of righting wrongs. The inhabitants of the Old World Order would have found the famous maxim from Carl von Clausewitz's On war—'War is simply the continuation of politics by other means'—to be incontrovertibly true.[3] Resorting to arms did not signal a failure in the system: it was how the system worked. War was an instrument of justice. Might was right.

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[3] Carl von Clausewitz, On war, trans. and ed. Michael Howard and Peter Paret (Princeton: Princeton University.

This principle was put succinctly by the great international lawyer Hugo Grotius in 1625: 'Where judicial settlement fails, war begins.'[4] States were legally permitted to go to war, in other words, because, in the absence of a court with the power to give them relief, they had no other option. For centuries, states operating under this principle used war to enforce their rights. They fought to collect debts, to recover tort damages, to protect trading rights and to enforce treaty obligations, among other reasons.[5]

In the Old World Order, the legality of war as a tool of justice gave rise to a range of other legal rights. To begin with, all states had the right of conquest: any state that claimed it had been wronged by another state, and whose demands for reparations were ignored, could retaliate with force and capture territory as compensation. The conquering state thereby became the new sovereign of the captured territory: it owned all public property and possessed the legal authority to rule over its subjects. Nearly every border in the world today bears witness to some such past battle—including that of the United States. Arizona, California, Nevada, Utah, and parts of Colorado, New Mexico and Wyoming, are no longer part of Mexico because the United States launched a war in 1846 over unpaid debts.

Not only did states have the legal right to wage war to redress wrongs, they could also threaten to wage war for the same purpose. When Japan refused to trade with the United States in the nineteenth century, violating its obligation to participate in global commerce, the United States sent Commodore Matthew Perry with a fleet of gunboats to offer a 'treaty of friendship'. He left the Japanese in no doubt that the alternative to friendship was war. The old world order also granted immunities to those who waged war—in effect, authorizing mass homicide. If an ordinary person killed another outside war, it was a murderous crime. If an army killed thousands during a war, it was not only lawful but glorious. Those who waged war could not be held criminally responsible for doing so.

While waging war was legal, economic sanctions by neutrals against belligerents were prohibited. A state that favoured one side over another in an ongoing war could be punished, even if it never fired a shot. Thus, if a neutral state traded with a belligerent but refused to trade with its opponent (or traded, but on less favourable terms), it violated its duty of neutrality and could be attacked in retaliation. Had the United States traded with Britain but refused to trade with Germany when the First World War began, it would have violated its duty of neutrality and Germany would have been entitled to attack.

In short, the Old World Order was not simply a collection of individual rules; those rules fit together in a coherent and cohesive system. Once states had the privilege to use force to impose their rights, a range of legal rules inevitably followed. If war was legal, conquests won in war had to be legal—a permissible form of compensation for legal wrongs. If states could wage war to right wrongs, they could also threaten to wage war for the same purpose. They could, moreover, enforce any agreements that resulted from such duress—with war, if necessary. If war was legal, then those who waged aggressive war had to be immune from prosecution. And if war was legal, then any neutral state that sought to punish a state that waged aggressive war by putting in place economic sanctions was violating its duty of neutrality—and that was a just cause of war. These rules all stemmed from the permission to use war to right wrongs, and they supported and reinforced one another.

The Outlawry of War

The First World War set in motion a chain of events that would transform the international legal order and eventually end its dependence on war. Even before hostilities ended, anti-war activists were taking aim at the foundational principle of international law: the legal right to wage war. As Salmon Levinson, one of the leaders of the so-called 'Outlawry of War' movement, put the point in August 1917: 'The real disease of the world is the

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Press 1976) 87. Howard and Paret translate the phrase as 'war is simply a continuation of political intercourse, with the addition of other means' p 605. Here we use the better-known paraphrase.

[4] Hugo Grotius, On the law of war and peace: three books, trans. Francis W. Kelsey (Oxford: Clarendon Press 1925) 2.1.2.1, p 171

[5] Oona A. Hathaway, William S. Holste, Scott J. Shapiro, Jacqueline Van De Velde and Lisa Wang Lachowicz, '"War Manifestos"' [2018] 85 Chicago Law Review 1139.

legality and availability of war.' The aim of the Outlawry movement was to make the waging of war illegal. 'We should have, not as now, laws of war, but laws against war; just as there are no laws of murder or of poisoning, but laws against them.'[6]

Levinson and the organization he founded to promote his idea, the American Committee for the Outlawry of War, tapped into an already robust peace movement, made up of hundreds of loosely coordinated groups, many of them formed during or shortly after the First World War. Jane Addams, a Chicagoan like Levinson, had founded the Women's International League for Peace in 1919 and served as its first president. The League organized chapters not only in Washington DC and New York, but across the country and around the world, providing a network for events in support of outlawry.

The first target of Levinson and his allies was the League of Nations, which he saw as a creature of Old World Order principles. Rather than bring peace, he argued, it would perpetuate the legality of war.[7] In one of the many undated memos to himself that he was in the habit of writing (perhaps meant as a draft of an article or letter), Levinson explained his opposition to the League by likening it to antiquated practices of medieval hygiene:

> *Recently I heard a man cite a statement from a book on sanitation in the middle ages to the effect that in the days before bath tubs had been invented perfumes were used very profusely, and that when bath tubs came in, perfumes very largely went out. Now, our international experts are sold on perfumes, so to speak. They think to get rid of war's menace by stifling its stench somewhat. No matter how poor a perfume is put on the market, they never fail to embrace it eagerly nor to give it the most flattering advance notices, especially if it has been bottled in a certain town in Switzerland.*[8]

The League Covenant negotiated by President Woodrow Wilson was just more perfume masking the rankness of war. Outlawry would be the cleansing bath. 'To outlaw war means to abolish this now lawful institution by smashing its legal props and branding it a crime.'[9] Despite President Woodrow Wilson's best efforts to convince them otherwise, the members of the U.S. Senate agreed, and they rejected the Versailles Treaty.[10]

The next step for Levinson and his allies was to devise a plan for peace based on outlawry. In 1919, Levinson and Senator Philander Chase Knox worked together on a pamphlet—entitled Plan to outlaw war—that would explain outlawry to the members of Congress and the public.[11] It would take nearly a decade, but eventually the audacious proposal to outlaw war resulted in a treaty. On 27 August 1928, 15 foreign ministers gathered together at the Quai d'Orsay in Paris to sign the 'General Treaty for the Renunciation of War', better known today as the Kellogg– Briand Pact. In article 1 of this document, states renounced their right of war: 'The High Contracting Parties solemnly declare in the names of their respective peoples that they condemn recourse to war for the solution of international controversies, and renounce it, as an instrument of national policy in their relations with one another.' Within a year (the treaty entered into force in 1929), virtually every state in the world had ratified the pact and thereby renounced their right of war.

Contrary to Levinson's expectations, of course, the pact did not cure the 'disease' of war. Just three years after the grand signing ceremony in Paris, Japan invaded China. Four years after that, Italy invaded Ethiopia. Four

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[6] Salmon O. Levinson to Jacob Schiff (25 August 1917) box 44, folder 3, Salmon O. Levinson papers, University of Chicago Library (hereafter SLP UCL).

[7] Legal experts agreed that the League left the legality of war intact. Oppenheim's third edition stated that 'war is not inconsistent with, but a condition regulated by, International Law. It does not object to States which are in conflict waging war upon each other, provided they have—in compliance with the Covenant of the League of Nations—previously submitted the dispute to an inquiry by the Council of the League': L. Oppenheim, International law: a treatise, 3rd edn, ed. Ronald F. Roxburgh (London: Longmans, Green & Co., 1921), vol 2, pp 65–6, s 53.

[8] 8 Salmon O. Levinson, memo, n.d., box 28, folder 8, SLP UCL. Levinson may have been speaking here of the Locarno treaties, negotiated at Locarno, Switzerland, in Oct. 1925 and formally signed in London (3 December 1925).

[9] Ibid.

[10] 'Senate defeats Treaty, vote 49 to 35', New York Times (19 March 1919).

[11] Plan to outlaw war (draft), n.d., box 28, folder 9, SLP UCL.

years after that, Germany invaded Poland and then most of Europe. Soon thereafter—with the exception of Ireland—every one of the states that had gathered in Paris to renounce war was at war.

The Transformation Set in Motion by the Pact

The League of Nations is remembered as a failure, but the Kellogg–Briand Pact is hardly even remembered. Most historians do not discuss it. There is not one reference to the pact in either *The Penguin History of the World* or Oxford's *History of the* World, each over 1,200 pages long.
To the extent that the pact is mentioned, the reference is almost always derisive. Robert H. Ferrell thought it evinced the 'appalling' naivety of the American public. Hans J. Morgenthau questioned whether it was anything more than 'a statement of moral principle without legal effect'. Ian Kershaw described it as 'singularly vacuous'. Henry Kissinger mocked the outlawry of war as 'irresistible as it was meaningless'. George Kennan called the very idea behind the pact 'childish, just childish'.[12]

It is wrong, however, to conclude from the lamentable fact that the 1928 pact did not bring about world peace that outlawing war was ineffectual. Contrary to the received wisdom, the outlawry of war set in motion a transformation in the international legal order. The new legal order did not emerge fully formed along with the pact; indeed, it would take more than a decade to build, piece by painstaking piece. And these pieces would eventually become the foundation of the very different world order that we enjoy today.

The failure of the authors of the Kellogg–Briand Pact to figure out how a global order grounded in the rejection of war could function, given the world's long reliance on war, became clear almost immediately. When, in September 1931, Japan invaded Manchuria, the League was paralysed. After all, nearly all its members had just renounced war. The prohibition on war certainly could not be enforced with war. But if not with war, then with what?

The answer came from Henry Stimson, the American Secretary of State and successor to Frank Kellogg. Stimson had been a classmate of Levinson's at Yale College. Levinson had written an article for the Christian Century and the editor had sent it to Stimson. In the article, Levinson argued that the outlawry of war must obliterate the right of conquest. 'If it is unlawful to wage war, conquests by war should furnish no legal title.' War might still be waged, but it would no longer work as before, for it would mean that 'never again can a nation bent upon conquest acquire indefeasible title to anything'. The refusal to recognize conquests would act as a real sanction against would-be conquerors.[13]

Stimson drafted a diplomatic note and, on 8 January 1932, a copy of it was sent to the governments of China and Japan. The note set out Levinson's policy of non-recognition—what would later come to be called the 'Stimson Doctrine': 'The American Government … does not intend to recognize any situation, treaty or agreement which may be brought about by means contrary to the covenants and obligations of the pact of Paris of August 27, 1928.'[14] The League of Nations quickly followed suit, calling on its member states not to recognize any conquest 'brought about by means contrary to the Covenant of the League of Nations or to the pact of Paris'.[15]

It was not long before international lawyers and politicians began to rethink other rights that had been connected to the legal right to resort to war. In 1934, an international assemblage of scholars in Budapest concluded a report on 'The effect of the Briand–Kellogg Pact of Paris on international law'.[16] In addition to accepting the Stimson Doctrine, it concluded that the law of neutrality ceased to protect states that had violated the pact. Neutrals were

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[12] Ian Kershaw, To hell and back: Europe, 1914–1949 (London: Allen Lane 2015); Henry Kissinger, Diplomacy.
(New York: Simon & Schuster 1994) 280; Eric Sevareid, 'Radio, racism and foreign policy', at 19:40
<https://archive.org/details/betweenthewarsradioracismandforeignpolicy_20150427.>
[13] Salmon O. Levinson, '"The Sanctions of Peace"' (The Christian Century 25 December 1929).
[14] Telegram from Secretary of State to US Ambassador in Japan (Forbes) (7 January 1932) US Department of State, Peace and war: United States foreign policy, 1931–1941 (Washington DC: US Government Printing Office, 1983) 159-160
[15] League of Nations, 'Report of the League Assembly on the Manchurian Dispute' (International Relations Committee).
[16] International Law Association, 'The Effect of the Briand–Kellogg Pact of Paris on International Law'' (Eastern Press 1935).

now allowed to discriminate between belligerents, including selling munitions to victims, providing them with financial assistance, and refusing to allow aggressors the right to visit and search their vessels.

The radical change in the law of neutrality became clear on the eve of World War II. In March 1941, President Roosevelt signed the Lend-Lease Act, which allowed the United States to discriminate between belligerent nations when it sold, lent or disposed of supplies. In the first 90 days after the act was passed, the United States allocated US$4.25 billion of authorized aid, immediately made available 2 million gross tons of cargo ships and oil tankers to carry the aid, and began training 7,000 British pilots.

To justify these actions, which would have been illegal for a neutral state under the Old World Order, the Attorney General Robert Jackson gave a speech at the Inter-American Bar Association in Havana on 27 March 1941 laying out the administration's legal reasoning. Having been counselled by the great international lawyer Hersch Lauterpacht, Jackson claimed that traditional rules of neutrality requiring strict impartiality were based on the idea that 'all wars are legal'. However, the outlawry of war had changed all that. 'The Kellogg–Briand Pact of 1928', he argued, 'of necessity altered the dependent concept of neutral obligations.' Neutral states were now permitted to aid one belligerent rather than another without violating any legal duties. He concluded his speech with a stirring call to use the pact as the foundation for a new world order. 'The principle that war as an instrument of national policy is outlawed must be the starting point in any plan of international reconstruction. And one of the promising directions for legal development is to supply whatever we may of sanction to make renunciation of war a living principle of our society.'[17]

With Jackson's speech, the transformation of the world order that had begun in 1928 took yet another step towards completion. Now, not only was conquest, once legal, illegal, as the Stimson Doctrine made clear; neutral states were no longer required to remain impartial, clearing the way for economic sanctions to become a new tool of international law enforcement. The other two pillars of the Old World Order—gunboat diplomacy and impunity against criminal prosecution for aggression—were also on the brink of collapse. Once waging aggressive war was no longer permitted, threatening to wage wars to obtain enforceable promises could no longer be allowed either. Duress became recognized as a defence to any effort to enforce a treaty negotiated at gunpoint—a right enshrined after the Second World War in the Vienna Convention on the Law of Treaties. The end of that war also brought the Nuremberg Trials, and with them a definitive declaration that there would be no more impunity for waging aggressive war. When war was legal, those who waged it could not be held criminally responsible. But now that war was illegal, the world declared that waging aggressive war was not only wrong—it was criminal.

International Law In The New World Order

Many consider the United Nations simply a reboot of the League of Nations. After all, even the names of the key institutions are nearly the same—the 'League of Nations' was replaced by the 'United Nations'; the 'Permanent Court of International Justice' was replaced by the 'International Court of Justice'; the 'Assembly' was replaced by the 'General Assembly'; and the 'Council' was replaced by the 'Security Council'. The key difference, according to this view, is that the United States did not make the same mistake in the wake of the Second World War that it made in the wake of the First World War. In the 1940s, instead of retreating from the global community and refusing to join the international organization its president had conceived, the United States took on leadership of the community and championed the organization—not only joining the United Nations, but hosting the conference at which it was inaugurated (in San Francisco in 1945) and housing it in New York City, where it remains today.

That story, however, fails to recognize a deep dissimilarity between the two organizations. It is not the engagement of the United States that marks the crucial difference between the two (though that was undoubtedly essential to the UN's success). The fundamental difference is in fact that the League of Nations was a creature of the Old World Order, and as such retained the right of states to resort to war at its core. As we have seen, the

[17] Robert H. Jackson, 'Address of Robert H. Jackson, Attorney General of the United States' [1941] 35 American Journal of International Law.

Covenant merely attempted to curtail the right, to slow down its exercise and to put peaceful dispute resolution in its place. But ultimately it allowed states to do what they had long done: go to war to enforce their rights as they saw them.

The United Nations, by contrast, is best understood as the culmination of the outlawry vision. Its authors placed the prohibition on the 'use of force' at its core: Article 2(4) of the UN Charter prohibits states from resorting to the 'threat or use of force' against another state. The Charter then created an institutional structure around this prohibition to maintain international peace and security.[18]

The new world order is not without its challenges. States cannot now act— legally—unilaterally to address violence in other states unless they have been attacked or face imminent attack (or have been asked to assist another state facing such a threat). The prohibition on use of force applies regardless of whether the target state is a model democracy or a crushing autocracy, a strong or a weak state, or even a failing one. This gives rise to a dilemma. The rules of the new world order that provide so much benefit protect all states from the use of force, including those we do not want to protect because they are too weak, chaotic, authoritarian or, for lack of a better word, evil.

The UN Charter has a mechanism for overriding the universal protection provided by article 2(4)—a vote by the UN Security Council. But the Council has been hamstrung by the very disagreements just described. In both the cases outlined above, the five permanent members have been unable to agree to override the prohibition on the use of force and authorize intervention. Thus the background prohibition remains: no state may use force without violating the most fundamental rule of the system, the prohibition on war.

The challenge is even greater than this suggests. For the prohibition on war not only prevents states from intervening to protect the rights of others unless the Security Council agrees to authorize an intervention or a state requests assistance defending itself from armed attack; it also prohibits states from using force to protect their own rights (except in cases of self-defence). States can refuse to join treaties with other states. After all, as explained earlier, gunboat diplomacy is no longer allowed. Once states join, they might even refuse to comply. As opposed to the Old World Order, where a violation of international law could trigger a military response, the outlawry of war no longer permits states to take unilateral decisions to wage war to right wrongs. In short, international law prohibits states from using force to enforce international law unilaterally.

This simple but perplexing fact—that international law prohibits states from using force to enforce international law on their own—is key to understanding international law in the modern era. In what may seem a cruel irony, the human rights revolution began just at the moment international law could no longer be implemented with force. The 16 major universal human rights treaties all postdate the creation of the UN.[19] All of the regional human rights treaties are similarly recent. The only significant human rights treaty that predates the new world order is the 1926 Slavery Convention, which came into effect on 9 March 1927.

The emergence of international legal human rights protections at the very moment they could no longer be enforced with war is unlikely to be coincidental, however. In an era when international law—including treaties—could be enforced through war, states were understandably reluctant to enter into treaty commitments that they were not confident they could meet. They certainly would not enter into such an agreement that offered no substantial, tangible, direct benefits.

The idea of going to war over a treaty violation might seem fanciful, but it was once commonplace. We can see this by examining 'war manifestos'—documents that set out the legal reasons sovereigns provided for going to war from the late fifteenth century through to the mid-twentieth.[20] Those manifestos reveal that violations of

[18] There are only three exceptions to the prohibition: self-defence under Article 51; host state consent; and authorization by a vote of the Security Council acting under Chapter VII.
[19] United Nations, 'United Nations Treaty Collection' <https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=XXVII-7-d&chapter=27&clang=_en>.
[20] Oona A. Hathaway, William S. Holste, Scott J. Shapiro, Jacqueline Van De Velde and Lisa Wang Lachowicz (n 5).

international law were a common cause of war. Nearly half of the war manifestos we collected and analysed cited treaty violations as just causes for war. In addition, 42.5 per cent of these war manifestos cited the laws of war, the law of nations or customary international law.[21] In such a world, a state would be foolish to join a treaty that committed it, for example, to protecting the civil and political rights of its own citizens in broad and general terms, as the 1976 International Covenant on Civil and Political Rights does. A violation would be inevitable—and so would war.

After the Kellogg–Briand Pact outlawed war, and after that principle was reiterated and reinforced in the UN Charter, such treaties were no longer so dangerous. A state could enter into a human rights treaty with little fear that war would follow. States were also newly free to create and ratify a wealth of environmental treaties, which were equally difficult to honour—requiring, as they often did, states to change the behaviour of third parties. Across the spectrum, the number of treaties and international organizations exploded.[22] The latest edition of the United Nations Treaty Series includes hundreds of thousands of international agreements in force in the world, comprising over 2,900 volumes, and the Union of International Associations maintains records on over 75,000 international organizations.[23]

Are these all simply empty promises? Doesn't a prohibition on enforcing treaties with force create an insuperable barrier to effective international law?

It turns out that the system works much more often than this description of the situation would seem to suggest—including at some times when it would seem most likely to fail. For in the new world order, states have developed a rich set of tools to replace war as a way of enforcing international law—tools we call outcasting.

Outcasting occurs when a group denies those who break its rules the benefits available to the rest of the group. 'Outcasting' is non-violent: instead of doing something to the rule-breakers, outcasters refuse to do something with the rule-breakers.[24] An example may help illustrate the point. When a state violates the rules of the World Trade Organization, no troops arrive to enforce the legal obligations. Instead, if a state breaks the rules—by, for example, putting in place an illegal tariff—a state harmed by that illegal tariff can file a complaint and prosecute its case before a tribunal (called the Dispute Settlement Body). If this tribunal rules in its favour, the WTO authorizes the state that filed the complaint to break the rules in return. That is, the WTO entitles the victorious party to suspend the benefits of membership in the community in respect of the offender.[25] Thus, if the tribunal finds that Mexico imposed an illegal tariff on Peru, and Mexico does not lift the tariff, Peru will be authorized to impose an otherwise illegal trade barrier of equal value on Mexico. The rules are enforced not with war, but with the loss of cooperative benefits (here lower trade barriers) to which the state would otherwise be entitled.

There are hundreds of similar examples throughout international law, from the International Coffee Organization, which can kick bad actors out of the association, to the Convention on International Trade in Endangered Species of Wild Fauna and Flora, which prohibits members from trading in endangered species unless all parties to the trade follow the rules designed to protect these species.[26] Outcasting, then, is a victim of its own success. It is so ubiquitous and so often effective that it is usually invisible. When is the last time that the evening news reported on a trade war that did not erupt, or that mail was delivered on time? Outcasting is the Holmesian dog that doesn't bark.

The ubiquitous use of outcasting in the modern era was made possible by the change in the law of neutrality triggered by the Kellogg Briand Pact. As Robert Jackson declared in a speech delivered in 1941 to explain the

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[21] ibid 1198.
[22] Union of International Associations, < https://uia.org/faq/intorgs1>.
[23] United Nations Treaty Series Cumulative Index, <https://treaties.un.org/pages/CumulativeIndexes.aspx?clang=_en>; Union of International Associations (Yearbook of International Organizations) <https://uia.org/yearbook>.
[24] For more on outcasting, see Oona Hathaway and Scott Shapiro, *'Outcasting: enforcement in domestic and international law'* (Yale Law Journal 2011) 252–349.
[25] General Agreement on Tariffs and Trade 1948 (1 January 1948) 55 United Nations Treaty Series 19 a 23
[26] International Coffee Agreement 2007 (28 September 2007) <http://www.ico.org/documents/ica2007e.pdf>; Convention on International Trade in Endangered Species of Wild Fauna and Flora 1973 (3 March 1973) 993 UNTS 243.

United States' new position on the law of neutrality, the Pact 'did not impose upon the signatories the duty of discriminating against an aggressor, but it conferred upon them the right to act in that manner'.[27] The shift from prohibiting to permitting discrimination meant that states that had once been required to remain impartial could now distinguish between belligerents at war with one another. Doing so was no longer a violation of neutrality, no longer a just cause for war.

Today, human rights treaties may not be enforced with war. But they can be enforced with outcasting, though doing so requires careful institutional design. Consider the European Convention on Human Rights. This is the most ambitious—and most successful—international human rights regime in the world. The Convention does not use the same direct form of outcasting as the WTO—after all, states cannot commit human rights abuses in retaliation for a state's commission of a human rights abuse. Instead, it uses what we have called cross-counter-measures—taking away another benefit in return for the failure of a state to live up to its commitment under the treaty. A state that violates the Convention can be sued in the European Court of Human Rights. If the Court finds a violation, the defendant state must obey its judgment. If it fails to do so, it may be cast out of the Council of Europe—effectively denying it the benefits it enjoys from participating in the web of economic, political and legal ties with other member states.[28] The Convention may be enforced through submissions to the European Court of Human Rights. [29] The strength of the human rights treaty thus ultimately rests on a threat of ejection from the Council of Europe, and a complete loss of the benefits that come with that membership—including a vast array of political, economic and regulatory programmes, and access to over 200 treaties open only to Council of Europe members.[30]

Conclusion

In a process that began in 1928, the international community decided to outlaw war as a method of enforcing rights, except in cases of self-defence. It would take decades, a world war, the creation of international institutions and the development of new forms of outcasting to bring it to fruition, but outlawry has made the world more peaceful and prosperous as result.

The world order in which we now live is a photo negative of the Old World Order that held sway at the close of the First World War. The Old World Order had rules governing neutrality, criminal liability, conquest and gunboat diplomacy. The New World Order that governs today has rules for all these, too—but they are precisely the opposite. In the new world order, aggressive wars are illegal. And because aggressive wars are illegal, states no longer have the right to conquer other states; waging aggressive war is a grave crime; gunboat diplomacy is no longer legitimate; and economic sanctions are not only legal, but the standard way in which international law is enforced.

Our generation, however, is slowly undoing this historic process. The institutions and achievements of the post-Second World War legal order are under assault today as never before. The very countries that created the New World Order are the ones now placing that order under the greatest stress. In 2014, Russia seized and incorporated Crimea—the first successful conquest in Europe since the Second World War—and in 2022, it invaded the rest of Ukraine in a flagrantly illegal war. China has occupied contested territory in the South China Sea, where it has hastily built military installations, and has ignored an international arbitral tribunal decision declaring its claims illegal. France, the United States and the United Kingdom all carried out illegal military strikes in Syria in April 2018. Former US President Donald Trump, who campaigned in 2016 on a slogan of 'America First', time and again treated international institutions not only as nuisances but as outright threats. Whether the world has learned anything in the last century will be seen in how it responds to these threats to the global legal order in the years to come.

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[27] Robert H. Jackson (n 34).
[28] Statute of the Council of Europe (5 May 1949) 87 UNTS 103, art 8.
[29] European Convention for the Protection of Human Rights and Fundamental Freedoms, arts 33, 34.
[30] 4 Council of Europe, Complete list of the Council of Europe's treaties <http://conventions.coe.int/Treaty/Commun/ListeTraites.asp?CM=8&CL=ENG.>

CHAPTER XXV: FROM LEGAL AMBIGUITY AND STRATEGIC CLARITY TO LEGAL CLARITY AND STRATEGIC AMBIGUITY

Charles Sampford[1]

Introduction

I fully appreciate that some may see the quest for the international rule of law (even a 'thin' or 'anorexic' theory[2]) as Quixotic beyond the realms of ageing academic fantasy. The lances deployed by international lawyers may seem as outdated as those imagined by Cervantes in 1615[3] – and needed for Grotius' vision ten years later.[4] The pessimists would note the lack of technological development of our lances and the considerable efforts of aggressors to update their windmills, with reinforced steel replacing timber shingles, and 125mm+ tank guns replacing sails. Add to this a 3000x increase in horse power[5] and a top speed moving from zero to 80km per hour, and international lawyers seem totally outgunned and outpaced.

However, many of us entertain hopes beyond fantasy and try to make useful suggestions. Dr Hugh Breakey and I are writing a non-fiction work on Building the International Rule of Law for OUP.[6] This paper will list some of my earlier suggestions and add some suggestions – particularly in the area of enforcement, which I have not previously discussed. At the very least, the international rule of law needs: normative commitment of sufficient national players and relevant professions; and institutional support, including those that deliver legal clarity and means for enforcement. I will deal with these in turn.

Normative Statements and Commitment

Great Principles

Many presidents and ambassadors have lauded the international rule of law. I will concentrate on those by the USA and Australia for reasons that will become obvious. The Kellogg Briand 'Pact of Paris' was a US/French initiative signed by 13 others, including Australia. They condemned "recourse to war for the solution of international controversies and renounce it as an instrument of national policy" and agreed to settle "all disputes or conflicts of whatever nature or of whatever origin they may be, which may arise among them, shall never be sought except by pacific means."

This was absorbed into the UN for which President Roosevelt pressed so hard. The UN Charter required that: a. All Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered (Article 2.3)

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[2] See Sampford "Thin Theories" of the Domestic and International Rule of Law" in Popovski (ed) *International Rule of law and professional Ethics* (Ashgate Aldershot 2014). The 'anorexic' quip was by Prof Simon Chesterman's in a workshop to discuss the papers in that book.

[3] The second part *Segunda Parte del Ingenioso Cavallero Don Quixote de la Mancha* was published in that year (1615) following the first part ten years earlier.

[4] Grotius 'On the Law of War and Peace' first published 1625.

[5] I am crediting Don Quixote's Rosinante with the full-on horsepower with which she is theoretically rated. The tank I am citing is the Russian T-14 Armata.

[6] This will seek inspiration from the means by which the 'domestic' rule of law developed and took root.

b. All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations. (Article 2.4)

These requirements were built into Article 1 of the NATO and ANZUS Treaties

> *The Parties undertake, as set forth in the Charter of the United Nations, to settle any international disputes in which they may be involved by peaceful means in such a manner that international peace and security and justice are not endangered and to refrain in their international relations from the threat or use of force in any manner inconsistent with the purposes of the United Nations. (ANZUS)*

The US drove the formation of the UN but Australia took an active part, especially in recognizing the role of small and middle powers. Australia's foreign minister, Hon Dr Evatt, was president of the third plenary session of the General Assembly and Hon John Makin was the first President of the UNSC.

Soon after, the US and Australia took leading roles in Nuremberg and Tokyo war crimes trial. Hon Justice William Webb presided over the latter but it was Robert Jackson who made the critical rule of law point:

> *"Let me make clear that while this law is first applied against German aggressors, the law includes, and* ***if it is to serve a useful purpose it must condemn aggression by any other nations, including those which sit here now in judgment."***[7]

Lest anyone think that the international rule of law is some recent 'pinko' invention of Democrat appointees like Jackson[8] which no self-respecting Republican would support, they should consider the following quote from President Eisenhower;

> *"The time has come for mankind to make the rule of law in international affairs as normal as it is now in domestic affairs. Of course the structure of such law must be patiently built, stone by stone. The cost will be a great deal of hard work, both in and out of government particularly in the universities of the world. Plainly one foundation stone of this structure is the International Court of Justice … [and] the obligatory jurisdiction of that Court. … One final thought on rule of law between nations: we will all have to remind ourselves that under this system of law one will sometimes lose as well as win. But … if an international controversy leads to armed conflict, everyone loses."*
> (Dwight D. Eisenhower, Delhi, 1959)

I quote the latter, not only because it is a powerful plea for the international law but also because, in coming from what might be seen to be an unlikely source (a Republican[9] US General and President), we may have hope that support for the rule of law may be much broader than it sometimes appears. (In fact, we should not be so surprised. His 'final thought' is a poignant reflection on war by the leader of what were appropriately called 'United Nations' forces in Western Europe: he had seen enough soldiers and civilians die and knew that many more had died on the rest of the Eurasian continent).

The US had accepted compulsory jurisdiction at the beginning. Australia did not follow until 1975. These sentiments were reiterated in the unanimous 2005 UN global leaders summit outcome document,

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[7] Robert Jackson, Chief US Prosecutor, Opening Address at Nuremberg The International Military Tribunal, *Trial of the Major War Criminals before the International Military Tribunal* (Blue Series 14 November 1945-1 October 1946) vol 2 (Nuremberg: Hein, 1947; repr., 1995) 154.

[8] He was US Attorney General under Roosevelt who then appointed him to the US Supreme court bench.

[9] It may well be that some modern republicans would disown him as a Republican – or as a 'RINO' short for Republican in Name Only. But in setting themselves apart from their past greats, they are more likely to open questions about their entitlements to that honour than their past greats. The younger leaders who did not go to war themselves and chose other alternatives open to them seem far more willing to commit others.

> *Recognizing the need for universal adherence to and implementation of the rule of law at both the national and international levels, we: (a) Reaffirm our commitment to the purposes and principles of the Charter and international law and to an international order based on the rule of law and international law, which is essential for peaceful coexistence and cooperation among States; … (f) Recognize the important role of the International Court of Justice, the principal judicial organ of the United Nations, in adjudicating disputes among States.*

Since then, there has been much talk of a rules based international order. The 2016 Australian Defence White Paper used the phrase 'rules-based global order' 46 times. Now hardly a day goes by without a US or Australian politician using that phrase.

> *I agree.*
> *I entirely agree.*
> *Indeed, the international rule of law is such a good idea I think that we should practice it.*

Unfortunately, we don't. Jackson and Eisenhower would be deeply disappointed. After 40 years of accepting compulsory jurisdiction, President Reagan mined Nicaraguan harbours. Nicaragua sued in the International Court of Justice. As Ike said, sometimes you lose. This was one of those times. Reagan said the court case was political and withdrew compulsory recognition of ICJ compulsory jurisdiction. Five years later, Bush the elder[10] went to very considerable pains to secure UN authorisation and a wide coalition to throw Iraq out of Kuwait. This was UN Rule of Law 101. Unfortunately, this was a virtuous aberration from the pattern that had set in. Clinton and Bush the Younger secured UNSC authorisation for, respectively, some peacekeeping and weapons inspections actions. But neither sought support from the UNSC for the wars they started, and stringent efforts were made to avoid the jurisdiction of the ICJ. No doubt they recognized that these were cases that they would lose. This was not what they said publicly. Clinton, Blair, Bush and Howard paraded lawyers who claimed that the action was legal. I have long pointed out that there is a temptation to seek and a temptation to give the advice the client wants. This temptation is constrained in part by legal ethics[11] but much more powerfully by judges' ability to rule differently. This latter constraint is not present where the lawyer's client will not go to the court.[12]

First and Second Lawyers

One example was the UK and US decisions to bomb Serbia in 1999. Robin Cook, the UK foreign secretary told the US Secretary of State Albright that UK's lawyers were clear that it would be illegal. Albright told him to 'get new lawyers.' He did. In March 2002, The UK, US and Australia were contemplating an invasion of Iraq. The UK Cabinet received very clear advice that the proposed war would be illegal. I have good reason to believe that the Australian government would have been notified of this. Within two weeks, Australia restricted its acceptance of the compulsory jurisdiction in a way that would prevent Iraq suing it. Australia did two things. First, it excluded seabed disputes – which would be seen as dudding East Timor. This drew attention away from the second thing it did – limiting when Australia could be sued. From 1975 to 2002 it had been any country which had itself signed up for compulsory jurisdiction. From 2002 onward, only those who had already signed up for compulsory jurisdiction for 12 months could sue us. When the Iraqi government approached an international lawyer I knew, they were told that it was impossible. Australia had a choice:

a. To find itself with interim orders from the ICJ well before US forces reached Bagdad (that is how quickly the court convened in 1999 to consider the Kosovo case and in 2022 when it considered the Ukraine case);

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[10] I have switched from calling the pair 'Bush the Elder' and 'Bush the Younger' to 'George II' and 'George III' of America. The former references Britain's 'Pitt the Elder' and 'Pitt the Younger' – wartime British PMs, the first successful, the latter dying in office in a losing coalition that eventually won. This is rather generous to the younger Bush, so George III of America might be more apt. It is actually surprising that the popularity of George Washington did not produce another President George until the Bushes. The analogies deserve more than a cheeky footnote.

[11] First there is the requirement of independence. I would argue that this is even stronger in cases where the client is refusing to go to court. There is also an analogy to ex parte submissions to a judge.

[12] See detailed discussion of the principles and examples in Sampford and Breakey Law, Lawyering and Legal Education: Building an Ethical Profession in a Globalizing World (Routledge London 2017), ch 14-16.

b. To politely refuse to take part, citing the embarrassment to the 'Coalition of the Willing' (should that be 'Conspiracy of the Willing'?);
c. To seek to persuade its friends of the folly they were pursuing and the precedents it would set;
d. To restrict jurisdiction and take part in a war that the vast majority of international lawyers said was illegal (and of the few who did say it was legal, none of them claimed that the case would win in the ICJ if it were brought there).

The UK and Australia found 'second lawyers' to write opinions supporting the war. Lord Goldsmith managed to be both a first lawyer and second lawyer. The Australian government did not ask the Attorney General, the Solicitor General or the most highly qualified international lawyer in government employ, but chose to ask Bill Campbell KC First Assistant Secretary Office of International Law Attorney-General's Department, and Chris Moraitis Senior Legal Adviser Department of Foreign Affairs and Trade. These opinions have been heavily and justifiably criticized.[13] More fundamentally, the law is not determined by the second group of lawyers (or even the first). It is determined by courts – the only bodies which can provide legal clarity by adjudicating between the contested claims about what the law requires. A court was available whose jurisdiction they could have accepted, as Eisenhower had urged us all to do.[14]

I would note two things:

1. The opinions of international law professors is a source of international law. They are trumped by decisions of ICJ and other relevant courts. But without a decision by the ICJ those opinions count and will determine the issue until a court decides otherwise;
2. Not only was the war illegal, it was a breach of Article 1 of the ANZUS treaty. If ANZUS is the most important treaty we have, which I agree it is, we should not have so cavalierly breached it in such a fundamental way. I do not propose that we sue the US for breaching the treaty at the same time as we did, but NZ could sue us. I have argued that this would do us a great favour. As the then government claimed its action to be legal and this view is rejected by the vast majority of international lawyers, this provides the Australian government an opportunity to trump that source of law by a higher one (ICJ). Any refusal of the 'favour' might suggest that the Prime Minister's claims to parliament on 6 March 2003 (that there was 'ample legal authority' for the impending war) might have been misleading the parliament. New Zealand would, of course, be following Ike's sage advice.

When the court that Jackson sought was established he would have been profoundly disappointed that the US not only rejected it but pressed others to reject it. They even authorized military action to spring American defendants who might be held awaiting trial. The 2002 'American Service Members Protection Act' was quickly labelled the 'Hague Invasion Act'. Not entirely clear how that squares with Article 1 of the NATO treaty, let alone Jackson's sentiment. The US has supported ICC prosecutions of leaders from other nations but not its own, the very thing that Jackson warned against. The US and Australia stopped talking about the international rule of law and rules based order. The 2002 Defence white paper made no reference to either.

In 2021 Iran sued the US under the 1955 Treaty of Amity, Economic Relations and Consular Rights. It won in the ICJ.[15] The US appeared to have forgotten to repudiate the treaty. But it refused to abide by the ICJ's decision. We all welcome the ICJ case that Ukraine took against Russia. Russia had publicly claimed to be entering Ukraine to prevent genocide of ethnic Russians and Russian speakers. Both are signatories of the Genocide convention. Like many conventions, it provides an opportunity for disputes about interpretation of the Treaty to the ICJ. The gist of the ICJ judgement was: 'don't worry, there is no genocide so stop!' The ICJ issued orders for interim measures which Russia has breached. One of the greatest ironies is that the case Ukraine took against Russia

[13] See Sampford and Breakey op cit, ch 16. It is most unfortunate that neither had practising certificates which prevented complaints to the relevant disciplinary bodies.
[14] Given the strong desire of the Republicans to impeach Clinton, I wondered if bombing from 20,000 feet might be seen as a 'high crime or misdemeanour'. But that was the last thing republicans wanted to get him for.
[15] *Islamic Republic of Iran v. United States of America* AWD 63-A15-(I:G)-FT on JSTOR <https://www.jstor.org/stable/2202419> accessed 26 September 2022.

could not have been brought against the US. Like Russia, the US is a signatory to the Genocide Convention. But the action by Ukraine could not have been brought against the US because the US required that its consent must be given before it can be sued for genocide!

Why Should Strong States Bother With International Law?

I will briefly recap the arguments I have made over the last twenty years.

1. Hypocrisy and resentment is causes: Hypocrisy is borne in sullen silence by those without power. It is noted as the latter's power grows, then mocked, then used as an example – especially against the formerly strong state. The level of resentment is only fully evident when they become sufficiently powerful to feel free to express it. Hypocrisy should be politely pointed out by friends and allies;
2. It is a good way of resolving many kinds of disputes. Disputes over the ownership of rocks and atolls would seem to be the kind of maritime boundary issue that should be the subject of international arbitration, and have been since the Treaty of Tordesillas.[16] The only problem is that it is hard to argue that these are greater breaches of our international rules based order than the 2003 Iraq war. And it is hard to criticize China for refusing to accept the decision of the Permanent Court of Arbitration in Philippines v China when the US did not accept the Nicaragua case;
3. Others might not feel bound in areas that are important to strong states – IP, terrorism and trade;
4. No-one is #1 forever.

Extra Reasons For Middle Powers

1. Middle powers are not powerful enough to dictate to others;
2. Middle power allies are much more vulnerable than the great power friend. Nuclear super powers are very cautious about targeting each other's armed forces. But they can and do make war against allied, aligned and client states. Imagine two fighters flying through the Taiwan strait: one Australian, one American. If PRC (People's Republic of China) wants to shoot down one of them to make a point, which will it be? They will not target the American. But if they target the Australian the same inhibition will probably mean that the American fighter will not retaliate.

Suggestions For Strengthening International Law[17]

I would suggest that the US should show leadership by:

1. Embracing the compulsory jurisdiction of the ICJ as suggested by Eisenhower, urging others to do so as Ike did;
2. Signing up to the Rome Statute (and hence ICC) as implied by Jackson's pledge – which would include the Kampala amendment;
3. Strengthening the Kampala amendment (it is currently more restrictive than the other war crimes) - in particular by extending the jurisdiction of the International Criminal Court to allow it to prosecute all crimes of aggression involving the signatories as aggressors OR defenders of sovereign territory that has been invaded. The ICC can initiate prosecutions of other war crimes by non-signatories on the territory of a signatory. This would merely extend the same principle. I have long argued that it is the most disgraceful cowardice for the leaders of nations to open their soldiers to prosecutions for "in bello" crimes while opposing "ad bellum" crimes in starting wars.

Lawyers, civil servants and politicians should engage in ethical standard setting that would emphasize the centrality of the international rule of law in international affairs. This should include:

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[16] Where the Spanish and Portuguese sought the Pope's adjudication for their spheres of influence (and trade, conquest and conversion).
[17] Most of the proposals on this list were provided to the USG law in 2005 following his request. He asked me to remove #9 because of the opposition it would draw – though I stick by my recommendation and have expanded the suggestion in 'No longer a moot point'.

1. Further development of the ILA code of conduct for counsel appearing before international courts and tribunals. Although I was on the committee that drafted the Code, I suggest further development, paying particular attention to where counsel are advising governments who refuse to defend their positions before independent tribunals of competent jurisdiction;
2. Development of codes of conduct for international civil servants and civil servants of nation states dealing in matters of international law and policy;
3. Provision of input into codes of conduct for businesses working across state borders to emphasize the importance of abiding by international law.
4. Development of a recommended code of conduct for Security Council members on the use of their powers, and encouragement of as many countries as possible to sign up to it. While we would seek to sign up existing members, candidate members might find it politic to subscribe to the code in future elections of state members. This code should recognize membership of the UNSC and other UN bodies as an 'office' in which the power is used for the purposes for which it is given, not in the interests of the state itself. Just as a Member of Parliament (or member of the Chinese Central Committee) is not expected to use their vote for personal gain but for the good of the relevant people, so members of the UNSC should see themselves acting for international peace and security. Once this has been established for the non-P10, pressure should be put on those to whom even more power is delegated by the UN Charter. (I fully appreciate that this is contrary to the original ways in which the UNSC was seen to operate but it is the sort of evolution all effective institutions go through).

The uncertainty of international law content can be reduced in a number of ways:

1. Assisting the International Law Commission (ILC) by collecting, collating and analysing interpretations of treaties and other international instruments by domestic courts as well as international courts. Where there are existing databases, they will be brought together and linked;
2. Drawing up a list of definitions that are unclear or 'fudged' (e.g. terrorism) and provide a range of definitions that are used and the contexts in which they might seem to be most relevant.

The above would be supported by a range of institutional developments:

1. Establish an independent international tribunal to resolve matters of controversy in ILC codifications. These would be different from 'Russell Tribunals' because they would only apply international law and would be staffed by eminent lawyers of impeccable integrity and non-partisanship;
2. The international tribunal could also adjudicate disputes where only one side accepted the compulsory jurisdiction of the ICJ;[18]
3. The UNSC should routinely refer disputes to the ICJ and ICC by simple majority without veto. In such cases, the UNSC is not deciding but referring a legal matter to a legal tribunal rather than claiming to act as one itself. There are many other suggestions about how the UNSC might strengthen the Rule of Law; [19]
4. The UNSC refrain from authorizing the use of force unless those who are authorised accept the compulsory jurisdiction of the ICJ and the ICC for that particular intervention;
5. Development of UN administrative law and judicial review by ICJ of all UN organs, including the UNSC. Even if the UNSC holds out, the judicial review of other elements of the UN would set a precedent and principles of judicial review for any UN body including the UNSC;
6. One of the ways of securing some of these developments involves the insertion of electoral strategies familiar in most states. Currently states seek the votes of other states and then vote on national interest. However, if states co-ordinated policies and ran for election to the UNSC and other UN bodies they could run as part of slates of candidates committed to a set of reforms. They would be judged on living up to their commitments in subsequent elections. While this will not get around the P5 veto, the P5 would face

[18] 'No longer a Moot Point' in Sampford and Thakur, *Institutional Support for the International Rule of Law* (Routledge London 2014).
[19] See, for example, Jeremy Farreall and Hilary Charlesworth (eds) *Strengthening the Rule of Law through the UN Security Council* (Routledge London 2016), which includes my essay 'The Rule of Law begins at Home'.

a permanent majority opposition to anything that they wanted to do that was contrary to the non-P5 election commitments;

7. Require ISDS procedures to incorporate judicial ethics and to create appellate pathways;
8. States to build international legal obligations into their domestic legal systems. For example states could make international legal obligations 'relevant considerations' in administrative law or its equivalent. They could go further and require that uncertainties in statutes be resolved in favour of interpretations that adopt international law and international legal principles. Finally they could legislate that some (or preferably all) international legal commitments take precedence over other domestic laws. (All of these measures are used by some states with respect to non-constitutional bills of rights.)

Enforcement

I have written very little on enforcement of international law against those who defy it – especially in cases of armed conflict. This is frequently seen as the fatal flaw in the UN in undertaking its highest and founding obligation. But we should not forget that the UN Charter explicitly included two forms of enforcement (UNSC action and collective self-defence) and provided room for a third (the UNGA's 'Uniting for Peace' process). President Roosevelt certainly envisaged the UNSC as the primary method of responding to international conflict. He saw the proposed permanent members (USA, USSR, UK and China) as the 'four policemen' – to which force Churchill pressed to add a 'gendarme' in the form of France.

The UN Charter provides the UNSC very broad authority to act in such cases. Indeed, it has the "primary responsibility to act as required to maintain international peace and security.'[20] If they were police in the full sense, they would have a clear duty to act[21] rather than a right to do so if they choose to. Having such an important function delegated to them would imply an ethical duty to act that would be picked up in any relevant code and should count as highly relevant considerations in any administrative law that might be developed for the UN. There is certainly an expectation that the UNSC should act and it certainly does debate possible actions, and not infrequently takes action in areas where P5 members do not see their interests threatened (a very unattractive attribute for any 'policeman').

This still leaves individual and collective self-defence as a legally available response under Article 51. But other states are understandably reluctant to do so, particularly when a P5's interests are at stake. It is not just a matter of blood and treasure. Interventions can make the situation worse, and there is a natural worry about escalation when nuclear armed states are involved (as is the case for all P5 members). They are particularly careful to avoid killing members of each other's troops. This taboo permits Russians to kill and be killed by US allies, and US soldiers to kill or be killed by Russia's allies (with some exceptions in Cuba and many exceptions in Vietnam).

Legal Clarity, Strategic Ambiguity And The Logic Of Flagged Escalation

As at the date of writing this essay, the USA has provided highly significant support for Ukraine with intelligence, weapons, training and ammunition. However, its concerns about retaliation have led it to make clear commitments that US and NATO forces will not exercise their right to come to the defence of Ukraine and uphold the Charter. This provides a strategic clarity which allows Russia to plan more effectively in its war – knowing that the US will eschew actions that are entirely legal and much less drastic than those the Russians are pursuing on a daily basis. At the same time, the USA has maintained its long term preference for legal ambiguity by avoiding jurisdiction and refusing to open up its action to legal challenge.[22]

I would argue that they have it the wrong way around. Instead of legal ambiguity and strategic clarity, they should engage in legal clarity and strategic ambiguity. This would involve stating clearly:

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[20] Resolution 377(v) the Uniting for Peace resolution.

[21] We might even say that they have a 'responsibility to protect' states under attack or threatened attack. While the international norm of that name explicitly does not go that far, the intention of the UN Charter did envisage a responsibility to act.

[22] They do not even urge UN bodies to seek advisory opinions from the ICJ.

a) What breaches of international law have occurred – including a listing in terms of legal and lethal significance (the aggressor's 'escalation ladder'). Sometimes it will be useful to indicate escalations beyond those already taken to signal likely responses;
b) The range of actions the USA and its allies are legally entitled to take in response (the defenders' 'escalation ladder');
c) What we are going to do, reserving the right for further actions on the range set out in (b);
d) Provide independent legal opinion on a-b;
e) Offering to defend those actions in the ICJ (and, if relevant, the ICC) with the single proviso that Russian actions can also be questioned.[23]
f) Accept jurisdiction of ICC and ICJ in these and further disputes.

The taboo on directly targeting Russian forces is respected but in a limited way that recognizes that the taboo works both ways. The escalation ladder may vary from war to war and at different times during those wars – but not very much. I have set out one for the Russo-Ukraine war as at August 2022.

Russia's Escalation Ladder: Acts Of War

Uncertain legality – cyber attacks, supporting insurgents.
Clearly illegal acts:

1. Demands with implied threats;
2. Explicit threat of force;
3. Blockade;
4. Aggressive war:
    a. Bombardment of military targets;
    b. Bombardment of dual use infrastructure;
    c. Bombardment of purely civilian infrastructure;
    d. Invading Ukraine;
    e. Killing NATO troops;
    f. Killing US troops;
    g. Invading a NATO country;
    h. Invading the USA.

5. War Plus War Crimes:
    a. Killing civilians through negligence;
    b. War crimes;
    c. Crimes against Humanity;
    d. Genocide;
    e. Tactical nuclear weapons;
    f. Broader use of nuclear weapons.

Responses By Victims And Allies (All Legal As Part Of Collective Self-Defence)

a. ICJ, ICC, UNSC or UNGA 'uniting for peace';
b. Buying export goods;
c. Selling arms that can be used within country to resist invading forces;
d. Selling arms that can target the aggressor's territory (no legal difference);
e. Transporting arms and training in use;
f. Transporting export goods (especially for food);

[23] A formula I first suggested in 1999 "Sovereignty and Intervention", Invited Plenary Paper, World Congress of Legal and Social Philosophy, New York, June 1999 later published in Campbell and Leiser (eds) Human Rights in Theory and Practice Ashgate, London 2001.

g. Humanitarian corridors – shoot back if fired upon by anybody;
h. Repelling attacks on ships carrying export goods;
i. Corridors to deliver weapons and ammunition to victim's soldiers;
j. Repelling attacks on ships carrying arms = all support short of war;
k. Targeting dual use infrastructure in aggressor's junior partner's territory (in this case Belarus – this merely returns the favour of Russian attacks on Ukraine);
l. Targeting military in aggressor's junior partner's territory (in this case Belarus);
m. Advisors are on hand during fighting;
n. Striking aggressor's advancing columns in victim's territory or at sea;
o. Striking advancing military in aggressor's territory;
p. Ground troops in victim's territory;
q. Ground troops in 'hot pursuit' into aggressor's or allies territory;
r. Sending troops into aggressor's territory > Taking aggressor's capital;

In general, we should rule nothing out. The possibility of doing more should always have a chilling effect on the other side's plans and their assessments of the costs of continued aggression. We should start with doing less than you are legally entitled to do. We should then warn that we might do more if the other side fails to de-escalate. This is the strategy for seeking moderation in the aggressor's behaviour. The other side can threaten to do more – as Putin has done in demanding an end to western arms shipments that might make defence and counter-attack more effective. But the demand that the aggressor's victim should not defend themselves is a nonsense (even if the USA has sometimes practised it). The taboo on shooting at the other needs to be recognized but the reverse taboo can also be used. We should choose actions that do not involve us shooting first but would necessitate Russians shooting first. Examples include responses e-j, which offer these possibilities. I note the point the USA reached in the North Atlantic which was the culmination of 'all support short of war' in late 1941.

Conclusion

The point of the last section is not to find new ways to war but to find new ways to peace via international law – strengthening enforcement and increasing the risks of those who want to make war. I hope that the US will lead the world in furthering the values underlying the UN, ANZUS and our alliance with them. We should encourage them to do so, and advise them privately at first, and only publicly when necessary. However, if the US will not lead us in this direction we should seek the promotion of those values with others. While some are naturally worried about the directions the US is taking, the rise of an authoritarian China and of course, the use by Russia of the bad precedents we have set, we should recognize that the vast majority of G20 countries, by number and GDP, are reasonably sound democracies with no desire for international conflict. One way or the other, we need to strengthen the international rule of law, including the ICC's rise to the place envisaged by Jackson. This will set us a different but familiar challenge. How far back will we go in prosecuting those who have breached it? There is no retrospectivity objection to prosecuting any act of aggression since Nuremberg (or Kellogg-Briand).

But there is a practical problem. The more certain a prosecution, the even less likely rogue leaders will give up their power. We may have to rule the line and declare a moratorium on prosecutions – but where? Is it today? Do we wait for others to catch up with our own wars? Do we go back only a number of years? Do we go back to Iraq, to Kosovo, to Nicaragua? Do we go back to Russia/Ukraine this year, 2014, South China Sea islands, Russia/Georgia, Iraq, Kosovo or back to the Russian genocidal famine in Ukraine in the 1930s? Should we push for a global truth and reconciliation commission? And should it start without waiting for recent aggressors to voluntarily join? I am inclined to go back to a date where we were responsible – such as the Iraq war – to avoid the appearance of privileging our wrong doing by a longer moratorium.

CHAPTER XIV: SOVEREIGNTY AS RESPONSIBILITY—UNDERSTANDING THE LEGAL PARAMETERS OF THE VETO POWER

*Jennifer Trahan**

Abstract

This book chapter examines the veto power of the permanent members of the UN Security Council from the vantage point of 'sovereignty as responsibility'—particularly, whether vetoing permanent members are breaching their obligations under the doctrine of the responsibility to protect ('R2P') when they cast a veto while there is ongoing genocide, crimes against humanity, or war crimes, or the serious risk of these crimes occurring, and the resolution in question would take action to prevent or stop the crimes. The chapter argues that the concept of 'sovereignty as responsibility' and R2P have in no way permeated into Security Council practice. The chapter argues that it is time to 'operationalize' at least the 'hard' (ie, binding) law that underlies R2P so that it is applied to the practice of the UN Security Council. The Security Council is simply not above the law, and neither the veto, nor the threat to use the veto, should be used to shield the perpetration of atrocity crimes.

Introduction

Over the last several decades (with much earlier foundations), there has been a gradual evolution towards the concept of 'sovereignty as responsibility'. This framework, as articulated within the doctrine of R2P, is described as creating three pillars of responsibility, with the second being the obligation to assist states in ensuring their responsibilities towards their own populations are met. This book chapter examines the veto power of the permanent members of the UN Security Council from that lens—whether vetoing permanent members are breaching their obligations under the doctrine of R2P when they cast a veto while there is ongoing genocide, crimes against humanity, or war crimes, or the serious risk of these crimes occurring, and the resolution in question would take action to prevent or stop the crimes. The chapter argues that a reconceptualization of the veto power is needed to bring it in conformity with the concept of 'sovereignty as responsibility' and the doctrine of R2P. To the extent that aspects of R2P are derided as 'soft law',[1] the chapter illustrates that the legal obligations at issues related to genocide, crimes against humanity, and war crimes are ones found in 'hard' (ie, binding) law. If the UN system is subject to the application of international law (as it is), it is no longer (if it ever was) legally permissible to use the veto power to shield the perpetration of atrocity crimes.

The Shift Towards Sovereignty as Responsibility

Pushback Against Unlimited Sovereignty

It was once a divisive topic what role the international community should play as to atrocity crimes[2] solely occurring within a state; thus, for example, when issues as to apartheid were raised in the early 1950s, South Africa responded that the matter was not one for the United Nations to consider, as the conduct was solely internal

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[1] 'Soft law is a term used to describe a range of non-legally binding instruments used by States and international organizations in contemporary international relations, as opposed to hard law, which is always binding'. André da Rocha Ferreira, Cristieli Carvalho, Fernanda Graeff Machry and Pedro Barreto Vianna Rigon, 'Formation and Evidence of Customary International Law' [2013] UFRGS Model UN J 182, 194.

[2] 'Atrocity crimes', as used in this article, refers to genocide, crimes against humanity, and war crimes. For discussion of the veto and aggression, see Jennifer Trahan, *Legal Issues Surrounding Veto Use and Aggression*, CASE WESTERN RESERVE J. INT'L L. (forthcoming 2023).

to South Africa.[3] Matters have evolved considerably since then, with the Security Council taking on many situations where atrocity crimes (eg, genocide, crimes against humanity, and/or war crimes) or other serious human rights violations are occurring within a country. It is now accepted that such situations can constitute 'a matter of international peace and security' and therefore ones properly before the Security Council as situations where it may act.[4] Yet, the ugly side of 'sovereignty' still rears its head when countries attempt to evade international scrutiny as to crimes being committed, sometimes by state actors, under the claim that the situation is one within their 'sovereignty'.[5] And, certain states are too often still able to shield the perpetration of atrocities, particularly countries that wield considerable power on the political stage—Chinese crimes against the Uyghurs, thought to constitute genocide,[6] being one current example.[7]

The entire field of human rights is of course 'push-back' against this notion of unlimited power in the hands of a 'sovereign'. The premise behind human rights is that a sovereign cannot have absolute sovereignty because the human rights of the populace matter, and that populace, with rare exceptions, is within the territory of a state. Thus, if there is to be any 'enforcement' of human rights, it *does* limit the power of a sovereign (ie, the government), which cannot be said to hold any power that permits the state to abuse its own citizens. International human rights law, as with much of international law, however, is largely based on a consensual regime. That is, it is left to states whether or not to become parties to human rights treaties (global, regional, or topical) or to subject themselves to jurisdiction before a regional human rights court, if one exists in their region.[8]

The recognition of certain norms as *jus cogens* is also 'push back' against a concept of unlimited sovereignty. Despite the largely consensual nature of international law,[9] as to *jus cogens*—the highest level norms within the system of international law from which no derogations are permitted[10]—it is not. Certain prohibitions, such as the prohibition against committing genocide, the prohibition against committing crimes against humanity, and

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[3] 'Four years after the legal establishment of apartheid in South Africa [in 1948], a group of developing states requested that the Secretary-General put apartheid per se on the agenda of the [General] Assembly. South Africa objected that the United Nations lacked the competence to consider the internal affairs of one of its members'. Jeffrey L Dunoff, Steven R Ratner and David Wippman, *International Law: Norms, Actors, Process, A Problem-Oriented Approach* (4th edn, Wolters Kluwer 2015) 154. Similarly, a British official debating plans for what would become the trials before the International Military Tribunal at Nuremberg wrote: 'To seek to try by any sort of Allied or Inter-Allied court German officials for acts done in Germany to German subjects (albeit Jews) . . . would raise great legal difficulties'. CAB 66/50, Simon UNWCC memorandum (2 June 1944) W.P. (44) 294, p 3, as cited in Gary Jonathan Bass, *Stay The Hand of Vengeance: The Politics of War Crimes Tribunals* (Princeton U Press 2000) 193. A similar view was expressed by Justice Pal who served on the International Military Tribunal for the Far East (Toyko), who 'thought that holding policy-makers accountable under international law would abrogate the sovereignty of the states they led'. Elizabeth S Kopelman, 'Ideology and International Law: The Dissent of the Indian Justice at the Tokyo War Crimes Trial' [1990–1991] 23 NYU J Intl L & Pol (n 157) 373, 415 citing *International Military Tribunal for the Far East: Dissenting Judgment* (Sanyal & Co 1953).

[4] The trigger for the Security Council 'acting' under Chapter VII is of course a 'threat to the peace, breach of the peace, or act of aggression'. Charter of the United Nations [1945] 892 UNTS 119, art 39 [hereinafter, 'UN Charter'].

[5] See, eg, Robin Guittard 'National Sovereignty vs Human Rights?' (Amnesty International 6 November 2014) <National sovereignty vs human rights? (amnesty.org)> ('Faced with an Inter-American Court of Human Rights decision that recognized the suffering of thousands of Dominicans of Haitian descent and Haitian migrants, the only response that the Dominican Republic could muster was to start shouting in defence of its national sovereignty').

[6] For discussion of the crimes, see, eg, 'The Uyghur Genocide: An Examination of China's Breaches of the 1948 Genocide Convention' (*New Lines Institute for Strategy and Policy & The Raoul Wallenberg Centre for Human Rights*, March 2021) <Chinas-Breaches-of-the-GC3-2.pdf (newlinesinstitute.org)>; 'A Multi-Generational Effort to Eliminate the Uyghurs: An Ongoing Genocide' (Global Accountability Network September 2022).

[7] See, eg, 'China to UN Rights Chief Bachelet: "Respect our Sovereignty"' (Aljazeera 11 September 2018) <China to UN rights chief Bachelet: 'Respect our sovereignty' | Human Rights News | Al Jazeera>

[8] There are only three regional human rights courts: the European Court of Human Rights, the Inter-American Court of Human Rights, and the African Court of Human and Peoples' Rights.

[9] See, eg, *The SS 'Lotus' (France v Turkey)* [1927] PCIJ, Ser A, No 10, p 4 ('The rules of [international] law binding upon States . . . emanate from their own free will . . .').

[10] *Jus cogens* norms receive the highest level of protection in the international legal system in that no derogations may be permitted from them except through the creation of a new norm having the same character. Vienna Convention on the Law of Treaties, art 53 (23 May 1969) [1969] 1155 UNTS 331, 8 ILM 679 ('VCLT'); M Cherif Bassiouni, 'International Crimes: *Jus Cogens* and *Obligatio Erga Omnes*' [1996] 59 L & Contemporary Problems 63, 67 ('A *jus cogens* norm holds the highest hierarchical position among all other norms and principles [of international law]'.

the prohibition against committing war crimes,[11] are deemed so fundamental that they are binding on all states, *regardless* of whether or not a state has joined a convention to that effect.[12] A state also may not "opt out" of such obligations, as it could do vis-à-vis customary international law that does not rise to the level of *jus cogens*.[13] Thus, while the entirety of convention obligations, such as those contained in the Genocide Convention[14] or 1949 Geneva Conventions[15] may not rise to the level of *jus cogens*, at least the basic prohibitions against committing genocide or war crimes do.[16] This is true as well for crimes against humanity,[17] although that crime, to date, lacks a freestanding convention, with adoption of one currently being debated.[18] Many of these same arguments also apply to aggression, or the crime of aggression, although not the focus of this book chapter.[19]

The Development of The Responsibility To Protect

An additional significant moment of 'push-back' against unlimited sovereign power has been the evolution of the concept of the 'responsibility to protect'. This was formulated in 1996 by Francis Deng,[20] although he drew from earlier sources.[21] Most famously, the concept was framed in the work of the Canadian convened International

[11] By focusing on these three crimes, the author does not mean to exclude or ignore that other crimes are also protected at the level of *jus cogens*. For example, the prohibition against the 'use of force' contrary to the UN Charter is a *jus cogens* norm. See *Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v US)* [1986] Merits, Judgment (ICJ Reports 14) para 190 (27 June) (citing the ILC's work and the views of states). The ILC writes that 'those peremptory norms that are clearly accepted and recognized include the prohibitions of aggression, genocide, slavery, racial discrimination, crimes against humanity and torture, and the right to self-determination'. Int'l L. Comm'n, Draft Articles on the Responsibility of States for Internationally Wrongful Acts, with Commentaries (adopted), art 26, UN Doc A/56/10 (2001) [hereinafter, 'ARSIWA].

[12] In the ARSIWA commentaries, the ILC refers to peremptory norms as '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'. ARSIWA, fn 11, p 112.

[13] 'Under the so-called persistent objector rule, states may opt out of an emerging [customary international law] rule by objecting to it as it develops'. Jeffrey L. Dunoff, Monika Hakimi, Steven R. Ratner and David Wippman, *International Law: Norms, Actors, Process, A Problem-Oriented Approach* (5th edn, Wolters Kluwer 2020) 64.

[14] Convention on the Prevention and Punishment of the Crime of Genocide (9 December 1948) 78 UNTS 277 ('Genocide Convention').

[15] Geneva Convention I for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (12 August 1949) 75 UNTS 31; Geneva Convention II for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (12 August 1949) 75 UNTS 85; Geneva Convention III Relative to the Treatment of Prisoners of War (12 August 1949) 75 UNTS 135; Geneva Convention IV Relative to the Protection of Civilian Persons in Time of War (12 August 1949) 75 UNTS 287 [collectively hereinafter, '1949 Geneva Conventions'].

[16] ARSIWA, fn 11, art 26 (including genocide as a peremptory norm); Commentary to art 40 (including basic rules of international humanitarian law as peremptory norms). That the current article does not encompass the crime of aggression is in no way intended to minimize its significance, nor the applicability of some of the same arguments as to it. *See* IMT, Judgment (1 October 1946) in The Trial of German Major War Criminals, Proceedings of the International Military Tribunal sitting at Nuremberg, Germany, Part 22, at 421 (22 August 1946 to 1 October 1946) (crimes against peace are 'the supreme international crime differing only from other war crimes in that it contains within itself the accumulated evil of the whole').

[17] ARSIWA, fn11, art 26 (including crimes against humanity as a peremptory norm).

[18] For the draft crimes against humanity convention, see Int'l L. Comm'n, Crimes Against Humanity, Texts and Titles of the Draft Preamble, the Draft Articles and the Draft Annex Provisionally Adopted by the Drafting Committee on Second Reading Prevention and Punishment of Crimes Against Humanity (15 May 2019) UN Doc A/CN.4/L.935 <http://legal.un.org/docs/?symbol=A/CN.4/L.935>. For discussion of where negotiations stand, see Leila Sadat and Akila Radhakrishnan, 'Crimes Against Humanity: Little Progress on Treaty as UN Legal Committee Concludes its Work' (7 December 2021) <Crimes Against Humanity: Little Progress on Treaty as UN Legal Committee Concludes its Work — Leila Nadya Sadat (leilasadat.com).>

[19] *See* Jennifer Trahan, 'Aggression and the Veto' (Opinio Juris 28 February 2022) <Aggression and the Veto – Opinio Juris>; see also Trahan, fn 2.

[20] Louise Arbour traces Francis Deng and Roberta Cohen as developing already in 1996 the first tentative formulations of what became R2P. *See* Louise Arbour, *'The Responsibility to Protect as a Duty of Care in International Law and Practice'* [2008] 34(3) Rev Intl Studies 445, 447, citing Roberta Cohen and Francis M. Deng, 'Normative Framework of Sovereignty' in Francis M. Deng et al., *Sovereignty as Responsibility: Conflict Management in Africa* (Brookings Institution Press, 1996).

[21] Oona Hathaway, et al. explain: 'The concept is often traced to Francis Deng, but Deng did not purport to be creating a new concept; rather, he viewed "sovereignty as responsibility" as a concept which, though not universally accepted, "[was] becoming increasingly recognized as the centerpiece of sovereignty"'. Oona A. Hathaway, Julia Brower, Ryan Liss, Tina Thomas and Jacob Victor, 'Consent-Based Humanitarian Intervention: Giving Sovereign Responsibility Back to the Sovereign' [2013] 46 Cornell Intl LJ 499, 539 (n 236) also citing Luke Glanville, 'The Antecedents of "Sovereignty as Responsivity"' [2011] 17 Eur J Intl Relations 233, 237–40 (arguing that the notion that sovereigns have some responsibility to their citizens has been around since at least the 16th century); see also Anne

Commission on Intervention and State Sovereignty in their 2002 report.[22] 'At its core, R2P provides that a sovereign state has a duty to protect its own populations, and when it is either unable or unwilling to do so, that responsibility falls on the broader international community'.[23]

The Secretary-General has endorsed R2P in a series of reports, including a 2004 report entitled *U.N. Secretary-General's High-Level Panel on Threats, Challenges and Change.*[24] The 2004 R2P Report 'endorses the emerging norm that there is a collective international responsibility to protect . . . in the event of genocide and other large scale killing, ethnic cleansing or serious violations of international humanitarian law which sovereign Governments have proved powerless or unwilling to prevent'.[25]

By 2005, in the World Summit Outcome Document,[26] the leaders of all UN Member States agreed that:

> *Each individual State has the responsibility to protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity. This responsibility entails the prevention of such crimes, including their incitement, through appropriate and necessary means. We accept that responsibility and will act in accordance with it. The international community should, as appropriate, encourage and help States to exercise this responsibility . . . .* [27]

The text goes on to express a commitment 'to take collective action, in a timely and decisive manner, through the Security Council, in accordance with the Charter', in such situations.[28]

The notion of R2P further evolved in the 2009 Secretary General's report, which focused on three pillars of responsibility.[29] Pillar I emphasizes that states have the primary responsibility to protect their own populations 'from genocide, war crimes, ethnic cleansing and crimes against humanity, and from their incitement'.[30] Pillar II focuses on the 'commitment of the international community to assist States in meeting those obligation'.[31] Pillar III stresses 'the responsibility of Member States to respond collectively in a timely and decisive manner when a State is manifestly failing to provide such protection'.[32]

Thus, there has been considerable evolution toward a recognition of the duties of 'sovereigns' (ie, governments)—that with rights, come responsibilities, and these, *at the very minimum,* include not committing genocide, crimes against humanity, or war crimes against their own citizens.

Yet, the doctrine of R2P, presently, is beset by at least three impediments: (1) it is sometimes derided as merely 'soft law', and, indeed, not all of R2P necessarily constitutes 'hard law'; (2) it has not permeated all areas of international practice, such as the behavior of at least some[33] of the permanent members of the UN Security Council; and (3) largely, as a result, there has been uneven application of R2P in practice.

Peters, 'Humanity as the A and Ω of Sovereignty' [2009] 20 EJIL 513, 525–526 (n 50) (tracing 'sovereignty as responsibility', going back to Hobbes, Locke, and the 1929 arbitral award in the Palmas case).

[22] International Commission on Intervention and State Sovereignty (ICISS), 'The Responsibility to Protect, Report of the International Commission on Intervention and State Sovereignty' (International Development Research Centre, Ottawa, December 2001).

[23] Hathaway, et al., fn 21, p 530.

[24] Report of the Secretary-General's High-Level Panel on Threats, Challenges and Change, A More Secure World: Our Shared Responsibility, UN Doc A/59/565 (2 December 2004) [hereinafter, '2004 R2P Report'].

[25] ibid, para 203. 'Ethnic cleansing' is not a defined term under international criminal law. The term's use may have been motivated to propel the international community into action where it is unclear if genocide is occurring or not.

[26] GA Res 60/1, 2005 World Summit Outcome Document (24 October 2005).

[27] ibid, para 138 (emphasis added).

[28] ibid, para 139.

[29] UN Secretary-General, 'Implementing the Responsibility to Protect: Rep of the Secretary-General', UN Doc A/63/677 (12 January 2009) <https://www.un.org/ruleoflaw/files/SG_reportA_63_677_en.pdf>.

[30] ibid, para 11(a).

[31] ibid, para 11(b).

[32] ibid, para 11(c).

[33] It is significant that France and the United Kingdom have endorsed 'voluntary veto restraint'—that is, a pledge not to use their veto when there is ongoing genocide, crimes against humanity, or war crimes. Specifically, France is co-sponsor of the 'French-Mexican initiative' on that topic (which 105 states have endorsed), and both France and the UK are parties to the 'ACT Code of Conduct' (which 122 states have endorsed), which embodies a similar commitment. See Political Declaration on Suspension of Veto Powers in Cases of

The 'Hard Law" Legal Obligations Underlying R2P

R2P is periodically derided as merely representing aspirations or 'soft law',[34] but not creating 'hard law', ie, binding, legal obligations.[35] The author concedes that R2P, in itself, probably has *not* yet created hard law legal obligations; however, much of R2P is *based on* hard law legal obligations. These can be said to underlie R2P, so that, as will be explained below, at least some of the obligations contained within R2P—including some of the most significant obligations—are, in fact, ones that exist as a matter of binding law.

When the ICISS issued their report, it was in the form of an expert report,[36] not purporting to represent *lex lata* (existing law). When the Secretary-General issues reports on R2P, these again do not necessarily purport to embody nor do they create hard law. Even the World Summit Outcome Document, as a resolution of the General Assembly, while agreed to by the heads of all UN Member States, does not create hard law legal obligations.[37]

Yet, to dismiss R2P as merely 'soft law' ignores the significant 'hard law' obligations that underlie it. These include the obligations to 'prevent' genocide contained in the Genocide Convention,[38] the obligation to 'ensure respect for' the Geneva Conventions contained the in 1949 Geneva Conventions[39] and two of their optional protocols,[40] and the obligation to prevent crimes against humanity, found, until there is a treaty adopted, within customary international law.[41] There needs to be greater recognition of the extent of the 'hard law' underlying R2P and *enforcement* of such obligations as binding legal commitments.

The Obligation To 'Prevent' Genocide

Mass Atrocity, 70th General Assembly of the United Nations, Political Statement on the Suspension of the Veto in Case of Mass Atrocities, Presented by France and Mexico, open to signature to the members of the United Nations, <Political Declaration on Suspension of Veto Powers in Cases of Mass Atrocities - Global Centre for the Responsibility to Protect (globalr2p.org)> [hereinafter, 'French-Mexican Initiative']; ACT Code of Conduct, GA Res A/70/621–S/2015/978, Ann. I to the letter dated (14 December 2015) from the Permanent Representative of Liechtenstein to the United Nations Addressed to the Secretary-General, Code of Conduct Regarding Security Council Action Against Genocide, Crimes Against Humanity or War Crimes (2015) [hereinafter, 'ACT Code of Conduct'].

[34] For criticism that norms are neither solely "hard" nor "soft," but lie in a spectrum in between, see, e.g., Michael Reisman, 'The Concept and Functions of Soft Law in International Politics' in E. Bello & Bola Ajibola (eds), *Essays in Honor of Judge Taslim Olawale Elias* (1992) and Kenneth Abbott, 'The Many Faces of International Legalization' [1998] 92 Proc Am Socy Intl L 57, 59, as cited in Steven Ratner, 'Does International Law Matter in Preventing Ethnic Conflict?' [2000] 32 NYU J Intl L & Pol 591, 613. This author, however, believes it is extremely significant to differentiate between 'hard' law and 'soft' law and will utilize that terminology.

[35] See, eg, Jennifer M Welsh and Maria Banda, 'International Law and the Responsibility to Protect: Clarifying or Expanding States' Responsibilities?' [2010] 2 Glob Responsibility to Protect 3, 213 (arguing that R2P is soft law); William W Burke-White, 'Adoption of the Responsibility to Protect' in Jared Genser & Irwin Cotler (eds), *The Responsibility to Protect* 34 (OUP 2012) (arguing that R2P is 'best understood as a norm of international conduct' and that '[t]he trajectory of the Responsibility to Protect over the past decade is strongly suggestive of its development toward a rule of international law, but further political development and legal process will be required'); Hitoshi Nasu, 'The UN Security Council's Responsibility and the "Responsibility to Protect"' [2011] 15 Max Planck YB of UN L 377 ('The responsibility to protect has been widely considered a policy agenda, and not a legally binding commitment by UN Member States'.).

[36] See: fn 22.

[37] 'Under Article 10 of the U.N. Charter, the General Assembly only issues "recommendation", which have long appeared to be texts having no binding force and carrying no obligations for the Member States . . .', but noting that General Assembly resolutions may have significant influence and may embody either *de lege ferenda* or customary international law. *Ad Hoc Arbitration*, Award on the Merits in Dispute Between Texaco Overseas Petroleum Company/ California Asiatic Oil Company and the Government of the Libyan Arab Republic (1977) para 83. See also *Case Concerning SEDOC, Inc v National Iranian Oil Company and the Islamic Republic of Iran* [1986] 10 Iran-US Ct Rep 180, Interlocutory Award (similar).

[38] Genocide Convention, fn 14, art 1.

[39] Geneva Convention 1949, fn15, Common, art 1.

[40] The obligation is also found in Protocols I and III. See Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (8 June 1977) ('Protocol I'); Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Adoption of an Additional Distinctive Emblem (8 December 2005) ('Protocol III').

[41] See 'The Obligation to Prevent Crimes Against Humanity' below.

Article 1 of the Genocide Convention contains the obligation to 'prevent' genocide. It states: 'The Contracting Parties confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake *to prevent* and to punish'.[42]

The obligation to 'prevent' genocide had not received significant judicial attention[43] until it was the focus of the International Court of Justice ('ICJ) in the *Bosnia v Serbia* case.[44] There, the Court applied the obligation to 'prevent' genocide, finding that Serbia failed to 'prevent' genocide within Bosnia-Herzegovina, particularly, in an around Srebrenica.[45] Over 8,300 Bosnian Muslim men and boys were systematically murdered there by the Army of the Republika Srpska ('VRS')[46] in a ten-day period commencing 11 July 2005.[47]

Seminally, the ICJ held that all parties to the Genocide Convention share this obligation to 'prevent' genocide, which is an obligation of 'conduct', for a state to exercise 'due diligence' and do all that it lawfully can do to 'prevent' genocide.[48] Thus, according to the ICJ, what is required is for states to 'employ all means reasonably available' to prevent genocide, based on their 'capacity to influence', which is judged by factors including 'the strength of the political links, as well as links of all other kinds, between the authorities of that State and the main actors in the events'.[49] The ICJ added that '[e]ven if and when . . . organs [of the UN] have been called upon, this does not mean that the States parties to the Convention are relieved of the obligation to take such action as they can to prevent genocide from occurring, while respecting the United Nations Charter and any decisions that may have been taken by its competent organs'.[50]

Marko Milanović, for example, explains the different levels of effort required of states, depending on their relative power:

> *A minor state could probably be considered to have only the obligation to cooperate with other states, most of all diplomatically, in attempting to put pressure on a genocidal actor. . . . A great power, on the other hand, would have to be much more active in order to discharge this obligation, while a state which is in one way or another directly involved in the events, for instance by proving assistance and support to the genocidal actors, as Serbia was in Bosnia, would have the greatest obligation yet.*[51]

John Heieck writes specifically regarding the permanent members of the Security Council: 'These five states must do everything within their collective and individual power to prevent an imminent genocide from occurring and to suppress an active genocide from continuing . . .'.[52]

The ICJ additionally held that the obligation to 'prevent' genocide is an 'extraterritorial' one. That is, a State Party is not only obliged to 'prevent' genocide within its own territory, but within the territory of other states.[53]

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[42] Genocide Convention, fn 14, art 1 (emphasis added).

[43] William Schabas wrote: 'While the final Convention has much to say about punishment of genocide, there is little to suggest what prevention of genocide really means'. In fact, according to Schabas, 'nothing in the debates about [ie the *travaux préparatoires* of] article I provides the slightest clue as to the scope of the obligation to prevent'. John Heieck, *A Duty to Prevent Genocide: Due Diligence Obligations among the P5* (Edward Elgar 2018) 14, quoting William Schabas, *Genocide in International Law: The Crime of Crimes* (2nd edn, CUP 2009) 81.

[44] *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia & Herzegovina v. Serbia and Montenegro)* [2007] Judgment ICJ Rep 43 (26 February) [hereinafter, *Bosnia v Serbia* case].

[45] ibid 438.

[46] The Republika Srpska is the Serb-controlled entity within the State of Bosnia-Herzegovina.

[47] Genocide was first adjudicated by the International Criminal Tribunal for the former Yugoslavia ('ICTY') in the *Krstic* case. *Prosecutor v Krstić* [2001] Case No. IT-98-33 (Trial Chamber) (August 2) (genocide conviction); *Prosecutor v Krstić* [2004] Case No. IT-98-33-A (Appeals Chamber) (April 19) (reducing conviction to aiding and abetting).

[48] *Bosnia v Serbia* case, fn 44, para 430.

[49] ibid, para 430.

[50] ibid, para 427.

[51] Marko Milanović, 'State Responsibility for Genocide: A Follow Up' [2007] 18 Eur J Intl L 669, 686.

[52] Heieck, fn 43, p 13.

[53] The obligation each state . . . has to prevent and to punish the crime of genocide is not territorially limited by the Convention'. *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia & Herzegovina v Yugoslavia (Serbia and Montenegro))* [1996] Preliminary Objections, Judgment para 31 (July 11). See also Claus Kreβ, 'The State Conduct Element' in Claus Kreβ and Stefan Barriga (eds), *The Crime of Aggression A Commentary* (CUP 2017) 491 ('In the *Genocide*

That was, of course, the situation that was before the Court, in that Serbia (then part of the Federal Republic of Yugoslavia ('FRY')), by the time of the 1995 genocide, was an independent state from Bosnia-Herzegovina.[54] Marko Milanović thus writes: 'The ICJ has made it clear that every state in the world has an obligation to prevent . . . genocide, albeit to a greater or to a lesser extent . . .';[55] 'the Court makes the obligation to prevent genocide a truly global duty of every state to do what it reasonably can'.[56] The failure to prevent and punish the crime of genocide is additionally alleged in the *Gambia et al v Myanmar* case,[57] currently pending before the ICJ.

There is also authority that the obligation to 'prevent' genocide exists as a matter of customary international law. For example, Guénaël Mettraux writes that '[t]he duties to prevent and punish genocide are now part of customary international law and are therefore binding even without any conventional obligation'.[58] Some moreover suggest that the obligation rises to the level of *jus cogens.*[59]

The Obligation to 'Ensure Respect for' the Geneva Conventions

A similar legal obligation is found in Common Article 1 to the 1949 Geneva Conventions and certain of their Optional Protocols. Specifically, Common Article 1 states that '[t]he High Contracting Parties undertake to respect and *to ensure respect* for the present Convention *in all circumstances*'.[60] This creates an obligation for states both to 'respect; Convention provisions themselves, and to 'ensure' Convention provisions are respected by other states.[61] The 1949 Geneva Conventions contain a large number of obligation under international humanitarian law ('IHL'), including the obligation not to commit war crimes known as 'grave breaches' (war crimes committed during international armed conflict)[62] and the war crimes enumerated in Common Article 3 (war crimes committed during non-international armed conflict).[63]

The prevailing view, espoused by the ICRC, is that Common Article 1 works like the Genocide Convention[64] and also requires due diligence.[65] The ICRC explains Common Article 1 does not impose 'an obligation to reach a specific result, but rather an "obligation of means" to take *all possible appropriate measures* in an attempt to prevent or end violations of IHL'.[66] The ICRC Commentaries to the Geneva Conventions state that that language 'covers *everything* a state can do to prevent the commission, or the repetition, of acts contrary to the

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case, the ICJ recognized the duty of states to prevent genocide even beyond their own borders'.); Jan Wouters, 'The Obligation to Prosecute International Law Crimes' [2005] 32 Collegium 8 (similar).

[54] See 'Serbia-Montenegro, Federal Republic of Yugoslavia (FRY)' (*Global Security*), <Serbia-Montenegro / Federal Republic of Yugoslavia (FRY) (globalsecurity.org)> (disintegration of the Socialist Federal Republic of Yugoslavia occurred 27 April 1992; the US declined to recognize the FRY).

[55] Milanović, fn 51, p 687.

[56] ibid 691.

[57] Application of the Convention on the Prevention and Punishment of the Crime of Genocide: *Gambia v Myanmar* [2019] Application Instituting Proceedings and Request for Indication of Provisional Measures, paras 2, 23, 111 (November 11).

[58] Guénaël Mettraux, International Crimes: Law and Practice, vol I (OUP 2019) 67.

[59] John Heieck, 'A Duty to Prevent Genocide—Due Diligence Obligations among the P5 (Part Two)' (Opinio Juris 12 October 2018), <http://opiniojuris.org/2018/12/10/symposium-a-duty-to-prevent-genocide-due-diligence-obligations-among-the-p5-part-two>.

[60] [1949] Geneva Conventions, fn 15, Common, art 1 (emphasis added).

[61] Oona Hathaway and Zachary Manfredi explain:

> In the new [ICRC] commentary [2016] on Common Article 1, the ICRC explains that duties 'to respect' are distinguishable from duties 'to ensure respect'. The former applies directly to states and their organs, and require[s] that they not directly violate the laws of armed conflict. The duty 'to ensure respect', however, creates independent obligation on states to ensure *other* states and non-state actors do not violate their own duties under international law.

Oona Hathaway and Zachary Manfredi, 'The State Department Adviser Signals a Middle Road on Common Article 1' (Just Security 12 April 2016), <https://www.justsecurity.org/ 30560/state-department- adviser-signals-middle-road- common-article-1>

[62] International Committee for the Red Cross (ICRC), *Grave Breaches Specified in the 1949 Geneva Conventions and in Additional Protocol I of 1977* <https://www.icrc.org/eng/resources/documents/misc/57jp2a.htm>

[63] 1949 Geneva Conventions, fn15, Common, art 3.

[64] ICRC, *Updated Commentary on the First Geneva Convention* (22 March 2016) art 1, para 120.

[65] ibid, art 1, para 153.

[66] *Increasing Respect for International Humanitarian Law in Non-international Armed Conflict* (M. Mack (ed), ICRC 2008) 10 (emphasis added).

convention[s]'.[67] The 'duty to ensure respect' falls on all states even if they are not a party to an armed conflict. This creates a *direct* obligation for states parties to 'ensure' that other states are not breaching Geneva Convention obligations.[68] A similar obligation is created under Additional Protocols I and III, which have the same Common Article 1.[69]

The ICJ has additionally recognized that the obligation to 'ensure respect for' Convention provisions creates 'external' obligations. Namely, Common Article 1 creates an obligation for States Parties not only to ensure that the war crimes (and IHL violations) covered in the Conventions are not committed within a State Party's own territory (ie, the state must 'respect' convention provisions itself), but also must "ensure respect for" Convention provisions by ensuring such war crimes (and IHL violations) are not committed in the territories of other states.[70]

The Obligation to Prevent Crimes Against Humanity

As mentioned, there is as of yet no parallel convention on crimes against humanity, although the International Law Commission ('ILC') has drafted one[71] and its adoption is being debated before the Sixth Committee of the UN General Assembly.[72] The draft preamble to the Convention twice affirms the importance of 'preventing' crimes against humanity,[73] and the text reflects the obligation as well. Article 3.2 states: 'Each State undertakes to prevent and to punish crimes against humanity, which are crimes under international law, whether or not committed in time of armed conflict'.[74] In explaining its drafting, the ILC wrote that '[t]he fifth preambular paragraph focuses upon . . . [prevention]; it foreshadows obligations that appear in . . . the present draft . . . *by affirming that crimes against humanity must be prevented in conformity with international law*'.[75] Charles Jalloh, who serves on the ILC, explains that '[t]he autonomous duty to prevent crimes against humanity is also consistent

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[67] Knut Dörmann and Jose Serralvo, 'Common Article 1 to the Geneva Conventions and the Obligation to Prevent International Humanitarian Law Violations' (2014) 96 Intl Rev Red Cross 707, 731 (n 141), citing Commentary: I Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field 367 (Jean Picted (ed), 1952) (emphasis added).

[68] See Hathaway and Manfredi, fn 61.

[69] See Additional Protocol I, fn 40, art 1; Additional Protocol III, fn 40, art 1. Additional Protocol II is lacking a parallel Common Article 1. See Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (8 June 1977) ('Protocol II').

[70] See, eg, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Wall Case) [2004] Advisory Opinion, 2004 ICJ Rep 136, para 158 (9 July) ('The Court would also emphasize that Article 1 of the Fourth Geneva Convention, a provision common to the four Geneva Conventions, provides that "The High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances". It follows from that provision that every State party to that Convention, whether or not it is a party to a specific conflict, is under an obligation to ensure that the requirements of the instruments in question are complied with'.); see also *Military and Paramilitary Activities in and Against Nicaragua*, fn 11, para 220 ('The Court considers that there is an obligation on the United States Government, in the terms of Article 1 of the Geneva Conventions, to "respect" the Conventions and even "to ensure respect" for them "in all circumstances", since such an obligation does not derive only from the Conventions themselves, but from the general principles of humanitarian law to which the Conventions merely give specific expression'.).

[71] See Draft Crimes Against Humanity Convention, fn 18.

[72] 'The Sixth Committee is the primary forum for the consideration of legal questions in the General Assembly. All of the United Nations Member States are entitled to representation on the Sixth Committee as one of the main committees of the General Assembly'. United Nations, General Assembly of the United Nations, Main Committees, 6th Committee (Legal), Sixth Committee (Legal) - UN General Assembly.

[73] The Convention is:

> *Affirming* that crimes against humanity, which are among the most serious crimes of concern to the international community as a whole, must be prevented in conformity with international law, [and]
>
> *Determined* to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes[.]

Draft Crimes Against Humanity Convention, fn 18.

[74] ibid, art 3.2. Draft Article 4 additionally states: 'Each State undertakes to prevent crimes against humanity, in conformity with international law, through: (a) effective legislative, administrative, judicial or other appropriate preventive measures in any territory under its jurisdiction; and (b) cooperation with other States, relevant intergovernmental organizations, and, as appropriate, other organizations'. ibid, art 4.

[75] ILC, Draft articles on Prevention and Punishment of Crimes Against Humanity, with Commentaries 2019, para 6, <Draft articles on Prevention and punishment of crimes against humanity, with commentaries, 2019> (emphasis added).

with the practice of States in concluding numerous . . . treaties . . . that feature a duty to take steps to prevent particular crimes such as terrorism, human trafficking and hostage taking'.[76]

Scholars additionally affirm that there is an obligation to 'prevent' crimes against humanity as a matter of customary international law, just as there is an obligation to prevent genocide and war crimes.[77]

Recognizing The 'Hard Law' Underlying R2P

While R2P has broader aspects, such as the 'obligation to rebuild'[78] (some of which is also found as 'hard law' in the legal obligations of an Occupying Power),[79] at least the obligation to 'prevent' genocide, crimes against humanity, and war crimes, as demonstrated above, is a matter of 'hard law'.[80] This is particularly clear for the States Parties to the Genocide Convention (152 States Parties),[81] the 1949 Geneva Conventions (196 States Parties),[82] Additional Protocol I (174 States Parties),[83] and Additional Protocol III (79 States Parties),[84] but also, more broadly, as a matter of customary international law.[85] Significantly, all permanent members of the UN Security Council are parties to the Genocide Convention and at least the 1949 Geneva Conventions.[86]

Thus, States Parties to these conventions (and States more broadly as a matter of customary international law) are required to use their 'best efforts' to prevent genocide, crimes against humanity, and war crimes,[87] as the obligation is one 'of conduct and not one of result'[88]—ie, there is no obligation to guarantee that the crimes do

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[76] Charles C Jalloh, 'The International Law Commission's First Draft Convention on Crimes Against Humanity: Codification, Progressive Development, or Both?' [2020] 52 Case Western Reserve J Intl L 331, 361; see also Sean D Murphy, 'Codifying the Obligations of States Relating to the Prevention of Atrocities' [2020] 52 Case Western Reserve J Intl L 27, 30–33, 34–35 (listing treaties with obligations to 'prevent' and tracing human rights treaties that have similar obligations). For more on the obligation to 'prevent' crimes against humanity and the draft crimes against humanity treaty, see William A. Schabas, 'Prevention of Crimes Against Humanity'[2018] 16 J Intl Criminal Justice 705; Maria Luisa Piqué, 'Beyond Territory, Jurisdiction, and Control: Towards a Comprehensive Obligation to Prevent Crimes Against Humanity' 165 (FICHL Publication Series No 20, 2014); Murphy, fn 76, p 35–52 (2020); Travis Weber, 'The Obligation to Prevent in the Proposed Convention Examined in Light of the Obligation to Prevent in the Genocide Convention' 173 (FICHL Publication Series No 18 2014). For discussion of the ILC's drafting process, see Jalloh, fn 76.

[77] See, eg, Marko Milanović, fn 51, p 571 ('States have a duty to prevent and punish genocide in exactly the same way as they have to prevent and punish crimes against humanity or other massive human rights violation'.).

[78] '[T]he [ICISS] Commission identified a responsibility to prevent, a responsibility to react and a responsibility to rebuild'. Secretary-General's Report 2009, fn 29, para 9.

[79] An Occupying Power has various obligations as a 'caretaker' government to protect the population under occupation. For discussion of the law governing Occupying Powers, see, eg, Hamada Zahawi, 'Redefining the Laws of Occupation in the Wake of Operation Iraqi "Freedom"' [2007] 95 California L Rev 2295.

[80] See 'The Obligation to "Prevent" Genocide; 'The Obligation to "Ensure Respect for" the Geneva Conventions'; 'The Obligation to Prevent Crimes Against Humanity' above.

[81] United Nations Treaty Collection, as of 22 September 2019, <https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-1&chapter=4&clang=_en>

[82] International Committee for the Red Cross (ICRC), Treaties, States Parties, and Commentaries, Geneva Conventions of 1949, <Treaties, States parties, and Commentaries - Geneva Conventions of 1949 and Additional Protocols, and their Commentaries (icrc.org)>.

[83] International Committee for the Red Cross (ICRC), Treaties, States Parties, and Commentaries, Additional Protocol I, <Treaties, States parties, and Commentaries - Additional Protocol (I) to the Geneva Conventions, 1977 (icrc.org)>

[84] International Committee for the Red Cross (ICRC), Treaties, States Parties, and Commentaries, Additional Protocol III, <Treaties, States parties, and Commentaries - Additional Protocol (III) to the Geneva Conventions, 2005 (icrc.org)>

[85] See text accompanying fn 58, 75–77.

[86] See fn 81 (parties to the Genocide Convention); Treaties, States Parties, and Commentaries, Geneva Conventions of 1949, note 82 above. Among the permanent members, the US is not a party to API and Russia has withdrawn from API; Russia and China are not parties to APIII. See fn 83–84.

[87] The author is focusing on these three crimes, but notes that there is an obligation to 'prevent' other crimes as well. See, eg, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (10 December 1984) 1465 UNTS 85 [hereinafter, 'Torture Convention'] Art 2.1; see also Jalloh, fn 76, p 361 (conventions containing the obligation to 'prevent').

[88] The ICJ articulated the standard of 'due diligence' that is required to comply with the obligation to 'prevent' genocide in Article 1 of the Convention:

> [I]t is clear that *the obligation in question is one of conduct and not one of result*, in the sense that a State cannot be under an obligation to succeed, whatever the circumstances, in preventing the commission of genocide: the obligation of States parties is rather to *employ all means reasonably available to them,* so as to prevent genocide so far as possible.

not occur; rather, the obligation is for state to use 'due diligence', which requires using 'all means reasonably available', based on a state's 'capacity to influence'.[89] Furthermore, vis-à-vis at least the crime of genocide and at least the war crimes contained in the 1949 Geneva Conventions (and Additional Protocols I and III for States Parties to them), the obligation includes an obligation to 'prevent' or 'ensure' the crimes are not committed in *another* state.[90] There is no reason that the obligation to 'prevent' crimes against humanity should be construed any differently, nor the obligation to prevent additional war crimes.[91]

However, what is required, according to the ICJ in the *Bosnia v Serbia* case, is what a state can lawfully do.[92] Thus, regardless of whether one can otherwise argue for the legality of 'humanitarian intervention',[93] the ICJ, at least in that case, is fairly clearly *not* endorsing the doctrine as part of the obligation to 'prevent' genocide. While a contrary approach was suggested in at least one early formulation of R2P—the ICISS report[94]—R2P, as currently understood,[95] does not create an obligation to, nor allowance of, unilateral or multilateral intervention that is not authorized by the UN Security Council.[96]

A Reconceptualization of the Veto Power in Line with Existing Legal Obligations

One of the difficulties with R2P has most certainly been its uneven implementation. Thus, while the intervention authorized by the UN Security Council in 2011 into Libya was described as an exercise of R2P,[97] that intervention was not particularly successful, leaving behind an unstable state with different factions vying for power.[98] When it comes to the situation in Syria and the vast number of crimes perpetrated during the Syrian civil war,[99] application of R2P seemed nowhere to be found. As will be detailed below, at the Security Council, attempts to pass resolutions trying to block the continued commission of atrocity crimes by the Assad regime and other

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Bosnia v Serbia case, fn 44, para 430 (emphasis added).

[89] ibid.

[90] fn 53–56.

[91] That is, a state should also work to 'prevent' war crimes that are not ones covered by the 1949 Geneva Conventions or Optional Protocols to which the state is a party. World Summit Outcome, fn 26, para 138.

[92] *Bosnia v Serbia* case, fn 44, p 430 ('it is clear that every State may only act within the limits permitted by international law').

[93] For a discussion of this topic, see Jennifer Trahan, *Existing Legal Limits to Security Council Veto Power in the Face of Atrocity Crimes* (2020) ch 2 (Acting in the Face of Atrocity Crimes – Humanitarian Intervention and the Responsibility to Protect).

[94] The ICISS Report states that while the decision to intervene *should* be made by the Security Council, if the Council 'fails to discharge its responsibility to protect in conscience-shocking situations crying out for action, concerned states may not rule out other means to meet the gravity and urgency of that situation'. ICISS Report, fn 22, XIII, para 3(F). This formulation would thus leave an opening for 'humanitarian intervention' when the Security Council is failing to act in the face of mass atrocities. One does not see similar language in later R2P reports, leading to the conclusion that the door opened to humanitarian intervention by the ICISS report is now closed—at least as it relates to R2P.

[95] One sees this shift already in the 2004 R2P Report, which makes clear that military intervention, which is to be exercised as a last resort, is only 'exercisable by the Security Council'. [2004] R2P Report, fn 24, para 203

[96] One can, however, argue that a *bona fide* humanitarian intervention at least falls into a 'grey area' of legality—perhaps not fully legal, but yet sometimes imperative. For discussion, see Jennifer Trahan, 'Defining the "Grey Area" Where Humanitarian Intervention May Not Be Fully Legal, But Is Not the Crime of Aggression' [2015] 2 J on the Use of Force and Intl L 42 (including discussion of what is a *bona fide* humanitarian intervention). For discussion of the extent to which humanitarian intervention exists subsequent to the development of R2P, see Trahan, fn 93, at ch 2.3. For the UK's position on humanitarian intervention, see UK Prime Minister's Office, Chemical Weapon Use by Syrian Regime: UK Government Legal Position, policy paper (29 August 2013), <www.gov.uk/government/publications/chemical-weapon-use-by-syrian-regime-uk-government-legal-position/chemical-weapon-use-by-syrian-regime-uk-government-legal-position-html-version>; Policy Paper: Syria Action – UK Government Legal Position (14 April 2018), <https://www.gov.uk/government/publications/syria-action-uk-government-legal-position/syria-action-uk-government-legal-position>.

[97] Catherine Powell, 'Libya: A Multilateral Constitutional Moment?' [2010] 106 American J Intl L 298, 315 ('The Libya intervention marked the first time that the Security Council invoked [R2P] to approve the use of force by U.N. member states'.).; S/RES/1973 (17 March 2011) ('[*r*]*eiterating* the responsibility of the Libyan authorities to protect the Libyan population . . .'.).

[98] 'Libya has effectively been two countries since 2015, with different factions vying for control after the civil war that followed Gaddafi's downfall'. Kevin Allison, 'Libya: When a Strongman Looks Weak', (*Libya Tribune* 5 May 2018) <Libya: When a strongman looks weak – Libya Tribune (minbarlibya.org)>.

[99] There have been years of atrocity crimes committed in Syria, predominantly at the hands of the regime of President Bashar al-Assad and the forces of the so-called "Islamic State of Iraq and the Levant" ('ISIL'), as well as other groups. These crimes have been well-documented by the Independent International Commission of Inquiry on the Syrian Arab Republic. For the work of the Commission, see <https://www.ohchr.org/en/ hrbodies/hrc/iicisyria/pages/independentinternationalcommission.aspx>.

perpetrators in Syria were blocked by the use of the veto power of certain permanent members.[100] As also explored below, R2P is additionally being, and has been, thwarted at the Security Council through the use of veto threats. Veto threats can play an analogous role, stopping the Security Council just as effectively as the use of an actual veto. Such threats have prevented the Council from taking any effective action when it comes to the suspected genocides in Darfur, Myanmar, and China (against the Uyghurs).[101]

Veto Use and Veto Threats In The Face Of Suspected Genocide

As demonstrated above, there exists a 'hard law' (ie, binding) obligation to 'prevent' genocide. Yet, faced with a draft Security Council resolutions that already in 2007 would have condemned the crimes being committed against the Rohingya and other ethnic groups within Myanmar, two permanent members vetoed the resolution.[102] The resolution would have called on 'the Government of Myanmar to cease military attacks against civilians in ethnic minority regions and in particular to put an end to the associated human rights and humanitarian law violations against persons belonging to ethnic nationalities, including widespread rape and other forms of sexual violence carried out by members of the armed forces'.[103]

Yet, the Independent International Fact-Finding Mission on Myanmar deployed by the UN Human Rights Council has concluded that credible evidence exists that genocide (as well as war crimes and crimes against humanity) have been committed in Myanmar particularly against members of the Rohingya ethnic group.[104] While the Fact-Finding Mission had not yet opined on the issue of genocide as of the date of the veto, it is relevant to note that the obligation to 'prevent' genocide is not triggered only when the crime is occurring (indeed, at that date, 'prevention' obviously comes too late), but rather, according to the ICJ in the *Bosnia v Serbia* case, is triggered by the 'serious risk' of the crime occurring.[105] Thus, the legal question would be whether as of the date of the veto there was a 'serious risk' of the crime's occurrence, a case that might be made given that there has been a Burmese military document entitled 'Rohingya extermination plan' since 1988.[106] The failure to condemn even the early onset of crimes against the Rohingya was a dangerous indication the Council would be unable to act later on, and may have been seen as a proverbial 'green light' to the perpetrators. The Council indeed failed to pass any later resolutions condemning the crimes or taking other action, even after the Fact-Finding Missions' report of credible evidence that genocide was occurring.

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[100] See: fn126-129, and accompanying text for discussion of the vetoes.

[101] See 'Veto Use and Veto Threats in the Face of Suspected Genocide' below.

[102] Draft Security Council Res S/2007/14 (12 January 2007) (vetoed by China and Russia), <http://www.un.org/en/ga/search/view_doc.asp?symbol=S/2007/14> (sponsored by the UK and US).

[103] *Bosnia v Serbia* case, fn 44, para 431.

[104] Report of the detailed findings of the Independent International Fact-Finding Mission on Myanmar, UN Doc A/HRC/39/CRP.2 (17 September 2018). See also Report of the Independent International Fact-Finding Mission on Myanmar, UN Doc A/HRC/42/50 (8 August 2019) <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G19/236/74/PDF/G1923674.pdf?OpenElement>

[105] See *Bosnia v Serbia* case, fn 44, para 431 ('A State's obligation to prevent, and the corresponding duty to act, arise at the instant that the State learns of, or should normally have learned of, the existence of a serious risk that genocide will be committed. From that moment onwards, if the State has available to it means likely to have a deterrent effect on those suspected of preparing genocide, or reasonably suspected of harbouring specific intent (*dolus specialis*), it is under a duty to make such use of these means . . .'.).

[106] Doug Bock Clark, 'Inside the Rohingya Refugee Camps, Traumatised Exiles Ask Why the World Won't Call the Humanitarian Crisis "Genocide"' (*Post Magazine*, 16 January 2018) (discussing the document), <https://www.scmp.com/magazines/post-magazine/long-reads/article/2128432/inside-rohingya-refugee-camps-traumatised-exiles>. See also Heieck, fn 43, p 154–55 (quoting Andreas Zimmermann) ('Responsibility under international law is incurred if a State, as a member of the [Security Council], manifestly fails to support or even delay possible [Security Council] measures aimed at preventing genocide, . . . which might have contributed to preventing such acts'.).

As to the crimes committed in Darfur, Sudan, in 2003–04 (the height of the killing)[107] and continuing to present,[108] these have been charged by the International Criminal Court ('ICC') as genocide.[109] Despite numerous indicia of ongoing genocide,[110] veto threats by a permanent member of the Security Council (China) were used to weaken the sanctions regime that the remainder of Security Council members were willing to impose.[111] That same permanent member then used veto threats to weaken the mandate of,[112] and delay the deployment of, peacekeepers to Darfur.[113] The joint United Nations-African Union Peacekeeping force later arrived, after the height of the killing was over.[114]

As to crimes against the Uyghurs and other Muslim groups within the Xinjiang province of China, there has never been a UN Security Council resolution condemning the crimes being committed, which, as mentioned, are believed to constitute genocide.[115] And, of course, given the veto power, it is exceedingly unlikely that there will be such condemnation, referral of the crimes to the ICC,[116] or the creation by the Security Council of an international[117] or hybrid[118] criminal tribunal to investigate and/or prosecute the crimes. The same can be said as to the crimes committed against the Rohingya in Myanmar—given the veto power, there has not been, and one can anticipate that there will not be, either a referral to the ICC, or creation of a hybrid or international criminal tribunal.[119]

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[107] For a chronological discussion of the crimes in Darfur, see Trahan, fn 93, ch 5.2; see also Eric Reeves, *A Long Day's Dying: Critical Moments in the Darfur Genocide* (Key Publishing House 2007); Eric Reeves, 'Compromising with Evil: An Archival History of Greater Sudan, 2007–2012', <http://www.compromisingwithevil.org>; Human Rights Watch, 'Darfur Destroyed: Ethnic Cleansing By Government and Militia Forces in Western Sudan' (2004) 6, <http://www.hrw.org/reports/2004/sudan0504/>; Human Rights Watch, 'Sudan, Darfur in Flames: Atrocities in Western Sudan' (2004) 8, <https://www.hrw.org/reports/2004/sudan0404/sudan0404.pdf>

[108] Human Rights Watch, 'Sudan: New Wave of Attacks in Darfur' (15 December 2021) <Sudan: New Wave of Attacks in Darfur | Human Rights Watch (hrw.org).>

[109] See Second Warrant of Arrest for Omar Hassan Ahmad Al Bashir, ICC-02/05-01/09-95 (12 July 2010).

[110] See Jennifer Trahan, 'Why the Killing in Darfur Is Genocide' (2008) 31 Fordham Intl L J 990 (compiling reports of the crimes occurring in 2003 and 2004 and detailing how they satisfied the elements of the crime of genocide). The International Commission of Inquiry on Darfur took the view that there was no policy to commit genocide, while finding 'that in some instances individuals, including Government officials, may commit acts with genocidal intent'. Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General Pursuant to Security Council Resolution 1564 of 18 September 2004 (25 January 2005) 4 <https://www.un.org/News/dh/sudan/com_inq_darfur.pdf>. Their finding makes little sense as either the *dolus specialis* (special mental state requirement of genocide) is met or not. Even their finding that Government officials may be acting with genocidal intent should have been enough to trigger responsibility, as by then there was at least a 'serious risk' of genocide, if not actual genocide occurring. See fn 106 (serious risk).

[111] See details in Trahan, fn 93, ch 5.2.3 (chronicling five known instances where China threatened, expressly or implicitly, to utilize its veto power if certain sanctions were imposed on the Sudanese Government, having the effect of delaying imposition of sanctions, completely blocking an oil embargo, and limiting arms and other sanctions).

[112] ibid 335 (blocking a disarmament mandate for peacekeepers).

[113] ibid, ch 5.2.4 (delayed deployment of UN peacekeeping with eventual consensual deployment, subject to agreement of the Government of Sudan—whose military is implicated in co-commission of the crimes—on a joint United Nations-African Union peacekeeping force, UNAMID).

[114] ibid.

[115] fn 6; see also Julian Borger, 'Mike Pompeo Declares China's Treatment of Uighurs "Genocide"' (The Guardian 18 January 2021) <Mike Pompeo declares China's treatment of Uighurs 'genocide' | China | The Guardian>.

[116] As to referrals, see Rome Statute of the International Criminal Court (17 July 1998) art 13(b).

[117] The ICTY and the International Criminal Tribunal for Rwanda ('ICTR') were created by the Security Council. See Statute of the International Tribunal for the Former Yugoslavia, UN SCOR, 48th Sess., 3217th Mtg., at 1, UN Doc S/RES/827, art 4 (1993); Statute of the International Tribunal for Rwanda, UN SCOR, 49th Session, 3453rd Mtg., at 1, UN Doc S/RES/955, art 2 (1994).

[118] The hybrid Special Tribunal for Lebanon was created by the Security Council. *See* UNSC Res 1757 (30 May 2007). A hybrid tribunal may also be created by agreement between the United Nations and the country where the crimes occurred, as was the Special Court for Sierra Leone—but in the case of China that is exceedingly improbable as well. *See* Agreement between the United Nations and the Government of Sierra Leone on the Establishment of the Special Court for Sierra Leone (16 January 2002) <Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone (rscsl.org)>.

[119] The ICC, absent referral, only has quite limited jurisdiction over the crimes in Myanmar; it has jurisdiction where one element of the crime occurred on the territory of Bangladesh (a State Party to the Rome Statute), such as the crime of forced deportation. See Decision on the 'Prosecution's Request for a Ruling on Jurisdiction under art 19(3) of the Statute', ICC-RoC46(3)-01/18 (6 September 2018). There also, of course, will be no tribunal for crimes committed during the civil war in Syria, and the ICC referral, as discussed below, was vetoed by Russia and China. As to the crimes in Myanmar and Syria, the most that has been possible is the creation of investigative mechanisms. See fn 122; Hum Rts Council, Res 39/2 (28 September 2018) (creating the United Nations Independent Investigative Mechanism for Myanmar ('IIMM').

In all of these situations, a good case can be made that the vetoing permanent member, or permanent member threatening to use its veto, acted at odds with the obligation to 'prevent' genocide found in the Genocide Convention.[120] As will be explained below, even in voting, Security Council members have obligations not to violate international law or the UN Charter.[121]

Other members serving on the UN Security Council also have legal obligations to utilize their "best efforts" to "prevent" genocide in such circumstances. For example, they should be drafting resolutions: condemning crimes suspected of being genocide; referring such situations to the ICC for investigation and/or prosecution; and taking other similar measures, such as imposing sanctions. Security Council member states should do their utmost to try to ensure such resolutions are passed, even if they are ultimately blocked by the veto. At least then, with the casting of the veto, the international community would realize why the Security Council is forced to sit on its hands and which country is to blame. A state not proposing such resolutions and not utilizing its best to ensure passage of such resolutions is simply not exercising 'due diligence'.

A state serving on the Security Council might argue: why should it expend such efforts in a situation where the state anticipates there will be a near certain veto? The point is to adhere to legal obligations, as international law mandates in requiring 'due diligence'. It is a significantly different situation where a resolution has been drafted and put to a vote, and a permanent member forced to use its veto, than a situation where no such attempts are made. In the former, at least the international community and general public will realize the abusive way the veto is being wielded, and this could galvanize support against such vetoes and perhaps result in other pressure being brought to bear (eg, economic sanctions—if not through the Security Council, then multilateral or bilateral sanctions). Where there is no resolution drafted and nothing put to vote, it is far less apparent that the situation is also a result of the veto power, and it would be less likely other measures would be employed.

Thus, each of the members of the UN Security Council bears some responsibility to exercise 'due diligence'. The same would be true of the members of the UN General Assembly (although not the focus of this chapter), as the General Assembly can also take some measures in the face of atrocity crimes.[122] States additionally have these obligations in the conduct of their bilateral relations, again based on their 'capacity to influence', with a more powerful state and/or one with bilateral ties to the country where the crimes are occurring having particularly weighty obligations. A country jointly conducting military operations in another country where the crimes are

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[120] As to how to interpret the permanent members' treaty obligations in light of Article 103 of the Charter, see Trahan, fn 93, ch 4.3.3. It is significant that the Genocide Convention and 1949 Geneva Conventions are foundational treaties where the crimes covered are protected at the level of peremptory norms of international law. See fn 14–15. The author does not claim that *all* treaty obligations act similarly. See, eg, *Case Concerning Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v United Kingdom)*, Order, Request for the Indication of Provisional Measures, [1992] ICJ Rep 3, 65 (14 April); *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v United States of America)*, Order, Request for the Indication of Provisional Measures, [1992] ICJ Rep 114 (14 April) (ruling that obligations under the Montreal Convention on airline safety were outweighed by obligations created under a Security Council resolution). Compare *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Yugoslavia (Serbia and Montenegro))*, Further Requests for the Indication of Provisional Measures [1993] ICJ Rep 325, 441, para 103 (13 September); 95 ILR 159 ['*Bosnia Arms Embargo* case'] (sep op, Lauterpacht, J ad hoc) ('when the operation of paragraph 6 of Security Council resolution 713 (1991) began to make Members of the United Nations accessories to genocide [one reading was that] it ceased to be valid and binding in its operation against Bosnia-Herzegovina[,] and that Members of the United Nations then became free to disregard it').

[121] See 'Resulting Violations of the Obligation to Respect International Law under the UN Charter' below.

[122] An example would be the investigative mechanism created by the UN General Assembly to compile evidence of crimes committed in Syria—The International, Impartial and Independent Mechanism to Assist in the Investigation and Prosecution of Persons Responsible for the Most Serious Crimes under International Law Committed in the Syrian Arab Republic since March 2011 ('IIIM'). UNGA Res 71/248 (11 January 2017); see also Asia-Pacific Centre for the Responsibility to Protect, 'The Powers of the UN General Assembly to Prevent and Respond to Atrocity Crimes: A Guidance Document' (U. of Queensland, Australia April 2021) <2021_UNGA_GuidanceDocument4.pdf (r2pasiapacific.org)>. However, under the UN Charter, the General Assembly's competence is considerably more limited than that of the Security Council. See UN Charter, fn 4, art 10 (the General Assembly may make recommendations); art 11.1 (same regarding matters of international peace and security).

occurring would be in a very significant position of influence.[123] Note that a permanent member exercising its veto or veto threat in these kinds of situations is significantly more responsible than other members on the Council, as that permanent member may be *solely* responsible for a resolution failing.

Veto Use and Veto Threats In The Face Of Suspected Crimes Against Humanity And War Crimes

As demonstrated above, there additionally are obligations to ensure respect for' the Geneva Conventions (including ensuring that the war crimes covered in the respective Conventions are not committed), and to 'prevent' crimes against humanity.[124] And, as with the crime of genocide, these obligations are also understood as 'due diligence' obligations for a state to do what is in its power lawfully to prevent the commission of the crimes.[125] Regarding these legal obligations, one might look to the sixteen vetoes cast (some double-vetoes) related to the situation in Syria, and inquire whether each of these situations represents the vetoing permanent member doing its best (ie, exercising due diligence) given its 'capacity to influence' to 'ensure respect for' the Geneva Conventions and prevent crimes against humanity. Specifically, as to the situation in Syria, there were: (1) vetoes of resolutions that would have condemned the crimes being committed;[126] (2) veto of a referral of the situation to the ICC; [127] (3) vetoes of six resolutions that would have condemned chemical weapons use, renewed a chemical weapons inspection regime known as the 'Joint Investigative Mechanism' ('JIM'), and/or taken other measures to try to curtail chemical weapons use; [128] and (4) vetoes or resolutions providing for humanitarian assistance.[129] As explored in more depth in the author's book,[130] a good case can be made that the permanent members casting such vetoes acted in dereliction of their legal obligations, which, as explained below,[131] carry over to conduct within the Security Council.

The Security Council's response to the situation in Syria is rather different than one where no resolutions are drafted or put to vote. As to the situation of Syria, the remainder of the Security Council (or particularly active members) were able to draft resolutions, galvanize signification support for them—sixty-five co-sponsoring states for one of them[132]—and put the resolutions to a vote. In this way, these Security Council member states *were* able to exercise their due diligence (at least before the Security Council) in trying to prevent or stop additional war crimes and crimes against humanity, although they ultimately were unsuccessful due to veto use.[133] The international condemnation and publicity these vetoes received may have been a contributing factor in enabling the UN General Assembly to create—while certainly not the equivalent of a tribunal or ICC referral—at least an investigative mechanism to gather evidence of the crimes being committed in Syria.[134] This mechanism is

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[123] For example, the ICRC writes that '[t]he duty to ensure respect for the Geneva Conventions is particularly strong in the case of a partner in joint operations' due to its 'unique position to influence the behavior' of the requesting state. ICRC, *Updated Commentary*, fn 64, para 167.

[124] See 'The Obligation to "Ensure Respect for" the Geneva Conventions' and 'The Obligation to Prevent Crimes Against Humanity' above.

[125] fn 69–70; For a book on due diligence, see Heike Krieger, Anne Peters, and Leonhard Kreuzer (eds), *Due Diligence in the International Legal Order* (OUP 2020).

[126] UNSC Res 2011/612 (vetoed by the Russian Federation and China); UNSC Res 2012/77 (vetoed by the Russian Federation and China); UNSC Res 2012/538 (vetoed by the Russian Federation and China).

[127] UNSC Res 2014/348 (vetoed by Russia and China).

[128] UNSC Res 2017/172 (vetoed by the Russian Federation and China); UNSC Res 2017/315 (vetoed by the Russian Federation); UNSC Res 2017/884 (vetoed by the Russian Federation); UNSC Res 2017/962 (vetoed by the Russian Federation); UNSC Res 2017/970 (vetoed by the Russian Federation); UNSC Res 2018/321 (vetoed by the Russian Federation).

[129] UNSC Res 2016/846 (vetoed by the Russian Federation); UNSC Res 2016/1026 (vetoed by the Russian Federation and China); UNSC Res 2019/756 (vetoed by the Russian Federation and China); UNSC Res 2019/961 (vetoed by the Russian Federation and China); UNSC Res 2020/654 (vetoed by the Russian Federation and China); UNSC Res 2020/667 (vetoed by the Russian Federation and China).

[130] See Trahan, note 93 above, ch 4 (legal arguments), ch 5.1 (chronological discussion of vetoes related to Syria and the crimes being committed on the date of each veto).

[131] See 'Resulting Violations of the Obligation to Respect International Law Under the UN Charter' below.

[132] UNSC Res 2014/348 (vetoed by Russia and China).

[133] Russia cast all sixteen vetoes, with China joining all except most resolutions dealing with chemical weapons.

[134] See fn 122.

facilitating other states in bringing domestic cases against some of the perpetrators under theories of universal jurisdiction and related jurisdictional grounds.[135]

As to Security Council failures in light of ongoing crimes against humanity and war crimes, one might also point to the complete absence of Security Council measures related to the mass atrocities committed in Sri Lanka's 1983–2009 civil war by both government forces and the Liberation Tigers of Tamil Eelam ('LTTE'). Here, of course, there also was no ICC referral nor tribunal created. It is difficult to determine the exact number of veto threats (express or implied) by China related to Sri Lanka, as it appears that China's support for the government has translated into a consistent understanding that China would not support Security Council action related to Sri Lanka.[136]

The author's arguments apply to any permanent member using its veto or veto threat in the face of ongoing or threatened genocide, crimes against humanity, and/or war crimes.[137]

Resulting Violations of The Obligation To Respect International Law Under The UN Charter

While the veto power is provided for under the UN Charter (Article 27(3)),[138] the UN Charter also obligates all UN Member States (which includes the permanent members of the Security Council), to adhere to the 'Purposes and Principles' of the UN.[139] Furthermore, under Article 1(1), the 'Purposes' of the UN include respecting international law.[140] There also exists extensive law that the UN, including the Security Council, is bound to respect international law.[141] And, indeed, as reflect in the preamble of the UN Charter, one of the reasons *for the creation of the United Nations* was 'to establish conditions under which *justice and respect for the obligations*

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[135] See, eg, Scott Lucas, 'Ex-Assad Official Given Life Sentence in Germany for "Crimes Against Humanity"' (*EA Worldview*, 13 January 2022) <Ex-Assad Official Given Life Sentence in Germany for "Crimes Against Humanity" - EA WorldView>.

[136] See, eg, 'Blame Russia and China for Sri Lanka Failure, Not UN's Ban' (*Channel 4 News*, 26 April 2011) <https://www.channel4.com/news/blame-russia-and-china-for-sri-lanka-failure-not-uns-ban>. Some suggest the slaughter in Sri Lanka may have amounted to genocide. See, e.g.. Francis A. Boyle, *The Tamil Genocide by Sri Lanka* (Clarity Press 2016).

[137] 'The United States . . . has routinely used its veto power to shield Israel from Security Council measures demanding it show greater restraint in its dealings with the Palestinians'. Colum Lynch, 'Rise of the Lilliputians' (Foreign Policy 10 May 2012) <http://foreignpolicy.com/2012/05/10/rise-of-the-lilliputians/>. Compare Citizens for Global Solutions, 'The Responsibility Not to Veto: A Way Forward' (2014) 4 (suggesting not all US vetoes have been in the face of atrocity crimes, and suggesting some vetoes may have been warranted due to 'language [that] can be interpreted as unbalanced and aggressive'). For one analysis of US vetoes related to Israel, see UN Security Council: US Vetoes of Resolutions Critical to Israel (1972–present) <https://www.jewishvirtuallibrary.org/u-s-vetoes-of-un-security-council-resolutions-critical-to-israel>. See also Blessing Nneka Iyase & Sheriff Folami Folarin, 'A Critique of Veto Power System in the United Nations Security Council [2018] 11(2) Acta Universitatis Danubius 104, 107; Serdar Yurtsever and Fatih Mohamad Hmaidan, 'From League of Nations to the United Nations: What Is Next?' [2019] 12(62) J Intl Soc Res 449 (stating that from 1946 to 2016 the US used the veto seventy-nine times regarding Israel/Palestine); Jan Wouters and Tom Ruys, 'Security Council Reform: A New Veto for a New Century?' (Royal Institute for Int'l Relations, Egmont Paper 9 August 2005) 15 (listing various US vetoes related to Israel).

[138] art 27(3) does not include the word 'veto', but requires substantive decision to be made 'by an affirmative vote of nine members'. UN Charter, fn 4, art 27(3). This has been read to also permit abstention. SC Rep, The Veto (2016, No 3) 1.

[139] UN Charter, fn 4, art 2 ('The Organization *and its Members*, in pursuing of the Purposes stated in art 1, shall act in accordance with the following Principles . . .'.) (emphasis added). Additionally, under art 24(2) 'the Security Council shall act in accordance with the Purposes and Principles of the United Nations'. ibid, art 24(2).

[140] ibid, art 1.1

[141] For example, Judge Fitzmaurice (dissenting) in the *Namibia* Advisory Opinion concluded that 'the Security Council is as much subject to [international law] . . . as any of its individual member States are, [just as] the United Nations is itself a subject of international law . . .'. *Advisory Opinion on the Legal Consequences for States of the Continued Presence of South Africa in Namibia*, Advisory Opinion of 21 June 1971, [1971] ICJ Rep 16, para 115 (diss op, Fitzmaurice, J). Judge Weeramantry in the ICJ's *Lockerbie* case similarly wrote: 'The history of the United Nations Charter . . . corroborates the view that a clear limitation on the plenitude of the Security Council's powers is that those powers *must be exercised in accordance with the well-established principles of international law*'. *Case Concerning Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v United Kingdom)*, Order of 14 April 1992, Request for the Indication of Provisional Measures, [1992] ICJ Rep 3, 65 (diss op, Weeramantry, J) (emphasis added); *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v United States of America)*, Order of 14 April 1992, Request for the Indication of Provisional Measures, [1992] ICJ Rep 114, 175 (diss op, Weeramantry, J) (emphasis added). See also Peters, fn 21, p 538 ('the traditional view of Security Council actions in a basically law-free realm is no longer tenable. The rule of law also governs decisions of the Security Council'.).

arising from treaties and other sources of international law can be maintained . . .'.[142] Accordingly, in ignoring legal obligations imposed by international law in this context,[143] a permanent member is additionally acting in disregard of obligations imposed under the UN Charter.

In addition to the mandate to respect international law, other relevant 'Purposes and Principles' include 'promoting and encouraging respect for human rights', 'co-operation in solving international problems of [a] . . . humanitarian character', and the obligation of 'good faith'[144]—and all of the above discussed vetoes and veto threats appear antithetical to respecting these obligations as well. There is nothing to suggest that the veto power can be used in a way that ignores these obligations contained within the UN Charter. Indeed, states have been vociferously objecting to veto use in the face of genocide, crimes against humanity, or war crimes, so they are certainly not acquiescing in such conduct.[145]

Numerous scholars concur with the conclusion that vetoes must not violate the UN's 'Purposes and Principles'. For example, Hannah Yiu analyzes use of the veto 'where genocide is occurring or where there is a prima facie case for suspecting its occurrence' as a breach of the Charter's 'Purposes and Principles'.[146] She writes: 'A failure to restrict use of the veto, or [Security Council] paralysis, is to be interpreted as the [Security Council] acting outside of its mandate to exercise its functions in accordance with the Charter's Purposes and Principles . . .'.[147] Former High Commissioner for Human Rights and former Chief Prosecutor of the ICTY and ICTR Louise Arbour similarly questions the legality of a veto cast where it blocks 'an initiative designed to reduce the risk of, or put an end to, genocide',[148] as does John Heieck. He writes:

> *[T]he due diligence standard [in the Genocide Convention] constrains the P5 from vetoing, either expressly or impliedly, draft resolutions aimed at preventing genocide under Article 27(3). . . . If a P5 expressly or impliedly vetoes a draft resolution containing the relevant Article 41 and 42 measures, then that state fails to do everything within its power to prevent genocide as required by the due diligence standard, thereby breaching its duty to prevent genocide and incurring international responsibility.*[149]

While those scholars focused on the crime of genocide, as demonstrate above, the same arguments apply to crimes against humanity and war crimes.

Numerous additional high-level experts question the legality of veto use in the face of genocide, crimes against humanity, or war crimes, including former Under-Secretary General for Legal Affairs and the Legal Counsel of the United Nations, Ambassador (ret.) Hans Corell;[150] former High Commissioner for Human Rights, Zeid Ra'ad

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[142] UN Charter, fn 4, pmbl (emphasis different from original).

[143] The legal obligations include not only those under treaty law and customary international law to 'prevent' genocide, crimes against humanity, and war crimes, but additionally those related to those crimes being protected at the level of *jus cogens.*

[144] ibid, arts 1(3), 2(2).

[145] For a compilation of statements by states making legal arguments against veto use in the face of genocide, crimes against humanity, or war crimes, see Trahan, fn 93, ch 4.2.4.2. The 122 states that have joined the ACT Code of Conduct as well as the 105 states that have joined the 'French-Mexican initiative' have also taken a stand against veto use while there is genocide, crimes against humanity, or war crimes occurring. See fn 33. For more on voluntary veto restraint measures, see Trahan, fn 93, ch 3.1.3–4.

[146] Hannah Yiu, '*Jus Cogens*, the Veto and the Responsibility to Protect: A New Approach' [2009] 7 NZ YB Intl L 207, 233.

[147] ibid.

[148] Arbour, fn 20, p 454.

[149] John Heieck, 'The Responsibility Not to Veto Revisited: How the Duty to Prevent Genocide as a Jus Cogens Norm Imposes a Legal Duty Not to Veto on the Five Permanent Members of the Security Council' in Richard Barnes and Vassilis Tzevelekos (eds), *Beyond Responsibility to Protect: Generating Change in International Law* (Intersentia 2016) 121.

[150] Hans Corell, Stockholm Centre for International Law and Justice, Fifth Hilding Eek Memorial Lecture (25 October 2021) <Microsoft Word - Utan punkter.docx (havc.se)> (as to the use of the veto in the face of genocide, crimes against humanity or war crimes: 'it is very important that the General Assembly now engages in a serious discussion about a decision to request the International Court of Justice for an advisory opinion'). See text accompanying fn 178 (suggesting such an advisory opinion).

Al Hussein;[151] former Minister of Foreign Affairs of Costa Rica, Bruno Stagno Ugarte;[152] former Minister of Foreign Affairs of Canada, Lloyd Axworthy;[153] former Minister of Justice and Attorney-General of Canada, Allan Rock;[154] and other high-level experts.[155] Andrew Carswell additionally opines that 'taking even a conservative view of the doctrine of abuse of rights, it is arguable that an employment of the veto in a blatantly *mala fid*e manner can be characterized as legally abusive',[156] which would violate the Charter's 'good faith' requirement.[157]

While some might argue—and the ICJ in one case appears to suggest[158]—that something procedural is not necessarily displaced by *jus cogens*, that ruling is distinguishable (as focused on immunities) and has faced extensive criticism.[159] Additionally, if *jus cogens* cannot displace substantive rules, it seems completely illogical if it could not displace something that is merely procedural. Alternatively, a vote is not necessarily 'procedural', as how one casts a vote could be seen as a substantive act (making a substantive decision on which way to vote). Furthermore, a simple hypothetical suggests the fallacy of not considering voting also subject to the constraints of *jus cogens*. Assume the Security Council were voting on a resolution to jointly endorse the commission of genocide; would one respond that there is nothing wrong with such voting? Of course not; the resolution in question would be void—a vote endorsing a violations of *jus cogens* must be treated as a nullity, as the Security Council has no power to violate *jus cogens.*[160] In nullifying the resolution, one would similarly be (appropriately) nullifying the vote to commit genocide. It is a basic proposition that one cannot agree to a criminal act, and, any

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[151] S/PV.6672, p 21–23 (20 November 2011) (delivering a statement on behalf of the Hashemite Kingdom of Jordan). Zeid later also served as President of the Assembly of States Parties to the Rome Statute of the International Criminal Court.

[152] Contribution de Bruno Stagno Ugarte, 'Regulating the Use of Veto at the UN Security Council in Case of Mass Atrocities' (SciencesPo 21 January 2015).

[153] Lloyd Axworthy and Allan Rock write that certain veto use to constrain UN action 'is an abuse of the veto privilege and needs to be challenged openly and judicially'. Lloyd Axworthy and Allan Rock, 'R2P: A New and Unfinished Agenda' [2009] 1 J Glob Responsibility to Protect 54, 61.

[154] ibid.

[155] Other prominent individuals sharing this concern include: former Prosecutor of the ICTY and the ICTR Justice Richard Goldstone; former High Commissioner for Human Rights and President of the ICTR Navanethem (Navi) Pillay; former Minister of Justice and Attorney-General of Canada and longtime Canadian Parliamentarian Irwin Cotler; former Under-Secretary General in charge of the Office of the Special Advisers on the Prevention of Genocide and of the Responsibility to Protect and former Registrar of the ICTR Adama Dieng. Concept Note, <www.vetoesinitiative.com/note.pdf>.

[156] Andrew J. Carswell, 'Unblocking the UN Security Council: The Uniting for Peace Resolution' [2013] 18 J Conflict & Sec L 453, 471, (n 71) Bardo Fassbender, *UN Security Council Reform and the Right of Veto: A Constitutional Perspective* (Kluwer 1998) 175 (use of the veto to prevent an amendment to the UN Charter for reasons of purely national interest would constitute an abuse of right).

[157] UN Charter, note 4 above, Art 2.2. For additional discussion of abuse of right (*abus de droit*) and the good faith requirement, see Trahan, fn 93, ch 4.2.3.

[158] *Jurisdictional Immunities of the State (Germany v Italy: Greece Intervening)*, Judgment [2012] ICJ Rep 99 ['Jurisdictional Immunities of the State'].

[159] Stefan Talmon writes:

> In the case concerning *Jurisdictional Immunities of the State*, the ICJ held that rules of *jus cogens* did not automatically displace hierarchically lower rules of state immunity. The Court's decision was based on the rationale that there was no conflict between these rules as the former were substantive rules while the latter were procedural in character. The 'substantive–procedural' distinction has been heavily criticized in the literature. Much of the criticism seems to be motivated by the unwanted result of the distinction, namely de facto impunity for the most serious human rights violations.

Stefan Talmon, '*Jus Cogens* after *Germany v Italy*: Substantive and Procedural Rules Distinguished' [2012] 25(4) Leiden J of Intl L 979 (quoting abstract). He notwithstanding goes on to defend the substantive/procedural distinction regarding *jus cogens.* Compare Alexander Orakhelashvili, 'State Immunity and Hierarchy of Norms: Why the House of Lords Got it Wrong' [2007] 18 EJIL 955, 968 ('international law knows of no straightforward distinction between "substantive" and "procedural" norms. All international norms derive from the agreement of states or acceptance by the international community as a whole, and there are neither established criteria nor a recognized agency to split them into such categories'); Alexander Orakhelashvili, 'State Immunity and International Public Order Revisited' [2006] 49 GYIL 327, 361 ('the so-called distinction between "substantive" and "procedural" norms which prevents the relevant *jus cogens* norms from operating as norms must be rejected as necessarily leading to impunity'). Importantly, even Talmon states that something procedural 'does not amount to recognizing as lawful a situation created by the breach of a substantive rule of *jus cogens*, or rendering aid or assistance in maintain that situation'—which Talmon admits would violate ARSIWA art 41. Talmon, p 986–87. He clearly does not suggest the permissibility of an ARSIWA violation.

[160] '*Jus cogens* norms receive the highest level of protection in the international legal system in that *no derogations may be permitted* from them except through the creation of a new norm having the same character'. VCLT, fn 10, art 53 (emphasis added).

agreement to do so (eve if accomplished through Security Council voting), must be void.[161] For example, the ILC writes in the draft articles on *Jus Cogens* (Draft Conclusion 16) that unilateral acts that conflict with peremptory norms are invalid[162] (synonyms being 'void' or 'null'). In blocking measures designed to *prevent* crimes, the vetoing or veto threatening permanent member is, in fact, *endorsing* or *enabling* the *status quo*—that is, the continuation of the criminal conduct by the state where the crimes are occurring—and such endorsement of criminal conduct (*jus cogens* violations) is clearly impermissible under international law.

This conclusion is reinforced by the ILC in its ARSIWA,[163] which precludes states from assisting or maintaining a situation where serious breaches of peremptory norms are being violated. Specifically, ARSIWA Article 16 states:

> A State which aids or assists another State in the commission of an internationally wrongful act by the latter is internationally responsible for doing so if:
> (a) The State does so with knowledge of the circumstances of the internationally wrongful act; and
> (b) the act would be internationally wrongful if committed by that State.[164]

Articles 40–41 of ARSIWA go on to preclude a state from rendering 'aid or assistance in maintaining', or 'recogniz[ing] as lawful a situation created by a serious breach' of an obligation arising under a peremptory norm of international law, and requires states to 'cooperate to bring to an end' such breaches.[165] The ICJ has applied the obligations set forth in Articles 16 and 41 as binding legal obligations.[166]

While a full analysis of the obligations under ARSIWA Articles 16 and 40–41 is beyond the scope of the present Chapter,[167] casting a veto or making a threat to veto is basically acting in a way that aids the perpetration of the crimes, and/or aids in maintaining a situation where peremptory norms are being violated.[168] There is no carve out in the ARSIWA that such conduct is permissible when a state is serving on the UN Security Council, nor could there be—at least as to crimes recognized as *jus cogens*, which stand above the UN Charter in order of

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[161] States 'can lawfully do together what—*but only what—one of them might lawfully do alone*'. John Lawrence Hargrove, 'Intervention by Invitation and the Politics of the New World Order' in Lori Fisler Damrosch and David J. Scheffer (eds), *Law and Force in the New International Order* (Westview Press 1991) 116–17 (emphasis added).

[162] Third Report on Peremptory Norms of General International Law (Jus Cogens) by Dire Tladi, Special Rapporteur (12 February 2018) UN Doc A/CN.4/71 ('A unilateral act that is in conflict with a peremptory norm of general international law (*jus cogens*) is invalid'.).

[163] ARSIWA, fn 12.

[164] ibid, art 16.

[165] ibid, arts 40–41.

[166] See *Bosnia v Serbia* case, fn 44, para 420 (art 16 has attained the status of customary international law); *Wall* case, note 70 above para 159 (utilizing Article 41: 'all States are under an obligation not to recognize the illegal situation resulting from the construction of the wall in the Occupied Palestinian Territory, including in and around East Jerusalem. They are also under the obligation not to render aid or assistance in maintaining the situation . . .'.); *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, Advisory Opinion [2019] ICJ Rep 95, paras 177, 182 (utilizing Article 41: after determining that 'the decolonization of Mauritius was not conducted in a manner consistent with the right of peoples to self-determination' and that 'the United Kingdom's continued administration of the Chagos Archipelago constitutes a wrongful act entailing the international responsibility of that State', the ICJ held that 'the United Kingdom has an obligation to bring to and end its administration of the Chagos Archipelago as rapidly as possible, and that all Member State must co-operate with the United Nations to complete the decolonization of Mauritius'.).

[167] For more extensive analysis of the obligations under ARSIWA Articles 16 and 40–41, see Anne Peters and Jennifer Trahan, *Invitation to Atrocities: When Military Intervention on Request is Unlawful* (forthcoming).

[168] See, eg, Rachel Lopez, 'The Duty to Refrain: A Theory of State Accomplice Lability for Grave Crimes' (2018) 97 Nebraska L Rev 120, 125 ('State complicity occurs when a State facilitates another State's commission of an internationally wrongful act. . .'. 'Under international law, States may not legitimize—by consent, acquiescence, or recognition—any act that is contrary to *jus cogens* norms. By logical extension, States should also not be permitted to aid other States in their violations of *jus cogens* norms'.), citing Robert Jennings and Arthur Watts (eds), *Oppenheim's International Law* (OUP 1992) 7–8.

hierarchy.[169] In fact, ICJ Judge *ad hoc* Lauterpacht in the *Bosnia Arms Embargo* case,[170] suggested that 'when the operation of paragraph 6 of Security Council resolution 713 (1991) began to make Members of the United Nations accessories to genocide [one possible reading was that] it ceased to be valid and binding in its operation against Bosnia-Herzegovina[,] and that Members of the United Nations then became free to disregard it'.[171] If a Security Council resolution may not aid genocide, then a situation where genocide is occurring or at serious risk of occurring, should not be perpetuated by a veto or veto threat blocking a resolution designed to prevent or stop the crimes. Both achieve the same result and both must be equally void, as endorsing violations of *jus cogens*. The same would be true of a resolution that endorses crime against humanity or war crimes, or a veto that permits the continued perpetration of those crimes.

As explained in far greater depth in the author's book,[172] for too long has the veto power been seen as above all other sources of law. Yet, the veto power exists within the context of a system of international law, including: (1) obligations related to *jus cogens*,[173] (2) obligations under the UN Charter, including its 'Purposes and Principles',[174] and (3) obligations created by treaties, such as the Genocide Convention and Geneva Conventions.[175] One provision of the Charter (the veto power) should not be read in isolation of all of the other obligations in the international legal system. As Dapo Akande writes: '[T]he Charter ha[s] to be considered in its entirety and if the Security Council violated its principles and purposes it would be acting ultra vires'.[176]

Accordingly, whether one phrases it as 'sovereignty as responsibility', R2P, or the specific treaty obligations underlying R2P, these need to permeate into Security Council practice. It is only then that R2P can start to be operationalized. The author has proposed that UN Member States: (1) raise concerns about the legality of vetoes cast in the face of genocide, crimes against humanity, or war crimes, and urge that all vetoes cast need to be in conformity with obligations under the UN Charter and international law;[177] (2) consider issuing a General Assembly resolution recognizing that there are legal limits to the use of the veto in the face of genocide, crimes against humanity, or war crimes; and/or (3) consider requesting an Advisory Opinion from the ICJ on the legality of such vetoes. The question posed could be: does existing international law contain limitation on the use of the veto power by permanent members of the UN Security Council in situations where there is ongoing genocide, crimes against humanity, and/or war crimes, or the serious risk of these crimes occurring?[178]

Conclusion

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[169] N.G. Onuf and Richard K. Birney, 'Peremptory Norms of International Law: Their Source, Function and Future' [1994] 4 J Intl L & Poly 187 (n 7) ('H[ans] Kelsen has argued the logical necessity of a hierarchical arrangement of positive norms in the international legal order'.), citing Hans Kelsen, *Principles of International Law* (Lawbook Exchange 1952) 408–38; Alexander Orakhelashvili, *Peremptory Norms in International Law* (OUP 2006) 9, 423 ('The superior rules [i.e., *jus cogens*], determine the frame[work] within which the inferior rules [i.e., custom, treaties and "the rights and obligations" flowing therefrom] can be valid, while the interior rules must comply with the content of the superior rules' in order to be lawful.). The UN Charter may be a treaty *par excellence* as it is the constitutive instrument that creates the UN system, but it is nonetheless a treaty.

[170] *Bosnia Arms Embargo* case, fn 120.

[171] ibid, ICJ Report, p 441, para 103; 95 ILR 159 (sep op, Lauterpacht, J). At issue was whether the Security Council's arms embargo imposed on Yugoslavia was void as conflicting with *jus cogens* as it allegedly assisted the better-armed Serbian forces within Bosnia, was contrary to the right of self-defense enshrined in Article 51 of the Charter, and stopped the Bosnian government from preventing genocide as required by Article 1 of the Genocide Convention.

[172] See Trahan, fn 93.

[173] For detailed arguments, see ibid, ch 4.1 (considering vetoes and *jus cogens*).

[174] For detailed arguments, see ibid, ch 4.2 (considering vetoes and UN Charter obligations).

[175] For detailed arguments, see ibid, ch 4.3 (considering vetoes and treaty obligations). The author makes three *independent* arguments, so that only one of them would be needed to prevail if a legal challenge were pursued.

[176] Dapo Akande, 'The International Court of Justice and the Security Council: Is There Room for Judicial Control of Decisions of the Political Organs of the United Nations' [1997] 46 Intl & Comp L Q 309, 319, quoting UN Doc 555.III/1/27 (1945) 378.

[177] Canada, for example, has made just such a statement. See Statement by H.E. Mr. Bob Rae, Ambassador and Permanent Representative of Canada to the United Nations, New York (17 May 2021) ('The use and threat of the veto in Syria and other situations where atrocity crimes are being perpetrated is shameful, *and may be contrary to obligations under the UN Charter and international law*'.) (emphasis added).

[178] For additional ways a case could be pursued before the ICJ, see Jennifer Trahan, 'Vetoes and the UN Charter: The Obligation to Act in Accordance with the 'Purposes and Principles' of the United Nations' (forthcoming J on the Use of Force and Intl Law 2022).

While the concept of sovereignty as responsibility has been endorsed in other venues—most significantly with all heads of state adopting the 2005 World Summit Outcome document on R2P[179]—this concept has not permeated the practice of the UN Security Council, *even where* it is legally mandated. Certain of the permanent member states, in these situations, are showing no responsibility to protect, exercising no due diligence, and breaching legal obligations to 'prevent' crimes. In fact, the behavior, rather than simply a failure to exercise due diligence, arguably is closer to 'facilitation' or 'assisting' the atrocity crimes being committed. That is, blockage of the resolutions essentially endorses the *status quo* in which the crimes are occurring, unimpeded by efforts to try to stop them. It is time to 'operationalize' international law so that it is applied to the practices of the UN Security Council, which, in the end of the day, is simply not above the law. The author has suggested several ways states can contribute to challenging the *status quo*. If, seventy-five years after the creation of the UN, states desire a more effective United Nations—as the author has argued in her submission to the UN Secretary-General[180]—this paralysis of the Security Council in the face of ongoing or threatened genocide, crimes against humanity, or war crimes, must be challenged.

CHAPTER XXVII: IN MEMORIAM: JUDGE JAMES CRAWFORD

Freya Baetens[181]

International disputes involving multiple claimants or respondents, or both, that are of mixed State/non-State nature seem to be arising with increasing frequency, as the circle of responsibility gradually widens to include, for example, international organisations. In a number of recent cases, issues of shared responsibility of States providing peacekeeping contingents, and of the organisation to which they are provided, have emerged.[182] These and similar envisaged contingencies raise difficult questions of substance and procedure which were only partially addressed by the International Law Commission (ILC) in its Articles on the Responsibility of States for Internationally Wrongful Acts (ILC Articles on State Responsibility).[183] Remaining issues are being grappled with by international adjudicatory bodies and scholars.

The present chapter draws from a wider research project on shared responsibility in mixed multi-party disputes, involving States and non- State entities as claimants as well as respondents. One specific case (the Eurotunnel arbitration)[184] is examined in terms of its ramifications on invoking, establishing and remedying State

[179] fn 26.

[180] See Jennifer Trahan, 'Contribution to the UN Secretary-General's Report, "Our Common Agenda", Mandated by the United Nations General Assembly Resolution Adopted in 2020 to Mark the 75th Anniversary of the United Nations Charter' (arguing that the Secretary-General should at least acknowledge the problem). The author's suggestion was not reflected in the Secretary-General's report. Our Common Agenda, Report of the Secretary-General (2021) <Common_Agenda_Report_English.pdf (un.org)>.

[181] The author has previously worked for the Permanent Court of Arbitration but the opinions expressed here are solely her own and do not represent the position of the PCA or any of the parties to the mentioned disputes. She is grateful for the feedback of *Maurizio Brunetti, Christine Chinkin, Brooks Daly, Yseult Marique, Andre´ Nollkaemper and Andrea Varga.* Regarding potential errors or omissions, the usual disclaimer applies.

[182] *Behrami and Behrami* v. *France*, Application No. 71412/01 and *Saramati* v. *France, Germany and Norway*, Application No. 78166/01, ECtHR, Decision Court (GC) (2 May 2007); *Al-Jedda* v. *UK*, Application No. 27021/08, ECtHR, Judgment (Merits and Just Satisfaction) Court (GC) (7 July 2011); *The Netherlands* v. *Hasan Nuhanovi´c* (12/03324 LZ/TT), Supreme Court of The Netherlands, Judgment (First Chamber) (6 September 2013).

[183] UNILC, Draft Articles on Responsibility of States for Internationally Wrongful Acts (2001) GAOR 56th session Supp 10, 43.

[184] *The Channel Tunnel Group Limited and France-Manche S.A. v. The Secretary of State for Transport of the Government of the United Kingdom of Great Britain and Northern Ireland and Le Ministre de l'E´quipement, des Transports, de l'Am´enagement du Territoire, du Tourisme et de la Mer du Gouvernement de la R´epublique Fran¸caise,* Partial Award, Permanent Court of Arbitration (PCA) (30 January 2007), 132 ILR 1 (Eurotunnel Partial Award). For an analysis of the entire case, see e.g. M. Audit, 'Un arbitrage aux confins du droit international public: observations sur la sentence du 30 janvier 2007 opposant le Groupe Eurotunnel au Royaume-Uni et a` la Re´publique franc¸aise', Revue de L'Arbitrage, 3 (2007) 445 ; Jean-Marc Thouvenin, 'L'arbitrage Eurotunnel', Annuaire fran¸cais de droit international, 52 (2006) 199.

responsibility. This choice was inspired by two considerations: Eurotunnel provides a prime example of a mixed dispute likely to increasingly occur due to ever more complex joint ventures between States and non-State entities. Moreover, an analysis of Eurotunnel seemed a fitting contribution to this book as the arbitral tribunal that decided the case was presided over by the honouree of this work: Professor James Crawford.

The starting point of this chapter is that, although in principle there is no general rule in international law allowing for joint and several responsibility,[185] such a rule can be created by means of specific treaty provisions. The legal difficulty lies in applying and interpreting such a lex specialis rule within an appropriate procedural framework which allows for mixed disputes. This chapter is structured as follows: after setting out the facts, background, and legal claims of Eurotunnel (section I), the Partial Award is analysed (section II) so as to identify the relevance of this case for future shared responsibility disputes between mixed parties (section III).

The Eurotunnel Dispute

A Facts and background

In 1985, the French and United Kingdom governments issued an invitation calling for tenders to develop, finance, construct and operate a 'Fixed Link' across the Channel between France and the UK, to be financed entirely by private investment.[186] France-Manche S.A. and The Channel Tunnel Group Ltd submitted a joint response[187] and on 20 January 1986, the French president and the British prime minister announced that they had been selected as the Concessionaires of the Fixed Link.[188] The Treaty concerning the Construction and Operation by Private Concessionaires of a Channel Fixed Link between the UK and France (Treaty of Canterbury) sets out the international legal framework to permit the construction and operation of this project.[189] Pursuant to its Article 1(2), the Fixed Link includes the tunnels themselves and associated terminal areas and freight facilities.

Article 10(1) establishes an Intergovernmental Commission (IGC) 'to supervise, in the name and on behalf of the two Governments, all matters concerning the construction and operation of the Fixed Link'. Subsequently, a Concession Agreement was signed on 14 March 1986 by the ministre de l'´equipement, du transport et de l'habitat for France and the Secretary for Transport for the UK, on the one hand, and France-Manche S.A. and The Channel Tunnel Group Ltd, on the other, which granted both companies a concession to develop, finance, construct and operate the Fixed Link for a term of fifty-five years.[190] This period was extended to ninety-nine years by the Concession Extension Agreement of 13 February 1998.

The Fixed Link consists of 'a fixed twin-bored tunnel rail link under the English Channel, a service tunnel and terminal areas at Coquelles in the French De´partement du Pas de Calais and Cheriton in the County of Kent'.[191] Since its opening in 1994, it has accommodated the transport of road vehicles through trains and shuttles, at the time said to be the largest privately financed infrastructure project in history. The Coquelles terminal has a kilometres-long perimeter fence, supplemented by additional fencing, and is situated in a rural area, approximately 3 km from the town of Calais. The Partial Award includes a map of the region (see Figure 23.1).

<Figure 23.1 here>

[185] As confirmed by James Crawford, *State Responsibility: The General Part* (Cambridge University Press, 2013) 328–32; to the contrary: Alexander Orakhelashvili, 'Division of Reparation between Responsible Entities' in James Crawford, Alain Pellet and Simon Olleson (eds.), *The Law of International Responsibility* (Oxford University Press 2010) 647–65.
[186] *Eurotunnel* Partial Award, para 48.
[187] ibid, para 46. France-Manche S.A. and The Channel Tunnel Group Ltd formed a *soci´et´e en participation* under French law and a partnership under English law (agreement concluded on 31 August 1996).
[188] ibid, para 49
[189] France–UK, Treaty concerning the Construction and Operation by Private Concession- aires of a Channel Fixed Link (Canterbury, adopted 12 February 1986, entered into force 24 July 1987), 1497 UNTS 334.
[190] Clause 2 of the Concession Agreement.
[191] *Eurotunnel* Partial Award, paras 55–7.

Legal claims: Sangatte and Sea France

By a Notice of a Request for Arbitration dated 17 December 2003, the Channel Tunnel Group Ltd and France-Manche S.A. initiated arbitral proceedings against the UK and France under the auspices of the Permanent Court of Arbitration (PCA). Their two main claims related to (1) the allegedly inadequate protection of the Fixed Link against disruptions by clandestine migrants at Sangatte, linked to a complaint about the UK's civil penalty regime, and (2) the allegedly improper financial support to the Sea France sea link. Although both claims were brought against both respondents, the tribunal later held that there was no dispute between the Concessionaires and the UK as concerned the Sea France claim so, to the extent that this claim was directed against the UK, the case was dismissed entirely for want of jurisdiction.[192] Analysis of the Sea France claim hence provides no further relevance to the present discussion concerning shared responsibility.

With regard to the Sangatte claim, the Concessionaires asserted that the Fixed Link was inadequately protected against interference by clandestine migrants based at the Sangatte Hostel, especially from 1999 to 2003. Thousands of migrants from Kosovo, Afghanistan, Iraq, and Somalia broke into the perimeter of the terminal site at Coquelles, hoping to smuggle themselves into shuttle trains destined for the UK. The claimants alleged that 'this caused significant disruption to the operation of the Fixed Link and cost a great deal in additional protective measures'.[193]

Linked was a complaint concerning the UK's civil penalty regime, introduced in April 2000 pursuant to Part II of the Immigration and Asylum Act (the 1999 Act),[194] under which persons or companies responsible for transporting clandestine migrants into the UK were subjected to a system of penalties. At first this regime applied only to road transport vehicles, but in 2001 it was extended to the claimants. Close to £400,000 in penalty charges were imposed on the Concessionaires, which were all subsequently remitted, up to the point where the UK entirely exempted claimants from the system in 2002. Later that same year, the UK amended the 1999 Act so as to re-render operators of freight shuttle trains liable for carrying clandestine migrants to the UK, but at the time of the Partial Award, no penalties had been imposed upon the Concessionaires under the amended 1999 Act.

The UK also imposed liability on the claimants under the Immigration Act 1971, as modified by the Channel Tunnel (International Arrangement) Order (the 1993 Order), which incorporated the Sangatte Protocol into English law,[195] for the costs of detention and removal of clandestine migrants arriving in the UK via the Fixed Link. The Partial Award refers to an amount of over £100,000 paid by the claimants on this account.

The Eurotunnel Partial Award

On 30 January 2007, an arbitral panel composed of Maˆıtre L. Yves Fortier, Judge Gilbert Guillaume, Lord Millett, and Mr Jan Paulsson, chaired by Professor James Crawford, issued a Partial Award in the Eurotunnel arbitration.

Applicable Law and Jurisdiction

The law to be applied by the tribunal consisted of the relevant provisions of the Treaty and the Concession Agreement, supplemented by English and French law insofar as necessary for the implementation of particular obligations. Furthermore, recourse could be had to 'the relevant principles of international law and, if the parties in dispute agree, to the principles of equity'.[196]

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[192] ibid, para 143.
[193] ibid, paras 58–64.
[194] ibid, paras 66–9.
[195] The Treaty of Canterbury was supplemented by later agreements between the two States, including the Protocol concerning Frontier Controls and Policing, Cooperation in Criminal Justice, Public Safety and Mutual Assistance Relating to the Channel Fixed Link, Sangatte, 25 November 1991 (Sangatte Protocol).
[196] Clause 40.4 of the Concession Agreement.

In order to establish the scope of its jurisdiction,[197] the tribunal distinguished three questions:

"(1) Was there a 'dispute' between the Claimants and either or both Respondents which existed at the time of the Request?
(2) As to any such dispute, have the Claimants presented claims falling within the scope of Clause 40.1 of the Concession Agreement?
(3) Does the fact that certain proceedings were or could have been brought before another forum pursuant to Clause 41.4 of the Concession Agreement affect the present Tribunal's capacity to deal with the claims?"[198]

The tribunal identified the source of its competence to determine the parties' respective rights and obligations as the Treaty ('but only insofar as it is given effect to by the Concession Agreement') and the Concession Agreement ('whether or not it goes beyond merely giving effect to the Treaty').[199]

Findings on Joint and Several Responsibility

Chapter V of the Eurotunnel Partial Award specifically deals with the claimants' thesis of 'Joint and Several Responsibility'. The Treaty of Canterbury, the Concession Agreement and their implementation were, at least in part, acts of the French and UK governments, so one contentious issue concerned 'the basis on which the Respondents may be held responsible'.[200] The question was whether the claimants needed to precisely show the degree to which any breach of obligations owed to them was specifically due to one or other government, or whether they could invoke some principle of solidary or collective responsibility.

Position of the claimants

The claimants argued that the conduct regarding the Sangatte claim (inadequate protection of the Fixed Link against clandestine migrants) was attributable to France and the UK, individually and collectively:[201]

Any violation caused by the Governments' respective acts and omissions in the context of policing, security and frontier controls should, in addition to engaging the specific responsibilities of the relevant Government, also be attributable to both Governments jointly since these actions are manifestations of the Governments' joint failure to co-operate and co-ordinate their actions in making appropriate provision in relation to policing, security and frontier controls.[202]

Emphasising that both governments were jointly obliged with regard to security and frontier controls under the applicable rules, the claimants asked the tribunal to hold France and the UK 'liable in respect of all claims, either on the basis of their own acts or omissions, and/or on the basis of their failure to protect the claimants from the acts or omissions of the other Government'.[203] Although accepting that joint responsibility does not generally exist under international law, the claimants pointed out that Article 47 of the ILC Articles on State Responsibility provides for the possibility of an agreement to the contrary between the States concerned. In the present case, this would imply that some form of 'joint liability flows from the fact that the [relevant] Instruments contemplate the Governments cooperating and coordinating their actions in making appropriate provisions in those fields'.[204]

This joint liability would be additional to the governments' individual liability. Thus, regardless of whether the relevant instruments gave rise to joint liability, the Concessionaires could still assert independent claims against both governments in those fields. The claimants further specified that such individual liability arose at two levels:

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[197] ibid, Clause 40.1.
[198] *Eurotunnel* Partial Award, para 135.
[199] ibid, para 153.
[200] ibid, para 162.
[201] ibid, paras 163–7.
[202] Claimants' Memorial, para 262 – as cited in *Eurotunnel* Partial Award, para 163 (original Memorial not publicly available)
[203] Letter from Matthew Weiniger to Brooks Daly dated 26 April 2005, Bundle G, 3883 at point 3 – as cited in *Eurotunnel* Partial Award, para 164 (original Letter not publicly available).
[204] Claimants' Reply, para 136 – as cited in *Eurotunnel* Partial Award, para 165 (original Reply not publicly available).

first, 'each Government's liability for disregarding its specific responsibilities in relation to policing, security and frontier controls'; and second, 'each Government's failure to cooperate, coordinate and consult so as to prevent the other Government's breach'.[205]

The claimants asserted that accepting the concept of joint responsibility as outlined would not raise any complications at the compensation stage because 'each Government would be liable for the entirety of the damage to the Concessionaires' bearing in mind that '[t]he Concessionaires would not, of course, receive the same compensation twice over'.[206] The manner in which the governments' liabilities were subsequently to be apportioned between themselves was of no concern to the Concessionaires.

Position of the Respondents

With reference to the closing of the Sangatte Hostel, France accepted that the two governments had assumed joint and several responsibilities. How- ever, this solely concerned the execution of the Agreement so, in addition, each government retained 'its own onus of responsibility, which is the case for any obligations relative to public order which depend upon the responsibility inherent to each State'.[207] How exactly the former (execution of the Agreement) was to be separated from the latter (public order obligations) was not clarified.[208] Moreover, France asserted that Clause 41.4 of the Concession Agreement granted national courts exclusive jurisdiction to address joint and several responsibility issues as it would be impossible for a tribunal to distinguish between breaches of France and those of the UK.

Unlike France, the UK maintained that it was unclear whether acts and omissions attributable to 'one or both of the Governments' entailed individual liability, joint liability or joint and several liability. In its view, 'Claimants must establish the specific responsibility of the United Kingdom for any alleged breach.'[209] Furthermore, the UK rejected the claimants' allegation that both governments had failed to co-operate, co- ordinate and consult so as to prevent the other government's breach, as such obligation of result was not stipulated in either the Concession Agreement or in any source of international law.[210] Whether it could instead potentially be construed as an obligation of conduct was not explored by either of the respondent parties.[211]

The Tribunal's Analysis

The tribunal commenced its investigation by examining Article 47 of the ILC Articles on State Responsibility (Plurality of responsible States) which provides:

> *"1. Where several States are responsible for the same internationally wrongful act, the responsibility of each State may be invoked in relation to that act.*
> *2. Paragraph 1:*
> *(a) does not permit any injured State to recover, by way of compensation, more than the damage it has suffered;*
> *(b) is without prejudice to any right of recourse against the other responsible States."*

The ILC stated in the commentary to this Article that:

The general rule in international law is that of separate responsibility of a State for its own wrongful acts and paragraph 1 reflects this general rule. Paragraph 1 neither recognizes a general rule of joint and several or solidary

[205] ibid, para 137 – as cited in *Eurotunnel* Partial Award, para 166.
[206] ibid, para 141 – as cited in *Eurotunnel* Partial Award, para 167.
[207] Transcript, Day 9, 34 (translation of the original French version, Day 9, 30–1) Reply – as cited in *Eurotunnel* Partial Award, para 169 (original Transcript not publicly available).
[208] Insofar as this can be derived from the Partial Award as the original Memorials are not publicly available.
[209] United Kingdom Counter-Memorial, para. 3.81 and Transcript, Day 4, 122–3 – as cited in *Eurotunnel* Partial Award, para 171 (original Counter-Memorial and Transcript not publicly available).
[210] *Eurotunnel* Partial Award, para 172.
[211] Insofar as this can be derived from the Partial Award as the original Memorials are not publicly available.

responsibility, nor does it exclude the possibility that two or more States will be responsible for the same internationally wrongful act. Whether this is so will depend on the circumstances and on the international obligations of each of the States concerned.[212]

Applying this statement, the tribunal questioned 'whether the provisions of the Treaty of Canterbury as given effect to by the Concession Agreement and the Concession Agreement establish or imply any general principle of solidary responsibility for breaches of obligation'.[213] Although Clause 20 of the Concession Agreement established a system of joint and several liability of the Concessionaires to the Principals, there is no equivalent provision vice versa.

Thus the question became whether 'the Concession Agreement provided or at least assumed that an obligation of the Principals was a joint obligation of both or individual obligations of each'.[214] The claimants' argument that such obligation was included in the reference in the Con- cession Agreement to the French Minister for Transport and the British Secretary of State 'of the one part' and to the British and French companies 'of the other part', was rejected by the tribunal as it is a usual formulation which does not necessarily entail any form of joint and several responsibility.[215] More significance was attached to the conduct of the IGC, a joint supervisory organ created to supervise 'in the name and on behalf of the two Governments, all matters concerning the construction and operation of the Fixed Link'.[216] Its decisions require the assent of both States-Principals – a violation of the Concession Agreement by an act of the IGC could thus entail joint responsibility of France and the UK.[217] The claimants, however, were complaining not about an act, but an omission on the part of the IGC – which gave rise to the question of whether this 'failure to take action' entailed the joint liability of both Principals or the individual liability of each.[218]

This led the tribunal to examine the Invitation to Promoters, more specifically, the undertaking not to terminate the promoters' right to operate the Fixed Link.[219] This Invitation provided that the Treaty would lay down 'the conditions for the allocation of responsibility as between the States'.[220] Where a breach of such undertaking falls under the responsibility of both States, or where the responsibility is disputed, the issue is to be decided by arbitration on the basis of international law. The Treaty in general does not require any joint action – the one express reference being Article 5(4) on measures necessary for the defence and security of the Fixed Link, which states that:

The Concessionaires shall, if required by the two Governments, take measures necessary for the defence and security of the Fixed Link. Save in exceptional circumstances of the kind envisaged in Article 6, the two Governments shall consult each other before requiring the Concessionaires to take such measures and shall act jointly.

As Article 6 deals with natural disasters, acts of terrorism and armed conflicts, the tribunal concluded that the defence and security of the Fixed Link must be a wider concept. Furthermore, Article 15 on Compensation of Concessionaries states that:

> *"(3) . . . In those cases where both States are liable under this provision and where the Concessionaires make a claim for compensation against both States, they may not receive from each State more than half of the amount of compensation payable in accordance with the law of that State.*

[212] Commentary to art 47 of the ILC Articles on State Responsibility, para 6.
[213] *Eurotunnel* Partial Award, para 175.
[214] ibid, para 177.
[215] ibid, para 178.
[216] Treaty of Canterbury, arts 10(1) and 10(3)(c).
[217] The Partial Award hereby refers to the ILC Articles on State Responsibility which envisage the situation of 'a single entity which is a joint organ of several States': commentary to art 6, para 3; commentary to art 47, para 2.
[218] *Eurotunnel* Partial Award, paras 179–80.
[219] ibid, para 181.
[220] Invitation to Promoters, para 11.5.

(4) Each State shall bear the cost of the payment of the compensation to the Concessionaires in proportion to its responsibility, if any, in accordance with international law."[221]

The Treaty contains many provisions for consultation and co-operation between the two governments,[222] while in other respects proceeding on the basis that the implementation of the Fixed Link is a matter for one government or the other, depending on where the tasks are to be carried out.[223] So, the tribunal scrutinised all provisions of the Concession Agreement which envisage joint or co-operative action by the Principals as well as action by each of them on its own responsibility.[224]

However, the tribunal found that 'there is no equivalent so far as the Principals are concerned of the joint and several responsibility and mutual guarantees exacted from the Concessionaires'.[225] As a result, to the extent that the claims relied on joint and several responsibility, defined as 'the per se responsibility of one State for the acts of the other', they failed. What was required was close co-operation between the two governments, in particular through their joint organs (the IGC and the Safety Commit- tee); the Concession Agreement set out core commitments towards the Concessionaires, in particular to facilitate the construction and to permit the uninterrupted operation of the Fixed Link. Subsequently, the tribunal embarked upon an extensive analysis of the alleged breaches of the Con- cession Agreement resulting from the fault of one or other, or both, States – whereof the findings on the Sangatte claim are most relevant to the present discussion.

Findings on the Sangatte Claim

The Sangatte claim consisted of two allegations which were brought jointly against both respondents: (1) failure to protect the Coquelles site against clandestine migrant incursions and (2) favouring the Soci´et´e Nationale des Chemins de Fer Francais (French Railways National Society or SNCF) Terminal and Port of Calais to the detriment of the Fixed Link.

Failure to Protect against Incursions

Starting with the failure to protect the Coquelles site against incursions, the tribunal identified four applicable legal standards. First, the clauses placing the burden of the assumption of risk upon the Concessionaires do not apply in this case as these clauses concern external hazards − such as risks arising from acts of third parties or the state of the economy – as opposed to governmental non-compliance with commitments under the Concession Agreement.[226] Secondly, the legal standard against which the respondents' conduct had to be measured consisted of obligations to allow the Concessionaires freely to determine their commercial policy, not to intervene in the operation of the Fixed Link and not to interrupt its operation.[227] Thirdly, the respondents' conduct had to be examined in the light of the clauses relating to frontier controls.[228] The fourth and final legal standard was the claimants' primary reliance on certain systematic obligations of the Principals, acting in consultation and through the IGC, to maintain the basic conditions under which the Fixed Link could be constructed and operate.[229]

Applying these standards, the tribunal recognised that the opening of the Sangatte Hostel fell within the margin of appreciation of the French authorities but by January 2001, it should have been sufficiently clear to the Principals and the IGC that it was being used 'as a base for criminal activity'.[230] This led the tribunal to hold that '[u]nder Clauses 2.1 and 27.1 of the Concession Agreement, the IGC should have taken the necessary steps to

[221] Emphasis added.
[222] *Eurotunnel* Partial Award, para 184.
[223] ibid, para 185.
[224] ibid, para 186.
[225] ibid, para 187.
[226] ibid, paras 279–82.
[227] ibid, paras 279–89.
[228] ibid, paras 290–4.
[229] ibid, paras 295–302.
[230] ibid, paras 306–9.

ensure the orderly operation of the Fixed Link' but yet 'at crucial periods, the IGC sought to shift the whole burden of security on to Eurotunnel'.[231] Even though 'issues of policing outside the control zone were exclusively a matter for France, the overall responsibility for the security of the Fixed Link was shared and not divided'.[232]

It was not that the UK was responsible for the security of the Fixed Link on its side of the boundary, while France was responsible on the Continental side. Rather, both States shared that responsibility and under Clause 27.7 had agreed to ensure that the IGC took the necessary steps to facilitate the implementation of the entire Agreement. The tribunal concluded that:

in the circumstances of the clandestine migrant problem . . . , it was incumbent on the Principals, acting through the IGC and otherwise, to maintain conditions of normal security and public order in and around the Coquelles terminal; that they failed to take appropriate steps in this regard, and thereby breached Clauses 2.1 and 27.7 of the Concession Agreement, and that the Claimants are entitled to recover the losses directly flowing from this breach.[233]

This finding was not considered inequitable vis-a`-vis the UK because all measures to secure the Coquelles terminal were taken to benefit the integrity of UK immigration laws. Moreover, the IGC record did not show 'consistent and conscientious opposition by the United Kingdom to a unilateral French policy, such that the United Kingdom could argue that it did everything within its power to bring a clearly unsatisfactory situation promptly to an end'.[234] As a result, the tribunal held the UK co-responsible with France for the damages caused to the claimants.

Favouring the SNCF Terminal and Port of Calais

Subsequently, the tribunal moved to examine the discrimination claim brought against the respondents, namely the allegation that both governments had favoured the SNCF Terminal and Port of Calais to the detriment of the Fixed Link. Although this could in principle have resulted in a shared responsibility finding, the tribunal held that there was 'no general obligation on the Principals under the Concession Agreement to observe the principle of non-discrimination between different cross- Channel operators in respect of operational requirements such as security and safety'.[235] Hence, as there was no general obligation, there could be no general breach either, resulting in a finding of shared responsibility.[236]

The Extent of Responsibility as Between the Respondents

In sum, only one ground for shared responsibility was accepted by the tribunal: the failure to prevent incursions on the Coquelles site. Regarding the apportionment of the established shared responsibility and the division of compensation obligations, as between the UK and France, the tribunal referred to the second phase of the proceedings, in which the quantum of the claimants' loss would be determined and apportioned.

The tribunal in the Eurotunnel Partial Award held that it had jurisdiction over the Sangatte claim in relation to both respondents. Furthermore, in the circumstances of the examined clandestine migrant problem, 'it was incumbent on the Principals, acting through the IGC and otherwise, to maintain conditions of normal security and public order in and around the Coquelles terminal'.[237] In failing to take appropriate steps in this regard, the tribunal decided with a 4:1 majority (with Lord Millett dissenting) that the Principals had breached Clauses 2.1 and 27.7 of the Concession Agreement. As a result, the claimants were entitled to recover the losses directly

[231] ibid, para 309.
[232] ibid, para 317.
[233] ibid, para 319.
[234] ibid, para 318.
[235] ibid, para 324.
[236] ibid, paras 325–35.
[237] ibid, para 395.

flowing from this breach, to be assessed in a separate phase.[238] This next phase, the proceedings on damages, terminated when the parties reached a settlement, the precise terms of which are not avail- able to the public.[239]

The reasoning underlying the majority decision on liability can be summarised as follows: (1) both governments bore the responsibility for security maintenance under the Concession Agreement; (2) both governments were liable for damages suffered by the Concessionaires based on the fact that the Channel Tunnel required close co-operation between the two governments and through their joint organ, the IGC; (3) as a result, what the IGC as a joint organ failed to do (protect the French terminal against intrusions of clandestine migrants), the governments in whose name and on whose behalf it acted, equally failed to do.

Relevance of the Eurotunnel Award for Shared Responsibility

A Reciprocity of Joint and Several Responsibility?

Arguably, Clause 20, which establishes a system of joint and several liability of the Concessionaires vis-a`-vis the Principals but not vice versa, may seem prima facie 'unfair' as it contradicts the reciprocity of contractual obligations, creating a potential imbalance in the relationship between the contracting parties. However, although the fact of private corporations being joint and severally liable in the absence of a similar liability as between the States may seem to lack symmetry, there is a clear reason why enterprises which run commercial ventures are often assumed to be joint and severally liable while governments are not.[240] Under private law, the system of joint and several liability aims at strengthening the position of the creditor, extending the assets available for recovery in case the debtor goes bankrupt. The traditional position is that States and public bodies, even when engaging in commercial activities, cannot be equated with private corporations because, amongst other things, they cannot go bankrupt. In case of contractual breach, the creditor will still be able to obtain a (financial) remedy,[241] which could explain the position taken when the Eurotunnel Concession Agreement was signed. Although the current financial crisis may weaken this argument, it remains indisputable that States cannot simply be equated with private companies in the anticipation of bankruptcy.

The Eurotunnel Case As A Precedent For Determining Shared Responsibility

The Partial Award: dividing the allocation of responsibility

When it comes to providing guidance as to the allocation of responsibility or reparation in shared responsibility cases, the approach taken by the Eurotunnel tribunal can be seen as rather careful – for very good reasons. The caution in the liability award hardly comes as a surprise, if one considers that the chair of the arbitral tribunal in the Eurotunnel dispute (Professor James Crawford) was also the ILC Special Rapporteur under whose charge the ILC Articles on State Responsibility – which are equally non-committal with regard to shared responsibility – were finalised. What the Eurotunnel case does teach us is the importance of the specific terms of the agreement upon which the jurisdiction of the adjudicatory body is to be based. Does this agreement, as lex specialis, prescribe any particular form of shared responsibility? More specifically, has a system of joint and several liability been stipulated? Has the issue of implementation of any such responsibility been devised, particularly when it comes to remedies, or should recourse be made to national law?

This is where arbitration as a procedural means to an end – settling shared responsibility claims – might have an edge over international and domestic litigation, as it allows for ad hoc solutions via the conclusion of an arbitration agreement. Moreover, arbitration also allows for the participation of a variety of actors – as seen in the Eurotunnel case in which two companies successfully invoked the shared responsibility of the two States involved. The decision adopted in Eurotunnel was to divide the allocation of responsibility between France and the UK rather

[238] Ibid.
[239] Correspondence with the UK Foreign and Commonwealth Office, on file with author.
[240] See e.g. Scott L. Hoffman, *The Law and Business of International Project Finance* (3rd edn, Cambridge University Press 2008) 158–63.
[241] Ibid.

than holding them jointly and severally responsible, with the concrete determination and allocation of the compensation to be made in a subsequent phase. Nothing in the procedural toolbox of arbitration, however, predetermines this division of the allocation of responsibility to be repeated in similar future proceedings.

The Millett Dissent: With No Power Comes No Responsibility

Lord Millett's dissent has a certain straightforward, practical charm: why would a State be held responsible for omissions if it was not in a position to act? Why would the UK have to pay damages for lack of maintenance of public order if it did not have the competence to authorise any actions on French soil? The answer, as found in the majority opinion, is that this was exactly what the parties had agreed to in the Concession agreement: the creation of a legal fiction, whereby two States could indeed be held jointly responsible on an abstract level, whereas only the actions of one of them could have prevented the breach in practice. Legally, it is a logical and common set-up to hold someone liable for damages due to failure to act, even if their own conduct did not contribute to the damages − for the sole reason that this was a joint operation.

Although Lord Millett agreed that the UK shared France's understanding of their legal obligations in this matter, he maintained that the respondents' authorisation of the IGC's conduct did not form a breach of the Concession Agreement in itself, but at most 'some encouragement to France'.[242] As a result, France – and only France − violated the Concession Agreement. Concluding that Clause 27 does not add anything to Clause 2.1[243] is an illustration of circular reasoning, effectively leaving Clause 27 devoid of legal meaning. Furthermore, it is rather unfair to the majority to state that:

"[t]he key proposition on which the majority base their finding against the United Kingdom is that it did not 'do everything within its power to bring an unsatisfactory situation promptly to an end' . . . This is, with respect, an abbreviated version of the truth, omitting as it does a crucial qualification. The true position is that the United Kingdom did not do everything within its power to bring an unsatisfactory situation promptly to an end by getting France to perform its obligations."[244]

The majority did not include the latter finding (either explicitly or implicitly) in its award. The most straightforward explanation is that this was not included because it was not part of the majority's position. The dissent seems to read an obligation of result into what is phrased as an obligation of conduct. Taken at face value, the award states exactly what it was in all likelihood meant to state: the UK could have undertaken certain actions to try to induce France to comply with the obligations resting upon both respondents, but the UK failed to do this. The reason is quite simple: the UK was labouring under the same understanding of these obligations as France was, thereby encouraging France to continue acting accordingly.

Had the UK, however, adopted the correct – the tribunal's – under- standing of the Principals' obligations and done everything in its power to convince France to change course, but failed in achieving that goal, the discussion would presumably have run a different course. The facts being as they are, the majority rightly concluded that the shared responsibility of both respondent States had been established. Particularly as to the IGC's conduct, the majority decision concurs with the line of reasoning followed by the International Court of Justice (ICJ) in its decision in Certain Phosphate Lands in Nauru relating to the shared responsibility of Australia, the UK and New Zealand for their joint organ, the Administrative Council[245] – incidentally also the first ICJ case in which the chair of the Eurotunnel arbitration and honouree of this work appeared as counsel.

This is not to imply that Lord Millett's dissent should be discarded: particularly relevant remains his analysis of the consequences of primary as opposed to secondary responsibility and, more precisely, the consequences

[242] Dissent Lord Millett, para 16.
[243] ibid, para 18.
[244] ibid, para 23 (emphasis in original).
[245] *Certain Phosphate Lands in Nauru (Nauru* v. *Australia)*, Judgment on Preliminary Objections, 26 June 1992 ICJ Reports (1992), 240, 258–9, para 48; see also Christian Dominicé, 'Attribution of Conduct to Multiple States and the Implication of a State in the Act of Another State' in James Crawford, Allain Pellet, Simon Olleson (eds.), *The Law of International Responsibility* (Oxford University Press 2010) 281–4.

pertaining to the different nature of the internationally wrongful act committed by the UK.[246] The majority award could be criticised not so much for the injustice of holding the UK liable, but for reducing France's liability to any extent, as 'ultimately the cause of the United Kingdom's supposed liability is that France failed to discharge its obligations under the Concession Agreement'.[247] Indeed, if France on its own had adopted the correct understanding of the Principals' obligations under the Concession Agreement and had satisfactorily discharged such obligations, there would have been no dispute, regardless of the UK's understanding. Thus, in such case, even if the UK had maintained its present incorrect understanding that no action was required, this would not have entailed a shared responsibility finding as there would have been no injury and ensuing cause for damages.

Even if one accepts that the UK and France jointly committed the same internationally wrongful act, the responsibility of one involved State (France) cannot be reduced due to the existence of a co-perpetrator (the UK). To what extent this may influence the allocation of the damages is a different matter.[248]

Determining Damages

Regarding the precise division of the damages flowing from the establishment of shared responsibility in the confidential settlement of the Eurotunnel case, one can only resort to speculative guesswork. Inasmuch as the IGC's conduct is concerned, it is most likely that the responsibility of the States involved has been divided on a fifty-fifty basis. Such estimation is based on the formulation of the Concession Agreement, and more precisely the stipulations under Clause 27 which give both Principals an equal role in the Agreement's implementation and the functioning of the IGC and the Safety Authority. Resulting from such equal power to drive the IGC's actions, and in the absence of evidence to the contrary, it would appear that each State should bear an equal measure of responsibility if and when the IGC fails to act to an extent that such omission is found to be in breach of the Agreement.

However, the same reasoning will not necessarily have been applied concerning the determination of the compensation for breaches due to acts or omissions of the respondents directly (as opposed to through the IGC). The tribunal held that 'it was incumbent on the Principals, acting through the IGC and otherwise, to maintain conditions of normal security and public order in and around the Coquelles terminal'.[249] The liability for the Principals' actions covered by the term 'and otherwise' is where the distinction between the consequences of primary versus secondary liability could come into play, because the settlement may have, as expressed in Lord Millett's words, treated 'the United Kingdom liable to the Claimants . . . in a very small amount'.[250] It is impossible to establish whether UK protests against French conduct would have had any effect. Hence, in the absence of any information on actual UK actions that have effectively contributed to the damage, it could even be possible that the UK share of reparation for this part of the Sangatte shared responsibility claim (as opposed to the IGC-related part) remained limited to some form of satisfaction, rather than actual compensation.

Conclusion

When it comes to providing guidance as to the allocation of responsibility or reparation in shared responsibility cases, the approach taken by the Eurotunnel tribunal can be seen as quite cautious; a significant contribution to alleviate the under-theorisation and under-exploration in this field has not been realised due to the confidential settlement reached by the parties to the dispute. What the Partial Award in the Eurotunnel case does teach us is the importance of the specific terms of the treaty upon which the jurisdiction of the adjudicatory body is to be based. Does this lex specialis prescribe any particular form of shared responsibility? More specifically, has a

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[246] This option was cursorily mentioned by Lord Millett in para. 19 of his Dissent: '[e]ven if [the conduct of the UK] did [constitute a breach of the Concession Agreement], it wouldnot be the same wrong but a wrong of a very different order'.
[247] ibid, para 24.
[248] *Certain Phosphate Lands in Nauru (Nauru* v. *Australia)*, Separate Opinion of Judge Shahabuddeen, p 283–5; Commentary to the art 47 of the ILC Articles on State Responsibility for Internationally Wrongful Acts, para 11; see also, Orakhelashvili, 'Division of Reparation between Responsible Entities', p 647–65.
[249] *Eurotunnel* Partial Award, para 395 (emphasis added).
[250] Dissent Lord Millett, para 24.

system of joint and several liability been provided? Has the implementation of such responsibility been regulated, particularly concerning remedies, or should recourse be made to general law?

The solution advocated in this chapter is to anticipate shared responsibility claims that may arise in the future and address their implementation already in the treaty or contract which contains the primary obligations – as a lex specialis to the limited provisions in the ILC Articles on State Responsibility. A subsidiary solution, if there is no primary treaty or contract, or if it does not regulate shared responsibility claims, would be that parties to an existing dispute try to reach an agreement in abstracto on the implementation of shared responsibility, incorporate this in their arbitration agreement and then let an arbitral tribunal decide, first, whether the primary obligation has been breached, and, secondly, how the shared responsibility regulations have to be applied in the case at hand.

Including a 'division formula' in a treaty is not entirely uncommon, an illustration being the 1976 Convention on the Protection of the Rhine from Pollution by Chlorides and its 1991 Additional Protocol, which allocate the clean-up costs for the pollution of the Rhine among the riparian States according to a predetermined formula.[251] Evidently, the contributory payment under this treaty and protocol formed the primary obligation and not a secondary one resulting from previous internationally wrongful conduct but States, international organisations and non-State entities could similarly work out a formula for existing or future shared responsibility claims.

Arbitration as a procedural means to an end – settling shared responsibility claims – has an edge over international and domestic litigation, as it allows for ad hoc solutions to be created via the conclusion of an arbitration agreement. Moreover, and just as important, arbitration also allows for the participation of a variety of actors – an option which is not limited to allowing companies to bring claims against States, as seen in the Eurotunnel case – but could be extended to include, as claimants or respondents, various combinations of States, international organisations, companies, peoples, and individuals. In this manner, a just sharing of responsibility among all accountable actors becomes less of an unattainable ideal and more of an achievable reality.

[251] Agreement for the Protection of the Rhine against Chemical Pollution (Bonn, signed 3 December 1976, entered into force 1 February 1979), 1124 UNTS 406; *Case concerning the Audit of Accounts between the Netherlands and France in Application of the Protocol of 25 September 1991 Additional to the Convention for the Protection of the Rhine from Pollution by Chlorides of 3 December 1976 (Netherlands* v. *France)* Award (12 March 2004) United Nations Reports of International Arbitral Awards, vol. XXV, p 267–344.

The Legacy of Antônio Augusto Cançado Trindade: Towards Building a New *Jus Gentium*

By **Paula Wojcikiewicz Almeida**[1]

Abstract

In his professional practice, Antônio Augusto Cançado Trindade perfectly combined theory and practice in matters of International Law. This essay illustrates his legal-humanist trajectory as an academic, as well as a judge of the Inter-American Court of Human Rights and the International Court of Justice. The theses he developed during his prolific academic career were equally visible in his practice as a judge. He believed that the jurisdictional function was guided, above all, by the ideal of achieving justice. This is because, for judge Cançado Trindade, an international court cannot remain indifferent to human suffering, favouring *raison d'État* and denying justice to individuals under its jurisdiction.

Introduction

"The International Court of Justice announces the passing of H.E. Judge Antônio Augusto Cançado Trindade on May 29 2022 in Brazil," as stated in the press release issued by the International Court of Justice on May 30. Silence. An immeasurable emptiness.

How can one fill the void felt by a generation of internationalists who had in Antônio Augusto Cançado Trindade a master, a guide, and, above all, a critical and sincere friend, faithful to his own convictions? We are all orphans. Generations of Latin Americans, including us Brazilians. Orphans of a notable jurist before the Brazilian Ministry of Foreign Affairs, orphans of an academic with the spirit of a researcher in constant pursuit of the development of International Law, orphans of a judge whose opinions stood out for the brilliance of his legal reasoning, accompanied by a meticulous scrutiny of the concepts employed, with a view to ensuring the triumph of justice over the *raison d'État*.

In his professional life, Antônio Augusto Cançado Trindade perfectly combined theory and practice in the field of International Law. Without any intentions of being all-encompassing, this essay illustrates the multiple facets of his prolific career as an academic (1) and as a judge of the Inter-American Court of Human Rights (2) and of the International Court of Justice (3).[2]

As a Scholar of International Law

Cançado Trindade served as a professor and lecturer at several universities and renowned institutions during his career, such as at The Hague Academy of International Law (1987 and 2005). In 2004, he became a member of the Curatorium of The Hague Academy representing Latin America, and since1997 he had been a member of the

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[2] I'd like to thank the researchers of the Jean Monnet Centre of Excellence at FGV Direito Rio that worked on the research and collected the necessary data for this essay: Gabriela Porto; Giulia Romay; Caio Ovelheiro; Vinícius Paiva; Maria Eduarda Muniz; and Hannah Leão.

Institut de Droit International. He was a Full Professor at the University of Brasília and the Rio Branco Institute from 1978 to 2009. In 2010, he was awarded the title of Professor Emeritus of International Law at the University of Brasília. He was also Doctor *Honoris Causa* and Honorary Professor at several universities in Latin America and Europe.

He authored about seventy-eight books and 780 monographs, having contributed to book chapters and articles in International Law journals in different countries and languages[3]. To illustrate his academic practice, it is worth recalling the writings resulting from his General Course on Public International Law, taught between July and August 2005 - which was the first general course by a Brazilian jurist since the establishment of The Hague Academy of International Law in 1923 –*International Law for Humankind: Towards a New Jus Gentium*.[4] In 2010, the second revised edition of the book was published by BRILL.[5] The third revised and updated edition, which considers the most recent challenges for the consolidation of International Law, was published in 2020 by BRILL.[6]

This book is vital both in national and international literature, as it seeks to overcome the predominant interstate and voluntarist vision of International Law[7] by rescuing the primacy of the reason of humanity over the reason of State, which is ever-present in the thinking of the sixteenth and seventeenth centuries founding fathers, such as F. de Vitoria (*Relecciones Teológicas* 1538-1539), F. Suárez (*De Legibus ac Deo Legislatore* 1612), A. Gentili (*De Jure Belli* 1598), H. Grotius (*De Jure Belli ac Pacis* 1625), S. Pufendorf,and C. Wolff, among others.[8] The work comprises texts selected and updated by Cançado Trindade, written between 1999 and 2005 - products of his teachings over three decades. It is, therefore, the result of personal reflections assembled over a lifetime dedicated to the theory and practice of International Law.

Positively and confidently, Cançado Trindade addresses future generations of international jurists who are attentive to the current-day aspirations of the international community. The *leitmotiv* of this work is the recognition that International Law is a *corpus juris* aimed at achieving the needs and aspirations of human beings and humankind in general. The author is concerned with restoring values at a time of evident crisis and neglect of said values and, to do so, relies on a universalistic and humanized International Law, true to the thinking of the discipline's founding fathers and the needs of the international community. It is based on the assumption that the pure state-centric dimension of International Law is outdated and that international legal personality grew to recognize international organizations and individuals as subjects.

The book is composed of eight logically linked parts that aim at constructing a new *jus gentium*. Cançado Trindade begins his preliminary chapter by presenting a solid analysis of the necessary bases for understanding the new *International Law for Humankind*, tracing its historical evolution. The doctrinal construction values and rescues the legacy of the founding fathers' writings on International Law in the sixteenth and seventeenth centuries - especially F. de Vitoria, F. Suárez, and H. Grotius, as well as A. Gentilli and S. Pufendorf, who backed the idea of a*civitas maxima* governed by the law of nations.[9] Cançado Trindade then goes on to identify the basic characteristics of the new *jus gentium* capable of meeting the needs and aspirations of humankind, which marks the beginning of the twenty-first century. The new *jus gentium* is thus imbued with a temporal dimension directed at progressively adapting itself to the needs and aspirations of humankind.

The second part of the book covers the foundations of International Law, referring to the role and importance of the basic principles of the discipline that form the basis of the legal order itself. The third part delves into the formation of International Law, reassessing the theory of its formal sources to demonstrate its non-exhaustive character and its insufficiency in current times.[10] The fourth part addresses the subjects of International Law as

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[3] International Court of Justice, Press Release 2022/19, 30 May 2022 <https://www.icj-cij.org/public/files/press-releases/0/000-20220530-PRE-01-00-EN.pdf> accessed 23 August 2022.

[4] The original text of the General Course on International Law given by Cançado Trindade was published in Collected Courses of The Hague Academy. See Antônio Augusto Cançado Trindade, *International Law for Humankind: Towards a New Jus Gentium - General Course on Public International Law* (2005) 316 Recueil des Cours de l'Académie de Droit International.

[5] The analysis presented here brings highlights and important points presented by the author of this essay. See Paula Wojcikiewicz Almeida, 'Review of the Book *International Law for Humankind: Towards a New* Jus Gentium, by Antônio A. Cançado Trindade' (2013) 9(1) *Revista Direito G.V.*

[6] Antônio Augusto Cançado Trindade, *International Law for Humankind*, vol 10 (Brill 2020).

[7] Antônio Augusto Cançado Trindade, *A Humanização do Direito Internacional* (Ed. Del Rey 2006) 21.

[8] Association Internationale Vitoria-Suarez 'Vitoria et Suarez – Contribution Des Theologiens Au Droit International Moderne' (A. Pedone 1939)169-170. See also Paul Guggenheim, 'Contribution a l'histoire des sources du droit des gens' (1958) 94 Recueil des Cours 21-5.

[9] Antônio Augusto Cançado Trindade, *International Law for Humankind*, vol 10 (Brill 2020)8-16.

[10] Antônio Augusto Cançado Trindade, *O Direito Internacional em um Mundo em Transformação* (Ed. Renovar 2002) 19-76; and Antônio Augusto Cançado Trindade, *International Law for Humankind*, vol 10 (Brill 2020) 30-96.

it aims to demonstrate the existence of a humanization process, resulting in the expansion of international legal personality. In the fifth part, Cançado Trindade seeks to construct the International Law for Humankind, the new *jus gentium*, based on ongoing conceptual constructions reaffirming its universal character. In the sixth part, the Professor recalls primary considerations of humanity that provide illustrations of the emergence of a new *jus gentium* in various areas of International Law. The seventh part assesses the current state of and prospects for peaceful settlement of disputes, reiterating the need for compulsory jurisdiction.[11] The author emphasizes the positive character of the multiplicity of international courts in contemporary International Law. It indicates an expansion of international jurisdiction and the process of decentralizing the international legal order beyond the purely interstate perspective.[12]

It represents the outcome of Cançado Trindade's reflections accumulated over the last three decades as an academic and international judge that rescues and brings to life the universal legal conscience, building a new *jus gentium* for humankind. He concludes his very up-to-date work by showing deep confidence in the new generation of international jurists on the construction of the new *jus gentium* of this century. *International Law for Humankind: Towards a New Jus Gentium* is a most valuable contribution to the study of International Law. It is indispensable for a generation of international jurists, guided by values, capable of seeing the human being beyond the shackles of State sovereignty and rescuing its central position as the subject of domestic and international law.

As a Judge of the Inter-American Court of Human Rights

Cançado Trindade served as a judge of the Inter-American Court of Human Rights (IACtHR) from 1995 to 2008 and was President of the Court from 1999 to 2004. Out of the 148 Judgments in contentious cases he attended over his tenure as ad hoc judge (1991, 1993, and 1994) and elected judge (1995-2000 and 2001-2006) of the IACtHR, Cançado Trindade delivered a total of 72 votes, among which: 57 separate opinions, nine dissenting opinions and six concurring opinions following the majority of the Court[13]. In particular, the nine dissenting opinions were delivered in cases that dealt with topics such as arbitrary detention by State agents[14], extrajudicial execution[15], forced disappearances[16], labour rights[17], and indigenous peoples' rights[18].

In advisory proceedings, Cançado Trindade delivered two concurring opinions out of the five Judgments to which he attended. These two opinions were proffered in the cases: *OC-17*, requested by the Inter-American Commission on the juridical condition and rights of children[19], and *OC-18*, requested by the Mexican State on the juridical condition and rights of undocumented migrants[20]. The Judge also participated in the judgments related to several requests on provisional measures.

As judge at the IACtHR, Cançado Trindade advocated for individuals' right of direct access to international jurisdiction.[21] He deemed the recognition of substantive rights under the American Convention to be associated

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[11] Antônio Augusto Cançado Trindade, *International Law for Humankind: Towards a New Jus Gentium - General Course on Public International Law* (2005) 316 Recueil des Cours de l'Académie de Droit International749-789; and Antônio Augusto Cançado Trindade, *International Law for Humankind*, vol 10 (Brill 2020) 226-77.

[12] Antônio Augusto Cançado Trindade, 'La perspective transatlantique: La contribution de l'œuvre des Cours internationales des droits de l'homme au développement du droit public international' (2000) 50(Numéro Spécial) *La Convention européenne des droits de l'homme à 50 ans – Bulletin d'information sur les droits de l'homme* 8-9; and Antônio Augusto Cançado Trindade, 'The Merits of Coordination of International Courts on Human Rights' (2004) 2(2) *Journal of International Criminal Justice* 309-12.

[13] In accordance with Article 65 (2) of the Rules of Procedure of the Inter-American Court, concurring or dissenting opinions should be motivated.

[14] *Caso Gangaram Panday Vs. Surinam* (Fondo, Reparaciones y Costas) IACtHR Serie C No 16 (21 January 1994); and *Caso Caballero Delgado y Santana Vs. Colombia* (Reparaciones y Costas) IACtHR Serie C No 31 (29 January 1997).

[15] *Caso El Amparo Vs. Venezuela* (Reparaciones y Costas) IACtHR Serie C No 28 (14 September 1996); *Caso El Amparo Vs. Venezuela* (Interpretación de la Sentencia de Reparaciones y Costas) IACtHR Serie C No 46 (16 April 1997); and *Caso Genie Lacayo Vs. Nicaragua* (Solicitud de Revisión de la Sentencia de Fondo, Reparaciones y Costas) IACtHR Serie C No 45 (13 September 1997.

[16] *Caso de las Hermanas Serrano Cruz Vs. El Salvador* (Excepciones Preliminares) IACtHR Serie C No 118 (23 November 2004); and *Caso de las Hermanas Serrano Cruz Vs. El Salvador* (Fondo, Reparaciones y Costas) IACtHR Serie C No 120 (1 March 2005).

[17] *Caso Trabajadores Cesados del Congreso (Aguado Alfaro y otros). Vs. Perú* (Fondo, Reparaciones y Costas) IACtHR Serie C No 125 (30 November 2007).

[18] *Caso Comunidad Indígena Yakye Axa Vs. Paraguay* (Solicitud de Interpretación de la Sentencia de Excepciones Preliminares, Fondo, Reparaciones y Costas) IACtHR Serie C No 174 (17 June 2005).

[19] *Condición Jurídica y Derechos Humanos del Niño*, Opinión Consultiva OC-17, IACtHR Serie A No 17 (28 August 2002).

[20] *Condición jurídica y derechos de los migrantes indocumentados*, Opinión Consultiva OC-18, IACtHR Serie A No 18 (17 September 2003).

[21] See Opinions in: *Caso Castillo Páez Vs. Perú*(Excepciones Preliminares) IACtHR Serie C No 24 (30 January 1996); *Caso Loayza Tamayo Vs. Perú.* (Excepciones Preliminares) IACtHR Serie C No 25 (31 January 1996); *Caso Castillo Petruzzi y otros Vs. Perú*(Excepciones Preliminares) IACtHR Serie C No 41 (4 September 1998); *Caso Blake Vs. Guatemala* (Reparaciones y Costas) IACtHR Serie C No 48 (22 January 1999); *Caso Bámaca Velásquez Vs.*

with the recognition of their procedural capacity[22] and the need to provide for the compulsory jurisdiction of international tribunals. Therefore, he proposed the revision of the Rules of Procedure to guarantee individuals direct access to the Inter-American system.[23] This is because the recognition of *legitimatio ad causam* for individuals before international bodies responds to a "need from the international legal order itself".[24] Thus, the individual petitioner would have *locus standi in judicio* and *jus standi* in all stages of the Court's proceedings.[25] He repeatedly stressed the need to provide for the automaticity of the mandatory jurisdiction of the IACtHR through unconditional acceptance by the State,[26] as well as the amendment of Article 62 of the American Convention.[27]

Also during his presidency, Cançado Trindade pointed out gaps in the system of supervision of enforcement of judgments,[28] which motivated the presentation of several reports and concrete proposals advocating the establishment of a permanent mechanism for the monitoring and enforcement of compliance with the Court's sentences.[29] Cançado Trindade also considered that provisional measures of protection in human rights cases constituted an autonomous legal institute with its own legal regime.[30]

In the substantive field, Cançado Trindade sustained the existence of crimes against human rights committed by States, which give rise to aggravated responsibility for that State. In his opinion, the existence of State crimes is even clearer in cases of massacres[31],in which affected victims or their families are given reparation, such as exemplary reparations and punitive damages. In *Mapiripán Massacre v. Colombia*[32] and *Plan Sánchez Massacre*

Guatemala (Fondo) IACtHR Serie C No 70 (25 November 2000); *Caso de los "Niños de la Calle" (Villagrán Morales y otros) Vs. Guatemala* (Reparaciones y Costas) IACtHR Serie C No 77 (26 May 2001); *Caso "Cinco Pensionistas" Vs. Perú* (Fondo, Reparaciones y Costas) IACtHR Serie C No 98 (28 February 2003); *Caso de los Hermanos Gómez Paquiyauri Vs. Perú* (Fondo, Reparaciones y Costas) IACtHR Serie C No 110 (8 July 2004); *Caso "Instituto de Reeducación del Menor" Vs. Paraguay* (Excepciones Preliminares) IACtHR Serie C No 112 (2 September 2004); *Caso Yatama Vs. Nicaragua* (Excepciones Preliminares) IACtHR Serie C No 127 (23 June 2005); *Caso Ximenes Lopes Vs. Brasil* (Sentencia) IACtHR Serie C No 149 (4 July 2006); *Caso de la Masacre de Pueblo Bello Vs. Colombia* (Sentencia) IACtHR Serie C No 140 (31 January 2006); *Caso López Álvarez Vs. Honduras* (Fondo, Reparaciones y Costas) IACtHR Serie C No 141 (1 February 2006); *Caso Comunidad Indígena Sawhoyamaxa Vs. Paraguay* (Fondo, Reparaciones y Costas) IACtHR Serie C No 146 (29 March 2006); *Caso Baldeón García Vs. Perú* (Fondo, Reparaciones y Costas) IACtHR Serie C No 147 (6 April 2006); *Caso de las Masacres de Ituango Vs. Colombia* (Sentencia) IACtHR Serie C No 148 (1 July 2006); *Caso Goiburú y otros Vs. Paraguay* (Fondo, Reparaciones y Costas) IACtHR Serie C No 153 (22 September 2006); *Caso Trabajadores Cesados del Congreso (Aguado Alfaro y otros). Vs. Perú (Fondo, Reparaciones y Costas) IACtHR Serie C No 125 (30 November 2007)*; *Asunto Mery Naranjo y otros respecto Colombia* (Medidas Provisionales) IACtHR (22 September 2006); *Caso García Prieto y otros respecto El Salvador* (Medidas Provisionales) IACtHR (26 September 2006); *Asunto de las personas privadas de libertad de la Penitenciaria "Dr. Sebastião Martins Silveira" en Araraquara, São Paulo respecto Brasil* (Medidas Provisionales) IACtHR (30 September 2006); and *Condición Jurídica y Derechos Humanos del Niño*, Opinión Consultiva OC-17, IACtHR Serie A No 17 (28 August 2002).

[22] Antônio Augusto Cançado Trindade, *El ejercicio de la función judicial internacional: memorias de la Corte Interamericana de Derechos Humanos* (Ed. Del Rey 2013) 113-4.

[23] After the adoption of the IACtHR's Fourth Rules of Procedure in 2001, Cançado Trindade prepared bases for a Draft Protocol to the American Convention to strengthen its mechanism for protection. Presented to the General Assembly of the Organization of American States (OAS) in 2002, the Draft is still pending evaluation. Some of his proposals are amendments to articles 50(2), 51(1), 59, 65, 68, 75, and 77 of the Convention. It also included an amendment to article 62that would make the IACtHR's jurisdiction compulsory for all Member States upon ratification, without admission of restrictions or need for additional expression of consent. For more details, see Antônio Augusto Cançado Trindade, *El ejercicio de la función judicial internacional: memorias de la Corte Interamericana de Derechos Humanos* (Ed. Del Rey 2013) 118-27.

[24] Antônio Augusto Cançado Trindade, *Evolution du droit international au droit des gens: L'accès des individus à la Justice Internationale, le regard d'un juge* (Pedone 2008) 29.

[25] Antônio Augusto Cançado Trindade, *El ejercicio de la función judicial internacional: memorias de la Corte Interamericana de Derechos Humanos* (Ed. Del Rey 2013) 113-4.

[26] *Caso del Tribunal Constitucional Vs. Perú* (Competencia) IACtHR Serie C No 55 (24 September 1999); *Caso Ivcher Bronstein Vs. Perú* (Competencia) IACtHR Serie C No 54 (24 September 1999); and *Caso Hilaire Vs. Trinidad y Tobago* (Excepciones Preliminares) IACtHR Serie C No 80 (1 September 2001).

[27] Antônio Augusto Cançado Trindade, 'La Cour Interaméricaine des Droits de l'Homme au seuil du XXIème siècle' (2000) 24 *Actualité et Droit International* 7-8; and Antônio Augusto Cançado Trindade, *El ejercicio de la función judicial internacional: memorias de la Corte Interamericana de Derechos Humanos* (Ed. Del Rey 2013) 60.

[28] As a result of these gaps, Cançado Trindade notes that the respondent State in the cases *Hilaire, Benjamin and Constantine (2001-2002)* did not send the IACtHR any information regarding compliance with the Court's judgment. See *Caso Hilaire, Constantine y Benjamin y otros Vs. Trinidad y Tobago* (Fondo, Reparaciones y Costas) IACtHR Serie C No 94 (21 June 2002).

[29] In 2000, Cançado Trindade informed the OAS General Assembly of the Peruvian State's failure to comply with the judgment under the Fujimori regime.

[30] *Caso Familia Barrios Vs. Venezuela* (Fondo, Reparaciones y Costas) IACtHR Serie C No 237 (24 November 2011).

[31] *Caso Masacre Plan de Sánchez Vs. Guatemala* (Reparaciones) IACtHR Serie C No 116 (19 November 2004); *Caso de la "Masacre de Mapiripán" Vs. Colombia* (Sentencia) IACtHR Serie C No 134 (15 September 2005); and *Caso de las Masacres de Ituango Vs. Colombia* (Sentencia) IACtHR Serie C No 148 (1 July 2006).

[32] *Caso de la "Masacre de Mapiripán" Vs. Colombia* (Sentencia) IACtHR Serie C No 134 (15 September 2005).

v. Guatemala,[33] Cançado Trindade affirmed the coexistence and complementarity between the State's aggravated international responsibility and the international criminal responsibility of the individual.

Also, throughout his work at the IACtHR, Cançado Trindade advocated for *jus cogens* norms, the gradual expansion of their content and the corresponding *erga omnes* obligations of protection based on the American Convention,[34] emphasizing the horizontal and vertical dimensions of these obligations.[35] For the judge, the first stage of the jurisdictional evolution of *jus cogens* consisted in the affirmation of the absolute prohibition of torture in any circumstance,[36] as a *jus cogens* norm, followed by the prohibition of cruel, inhuman, and degrading treatment.[37] Subsequently, the Court again expanded the material content of the institution by encompassing the basic principle of equality and non-discrimination[38] and the right of access to justice.[39] As a judge of the IACtHR, he actively engaged in the conceptual and jurisprudential construction of the *erga omnes* obligations of protection and criticized contemporary legal doctrine for not adequately addressing the vertical dimension of *erga omnes* obligations.

Cançado Trindade affirmed the importance of horizontal international judicial dialogue, whether direct or indirect.[40] In his pronouncements before the IACtHR, the judge often brought up judgments of the International Court of Justice (ICJ) intending to promote cross-fertilization, to inspire the solution of legal problems, and also to reinforce persuasion, authority, or legitimacy of the decisions.[41] Such practice was already frequent in the majority judgments of the IACtHR[42]: by October 2018, the IACtHR had referred to ICJ jurisprudence in 146 majority judgments involving both procedural and substantive issues.[43] In particular, indirect judicial dialogue with the ICJ was present in ninety-four judges' opinions by 2018,[44] with Cançado Trindade being the most active judge as far as cross-fertilization is concerned. In fact, from 1995 to 2006, the judge made fifty-six references to ICJ jurisprudence: forty-two in separate opinions, twelve in concurring opinions, and two in dissenting opinions.[45]

As a Judge of the International Court of Justice

In November 2008, Cançado Trindade was the fifth Brazilian elected to the ICJ, having been preceded by Francisco Rezek (1996-2006), José Sette Câmara (1979-1988), Levi Fernandes Carneiro (1951-1955) and José

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[33] *Caso Masacre Plan de Sánchez Vs. Guatemala* (Reparaciones) IACtHR Serie C No 116 (19 November 2004).

[34] See concurring votes in: Asunto *de la Comunidad de Paz de San José de Apartadó respecto Colombia* (Medidas Provisionales) IACtHR (15 March 2005); *Asunto Comunidades del Jiguamiandó y del Curvaradó respecto Colombia* (Medidas Provisionales) IACtHR (15 March 2005); *Asunto Pueblo Indígena Kankuamo respecto Colombia* (Medidas Provisionales) IACtHR (5 July 2004); *Asunto Pueblo Indígena Sarayaku respecto Ecuador* (Medidas Provisionales) IACtHR (6 July 2004); *Asunto de la Cárcel de Urso Branco respecto Brasil* (Medidas Provisionales) IACtHR (7 July 2004); and *Asunto de las Penitenciarias de Mendoza respecto Argentina* (Medidas Provisionales) IACtHR (18 June 2005). See also Separate Vote in *Caso Blake Vs. Guatemala* (Reparaciones y Costas) IACtHR Serie C No 48 (22 January 1999).

[35] Antônio Augusto Cançado Trindade, *El ejercicio de la función judicial internacional: memorias de la Corte Interamericana de Derechos Humanos* (Ed. Del Rey 2013) 131-2.

[36] *Caso de los Hermanos Gómez Paquiyauri Vs. Perú* (Fondo, Reparaciones y Costas) IACtHR Serie C No 110 (8 July 2004).

[37] *Caso Caesar Vs. Trinidad y Tobago* (Fondo, Reparaciones y Costas) IACtHR Serie C No 123 (11 March 2005).

[38] *Condición jurídica y derechos de los migrantes indocumentados*, Opinión Consultiva OC-18, IACtHR Serie A No 18 (17 September 2003)..

[39] *Caso Goiburú y otros Vs. Paraguay* (Fondo, Reparaciones y Costas) IACtHR Serie C No 153 (22 September 2006); and *Caso de la Masacre de Pueblo Bello Vs. Colombia* (Sentencia) IACtHR Serie C No 140 (31 January 2006). See also reasoned opinions presented at the trial of *Goiburú*; *Caso Almonacid Arellano y otros Vs. Chile* (Excepciones Preliminares) IACtHR Serie C No 154 (26 September 2006); and *Caso La Cantuta Vs. Perú* (Fondo, Reparaciones y Costas) IACtHR Serie C No 162 (29 November 2006).

[40] Anne-Marie Slaughter, '*A Typology of Transjudicial Communication*' (1995) 29(1) *University of Richmond Law Review* 103, 117-119. See also Harold Hongju Koh, 'International Law as Part of Our Law' (2004) 98(1) *American Journal of International Law*.

[41] Anne-Marie Slaughter, '*A Typology of Transjudicial Communication*'(1995) 29(1) *University of Richmond Law Review* 103,117-119.

[42] Nathan Miller, 'An International Jurisprudence? The Operation of Precedent Across International Tribunals' (2002) 15(3) *Leiden Journal of International Law* 489. See also Eduardo Ferrer Mac-Gregor, 'What Do We Mean When We Talk about Judicial Dialogue: Reflections of a Judge of the IACtHR' (2017) 30 *Harvard Human Rights Journal* 90.

[43] Paula Wojcikiewicz Almeida & Gabriela Hühne Porto, 'O Impacto da Jurisprudência Da Corte Internacional De Justiça Em Cortes De Direitos Humanos: Diálogo Judicial Ou Monólogo Com A Corte Interamericana De Direitos Humanos?' (2021) 26(2) *Revista direitos fundamentais & democracia* (UniBrasil), *passim*.

[44] Paula Wojcikiewicz Almeida & Gabriela Hühne Porto, 'O Impacto da Jurisprudência Da Corte Internacional De Justiça Em Cortes De Direitos Humanos: Diálogo Judicial Ou Monólogo Com A Corte Interamericana De Direitos Humanos?' (2021) 26(2) *Revista direitos fundamentais & democracia* (UniBrasil), *passim*. See also Laurence Burgorgue-Larsen& Nicolás Montoya Céspedes, 'El diálogo judicial entre la Corte Interamericana de Derechos Humanos y la Corte Europea de Derechos Humanos' in George Rodrigo Bandeira Galindo, René Urueña & Aida Torres Pérez(org.), *Manual: Protección Multinivel de Derechos Humanos* (Red de Derechos Humanos y Educación Superior 2013) 191-2.

[45] Paula Wojcikiewicz Almeida & Gabriela Hühne Porto, 'O Impacto da Jurisprudência Da Corte Internacional De Justiça Em Cortes De Direitos Humanos: Diálogo Judicial Ou Monólogo Com A Corte Interamericana De Direitos Humanos?' (2021) 26(2) *Revista direitos fundamentais & democracia* (UniBrasil), *passim*.

Philadelpho de Barros e Azevedo (1946-1951). He was elected by the UN with an unprecedented and historic vote: 163 votes in the General Assembly and fourteen out of fifteen votes in the Security Council. In 2017, he was re-elected for a new nine-year term.

In his thirteen years as Judge of the ICJ, Cançado Trindade attended to judgments related to questions of jurisdiction and procedure, questions of substance, and provisional measures in both contentious cases and advisory proceedings. In ICJ contentious cases, the Justice Cançado Trindade delivered 31 votes: eight dissenting opinions (seven in concluded cases and one in pending cases)[46]; and 23 separate opinions (19 in concluded cases and four in pending cases), delivered while concurring with the decision adopted by the majority of the Court. Regarding ICJ advisory proceedings, Cançado Trindade also delivered three separate opinions. One opinion related questions of labour rights of workers of UN agencies[47]. The other two separate opinions were delivered in cases dealing with matters of self-determination[48].

During his tenure as a judge at the ICJ, Cançado Trindade demonstrated concern with the importance of international judicial duties and the role of international courts, especially the ICJ, in the progressive development of international law and in the realization of justice. In his dissenting opinion in *Georgia v. Russia*,[49] Cançado Trindade criticized the voluntarist conception underlying the rules for the exercise of jurisdiction of international courts. On this occasion, he stated that "the time ha[d] come to overcome definitively the regrettable lack of automatism of the international jurisdiction",[50] then defending the need to establish compulsory jurisdiction as an imperative to achieve international justice.[51]

In his separate opinions and dissenting votes, Cançado Trindade insisted on the centrality of human beings as the ultimate addressee of all legal norms: "States were conceived, and gradually took shape, in order to take care of human beings under their respective jurisdictions, and to strive towards the common good. States have human ends".[52] As in *Jurisdictional Immunities* and in *Diallo*,[53] the concern for human beings is also visible in his dissenting opinion in *Application of the Genocide Convention*,[54] in which he emphasized that the principle of humanity permeates the entire *corpus juris* of human protection, taking both people-oriented and victim-oriented approaches.[55] In the same vein, Cançado Trindade pointed out the proliferation of cases involving human rights in his separate opinion in *Qatar v. UAE*,[56] among other cases.[57]

On several occasions, Cançado Trindade expressed harsh criticism of the often formalistic stance adopted by the majority of the Court, which, in certain circumstances, failed to analyse the merits of claims presented (often in cases involving the interests of the international community) based on procedural impediments.[58] In his dissenting opinion in *Jurisdictional Immunities*,[59] Cançado Trindade stated that the "legal procedure is not an end in itself,

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[46] See cases: *ICERD* (Georgia v. Russian Federation)/ *Jurisdictional Immunities* (Germany v. Italy); *Obligation to Prosecute or Extradite* (Belgium v. Senegal); *Genocide Convention* (Croatia v. Serbia); *Cessation of the Nuclear Arms Race and to Nuclear Disarmament* (Marshall Islands v. United Kingdom); *Cessation of the Nuclear Arms Race and to Nuclear Disarmament* (Marshall Islands v. India); *Cessation of the Nuclear Arms Race and to Nuclear Disarmament* (Marshall Islands v. Pakistan); *Continental Shelf* (Nicaragua v. Colombia).

[47] See case *Judgment No. 2867 of the Administrative Tribunal of the International Labour Organization upon a Complaint Filed against the International Fund for Agricultural Development.*

[48] See cases *Accordance with international law of the unilateral declaration of independence in respect of Kosovo* and *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965.*

[49] *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation)* (Preliminary Objections) [2011] ICJ Rep 70.

[50] *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation)* (Preliminary Objections, Diss. Op. of Judge Cançado Trindade) [2011] ICJ Rep 258.

[51] *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation)* (Preliminary Objections, Diss. Op. of Judge Cançado Trindade) [2011] ICJ Rep 263.

[52] *Frontier Dispute (Burkina Faso/Niger)* (Merits, Sep. Op. of Judge Cançado Trindade) [2013] ICJ Rep 133.

[53] *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)* (Merits) [2010] ICJ Rep 639.

[54] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)* (Merits) [2015] ICJ Rep 3.

[55] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)* (Merits, Diss. Op. of Judge Cançado Trindade) [2015] ICJ Rep 226-7.

[56] *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v. United Arab Emirates)* (Provisional Measures, Sep. Op. of Judge Cançado Trindade) ICJ Rep 439-40.

[57] The centrality of the human being was also present in separate opinions of Cançado Trindade on issues involving the rights of peoples, groups, or collectivities, as in *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo* (Advisory Opinion) [2010] ICJ Rep 403; *Frontier Dispute (Burkina Faso/Niger)* (Merits, Sep. Op. of Judge Cançado Trindade) [2013] ICJ Rep 133; and *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965* (Advisory Opinion) [2019] ICJ Rep 95.

[58] Paula Wojcikiewicz Almeida, 'Imunidades jurisdicionais do Estado perante a Corte Internacional de Justiça: uma análise a partir do caso Alemanha vs. Itália' (2016) 12(2) *Revista Direito GV*, 530.

[59] *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)* (Merits) [2012] ICJ Rep 99.

it is a means to the realization of justice".[60] The judge diverged from the majority of the Court in holding that the atrocities committed by the Nazi regime constituted *delicta imperii* - that is, international crimes that violated imperative norms against which immunity could not be invoked.[61] It further stated that "to uphold State immunity in cases of the utmost gravity amount[ed] to a travesty or a miscarriage of justice, from the perspective not only of the victims (and their relatives) but also of the social *milieu* concerned as a whole".[62]

The controversial cases involving the *Marshall Islands*[63] also illustrate well his criticism of procedural impediments. Cançado Trindade demonstrated his dissatisfaction with the majority of the Court's decision, stating in his introduction: "I distance myself as much as possible from the position of the Court's split majority, so as to remain in peace with my conscience".[64] In his vote, he strongly criticized the Court's decision not to pronounce itself on an issue of extreme importance to all humanity based on purely procedural issues, concluding that "a world with arsenals of nuclear weapons, like ours, is bound to destroy its past, dangerously threatens the present, and has no future at all," which ultimately makes the international community vulnerable.[65]

In his opinions, Cançado Trindade cited the jurisprudence of the IACtHR on several occasions. By October 2018, he had made eighteen references to the Court's jurisprudence,[66] being therefore the most activist judge in matters of cross-fertilization compared to others.[67] This scenario is due to Cançado Trindade's previous practice at the IACtHR (1995 - 2008).[68] At the ICJ, Cançado Trindade's references to the IACtHR covered procedural and substantive issues, including access to justice; provisional measures; evidence and burden of proof; interpretation of human rights treaties; material scope of *jus cogens*; and reparations.

Conclusion

This essay illustrates the legal-humanistic trajectory of Professor Antônio Augusto Cançado Trindade in its multiple facets - as scholar and practitioner of International Law. The theses he developed in his prolific academic writings were equally visible in his practice as a judge of the Inter-American Court of Human Rights and of the International Court of Justice. He believed that the jurisdictional function was guided, above all, by the ideal of achieving justice.[69] Furthermore, he believed that it would not be possible to judge cases involving serious violations of human rights and international humanitarian law without paying attention to fundamental human values since law and ethics are inseparable - contrary to the assertions of the positivist doctrine.[70] This is because an international court cannot remain indifferent to human suffering, favouring *raison d'État* and denying justice to individuals under its jurisdiction.[71] May the new generations of internationalist jurists be inspired by his rich legacy.

CHAPTER XXIX: IN MEMORIAM: SOLI SORABJEE

[60] *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)* (Merits, Diss. Op. of Judge Cançado Trindade) [2012] ICJ Rep 285.

[61] Paula Wojcikiewicz Almeida, 'Imunidades jurisdicionais do Estado perante a Corte Internacional de Justiça: uma análise a partir do caso Alemanha vs. Itália' (2016) 12(2) *Revista Direito GV,* 530.

[62] *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)* (Merits, Diss. Op. of Judge Cançado Trindade) [2012] ICJ Rep 256.

[63] *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. United Kingdom)* (Preliminary Objections) [2016] ICJ Rep 833; *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. India)* (Jurisdiction and Admissibility) [2016] ICJ Rep 255; and *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. Pakistan)* (Jurisdiction and Admissibility) [2016] ICJ Rep 552.

[64] *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. Pakistan)* (Jurisdiction and Admissibility, Diss. Op. of Judge Cançado Trindade) [2016] ICJ Rep 617.

[65] *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. Pakistan)* (Jurisdiction and Admissibility, Diss. Op. of Judge Cançado Trindade) [2016] ICJ Rep732.

[66] Paula Wojcikiewicz Almeida, 'The Asymmetric Judicial Dialogue Between the ICJ and the IACtHR: An Empirical Analysis' (2019) 11(1) *Journal of International Dispute Settlement*.

[67] Judge *ad hoc* Kreka and Judge Higgins made only two references to IACtHR cases.

[68] Rosalyn Higgins, 'Human Rights in the International Court of Justice' (2007) 20(4) *Leiden Journal of International Law* 746; John R. Crook, 'The International Court of Justice and Human Rights'(2004) 1(1) *Northwestern Journal of International Human Rights* 7; Gerald L. Neuman, 'The External Reception of Inter-American Human Rights Law' (2011) (Special Edition) *Revue québécoise de droit international* 102; and Erik Voeten, 'Borrowing and Nonborrowing among International Courts' (2010) 39(2) *The Journal of Legal Studies*549, 567-8.

[69] *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)* (Merits, Diss. Op. of Judge Cançado Trindade) [2012] ICJ Rep 182.

[70] *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)* (Merits, Diss. Op. of Judge Cançado Trindade) [2012] ICJ Rep 283.

[71] *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)* (Merits, Diss. Op. of Judge Cançado Trindade) [2012] ICJ Rep 286.

Ankit Malhotra[72]

"Death, thou wast once an uncouth hideous thing,
Nothing but bones,
The sad effect of sadder groans:
Thy mouth was open, but thou couldst not sing.
Therefore we can go die as sleep, and trust
Half that we have
Unto an honest, faithful grave;
Making our pillows either down or dust."[73]

Biography

In 1971, Soli Sorabjee was designated a Bombay High Court senior advocate. He served as Solicitor-General of India from 1977 to 1980. He was appointed Attorney-General for India on 9 December 1989, up to 2 December 1990, then again on 7 April 1998, a post he held until 2004. In March 2002, Soli Sorabjee received the Padma Vibhushan for his defence of the freedom of expression and the protection of human rights. Throughout his career, Soli remained passionate about Public Law and International Law, especially with the protection and promotion of human rights. The UN appointed Sorabjee as a Special Rapporteur for Nigeria. Later he was appointed as Chairman of the UN Sub Commission for the Promotion and Protection of Human Rights from 1998 to 2004. He also served as a member of the United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities since 1998. Soli Sorabjee also served as a Permanent Court of Arbitration member at the Hague. Sorabjee appeared before the International Court of Justice, The Hague, representing India in the Atlantic Case between India and Pakistan.

Sorabjee: Eden Garden of Sagacity

Soli Jehangir Sorabjee was born in 1930 in Bombay. He commenced his legal practice in 1953 in the Bombay High Court. In 1971, he was designated senior counsel by the Supreme Court of India. He became the attorney general of India first from 1989-90 and then from 1998-2004. He was honoured with the Padma Vibhushan award, the second highest civilian award in India, in March 2002 for his defence of freedom of speech and the protection of human rights. He has defended freedom of the press in many landmark cases in the Supreme Court of India and has been instrumental in revoking censorship orders and bans on publications. Sorabjee served as the nation's Solicitor General and Attorney General and passed away at 91 in 2021. His legacy lives on in the work and the living tree that is the law.[74] However, perhaps the most exemplary panoramic description that can be given to the mighty Soli J. Sorabjee can be the one by Abhinav Chadrachudh, who observed:

> *"... A Parsi lawyer, deeply influenced by the principles of Roman Catholicism, falls in love with a Bahai and goes on to become the Attorney General of India for a Hindu nationalist BJP government? How does a boy with a broken leg, who studied in a Gujarati medium school and lost his father at nineteen, mount a heroic defence of the Janata government's decision to dissolve Congress and state legislatures in the Supreme Court in 1977? How does a newspaper columnist who admires Nehru, who criticises the BJP for being 'obsessed' with 'demolishing mosques' and advises them to replace 'Hindutva' with 'Bharatva' or 'Indianness', get chosen by Prime Minister Vajpayee to represent the Government in the Supreme Court in many cases including the Ayodhya case? How does a lawyer with a humdrum customs and excise law*

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[72] Ankit Malhotra reads his LLM at the School of Oriental and African Studies, the University of London, as the Felix Scholar. He is grateful to Mrs Zena Sorabjee and Mrs Zia Mody for their kind words and reflections on the drafts of this text. In equal proportion, he is grateful to Sir Richard Sorabji for his utmost suggestions.

[73] Herbert, G. 2016. Death, H. Wilcox (Ed.), *George Herbert: p 100 Poems* (Cambridge: Cambridge University Press) 154, doi:10.1017/CBO9781316584910.098.

[74] *Tyrer v. the United Kingdom* (25 April 1978) Series A, no. 26. See also Lord Sankey, in *Edwards v. Attorney General for Canada [GC]*, no. 59532/00, ECHR 2006-III and The Rt. Hon. The Baroness Hale of Richmond, D.B.E., PC, '"What Are The Limits To The Evolutive Interpretation Of The Convention?"' (*ECHR.coe.int*, 2011) <https://www.echr.coe.int/Documents/Dialogue_2011_ENG.pdf> accessed 2 September 2022.

practice, whose grandfather sold horse-drawn carriages in Bombay, become a UN human rights rapporteur and repeatedly defend the fundamental right to free speech and expression in the Supreme Court of India?[75]

This Chapter is composed to reflect on the life and work of Soli Sorabjee. As the readers will observe, this Chapter includes a small tribute in the form of a reflection on time spent with Sorabjee. Sorabjee was a champion of freedom of speech and expression.

India and International Law

A significant number of multilateral, plurilateral, and bilateral treaties govern various regulatory domains concurrently with growth in international forums' institutional scope and practice. Due to its lack of precision, the Supreme Court of India's jurisprudence cannot contribute to the formulation, crystallisation, or future evolution of international law norms, despite its apparent expansive and progressive acceptance of international law. Moreover, this body of law, in that it usurps Parliament's authority, is subject to the allegation of denying democracy, regardless of how favourable the decisions of specific cases may be.

It concerns light of constitutional provisions that grant the administration public authority to negotiate treaties. The structure of the Constitution has thus permitted the executive and judicial branches to usurp power, while the elected legislature has been left with little authority. International law influences the conduct of states, corporations, and even private individuals. Priority should be given to promoting tolerance in our multi-religious, multi-cultural nation, strengthening our pluralist democracy and ensuring that freedom of speech and expression and freedom of the press is fully realised. Our Constitution specifies a list of fundamental responsibilities for all citizens. Tolerance is essential and should be the most crucial fundamental duty of every citizen, in my opinion. If carried out with integrity, it would bring about positive changes in our society and promote peace among world nations.

Under the Indian Constitution's Directive Principles of State Policy under art. 51 and Article 40 of the Draft Constitution, 1948, endeavours to promote "*international peace and security by the prescription of open, just and honourable relations between nations, by the firm establishment of the understandings of international law as the actual rule of conduct among governments and by the maintenance of justice and respect for treaty obligations in the dealings of organised people with one another*".[76] Similarly, in 1984, Hari Vishnu Kamath added, "India with her ancient cultural and spiritual heritage and her tradition - a centuries-old tradition of non-aggression – is best qualified to enhance respect for international law and treaty obligations."[77]

Article 51(c) of the Indian Constitution mandates that the country "promote respect for international law." Article 51(c) contains several notable features. Part IV of the Constitution contains this article, which establishes the Directive Principles of State Policy, which cannot be interpreted as being justiciable but are essential to the country's democratic framework, and there is an urgent need to apply these principles through the legal system. Article 51 should be interpreted to be consistent with the obligations imposed by the United Nations Charter, which India has ratified, according to the clarification provided by the Supreme Court. Like many other states, India remained to vary international law and governance, eventually becoming a 'Government'. India's trepidation after her independence currently germinates not because of the structure but rather how and where India would be situated in the structure. In the constitutional debates, Kamath noted, "*…one world Government or one Super-*

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[75] Chandrachud, Abhinav, *"Soli Sorabji: Life And Times: An Authorised Biography"* (India: Penguin Random House India Private Limited 2022).

[76] India. Constituent Assembly. Draft Constitution of India. New Delhi, Printed by the Manager (Govt. of India Press 1948) OCoLC 654518300.

[77] Constituent Assembly Debates (4 November 1984) *speech by* Shri H. V. Kamath, available at <https://eparlib.nic.in/bitstream/123456789/762996/1/cad_04-11-1948.pdf>

State to which the various nation-States of the world will have surrendered part of their sovereignty and to which all these nation-States will owe willing allegiance and will accept the Sovereignty of this Super-State…."[78].

Sovereignty has continued to remain of paramount importance. Through international Declarations, India has expressed her continuously renewed R/reservations[79] To shield sovereignty and shave its complicity to international law by limiting its jurisdiction to limited treaties. As a result, it has created the potential to exclude itself from disputes that may fall under the umbrella of customary international law by using national defence and security as smokescreens. In some sense, the current foreign policy of India echoes the perspective of Kamath, who held that "*it is common knowledge that international law and treaties had sunk to a low level and treaties are regarded as mere scraps of paper...*"[80] However, as this note has attempted to show over the years, India has played an instrumental role in the evolution of international jurisprudence with long-term consequences for the international community.

Sorabjee at the World Court

In 1998, Attorney General Sorabjee appeared in The International Court of Justice in a dispute with Pakistan involving an aerial incident.[81] The International Court of Justice (ICJ) found (14-2) on 21 June 2000 that it lacked the authority to handle the September 1999 dispute between Pakistan and India. Two ad-hoc judges were explicitly appointed for the case by Pakistan and India.[82]

Pakistan's Application of 21 September 1999 demanded that the Court find India liable under international law for the alleged shooting down of an unarmed Pakistani naval aircraft by Indian air force jets on 10 August 1999.[83] The event in the air resulted in the deaths of all sixteen troops on board, who were reportedly conducting formal training over Pakistani territory. In its application filed on 21 September 1999, Pakistan asked the Court to rule that India is responsible under international law for the shooting down, on 10 August 1999, of an unarmed aircraft belonging to the Pakistani navy, allegedly at the hands of Indian air force planes. Pakistan's application was filed on 21 September 1999. According to reports, the aircraft was reportedly conducting a regular training trip over Pakistani territory when it was involved in an accident that resulted in the deaths of all 16 people aboard. In addition, Pakistan stated that helicopters belonging to the Indian air force violated Pakistan's territorial integrity when they went to the crash site of the aircraft within Pakistani territory to retrieve things from the aircraft's wreckage shortly after the event. According to Pakistan's point of view, the actions of the Indian air force violated Pakistan's sovereignty. They breached India's obligation to refrain from the threat or use of force as outlined in Article 2, paragraph 4 of the UN Charter, other treaties, and customary international law.

Pakistan's point of view is supported by the fact that the Indian air force carried out these actions. In addition, Pakistan asserted that India's activities violated the 1991 Agreement on Prevention of Air Space Violations between the two nations.[84] As a result, India should take the blame for these violations on the international level. Article 1 of the Agreement from 1991 requires both countries to take precautions to prevent violations of the air

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[78] Constituent Assembly Debates (13 December 1946) *speech by* H.V. Kamath, available at <http://164.100.47.194/loksabha/writereaddata/cadebatefiles/C25111948.html> accessed 27 November 2021. The Constituent Assembly of India met in the Constitution Hall, New Delhi, at Ten of the Clock, with Mr Vice President, Dr H.C. Mookherjee, in the Chair.
<http://164.100.47.194/loksabha/writereaddata/cadebatefiles/C25111948.html>

[79] to suggest the formal and legal meaning of Reservation under international law and highlight the word's general meaning. See generally; ICJ-cij.org. 2019. *India | Declarations are recognising the jurisdiction of the Court as compulsory | International Court of Justice*. Available at: <https://www.icj-cij.org/en/declarations/in> accessed 11 November 2021.

[80] ibid 5.

[81] Aerial Incident of *Pak. v. India* (10 August 1999) Judgment, Jurisdiction (21 June 2000).

[82] Judge Al-Khasawneh (Jordan) and Judge ad hoc Pirzada (appointed by Pakistan) voted against the judgment and appended dissenting opinions.

[83] The Case concerning the Aerial Incident of Pak. v. India (10 August 1999) 'Memorial of the Government of Pakistan on Jurisdiction' (*ICJ-cij.org.* 1999). See 'India Shoots Down Pakistani Military Plane' (The Guardian 1999) <https://www.theguardian.com/world/1999/aug/10/3> accessed 4 September 2022.

[84] Agreement between Pakistan and India on Prevention of Air Space Violations and Permitting Over Flights and Landings by Military Aircraft, New Delhi (6 April 1991) <https://www.stimson.org/wp-content/files/CBMHandbook3-1998-i-pagre2.pdf>

space of the other. It stipulates that if a violation of either party's air space occurs accidentally, the incident must be investigated as soon as possible. The other party must be informed of the findings as soon as possible. Pakistan submitted a request to the Court that it rules that India is compelled to compensate Pakistan for the loss of the navy aircraft and the heirs of the Pakistani troops killed.

First, Pakistan relied on Article 17 of the 1928 General Act for the Pacific Settlement of Disputes as affording jurisdiction to the International Court of Justice (ICJ) as the successor of the Permanent Court of International Justice (PCIJ), which functioned between the years 1922 and 1945.[85] According to the provisions of Article 17, the Parties to the General Act are required to bring to the attention of the Permanent Court of International Justice (PCIJ) any issues that arise out of a difference in their respective rights (currently the ICJ, as Article 37 of the ICJ Statute provides). According to Pakistan, the General Act is a treaty still in effect, although it passed to India at the time of India's independence in 1947. However, the League of Nations ceased to exist long ago. India, on the other hand, referred to a communication that was sent to the UN Secretary-General on 18 September 1974, stating that India "never regarded [itself] as bound by the General Act of 1928 since [its] Independence in 1947, whether, by succession or otherwise."[86] Based on this statement, which the Court found to have served in any event as a notification of denunciation, the Court concluded that India could not be considered a party to the General Act at the filing of Pakistan's Application. As a result, the General Act does not serve as a basis for jurisdiction in this case.

Pakistan relied on the statements made by the two states admitting the Court's obligatory jurisdiction under Article 36(2) of the International Court of Justice Statute- an additional ground for the jurisdiction of the Court. This provision also referred to as the "Optional Clause," stipulates that states that are parties to the ICJ Statute (currently all 188 UN Member States and Switzerland) can submit declarations to the UN Secretary-General at any time, stating that they recognise as obligatory, without special agreement, concerning any other state accepting the same obligation, the Court's jurisdiction over all legal disputes about the interpretation of a treaty, any question of international law, and any other subject India raised a challenge to the jurisdiction of the Court by invoking a reservation that was included in its Declaration dated 18 September 1974.[87]

This Reservation states that "disputes with the government of any State which is or has been a Member of the Commonwealth of Nations" are not subject to the Court's authority. Pakistan argued that India's Commonwealth reservation did not fall within the range of reservations that the Court's Statute permitted and that it is, in any event, superfluous and devoid of any contemporary justification because members of the Commonwealth are no longer united by a collective allegiance to the British Crown. The modes of dispute settlement that were initially envisioned never came to fruition. Pakistan's argument was based on the fact that a common allegiance no longer unites members of the Commonwealth. In its decision to reject Pakistan's arguments, the Court noted that, regardless of the motivations that may have led India to limit the scope of its acceptance of the Court's compulsory jurisdiction in the manner in which it did, Pakistan is required to adhere to this limitation because it expresses the intention of India as the declarant State. Pakistan's arguments were rejected. Because both Pakistan and India are participants in the Commonwealth of Nations, the Optional Clause does not serve as a foundation for jurisdiction in this particular instance.

In the end, Pakistan submitted a jurisdictional argument as an invocation of Article 36, paragraph 1 of the ICJ Statute. The article states that the jurisdiction of the Court extends to cover all areas expressly provided for in the UN Charter or treaties and conventions currently in effect. On the other hand, the Court concluded that neither the Charter nor the bilateral convention that Pakistan relied on included any particular provision that would automatically provide the Court compulsory jurisdiction over a matter.

[85] General Act for Pacific Settlement of International Disputes (26 September 1928) 93 LNTS 343 [hereinafter General Act].
[86] Aerial Incident Judgment, paras 17, 23; [1978] ICJR EP 3 47 (Dec. 15).
[87] Charter of the United Nations and the Statute of the International Court of Justice (24 October 1945) 1 UNTS XVI, art 36 (2).

Even though it did not have jurisdiction, the Court reminded both sides that the international obligations they had accepted required them to work toward peaceful resolving their disagreements in good faith.[88] This was especially important concerning the disagreement that stemmed from the aerial incident on 10 August 1999.

During the 1970s, India and Pakistan were parties to lawsuits brought before Court. These cases were titled "Appeal Relating to the Jurisdiction of the ICAO Council (India v. Pakistan)."[89] and "Trial of Pakistani Prisoners of War,"[90] Respectively (Pakistan v. India). Accordingly, the Court reminds the parties of their obligation to settle their disputes by peaceful means, particularly the dispute arising out of the aerial incident of 10 August 1999, in conformity with their obligations.

While submitting and contributing to international law, India has also rescinded further into her cocoon of sovereignty. Under India's latest Declaration of 27 September 2019[91]. Under Article 36(2) of the International Court of Justice (hereinafter ICJ/ World Court) Statute, India, under renewed terms, accepted the compulsory jurisdiction of the ICJ. The new Declaration replaces India's 1974 Declaration and is the harbinger of acute trepidation since the list of R/r reservations[92] has increased and become even more detailed. As a result, the additional reservations diminish the value of India's voluntary submission to the World Court's compulsory jurisdiction. More precisely, paragraphs 4, 7, and 13 prominently display India's new reservations. (To emphasise, Paragraph 7 is reproduced as hereunder):

> *(7) disputes concerning the interpretation or application of a multilateral treaty to which India is not a party; and disputes concerning the interpretation or application of a multilateral treaty to which India is a party, unless all the parties to the treaty are also parties to the case before the Court or the Government of India especially agree to jurisdiction; [emphasis supplied]*

The emphasis may be implied in the highlighted text to show that India has limited its jurisdiction to a limited set of treaties. However, it must be noted here that, under Paragraph 7, new modifications will not be covered for the obligations to the Court's jurisdiction. To this end, it should also be acknowledged under Paragraph (4), especially under "including the measures taken for the protection of national security and ensuring national defence."[93] India has created the potential to exclude itself from disputes that may fall under customary international law by using national defence and security as smokescreens. At this junction, we must emphasise that Customary International Law is a vital source of international law as per Article 38, Paragraph 1 of the Statute of the ICJ, which refers in subparagraph (b) to "international custom, as evidence of a general practice accepted as law."[94]. Thus, the newly adopted measures of India contravene the mandate and spirit of the ICJ's compulsory jurisdiction and objective of peaceful dispute settlement. In sum, it can be noted that the 2019 Declarations renew and reinvigorate the scope of scepticism towards the Court.

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[88] Invoking the Simla Accord (2 July 1972), and the Lahore Declaration (21 February 1999).
[89] [1972] ICJ REP 46 (August 18).
[90] [1978] ICJ REP 347 (15 December) (order removing the case from General List upon discontinuance of the proceedings).
[91] ICJ-cij.org. (2019). *India | Declarations are recognising the jurisdiction of the Court as compulsory | International Court of Justice*. Available at: <https://www.icj-cij.org/en/declarations/in> accessed 11 November 2021.
[92] Suggesting the formal and legal meaning of Reservation under international law and highlighting the word's general meaning.
[93] ibid 6.
[94] Moreover, it may sometimes be necessary to determine the law applicable when certain acts occurred ("the intertemporal law"), which may be customary international law even if a treaty is now in force. In any event, a rule of customary international law may continue to exist and be applicable, separately from a treaty, even where the two have the same content and even among parties to the treaty (see Military and Paramilitary Activities in and against Nicaragua *(Nicaragua v. the United States of America)*, Merits, Judgment (ICJ Reports, 1986) 14, pp 93–96, paras 174–179; Application of the Convention on the Prevention and Punishment of the Crime of Genocide *(Croatia v. Serbia)*, Judgment (ICJ Reports, 2015) 3, pp 47–48, para 88 <https://legal.un.org/ilc/texts/instruments/english/commentaries/1_13_2018.pdf>.

Sorabjee and Human Rights

The march on human rights commenced on that historic day in Paris on 10 December 1948. The road has been long and bumpy. Many promises were made, but few have been kept. Human Rights day should be a day neither of celebration or commiseration nor for offering condolences. It should be for stock taking in which a balanced balance sheet should be drawn.

There is a widespread violation of human rights occurring almost daily. Nevertheless, that was also the situation before the Declaration. It was worst because of the absolute immunity and impunity with which the violations took place. The notion of accountability for human rights violations appeared strange and quixotic. Since the Declaration, there has been a qualitative change in international human rights law. Individuals are not mere subjects but have rights against the State and its various instrumentalities. Human Rights have become judicially enforceable both nationally and internationally, thanks to the 1966 Covenants: International Covenant on Economic, Social and Cultural Rights, the International Convention on Civil and Political Rights and also other human rights instruments, in particular, the Convention against Torture.

At Strasbourg, human rights are enforced, and relief is given to victims in a manner undreamt before 1950. The European Court on Human Rights at Strasbourg had to deal with a claim that the conditions in a detention centre in Russia amounted to degrading treatment because the Centre, which contained eight beds, had 24 inmates. There were three men to every bunk, and inmates slept in turn. The cell had no ventilation and was strikingly hot in summer and bitterly cold in winter, and cockroaches and ants overran the cells. The Court held the claim of violation of Article 3 of the European Convention of Human Rights, which provides that no one shall be subject to inhuman or degrading treatment.[95] The Inter-American Court of Human Rights at San Jose, established under the American Convention of Human Rights, held that the State was responsible for the assassination committed in 1991 and quashed the self-amnesty laws promulgated by the State of Peru as being incompatible with the American Convention.[96]

Could anyone in 1950 have imagined the Courts' power to give such relief? The cynical sceptic would be aghast at these developments at poor Jeremy Bentham, who has described the natural rights as non-sense upon stills, would have had a severe cardiac attack.

> *"History is replete with instances of violent upheavals and breach of peace on account of intolerance leading to oppression of minorities and other unpopular groups. Violent conflicts which we are witnessing today are also the result of intolerance. What we need urgently and should aspire to is the practice of tolerance. It is noteworthy that the Preamble to the Charter of the United Nations proclaims that to achieve the goals of the Charter, we need "to practice tolerance and live together in peace with one another as good neighbours". Again the Declaration of 24 October, 1970, on Principles of International Law Concerning Friendly Relations and Co-operation among States also states "that the peoples of the United Nations are determined to practice tolerance and live together in peace with one another…" The link between tolerance and peace is thus clearly recognised. In reality, there is indeed an essential linkage between tolerance, human rights, democracy and peace."*[97]

Sorabjee was a passionate human rights lawyer appointed as a United Nations Special Rapporteur for Nigeria in 1997 to report the situation. In addition to this honourable designation, he joined the UN Sub-Commission on Promotion and Protection of Human Rights and was the chairman from 1998 to 2004. Furthermore, he was also a member of the UN Sub-Commission on the Prevention of Discrimination and Protection of Minorities. Last but

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[95] European Court of Human Rights (2304/06) - Court (Third Section Committee) - Judgment (Merits and Just Satisfaction) - Case of *Kalashnikov v. Russia.*

[96] Barrios Altos Case, Judgment (14 May 2001) Inter-Am Ct. HR (Ser. C) No. 75 (2001).

[97] Soli Sorabjee, 'Soli Sorabjee: Freedom from Intolerance - Forbes India' (Forbes India 2010) <https://www.forbesindia.com/article/ideas-to-change-the-world/soli-sorabjee-freedom-from-intolerance/13632/1> accessed 4 September 2022.

certainly not least, Sorabjee served as a Member of the Permanent Court of Arbitration at The Hague from 2000 to 2006. One of his finest speeches, at the United Nations, was, just like all his aspirations, a hope:

> *Madam Chairperson, the crucial test of a country's claim to democracy is its respect for the rule of law, the existence of an independent judiciary and a free press. It is heartening to note that numerous political detainees incarcerated by the previous military regime have been released. The Special Rapporteur was given assurances by the Government during his visit that there were no longer any political prisoners in Nigeria. Nevertheless, a distressing feature is the continued operation of Decree 2/1984, which permits detention without trial for an indefinite period and ousts the jurisdiction of the courts. Even though Decree 2/1984 may not have been invoked against any individual under the present administration, the existence of this Decree has an inherent potential for suppression of human rights. It is incompatible with the rule of law. The Special Rapporteur has been assured that this Decree would be repealed by May 1999. Let us hope this assurance will materialise.*[98]

We must not be unmindful of the vital principles laid down by the Vienna Declaration of 1993, which has recognised the indivisibility, and inter-dependability of all human rights, be they civil or political, socio-economic, or cultural. The hearsay that one set of rights is subordinate to the other has been demolished. These decisions have inspired the national courts in many jurisdictions with an enforceable Bill of Rights. Today officials, however high they may be, who have indulged in a systematic practice of torture or have committed crimes against humanity have failed to find haven in any part of the world. The torturer can no longer claim impunity. Gone are the days when governments could blatantly trample upon the human rights of their citizens and spurn moral, political and legal accountability under the pretext of State sovereignty. Today how a State treats its citizens has become a matter of international concern.

Currently, the categories of persons who can claim violation of human rights have substantially increased. There is heightened awareness and recognition of the human rights of several persons like HIV AIDS victims, the disabled, the elderly, women and children, minorities and displaced persons. The vital need of the hour is human rights education. Rights without remedies are indeed useless, mere parchments and mere teasing illusion. Our effort should be directed to spreading awareness of human rights and, more critical, devising effective mechanisms for their enforcement. There is also a need to provide free legal services for victims of human rights violations who, because of social and economic disabilities, are handicapped in enforcing them. Let there be an international NGO that, through its branches and agencies worldwide, monitors the enforcement of human rights. This may seem ambitious and Utopian, but so did the enactment of the Covenants and other human rights instruments before they were enacted.

The press has an essential role in developing human rights awareness and consciousness. Instead of regaling us with stories of the divorce of Hollywood and Bollywood celebrities and the sexually deviant behaviour of famous stars, one would appreciate a regular weekly column taking stock of the human rights situations in our country and arousing consciousness and mobilising public opinion. Human rights are not self-executing. Governments are notorious for their failure to observe human rights obligations. This is particularly so in so-called times of emergency and when fears of national security and public safety are overplayed and exaggerated. The threat to human rights is greatest when popular prejudices tend to encourage jettisoning of fundamental human rights of the people. Guantanamo Bay is a vivid example of how countries which are known for their commitment to liberty and which can be proud of their Bill of Rights and independent judiciary can justify the denial of fundamental human rights, fair trial and individual dignity of persons who are suspected of having committed crimes and are regarded as enemy combatants on mere suspicion. Therefore the most effective safeguard against violation of human rights would be a concerted effort of genuine NGOs by public-spirited persons, a free press and an independent judiciary. All these have to work in tandem to secure effective implementation of human rights; otherwise, we shall just be holding seminars and discussions and will sound in a fury and signify nothing. Today we certainly cannot rejoice at the current situation. The significant casualty to my mind is the sad part of

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[98] Soli Sorabjee, 'Statement By Mr Soli J. Sorabjee Special Rapporteur on the situation of Human Rights In Nigeria' (The Office of the High Commissioner for Human Rights is the leading United Nations 1999) <https://www.ohchr.org/en/statements/2009/10/statement-mr-soli-j-sorabjee-special-rapporteur-situation-human-rights-nigeria> accessed 1 September 2022.

the Iraqi war, not so much the casualty suffered by the Iraqi civilians and the coalition forces. It is the casualty of the United Nations, whose authority and legitimacy have been undermined by the unilateral action of the coalition forces. We must strive to restore the authority of the United Nations. Nevertheless, at the same time, there is no need for despondency, and one can look at the future with renewed hope and optimism.

A Relationship deeper than the Marina Trench and as Tall as Mount Everest

Beyond the law, Sorabjee's collection revealed his broad intellectual interests. However, he was not a bookworm. He was a jazz fanatic who attended and organised concerts frequently. Sorabjee was an outstanding mimic, lively performer, and courteous host. Vikram Raghavan adds, "In his journal, Austin describes a typical get-together at his friend's house:

> *I just returned from Sorabjee's for dinner. There were also Shankar Ghose and his wife, Ranjit Singh and his wife (the former director of the Pusa Institute of Agricultural Research and a classical musician from Lyallpur), and Rajmohan Gandhi. Also, Maja Daruwala. Soli was greatly concerned after discussing corruption in public life. Nevertheless, I cannot comprehend why this is occurring."*

Austin, like many others, met Sorabjee at the India International Centre, whose old-fashioned, Sorabjee preferred a genteel atmosphere over fancier restaurants. He was, as a matter of fact, President of the Indian International Center from 2012 to 2017. He, however, stepped down due to personal reasons.[99] Unfazed by the pandemic, Sorabjee attended a celebration in his honour just days before he became ill."[100] Although he had slowed down, he never truly retired from the practice of law or gave up his other interests. Reading, *"Down Memory Lane: A Festschrift in the honour of Soli J. Sorabjee."*[101], released during his 90th birthday celebrations, I noted Fali S. Nariman's remembrance of Sorbajee's entry into the chambers of the then doyen of the Bombay Bar, Sir Jamshedji Kanga, as a young lawyer. "*For a long while, we were rivals, later un-friendly rivals, but now, in the evening of our lives, we are friends*." I also noted that Fali Nariman eloquently observed that nonagenarians such as Sorabjee and himself were adamant about never hanging up their boots, despite some encouragement. The book referred to Sorabjee's distinguished career, becoming India's Attorney General (first in 1989 for a year and again in 1998 for five years).

In the same book, my Uncle writes that holidays and conference trips with Uncle were never about shopping trips, although he loved Fortnum and Mason on Jermyn Street in London. London, for Soli Uncle, was home away from home and his favourite stomping ground. However, each holiday for him was about spending time with family and friends and, yes, pursuing an intellectual and cerebral indulgence. As a result, one can easily stretch up to Daunt's, one of his favourite bookshops on Marylebone High Street in London, and Blackwell's, the famous book store in Oxford if not more, note my Uncle in his account. Soli uncle was not afraid to call a spade a spade. As I knew him, Soli uncle would concur that recognition such as an awardee of the Padma Vibhushan is not as rewarding to him as the defender of freedom of speech and expression. Upon my invitation on behalf of the Jindal Society of International Law, my guru, Sri Gopal Subramanium, spoke about Soli uncle after Soli Uncle had passed on. In his address, he proclaimed, "*He (Soli Sorabjee) will always be remembered as one of the most incredible sons of India, one of the tremendous lawyers of all time, and someone who could constantly inspire*".[102]

I must admit that while my interactions with Sorabjee were limited, I was often made privy to his habits, preferences, vices and mannerism by my father, Anil Malhotra, and Uncle, Ranjit Malhotra. As I knew him, Soli

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[99] Ajmer Singh, 'Soli Sorabjee Steps Down as IIC President, Mantle Passes To J&K Governor NN Vohra' (The Economic Times 2017) <https://economictimes.indiatimes.com/news/politics-and-nation/soli-sorabjee-steps-down-as-iic-president-mantle-passes-to-jk-governor-nn-vohra/articleshow/59292706.cms?from=mdr> accessed 19 September 2022.

[100] Soli Jehangir Sorabjee — Sentinel of the Constitution by Vikram Raghavan [2021] 7 SCC J-20.

[101] Pallavi Sharma, *Down Memory Lane- A Festschrift in Honour of Soli J. Sorabjee* (1st edn, All India Reporter 2020).

[102] 'Celebrating The Legacy Of Soli Sorabjee' (YouTube 2021) <https://youtu.be/ZDRXIhG_g-Q> accessed 17 September 2022. See Gopal Subramanium, 'Celebrating The Legacy Of Soli Sorabjee' (Gopalsubramanium.co.uk 2021) <https://gopalsubramanium.co.uk/speech/celebrating-the-legacy-of-soli-sorabjee> accessed 17 September 2022.

uncle stood behind my father and Uncle as a fatherly figure in times of joy and celebration and as a guardian in times of trepidation.

Sorabjee, or Soli uncle, as I knew him, was a person whose regard for international law and passion for jazz surpasses mine. My fondness for Soli uncle increased when I met his wife, Mrs Zena Sorabjee, in January 2019. Mrs Sorabjee showed photographs of Uncle when he was not older than I am as I write this Chapter. I also saw photographs of Uncle when he was much younger. I feel, like my father and Uncle, indebted to Uncle for the sagacity and wisdom he has imparted onto them and as a result, they have, onto me. As I knew him, Soli's Uncle also shared a keen interest in architecture. In my brief discussions with him, he would share his thoughts on modern architecture- we would converge and lament the architectural monstrosity that is modern architecture. As I knew him, Soli's Uncle was instrumental in revoking censorship orders and bans on publications. These, according to him, are and always will be the foundational underpinnings of democracy which are unquantifiable and must never be infringed. Our brief conversations would then slide into international law and often into literature. True to his wit, Soli uncle, on life and everything else, would have concluded by quoting one of his favourite essayists, William Hazlitt, who wrote in *On Going a Journey*;

"*The soul of a journey is liberty, perfect liberty, to think, feel, do just as one pleases... We go a journey chiefly to be free of all impediments and all inconveniences*."[103]

[103] William Hazlitt, *New Monthly Magazine* (Table Talk 1822).