



SOVEREIGNTY AND COERCION

The United Nations in the Web of Power Politics

Edited by
Hans Köchler

INTERNATIONAL PROGRESS ORGANIZATION

INTERNATIONAL PROGRESS ORGANIZATION

Studies in International Relations

XL

SOVEREIGNTY AND COERCION

THE UNITED NATIONS IN THE WEB OF POWER POLITICS

**Statements and papers
from an international roundtable
consultation in Istanbul**

Edited by
Hans Köchler

Vienna 2025

Editorial Assistants / Executive Summary:
Joël Christoph and Davide Sirna

All rights reserved.

© 2025 by International Progress Organization
A-1010 Vienna, Kohlmarkt 4, Austria

ISBN 978-3-900704-41-4

The different citation styles used by the contributors of this publication have been maintained. The editors cannot guarantee the accuracy of the information and statistics contained in the articles.

Printed in Austria

TABLE OF CONTENTS

Editorial Note	ix
Foreword by the Editor	xi
Exposé	xiii
Opening Remarks	xv

I. The United Nations and the Rule of Law: Real vs. Ideal

Mogens Lykketoft	
Observations on the Workings of the UN System	3
Rauf Versan	
International Rule of Law: The Dilemma of Enforcement under Chapter VII of the United Nations Charter	9
C. L. Lim	
The Rules-based Order versus the UN Legal Order	19

II. The Security Council and Global Power Politics

Bardo Fassbender	
The Right of Veto in the UN Security Council: Original Intent, Present Status and Prospects	31
Hassan B. Diab	
Rethinking P5 Veto Power in the UN Security Council: A Challenge to Democracy in a Multipolar World	41
Gabriel M. Lentner	
The Inglorious Role of the UN Security Council in International Criminal Justice: Selectivity and Double Standards	51
Daniele Archibugi and Marina Bagato	
The UN Security Council in a Fragmented World	85

III. The Dilemma of Sovereignty in the UN System

Berdal Aral	
UN Charter Exceptions to the Sovereign Equality of States and their Injurious Consequences	105
Beatriz Bissio	
The Concept of Sovereignty and the Experience of the South	125
Deepak Mawar	
Liberalism Challenged: The UN Security Council and Power Politics in a Populist Era	133

IV. National Sovereignty or Global Governance? Prospects for Reform

Karin Kneissl	
The Concept of Sovereignty: Tension between Normative and Factual Level	159
Said Saddiki	
UN Charter Reform: Balancing Sovereign Equality and Effective Functioning	169
Alfred de Zayas	
The UN Charter as World Constitution Needs an Enforcement Mechanism	185

V. Appendix

Executive Summary	219
Initiatives of the International Progress Organization related to core issues of the United Nations system and to UN reform (1974-2024)	223
Publications of the International Progress Organization related to UN reform	227

About the Contributors 229
List of Acronyms 237

Editorial Note

The present volume contains statements and papers delivered at, or submitted for, an international roundtable consultation hosted by the International Progress Organization at Çırağan Palace in Istanbul, Türkiye. The discussions on 12 September 2024 were held in private. Only the texts that the participants have made available for publication are included. A brief overview of the entire debate is given in the Executive Summary reproduced in the Appendix.

The texts of this selection differ in style and method depending on whether the author focuses on conceptual analysis, the history of ideas, legal critique, or political advocacy. The subjects of the chapters partially overlap due to the meeting's focus on the role of the Security Council.

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

Foreword by the Editor

Since the founding of the United Nations, the antagonism between power and law – the dilemma of power politics – has remained unresolved, undermining the organization’s mission of collective security. With the privileges accorded to the Security Council’s permanent members, the UN Charter represents a system where the rules cannot be *enforced* against the main *enforcers*. Statesmen and diplomats from the Global South, then referred to as the “Third World,” early on alerted the international community about a systemic contradiction in the Charter due to the exception from the principle of sovereign equality, in favor of the organization’s very sponsors. At the drafting conference of the United Nations in San Francisco in the spring of 1945, the delegate of Mexico identified the problem, but the entrenched power structure post-1945 made any adjustment impossible. The “statutory stalemate” has continued until the present day. In the early years of the organization, the Philippines and Indonesia were among the most outspoken critics of the monopoly of power wielded by the permanent members. In the decades following decolonization, it was Libya that most decisively raised the issue in the fora of the United Nations. Today, it is principally due to the public diplomacy of Türkiye that the world is reminded of the fact that sovereign equality is effectively negated in the composition and decision-making rules of the Security Council.

Ignored by most, the United Nations Charter provides the framework where the “great powers” – as arbiters and enforcers of international peace and security, not bound by the will of the majority – negotiate the balance of power *all among themselves*, to the detriment of all the others. Comparing the constellation to the post-Napoleonic concert of powers in the wake of the Vienna Congress, Hans Morgenthau pointedly spoke of the Security Council as the “Holy Alliance of our time” – a

comparison, which aptly evokes a timeless truth about the arbitrariness of a self-righteous exercise of power.

Two decades into the new millennium, we witness a renaissance of 19th century power politics that is facilitated, if not encouraged, by the *letter* of the Charter – obviously in accordance with the *spirit* of its authors. It is indeed the provisions of its Article 27, guaranteeing freedom from coercion for a select few, that have opened the space for power politics also in our era. This time, at the beginning of 2025, it is the “P3” (the three major nuclear powers, permanent members of the Security Council) who, benefiting from their special status in the UN, could be about to embark on a new Great Game, according one another the pursuit of national interests on the basis of mutuality. Should this materialize, it would be 19th century geopolitics transformed into great-power bargaining with a nuclear dimension, enabling those countries to substantially extend their spheres of interest (and control) in Eurasia and the Americas, merely on the basis of *do ut des*, not in deference to the “international rule of law.” I doubt whether the late Zbigniew Brzezinski, author of “The Grand Chessboard,” had this development in mind when – in his very last essay – he spoke of the inevitability, and need for, a “global realignment.”

With last year’s meeting in Istanbul, the International Progress Organization wanted to sum up and conclude the discussions and debate on the role of power politics in the United Nations – and the corresponding need for reform of the international system – which we initiated at our colloquium in New York City in 1985, commemorating the 40th anniversary of the UN. Another 40 years later, we need to move on to new horizons – in search of a paradigm of world order that is not hostage to a consensus among the great powers from 80 years ago.

I extend my thanks to Ramazan Ersoy, Joël Christoph and Davide Sirna for their dedicated cooperation.

Hans Köchler

Vienna, 20 January 2025

Exposé

The armed conflicts in Europe and West Asia have again made painfully obvious the United Nations Organization's inability to fulfill its basic purpose, "to maintain international peace and security." The Security Council's paralysis in disputes that touch upon the vital interests of a permanent member is not by accident, but by design. While affirming the principle of "sovereign equality of all its Members," the organization's Charter nonetheless puts a small group of states virtually above the law. Using the provisions of Article 27, the four states whose governments drafted the Charter plus France (the P5) are able to protect themselves and any of their allies against the coercive power of the Council, the very body that was meant to take "prompt and effective action" for the maintenance of international peace and security. This has been the reason why never in the history of the world organization any of those states was held accountable for breaches of the peace.

Thus, the authority vested in the Security Council under Chapter VII of the UN Charter has been compromised by the power politics of its permanent members. For the P5, and for them alone, sovereignty means the *right to coerce*, combined with the *privilege not to be coerced*, while all the others must put up with the fact that they are subject to the supreme authority of the Council – effectively of the P5. The inconsistency between the Charter's principle of sovereign equality and these countries' voting privilege has led to a – *de facto* and *de jure* – system of "sovereign inequality."

Following up on last year's roundtable in Vienna (Austria) on "Responsibility in International Relations," the International Progress Organization would like to focus on the contradiction in the UN Charter between the foundational principles and norms of the Charter and discuss the implications for world order. The notion of an *international rule of*

law cannot be upheld and credibly defended as long as the Charter, by granting virtual impunity to the most powerful states, introduces a *jus ad bellum* through the back door. Prohibition of the use of force – according to Article 2(4) – is meaningless if it is made to “coexist” with the provisions of Article 27(3), dictated by *realpolitik*. As history has proven, this state of affairs encourages reckless use of power. It undermines the *raison d’être* of the organization.

While the indefinite perpetuation of a favorable balance of power (for those states) may have been one of the principal considerations of the organization’s founders in drafting the voting provisions of the Charter, the United Nations is now faced with a situation where world order appears to change in the direction of a multipolar constellation that is essentially different from that of 1945. The inability, due to Article 108, to constructively react to this tectonic shift and adapt the Charter – in particular its Chapter V – to the new realities has become the basic predicament and challenge of the world organization in the new millennium.

Hans Köchler

Opening Remarks

Excellencies,
Dear colleagues,

De facto admitting its inability to exercise its “primary responsibility for the maintenance of international peace and security,”¹ the United Nations Security Council, in a procedural resolution (where the veto does not apply), on 27 February 2022 decided “to call an emergency special session of the General Assembly to examine the question” of Ukraine. The supreme irony of this was that the body to which the Council referred the situation under the “Uniting for Peace” formula is itself only able to make what are called “*appropriate recommendations* to Members for collective measures (...) to maintain or restore international peace and security.”²

This highlights in nuce the ambiguity of the Charter’s principle of “sovereign equality” and exposes a *fundamental inconsistency* in the organization’s rules and procedures. A certain category of members of the supreme executive organ of the UN, vested with vast coercive powers to enforce the ban on the use of force, can under no circumstances be legally coerced to abide by the law. For those countries, namely the five permanent members of the Security Council (P5), “sovereignty” appears to be *exclusive*, in stark contrast to the Charter’s principle of “sovereign equality” of all member States. For the P5, the provisions of the Charter mean sovereignty in the sense of *absolutist rule*: the power to coerce, linked with the privilege not to be coerced. In other words:

¹ United Nations Charter, Article 24(1).

² General Assembly, resolution 377 (V) [Uniting for peace], A, Par. 1, 3 November 1950. (Emphasis H.K.)

the law cannot be enforced against a permanent member, or an ally enjoying the protection of a permanent member.

The stalemate – or blockage – in the dispute and armed conflict over Ukraine is certainly not the only such situation involving a permanent member of the Security Council. The conflicts over Iraq (2003) and Palestine (since several decades) were, or still are, further tragic instances of paralysis of the world organization.

At last year's roundtable consultation in Vienna, we came to the conclusion that within the UN system countries cannot in a consistent manner be held accountable for their international actions. *State responsibility* has remained a noble principle that will only be invoked when the power constellation allows, and international criminal justice – a system of norms intended, *inter alia*, to hold leaders to account – can only operate within the arbitrary constraints of politics. *Responsibility* – whether of states or their leaders – is not linked to *accountability*. This has profoundly eroded the concept of the “international rule of law” as advocated by the United Nations. As Hans Kelsen has convincingly argued in his *Reine Rechtslehre* (“Pure Theory of Law”), norms without procedures for their enforcement are not norms of law.

As an NGO in consultative status with the United Nations, the International Progress Organization has dealt with the dilemma of power and law since our colloquium on “Democracy in International Relations” in New York City in October 1985. In this event to commemorate the 40th anniversary of the UN, we addressed the *absence of equality* in crucial areas of the UN system. The Executive Director for the International Year of Peace, Mr. Krzysztof Ostrowski, attended our meeting as special representative of the Secretary-General of the United Nations. Also, in the euphoric years immediately after the end of the Cold War, we were co-sponsors of the CAMDUN initiative – “Conferences on A More Democratic United Nations” – of which we convened the second meeting at the UN Centre in Vienna in 1991, under the title “The United Nations and the New World Order.” In spite of increasing global awareness of the problems, not much has changed in terms of substance – in the way the United Nations Organization operates – since we launched our reform proposals. After three decades of stalemate in the reform debates, it is indeed time to take a fresh look.

I am happy to welcome at our consultation today scholars and practitioners from distant corners of the globe – scholars who are practitioners, and practitioners who are scholars, who all have contributed to the discourse on a world order that would be in conformity with equal rights and justice among nations. From the world of politics, we are particularly honored to have among us Mr. Mogens Lykketoft, President of the 70th General Assembly of the United Nations, former Speaker of Denmark's *Folketing* (Parliament) and Minister of Foreign Affairs and of Finance in several legislative periods. Opening up the selection process for the post of Secretary-General and ensuring a proactive role for the General Assembly on the basis of its “revitalization resolution” of 2015,³ Mr. Lykketoft introduced a much-needed element of transparency into the UN system. I also welcome Professor Hassan Diab who served, in an expert government, as President of the Council of Ministers (Prime Minister) of Lebanon in one of the country's most difficult periods, and Dr. Karin Kneissl who, as Foreign Minister of Austria, succeeded to initiate a constructive dialogue in relations between Austria and Türkiye.

I also would like to greet Professor Türkkaya Ataöv in Ankara, the doyen of political science and international relations in Türkiye and recipient of the golden honorary medal of the I.P.O., who over several decades has worked with us on the issues that are on our agenda here today. Our organization is deeply indebted to him.

We are meeting today at a place of special historic significance, at the gateway between Europe and Asia, in sight of one of the iconic bridges that not only facilitate the crossing between the European and Asian districts of the global megalopolis Istanbul has become, but also symbolize the interaction that has existed between East and West since the days of Emperor Darius I the Great. 2,500 years ago, he ordered the bridging of the Bosphorus by connecting boats, as is famously reported by Herodotus (Ἱστορίαι, book 4, logos 11).

History was written here, at Çırağan Sarayı, where the parliament of the Ottoman Empire, with the permission of Sultan Mehmed V, convened for the opening of the Second Legislative Year on 14 November

³ Resolution adopted on 11 September 2015: 69/321. *Revitalization of the work of the General Assembly*.

1909, an event that highlighted the transition from absolute to constitutional monarchy. Earlier, in the 19th century, the palace was the site of extended power struggles and intrigues. Dethroned Sultan Murad V lived here for 28 years. In 1878, a failed attempt to liberate him by means of a battleship anchored offshore in front of the Palace, and to reinstate him to the throne, cost the lives of most of the plotters.

Fast-forward to the realpolitik of today, and the significance of the Bosphorus will appear in a new light. In the current situation of regional and geopolitical conflict, the “Régime of the Straits,” in place since 1936, has again made us aware of the *crucial role of international law*. Under the Treaty of Montreux, the Republic of Türkiye has acted as “Guardian of the Straits,” ensuring that “vessels of war belonging to belligerent Powers shall not (...) pass through the Straits” (Art. 19, Par. 2). In conformity with her rights and obligations under the Treaty, Türkiye on 27 February 2022 declared, for the purposes of the Convention, that a “state of war” existed between Russia and Ukraine. Also, in the nearby Dolmabahçe Palace, Türkiye hosted peace talks between Russia and Ukraine and, together with the United Nations, brokered the so-called grain deal – “Black Sea Grain Initiative” – between the warring parties.

Türkiye’s role – also as facilitator, a few weeks ago, of the largest prisoner exchange between the West and Russia since the end of the Cold War – is just *one* indicator of an emerging multipolar constellation that is substantially different from the multipolarity among the Allied powers of the time when the UN was founded. It is to be hoped that the emergence of new global players will give fresh impetus to a comprehensive debate on reform of the international system. A new order must ensure that no one single actor, as powerful as he may be, will be able to block collective action for the maintenance of peace. The protracted armed conflicts in Europe and the Middle East are sad testimony to the predicament of the world organization under the conditions of an outdated statute, dictated by a balance of power that vanished long ago.

In conclusion, I would like to recall the words of President Sukarno of Indonesia who more than 60 years ago anticipated the gist of today’s reform debates. In a far-reaching speech to the 15th session of the General Assembly of the United Nations on 30 September 1960 he said: “In many ways, the Charter reflects the political and power constellation

of the time of its origin. In many ways that Charter does not reflect the realities of today.”⁴ Emphasizing the principle of sovereign equality of States,⁵ he called for major structural reform, and in particular for a redistribution of seats in the Security Council.

What was to the point at the height of the Cold War is even more relevant under conditions of today’s global realignment. To free the United Nations from the web of power politics, the paralyzing legacy of an earlier era, will require participation of *all* global regions in the organization’s decision-making bodies – according to the phrase made popular and eloquently pronounced from the rostrum of the General Assembly by the president of the country we are meeting in today: “*The world is bigger than five.*”

It will be high time for the member states to “recommit to fundamental principles and further develop the frameworks of multilateralism,” as Secretary-General António Guterres suggested in his exposé for the UN “Summit of the Future,”⁶ which is to convene in ten days’ time in New York. However, if the states that created the organization in the middle of the last century continue to refuse adaptation of the Charter to the evolving realities of the 21st century, they are putting at risk the very future of their collective effort.

I thank you for having accepted our invitation and look forward to our discussions.

⁴ United Nations, 880th Plenary Meeting of the General Assembly: 15th Session – Part 3, Official Record, A/PV.880.

⁵ Article 2(1) of the UN Charter.

⁶ *Secretary-General’s remarks to the General Assembly Consultation on “Our Common Agenda.”* United Nations, Secretary-General, 04 August 2022 / General Assembly.

I

The United Nations and the Rule of Law: Real vs. Ideal

Mogens Lykketoft

President of the 70th General Assembly of the United Nations

Observations on the Workings of the UN System*

In the course of my lifelong interest in international affairs, I always hoped to see nation-states further commit themselves to the UN system and respect international law and conventions. Therefore, it was a great honor and experience to serve as the 70th President of the United Nations General Assembly.

Our roundtable today will focus on the limitations of global order and lack of equality among nation-states in the UN system, due to the veto power and impunity of the P5 in the Security Council.

But first, let us not lose sight of the gains we have achieved for civilization through the creation of the UN system:

It is the first time in human history that we have succeeded in creating a permanent forum of some influence where (almost) all governments are present and talk to each other.

Yes, the Security Council has all too often been blocked in efforts to end conflicts because of a veto from one of the P5. But even so, since 1945 the UN has played an important role in assisting in avoiding direct military conflict between superpowers with nuclear weapons.

Remember, too, that back then the power of veto was seen as a precondition for keeping the mightiest members inside the tent, so to speak – contrary to what happened in the League of Nations. And importantly: The UN is much more than the UNSC and UNGA – it is 50 associated

* Transcript of speech delivered at the opening of Session I.

units that have produced plenty of results and recommendations that have contributed to important progress for humanity. For example, the WHO has been successful in increasing the average living age on the globe by twenty years in my lifetime.

But it is a fact that, except for a few times in the first years after the end of the Cold War, the Security Council did not fulfill its obligation and live up to the high ideals of the Charter.

Therefore, the majority of the 188 other member states have become increasingly impatient with the P5's privileges. Their reaction has been to try to gain more authority for the UNGA itself, and put more pressure on the P5 by the non-permanent members of the UNSC working more closely together. In this context, the office of President of the General Assembly is not just an honorary position; it is a central position as negotiator to increase that exact pressure on the P5.

I was able to change the selection procedure for the appointment of Secretary-General. Each candidate had to present his or her vision and program and take questions from the entire GA as well as from civil society. This new process made it very difficult for any of the P5 to ignore the candidate that was preferred by most member states. The selection of the SG is no longer decided in last-minute compromise in a smoky backroom by 2 or 3 of the P5. That may pave the way for Secretaries-General being less dependent on the P5.

I was also called upon to push for reform of the SC. But – very predictably – that dossier could not be moved forward. It stalled yet again, as it has done in the past forty years, because the Charter demands a majority in the GA of 2/3 *including the P5*.

But we did get a little insight into what might be possible – or impossible, even on a good day:

It is broadly agreed that the number of GA-elected members in the SC should increase – perhaps by another five members, especially from the Global South, to make the SC more representative of the world today. There were also some sympathies for giving access to unlimited reelection – in theory opening for a de facto increase in permanent presence.

However, neither the US nor China or Russia are willing to give up their veto power or grant it to other countries. Old ideas of elevating specific larger countries to permanent membership meet different opposition. Spanish-speaking Latin-American nations do not support Brazil; China is against Japan; India is opposed by Pakistan and other neighbors. Southern Europe does not support Germany. African member states cannot agree on one or two among them as permanent members.

Beside calls for reform of membership and voting rules in the SC there is a strong demand from the general membership to commit the P5 to restrain their use of veto and be obliged to explain to the General Assembly every veto that they exercise. The demand has recently been taken up by the GA in the hope that the rest of us, if able to argue against the veto in a more united fashion, will gain more moral leverage over its use.

Other proposals with considerable support among member states have been circulated trying to commit the P5 to promise not to veto action to stop crimes against humanity, war crimes and genocide – but without success.

Despite continued deadlock on reform of the Security Council, the UN moved the general global agenda in a better direction in 2015.

But from 2016, we were turned backwards again.

We got the Iran nuclear deal through consensus between Iran and all the P5 plus Germany, the EU and a united UNSC. This was accomplished mainly due to the ingenuity of foreign ministers John Kerry of the US and Javad Zarif of Iran.

Trump tore that agreement apart with lasting negative impact on Iran and the entire Middle East region.

The General Assembly approved with unanimity the Sustainable Development Goals – and we had the COP-meeting in Paris adopting the hitherto most ambitious goals and commitments to Climate Action. The Climate Agreement was reached because of good leadership from the UN and the French Presidency of the COP, but most importantly because the US under President Obama worked together with China un-

der Xi Jinping – also in bringing their most hesitant allies, friends and clients on board.

Trump left the agreement a couple of years later – delaying the existentially important global efforts to stop climate change. Biden brought the US back into the agreement; but global action on climate has suffered because of attention turning first to the pandemic and later to the Russian war of horrible aggression against Ukraine. And in the last 11 months focus has been on the lack of American action to end the very devastating Israeli war against the civilian population in Gaza – and the violent escalation of the occupation and colonization of the West Bank.

All of this is a further demonstration of the P5's arrogance in relation to the overwhelming demands of a huge majority of UN member states.

The bad state of global affairs reminds me of an old story about Mahatma Gandhi being asked about his opinion on Western civilization. His sarcastic answer was, "It is a good idea!"

The same comment could be made on the idea of the UN Charter and international conventions as constitutional obligations for every member country, big or small. It is indeed a good idea. But we still have a very long way to go!

Dare we hope to "civilize" Vladimir Putin, unless he himself is made to realize that he will not be able to take Ukraine by force?

Dare we hope that American and European double standards on human rights and war crimes in Ukraine and Palestine will come to an end through combined pressure from domestic public opinion and the political necessity of closing the credibility gap in relations with the Global South?

Dare we hope for an understanding that the unipolar world is forever a thing of the past? That we need to reinvent an international order where a large majority of UN member countries never again will have to get in line as clients of the US, Europe, China, or Russia?

Most countries in the world will not become model democracies – and, as ever, we must live together, a multitude of different kinds of democ-

racies and authoritarian regimes. But hopefully we share a common interest in preserving or reestablishing peace and create sustainable development for future generations.

This is the important reason why the word “democracy” is not mentioned in the Sustainable Development Goals. We cannot expect China to become a Western style democracy – we must act together on climate now.

In the long perspective, most important for all of us is that the US and China manage to contain and administer their conflicts of interest and realize that they have much more important common interests in peace, economic development and climate action.

The disturbing fact is that – veto power in the UN or not – we will have no lasting and peaceful international order if the biggest powers do not recognize that they share overarching common interests.

What the rest of us can do is to argue and pressure for their understanding and acceptance of this – including their support for more and stronger UN peacekeeping missions and much more investment through the UN system for the eradication of poverty and climate solutions in poor countries.

And, by the way, to support a stronger international system we not only need a Security Council much more representative of the peoples of the world today. We also need a reform of the Bretton Woods institutions, to better reflect the actual distribution of economic strength.

The broadest shoulders should bear the heaviest load and carry the highest responsibility to live up to the UN Charter.

Rauf Versan

International Rule of Law: The Dilemma of Enforcement under Chapter VII of the United Nations Charter

A. Introduction

The study of the law governing the workings of the United Nations Security Council has attracted a great deal of interest by scholars from a variety of disciplines, including international relations, history, philosophy and law. From a legal perspective, the main source of attention has been the powers of the Security Council accorded by the Charter of the United Nations. These powers have the force of law insofar as they emanate from a treaty; they are also discretionary insofar as they do not lend themselves to the formal scrutiny or review of any international body, judicial or political, other than the Security Council itself.

The history and practice of the United Nations support the view that the Security Council has attained a special status on the international plane not only as a principal organ of a universal organization, but also as a global actor of its own. This has raised concerns about the legitimacy of Security Council actions. Hence, the demands for reform, which started not long after the creation of the United Nations when membership began to increase as a result of the decolonization process. Reform was needed mainly in the areas of composition of the Security Council, the so-called veto power, and the amenability of the Security Council decision-making process to public scrutiny, both within and outside the United Nations. These are really questions about global constitutionalism. Arguments range from whether the composition of the Security Council should reflect democratic representation of wider United Nations membership, to whether the Security Council should represent global powers. There is inherent difficulty, theoretically and practically, when it comes to deciding which argument is more conducive to the achievement of the purposes set forth in the United Nations Charter,

and whether it is necessary to have a democratic Security Council in order for it to be able to perform its functions in the preservation and maintenance of international peace and security.

B. Normative Considerations

(1)

The heading of Chapter VII of the United Nations Charter is “Action with Respect to Threats to the Peace, Breaches of the Peace, and Acts of Aggression.” As the Charter does not provide a definition of these terms,¹ an important question to be discussed in this connection relates to the definition of the material elements of these terms, which is also the prerequisite of their practical application.

The term “threat to the peace” is a flexible concept contained in Article 39. An examination of the early practice of the Security Council indicates an inclination on the part of the Council to utilize this concept, in given circumstances, through the exercise of its wide discretionary power. In the Spanish Question of 1946, the issue was whether the remaining fascist régime of General Franco in Spain constituted a threat to peace. On this occasion, the Council was unable to adopt a decision as it was uncertain whether the régime was actually or potentially a threat, in which latter case it would be dealt with on the basis of the recommendatory powers of the Council under Chapter VI of the Charter.² In either case, this is an example of the situation where a question seemingly of domestic concern could be viewed, by virtue of its political impact, as possessing elements to constitute a threat to the peace. In 1961, the Security Council found that the civil war in Congo was a threat to international peace and security,³ as it did in the initial conflict in Yugoslavia in 1991 and in Liberia in 1992.⁴

¹ This lack was deliberate. At the San Francisco Conference an area of discretion was intentionally left to the Council, and although in 1974 the General Assembly adopted a definition of aggression this is only for the guidance of the Council and the list of aggressive acts is not exhaustive.

² See *The Charter of the United Nations: A Commentary*, ed. by B. Simma, 1995, p. 609.

³ SC Res. 4722 of 21 February 1961.

⁴ *Op. cit.* n. 2 at p. 611.

Insofar as the Security Council is capable of exercising latitude in interpreting the concept of a “threat to the peace,” and when the political will has been there, it has interpreted it to allow intervention in situations of internal strife or humanitarian emergency. In 1992, the Security Council determined that “the magnitude of the human tragedy caused by the conflict in Somalia” constituted a threat to international peace and security.⁵

The Council, especially after the Cold War, developed the concept of a threat to the peace in situations where there have been civil conflicts, but only if member states of the Council are not reluctant to accept that such conflicts display international dimensions. Such dimensions may take the form of large-scale refugee movements across international borders, or they may be such that regional or international peace is affected. The latter dimension is so susceptible to subjective interpretation as to make the concept of a threat to international peace essentially a matter of political assessment rather than a juridical determination. A case in point is the Rwanda conflict where the Security Council failed to act to stop the Rwandan genocide.⁶ Rwanda is a good example of the situation where an “internal” conflict can pose a real threat to international peace and security; the genocide in Rwanda provoked a series of consequences that led directly to a war in Zaire (later to become the Democratic Republic of Congo) in which a great number of people died.

Whilst the concept of a threat to the peace has been developed by the Council to cover intra-territorial strife and violations of the basic norms of international human rights laws, the concept of a “breach of the peace” is applicable to inter-state uses of force. A breach of the peace exists when the armed forces of two states are engaged in hostilities. Theoretically, it could be argued that a breach of the peace is a proper determination of the situation where the use of armed force is involved, but on a limited scale such as not to qualify as an armed attack, whilst “aggression” presumes use of force on a far greater scale. However, in practice, the Council has deployed both terms for serious breaches of Article 2(4) of the Charter. It has used the term “breach of the peace”

⁵ *Ibid.*

⁶ See Akehurst’s *Modern Introduction to International Law*, 7th rev. ed. by Malanczuk, pp. 405-407.

when determining the full-scale attacks of one state against another, whilst using the term “aggression” in relation to “acts” as opposed to “wars” of aggression. Examples of determinations by the Security Council that there was a breach of the peace include the case of Korea in 1950,⁷ the Falkland/Malvinas Islands case in 1982⁸ and the case arising from the invasion of Kuwait by Iraq in 1990.⁹ As for aggression, the Security Council in two cases has determined that short-term military actions by South Africa and Israel amounted to acts of aggression.¹⁰

(2)

The foremost function of Article 42 of the Charter is to confer authority on the Security Council to take action by the use of force in interstate conflicts where there is a threat to the peace, breach of the peace or an act of aggression. It was originally assumed that this would be realized on the basis of agreements that would be made with the member states of the United Nations so that armed forces and facilities would be available to the Council (Article 43) and that a Military Staff Committee would assist the Council (Article 47). As no such agreements were concluded the Council has chosen to interpret the Charter as enabling it to confer authority on member states to use their armed forces on its behalf.¹¹

While the Security Council has often been instrumental in the setting up of peacekeeping operations involving armed forces but not enforcement, instances where it has authorized enforcement action in interstate conflicts have been few. Some would say that the Council is anything but a morally principled and consistent body and that it functions not on the basis of a fine determination of justice but according to the interests of its members, some of whom retain a strong attachment to their privileged position as permanent members of the Council. A rare measure to mitigate the negative effects of the veto was the Code of Conduct of the Accountability, Coherence and Transparency (ACT)

⁷ *Op. cit.* n. 2 at p. 609.

⁸ *Ibid.*

⁹ *Op. cit.* n. 6 at p. 396.

¹⁰ *Op. cit.* n. 2 at p. 610.

¹¹ See *op. cit.* n.2 at pp. 630-631.

Group which was set up in 2015¹² upon the initiative of more than 100 states, including three permanent members of the Security Council, which have, in different ways, promised not to cast the veto in certain situations, especially where mass atrocities are concerned. A similar initiative took place in the aftermath of the Russian invasion of Ukraine, when the United Nations General Assembly on 26 April 2022 adopted Resolution 76/262.¹³ The central point of this “veto initiative” which was adopted by consensus was that whenever a resolution in the Security Council was hindered by a veto the issue could be automatically taken up within ten working days for discussion in the General Assembly. The state, which had used its veto, would be called upon to be the first speaker in the discussion in order to explain the reasons for the negative vote. These procedures do not limit the right of veto, but they may prove to be instrumental in pressurizing the permanent members of the Council to be more accountable before a sufficient critical mass of opinion in the General Assembly and beyond.

(3)

It is debated whether actions to be taken for the preservation or restoration of international peace and security are, or should be, a matter of exclusive concern for the Security Council, or whether individual or collective action by states outside the purview of the Council may also play a useful and legitimate role to that end. General international law envisages the institution of self-help by states in cases of a violation of their rights: if one state commits an illegal act against another state and refuses to make reparation or to accept the jurisdiction of an international adjudicatory body, the sanction ordinarily available to the injured state is self-help. Self-help measures should not involve the use of force, unless the conditions for the exercise of the inherent right to self-defence are met. However, states and coalitions of states have sometimes resorted to military force outside of this context on grounds, which have seemingly received a certain degree of support in international law and practice.

¹² UN Doc. A/70/621-S/2015/978.

¹³ UN Doc. A/RES/76/262.

Humanitarian intervention is a much-discussed concept under which states individually or collectively have the right to undertake armed interventions to protect or rescue groups of people, nationals and residents alike, in places where they run serious risks to their lives. The right is said to be derived from customary international law and to form an exception to the United Nations Charter's prohibition of the threat and use of force between states (Article 2[4]). It thus differs from the claimed exception that states can intervene to protect their own nationals, which is said to be based on the right to self-defence enshrined in Article 51 of the Charter. NATO's seventy-eight-day air strike in Kosovo is often referred to as a case in point, which arguably justifies the legitimacy of humanitarian interventions that lack Security Council authorization. In the Kosovo case, after Russia indicated that it would block authorization in the Security Council, NATO forces initiated a bombing operation to protect Kosovar Albanians from ethnic annihilation by Serbs in rump Yugoslavia.¹⁴ This intervention was later deemed "illegal legitimate" by various independent scholars.

The emergence of the Responsibility to Protect doctrine in the early 2000s may also be seen to justify the use of force outside Security Council authorization by qualifying the principle of non-interference in domestic affairs.¹⁵ This so-called doctrine emerged through the adoption of the 2005 United Nations World Summit Outcome Document.¹⁶ It stipulates that states have a responsibility to protect their populations from large scale violence within their territories; the "international community" has a responsibility to use peaceful means to protect threatened populations; and when a state "manifestly fails" to meet its responsibilities, the doctrine envisages a number of non-coercive ways through which the United Nations may act to remedy the situation. The doctrine also foresees intervention by the collective use of coercive measures authorized by the Security Council.

The tenets of the responsibility to protect are said to be rooted in existing international law, especially the law relating to sovereignty, peace and security, human rights and armed conflict. The explanation of why

¹⁴ See C. Gray, *International Law and the Use of Force*, 2nd ed. 2004, pp. 37-42.

¹⁵ See Brierly's *Law of Nations*, 7th ed. by A. Clapham, pp. 462-464.

¹⁶ General Assembly, A/60/L.1, 24 October 2005.

the United Nations Summit endorsed an expansive role for the United Nations in these situations is probably to generate an expectation that the international community must not stand by idly, as it did in the cases of genocide in Cambodia in 1975, Rwanda in 1994 and, to a large extent, in connection with Rohingya people in Myanmar from 2017, as well as the expectation that action should be taken to protect those in serious danger. The doctrine is viewed with suspicion by many developing countries fearing that it can open the way for misuse by great powers masking their political intentions behind a humanitarian posture. It has been supported by many others as an instrument for upholding the basic principles of human rights in the civilized global community.

(4)

The sanctions provisions in Article 41 of the United Nations Charter, dormant during much of the Cold War, have become one of the Security Council's most frequently used tools. The Council imposed sanctions in only two cases prior to the fall of the Berlin Wall: in 1966, a trade embargo was laid down against Southern Rhodesia (now Zimbabwe),¹⁷ which represents the first clear occasion on which the Council gave an order under Article 41, and in 1977, an arms embargo was enacted against apartheid-era South Africa.¹⁸ The Security Council began to resort regularly to sanctions in the early 1990s, starting with Iraq, the former Yugoslavia, and Haiti.¹⁹ As of October 2024, there are fifteen far-reaching Security Council sanctions régimes in place: they list more than eight hundred individuals and associated entities, as well as states that do not take the necessary measures to combat terrorism.

(5)

The term “sanctions” does not appear in the United Nations Charter. However, the constitutional basis for non-military mandatory sanctions is accepted to be Article 41. This article provides that “the Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon

¹⁷ SC Res. 232(1966), *International Legal Materials*, 1967, p. 141.

¹⁸ SC Res. 418(1977), *UN Chronicle*, December 1977, p. 10.

¹⁹ *Op. cit.* n. 6 at pp. 407-408.

the Members of the United Nations to apply such measures.” Recourse may be had to Article 41 once the Security Council has determined under Article 39 that a threat to the peace, breach of the peace, or an act of aggression has been committed. Where the Security Council has imposed recommendatory or voluntary sanctions, their constitutional basis is less clear; however, they would appear to fall outside Article 41 and, even, Chapter VII entirely.

So-called “smart” sanctions emerged in the mid-1990s as an alternative to what the then United Nations Secretary-General termed a “blunt instrument” employed in Iraq following the Gulf War. These sanctions target various specific political and economic interests as well as specific individuals regarded to be threats to international security. As opposed to comprehensive embargoes, they may take the form of arms embargoes, travel bans, asset freezes, and export/import bans on individual goods. But such sanctions have entailed human rights concerns of their own, and have been susceptible to changed behaviour. To be de-listed, embargoed individuals, entities, and items require an affirmative vote of sanctions committees, in which all Security Council members are represented.²⁰

An important question arises where the Security Council is unable to fulfil its functions under Article 39 or Article 41 of the Charter, or both, because of a lack of consensus among the permanent members of the Council, or even worse, because acts or actions affecting international peace and security have originated from, or with the support of, a permanent member of the Security Council. The case in point is the 2022 invasion of Ukraine by Russia and its aftermath.

In such situations, as mentioned above, it is questionable whether the protection of international security should remain a matter to be dealt with exclusively under United Nations mandate or whether individual states may legally take unilateral action (even of an extraterritorial nature) against the offending state, as a means of countermeasure.²¹

²⁰ Cf. D. Franchini, “Extraterritorial Sanctions in Response to Global Security Challenges: Countermeasures as Gap-Fillers in the United Nations Collective Security System,” *Cambridge International Law Journal*, Vol. 12 (2023), p. 129 *et seq.*

²¹ Cf. “Obligations and rights *erga omnes* in international law,” *Resolution of the Fifth Commission*, Institut de Droit International, Session de Cracovie, 2005.

In all these situations, countermeasures are subject to limitations and must be consistent with substantive and procedural rules of both international law and municipal law in order to be lawful. These are requirements, which cannot be evaluated in the abstract, but need to be looked at in relation to individual situations and on a case-by-case basis. Where countermeasures are to be applied outside the purview of the United Nations Security Council mandate, each state will resort to these measures on the basis of its own autonomous assessment of the legal situation, taking into account the pertinent risk of exposing itself to international accountability.

C. Concluding Remarks

The United Nations was set up at the end of the Second World War. Its founders were anxious to avoid not only another such calamity but also the shortcomings which had caused the failure of the League of Nations. The drafters of the United Nations Charter reflected the circumstances of the immediate post-war environment. They were realists who also had to work on assumptions some of which have eventually found their way into the Charter. They believed that law largely remained an appropriate medium for realizing the declared goals of achieving peace and international security, and promoting democracy and human rights across the world. What was controversial was whether the system through which these goals would be achieved via the legally established mechanisms of an inclusive, but often weak and selective, world organization would prove to be an effective one.

It soon became clear that things would not work out entirely in the way that they were foreseen. Wartime cooperation among the allies collapsed, which led to the Cold War. Far from being a forum for cooperation to tackle post-war issues, the United Nations, and especially the Security Council, became a venue of hostility between East and West where the West faced frequent vetoes from the Soviet Union. At the same time, during the period of the 1950s and 1960s, the old colonial empires had come to an end and new states came into being, with the result that not only the membership of the United Nations and consequently the Security Council increased, but that the newly independent states wanted a different sharing of global power and resources in a way that would meet their own priorities, especially with regard to a

new international economic order and an international security system based on equitable mutual guarantees.

After the end of the Cold War, it appeared that the Security Council was now more disposed to making full use of its powers under Chapter VII, not only to prevent aggression, but also in respect of pursuing quite different goals, such as conducting humanitarian interventions in intra-territorial conflicts and even to enforce democracy. There has been a host of other situations where the Security Council has taken measures under Chapter VII, ranging from border determinations (Iraq-Kuwait), creation of subsidiary bodies of the Security Council to assess and administer claims for war damages (United Nations Compensation Commission for Claims against Iraq) to the prosecution of individuals for crimes (Yugoslavia and Rwanda Tribunals).

What will the Security Council achieve in the future? Any analysis of this question must be in the form of a guess.

The Security Council is an important and certainly the most conspicuous part of the machinery of the United Nations. It originated in an era in which it was expected that power politics would vanish and the rule of law would be achieved. We now realize that this idealistic assumption was hopelessly inadequate, not only because it failed to foresee the Cold War, but also because it misconceived the gist of international relations. The Security Council provides a forum for the management of politics and the reconciliation of competing national interests in times of heightened tension. Its effectiveness will depend upon the willingness and ability of member states to cooperate with one another, as well as with the United Nations itself.

C. L. Lim

The Rules-based Order versus the UN Legal Order*

I.

Thank you to the IPO and Professor Hans Köchler for this kind invitation, which brings together committed internationalists at a time when there is a sense that the international order is failing. I would like to talk about the criticism today that many States, – rather than just some of them, – now act outside the UN, and are abandoning the United Nations Legal Order (UNLO). In this morning’s discussions we have already gained some political insight into this in some of the remarks we heard from Mr. Mogens Lykketoft, and there was the masterful analysis of Security Council law by Professor Rauf Versan just now.

What I might add to all this is that some people elsewhere have also pointed to another factor; namely, the introduction into our vocabulary of the idea of promoting or defending a “Rules-based International Order” (RBIO).

Critics say that the Rules-based vision is not the UN Legal Order; more than that it is an attempt to exempt oneself from the UNLO, and to supplant the UNLO.¹

This is not how the RBIO’s proponents see it. Rather than aiming to replace the UNLO, they say that the UN framework should support the RBIO’s liberal values, and that rather than being a form of exceptionalism, the RBIO is just liberalism, as we have always understood

* Transcript of statement delivered in Session I.

¹ J. Dugard, “The choice before us: International law or a ‘rules-based international order?’” (2023) 36 *Leiden J.I.L.* 223. It is not something international lawyers really talk about; *ibid.*, 224-225.

it – meaning (1) having a general belief in the merits of international cooperation, (2) being against sheer power politics or realism in international relations, (3) having a belief in the role of international organizations, (4) supporting free trade, and (5) upholding democratic governance.

In fact the RBIO too claims to be based upon the UNLO,² and the RBIO proponents' claim is that they are defending the UNLO rather than undermining it.

II.

Amongst international lawyers there have been signs of deep disquiet, and concern with what are perceived inconsistencies in the RBIO's proponents' positions.

Does Israel have the right of self-defence against Hamas, a non-State entity, rather than simply having the legal duties of an occupation force? RBIO proponents would say yes, I believe.

Do conflicts over territorial sovereignty trump “freedom of navigation” in the South China Sea? RBIO proponents say no, that what is happening there is simply, or really, about the freedom of navigation. If that were correct it would involve extra-regional third countries taking sides in a territorial or sovereignty dispute in a particular region.

What are the respective roles of the Security Council and the General Assembly in the Russo-Ukrainian conflict? Or, as the Arab League would argue, in the Gaza context? Many or the main RBIO proponents would likely wish to see the General Assembly step in in the case of the former, but not do so in the case of the latter (i.e. Gaza) context. Professor Aral has mentioned this issue during this morning's proceedings.

We are not talking about legal minutiae or lawyers' controversies, which even an informed global public may find difficult to follow, but

² See Julinda Beqiraj, “The Rules-Based International Order: Catalyst or Hurdle for International Law,” *BIIGL Blog*, March 2024, 11.

where the questions raised are fairly easily resolved through the ordinary application of uncontroversial legal reasoning. Such as what the International Court of Justice said about “genocide,” if anything, in its original order of provisional measures in *South Africa v. Israel*,³ or what that court said recently in its advisory opinion regarding Israel’s occupation of Palestinian territories.⁴

However, other kinds of questions go beyond such questions of United Nations Law. People want to know if sanctions taken without Security Council authorization may be imposed collectively outside the UNLO, and may be taken by States other than the injured State itself. They want to know if such like-minded States can, and can be counted upon, to act legitimately in place of the Security Council, including in freezing, – if not in seizing, – Russian sovereign assets.⁵ The RBIO says yes, to all of these questions. I will in the next part give you my own answers, in as frank a manner as possible.

It is here that there is a genuine sense of unease about the solutions the RBIO proposes against the backdrop of what people call “the changing world order,” against the backdrop of what a friend of mine, Prof. Thomas Skouteris at the American University in Cairo, has in a separate context called a sense of crisis. He calls it “the sense of an ending”:⁶

[A] deep, unsettling sense that we are living through a fin de siècle, a moment of both culmination and collapse. It is a mood that permeates not just international law but the very fabric of our times. The existential threat of climate change looms large, the rapid advancement of artificial intelligence threatens to outpace our ethical frameworks,

³ See *Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v. Israel)*, Provisional Measures, ICJ Reports, 26 January 2024. See also the court’s subsequent orders.

⁴ *Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem*, Advisory Opinion, ICJ Reports, 19 July 2024.

⁵ All of these too have careful legal answers. Hans Kelsen once taught that there is no such thing as a situation of “*non liquet*” where there is no legal answer. One may not have a right that is claimed but that is hardly a non-answer to a legal question.

⁶ Thomas Skouteris, “Contemporary International Criminal Law After Critique Symposium: The Sense of an Ending”, *Opinio Juris*, 13 September 2024.

democratic values seem to erode daily, and the chasm of social and economic inequality widens with each passing year. Walter Benjamin's notion of "shock," as explored in The Arcades Project, captures the jarring dislocations that define this era. We are not merely witnessing a series of disruptions; we are living through a systemic rupture, one that challenges the very narratives we have long relied upon to make sense of our world.

III.

I promised to offer some technical legal answers. I need to speak plainly before such a distinguished audience because we live in an age of lawfare and legalistic propaganda. I will try to avoid advocacy in favour of analysis, as best I know how.

On Russia-Ukraine

- a) Can the General Assembly act when the Security Council is unable to in matters of peace and security? Yes, since the days of the Uniting for Peace Resolution.⁷
- b) Can sanctions be imposed as countermeasures by States as a response to a breach of legal rights? Yes, provided such countermeasures do not usurp the authority of the Security Council.
- c) Can States impose sanctions when they do not suffer injury themselves, such as when there is breach of an obligation owed to the international community?⁸ Yes.⁹

⁷ U.N.G.A. resolution 377(V), 3 November 1950. See, for the Ukraine resolution, U.N.G.A. Res. ES-11/1, 2 March 2022 (141:5:35).

⁸ Now I could tell a long story about two brilliant Italian lawyers, who had paved the way for this view, the second of whom insisted on appropriate institutional safeguards, most importantly, compulsory adjudication. But I think I will leave that for my law students. See C. L. Lim and Ryan M. Mitchell, "Neutral Rights and Collective Countermeasures for Erga Omnes Violations," (2023) 72 *I.C.L.Q.* 361, 378. See also, C. L. Lim and Ryan Martinez Mitchell, "Why Neutral Rights Mean that States are Not Obligated to Join in Collective Sanctions," *Opinio Juris*, 23 March 2024.

⁹ ILC Articles on State Responsibility, Art. 48(1)(b).

- d) Non-injured States can also impose sanctions as countermeasures if requested by the injured State.¹⁰
- e) Now comes the important question. Are other, third States bound to comply with such sanctions? Where X, Y, and Z impose sanctions against A, at the request of B, are C, D and E bound to comply with such sanctions? I have written that other States would be within their rights to deny the legitimacy of such “secondary” sanctions, i.e. sanctions that are not in fact targeted at their own conduct. There are various reasons for this, some cite the norm of non-intervention in the internal affairs of States, – sovereign equality, if you like, – but I have also argued for the rights of neutral States more specifically.¹¹
- f) Yet can we not at least try to get third States to co-operate with a coalition of those willing to sanction? RBIO proponents might say that there is a legal duty to co-operate in order to stop breaches of *jus cogens* norms.¹² The problem is that this is not, or not yet, international law. I have explained elsewhere that:¹³

This was described at the time in the ILC’s commentary as a “progressive development of international law,” and has more recently (albeit somewhat more contentiously) been described as “now recognized under international law.” But even this “duty to cooperate,” alongside other provisions such as the negatively-worded “duty not to render aid or assistance in maintaining [an] unlawful situation” cannot plausibly be taken to mean an affirmative duty to join an ersatz multilateral (i.e., non-UN-based) sanctions scheme.

¹⁰ ILC Articles on State Responsibility, comment no. 5 to Art. 54.

¹¹ See C. L. Lim and Ryan M. Mitchell, “Neutral Rights and Collective Countermeasures for Erga Omnes Violations,” (2023) 72 I.C.L.Q. 361, 378. See also, C. L. Lim and Ryan Martinez Mitchell, “Why Neutral Rights Mean that States are Not Obligated to Join in Collective Sanctions”, *Opinio Juris*, 23 March 2024.

¹² ILC Articles on State Responsibility, Art. 41(1).

¹³ C. L. Lim and Ryan Martinez Mitchell, “Why Neutral Rights Mean that States are Not Obligated to Join in Collective Sanctions,” *Opinio Juris*, 23 March 2024.

Israel-Gaza

- g) Does Israel have the right of self-defence against Hamas in the Gaza context? The ICJ has said no,¹⁴ but RBIO proponents, including the US, would as I understand it reject the Court's view.
- h) Is there a genocide occurring in Gaza? Whatever the true answer, the ICJ in *South Africa v. Israel* has not said that Israel has committed genocide, it has not even said that this is a plausible view, and the former President of the Court came out to explain the Court's judgment, which is an unconventional thing for a judge to do.¹⁵ In para. 57, which is the operative clause, sub-paragraph 2, the Court said:¹⁶

The State of Israel shall, in conformity with its obligations under the Convention on the Prevention and Punishment of the Crime of Genocide, and in view of the worsening conditions of life faced by civilians in the Rafah Governorate:

*(a) By thirteen votes to two,
Immediately halt its military offensive, and any other action in the Rafah Governorate, which may inflict on the Palestinian group in Gaza conditions of life that could bring about its physical destruction in whole or in part [...]*

The South China Sea

- i) Is there a right to protect the freedom of navigation? Yes, if we are truly talking about the freedom of navigation. How does that

¹⁴ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion*, ICJ GL No 131, [2004] I.C.J. Rep. 136, at [138]-[139].

¹⁵ Daniel Hurst, "Australian International Court Judge Calls Israel to Suspend Gaza Military Operation," *Guardian*, 2 April 2024.

¹⁶ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v. Israel)*, Order of 24 May 2024, available at < <https://www.icj-cij.org/case/192> >.

work through a coalition of States acting outside the Security Council framework? In a roughly similar way to unilaterally acting outside the Security Council, which I have already described, such that if country A asks for country B's help to preserve the freedom of navigation, – for example, through archipelagic waters or on the high seas, – then it is the same question as that of whether collective action can be taken by third States outside the UN to assist any State which claims that its rights have been violated, allowing third-party countermeasures to induce compliance with the law. This was what happened when such sanctions were imposed by some countries against Argentina in connection with the Malvinas/Falklands War. One could also invoke a collective security arrangement existing independently of the UN Charter; the obvious example is NATO's treaty, while the increasingly prominent example is the US-Philippines Mutual Defence Treaty.

IV.

I could go on with more and more examples, but my point is only to show two things.

First, the International Court of Justice is becoming prominent.

Such that when we speak of the international legal order, and the UN Legal Order, we are not just talking about Chapters Six and Seven of the Charter. Think of the Israel-Gaza example where (a) the ICJ has at least pronounced on the issue. Similarly, (b) the ICJ in *Ukraine v. Russia* ordered Russia to “immediately suspend its military operations.”¹⁷

However, a sense of realism would also counsel against expectation that Russia as a Security Council member, which will tend to view questions of peace and security as being entrusted primarily to the Security Council, would have agreed with or complied with that order of the Court. In *South Africa v. Israel*, where the provisional measure or order

¹⁷ As for non-compliance with that order, it involves an old difference between saying that international law is not real – it is –, and merely saying that it is inefficacious. Ian Brownlie, “The Reality and Efficacy of International Law,” (1981) 52 *B.Y.I.L.* 1.

was against a non-P5 member, i.e. Israel, the Court was unfortunately ambiguous in the way it referred to the genocide issue when it ordered an immediate halt to the military offensive “and any other action in the Rafah Governorate, which may inflict on the Palestinian group in Gaza conditions of life that could bring about its physical destruction in whole or in part.”¹⁸

Secondly, the weight of securing world order does not fall solely on jus ad bellum rules but also on the technical rules governing international countermeasures, e.g. under Article 49 of the Articles on State Responsibility:

Object and limits of countermeasures

- 1. An injured State may only take countermeasures against a State which is responsible for an internationally wrongful act in order to induce that State to comply with its obligations under part two.*
- 2. Countermeasures are limited to the non-performance for the time being of international obligations of the State taking the measures towards the responsible State.*
- 3. Countermeasures shall, as far as possible, be taken in such a way as to permit the resumption of performance of the obligations in question.*

V.

Let me finish by saying that, ***as for the first***, the increased prominence of the International Court of Justice may seem very little, and it may be that, the more activist the Court has been, it has only served to deepen a sense of crisis.

¹⁸ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v. Israel)*, Order of 24 May 2024, para. 57, available at < <https://www.icj-cij.org/case/192> >.

However, I think *the second point*, concerning the shift toward using countermeasures, perhaps just an inch from resorting to treaties of collective self-defence, is now real. The law of countermeasures is almost made for the Age of Hybrid Warfare. It has become the law governing the intermediate phase before resort to collective security arrangements outside the Security Council, partly because of the new notion of a “rules-based order.” It is because of that that I think it is so important not just to lament the challenge to global security caused by the non-functioning of the Security Council, which as I have said elsewhere was always only as good as its ability to maintain the balance between the great powers.

I have, incidentally, written elsewhere on the importance of clarifying the rights of neutral States, because this stops the spread of war. If that is against the RBIO, then so be it.

A third issue that I have been working on is not something there is now time left to talk about, which is that renewed importance should be given to the problems of the disrecognition of States, and the recognition of new States.¹⁹ We have become accustomed to thinking that States are born through collective UN recognition. That only confirms membership in an organization which happens to be open only to States. Looked at carefully, however, Statehood is a requirement rather than a consequence of United Nations membership. The problem was most acutely observed during the United Nations decolonization process when many entities which clearly could not stand on their own could not have said that they were truly independent, or that they could defend that independence on their own. It was through their sponsorship by the former colonial metropolis, France, or the United Kingdom, for example, that many new States came into being.

Today, we face the spectre of the disrecognition of the Statehood of a UN member, as well as new questions about whether, conversely, absence of collective recognition of Palestinian Statehood in the UN is as

¹⁹ See Ryan Martinez Mitchell and C. L. Lim, “The Decolonisation of Recognition: Re-assessing the Trajectory after the ICJ’s Occupied Palestinian Territory Advisory Opinion,” m/s, on file.

significant as treating certain polities as having rights that are akin to the rights of States, such as whether force can be used against them. The Court has unfortunately also been less than entirely clear on this point since it is not certain whether it is referring to Palestine itself whose rights have been violated:²⁰

As regards the prohibition of the acquisition of territory by force, the Court notes that the Security Council has declared on several occasions, in relation to the Occupied Palestinian Territory, the inadmissibility of the acquisition of territory by force and has determined that “all measures taken by Israel to change the physical character, demographic composition, institutional structure or status of the Palestinian and other Arab territories occupied since 1967, including Jerusalem, or any part thereof have no legal validity” (Security Council resolution 465 [1980]).

Let me end here and thank you for your time.

²⁰ *Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem*, Advisory Opinion, ICJ Reports, 19 July 2024, para. 276.

II

The Security Council and Global Power Politics

Bardo Fassbender

The Right of Veto in the UN Security Council: Original Intent, Present Status and Prospects

In 1945, the UN Charter instituted majority voting in all UN organs, including the Security Council. However, according to Art. 27, para. 3 of the UN Charter, any decision of the Security Council on substantive matters requires an affirmative vote of nine members (until the number of non-permanent members of the Council was raised from six to ten in 1963, it had been seven members), “*including the concurring votes of the permanent members.*” This provision is the basis of the famous and often criticized veto power of the “P5,” namely China, France, Russia (formerly the Soviet Union), the United Kingdom, and the United States (Art. 23, para. 1 of the UN Charter).

In the context of the present roundtable discussion about “Sovereignty and Coercion: The United Nations in the Web of Power Politics,” this contribution wishes briefly to reconsider and reassess the political and legal importance of the veto power in the first half of the 21st century. My remarks are arranged in three parts. First, I want to recall what the founders of the United Nations, and especially the leading powers of the time, had in mind when they invented the procedure of the veto. In a second part, the present status of the veto power is addressed: What does the veto of the “P5” mean today? Thirdly and lastly, I venture to look ahead, presenting a few thoughts about the possible future of the veto in the context of the international order.

Original intent

In 1945, the UN Charter instituted majority voting in all UN organs, including the Security Council. This step represented, in the words of C.

Wilfred Jenks, “the completion of a revolution of decisive importance for the future development of international organizations.”¹ Why “a revolution”? Because until the founding of the United Nations it had been an unquestioned consequence of the principle of state sovereignty that a sovereign state could not be bound by a decision or a legal rule without its consent. Consequently, Art. 5 para. 1 of the Covenant of the League of Nations of 1919 had provided that generally “decisions at any meeting of the Assembly or of the Council shall require the agreement of all the Members of the League represented at the meeting.”

However, the five states which Art. 23 para. 1 of the UN Charter designates as permanent members of the Security Council succeeded in carrying the freedom they had enjoyed under general international law and the Covenant of the League into the new organization, with Art. 27 para. 3 of the Charter providing that any decision of the Council on substantive matters requires “the concurring votes of the permanent members.” Accordingly, a resolution of the Council on other than procedural matters cannot be adopted against the will of any of these five states, and the Council cannot oblige any one of them to take action, or to refrain from taking action, against its will. Although a permanent member numerically has the same voting power as every other member of the Council, its right of veto enhances this power enormously: A permanent member alone can obstruct a decision of the Council, while it needs a negative vote of at least seven non-permanent members to have the same effect.

The right of veto enshrined in Art. 27 of the UN Charter has three major consequences that were already described by Professor Hans Morgenthau in 1948 in his book “Politics among Nations”: First, “the veto eliminates any possibility of centralized measures of law enforcement being applied against any of the permanent members.” Secondly, because of the veto, enforcement measures are also unlikely to be taken by the Council against any state aligned with one of the “P5.” And thirdly, the veto affects the working of Art. 51 of the Charter on self-defence of a state in the case of an armed attack: A permanent member invoking the right of self-defence cannot be forced to hand over the respective

¹ C. Wilfred Jenks, “Some Constitutional Problems of International Organizations,” in: *British Year Book of International Law*, Vol. 22 (1945), pp. 11-72, at p. 36.

situation to the authority of the Security Council as intended by the provision.²

But the scope of the veto power extends beyond the maintenance of international peace and security entrusted to the Security Council. The admission of new members and the suspension of membership rights (Arts. 4 and 5 of the UN Charter) are subject to the veto just as is the appointment of the UN Secretary-General (Art. 97 of the UN Charter). Further, an amendment of the UN Charter only comes into force after ratification by all the permanent members (Arts. 108 and 109 of the UN Charter), with the effect that the veto power of the P5 enshrined in Art. 27 para. 3 of the Charter itself is protected by the veto.

In 1945, the veto was a matter of concern mainly for only two states: the United States and the Soviet Union, which had positioned themselves as the primary global postwar military powers. Both states wished to decide freely when and to which extent to make their military capacity available to the new world organization, and each of them wanted to exclude the possibility of becoming the object of a majority decision organized by the other. That way, they continued the basic principle of unanimity of their war coalition against the Axis Powers. It was mainly to avoid the unwanted impression of a dual world government of the US and the USSR, and to appreciate their contribution to the fight against Germany and Japan, that the United Kingdom, China and France were also made permanent members endowed with the veto. Still, the veto was essentially in the hands of only two states which made the practical consequences appear limited.³ Further, there was a general expectation that the veto would only be used if vital interests were at stake.

Although it was pushed through at the San Francisco Conference against the resistance of the small and medium-sized states, the veto

² See Hans J. Morgenthau, *Politics among Nations: The Struggle for Power and Peace*. New York: Alfred A. Knopf, 1948, at p. 240 *et seq.*

³ France and the United Kingdom did not cast a veto since 23 December 1989 when, together with the United States, they prevented the Security Council from condemning the US invasion of Panama. See Security Council Report, May 2022 Monthly Forecast: “Challenging the Power of the Veto”; available at: <https://www.securitycouncilreport.org/monthly-forecast/2022-05/in-hindsight-challenging-the-power-of-the-veto.php> (last visited 27 October 2024).

power was not a birth defect of the United Nations. Instead, it was a condition of the consent of the US and the USSR to the broad competences entrusted to the Security Council in Chapter VII of the Charter. I agree with the late Professor Inis L. Claude of the University of Virginia who observed in 1961 that “the insertion of the veto reflected the belief that the great Powers might be divided on critical issues, and the intention that no effort to organize collective security action should be made in such cases.” “In these terms,” Professor Claude remarked, “the inability of the Security Council to act in East-West crises represents the fulfillment, not the frustration, of the expectations and intentions of San Francisco; the United Nations was conceived as an organization which could not achieve, and should not attempt, the collective suppression of aggression undertaken or supported by a great Power.”⁴

Present Status

And where are we today? Art. 27 of the Charter has remained unchanged, with the only exception of the numbers in paragraphs 2 and 3: while originally a decision of the Council required a majority of seven members, that figure was changed to nine when the number of non-permanent members was raised from six to ten in 1963.⁵ However, changes invisible to the reader of the Charter (and its unaltered Art. 23 para. 1) were the replacement in 1971 of the Republic of China by the People’s Republic as the “lawful” and “legitimate” representative of China,⁶ and the “continuation” of the membership of the Soviet Union by the Russian Federation in 1991.⁷ With the first change, a (militarily weak) close ally of the United States was replaced with an increasingly

⁴ See Inis L. Claude, Jr., Review of Maurice Bourquin, “L’état souverain et l’organisation internationale,” in: *American Journal of International Law*, Vol. 55 (1961), pp. 193-194, at p. 194.

⁵ See UN General Assembly Resolution 1991 (XVIII), “Question of equitable representation on the Security Council and the Economic and Social Council,” Part A, adopted on 17 December 1963. The amendment entered into force on 31 August 1965.

⁶ See UN General Assembly Resolution 2758 (XXVI), “Restoration of the lawful rights of the People’s Republic of China in the United Nations,” adopted on 25 October 1971.

⁷ For details, see Bardo Fassbender, *UN Security Council Reform and the Right of Veto: A Constitutional Perspective*. The Hague/London/Boston: Kluwer Law International, 1998, pp. 183-190.

powerful rival, preparing the ground for the emergence of a third autonomous holder of the veto power in place of the US-USSR dualism of 1945.

It must also be noted that, compared to the time of the Cold War, the practical scope of application of the veto has become much larger since the 1990s as the range of responsibilities assumed by the Security Council was expanded to comprehensive economic and financial sanctions, international criminal law, post-conflict peacebuilding, quasi-legislative functions, and thematic issues such as the protection of civilians in armed conflict, “Women, Peace and Security,” or climate change. The increase in the number of Security Council resolutions has also made possible an improper linking of issues in the way that a certain part of a draft resolution is rejected in negotiations in order to get approval for a particular statement included in another draft resolution on a different subject.

The new international environment which in the 1990s resulted from the breakdown of the Soviet Union did not only lead to calls for an abolition or limitation of the veto but also to new demands for permanent membership and the right of veto by certain “rising powers” like India and Brazil, by former enemy states (Germany and Japan), and by states wishing to see their disadvantageous position in the international system corrected (in particular the African states).⁸ All states justified their proposals as an improvement of the representative character and thus the political legitimacy of the Security Council. But so far, none of these efforts (either to abolish or to limit the veto, or to extend it to additional states or groups of states) has been successful. The different aspirations have neutralized each other so that the conditions provided for in Articles 108 and 109 for an amendment to the Charter (a two-thirds majority in the General Assembly, and a ratification by two thirds of the member states, including the permanent members) could not be met. Diplomatic discussions continue in New York, but with truly little chance of success. They have gotten lost in technical details, and for

⁸ See Fassbender, *UN Security Council Reform* (note 7), pp. 221-275. For a documentary record also of later proposals, see Bardo Fassbender (ed.), *Key Documents on the Reform of the UN Security Council 1991–2019*. Leiden/Boston: Brill Nijhoff, 2020. The introduction to the latter book gives a summary of the history of the Security Council reform debate since the early 1990s.

years now they have not attracted sufficient attention at the highest level of government of member states. If the veto power was a condition of the consent of the US and the USSR to the far-reaching powers entrusted to the Security Council in 1945, then the question arises whether *today* the US, China or Russia would accept a Council in which they could be outvoted on a matter of vital interest. The answer seems clear to me.

Prospects

The present international situation is fundamentally different from that prevailing at the end of the Second World War, when the veto was conceived, and from that of the 1990s when proposals for a reform of the Security Council were seriously discussed across the globe. The optimism of the years following the East-West confrontation has disappeared. The Western states, which after World War II imagined the UN as a cornerstone of a new multilateral system, no longer act from a self-confident position of ideological, economic and military strength. The United States, the single most important driving force behind the original UN, is confronted with the limits of its claim to world leadership. Mutual tensions between the US, Russia and China have increased, to the point of a proxy war between Russia and the US on European soil. At the same time, many developing countries of Africa and Asia are disappointed that their decades-long efforts in the UN to substantially improve their status in the world community have largely remained unsuccessful. (I mention here only changes in the conditions of the state system, and do not consider the changed role and importance of non-state actors, in particular multinational corporations, which may be even more significant.)

It is sometimes overlooked that abolition, or a substantial limitation, of the veto alone would not bring about a functioning system of collective security as the founders of the United Nations had envisioned it. The founders did not just allocate legal authority to the Security Council but also wanted to furnish it with real and credible military power to prop up its decisions against an aggressor. Following Thomas Hobbes' ideas expressed in his "Leviathan" of 1651, the Security Council's legal monopoly on the lawful use of force in international relations was meant to be accompanied by effective means of coercion. Art. 43 para. 1 of

the Charter provides that all members of the UN “undertake to make available to the Security Council, on its call and in accordance with a special agreement or agreements, armed forces, assistance, and facilities (...) necessary for the purpose of maintaining international peace and security.”

It is well known that the agreements provided for in Art. 43 were never concluded, and that not even in the optimistic period after the end of the Cold War a sincere effort was made to bring them about. That means that even if the decision-making procedure of the Security Council were improved by eliminating or reducing the paralyzing force of the veto, this would not guarantee a more effective securing of international peace by the Council. Rather the Council would remain dependent for the enforcement of its decisions on a case-by-case supply of “authorized force” by member states (which has been extremely rare in the past three decades), and the problem of enforcing a decision against the US, China or Russia would persist.

In my view, the right of veto of the permanent members is not the real problem of the Security Council. The veto is a procedural device that, if it is used or threatened to be used, only makes visible a substantial lack of agreement between powerful states in situations of a threat to the peace or breach of the peace. East-West relations during the Cold War would not have been any better in the absence of the Charter rule about the veto. Rather, it is likely that the United Nations would not have survived the Cold War without the veto. As Professor W. Michael Reisman once remarked, the veto “permits its holder to stop the Organization from operating if it feels the proposed action would conflict with one of its own vital interests. Thus, the Organization cannot directly confront one of the major power centers or, in more general terms, interfere with the effective power process. Recognition of this condition seems necessary for, in a confrontation, the Organization would be the casualty.”⁹ In other words, the real question is whether the conflicting views and the political, economic and military interests of major states and groups of states can be bridged in a way that at least minimal consensus is achieved in the face of an international crisis. It is by no means certain

⁹ See W. Michael Reisman, “The Constitutional Crisis in the United Nations,” in: *American Journal of International Law*, Vol. 87 (1993), pp. 83-100, at p. 98.

that a system of pure majority voting could better contribute to bringing forth that consensus than a “process of persuasion, compromise, and agreement” among the major powers.¹⁰

It seems that in recent years the expectations placed in the Security Council have fallen sharply. No one seems to believe that the Council could make a decisive difference regarding the ongoing Ukraine war, or the Gaza conflict, or climate change with its foreseeable ramifications in terms of international peace and security. Sometimes the Security Council, as the heart of the UN Charter system of 1945, appears as a body which only still exists because the political costs for dissolving it are too high, or because the consequences of its liquidation are unpredictable, or because no one has an idea with what it could be replaced. Are we waiting for a fundamentally different universal organization of states? And who could possibly bring it about? Or has the idea of a universal political and legal structure been exhausted along with the power of the West (in particular the United States) and is being replaced by a new particularistic relativism and a political fragmentation of the world into separate spheres of values and interests?

In the future shaping of international organization, China will probably play a decisive role. The current Chinese “Global Security Initiative” still emphasizes the importance of the UN Charter: “The purposes and principles of the UN Charter (...) are humanity’s institutional design for collective security and lasting peace. The various confrontations and injustices in the world today did not occur because the purposes and principles of the UN Charter are outdated, but because they are not effectively maintained and implemented.”¹¹ However, China has already begun developing new institutional forms of intergovernmental cooperation outside the UN, for example in the framework of BRICS, the Shanghai Cooperation Organization or the Belt and Road Initiative.

If the real problem of fulfilling the Security Council’s mandate is not the veto power of the three power centers, US, China and Russia, but their

¹⁰ See Inis L. Claude, Jr., *Swords into Plowshares: The Problems and Progress of International Organization*. New York: McGraw-Hill, 4th ed. 1984, at p. 131.

¹¹ See “The Global Security Initiative Concept Paper,” 21 February 2023, part II.3; available at: http://mv.china-embassy.gov.cn/eng/sgsd/202302/t20230221_11028774.htm (last visited 27 October 2024).

lack of agreement in goals and interests, one could take a further step back and say that what ultimately matters is a global culture of peace and justice. The absence of violence in interstate relations must not be seen as an isolated issue but in a holistic view, as already envisioned by the founders of the UN in the Preamble and in Chapter I of the Charter. That approach understands peace as an integral aspect of the common good of humankind, together with the protection of fundamental human rights, justice, and the economic and social advancement of all peoples. National egotism and rivalry must be replaced with a willingness to share resources and opportunities. Accordingly, we today would need personalities like Mahatma Gandhi, Martin Luther King or Nelson Mandela, who could successfully promote such a culture of peace and justice in the various parts of the world. New political and legal structures and rules would follow.

Hassan B. Diab

Former Prime Minister of Lebanon

**Rethinking P5 Veto Power in the
UN Security Council
A Challenge to Democracy in a
Multipolar World**

Introduction

This paper addresses a crucial global concern affecting ongoing armed conflicts in Europe and West Asia, shedding light on the United Nations Organization's inability to fulfill its core mandate of maintaining international peace and security. The paralysis witnessed in the UNSC, particularly when disputes involve the vital interests of permanent members, is not an accident but a deliberate design flaw. Despite the UN Charter's affirmation of "sovereign equality of all its Members," a select group of states, the P5, have effectively positioned themselves above the law.

Exploiting Article 27 provisions, these states can shield themselves and their allies from the Council's intended coercive actions, creating a glaring gap between the principle of sovereign equality and the *reality* of sovereign inequality. Consequently, none of these states have ever been held accountable for breaching the peace throughout the history of the organization. This compromises the authority bestowed upon the Security Council under Chapter VII of the Charter, as it serves the power politics of its permanent members.

For the P5, sovereignty entails the right to coerce and the privilege of avoiding coercion, while all other member states must acknowledge their subordination to the Council's supreme authority. The inconsistency between the principle of sovereign equality outlined in Article

2(1) of the Charter and the voting privilege granted by Article 27(3) has established a system of “sovereign inequality” both in practice and in law.¹

Challenges of P5 Veto Power

The UNSC, established after World War II, reflects the world of 1945, almost eight decades ago, dominated by the victorious powers. However, as the 21st century unfolds, a multipolar landscape develops,² where emerging powers wield significant influence in global affairs. This presentation explores the necessity of transitioning the UNSC into a more representative and effective body capable of addressing contemporary challenges in today’s multipolar environment.

The UNSC stands as the pinnacle of international peace and security, tasked with maintaining stability and preventing conflicts worldwide. However, the veto power wielded by the P5, while intended to safeguard national interests, often impedes collective action, leading to deadlock and inaction. This exceptional power not only perpetuates existing power imbalances but also marginalizes the voices of emerging states and regions. This system not only undermines the principles of equality and fairness but also hampers the Council’s ability to effectively address pressing global challenges. Furthermore, the contradiction becomes even more pronounced in the context of the emerging multipolar world order. The negative implications of the veto power are evident in key instances where critical resolutions addressing humanitarian crises, human rights abuses, genocide, and conflicts were vetoed by P5 members.

Democracy, at its core, emphasizes the equal participation and representation of all stakeholders in decision-making processes. However,

¹ *Exposé* issued by the International Progress Organization: International Roundtable Consultation, “Sovereignty and Coercion,” Istanbul, 12 September 2024, <https://i-p-o.org/Sovereignty-and-Coercion-EXPOSE-12Sept2024.pdf>.

² Hans Köchler, *The UN and the Multipolar Order of the Future: Reflections on the Tenacity of Power*. Skopje Cultural Diplomacy Forum 2023: “Promoting International Cooperation, Cultural Understanding & Peace,” Skopje, North Macedonia, 5 September 2023.

the veto power bestowed upon the permanent members of the UNSC contradicts this fundamental principle by granting disproportionate influence to a select few nations. While the veto was initially meant to prevent major powers from distancing themselves from the Council's decisions and thereby rendering it ineffective, it has evolved into a tool of geopolitical maneuvering and obstructionism. It has resulted in a scenario where the interests of a handful of countries can supersede the collective will of the international community, undermining the legitimacy and efficacy of the UN system.

The Use of Veto Power and Key Instances of Vetoed Resolutions

The ability of the P5 members to veto resolutions has often been a source of controversy and frustration within the UNSC. While intended to prevent actions that could threaten their national interests, the veto power can also hinder the Council's ability to address pressing global challenges effectively. Moreover, it exacerbates existing power imbalances within the UNSC, perpetuating a hierarchy that favors the interests of the victors of World War II. This not only reflects an outdated geopolitical landscape but also marginalizes the voices and concerns of emerging powers and regions. As the world becomes increasingly multipolar, with rising powers such as India, Brazil, and others asserting their influence on the global stage, the anachronistic nature of the UNSC's structure becomes more glaring. Accordingly, the failure to reform the UNSC to reflect the new geopolitical realities not only erodes its credibility but also hinders its ability to address complex global challenges effectively.

The use of veto power by the P5 members has resulted in the blocking of numerous resolutions aimed at addressing critical international issues. Examples include resolutions concerning humanitarian crises, human rights abuses, and conflicts in regions such as Syria, Palestine, and Myanmar. In many cases, these draft resolutions enjoyed broad support from the international community but were thwarted by the vested interests or geopolitical considerations of one or more P5 members. The following are examples:

- *Crimea*: Following Russia's takeover of Crimea in 2014, the UNSC considered several resolutions condemning the action and calling for the restoration of Ukraine's territorial integrity. However, these resolutions were vetoed by Russia.
- *Israeli-Palestinian conflict*: The Israeli-Palestinian conflict has been the subject of several UNSC resolutions, many of which have been vetoed by the United States. These resolutions have addressed issues such as Israeli settlements in the occupied territories, the status of Jerusalem, and the right of return of Palestinian refugees. The use of the veto has perpetuated the stalemate in the peace process and undermined efforts to achieve a two-state solution. On February 20, 2024, the US blocked a ceasefire call with a third UN veto in the Israel-Hamas war since October 7, 2023, at a time when the number of dead, missing, and injured exceeded 100,000 people. Out of a total of over 200 P5 vetoes, the United States since 1972 has exercised its veto power in the UN around 100 times, over 50% of which were to block resolutions condemning Israel.

A more recent manifestation of the problem pertaining to the latter example is the vote (143-9 with 25 abstentions) of the UN General Assembly of 10 May 2024, which allows Palestinians to submit their own resolutions and fully participate in UN and international conferences. This reflected the wide global support for full membership of Palestine in the UN, and put the almost 77-year-old Israeli-Palestinian conflict at center stage. Palestine has held a non-member observer status that was granted by the UN General Assembly in 2012. Unlike resolutions in the UNSC, there are no vetoes in the 193-member General Assembly. This resolution required a two-thirds majority of members voting and got significantly more than the 118-vote minimum. The resolution "determines" that a state of Palestine is qualified for membership – dropping the original language that in the General Assembly's judgment it is "a peace-loving state." It recommends that the UNSC reconsider its request "favorably." Notably, the US blocked such a move in April 2024.

The resolution was adopted within the framework of the "tenth emergency special session" of the General Assembly, a format created by General Assembly Resolution 377 ("Uniting for Peace") of 3 November 1950 for situations in which the Security is paralyzed due to the veto (at that time, regarding the conflict in Korea). The tenth emergency

special session, dealing with the Israeli-Palestinian conflict, convened in April 1997 for the first time. Since then, almost 20 special meetings were convened on Palestine. On the instrument of emergency special sessions, there is a thesis paper at Harvard Law School.³ Hans Köchler repeatedly referred to that issue, e.g., “The Evolution of the Palestine Problem and the Status of Jerusalem: Force of Law or Law of Force,”⁴ and also, in his speech, “Palestine and the International Rule of Law” at a UN meeting on Palestine Day 2021.⁵ His general analysis on the UN Security Council and the veto was published in 1991 (long before the actual reform debates): “The Voting Procedure in the United Nations Security Council: Examining a Normative Contradiction in the UN Charter and its Consequences on International Relations.”⁶

Challenges, Implications and the Imperative for Reform

As is evident from history over the past few decades, the misuse of veto power undermines the UNSC’s credibility and effectiveness, perpetuates impunity for human rights abuses, and exacerbates global conflicts. By prioritizing their own strategic interests over the collective good, P5 members sometimes prolong conflicts and hinder efforts to achieve peaceful resolutions. Accordingly, as the world evolves and power dynamics shift, urgent reforms are needed to address these challenges.

The exceptional power of veto wielded by the P5 members undermines the credibility and effectiveness of the UNSC as the primary international body responsible for maintaining peace. The inability to act decisively in the face of pressing humanitarian crises or conflicts erodes trust in the institution and diminishes its legitimacy in the eyes of the global community. Secondly, the use of the veto power perpetuates impunity for perpetrators of atrocities and human rights abuses. By blocking res-

³ Jessica Espinoza Maldonado, “*Uniting for Peace*” as the Basis of United Nations General Assembly Binding Resolutions. Harvard Law School thesis, May 2015.

⁴ https://i-p-o.org/Koechler-Palestine-Jerusalem-Arab_League-IPO-OP-February2012.htm.

⁵ https://www.unvienna.org/uploads/protocol/res/observance-of-the-2021-international-day-of-solidarity-with-the-palestinian-people-at-the-united-nations-of-vice-at-vienna_html/IPO.pdf.

⁶ http://i-p-o.org/Koechler-Voting_Procedure-UN_Security_Council.pdf.

olutions aimed at holding individuals or governments accountable for their actions, P5 members effectively shield them from international scrutiny and justice, allowing violations to continue unchecked.

The current composition of the UNSC, with five permanent members wielding veto power, no longer adequately represents the diverse array of voices and interests in today's world. Expanding the Council's membership to include emerging powers and curbing the veto power could enhance its legitimacy and effectiveness. However, achieving consensus on reform remains a challenge due to entrenched interests and geopolitical rivalries. Powers such as India, Brazil, Germany, and Japan, among others, have emerged as key players in global affairs, yet they remain excluded from permanent membership. This lack of representation undermines the legitimacy and effectiveness of the Council, hindering its ability to respond promptly and decisively to pressing security issues.

In the context of the new multipolar world order, characterized by shifting power dynamics and the emergence of new centers of influence, the contradiction posed by the UNSC's veto power becomes even more pronounced. Accordingly, to address the challenges, the UNSC must undergo comprehensive reform. As new actors assert their interests and seek greater representation within international institutions, the outdated and undemocratic nature of the UNSC threatens to undermine the legitimacy of the entire UN system. Calls for reform, including expanding the number of permanent seats on the Council to embrace representatives from key regions and emerging powers in an attempt to curb the veto power, have been voiced by numerous countries and stakeholders. However, entrenched interests and geopolitical rivalries have thus far impeded meaningful progress on this front. Expansion of membership would ensure greater diversity and inclusivity in decision-making processes, reflecting the realities of multipolarity in the 21st century.

Despite widespread recognition of the need for reform, achieving consensus among member states remains a significant challenge. Existing permanent members are reluctant to relinquish their privileged position, while aspiring candidates face resistance from those weary of diluting their influence. Overcoming these obstacles will require diplomatic skills, compromise, and political will on the part of all stakeholders involved.

Practical Solutions and Reforms

As the international community grapples with increasingly complex challenges, only by embracing the principles of democracy and equality can the UNSC fulfill its mandate to maintain international peace and security.

The following are some ideas and demands for practical measures to address the inherent flaws in the UNSC's structure and strengthen its capacity:

1. Supermajority vote: Reforming the veto power requires implementing measures to limit its arbitrary exercise by the P5 members. This could involve requiring a supermajority vote (e.g. 4 out of 5) instead of a single veto to block resolutions. Alternatively, restrictive criteria should be established for use of the veto, such as only allowing it in cases directly impacting a member state's national security.
2. Expansion of the Security Council: The membership of the Council should be enlarged to include more diverse and representative voices from emerging powers and regions. This could involve adding new permanent members, in synch with the supermajority vote suggestion, and/or increasing the number of non-permanent members to ensure a more inclusive decision-making process.
3. Rotation mechanisms: Rotation mechanisms should be introduced for permanent membership to ensure fair representation over time. This could involve rotating permanent seats among different regions or countries, allowing for broader participation and reducing the concentration of power among a few states.
4. Accountability mechanisms: Transparency and accountability within the Security Council should be enhanced by establishing mechanisms to monitor and review the use of veto power. This could involve creating an independent oversight body to assess the impact of specific uses of the veto and hold P5 members accountable for their actions.
5. Empowering non-P5 members: Strengthen the role and influence of non-P5 members within the Security Council by providing them

with more opportunities to contribute to the decision-making process. This could involve granting non-permanent members greater access to information, resources, and decision-making forums.

6. Promoting dialogue and cooperation: Foster a culture of dialogue and cooperation among Security Council members to overcome divisions and promote consensus-based decision-making. This could involve facilitating regular meetings, consultations, and negotiations to build trust and understanding among member states.
7. Engaging civil society and external stakeholders: Involve civil society organizations, regional bodies, and other external stakeholders in Security Council discussions and decision-making processes. This could involve hosting regular consultations, briefings, and hearings to gather diverse perspectives and inputs from a wide range of actors.
8. Advocating for reform: Mobilize international support and advocacy to push for comprehensive reforms within the Security Council. This could involve engaging with member states, diplomatic missions, and international organizations to build consensus and momentum for change.

Moreover, a pragmatic proposal in 2013 by the French President suggested adding a regulation of how to use the veto, which would mean that the five permanent members of the Security Council would voluntarily and collectively commit to refraining from using the veto where a mass atrocity has been ascertained.⁷

Conclusion

As the world undergoes profound geopolitical shifts, the UNSC must evolve to meet contemporary challenges. Adapting to the multi-polarity of the 21st century is crucial for the Council's relevance and effective-

⁷ <https://www.diplomatie.gouv.fr/en/french-foreign-policy/france-and-the-united-nations/france-and-the-united-nations/france-and-the-united-nations-security-council/why-france-wishes-to-regulate-use-of-the-veto-in-the-united-nations-security-65315/>.

ness. Embracing democratic principles and inclusivity is imperative to ensure the UNSC can effectively address global challenges.

The exceptional power of veto vested in the P5 members of the UNSC has far-reaching implications for global peace and security. The frequent blocking of resolutions has undermined the credibility and effectiveness of the Council, perpetuated impunity for human rights abuses, and exacerbated conflicts around the world.

Otto von Bismarck's saying remains relevant: *politics is the art of the possible, the attainable, the art of the next best.*⁸ The concept of a rules-based international order, supported by international law, continues to be preferable to any other historical model; these models have all essentially been variations of "might is right" or the "law of the jungle." It's time to realize that "*might is not right*"; alternatively, "*right is might.*" Only if the international community takes this to heart can the UNSC fulfill its mandate to maintain peace and security for all nations in a multipolar world.

⁸ <https://www.goodreads.com/quotes/424187-politics-is-the-art-of-the-possible-the-attainable>; original German quote, attributed to Bismarck: "Politik ist die Kunst des Möglichen, des Erreichbaren – die Kunst des Nächstbesten."

Gabriel M. Lentner

The Inglorious Role of the UN Security Council in International Criminal Justice: Selectivity and Double Standards

Introduction

Many had high hopes that the UN Security Council (UNSC) referral mechanism could extend the International Criminal Court's (ICC) jurisdiction to situations in non-member states. According to Article 13(b) of the Rome Statute, the ICC can prosecute international crimes if the UNSC, acting under Chapter VII of the UN Charter, refers a situation involving a non-member state to the Prosecutor. This theoretically allows the ICC to pursue its mission of ending impunity for serious international crimes, irrespective of a state's acceptance of its jurisdiction. However, in practice, the reality has been less promising.¹

This should not be overly surprising. International criminal law has overwhelmingly been practiced in a way where those in power punished the vanquished.² The dissenting Indian judge at the Tokyo Military Tribunal (IMTFE) summed up the fundamental issue as follows: "Only lost

¹ See already Hans Köchler, *The Security Council as Administrator of Justice? Reflections on the Antagonistic Relationship between Power and Law* (Studies in International Relations Vol 32, International Progress Organization 2011). See also Gabriel M. Lentner, "The End of an (Unsuccessful) Era? UN Security Council Referrals to the ICC" (*Völkerrechtsblog*, 13 July 2022), <https://voelkerrechtsblog.org/the-end-of-an-unsuccessful-era/>, accessed 27 November 2024.

² Hans Köchler, "Justice and Realpolitik: The Predicament of the International Criminal Court" (2017) 16(1) *Chinese Journal of International Law* 1, 4. See also more comprehensively, Hans Köchler, *Global Justice or Global Revenge?: International Criminal Justice at the Crossroads* (Springer 2003).

wars are international crimes.”³ Of course, international criminal law enforcement has evolved since the end of the Second World War, with the establishment of the International Criminal Tribunal for the Former Yugoslavia (ICTY) and Rwanda (ICTR),⁴ besides other hybrid and international(ized) criminal courts and tribunals. Most importantly, after the end of the Cold War, the establishment of the International Criminal Court (ICC) promised to be the culmination of efforts toward a truly universal criminal justice institution on the global level.⁵

Yet, the reality of state interests and power politics led to two fundamental limitations for the realization of the ICC’s goals. First, many of the world’s major military powers did not become parties to the ICC, including the US,⁶ China, Russia, Türkiye, Egypt, Israel, India, Saudi

³ He was pointing out that the London Agreement that established the tribunal was concluded only two days after the drop of the first nuclear bomb in Hiroshima and two days before Nagasaki. See also, Yuki Tanaka, "The Atomic Bombing, the Tokyo Tribunal and the Shimoda Case: Lessons for Anti-Nuclear Legal Movements" in Yuki Tanaka, Tim McCormack and Gerry Simpson (eds.), *Beyond Victor's Justice? The Tokyo War Crimes Trial Revisited* (International Humanitarian Law series v. 30. Martinus Nijhoff Publishers 2011).

⁴ On the tribunals’ flaws see, most prominently, William Schabas and Antonio Cassese re. selective justice: William Schabas, "Victor's Justice: Selecting 'Situations' at the International Criminal Court" (2010) 43 *John Marshall Law Review* 535, 537; Antonio Cassese, "The International Criminal Court Five Years On: Andante or Moderato?," in C. Stahl and Göran Sluiter (eds.), *The Emerging Practice of the International Criminal Court* (Martinus Nijhoff Publishers, Leiden, Boston, 2009) 22; Köchler, *Global Justice or Global Revenge?* (n 2) 11–13.

⁵ For the development to be categorized in “victor’s justice” (Nuremberg), “Security Council justice”(ad hoc tribunals) and “community justice” (ICC), see Darryl Robinson and Gillian MacNeil, "The Tribunals and the Renaissance of International Criminal Law: Three Themes" (2016) 110(2) *American Journal of International Law* 191, 209–210. On that evolutionary logic see also Christopher Rudolph, *Power and Principle: The Politics of International Criminal Courts* (Cornell University Press 2017) 17.

⁶ The US (with then President Bill Clinton initially signing the Rome Statute of the ICC, which was later “unsigned” by President George W. Bush) actively interfered with the Court through UN Security Council resolutions and bilateral immunity agreements as well as the “Hague Invasion Act 2002,” which authorizes the use of force to free US (and certain allied) personnel from the ICC’s reach; see Alberto Toscano, "Sovereign Impunity" (2008) 50 *New Left Review* 128-135, 132–133. For understanding the US position vis-à-vis the ICC, see G. Hafner, "An Attempt to Explain the Position of the USA towards the ICC" (2005) 3(2) *Journal of International Criminal Justice* 323.

Arabia, Pakistan and Indonesia.⁷ Together, states representing roughly three-quarters of the world's armed forces are not members of the ICC.⁸ The second significant limitation on the practical work of the ICC relates to the lack of enforcement powers. The Rome Statute provides for legal obligations for state parties to cooperate, yet there are no actual enforcement mechanisms in place. As a result, for the success of the Court's prosecutions, the ICC is entirely dependent on state cooperation. That naturally will only be forthcoming very selectively. Hence, as put correctly by Hans Köchler: "Law without enforcement remains an illusion"⁹ and "law with selective enforcement lacks legitimacy."¹⁰

The dilemma was summed up by a British official reportedly in November 1952 discussing a permanent court for genocide and aggression, saying, "[i]f the [proposed] statute imposes obligations, governments will not sign it, and if it does not the court will not work."¹¹ That the UK and France became members of the ICC, albeit being permanent members of the UNSC, must be viewed as an exception.¹² While symbolically valuable, the fact that states like Austria or Liechtenstein are staunch supporters of the ICC will not make any real difference.¹³

Focusing on the role of the UNSC, I analyze the nuanced ways in which interests of powerful states as permanent members of the UNSC influence the work of the ICC. To this end, I describe the UNSC referral mechanism and the (so far only) referrals of the situations of Darfur and Libya to give some context for the analysis of an institutional de-

⁷ For the list of the current member states of the ICC, see <https://asp.icc-cpi.int/states-parties>.

⁸ David Bosco, *Rough Justice: The International Criminal Court in a World of Power Politics* (Oxford University Press 2014) 5. See also Stephen Hopgood, *The Endtimes of Human Rights* (Cornell University Press 2013) 14.

⁹ Köchler, *Global Justice or Global Revenge?* (n 2) 44.

¹⁰ *Op. cit.* 45.

¹¹ "UN Powers Split on Crime Tribunal: France Backs World Court for Genocide and Aggression – Impractical, Britain Says" (*New York Times*, 8 November 1952) 4. See for context, Bosco (n 8).

¹² Rudolph (n 5).

¹³ Köchler, *Global Justice or Global Revenge?* (n 2) 46 (correctly pointing out: "How functional can the ICC, as an institution charged with the permanent exercise of universal jurisdiction, be if [...] smaller states [...] are among the State Parties, but nuclear powers such as the United States, Russia, China, India, Israel, and Pakistan are not?").

sign that can very easily be exploited to pursue double standards and selectivity.

Selectivity and Double Standards under the Rome Statute

While the political limitations and selectivity of the ICC have been discussed and theorized at length,¹⁴ what has received less attention is the institutionalized role and actual political context of Security Council referrals, which the ICC, including its Prosecutor, cannot easily escape from. I will focus on the application of double standards, i.e. different standards applied in the prosecution and actual enforcement of international criminal law to accommodate the interests of powerful state actors.

The UNSC referral mechanism (UNSC referral) allows the Council to refer situations to the ICC against the will of the territorial state under Article 13(b) of the Rome Statute, even in situations where the territorial state is not party to the Rome Statute or has not otherwise accepted the jurisdiction of the ICC.¹⁵

¹⁴ Robert Cryer, *Prosecuting International Crimes: Selectivity and the International Criminal Law Regime* (Cambridge University Press 2005); Jonathan Hafetz, "Fairness, Legitimacy, and Selection Decisions in International Criminal Law" (2017) 50 *Vanderbilt Journal of Transnational Law* 1133-1170; Margaret M. de Guzman, "Choosing to Prosecute: Expressive Selection at the International Criminal Court" (2012) 33(2) *Michigan Journal of International Law* 265-320; Alette Smeulers, Maartje Weerdesteijn and Barbora Hola, "The Selection of Situations by the ICC: An Empirically Based Evaluation of the OTP's Performance" (2015) 15(1) *International Criminal Law Review* 1; William Schabas, "Victor's Justice: Selecting 'Situations' at the International Criminal Court" (n 4); S. M. H. Nouwen and W. G. Werner, "Doing Justice to the Political: The International Criminal Court in Uganda and Sudan" (2010) 21(4) *European Journal of International Law* 941; Benjamin Schiff, "The ICC's Potential for Doing Bad When Pursuing Good" (2012) 26(1) *Ethics int aff* 73; Georg Schwarzenberger, "The Problem of International Criminal Law" (1950) 3(1) *Current Legal Problems* 263.

¹⁵ See also Gabriel M. Lentner, *Victor's Justice in Disguise?* voelkerrechtsblog.org/victors-justice-in-disguise/, accessed 3 October 2019; with regard to the actual practice of UNSC referrals see also, E. Jimenez, "Seeking Global Reform: The United Nations Security Council, the International Criminal Court, and Emerging Nations," 30 *Macalester International* (2012) 84-109.

However, UNSC referrals, ICC membership, its jurisdictional reach and dependence on state cooperation must be seen in their broader context and connection – not in isolation from each other. In view of the fact that many powerful states stay outside the court and states did not give the ICC any enforcement powers, theoretical independence from the UNSC does not mean much when the Council's involvement is crucial in ensuring cooperation against the will of state authorities concerned. The referral mechanism merely amplifies these structural imbalances.¹⁶

The referral mechanism allows the UNSC to steer the ICC towards serving specific interests. It is acknowledged that the referral and deferral powers of the UNSC were necessary concessions to major powers. As research has shown, powerful states can gain political advantage through international organizations (IOs), despite the potential costs of institutional constraints.¹⁷ The US delegate at the Rome Conference noted that the US government's objectives in shaping the ICC were indeed met.¹⁸

¹⁶ See section 3 of Gabriel M. Lentner, "The Lasting Legacy of Double Standards: The International Criminal Court and the UN Security Council Referral Mechanism" (2020) 20(2) *International Criminal Law Review* 251-284.

¹⁷ Alexander Thompson, "Coercion Through IOs: The Security Council and the Logic of Information Transmission" (2006) 60(1) *International Organization* 1

¹⁸ David J Scheffer, "Staying the Course with the International Criminal Court" (2001-2002) 35 *Cornell International Law Journal* 47, 73. On the US position see further J. P. Cerone, "Dynamic Equilibrium: The Evolution of US Attitudes toward International Criminal Courts and Tribunals" (2007) 18(2) *European Journal of International Law* 277; Jennifer K Elsea, "U.S. Policy Regarding the International Criminal Court" (updated 29 August 2006); Caroline Fehl, *Living with a Reluctant Hegemon: Explaining European Responses to US Unilateralism* (Oxford University Press 2011); Lee Feinstein and Tod Lindberg, *Means to an End: U.S. Interest in the International Criminal Court* (Brookings Institution Press 2009); Thomas M. Franck and Stephen H. Yuhuan, "The United States and the International Criminal Court: Unilateralism Rampant" (2003) 35 *International Law and Politics* 519; Hafner (n 6); Robert C. Johansen, "The Impact of US Policy toward the International Criminal Court on the Prevention of Genocide, War Crimes, and Crimes Against Humanity" (2006) 28(2) *Human Rights Quarterly* 301; Mark D. Kielsgard, *Reluctant Engagement: U.S. Policy and the International Criminal Court* (Studies in Intercultural Human Rights vol. 2, Martinus Nijhoff Publishers 2010); Harold Koh, "On American Exceptionalism" (2003) 55 *Stanford Law Review* 1479; Jason G Ralph, *Defending the Society of States: Why America Opposes the International Criminal Court and Its Vision of World Society* (Oxford University Press 2007); Leila N. Sadat, "Summer in Rome, Spring in the Hague, Winter in Washington?: U.S. Policy Towards the International Criminal Court" (2003) 21 *Wisconsin International Law Journal* 557.

The lack of jurisdiction over states not party to the Rome Statute undermines the court's independence and authority, especially concerning the permanent members of the UNSC on whom it relies for cases outside its jurisdiction.¹⁹

Indeed, the US has successfully locked in important policy preferences in the statutes that shaped the development of international criminal law, especially as regards enforcement.²⁰ This was possible by way of agenda setting – particularly through the Security Council – in the post-Cold War era at a time when the US was in a position of economic and security predominance. This was evident in the acquiescence of Russia and China during the establishment of the ICTY/ICTR.²¹ This “experience illuminated means of capturing prosecution case selection either through inserted jurisdictional constraints or functional vulnerability into court design, or through subsequent cooperative pressure.”²²

Another weakness of the institutional design of the ICC is the lack of any police force or other enforcement powers. This means that without the cooperation of the government concerned or coercive measures by the UNSC, prosecutions against the will of a powerful government are almost impossible. Uganda is a perfect example. The government refused to cooperate with the court with respect to allegations of crimes committed by government forces in the conflict with the Lord's Resistance Army (LRA), the prosecution of whom the government very much supported.²³ Arrest warrants were issued only against suspects from the ranks of the LRA.

¹⁹ Yuval Shany (ed.), *Assessing the Effectiveness of International Courts* (Oxford University Press 2014) 241.

²⁰ Chris Mahony, "The Justice Pivot: US International Criminal Law Influence from Outside the Rome Statute" (2015) 46 *Georgetown Journal of International Law* 1071, 1073-1074.

²¹ Cf. the argument that Russia's short-lived engagement with the West with respect to the ICTY was due to “policy compromise in the interest of maximizing power”: Rudolph (n 5) 45–46. Re. the similarly strategic reasons for China to vote in favor of the ICTY and not block the establishment of the ICTR, see *op. cit.* 46-50.

²² Mahony (n 20) 1073-1074.

²³ See Sarah M. H. Nouwen, *Complementarity in the Line of Fire: The Catalysing Effect of the International Criminal Court in Uganda and Sudan* (Cambridge Studies in Law and Society, Cambridge University Press 2013) 114ff *et seq.*

The failed cases against the President and Vice-President of Kenya for their alleged role in international crimes committed in the aftermath of the elections in 2007 are further evidence. On 5 April 2016, Trial Chamber V(A) decided, by majority, that the case against William Samoei Ruto and Joshua Arap Sang was to be terminated. In the Kenyatta case, the confirmation of charges hearing took place from 21 September to 5 October 2011. Charges were withdrawn due to insufficient evidence, reportedly because important witnesses had, under pressure, withdrawn their testimony.²⁴ The case also involved charges against Francis Kiriimi Muthaura and Mohammed Hussein Ali. The court declined to confirm charges against Mohammed Hussein Ali on 23 January 2012.²⁵

This is of course not unique to international criminal tribunals. For example, Indonesia failed to keep commitments made regarding the prosecution of individuals responsible for atrocities in East Timor through the creation of the Ad Hoc Human Rights Court on East Timor in Jakarta. As Human Rights Watch noted, “The twelve verdicts announced so far by the Ad Hoc Court suggest that Indonesians will not be held accountable for abuses in East Timor. In the cases decided thus far, nine military and police personnel have been acquitted. All are Indonesians. In total only 6 out of 18 defendants have been convicted.”²⁶ The ECCC in Cambodia, a hybrid tribunal, or the domestically set up Bangladeshi International Crimes Tribunal are other examples.²⁷

²⁴ See Marlise Simons and Jeffrey Gettleman, *International Criminal Court Drops Case Against Kenya’s William Ruto*, www.nytimes.com/2016/04/06/world/africa/william-ruto-kenya-icc.html?smid=tw-share&_r=0, accessed 3 October 2019.

²⁵ *Ibid.*

²⁶ Human Rights Watch, *Justice Denied for East Timor*, www.hrw.org/legacy/background-er/asia/timor/etimor1202bg.htm, accessed 3 October 2019. See also David Cohen, “Intended to Fail: The Trials Before the Ad Hoc Human Rights Court in Jakarta” (*International Center for Transitional Justice*, August 2003); Suzannah Linton, “Unravelling the First Three Trials at Indonesia’s Ad Hoc Court for Human Rights Violations in East Timor” (2004) 17(2) *LJL* 303.

²⁷ The Extraordinary Chambers in the Courts of Cambodia (ECCC) suffered from Cambodian government intervention in the court proceedings; see W. Kaleck, *Double Standards: International Criminal Law and the West* (Torkel Opsahl Academic EPublisher 2015) at p. 56. The so-called International Crimes Tribunal set up by Bangladesh to try individuals that committed international crimes during Bangladesh’s 1971 war of independence is just another example. See Sudha Ramachandran, *Flawed Justice in Bangladesh* thediplomat.com/2013/10/flawed-justice-in-bangladesh/?allpages=yes, accessed 3 October 2019.

These examples demonstrate the importance of strong international pressure to ensure even-handed accountability in a domestic setting.²⁸ The ICC cannot do much about double standards since certain individuals, specifically officials from the P3 (US, Russia, China) and possibly their allies, are simply outside the jurisdiction of the Court. Thus, it is highly unlikely that leaders and armed personnel of powerful states will ever be tried before the ICC against their will or acquiescence.²⁹ In order to maintain resource support, the ICC and the Office of the Prosecutor (OTP) will need to carefully strategize when investigating wrongdoers. This would require internalizing the interest of the UNSC in the Court's prosecutorial practice. Prosecutions will possibly only be effective either in politically powerless places³⁰ or with the support of the UNSC.

Relying on the UNSC for enforcement does not appear to be promising, however. At the time of writing, potential enforcement through UNSC action of the arrest warrants against sitting heads of state/government of Israel and Russia in connection with the wars in Gaza and in Ukraine respectively is entirely unrealistic, since they directly involve the interests of Russia and the US, both permanent members.

Furthermore, even outside such obvious political limitations, the record of the UNSC to enforce international court orders or arrest warrants has been meager. As has been noted, "the overall record of states' willingness to ensure each other's compliance with humanitarian treaty obligations is generally poor and confined to instances where such en-

²⁸ Concerning US strategy in the UNSC see Marc Weller, "Undoing the Global Constitution: UN Security Council Action on the International Criminal Court" (2002) 78(4) *International Affairs* 693.

²⁹ B. S. Chimni, "International Institutions Today: An Imperial Global State in the Making" (2004) 15(1) *European Journal of International Law* 1, 13. See also Jennifer Trahan, "Views of the Future of the Field of International Justice: A Scenarios Project Based on Expert Consultations" (2018) 33 *American University International Law Review* 837, 841–842.

³⁰ David Chuter, *War Crimes: Confronting Atrocity in the Modern World* (Lynne Rienner 2003) at pp. 94, 96–97. See also Mark A. Drumbl, *Atrocity, Punishment, and International Law* (Cambridge University Press 2007) 152; Benson C Olugbuo, "The African Union, the United Nations Security Council and the Politicisation of International Justice in Africa" (2014) 7 *African Journal of Legal Studies* 351.

forcement falls within its [sic] own political interests.”³¹ This makes even-handed enforcement of ICL a rather challenging task.³²

The referral mechanism creates a unique dilemma: since UNSC referrals often involve state actors who resist ICC involvement, cooperation will heavily depend on the UNSC's enforcement powers. However, when transferring the responsibility for addressing atrocities from the UN to the ICC, the UNSC is likely to act in the interest of its most powerful members. Consequently, the ICC faces a dilemma: it can either be used by the UNSC (with its potentially inconsistent prosecution goals), be manipulated by the state in question, or be unable to enforce its decisions. This predicament may force the ICC to adopt the preferences of both the concerned state and the UNSC. The following sections will explore the issue further and examine the hypothesis using empirical evidence from the two UNSC referrals to date.

The Security Council Referral Mechanism

As recent scholarship has pointed out, the UN system, with the UNSC at its helm, was established as a concert of great powers “to facilitate the peaceful coexistence of the allied powers of World War II in the post-war order.”³³ The UNSC always retained discretion as to the decision whether to intervene in any given situation:³⁴ nothing in the UN Charter contains a legal obligation for the UNSC to act at all, or to act consistently.³⁵ The World Summit Outcome Document, unanimously adopted by the UNGA, did not alter this fact but merely affirmed the UNSC’s right to intervene – not its obligation – in situations where human rights are abused on a massive scale.³⁶ This is hardly a recipe for principled approaches toward international criminal law.

³¹ Matthew R. Brubacher, "Prosecutorial Discretion within the International Criminal Court" (2004) 2 *Journal of International Criminal Justice* 71, 92.

³² Schiff (n 14) 75.

³³ Mohamed S. Helal, "Am I My Brother's Keeper? The Reality, Tragedy, and Future of Collective Security" (2015) 6 *Harvard National Security Journal* 383-473, 390.

³⁴ *Ibid.*

³⁵ *Op. cit.* 424.

³⁶ *Op. cit.* 454.

The UNSC referral mechanism relies on the influence of powerful states.³⁷ The Council may also refer to the ICC situations involving non-party states.³⁸ In practice, the P5 are given the power to veto or tailor any referral to their interests. In other words, the UNSC referral gives the permanent members of the UNSC the power to refer situations to the ICC without themselves being subjected to its jurisdiction (with the exception, at least theoretically, of the UK and France).³⁹ UNSC referrals are less likely to involve a state where a P5 member has an interest in not bringing it before the ICC (see for example the situation involving Syria or North Korea). To get the US to agree to an ICC referral of the situation in Darfur (Sudan) required considerable political pressure and a compromise that secured exemptions for US nationals. No general legal obligation exists to refer a case in which crimes under the Rome Statute appear to be committed.⁴⁰ Thus, the activation of a referral depends on political considerations.

³⁷ In a similar vein see Sara Kendal, "Critical Orientations: A Critique of International Criminal Court Practice" in Christine E. J. Schwöbel (ed.), *Critical Approaches to International Criminal Law: An Introduction* (2014) 58.

³⁸ On the legality of SC referrals and its limits, see Luigi Condorelli and Santiago Villalpando, "Referral and Deferral by the Security Council" in Antonio Cassese, Paola Gaeta and John R. Jones (eds.), *The Rome Statute of the International Criminal Court* (Oxford University Press 2002); Luigi Condorelli and Santiago Villalpando, "Can the Security Council Extend the ICC's Jurisdiction?" *op. cit.*; Gabriel M. Lentner, *The UN Security Council and the International Criminal Court: The Referral Mechanism in Theory and Practice* (Edward Elgar 2018).

³⁹ While the Rome Statute grants the ICC jurisdiction over nationals of non-states parties in cases in which the alleged crimes have been committed on the territory of a state party, the US preemptively secured its interest via Art. 98 agreements preventing any extradition of US nationals to the ICC. The Court has no enforcement powers of its own, and the legal obligation to hand over an accused in that scenario is neither clear nor undisputed.

⁴⁰ Some authors claim that there is an obligation due to the *jus cogens* nature of the crimes. However, this appears to be the case only *de lege ferenda* and not reflecting international law as it presently stands (*de lege lata*). For the argument that once the responsibility to protect attains the status of a binding legal rule under international law, the UNSC and its members would be under the obligation to authorize or to take sufficiently robust action in situations that would fall under the concept of Responsibility to Protect, see Anne Peters, "The Security Council's Responsibility to Protect" (2011) 8(1) *International Organizations Law Review* 15.

Political influence shapes not only the decisions on what situations to refer but also on the modalities of the referral and the follow-up.⁴¹

In view of the powers of the UNSC, it is difficult to depict the situation as realization of the idea of universal justice. Suffice to note that through the referral mechanism, the P3 – US, China, Russia – and their allies are not likely to be held accountable for international crimes against their consent or acquiescence. On the contrary, they are empowered to subject other states to the jurisdiction of the ICC against their will while exempting themselves from its jurisdiction – under the disguise of supporting international justice, and in the name of ending impunity.

The recent developments around the arrest warrants issued against President Putin of Russia and Prime Minister Netanyahu of Israel can be viewed in different ways. On the one hand, the prosecution appeared to stage a show of force and independence of the ICC, going after the interests of major powers. On the other hand, it is entirely unrealistic that any trial will take place, unless these leaders are removed from office and international and domestic pressure mounts in a way that would be unprecedented.

The recent visit of President Putin in Mongolia,⁴² an ICC member, illustrates the limits of the Court's reach. In the view of the ICC,⁴³ Mongolia was obliged to enforce the arrest warrant against Putin and apprehend and surrender him to The Hague for trial.⁴⁴ However, the state visit was conducted without any risk of Putin being arrested, just as the then President of Sudan, Omar Al-Bashir, also sought by the ICC, was able to travel to several ICC member states.

⁴¹ Hemi Mistry and Deborah R. Verduzco, "The UN Security Council and the International Criminal Court" [2012] *Chatham House* 1, 9-10.

⁴² "Putin Gets Lavish Welcome in Mongolia Despite ICC Warrant" (Reuters, 3 September 2024), <https://www.reuters.com/world/putin-gets-lavish-welcome-mongolia-despite-icc-warrant-2024-09-03/>, accessed 26 November 2024.

⁴³ For reasons I have explained elsewhere in detail, the ICC's position that there is no immunity from prosecution even for heads of state of non-state parties is simply incorrect as a matter of law. See Lentner, *The UN Security Council and the International Criminal Court* (n 38).

⁴⁴ "Finding under article 87(7) of the Rome Statute on the non-compliance by Mongolia with the request by the Court to cooperate in the arrest and surrender of Vladimir Vladimirovich Putin and referral to the Assembly of States Parties" (Decision, Pre-Trial Chamber, ICC-01/22-90, 24 October 2024).

The Security Council's Referral and Deferral Practice

Concerning its referral authority under the statute of the ICC, the UNSC's practice has been characterized by selectivity, a lack of follow-up, and inaction.⁴⁵ Depending on the P5 perceptions of national interest, the UNSC has so far both ignored and utilized the ICC. This has produced an incoherent practice as to when to prosecute individuals for international crimes and when to adopt a different course of action.⁴⁶

Judging from the current developments on the international stage, it is not very likely that referrals will be forthcoming in the future: for example, Russia explicitly stated already in 2018 that it "is determined to do whatever is necessary to enable the members of the Council to avoid repeating the unsuccessful experiment of referring Security Council issues to the ICC."⁴⁷

Any enforcement action in relation to the wars in Ukraine or in Gaza is entirely unrealistic. But even in many cases not directly affecting the interests of the US or Russia, the UNSC has failed to consider situations where grave international crimes have been committed, such as in Sri Lanka, Syria, or Zimbabwe.⁴⁸ It is not evident what legal factors or factors relating to the pursuit of international criminal justice would distinguish these situations from those in Libya and Darfur, where the Council did refer.⁴⁹ It thus appears that P5 members are pursuing a political agenda, with Russia and China seeking to protect allies in Syria and Sri Lanka, for example.⁵⁰

⁴⁵ Richard Dicker, "The International Criminal Court (ICC) and Double Standards of International Justice" in Carsten Stahn (ed.), *The Law and Practice of the International Criminal Court* (Oxford University Press 2015) 4; Mistry and Verduzco (n 41). The UNSC has never considered a resolution to refer the situation in Sri Lanka, Democratic People's Republic of Korea (DPRK), or Lebanon to the ICC.

⁴⁶ David P. Forsythe, "The UN Security Council and Response to Atrocities: International Criminal Law and the P-5" (2012) 34 *Human Rights Quarterly* 840, 843. See also K. M. Clarke, S.-J. Koulen, "The Legal Politics of the Article 16 Decision: The International Criminal Court, the UN Security Council and Ontologies of a Contemporary Compromise" 7 *African Journal of Legal Studies* (2014) 297–319, at p. 297.

⁴⁷ Statement by Mr. Kuzmin (Russian Federation), United Nations, S/PV.8250, Security Council, Seventy-third Year, 8250th meeting (9 May 2018, New York), <https://documents.un.org/doc/undoc/pro/n18/140/45/pdf/n1814045.pdf?OpenElement> 7.

⁴⁸ Dicker (n 45) 7.

⁴⁹ Mistry and Verduzco (n 41) 4.

⁵⁰ Dicker (n 45) 4.

Early UNSC Interference in the ICC

The power of the UNSC was already used shortly after the entry into force of the Rome Statute in 2002. Particularly the US was concerned that its soldiers and personnel could be subject to “unwarranted, politically motivated prosecutions” by the ICC.⁵¹ Accordingly, the US exercised considerable pressure in the UNSC to exempt its soldiers and personnel from ICC jurisdiction.⁵²

Many states opposed the US effort as an attempt to amend the ICC Statute in excess of the UNSC’s authority. However, a compromise was reached to preserve essential peacekeeping operations, which the US otherwise threatened to veto.⁵³ Acting under Chapter VII of the UN Charter, the Council adopted resolution 1422 (2002).⁵⁴ In its operative part, the resolution (rhetorically) invoked Art. 16 of the Rome Statute, and in its operative part it decided that no investigation or prosecution was to take place of current or former officials or personnel from a contributing state not party to the Rome Statute over acts or omissions relating to a UN-established or authorized operation, for a 12-month period.⁵⁵

A year later, the “deferral” was renewed by resolution 1487 (2003), with 12 votes in favor, none against, and 3 abstentions.⁵⁶ During the deliberations of the Council, the Secretary-General of the UN again

⁵¹ See the statement of Congressman and Chairman of the International Relations Committee of the US House of Representatives, Representative Henry Hyde, “Others Seek Immunity from ICC Jurisdiction for US Service members in UN Peacekeeping Operations” (press release, 11 April 2002), cited in Lentner, *The UN Security Council and the International Criminal Court* (n 38).

⁵² Claudia Fritsche, “Security Council Resolution 1422: Peacekeeping and the International Criminal Court” in Jochen A. Frowein (ed.), *Verhandeln für den Frieden: Negotiating for Peace : Liber amicorum Tono Eitel* (Beiträge zum ausländischen öffentlichen Recht und Völkerrecht, vol 162. Springer 2003) 107.

⁵³ UNSC, 4568th meeting, UN Doc S/PV.4568 (10 July 2002), undocs.org/en/S/PV.4568, accessed 26 November 2024. The number of states represented was greater than the number of speakers; the Ambassador of Denmark spoke on behalf of the European Union and Costa Rica on behalf of the Rio Group.

⁵⁴ S/RES/1422 (2002).

⁵⁵ *Loc. cit.*

⁵⁶ United Nations, UNSC Verbatim Record (12 June 2003), UN Doc S/PV.4772, 22.

voiced his concern about such a request,⁵⁷ along with most delegates of member states.⁵⁸ Concerns about the difficulty of renewing the resolution in 2003 led the US to conclude bilateral immunity agreements pursuant to Article 98 of the Rome Statute to prevent the extradition of US nationals to the Court. In 2004, the US announced its decision not to renew resolution 1487.⁵⁹ Among the reasons was the increasing hostility toward the exemption in light of the revelations of prisoner abuse in Iraq, with numerous countries, including China, stating that they would abstain.⁶⁰

Resolution 1497 (2003)⁶¹ establishing a Multinational Force in Liberia to support the implementation of the 17 June 2003 ceasefire agreement followed the precedent of UNSC referrals concerning Darfur and Libya. In August 2003, the US threatened to veto the resolution unless it secured an exemption from ICC jurisdiction for personnel of non-state parties,⁶² which was eventually granted. In paragraph 7, the resolution provides:

“that current or former officials or personnel from a contributing state, which is not a party to the Rome Statute of the International Criminal Court, shall be subject to the exclusive jurisdiction of that contributing state for all alleged acts or omissions arising out of or related to the Multinational Force or UN stabilization force in Liberia, unless such exclusive jurisdiction has been expressly waived by that contributing state.”

⁵⁷ *Loc. cit.* 2-3.

⁵⁸ *Ibid.*

⁵⁹ Regarding the shift in the voting balance in the UNSC, with seven Council members supporting the ICC (in 2004) – which allowed them to block any renewal without use of a veto – see L. R. Atkinson, "Knights of the Court: The State Coalition Behind the International Criminal Court" (2011) 7 *Journal of International Law & International Relations* 66, 83-84.

⁶⁰ Secretary-General Kofi Annan said, “For the past two years, I have spoken quite strongly against the exemption, and I think it would be unfortunate for one to press for such an exemption, given the prisoner abuse in Iraq,” Statement of 17 June 2004, <https://news.un.org/en/story/2004/06/106842>, accessed 26 November 2024.

⁶¹ United Nations, UNSC Resolution 1497 (1 August 2003), UN Doc S/RES/1497.

⁶² Department of State Spokesman Richard Boucher, “Daily Press Briefing” (31 July 2003), <https://www.c-span.org/video/?177633-1/state-department-daily-briefing>, accessed 26 November 2024.

This resolution was approved with 12 votes in favor and 3 abstentions (Mexico, Germany, France). In his statement, the Mexican representative sought “to make it clear that the one and only reason for our abstention is our disagreement with the content of paragraph 7 of the draft resolution.”⁶³

Darfur

The Council’s first resolution to refer a situation to the ICC was 1593 of 31 March 2005, concerning Darfur (Sudan). Preceding the adoption of the referral were intense efforts by the US to gather support for an UN-AU hybrid court due to its hostility towards the ICC under the Bush administration.⁶⁴ But with the ICC established and the referral mechanism in place, it was difficult for the US to explain why a separate ad hoc tribunal needed to be set up. In addition, the pressure from American public opinion became so strong that the Bush administration gave in and decided to abstain from voting on the referral.⁶⁵ In view of reports of genocide, decisive action was required, and particularly so on the grim 10th anniversary of the Rwandan genocide.⁶⁶ China abstained, confident that the resolution would not threaten government officials in Sudan, as the ICC would entirely depend on the cooperation of the Sudanese government with whom the Chinese had very close ties.⁶⁷ China did not support the referral arguing that “we cannot accept any exercise of the ICC’s jurisdiction against the will of non-State parties, and we would find it difficult to endorse any Security Council authorization of such an exercise of jurisdiction by the ICC.”⁶⁸ Although Russia agreed with China concerning the ICC and the Al-Bashir question, it did vote in favor of the referral, mostly because it did not have significant interests at stake there.⁶⁹

⁶³ United Nations, UNSC Verbatim Record (1 August 2003), UN Doc S/PV.4803, 2.

⁶⁴ Lentner, *The UN Security Council and the International Criminal Court* (n 38) 171.

⁶⁵ Jonathan Holslag, "China's Diplomatic Manoeuvring on the Question of Darfur" (2008) 17(54) *Journal of Contemporary China* 71, 82.

⁶⁶ Eric Reeves, "Darfur and international justice" (2009) 56(3) *Dissent* 13, 15.

⁶⁷ Holslag (n 65) 82.

⁶⁸ UNSC Records, S/PV.5158, 31 March 2005.

⁶⁹ Victor Peskin, "The International Criminal Court, the Security Council, and the Politics of Impunity in Darfur" (2009) 4(3) *Genocide Studies and Prevention* 304, 320.

Nevertheless, the action of the UNSC appears as a late and weak response for political purposes, rather than a practical response to atrocity crimes. In effect, through the referral, the UNSC aimed at shifting responsibility for the situation to the ICC. The referral did not commit its members to any further action.⁷⁰ In view of the position of China and Russia, no serious enforcement action was likely to be agreed upon anyway. Then-Secretary of State Colin Powell said as much, even after a report found that genocide had been committed.⁷¹ To buy the UN time to react to this finding (knowing that its hands were tied), the organization appointed a UN Commission of Inquiry on Darfur (COI) that found that crimes against humanity and war crimes had been committed.⁷² It also recommended a referral of the situation to the ICC.

The US directly shaped the extent of jurisdiction of the referral. It secured a jurisdictional exemption similar to the one in UNSC resolution 1497 (2003) that put certain categories of nationals of states not party to the ICC under the exclusive jurisdiction of their state of nationality (cf. operative para. 6). The wording is almost identical to that of paragraph 7 of UNSC resolution 1497 (2003).⁷³

As stipulated by the US, no additional or supporting measures were taken, and China and Russia made clear that they would veto any UNSC action in support of the warrant.⁷⁴ The referral seemed to only have symbolic value. The consequences for the people in Sudan were real, however. When an arrest warrant against the president of Sudan, Omar Al-Bashir, was issued by the ICC four years after the referral,

⁷⁰ Schiff (n 14) 79.

⁷¹ See the report by the Coalition for International Justice, "Documenting Atrocities in Darfur," 2001-2009.state.gov/g/drl/rls/36028.htm, accessed 21 November 2019; Eric Reeves, "Darfur and international justice," 56 (3) *Dissent* 13-18 (2009), p. 15.

⁷² *Op. cit.*, p. 16.

⁷³ The resolution guarantees immunity from jurisdiction to "current or former officials or personnel from a State outside the Libyan Arab Jamahiriya which is not a party to the Rome Statute of the International Criminal Court (...) for all alleged acts or omissions arising out of or related to operations in the Libyan Arab Jamahiriya established or authorized by the Council." See also Deborah R. Verduzco, "The Relationship between the ICC and the United Nations Security Council" in Carsten Stahn (ed.), *The Law and Practice of the International Criminal Court* (Oxford University Press 2015) 36-38.

⁷⁴ Eric Reeves, "Darfur and International Justice," 56 (3) *Dissent* 13-18 (2009), p. 16.

the government used this as a pretext to expel thirteen major international humanitarian organizations and to shut down some of the most important domestic human services and human rights organizations.⁷⁵ The Sudanese government also put pressure particularly on the Arab League and AU member states to use their influence so that the UNSC would suspend ICC proceedings under Art. 16 of the Rome Statute. Sudan's efforts culminated in a decision of the African Union (AU) that its members should not cooperate with the ICC concerning the arrest warrant against Al-Bashir. The AU even contemplated a mass withdrawal of African States Parties from the ICC, threatening the very existence of the Court.⁷⁶ In the meantime, to name just one of several disastrous consequences, an estimated 1.5 million people did not have access to health services and nutrition as a result of the government's reaction to the ICC.⁷⁷ No significant action was taken by the UNSC in response.⁷⁸

Resolution 1591 did impose sanctions against some individuals.⁷⁹ The measures were reaffirmed by resolution 1672 in 2006. However, neither of the resolutions referred to the ICC. On a broader level, resolution 1706 set the mandate for UNMIS to "take over from AMIS [the previous

⁷⁵ Reeves (n 66) 13. – Earlier, ICC investigators repeatedly met government and judicial officials, primarily to determine if domestic courts were willing and able to prosecute the cases under ICC investigation; cf. Peskin (n 69) 306. See also Nerina Boschiero, "The ICC Judicial Finding on Non-cooperation Against the DRC and No Immunity for Al-Bashir Based on UNSC Resolution 1593" (2015) 13(3) *Journal of International Criminal Justice* 625, 646–647.

⁷⁶ AU Assembly, 28th Ordinary Session, Decision On The International Criminal Court (ICC), Doc. EX.CL/1006(XXX), AU Assembly, Dec.622(XVIII) (30-31 January 2017), www.au.int/web/sites/default/files/decisions/32520-sc19553_e_original_-_assembly_decisions_621-641_-_xxviii.pdf, accessed 2 December 2019.

⁷⁷ Reeves (n 66) 13.

⁷⁸ *Op. cit.* 14.

⁷⁹ Major General Gaffar Mohamed Elhassan (Commander of the Western Military Region for the Sudanese Armed Forces); Sheikh Musa Hilal (Paramount Chief of the Jalul Tribe in North Darfur); Adam Yacub Shant (Sudanese Liberation Army Commander); and Gabriel Abdul Kareem Badri (National Movement for Reform and Development Field Commander). The mandate has been extended by resolutions 1982 (17 May 2011), 2035 (17 February 2012), 2091 (14 February 2013), 2138 (13 February 2014), 2200 (12 February 2015), 2265 (10 February 2016), 2340 (8 February 2017), and 2455 (7 February 2019).

African Union Mission]⁸⁰ responsibility for supporting the implementation of the Darfur Peace Agreement.” The resolution was called one of the “worst Security Council resolutions ever” as it mandated legally binding peacekeeping, which, however, could not be implemented.⁸¹ Resolution 1769 established a hybrid AU/UN mission, UNAMID, and its mandate has been extended/renewed continuously since.⁸² None provided any support for the investigations of the ICC.

Despite not having been able to properly investigate in the country, the Prosecution of the ICC presented charges against high officials and later also against rebel commanders.⁸³ In 2008, the Prosecutor in a briefing accused the entire Sudanese state apparatus of being implicated in the commission of crimes in Darfur and recommended the adoption of a “Presidential Statement” by the President of the Security Council addressing the situation.⁸⁴ Resolution 1828 emphasized the need to bring the perpetrators of serious crimes to justice, stressing the Sudanese government’s obligations in this respect without specifying those stemming from the referral. The resolution also mentioned the concerns of some Council members about the request for an arrest warrant against Al-Bashir. This was because of the division between pro-ICC states, most importantly the UK and France, and “anti-ICC” states such as the US, Russia and China, who were strongly opposed to any prosecution of the highest government officials.⁸⁵ However, the UK and France were rather ambivalent about supporting the ICC in the investigation in Sudan.⁸⁶ Opposition by the P3 meant that the UK and France could blame

⁸⁰ AMIS is not an effective protection force: www.hrw.org/report/2007/09/19/darfur-2007-chaos-design/peacekeeping-challenges-amis-and-unamid, accessed 3 December 2019.

⁸¹ Colum Lynch, “The 10 worst UN Security Council resolutions ever” (*Foreign Policy*, 21 May 2010), foreignpolicy.com/2010/05/21/the-10-worst-u-n-security-council-resolutions-ever-2/, accessed 3 December 2019.

⁸² See resolutions 1935 (30 July 2010), 2003 (July 2011), 2063 (31 July 2012), 2113 (30 July 2013), 2173 (27 August 2014), 2148 (3 April 2014) (revising strategic priorities), 2228 (29 June 2015), 2296 (29 June 2016), 2363 (29 June 2017), 2429 (13 July 2018), 2479 (27 June 2019), and 2495 (31 October 2019).

⁸³ Peskin (n 69).

⁸⁴ ICC OTP, *Seventh Report of the Prosecutor of the International Criminal Court to the UN Security Council Pursuant to UNSCR 1593 (2005)*.

⁸⁵ Peskin, 317.

⁸⁶ Peskin, 318.

them for the lack of progress while not having to commit resources and political capital themselves to change the status quo.

As regards the ICC, the Court decided in 2011 that Chad had not met its obligation to fully cooperate with the ICC when it failed to arrest and surrender Al-Bashir during his visit to the country. Also, Malawi, a party to the Rome Statute, had been referred to the UNSC and the Assembly of States Parties of the Rome Statute for its failure to apprehend and surrender Al-Bashir when he visited that country. In June 2013 the Prosecutor briefed the UNSC with “a deep sense of frustration, even despair,” as each of the 17 previous briefings on the work of the ICC on Darfur “had been followed by inaction and paralysis within the Council while the plight of victims of crimes committed in Darfur has gone from bad to worse.” A potential visit by President Al-Bashir at UN Headquarters in New York for the annual session of the General Assembly led to discussions as to whether the US would deny him entry or arrest him; Al-Bashir cancelled the trip.⁸⁷

The Prosecutor’s calls for UNSC support fell repeatedly on deaf ears. In 2014, the Prosecutor briefed the UNSC again, stating that “the time is long overdue for the Government of the Sudan’s consistent defiance of Security Council resolutions to be met by decisive action from the Council.”⁸⁸ She [Fatou Bensouda] called for a “thorough, independent and public inquiry” into allegations that UNAMID reporting had been manipulated “with the intentional effect of covering up crimes committed against civilians and peacekeepers.”⁸⁹ She further stressed that there should be greater scrutiny of the UN’s policy of non-essential contacts with ICC indictees.⁹⁰ Eventually, the ICC Prosecutor decided to suspend investigations in Darfur due to the lack of action by the UNSC.⁹¹ Again and again, the Prosecutor requested the Council to respond

⁸⁷ Cf. the ICC Press Release of 18 September 2013: “Al Bashir case: ICC judges invite the US to arrest the suspect and surrender him to the Court.” In resolution 1593 (2005) the Council had urged all states to “cooperate fully” with the Court.

⁸⁸ *Reports of the Secretary-General on the Sudan and South Sudan*, S/PV.7199 (17 June 2014), at p. 2.

⁸⁹ *Ibid.*

⁹⁰ *Loc. cit.*

⁹¹ *Reports of the Secretary-General on the Sudan and South Sudan*, S/PV.7337 (12 December 2014).

to non-compliance and non-cooperation over the outstanding arrest warrants; to no avail.

In 2017, the Prosecutor noted Al-Bashir's most recent travels to South Africa,⁹² Jordan, Uganda, Chad and Russia, and requested again that the UNSC take action to respond to ongoing instances of non-compliance or non-cooperation relating to the situation in Darfur and outstanding arrest warrants. The Council remained unwilling to act against non-compliance. When on 6 May 2019 the ICC Appeals Chamber confirmed the decision of the Pre-Trial Chamber that Jordan had failed to comply with its obligations by not arresting Al-Bashir and surrendering him to the ICC while he was on Jordanian territory,⁹³ the Appeals Chamber did not refer Jordan's non-compliance to the UNSC.

Until today, prosecutions against Al-Bashir and other officials for crimes in Darfur, including genocide, war crimes, and crimes against humanity, have not been very effective. President Al-Bashir was ousted in 2019, but is still not in the Court's custody. He was reportedly held at a military facility on the outskirts of the Sudanese capital and then transferred to another location for health reasons.⁹⁴ No suspect was in ICC custody until Ali Muhammad Ali Abd-Al-Rahman surrendered himself voluntarily in 2020. His trial before the ICC is set to conclude soon.

UNSC engagement in Darfur has been lessening recently due to the deteriorating situation on the ground. In June 2018, the Security Council approved drastic cuts to the peacekeeping mission,⁹⁵ reduced the area of operation to Jebel Mara, and made plans for a full withdrawal by June 2020. The United Nations – African Union Hybrid Operation in

⁹² See Erika de Wet, "The Implications of President Al-Bashir's Visit to South Africa for International and Domestic Law" (2016) 13(5) *Journal of International Criminal Justice* 1049.

⁹³ *Prosecutor v Omar Hassan Ahmad Al Bashir (Judgment in the Jordan Referral re Al-Bashir Appeal)*, ICC-02/05-01/09 OA2 (6 May 2019), https://www.icc-cpi.int/CourtRecords/CR2019_02531.PDF, accessed 27 November 2024.

⁹⁴ Associated Press, "Sudan's Jailed Former Strongman Omar al-Bashir Moved to Better-Equipped Hospital" (25 September 2024), <https://www.voanews.com/a/sudan-jailed-former-strongman-omar-al-bashir-taken-to-hospital-in-north-for-better-care-/7799517.html>, accessed 26 November 2024.

⁹⁵ UNSC Resolution 2296 (29 June 2016), S/RES/2296 (2016).

Darfur (UNAMID) completed the withdrawal of all uniformed and civilian personnel in 2021.⁹⁶ The United Nations Integrated Transition Assistance Mission in Sudan (UNITAMS) was established on 3 June 2020 by Security Council resolution 2524 to support the Sudanese democratic transition. After several renewals of its mandate, it was terminated on 3 December 2023. While transitional justice and accountability were mentioned in that resolution, no mention was made of the ICC in any of the resolutions.⁹⁷

In conclusion, the Darfur referral can only be viewed as a small step toward accountability with the support of the UNSC. The US secured exceptions that protect its interests and shield it from any potential prosecution of its nationals under the terms of operative paragraph 6 of the respective Council resolution. Legal issues aside,⁹⁸ this was hardly a major step toward universal accountability for the most serious crimes under international law. The lack of any serious support by the UNSC to enforce the arrest warrants is further evidence that the Council only supported half-measures and never really intended to follow up with robust coercive action to ensure compliance with the Court's orders.

Libya

The unanimously adopted resolution on the referral of the situation in Libya in 2011 was initially praised as “a historic moment in accountability for crimes under international law.”⁹⁹ The resolution also imposed

⁹⁶ United Nations Security Council, “Withdrawal of Hybrid Peacekeeping Operation in Darfur Completed by 30 June Deadline, Under-Secretary-General Tells Security Council, Outlining Plans to Liquidate Assets” (8825th Meeting, 27 July 2021), <https://press.un.org/en/2021/sc14587.doc.htm>, accessed 27 November 2024.

⁹⁷ Human Rights Watch has repeatedly warned that the downsizing reflected a false narrative about the end of the war in Darfour and would severely undermine the peacekeepers' ability to monitor human rights and protect civilians across a still volatile region. See Human Rights Watch, www.hrw.org/news/2019/06/11/un-halt-handover-abusive-forces-sudan, 3 December 2019.

⁹⁸ Cf. Lentner, *The UN Security Council and the International Criminal Court* (n 38).

⁹⁹ See, e.g., Amnesty International, *Unanimous Security Council vote a crucial moment for international justice*, www.amnesty.org/en/news-and-updates/unanimous-security-council-vote-crucial-moment-international-justice-2011-02-28, accessed 3 October 2019.

sanctions. However, the enthusiasm of supporters quickly faded following the intervention of NATO on the basis of resolution 1973 (2011),¹⁰⁰ which authorized states “to take all necessary measures, (...) to protect civilians and civilian populated areas under threat of attack in the Libyan Arab Jamahiriya, including Benghazi.”¹⁰¹ The broad interpretation of the mandate by NATO was criticized by Council members Russia, China, India, Brazil, and South Africa¹⁰² who raised allegations of crimes relating to abuses by the opposition forces and NATO,¹⁰³ and questions about the ICC’s involvement.¹⁰⁴ China had particular reservations about the ICC’s involvement in the domestic judicial sphere of states like Libya and Sudan, reiterating that the Libyan case was “entirely exceptional” and “[did] not set a precedent for the future of Chinese foreign policy.”¹⁰⁵

Russia and China (the latter having about 30,000 of its nationals in Libya at the time) were only persuaded to support the referral after the defecting Libyan deputy ambassador to the UN, supported by Arab states, expressly requested the referral.¹⁰⁶ As one diplomat described

¹⁰⁰ United Nations, UN Doc S/RES/1973 (2011).

¹⁰¹ *Loc. cit.*, operative para 4.

¹⁰² See United Nations, UNSC Verbatim Record (4 October 2011), UN Doc S/PV.6627. See more thoroughly, P Kirsch, M. S. Helal, “Libya” in J. Genser and B. S. Ugarte (eds.), *The United Nations Security Council in the Age of Human Rights* (Cambridge University Press, 2014) at pp. 419-430.

¹⁰³ Carsten Stahn, “Libya, the International Criminal Court and Complementarity: A Test for ‘Shared Responsibility’” (2012) 10(2) *Journal of International Criminal Justice* 325, 326-327.

¹⁰⁴ David Kaye, “Who is Afraid of the International Criminal Court? Finding the Prosecutor Who Can Set It Straight” (2011) 90 *Foreign Affairs* 118.

¹⁰⁵ Konstantin Antipov, “Events in the Arab East and China’s Position” (2012) 40 *Far Eastern Affairs*, 8, at p. 9; Ministry of Foreign Affairs of the People’s Republic of China, *Deputy Representative Wang Ming’s Statement to the United Nations on the ICC*, http://www.fmprc.gov.cn/mfa_chn/dszlsjt_602260/t873328.shtml, accessed 3 October 2019; Ministry of Foreign Affairs of the People’s Republic of China, *Deputy Representative Wang Min’s Statement to the United Nations on the ICC and Libya*, 16 May 2012, www.fmprc.gov.cn/mfa_chn/zwbdt_602255/t932570.shtml, accessed 3 October 2019. See also Matthias Vanhullebusch, “Regime Change, the Security Council and China” (2015) 14(4) *Chinese Journal of International Law* 665.

¹⁰⁶ Lawrence Moss, *The UN Security Council and the International Criminal Court: Towards A More Principled Relationship*. Friedrich Ebert Stiftung, library.fes.de/pdf-files/iez/08948.pdf, 3 October 2019, 9.

it: “the case was over because China and Russia were using the argument to wait for regional organizations first. But once the Libyan representative sent the request, South Africa gave up ... So did Russia. The Chinese asked for some time to make a decision and then ended up supporting it.”¹⁰⁷ Also, with the experience of the situation in Darfur, Russia and China might have seen an opportunity to gain political capital and legitimacy internationally by supporting the referral, knowing that without further measures (which would be subject to their veto) such referral was politically non-threatening.

While including the exact same jurisdictional exemptions contained in the earlier referral of Sudan,¹⁰⁸ resolution 1973, following resolution 1970, demanded a ceasefire and the protection of civilians, imposed a no-fly zone and an arms embargo, confirmed sanctions (including those against entities such as the Central Bank of Libya, the Libyan National Oil Corporation, etc.) and established a Panel of Experts to support the Sanctions Committee (PoE).¹⁰⁹ Soon after, arrest warrants were issued against Muammar Gaddafi (killed on 20 October 2011), Saif Al-Islam Gaddafi (Gaddafi’s son and de facto Prime Minister at the time of the warrant) and Abdullah Al-Senussi (Head of Military Intelligence at the time of the warrant). In reaction to those arrest warrants, the AU – Gaddafi was one of the driving forces behind the founding of the Union in 2002 – called upon states not to cooperate with the ICC and requested the UNSC to defer the proceedings under Art. 16 of the Rome Statute.¹¹⁰ In September 2011, a United Nations mission was

¹⁰⁷ Rebecca Adler-Nissen and Vincent Pouliot, “Power in Practice: Negotiating the International Intervention in Libya” (2014) 20(4) *European Journal of International Relations* 889, 900.

¹⁰⁸ Only the Brazilian delegate referred to his country’s earlier concerns regarding the jurisdictional exemption: see *Statement by the Brazilian Representative*, UNSC Verbatim Record (26 February 2001), UN Doc S/PV.6491, 7.

¹⁰⁹ UNSC Res 1973 (17 March 2011), S/RES/1973 (2011).

¹¹⁰ Andrew Meldrum, “African Union refuses to arrest Gaddafi” (PRI, 1 July 2011), www.pri.org/stories/2011-07-01/african-union-refuses-arrest-gaddafi, accessed 3 December 2019. See also, Konstantinos D. Magliveras and Gino J. Naldi, “The International Criminal Court’s Involvement with Africa: Evaluation of a Fractious Relationship” (2013) 82 *Nordic Journal of International Law* 417, 423-443; Olugbuo (n 30) 352.

established by resolution 2009 with a modified sanctions mandate that was extended and continuously renewed.¹¹¹

Subsequent resolutions dealt with e.g. non-proliferation of arms,¹¹² sanctions in connection with illicit oil exports,¹¹³ the political transition,¹¹⁴ tightening the arms embargo,¹¹⁵ counter-terrorism,¹¹⁶ migrant smuggling and human trafficking,¹¹⁷ and the destruction of chemical weapons.¹¹⁸ None dealt with cooperation with the ICC.

The ICC however had to deal with challenges to its jurisdiction based on the complementarity principle. In the case against Saif Al-Islam Gaddafi, Libya lost the admissibility challenge,¹¹⁹ but he was not surrendered to the court. While Al-Senussi's challenge was successful,¹²⁰ the ICC Prosecutor deplored the slow progress in the domestic trial.¹²¹ The arrest warrants against Al-Tuhamy Mohamed Khaled and Mahmoud M. B. Al-Werfalli remain unenforced (the suspects remain at large).¹²²

¹¹¹ The UNSMIL mandate has been extended by resolution 2022 (2 December 2011), tasking the mission with assisting the Libyan authorities in addressing the threats of proliferation of arms; see also resolutions 2040 (12 March 2012), extending the mandate of the PoE; 2095 (14 March 2013) (re. mandate of the PoE); 2144 (14 March 2014) (re. mandate of the PoE); 2213 (27 March 2015) (re. mandate of the PoE); 2238 (10 September 2015); 2273 (15 March 2016); 2323 (13 December 2016); 2376 (14 September 2017); 2434 (13 September 2018); 2486 (12 September 2019).

¹¹² Resolution 2017 S/RES/2017 (31 October 2011).

¹¹³ Resolution 2146 S/RES/2146 (19 March 2014).

¹¹⁴ Resolution 2174 S/RES/2174 (27 August 2014).

¹¹⁵ Resolution 2174 S/RES/2174 (27 August 2014).

¹¹⁶ Resolution 2214 S/RES/2214 (27 March 2015).

¹¹⁷ Resolution 2240 S/RES/2240 (9 October 2015).

¹¹⁸ Resolution 2298 S/RES/2298 (22 July 2016).

¹¹⁹ *The Prosecutor v. Saif Al-Islam Gaddafi*, Decision on the "Admissibility Challenge by Dr. Saif Al-Islam Gaddafi pursuant to Articles 17(1)(c), 19 and 20(3) of the Rome Statute" ICC-01/11-01/11-662 (5 April 2019).

¹²⁰ *The Prosecutor v. Saif Al-Islam Gaddafi*, Decision on the admissibility of the case against Abdullah Al-Senussi, Judgment on the appeal of Mr Abdullah Al-Senussi against the decision of Pre-Trial Chamber I, ICC-01/11-01/11-565 (24 July 2014).

¹²¹ UNSC, S/PV.7173 (13 May 2014).

¹²² ICC, *The situation in Libya*, www.icc-cpi.int/libya, 3 December 2019. See also, Courtney Hillebrecht and Scott Straus, "Who Pursues the Perpetrators? State Cooperation with the ICC" (2017) 39(1) *Human Rights Quarterly* 162, 171–184.

Eleven warrants of arrest were issued altogether; seven suspects remain at large. None of the accused are in ICC custody.

Ultimately, the enthusiasm at the beginning of the UNSC's actions in support of accountability in Libya was thwarted. The Libya referral included the same exemptions as in the case of Darfur. While the prosecution is still active in this situation, the UNSC does not provide any assistance to the Court via coercive measures, and the success of any prosecution will very much depend on the authorities in Libya¹²³ who are unlikely to cooperate when their interests are negatively affected.

Syria

In 2024, a draft resolution regarding the conflict in Syria was tabled by France in the Security Council. The text points to an acceptance of the practice of indirect control by the UNSC. It contains the exact same wording used in the Darfur and Libya referrals, particularly regarding the jurisdictional exemption for certain categories of nationals of non-State Parties.¹²⁴

The draft was supported by a large number of states.¹²⁵ In several resolutions, the United Nations Human Rights Council indicated support

¹²³ This is obvious from the assessment of the Prosecutor to the UNSC in November 2024: *Statement of ICC Prosecutor Karim A. Khan KC to the United Nations Security Council on the Situation in Libya, pursuant to Resolution 1970 (2011)* (20 November 2024), <https://www.icc-cpi.int/news/statement-icc-prosecutor-karim-aa-khan-kc-United-nations-security-council-situation-libya>, accessed 27 November 2024.

¹²⁴ UN Security Council Draft Resolution, UN Doc S/2014/348 (22 May 2014).

¹²⁵ The draft resolution was jointly submitted by Albania, Andorra, Australia, Austria, Belgium, Botswana, Bulgaria, Canada, Central African Republic, Chile, Côte d'Ivoire, Croatia, Cyprus, Czech Republic, Democratic Republic of the Congo, Denmark, Estonia, Finland, France, Georgia, Germany, Greece, Hungary, Iceland, Ireland, Italy, Japan, Jordan, Latvia, Libya, Liechtenstein, Lithuania, Luxembourg, Malta, Marshall Islands, Mexico, Monaco, Montenegro, Netherlands, New Zealand, Norway, Panama, Poland, Portugal, Qatar, Republic of Korea, Republic of Moldova, Romania, Samoa, San Marino, Saudi Arabia, Senegal, Serbia, Seychelles, Slovakia, Slovenia, Spain, Sweden, Switzerland, The former Yugoslav Republic of Macedonia, Türkiye, Ukraine, United Arab Emirates, United Kingdom of Great Britain and Northern Ireland, and United States of America.

for a referral to the ICC.¹²⁶ It thus appears to be accepted that these exemptions, while clearly at odds with the spirit of the Rome Statute (and, as some argue, also literally violating it), are the price to be paid to get the United States' support for a referral.

Eventually, the resolution – as widely expected – was vetoed by China and Russia.¹²⁷ Russia had important geopolitical¹²⁸ and economic reasons to do so,¹²⁹ and China argued that such referral would undermine the chance to seek a long-term political settlement between the parties to the conflict.¹³⁰ Even if the resolution had passed, it is not clear whether the P5 would simply not have been trying to mask inaction. Again, it seemed as if Western states in the UNSC saw in the draft a way to do something about Syria that would have no political cost domestically.¹³¹

Evaluation of the Existing Practice

With the arrest warrants issued against Putin and Netanyahu, the ICC appears to be more assertive in confronting major powers. This was not entirely foreseeable. It is not true anymore that, as Dicker noted in 2015, “[t]hose who represent the most powerful states are beyond [the ICC’s] reach and are unlikely to find themselves the target of an ICC arrest warrant. These governments also protect states with whom they share close economic, political, or security interests.”¹³² The major powers could not prevent the ICC from issuing those arrest warrants.

¹²⁶ Human Rights Council, resolution A/HRC/31/L5, 18 March 2016, para. 27. For all documents regarding the UN Human Rights Council’s dealing with the Syrian civil war, see ap.ohchr.org/documents/dpage_e.aspx?c=179&su=178, accessed 3 October 2019.

¹²⁷ UNSC Verbatim Record (22 May 2014), UN Doc S/PV.7180, p. 4.

¹²⁸ Particularly as regards Russia’s naval base in Syria, the country’s only notable facility outside the former Soviet Bloc. Cf. Alexandra Roberts, *Understanding the Relationship Between Russia and Syria*. The Aspen Institute, www.aspeninstitute.org/blog-posts/understanding-the-relationship-between-russia-and-syria/, 3 October 2019.

¹²⁹ Forsythe (n 46), 853. On Russia’s interests in Syria see also Sinan Hatahet, *Russia and Iran: Economic Influence in Syria*. Chatham House Research Paper, www.chathamhouse.org/sites/default/files/publications/research/2019-03-08RussiaAndIranEconomicInfluenceInSyria.pdf, 3 October 2019.

¹³⁰ Vanhullebusch (n 105) 688.

¹³¹ Rudolph (n 5) 43; 168.

¹³² Dicker (n 45) 3.

What the eventual results will be on the ground – and for accountability in general – remains to be seen. Enforcement of the warrants is highly unlikely, and since they concern the interests of permanent members of the UNSC no helping hand will be extended from there.

Even when there is consensus on referring a situation to the Court, the UNSC exercises indirect control over the ICC of which the exemptions included in the referrals are an important element.¹³³ Circumscribing jurisdiction is to legally exclude certain actors from international accountability. In other words, the “policy of double standards, driven by the interests of the most powerful permanent member, could not have been demonstrated more drastically.”¹³⁴ Exempting themselves from the jurisdiction of the ICC while subjecting others to it is the essence of double standards.

The jurisdictional exemptions were not the only means to limit the reach and effectivity of the ICC. Both UNSC referrals to date contain a clause stating that none of the expenses incurred in connection with the referrals, including expenses related to investigations or prosecutions, shall be borne by the UN. This clause has had real consequences. Budgetary authority in the UN rests exclusively with the General Assembly.¹³⁵

¹³³ Hans Köchler, *Double Standards in International Criminal Justice: The Case of Sudan*, i-p-o.org/Koechler-Sudan-ICC.pdf, accessed 17 April 2019.

¹³⁴ Köchler, *The Security Council as Administrator of Justice? Reflections on the Antagonistic Relationship between Power and Law* (International Progress Organization 2011) p. 57. For comprehensive analysis see Köchler, *Global Justice or Global Revenge? International Criminal Justice at the Crossroads* (Springer, New York 2003). See also Forsythe (n 46) 862, arguing that “double standards obviously persist. China, Russia, and the US refuse to ratify ICC arrangements that would legally regulate them but push the ICC on others. Particularly the US, which has been a major advocate for such measures as the UN ad hoc courts and the Special Tribunal for Lebanon, has sought to turn American exceptionalism into legal exemptionalism.”

¹³⁵ *Certain Expenses Case* (Advisory Opinion) [1962] ICJ Rep 151. See also Jennifer Trahan, “The Relationship Between the International Criminal Court and the U.N. Security Council: Parameters and Best Practices” (2013) 24(4) *Criminal Law Forum* 417, 451; Rosalyn Higgins and others, *Oppenheim’s International Law: United Nations* (Vol. 1, Oxford University Press 2017) 1351; Kenneth S Gallant, “The International Criminal Court in the System of States and International Organizations” (2003) 16(3) *Leiden Journal of International Law* 553, 575.

However, the United Nations has not contributed to the ICC.¹³⁶ Without funds, the concept of legal independence (to investigate and prosecute freely) is reduced to nomenclature. The Assembly of States Parties of the ICC addressed the problem with respect to the funding for the Libya referral and sought to engage with the UN General Assembly to explore options to cover the financial burden from future referrals.¹³⁷ The funding problem seriously constrains the Office of the Prosecutor and thus negatively affects prosecutorial independence.¹³⁸ In November 2011, after the end of the NATO campaign in Libya, the Office of the Prosecutor reported to the UNSC that the scope of investigations and prosecutions, including of potential crimes by “all parties to the conflict [would depend] on the funds available to the Office to conduct the Libya investigation.”¹³⁹ This predicament challenges the very independence of the ICC.¹⁴⁰

Both cases demonstrate that when the Security Council refers a situation to the Court it does not use its powers to ensure cooperation by states.¹⁴¹ In its referral resolutions, the Council has failed to require all UN member states to cooperate with the Court.¹⁴² Also, the UNSC has not imposed sanctions or otherwise taken action against state parties to

¹³⁶ See *Contingency Fund request for extra resources for the Libya situation for May to December 2011*, Letter from Mr. Marc Dubuisson, Director of Court Services, on behalf of the Registrar to H. E. Mr. Santiago Wins, Chair of the CBF (2011/09/1A, 27 April 2011), referred to in *Proposed Programme Budget 2012*, ICC/ASP/10/10, 21 July 2011 (Tenth Session of the Assembly of States Parties), Table 1.

¹³⁷ See *Report of the Committee on Budget and Finance on the Work of its Sixteenth Session*, ICC-ASP/10/15, 17 June 2011 (Tenth Session of the Assembly of States Parties), para. 23. See also *Budget Resolution*, ICC-ASP/11/Res.1, 21 November 2012 (Eleventh Session of the Assembly of States Parties), sec J. See also *Budget Resolution*, ASP/10/Res.4, 21 December 2011 (Tenth Session of the Assembly of States Parties), sec. G.

¹³⁸ In the same vein, see Stahn (n 103) 328. On the general issue of limited financing of international criminal courts and tribunals see Mahnouch H. Arsanjani and W. M. Reisman, "The Law-in-Action of the International Criminal Court" (2005) 99 *American Journal of International Law* 385, 402.

¹³⁹ See OTP, *Second Report of the Prosecutor of the International Criminal Court to the UN Security Council pursuant to UNSCR 1970 (2011)*, 2 November 2011, para. 53.

¹⁴⁰ Verduzco (n 23) 38-42. For the financial details of the ICC see Sigall Horovitz, Gilad Noam and Yuval Shany, "The International Criminal Court" in Yuval Shany (ed.), *Assessing the Effectiveness of International Courts* (Oxford University Press 2014) 247.

¹⁴¹ Dicker (n 45) 4-7.

¹⁴² *Op. cit.*.7.

the ICC that hosted visits by then president Al-Bashir of Sudan against whom an arrest warrant had been issued for genocide and crimes against humanity.¹⁴³

The Council also did not provide any financial resources to the Court. Instead, it included provisions in its resolutions that impose the entire financial burden on the Court and the States Parties. Despite urgent calls by the Prosecutor to provide support, for instance, for apprehending individuals sought by the Court, the Council did not act.

The practice has rightly been characterized as “a smokescreen for Council inaction.”¹⁴⁴ If that were to continue, so the argument goes, referrals “will constitute a merely symbolic adjunct to a failing Security Council and thus not improve either perpetrator accountability or victim welfare.”¹⁴⁵ Hence, it appears to hold true that the major states represented in the UNSC “have tried to use the United Nations as a vehicle for the advancement of their individual, antithetical foreign-policy interests.”¹⁴⁶ The dilemma for the ICC is that this turns the Court into an institution subordinate to the political machinations of the Security Council.¹⁴⁷

Without consensus among the P5, no referral can ever take place. Even in the case where a referral should be decided, the practice of weak enforcement can be expected to continue. With the global shift of power from the West to the East and the confrontation between the superpowers US and China over global issues, consensus on ICC involvement seems unlikely. Especially with the ongoing war in Ukraine, Russia and

¹⁴³ Hafetz (n 14) 1143-1144.

¹⁴⁴ Schiff (n 14) 79-80.

¹⁴⁵ *Ibid.*

¹⁴⁶ John G. Stoessinger, *The United Nations & the Superpowers: China, Russia, & America* (3rd ed., Random House 1973) xi-xii, cited in Forsythe (n 46) 842. See also D. Tladi, “When Elephants Collide it is the Grass that Suffers: Cooperation and the Security Council in the Context of the AU/ICC Dynamic,” 7(3) *African Journal of Legal Studies* (2014) 381-398; K. M. Clarke, S.-J. Koulen, “The Legal Politics of the Article 16 Decision: The International Criminal Court, the UN Security Council and Ontologies of a Contemporary Compromise,” 7 *African Journal of Legal Studies* (2014) 297-319.

¹⁴⁷ Schiff (n 14) 79.

China are blocking any efforts towards positive engagement.¹⁴⁸ The positions of India and China (representing 36.56 per cent of the world's population that are outside the jurisdiction of the ICC) and of African countries vis-à-vis the ICC are similarly not encouraging.¹⁴⁹ Even states supporting the ICC have so far not used their political clout for strong enforcement measures.

In a nutshell, the two referrals to date have brought few tangible results for justice. In light of the conflicts in Ukraine and Gaza, any constructive role for the Security Council in support of the arrest warrants against Russian and Israeli nationals appears unthinkable. The practices reviewed here have revealed the Council's tendency to politicize criminal justice. The resulting policy of double standards has undermined the independence and tainted the legitimacy of the ICC.¹⁵⁰

¹⁴⁸ See Human Rights Watch, *UN Security Council: Ensure Justice for Syria Atrocities*, www.hrw.org/news/2016/08/30/un-security-council-ensure-justice-syria-atrocities, accessed 3 October 2019. In 2016, the UN High Commissioner for Human Rights, Zeid Ra'ad Al Hussein, expressed his frustration with the lack of SC action, stating, "the persistent failure of the Security Council to refer the situation in Syria to the International Criminal Court is an example of the most shameful form of realpolitik." Quoted according to: UN News Centre, "Monstrous disregard" for civilians, says UN rights chief, as hospitals bombed in Syria, news.un.org/en/story/2016/04/528062-monstrous-disregard-civilians-says-un-rights-chief-hospitals-bombed-syria, accessed 3 October 2019.

¹⁴⁹ For India and China, see Suzannah Linton, "India and China Before, At, and After Rome" (2018) 16(2) *Journal of International Criminal Justice* 265. For African countries, see Line E. Gissel, "A Different Kind of Court: Africa's Support for the International Criminal Court, 1993-2003" (2018) 29(3) *European Journal of International Law* 725-748; Manisuli Ssenyonjo, "The Rise of the African Union Opposition to the International Criminal Court's Investigations and Prosecutions of African Leaders" (2013) 13(2) *Int Crim Law Rev* 385. On the practice of China regarding regime change and UNSC actions, see Vanhullebusch (n 105).

¹⁵⁰ Louise Arbour, *Doctrines Derailed? Internationalism's Uncertain Future*, www.crisis-group.org/global/doctrines-derailed-internationalism-s-uncertain-future, accessed 4 October 2019. As regards the concerns by developing states, see Steven C. Roach, "The Turbulent Politics of the International Criminal Court" (2011) 23(4) *Peace Review* 546, 550.

Conclusion

In the past more than 20 years, the referral provision – the key mechanism by which the UNSC could ensure universal accountability – was used only twice, and it is unlikely to be activated again any time soon. Those two referrals were marred by jurisdictional exemptions undermining the very purpose of the provision. The Council's unwillingness to use its coercive powers to ensure compliance with the decisions of the Court in the situations in Sudan and Libya has demonstrated that its actions in matters of international criminal justice are half-measures at best.

The most serious challenge for any future referral stems, however, from current events. With Russia's invasion of Ukraine and the confrontation of the Court with Israel and its allies, multilateral institutions are facing immense challenges. Judging from previous attitudes of powerful non-member states of the ICC (most importantly the P5 members China, Russia and the US), progress is rather unlikely in the near future.

This state of affairs is difficult to reconcile with the idea of universal criminal justice, which I define with Köchler as “a body of norms that are binding upon all, even the most powerful, and enforced in a consistent manner by a permanent and independent court.”¹⁵¹

This nonetheless does not mean that the international criminal justice project as such should be called into question. Rather, it warrants renewed attention to domestic prosecutions based on the principle of *universal jurisdiction*, which should be strengthened and supported. Germany offers a good example of what the establishment of war crimes investigation units and procedural novelties like the “structural investigation” can do for the successful prosecution of international crimes. This model should be strengthened and emulated around the world.

Of course, prosecutions are only likely to happen when in a state's interest. This leaves it to the discretion of each state to ensure accountability for international crimes, something which the establishment of the International Criminal Court was intended to avoid. Still, in the

¹⁵¹ Köchler, "Justice and Realpolitik" (n 2) 1–2.

context of an arguably multipolar world, the responsibility of individual states to ensure such accountability might be our best hope.

In conclusion, expecting the Security Council to evenhandedly ensure impunity around the world – without interference of great power interests – was never realistic. Now, with more than 20 years experience, it is imperative to draw the lessons from the institutional and political shortcomings of the referral mechanism and emphasize that the means to end impunity should not be in the hands of the UNSC alone.

To avoid being instrumentalized by the UNSC, the ICC needs to speak truth to power. Instead of merely trying to make the best out of the available resources and within present political constraints, the Court should more forcefully stand up to the Security Council. The most difficult and long-term goal will be to ensure consistency in the selection of situations by the Council. The ICC should not be complacent in the face of political adversity. Instead, it should use every opportunity to call for a referral practice of the Council that avoids double standards. Furthermore, when situations are referred to it, the Court should only commence investigations when the following conditions are met: (i) the referral gives a full mandate to investigate all actors and obliges all states (including non-state parties) to cooperate fully with the ICC;¹⁵² (ii) funding is provided by the UN;¹⁵³ (iii) a sanctions committee or similar body is established and authorized under Chapter VII to impose coercive measures against states and individuals so as to give effect to the Court's decisions, including arrest warrants, and requests for cooperation.¹⁵⁴

¹⁵² William Schabas, *An Introduction to the International Criminal Court* (4th ed., Cambridge University Press 2011) 172.

¹⁵³ Cf. also the point made by Germany that ending impunity “is not a free ride,” www.securitycouncilreport.org/atf/cf/%7b65BF9B-6D27-4E9C-8CD3-CF6E4F-F96FF9%7d/s_pv_6849.pdf, accessed 3 October 2019, at p. 19.

¹⁵⁴ Similarly, Lawrence Moss, *The UN Security Council and the International Criminal Court: Towards A More Principled Relationship*. Friedrich Ebert Stiftung, library.fes.de/pdf-files/iez/08948.pdf, accessed 3 October 2019, at p. 13 (recommending that the UNSC “should support the Court with its enforcement powers under Chapter VII”); Mistry and Verduzco (n 41).

If these conditions are not met, the ICC is unlikely to fulfil its mandate and should therefore not proceed with any prosecution. The continued operation of the Court would threaten to undermine the very project of international criminal justice.¹⁵⁵ We thus need to forcefully articulate the deficiencies of the system and the unjust outcomes it produces.¹⁵⁶ Otherwise, we risk making a mockery of international criminal law. This would only embolden those who cynically use such criticism to further their own political goals.

¹⁵⁵ Köchler, "Justice and Realpolitik" (n 2) 8.

¹⁵⁶ For a clear-eyed analysis of the dilemma of international criminal justice, see Köchler, *Global Justice or Global Revenge?* (n 2) 9 *et seq.*

Daniele Archibugi and Marina Bagato

The UN Security Council in a Fragmented World

Introduction: What is the purpose of the Security Council?

In the international political landscape, the Security Council (SC) is the most powerful organ of the United Nations (UN) since it is responsible for the maintenance of international peace and security. Although it has never fulfilled the ambitious role that the architects of the UN had planned for it, it has played a useful role in world politics as an institutional forum in which major powers could take a stand before public opinion.¹

Based on the hierarchical ideas derived from the international relations system of the Concert of Powers² and the League of Nations, the UN Charter gave to five permanent members (P5) advantages to lead, reflecting the world as it emerged at the end of World War II. The P5 nations have also managed to considerably enlarge their power well beyond the Security Council, and in fact, they extend their influence in all the decision-making processes of the UN.³

There have been several attempts to make the SC more representative as was the case with the enlargement of the UN in 1963: the number of elected members of the SC increased in 1965 from 6 to 10, forming the current Elected 10 (E10). Since then, there have been several proposals for radical and incremental reform, which have sometimes been discussed but certainly not implemented.⁴

¹ For a vivid account, see Paul (2017).

² Mawar (2024).

³ Lentner (2020).

⁴ See, among others, Köchler (1991; 2007); Archibugi (2008). For a wide perspective, see Fassbender (2020).

For years, the composition has been seen as outdated, a perception reinforced since the end of the Cold War. Nowadays, with 193 member states, it is argued that a body composed of 15 members cannot be representative. In addition, countries such as Japan, Germany, India, Brazil and South Africa have requested to join as members with a permanent seat, based on financial contribution, population or regional representation. Despite numerous proposals, no changes have been made, nor are any forthcoming. And one can assume that the second Trump presidency will make any substantial change in the UN institutional structure less likely. Amending the UN Charter requires a broad consensus at both international and domestic levels: just to remember that it requires the favorable vote of two-thirds of the members of the General Assembly, including the positive vote of the P5. In addition, two-thirds of the member states must ratify the change, once again including the P5. To compensate for the lack of reform, informal changes have however been introduced.⁵

Who do UN Security Council members represent?

Article 24, para. 1 states, “The Security Council shall act in accordance with the Purposes and Principles of the United Nations.” But we know too well that this is not what is happening in the Security Council Chamber, and even less in the corridors of the UN headquarters.

There are two opposing views regarding the behaviour of states: the optimist view assumes that the SC members are mostly altruistic and act to achieve the objectives indicated in the Charter, prioritizing the common interest. The alternative, and more realistic, view suggests that both permanent and elected members act to pursue national interest, aiming to defend and enhance their own state’s power. However, neither of these extremes fully explains state behaviour.

In practice, unanimity in voting is not always achievable, which highlights the diverse perspectives among states. According to the realist approach, many states may choose not to participate in votes on issues that do not align with their interest. The combination of altruism and

⁵ Hosli and Dörfler 2019; Gifkins 2021.

selfishness regulating states' behaviour is also facilitated by the fact that there is no well-developed legal doctrine or clear practice. The Council is certainly not a court of justice, and states act on the basis of legal considerations as well as political interests.⁶

Elected members do not have a binding mandate but they are appointed according to predetermined regional groups, even though the Charter provides no guidance in this matter. For this reason, one could infer that they should somehow represent the group to which they belong. Nevertheless, once elected, there are no mechanisms in place to enable a state to represent its regional group. The analysis by Lai and Lefler shows that the voting behaviour of the E10 does not correspond to the preferences of the states in their regional groups, as expressed by their votes in the General Assembly,⁷ and this may contribute, as noted by Ungar, to lowering legitimacy of the institution.⁸ Elected members are normally expected to act as spokespersons for their regions, but the same is not expected of permanent members.

In terms of electability, E10 candidate states often try to win votes by using economic aid to developing countries as a bargaining tool.⁹ Wealthy states campaign by promising money and thus have a better chance of being elected than poorer and weaker ones. At the same time, the vote of the E10 is often susceptible to being influenced by political pressures and economic aid they receive from more powerful countries, as well as from international organizations such as the International Monetary Fund and the World Bank.¹⁰

Relevance and voting in the Security Council

An attempt to interpret the Security Council's role in coordinating international security efforts is illustrated in Figure 1. The largest set "A" represents global policy actions and diplomatic activity carried out within and outside international organizations. The set "B" represents

⁶ Hurd 2014.

⁷ Lai and Lefler 2017.

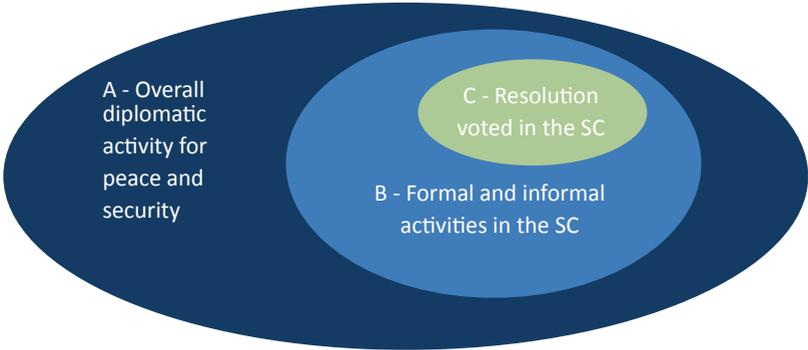
⁸ Ungar 2024.

⁹ Dreher *et al.* 2009; Dreher *et al.* 2011; Reinsberg 2019.

¹⁰ Vreeland and Dreher 2014; Dreher *et al.* 2022.

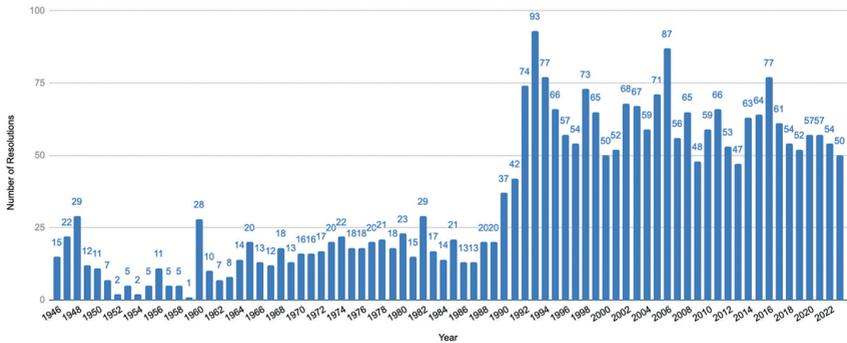
the part of the political and diplomatic activities that also occur in the SC, which performs overt and covert functions, including formal meetings that do not lead to voting on resolutions, and informal consultations,¹¹ often-confidential negotiations and activities. Finally, the set C is the area for which the SC is constantly in the spotlight, including the draft resolutions rejected and the resolutions approved. (All data is on record.)

Figure 1: *International coordination for security inside and outside the Security Council*



From the available information obtained from area C in Figure 1, several analyses can be made. First, it allows us to divide the history of the SC into two phases: from 1946 to 1989 and from 1990 to 2023. We focus on the resolutions approved, since they can be considered the “physiology” of the SC, as they show the existence of sufficiently broad consensus among the permanent members and within the rest of the international community, represented by the E10.

¹¹ Allen and Yuen 2020; Bosco 2020.

Figure 2: Resolutions approved by the Security Council 1946-2023

Source: PS Data UN, <https://psdata.un.org/>

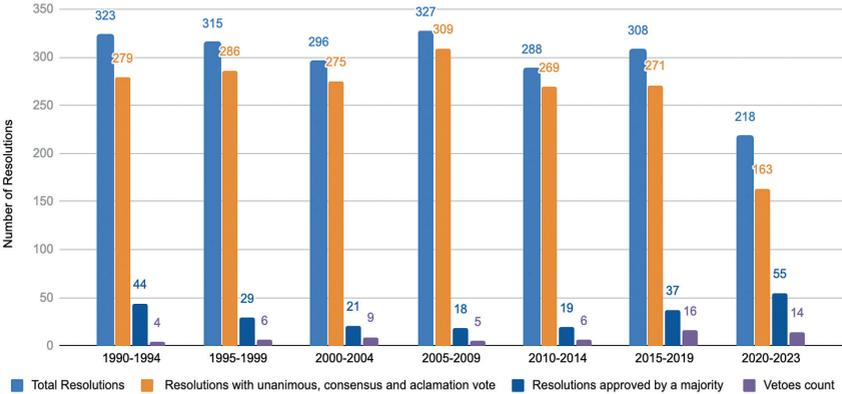
Since the end of the Cold War, the number of resolutions approved has risen considerably, fostering hope that the Council can effectively guide global policy. This means in terms of Figure 1 that sets B-C would expand at the expense of the role played in set A-B. A significant event took place in 1992 at meeting 3046, where all member states were represented by their heads of state or government, leading to a peak in activity in 1993. This optimism was echoed in another symbolic meeting on 7 September 2000.

In most cases, member states present a resolution when there is already a broad consensus to approve it. From its founding until 2023, 74.5% of Security Council resolutions were approved unanimously (the famous 15-0-0), typically reflecting a consensus to condemn actions by governments or political forces not represented on the Council. Moreover, with states assuming in advance that there would be no consensus among members and bringing the resolution to vote would confirm the divisions, many existing conflicts are not even brought into light.

Figure 3 below lets us identify the total number of resolutions voted on during the most recent period, including those that were passed unanimously and those that did not, and the resolutions rejected due to veto of one or more P5 members.

Although the number of resolutions that are not approved unanimously is quite low, they are often the most significant because they reveal divergences or outright conflicts between superpowers. In the last two periods there has been a significant increase in resolutions approved by majority, reflecting the emergence of new polycentrism.¹²

Figure 3: Resolutions approved, with unanimous vote, by majority, and blocked by veto 1990-2023



Source: PS Data UN, <https://psdata.un.org/>

Once a resolution is approved, the consensus doesn't mean that the underlying problems are solved. Only a few resolutions are truly costly for member states, such as requiring the funding and deployment of peacekeepers, sanctions, or other coercive actions.¹³ States and/or political forces that ignore them, even if they do not suffer direct consequences, pay a price in terms of reputation, sanctions and/or restrictions.

The problem of vetoed resolutions

The most controversial aspect of the Security Council is the use of ve-

¹² Gadinger and Scholte 2023.

¹³ Benson and Tucker 2022.

toes by the P5. While actual use of the veto is relatively rare it has increased in recent times, reflecting how the winds of the so-called “Second Cold War” are also making their presence felt in the SC chambers. Table 1 shows the vetoes cast by P5 from 1946 to 1989. Until 1974 the majority were related to the admission of new members to the UN, often associated with the process of decolonization or the Cold War. (It was not until that date that the Federal Republic of Germany and the German Democratic Republic were admitted to the UN.)

In this period, the Soviet Union cast the highest number of vetoes, followed by the United States. The United Kingdom and France used the veto less frequently, while the People’s Republic of China was largely absent during this first period due to the dispute with Taiwan and remained relatively disengaged even after joining the SC in 1971.

Table 1: *Vetoes cast by permanent members of the Security Council 1946-1989*

Country	# veto	Comment
China	3	3 resolutions were blocked by China alone; 2 concerned the admission of Bangladesh and the application of Spain for admission to membership in the UN.
France	18	2 resolutions were blocked by France alone. 14 vetoes have been jointly cast by the United Kingdom and the United States, mostly related to colonialism, independence conflicts or decolonization issues in Africa.
Russia	120	43 vetoes have been cast on draft resolutions on the admission of new members.
United Kingdom	32	Only 7 resolutions have been blocked by the United Kingdom alone; 13 vetoes have been jointly cast by the United Kingdom and France. 10 vetoes have been jointly cast with the United States; 8 vetoes were related to the situation in Namibia.

Country	# veto	Comment
United States	67	28 vetoes regarded the situation in the Middle East; among them, 16 vetoes specifically concerned the Palestinian territories.
Total vetoes	240	240 is the sum of the vetoes, since the same draft resolution can be rejected by more than one P5 member. 200 is the number of resolutions, which have not been approved because of vetoes.

Source: PS Data UN, <https://psdata.un.org/>

Since 1990, the number of approved resolutions has risen significantly. The use of veto has been much less frequent (75 vetoes in the second phase vs. 240 in the first phase).

Table 2: *Vetoes cast by permanent members of the Security Council 1990-2023*

Country	# veto	Comment
China	17	Only 2 resolutions were blocked solely by China; 15 vetoes were cast jointly with Russia. 11 vetoes concerned the situation in the Middle East (the majority related to Syria and 1 to Palestine).
France	0	France has not blocked any resolution in this period.
Russia	35	Since 1990, Russia has cast 37 vetoes; 20 vetoes concerned the situation in the Middle East (most of them related to Syria).
United Kingdom	0	The United Kingdom has not blocked any resolution in this period.
United States	23	Since 1990, 23 resolutions were blocked solely by the United States; 15 vetoes concerned Palestine and 4 related to the situation in the occupied Arab territories.

Country	# veto	Comment
Total vetoes	75	60 is the number of resolutions, which have not been approved because of vetoes.

Source: PS Data UN, <https://psdata.un.org/>

During this period, the United States and Russia have alternately blocked various resolutions, particularly on the Middle East (e.g. Syria and Palestine). The Western (United States, France, and the United Kingdom) and Eastern (China and Russia) blocs are not monolithic, with France, United Kingdom and China often abstaining rather than aligning with vetoes by their allies.

The main problems of the Security Council

One of the main problems is establishing more effective mechanisms to ensure the implementation of resolution mandates. Means should be found to strengthen their implementation by providing the UN Secretariat with greater resources of its own. Another problem is the power of veto. The fact that France and the United Kingdom have not used their veto since 1990 shows that holding veto power does not necessarily mean using it.

However, the frequent blocking of resolutions on crucial international issues by means of the veto undermines the SC's authority, highlighting the paralysis of the UN and its limited contribution to conflict resolution. Every time a resolution is blocked by a veto, component A-B becomes more relevant at the expense of component C (Figure 1). The challenge is to make the use of the veto more costly and giving autonomy to the UN Secretariat.

The E10 face three problems: i) the election process is influenced by incentives offered by wealthier and more powerful states, ii) their voting is often conditioned by the granting of economic aid, and iii) there is no alignment between their voting behaviour, as their preferences do not correspond with the preferences of the states in their geographic group within the General Assembly.

For international peace and stability, it is crucial for the Council to play a more active role, absorbing as much diplomatic action as possible currently taking place outside its area. (In terms of Figure 1, it means expanding B and C while reducing A-B.) This requires an efficient and effective body capable of increasing its role in global politics and being representative of the international community.

Proposals for the enlargement and reform of the Security Council

In the extensive consultations that have been conducted, various reform proposals have emerged¹⁴ in which the entire global diplomatic corps is engaged. There is a fundamental difference between enlargement and reform. *Enlargement* refers to the proposals aimed at increasing the number of members of the SC, without involving a change in the methods of participation or significant limitations on the veto power of the P5.

On the other side, *reform* includes more radical proposals that also aim to change the methods of participation of states, abolish, limit or qualify the veto of the P5, and open the body to other political actors, such as regional organizations and civil society representatives, allowing them to participate and intervene. Usually, the proposals are mostly about enlargement rather than reform and also they do not question what the role of the states called to serve on the SC should be. It does not seem that a simple enlargement can help solve the problems of peace and security.

The 1995 Italian proposal¹⁵

Contextualizing, the Italian proposal was made at a time when there was optimism about the role the UN could play in the new international scenario and where it seemed that the quick-fix was about to be approved. The proposal suggested a much more ambitious expansion:

¹⁴ Fassbender 2020; Pirozzi *et al.* 2023.

¹⁵ An idea supported by Italy in 1995, promoted by Ambassador Francesco Paolo Fulci.

keeping the actual constitution unchanged and introducing a new category of members with more frequent rotation of the seats.¹⁶ These states would be designated by the General Assembly based on objective criteria such as population, geographic representation, financial, political, and military contributions to the UN.

The proposal lay in the fact that each frequently rotating state would naturally be inclined to coordinate its actions with the other states from the same geographic area, contributing to regional stability. Another advantage would be to make it easier for small states to gain access to the SC through the 10 elected members.

Possible scenarios and reform proposals

One scenario is that the states with veto power, which have continued to use it in the last decade, might begin to exercise it more sparingly. The idea of abolishing the P5 veto power is largely idealistic. Making the veto increasingly outdated¹⁷ would require diplomatic actions by the UN Secretariat, the E10 and the General Assembly. Regarding enlargement, one proposed reform envisions a scenario in which the Council's composition would be increased. In cases where resolutions are not approved due to the veto of one of the P3 (United States, Russia, and China) a situation like 26-1-0 might politically isolate the countries using the veto, though the outcome would not be substantially different. For approved resolutions, this reform could make the Council's decisions more authoritative.

For any enlargement to enhance peace and stability, the mandate must clearly define the relationship between elected members and their electors. For example, India seeks a permanent seat to represent Asia, but Pakistan is the first to oppose, fearing that its rival could use the position against it. The objective would be more appropriate if mechanisms ensure a proper system of accountability for the actions elected countries take as members of the Council.

¹⁶ 8-10 new members selected from 24-30 states, i.e. 3 eligible states for each frequently rotating seat.

¹⁷ Giffkins 2021.

The legitimacy and representativeness of the E10 should be increased. One option is to require that candidates for election present a work program so as to ensure that they pursue global interests and that they can be held accountable for their decisions. Another way is to require that the work program include a consultation in advance with states within their geographic group, thus strengthening their role as representatives of a group. These measures would help counter the practice of some states offering incentives to gain election and, once elected, seeking to benefit from how they vote. In order for the SC to be more authoritative, methods must be found to elect E10 based on their commitment to peace and security and, once elected, to exercise their mandate with less external influence.

Other reform proposals address the question of opening participation in the work of the Council to regional organizations and other international bodies, with the aim to increase representativeness.¹⁸ Empirical research shows that global public opinion is strongly in favour of the United Nations playing a more prominent role.¹⁹ This includes giving the General Assembly or new bodies such as an elected UN Parliamentary Assembly a voice on issues of peace and security.²⁰

Thus, to improve the functionality of the Council, it would be useful to open it to regional organizations such as the European Union, ASEAN, the African Union, the Organization of American States, the Arab League, Mercosur, etc. Their participation in the meetings, even without voting rights, would still strengthen its authority and representativeness.

Relying solely on the P5 entails the risk that the Security Council loses relevance and important decisions are made outside the Council. In cases where the Council cannot pass a resolution due to the veto of a single permanent member, emergency sessions of the General Assembly should be convened (as in the case of Ukraine, 26 April 2022²¹).

¹⁸ Ungar 2024.

¹⁹ Ghassim *et al.* 2022.

²⁰ Cabrera 2018.

²¹ United Nations, General Assembly, seventy-sixth session, 69th plenary meeting, 26 April 2022, A/76/PV.69.

Alternatively, as required by resolution 76/262, the P5 member using the veto should be held accountable before the body of member states.

Conclusion

The intensifying conflicts in Palestine and Ukraine have shown that the SC is not the main place where diplomatic activity, negotiations, mediation and reproof are taking place. In order for the UN to be the primary forum to address and resolve international disputes, the SC must become the guiding centre of global policy, with the tools and authority to enforce its decisions.²² Strengthening the Council, and consequently the United Nations, is essential to achieving a more peaceful and participatory world.²³ This can only happen if all components of the international community feel equally represented and protected. Reforming the body to make it more representative and limit the veto power of the P5 is one essential step. The challenge lies in obtaining a broad consensus.

²² Falk and von Sponeck 2024.

²³ Archibugi 2008.

References

- Allen, Susan Hannah, and Amy T. Yuen. 2020. "Action or inaction: United Nations Security Council activity, 1994-2013." *Journal of Peace Research* 57 (5), 658-665. DOI 10.1177/0022343319900222.
- Archibugi, Daniele. 2008. *The Global Commonwealth of Citizens: Toward Cosmopolitan Democracy*. Princeton: Princeton University Press.
- Archibugi, Daniele, Maria Cellini, and Alessandro Malgieri. 2024. *Le ragioni della riforma del Consiglio di Sicurezza*. Rome: Irpps-Cnr.
- Benson, Michelle, and Colin Tucker. 2022. "The Importance of UN Security Council Resolutions in Peacekeeping Operations." *Journal of Conflict Resolution* 66 (3): 473-503. DOI 10.1177/002200272111044205.
- Bosco, David. 2014. "Assessing the UN Security Council: A Concert Perspective." *Global Governance* 20 (4): 545-561.
- Cabrera, Luis. "The Case for a United Nations Parliamentary Assembly as a Means of Promoting Just Security." In: *Just Security in an Undergoverned World*, eds. William Durch, Joris Larik, and Richard Ponzio (Oxford: Oxford University Press, 2018), 413-439.
- Commission for Global Governance. *Our Common Neighbourhood* (Oxford: Oxford University Press, 1995).
- Dreher, Axel, Jan-Egbert Sturm, and James Raymond Vreeland. "Development aid and international politics: Does membership on the UN Security Council influence World Bank decisions?" *Journal of Development Economics* 88 (1) (2009), 1-18. DOI 10.1016/j.jdeveco.2008.02.003.
- Falk, Richard A., and Hans von Sponeck. *Liberating the United Nations: Realism with Hope* (Stanford: Stanford University Press, 2024).
- Fassbender, Bardo. 1998. *UN Security Council Reform and the Right of Veto: A Constitutional Perspective*. The Hague: Kluwer.

- Fassbender, Bardo. 2003. "All illusions shattered? Looking back on a Decade of Failed Attempts to Reform the UN Security Council." *Max Planck Yearbook of United Nations Law online* 7 (1): 183-218. DOI 10.1163/187574103X00031.
- Fassbender, Bardo. 2020. *Key Documents on the Reform of the UN Security Council 1991-2019*. Leiden: Brill Nijhoff.
- Gadinger, Frank, and Jan Aart Scholte. 2023. *Polycentrism: How Governing Works Today*. Oxford: Oxford University Press.
- Ghassim, Farsan, Mathias Koenig-Archibugi, and Luis Cabrera. 2022. "Public Opinion on Institutional Designs for the United Nations: An International Survey Experiment." *International Studies Quarterly* 66 (3): sqac027.
- Gifkins, Jess. 2021. "Beyond the Veto: Roles in UN Security Council Decision-making." *Global Governance: A Review of Multilateralism and International Organizations* 27 (1): 1-24. DOI 10.1163/19426720-02701003.
- Hosli, Madeleine O., and Thomas Dörfler. 2019. "Why is change so slow? Assessing prospects for United Nations Security Council reform." *Journal of Economic Policy Reform* 22 (1): 35-50. DOI 10.1080/17487870.2017.1305903.
- Hurd, Ian. "The UN Security Council and the International Rule of Law." *The Chinese Journal of International Politics* 7 (3) (2014), 361-379. DOI 10.1093/cjip/pot015.
- Italy. *A Revised Proposal for the Enlargement of the Security Council of the United Nations* (New York: Permanent Mission of Italy to the UN, October 1995).
- Köchler, Hans. 1991. "The United Nations Security Council and the New World Order," In: *Building a More Democratic United Nations* (pp. 238-245). London: Routledge.
- Köchler, Hans. 2007. "Security Council Reform: A Requirement of International Democracy." *Center for the Study of Federalism*, 3.

- Lai, Brian, and Vanessa A. Lefler. 2017. "Examining the role of region and elections on representation in the UN Security Council." *The Review of International Organizations* 12: 585-611. DOI 10.1007/s11558-016-9254-z.
- Lentner, Gabriel. 2020. "The Lasting Legacy of Double Standards: The International Criminal Court and the UN Security Council Referral Mechanism." *International Criminal Law Review* 20: 251-284. DOI 10.1163/15718123-02002005.
- Mawar, Deepak. 2024. "Realpolitik in Global Governance: Understanding the Competing Realist and Cosmopolitan Narratives of the Nineteenth Century Era of International Law." *The International History Review*. DOI 10.1080/07075332.2024.2354870.
- Paul, James A. 2017. *Of Foxes and Chickens: Oligarchy and Global Power in the Security Council*. New York: Rosa Luxemburg Stiftung.
- Pirozzi, Nicoletta, and Giovanni Finizio, Pietro Gargiulo, Giuseppe Nesi. 2023. *Grasping the Nettle of UN Security Council Reform: The Uniting for Consensus Proposal*. Rome: Institute for International Affairs.
- Reinsberg, Bernhard. 2019. "Do Countries Use Foreign Aid to Buy Geopolitical Influence? Evidence from Donor Campaigns for Temporary UN Security Council Seats." *WIDER Working Paper* 2019 (4). DOI 10.35188/UNU-WIDER/2019/638-8.
- Ungar, Maya. 2024. "Relevance and Reform: The United Nations Security Council of the Future." *Global Governance: A Review of Multilateralism and International Organizations* 30 (2): 304-312. DOI 10.1163/19426720-03002006.
- United Nations General Assembly. 2022. *Standing mandate for a General Assembly debate when a veto is cast in the Security Council*. Resolution 76/262 adopted on 26 April. New York: United Nations.
- Vreeland, James Raymond, and Axel Dreher. 2014. *The Political Economy of the United Nations Security Council: Money and Influence*. Cambridge University Press.

Vreeland, James Raymond. 2019. "Corrupting international organizations." *Annual Review of Political Science* 22 (1): 205-222. DOI 10.1146/annurev-polisci-050317-071031.

Acknowledgements

This paper originates from a project on “The United Nations Security Council after the End of the Cold War: Its Role and Proposals for Reform,” funded and promoted by the Unit for Analysis, Programming, Statistics, and Historical Documentation of the Directorate-General for Public and Cultural Diplomacy of the Italian Ministry of Foreign Affairs and International Cooperation. Special thanks to Marco Cellini for the elaboration of the data and to Azzurra Malgieri for allowing the context of the research.

Preliminary results were discussed with some colleagues during a meeting held at the IRPPS-CNR (Rome, 11 June 2024), at the Conference on Sovereignty and Coercion: The United Nations in the Web of Power Politics, International Progress Organization (Istanbul, 12 September 2024), and at the dialogue on Democratizing Globalization, Bard College New York, Berlin Campus (Berlin, 16 September 2024). Many thanks to the colleagues for their sharp and undiplomatic comments. Our colleagues at the Italian Ministry of Foreign Affairs, Giuliana Del Papa, Giorgio Cammareri, Andrea Cofelice, Alessandro Costa, and Chiara Luti, also provided useful feedback. We also wish to thank Costanza Cossu, Andrea Crescenzi, Mathias Koenig-Archibugi, Nicoletta Pirozzi, and Tommaso Visone. Sebastiano Cardi, former Permanent Representative of Italy to the United Nations, gave us a real vision of what happens in the chamber of the SC. We alone are responsible for the views expressed, and they are not necessarily shared by our colleagues at the Italian Ministry of Foreign Affairs.

III

The Dilemma of Sovereignty in the UN System

Berdal Aral

UN Charter Exceptions to the Sovereign Equality of States and their Injurious Consequences

Introduction

This paper is premised on an analysis of primary legal problems emanating from the exceptions to the principle of the sovereign equality of states as laid out in the Charter of the United Nations (UN). It argues that the disavowal of equality between states in a number of different settings and situations as enshrined in different parts of the UN Charter has at least two problematic implications: first, it contributes to the asymmetry of relations between permanent members (P5) and other states; second, it endangers international peace and security by blocking the Security Council in cases when one of the permanent members has been involved in military aggression. This paper focuses on the period following the end of the Cold War.

The essay initially looks at the provisions of the UN Charter regulating the sovereign equality of states as well as the major exception to it, namely the permanent membership of five states in the UN Security Council. It then sets out to identify the major motives and expectations behind conferring privileges to a few states, which put them above others in the UN system. It then probes into the ways in which the Charter's exceptions to the equality of states have undermined the successful implementation of the main goals of the United Nations, in particular in the field of international peace and security, by almost "inviting" the P5 to exploit their privileges to advance their national interests, to use their status as a bargaining chip in dealings with other states, and to pursue a variety of strategic goals. In this context, we also discuss the ways in which these exceptions have distorted the balance of competences between UN organs.

The paper draws on the fact that the Security Council became more active and adopted resolutions comparatively more easily when the Cold War had come to an end in the early 1990s. Besides, it notes that the Council has assumed new roles and competences for itself – from adopting resolutions on international terrorism and the spread of weapons of mass destruction through establishing *ad hoc* international criminal courts to the authorization of military interventions on human rights and humanitarian grounds. It argues that, in spite of the reactivation of the Security Council in the aftermath of the Cold War, the most powerful UN body has not been able to exercise its task of maintaining international peace and security properly, effectively and consistently, in part due to the Charter's exceptions to the principle of the equality of states.

The paper will focus, *inter alia*, on the following questions: In what ways is the system of the Security Council reminiscent of the great power politics of past centuries? To what extent has the P5 mechanism in the Security Council impacted the principles of the sovereign equality of states, of non-discrimination, and of self-determination in so far as the small and medium powers in the non-Western world are concerned?

“Sovereignty” and “Equality” of States as Intertwined Concepts

Sovereignty of states as an international legal norm undoubtedly lessens the effect of power imbalances among states. It also serves as a protection against abuses inflicted on weak states. If the rights and privileges associated with sovereignty are neglected, power inequalities among states would become more pronounced.¹ Article 2(1) of the UN Charter states: “The Organization is based on the principle of the sovereign equality of all its Members.”² This implies that states have the same rights and obligations under international law. Accordingly, they should be treated equally when exercising state authority, such as acceding

¹ Benedict Kingsbury, “Sovereignty and Inequality,” in Andrew Hurrell and Ngaire Woods (eds.), *Inequality, Globalization, and World Politics* (New York, Oxford University Press, 1999), p. 8.

² Charter of the United Nations, 26 June 1945.

to an international treaty or becoming member of an international organization. This is also linked to respect of the territorial integrity and political independence of states. The natural corollary of the sovereign equality of states is to be found also in other principles of international law as laid down in the UN Charter. As asserted by Wright, the Charter

“legally sanctions the system of equality of states by formally proclaiming it, by requiring pacific settlement of disputes, by forbidding unilateral or regional use of force except in defense against armed attack and, implicitly, by refusing to recognize territorial or political advantages gained by force.”³

According to Article 2(3), “All Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered.” The next paragraph within the same article (Article 2[4]) is about the principle of the non-use of force:

“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.”

Finally, under the terms of Article 2(7), there is a warning to states and the UN not to interfere into the domestic affairs of states:

“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 the Members to submit such matters to settlement under the present Charter.”

All these indicate that, under the terms of the UN Charter, states are legally equal and are therefore entitled to exercise sovereignty in the same way. As expressed in a prestigious regional multilateral treaty in reference to sovereign states, “the rights of each one do not depend

³ Quincy Wright, "The Equality of States," *Cornell International Law Journal*, Vol. 3, No. 1, 1970, 1-7, p. 6.

upon the power which it possesses to assure its exercise, but upon the simple fact of its existence as a person under international law.”⁴

Permanent Membership in the UN Security Council as an Exception to the Sovereign Equality of States

The veto power of the permanent members is mentioned in Article 27(3) of the Charter of the UN: “Decisions of the Security Council ... shall be made by an affirmative vote of nine members including the concurring votes of the permanent members.”⁵ The five permanent members (P5) are mentioned in Article 23 of the Charter: the United States of America (US), United Kingdom/Britain (UK), France, the Soviet Union (succeeded by Russia in 1991), and China.

How did the permanent members justify their power of veto? They argued that it is thanks to them that the world was saved from the military aggression of the Axis Powers led by Nazi Germany. They also claimed that they had the capacity to prevent a similar threat of great war in the future. At the time when the Charter was negotiated the P4 (France was not a member of the negotiating group) issued a common statement to “explain” the rationale behind their “more equal” status.⁶ They asserted:

“if a majority voting in the Security Council is to be made possible, the only practicable method is to provide, in respect of non-procedural decisions, for unanimity of the permanent members plus the concurring votes of at least two of the non-permanent members.”⁷

⁴ *Montevideo Convention on the Rights and Duties of States*, 26 December 1933, retrieved from <https://www.oas.org/juridico/english/treaties/a-40.html>.

⁵ Originally, seven members out of 11 would suffice for a resolution to be adopted by the UN Security Council. However, after enlargement of the membership to 15 in 1965, the required majority was increased from seven to nine.

⁶ France was not a party to this declaration due to the ongoing war.

⁷ “Statement by the Delegations of the Four Sponsoring Governments on Voting Procedure in the Security Council, 7 June 1945,” *United Nations Conference on International Organization*, Doc. 852 III/1/37(1), 8 June 1945, p. 713. To recall, the UN Charter initially provided that the Security Council would consist of 11 members and a minimum of seven votes (with concurring votes of permanent members) would be required for a draft resolution to be adopted.

In order to mobilize the Security Council effectively against those that violated international peace and security, the argument went, the P5 had to concur and act jointly against them. Furthermore, as envisioned by Article 43 of the UN Charter, a joint military force would be established in order to serve as standing army attached to the Security Council.⁸ However, contrary to what was envisaged in the Charter, the P5 failed to agree on establishing a permanent military force (a standing army). Thus, there was not much difference between the UN security system and the one established by the League of Nations.

P5 Abuses of their Special Status to the Detriment of “Lower-ranking” States

To the disappointment of the overwhelming majority of states and contrary to expectations, the P5, both during the Cold War and in its aftermath, have by and large failed to act collectively as a force for peace. Their “power monopoly” and “impunity” inevitably resulted in abuses of privilege. Gradually it became clear that the wars of aggression, threats to and breaches of international peace and security mostly emanated from the P5 (China excluded) who were engaged in colonial, neo-colonial and imperialistic wars in Asia, Africa and Latin America – with devastating humanitarian consequences, including the death of millions of people. As the UN system unfolded, the justificatory claims about the veto power became less convincing. They were mostly viewed as a mixture of euphemism and deception in so far as the “less privileged” members of international society were concerned.

The permanent members have not been reticent about using their privileges to their own benefit. Nearly 200 vetoes have been cast up to this day to defeat unwanted draft resolutions. By means of the veto, the P5 have been able to enhance their international standing by fashioning for themselves broader spheres of influence and protecting their allies and friends from undesirable resolutions. It is interesting to note that the permanent members rarely needed to veto a draft resolution tar-

⁸ Dilip Sinha, “Veto Provision in UN Charter: Issues and Dimensions,” *Indian Foreign Affairs Journal*, October-December, 2019, Vol. 14, No. 4, Special Issue: *India and the “UN@75”* (October-December, 2019), 267-274, p. 268.

getting their own military aggressions simply because the issue was not put to a vote due to the threat of veto.⁹ The cases in which permanent members made use of their privilege included the Soviet Union's vetoes of draft resolutions condemning its occupation of Hungary (1956), Czechoslovakia (1968), and Afghanistan (1979), and British and French vetoes during the Suez crisis that had erupted as a consequence of their joint military aggression against Egypt (1956). The US, strangely, did not have to exert a veto on its military invasions of other countries such as Vietnam (1965-1973) and Iraq (2003-2011). These situations were never brought to the attention of the Security Council by other members. (Any such move would have undoubtedly been vetoed by the US.)¹⁰

Another cause for concern regarding the performance of the UN Security Council has been the process of decision-making. Towards the end of the Iraq-Iran war (1980-1988), the world witnessed the onset of informal meetings among the P5 in which they agreed on the wording of draft resolutions to be put to a vote in the Council. This meant that other members of the Council were simply expected to rubber-stamp the motions brought to the table.¹¹ The practice has led to a further erosion of the principle of the sovereign equality of states.

Other Aspects of the Decision-Making Process in the Security Council

In order to understand the deleterious effect of the privileges of the P5 on the functioning of the Security Council, we need to delve into the maze of decision-making within this body. The privileges of the P5 have come to the fore in a variety of contexts, processes and initiatives. They consist of the following: (1) *Agenda setting*: This refers to the quasi-monopoly of the P5 in the *identification* of “threats” and “actors” (state and non-state) that are declared to breach international peace and security. (2) *Decision-making*: this relates to the power of the P5 to decide as to whether to take “effective” action against states (supposedly) breaching or threatening international peace and security. (3) The P5 have

⁹ *Op. cit.*, pp. 270-272.

¹⁰ *Ibid.*

¹¹ *Op. cit.*, p. 272.

the upper hand in deciding on the *modality of action* – whether by way of sanctions or military force – against a state or non-state actor considered as “aggressor” and/or in breach of international peace and security. (4) *Conduct and execution*: The P5 also effectively decide *how* to conduct military operations and execute sanctions against a targeted state. In this context, one ought to note that the P5 have come to dominate the committees monitoring the respective sanctions regimes. These committees have proven to be notoriously non-transparent and insufficiently accountable.¹² Finally, (5): *Virtual immunity from enforcement action*: The status of the P5 provides them and their allies with virtual *impunity* from punitive action by the Council since any motion targeting any one of them is destined to fail due to the veto.

Also, we need to understand the variety of ways in which resolutions of the Security Council have diluted the sovereignty of states and thus undermined the principle of sovereign equality, especially since the 1990s. We shall particularly address the following areas: a) international terrorism; b) proliferation of nuclear weapons; c) the failed state paradigm – the right of humanitarian intervention – Responsibility to Protect; d) nuclear disarmament.

Lack of Punitive Action against Military Aggressors

Inequality between states is also evident in the fact that victims of military aggression are almost always left to their own devices in order to fight their enemies. With very few exceptions, the Security Council has tended to refrain from coercive action on the basis of Chapter VII of the UN Charter against aggressor states. In other words, when a state is faced with an assault on its territorial integrity, sovereignty and independence, that state almost never receives support from the Security Council. This was the case during the Cold War when, for instance, military aggressions by the United States, the Soviet Union, the United Kingdom, France, Israel, and India against states or peoples including Vietnam, Cambodia, Panama, Hungary, Czechoslovakia, Afghanistan, the Palestinians, Syria, Lebanon, Jordan, Egypt, Pakistan, and states in Africa did not in any way elicit effective response from the Security Council.

¹² *Ibid.*

The post-Cold War era has likewise seen numerous instances of violations of the sovereignty of states. Perpetrators have almost never been challenged by the Security Council. Cases include, *inter alia*, the US-led occupations of Afghanistan (2001) and Iraq (2003); the Ethiopian occupation of Somalia (2006); US-led military operations which, *inter alia*, included Britain and France, against ISIS-controlled areas in Syria since September 2014 without a UN mandate or approval by the Syrian government; the Russian occupation of Ukraine (2022); the Israeli occupation of Lebanon (2006), Israel's illegal military operations in Syria, Lebanon, and two such operations in Sudan (2009 and 2012); and numerous military assaults on Gaza. With the notable exception of the Iraqi invasion of Kuwait in August 1990 – when the Security Council, acting under Chapter VII of the Charter, exhausted all the measures at its disposal (according to Articles 39 to 42), eventually authorizing military enforcement action against Iraq to “liberate” Kuwait¹³ – states that perpetrate “Threats to the Peace, Breaches of the Peace, and Acts of Aggression” have rarely faced coercive action by the Security Council although illegal use of force between states is a breach of *jus cogens* norms and a violation of obligations *erga omnes*. The double standards concerning the international use of force are another indication of the widespread exceptions to the equality of states in international law.

Humanitarian Intervention, Responsibility to Protect, and the Failed State Paradigm as Pretexts for Assaulting the Sovereignty of States

An important aspect of current international relations is the tendency of major international powers, states and international organizations alike, to selectively intervene into the domestic affairs of other states seemingly for humanitarian purposes. The modern doctrine of “humanitarian intervention” was born in the early 1990s as a response to the mushrooming of civil wars that frequently resulted in ethnic cleansing, mass killings of civilians, mass expulsions, and widespread torture.¹⁴

¹³ On the Gulf War, international law and the available UN mechanisms, see Oscar Schachter, “United Nations Law in the Gulf Conflict,” *The American Journal of International Law*, Vol. 85, No. 3, 1991, 452-473.

¹⁴ On humanitarian intervention, see Thomas G. Weiss, *Humanitarian Intervention: Ideas in Action*, 3rd edition (Cambridge/UK, Pluto Press, 2016).

Compared to the Cold War era, there was greater acceptance among members of international society that massive human rights violations perpetrated *within* a state, especially if leading to a mass influx of refugees as the “international” factor, could be “legal” grounds for coercive action under Chapter VII of the UN Charter. Humanitarian intervention represents an inevitable tension between two classes of principles in international law: *sovereignty of states* (with the concomitant principle of non-intervention) versus international protection of the *human rights* of the individual against the state. Under the doctrine of humanitarian intervention, when a state is faced with military intervention mandated by the UN Security Council and launched by a coalition of states, that state *de facto* loses its sovereignty as an attribute of statehood.¹⁵ Far from obtaining universal recognition, this doctrine is at odds with the idea that international order can best be established and sustained if states are sovereign and immune from encroachment by other actors.¹⁶

The development of the doctrine of humanitarian intervention is linked to the fact that, in the early 1990s, “human security,” alongside the classical notion of “state security,” was incorporated into the agenda of the Security Council. Human rights thus became the new “standard of civilization.” These developments, largely reflecting the worldview of the West, put the states of the Third World under the threat of an erosion of their sovereignty to the extent that this could spell a return to a kind of colonial ordering of international society: the West versus the Rest. As a result, numerous Asian and African states, as part of the zone of “uncivilized states,” given that many were serious human rights violators, fell prey to the hegemonic impulses of powerful Western actors claiming to represent the “zone of civilization.”¹⁷

Revulsion against the silence of international society in the face of war crimes, crimes against humanity, and genocide was a major factor behind the arming of the Security Council with new powers. One of the instances was what many, particularly in the Muslim world, believed to be the genocide by the Serbs against Muslims in Bosnia in the years 1992-1995. The disillusionment deepened, however, when the Council

¹⁵ Mohammed Ayoob, “Humanitarian Intervention and State Sovereignty?” *The International Journal of Human Rights*, Vol. 6, No. 2, 2002, 81-102, p. 82.

¹⁶ *Op. cit.*, p. 81.

¹⁷ *Op. cit.*, pp. 84-85.

declined to authorize military intervention to stop the genocide by Hutus against the Tutsis in Rwanda, in 1994.

The debacles of Bosnia and Rwanda encouraged some of the leading Western powers to broaden the criteria for the use of the Chapter VII powers of the Council. Scepticism about the practice of humanitarian intervention and the interest of some Western actors to enhance the authority of the UN Security Council in dealing with serious human rights breaches led to the introduction of the notion of “responsibility to protect” at the World Summit of 2005.¹⁸

The notion of “sovereignty as responsibility” came to the fore in 1996. The intention was that when states fail to act “responsibly” towards their own people, they should no longer be permitted to enjoy the fruits of sovereignty. The notion of “sovereignty as responsibility” emerged simultaneously with the idea that state compliance with human rights was an international matter, which meant that a breaching state could not only face judicial penalty but also political pressure, economic sanctions or military intervention (ideally authorized by the Security Council). However, a major problem is *who* will have the ultimate right and privilege to decide whether a particular state has breached its obligations by failing to act “responsibly” against its people. Further, what action ought to be taken in order to coerce the state to abide by its obligations according to the principle of “sovereignty as responsibility”?¹⁹ Norms and rules on humanitarian intervention are mostly formulated by Western states and enforced by some of those states, claiming to represent the “will of international society.” They are those who are represented in the UN Security Council as permanent members, namely the US, UK and France.

“Shared interests” appear to be the main driving force of the P5 in cases when the Council decides to resort to Chapter VII of the UN Charter. A revealing case testifying to the collusion among the P5 was the Council’s consent, in 1994, to the American intervention in Haiti, the French intervention in Rwanda (after the orgy of killings had ended), and the

¹⁸ *2005 World Summit Outcome*. Resolution adopted by the General Assembly on 16 September 2005, retrieved from A/RES/60/1, <https://documents.un.org/doc/undoc/gen/n05/487/60/pdf/n0548760.pdf>.

¹⁹ Ayooob, *op. cit.*, p. 85.

Russian intervention in Georgia. Claiming to be motivated by “humanitarian concerns,” the three intervening states apparently traded their votes in return for the approval of their own favoured intervention.²⁰

Mohammed Ayoob argues that even if one accepts that the Security Council is the proper authority for mandating humanitarian intervention, we are still faced with the problem of legitimacy. In his view, this is mainly because intervening states do not feel that they are accountable to the Security Council. In many instances, the participating states decide arbitrarily about the military and political objectives of interventions purportedly grounded in humanitarian motives.²¹ Ayoob’s misgivings about such military interventions were later proven to be well founded. The Libya campaign became the most prominent case of a multilateral intervention mandated by the UN Security Council in reliance on the principle of “responsibility to protect.”²² It was conducted mainly by NATO forces in the midst of a mass uprising of Libyans against the regime in 2011, during the Arab Spring, when collective crimes had been committed by security forces against people taking to the streets. The intervention of NATO bore all the hallmarks of a politically motivated operation that destroyed the sovereignty of Libya and turned the country with its vast natural resources into a playground of imperial interests. There were numerous flaws and inconsistencies in the conduct of the operation: first, because of the inclinations of the P5, the Security Council decided to take robust action only against the Libyan government although similar mass atrocities and grave human rights breaches were being committed against the people taking to the streets in numerous other Arab states, from Yemen through Syria to Bahrain, during the same period;²³ second, although

²⁰ S. Neil MacFarlane and Thomas Weiss, “Political Interest and Humanitarian Action,” *Security Studies*, Vol. 10, No. 1, Autumn 2000, pp. 120-152, p. 127.

²¹ Ayoob, *op. cit.*, p. 88.

²² In resolution 1973 there is no mention that this operation was undertaken under the rubric of Responsibility to Protect. However, the international narrative around the resolution as well as the pronouncements of UN Secretary-General Ban Ki-moon indicated that the intervention was grounded in the doctrine of Responsibility to Protect.

²³ On the Security Council’s lack of consistency during the Arab Spring, displaying strong commitment only to the crisis in Libya while remaining largely aloof in all other cases, see Berdal Aral, “Roaring in Libya, Whispering in Others: UN Security Council’s Posture during the ‘Arab Spring’,” *Insight Turkey*, Vol. 16, No. 1, 2014, pp. 181-197.

resolution 1973²⁴ mandated military enforcement action in Libya for the dual purpose of enforcing a no-fly zone and preventing obstructions to the delivery of humanitarian aid, the operation turned into a war against the Libyan government; finally, after the overthrow of the Gaddafi regime due to the *ultra vires* use of overwhelming force to ensure victory for the opposition, the country descended into a state of anarchy with bloody confrontations between a myriad of political factions and tribes. Libya has still not recovered from this terrible civil war.

Libya's chaotic situation has emboldened many politicians and observers, especially in the West, to label the country a "failed state." This paradigm is inextricably linked to imperial assaults on Asian and African states in this century and to often legally dubious interventions by hegemonic states, first and foremost the US and some of its allies such as Britain, on the pretext, in particular, of averting a humanitarian crisis or combating international terrorism. The US-led military occupations of Afghanistan in 2001 and Iraq in 2003 were largely the reason for the collapse of state institutions, lack of security and the onset of civil war in both countries. Both Afghanistan and Iraq have every so often been labeled as "failed states," especially by Western actors. The group of "failed states" also included Somalia, Haiti, Sudan, Burundi, the Democratic Republic of Congo, Chad, and the Central African Republic. The designation has often been used to discredit states (always from the South) and deny them the benefits of sovereignty by subjecting them to a mix of economic sanctions, military interventions and aggressive "peacekeeping operations," justified as a response to alleged grave human rights violations. This predicament is incisively noted by Neyire Akpinarlı:

"The 'failed state' paradigm clearly shows how terms used to describe states with ineffective governments originate and how they are transferred from international policy to international law. 'Failed state', 'rogue state', and 'the war on terror' have been used so often that we take them for granted without questioning their pejorative meanings or their fragility vis à vis states' right to honour and equal sovereignty in international law."²⁵

²⁴ UN SC resolution 1973, 17 March 2011, <https://documents.un.org/doc/undoc/gen/n11/268/39/pdf/n1126839.pdf>.

²⁵ Neyire Akpinarlı, *The Fragility of the "Failed State" Paradigm* (Leiden and Boston, Martinus Nijhoff Publishers, 2010), p. 230.

The arguments presented above do not suggest that gross human rights violations should remain matters solely within the domestic jurisdiction of sovereign states. Breaches that devalue and offend human life ought to be of concern to the entire international society. The objections raised here arise out of two major drawbacks that often turn international interventions into instruments of Western imperial hegemony, military aggression or neo-colonial domination. First, the UN Security Council, under the control of the P5, has virtually become a Leviathan with almost no legal or political restraints on its power. Second, the power constellation in the existing international order (if we leave China aside) is defined by an apparent asymmetry between the North and the South due to the former's global supremacy within the capitalist world economy and international institutions. The "new" conceptions of sovereignty are premised on a more "flexible" approach in the areas of human rights, international criminal law, international arbitration, and possibly the law of disarmament. In the European Union (EU), the concept of "pooled sovereignty," incorporated into Community law, has impacted small and big states in the same way as each of them has transferred part of its sovereignty to the organs of the EU. For many states in the South, the piercing of the veil of sovereignty in a globalized world has only served to reinforce their subjugation and the exposure of their territory to predatory interventions.

The Predominance of the P5 in the Field of Nuclear Weapons

The UN Security Council has so far failed to lead the way towards nuclear disarmament. On the contrary, each of the P5 possesses a large stock of nuclear weapons and continues to keep and develop them. Under the terms of the 1968 Treaty on the Non-Proliferation of Nuclear Weapons,²⁶ states already in possession of nuclear arms are under the legal obligation not to share their nuclear technology with non-nuclear states if the latter seek to obtain or produce nuclear weapons. According to Article 6 of the treaty, states with nuclear weapons (which include the P5) undertake:

²⁶ 190 states are parties to the treaty.

“to pursue negotiations in good faith on effective measures relating to cessation of the nuclear arms race at an early date and to nuclear disarmament, and on a treaty on general and complete disarmament under strict and effective international control.”

Apparently, in spite of their pledge to end the nuclear race and abolish nuclear weapons altogether, the P5 have chosen to use their nuclear superiority as deterrent against potential rivals and an asset in their pursuit of imperialistic goals and military aggression. This also explains why none of the P5 has shown any interest in the Treaty on the Prohibition of Nuclear Weapons, which was signed in 2017 and entered into force in 2021.²⁷ Obviously, the P5 intend to maintain their superiority and monopoly of violence, *inter alia*, by virtue of keeping their nuclear weapons intact.

The Security Council’s Intrusion into the Competences of the UN General Assembly after the Cold War

New developments have further tarnished the image and affected the reliability of the Security Council. A case in point is the Council’s use of its privileged position to intrude into the competences of the General Assembly and specialized agencies of the UN.²⁸ After the Cold War, the Council, by adopting resolutions as if they were treaties, both in form and in substance, began to arrogate responsibilities of the General Assembly especially in two key areas, namely: international terrorism and proliferation of weapons of mass destruction. Although resolutions of the Council need to address a specific crisis and thus must be worded in such a way as to oblige only the parties to a dispute, the Council’s decisions in the two areas, while prompted by a particular crisis, obligated all states and imposed on them duties and responsibilities which are normally defined by international treaties.²⁹ Accordingly, the Council prejudiced the

²⁷ Date of signature: 7 July 2017. There are 93 signatory states, 70 of which are parties to the treaty.

²⁸ Sinha, *op. cit.*, p. 272.

²⁹ The following two resolutions come to mind: *On international terrorism*: resolution 1373, 28 September 2001, <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N01/557/43/PDF/N0155743.pdf?OpenElement>; *on averting the spread of nuclear, chemical and biological weapons*: resolution 1540, 28 April 2004, <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N04/328/43/PDF/N0432843.pdf?OpenElement>.

role of the General Assembly in its pursuit of the advancement of international law in these and other areas. The Council's approach is all the more striking given the equal voting rights in the General Assembly (in conformity with the principle of sovereign equality of all states).

Since the early 1990s, the Security Council has been giving the impression that it is not bound by considerations of international law. It conceives itself as an autonomous actor who defines the limits of its competences, far beyond its powers under Chapter VII of the Charter. Self-righteousness even led the Council to order a state to revoke its decision to withdraw from an international treaty, although such a step is purely a matter within the sovereign domain of each state.³⁰

Other Privileges of the P5

The P5 have also been granted privileges with regard to the functioning of the International Criminal Court (ICC). Under the Statute of the ICC,³¹ the Security Council possesses two competences both of which are an affront to the sovereign equality of states. Under Article 13(b), "the Court may exercise its jurisdiction," *inter alia*, if "[a] situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations." On the other hand, Article 16 of the Statute confers on the Council the right to defer a case pending before the Court:

"No investigation or prosecution may be commenced or proceeded with under this Statute for a period of 12 months after the Security Council, in a resolution adopted under Chapter VII of the Charter of the United Nations, has requested the Court to that effect; that request may be renewed by the Council under the same conditions."

The empowerment of the Security Council in regard to the jurisdiction of the International Criminal Court has meant new P5 privileges

³⁰ Berdal Aral, "Rule of Law and the Effective Decisions of the UN Security Council after the Cold War," Hans Köchler and Joël Christoph (eds.), *Responsibility in International Relations* (International Progress Organization, 2024), 75-110, pp. 88-89.

³¹ Rome Statute of the International Criminal Court, 17 July 1998.

on account of their permanent membership and veto right. The consequences are far-reaching. On the one hand, the P5 can brusquely interfere with the business of the Court. On the other hand, the Council will never be able to refer a situation to the Court when serious crimes are alleged to be committed by nationals of a P5 state, simply because the state in question would exercise its veto. The insertion of the two articles into the Statute makes a mockery of the law of treaties. Thus, the threshold for the breach of the principle of the sovereign equality of states has been crossed also in the area of jurisdiction of the ICC.

The above-described developments confirm the point made by Koskeniemi & Kari about the gradual increase in the number of exceptions to the sovereign equality of states under the umbrella of the United Nations:

“In the United Nations there are sovereigns and then there are Sovereigns. Insofar as sovereign equality of States was inserted into the Charter as the general and principal rule, then it meant that the exceptions and conditions to that main rule became increasingly visible and formal.”³²

Intrusions into the Sovereign Equality of States Resulting from the Predatory International Order

The erosion of the principle of sovereign equality of states is also the result of mechanisms and processes within the system of global governance. In addition to some states being “more equal than others” in the UN, and the partial empowerment of the Security Council in respect of the judicial authority of the ICC, these processes include the modus operandi of international financial institutions such as the World Bank and the IMF (both being specialized agencies of the UN) whose policies are mainly decided by a minority of states with high voting shares within a weighted voting system.³³

³² Martti Koskeniemi & Ville Kari, “Sovereign equality,” Jorge E. Viñuales (ed.), *The UN Friendly Relations Declaration at 50: An Assessment of the Fundamental Principles of International Law* (Cambridge University Press, 2020), 166-188, p. 175.

³³ *Op. cit.*, p. 186.

Indeed, the realities of international society, both during the Cold War and today, have been far from fair and just. They are indicative of the inequality of states. The scene described by Evans in reference to the early 1980s is, regrettably, *a fortiori* valid today:

“The institutions of international society, balance of power, alliances, international law and diplomatic practice, while recognizing the sovereign equality of states nevertheless served to encourage and sustain a hierarchical order which allowed ‘equality’ only between powers which were evenly matched. The history of international relations has unfolded largely in these terms and whatever collective procedures for settling disputes existed, they did so because of inequality rather than in spite of it.”³⁴

The words of E. H. Carr, uttered just before the outbreak of the Second World War, could likewise be transposed into today’s complex and predatory system of global governance in which power inequalities are both multi-layered and ever more hidden: “The constant intrusion, or potential intrusion, of power renders meaningless any conception of equality between members of the international community.”³⁵

Conclusion

In spite of the recognition of the sovereign equality of states as a cardinal principle of the “new” international law in the UN Charter, that very text completely negates the principle by privileging five states with permanent membership in the Security Council and with the right of veto. Thus, contrary to expectations, both in the course of the Cold War and since the 1990s, the Charter’s system of collective security has proven to be dysfunctional. It established rules and procedures, which endow the P5 and their “friends” with impunity in cases when they commit acts of aggression.

³⁴ Graham Evans, “All States Are Equal, but ...,” *Review of International Studies*, Vol. 7, No. 1, 1981, 59-66, p. 59.

³⁵ E. H. Carr, *The Twenty Years Crisis, 1919-1939* (London, 1939), p. 166.

In addition to the imbalanced composition of the Security Council and the unfair decision-making procedures, “human rights imperialism” has been another major factor behind the erosion of state sovereignty especially in Asia and Africa. This is indicative of the low regard of major Western powers for the sovereign equality of states. It has been truly appalling to witness the prosecution of a long list of African leaders by the ICC for war crimes and crimes against humanity, whereas no such cases have ever been brought against the ruling elites and army chiefs of Western states although the US, UK and some of their allies have been among the chief perpetrators of such crimes. These countries also waged wars of aggression amounting to “crimes against peace” against hapless states such as Afghanistan (2001) and Iraq (2003). Also, alongside European states including Germany, France and Italy, they have been aiding and abetting Israel’s genocidal assault on Gaza (since 2023).

The Council’s selective use of its powers in situations where it establishes a link between international peace and human rights demonstrates a bias against the non-Western world. This has further undermined the sovereignty of an increasing number of economically weak and less powerful states. Unavoidably, the lack of consistency and integrity has also brought about an irreversible erosion of the credibility and prestige of the Security Council, in particular in the eyes of the “have-nots” of the world.

This is not, however, to suggest that we ought to sanctify the sovereign equality of states at all times and in every conceivable situation. Power imbalances between states may require the granting of special rights for the underdogs of the international order, as noted by Koskenniemi:

“Neither equality nor sovereign equality exclude different treatment as such. On the contrary, equality does not only mean treating those that are similar in some respect in a similar way, but also treating differently those whose situation is *de facto* different.”³⁶

It also can be argued that a small state threatened by a greedy and larger neighbour should be given security guarantees through a treaty

³⁶ Koskenniemi & Kari, *op. cit.*, p. 186.

signed by a number of powerful states with a stake in the peace and security of the small state.

The logic of permanent membership and the veto rule reflects the desire of the founders of the UN to prevent major armed conflict of the type that the world witnessed during the First and Second World War. This explains why many Western observers believe that the avoidance of a third global cataclysm in the period of the Cold War proves that the UN system of security was relatively successful.

The hubris and egocentrism of great powers has been a major reason why the principle of sovereign equality of states did not bring any noticeable benefits to the states of the Global South. In comparison to the previous “universal” organization, the League of Nations, today’s international system represents a step backwards. In the League of Nations, all members, whether powerful or weak, Western or non-Western, possessed the right of veto. Decision-making in the Assembly and the Council of the League was based on unanimity.

Ironically, one might say that after the end of the Cold War the principle of sovereign equality of states has been useful in facilitating – and, at the same time, hiding – the complex mechanisms through which neo-colonial domination and imperialist aggression have continued to victimize many states especially in Asia and Africa. These abuses have been taking place in a world and in an age where, so it is claimed, international law has become universal as never before in history.

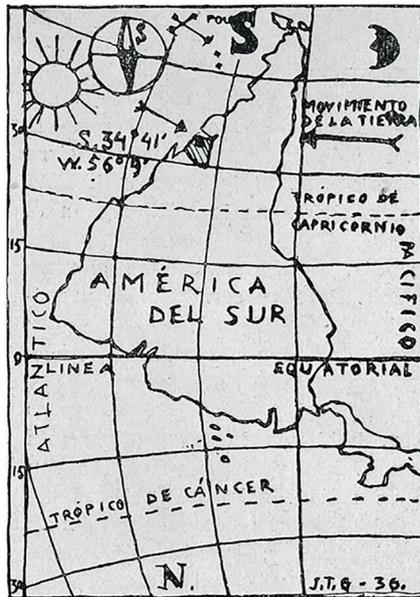
Beatriz Bissio

The Concept of Sovereignty and the Experience of the South

In theory, the modern international system consists of sovereign states with exclusive authority within their geographical borders. This is not, however, the experience of most of the South, the Third World, as it was called in the 1960s and 1970s.

With few exceptions, the violations of the sovereignty of an independent state since the second half of the twentieth century have occurred in the countries of the South. Interventions, whether by individual former colonial powers or military alliances of several powers, are usually directly related to a sovereign decision by the attacked country on how to use its natural resources. Not infrequently, foreign intervention is dressed in a humanitarian cloak. This unavoidably leads one to the conclusion that the principle of equality between UN member states has never been respected by the most powerful.

Thus, historical experience obliges us to broaden the concept of sovereignty to include, more explicitly, the right of a state to dispose of its own natural resources in order to promote its development.



Joaquín Torres García (Uruguay), *América Invertida*, 1936, ink on paper
 Image © Museo Torres García, Montevideo

The Uruguayan artist Joaquín Torres García created the (now) famous painting "America Inverted" in 1936¹ and captioned it with the following phrase: "Our compass is the South." It was the expression of an interpretation that was beginning to germinate, and matured over the following decades, about the need to redefine and change the asymmetrical relations between the countries of the North, enriched and developed to a large extent at the expense of colonial exploitation, and the countries of the South, impoverished and underdeveloped as a result of that exploitation. Addressing the needs of the South should be the priority.

Torres García was a pioneer in a long process of re-signifying the South (formerly known as the Third World), which expressed the "awareness of people of colour of their eminent dignity, declaring the death

¹ Redesigned and widely distributed in 1943.

of the inferiority complex," to quote Léopold Senghor's beautiful definition. The Senegalese statesman, a driving force behind "blackness" (*négritude*), made this statement when referring to the legacy of the Afro-Asian Conference held in 1955 in the city of Bandung, Indonesia.

The geopolitical change reflected in the Bandung Conference – which brought together the leaders responsible for the fate of one billion 350 million human beings, almost three quarters of humanity at the time – was not the product of chance. The final declaration, approved unanimously, formulated a vision of the world and defined demands that were the fruit of the experience accumulated over decades of resistance to foreign domination. The document was drafted by representatives of peoples with, in many cases, millennia of history and who were heirs to some of the oldest civilizations from which even the colonial powers themselves had benefited in terms of knowledge and technology.

One of the spaces in which Third World leaders had the opportunity to dialogue and exchange experiences was at the United Nations, the institution to which the newly independent nations were becoming integrated. In theory, the United Nations formed a system made up of sovereign states on an equal footing whose authority was to be respected within the recognized borders. But the experience of the countries of the South was not consistent with this postulate. That's why one of the Ten Points of the Bandung Declaration demanded respect for the sovereignty and territorial integrity of all nations, and others called for non-intervention and for the rejection of all collective defense agreements because they were "designed to serve the interests of the great powers."

The Movement of Non-Aligned Countries was founded in Belgrade in 1961 with the Bandung postulates in mind. Over the course of successive meetings, the experience of living on the world stage as independent and supposedly sovereign countries made them – as representatives of the Third World – aware that sovereignty will not be complete until they can take full control of their economy – which meant severing the ties of dependence on the economies of the former metropolises – and until they could reach local, regional and global public opinion by presenting their interpretation of history and their vision for the future, in a communication system with a democratic and balanced flow of information.

It also became clear that the UN Charter, signed in June 1945 and ratified on 24 October of that year (now known as United Nations Day) by the 50 countries that existed at the time, no longer reflected the new configuration of the world. As a result, the organization lacked instruments to respond to increasingly conflictual situations, gradually losing its efficiency and credibility. Today, the UN is made up of 193 full members, plus observers, a consequence of the decolonization process that changed the world map and the organization's political, cultural and religious profile. The UN Charter, drafted by the victorious powers of the Second World War – who introduced the veto power in the Security Council to protect themselves in future conflicts, even in cases where their own actions are under debate – has been undermined in its essence and purposes. The UN is no longer an institution of equally sovereign states, nor is it in a position to ensure peace. The privilege of the power of veto over the years has been tantamount to total impunity for those states that cannot be subjected to international law and that extend this privilege to their allies (vassals?).

The countries of the South have undoubtedly suffered the most from the power of veto. Of all the violations of sovereignty that have taken place over the last decades, only a few have not been directed against countries of the South, whether in Latin America, Africa or Asia. Thus, it has been shown in practice that the concept of sovereignty implies being able to exercise this right not only at the political level, but also in the economy, in culture, and especially in the military sphere.

One of the first experiences of disrespect for the Charter and the principle of national sovereignty in the Third World was the coup against Jacobo Árbenz in Guatemala in 1954. While promoting a series of reforms, including in agriculture, the Guatemalan government expropriated properties belonging to the United Fruit Company – a US multinational with a huge influence on the country's economy, not only in agricultural production, but also in communication and other sectors. Disgruntled, the multinational took advantage of its links with the US government to demand retaliatory measures, which came in the form of an invasion orchestrated from Washington with the alibi that the Guatemalan government was "at the service of communism." Two decades of bloody military dictatorship followed.

In Africa, we have the case of the invasion of Egypt prompted by Nasser's nationalization of the Suez Canal Company on 26 July 1956. The Egyptian president's sovereign decision led to Israeli, French and British troops entering Egypt. The crisis would end with the humiliating withdrawal of the invaders, but it was another warning of the reaction that could come in the face of policies of the Third World aimed at defending sovereignty.

Many other interventions in violation of sovereignty had already taken place or would take place. In the case of Western Asia, we have the example of Iran, where a CIA-backed coup was launched in 1953 against Prime Minister Muhammad Mossadegh. He had tried to nationalize the Anglo-Iranian Oil Company. There are other examples. Among the best known for the bloodshed caused were those in Indonesia, which cost a million dead in 1965, and Chile in 1973, where there are no reliable figures for the dead or missing. The coup that ended the government of Sukarno, the great host of the Bandung Conference, was triggered by the president's decision to create PERTAMINA to break the monopoly exercised by the West in the area of oil through Royal Dutch Shell. Shortly afterwards, the decision to nationalize all oil production was the straw that broke the camel's back: again under the pretext of containing communism, a coup d'état was staged by General Suharto, supported by the United States.

In Chile, a coup was orchestrated against President Salvador Allende who had won the 1970 election and was implementing a program, approved by Popular Unity, the coalition that had elected him, to expropriate the copper mines and other strategic segments of the economy, and to nationalize the banks. Backed by the Pentagon and the CIA, General Augusto Pinochet took power in 1973 and established a dictatorship that was among the most repressive in Latin American history.

Thus, the principle of equality among the members of the United Nations was never real and the declaration of respect for the sovereignty of countries was not intended by the drafters of the UN Charter (i.e. the great powers) to be taken seriously if the pursuit of sovereignty went against their interests.

What is the reason for the asymmetry between countries, and especially between North and South? Is there a way to overcome it? The issue

was widely debated in Latin America, in the Non-Aligned Movement, in ECLAC, in other forums, and even within the General Assembly and the specialized agencies of the United Nations. In view of historical experience, the need to change the rules of the world economy became clear, so that the countries of the South could carry out their agenda of transformation, with decent budgets supported by foreign trade revenues and their natural wealth. These postulates and the measures needed to implement them were contained in the NAM document which called for a "New International Economic Order," defining paths and proposals to be implemented together with the global community.²

The diagnosis of the need and ways to promote development was not limited to calling for changes in the economy. It was complemented by an assessment of the need for the Third World to make its voice heard on a global scale through a New International Information and Communication Order.³ The idea was that the public in the North and the South should have access to information on local, regional and global issues not only from the perspective of developed countries, but also from the historical record and experience of developing countries. The demands reached the UN and were the subject of analysis and debates in the General Assembly and, in the case of the New Information Order, also at UNESCO, which appointed a special commission chaired by Seán MacBride to analyze the issue and propose solutions. However, the drastic reaction of the United States and Washington's allies such as the United Kingdom frustrated any possibility of progress in both the economic and communications fields. In hindsight, we can say that if the clamor for change had been heard the United Nations would be in a better position to deal with the new international reality, and the world would have been able to avoid the tensions of the last few decades.

After the disintegration of the Soviet Union, when the United States became the hegemonic power, the Pentagon and the White House made it increasingly clear that they intended to put the world's natural and

² Cf. Hans Köchler (ed.), *The New International Economic Order: Philosophical and Socio-cultural Implications*. Studies in International Relations, Vol. III. Guildford (England): Guildford Educational Press, 1980.

³ Cf. Hans Köchler (ed.), *The New International Information and Communication Order: Basis for Cultural Dialogue and Peaceful Coexistence among Nations*. Studies in International Relations, Vol. X. Vienna: Braumüller, 1985.

strategic resources at the service of their own interests, at whatever cost. Several official documents, particularly from the years of the Obama administration onwards, are very explicit in this regard. The following is an example taken from the document “Great Power Competition: Implications for Defence – Issues for Congress, Updated August 28, 2024,” published by the US Congressional Research Service:⁴

“From a U.S. perspective on grand strategy and geopolitics, it can be noted that most of the world's people, resources, and economic activity are located not in the Western Hemisphere, but in the other hemisphere, particularly Eurasia. In response to this basic feature of world geography, U.S. policymakers for the last several decades have chosen to pursue, as a key element of U.S. national strategy, a goal of preventing the emergence of regional hegemons in Eurasia. Although U.S. policymakers do not often state explicitly in public the goal of preventing the emergence of regional hegemons in Eurasia, U.S. military operations in recent decades – both wartime operations and day-to-day operations – appear to have been carried out in no small part in support of this goal.”

The position of the United States is clear. If we pay attention to international news, we will quickly understand that when claiming “implications for the Defence” Washington does not care about the consequences of its actions. The aforementioned document, which refers to Eurasia but also reflects the stance towards the rest of the world, shows that US strategists, aiming to control the natural wealth and economic dynamics in other regions, recognize no limits to their actions, to the detriment of the sovereignty of other states.

As a result, the countries of the South are looking with interest at the BRICS project, for example. Faced with a lack of respect for their sovereignty and international law in institutions dominated by Western powers, they see in BRICS an interesting alternative, aimed at democratizing the structure and functioning of the United Nations.

⁴ <https://crsreports.congress.gov>.

Deepak Mawar

Liberalism Challenged: The UN Security Council and Power Politics in a Populist Era

1. Introduction

The vulnerabilities of the UN Security Council have been a topic that has received much attention throughout the almost eighty-year history of the United Nations. The executive organ's tendency to sway with the political machinations of the international political landscape has often led to disenchantment. A person emblematic of such experiences is Filipino diplomat Carlos Romulo who was a leading figure in the first several decades of the United Nations. Not only did he take on the role of president of the General Assembly in the period 1949-1950, but he was also an integral voice of the Third World, ensuring that the interests of this community were included in the Charter.¹ He criticized the composition of the Security Council, asserting that the UN Charter required revision in order to limit the veto power of the five permanent members of the UN Security Council. Romulo was deeply disappointed with the "condition of permanent paralysis"² that was a result of the veto, especially during the Cold War era.

¹ See Lisandro E. Claudio, "The Anti-Communist Third World: Carlos Romulo and the Other Bandung," April 2015, 4.1 *Southeast Asian Studies* 125, 136: "in discussions about the wording of the UN Charter, for instance, the Big Powers wanted the Charter to state that non-self-governing nations should aspire only toward self-governance. Romulo led the delegates who wanted to insert the word 'independence.' Big powers such as UK, France, and USSR opposed Romulo and his allies, while the United States abstained from the vote. The Philippine proposal eventually won."

² "Carlos Romulo of Philippines, Founder of the UN Dies at 86," December 15 1985, <https://www.nytimes.com/1985/12/15/us/carlos-romulo-of-philippines-a-founder-of-un-dies-at-86.html?auth=login-google1tap&login=google1tap>.

Romulo's critique is still relevant in the 21st century. The power politics of the permanent members continues to hamper the Council's ability to maintain international peace and security. Thus, it has been a long-standing position amongst international lawyers, government figures and those passionate about ensuring international peace and security that reform of the Security Council is urgently required.

Calls for reform continued to grow in the face of recent political developments. Right-wing populist movements have become stronger in many parts of the world, with a particular rise in the West. The recent US election results set the stage for a more aggressive form of Trumpian politics, and parties across Europe such as France's National Rally, the Alternative for Germany (AfD) and the Austrian Freedom Party (FPÖ), campaigning on the pledge to restore national sovereignty and implement policies that consistently prioritize natives over immigrants, have grown in popularity this year. Even a country such as Portugal, often cited for its center-ground politics, has seen a dramatic surge in far-right populism, as *Chega* (a party only founded in 2019) won the second largest number of votes. Right-wing parties which challenge liberal values have also consolidated their dominance in other parts of the world. The reelection of Nayib Bukele in El Salvador with a large majority and the victory of Prubawo Subianto in Indonesia are evidence of this trend.

These developments demonstrate that the international political landscape in which the UN Security Council operates is changing. A strand of politics is consolidating itself at various domestic and regional levels that could prove to be contentious to the liberal values embedded in the United Nations. As Mohamed Metawe notes, "with the increasing yielding of power to supranational institutions, the hitting global economic crises, and the unceasing influx of immigrants and refugees from the developing to the developed world, far-right politics is becoming more and more popular."³ It is essential to study the Security Council in the midst of these political shifts so as to understand what the future holds for global governance. The United Nations was formed in an era espousing communal values and togetherness. How will it endure in an era of insular and anti-institutionalist politics?

³ Mohamed Metawe, "Populism and domestic/international politics: theory and practice" (2020) *9 Review of Economics and Political Science* 194, 195.

I seek to understand why the right-wing populist challenge to the liberal values of the United Nations makes reform of the Security Council even more urgent. In the face of the populist challenge to the liberal international order, I use van den Herik's argument that urges less powerful states to develop mechanisms to effectively regulate the Security Council.⁴ The dynamics of power and law needs to shift in favor of the rule of law and institutional procedures. With the increasing challenge to the liberal international order, it is imperative to demonstrate how the Security Council can be protected from populist influences. Thus, in the following chapter we will focus on the (institutionalist) antidote to power politics in the UN Security Council. In section 3, I intend to demonstrate how modern right-wing populist movements affect global governance and the Security Council. Finally, in section 4, I illustrate how the reinforcement of institutionalist structures counters the negative impact of modern right-wing populist movements on the Security Council.

2. Institutional approaches to the Security Council

The Security Council is the executive organ of the United Nations mandated to deal with threats to international peace and security. To fulfil this role, the Council is granted the power to determine any threat to the peace and decide on the necessary measures to restore international peace and security.⁵ Furthermore, the Charter asserts that the members of the United Nations “shall join in affording mutual assistance in carrying out the measures decided upon by the Security Council.”⁶ This means that the Council possesses a “degree of centralized military and political authority [that] is unprecedented in international politics.”⁷ The Security Council is the first of its ilk. It is a political-legal structure that has the backing of the international community to collectively define and devise strategies, military or otherwise, to maintain international peace and security, whilst having the ability to legally bind both the powerful and the rest.

⁴ Congyan Cai, Larissa van den Herik, Tiyanjana Maluwa, *The UN Security Council and the Maintenance of Peace in a Changing World* (Cambridge University Press 2024).

⁵ UN Charter, Art. 39.

⁶ Art. 49.

⁷ Ian Hurd, “The UN Security Council and the International Rule of Law” (2014) Vol 7.3 *The Chinese Journal of International Politics*, 361–379, 362.

Whether or not the Security Council actually exercises such power and authority is perhaps a superfluous consideration.⁸ The Council is vulnerable to the fluctuations of the international political landscape, especially when the vested interests of the five permanent members (P5) are at stake. A plethora of scholars, in both the disciplines of international law and international relations, have studied the legal limits to the powers of the Security Council and the means to ensure that it is held accountable for its decisions. As van den Herik suggests, “the institutionalist perspective is premised on the idea that, even in the setting of intense power politics in which the Security Council operates, the Council is not entirely unbounded; rather, it is governed by its own institutional and procedural framework.”⁹

Ian Hurd surveys this facet of the Security Council:

“The relation between the Security Council and international law is complex. The Council is clearly a product of international law, but it is also the author of, and interpreter of, law, and in different moments it alternates between sitting inside and outside of the law.”¹⁰

Hurd demonstrates this assertion by highlighting that the Charter does give the Security Council the ability “to decide when an international threat to the peace, breach of the peace, or act of aggression exists and when it does how to respond.” The Council’s responses may range from non-military measures, economic sanctions (Article 41) to military actions (Article 42).

The Charter also establishes some legal limits to the authority of the Security Council, most notably in Article 2(7), which stresses that

⁸ In reality, the power of the Security Council is very much restricted by its member states. Although the Council possesses various means to maintain international peace and security, these instruments can only be used if the member states are committed to its work. See, Deepak Mawar, *States Undermining International Law: The League of Nations, United Nations, and Failed Utopianism* (Palgrave 2021), 181-226.

⁹ Larissa van den Herik, “The UN Security Council: A Reflection on Institutional Strength,” in Congyan Cai, Larissa van den Herik, Tiyanjana Maluwa (eds.), *The UN Security Council and the Maintenance of Peace in a Changing World* (Max Planck Triangles, Cambridge University Press 2024), 112.

¹⁰ Hurd, *supra* note 7, 363.

“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.” The primary legal constraints can be identified in Articles 1 and 2 of the Charter which delineate the Purposes and Principles of the United Nations. Although they are wide in scope, they nevertheless impose a certain standard that all organs of the United Nations must comply with. Furthermore, Erika De Wet emphasizes that “the principle of good faith is relevant to the UN Security Council because it binds states both when acting individually and as an organ of the United Nations.”¹¹ More substantively, Article 24(2) of the Charter asserts, “in discharging these duties the Security Council shall act in accordance with Principles and Purposes of the United Nations.” Anne Peters also highlights how Article 24(3) establishes the idea that the Security Council “is a trustee (or fiduciary) of the membership (or of the ‘international community’), institutionalized in the GA, which must render its ‘accounts’ to the trust-givers,”¹² as the Security Council – in addition to regular annual reports – is obligated to submit “special reports” to the General Assembly when necessary. Although what is a “necessary” case for reporting has remained unclear, Article 24(3) opens the opportunity for checks and balances in the UN framework. It further strengthens the argument that the Security Council is not unbound by law. The Charter indeed sets legal limits on the authority of the Council and establishes processes for greater accountability and transparency of its actions.

The claim that the Security Council must comply with international law, primarily *jus cogens*, finds considerable support amongst international lawyers. The International Law Commission’s (ILC) work on *jus cogens* has been an important step in outlining the limits these norms impose upon the Security Council. The Council is mentioned in conclusion 16 of the ILC’s *Third Report on Peremptory Norms of General International Law*, which deals with conflicts between acts of international organizations and *jus cogens*. Dire Tladi, as Special Rapporteur to the ILC,

¹¹ Van den Herik *supra* note 10, 115. For the source, see Erika de Wet, *The Chapter VII Powers of the United Nations Security Council* (Bloomsbury Publishing, 2004) 178-216.

¹² Anne Peters, “Article 24” in Bruno Simma, Daniel-Erasmus Khan, Georg Nolte, and Andreas Paulus (eds.), *The Charter of the United Nations: A Commentary* (Oxford: Oxford University Press, 4th ed. 2024), 1047.

confirmed in the report that Security Council decisions cannot conflict with peremptory norms.¹³ Conclusion 16 got substantial support from a number of states such as Austria, Belgium, Brazil, Cyprus, Slovenia, South Africa, Spain, Switzerland, and Togo. Though there was contestation by the P5 as well as Israel, on the basis that this position would jeopardize the work of the Security Council and undermine the system of collective security more broadly, conclusion 16 was adopted by consensus. Thus, there is “some shared understanding among all states – even if on occasion reluctant understanding ... about the existence of limits to the Security Council beyond the Charter.”¹⁴

These points of analysis demonstrate Anne Peters’ argument that “the fact that the UN Security Council is a political organ does not render it an extra-legal entity as such.”¹⁵ The Council, although an organ with a substantial degree of power and authority in international law, is nonetheless regulated by international law. This institutional approach provides less powerful states the legal tools to challenge the political dominance of the P5 and to counter the pervasive impact of realist politics on the Security Council’s mandate to maintain international peace and security. As Article 24(1) outlines, the Council has been entrusted this primary responsibility by the United Nations member states. Failure to carry out such responsibility in good faith can and must lead to questions of accountability.

The Security Council in an era of burgeoning right-wing populist movements

Van den Herik in particular has made the claim that the institutionalist structures of the Security Council need to be bolstered. In the face of states’ tendencies to ignore the Security Council’s primary responsibility for the sake of their own political interests, there would be merit in reverting to a Kelsenian approach to the supreme executive organ of the UN. This is all the more important in the wake of the changing political landscape amidst the rise of right-wing populism in the 2020s.

¹³ Dire Tladi, *Third Report on Peremptory Norms of General International Law (Jus Cogens)*, UN Doc. A/CN.4/714 (12 February 2018) 67.

¹⁴ Van den Herik, *supra* note 10, 117. See also, *Report of the International Law Commission on the Work of its 73rd Session*, UN Doc. A/77/415, 18 November 2022; GA Res. 77/103 of 19 December 2022, UN Doc. A/RES/77/103.

¹⁵ *Op. cit.*, 113. See also, Anne Peters, “Article 25,” *loc. cit.*

Thus, in order to be able to identify specific measures to strengthen the institutional framework of the Security Council under these conditions, it is necessary to study the emergence of modern right-wing populism and its impact on international politics.

Although populism has somewhat become a buzzword in the late 2010s and 2020s, the origins of the concept can be traced back to the late nineteenth century. Furthermore, although discussions of right-wing politics dominate our understanding of populism, the phenomenon can occur in any segment of the political spectrum, and it can often also be found in left-wing movements. For example, Rooduijn and Akkerman assert that left-wing parties such as *Die Linke* in Germany, the Scottish Socialist Party (SSP) and the *Socialistische Partij* (SP) in the Netherlands can also be considered populist movements.¹⁶ Thus, it is important to comprehensively define populism in the 21st century to better grasp how such a movement has impacted or could impact global governance. The term is often used in a pejorative sense. However, if we trace back the origins of the populist movement, it becomes clear that this form of politics has been focused on mobilizing anti-establishment sentiments with a view to addressing the needs and desires of the wider public. Indeed, the first populist movement emerged in 1892 with the United States People's Party, which advocated "for unemployment benefits, women's suffrage and the direct election of senators, strengthening the belief that Senate should be accountable to the people."¹⁷ Although the party's influence weakened over time, populism in and of itself remained culturally significant as "many citizens understand that populists, as representatives of the 'forgotten people', fulfil the task of a corrective."¹⁸ Historians often cited populism as a noble cause for, in their view, the intention of populist movements, giving marginalized groups a platform to be heard, was to loosen the stranglehold that political elites have maintained on political discourse. Essentially, "populist movements force governments or traditional political parties to reflect on themselves and their positions."¹⁹ Cas Mudde and Cristóbal Kaltwasser add to this sentiment by suggesting that populist movements "raise their voices to criticize multilateral organizations limiting the power

¹⁶ Matthijs Rooduijn and Tjitske Akkerman, "Flank attacks" (2015) 23 *Party Politics* 193.

¹⁷ Michael Oswald, *The Palgrave Handbook of Populism* (Palgrave 2022), 11.

¹⁸ *Ibid.*

¹⁹ *Op. cit.*, 12.

of elected politicians.”²⁰ Focusing on the will of the people, populism aims to push back against the power of non-elected and non-responsive technocratic institutions. In a sense, populist movements can also be considered as forms of direct democracy, with the populace pressuring mainstream political parties to reconsider various agendas. For the likes of Jean Comroff, populist movements are an important and necessary part of political discourse:

“It is important to acknowledge that a certain populist radicalism – an opposition to the dictatorship and doxa of elites, whether they be the *ancien régime*, tsarist autocracy, the capitalist classes, colonial rulers, the established church, or intellectual vanguards – is a necessary, if not a sufficient condition for mass movements in all times and places. Such populist mobilization forces a clear line between ‘the people’ and those who oppose their interests; it shatters the thrall of regnant ideologies and endorses popular experience as a basis for valid knowledge, desire, and intention. It can also serve to debunk pious cant and sophistry, and to unmask self-serving ideologies and illegitimate representations.”²¹

However, such movements inherently carry with them a dimension of belligerence as the anti-establishment aspect of populist movements often leads to a more aggressive form of political discourse. Huber and Schimpf claim that “populist actors revitalise social movements as well as public opinion by emphasising a conflictive dimension of politics.”²² Populism can lead to a more combative and polarizing form of politics due to the inherent “us vs. them” nature of discourse. These movements often have the tendency of “othering” diverging opinions. As linguist Silverstein states, populism “is almost always used in opposition to what is defined, by contrast, as ‘elite,’ ‘exclusive,’ or ‘establishment,’ its deployment being more about marking difference than denoting content, and its meaning being largely relative to the standpoint from

²⁰ Cas Mudde and Cristóbal Rovira Kaltwasser, *Populism: A Very Short Introduction* (Oxford University Press 2017) 117.

²¹ Jean Comroff, "Populism and Late Liberalism" (2011) 637 *The ANNALS of the American Academy of Political and Social Science* 99, 104

²² Robert A. Huber and Christian H. Schimpf, "Friend or Foe? Testing the Influence of Populism on Democratic Quality in Latin America" (2015) 64 *Political Studies* 872, 874.

which it is deployed.”²³ Subsequently, Comroff criticizes the dualist or binary framing of political discourse which tends to lead to radical reductionism. Populist movements are often averse to nuanced thinking, instead “populism relies on more immediate, emotive dualisms – ‘for’ or ‘against’ the leader, the people, the nation, the revolution.”²⁴ These elements of simplified messaging, the tendency of “othering” diverging voices, and a more aggressive disposition demonstrate why populist movements are significant disruptors to the political status quo and often have a polarizing effect. This leaves little room for a contemplative and nuanced form of politics that acknowledges the necessity of compromise in the face of a wide array of ideological positions. While in certain situations populist movements may serve as a corrective in a democratic polity, they are not sufficient in and of themselves.²⁵ According to Canovan, most populist communication is shaped by a “simple and direct style”²⁶ which often leads to oversimplification of complex political issues and an emotionally charged political discourse that is perhaps not well suited for long-term thinking.

With the rise of today’s right-wing populism, new characteristics of the phenomenon are emerging in mainstream politics. The origin of modern right-wing populism can be traced back to the financial crisis of 2008, which shook the foundations of the neoliberal system. The subsequent decade of stagnant income and fiscal austerity proved to be fertile ground for populist movements to upstage liberal democracies:

“The 2008 economic crisis exposed the cracks within the articulation of liberalism, capitalism and democracy, opening the gates for multiple possible criticisms. (Neo)Liberalism as an economic doctrine, for example, was criticised after 2008 from a democratic socialist perspective as disembedding markets from democratic

²³ Michael Silverstein, “Shifters, Linguistic Categories, and Cultural Description” in Keith H. Basso and Henry A. Selby (eds.), *Meaning in Anthropology* (University of New Mexico Press 1976) 11–56.

²⁴ Comroff, *supra* note 21, 105.

²⁵ *Op. cit.*, 104: “in the postcolony, things are more confusing, and here the cut-and-dry certainties that helped to propel revolutionary change can threaten the more nuanced discriminations needed to establish and maintain democracy-in-action.”

²⁶ Margaret Canovan, “Trust the People! Populism and the Two Faces of Democracy” (1999) 47 *Political Studies* 2-16, 3.

politics, infringing on democratic sovereignty and ultimately leaving atomized precarious individuals at the whim of market mechanisms.”²⁷

Hungary is perhaps the best example of this phenomenon. Many promises were made in the early 2000s by the Péter Medgyessy cabinet regarding “fiscal expansion under the slogan ‘welfare transition’, hinting on the end of the era of hardships and promising a fast catch-up to Western Europe after the EU-accession.”²⁸ However, Medgyessy’s and his successor’s, Ferenc Gyurcsány’s, failures to fulfil the promises led not only to the collapse of the Socialist electorate but to the end of the Hungarian population’s patience with technocratic reform. The crisis of 2008 exacerbated such sentiments even further, and Viktor Orbán was seen as the final hope. He combined the anti-technocratic sentiment with a paternalistic and populist dimension. Whilst he lambasted the Socialist Party for economic mismanagement, corruption and cronyism, *Fidesz* combined a nationalist message with a neoliberal twist. Firstly, they reduced foreign investment “in the need to rebalance the ownership structure of the Hungarian economy in favour of domestic capital, both state and private capital.”²⁹ In parallel to this, the government signed a number of high-profile “strategic co-operation agreements” with the likes of Audi, Coca-Cola, General Electric, Microsoft, Samsung and Suzuki. Moreover, the German car industry is heavily invested in Hungary, which provides jobs to thousands of Hungarians. *Fidesz* consolidated neoliberal economic policies with an anti-globalization position, which Orbán garnered support for through a prioritization of the ethnic-Hungarian people and their cultural identity. A case in point is his attack on the liberal Hungarian-American billionaire philanthropist George Soros. Orbán accused Soros of promoting internationalist, multicultural and open border ideals that pose a “threat to Hungary’s nationhood.” Orbán’s government attacked the Soros-funded Central

²⁷ Julia Rone, “Backsliding of the left: or how Viktor Orbán’s right-wing conservative illiberalism emerged as a normative ideal in Bulgarian political discourse” (2021) 24 *European Politics and Society* 59, 61.

²⁸ András Deák, “Hungarian Dances – The Origins and the Future of Viktor Orbán’s Revolution” (2013) 11 *Lithuanian Annual Strategic Review* 145, 150.

²⁹ Marcin A Piasecki, “Was Viktor Orbán’s Unorthodox Economic Policy the Right Answer to Hungary’s Economic Misfortunes?” (2015) 46 *International Journal of Management and Economics* 41-71, 52.

European University in Budapest, founded in 1991 to train the political elite in Central and Eastern Europe. The attacks came to fruition when, in 2018, the CEU moved the majority of its programs to Vienna.³⁰ As recently as 2022, Orbán's comments sparked outrage across Europe as he professed that he did not want Hungarians to become part of "peoples of mixed race." Certainly, several key features of "traditional" populism can be identified in modern right-wing populism since the anti-establishment sentiment was particularly profitable in whipping up distrust of internationalist ideas and globalization. The "othering" dimension was incorporated adeptly by Orbán and *Fidesz*, brandishing anyone who does not fit the "ethno-Hungarian stereotype" as a threat. Indeed, as stated by Larry Liu, "identification with the nation-state offers a strong emotional appeal among the Hungarian working class in a period where it was lacking stable jobs or trade unions and widespread deindustrialization occurred."³¹

After the 2008 financial crisis had opened the opportunity for criticism of the neoliberal hegemony, right-wing populist movements were able to garner considerable support in the following two decades. There are two key features of this development. Firstly, nativist tendencies have become a pivotal part of modern right-wing populism. At the heart of the movement is belief in "a narrow conception of solidarity on the grounds that only a narrow conception will sustain solidarity in an age of progressive individualization."³² Ideologically as well as practically, this infers that "governments have as their primary duty the promotion and protection of the well-being and welfare of its [sic] own citizens, often defined in ethnic terms."³³ Furthermore, for the likes of David Miller, governments should respect their special obligations to compa-

³⁰ Shaun Walker, "Dark Day for Freedom: Soros-Affiliated University Quits Hungary" *The Guardian* (3 December 2018), <https://www.theguardian.com/world/2018/dec/03/dark-day-freedom-george-soros-affiliated-central-european-university-quits-hungary>.

³¹ Larry Liu, "Re-Embedding and Disembedding in Post-Socialist Hungary: An Analysis of Orbanism from a Polanyian Perspective" (2022) 52 *Forum for Social Economics* 255, 262.

³² Hans-Georg Betz and Michael Oswald, "Emotional Mobilization: The Affective Underpinnings of Right-Wing Populist Party Support," *The Palgrave Handbook of Populism* (2022), 118.

³³ *Ibid.*

trials,³⁴ particularly in regard to employment and social benefits. This strand of politics can be identified in the rise of the Finns Party. Although formed in 1995, this Finnish party eventually rose to prominence after 2007, transitioning from “a rural-populist social justice platform to a right-wing anti-immigration platform”³⁵ with a particularly adept use of the internet and social media in particular. In the run-up to the 2011 election, the Finns Party weaponized the immigration debate to its advantage, staunchly positioning itself as the anti-immigration party. Much of the party’s election campaign focused on how political elites betrayed the native Finnish people, prioritizing instead the needs of refugees. Moreover, the Finns Party portrayed refugees as a threat to the ethno-Finnish demographic, linking them to various forms of organized criminal activity.³⁶ In 2017, the party intensified its anti-immigration and nativist policies. Jussi Halla-aho, the new chairman, ramped up the racist rhetoric with the use of terms such as *maahanmuuttokriittinen* (immigration-critical) and *haittamaahanmuutto* (harmful immigration). He also propagated transnational conspiracy theories about the *väestönvaihtoteoria* (great replacement) of the white race that are related to the white supremacy movement and even speak of “white genocide.”³⁷ These movements promote the notion that nativist interests need to be protected and that those that do not fit this specific profile are a potential threat to the nation. This has further exacerbated an isolationist understanding of politics where the state increasingly prioritizes domestic over international duties.

Secondly, in connection with nativist politics, modern right-wing populist movements tend to hold sovereignty as the most fundamental concept of their ideology. However, sovereignty for them does not rest in state institutions but remains with the people in the nativist sense. This understanding deviates from the Hobbesian perspective, asserting instead a simplified notion of sovereignty rooted in the individual who

³⁴ David Miller, “Reasonable Partiality towards Compatriots” (2005) 8 *Ethical Theory and Moral Practice* 63–81, 64.

³⁵ Tuukka Ylä-Anttila, “Social Media and the Emergence, Establishment and Transformation of the Right-Wing Populist Finns Party” (2020) 3 *Populism* 121, 128.

³⁶ <https://www.perussuomalaiset.fi/kielisivu/in-english/>.

³⁷ Urpo Kovala, Tuija Saresma and Tuula Vaarakallio, “The Finns Party: From Catch-All Populism to Radical Anti-Immigration Discourse,” *International Discourses of Authoritarian Populism* (Routledge 2022), 132.

constitutes society. Thus, populists advocate a form of *direct* political action. For them, the “will of the people” uncompromisingly remains the foundation of any political decision. The UK’s withdrawal from the European Union adeptly demonstrates this approach. Among the reasons behind the support for Brexit was the perception that the UK would be “taking back” sovereignty,³⁸ primarily understood as popular sovereignty. The EU was seen as a major barrier to the full realization of this goal.

Modern right-wing populist movements are often in opposition to core liberal values. In their opinion, the will of the native population cannot possibly go hand in hand with the concepts of checks and balances, human rights or democratic liberalism. Populist movements are totalizing in nature. In contrast, democratic liberalism is essentially about creating a more equal society and ensuring that there is accountability for any political step or initiative. Imperatives such as avoiding the tyranny of the majority, upholding the rule of law and the separation of powers are essential for a fair and just society. Modern understanding of liberalism accepts that society is diverse and, thus, for the smooth functioning of the state compromise is a necessity. In contrast, populism favors authoritarian rule over a liberal system of checks and balances. This is because “[P]opulists believe that politics should be based on the immediate expression of the general will of the people. They speak and behave as if ‘democracy meant the power of the people and only the power of the people.’”³⁹

3. Understanding the Impact of Populism on Global Governance

Understanding the characteristics of modern right-wing populist movements is essential for gaining insight into how such movements may challenge the liberal structures of global governance institutions, and in particular the Security Council. These considerations are particularly

³⁸ Lord Ashcroft (2016), “How the United Kingdom voted on Thursday ... and why.” *Lord Ashcroft Polls*, 24 June 2016, retrieved from: <https://lordashcroftpolls.com/2016/06/how-the-united-kingdom-voted-and-why/>.

³⁹ Koen Abts and Stefan Rummens, “Populism versus Democracy” (2007) 55 *Political Studies* 405, 408.

important in the wake of 2024. Although populism has not swept aside everything in its path, there is no doubt that it has garnered a greater level of legitimacy and entered the political mainstream. For example, although Marine Le Pen's National Rally (RN) was left disappointed with the snap election results in France, ending up behind Macron's centrist alliance *Ensemble* and, most surprisingly, the left-wing New Popular Front, RN still won a historic number of seats, solidifying its position as mainstay of French politics. In Germany's state elections, the controversial far-right AfD party came second in Saxony and won in Thuringia – the first time, since 1945, that a far-right party has obtained a plurality of votes in Germany. Even in countries such as the UK, where the center-left party *Labour* won a resounding majority, the rise of *Reform UK*, which won the third most votes,⁴⁰ indicates the success of right-wing populist rhetoric. Outside of Europe, the Hindu-nationalist *Bharatiya Janata Party* (BJP), despite the loss of the majority, is still the ruling party in India, and challenging its predominance seems to be a tall order. Perhaps the most significant development has been the reelection of Donald Trump as president of the United States. It appears that far-right populism is here to stay. Thus, the international community must contend with a trend towards undoing liberal structures in favor of a more isolationist brand of politics.

Tamar Hostovsky Brandes notes that “populists often target international law and undermine its legitimacy and importance.”⁴¹ Contempt for international law has materialized in several ways. The most salient feature of the right-wing approach to international relations and global governance is the rejection of multilateralism. As James Crawford surmised, “the post-1945 framework, in detail, if not in principle, is the work of negotiation of treaties, mostly multilateral treaties.”⁴² Consequently, unilaterally minded populist movements see the legal

⁴⁰ It is important to mention that although the Reform UK party won the third most votes during the election, this resulted in only 5 seats in Parliament. Additionally, the number of votes won by Reform is also a result of some strategic political campaigning by parties such as the Liberal Democrats and Labour that focused their attention on a selective number of constituencies.

⁴¹ Tamar Hostovsky Brandes, “International Law in Domestic Courts in an Era of Populism” (2019) 17.2 *International Journal of Constitutional Law* 576-596, 577.

⁴² James Crawford, “The Current Political Discourse Concerning International Law” (2018) 81.1 *The Modern Law Review* 1-22, 6.

framework and institutions that have facilitated multilateralism as a threat, and for two reasons in particular. Firstly, international law and organizations have facilitated the dominance of neoliberalism on a global stage. Secondly, populist movements are primarily focused on the interests of their native demographic, with little concern for the international community at large. These parties are not shy to rally against international law in order to serve their native demographic.

The first Trump administration's "America First" policy is a pertinent example. Cases in point are the withdrawal from the Paris (climate) Agreement and the Trans-Pacific Partnership (TPP), and threats to pull out of several other multilateral treaties and organizations, including the UN Human Rights Council and the North Atlantic Treaty Organization (NATO). Trump justified his position on the climate agreement, for example, by the need of protecting US sovereignty.⁴³ Previously, in a tweet about the United Nations, he had said, "[it] has such great potential but right now it is just a club for people to get together, talk and have a good time. So sad!"⁴⁴ Thus, the claim of the Managing Director of the International Monetary Fund (IMF), Christine Lagarde, that "the greatest challenge that we are facing now is the risk of the world actually turning its back on global cooperation,"⁴⁵ resonates strongly with those who were concerned about the Trump administration's somewhat fractured relationship with the United Nations. Rejecting and discrediting multilateralism can be a significant stumbling block for efforts to maintain international peace and security. Hostile sentiments toward the United Nations undermine the spirit of solidarity within the international community.

This has been particularly obvious in the domain of human rights. Philip Alston touches upon the fact that "the reality is that the majority in society feel that they have no stake in the human rights enterprise

⁴³ White House Press Secretary, *Statement by President Trump on the Paris Climate Accord*, 1 June 2017, <https://www.whitehouse.gov/briefings-statements/statement-president-trump-parisclimate-accord/>, accessed 4 September 2024.

⁴⁴ M. Rhodan, "Here Are All the Times Donald Trump Bashed the United Nations Before Speaking There," *Time*, 18 September 2017, <http://time.com/4946276/donald-trump-united-nations-generalassembly/>, accessed 4 September 2024.

⁴⁵ Christine Lagarde, Speech at the Center for Global Development, 14 July 2016, <https://www.youtube.com/watch?v=ULiuWWGzU8>, accessed 22 November 2024.

and that human rights groups really are just working for ‘asylum seekers’, ‘felons’, ‘terrorists’, and the like.”⁴⁶ Populist movements often cite human rights as barriers to protecting the interests of the nativist demographic. In the UK, right-wing groups have suggested withdrawing from the European Convention on Human Rights. They argue that the “migrant/refugee crisis” cannot be effectively dealt with because human rights instruments such as the ECHR make it difficult to pursue any meaningful action. In their opinion, the principle that every individual’s human rights should be protected no matter the circumstance must be questioned, primarily because human rights are barriers to the full realization of national sovereignty, rooted in the “sovereign” will of the people.

The disdain for the liberal approach has been obvious in how states interact with the United Nations. In recent times, there have been a series of attacks by populist figures. In addition to the above-mentioned polemic, President Trump, in a scathing statement, said: “We get nothing out of the United Nations. They don’t respect us, they don’t do what we want, and yet we fund them disproportionately ...”⁴⁷ Moreover, Nikki Haley, US Ambassador to the UN during the Trump administration, lambasted UN Special Rapporteur Philip Alston for “wast[ing] the UN’s time and resources, deflecting attention from the world’s worst human rights abusers and focusing instead on the wealthiest and freest country in the world,”⁴⁸ after the latter had released a report claiming that the Trump administration had exacerbated inequality and extreme poverty in the US.⁴⁹ Other populist figures have similarly clashed with the UN. Brazilian President Jair Bolsonaro threatened to leave the organization, believing that “it served no purpose.” Generally, populist figures see the UN as a distant world organization acting as arbiter of the choices of

⁴⁶ Philip Alston, “The Populist Challenge to Human Rights” (2017) 9 *Journal of Human Rights Practice* 1, 6.

⁴⁷ *New York Times*, 2016. Transcript: *Donald Trump Expounds on His Foreign Policy Views*. 26 March, <http://www.nytimes.com/2016/03/27/us/politics/donald-trump-transcript.html> (referenced 27 February 2017).

⁴⁸ “Nikki Haley attacks damning UN report on US poverty under Trump.” *The Guardian*, 21 June 2018.

⁴⁹ *Report of the Special Rapporteur on extreme poverty and human rights on his mission to the United States of America*, Human Rights Council, thirty-eighth session, 18 June – 6 July 2018, <https://documents.un.org/doc/undoc/gen/g18/125/30/pdf/g1812530.pdf>.

national leaders, politicians, and populations. As a result, they treat the UN as something to rally against rather than get behind, which poses a threat to all multilateral initiatives.

This is particularly problematic for the Security Council because its *modus operandi* as supreme executive organ of the UN is shaped by the national interests of its most powerful members. The Council has often been criticized for being “ineffective, unprincipled, or an anachronistic mechanism that reflects a power balance from the past, rather than the realities of today.”⁵⁰ Although arguments have been made that the Security Council has enough tools in its arsenal to effectively intervene in instances of threats to international peace and security, the influence of the veto-wielding members has been the root cause of the Council’s predicament.

Too often the Security Council has been vulnerable to the fluctuations of world politics when attempting to use its powers. This is illustrated by the number of resolutions passed each year and the number of vetoes cast by the five permanent members. After an initial period of frequent activity in the 1940s, the Council’s output declined significantly in the course of the Cold War up until the 1990s when it was able to build on a revived commitment to multilateralism.⁵¹ However, Security Council activism has petered out somewhat since the highly criticized intervention in Libya in 2011. An indication is the political stalemate between the permanent members of the Council over Syria. The disagreement between the permanent members that supported anti-Assad forces (US, UK and France) and Russia, that backed the Assad government, has dashed any hopes of multilateral cooperation to end hostilities and prevent further violations of international law.

⁵⁰ Ramesh Thakur, *The United Nations, Peace and Security* (Cambridge University Press 2002) 339-342. See also Jeremy Farrall, “The Populist Challenge and the Future of the United Nations Security Council” (2020) 35.1 *Maryland Journal of International Law* 73, 74.

⁵¹ In the 1940s, the Council passed around 20 resolutions each year. Around ten resolutions were vetoed each year, almost exclusively by the Soviet Union – in most cases, blocking states from becoming members of the United Nations. The Cold War led to a stark decline in the Security Council’s activity. Only 54 resolutions were passed between 1950 and 1959; during the same time, 36 resolutions were vetoed. From the 1960s onward, activity increased, and an average of around 18 resolutions were passed each year between 1960 and 1989.

The most recent example of the Security Council's ineffectiveness is its inability to take any decision on the war in Ukraine due to Russia's position as a permanent member. Similarly, the Council's action on the Israel-Palestine conflict has been somewhat limited. Although several resolutions have been passed addressing aspects of the conflict, including calls for a ceasefire, negotiations, and withdrawal of Israeli forces from occupied territories, no sanctions have been authorized. This is primarily due to the United States' support of Israel making it very difficult to apply pressure to bring an end to the conflict.

Also, the outcome of recent elections in the United States is of fundamental concern for the Security Council. President-elect Trump previously has demonstrated his lack of support for multilateralism. He may double down on an isolationist brand of politics that will negatively impact on the country's international relations. A permanent member that embraces elements of modern right-wing populism will likely be detrimental to the Security Council's mandate to maintain international peace and security.

As regards the United Nations system of collective security, Alston highlights that there has been a "systematic undermining of the rules governing the international use of force."⁵² Due to this precedence, he contends that it is difficult for major powers to reprimand other states, considering their track record:

"Western countries, and particularly the United States through the global operations of the Central Intelligence Agency (CIA) and the Joint Strategic Operations Command (JSOC) and its ever-supportive, never-questioning allies such as the United Kingdom and Australia, have set us up very nicely for the era of Syria, Crimea and Yemen in which countries wishing to use force can more or less write their own rules. Having stood by and let those different agencies operate around the world carrying out targeted killings and other dubious acts, we are not well placed to then turn around and say that some of the tactics used by countries we do not like are in violation of international rules."⁵³

⁵² Alston *supra* note 46, 6.

⁵³ *Ibid.*

In an already existing environment where the rule of law is under threat, policies of right-wing populists further aggravate the situation. For example, the Austrian Freedom Party (FPÖ) “puts international legal obligations at odds with national interests and will only adhere to international obligations so long as they defend national interests.”⁵⁴ This corroborates with an *absolute* understanding of national sovereignty that subordinates international obligations of states to domestic considerations, namely, “the will of the people.” During Jair Bolsonaro’s tenure as President of Brazil, the career diplomat Ernesto Araújo claimed that “Itamaraty [shorthand for the Brazilian Ministry of Foreign Affairs] exists [to serve] Brazil, it does not exist [to serve] the global order.”⁵⁵ Unlike previous administrations that attempted to use the language of international law to justify their actions, it appears that many modern right-wing populists do not shy away from openly undermining the international rule of law when deemed necessary. It is important to devise strategies to tackle such challenges to the liberal international order.

Reinforcing the institutional structures of the Security Council

The dramatic shifts in international politics mean that the Security Council will have to operate in an environment that is hostile to liberal values and the rule of law. This underlines the necessity of bolstering the institutional structure. For example, in the face of the climate crisis, there have been calls upon the Security Council to recognize a responsibility of environmental protection in matters of international peace and security. It has been noted that:

“a growing coalition of UN member States shares a common understanding favourable to an increasing UNSC’s responsibility and role regarding environmental issues. It would fit into UNSC’s traditional mandate of responding to conventional threats (armed conflicts,

⁵⁴ Kristian Humble, “Populism and the Threat to International Law” (2022) 11.3 *Laws* 50, 57.

⁵⁵ “Speech by Ambassador Ernesto Araújo at the inauguration ceremony for the Ministry of Foreign Affairs.” FUNAG – Fundação Alexandre de Gusmão, 2 January 2019, funag.gov.br.

terrorism) and international law violation, humanitarian and human security vision as well as preventive action.”⁵⁶

Yet in the face of such calls, China and Russia have been unwilling to address environmental issues in Security Council resolutions related to armed conflict. If we further consider the United States’ position under a Trump administration, the possibility of the Security Council to be more involved in matters pertaining to the climate crisis appears to be slim.

The impact of populist politics on the United Nations can be mitigated by a more “legalistic” approach to the mandate of the Security Council. Recent developments highlight the need for such institutional mechanisms. For example, in 2013 a number of states developed the *Accountability, Coherence and Transparency* (ACT) group, which eventually resulted in a code of conduct that had the support of the likes of France and the UK.⁵⁷ The signatories of the ACT code pledged “to support timely and decisive action by the Security Council aimed at preventing or ending the commission of genocide, crimes against humanity or war crimes,” and “in particular to not vote against a credible draft resolution before the Security Council on timely and decisive action to end the commission of genocide, crimes against humanity or war crimes, or to prevent such crimes.”⁵⁸ The introduction of such initiatives helps to constrain the Security Council and serves as “a step towards diminishing the gap between the legal privileges and the political promises that come with P5 status.”⁵⁹

⁵⁶ Gabriel Lagrange, “The UN Security Council in conflict: how does the protection of the environment related to armed conflict fit into its structural and inequal dynamics?” (2024) 8.1 *The Journal of Social Encounters* 68-87, 70.

⁵⁷ For more on the group, see Christian Wenaweser, “Working from the Outside to Change the Working Methods of the Security Council: Elected Members as a Bridge between the Permanent Members and the Rest of the UN Membership,” in Nico Schrijver and Niels Blokker (eds.), *Elected Members of the Security Council: Lame Ducks or Key Players?* (Leiden/Boston: Brill Nijhoff, 2020), 279-284.

⁵⁸ Letter dated 14 December 2015 from the Permanent Representative of Liechtenstein to the United Nations addressed to the Secretary-General, UN Doc. A/70/621-S/2015/978. The list of supporters is published on the website of the Permanent Mission of Liechtenstein to the United Nations.

⁵⁹ van den Herik, *supra* note 9, 119.

Moreover, the dissatisfaction with the Russian invasion of Ukraine has led states to look beyond the Security Council. The aim was to develop measures through the General Assembly to review cases in which P5 members use their veto power. During the 11th Special Emergency Session, the General Assembly, in the context of Russia's invasion of Ukraine, adopted a number of resolutions affirming the member states' commitment to the UN Charter.⁶⁰ Furthermore, an initiative promulgated by Liechtenstein during a regular session of the General Assembly on April 26, 2022, concerning the veto power, resulted in resolution 76/242, which authorizes the General Assembly to convene when a veto has been cast in the Security Council.⁶¹ The Assembly made prompt use of the provision in its debate on 8 June 2022 on nuclear non-proliferation and the Democratic People's Republic of Korea, and subsequently, on 21 July 2022, on cross-border humanitarian assistance in Syria.⁶²

Another, albeit older, mechanism that allows for consultations on the affairs of the Security Council and the policies of its members is the "Arria formula meeting." In 1992, a meeting was convened at the initiative of Venezuelan Ambassador Diego Arria in the UN delegates lounge to facilitate informal consultations so as to give a Croatian catholic priest the opportunity to offer his account of the violence in Bosnia and Herzegovina. In the meantime, Arria meetings have become a frequently used procedure for states to deliberate in particular on human rights issues and the course of action in the Security Council. This has given "lesser" states and civil society an opportunity to make their voice heard in the Council.

⁶⁰ GA resolution ES-11/1 of 2 March 2022, UN Doc. A/RES/ES-11/1; GA resolution ES-11/2 of 24 March 2022, UN Doc. A/RES/ES-11/2; GA resolution ES-11/3 of 7 April 2022, UN Doc. A/RES/ES-11/3.

⁶¹ UN Doc. A/RES/76/262: "Standing mandate for a General Assembly debate when a veto is cast in the Security Council."

⁶² See "General Assembly Holds Landmark Debate on Security Council's Veto of Draft Text Aimed at Tightening Sanctions against Democratic People's Republic of Korea," UN Doc. GA/12423, 8 June 2022, available at <https://press.un.org/en/2022/ga12423.doc.htm>; "Speakers Debate Terms, Merits of Cross-Border Aid Operations in Syria's North-West, as General Assembly Considers Security Council Text Vetoed by Russian Federation," UN Doc. GA/12436, 21 July 2022, available at <https://press.un.org/en/2022/ga12436.doc.htm>.

As Tiyanjana Maluwa suggests, less powerful states do not need to play a secondary role all the time. This alludes to the philosophical underpinnings of solidarity in international law and perceptions of the existence of an *international society*. As Vattel argued in the eighteenth century, states owe each other assistance because they are all part of a larger community.⁶³ The above-described features and mechanisms promote a culture of accountability and transparency in the framework of the Security Council. They contribute to the participation of the wider international community, which perhaps is the best way to safeguard liberal values in the international legal system and ward off the challenges of populism.

The international legal system is a product of state activity. Hans Kelsen saw in the state a structure to advance the development of social life.⁶⁴ Moreover, states have recently shown their capacity to go beyond mere self-interest in matters of international law. For example, Gambia and South Africa have brought cases before the ICJ on violations of peremptory norms of international law.⁶⁵ One could also mention here Liechtenstein's persistent efforts at the UN in support of the international rule of law. Although there are concerns about how right-wing populists may use state structures to challenge the liberal international legal order, it is through the development of a variety of institutionalist mechanisms – opening the pathway for wider participation of the international community – that their influence can be counterbalanced.

Conclusion

The liberal international legal order is by no means a perfect system. TWAIL scholars have highlighted how that order – as a result of its European origin – has prioritized the interests of Western states over those

⁶³ Larry May, "The International Community, Solidarity and the Duty to Aid" 38.1 *Journal of Social Philosophy* 185-203, 185.

⁶⁴ Hans Kelsen, "State-Form and World-Outlook" in Hans Kelsen, *Essays in Legal and Moral Philosophy* (Kluwer Academic Publishers, 1973).

⁶⁵ See *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v Myanmar)*, ICJ Case No. 178, Order of 23 January 2020, and *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (South Africa v Israel)*, ICJ Case No. 192, Order of 26 January 2024.

of others.⁶⁶ Also, Marxist scholars criticize it for reflecting and perpetuating the inequalities inherent in the global capitalist system. They argue that the international legal order has reinforced economic exploitation, serving only the interests of powerful states and corporations.⁶⁷

More specifically, with regard to the Security Council, calls for reform are long overdue because the supreme executive organ of the UN has not lived up to the ambitions of the drafters of the Charter in 1945. Political stalemate has often led to double standards in the maintenance of international peace and security and left many disillusioned with the Council's inability to address major humanitarian crises.

The populists' ideas are not suitable for reforming the system. Their exclusive claim to fulfill "the will of the people" has ushered in an era where complex and nuanced socio-political issues are oversimplified and the long-term effects of policies are disregarded. Even if there are legitimate concerns about the liberal order as such, in the current climate the focus should be on how to bolster its legal framework. Only this will make the United Nations – and first and foremost the Security Council – less dependent on the vagaries and fluctuations of power politics.

⁶⁶ Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge University Press, 2012).

⁶⁷ See China Miéville, *In Between Equal Rights: A Marxist Theory of International Law* (Brill 2004).

IV

National Sovereignty or Global Governance? Prospects for Reform

Karin Kneissl

Former Foreign Minister of Austria

The Concept of Sovereignty: Tension between Normative and Factual Levels

Transition to a new multipolarity

The notion of sovereignty is back to the political and legal discourse. This holds particularly true when we reflect on the topic from a Russian perspective. “Technical sovereignty” is the shorthand for a comprehensive response to the toughest sanctions regime the world has ever seen. When it comes to commodities and sovereignty, we speak about mining concessions, access to technology, but also trading and insurance.

In the geopolitical do-tank named G.O.R.K.I. that we founded at St. Petersburg State University in September 2023, these topics are ranking high on our agenda. Those 24,000 unilateral sanctions, implemented by the EU-27 and the US plus several other states, in total 42, have triggered many changes that were long overdue. The emergence of a multipolar global setting affects international trading, the shaping of new currency baskets and new trade corridors. We are in new interesting times, so to say. Definitely, the world is fragile and noisy. But there are new *rapports de force* where fresh thinking is required.

As a reminder, these sanctions are not based on UN Security Council resolutions in line with Chapter VII measures. Furthermore, it was the rise of extrajudicial jurisdiction as the complementary instrument to unilateral sanctions outside of the UN system that has sharply contributed to a partial dismantling of sovereignty. In the beginning, the Iran and Libya Sanctions Act of 1996 (ILSA) by the US Congress imposed economic sanctions on firms doing business with Iran and Libya. It was one of the contested milestones in enhancing the hegemony of the US in terms of total control over US-held assets by whoever and wherever.

According to the UN Charter, only the Security Council can decide on sanctions, as was the case with the coercive measures against Iraq and Iran in recent decades. 151 UN members refrained from unilateral sanctions despite US and EU pressure via secondary sanctions. A formidable example is Türkiye, which also interprets its concept of national sovereignty assertively. Ankara is a lifeline for Russia when it comes to traveling and services; apart from certain topics like the use of Russian credit cards, the Erdoğan government has not made big concessions to the US, though it is (or maybe because it is) the number two military power within NATO.

In the 1990s, when Austria joined the EU on January 1st, 1995, we were taught the “virtue” of constant transfer of sovereignty to supranational entities like the European Commission in an ever-deepening process of European integration. The gradual weakening of sovereignty went in tandem with the spirit of a multilateral era that meant giving up control over traditional elements of the state, e.g., in shaping foreign policy. Sovereignty as the basic tenet of statehood gradually lost its substance. Reduction of sovereignty via rigid multilateralism has ended in a stalemate. Multilateral diplomacy has regressed while classical bilateral negotiating has remained key in many fields, namely on war and peace – the essence of all diplomacy. The “multilaterals” have left center-stage; but sovereignty has not regained its role on a large scale. Though our international system is still based on the Westphalian order and the equality of sovereigns, we see a tremendous confusion when it comes to the essence of sovereignty. While Russia, via the regional BRICS+ forum, is determined to strengthen it, the collective West seems to prefer less sovereignty. This is not a subjective perception.

The fragmenting of sovereignty coincided also with an era of strong globalization. Prior to 1914, the world saw a similar practice, namely the rise of multilateral diplomacy, “permanent negotiating” for the sake of disarmament and peace. Alas, the big war, “la Grande Guerre,” as it was called by contemporaries, transformed Europe and the world. The British author Norman Angell warned in his book *The Great Illusion*,

published in 1909,¹ against the assumption that war would be impossible in such an interconnected world. He proved to be right.

110 years later, we had to wake up to similar sobering realities. The illusion of an ever-deepening integration via globalization that is perceived by many as a US way of life, controlled by security codes made in Washington (see the testimonial by Edward Snowden) and run by US finance, had come to an end in various parts of the world prior to the recent military confrontation on the Ukrainian battlefield. The rise of political Islam in the 1980s in reaction to the failure of secular ideologies like Arab nationalism was probably the first manifestation of the anti-globalist movement. Mecca-Cola replaced Coca-Cola – at least for some fervent disciples. Meanwhile, deglobalization has become a fact. The fragmentation of the global market by trade tariffs, the many sanctions regimes, in particular those targeting Russia, and the lockdowns during the pandemic (2020-2022) have made globalization a thing of the past. Deglobalization trends began probably right after the global financial crisis in 2008, when China started to phase out its years-long policy of buying US bonds.² Now we are all physically aware of the new limits in a once unlimited space of financial transfers, information, and movement of goods and people.

Still some seven years ago, Austria was proud of its number 5 rank in the globalization index, which measures the degree of connectedness in the globalized economy. In a deeply globalized economy, this rank can turn into an Achilles' heel. In times of rising deglobalization, countries embedded in a fragile global supply chain – as is the case with the automotive industry – seem more vulnerable than those which exercise more control over their industry, their energy mix and their decision-making by and large.

Looking back at the last decades of geopolitical and socio-economic upheavals I see a return of topics that seemed being marginalized by new times, new technologies and until recently unknown actors, such

¹ Norman Angell, *The Great Illusion: A Study of the Relation of Military Power to National Advantage*. 4th ed., New York and London: G.P. Putnam's Sons, 1913. Ebook: <https://www.gutenberg.org/files/38535/38535-h/38535-h.htm>.

² Karin Kneissl, *Die zersplitterte Welt – was nach der Globalisierung kommt*. Braumüller: Vienna, 2013.

as big-tech companies in addition to transnational conglomerates and all sorts of civil society movements. These new-old topics are decolonization and the concept of “permanent sovereignty over natural resources.” I will recall the importance of this agenda in the late 1950s and early 1960s, notably in the oil industry.

The main thesis of this article can be summed up as follows: exercising sovereignty over one’s natural resources goes far beyond the control of mining and exploitation. It touches upon access to technologies, availability of financial resources, insurance contracts and the freedom from foreign interference in domestic affairs. And in times of many wars, it is evident that this is not an academic debate, but everyday political action accelerated by power politics and new harsh realities. Once more, the Greek philosopher Heraclitus who coined the phrase “war is the father of all things” has been proven right. The famous quote continues by stating that war puts everyone into his place.

The massive return of wars and the implications for sovereignty

The confrontation between the Russian Federation and NATO on the battlefield in Ukraine and beyond is about human suffering and military innovation, such as the use of unmanned aerial vehicles (drones) driven by artificial intelligence, new hypersonic missiles and an unprecedented level of information warfare. Wars have been like that ever since the War of Troy, epically narrated by the Greek genius Homer in his *Iliad* some 2,800 years ago. Thousands of more wars would follow right up to our time that invented the doctrine of MAD, “mutual assured destruction”; it shaped the age of nuclear arsenals. In the absence of normative arms control, the acronym has turned topical once more.

War is about real things such as striving for territorial depth and access to commodities. The return of geography as a dominant factor in international relations is visible in the old debate about NATO enlargement as explained by Russian President Vladimir V. Putin in his landmark speech at the Munich Security Conference in February 2007.³ That

³ <http://en.kremlin.ru/events/president/transcripts/24034>.

document is worthwhile reading; it has turned into a modern classic among political speeches.

What would happen some 15 years later was clearly announced in Munich back then: “I think it is obvious that NATO expansion does not have any relation with the modernization of the Alliance itself or with ensuring security in Europe. On the contrary, it represents a serious provocation that reduces the level of mutual trust. And we have the right to ask: against whom is this expansion intended?”

Trust constantly decreased, diplomacy was replaced by speechlessness, and wars started, from Georgia in 2008 to Ukraine in 2014. In the year 2024, the world is confronted with a complete breakdown of international norms enshrined in the UN Charter. What is called acquisition of territory by force in one battlefield in Eastern Europe – resulting in the total ban of the Russian Federation – is considered “border shift for security reasons” when it comes to Israel expanding across the Occupied Palestinian Territory or creating all sorts of buffer zones in neighboring states, such as Lebanon and Syria. Ever since the breakdown of the former Socialist Federal Republic of Yugoslavia, the reunification of Germany and the creation of new states on the African continent as in the cases of the partition of Sudan and Ethiopia, we have been witnessing the elasticity of legal notions such as “integrity of state territory and borders.”

When the British geographer Halford Mackinder published his article entitled “The Geographical Pivot of History” in Britain’s *The Geographical Journal* in 1904,⁴ the battle for controlling Eurasia was not yet about commodities. It was all about strategic depth, and also markets, with the British opposing the Russians and their merchandise in Central Asia. As a reminder: who controls Eastern Europe controls Central Asia, the Heartland. Who controls the Heartland controls the world; this doctrine, which many consider as the beginning of contemporary geopolitics, now a catchword, keeps shaping international relations.

⁴ H. J. Mackinder, “The Geographical Pivot of History,” in: *The Geographical Journal*, Vol. XXIII, No. 4 (April 1904), pp. 421-437.

**What is different this time?
It is, to a large degree, about energy!**

Though the term “tectonic geopolitical shift” is currently employed in an inflationary manner, many of us will feel the changes, oscillating between “angst” – for good reasons a German term – and new dynamics. We see a reshuffling of the maps in the literal territorial sense in Eastern Europe and possibly also in Western Asia. In addition, the global economic system is undergoing fundamental changes.

The doctrine of permanent sovereignty over natural resources covers the right of the state to freely use, exploit and regulate its natural resources within its territory. This principle relates to a number of areas of international law, which include: exploitation of resources by individuals of one state or of another state, expropriation, territorial rights, trade concessions, and other economic aspects.

The roots of the principle go down to the right of self-determination and economic development, and hence it has become a key factor influencing foreign investment regulations, environment law, resource management, and rules for sustainable economic development. Permanent sovereignty, together with the right of self-determination, was indeed a guiding principle of the decolonization process. Being considered as part of *opinio juris communis* in certain principal areas, it had an influence on the formulation of multiple laws.

When the Organization of Petroleum Exporting Countries (OPEC) was formally established in Baghdad in September 1960, the five founding members Iraq, Iran, Kuwait (then still under British rule), Saudi Arabia and Venezuela were strongly influenced by the intense preparations for the far-reaching UN General Assembly resolution on the very topic of permanent sovereignty over natural resources.

The founding of OPEC did not catch international headlines since the oil business was still in the hands of the so-called “Seven Sisters,” namely the dominant Anglo-Saxon oil companies. It was only in the late 1960s that national oil companies gradually started replacing them. Once national oil companies were created in the processes of nationalization, OPEC decision-making on production quota had a different impact. The embargo by Arab OPEC members of oil exports to a number of Western

countries in response to the US military assistance to Israel in October 1973 was a watershed event, which put OPEC in the limelight; but that is another story.

In December 1962, the UN General Assembly adopted the groundbreaking resolution 1803 (XVII) on permanent sovereignty over natural resources. In the midst of decolonization and the emergence of often resource-rich new sovereign states, the following two operative paragraphs were of historic importance:

“1. The right of peoples and nations to permanent sovereignty over their natural wealth and resources must be exercised in the interest of their national development and of the well-being of the people of the State concerned.

2. The exploration, development and disposition of such resources, as well as the import of the foreign capital required for these purposes, should be in conformity with the rules and conditions which the peoples and nations freely consider to be necessary or desirable with regard to the authorization, restriction or prohibition of such activities. (...)”

The text of the resolution is concise and precise; it is a milestone among UN documents, which would lose clarity in later decades. More than 60 years after this resolution we can identify certain analogies with the current confrontation between Russia and the Global South on one side and the Collective West on the other side of the table.

This is also a confrontation between those who control the ambit of finance, stretching from banking to insurance, and those who are in control of the commodity markets. Two years ago, I summed it up in an article: “You can print money, but you cannot print energy!”⁵

It was in the 1970s that this fact became very evident, with galloping double-digit inflation in the US and other major oil-importing countries

⁵ Karin Kneissl, “Global finance versus global energy: who will come out on top?” *The Cradle*, October 13th, 2022, <https://thecradle.co/articles/global-finance-vs-global-energy-who-will-come-out-on-top>.

in the aftermath of the then first major oil price crisis, when the average price of a barrel increased by four times within three weeks. One of the lessons learnt by the producers was to better keep their oil under the surface than to lose it to inflation.

In the course of the confrontation between Russia and the West, the Russian economy became number four in the global ranking despite all pressure. Russians are fast learners and found new clients. Pipelines and cargo ships are now moving east-south-east. They should have done so as of 2014 when it became evident that the European Union wanted to get rid of Russian gas by boycotting the construction of South Stream. That project later turned into TurkStream via the Black Sea.

Russia disposes of the minerals necessary for its industrial needs and the generation of energy, since all forms of energy require commodities, especially also those called renewables. It remains to be seen who has the longer breath in the very harsh confrontation between those who control the financial services and dispose of a reserve currency such as the US dollar and those who have the commodities. It was and is impossible to simply push Russia out of the global market as the authors of the sanctions had planned. Sanctions are about coercing a state into changing its behavior so as to encroach on its sovereignty. Furthermore, the sanctions are hitting back on Western economies in the form of a volatile energy market and the loss of the Russian market for Western goods in general, and for the German automotive industry in particular. Russian natural gas, in its liquefied form, and uranium are still traveling across the globe further west. Many Western companies, especially from the USA, have not quit the Russian market which is simply too important.

Another issue is the dangerous scenario of internal sabotage in Russia. It is a well-known fact that many drones targeting civilians are launched from inside Russia. The Bolshevik Revolution of 1917 can be considered as the first color revolution of the 20th century. In contrast to today's politicians in Vienna and Berlin, the monarchies ante 1914 knew that Russia could not be defeated on the battlefield, but had to be "destroyed from inside." The dispatching of Vladimir Lenin from Switzerland to Petrograd was not an ad hoc decision by Berlin to get rid of the Eastern front. It was the result of a deliberate policy to support the Bolsheviks in toppling Tsar Nikolai II, a cousin of German Emperor

William II. The desire to fragment Russia has not ebbed in any way. On the contrary, all sorts of maps are published by think tanks, and EU politicians demand the dismembering of Russia. That such discourse amounts to blunt interference in domestic affairs is not at all acknowledged by the West.

One thing many governments have understood is that what is happening to Russia can happen to any of them in terms of a total boycott. But not all of them might easily survive such a confrontation.

The comprehensive approach to sovereignty

Nearly 30 years after the first big steps of US extraterritorial jurisdiction in flagrant violation of the sovereignty of all others in the international community, we can observe the ultimate backlash of these actions. In response to the “sanctions from hell”⁶ scheme against the Russian Federation, as of spring 2022 states are reflecting more dynamically on new currency baskets and thus advancing the process of dedollarization. There is a clear trend of regaining control over sovereign financial decision-making. Whether blockchain and digital currencies – still a project in the making – are the right alternative to the current financial system is an open question. Commodities will have their stake in this process. The war about Ukraine is also a battle for resources, whether hard commodities like minerals – from coal to lithium – or soft commodities like arable land such as the fertile soil in Ukraine. Many investment funds keep an eye on those commodities, thus playing a semi-political role.

Furthermore, it was more than a decade ago in Russia and China that the notion of “technical sovereignty” entered the international debate on the role of the internet and of Big Tech companies. When discussing Taiwan, it should be borne in mind that the debate is mainly about semiconductors and to a lesser degree perhaps about the territorial status of the island.

The current tectonic shifts in geopolitics, affecting the intergovernment-

⁶ © by US Republican Senator Lindsey Graham, <https://www.reuters.com/article/usa-russia-sanctions-idUKL5N20F58G/>.

tal system embodied by the United Nations, are taking place at a time of tremendous technical change. Artificial intelligence could eventually undermine our traditional notion of territorial statehood. However, for reasons that go beyond the momentum of deglobalization, the author expects the nation-state to remain. History has its cycles, and we now witness a return of state control after an era of marginalization of the state. That the notion of sovereignty has returned to daily political discourse also illustrates the role of state control over territory and commodities. We will see more nationalization of energy companies and utilities; EDF in France was only the beginning. The era of liberalization of the energy market, in the EU in particular of the messy electricity market, is gone. When energy becomes unaffordable, social unrest is only a matter of time.

For many, decolonization seemed like a closed chapter from the 1950s and 1960s. But in times of new assertiveness by countries like Russia, in addition to many others in the Global South, it is the *call for national sovereignty* that is back. It comes as a surprise more to the EU than to the US, which was never that much interested in multilateralism and in giving up sovereignty by committing to broader legal obligations.

Said Saddiki

UN Charter Reform: Balancing Sovereign Equality and Effective Functioning

Introduction

The United Nations (UN), the largest and most significant international organization in history, was established with high hopes for global peace and stability. Although its era has avoided a third world war, it has not succeeded in preventing conflicts and instability in various regions. This failure in ensuring international peace and security has brought the effectiveness of the UN into question.

Accordingly, the UN has been and continues to be the subject of scholarly and political controversy regarding its role in international politics. In the discipline of international relations, the UN is viewed and assessed from multiple competing perspectives, the most prominent of which are *liberalism* and *realism*: liberals see it as an important international actor and a means of collective security, expecting the Security Council to address threats to international peace, while realists view it primarily under the aspect of the balance of power between the major global players, and as a platform to manage their differences, noting its success in preventing a third world war, although this success could be attributed to other factors like nuclear deterrence.

The Charter of the UN, shaped in the aftermath of World War II, reflected the power dynamics of the international system at the time. Despite its inherent inequalities, the Charter functioned within the Cold War balance of power, albeit with limitations on the effectiveness of the Security Council. Although this balance of power spared the world from another global war between the superpowers, it did not prevent the outbreak of many proxy wars that claimed millions of victims.

The end of the Cold War sparked discussions about reforming the UN to enhance the legitimacy, democracy, equality, and effectiveness in its actions. Despite numerous proposals by officials and academics, the discussion did not yield any results due to the reluctance of the permanent members of the Security Council to give up the privileges acquired after World War II and the difficulty of achieving consensus among the countries of the Global South.

However, with the changes in the structure of the international system and the rise of new global powers aspiring to play a more equitable role in international affairs, discussions about reforming the UN, particularly the Security Council, have resurfaced in recent years. All proposals for reforming the UN Charter, despite their differences and diversity, are based on coherent and solid arguments. However, the enduring challenge is reconciling the goals of reform – legitimacy, equality, and democracy – with the task of enhancing the organization's effectiveness.

This article explores the challenge of balancing sovereign equality with the effective functioning of the UN. It also examines how proposed UN reforms could improve the organization's legitimacy and effectiveness while ensuring equitable representation for all member states and major regions.

The Paradox of Legitimacy and Effectiveness

After World War II, believing that the League of Nations had failed in keeping the peace due to ineffective decision-making and the lack of involvement from the great powers, which hindered unified action against Nazi and fascist aggression, the victorious nations created a new international system designed to ensure great power leadership in the maintenance of peace and to facilitate collective action. One of the primary goals of the founders of the UN was to avoid the ineffectiveness of the League of Nations, which had been unable to maintain the international system. Despite the idealistic content of the UN Charter, the founders of the new international organization sought to create conditions they perceived would ensure effectiveness, even if this contradicted some international principles, including sovereign equality.

Therefore, the privileges granted to permanent members of the Security Council, particularly the veto, were “justified” by realistic and pragmatic reasons, and efficiency was prioritized over legitimacy. However, experience has refuted the purposes of the drafters of the UN Charter, as the post-World War II international system has led to the paralysis of the Security Council. Since the creation of the UN, the Security Council has demonstrated its ineffectiveness in maintaining world peace in numerous cases, which led to a crisis of legitimacy.

The Council's legitimacy is crucial for its effectiveness, as it enhances the likelihood that states will respect and implement its decisions, including on economic sanctions, peace missions, and dispute resolutions. Without coercive or financial power, the Security Council relies on its perceived legitimacy to ensure state compliance.¹ Due to the legitimacy crisis, the Security Council now functions as an outdated tool of great power dominance, reflecting the power dynamics of 1945.² The primary issue contributing to this crisis of legitimacy and equality is the disparity in power between permanent and non-permanent members, which has prevented the Council from achieving even a modicum of legitimacy and, consequently, reduced its overall effectiveness.

The Security Council's frequent reluctance to act during crises, often driven by the self-interest of its permanent members, raises questions about its effectiveness in maintaining international peace. Moreover, the Council's decision-making process lacks transparency and is insulated from public scrutiny and oversight, contrary to the principles of equality and sovereignty upon which the UN was founded. This exclusionary approach often results in powerful states dominating decisions and marginalizing the voices of other states, as exemplified by the Russian invasion of Ukraine and the Israeli war on Gaza of 2023-2024.

Most arguments for expanding the Security Council emphasize that the disparity between the structure of membership and contemporary in-

¹ Ian Hurd, “Myths of Membership: The Politics of Legitimation in UN Security Council Reform,” *Global Governance*, Vol.14 (2008), p. 201.

² Hans Köchler, “Security Council Reform: A Requirement of International Democracy.” Lecture delivered at the International Seminar on “Reforming the UN: Democracy, Justice and Security in the Age of Globalization” organized by Centro Studi sul Federalismo / Center for the Study of Federalism, Turin, Italy, 8 June 2007, p. 2.

ternational realities undermines its legitimacy.³ Many scholars argue that changing the Council's membership or its voting rules on the basis of sovereign equality could address the legitimacy deficit, ultimately enhancing its effectiveness. This view posits that legitimacy is valuable because it leads to greater power and effectiveness of the Council.⁴ For instance, the Rwandan genocide, the Russian-Ukrainian war, and the 2023-2024 Israeli war on Gaza have highlighted that a truly legitimate Security Council committed to peace should not stand by while atrocities escalate. These cases demonstrate a pattern of ineffectiveness, and an enduring crisis of legitimacy within the Council.

Accordingly, ensuring a balance between legitimacy and effectiveness should be a central goal in any reform proposal for the United Nations. The organization was established to promote international peace and security, address global challenges, and uphold human rights. Achieving these objectives requires not only a system that is widely accepted as legitimate but also one that operates efficiently and effectively. Any reform that fails to address this balance may undermine the very purposes for which the UN was established, and compromise its ability to function as intended. Additionally, reforms that focus solely on enhancing legitimacy – such as expanding permanent membership in the Security Council to improve its regional or cultural representation – without considering the impact on operational efficiency could result in a system that is more inclusive but less effective.

Is the Veto Power Outdated?

The five permanent members of the Security Council – China, France, Russia (formerly the Soviet Union), the United Kingdom, and the United States – were granted veto power because they were the most influential states in the aftermath of World War II, a political advantage that can be considered the "spoils of war." This privilege was granted with the consent of the other UN founders not only because those countries were the victors of World War II but also because they were believed to be capable of maintaining global peace, in contrast to the ineffective

³ Ian Hurd, *op. cit.*, p. 199.

⁴ *Op. cit.*, p. 202.

Council of the League of Nations. However, over time, the veto power has been abused, which led to paralysis of the Security Council and sparked debates about the veto's abolition, restriction, or expansion through the admission of new states as permanent members.

The Security Council's legitimacy crisis is exacerbated by the current power imbalance where the veto power in the hands of the dominant global player disrupts international stability while other permanent members hesitate to use their privilege. This imbalance has led the Security Council to either grant excessive authority to dominant powers, as in the case of the Gulf War resolutions in 1990, or retrospectively legitimize illegal actions, such as the 2003 Iraq invasion.⁵ It also prevented it from taking binding decisions to avert or stop atrocities and massacres, as in the cases of the 2023-2024 Israeli war on Gaza and the Russian-Ukrainian war. It is worth noting that when major powers do not obtain consent for their policies, they frequently act in their own interests without UN approval, as seen in many global conflicts. In addition to the lack of legitimacy, the veto rule in Article 27(3) of the UN Charter undermines the democratic principle of equal voting and contradicts the principle of sovereign equality of states in Article 2(1). Although all member states have equal voting rights in the General Assembly, their influence is diminished because General Assembly resolutions are non-binding, in contrast to the binding decisions of the Security Council, particularly those made under Chapter VII of the UN Charter.

The ineffectiveness and lack of legitimacy of the Security Council have led the majority of UN members – except the five permanent members and aspiring veto holders – to conclude that the veto is outdated and should be eliminated or radically revised, as it contradicts the principle of sovereign equality and paralyzes the organization. Nevertheless, abolition of the veto power of the permanent members is highly unlikely as this would require their consent, which they will not give voluntarily. Advocates for abolishing the veto might secure a two-thirds majority in the General Assembly, but without the approval of the five permanent members it cannot take effect.

⁵ Hans Köchler, *op. cit.*, p. 3.

Since 1945, the structure of the international system has undergone major changes. The influence of some permanent members of the Security Council has declined while new regional powers such as India, Brazil, or Türkiye have come to the fore, aspiring to permanent membership and veto power in the Security Council. Additionally, major economic powers like Germany and Japan feel that their influence in UN decision-making is disproportionate to their contributions to the budget of the organization. Both countries have been long-standing candidates for permanent membership in the Security Council.⁶ Consequently, the current UN system, particularly because of the veto power held by the five permanent members, has become increasingly ineffective and dysfunctional. Originally intended to prevent unilateral action by powerful states, the veto now often paralyzes the ability of the United Nations to respond to global crises, undermining both the effectiveness of the organization and the legitimacy of its actions.

Calls for Reform of the Veto System

Since its establishment in 1945, there have been persistent calls to expand and democratize the Security Council, with critics arguing that the privileged status of permanent members contradicts the UN principle of sovereign equality among member states and is not aligned with shifts in international power such as the decline of the British and French empires, the dissolution of the USSR, and the rise of new powers.

As former UN Secretary-General Kofi Annan expressly stated, “no reform of the UN would be complete, however, without Security Council reform,”⁷ all UN reform initiatives, emphasizing the principles of legitimacy and equality, focus on changing the structure and powers of the Council, as it is the most powerful international decision-making body.

The most common issue with the Security Council is that its membership inequalities lead to a loss of legitimacy and diminish support for

⁶ Thomas G. Weiss, “Overcoming the Security Council Reform Impasse,” *Dialogue on Globalization – Occasional Paper*, Vol. 2, No. 14 (2005), p. 4.

⁷ Kofi Annan, *In Larger Freedom: Towards Development, Security and Human Rights for All*, A/59/2005 (New York: UN, 2005).

its actions. Accordingly, changing the structure of the Council could increase its legitimacy and ultimately enhance its effectiveness.⁸ The High-Level Panel, established by Secretary-General Kofi Annan in September 2003 with the task of analyzing future global security threats and proposing measures for effective collective action, noted that the effectiveness of the global security system depends on both the legality and perceived legitimacy of the Council's decisions.⁹

Despite significant changes in the structure of the international system since 1945, the Charter provisions regarding the Security Council have only been amended once, in 1965, to increase the number of non-permanent members from six to ten. By 1956, pressure from Latin American states had brought Security Council reform onto the General Assembly's agenda. Newly independent African states and the Soviet Union joined these calls in 1960. In 1963, twenty-one member states proposed amending the Charter to increase Security Council membership by adding non-permanent seats. This led to the Council's enlargement to its current number of 15 members.¹⁰ Since then, the ten non-permanent seats have been distributed among the UN's regional groups as follows: three for Africa, two for Asia-Pacific, two for the Western Europe and Others Group (WEOG), two for Latin America and the Caribbean, and one for Eastern Europe.

Momentum for a second round of reform emerged in 1993 when the General Assembly set up the Open-ended Working Group on the Question of Equitable Representation and Increase in the Membership of the Security Council (OEWG). Criticisms of the current status focus on efficiency, highlighting the Security Council's inability to respond decisively to conflicts like in Syria, repeated Israeli wars on Gaza, and its slow response to crises such as the Rwandan genocide. There are also concerns about democratic equity, with Asia and Africa being under-

⁸ Ian Hurd, *op. cit.*, pp. 201-203.

⁹ UN, *A More Secure World: Our Shared Responsibility: Report of the Secretary-General's High-Level Panel on Threats, Challenges and Change* (New York: UN, 2004), p. 66, <https://www.un.org/peacebuilding/sites/>, www.un.org/peacebuilding/files/documents/hlp_more_secure_world.pdf.

¹⁰ UN General Assembly, *Question of equitable representation on the Security Council and the Economic and Social Council*, A/RES/1991 (XVIII), 17 December 1963, <https://documents.un.org/doc/resolution/gen/nr0/186/66/pdf/nr018666.pdf>.

represented while Eastern Europe and the WEOG are overrepresented, which highlights a global imbalance in representation.¹¹

Many countries in the Global South argue that the dominance of Western members in the Security Council leads to extreme inequalities, with the veto exacerbating these disparities. Hence, considering recent geopolitical shifts and the increase in the number of UN members since decolonization, they assert that equitable regional representation, with equal privileges, would reduce these disparities.¹² For example, Africa, the only continent without a permanent seat on the Security Council, is advocating for two permanent seats with full privileges, including veto power.

However, significant constitutional changes in the structure of international order rarely occur during times of peace; they typically arise from major upheavals, as was the case with the creation of the League of Nations and the UN following World War I and World War II.¹³ Additionally, a significant structural obstacle to any real reform of the UN Charter is that it cannot occur without the agreement of two-thirds of the members of the UN General Assembly, including all permanent members of the Security Council (Article 108 of the UN Charter) who are unlikely to vote for any amendment that reduces their privileged status. Moreover, the imbalance of power in the current international system, including within the UN itself, represents another significant challenge to real reform initiatives.¹⁴ Thus, comprehensive reform of the Security Council is unlikely in the near future. This is primarily due to the strong defense by influential permanent members of their veto privilege as well as the impasse due to conflicting proposals in the General Assembly.¹⁵ Achieving consensus among all stakeholders would be essential. Otherwise, the establishment of a new international organization will be unavoidable; but this will not happen without major international upheaval.

¹¹ Matthew Gould and D. Rablen, "Reform of the UN Security Council: Equity and Efficiency," *Public Choice*, Vol. 173, No. 1 (2017), pp. 146-147.

¹² Ian Hurd, *op. cit.*, p. 199.

¹³ Hans Köchler, *op. cit.*, p. 11.

¹⁴ *Op. cit.*, p. 7.

¹⁵ Thomas G. Weiss, *op. cit.*, p. 156.

Accordingly, some scholars argue that effective Charter reform to satisfy basic democratic requirements such as abolishing the veto provision is unattainable under present circumstances. Democratic voting procedures on the basis of sovereign equality of states can only be achieved by replacing the UN with a new international organization.¹⁶ Since amendments to the UN Charter must be approved by the five permanent members, most countries have shifted their focus to less ambitious reform proposals. These proposals aim to balance legitimacy and effectiveness while encouraging greater participation from more countries. Some scholars regard these proposals as primarily aimed at alleviating symptoms rather than addressing the core issue of legitimacy, leaving the Security Council dominated by great powers, a situation that has worsened in the unipolar world.¹⁷ Given the “statutory predicament,”¹⁸ a realistic approach must reconcile established international principles – such as international democracy and sovereign equality – with the ever-changing realities of the international system and its evolving balance of power.

Towards Equitable Regional Representation

Following the Cold War, there was renewed focus on the UN Security Council, accompanied by growing demands for reform to make it more representative, democratic, and effective in light of the changing geopolitical environment. In 1995, the Open-Ended Working Group (OEWG) noted that expanding permanent membership would strengthen the UN and enhance its legitimacy by more accurately reflecting contemporary global realities.¹⁹ Additionally, equitable regional representation within the Security Council could rectify current imbalances and address the overrepresentation of the European region, considering, in particular, that the United Kingdom and France, once considered great powers, no longer hold the same status.²⁰

¹⁶ Hans Köchler, *op. cit.*, pp. 5, 7.

¹⁷ *Ibid.*

¹⁸ *Op. cit.*, p. 7.

¹⁹ UN, *Report of the GA Working Group on the Security Council for 1995*, A/AC.247/1 (New York: UN, 1995).

²⁰ Hans Köchler, *op. cit.*, p. 10; Thomas G. Weiss, *op. cit.*, p. 13.

In the Global South, the non-aligned countries that had come together in reaction to the bipolar conflict of the Cold War perceive themselves as significantly underrepresented in the Security Council. They believe this should be corrected by expanding the Council on the basis of equitable geographical distribution and sovereign equality.²¹ At various summits, including in Cartagena in 1995, and in subsequent declarations, the Non-Aligned Movement consistently advocated for curtailing and eventually eliminating the veto power of the permanent members of the Security Council. The non-aligned states emphasized that both reform and expansion of the Council should ensure sovereign equality among states, equitable geographical representation, transparency, accountability, and democratization in decision-making processes.²²

As for Africa, many of whose countries were still colonized when the UN Charter was adopted, states believe that the post-colonial representation within the UN has been inadequate both demographically and geographically. Consequently, Africa has consistently sought reform of the UN to address these imbalances. In their 2005 draft resolution (A/59/L.67) to the UN General Assembly, 43 African countries proposed expanding the Security Council to 26 members, including 6 new permanent seats (2 for Africa) with veto power, and 5 new non-permanent seats (2 for Africa). This proposal argued that an amended UN Charter should grant the same prerogatives and privileges to the new permanent members as those currently held by the existing permanent members.²³ According to the Ezulwini Consensus, the African Union asserts that “even though Africa is opposed in principle to the veto, it is of the view that so long as it exists, and as a matter of common justice, it should be made available to all permanent members of the Security Council.”²⁴

²¹ Non-Aligned Movement, *Final Document of the 12th Summit of The Non-Aligned Movement*, para. 66/c, Durban, South Africa, 2-3 September 1998.

²² Non-Aligned Movement, *Final Document of 18th Summit of Heads of State and Government of the Non-Aligned Movement*, Baku, Azerbaijan, 25-26 October 2019.

²³ UN General Assembly, “Question of equitable representation on and increase in the membership of the Security Council and related matters,” A/59/L.67, 14 July 2005, https://www.securitycouncilreport.org/atf/cf/{65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9}/A_59_L67.pdf.

²⁴ African Union, *The Common African Position on the Reform of the United Nations: The Ezulwini Consensus* (Addis Ababa: Executive Council, 7th Extraordinary Session, 7-8 March 2005), pp. 9-10, [https://old.centerforunreform.org/sites/default/files/Ezulwini Consensus.pdf](https://old.centerforunreform.org/sites/default/files/Ezulwini%20Consensus.pdf).

However, any reform of the UN system should go beyond mere continental or geographical representation and consider the cultural diversity that shapes global dynamics. For example, the Muslim and Arab worlds, encompassing vast regions with significant cultural, demographic, geographical, and economic potential, merit appropriate representation. These regions are not just geographical entities; they embody distinct civilizations with deep-rooted histories and substantial contributions to the global community. Ignoring these cultural dimensions in UN reforms would perpetuate a narrow and inequitable structure of international representation.

Currently, four out of the five permanent members of the UN Security Council are from Christian-majority countries, while one member represents an East Asian culture. This imbalance underscores the necessity for an expansion that accurately reflects the diverse cultural realities of our world. Failure to grant permanent membership or veto power to at least one representative from the Arab or Muslim world would render any proposed reform inequitable, potentially leaving large populations feeling excluded and underrepresented. This would further compromise the legitimacy of the United Nations in its role of promoting international peace and stability. The issue can be addressed by granting major regional organizations, including the Organization of Islamic Cooperation (OIC), the African Union (AU), the Community of Latin American and Caribbean States (CELAC), and the European Union (EU), the right to elect non-permanent members with veto power, renewable for a specified period.

While there is broad recognition of the necessity to enhance the representation of the countries of the Global South, achieving this goal faces many difficulties, including the lack of consensus on which specific nations should be added. For example, African countries face internal divisions, which makes it challenging to achieve a unified regional consensus on who should be a permanent member of the Security Council.

Such disagreements and conflicts of interest could undermine collective efforts toward constructive reform.²⁵

Additionally, the paradox of equity and effectiveness remains a crucial problem because the proposed expansion of the Security Council, intended to enhance equity by broadening representation, could create a group too large for effective deliberations yet still too small to fully represent the UN membership.²⁶ Therefore, with numerous calls and proposals advocating for expanding the Security Council's membership, it is essential to manage the enlargement carefully so as to improve equity and representation while addressing the efficiency challenges due to diverse interests and difficulties of consensus-building.

Advancing Sovereign Equality

In Article 2(1), the Charter of the United Nations asserts “the principle of sovereign equality of all its members” as the foundation of the organization. The principle is evident, at the formal level, in the composition and voting procedure of the General Assembly, the only major organ of the UN where all members are represented with one equal vote per country, regardless of size or power.

However, the concept of sovereign equality in the Charter refers not to factual, but to legal equality of states. This means that a sovereign state determines how to deal with its internal and external affairs²⁷ and that no state has legal superiority²⁸ or jurisdiction over another without its consent. Additionally, the courts of one state cannot question the acts of

²⁵ Bjarke Zinck Winther, *UN Council Reform: New Approaches to Understanding and Unlocking the Gridlock*. Aalborg Universitetsforlag (2022), p. 40, <https://doi.org/10.54337/aaU510591888>; Jonathan Oshupeng Maseng & Frank Gadiwele Lekaba, “UN Security Council Reform and the Dilemmas of African Continental Integration,” *African Security Review*, Vol. 23, No. 4 (2014), pp. 395-398, <https://doi.org/10.1080/10246029.2014.948896>.

²⁶ Thomas G. Weiss, “The Illusion of UN Security Council Reform,” *Washington Quarterly*, Vol. 26, No. 4, (2003), p. 151.

²⁷ Kenneth Waltz, *Theory of International Politics* (Addison-Wesley: Reading, MA, 1979), p. 96.

²⁸ Bardo Fassbender, “Are the EU Member States Still Sovereign States? The Perspective of International Law,” *European Papers – A Journal on Law and Integration*, Vol. 8, No. 3 (2023), p. 1633.

another state within its own legal order, which highlights “the autonomy of the states as subjects of international law.”²⁹

The prevailing classic view on sovereign equality posits that states, despite their similarities and differences, enjoy *internal* sovereignty (legal authority within their territory) as well as *external* sovereignty (territorial integrity and immunity from the jurisdiction of other states).³⁰ However, in modern international law, while states have equal capacity for duties and rights – meaning they cannot be legally bound without their consent – this does not ensure equality in the actual duties and rights they possess³¹ nor does it guarantee insulation from the impact of other states.³² Sovereign equality means legal equality, i.e. equal *legal* status and capacity, but it does not indicate *political* equality. Political (in)equality reflects the influence of states in the international system, which can result in special rights for certain states³³ such as the great powers (permanent members of the Security Council), recognized by the Charter of the UN.

In an anarchic world governed largely by the balance of power, it is left to the dominant countries whether they will play a constructive or destructive role in maintaining international peace. These powers may be granted greater responsibility compared to other states. Thus, it is arguable that major powers are accorded specific privileges in the voting systems of international organizations, not only due to their capability to maintain peace, but also in order to ensure a functional balance between them.³⁴ It is worth noting that unequal voting rights are not exclusive to the Security Council; they are practiced in many international organizations. For example, international financial institutions allocate

²⁹ Hans Kelsen, “The Principle of Sovereign Equality of States as a Basis for International Organization,” *The Yale Law Journal*, Vol. 53, No. 2 (March 1944), p. 209.

³⁰ Gerry Simpson, *Great Powers and Outlaw States: Unequal Sovereigns in the International Legal Order*, Vol. 32 (UK: Cambridge University Press, 2004), pp. 27-28.

³¹ Hans Kelsen, *op. cit.*, p. 209.

³² Kenneth Waltz, *op. cit.*, p. 96.

³³ Paweł Czubik, “Sovereignty in International Law,” in Anikó Raisz (ed.), *International Law From a Central European Perspective* (Miskolc-Budapest: Central European Academic Publishing, 2022), p. 101, https://doi.org/10.54171/2022.ar.ilfcec_5.

³⁴ Pieter Hendrik Kooijmans, *The Doctrine of the Legal Equality of States: An Inquiry into the Foundations of International Law* (Leiden: A.W. Sythoff, 1964), pp. 241-242.

voting rights based on the economic size of member states. Also, the International Labour Organization grants representational preference in its Governing Body to states with "chief industrial importance."³⁵

In world governance, absolute equality among states is impractical as it requires unanimity, which can allow a minority to block governance. What is needed is a balance between ideal principles and practical functioning.³⁶ The key issue is not the frequency or variety of situations in which a state is outvoted, but the specific matters involved. A state may consent to limit its freedom of action in certain areas of sovereignty, but this does not mean that the state *relinquishes* its sovereignty.³⁷ The voluntary delegation of sovereignty by states to international organizations, or its restriction through treaties, is essential for achieving greater cooperation and maintaining international peace.

Conclusion

The changes in the structure of the international order, along with the demands from the Global South and emerging powers for greater equality in the UN system, necessitate comprehensive reform of the world organization. Any such initiative should balance sovereign equality against effectiveness, most notably via restructuring of the Security Council as the cornerstone of any meaningful reform.

Since the permanent members are unlikely to give up their voting privilege and in view of the difficulties in reaching a consensus on new permanent members, a more realistic option may be to rotate the veto among a number of elected non-permanent members. This would be consistent with the proposals of the Uniting for Consensus (UFC) group, which includes Argentina, Canada, Colombia, Costa Rica, Italy, Malta,

³⁵ Jeffrey L. Dunoff, "Is Sovereign Equality Obsolete? Understanding Twenty-First Century International Organizations," in Janne E. Nijman and Wouter G. Werner (eds.), *Netherlands Yearbook of International Law 2012* (The Hague: Asser Press, 2013), pp. 110-111.

³⁶ Ann van Wynen Thoma and A. J. Thomas, Jr., "Equality of States in International Law: Fact or Fiction?" *Virginia Law Review*, Vol. 37, No. 6 (October 1951), p. 822.

³⁷ Hans J. Morgenthau, "The Problem of Sovereignty Reconsidered," *Columbia Law Review*, Vol. 48, No. 3 (April 1948), p. 359.

Mexico, Pakistan, the Republic of Korea, San Marino, Spain, and Türkiye, under Italy's leadership. These proposals could be further developed to serve as a basis for intergovernmental negotiations aimed at achieving a practical and widely acceptable reform of the Security Council.

Rotating non-permanent seats with veto power among states that equitably represent different regions, combining both geographical and cultural diversity, could indeed be more easily agreed upon. This approach allows for a larger number of states to hold veto power over time, alleviating concerns about favoring specific states and reducing fears among rival states about the enhancement of the international status of certain nations if they were granted permanent membership. Additionally, the rotation of non-permanent seats with veto power in the Security Council would accommodate the ever-changing international order with the emergence of new global and regional players.

Furthermore, a fundamental determinant in any Security Council reform should be the capability of new members to contribute to international peace and security. Also, empowering the General Assembly with more authority in that domain, and making some of its recommendations binding, will be crucial for a more balanced and effective United Nations. These changes are essential to address contemporary global challenges while upholding the principle of equality among all member states.

Alfred de Zayas

The UN Charter as World Constitution Needs an Enforcement Mechanism

Dealing with today's threats requires broad, deep, and sustained global cooperation. Thus the states of the world must create a collective security system to prevent terrorism, strengthen non-proliferation, and bring peace to war-torn areas, while also promoting human rights, democracy, and development. And the UN must go through its most radical overhaul yet.

Kofi Annan, 25 April 2005¹

The UN Charter, adopted on 24 October 1945, has not lost its relevance. In fact, we need the United Nations more than ever. The Charter constitutes the only rules-based order that humanity has. The General Assembly remains the best forum for diplomats to exchange views and craft compromises, a peaceful *modus vivendi* that will facilitate development and prosperity for everyone on the planet. Civil society must play a stronger role in decision-making and strengthening a democratic and equitable international order.²

79 years after the adoption of the UN Charter, new realities have emerged that are not properly reflected in the membership of the UN Security Council. Already in 2005, UN Secretary-General Kofi Annan proposed in his report “*In Larger Freedom*” an expansion of the SC from 15 to 24 members:

“If the UN is to be a vehicle through which states can meet the challenges of today and tomorrow, it needs major reforms to strengthen

¹ <https://www.un.org/sg/en/content/sg/articles/2005-04-25/larger-freedom-decision-time-un>; see also <https://reform.un.org/news/news>.

² <https://www.ohchr.org/en/special-procedures/ie-international-order>.

its relevance, effectiveness, and accountability ... No reform of the UN would be complete, however, without Security Council reform. The council's present makeup reflects the world of 1945, not that of the twenty-first century. It must be reformed to include states that contribute most to the organization, financially, militarily, and diplomatically, and to represent broadly the current membership of the UN. Two models for expanding the council from 15 to 24 members are now on the table: one creates six new permanent seats and three new non-permanent ones; the other creates nine new non-permanent seats. Neither model expands the veto power currently enjoyed by the five permanent members. I believe the time has come to tackle this issue head on.”³

I endorsed Annan’s proposal in my 2013 report to the General Assembly in my capacity as Independent Expert on International Order, formulated reform options, and laid out a plan of action how to gradually phase out the veto power in the Security Council, by amending Article 27 of the Charter.⁴

There have been five amendments to the UN Charter, starting with the amendment adopted on 31 August of 1965 to increase the membership of the Security Council from 11 to 15 pursuant to Article 108 of the Charter. An expansion of the Security Council membership is urgent in order to make it genuinely representative and strengthen its authority and credibility. We no longer live in the world of 1945, although three members of the Security Council are still major powers: China, Russia and the US; but there is no justification to perpetuate the permanent seats of the United Kingdom and France, whose political and economic power has declined. A better reflection of today’s world would be achieved through the permanent presence in the Security Council of Brazil, India, Indonesia, Japan, Mexico, Nigeria, South Africa and Türkiye.

If and when the UN Charter is amended, the States should also agree on the establishment of enforcement mechanisms beyond those fore-

³ <https://digitallibrary.un.org/record/550204?v=pdf>.

⁴ <https://documents.un.org/doc/undoc/gen/n13/421/23/pdf/n1342123.pdf>. See also Joseph Schwartzberg, *Transforming the United Nations System*, United Nations University Press, Tokyo, 2013.

seen in Chapter VII of the Charter, providing for the possibility of delegating or outsourcing certain functions to specialized agencies like the ILO, UNESCO, UNICEF and WHO with hands-on experience on the ground. Among the amendments that should be considered is the addition of a clause requiring countries to adopt enabling legislation granting domestic legal status to international judgments and decisions, so that local judges can actually order the implementation of international commitments.

In other words, international law and international jurisprudence should become part of the domestic legal order. For instance, citizens should be able to directly invoke the provisions of the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ICESCR), the International Convention on the Elimination of all Forms of Racial Discrimination (ICERD), the Convention against Torture (CAT), the International Convention on the Prohibition and Punishment of the Crime of Apartheid,⁵ the Convention on the Prevention and Punishment of the Crime of Genocide,⁶ etc. Moreover, citizens should have standing in local courts to demand from their governments that they abide at least by the fundamental commitments undertaken under the United Nations Charter, e.g. not to deliver lethal weapons to countries committing war crimes, crimes against humanity and genocide. In a few states like the Netherlands, every citizen can invoke the ICCPR directly and start a case against the government for the delivery of weapons to a country committing war crimes and crimes against humanity.⁷

Law without enforcement loses its authority and credibility. Enforcement, however, presupposes a mental disposition to accept and imple-

⁵ https://www.un.org/en/genocideprevention/documents/atrocity-crimes/Doc.10_International%20Convention%20on%20the%20Suppression%20and%20Punishment%20of%20the%20Crime%20of%20Apartheid.pdf.

⁶ <https://www.ohchr.org/en/instruments-mechanisms/instruments/convention-prevention-and-punishment-crime-genocide>.

⁷ <https://apnews.com/article/netherlands-court-f35-israel-b33608b054a33fbacc518395b53b74e8>; <https://www.ohchr.org/en/press-releases/2024/02/arms-exports-israel-must-stop-immediately-un-experts>.

ment judgments and advisory opinions of the ICJ⁸ and other competent tribunals, whether or not the state agrees with the rulings or with their rationale. That is the essence of civilization: to accept that in every judicial dispute there are valid arguments on all sides and that the competent judicial instance has been given authority to decide. This entails an obligation to respect the decision in good faith. Selective enforcement of ICJ judgments and orders, selective implementation of resolutions of the General Assembly and Security Council, selective compliance with recommendations of UN bodies undermine the international order. On the other hand, enforcement does not mean only “sanctions” under Chapter VII of the UN Charter, and should not be primarily perceived as a form of punishment. Rather, it should be understood as a self-evident component of the social contract, of the rule of law, of civilization. Enforcement should be accompanied by incentives, advisory services and technical assistance in international solidarity.⁹ Enforcement also requires the cooperation of non-state actors including transnational corporations, which have become subjects of international law.¹⁰

“Exceptionalism,”¹¹ as practised by some of the P5 Security Council members, has been rejected by the global majority in countless UN resolutions that emphasize the Charter obligation to respect the sovereign equality of states and to promote the right of self-determination of peoples. It is unacceptable that in the 21st century millions of human beings are subjected to illegal unilateral coercive measures (UCMs). Every year the General Assembly condemns UCMs, most recently in resolution 78/202 of 19 December 2023.¹² Similarly, the UN Human Rights Council condemns them,¹³ every year, most recently in resolution 55/7 of 3 April 2024.¹⁴ Millions of human beings continue to suffer the con-

⁸ Sanja Sarraf, *Enforcing International Law: An Analysis of ICJ Decisions*, <https://ijcr.org/papers/IJCRT2304409.pdf>; Shany, Y. (2007), “Assessing the Effectiveness of International Courts,” *Journal of International Law and Politics*, 40(4), 897-924.

⁹ <https://www.ohchr.org/sites/default/files/documents/issues/solidarity/reviseddraftdeclarationrightInternationalsolidarity.pdf>.

¹⁰ <https://www.oxfordbibliographies.com/display/document/obo-9780199796953/obo-9780199796953-0049.xml>.

¹¹ <https://www.counterpunch.org/2024/09/25/exceptionalism-and-international-law/>.

¹² <https://documents.un.org/doc/undoc/gen/n23/423/58/pdf/n2342358.pdf>.

¹³ <https://www.ohchr.org/en/unilateral-coercive-measures>.

¹⁴ <https://documents.un.org/doc/undoc/gen/g24/058/92/pdf/g2405892.pdf>.

sequences of UCMs, selectivity and double standards. Exceptionalism is an affront against the very ontology of justice and frequently degenerates into what one may call “lawfare” against certain countries and individuals. Exceptionalism constitutes a revolt against international law.

One of the most shocking manifestations of exceptionalism was when the United States imposed sanctions on the Prosecutor of the International Criminal Court, Fatou Bensouda,¹⁵ for daring to open an investigation into war crimes by US and NATO forces in Afghanistan and Iraq. This emblematic example of contempt for international law and international judicial institutions was criticized by Amnesty International¹⁶ and Human Rights Watch.¹⁷ The exceptionalist refusal to respect the primacy of the UN Charter and the UN institutions may soon be repeated. The incoming US Senate majority leader threatened the ICC with sanctions for seeking an arrest warrant against Israeli Prime Minister Benjamin Netanyahu.¹⁸ Notwithstanding the US threats, the ICC did issue arrest warrants against Netanyahu and his former Defence Minister Yoav Gallant¹⁹ on 21 November 2024. Had the ICC failed to do so, it would have lost the little authority and credibility it still has. Already a number of states including Canada, France, the Netherlands and the United Kingdom have expressed that they would respect the arrest warrants.²⁰

Shortly after the ICC issued the arrest warrants, the US government rejected them²¹ and Secretary of State Antony Blinken suggested that the administration was willing to work with Congress to adopt sanctions against members of the ICC and come up with a response to the court.²² Republican Senator from Arkansas, Tom Cotton, posted on X:

¹⁵ <https://www.bbc.com/news/world-us-canada-54003527>.

¹⁶ <https://www.amnestyusa.org/press-releases/iccsantions/>.

¹⁷ <https://www.hrw.org/news/2020/12/14/us-sanctions-international-criminal-court>.

¹⁸ <https://www.timesofisrael.com/incoming-senate-majority-leader-threatens-icc-with-sanctions-over-case-against-israelis/>.

¹⁹ <https://www.bbc.com/news/articles/cly2exvx944o>.

²⁰ <https://www.newsweek.com/netanyahu-arrest-warrant-list-countries-comply-icc-1990062>.

²¹ <https://www.reuters.com/world/us-rejects-icc-arrest-warrants-israeli-officials-white-house-spokesperson-says-2024-11-21/>.

²² <https://www.middleeasteye.net/news/us-lawmakers-hague-invasion-act-what-is-it>.

“The ICC is a kangaroo court and Karim Khan is a deranged fanatic. Woe to him and anyone who tries to enforce these outlaw warrants. Let me give them all a friendly reminder: the American law on the ICC is known as The Hague Invasion Act for a reason. Think about it.”²³ Republican Senator Lindsey Graham posted: “The International Corrupt Criminal Court has acted in the most absurd and irresponsible manner possible by issuing arrest warrants against the Prime Minister and former Defence Minister of Israel while there is a serious cloud of allegations hanging over the prosecutor who sought these warrants. (...) The Court is a dangerous joke. It is now time for the U.S. Senate to act and sanction this irresponsible body.”²⁴ Already in 2002, during the George W. Bush administration, the US “unsigned” the Rome Statute,²⁵ and the US Congress adopted the so-called “Hague Invasion Act,”²⁶ which empowers the United States government to “free its allies from the clutches of the ICC,”²⁷ using all “necessary and appropriate” means. This confirms the consistent pattern of US contempt for the UN Charter and international law in general.

Object and purpose of the United Nations Organization

The Purposes and Principles of the Organization are laid down in Articles 1 and 2 of the Charter. Its three pillars are peace, development and human rights. Among the *jus cogens* obligations assumed by states are the respect for the sovereign equality of states, the recognition of the right of self-determination of peoples, the commitment to settle differences by peaceful means, the prohibition of the use of force or the threat thereof, and the prohibition of interference in the internal affairs of states. These are *erga omnes* obligations binding on all member

²³ <https://www.palestinechronicle.com/hague-invasion-act-us-senator-threatens-icc-with-military-force/>.

²⁴ <https://www.msn.com/en-us/news/politics/graham-knocks-icc-over-netanyahu-galant-a-dangerous-joke/ar-AA1uvFC5>.

²⁵ <https://www.asil.org/insights/volume/7/issue/7/us-announces-intent-not-ratify-international-criminal-court-treaty>.

²⁶ <https://www.newarab.com/news/hague-invasion-act-can-us-invade-netherlands-protect-israel>.

²⁷ <https://newrepublic.com/post/188733/tom-cotton-plan-icc-benjamin-netanyahu-warrant>.

states. Only with good faith, in a spirit of cooperation and multilateral action, can the world solve global challenges, including armed conflict, natural disasters, global warming, pandemics and extreme poverty.

Over the past 79 years, the United Nations has delivered in all fields of human activity. UN specialized agencies such as ILO, UNESCO, UNICEF, WHO, WIPO, IAEA, ICAO have worked in tandem with the UN in promoting the goals of the Charter. Unfortunately, the greed, ambition and intransigence of powerful nations have caused and continue to cause wars, destruction and human suffering.

In many ways, it can be said that some aspects of the United Nations system are dysfunctional. Yet, this does not mean that the Organization and its agencies should be abolished or replaced. It means that all states must work together to make the necessary reforms, including the establishment of enforcement mechanisms with the necessary flexibility to implement decisions in due time, good faith and international solidarity.

Undoubtedly, the United Nations Organization has performed a formidable job of standard setting and institution building. The International Law Commission has elaborated treaties and protocols that have been ratified by a majority of UN member states and have contributed significantly to the progressive development of international law. The ILC has defined the law on the responsibility of states, the law of treaties, the laws of diplomatic relations, the law of the sea, the law on outer space. The Universal Declaration of Human Rights, adopted by the General Assembly on 10 December 1948, and the elaboration of ten core human rights treaties equipped with expert committees mandated to monitor implementation are major achievements.

There is no dispute with regard to the fact that human rights are juridical and justiciable, but we all see that oftentimes the ICCPR, ICESCR, ICERD, CAT are violated with impunity, judgments and resolutions are not implemented. Alas, norms are not self-executing and require incor-

poration into domestic legislation.²⁸ In this context, the Office of the United Nations High Commissioner for Human Rights,²⁹ established in 1993 by General Assembly Resolution 48/141, provides advisory services and technical assistance to states that request it. The UN Commission on Human Rights (1946-2006) and the Human Rights Council (2006 to date) established thematic and country mandates to facilitate the implementation of the human rights treaties. But to this date, there is no follow-up mechanism to the reports of independent experts and working groups.

We observe retrogression in the implementation of norms, both domestically and internationally. In particular, governments at war have massively curtailed the enjoyment of human rights, although the application of human rights norms and human rights treaties becomes all the more crucial in times of armed conflict. And even in countries not at war, the existence of wars elsewhere has been misused as an excuse to curtail freedom of opinion and expression, hitherto considered *acquis* of civilization.³⁰ The law on territorial and diplomatic asylum³¹ is under attack. The great powers have violated treaties in such number and frequency that one can speak of a generalized culture of impunity, notwithstanding the existence of competent international courts and tribunals that should investigate and punish such violations.

Bearing in mind that many ICJ judgments and advisory opinions are not being complied with, experts are pondering how to reverse the trend of international outlawry, how to return to a commitment to enforce the rulings of the highest UN judicial bodies – and not just those that governments like.

²⁸ <https://www.cambridge.org/core/journals/american-journal-of-international-law/article/abs/changing-concepts-and-the-doctrine-of-incorporation/880F3C9EE46ED3C554117F1FDFB69DCD>.

²⁹ <https://digitallibrary.un.org/record/180226?v=pdf>.

³⁰ Criminal legislation in Germany is particularly problematic in that it amalgamates criticism of the Israeli government with anti-semitism.

³¹ https://legal.un.org/ilc/texts/instruments/english/conventions/9_1_1961.pdf; <https://treaties.un.org/doc/Publication/UNTS/Volume%201438/volume-1438-I-24377-English.pdf>; <https://www.unhcr.org/about-unhcr/overview/1951-refugee-convention>.

As long as the great powers take international law *à la carte*, it will not be possible to enforce the UN Charter and the rulings of its organs and institutions. It is time for the global majority in Latin America, Africa and Asia to rise up and demand in the UN General Assembly that the great powers abide by their legal commitments under the Charter. It is time to reactivate the “Uniting for Peace” procedure³² and enforce a ceasefire in Ukraine, Gaza and Lebanon, and in other conflicts less mediatized in the West, including Yemen and Sudan.

Bearing in mind that the UN Charter was conceived as a world constitution that operates on the basis of multilateralism, it is crucial for the Global Majority to push back against its misuse as an instrument of imperialism. It is time to return to the practical recognition of the supremacy of the Charter as laid down in its Art. 103, which stipulates: “In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.”³³ It is time for the ICJ to rule that the Charter takes precedence over all treaties, including that of the North Atlantic Treaty Organization that tends to usurp the powers and functions of the Security Council.³⁴

In my books *Building a Just World Order* and *The Human Rights Industry*,³⁵ I elaborate on the retrogression of rights and stress that enforcement is key to the authority and credibility of every institution. No matter how noble the principles, how compelling the norms, how respectable the mechanisms, institutions become irrelevant when their judgments, resolutions and decisions are not implemented. Moreover, it is imperative to ensure that the institutions created to protect our rights – our governments, the courts, the UN Human Rights Council – act according to their respective charters and constitutions and not *ultra vires*. It is unacceptable that some United Nations organs frequently apply double standards, investigate and condemn the violations of

³² <https://legal.un.org/avl/ha/ufp/ufp.html>; <https://news.un.org/en/story/2023/12/1144717>.

³³ <https://www.un.org/en/about-us/un-charter/full-text>.

³⁴ <https://www.counterpunch.org/2024/03/27/un-charter-un-credibility-and-unlawful-unilateral-coercive-measures/>.

³⁵ <https://www.claritypress.com/book-author/alfred-de-zayas/>.

international law by certain countries while keeping silent about the violations committed by other countries. This kind of selectivity has become obvious and many countries have denounced it.

The authority and credibility of institutions like the League of Nations and the United Nations depend on their neutrality and independence as honest brokers. Their credibility also rests on the objectivity and professionalism of their secretariats. When it is perceived that the institutions established to defend our rights are not living up to the expectation of neutrality and professionalism, the trust given to them by the world community diminishes. Juvenal's Sixth Satire posed the question succinctly, "*quis custodiet ipsos custodes?*" [who will guard over the guardians?] (verses 347-48). If the institutions are not truly independent but serve the interests of the hegemons, the "clients" of these institutions will sooner or later abandon them, will no longer believe in their pronouncements, and will be even less inclined to implement their rulings and resolutions.³⁶

The profound inequities of the Paris Peace Conference of 1919, the absence of neutrality and even-handedness and the lack of enforcement mechanisms in the Covenant of the League of Nations³⁷ (1920-1946) contributed significantly to the outbreak of the Second World War.³⁸ At the Paris Peace Conference the victorious powers made a mockery of Woodrow Wilson's 14 points and, in particular, of the right of self-determination of peoples, which was granted to the Slavic populations of Czechoslovakia, Poland and Yugoslavia, but denied to the German populations of Bohemia, Moravia, Danzig,³⁹ Königshütte, Kattowitz, Posen, Südtirol, and also denied to the Hungarian populations of Romania, Slovakia and Ukraine. In order to mellow the manifold injustices of the treaties of Versailles, St. Germain and Trianon, the Paris Peace

³⁶ <https://onlinelibrary.wiley.com/doi/abs/10.1111/ajes.12542>.

³⁷ <https://www.un Geneva.org/en/about/league-of-nations/covenant>.

³⁸ Alfred de Zayas, "The International Judicial Protection of Peoples and Minorities," in C. Bröllmann, *Peoples and Minorities in International Law*, Brill 1994, pp. 253-287, <https://brill.com/edcollbook/title/9319>. – *Nemesis at Potsdam*, Routledge, London 1977.

³⁹ Carl Jacob Burckhardt, *Meine Danziger Mission*, Munich 1960, third enlarged edition 1980.

Conference provided for a minorities protection system.⁴⁰ The promised protection proved illusory. Thousands of petitions in the archives of the League of Nations⁴¹ document how gravely the rights of minorities were violated by the new rulers and how, in spite of judgments by the Permanent Court of International Justice,⁴² the minorities were deprived of effective remedies. In 1934, Poland unilaterally withdrew from the Minorities Rights Treaties,⁴³ while Czechoslovakia violated it in total impunity.⁴⁴ In the light of constant violations of the Covenant of the League of Nations and more directly because of the Soviet invasion of Finland, the Soviet Union was expelled from the League of Nations in December 1939.⁴⁵

It is for our generation to ensure that the United Nations can indeed “save succeeding generations from the scourge of war” (Preamble, UN

⁴⁰ H. v. Truhart, *Völkerbund und Minderheitenpetitionen*, Vienna, 1961; Alfred de Zayas, *Nemesis at Potsdam*, Routledge 1977, chapters 1-3; de Zayas, *50 Theses on the Expulsion of the Germans*, Inspiration, London and Berlin, 2012; <https://www.cambridge.org/core/journals/american-journal-of-international-law/article/abs/protection-of-minorities-by-the-league-of-nations/D0767817D3FA0A0478EE0FE408AB31AC>; <https://academic.oup.com/edited-volume/42626/chapter-abstract/358047973?redirectedFrom=fulltext&login=false>; Victor Burns, “Die Tschechoslowakei auf der Pariser Friedenskonferenz,” in *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, vol. VIII (1938) pp. 607.23, https://link.springer.com/chapter/10.1007/978-3-642-80273-7_4.

⁴¹ <https://archives.ungeneva.org/lontad>.

⁴² Permanent Court of International Justice, *Decisions and Judgments*, Series A, B, The Hague, 1919-1939, <https://icj-cij.org/pcij-series-a>; <https://www.icj-cij.org/pcij>; https://www.worldcourts.com/pcij/eng/decisions/1928.04.26_upper_silesia.htm; <https://lawhelpbd.com/international-law/chorzow-factory-case/>; https://www.worldcourts.com/pcij/eng/decisions/1933.07.29_agrarian_reform.htm.

⁴³ <https://www.nytimes.com/1934/09/15/archives/poland-hails-end-of-treaty-on-minorities-sees-herself-now-becoming.html>; <https://www.jstor.org/stable/25777027>; <https://academic.oup.com/book/6317/chapter-abstract/150016989?redirectedFrom=fulltext&login=false>.

⁴⁴ Hermann Raschhofer, *Selbstbestimmungsrecht und Völkerbund*, Köln, 1969; *Die Sudetenfrage, ihre völkerrechtliche Entwicklung vom Ersten Weltkrieg zur Gegenwart*, München, 1953. – A. de Zayas, *Nemesis at Potsdam*, Routledge, 1977, chapters 2 and 3. – A. de Zayas, *Heimatrecht ist Menschenrecht*, Universitas, Munich, 2001.

⁴⁵ <https://www.history.com/this-day-in-history/ussr-expelled-from-the-league-of-nations>; <https://soviethistory.msu.edu/1939-2/soviet-territorial-annexations/soviet-territorial-annexations-texts/expulsion-of-the-ussr-from-the-league-of-nations/>.

Charter). Unlike World War II, which cost more than 50 million lives, the outbreak of a nuclear war today would mean Apocalypse for human and animal life on the planet.

Enforcement of UN resolutions

Pursuant to Article 25 of the UN Charter, “The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter.” However, there are many “hard law” Security Council resolutions that remain unenforced. Take, for instance, resolution 242 of 22 November 1967, which stipulates:

“The Security Council, Expressing its continuing concern with the grave situation in the Middle East, Emphasizing the inadmissibility of the acquisition of territory by war and the need to work for a just and lasting peace in which every State in the area can live in security, Emphasizing further that all Member States in their acceptance of the Charter of the United Nations have undertaken a commitment to act in accordance with Article 2 of the Charter, 1. Affirms that the fulfilment of Charter principles requires the establishment of a just and lasting peace in the Middle East which should include the application of both the following principles: (i) "Withdrawal of Israel armed forces from territories occupied in the recent conflict; (ii) Termination of all claims or states of belligerency and respect for and acknowledgement of the sovereignty, territorial integrity and political independence of every State in the area and their right to live in peace within secure and recognized boundaries free from threats or acts of force; 2. Affirms further the necessity (a) For guaranteeing freedom of navigation through international waterways in the area; (b) For achieving a just settlement of the refugee problem; (c) For guaranteeing the territorial inviolability and political independence of every State in the area through measures including the establishment of demilitarized zones; 3. Requests the Secretary-General to designate a Special Representative to proceed to the Middle East to establish and maintain contacts with the States concerned in order to promote agreement and assist efforts to achieve a peaceful and accepted settlement in accordance with the provisions and principles in this resolution; 4. Requests the Secretary-General

to report to the Security Council on the progress of the efforts of the Special Representative as soon as possible.”

Adopted unanimously at the 1382nd meeting⁴⁶

57 years after Resolution 242, we realize that successive Israeli governments have systematically flouted the letter and spirit of resolution 242 and subsequent resolutions. This serial violation of international law has been possible because of the misuse of the veto power in the Security Council by the United States.⁴⁷ Also the orders issued by the International Court of Justice pursuant to Article 41 of the ICJ Statute constitute “hard law” and are legally binding. Yet, all the orders issued by the ICJ in *South Africa v. Israel* have been blithely ignored.⁴⁸ Bolivia, Colombia, Chile, Ireland, Libya, Maldives, Mexico, Nicaragua, Palestine, Spain, Türkiye have made declarations of intervention in the case.⁴⁹

Genocide is occurring before our eyes, and some countries have become complicit in it by providing military, economic, political, diplomatic and propagandistic support to the government of Israel. Even international organizations like the European Union have become complicit in the genocide,⁵⁰ and the International Criminal Court has to this date failed to issue a warrant for the arrest of any European politician or journalist pursuant to Article 6 of the Rome Statute, although the Prosecutor Karim Khan has received such requests.⁵¹

⁴⁶ Resolution 242 (1967) of 22 November 1967, S_RES_242(1967)-EN.pdf.

⁴⁷ <https://news.un.org/en/story/2023/10/1142507>; <https://www.aljazeera.com/news/2021/5/19/a-history-of-the-us-blocking-un-resolutions-against-israel>; <https://www.middleeasteye.net/news/43-times-us-has-used-veto-power-against-un-resolutions-israel>; <https://globalaffairs.org/bluemarket/how-us-has-used-its-power-un-support-israel-decades>.

⁴⁸ <https://www.icj-cij.org/case/192>. – On 28 October 2024 South Africa presented a 750-page memorial supported by more than 400 pages of documentation on Israel’s war crimes, crimes against humanity and genocide against the people of Palestine: <https://www.gov.za/news/media-statements/south-africa-delivers-evidence-israel-genocide-icj-28-oct-2024>.

⁴⁹ <https://www.icj-cij.org/case/192/intervention>.

⁵⁰ <https://www.counterpunch.org/2024/05/27/call-for-the-icc-to-investigate-ursula-von-der-leyen-for-complicity-in-war-crimes-and-genocide/>.

⁵¹ <https://news.un.org/en/story/2024/05/1149966>.

The very fact that the United Nations institutions have tolerated an apartheid regime in Israel for seven decades and that the Organization has been incapable to stop the ongoing genocide in Gaza has resulted in a significant loss of reputation by the United Nations and a loss of the trust that it once enjoyed. Many politicians and journalists in Latin America, Africa and Asia perceive the United Nations as being in the service of the United States, the European Union and Israel, and not in the service of humanity.⁵² Some countries are calling for the expulsion of Israel from the United Nations,⁵³ as would be possible pursuant to Article 6 of the Charter, which stipulates: “A Member of the United Nations which has persistently violated the Principles contained in the present Charter may be expelled from the Organization by the General Assembly upon the recommendation of the Security Council.” Of course, even if the General Assembly were to adopt a pertinent resolution, it is absolutely certain that the US, and probably the UK and France would veto it,⁵⁴ as the United States did on 20 November 2024 when it vetoed the Security Council ceasefire resolution on Gaza.⁵⁵ Thus, the genocide continues and the US and Europe continue selling weapons to Israel.

Not even an appeal to the International Court of Justice has resulted in a change in the policies of the State of Israel vis-à-vis the right of self-determination of the Palestinians. Israel brazenly violated the Advisory Opinion of 9 July 2004⁵⁶ and has rejected the Advisory Opinion of 19 July 2024.⁵⁷ In the 2024 Opinion the ICJ concluded “that the State of Israel’s continued presence in the Occupied Palestinian Territory is unlawful,” further that “the State of Israel is under an obligation to bring to an end its unlawful presence in the Occupied Palestinian Ter-

⁵² <https://www.counterpunch.org/author/alfred-de-zayas/>; <https://www.ohchr.org/en/special-procedures/ie-international-order/mr-alfred-maurice-de-zayas-former-independent-expert-2012-2018>.

⁵³ <https://www.malaymail.com/news/malaysia/2024/11/04/pm-anwar-malaysia-proposes-expelling-israel-from-un-if-there-is-legal-violation/155764>; <https://www.nst.com.my/news/nation/2024/11/1129752/un-draft-resolution-malaysia-proposes-expelling-israel-un-watch>.

⁵⁴ <https://www.counterpunch.org/2024/05/17/a-rebellion-against-law-and-civilization-on-genocide-and-its-accomplices/>.

⁵⁵ <https://news.un.org/en/story/2024/11/1157216>; <https://www.youtube.com/watch?v=MYqlxZefVLA>.

⁵⁶ <https://www.icj-cij.org/case/131>.

⁵⁷ <https://www.icj-cij.org/case/186>.

ritory as rapidly as possible,” further that “the State of Israel is under an obligation to cease immediately all new settlement activities, and to evacuate all settlers from the Occupied Palestinian Territory,” further that “the State of Israel has the obligation to make reparation for the damage caused to all the natural or legal persons concerned in the Occupied Palestinian Territory.” The strong endorsement of the Advisory Opinion by the UN General Assembly⁵⁸ has not moved Israel to change its policies. It is a disgrace that 14 states actually voted against the GA resolution. One can legitimately ask how any member of the United Nations could oppose the implementation of an ICJ Advisory Opinion? This constitutes a separate and distinct violation of the UN Charter by those states.

Predictably, Israel has failed to implement the ICJ ruling of 19 July 2024, confirming the diagnosis that it is in open rebellion against international law and the ICJ, and that the United States and a number of European States are complicit. This rebellion adversely impacts the authority of international judicial institutions and questions the viability of international law itself. At the very least, the General Assembly should adopt a resolution withdrawing the accreditation of Israeli diplomats, as it did in 1974 when it suspended South Africa, whose delegates were stripped of their right to vote in the United Nations because of its consistent disregard of ICJ rulings and General Assembly resolutions condemning apartheid.⁵⁹

Part of the problem associated with non-implementation of ICJ rulings is that only the Security Council can sanction states for non-compliance, and any of the five permanent members of the Security Council can veto any resolution ordering enforcement. More generally, with regard to other United Nations pronouncements, only Security Council decisions and resolutions are deemed “hard law” and considered legally binding. Only the Security Council has the authority to enforce them.

By contrast, General Assembly resolutions are deemed to be “soft law” and are *stricto sensu* not legally binding. Thus, they are all too frequent-

⁵⁸ <https://news.un.org/en/story/2024/09/1154496>.

⁵⁹ <https://www.nytimes.com/1974/11/13/archives/south-africa-is-suspended-by-un-assembly-9122-un-session-barssouth.html>.

ly ignored. There is no price to pay for violating GA resolutions; e.g., the United States has flouted 32 GA Resolutions on the lifting of the US embargo against Cuba, although these resolutions were adopted by huge majorities. The most recent resolution was adopted on 30 October 2024 by a vote of 187 in favour and only two against⁶⁰ – the usual suspects: the United States and Israel. One remembers that, during the second term of President Barack Obama, the GA resolution was adopted by a vote of 191 in favour and two abstentions: the United States and Israel.⁶¹ More “universal” than this is hardly conceivable. And yet, the embargo was not lifted and the UCMs imposed by the United States on Cuba have been intensified as part of the US policy of “maximum pressure.”

It is important for the international community to push back against this systematic disregard of UN resolutions, adopted by huge majorities and rejected by the US and most often by its vassals as well. Among possible measures that states could take I would propose that a consortium of states move the General Assembly pursuant to Article 96 of the Charter to request the International Court of Justice to issue an Advisory Opinion on the questions whether UCMs that demonstrably kill thousands of people worldwide⁶² constitute a “crime against humanity” within the meaning of Article 7 of the Rome Statute, what is the level of complicity of third parties and transnational corporations, and what would be an appropriate level of compensation that the states imposing UCMs owe to the victims.

In order to vindicate the rule of law and the sanctity of treaties, states should submit contentious cases to the International Court of Justice and Permanent Court of Arbitration and demand an immediate end to UCMs. States could take measures of retorsion against states that impose UCMs. States should proactively exercise diplomatic protection on behalf of their enterprises affected by UCMs, e.g. for penalties imposed by the US Department of the Treasury. Victims of UCMs should bring individual complaints to the UN human rights treaty bodies, including

⁶⁰ <https://press.un.org/en/2024/ga12650.doc.htm>.

⁶¹ <https://news.un.org/en/story/2016/10/543832-us-abstains-first-time-annual-un-vote-ending-embargo-against-cuba>; <https://documents.un.org/doc/undoc/gen/n15/336/95/pdf/n1533695.pdf>.

⁶² <https://cepr.net/images/stories/reports/venezuela-sanctions-2019-04.pdf>.

the Human Rights Committee, the Committee on Economic, Social and Cultural Rights, the Committee on the Rights of the Child, etc. States should penalize enterprises registered or operating within their jurisdiction for complicity in the implementation of illegal UCMs and complicity in the violation of state sovereignty by giving effect to illegal extraterritorial legislation. States should penalize enterprises for violation of “duty of rescue” laws, when it is established that the implementation of UCMs by these enterprises results in the death of innocents, e.g. as a consequence of the refusal to deliver medicines or medical equipment to states subjected to UCMs. Moreover, states should establish special courts where victims of UCMs can submit claims against enterprises registered or operating under the states' jurisdiction for harm resulting from the implementation of UCMs by these enterprises.

There is also an implementation gap concerning findings and resolutions by UN Working Groups established by the General Assembly or by the Human Rights Council. These too are deemed to be soft law and not legally binding. Thus, the rulings of the UN Working Group on Arbitrary Detention,⁶³ condemning the imprisonment of Julian Assange as arbitrary and in violation of Article 9 of the ICCPR, were not only ignored – they were ridiculed by the British Foreign Office.⁶⁴ In my function as UN Independent Expert on International Order, I repeatedly called for Assange's release. I never received any kind of acknowledgment from the United States, the United Kingdom or Sweden.⁶⁵ In other words, we special rapporteurs are but an assembly of Cassandras.

⁶³ https://www.ohchr.org/sites/default/files/Documents/Issues/Detention/Opinions/2015AUV/Opinion_2015_54_Sweden_UK_Assange_AUV.pdf; <http://www.ohchr.org/Documents/Issues/Detention/A.HRC.WGAD.2015.docx>; <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=17013&LangID=E>.

⁶⁴ <https://www.ft.com/content/d90d55d3-41fd-3548-9586-0449c3f1a7f8>; <https://www.gov.uk/government/news/uk-submits-response-to-un-working-group-on-assange-case--2> – See also Nils Melzer, *The Trial of Julian Assange*, Verso Books, New York, 2022. In this book Professor Melzer, UN Special Rapporteur on Torture, documents the breakdown in the rule of law in the US, UK, Sweden and Ecuador. His revelations are far more serious than those in the 1898 Dreyfus Affair, but unlike in the case of Dreyfus, the US, UK, Sweden and Ecuador persisted in the continuing violation of the rights of Assange.

⁶⁵ <https://news.un.org/en/story/2016/02/522282>.

It must be emphasized that when hard law and/or soft law is violated, the United Nations Organization is under an obligation to take appropriate action, especially when grave violations of human rights constitute a threat to international peace and security within the meaning of Article 39 of the UN Charter. If the United Nations remains silent, it loses authority and credibility.

The principal spokesperson of the United Nations is the Secretary-General, who has a mandate to speak out in order to advance the Purposes and Principles of the UN Charter. Unfortunately, hitherto most Secretaries-General (with the notable exception of Kofi Annan and Boutros-Ghali) have been too “cautious” and only seldom have they displayed the courage to *speak truth to power* and to condemn actions by the hegemons. Secretary-General António Guterres has not yet dared to call the Israeli war on the Palestinian people genocide. He has failed to show the leadership necessary to try to mobilize all United Nations agencies in concerted action to stop the ongoing genocide. Guterres repeats platitudes that do not help the suffering Palestinians and are at best an inadequate “fig leaf” for the United Nations. He could but does not push back against the lies and distortions promoted by some of the P5 and other countries. The failure of António Guterres is emblematic for the entire UN system.

The UN Summit of the Future⁶⁶

The General Assembly’s Summit of the Future held in New York on 20-21 September 2024 had enormous potential, but the Pact for the Future adopted did not do justice to the burning problems of our day. Far more than a Summit of the Future, humanity needs a *Summit for the Present*, a concrete, implementable, pragmatic plan of action to stop armed conflicts throughout the world, including in Ukraine, Israel, and Sudan, a blueprint for sustainable peace, a program for reconstruction and reconciliation, equipped with a *mode d’emploi* for implementation. There was very little talk at the summit with regard to the centrality of the “rule of law” and the necessity to strengthen the administration of justice domestically and internationally. There was no proposal for an

⁶⁶ <https://www.un.org/en/summit-of-the-future>.

expansion of the regional human rights courts or the adoption of legislation rendering the decisions of international tribunals enforceable by domestic courts.

Admittedly, the Global Digital Compact and a Declaration on Future Generations hold much promise, but more urgently we need to ensure the enforcement of existing international treaties, including the two UN Human Rights Covenants and the Geneva Red Cross Conventions. We need implementation of the Judgments, Orders and Advisory Opinions of the International Court of Justice. We need responsibility in world governance, transparency, accountability, and a return to the spirituality of the Universal Declaration of Human Rights.

The UN Pact for the Future⁶⁷

While the pact does not include any provision concerning enforcement, it does formulate some important commitments. Let us hope that in the course of time states will adopt measures to facilitate its implementation. Otherwise the pact will remain a collection of pious slogans and empty promises without any effective monitoring mechanism or “observatory.”

The pact commits members to work for peace and disarmament. Actions 25 and 26 are worth quoting:

Action 25 – We will advance the goal of a world free of nuclear weapons.

A nuclear war would visit devastation upon all humankind and we must make every effort to avert the danger of such a war, bearing in mind that “a nuclear war cannot be won and must never be fought.” – We will uphold our respective obligations and commitments. – We reiterate our deep concern over the state of nuclear disarmament. – We reaffirm the inalienable right of all countries to develop research, production and use of nuclear energy for peaceful purposes

⁶⁷ <https://www.un.org/sites/un2.un.org/files/soft-pact-for-the-future-deck.pdf>; <https://www.youtube.com/watch?v=hgbHVO14Ayg>; <https://news.un.org/en/story/2024/09/1154671>.

without discrimination, in conformity with their respective obligations. – We decide to: (a) Recommit to the goal of the total elimination of nuclear weapons; (b) Recognize that, while the final objective of the efforts of all States should continue to be general and complete disarmament under effective international control, the immediate goal is elimination of the danger of a nuclear war and implementation of measures to avoid an arms race and clear the path towards lasting peace; (c) Honour and respect all existing security assurances undertaken, including in connection with the treaties and relevant protocols of nuclear-weapon-free zones and their associated assurances against the use or threat of use of nuclear weapons; (d) Commit to strengthening the disarmament and non-proliferation architecture and work to prevent any erosion of existing international norms and take all possible steps to prevent nuclear war; (e) Seek to accelerate the full and effective implementation of respective nuclear disarmament and non-proliferation obligations and commitments, including by adhering to relevant international legal instruments and through the pursuit of nuclear-weapon-free zones to enhance international peace and security and the achievement of a nuclear-weapon-free world.

Action 26 – We will uphold our disarmament obligations and commitments.

We express our serious concern at the increasing number of actions that are contrary to existing international norms and non-compliance with obligations in the field of disarmament, arms control and non-proliferation. – We will respect international law that applies to weapons, means and methods of warfare, and support progressive efforts to effectively eradicate the illicit trade in arms. – We recognize the importance of maintaining and strengthening the role of the United Nations disarmament machinery. – Any use of chemical and biological weapons by anyone, anywhere and under any circumstances is unacceptable. – We call for full compliance with and implementation of relevant treaties.

In this context it bears repeating that a fundamental condition for disarmament is mutual trust and verifiable agreements. Therefore, confidence-building measures must be facilitated by the United Nations and all regional organizations. The alternative to confidence-building is fear-mongering and gambling with the future of mankind. Alas, this is

what we are witnessing today, with the world getting closer and closer to a nuclear confrontation and the destruction of the planet.

The pervasive warmongering and demonization of adversaries must end. Art. 20 of the International Covenant on Civil and Political Rights stipulates: “1. Any propaganda for war shall be prohibited by law. 2. Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.”

Quite concretely this requires an immediate cessation of provocations and a phasing out of virulent Russophobia, Sinophobia, and Islamophobia, which are practiced not only by politicians, but also by the mainstream media in many Western states. The International Criminal Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda established pertinent jurisprudence on the issue of complicity in war crimes and crimes against humanity, and on the issue of incitement to hatred and violence. This jurisprudence sets precedents that can be applied to the conflicts in Ukraine and in the Middle East.

The 16th BRICS Summit⁶⁸ and the Kazan Declaration⁶⁹

The Kazan Declaration of 23 October 2024, adopted at the 16th BRICS Summit hosted by Russia in the city of Kazan on the Volga river from 22 to 24 October and attended by 36 countries, constitutes a pivotal moment for humanity. Admittedly, 36 countries out of 193 UN member States does not appear much, but these 36 countries (many of them not yet full members of BRICS) encompass a population of approximately 5 billion, thus a global majority.

There is hope that we can gradually change the paradigm, marshal the world disorder, move away from bloc-mentality, abandon confrontational politics, phase out dependence on the US dollar, and craft a coherent policy to enhance trade, social and cultural exchange in tandem

⁶⁸ <https://brics-russia2024.ru/en/summit/>.

⁶⁹ https://cdn.brics-russia2024.ru/upload/docs/Kazan_Declaration_FINAL.pdf?1729693488349783.

with the Purposes and Principles of the UN Charter and in the spirit of the UNESCO Constitution.⁷⁰

Unlike the UN Summit of the Future and Pact for the Future of 20-22 September 2024, the Kazan Declaration with its 134 paragraphs constitutes a plan of action that goes beyond mere rhetorical incantations. Observers have already called it a major step in the development of a multipolar world order and a reaffirmation of the will of a growing number of States in Latin America, Africa and Asia to strengthen international peace and security through multilateralism.⁷¹ A return to the Purposes and Principles of the United Nations is possible when enough states commit to resolve all differences through diplomacy and exercise good faith instead of continuing to practice a “culture of cheating.”⁷² International cooperation depends on mutual trust and mutual respect, on good faith, the implementation of treaties, and the sincere desire to foster international friendship in all fields through cultural exchange, sports and trade in the spirit of UNESCO.

The comprehensive agenda of the Kazan Declaration covers a broad range of activities in the areas of peace-making and maintenance of peace, climate change and the environment, global health and pandemics, fighting international drug trade and terrorism, supporting women’s participation, people-to-people exchanges, energy security, digitalization, financial cooperation and the need for de-dollarization. Proposals were tabled and discussed for new multilateral cross-border mechanisms for trade and finance, the modalities of creating a new currency, which, of course, are long-term and complex in their implementation.

The Kazan Declaration is entirely in conformity with the UN Charter and better reflects the spirit of multilateralism and cooperation than the documents of many other “summits” held in the recent past.

⁷⁰ <https://www.unesco.org/en/articles/constitution-united-nations-educational-scientific-and-cultural-organization-2022-edition>.

⁷¹ <https://internationalbanker.com/news/key-takeaways-from-the-16th-annual-brics-summit-in-kazan-russia/>.

⁷² <https://transnational.live/2022/02/16/alfred-de-zayas-a-culture-of-cheating-on-the-origins-of-the-crisis-in-ukraine/>.

The UNESCO Constitution as a guide

The UNESCO Constitution, adopted in London on 16 November 1945, places great importance on the dialogue of civilizations and the necessity of mutual respect for the promotion of peace and prosperity through enhanced educational, scientific and cultural cooperation. The Constitution, which has been amended and strengthened over the years, promotes learning about other cultures and trying to understand the perspectives of other peoples, always recognizing our commonalities as human beings and our responsibility vis-à-vis the common heritage of mankind.

Article of 1 of the UNESCO Constitution proposes to achieve its aims

“By encouraging cooperation among the nations in all branches of intellectual activity, including the international exchange of persons active in the fields of education, science and culture and the exchange of publications, objects of artistic and scientific interest and other materials of information.”

Article 8 reminds us:

“That ignorance of each other’s ways and lives has been a common cause, throughout the history of mankind, of that suspicion and mistrust between the peoples of the world through which their differences have all too often broken into war.”

The Constitution’s preamble emphasizes:

“That a peace based exclusively upon the political and economic arrangements of governments would not be a peace which 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.”

Further, “that the wide diffusion of culture, and the education of humanity for justice and liberty and peace are indispensable to the dignity of man and constitute a sacred duty which all the nations must fulfil in a spirit of mutual assistance and concern.”

In my reports to the UN General Assembly and Human Rights Council I have frequently called for a *Global Compact on Education for Peace and Empathy*, education on the common dignity of all human beings and on the common heritage of mankind. On 13 September 1999 the UN General Assembly adopted Resolution 53/243 containing the Declaration and Programme of Action on a Culture of Peace,⁷³ recalling its earlier resolution 52/15 of 20 November 1997, by which it proclaimed the year 2000 as the “International Year for the Culture of Peace.” Article 1 of the Declaration defined a culture of peace as:

“a set of values, attitudes, traditions and modes of behaviour and ways of life based on: (a) Respect for life, ending of violence and promotion and practice of non-violence through education, dialogue and cooperation; (b) Full respect for the principles of sovereignty, territorial integrity and political independence of States and non-intervention in matters which are essentially within the domestic jurisdiction of any State, in accordance with the Charter of the United Nations and international law; (c) Full respect for and promotion of all human rights and fundamental freedoms; (d) Commitment to peaceful settlement of conflicts; (e) Efforts to meet the developmental and environmental needs of present and future generations; (f) Respect for and promotion of the right to development; (g) Respect for and promotion of equal rights and opportunities for women and men; (h) Respect for and promotion of the right of everyone to freedom of expression, opinion and information; (i) Adherence to the principles of freedom, justice, democracy, tolerance, solidarity, cooperation, pluralism, cultural diversity, dialogue and understanding at all levels of society and among nations; and fostered by an enabling national and international environment conducive to peace.”

The Information War: fake news, fake history, fake law⁷⁴

One of the factors contributing to the dysfunctionality of the United Nations is the disinformation disseminated by the mainstream media,

⁷³ <https://digitallibrary.un.org/record/285677?v=pdf>.

⁷⁴ <https://www.counterpunch.org/2022/03/21/fake-news-fake-history-fake-law/>.

sometimes referred to as the “quality press.” If we want to build a democratic and equitable international order, if we want to achieve the sustainable development goals,⁷⁵ we need accurate information on all fields of human activity, free of propaganda, free of public relations and political spin.

A precondition to the implementation of the UN Charter and the rulings of UN bodies is an informed society, informed politicians and diplomats, a political culture of objectivity, transparency and accountability. Governments spend billions of dollars in attempts to deceive the world about their geopolitical interests, about the facts surrounding armed conflict, about the possibilities of negotiation under the UN Charter. Associated with fake news, we also observe the proliferation of false historical narratives and phoney interpretations of international law. There is widespread censorship and self-censorship.

Yet another problem is that of government secrecy, which since time immemorial has been an enabler of the gravest violations of human rights and international law, including genocide.⁷⁶ In a democratic society under the rule of law, it is necessary to ensure that the population has access to all pertinent information. This is why I called in my reports to the General Assembly and in numerous press releases for the adoption of a *Charter of Rights of Whistleblowers*⁷⁷ that would give them protection from persecution and lawfare and in the future would prevent the gross human rights abuses of the kind committed by the US, UK, Sweden and Ecuador against Julian Assange.

Whistleblowers are genuine human rights defenders, and it is thanks to them that we are aware of the crimes that our governments commit in our name. How can we expect enforcement of UN resolutions when the perception of facts, history and law is distorted by relentless propaganda, double standards and intellectual dishonesty? Indeed, without significant reforms the United Nations will continue losing credibility in

⁷⁵ <https://sdgs.un.org/goals>.

⁷⁶ See Alfred de Zayas, *Völkermord als Staatsgeheimnis*, Olzog Verlag, München 2011.

⁷⁷ <https://www.ohchr.org/en/statements/2016/10/statement-alfred-maurice-de-zayas-independent-expert-promotion-democratic-and>; <https://studylib.net/doc/17691385/human-rights-and-whistleblowers-%E2%80%93-alfred-de-zayas>; <https://www.claritypress.com/product/building-a-just-world-order/>.

the eyes of the international community. Alas, there is too much cynicism in the current system, too much lip service and diplomatic ritual around the UN Charter and values that no one really seems to want to fight for.

Conclusions

International order depends on agreed standards, objective institutions, checks and balances, transparency and accountability. Enforcement is key to maintaining the authority and credibility of any system of governance or institutions. While enforcement of domestic laws can be achieved more readily in local courts, the implementation of international rulings and judicial decisions poses formidable problems.

The United Nations' apparent inability to assert its authority has led to a significant crisis of legitimacy. Indeed, over the past 30 years the major powers have done what they saw fit, kept the United Nations weak and thereby rendered it nearly irrelevant. In 1999 NATO carried out an illegal war against Yugoslavia, a UN member state, without respecting Article 39 of the UN Charter and seeking a resolution from the UN Security Council under Chapter VII. This was sheer aggression and a "crime against peace" within the meaning of Article 6a of the Statute of the International Military Tribunal at Nürnberg and the subsequently adopted Nürnberg Principles.⁷⁸ It was also aggression within the meaning of GA resolution 3314.⁷⁹ No one was held accountable. The fundamental principle of international law concerning the territorial integrity of states (Article 2[4] of the UN Charter) was not only violated by NATO in 1999, it was fatally weakened. Far from defending the principle of territorial integrity, NATO deliberately rampaged to destroy it. This created precedents of permissibility.⁸⁰ Again, in 2003, the "coalition of the willing" violated Article 2 when it engaged in a criminal aggression against the Iraqi people, an orchestrated, deliberate revolt against the UN Charter and international law. With good reason UN Secretary General Kofi Annan called the Iraq war "illegal."⁸¹

⁷⁸ https://legal.un.org/ilc/texts/instruments/english/draft_articles/7_1_1950.pdf.

⁷⁹ <https://documents.un.org/doc/resolution/gen/nr0/739/16/pdf/nr073916.pdf>.

⁸⁰ <https://www.counterpunch.org/2022/03/04/precedents-of-permissibility/>.

⁸¹ http://news.bbc.co.uk/2/hi/middle_east/3661134.stm.

What is civilization but an agreement to live together⁸² in peace on the basis of a constitution and a social contract (Rousseau), which today means the UN Charter? The measure of civilization, however, is not only the existence of laws, competent administration and judicial institutions, transparency and accountability – but also rests on the reliable and predictable operation of enforcement mechanisms.

Civilization is another word for the “rule of law”⁸³ and entails respect for judicial pronouncements and a joint commitment to abide by judicial rulings. Civilization is reflected in the UN Charter, the UNESCO Constitution, and the Statute of the International Court of Justice. But the “rule of law” must gradually evolve into the rule of justice.⁸⁴

In the landscape of the 21st century, in the post-Cold War period, characterized by emerging multipolarity, what is most needed is a dialogue of civilizations and a readiness to accept others as potential friends and partners and not *a priori* as potential enemies. What is necessary is checks and balances, a commitment to the rule of law and the necessity to evolve with the times. What destroys civilization is abstruse ideologies, contempt for the law and a self-righteous attitude of being above the law, what we know today as “exceptionalism.”

Recommendations

Action, not just rhetoric, is called for. What can we recommend to the international community by way of concrete, pragmatic, implementable measures? We can begin by educating civil servants and citizens about the necessity to strengthen the *rule of law* at all levels. It sounds self-evident, but the rule of law is not automatic, not self-executing. It needs committed politicians and citizens to sustain it.

⁸² Kirk Boyd, 2048: *Humanity’s Agreement to Live Together*, Berrett-Kohler Publishers, San Francisco 2010; *Global Bill of Rights*, Version 14, <https://www.youtube.com/watch?v=6Vxvow8tHFU>, <https://eleanorlives.org/>.

⁸³ <https://www.counterpunch.org/2024/01/19/international-order-means-playing-by-the-rules/>.

⁸⁴ <https://www.counterpunch.org/2022/01/14/the-rule-of-law-must-finally-evolve-into-the-rule-of-justice/>.

*A Global Compact on Education for Peace through Law*⁸⁵ is desirable, but that will not bear fruit in the immediate future.

Right now it would be practicable to undertake a *general strengthening of the regional courts, strengthening of the ICJ, adopting enabling legislation* so that international rulings have status in domestic courts and are *ipso facto* implementable by local judges. In fact, every treaty should be enhanced by the addition of a clause concerning its enforcement and a clause establishing recourse and remedies for its violation.

This may sound like blue-eyed optimism. Yet, these recommendations are implementable and grounded on reason. *Ergo*, not only politicians, but civil society, NGOs, human rights activists should work together to resuscitate and invigorate the spirit of 1945, to reaffirm the values of Eleanor Roosevelt, René Cassin, Charles Malik and P. C. Chang. It is that spirit that is the fountainhead for a democratic and equitable international order, and for the *buen vivir* which Latin Americans aspire to.⁸⁶ Let us revive the Roosevelt spirit, which Eleanor eloquently expressed in 1954:

*Where, after all, do universal human rights begin? In small places, close to home – so close and so small that they cannot be seen on any maps of the world. Yet they are the world of the individual person; the neighbourhood he lives in; the school or college he attends; the factory, farm, or office where he works. Such are the places where every man, woman and child seeks equal justice, equal opportunity, equal dignity, without discrimination. Unless these rights have meaning there, they have little meaning anywhere. Without concerted citizen action to uphold them close to home, we shall look in vain for progress in the larger world.*⁸⁷

With regard to the ongoing genocide in Gaza, the General Assembly should adopt a “*Uniting for Peace*” Resolution and authorize blue hel-

⁸⁵ https://sdgacademylibrary.mediaspace.kaltura.com/media/Conversation%20with%20Alfred%20de%20Zayas%2C%20Building%20a%20Just%20World%20Order/1_vrm2m1wp.

⁸⁶ <https://theconversation.com/buen-vivir-south-americas-rethinking-of-the-future-we-want-44507>.

⁸⁷ Speech at the United Nations: “The Great Question,” 27 March 1958.

mets and peacekeepers to mediate, impose and maintain a ceasefire. The precedents of General Assembly involvement in the Korean War and in the Congo could be invoked. More recently, the General Assembly adopted the “Responsibility to Protect”⁸⁸ (R2P) doctrine, reflected in paragraphs 138 and 139 of resolution 60/1 of 24 October 2005. If there was any situation in the world that required action on the basis of R2P, it is the relentless massacre of the civilian population in Gaza.

Another tool to achieve implementation of UN rulings is *strengthening the voice of civil society*. Amnesty International, Human Rights Watch, PEN International can contribute significantly to the international consensus building that would result in pressure on governments to do what their electorates demand from them. Activism for the rule of law is an ingredient in enabling enforcement across the board.

In order to strengthen the rule of law, we must all act in conformity with the world’s primary code of deontology – the UN Charter. Society must join forces to strengthen the courts and promote a culture of respect for the overarching principle of justice. Indeed, the rule of law must not be mere positivism, not just the idea that “the law is the law,” *dura lex, sed lex*. We must make sure that the law is there to advance justice, to enable development and sustainable peace. This is the goal of many NGOs including Unite for Rights,⁸⁹ a San Francisco civil society organization committed to continuously guarding over the convergence of law and justice, because “the law was made for man, and not man for the law” (Mark, 2, 27). In other words, we need the law, but not the excess of law, as Cicero already warned: *summum jus, summa injuria*⁹⁰ – the blind application of laws, the abuse of positivism, frequently leads to injustice. Accordingly, while committing to the enforcement of the rule of law, we must ensure that the letter of the law never betrays the spirit of the law (Montesquieu, *De l’esprit des lois*).

It is not difficult to understand that law without enforcement is but a pious prayer; enforcement without mercy is terror; selective enforcement destroys the impartiality imperative; lawfare is not law, but war

⁸⁸ <https://documents.un.org/doc/undoc/gen/n05/487/60/pdf/n0548760.pdf>.

⁸⁹ <https://www.youtube.com/watch?v=2NFjUvidrtU>; <https://www.legalpact.org/blog/a-new-social-contract>.

⁹⁰ Marcus Tullius Cicero, *On Duties (De officiis I, 33)*.

on the law. Double standards subvert the very ontology of the law and civilization.

My human rights trilogy, together with my *25 Principles of International Order*⁹¹ constitute a plan of action to make international law work, to strengthen the UN Charter and recommit to fundamental principles of international order and general principles of law such as good faith and *pacta sunt servanda*.⁹² The United Nations Charter must be enforceable.

Ultimately it is a matter of political will, international solidarity, good will, intellectual honesty and truth.

It is unhelpful for politicians to give hypocritical lip service to the UN Charter. States must be prepared to take concrete action to make enforcement possible. This includes *reliable financing of the United Nations Organization* without strings attached. Indeed, one of the many problems that all UN agencies suffer today is the “hardball” blackmail practised by the donors who pretend to establish the priorities and frequently want to keep the UN weak and leave its rulings unenforced.

An effective United Nations is an independent United Nations that builds on consensus and common sense. Rather than convening a “Summit of the Future,” the United Nations General Assembly would serve humanity better by convening a “*Summit on Implementation*” in which the creation of new mechanisms for follow-up and implementation would be discussed in the spirit of multilateralism and international solidarity. In order to prepare for such a summit, the General Assembly should draw on the vast experience and wisdom of philosophers, lawyers, economists, sociologists from all continents, and establish a “*Think Tank for the Implementation of Norms and Judgments*.” It can be done. Civil society and non-governmental organizations must work to generate the necessary political will and momentum.

In this context, it is appropriate to refer to the recommendations of the Report of the UN Sustainable Development Solutions Network (SDSN),

⁹¹ <https://www.counterpunch.org/2022/11/28/principles-of-international-order/>;
<https://www.un.org/pt/node/212506>.

⁹² “Treaties must be observed.” *Vienna Convention on the Law of Treaties*, Article 26, https://legal.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf.

which Professor Jeffrey Sachs⁹³ directs on behalf of the Secretary-General. SDSN proposes to introduce a UN Parliamentary Assembly (UNPA) as a new chamber alongside the UN General Assembly.⁹⁴ Whereas the GA gives each member state one vote, with the power of that vote in the hands of the executive branch of each government, a UN Parliament would represent the peoples of the world rather than the governments. Thus, civil society would be able to articulate its call for the good faith implementation of norms and judgments by all countries, a call that hitherto has fallen on deaf ears, because many governments are not interested in enforcement of the law, especially when they are on the receiving end.

Already in 2013, I participated in a conference held in Brussels on the establishment of such a peoples' Parliamentary Assembly. I commented: "A World Parliamentary Assembly functioning outside the United Nations, or a United Nations Parliamentary Assembly set up as a subsidiary body of the General Assembly pursuant to Article 22 of the UN Charter, could start initially as a consultative body and gradually develop into a legislative assembly." My conclusion was that such an assembly should be inclusive and open for participation of parliamentarians of all UN member states and observer states, and also provide for the participation of representatives of indigenous peoples, unrepresented peoples and peoples living under occupation.

It is generally acknowledged that there is need for reform and democratization of the United Nations and its institutions. "If the United Nations General Assembly is to be revitalized and strengthened, it also

⁹³ <https://www.jeffsachs.org/newspaper-articles/y9ztggwdzsljdr386lgbma5snhk3rr>.

⁹⁴ Note by the editor: The first such proposal was made in 1990 and 1991 by the delegates of the *International Conferences On A More Democratic United Nations*, convened in New York (CAMDUN-1, 13-15 October 1990) and at the United Nations Office in Vienna (CAMDUN-2, 17-19 September 1991). The Concluding Statement of CAMDUN-2, initiated and convened by the International Progress Organization, lists under item 1.3 of the "proposals that appear feasible under the UN Charter as it exists" the following measure: "Instituting a UN Second (peoples') Assembly as a subsidiary organ of the General Assembly under Article 22, representative of the peoples of the United Nations as global inhabitants." (Hans Köchler [ed.], *The United Nations and the New World Order: Keynote addresses from the Second International Conference On A More Democratic United Nations*. Studies in International Relations, Vol. XVIII. Vienna: International Progress Organization, 1992, p. 50.)

needs to be made more democratic and representative. Complementing it with a parliamentary body could be a key to achieve this goal.”⁹⁵ As the late Secretary-General Boutros Boutros-Ghali said, we need to promote the democratization of globalization, before globalization destroys the foundations of national and international democracy. “The establishment of a Parliamentary Assembly at the United Nations has become an indispensable step to achieve democratic control of globalization.”⁹⁶

In my 2013 report to the UN Human Rights Council (A/HRC/24/38), I recommended that the Council conduct a study on the added value of a United Nations Parliamentary Assembly, the modalities of establishing such a body, and the possibilities of mobilizing global public opinion to strengthen the enforcement of international law in larger freedom.

⁹⁵ <https://www.ohchr.org/en/2013/10/time-world-parliamentary-assembly>; <https://theglobalobservatory.org/2013/10/with-democracy-one-size-does-not-fit-all-interview-with-alfred-de-zayas/>.

⁹⁶ <https://www.unpacampaign.org/about/declarations/calltoaction/en/>.

V

Appendix

Executive Summary

On September 12, 2024, scholars, politicians, diplomats, and practitioners convened at the historic Çırağan Palace in Istanbul for the Bosphorus Roundtable, hosted by the International Progress Organization, continuing its tradition of tackling crucial issues in international affairs. The roundtable addressed the challenges and contradictions facing the United Nations system in maintaining international peace and security, focusing on the tensions between sovereignty and coercion in an increasingly multipolar world.

The event was structured around four sessions, each featuring distinguished experts who spoke on various aspects of sovereignty, power politics, and the future of the UN's role in global governance. The speakers discussed the foundational contradictions of the UN Charter, the veto power of the "Permanent Five" (P5) members of the Security Council, and the impact of realpolitik on the enforcement of international law.

In his opening remarks, Dr. Hans Köchler, President of the International Progress Organization, emphasized the contradiction between the UN Charter's principle of sovereign equality and the voting privilege of the permanent members of the Security Council. He highlighted how this inconsistency has led to a de facto system of "sovereign inequality" and outlined its implications for world order and international peace. Dr. Köchler recalled the International Progress Organization's long-standing engagement with UN reform, dating back to its 1985 meeting in New York City on democracy in international relations.

Mogens Lykketoft, former speaker of the Danish Parliament, shared insights from his experience as President of the 70th General Assembly of the United Nations, focusing on the dynamics of the power play within the UN system and efforts to increase the relevance of the General Assembly. He stressed the importance of the UN as a forum for global dialogue while acknowledging the challenges posed by current geopolitical tensions. Lykketoft highlighted the UN's role in preventing direct confrontation between nuclear powers and its contributions to global health and life expectancy through agencies like the World Health Organization (WHO).

Professor Rauf Versan from Istanbul University (Türkiye) examined the dilemma of enforcement under Chapter VII of the UN Charter, highlighting the tension between the Security Council's mandate and the principles of international law. His presentation explored the Council's record in the peaceful settlement of disputes and the problems resulting from political divergences among its members. Versan delved into the historical context of international law and the evolution of the UN system, particularly focusing on the shift from the "right to wage war" to the current collective security framework.

Professor Chin Leng Lim from the Chinese University of Hong Kong provided a critical analysis of the "rules-based order" versus the UN legal order, discussing the interpretative disputes that arise between these two meta-narratives, and their implications for international peace and security. Lim explored the tensions between different interpretations of international law, particularly in contentious areas such as the Israel-Palestine conflict and freedom of navigation in the South China Sea.

In the second session, Dr. Karin Kneissl, former Foreign Minister of Austria, focused on the tension between normative and factual levels of sovereignty. She discussed the impact of technological changes on traditional notions of state sovereignty and raised the issue of extra-territorial jurisdiction. Kneissl particularly stressed the importance of permanent sovereignty over natural resources and highlighted, in that regard, the development of alternative forms of intergovernmental cooperation such as BRICS.

Professor Beatriz Bissio from the Federal University of Rio de Janeiro (Brazil) offered insights on the concept of sovereignty from the perspective of the Global South, explaining how violations of sovereignty of these countries often relate to interference in decisions about the use of natural resources. Bissio described the history of the debates on sovereignty in the context of decolonization from the 1955 Bandung Conference to contemporary discourses on economic sovereignty and control over resources.

Professor Berdal Aral from Istanbul Medeniyet University (Türkiye) analyzed the UN Charter's exceptions to the principle of sovereign equality and the consequences of this for world peace, focusing on the Security Council's decision-making processes in the period after the

Cold War. Aral provided numerous examples of how the P5 have used their veto power to protect their interests and those of their allies, often at the expense of global peace and security.

The third session began with a presentation by Professor Daniele Archibugi of the Italian National Research Council, who interpreted data on the use of the veto by permanent members of the Security Council and discussed realistic options for reform. Archibugi emphasized the need for greater transparency in the Council's operation and explored potential ways to make the use of the veto more costly for permanent members.

Professor Bardo Fassbender from the University of St. Gallen (Switzerland) provided a comprehensive overview of the right of veto in the UN Security Council, tracing its history, present status, and future prospects. He examined the political and legal importance of the veto power in the 21st century and considered possibilities for its reform or abolition, noting the significant challenges posed by the current geopolitical landscape.

Professor Hassan Diab, former Prime Minister of Lebanon, addressed the challenges to democracy in a multipolar world due to the P5 veto power in the UN Security Council. He advocated for comprehensive reforms to ensure greater inclusivity, transparency, and accountability, proposing specific measures such as supermajority voting and a rotation mechanism for representation.

Associate Professor Gabriel M. Lentner from Danube University Krems (Austria) critically examined the role of the UN Security Council in international criminal justice, highlighting issues of selectivity and double standards in the practice of international criminal law. Lentner discussed the complex relationship between the Security Council and the International Criminal Court, using case studies such as on the situations in Darfur and Libya to illustrate his points.

In the final session, Professor Said Saddiki from Sidi Mohamed Ben Abdellah University in Fès (Morocco) discussed UN Charter reform, emphasizing the need to balance sovereign equality with effective functioning in the face of contemporary global challenges. Saddiki explored various models of voting rights in international organizations and pro-

posed realistic options for reform, such as rotating veto power among non-permanent members.

The conference concluded with a presentation by Dr. Deepak Mawar from Tilburg University (Netherlands), who examined the challenges to liberalism in global governance, focusing on the impact of populist trends on the UN Security Council and international law. Mawar discussed the rise of nationalist movements globally and their potential effects on multilateral cooperation and the functioning of international institutions.

Through diverse yet interconnected presentations, the conference provided a comprehensive analysis of the tensions between sovereignty, coercion, and global governance within the UN system. Addressing both historical perspectives and contemporary challenges, the participants underscored the need for structural reform in international institutions to reflect current global realities and ensure a more equitable world order.

Initiatives of the International Progress Organization related to core issues of the United Nations system and to UN reform (1974–2024)

<p><i>The Cultural Self-comprehension of Nations</i></p> <p>International conference in co-operation with the United Nations Educational, Scientific and Cultural Organization (UNESCO)</p> <p>Innsbruck, Austria, 27-29 July 1974</p>
<p><i>The New International Economic Order: Philosophical and Socio-cultural Implications</i></p> <p>International Meeting of Experts, Vienna, Austria, 2-3 April 1979</p>
<p><i>The Legal Aspects of the Palestine Problem with Special Regard to the Question of Jerusalem</i></p> <p>International Conference, Vienna, Austria, 5-7 November 1980</p>
<p><i>The Principles of Non-alignment: The Non-aligned Countries in the Eighties – Results and Perspectives</i></p> <p>International Conference, Baghdad, Iraq, 4-6 May 1982</p>
<p><i>The New International Information and Communication Order: Basis for Cultural Dialogue and Peaceful Co-existence among Nations</i></p> <p>International Meeting of Experts in co-operation with the United Nations Educational, Scientific and Cultural Organization (UNESCO)</p> <p>Nicosia, Cyprus, 26-27 October 1984</p>
<p><i>Democracy in International Relations</i></p> <p>Colloquium on the occasion of the 40th anniversary of the United Nations</p> <p>New York, N.Y., USA, 31 October 1985</p>
<p><i>International Conference on the Question of Terrorism</i></p> <p>Geneva, Switzerland, 19-21 March 1987</p>

<p><i>The Exchange of Prisoners of War between Iran and Iraq as a Requirement of International Law and Human Rights</i> International Meeting of Experts, Geneva, Switzerland 29-30 May 1989</p>
<p><i>International Seminar on the Reunification of Korea through Confederation</i> Vienna, Austria, 23 June 1989</p>
<p><i>Presentation by the delegate of the International Progress Organization on U.N. sanctions against Iraq and human rights</i> United Nations, Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities, forty-third session Palais des Nations, Geneva, 20 August 1991</p>
<p><i>Second International Conference On A More Democratic United Nations (CAMDUN-2)</i> United Nations Office at Vienna, 17-19 September 1991</p>
<p><i>The Sanctions Policy of the United Nations Security Council</i> International Meeting of Experts, Geneva, Switzerland, 23 May 1992</p>
<p><i>Islam and the West: The Conflict in Bosnia-Herzegovina and its Implications for a New World Order</i> International Panel Discussion, Vienna, Austria, 25 November 1993</p>
<p><i>The United Nations and International Democracy</i> International Roundtable, Geneva, Switzerland, 1-2 July 1994</p>
<p><i>Meeting of Legal Experts on UN Sanctions against Libya</i> New York, N.Y., USA, 1 December 1994</p>
<p><i>Economic Sanctions and their Impact on Development</i> Meeting of Experts in co-operation with the NGO Committee on Development United Nations Office at Vienna, 28 November 1996</p>

<p style="text-align: center;"><i>Civilizations: Conflict or Dialogue?</i></p> <p style="text-align: center;">International Roundtable, University of Innsbruck, Austria 8 June 1998</p>
<p style="text-align: center;"><i>The United Nations, the International Rule of Law and Terrorism</i></p> <p style="text-align: center;">Fourteenth Centennial Lecture, Supreme Court of the Philippines Manila, Philippines, 12 March 2002</p>
<p style="text-align: center;"><i>The United Nations and International Power Politics: The Future of World Order</i></p> <p style="text-align: center;">International conference in co-operation with International Human Rights Association of American Minorities (IHRAAM) East-West University, Chicago, USA, 5 June 2004</p>
<p style="text-align: center;"><i>The Use of Force in International Relations – Challenges to Collective Security</i></p> <p style="text-align: center;">International Roundtable, University of Innsbruck, Austria 22 June 2005</p>
<p style="text-align: center;"><i>The “Global War on Terror” and its Implications for Muslim-Western Relations</i></p> <p style="text-align: center;">International Roundtable in co-operation with Center for Policy Re- search and International Studies (CenPRIS) at Malaysia Science University Penang, Malaysia, 13–14 December 2007</p>
<p style="text-align: center;"><i>The New Threat: Hybrid Wars as a Tool of Subversion</i></p> <p style="text-align: center;">Plenary Session, World Public Forum "Dialogue of Civilizations" Rhodes, Greece, 10 October 2015</p>
<p style="text-align: center;"><i>Responsibility in International Relations</i></p> <p style="text-align: center;">International Roundtable Consultation, Vienna, Austria 21 September 2023</p>
<p style="text-align: center;"><i>The United Nations and Global Power Politics</i></p> <p style="text-align: center;">Lecture, World Forum on the Future of Democracy, Tech and Humankind Cinema for Peace Foundation, Berlin, Germany, 19 February 2024</p>

Sovereignty and Coercion:
The United Nations in the Web of Power Politics
International Roundtable Consultation, Istanbul, Türkiye
12 September 2024

Publications of the International Progress Organization related to UN reform

- Democracy in International Relations. Studies in International Relations, Vol. XII. Vienna: International Progress Organization, 1986.
- The Voting Procedure in the United Nations Security Council: Examining a Normative Contradiction and its Consequences on International Relations. Studies in International Relations, Vol. XVII. Vienna: International Progress Organization, 1991.
- The United Nations and the New World Order: Keynote addresses from the Second International Conference On A More Democratic United Nations. Studies in International Relations, Vol. XVIII. Vienna: International Progress Organization, 1992.
- Democracy and the International Rule of Law: Propositions for an Alternative World Order. Selected Papers Published on the Occasion of the Fiftieth Anniversary of the United Nations. Vienna/New York: Springer, 1995.
- The United Nations and International Democracy: The Quest for UN Reform. Studies in International Relations, Vol. XXII. Vienna: International Progress Organization, 1997.
- Globality versus Democracy? The Changing Nature of International Relations in the Era of Globalization. Studies in International Relations, Vol. XXV. Vienna: International Progress Organization, 2000.
- The Iraq Crisis and the United Nations: Power Politics vs. the International Rule of Law. Memoranda and declarations of the International Progress Organization (1990 – 2003). Studies in International Relations, Vol. XXVIII. Vienna: International Progress Organization, 2004.
- The Use of Force in International Relations – Challenges to Collective Security. Studies in International Relations, Vol. XXIX. Vienna: International Progress Organization, 2006.

- The “Global War on Terror” and the Question of World Order. *Studies in International Relations*, Vol. XXX. Vienna: International Progress Organization, 2008.
- The Security Council as Administrator of Justice? *Studies in International Relations*, Vol. XXXII. Vienna: International Progress Organization, 2011.
- Challenges and Contradictions of World Order: A Reader. Selected papers published on occasion of the 50th anniversary of the foundation of the International Progress Organization. *Studies in International Relations*, Vol. XXXVII. Vienna: International Progress Organization, 2022.
- The United Nations and the Multipolar Order of the Future: Reflections on the Tenacity of Power. Skopje Cultural Diplomacy Forum 2023 – Keynote Lecture. Vienna: International Progress Organization, 2023.

About the Contributors

Berdal Aral received his Ph.D. in 1994 from the University of Glasgow with a dissertation on "Türkiye and International Society from a Critical Legal Perspective." His research interests and teaching are focused on international law and human rights. Aral has authored four books in Turkish: "The Right of Self-Defence under International Law" (1999), "Collective Rights as Third Generation Human Rights" (2010), "From Global Security to Global Hegemony: The UN System and the Muslim World" (2016), and "Perpetual Betrayal: The Palestinian Problem and International Law Under the Shadow of Imperialism" (2019). Additionally, he has published numerous articles in both English and Turkish on issues related to international organizations, integration in the Muslim world, Turkish foreign policy, and broader topics of international law. His writing has been featured in publications including the European Journal of International Law, Human Rights Quarterly, and the Journal of the History of International Law. Currently, Professor Aral teaches in the Department of International Relations at Istanbul Medeniyet University.

Daniele Archibugi is a Research Director at the Italian National Research Council (CNR-IRPPS) in Rome, and Professor of Innovation, Governance and Public Policy at the Birkbeck Business School (London). He works on the economics and policy of science, technology and innovation and on the political theory of international relations. He has worked at the Universities of Sussex, Cambridge, London School of Economics, Harvard, and Rome LUISS, and gave courses at the SWUFE University of Chengdu and at the Ritsumeikan University of Kyoto. In the field of international political theory, with David Held he has advocated a cosmopolitan democracy (co-editing "Cosmopolitan Democracy: An Agenda for a New World Order," Polity Press, 1995). He has also worked on a greater involvement of transnational citizens to

counterbalance the power of governments in world politics (co-editing “Global Democracy,” Cambridge University Press, 2011). He has also carried out an assessment of international criminal justice (with Alice Pease, “Crime and Global Justice: The Dynamics of International Punishment,” Polity, 2018) and drafted a plea to shape the European citizenship strategy (with Ali Emre Benli, “Claiming Citizenship Rights in Europe: Emerging Challenges and Political Agents,” Routledge, 2017).

Marina Bagato is an economist with a master’s degree in International Relations Europe – Latin America from the University of Bologna, Italy (2023) and a degree in Economy from the National University of La Plata, Buenos Aires, Argentina (2019). Since 2024, she has been a researcher at the National Institute for Research on Population and Social Policies at the Italian National Research Council in Rome. From 2019 to 2022, she served as an analyst in the Public Budget Department of the Ministry of Economy, and from 2022 to 2023 in the Department for Gender and Economy at the Ministry of Economy of the Buenos Aires Province. Ms. Bagato specializes in international organizations, foreign policy, public budget, gender equality, and women’s rights.

Beatriz Bissio is Vice-Director of the Institute of Philosophy and Social Sciences (IFCS) of the Federal University of Rio de Janeiro and Associate Professor at the Department of Political Science and the Post-graduate Programme in Comparative History at the same university. Her doctoral thesis on classical Arab-Islamic civilization was published under the title “*O mundo falava árabe*” (“The world used to speak Arabic”). Beatriz Bissio has worked as an international journalist and correspondent for various Latin American media, and as the founder, editor and later director of the magazines *Cadernos do Terceiro Mundo* (1974-2006), *Ecologia e Desenvolvimento* (1991-2006), and *Revista do Mercosur* (1992-2006). For three decades, she covered events in Latin America, the Middle East and Africa (e.g. the liberation and independence wars in Angola and Mozambique, the struggle against apartheid in South Africa, the Palestinian-Israeli question, the war in Lebanon, the crises in Somalia and Iraq, and the conferences of the Non-Aligned Movement). She has received several awards, including the “Golden Dolphin” for journalism (2000), the “Victory Medal” (Brazil, 2013), and the “Abreu e Lima Medal” from the House of Latin America and the José Martí Institute, in 2015.

Alfred de Zayas is a lawyer, historian, and former UN Independent Expert on the promotion of a democratic and equitable international order (2012-2018) who has worked extensively with the Office of the UN High Commissioner for Human Rights. He holds a J.D. from Harvard Law School and a Ph.D. in modern history from the University of Göttingen (Germany) where he was a Fulbright Scholar. De Zayas is a retired member of the New York and Florida Bar Associations and has authored over 200 scholarly articles and nine books. He is a past president of PEN International – Centre Suisse Romande and a winner of the 2022 International Book Award for Law.

Hassan Diab is a Lebanese academic, professor, engineer, executive, and politician with over 33 years in academia including almost 20 years in executive roles. From 2019 to 2021 he served as the 26th President of the Council of Ministers (Prime Minister) of Lebanon. He earlier was Minister of Education & Higher Education of Lebanon. From 2006 to 2020, Professor Diab was Vice-President of the American University of Beirut (AUB). He has over 150 publications in internationally refereed journals and conference proceedings and is a registered Chartered Engineer in the Engineering Council, UK, and a Fellow of the Institution of Engineering and Technology (IET), UK. Professor Diab was Founding President of Dhofar University (DU) and Founding Dean of the School of Engineering at DU (2004-06), Sultanate of Oman. He also is Founder and President of the Rifca Taji Foundation Charity and Chairman of IKAR Global, IKAR Holding, London. He served on many boards, including of the Global Council for Tolerance and Peace, Academy for Cultural Diplomacy, and the Southern New Hampshire University's Global Education Movement (GEM) (USA). On 21 September 2022, he received the Lebanese Order of Merit (*Grand Cordon Grade*) from the President of Lebanon.

Bardo Fassbender is Emeritus Professor of International Law, European Law and Public Law at the University of St. Gallen, Switzerland. He holds an LL.M. from Yale Law School and a *doctor iuris* from the Humboldt University in Berlin. He was a Ford Foundation Senior Fellow in Public International Law at Yale University and a Jean Monnet Fellow at the European University Institute in Florence. He advised the Legal Counsel and Under-Secretary-General of the United Nations on the subject of “Targeted Sanctions of the UN Security Council and Due Process of Law.” Before joining the University of St. Gallen in 2013, he held

the chair in international law and human rights law at the Bundeswehr University in Munich. In the years 2019 and 2020, he was Vice Dean, and in 2021 and 2022 Dean of the Law School of the University of St. Gallen. His principal fields of research are public international law, United Nations law, comparative constitutional law and theory, and the history of international and constitutional law. His books include “UN Security Council and the Right of Veto: A Constitutional Perspective” (Kluwer Law International, 1998) and “The United Nations Charter as the Constitution of the International Community” (Martinus Nijhoff, 2009). He is co-editor of the series “*Studien zur Geschichte des Völkerrechts*” (Studies in the History of International Law, Nomos).

Karin Kneissl is an Austrian author and analyst of international affairs. She served as Austria’s Federal Minister of Foreign Affairs from 2017 to 2019. Dr. Kneissl is co-founder and head of the G.O.R.K.I. Center at St. Petersburg State University, Russia. In 1989, Ms. Kneissl obtained a doctoral degree (international law) from the University of Vienna with a dissertation on the concept of borders in the Middle East. She also studied at Ecole Nationale d’Administration (ENA), Paris, and at the Hebrew University of Jerusalem (International Relations) and the University of Urbino, Italy (European Law). She also was a Fellow at the Center for Contemporary Arab Studies of Georgetown University (USA). Dr. Kneissl taught as lecturer at the University of Vienna, the Diplomatic Academy Vienna, the *Centre International des Sciences de l’Homme* (Byblos, Lebanon), *Université Saint Joseph*, Beirut, and the National Defence Academy and Military Academy of Austria. Since the end of her term of office in the federal government in June 2019, Dr. Kneissl has returned to freelance work as author, lecturer on geopolitics and energy economics, and as analyst, regularly commenting on world affairs for the multilingual RT channels. From May 2020 to 2022, she taught as visiting professor at MGIMO University in Moscow.

Hans Köchler is a graduate in philosophy *sub auspiciis praesidentis rei publicae* (the highest academic honors in Austria) and University Professor emeritus of Philosophy at the University of Innsbruck, having previously chaired the Department of Philosophy. He founded and presides over the International Progress Organization, an NGO in consultative status with the United Nations, and served as an international observer at the Lockerbie Trial in the Netherlands, nominated by UN Secretary-General Kofi Annan. Köchler has published extensively on

political and legal philosophy (e.g., “Global Justice or Global Revenge?” Springer, 2004), international relations and the UN, conflict resolution, cultural hermeneutics, and intercultural dialogue. He edits the book series "Studies in International Relations" and serves on the editorial boards of journals such as "Culture and Dialogue," "Open Philosophy," and "Indian Yearbook of International Law and Policy." Köchler has received numerous honors including an Honorary Professorship from Pamukkale University in Türkiye, honorary doctor degrees from Mindanao State University (Philippines) and Armenian State Pedagogical University, and awards like the Apostle of International Understanding medal (India), the Honorary Medal of the International Peace Bureau (Geneva), and the Gusi Peace Prize.

Gabriel M. Lentner is Associate Professor of International Law and Arbitration at Danube University Krems (Austria) where he is also the deputy head of the Department of Law and International Relations. Lentner has also been a Fellow at Stanford Law School since 2014 and was a visiting scholar at the Lauterpacht Centre for International Law of the University of Cambridge and at the Harvard Law School. His research and teaching focus on international law as well as legal theory and philosophy of law. He received his Ph.D. in law at the University of Vienna with the thesis "The Legal Nature of UN Security Council Referrals to the International Criminal Court." Prof. Lentner is author and co-author of more than 50 articles published in journals such as the *Leiden Journal of International Law*, *ICSID Review*, *British Yearbook of International Law*, *International Criminal Law Review*, and *Journal of World Investment & Trade*. In addition to his research and teaching, Lentner was member of the editorial team of the *Harvard International Law Journal* (2019) and is a member of the Academic Advisory Board of the *Cambridge International Law Journal* and a reviewer for, among others, the *European Journal of International Law*, the *Max Planck Yearbook of United Nations Law* (Heidelberg), and the *Journal of International Criminal Justice* (Geneva).

Chin Leng Lim (C. L. Lim) is the Choh-Ming Li Professor of Law at the Chinese University of Hong Kong, an *associé* of the Institut de droit international, visiting professor at King's College London, honorary senior fellow of the British Institute of International and Comparative Law, and an editor of the *International and Comparative Law Quarterly*. His 2023 Hague Lectures, "The Aims and Methods of Postcolonial Interna-

tional Law,” were published in Brill/Nijhoff’s Hague Academy Pocket-books Series and the Collected Courses/Recueil des cours. Other books include “Treaty for a Lost City” (Cambridge University Press, 2022) and the “Cambridge Companion to International Arbitration” (2021). Lim was formerly Professor of Law and a member of the Court and Senate of the University of Hong Kong, and the inaugural Lionel A. Sheridan Visiting Professor at the National University of Singapore. He is on the European Commission’s list of chairpersons for disputes under the EU’s bilateral free trade agreements and served previously on a committee advising Hong Kong’s Commerce Secretary. Currently he practices as a barrister with chambers in London and has acted as counsel, arbitrator, or expert in various international arbitrations. Lim is also a member of the ICC/UNIDROIT Working Group on International Investment Contracts, and a delegate to UNCITRAL Working Group III.

Mogens Lykketoft is a Danish economist and politician who was President of the 70th session of the United Nations General Assembly (2015-2016). He was Leader of the Social Democrats (2002-2005) and served as Denmark’s Minister of Finance and Minister of Foreign Affairs. He also was a member of the Danish Parliament from 1981 to 2019. From 2011 to 2015, he acted as Speaker of the Folketing (President of the Parliament of Denmark). Since 2020, Mr. Lykketoft has been Chairman of the Board of *Energinet*, the National Transmission Company for electricity and gas.

Deepak Mawar received his Ph.D. in Public International Law from King’s College London (2020). He holds an LL.M. degree in Public International Law from Leiden University, Netherlands (2013). His fields of specialization are, *inter alia*, international legal history, legal and political philosophy, global governance, critical legal studies, biopolitics, and 20th century global history. Since 2021, Dr. Mawar has been Lecturer at Tilburg University (Netherlands). From 2021 to 2021, he taught at the University of Kent (UK), and from 2018 to 2021, he was Visiting Lecturer at King’s College London. His publications include: “The Perils of Judicial Restraint: How Judicial Activism Can Help Evolve the International Court of Justice” (*Göttingen Journal of International Law*, 2019) and “States Undermining International Law: How and Why the League of Nations Failed the Utopian Goals of International Law” (Palgrave Macmillan, 2021).

Said Saddiki is Professor of International Relations and International Law at Sidi Mohamed Ben Abdellah University, Fès, Morocco, where he heads the Department of Public Law. He received a doctor's degree in Public Law (International Relations discipline) from Mohammed First University in Oujda (Morocco) in 2002. Saddiki served as professor at Al-Ain University in Abu Dhabi (UAE) from September 2012 to July 2019. He is the author of six books, including "World of Walls: Structure, Roles and Effectiveness of Separation Barriers" (2017) and "The State in a Changing World: Nation-State and New Global Challenges" (in Arabic) (2008). He has published several articles in peer-reviewed journals, book chapters, and policy papers. He has received a number of international awards and grants, including a Fulbright Visiting Scholarship, a Research Fellowship at the NATO Defense College in Rome, and the Arab Prize in the Social Sciences and Humanities. He is currently interested in border walls/fences, foreign policy analysis, international migration, and the Western Sahara dispute.

Rauf Versan is Emeritus Professor of International Law at the Faculty of Political Science of Istanbul University, Türkiye. A graduate from the Law Faculty of Istanbul University, he undertook postgraduate studies in international law at Downing College, University of Cambridge, UK (LL.B., 1978; Ph.D., 1986). He served as Research Fellow at the Law Faculty of Heidelberg University and concurrently at the Max Planck Institute for Comparative Public Law and International Law at Heidelberg, Germany (1984-1985). Prof. Versan was Lecturer (1986-1993), *Privat-Dozent* (Associate Professor) (1993-2001), and Professor (2001-2021) at the Faculty of Political Science of Istanbul University. He served as ad hoc judge at the European Court of Human Rights (2007-2008) and as member of the Board of Trustees of the Turkish Education Foundation.

List of Acronyms

ACT	Accountability, Coherence and Transparency group (Security Council)
AfD	<i>Alternative für Deutschland</i>
AMIS	African Union Mission in Sudan
ASEAN	Association of Southeast Asian Nations
ASP	Assembly of States Parties (ICC)
AU	African Union
AUB	American University of Beirut
BIICL	British Institute of International and Comparative Law
BJP	Bharatiya Janata Party (India)
Brexit	“British exit” (from the European Union)
BRICS	Brazil, Russia, India, China, South Africa
BRICS+	original members plus Iran, UAE, Egypt, Ethiopia, Saudi Arabia
BYIL	British Yearbook of International Law
CAMDUN	Conferences On A More Democratic United Nations
CAT	Committee against Torture
CBF	Classification of Business Functions (United Nations / Statistics Division)
CELAC	Community of Latin American and Caribbean States
GenPRIS	Center for Policy Research and International Studies (Malaysia)
CEU	Central European University
CIA	Central Intelligence Agency (United States)
CNR	<i>Consiglio Nazionale delle Ricerche</i> (Italy)
COI	Commission of Inquiry
COP	Conference of the Parties (UN Climate Change Convention)
DPRK	Democratic People’s Republic of Korea
DRC	Democratic Republic of the Congo
DU	Dhofar University (Oman)
ECCC	Extraordinary Chambers in the Courts of Cambodia
ECHR	European Convention on Human Rights

ECLAC	Economic Commission for Latin America and the Caribbean (United Nations)
EDF	<i>Électricité de France</i>
ENA	<i>Ecole Nationale d'Administration</i> (France)
EU	European Union
EU-27	the twenty-seven member states of the European Union
E10	Elected 10 (the 10 elected members of the UN Security Council)
Fidesz	<i>Fidesz – Magyar Polgári Szövetség</i> (Hungarian Civic Alliance) / originally: <i>FIDESZ – Fiatalkor Demokraták Szövetsége</i> (Alliance of Young Democrats)
FPÖ	<i>Freiheitliche Partei Österreichs</i>
FUNAG	<i>Fundação Alexandre de Gusmão</i> (Brazil)
GA	General Assembly (United Nations)
GEM	Global Education Movement (Southern New Hampshire University)
GL	General List (ICJ)
G.O.R.K.I.	Geopolitical Observatory for Russia's Key Issues
IAEA	International Atomic Energy Agency
ICAO	International Civil Aviation Organization
ICC (1)	International Chamber of Commerce
ICC (2)	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICERD	International Convention on the Elimination of All Forms of Racial Discrimination
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICJ	International Court of Justice
ICL	international criminal law
ICLQ	International & Comparative Law Quarterly
ICSID	International Centre for Settlement of Investment Disputes
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the Former Yugoslavia
IET	Institution of Engineering and Technology (UK)

IFCS	<i>Instituto de Filosofia e Ciências Sociais</i> (Federal University of Rio de Janeiro)
IHRAAM	International Human Rights Association of American Minorities
ILC	International Law Commission (United Nations)
ILO	International Labour Organization
ILSA	Iran and Libya Sanctions Act
IMF	International Monetary Fund
IMTFE	International Military Tribunal for the Far East (“Tokyo Tribunal”)
IO	international organization(s)
IPO	International Progress Organization
IRPPS-CNR	Institute for Population and Social Policies – National Research Council (Italy)
ISIS	Islamic State of Iraq and ash-Sham [Syria]
JIL	Journal of International Law
JSOC	Joint Strategic Operations Command (United States)
LJL	Leiden Journal of International Law
LRA	Lord’s Resistance Army (Uganda)
LUISS	<i>Libera Università Internazionale degli Studi Sociali</i> (Rome)
MAD	mutual assured destruction
MENA	Middle East and North Africa
Mercosur	Southern Common Market (Argentina, Bolivia, Brazil, Paraguay, Uruguay, Venezuela)
MGIMO	Moscow State Institute of International Relations
NAM	Non-Aligned Movement
NATO	North Atlantic Treaty Organization
NGO	non-governmental organization
OEWG	Open-ended Working Group (United Nations / General Assembly)
OIC	Organisation of Islamic Cooperation
OPEC	Organization of the Petroleum Exporting Countries
OTP	Office of the Prosecutor (International Criminal Court)
PERTAMINA	National Oil and Natural Gas Mining State Corporation (Indonesia)

PoE	Panel of Experts
PRI	Public Radio International
PS Data	Peace & Security Data Hub (United Nations)
P3	three permanent members of the UN Security Council: China, Russia, United States
P4	the permanent members of the UN Security Council except France
P5	the five permanent members of the UN Security Council
RBIO	Rules-Based International Order
RN	<i>Rassemblement National</i> (France)
RT	(formerly) Russia Today
R2P	Responsibility to Protect
SDSN	Sustainable Development Solutions Network
SG	Secretary-General (United Nations)
SP	<i>Socialistische Partij</i> (Netherlands)
SSP	Scottish Socialist Party
SWUFE	Southwestern University of Finance and Economics (Chengdu, China)
TPP	Trans-Pacific Partnership
TWAIL	Third World approaches to international law
UAE	United Arab Emirates
UCM	unilateral coercive measures
UFC	Uniting for Consensus group (United Nations / Security Council)
UK	United Kingdom
UN	United Nations
UNAMID	United Nations – African Union Hybrid Operation in Darfur
UNCITRAL	United Nations Commission on International Trade Law
UNESCO	United Nations Educational, Scientific and Cultural Organization
UNGA	United Nations General Assembly
UNICEF	United Nations International Children’s Emergency Fund
UNIDROIT	International Institute for the Unification of Private Law

UNITAMS	United Nations Integrated Transition Assistance Mission in Sudan
UNLO	United Nations Legal Order
UNMIS	United Nations Mission in Sudan
UNPA	United Nations Parliamentary Assembly
UNSC	United Nations Security Council
UNSMIL	United Nations Support Mission in Libya
US / USA	United States of America
WEOG	Western European and Others Group (United Nations)
WHO	World Health Organization
WIPO	World Intellectual Property Organization

Since the founding of the United Nations, the antagonism between power and law – the dilemma of power politics – has remained unresolved, undermining the organization’s mission of collective security. With the privileges accorded to the Security Council’s permanent members, the UN Charter represents a system where the rules cannot be enforced against the main enforcers.

Ignored by most, the Charter provides the framework where the “great powers” – as arbiters and enforcers of international peace and security, not bound by the will of the majority – negotiate the balance of power all among themselves, to the detriment of all the others.

(From the Foreword)

The texts published in this volume were presented in September 2024 at an international roundtable consultation at Çırağan Palace in Istanbul. Scholars and practitioners from Austria, Brazil, China, Italy, Morocco, the Netherlands, Russia, Switzerland, Türkiye, and the United States explore and analyze the dynamics of global power relations and the challenges to the rule of law under UN auspices. The chapters deal with: “The United Nations and the Rule of Law: Real vs. Ideal,” “The Security Council and Global Power Politics,” “The Dilemma of Sovereignty in the UN System,” and “National Sovereignty or Global Governance? Prospects for Reform.”

