

# LAW, LEGITIMACY AND UNITED NATIONS

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*The gulf between law and legitimacy — a distinction popularised in the context of the North Atlantic Treaty Organization's intervention in Kosovo in 1999 — is a more serious crisis-in-the-making for the United Nations than is commonly realised. The reason for the under-estimation of the extent and gravity of the gap is that different segments of the international community have problems with different elements of the gap and fail to capture the several dimensions in their cumulative effect. This is illustrated with respect to international law and international humanitarian law, sanctions, nuclear weapons, atrocity crimes and international interventions, international criminal justice, the Security Council, the UN–United States relationship, and UN integrity systems.*

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## I INTRODUCTION: THE LAW–LEGITIMACY GAP

The UN Security Council, the World Bank, the IMF and the World Trade Organisation make decisions that affect us all. They do so without our consent ... Global governance is a tyranny speaking the language of democracy ... The purpose of a world Parliament is to hold international bodies to account. It is not a panacea. It will not turn the IMF or the UN Security Council into democratic bodies ... But it does have the potential to impose a check on them.<sup>1</sup>

In 2007, Zimbabwe was elected as chair of the United Nations Commission on Sustainable Development. A more grotesque choice is hard to imagine. President Robert Mugabe inherited a beautiful and prosperous country and has systematically ground it to ruins, the unbounded goodwill of the international community attending the euphoria of his country's birth notwithstanding. What then are we to make of the UN's unique legitimacy that Kofi Annan was so fond

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<sup>1</sup> George Monbiot, 'The Best Way to Give the Poor a Real Voice is through a World Parliament', *The Guardian* (London), 24 April 2007, 31.

of invoking while he was Secretary-General? This is on top of the decades of imbalanced and obsessive focus by the old United Nations Commission on Human Rights on alleged Israeli violations of human rights while turning a blind eye to so many other regimes. It became morally bankrupt and an embarrassment to the UN system. To reverse growing cynicism about the hypocrisy of existing institutions and practices, and noting that states often seek membership in the Commission to shield themselves from scrutiny, Annan recommended the creation of a smaller Human Rights Council to facilitate more focussed debate and discussions.<sup>2</sup> That 'reform' has been implemented, but progress on substance is not yet obvious. While the Commission on Human Rights found it difficult to indict any country other than Israel, the UN Security Council seems to require compliance from all countries but Israel. It would be interesting to learn which side in the Arab–Israeli conflict holds the organisation in greater contempt because of perceived illegitimacy owing to bias.

The *Report of the High-level Panel on Threats, Challenges and Change* included an intriguing sentence: 'The maintenance of world peace and security depends importantly on there being a common global understanding, and acceptance, of when the application of force is both legal and legitimate.'<sup>3</sup> The gulf between law and legitimacy is applicable more generally than the panel suggested. Consider Annan's successor in office. On 1 January 2007, Ban Ki-moon took office as the Secretary-General. The basis of his 'election' was a series of straw polls in the Security Council in which he received the most votes while escaping a single negative vote from any one of the five permanent members ('P5'). Shashi Tharoor, who consistently ranked second in the polls, attracted one P5 (United States) 'discouragement' and withdrew. Ban was then elected unanimously by the Security Council and the election was ratified by acclamation by the UN General Assembly.

Two conclusions may be drawn from this. First, Ban is the legally elected Secretary-General: all proper procedures were followed and he was duly sworn in. Second, the choice between him and Tharoor was made effectively by Washington. While the US cast an indicative veto against one candidate, 177 of the 192 members of the organisation had neither voice nor vote on the ultimately successful candidate. The Secretary-General is meant to be the world's top diplomat and the embodiment of the international interest. In an age of democratic legitimacy, why should the bulk of the world's countries and people accept him as 'their' representative when they had neither voice nor vote in his selection? That is, the antiquated and opaque selection procedures seriously compromise the legitimacy of the outcome even though it is perfectly legal. Perhaps the point can be grasped by noting that during his tour of the Middle East in April 2007, Ban pointedly did not meet the Palestinian Prime Minister

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<sup>2</sup> *In Larger Freedom: Towards Development, Security and Human Rights for All — Report of the Secretary-General*, UN GAOR, 59<sup>th</sup> sess, Agenda Items 45 and 55, UN Doc A/59/2005 (21 March 2005) [140], [182]–[183] ('*In Larger Freedom*').

<sup>3</sup> High-level Panel on Threats, Challenges and Change, *A More Secure World: Our Shared Responsibility — Report of the High-level Panel on Threats, Challenges and Change*, UN GAOR, 59<sup>th</sup> sess, Agenda Item 55, UN Doc A/59/565 (December 2004) [184].

Ismail Haniya of Hamas,<sup>4</sup> even though he was the legally elected leader in a region rather short of elected leaders. The reason? Israel and the US regard Hamas as a terrorist organisation, and therefore illegitimate.

In this feature, I shall argue that the gulf between law and legitimacy is a more serious crisis-in-the-making for the UN than is commonly realised. The reason for the underestimation of the extent and gravity of the gap may be that separate segments of the international community have problems with disparate elements of the gap. The result is a failure to capture the different dimensions in their cumulatively devastating impact on the UN's self-proclaimed legitimacy. I draw attention to the risks of the growing gap with respect to UN sanctions, the challenge of nuclear weapons, the use of force, international criminal justice, the structure and procedures of the Security Council, and accountability deficits among UN officials. Even so, this is an illustrative list, not an exhaustive account. I conclude with a comment on the danger of replacing an objective rule of law with an inherently subjective interpretation of international legitimacy as the primary basis of international action. Because much of the legitimacy-privileging justification is grounded in the vocabulary of humanitarianism, I will pay particular attention to the contentious aspects of the human rights discourse.

## II AUTHORITY, LEGITIMACY, POWER

The distinction between law and legitimacy is an old one for political philosophers and intersects with the equally familiar discourse on the grounds of political obedience. Power is the capacity simply to enforce a particular form of behaviour. Authority signifies the capacity to create and enforce rights and obligations which are accepted as legitimate and binding by members of an all-inclusive society who are subject to the authority. Ian Hurd distinguishes between coercion, self-interest and legitimacy as alternative grounds for rule obedience and argues that, precisely because there is no international government to enforce them, states' compliance with international rules is a function of the legitimacy of those rules *as perceived by the norm-conforming states*.<sup>5</sup> That is, rules are regarded as proper or appropriate by the actors to whom they are addressed within a socially constructed system of values and beliefs. If the source of legitimacy is institutions (either formal organisations or recurring and stable patterns of behaviour), then those institutions indicate the existence of an international authority even in the absence of world government. As Hurd

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<sup>4</sup> Warren Hoge, 'UN Chief Starting to Wield Personal Authority in Mideast', *International Herald Tribune* (Paris), 3 April 2007, 3. The title of the article notwithstanding, everything that Ban did on the trip as reported in it conformed to Washington's priorities and perceptions.

<sup>5</sup> Ian Hurd, 'Legitimacy and Authority in International Politics' (1999) 53 *International Organization* 379. For example, Hurd notes that many borders are undefended and indefensible, such as the border between Canada and the US. Coercion or the fear of retribution is inadequate to explain US restraint in not taking over Canada. Nor does one find a continual calculation and recalculation by states of the costs and benefits of conquest as would be predicted by a rational self-interest model. Instead there is a 'taken-for-grantedness' of borders as a whole. Revisionist actors are and are seen as dangerous 'rogues' by others precisely because they approximate the self-interested model: at 395–8.

explains, ‘the international system clearly exhibits some kind of order in which patterns repeat, institutions accrete, and practices are stable.’<sup>6</sup>

The UN is the only truly global institution of a general purpose which approximates universality. The size of UN voting majorities, the forcefulness of the language used and the frequency with which particular resolutions and language are recited are important because of the political significance attached to its perception as the closest we are able to get to an authentic voice of humanity. The role of custodian of collective legitimacy enables the UN, through its resolutions, to articulate authoritative standards of state behaviour. The UN was meant to be the framework within which members of the international system negotiated agreements on the rules of behaviour and the legal norms of proper conduct in order to preserve the society of states. Thus, simultaneously the UN was to be the forum for mediating power relationships, accomplishing political change that is held to be just and desirable by the international community, promulgating new norms and conferring the stamp of collective legitimacy.

The UN is the site where power is moderated by lawful authority because law and legitimacy come together. At least they should come together, given the core identity on which the international organisation was constructed. A community denotes shared values and bonds of affinity. An international community exists to the extent that there is a shared understanding of what constitutes legitimate behaviour by the various actors in world affairs. A gulf between lawful and legitimate international behaviour at or by the UN is *prima facie* evidence of an erosion of the sense of international community.<sup>7</sup> The UN is the symbol of an imagined and constructed community of strangers who have banded together to tackle the world’s problems collectively and to work together cooperatively in the pursuit of shared goals. In this sense the organisation is first and foremost the repository of international idealism, the belief that human beings belong to one family, inhabit the same planet and have joint custodial responsibility to husband resources and protect the environment for all future generations of life on this planet.

Deriving from this, the core UN mandates are primarily normative: to preserve peace, promote development and protect human rights.<sup>8</sup> Operational plans are implementation strategies of these essentially normative mandates. This in turn means that ethics, principles and values are central to the identity of the UN and must inform all its activities and operations. This explains why allegations of financial fraud by UN officials or sexual misconduct by UN peacekeepers are so intensely damaging to the UN. This is also why hints of South Korea having in part ‘bought’ the post of Secretary-General for Ban<sup>9</sup> — strenuously denied by Seoul — were not helpful.

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<sup>6</sup> Ibid 400.

<sup>7</sup> Amitai Etzioni argues similarly that the greater threat to the European Union is not the so-called democratic deficit, but a ‘community deficit, the lack of shared values and bonds’: Amitai Etzioni, ‘The Community Deficit’ (2007) 45 *Journal of Common Market Studies* 23, 23.

<sup>8</sup> See *Charter of the United Nations* art 1.

<sup>9</sup> See Richard Beeston and James Bone, ‘Seoul Tries to Buy Top UN Job’, *The Australian* (Sydney) 29 September 2006; ‘Ban Denies Influence-Peddling Charge’, *Japan Times* (Tokyo) 20 October 2006.

Yet another pertinent example might be the way in which Taiwan has been ‘banned’ and made to disappear from the UN, just like undesirables were officially banned under South Africa’s apartheid regime and therefore could not be covered by news reports. Taiwan is refused membership, is not granted observer status and does not figure in the UN’s statistical databases. The irony of the situation has been noted: ‘Taiwan, meanwhile, has been a world leader in embodying the ideals of the UN’s own charter’<sup>10</sup> — it is prosperous and free-wheelingly democratic, ‘the world’s first Chinese democracy’.<sup>11</sup> Taiwan’s exclusion is procedurally legal, but is it constitutional and legitimate, bearing in mind that Taiwan ‘is indisputably a sovereign state ... free and democratic’?<sup>12</sup> In January 2006, Mukhtar Mai — the Pakistani woman who became a global symbol of courage for defying a tribal court on whose orders she had been gang raped and who chose to go public with her story despite official apathy and discouragement — was denied the opportunity to speak at the UN because Pakistan’s Prime Minister was visiting the organisation on the same day.<sup>13</sup> So much for ‘[w]e the peoples’.<sup>14</sup>

The bases of UN legitimacy include its credentials for representing the international community, agreed procedures for making decisions on behalf of international society and political impartiality.<sup>15</sup> But sometimes this elides into claims of legitimacy based on the technical identity of the Secretariat as an international civil service, which is quite problematic. When Iraq’s interim leaders requested UN assistance for training Iraqi judges and prosecutors who would be trying Saddam Hussein and his senior associates, the response from Annan was that the organisation would not assist national courts that can impose the death penalty.<sup>16</sup> In his report on transitional justice, Annan reaffirmed that the UN would ‘not establish or directly participate in any tribunal for which capital punishment is included among possible sanctions’.<sup>17</sup> But whose preferred political morality is this? What proportion of the world’s people lives under governments that have capital punishment on their statutes (including China, India, Indonesia, Japan and the US)? Who sets the relevant international standards and benchmarks? Does the UN somehow have a state of grace above its member states?

If the Security Council is the geopolitical centre of gravity in the UN system, the General Assembly is its normative centre of gravity. Thus, the legal

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<sup>10</sup> Claudia Rosett, ‘The Good China’, *Wall Street Journal* (New York) 5 October 2005.

<sup>11</sup> See, eg, Suzanne Fields, ‘Embracing the Beijing Elephant’, *The Washington Times* (Washington DC), 13 June 1997, A23.

<sup>12</sup> Chen Shui-bian, President of Taiwan, ‘The Shunning of a State’, *The Washington Post* (Washington DC), 11 May 2007, A19.

<sup>13</sup> Warren Hoge, ‘Heeding Pakistani Protest, UN Blocks Talk by Rape Victim’, *The New York Times* (New York), 21 January 2006, A4.

<sup>14</sup> *Charter of the United Nations* Preamble.

<sup>15</sup> See Robert O Keohane, ‘The Contingent Legitimacy of Multilateralism’ in Edward Newman, Ramesh Thakur and John Tirman (eds), *Multilateralism under Challenge? Power, International Order, and Structural Change* (United Nations University Press, 2006) 56.

<sup>16</sup> See Marlise Simons, ‘Iraqis Not Ready for Trials; UN to Withhold Training’, *The New York Times* (New York), 22 October 2004, A11.

<sup>17</sup> *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies — Report of the Secretary-General*, UNSCOR, 59<sup>th</sup> sess, UN Doc S/2004/616 (23 August 2004) [64(d)].

competence to authorise the international use of force vests in the Security Council, but the legitimacy of a General Assembly resolution is the greater for being the only authentic voice of the mystical 'international community'. The General Assembly–Security Council clash of corporate interests intersects with the sometimes bitter North–South divide at the UN that has found expression in recent times on such issues as 'humanitarian intervention', the relative priority to be accorded to tackling terrorism and global poverty, and internal UN management reform.<sup>18</sup> The new Secretary-General soon encountered a backlash on the last count.<sup>19</sup> But this division is broader than that, and goes to the heart of the debate between law and legitimacy. International law was a product mainly of the European states system,<sup>20</sup> and international humanitarian law also has its roots essentially in Europe.<sup>21</sup> In the age of colonialism, most Afro-Asians and Latin Americans became the victims of Western superiority in the organisation and weaponry of warfare. They continue to be the objects but not the authors of norms and laws that are supposedly international.<sup>22</sup>

A world order in which developing countries are norm-takers and law-takers while Westerners are the rule-setters, interpreters and enforcers will not be viable because the division of labour is based neither on comparative advantage nor on equity. The risk is under-appreciated because the international discourse is dominated by Western — in particular Anglo-American — scholarship. The net result of this, in turn, is that the bulk of scholarly analyses and discourse 'privilege[s] the experiences, interests, and contemporary dilemmas of a certain portion of the society of states at the expense of ... the large majority of states'.<sup>23</sup> That is, the very universality from which the UN draws its legitimacy is in some crucial respects more token than real.

### III SANCTIONS: LEGAL BUT ILLEGITIMATE?

If Kosovo was an illegal and yet legitimate intervention by the North Atlantic Treaty Organization, as argued by the Independent International Commission,<sup>24</sup> the reverse might be said of many sanctions regimes. Attempts to enforce authority can only be made by the legitimate agents of that authority. What distinguishes rule enforcement by criminal thugs from that by police officers is the principle of legitimacy. Legitimacy is thus the conceptual rod connecting the

<sup>18</sup> See, eg, Laura Trevelyan, *Poor Nations Block Key UN Reform* (29 April 2006) BBC News, <<http://news.bbc.co.uk>>.

<sup>19</sup> See Colum Lynch, 'Secretary-General Faces a Backlash: Some Say He's Out to Reshape UN to Accommodate US', *The Washington Post* (Washington DC), 14 February 2007, A14; 'G-77, NAM Oppose Deadline to Approve UN Restructuring Plan', *Doordarshan News* (India), 2 February 2007.

<sup>20</sup> See Jan Hendrik Willem Verzijl, *International Law in Historical Perspective* (A W Sijthoff, 1968) Vol 1, 435–47.

<sup>21</sup> See, eg, M Sornarajah, 'An Overview of the Asian Approaches to International Humanitarian Law' (1985) 9 *Australian Year Book of International Law* 238, 238–9. But see Karl Joseph Partsch, 'The Western Concept' in Henry Dunant Institute, *International Dimensions of Humanitarian Law* (Martinus Nijhoff, 1988) 59.

<sup>22</sup> See Ramesh Thakur, 'Global Norms and International Humanitarian Law: An Asian Perspective' (2001) 841 *International Review of the Red Cross* 19.

<sup>23</sup> Mohammed Ayoob, 'Inequality and Theorizing in International Relations: The Case for Subaltern Realism' (2002) 4(3) *International Studies Review* 27, 29.

<sup>24</sup> Independent International Commission on Kosovo, *Kosovo Report: Conflict, International Response, Lessons Learned* (2000) 4.

exercise of authority to the recourse to power. Enforcement includes diplomatic and economic coercion. Coercive economic sanctions developed as a conceptual and policy bridge between diplomacy and force for ensuring compliance with UN demands. Recourse to sanctions increased dramatically in the 1990s.<sup>25</sup> Calls for effective sanctions continue to be made sporadically with respect to Iran, Myanmar, Sudan and Zimbabwe.

The right of the Security Council to impose sanctions in response to ‘any threat to the peace, breach of the peace, or act of aggression’<sup>26</sup> is clearly spelt out in the *UN Charter*: measures ‘not involving the use of armed force’ including (but not limited to) the ‘complete or partial interruption of economic relations’.<sup>27</sup> Support for sanctions rests in their image as a humane alternative, and perhaps a necessary prelude to war, which is increasingly regarded as a tool of the very last resort. Yet in contrast to wars, sanctions shift the burden of harm solely to civilians, mainly women and children. They cause death and suffering through *structural violence*: starvation, malnutrition and disease on a scale exceeding the *cleaner* alternative of war. Yet, ‘[s]anctions have had an uneven track record in inducing compliance with Security Council resolutions.’<sup>28</sup> They inflict undeniable pain on ordinary citizens while imposing questionable costs on leaders who are often enriched and strengthened on the back of their impoverished and oppressed people by the law of perverse consequences. All too often, sanctions are a poor alibi for, and not a sound supplement to, a good foreign policy.

All this has steadily undermined their legitimacy. Once seen as an attractive non-violent alternative to war, sanctions have become increasingly discredited for their harsh humanitarian consequences on the civilian population.<sup>29</sup> Instead of the authority of the UN legitimising sanctions regimes, the baleful effects of sanctions began to erode the legitimacy of the UN.<sup>30</sup> This was exacerbated by the paucity of intellectual and institutional foundations for the organisation’s sanctions policy. In response, the international community has been trying to refine and improve the tool in both design and implementation. Interest shifted to incorporating carefully considered humanitarian exemptions or looking for *smarter* alternatives to comprehensive sanctions that put pressure on regimes rather than peoples. But even when much improved from a moral, political and technical point of view and conceptually compelling, smart sanctions remain unproven in actual practice.

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<sup>25</sup> See David Cortright and George A Lopez, *The Sanctions Decade: Assessing UN Strategies in the 1990s* (Lynne Rienner, 2000) 13.

<sup>26</sup> *UN Charter* art 39.

<sup>27</sup> *Ibid* art 41.

<sup>28</sup> See *We the Peoples: The Role of the United Nations in the Twenty-First Century — Report of the Secretary General*, UN GAOR, 54<sup>th</sup> sess, Agenda Item 49b, UN Doc A/54/2000 (27 March 2007) 36 (‘*Millennium Report*’).

<sup>29</sup> See David Cortright, George A Lopez and Linda Gerber-Stellingwerf, ‘Sanctions’ in Thomas G Weiss and Sam Daws (eds), *Oxford Handbook on the United Nations* (Oxford University Press, 2007) 349, 357–8.

<sup>30</sup> The UN has a particularly low image among Iraqis in large part because of the UN sanctions regime, which inflicted severe pain on the population without removing Saddam Hussein.

## IV NUCLEAR WEAPONS

One of the countries under threat of increasingly broad-ranging sanctions in 2007–09 was Iran. The reason for this was a concern that Iran was engaging in a clandestine pursuit of nuclear weapons. But in this case there were a number of significant questions raised: about the nuclear legality of those who would impose sanctions; about the legality of the Security Council in imposing sanctions as a tool of geopolitical dominance rather than lawful enforcement; and about the legitimacy of the nuclear order as presently constituted.<sup>31</sup> The issue of nuclear weapons is also useful in highlighting the behaviour-regulating role of legitimacy in international relations. Indeed, the arguments over Iran in some respects merely reprised the law–legitimacy dichotomy passionately debated when India and Pakistan tested in 1998,<sup>32</sup> and also over the *Agreement for Cooperation between the Government of the United States of America and the Government of India concerning Peaceful Uses of Nuclear Energy*.<sup>33</sup>

India had argued for decades that the most serious breaches of the anti-nuclear norm were being committed by the five nuclear powers ('N5', who coincide with the P5) who simply disregarded their disarmament obligations under art 6 of the nuclear *Treaty on the Non-Proliferation of Nuclear Weapons*.<sup>34</sup> The imbalance of reporting, monitoring and compliance mechanisms between the non-proliferation and disarmament clauses of the *NPT*, India insisted, had in effect created nuclear apartheid. Against this background, the UN response to the 1998 tests posed the question of moral equivalence. The N5 preached non-proliferation while engaging in consenting deterrence. Their nuclear stockpiles were in defiance of the World Court's 1996 advisory opinion in *Legality of the Threat or Use of Nuclear Weapons*;<sup>35</sup> yet India and Pakistan breached no international treaty, convention or law by testing. For the N5 to impose sanctions on the nuclear gatecrashers was akin (on this issue) to outlaws sitting in judgment, passing sentence and imposing punishment on the law-abiding.

The attacks of 11 September 2001 concentrated minds on the prospect of terrorists acquiring weapons of mass destruction ('WMDs'). Security Council *Resolution 1540*<sup>36</sup> crossed a conceptual Rubicon in directing sovereign states to

<sup>31</sup> See George A Lopez and David Cortright, 'United Nations Sanctions and Nuclear Weapons' in Jane Boulden, Ramesh Thakur, and Thomas G Weiss (eds), *The United Nations and Nuclear Orders* (United Nations University Press, 2009) 111, 129.

<sup>32</sup> See Ramesh Thakur, 'The South Asian Nuclear Challenge' in John Baylis and Robert O'Neill (eds), *Alternative Nuclear Futures: The Role of Nuclear Weapons in the Post-Cold War World* (Oxford University Press, 2000) 101.

<sup>33</sup> Opened for signature 10 October 2008, KAV 8548 (entered into force 6 December 2008). See Jayantha Dhanapala and Daryl Kimball, *A Nonproliferation Disaster* (2008) Carnegie Endowment <<http://www.carnegieendowment.org>>; Sumit Ganguly and Dinshaw Mistry, 'The Case for the US–India Nuclear Agreement' (2006) 23(2) *World Policy Journal* 11; William C Potter, 'India and the New Look of US Nonproliferation Policy' (2005) 12 *Nonproliferation Review* 343; Ramesh Thakur, 'US–India Nuclear Accord a Win-Win Outcome for All', *The Daily Yomiuri* (Tokyo), 27 November 2005; Ramesh Thakur, 'Don't Let the India–US Nuclear Deal Unravel' *Globe and Mail* (Toronto), 27 April 2007.

<sup>34</sup> Opened for signature 1 July 1968, 729 UNTS 161 (entered into force 5 March 1970) ('*NPT*').

<sup>35</sup> (*Advisory Opinion*) [1996] ICJ Rep 226.

<sup>36</sup> SC Res 1540, UN SCOR, 59<sup>th</sup> sess, 4956<sup>th</sup> mtg, UN Doc S/RES/1540 (28 April 2004) ('*Resolution 1540*').



enact and enforce laws prohibiting non-state actors from developing, acquiring, transferring or using WMDs, and to take and enforce effective domestic control, physical protection, accounting and border control measures to prevent proliferation.

The unprecedented intrusion into national law-making authority can be read as the toughened new determination of the international community to take effective action. But it was not without controversy. A former member of the UN/Organisation of African Unity Expert Group on the Denuclearization of Africa noted that ‘by arrogating to itself wider powers of legislation’,<sup>37</sup> the Security Council was departing from its *UN Charter*-based mandate. Excessive recourse to Chapter VII of the *UN Charter* could signal a preference for coercion over cooperation, while framing the resolution within the global war against terrorism was meant to silence dissenting voices. And the Council’s effort to seek global adherence to its resolutions was undermined by its unrepresentative composition and the veto power of the P5.<sup>38</sup> Many non-government organisations also criticised the resolution’s silence on the role of disarmament in promoting non-proliferation, as well as the Security Council’s effort to transform itself into a world legislature.<sup>39</sup>

The biggest tension in the arms control regimes remains that between non-proliferation and disarmament. Article 6 of the *NPT* is the only explicit multilateral disarmament commitment undertaken by all the N5. Implementing art 6 of the *NPT* instead of dusting it off occasionally as a rhetorical concession would dramatically transform the *NPT* from a non-proliferation into a prohibition regime. The N5 regard art 6 as a peripheral obligation. Yet, as argued by the 2005 Nobel Peace Prize-winning Director-General of the International Atomic Energy Agency, ‘[w]ithout this linkage, there would have been no agreement on an *NPT* in 1968 — and it is hard to envision any new international non-proliferation compact that would not inherently contain such a linkage.’<sup>40</sup>

If any one country can justify nuclear weapons on grounds of national security, so can others. Tehran portrays its actions as consistent with its *NPT* right to acquire nuclear technology and materials for peaceful purposes. The *NPT* requirements reflect the technical and political world of 1968. The series of inflammatory statements made and incendiary steps taken by Mahmoud Ahmadinejad since he became President may make his pursuit of the nuclear weapons option illegitimate, but they do not by themselves prove Iran’s actions to date to be illegal.

The security deficits of Iran’s geo-strategic environment include: three de facto nuclear powers (Israel, Pakistan and India) in its own region to the west and east; aggression in recent memory by its neighbour Iraq, including the use of chemical weapons delivered by Scud missiles, which was at least tolerated if not condoned by the same Western powers that later turned against the author of the

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<sup>37</sup> Abdalmahmood Abdalhaleem Mohammad, ‘Security Council and Non-Proliferation’, *The Hindu* (Chennai), 28 May 2004, 10.

<sup>38</sup> *Ibid.*

<sup>39</sup> Jim Wurst, ‘NGOs Criticize Nonproliferation Draft for Ignoring Disarmament’, *UN Wire* (Washington DC), 1 April 2004.

<sup>40</sup> Mohamed ElBaradei, ‘Preserving the Non-Proliferation Treaty’ [2004] 4 *Disarmament Forum* 3, 3.

aggression; two nuclear powers (China and Russia) in the Central Asian regional context; a history of Anglo-American aggression against Iran; and a circle of US bases and forces around it in the context of having been designated a member of the 'axis of evil'.

Confronted with such a strategic environment, a prudent national security planner could not reasonably be faulted for recommending the acceleration rather than the abandonment of the nuclear program. Tehran, too, could cloak its actions in arguments that legitimacy is different from and on a higher plane than legality. US advocates of robust national postures argue that global regimes are unreliable instruments of security, international law is a fiction and the UN is an irrelevant nuisance. Countries have to rely on their own military might to avoid becoming the victims of others'. The *NPT* was negotiated for another time and another world. In the harsh world of today's international jungle, the only reliable route to ensuring national security is through national military might, including nuclear weapons.

All of these elements might be enough to put the ball back in the UN's court. But its authority, too, has been diminished by the Iraq War.<sup>41</sup> As I have put it elsewhere: '[w]hat is to stop other leaders from mimicking the bumper sticker argument about not needing a permission slip from the UN to defend one's country?'<sup>42</sup> In other words, repeated US assaults on UN-centred law governing the international use of force have undermined the norm of a world of laws, the efficacy of international law and the legitimacy of the UN as the authoritative validator of international behaviour.

A norm cannot control the behaviour of those who reject its legitimacy. Norm compliance by those who reject the legitimacy of the existing order will be a function of their incapacity to break out, not of voluntary obedience. The *de facto* position of 'nuclear might equals right' is an inducement to join the club of nuclear enforcers. It is curious, to say the least, that those who worship at the altar of nuclear weapons are the fiercest in denouncing as heretics anyone else wishing to join their sect. In order to enhance their credentials as critics and enforcers of the norm, the N5 need to move more rapidly from deterrence to disarmament. There have been signs that the Obama Administration might well take a lead on this.<sup>43</sup> The logic of non-proliferation is inseparable from that of disarmament. Hence, the axiom of non-proliferation: as long as any one country has them, others, including terrorist groups, will try their best (or worst) to get them. If they did not exist, nuclear weapons could not proliferate. Because they do, they will. The pursuit of nuclear non-proliferation is doomed without an accompanying duty to disarm.

Paradoxically, counter-proliferation efforts may well be legitimate even if illegal. The reality of contemporary threats means that significant gaps exist in the legal and institutional framework to combat them. Within the constraints of

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<sup>41</sup> See Ramesh Thakur, 'Fast Forward to the Past? The Line in the Sand from Iraq to Iran' (Working Paper No 7, Centre for International Governance Innovation, 2006) 15.

<sup>42</sup> *Ibid.*

<sup>43</sup> See, eg, Hillary Clinton, 'Statement by Secretary of State Hillary Rodham Clinton to the 2010 Review Conference of the Treaty on the Non-Proliferation of Nuclear Weapons' (Statement delivered at the 2010 Review Conference of the Treaty on the Non-proliferation of Nuclear Weapons, New York, US, 3 May 2010) <[http://www.un.org/en/conf/npt/2010/statements/pdf/usa\\_en.pdf](http://www.un.org/en/conf/npt/2010/statements/pdf/usa_en.pdf)>.

the *NPT*, a non-nuclear country can build the necessary infrastructure to be but a screwdriver away from acquiring nuclear weapons. Non-state actors are outside the jurisdiction and control of multilateral agreements. Recognising this, a US-led group of like-minded countries launched the Proliferation Security Initiative to interdict illicit air, sea and land cargo linked to WMDs. Its premise is that the proliferation of such weapons deserves to be criminalised by the civilised community of nations. The Initiative signals a new determination to overcome an unsatisfactory state of affairs through a broad partnership of countries that, using their own national laws and resources, will coordinate actions to halt shipments of dangerous technologies and material.

## V ATROCITY CRIMES AND INTERNATIONAL INTERVENTIONS

The Proliferation Security Initiative involves a limited use of force by groups of countries acting outside the UN framework. The law–legitimacy distinction arose with particular cogency with respect to the legal system promulgated and enforced by the apartheid regime in South Africa. If the constitutional system itself was essentially a criminal regime, then could not opposition to it be held up as legitimate even if illegal? That debate had barely faded when the same dilemma flared up in the 1990s with the spate of humanitarian atrocities and the role of international indifference, inaction or intervention with respect to these atrocities. Except, this time, the roles of the global North and South were reversed. When NATO launched a ‘humanitarian war’ without UN authorisation in Kosovo, it raised a triple policy dilemma:

- 1 To respect sovereignty all the time is sometimes to be complicit in humanitarian tragedies;
- 2 To argue that the Security Council must give its consent to international intervention for humanitarian purposes is to risk policy paralysis by handing over the agenda either to the passivity and apathy of the Council as a whole, or to the most obstructionist member of the Council, including any one of the P5 determined to use the veto clause;
- 3 To use force without UN authorisation is to violate international law and undermine world order.

The three propositions together highlight a critical law–legitimacy gap between the needs and distress felt in the real world and the codified instruments and modalities for managing world order. Faced with another Holocaust or Rwanda-type genocide on the one hand and a Security Council veto on the other, what would we do? Doing nothing would progressively de-legitimise the role and undermine the authority of the Security Council as the cornerstone of the international law enforcement system. But action without UN authorisation would be illegal and also undermine the lawful authority of the Security Council. The law–legitimacy distinction was to resurface four years later over Iraq and leave many Westerners rather less comfortable than the Kosovo precedent.<sup>44</sup>

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<sup>44</sup> See Ramesh Thakur, *War in Our Time: Reflections on Iraq, Terrorism and Weapons of Mass Destruction* (United Nations University Press, 2007).

In making up the rules of intervention ‘on the fly’ in Kosovo,<sup>45</sup> NATO countries put at peril the requirement for a lasting system of world order grounded in the rule of international law. The attempt ‘to limit the reach of the Kosovo precedent did not prevent the advocates of the Iraq War from invoking it to justify toppling Saddam.’<sup>46</sup>

The Iraq War’s legality and legitimacy will be debated for years to come. The belligerent countries insisted that the war was both legal and legitimate, based on a series of prior UN resolutions and the long and frustrating history of combative-cum-deceitful defiance of the UN by Saddam Hussein. Others conceded that it may have been illegal but, like Kosovo in 1999, it was nevertheless legitimate in its largely humanitarian outcome. For a third group, the war was both illegal and illegitimate.<sup>47</sup>

Similarly, there were three views on the significance of the war for the UN–US relationship: that it demonstrated the irrelevance, centrality or potential complicity of the UN.<sup>48</sup> First, for the neo-conservatives, because it exists, the UN should be uninvented and there was therefore no reason to seek UN approval.<sup>49</sup> Under the second view, it was recognised that there was a need ‘to confront Saddam Hussein but [it] ruled out acting without UN authorisation.’<sup>50</sup> Third, UN authorisation of the war was ‘necessary but not sufficient’ with irrelevance preferred to complicity.<sup>51</sup> In the opinion of some, the UN is ‘now more than ever reduced to the servile function of after-sales service provider for the United States, on permanent call as the mop-up brigade.’<sup>52</sup>

Humanitarianism provides us with a vocabulary and institutional machinery of emancipation. But ‘[f]ar from being a defense of the individual against the state, human rights has become a standard part of the justification for the external use of force by the state against other states and individuals.’<sup>53</sup> The use of force may be lawful or unlawful; the decision to use force is a political act; and almost the only channel between legal authority and political legitimacy with regard to

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<sup>45</sup> Michael J Glennon, ‘The New Interventionism: The Search for a Just International Law’ (1999) 78(3) *Foreign Affairs* 2, 6.

<sup>46</sup> Robert W Tucker and David C Hendrickson, ‘The Sources of American Legitimacy’ (2004) 83(6) *Foreign Affairs* 18, 31.

<sup>47</sup> For the three arguments, see David Kreiger, ‘The War in Iraq as Illegal and Illegitimate’ in Ramesh Thakur and Waheguru Pal Singh Sidhu (eds), *The Iraq Crisis and World Order: Structural, Institutional and Normative Challenges* (United Nations University Press, 2006) 381; Charlotte Ku, ‘Legitimacy as an Assessment of Existing Legal Standards: The Case of the 2003 Iraq War’ in Ramesh Thakur and Waheguru Pal Singh Sidhu (eds), *The Iraq Crisis and World Order: Structural, Institutional and Normative Challenges* (United Nations University Press, 2006) 397; Ruth Wedgwood, ‘The Multinational Action in Iraq and International Law’ in Ramesh Thakur and Waheguru Pal Singh Sidhu (eds), *The Iraq Crisis and World Order: Structural, Institutional and Normative Challenges* (United Nations University Press, 2006) 413.

<sup>48</sup> This is developed in Ramesh Thakur, ‘Iraq, UN and Changing Bases of World Order’ (2003) 38 *Economic and Political Weekly* 2261, 2261–3.

<sup>49</sup> See Richard Perle, ‘Thank God for the Death of the UN’, *The Guardian* (London) 21 March 2003, 26.

<sup>50</sup> Thakur, ‘Iraq, UN and Changing Bases of World Order’, above n 48, 2262.

<sup>51</sup> *Ibid.*

<sup>52</sup> Alexander Cockburn, ‘It Should Be Late, It Was Never Great’, *The Nation* (New York) 22 December 2003, 9.

<sup>53</sup> David Kennedy, *The Dark Sides of Virtue: Reassessing International Humanitarianism* (Princeton University Press, 2004) 25.

the international use of force is the UN. Conceding to any regional organisation the authority to decide when political legitimacy may override legal technicality would make a mockery of the entire basis of strictly limited, and in recent times increasingly constricted, recourse to force for settling international disputes. Conversely, restricting the right solely to NATO is ‘an open argument for law-making by an elite group of Western powers sitting in judgment over their own actions’<sup>54</sup> — as well as that of all others. In effect, the West’s position vis-a-vis the rest is: we shall hold you to account for your use of force domestically while exempting our international use of force from any external accountability.

While the West wants to proscribe the unconstrained use of force to maintain domestic order, developing countries want to proscribe the use of force by outsiders to enforce justice within errant member states. There is also the moral hazard that outside intervention on behalf of groups resisting state authority by force encourages other recalcitrant groups in other places to resort to ever more violent challenges, since that is the trigger to internationalising their power struggle.

The tension is both powerful and poignant with respect to moving the globally endorsed responsibility to protect from norm to action (or words to deeds, principle to practice). Here we enter the realm both of *normative inconsistency* — selective application and enforcement of global norms against friends and adversaries, for example downplaying the human rights abuses of Central Asian states and Israel while highlighting those of Iraq and Iran — and *normative incoherence* — when different norms clash with each other — as between human rights requirements and prohibitions against the use of force. Is it permissible (or legitimate) to violate some aspects of international law in order to enforce respect for human rights laws? Is it still legitimate if some states are more equal than others in facing international pressure and sanctions, including military intervention as the ultimate sanction? Bernard Kouchner, the French Foreign Minister, advocated invoking the responsibility to protect in order to override the junta’s recalcitrance about accepting international assistance after Cyclone Nargis in Myanmar in 2008,<sup>55</sup> but was notably silent about possible Israeli war crimes in Gaza in 2009. Such selectivity will quickly de-legitimise the new norm whose path to global endorsement was quite contentious.<sup>56</sup>

In a Security Council debate on the protection of civilians in armed conflict on 4 December 2006, Chinese ambassador Liu Zhenmin warned that the *2005 World Summit Outcome*<sup>57</sup> was a ‘very cautious representation of the responsibility to protect populations from genocide, war crimes, ethnic cleansing

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<sup>54</sup> David Chandler, *From Kosovo to Kabul: Human Rights and International Intervention* (Pluto Press, 2002) 135.

<sup>55</sup> See Seth Mydans, ‘Myanmar Junta, Wary of Outsiders, Is Accused of Delaying Storm Aid’, *The New York Times* (New York), 8 May 2008, A22.

<sup>56</sup> That story is told in three books by three people closely associated with it: Gareth Evans, *The Responsibility to Protect: Ending Mass Atrocity Crimes Once and for All* (Brookings Institution Press, 2008); Ramesh Thakur, *The United Nations, Peace and Security: From Collective Security to the Responsibility to Protect* (Cambridge University Press, 2006); Thomas G Weiss, *Humanitarian Intervention* (Polity, 2007).

<sup>57</sup> *2005 World Summit Outcome*, GA Res 60/1, UN GAOR, 60<sup>th</sup> sess, Agenda Items 46 and 120, UN Doc A/RES/60/1 (24 October 2005).

and crimes against humanity ... it is not appropriate to expand, wilfully interpret or even abuse this concept'.<sup>58</sup> Yet, that is precisely what was suggested in 2008 in the context of Cyclone Nargis and more recently by the London-based One World Trust.<sup>59</sup> Ban is surely right in warning that 'it would be counterproductive, and possibly even destructive, to try to revisit the negotiations that led to the provisions of paragraphs 138 and 139 of the Summit Outcome.'<sup>60</sup> Nor is this an isolated phenomenon. The 2005 *World Summit Outcome* failed to include a single reference to the nuclear weapons challenge. A major reason for this failure was the backlash to the unilateral reinterpretation by the N5. These states considered that the *NPT* was solely about non-proliferation obligations by non-N5 states, instead of a package bargain between non-proliferation and disarmament obligations.

## VI INTERNATIONAL CRIMINAL JUSTICE

Afro-Asian countries achieved independence on the back of extensive and protracted nationalist struggles. The anti-colonial impulse was instilled in their countries' foreign policies and survives as a powerful sentiment in the corporate memory of the elites. All too often, developing countries' views either fail to get a respectful hearing at all in Western policy and scholarly discourse, or are patronisingly dismissed.<sup>61</sup> There has been something of a revival of the enterprise of liberal imperialism, which rests on nostalgia for the lost world of Western empires that kept the peace among warring natives and provided sustenance to their starving peoples. This is at variance with the developing countries' own memory and narratives of their encounter with the West. Typically, their communities were pillaged, their economies ravaged and their political development stunted. Whether it was Britain in Kenya or Belgium in the Congo,<sup>62</sup> the colonial powers were brutal in dealing with dissent and rebellion.

The displacement and ethnic cleansing of indigenous populations was carried out with such ruthless efficiency that the place of settler societies like Australia, Canada and the US in contemporary international society is accepted as a given because, as Paul Keal notes, the 'criteria fixed by the inner circle [of powerful states] articulate rules of legitimacy and norms of behaviour'.<sup>63</sup> Presumably, the same explanation holds for the failure of even a peep of protest by the UN for the

<sup>58</sup> UN SCOR, 61<sup>st</sup> sess, 5577<sup>th</sup> mtg, UN Doc S/PV.5577 (4 December 2006) 8, quoted in Sarah Teitt, 'Assessing Polemics, Principles and Practices: China and the Responsibility to Protect' (2009) 1 *Global Responsibility to Protect* 208, 216.

<sup>59</sup> See Elodie Aba and Michael Hammer, *Yes We Can? Options and Barriers to Broadening the Scope of the Responsibility to Protect to Include Cases of Economic, Social and Cultural Rights Abuse* (One World Trust Briefing Paper No 116, March 2009).

<sup>60</sup> *Implementing the Responsibility to Protect — Report of the Secretary-General*, UN GAOR, 63<sup>rd</sup> sess, Agenda Items 44 and 107, UN Doc A/63/677 (12 January 2009) [67].

<sup>61</sup> See Ramesh Thakur, 'Towards a Less Imperfect State of the World: The Gulf between North and South' (Briefing Paper No 4, Friedrich Ebert Foundation, April 2008) 6.

<sup>62</sup> For two recent books that dramatically revise the severity and scale of British repression and what today would be termed atrocities, see David Anderson, *Histories of the Hanged: The Dirty War in Kenya and the End of Empire* (W W Norton, 2005); Caroline Elkins, *Imperial Reckoning: The Untold Story of Britain's Gulag in Kenya* (Holt, 2005). For an account of the scale of humanitarian atrocities committed by Belgium in its African colony, see Adam Hochschild, *King Leopold's Ghost* (Houghton Mifflin, 1999).

<sup>63</sup> Paul Keal, *European Conquest and the Rights of Indigenous Peoples: The Moral Backwardness of International Society* (Cambridge University Press, 2003) 188.

alleged atrocities committed by the US military in Fallujah in April 2004, including the use of chemical weapons prohibited under international humanitarian law. As one commentator observed on the eve of the third anniversary of the siege, '[t]he US has overthrown a regime while supposedly searching for phantom weapons of mass destruction, only to use such weapons on the newly "liberated" civilian population.'<sup>64</sup> This commentator offers as explanation for the failure of any lasting international outcry an all-encompassing weariness, 'a kind of fatigue, a sense that ethical action is just too troublesome in our complicated and distracted world'<sup>65</sup> — unless, of course, the sense of ethical outrage can be mobilised by the powerful to launch all-out military assaults against troublesome upstarts who do not kowtow to the resplendent ruler of the new middle kingdom.

The actions of the former colonial powers are as free of international criminal accountability today as they ever were. Discarding diplomatic language in favour of some blunt talking, on 17 March 2009, Hillary Clinton, the US Secretary of State, warned Sudan's President Omar Hassan al-Bashir that he and his government 'will be held responsible for every single death that occurs' in Darfur's refugee camps.<sup>66</sup> She was speaking in response to the expulsion of 13 international aid groups, who provided around half of all assistance delivered in Darfur, in retaliation against the arrest warrants for al-Bashir issued by the International Criminal Court in The Hague. Left unsaid was that no American can be held internationally criminally responsible for a single death that occurs anywhere in the world. An initiative of international criminal justice meant to protect vulnerable people from brutal national rulers has been subverted into an instrument of power against vulnerable countries.

All four ICC indictments to date have been against Africans: nationals of the Central African Republic, the Democratic Republic of the Congo, Uganda and Sudan.<sup>67</sup> When a person under ICC indictment is welcomed to Egypt by the President himself and attends an Arab League summit in Qatar at which even Ban Ki-moon was present, the net result is to bring the system of international criminal justice into disrepute.<sup>68</sup> Unlike al-Bashir or the other Africans in the dock, whose alleged atrocities were limited to national jurisdictions, the Bush Administration asserted and exercised the right to kidnap suspected enemies in the war on terror anywhere in the world and take them anywhere else, including countries known to torture suspects.<sup>69</sup> Many Western allies colluded in the

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<sup>64</sup> Jonathan Holmes, 'The Legacy of Fallujah: The Western Rhetoric of Apathy Must not Bind Us to Our Obligation to Challenge Atrocities', *The Guardian* (London), 4 April 2007, 30.

<sup>65</sup> *Ibid.*

<sup>66</sup> Jill Dougherty, *US Blames Sudan's President for Darfur 'Catastrophe'* (18 March 2009) CNN <<http://edition.cnn.com>>.

<sup>67</sup> For a troubling account of the arbitrary and corner-cutting basis on which the ICC Prosecutor has operated, including in relation to Sudan's President, see Julie Flint and Alex de Waal, 'Case Closed: A Prosecutor without Borders' (2009) 171(4) *World Affairs* 23.

<sup>68</sup> See generally Xan Rice, 'Bashir Flouts War Crimes Warrant with Egypt Trip', *The Guardian* (London), 26 March 2009, 22; Michael Slackman and Robert F Worth, 'Often Split, Arab Leaders Unite for Sudan's Chief', *The New York Times* (New York), 30 March 2009, A5.

<sup>69</sup> For details of the secret but leaked report of the International Committee of the Red Cross on the Guantánamo detainees, see Mark Danner, 'US Torture: Voices from the Black Sites' (2009) 56(6) *New York Review of Books* 69.

distasteful practice of rendition. In a surreal twist worthy of Kafka, we send terror suspects to be tortured to countries which we then brand as human rights abusers.

What of charges of war crimes by Hamas and Israelis in Gaza earlier this year?<sup>70</sup> There was a furore in Israel as some soldiers claimed they shot unarmed civilians, sometimes under orders from their officers.<sup>71</sup> And we are all aware of the Hamas tactic of hiding its fighters and weapons amidst civilians, knowing that this will risk the death of innocents as Israelis return fire. The deaths of fellow Palestinians are less consequential to them than the international censure of Israel for killing innocent civilians. The *Report of the United Nations Fact-Finding Mission on the Gaza Conflict* carefully marshalled evidence of wrongdoing by both Hamas and Israel during the Gaza war.<sup>72</sup> It called on both Palestinian and Israeli authorities to conduct investigations in good faith in conformity with international standards.<sup>73</sup> It also called on the Security Council to monitor these and, only if credible inquiries were not carried out within six months, to refer them to the ICC.<sup>74</sup> Both recommendations are in line with what European and US governments advocate regularly elsewhere. Failure to follow them in the Gaza context will undermine the broader international legal principles and also ‘the Obama administration’s ability to press for justice in places such as Kenya, the Congo and Darfur’.<sup>75</sup>

Which rights that Westerners hold dear would they be prepared to give up in the name of universalism? Or is the concept of universalism just a one-way street — what we Westerners have is ours, what you heathens have is open to negotiation? One hint of the answer lies in the following:

[T]he diffusion of international norms in the human rights area crucially depends on the establishment and the sustainability of networks among domestic and transnational actors who manage to link up with international regimes, to alert Western public opinion and Western governments.<sup>76</sup>

<sup>70</sup> See Chris McGreal, ‘Demands Grow for Gaza War Crimes Investigation’ *The Guardian* (London), 13 January 2009, 1; Richard Falk, ‘Calls for Investigation into Gaza Attacks: Israel’s War Crimes’, *Le Monde Diplomatique: English Edition* (Paris) 1 March 2009.

<sup>71</sup> See Ethan Bronner, ‘Soldiers’ Accounts of Gaza Killings Raise Furore in Israel’ *The New York Times* (New York), 20 March 2009, 1; Rory McCarthy, ‘Israeli Troops Describe Shooting Gaza Civilians’, *The Guardian* (London), 20 March 2009, 2. The conquerors’ arrogance can be seen also in Israeli sharpshooters ordering T-shirts showing a pregnant Arab woman with a bullseye superimposed on her belly, accompanied by the slogan ‘1 shot 2 kills’: see Donald Macintyre, ‘Israel Military Condemns Soldiers’ Shocking T-Shirts’, *The Independent* (London), 22 March 2009.

<sup>72</sup> Human Rights Council, *Human Rights in Palestine and Other Occupied Arab Territories: Report of the United Nations Fact Finding Mission on the Gaza Conflict*, Human Rights Council, 12<sup>th</sup> sess, Agenda Item 7, UN Doc A/HRC/12/48 (25 September 2009) (‘Goldstone Report’).

<sup>73</sup> *Ibid* 424–7.

<sup>74</sup> *Ibid* 424.

<sup>75</sup> Antonio Cassese, ‘We Must Stand behind the UN Report on Gaza’, *Financial Times* (London), 14 October 2009, 11.

<sup>76</sup> Thomas Risse and Kathryn Sikkink, ‘The Socialization of International Human Rights Norms into Domestic Practices: Introduction’ in Thomas Risse, Stephen C Ropp and Kathryn Sikkink (eds), *The Power of Human Rights: International Norms and Domestic Change* (Cambridge University Press, 1999) 1, 5.



The philosophical antecedents of such beliefs lie in the 18<sup>th</sup>–19<sup>th</sup> century theory of evolutionary progress through diffusion and acculturation from the West to the rest. The implicit but clear assumption is that when Western and non-Western values diverge, the latter are in the wrong and it is only a matter of working on them with persuasion and pressure for the problem to be resolved and progress achieved.<sup>77</sup> The cognitive rigidity is shown again in the phrase that ‘[p]ressure by Western states and international organizations can greatly increase the vulnerability of norm-violating governments to external influences.’<sup>78</sup> Self-evidently, only non-Western governments can be norm violators; Western governments can only be norm-setters and enforcers.

The rejection of the ICC by Washington highlights the irony that the US ‘is prepared to bomb in the name of human rights but not to join institutions to enforce them.’<sup>79</sup> Even if we agree on universal human rights, they still have to be constructed, articulated and embedded in international conventions. The question remains of the agency and procedure for determining what they are, how they apply in specific circumstances and cases, what the proper remedies might be to breaches, who decides on these breaches and what rules of procedure and evidence they should follow. Under present conditions of world realities, the political calculus — relations based on military might, economic power and media and NGO dominance — cannot be taken out. The resilience of the opposition to the internationalisation of the human conscience lies in the fear that the lofty rhetoric of universal human rights claims merely masks the more mundane and familiar pursuit of national interests by different means.

## VII THE UNITED NATIONS SECURITY COUNCIL

Almost all the above examples relate to the Security Council as the core of the international law enforcement system. General Rupert Smith argues that in Bosnia, ‘[t]he existence and actions of the Security Council negatively affected events ... The consequence of this failing was the destruction of the credibility of the UN.’<sup>80</sup> He concludes that ‘[i]f the Security Council ... is to change so as to wield force for good, then structural and organizational changes are necessary.’<sup>81</sup> An unreformed Security Council has been experiencing a steady erosion of international legitimacy, which helps to explain the growing willingness of many state and non-state actors to defy its edicts openly. That is, the increasing

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<sup>77</sup> Many in developing countries watched bemusedly from the sidelines when the same attitudinal divide opened up across the Atlantic in 2003 with respect to the US threat of war on Iraq and the stiff resistance from European citizens. The dominant view in Washington seemed once again to be that the European people could not possibly be right. The task was to show them the error of their ways or, failing that, to make sure that the European governments listened to the US Administration rather than to their own people. That the Administration could be wrong was a priori beyond the realm of possibility.

<sup>78</sup> Thomas Risse and Stephen C Ropp, ‘International Human Rights Norms and Domestic Change: Conclusions’ in Thomas Risse, Stephen C Ropp and Kathryn Sikkink (eds), *The Power of Human Rights* (Cambridge University Press, 1999) 234, 277.

<sup>79</sup> Christine Chinkin, ‘Kosovo: A “Good” or “Bad” War?’ (1999) 93 *American Journal of International Law* 841, 846.

<sup>80</sup> Rupert Smith, ‘The Security Council and the Bosnian Conflict: A Practitioner’s View’ in Vaughan Lowe et al (eds), *The United Nations Security Council and War: The Evolution of Thought and Practice since 1945* (Oxford University Press, 2008) 442, 451.

<sup>81</sup> *Ibid.*

divergence of Security Council-sourced law from legitimacy dramatically reduces the efficacy of the UN in regulating the international behaviour of a growing number of actors. For legality and legitimacy to come together again in the Security Council, its composition and procedures must be changed urgently to reflect today's military and ideational realities.

The legitimacy of the Security Council as the authoritative validator of international security action suffers from a quadruple legitimacy deficit: performance, representational, procedural and accountability. Its performance legitimacy suffers from two strikes: an uneven and a selective record. It is unrepresentative from almost any point of view.<sup>82</sup> Its procedural legitimacy is suspect on grounds of a lack of democratisation and transparency in decision-making. And it is not answerable to the General Assembly, the World Court, the nations or the peoples of the world.

Western countries often fret at the ineffectual performance legitimacy of the Council. Their desire to resist the Council's role as the sole validator of the international use of force is the product of this dissatisfaction at its perceived sorry record. But the moral authority of collective judgments does depend in part on the moral quality of the *process* of making those judgments.<sup>83</sup> Michael Ignatieff writes that '[w]hen democrats disagree on substance, they need to agree on process.'<sup>84</sup> The collective nature of the decision-making process of the Security Council is suspect because of the skewed distribution of political power and resources among its members. If the Security Council were to become increasingly activist, interventionist and effective, the erosion of representational and procedural legitimacy and the absence of any accountability mechanisms would lead many countries to question the authority of the Council even more forcefully.

There is a logical slippage between normative idealism and Realpolitik in picking and choosing which elements of the existing order are to be challenged and which retained. If ethical imperatives and calculations of justice are to inform, underpin and justify international interventions, then there is a powerful case for reforming the composition of the Security Council and eliminating the veto clause with respect to humanitarian operations. To self-censor such calls for major reform on the grounds that they are unacceptable to the major powers and therefore unrealistic, is to argue in effect that the motive for intervention is humanitarian, not strategic; yet, the agency and procedure for deciding on intervention must remain locked in the strategic logic of Realpolitik.

The UN is usually attacked for doing too little, too late. Has the Security Council been doing too much and too soon? In recent times the Council has been coopting functions that belong properly to legislative and judicial spheres. It has taken on a legislative role in resolutions on terrorism and non-proliferation. This is intruding into the realm of state prerogatives as negotiated in international conferences and conventions. Security Council decisions are binding, so 192

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<sup>82</sup> See Ramesh Thakur, 'UN Electoral Groupings Reform' in Ramesh Thakur (ed), *What is Equitable Geographic Representation in the Twenty-First Century?* (United Nations University Press, 1999) 2–3.

<sup>83</sup> Amy Gutmann and Dennis Thompson, *Democracy and Disagreement* (Belknap Press, 1996) 4.

<sup>84</sup> Michael Ignatieff, *The Lesser Evil: Political Ethics in an Age of Terror* (Edinburgh University Press, 2004) viii.

legislatures are denied their right of review over international treaties. The Security Council imposed sanctions on Libya for its failure to extradite two citizens accused of being the brains behind the Lockerbie bombing. That is, without a trial and conviction, the Security Council was bent on compelling one sovereign state to hand over its citizens to another sovereign state on the basis of allegations from the latter — which had itself, just a few years earlier, defied the World Court's verdict in a case brought against it by Nicaragua.

In September 2004, the Council approved a US-backed resolution<sup>85</sup> demanding the immediate withdrawal of all foreign forces from Lebanon — at a time when more than 100 000 US troops were occupying Iraq. No-one held their breath over any possible UN investigation of the tens — or is it hundreds — of thousands killed in Iraq since 2003. On 31 May 2007, a sharply divided Security Council voted 10:0:5 to establish an international criminal tribunal to prosecute the perpetrators of the suicide-assassination of Lebanon's Prime Minister, Rafiq Hariri, and 22 others in February 2005, which put the organisation 'in the business of stigmatizing and punishing individuals for a political crime'.<sup>86</sup> The five abstainers — China, Indonesia, Qatar, Russia and South Africa — explained that the resolution 'bypassed the Lebanese parliament's constitutional role in approving international agreements'.<sup>87</sup> Hezbollah issued a statement denouncing the Security Council resolution as 'illegal and illegitimate at the national and international level'.<sup>88</sup>

It is easy to understand why Iranians might have come to the same conclusion about the Security Council after their bitter war with Iraq. For eight long years, despite clear evidence of aggression by Saddam Hussein (who during this time was the West's useful idiot) and his use of chemical weapons, the Council's standard response was to suggest that 'both belligerents were equally at fault'.<sup>89</sup>

If and when the *UN Charter* is reformed, one item on the agenda should be the introduction of curbs on untrammelled authority in the Security Council, which is presently subject to no countervailing political check or judicial review.<sup>90</sup> The idea that the P5 should fuse legislative, executive and judicial

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<sup>85</sup> SC Res 1559, UN SCOR, 59<sup>th</sup> sess, 5028<sup>th</sup> mtg, UN Doc S/RES/1559 (2 September 2004).

<sup>86</sup> Gary J Bass, 'Does the UN Understand What It's Getting Itself Into?', *The Washington Post* (Washington DC), 30 October 2005, B03.

<sup>87</sup> Colum Lynch and Ellen Knickmeyer, 'UN Council Backs Tribunal for Lebanon: Beirut Braces for Unrest after Vote to Pursue Assassins of Former Premier', *The Washington Post* (Washington DC), 31 May 2007, A01.

<sup>88</sup> *Hezbollah Condemns Hariri Court* (31 May 2007) BBC News <<http://news.bbc.co.uk>>.

<sup>89</sup> Charles Tripp, 'The Security Council and the Iran–Iraq War,' in Vaughan Lowe et al (eds), *The United Nations Security Council and War: The Evolution of Thought and Practice since 1945* (Oxford University Press, 2008) 368, 374.

<sup>90</sup> In *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970) (Advisory Opinion)* [1971] ICJ Rep 16; *Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libya v UK) (Preliminary Objections)* [1998] ICJ Rep 9; and *Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libya v US) (Preliminary Objections)* [1998] ICJ Rep 115, the ICJ cast doubts on the blanket immunity of the Security Council from judicial scrutiny but did not go so far as to enunciate a doctrine of judicial review. See Jose E Alvarez, 'Judging the Security Council' (1996) 90 *American Journal of International Law* 1; Thomas M Franck, 'The "Powers of Appreciation": Who Is the Ultimate Guardian of UN Legality?' (1992) 86 *American Journal of International Law* 519.

powers to themselves violates elementary notions of due process. Imagine if abuser regimes, and only they, had permanent membership and veto powers in the new Human Rights Council.

Western commentators seem to point routinely to China and Russia as the veto-wielding problem members of the P5. In fact, since the end of the Cold War, the country to have cast the veto most frequently is the US. The UK and the US have been among the most heavily involved in warfare and armed conflict over the last century, and if we limit the period to that starting after the Second World War, a third country in the list would be Israel. Not the least, because of the veto power in the Security Council, there is no prospect of anyone from any of these three countries being placed in the ICC dock in the foreseeable future. Little wonder that the precedent-setting indictment of the President of Sudan by the ICC in March 2009 drew protests from the majority of the African Union,<sup>91</sup> the Arab League<sup>92</sup> and the Non-Aligned Movement<sup>93</sup> (the world's most representative general purpose body after the UN itself) about the selective justice being meted out by the ICC. Until such time as Washington (and London) are prepared to lead the campaign for the abolition of the veto clause, it is difficult to see how the expectation, threat or use of veto by others can legitimise any US or UK action that circumvents the veto. Those who live by the veto cannot rightfully complain about having to die by the veto.

#### VIII THE UNITED NATIONS–UNITED STATES DUALISM

The push for democratisation in the world has been led by the three Western members of the P5 (UK, France and the US). Yet the three have been the most fiercely resistant to bringing democracy and transparency to the workings of the Council itself.

In some respects, it is more accurate to speak these days of the 'P1' rather than the 'P5'. Authority is the right to make policy and rules, while power is the capacity to implement the policy and enforce the rules. The UN has global reach and authority but no power. It symbolises global governance but lacks the attributes of international government. While lawful authority remains vested in the UN, power has become increasingly concentrated in the US which has global grasp and power but not international authority. The exercise of power is rendered less effective and generates its own resistance if divorced from authority. The latter in turn is corroded when challenges to it go unanswered by the necessary force. Lack of capacity to be the chief enforcer acting under Chapter VII of the *UN Charter* means that the UN remains an incomplete organisation, one that practises only parts of its Charter. That being the case, Edward Luck asks, '[i]s it tenable for the UN to say that it only wants to walk on the soft side of the street but nevertheless wants to have some degree of control over what happens on the other side as well?'<sup>94</sup>

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<sup>91</sup> See Rice, above n 68.

<sup>92</sup> Ibid.

<sup>93</sup> See Non-Aligned Movement Coordinating Bureau, 'Ministerial Meeting of the Non-Aligned Movement Coordinating Bureau: Final Document' (30 April 2009) 67.

<sup>94</sup> Edward C Luck, 'Another Reluctant Belligerent: The United Nations and the War on Terrorism' in Richard M Price and Mark W Zacher (eds), *The United Nations and Global Security* (Palgrave Macmillan, 2004) 95, 105.

Until the First World War, war was an accepted and normal part of the state system with distinctive rules, norms and etiquette. In that Hobbesian world, the only protection against aggression was countervailing power, which increased both the cost of victory and the risk of failure. Since 1945, the UN has spawned a corpus of law to stigmatise aggression and create a robust norm against it. The UN exists to check the predatory instincts of the powerful towards the weak — one of the most enduring but not endearing lessons of history. Since 11 September 2001, a US that was already over-armed has militarised its foreign policy still more.

Might the US irritation at the UN owe as much to its effectiveness in constraining imperial US behaviour as alleged UN ineffectiveness against others? The Bush Administration rejected Harry Truman's counsel that the US must deny itself the licence to do as it pleases, ignored John F Kennedy's wisdom that the US is neither omnipotent nor omniscient, and rode roughshod over four decades of tradition of enlightened self-interest and liberal internationalism as the guiding normative template of US foreign policy.<sup>95</sup> Paul Heinbecker, Canada's former UN ambassador, comments that '[t]he distance between delusion and hubris is short and the Bush Administration covered it in a sprint.'<sup>96</sup>

At the same time, most Western countries, including the US, rightly point to the total dysfunctionality of the General Assembly. There is merit to the argument that at least one explanation for the creeping powers of the Council is the loss of focus and efficiency by the Assembly. It is far more interested in finger-pointing and point-scoring than problem-solving. Its fascination with procedural technicalities and square brackets fails to excite any outsider. One of its low points surely was the equation of Zionism with racism,<sup>97</sup> a resolution that mercifully has since been rescinded.<sup>98</sup> Thus in many quarters, the chief cause of the steady erosion of UN legitimacy is the General Assembly, not the Security Council.

#### IX ACCOUNTABILITY, INTEGRITY AND LEGITIMACY DEFICIT

International organisations that are perceived by their members as legitimate are governmental in the way in which they exercise social control through the promulgation of norms (standards of behaviour) and laws (rules of behaviour). The UN, not unlike national governments, represents a structure of authority that rests on institutionalised state practices and generally accepted norms. But 'governmental bodies are expected to be accountable and open to opposition',<sup>99</sup> otherwise they will suffer an erosion of their legitimacy. The UN's authority to preach the virtues of good governance and accountability to others will be gravely compromised by any departures from these values in its own behaviour.

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<sup>95</sup> See Tucker and Hendrickson, above n 46.

<sup>96</sup> Paul Heinbecker, 'The Davey Lecture' (Speech delivered at Victoria College, University of Toronto, 29 March 2007).

<sup>97</sup> See GA Res 3379 (XXX), UN GAOR, 30<sup>th</sup> sess, 2400<sup>th</sup> plen mtg, UN Doc A/RES/3379 (XXX) (10 November 1975).

<sup>98</sup> See GA Res 46/86, UN GAOR, 46<sup>th</sup> sess, 74<sup>th</sup> plen mtg, UN Doc A/RES/46/86 (16 December 1991).

<sup>99</sup> Hurd, above n 5, 383.

In recent times the organisation has been in turmoil, struggling to cope with a string of allegations of fraud and misconduct by foot soldiers and senior officials. I have remarked on the poisonous North–South divide at the UN which has a corrosive effect on the organisation’s legitimacy to the extent that it derives from its identity as a universal organisation and that developing countries comprise the majority of its membership. Sometimes this is turned on its head by Western critics who blame management shortcomings on quota politics imposed by the Third World majority on UN recruitment and promotion policy and practice. Yet my own research showed the fallacy of such a charge. The senior ranks of the UN system are dominated by nationals of the rich and powerful countries.<sup>100</sup> The point was borne out by the senior appointments made by the new Secretary-General.<sup>101</sup> And in the case of the choice of his deputy, the general consensus is that Ban had another African female candidate available who would have raised fewer initial questions about management and competence. That is, it is the individual exercise of judgment that may be flawed, not the general principle of equitable geographical and, increasingly, gender representation.

A second canard is about the oil-for-food scandal. Yes, the affair showed up lapses and weaknesses in the internal management culture and practices of the UN Secretariat. But, in the total sweep of the scandal, these were minor. The really important lessons were four. First, the UN simply does not have the capacity, in size and technical resources, to manage such a program and should firmly refuse any such task in the future. Besides, on the integrity count, even the record of US authorities since 2003 is considerably worse.<sup>102</sup> Second, UN officials did in fact raise queries about potential shenanigans with the appropriate oversight committee of the Security Council, but their concerns were not taken up for serious investigation. The main players in the Council had other priorities. If judgments are to be made, they should be about the Council members, not UN officials.<sup>103</sup> Third, the real money was changing hands between business firms and executives and ministers and officials of member governments, not UN officials. After a US\$35 million inquiry, the Volcker committee found a risible US\$150 000 that one official could not satisfactorily account for: unaccounted, not even prima facie evidence of having received a bribe.<sup>104</sup> By contrast, many non-UN politicians, officials and business executives were implicated in serious

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<sup>100</sup> Thakur, *The United Nations, Peace and Security: From Collective Security to the Responsibility to Protect*, above n 56, 310–14.

<sup>101</sup> See Richard Beeston and James Bone, ‘Britain Names Price for UN Vote’, *The Australian* (Sydney), 6 October 2006, 9; Evelyn Leopold, ‘Mexican Biologist, British Diplomat Get UN Posts’, *Reuters Newsfeed*, 4 January 2007; David Nason, ‘UN Chief “Hits the Ground Stumbling”’, *The Australian* (Sydney), 15 January 2007, 10; Tunku Abdul Aziz, ‘Ban Has Lost a Great Opportunity’, *New Straits Times* (Kuala Lumpur), 26 February 2007.

<sup>102</sup> See, eg, Philip Shenon, ‘Did Billions Sent by US to Iraq Fund Insurgents?’, *International Herald Tribune* (Paris), 8 February 2007, 5; Editorial, ‘The Fog of Accountability’, *The New York Times* (New York), 8 February 2007, 20.

<sup>103</sup> See Stephen Schlesinger, *Where Volcker Got It [sic] Wrong* (12 December 2005) MaximsNewsNetwork <[www.maximsnews.com/2005schlesinger1december.htm](http://www.maximsnews.com/2005schlesinger1december.htm)>: ‘the one nation which shoved the inquiry forward from the beginning was most culpable — the United States’.

<sup>104</sup> Paul A Volcker, Richard J Goldstone and Mark Pieth, ‘Third Interim Report: The Conduct of Benon Sevan and the Conduct of Alexander Yakolev’ (Independent Inquiry into the United Nations Oil-for-Food Programme, 8 August 2005) 48 <<http://www.iic-offp.org/documents.htm>>.

sums of money. The biggest single questionable payment, some A\$300 million, concerned the originally government-owned and later government-backed Australian Wheat Board (and subsequently just AWB) dealings with Saddam Hussein.<sup>105</sup> Finally, for all these flaws, the program actually succeeded in its humanitarian goals, just as the UN inspection teams succeeded in disarming Saddam Hussein of WMDs.

In a similar vein, who should be held accountable for the flawed judgment and actions of a Secretary-General: UN officials or those with the most say in (s)electing him?<sup>106</sup> When the US's love affair with Annan soured and the right wing commentators in particular decided to go after him, the UN as a corporate entity was just as liberally smeared, and some UN officials, too, had to bear barbs directed at the UN for its supposed lack of institutional ethics. Leaving aside the question of Annan's legacy and whether or not the attacks were merited or ill-intentioned,<sup>107</sup> the facts are fairly straightforward and incontestable. In 1991, the African candidate with the widest support in the Security Council was Salim Ahmed Salim. He was much too radical for Washington's taste and was vetoed. Instead, Boutros Boutros-Ghali was chosen as Secretary-General. Five years later, he was out of favour in Washington and was replaced by Annan, who was subsequently, at the instigation of the US, reappointed unanimously for a second term. So if Annan turned out to be deficient, should critics direct their ire at the UN as an institution, at UN officials, or at the US government?

That said, the real UN scandal of the last dozen years or so has been with respect to predatory peacekeepers.<sup>108</sup> Fifteen years ago, Amnesty International argued that the time was overdue for the UN to build measures for human rights promotion and protection into its own peacekeeping activities.<sup>109</sup> If the UN is to maintain its human rights credibility, soldiers committing abuses in its name must face investigation and prosecution by effective international machinery.<sup>110</sup>

Annan admitted to being 'especially troubled by instances in which United Nations peacekeepers are alleged to have sexually exploited minors and other vulnerable people',<sup>111</sup> repeated his policy of zero tolerance of such offences and reaffirmed the UN's commitment 'to respect, adhere to and implement

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<sup>105</sup> See generally Editorial, 'Credibility Crippled', *The Australian* (Sydney), 29 March 2006, 13. See also David Leigh and Rob Evans, 'Firms Accused of Bribing Saddam to be Investigated by Fraud Office', *The Guardian* (London) 14 February 2007, 13.

<sup>106</sup> The lack of enthusiasm for Ban among UN officials was an open secret in New York. See Ewen MacAskill and Ed Pilkington, 'Despair at UN over Selection of "Faceless" Ban Ki-moon as General Secretary [sic]', *The Guardian* (London), 7 October 2006, 20.

<sup>107</sup> See Ramesh Thakur, 'What Annan Has Contributed to World [sic]', *The Daily Yomiuri* (Tokyo) 26 December 2006.

<sup>108</sup> See Vanessa Kent, 'Protecting Civilians from UN Peacekeepers and Humanitarian Workers: Sexual Exploitation and Abuse' in Chiyuki Aoi, Cedric de Coning and Ramesh Thakur (eds), *Unintended Consequences of Peacekeeping Operations* (United Nations University Press, 2007) 44.

<sup>109</sup> See Amnesty International, *Peacekeeping and Human Rights* (Amnesty International Report No 40/0194, January 1994).

<sup>110</sup> However, it should be noted that the abuses are not confined to UN peacekeepers. Amnesty concluded that 'the international community' — including NATO peacekeepers and UN civilian personnel — made up around 80 per cent of the clientele of women trafficked into prostitution in Kosovo. See Amnesty International, *So Does That Mean We Have Rights? Protecting the Human Rights of Women and Girls Trafficked for Forced Prostitution in Kosovo* (Amnesty International Report, 5 May 2004) 47.

<sup>111</sup> *In Larger Freedom*, UN Doc A/59/2005 (21 March 2005) [113].

international law, fundamental human rights and the basic standards of due process'.<sup>112</sup> He appointed Prince Zeid Al-Hussein, Jordan's ambassador to the UN with personal civilian peacekeeping experience in Bosnia, to study the abuses and make recommendations on improving the accountability of UN peacekeeping missions. Prince Zeid Al-Hussein's report concluded that sexual exploitation of women and girls by UN security and civilian personnel in the Democratic Republic of the Congo was significant, widespread and ongoing.<sup>113</sup> Annan concurred with the analysis and recommendations with respect to the investigative processes; the organisational, managerial and command responsibility; and individual disciplinary, financial and criminal accountability. But, when the problem of peacekeepers as sexual predators had been known at least since the Namibia and Cambodia operations, why was no action taken earlier and who has been held accountable for the lapse?<sup>114</sup>

#### X CONCLUSION: OBJECTIVE LAW VS SUBJECTIVE LEGITIMACY

International law, like all law, is an effort to align power to justice. Politics is about power: its location, bases, exercise and effects. Law seeks to tame power and convert it into authority through legitimising principles (such as democracy and separation of powers), structures (such as legislature, executive and judiciary) and procedures (such as elections). Law thereby mediates relations between the rich and the poor, the weak and the powerful, by acting as a constraint on capricious behaviour and setting limits on the arbitrary exercise of power. Conversely, the greater the gap between power and authority, the closer we are to anarchy, to the law of the jungle where might equals right, and the greater is the legitimacy deficit. Equally, the greater the gap between power and justice in world affairs, the greater is the international legitimacy deficit. When the powerful subvert the proper relationship to make law subservient to their agenda for keeping others in line, as seems to be happening with the ICC, the many will reject, resist and rebel against such a perversion of justice.

The rule of law ideal has been diffused from the West to become an international norm. It asserts the primacy of law over the arbitrary exercise of political power by using law to tame power; it asserts the protection of the citizen from the arbitrary actions of the government by making both (and their relationship to each other) subject to impersonal and impartial law; and it asserts the primacy of universalism over particularism through the principle of equality in law, whereby individuals coming before the law are treated as individuals, divorced from their social characteristics.

A normative commitment to the rule of law implies a commitment to the principle of relations being governed by law, not power. It also implies a willingness to accept the limitations and constraints of working within the law, in specific instances if necessary against individual notions of just or illegitimate outcome. Fidelity to international regimes, laws and institutions must be required

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<sup>112</sup> Ibid.

<sup>113</sup> See Prince Zeid Ra'ad Zeid Al-Hussein, *A Comprehensive Strategy to Eliminate Future Sexual Exploitation and Abuse in United Nations Peacekeeping Operations*, UN GAOR, 59<sup>th</sup> sess, Agenda Item 77, UN Doc A/59/710 (24 March 2005) [8].

<sup>114</sup> See, eg, Peter Dennis, 'The UN, Preying on the Weak', *The Washington Post* (Washington DC), 12 April 2005, A21.



of and demonstrated by all countries. Trashing global institutions and cherry-picking norms and laws is incompatible with using them to compel compliance by others. To those who uphold the law themselves, and only to them, shall the right be given to enforce it on others.

In apartheid South Africa, in colonial India, and in any situation where conscience dictates that individuals resist laws that they regard as unjust — that is, illegitimate — citizens accept the resulting punishment meted out by the legal process as the necessary price for acting on the basis of their core beliefs. By contrast, in international affairs, the legality–legitimacy distinction is used in the effort to *escape* from any penalty for acting outside the law. For instance, Kosovo may have been illegal, but because our intervention was legitimate, we deserve praise and reward, not blame and punishment.

The Kosovo and Iraq interventions underlined widespread perceptions that powerful countries can break the rules of the *UN Charter* regime with impunity. This has widened the gulf between law and legitimacy. Susan Woodward makes the telling point that the Security Council still does not have ‘a policy on how to address and manage conflicts that threaten the territorial integrity of a country from within’.<sup>115</sup> This is a policy dilemma for Serbia with which most developing countries could identify and most Western countries could not. The result was ‘a cavalier invocation by the Security Council of Chapter VII authority without providing the mandate or resources necessary to stop the war.’<sup>116</sup> She goes on to indict the Council for bearing ‘the larger moral responsibility, for never having sought to craft a policy of its own independent of the actions of its members ... either for the Yugoslav conflicts or for the generic problem which it will continue to face.’<sup>117</sup> It ‘failed to defend the territorial integrity of a member state, and it then failed to establish and enforce rules on the recognition of statehood and borders.’<sup>118</sup>

As David Kennedy notes, ‘[w]ar has always been with us. So has humanitarianism — an endless struggle to contain war in the name of civilization.’<sup>119</sup> He argues that, by and large, the humanitarian community has failed to confront the reality of harmful consequences flowing from good intentions. The central objective of traditional humanitarian policymaking has been to reduce the frequency and violence of war. Now many humanitarians demand the use of violence and war in order to advance the humanitarian agenda.

But how can one ‘intervene’ in Kosovo, East Timor, Iraq or Darfur and pretend to be detached from and not responsible for the distributional consequences with respect to wealth, resources, power, status and authority? This dilemma is inherent in the structure of interventions and has nothing to do with the false dichotomy between multilateral interventions in one context and unilateral in another: ‘The effort to intervene ... without affecting the

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<sup>115</sup> Susan L. Woodward, ‘The Security Council and the Wars in Former Yugoslavia’ in Vaughan Lowe et al (eds), *The United Nations Security Council and War: The Evolution of Thought and Practice since 1945* (Oxford University Press, 2008) 406, 407.

<sup>116</sup> Ibid.

<sup>117</sup> Ibid.

<sup>118</sup> Ibid 440–1.

<sup>119</sup> Kennedy, above n 53, 323.

background distribution of power and wealth betrays this bizarre belief in the possibility of an international governance which does not govern'.<sup>120</sup>

By virtue of their growing influence and power, humanitarian actors have effectively entered the realm of policymaking, at the same time as their emancipatory vocabulary has been captured by governments and other power brokers. International humanitarians are participants in global governance as advocates, activists and policy makers. Their critiques and policy prescriptions have demonstrable consequences in the governmental and intergovernmental allocation of resources and the exercise of political, military and economic power. With influence over policy should come responsibility for the consequences of policy. When things go wrong or do not happen according to plan, the humanitarians share the responsibility for the sub-optimal outcomes.

Human rights has become the universal vocabulary of political legitimacy and humanitarian law of military legitimacy. But rather than necessarily constraining the pursuit of national interests in the international arena by military means, human rights and humanitarian law provide the discourse of justification for the traditional means of statecraft. As much as humanitarians might want to believe that they still hold up the virtue of truth to the vice of power, the truth is that the vocabulary of virtue has been appropriated in the service of power. Far from bridging, this increases the distance between law and legitimacy, particularly at the UN.

Yet most, if not all, the examples of the law–legitimacy gap are solvable. With respect to the nuclear challenge, Barack Obama has affirmed his commitment to a world free of nuclear weapons<sup>121</sup> and the report of the International Commission on Nuclear Non-Proliferation and Disarmament shows one practical way forward to that eventual goal, by an innovative combination of minimisation to a global ceiling of 2000 nuclear warheads by 2025 and negotiations on a nuclear weapons convention for their elimination within our lifetime.<sup>122</sup> It may not be possible to 'uninvent' nuclear weapons, but they can be controlled, regulated, reduced in numbers and role and then outlawed under credible verification and enforcement machinery just like chemical weapons. There is no reason in principle why the writ of the ICC could not be extended to other regions of the world like the Middle East, Europe and North America. Many improvements have already been made in moving from comprehensive but blunt sanctions that punish innocent citizens to smart sanctions that target leaders. And the procedures for selecting the Secretary-General could be modified by a resolution of the General Assembly if it wishes to reclaim a substantive rather than a rubber-stamping role.

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<sup>120</sup> Ibid 130.

<sup>121</sup> See Barack Obama, 'Remarks by President Barack Obama' (Speech delivered at Hradčany Square, Prague, Czech Republic, 5 April 2009) <<http://www.whitehouse.gov/the-press-office/remarks-president-barack-obama-prague-delivered>>.

<sup>122</sup> Gareth Evans and Yoriko Kawaguchi (Co-Chairs), 'Eliminating Nuclear Threats: A Practical Agenda for Global Policymakers' (International Commission on Nuclear Non-Proliferation and Disarmament Report, November 2009) 186.