

Strengthening the International Rule of Law

Law is, essentially, an order for the promotion of peace. Its purpose is to assure the peaceful living together of a group of individuals in such a way that they settle their inevitable conflicts in a peaceful manner; that is, without the use of force, in conformity with an order valid for all. This order is the law.¹

Hans Kelsen

In a very real sense, the world no longer has a choice between force and law. If civilization is to survive, it must choose the rule of law.²

Dwight Eisenhower

INTERNATIONAL LEGAL INSTITUTIONS: A JOB HALF-DONE

The realization of the mandatory and systematic peaceful settlement of international disputes, the *practical* transition to binding adjudication at the international level, and the strengthening of key international legal institutions on a macro scale in service of the same, has, with some exceptions, received vastly inadequate attention in international policy circles and in academia. Yet, as Kelsen notes above, such a concrete transition would be the hallmark of a shift from primitive sociological conditions marked by precarious and unpredictable violence, to a rational system based upon sound international norms, facilitating a global durable peace and accompanying prosperity which could be associated with such a peace.

It would seem obvious that the transition from an essentially “war-lord” system at the international level – or a version of *Pax Romana* based on the most recent ascendant international hegemon – with war or the threat of war employed as a

¹ Kelsen, Hans. 1942. *Law and Peace in International Relations*, Cambridge, MA, Harvard University Press, p. 1.

² Larson, Arthur. 1969. *Eisenhower: The President Nobody Knew*, London, Frewin, p. 119.

means to resolve disputes or to further political goals (to paraphrase von Clausewitz), is a significantly inferior approach to international conflicts than would be a viable, effective rule-based international dispute resolution system. War has always been expensive, unpredictable, callous to suffering and wasteful of lives. This is even more the case given the stakes in contemporary times with modern warfare, as noted above by Eisenhower in 1958, and with intensifying salience resulting from recent developments in cyber warfare and “killer robots,” not to mention ongoing nuclear and other threats (see Chapter 9). Moreover, in the current shifting global and regional power contests and the possibility of renewed arms races, it would seem to be in the enlightened self-interest of the vast majority of states to work for a truly rule-based international system with obligatory peaceful dispute settlement and more enforceable international law.

Every country in the world has something resembling a legal system, to varying degrees of efficacy, and is accustomed to the idea of judicial dispute resolution; the imposition of an international rule of law should be no great leap of imagination for any nation. Certainly, multiple UN statements and declarations (see below) testify to a consensus on the merit and centrality of the international rule of law for a viable global order. It is also hard to imagine any international system which could be deemed to be humane or civilized, by any definition, that is not based on the rule of law and duly constituted, legitimate international legal institutions.

The notion of “peace through law” is a key precept embedded at the heart of the modern international order, clearly conceived within the context of a variety of interdependent provisions of the current UN Charter. As the first enumerated purpose of the UN, the Charter sketches its system for the centralized monopoly on the use of force, to be employed only in the collective interest (within UN machinery and according to the principles established), and with the “adjustment or settlement of international disputes or situations which might lead to a breach of the peace [to be resolved] in conformity with the principles of justice and international law” (Article 1(1)). This purpose is interdependent with the setting up of a comprehensive system for the regulation of armaments under Article 26 of the Charter (see Chapter 9). As Louis Henkin convincingly argues, the Charter was in fact meant to outlaw war, noting that the terminology of “war” is only used once in the Charter’s preamble as the “scourge” wished to be prevented. Instead the Charter uses new technical language in the context of the collective security system it establishes, including “threats to the peace,” “breach of the peace,” “acts of aggression,” and “threat or use of force.” Henkin notes that with the Charter, “international law sought to eliminate the word “war,” the legal status of war, the institution of war, and the concept of war.”³

³ Henkin, Louis. 2005. “Symposium, War and Terrorism: Law or Metaphor.” *Santa Clara Law Review*, Vol. 45, No. 4, p. 819. <http://digitalcommons.law.scu.edu/lawreview/vol45/iss4/2>.

More generally and relatedly, the Charter in its preamble, sets out a key goal of the UN to “establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained.” More particularly, it encourages and establishes the means for “the progressive development of international law and its codification” (Article 13(1)(a)). The International Law Commission was created by the UN General Assembly in 1947 under Article 13(1)(a) and has undertaken a long series of significant studies in relation to its mandate. As a foundational instrument for a reformed international order, the Charter sketches a rather clear path for the progressive maturation of an international legal order, hopeful that the international community will do its homework.

Yet, despite these fundamental goals embedded in the 1945 Charter and in earlier international governance initiatives meant to establish systems for sustainable peace, today we can still meaningfully ask the question as to “[w]hy are scholars and decision-makers so focused on war and not peace more broadly?”⁴ Part of the answer is that the conditions necessary for peace (both “positive” and “negative,” with the latter being the mere absence of armed conflict and the former involving further integrative cooperation and other salutary features) may be less “observable,” because they are more diffuse and involve more interactions and complex institutional interrelationships than do more discrete and event-based battles or wars, however devastating such conflicts may be.

Designing and ensuring a sustainable peace requires the strengthening of multiple parts of the international system, and in particular, we argue, properly implementing an international rule of law and Chapter VI of the Charter, which has also been seriously neglected. A key, indispensable part of the international system – alongside effective collective security institutions/norms and meaningful arms control/disarmament – are strong international legal institutions (see also Chapters 10 and 18, proposing an International Human Rights Tribunal and an International Anti-Corruption Court).

After some notes on the historical process of the establishment of the war prohibition in international law and notions of “peace through law,” as well as dovetailing perspectives from modern peace research, this chapter turns to several international norms or institutions which, essentially, remain incomplete and inadequate, including Charter Chapter VI, the International Court of Justice (ICJ) and the International Criminal Court (ICC). It also briefly explores the establishment of an international judicial training institute and a possible office of an international attorney general (as proposed in the 1950s/1960s by Clark and Sohn), as further ways to strengthen the basic international legal infrastructure. Such efforts to make the international legal system more viable are interdependent with the ability to

⁴ Goertz, Gary, Paul F. Diehl, and Alexandru Balas. 2016. *The Puzzle of Peace: The Evolution of Peace in the International System*, Oxford, Oxford University Press, p. 3.

move toward a legitimate and effective (rule-based) collective security mechanism (see Chapter 8), and the potential for meaningful, substantial international disarmament, cutting off perennial arms races (see Chapter 9). Such efforts are particularly urgent given contemporary vicissitudes in international power configurations or aspirations.

FROM KANT TO HABERMAS: IN SEARCH OF A
BROADER PERSPECTIVE

War is mischief upon the largest scale.⁵

- Jeremy Bentham

Philosophers and thinkers since at least Diogenes and Dante (see Chapter 2) have set forth a vision of some sort of globally shared *civitas* or rationally organized international order, well before Clark and Sohn and those thinkers proximate to the drafting and adoption of the 1945 UN Charter; the latter can indeed be seen as a testament of the soundness of the ideas of earlier philosophers. One should recall this intellectual history with respect to the centrality of the notion of international law and legal order in many of these visions.

It is not always well known that British philosopher Jeremy Bentham, credited, in fact, with coining the term “international,”⁶ set forth a *Plan for an Universal and Perpetual Peace* in the late 1780s. It proposed “a plan of general and permanent pacification for all Europe” through binding treaties, with military reductions, the renunciation of colonies and “a Common Court of Judicature” to settle disputes between nations.⁷ Immanuel Kant’s 1795 essay on *Perpetual Peace* is more widely known,⁸ where he sketches various models of unions of states, formed in service of international peace, and the preliminary requirements to create such a union (e.g., a prohibition on the use of force to interfere with the governments of another nation or annexation of another state’s territory, certain laws of war including prohibiting the use of assassins, prohibition of secret reservations to peace treaties where future war is contemplated, the gradual abolition of standing armies, etc.). He also proposes three other conditions he deems as necessary foundations for a deeper, permanent peace among nations, most famously including the republican constitutional nature

⁵ Bentham, Jeremy. 1789. *The Principles of International Law*, Essays 3 and 4: Of War, Considered in Respect of Its Causes and Consequences and A Plan for Universal and Perpetual Peace, London, Sweet and Maxwell (reprinted 1927).

⁶ Crimmins, James E. 2018. “Jeremy Bentham.” *The Stanford Encyclopedia of Philosophy* (Summer), Edward N. Zalta (ed.) <https://plato.stanford.edu/archives/sum2018/entries/bentham/>.

⁷ Bentham, *Principles of International Law*.

⁸ See also Chapter 2 for additional discussion of Kant’s influence on global governance history. Kant, Immanuel (trans. and with introduction and notes by M. Campbell Smith). 1795. *Perpetual Peace: A Philosophical Essay*, London, George Allen & Unwin Ltd.

of their internal governments (as well as entering into a federation of free states and practicing a law of universal hospitality). He describes what he views as the realistic evolution of such a union of states as follows:

For states, in their relation to one another, there can be, according to reason, no other way of advancing from that lawless condition which unceasing war implies, than by giving up their savage lawless freedom, just as individual men have done, and yielding to the coercion of public laws. Thus they can form a State of nations (*civitas gentium*), one, too, which will be ever increasing and would finally embrace all the peoples of the earth. States, however, in accordance with their understanding of the law of nations, by no means desire this, and therefore reject *in hypothesi* what is correct *in thesi*. Hence, instead of the positive idea of a world-republic, if all is not to be lost, only the negative substitute for it, a federation averting war, maintaining its ground and ever extending over the world may stop the current of this tendency to war and shrinking from the control of law.⁹

Aspects of Kant's vision of a weaker union of states as described has to some extent come true in the "negative" interstate peace generally felt to be established by the United Nations, now embracing essentially all countries of the earth. In terms of the further evolution of the international system, as Kant believed the idea of a genuine and more integrated "perpetual peace" of nations to be a moral and rational ideal (with moral/rational capacities inherent to the human subject), he affirmed its practicality: "[n]ature guarantees the coming of perpetual peace, through the natural course of human propensities; not indeed with sufficient certainty to enable us to prophesy the future of this ideal theoretically, but yet clearly enough for practical purposes."¹⁰

While the European Enlightenment saw a flurry of "perpetual peace" plans, the intellectual thread has continued, albeit usually not at center stage in international politics, which has tended to be dominated by international relations theorists and what have been called realist thinkers. Austrian jurist and legal philosopher Hans Kelsen wrote a number of works on the international legal system – as it then was and/or how it could or should be – before and around the time of the adoption of the 1945 UN Charter. Like any good jurist, but with a very singular confidence and broadness of view, Kelsen seems to clearly wish to see the international legal system built as a *legal system* parallel to what we find in functional national systems, advocating for the "slow and steady perfection of the international legal order."¹¹

Writing *Peace Through Law* in 1944 just before the adoption of the Charter and seeking to learn from the frailties of the League of Nations arrangement, Kelsen was

⁹ Ibid., p. 136.

¹⁰ Ibid., p. 157.

¹¹ Kelsen, Hans. 1944. *Peace through Law*. Chapel Hill, The University of North Carolina Press, p. ix.

adamant that strengthening international law was fundamental to preventing new world wars.¹² He advocated for the holding of individuals to account for war crimes and the *mandatory* settlement of disputes between states at an international court. Conflicts between states should be handled as legal matters, with international court(s) also empowered to develop the law over time, as has occurred in national systems. Kelsen viewed the establishment of mandatory international juridical mechanisms as less controversial than establishing, for example, an international legislature and executive, and more fundamental to the prevention of war and to the creation of a stable international order.

In our time, Jürgen Habermas has taken up the torch, recently criticizing policy-makers, within Europe (given certain events occurring at the time of his writing) and beyond, for what he diagnoses as a “[p]anic-stricken incrementalism betray[ing] the lack of a broader perspective” of the civilizational process of global society within which we find ourselves:

The enduring *political* fragmentation in the world and in Europe is in contradiction with the systemic integration of a multicultural world society and is blocking progress in the process of legally civilizing violence between states and societies.¹³

He sees the need for

a convincing new narrative from the perspective of a constitutionalization of international law that follows Kant in pointing far beyond the *status quo* to a future cosmopolitan rule of law: the European Union can be understood as an important step on the path toward a politically constituted world society.¹⁴ (See Chapter 3.)

Indeed, at the international level, we now have functioning supranational legal institutions, such as the Court of Justice of the European Union and the European Court of Human Rights (among other important regional courts), which may point the way for further developments at the international level. Moreover, we have a great deal more technocratic and formal expertise developed in relation to the international administration of justice, with a by now very significant developed body of international law (based on International Law Commission work, decisions of the ICJ, the work of various other UN agencies, other treaty regimes, etc.) yet we seem to have far less self-confidence and assurance than thinkers such as Bentham, Kant, and Kelsen – or merely understanding – of the path on which we are on. Technically we are much better equipped to realize these compelling “civilizational” visions, embracing and reflecting the diversity of the whole of humanity.

¹² Ibid. See also, Kelsen, Hans. 1935. *The Legal Process and International Order*, London, Constable & Co.; and Hans. *Law and Peace in International Relations*.

¹³ Habermas, J. 2012. “The Crisis of the European Union in the Light of a Constitutionalization of International Law.” *The European Journal of International Law*, Vol. 23, No. 2, pp. 335–348, p. 340.

¹⁴ Ibid.

THE THREAD OF HISTORY: EARLY EFFORTS AT
PEACE THROUGH LAW

In order to understand where we currently stand in terms of the evolution of an international legal system, it is also useful to recall parts of the history of the collective thinking, incorporated into early treaty law, which eventually lead to the ideas enshrined in the 1945 Charter. Proposals for a rational, rule-based international order to ensure “durable” peace have, as briefly described, an impressive pedigree of support from major philosophers, and also, a history of vigorous popular transnational civil society advocates who have been active from very early stages of interstate dialogue on international governance and on building a viable international “peace system.”¹⁵ As just one remarkable and illustrative example, women’s organizations composed of thousands of individuals from 18 countries sent written and telegram messages to sister organizations around the world as well as to the governments of major powers convened by Tsar Nicholas II at the 1899 First Hague Peace Conference. Just one of these extraordinary messages reads as follows:

We, the women of the United States, extend to the women of Germany sympathetic and affectionate greetings. We feel profoundly grateful that the women of the world have been aroused to the need of international relationship through their desire to support the initiative made by His Majesty the Czar of Russia in behalf of gradual disarmament.

We of the United States regard gradual disarmament, the object of which the Conference at the Hague is convened, as the first step in a perhaps long but straight path which humanity is destined to walk, and which leads undeniably to the goal of universal peace maintained by universal obedience to the decisions of a permanent Court of Arbitration.¹⁶

As reflected in this telegram, the hope was that international, interstate arbitration – that is, neutral, third-party dispute resolution – along with “gradual disarmament,” would be the vehicle to finally put an end to war. Such early “norm entrepreneurs”¹⁷ included what we would now call “grassroots” civil society advocates, but also international officials, civil servants, and prominent diplomats, both active and retired. For example, recent scholarship has shed further light on the importance

¹⁵ Fry, Douglas P. 2012. “Life without War.” *Science*, Vol. 336, No. 6083, pp. 879–884.

¹⁶ Sewall, May Wright. 1900. “Telegram Sent to Lenore Selena in Support of the International Demonstration of Women for the Peace Conference” in *The International Demonstration of Women for the Peace-Conference of May 15th 1899* edited by Lenore Selena. Munich, August Schupp, p. 70. Gratitude is owed to Professor Hope May and Ms. Taylor Ackerman for bringing greater attention to these valuable materials on early transnational civil society activity for international peace.

¹⁷ Finnemore, Martha and Kathryn Sikkink. 1998. “International Norm Dynamics and Political Change.” *International Organization*, Vol. 52, No. 4, pp. 887–917.

of the “Kellogg–Briand Pact” of 1928,¹⁸ so-named for its conceivers, US Secretary of State Frank Kellogg and French Foreign Minister Aristide Briand.¹⁹ The treaty, also known as the Paris Peace Pact, “condemn[ed] recourse to war for the solution of international controversies,” and obliged the contracting parties to “renounce it as an instrument of national policy in their relations with one another” (Article 1). States joining the treaty, which included the US, France, Germany, Japan, the USSR, the UK, China, India, and others (for a total of more than 63 states worldwide and virtually all members of the League of Nations) agreed “that the settlement or solution of all disputes or conflicts of whatever nature or of whatever origin they may be, which may arise among them, shall never be sought except by pacific means” (Article 2).

The Pact has traditionally been assumed to be a failure as it did not succeed in preventing, obviously, the slaughter which was World War II. However, Oona Hathaway and Scott Shapiro have recently contested this view of the Pact, and rather position it as a watershed moment in laying the necessary normative groundwork for subsequent developments:

The Peace Pact was naïve – but not for the reason most think. Outlawing war did work. If anything, it worked too well By outlawing war, states renounced the principal means they had for resolving their disputes. They demolished the existing system, which had allowed states to right wrongs with force, but they failed to replace it with a new system. This was in part because there already was an institution – the League of Nations – that seemed poised to resolve disputes. But the League of Nations was built on Old World Order principles. It, too, relied on war and the threat of war to right wrongs and enforce the rules. In a world in which war was outlawed, however, the League’s enforcement mechanism was grounded in a power that states were reluctant to wield.²⁰

Hathaway and Shapiro note that while the “Pact repealed the core principle of the Old World Order” it “did not replace it with a new set of institutions,” which would include, for example, a viable collective security mechanism and sufficiently strong peaceful international dispute settlement mechanisms (such as those we are suggesting in this book, building on the first efforts of the 1945 Charter). In the wake of the carnage of World War II and the failure of the League and related endeavors (including the Paris Peace Pact), the 1945 UN Charter constituted the next very significant advance in establishing and fleshing out crucial new international norms, with, also, an attempt to establish and pave the way for new institutions and mechanisms to support these norms. The Charter indeed could be seen to be

¹⁸ *General Treaty for Renunciation of War as an Instrument of National Policy*, signed at Paris, August 27, 1928.

¹⁹ Hathaway, Oona Anne and Scott Shapiro. 2017. *The Internationalists: How a Radical Plan to Outlaw War Remade the World*, New York, Simon & Schuster.

²⁰ *Ibid.*, pp. xvi–xvii.

another quantum leap forward in establishing the binding obligation of peaceful settlement of international disputes and has been dramatically successful in many respects in greatly reducing the incidence of interstate war since 1945 (e.g., see the range of studies cited in Goertz et al.)²¹ What is probably critical to realize at this juncture in history, is that the institutions, procedures, and basic knowledge of the need for a strong collective security system and peaceful international dispute resolution among national decision-makers, in practice, still remains dangerously weak; we are still in the middle of an important institution-building phase (and a phase of understanding the basic logic of the system meant to be established in 1945), as we take forward the “civilizational process” mentioned by Habermas.

MODERN PEACE RESEARCH

Contemporary peace research affirms that important international norms, gaining progressively widespread traction, do matter, as do supranational institutions, which provide opportunities for nonviolent international dispute resolution. In the “first systemic and comprehensive data set on international peace,” Goertz et al. sketch how a normative “tipping point” was reached with the “hugely influential” norms on territorial integrity promulgated in the UN Charter and in the post-1945 era.²² It has been shown empirically that boundary and territorial disputes are a prime cause of interstate conflict or “war,” and Goertz et al. show, based on their comprehensive analysis, how the new international norms and the increasing range of international conflict management mechanisms available, including mediation and adjudication, have indeed led to the remarkable post-World War II “long peace” marked by a very significant statistical decline in interstate war.²³

Hathaway and Shapiro likewise note the dramatic transition with respect to territorial annexation, pointing to an even earlier demarcation of a new international norm “taking hold” from the time of the Kellogg–Briand Pact:

The New World Order is not simply the law. States actually obey it. There have been breaches, of course – for example, Russian president Vladimir Putin’s brazen annexation of the Crimea in 2014. But the disparity between the world before and after the Peace Pact is extraordinary. Russia’s seizure of Crimea is the first significant territorial seizure of its kind in decades . . . in the century before 1928, states seized territory equal to eleven Crimeas a year on average . . . the likelihood that a state will suffer a conquest has fallen from *once in a lifetime to once or twice a millennium* [emphasis in original].²⁴

²¹ Goertz et al., *The Puzzle of Peace*, p. 2.

²² *Ibid.*, pp. 4 and 7–8.

²³ *Ibid.*, pp. 13 and 17–18.

²⁴ Hathaway and Shapiro, *The Internationalists*, pp. xvii–xviii.

Goertz et al. note the declining utility of the use of force as a means to tackle modern conflict, confronting “realist” assumptions head on that the use of force is generally the preferable or the common “go to” option.²⁵ In fact, furthering this observation, Azar Gat notes that “[a] map of the world’s ‘zones of war’ strikingly reveals the correlation, and suggests the causal relationship, between modernization and peace.”²⁶ He suggests the reason “is that the violent option for fulfilling human desires has become much less promising than the peaceful option of competitive cooperation . . . [and] [f]urthermore, the more affluent and satiated the society and the more lavishly people’s most pressing needs are met.”²⁷

However, at the same time Gat warns that

much of humanity is still going through the process of modernization, and is affected by its pacifying aspects, while struggling to catch up and charting various cultural and national paths, some of which are and may remain illiberal and undemocratic. . . [while at the same time] some parts of the world have so far failed in their efforts to modernize, yet experience many of the frustrations and discontents of that process.²⁸

Such an observation puts in relief the crucial nature of other aspects and purposes of the United Nations (e.g., related to social and economic development), and the international system more generally in facilitating the delivery of sound, participatory governance and a measure of shared prosperity at the national level. Establishing international institutions on a firmer democratic footing (see Chapters 4 to 6 on enhancements to the General Assembly as it currently stands), improving global anticorruption and human rights oversight (see Chapters 11 and 18), and ensuring economic and environmental sustainability (see Chapters 13–16) are all vital initiatives in this respect.

UNITED NATIONS WORK ON THE INTERNATIONAL RULE OF LAW

The unanimously adopted 2015 Sustainable Development Goals exemplify a recent strong example of the international community’s embrace of the central goal and importance of establishing and strengthening the “rule of law” at the international and national levels, across issue areas. In particular, Goal 16 is to “[p]romote peaceful and inclusive societies for sustainable development, provide access to justice and build effective, accountable and inclusive institutions at all levels,” with

²⁵ Goertz et al., *The Puzzle of Peace*, p. 152.

²⁶ Gat, Azar. 2017. *The Causes of War and the Spread of Peace: But Will War Rebound?* Oxford, Oxford University Press, p. 245.

²⁷ *Ibid.*, p. 250.

²⁸ *Ibid.*, p. 251.

a specific target to “[p]romote the rule of law at the national and international levels and ensure equal access to justice for all.”²⁹

As mentioned, the UN Charter sought to establish, in 1945, the fundamentals of an international order based on the rule of law. Building significantly on this foundation, within the last 20–25 years especially, a host of official international statements issued by various UN bodies and UN members collectively have reiterated an international commitment to the “rule of law” as a key principle in establishing a workable global order, as well as in addressing a range of specific issues of concern. The intensification of references to the rule of law as a governing principle at the global level was likely facilitated by a post–Cold War environment marked by fewer “ideological tensions” and far greater consensus for the governance model of “democratic polity founded on the rule of law,” as reflected in the work of the United Nations (see, e.g., the bold 1996 report, *An Agenda for Democratization*, submitted by UN Secretary General Boutros Boutros-Ghali to the General Assembly).³⁰

The UN General Assembly first notably considered the ‘the rule of law’ in connection with its 1993 Vienna World Conference on Human Rights, which convened representatives of 171 states, with some 7,000 participants overall, to chart out a new international human rights agenda.³¹ The Office of the High Commissioner of Human Rights was subsequently established, with the Third Committee of the General Assembly also adopting annual resolutions on “strengthening the rule of law” from 1993 until 2002, reaffirming that “the rule of law is an essential factor in the protection of human rights, as stressed in the [Universal] Declaration [of Human Rights], and should continue to attract the attention of the international community.”³² Recent statements of the Human Rights Council have noted that “human rights, democracy and the rule of law are interdependent and mutually reinforcing,” referring to work of the Secretary General to “address[...] the ways and means of developing further the linkages between the rule of law and the three main pillars of the United Nations: peace and security, human rights and development.”³³

²⁹ United Nations General Assembly. 2015. *Transforming Our World: The 2030 Agenda for Sustainable Development*, September 25, UN Doc. A/RES/70/1.

³⁰ Wouters, J., Bart De Meester, and C. Ryngaert. 2004. *Democracy and International Law*, Leuven, Leuven Interdisciplinary Research Group on International Agreements and Development (LIRGIAD), p. 4.

³¹ United Nations. 2016. *The Rule of Law in the UN’s Intergovernmental Work*. www.un.org/ruleoflaw/what-is-the-rule-of-law/the-rule-of-law-in-un-work/.

³² United Nations General Assembly. 2002. *Strengthening the Rule of Law*, February 27, 2003, UN Doc. A/RES/57/221.

³³ United Nations General Assembly. 2015. *Human Rights, Democracy and the Rule of Law*. Resolution adopted by the Human Rights Council, March 23, UN Doc. A/HRC/28/L.24, p. 2; citing the UN Secretary General in United Nations General Assembly. 2014. *Strengthening and Coordinating United Nations Rule of Law Activities*. Report of the Secretary General, July 24, 2014, UN Doc. A/69/181.

The UN World Summit in 2005, and the resulting World Summit Outcome document, adopted unanimously by all world leaders convened, was another prominent occasion where the “rule of law” was highlighted as a key area of shared commitment.³⁴ The Outcome document delineates four areas of priority needing investment in order to “create a more peaceful, prosperous and democratic world”: (1) development; (2) peace and collective security; (3) human rights and the rule of law; and (4) strengthening the UN.³⁵ The world leaders noted that “good governance and the rule of law at the national and international levels are essential for sustained economic growth, sustainable development and the eradication of poverty and hunger.”³⁶ A section of the Outcome document devoted to the rule of law reiterated UN members’ commitment to “an international order based on the rule of law and international law” and recognized the need for “universal adherence to and implementation of the rule of law at both the national and international levels.”³⁷

Following the World Summit, “The Rule of Law at the National and International Levels” was added to the agenda of the Sixth Committee (Legal) of the General Assembly, with a series of Assembly resolutions on that theme from 2006 to 2016, as well as annual reports on “Strengthening and coordinating United Nations rule of law activities” produced by the Secretary General.³⁸ A 2012 High Level Meeting on the Rule of Law was held upon the opening of the 67th Session of the General Assembly, where member states made over 400 pledges to advance rule of law concretely at the national and international levels, and, in their Declaration, among other things, “reaffirm[ed] that human rights, the rule of law and democracy are interlinked and mutually reinforcing and that they belong to the universal and indivisible core values and principles of the United Nations.”³⁹

The above is a sample of some of the notable highlights in recent UN rule of law “discourse,” which stretches across a range of bodies and thematic areas, including also, for example, such issues as counterterrorism, transitional justice, gender equality, international development and sustainability, among other matters. The Security Council first introduced “rule of law” language into resolutions in 1996, and has engaged with this concept in a number of ways, including, for example, with the establishment of the special criminal tribunals for Rwanda and the former Yugoslavia, making referrals to the ICC, and passing resolutions in relation to rule of law as a key component in post-conflict peace-building situations.

³⁴ United Nations General Assembly. 2005. *2005 World Summit Outcome*, October 24, UN Doc. A/RES/60/1.

³⁵ *Ibid.*, p. 3.

³⁶ *Ibid.*, principle no. 11, p. 2.

³⁷ *Ibid.*, p. 29.

³⁸ The reports and other key documents are available at www.un.org/ruleoflaw/key-documents/.

³⁹ UN General Assembly. 2012. *Declaration of the High-Level Meeting of the General Assembly on the Rule of Law at the National and International Levels: resolution/adopted by the General Assembly*, November 30, A/RES/67/1, p. 2.

THE NEED FOR AN INTERNATIONAL CULTURAL SHIFT

The legitimacy and soundness of the rule of law as the basis for the conduct of international affairs has been clearly recognized in authoritative “top down” international statements, endorsed by global political leaders representing virtually all of humanity, as well as in the incisive prescriptions of major thinkers, civil society advocates and far-sighted diplomats. If there is going to be further concrete progress on this topic and the political will to push through major reforms, there will likely also have to be the further cultivation of the necessary cultural conditions responding, for example, to the sociological/anthropological observation that “[t]he rule of law presupposes the coming together of commitment to common values (which are marked, at the level of custom, by the presence of spontaneous and collective sanctions such as moral disapproval) and of the existence of explicit rules and sanctions and normalized procedures.”⁴⁰ Fortunately, however, we already see such trends in the cultural embrace of key international legal rules, as noted by Hathaway and Shapiro, and Goertz et al., above (see also, for example, the work of Harold Koh and others analyzing why many states might generally obey international law most of the time, despite the absence of vigorous enforcement).⁴¹

Education, therefore remains of supreme importance, certainly of the general public, who may be too easily manipulated by misinformation about more remote international institutions,⁴² but also of the intelligentsia and “elites” of various nations.⁴³ Foreign service, diplomatic, and military personnel and leadership at all levels, too frequently still remain within exclusively military security or geopolitical perspectives in their approaches to international affairs and national security, and often do not have adequate knowledge of the primacy, practical operation, and fundamental purposes of international dispute resolution institutions. There is still insufficient training, at global, regional and national levels, of international diplomats in the peaceful settlement of international disputes and collective security as core aims of the post-1945 world order. Policymakers around the world should better understand the basic logic of why judicial dispute resolution is (far) superior to a “solution” by use or threat of force, for rational, ethical and very compelling financial and practical reasons. The international community is wont to complain

⁴⁰ Bourdieu, P. 1987. “The Force of Law: Toward a Sociology of the Juridical Field.” *The Hastings Law Journal*, Vol. 38 (July), pp. 805–853.

⁴¹ Koh, Harold Hongju. 1997. “Why Do Nations Obey International Law?” *Faculty Scholarship Series*. 2101. https://digitalcommons.law.yale.edu/fss_papers/2101.

⁴² See Chapter 19. Education of the global public about enhanced international institutions is vitally important, in order that populations around the world understand their rationale and basic workings

⁴³ See, e.g., May, with a view on the requirement of elite buy-in to establish rule of law systems/culture. May, C. 2014. “The Rule of Law as the Grundnorm of the New Constitutionalism,” in S. Gill and A.C. Cutler (eds.) *New Constitutionalism and World Order*, Cambridge, Cambridge University Press, pp. 63–75.

of the costs of various international tribunals (for example, international criminal tribunals); but these institutions, if invested in to be significantly more effective, are much cheaper than renewed arms races and “preventative” military expenditures (which, in fact, often have the opposite effect and destabilize relationships or situations in classic “security dilemma” scenarios; see Chapter 9).

Additionally, anthropologists have more recently weighed in in terms of analyzing the social conditions necessary for a durable peace among groups of administrative or “territorial sub-units,” which would include, for example, states at the international level. Douglas Fry, in *Science*, has set forth a theory where he identifies at least six characteristics of “peace systems” among disparate groups of nations or other human communities.⁴⁴ The characteristics include: an overarching social identity; interconnections among subgroups; interdependence; nonwarring values; symbolism and ceremonies that reinforce peace; and, superordinate institutions for conflict management. Fry’s examples of such systems include the Upper Xingu River basin tribes of Brazil, the Iroquois Confederacy of upper New York State, and the European Union (see Chapter 3 on the latter). Federated states, of course, are also a genre of a stable “peace system,” likely possessing of the requisite characteristics identified by Fry. The international community at present has very substantial interdependence, and perhaps increasing interconnections among subgroups (in particular within various regions), but remains greatly lacking in the other characteristics identified by Fry, including adequate superordinate institutions for conflict management.

AN “UTTERLY UNSATISFACTORY STATE OF AFFAIRS”: SUGGESTIONS FOR INSTITUTIONAL ENHANCEMENTS

In comparison with domestic legal systems, notes the great modern Italian jurist, Antonio Cassese, “the position of the international community appears totally rudimentary” in relation to promoting compliance with law and the preventing or settlement of international disputes in a compulsory and binding fashion.⁴⁵ With some exceptions, the international legal system has not yet matured into what might be considered a true rule of law system, and further vital steps should be taken toward remedying what Cassese has termed an “utterly unsatisfactory state of affairs.”⁴⁶ Indeed, since the adoption of the 1945 UN Charter, types of mandatory and binding dispute settlement systems have developed in relation to various specific

⁴⁴ Fry, *Life without War*.

⁴⁵ Cassese, Antonio. 2005. *International Law (Second ed.)*, Oxford, Oxford University Press, pp. 278–279.

⁴⁶ *Ibid.*, pp. 283–284, referring specifically to the situation under the Charter’s current terms where “States are mandated to try to settle their differences by means other than force,” but this “stringent obligation is accompanied by complete freedom of choice as to the means of settlement.”

topics (such as in trade and the international regulation of the law of the sea), which show the international community's readiness to engage in such binding settlement, and present models that could be drawn upon for reform in other areas.

This section suggests overview perspectives on what we deem as necessary and fundamental enhancement of Chapter VI of the current UN Charter on the peaceful settlement of disputes, including, in particular, the strengthening of the ICJ. We also discuss the ICC as a key institution in the modern international order, the requirement of greatly enhanced international judicial training as a corollary to enhanced institutions, and a possible eventual office of UN Attorney General.

Obligations under Chapter VI of the Charter of the United Nations

Given the key place that the peaceful settlement of disputes was meant to play in the modern international order, Chapter VI on the Pacific Settlement of Disputes, which has not been implemented within the international system to the extent anticipated in 1945, is a notably unrealized attribute of the Charter. As discussed in Chapter 8 on the establishment of an International Peace Force – and as described above, in relation to the evolution of an international system away from the arbitrary and unpredictable use of force – peaceful settlement of disputes among states is a core principle that is also linked to viable collective security, prohibitions on the unilateral use of force, and disarmament; the latter become very difficult to realize without it. Perhaps because of historical biases toward notions of military security (and the mainstream assumption that states will always seek to jockey for “hard power”; contradicted by scholars such as Gat and others), Chapter VI remains largely an afterthought, both in academic and policy circles.

Article 2(3) of the Charter sets out the obligation of all UN members to “settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered.” Article 33(1) subsequently sets out a nonexhaustive “menu” of ways states may settle their dispute if it is likely to endanger the maintenance of international peace and security: “negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice” (see discussion in Chapter 8). Article 33(2) empowers the Security Council to “call upon” the parties to settle their disputes by such means when it deems it necessary in the interests of international peace and security, with other Articles under Chapter VI also giving the Security Council powers of recommendation in relation to conflicting parties or situations. However, unlike Chapter VII action by the Security Council, the consensus is that such suggestions of the Security Council are not binding on members. It is reported that John Foster Dulles, while serving as the US Secretary of State in the 1950s under President Eisenhower, had considered reforms to strengthen the pacific settlement of disputes as a priority topic in Charter revision, among several other matters, in the scope of a general Charter review conference that was meant to be held

within 10 years of its adoption (he eventually abandoned hope of such a conference due to the Soviet position at the time, among other concerns).⁴⁷

In relation to what has been accomplished under this Chapter since 1945, Tomuschat notes that “[a]ll observers agree that the SC [Security Council] has achieved only modest results in implementing Article 33(2) and more generally within the entire framework of Chapter VI,” commenting that “[a]pparently, the institutional pressures exerted upon the parties to a dispute in accordance with Chapter VI are somewhat lacking in persuasive impact.”⁴⁸ Also, if one accepts theories of leading by example, it is telling that currently only one permanent member of the Security Council has accepted compulsory jurisdiction of the ICJ (see the following section on the ICJ).

It seems clear that, due to the importance of this norm, Chapter VI should be transformed into a series of hard obligations, with binding procedures for the peaceful settlement of international disputes between parties, before collective security action or other coercive measures are contemplated. A revised Charter Chapter on the peaceful settlement of disputes could include clear procedures in relation to the sequencing and timing of the range of dispute resolution mechanisms currently listed in Article 33(1) (“negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements”), striking a balance between some flexible choice as to method and an obligation to engage in peaceful resolution in a timely manner.

There now exist a range of models, for example that of the World Trade Organization (WTO), from which such an improvement could take inspiration. The WTO, currently with 164 state members, employs an innovative, multilayered dispute resolution procedure adopted in 1994, which involves first notification and consultation to find mutually satisfactory solutions, followed by employment of good offices or conciliation by the WTO. If this is not successful, a grievance can be escalated to a complaint to a panel of independent experts, which issues both interim and final reports, with opportunity for further comment and consultation in relation to these reports. A party may subsequently appeal to an appellate body (with monitoring of compliance with its report, and the possibility of countermeasures by the aggrieved party), with a final “appeal” to binding arbitration as the last level of dispute resolution.⁴⁹

⁴⁷ See Scott, Shirley. 2005. *The Failure of the UN to Hold a Charter Review Conference in the 1950's: The Future in the Past?* ANZLH E-Journal, p. 76.

⁴⁸ Tomuschat, Christian. 2012. “Ch. VI Pacific Settlement of Disputes, Article 33,” in Bruno Simma, Daniel-Erasmus Khan, Georg Nolte, Andreas Paulus, and Nikolai Wessendorf (eds.) *The Charter of the United Nations: A Commentary*, Oxford Commentaries on International Law series, Third ed., 2 Vols., Oxford, Oxford University Press, Vol. I, pp. 1069–1085, at p. 1085.

⁴⁹ See the description in Cassese, *International Law*, pp. 289–291. Other prominent legal scholars have suggested that the international community could generalize and follow the UN Convention on the Law of the Sea (UNCLOS) dispute resolution formula, another modern international dispute resolution system that has been deemed relatively successful.

To facilitate the efficacy of such mechanisms, additional standing bodies or panels of independent experts, such as within the frame of a new global “Mediation and Conciliation Commission,” could also be created, whose recommendations would not be binding, except with the consent of the parties. Clark and Sohn in *World Peace Through World Law* suggested a “World Conciliation Tribunal” and a “World Equity Tribunal,” with the former performing independent investigation of situations to seek to bring the nations concerned to agreement, and the latter possessing the authority to recommend a solution to a given dispute (while taking care to respect the determination of any crucial legal matters by the ICJ). Such bodies, which could remain complementary to similar bodies at the regional level, were considered to be necessary to ensure conflict prevention and general international or regional stability, and/or to put an end to long-standing and festering conflicts that impede cooperation and further economic and social development. Disputes could be referred to such bodies by the General Assembly or Executive Council, as required, before a conflict or potential conflict has ripened into a destabilizing situation.

In relation to the norms established in Charter Chapter VI, there has been by now widespread (albeit uneven) recourse to and acceptance of peaceful, third-party dispute resolution (primarily, but not exclusively, on a voluntary basis), across a range of important areas, with a truly impressive increase in use of supranational tribunals and other conflict resolution bodies.⁵⁰ Such state practice signals a general acceptance, at the “cultural” level, of these mechanisms, and a maturity of the international system, which can be further consolidated and firmly institutionalized. It is very costly if this main Charter mechanism lags far behind contemporary dispute resolution practice, especially as these provisions are meant to deal with very fundamental issues of international peace and security.

The International Court of Justice

Within the Charter’s Article 33 list of enumerated methods, which states may employ to fulfill their obligations for the peaceful resolution of their disputes, is “judicial settlement.” Again, at the domestic level, every legal system would be endowed with a system of judicial settlement of disputes, central to its operation, ensuring that duly constituted laws are applied and enforced.⁵¹

The preeminent judicial body created at the time of Charter adoption is found under its Article 92, establishing the International Court of Justice (ICJ) to serve as “the principal judicial organ of the United Nations,” tasked with resolving interstate

⁵⁰ See, e.g., trends noted in Goertz et al. *The Puzzle of Peace*.

⁵¹ Of course, alternative dispute resolution mechanisms such as mediation and arbitration also exist at the national level, but operate in a manner complementary to judicial settlement, and are done “in the shadow of the law” and with the supervision or assistance of the courts, for example in relation to the enforcement of agreements or awards.

disputes. The ICJ functions in accordance with the statute of the court that is annexed to the Charter. Because the ICJ and its statute are incorporated into the Charter, like various other aspects of the Charter, it has remained largely “frozen in time.” Although there have been many suggestions for (usually modest) ICJ reform throughout its life, emanating from a variety of sources,⁵² reform achievements have been largely confined to “practice directions” and fleshing out supplementary procedural rules relevant to the court’s operation. International dispute resolution at more recent international institutions and under other important multilateral regimes (for example, as mentioned above, under the WTO or the UN Convention on the Law of the Sea (UNCLOS), or at various international criminal law tribunals) has, in the modern era, by now outpaced the ICJ in sophistication of design, functional architecture and rules of procedure and evidence. With the proliferation of international laws and intensifying interdependence among countries, which inevitably gives rise to disputes and legal matters to be clarified, a substantial update of the principal judicial organ of the United Nations is by now long overdue.

All members of the United Nations are *ipso facto* parties to the Statute of the ICJ under Article 93 of the Charter, which however, does not grant the court automatic jurisdiction over the parties to a given dispute. The ICJ may take jurisdiction over a case upon the agreement of the parties in relation to a specific dispute, based on a compromissory clause in an individual treaty to which a state is a party, based on what may be deemed to be acquiescence in a given situation, or upon special declarations accepting the compulsory jurisdiction of the court under Article 36(2) of its statute. Currently, states accepting the general compulsory jurisdiction of the court number 73 of the 193 members of the United Nations.⁵³ That is, less than 40 percent of the UN membership, and including only one of the permanent members of the Security Council, the United Kingdom. Moreover, states making declarations to accept the general compulsory jurisdiction of the court under Article

⁵² E.g., see those summarized as a result of the work of the International Law Association (ILA) Study Group on UN Reform in: Yee, Sienho. 2009. “Notes on the International Court of Justice (Part 2): Reform Proposals Regarding the International Court of Justice – A Preliminary Report for the international Law Association Study Group on United Nations Reform.” *Chinese Journal of International Law*, Vol. 8, No. 1, pp. 181–189.

⁵³ According to the ICJ website, at the time of writing, the following states have made declarations accepting the compulsory jurisdiction of the court: Australia, Austria, Barbados, Belgium, Botswana, Bulgaria, Cambodia, Cameroon, Canada, Costa Rica, Cote d’Ivoire, Cyprus, Democratic Republic of the Congo, Denmark, Djibouti, Dominican Republic, Dominica, Commonwealth of, Egypt, Equatorial Guinea, Estonia, Finland, Gambia, Georgia, Germany, Greece, Guinea-Bissau, Guinea, Republic of, Haiti, Honduras, Hungary, India, Ireland, Italy, Japan, Kenya, Lesotho, Liberia, Liechtenstein, Lithuania, Luxembourg, Madagascar, Malawi, Malta, Marshall Islands, Mauritius, Mexico, Netherlands, New Zealand, Nicaragua, Nigeria, Norway, Pakistan, Panama, Paraguay, Peru, Philippines, Poland, Portugal, Romania, Senegal, Slovakia, Somalia, Spain, Sudan, Suriname, Swaziland, Sweden, Switzerland, Timor-Leste, Togo, Uganda, United Kingdom of Great Britain and Northern Ireland, and Uruguay (see www.icj-cij.org/en/declarations).

36(2) may also declare certain “carve outs” or exceptions to such compulsory jurisdiction of the court, making its jurisdictional mandate sometimes look like a Swiss cheese of obligations.⁵⁴ Such a state of affairs seriously undermines the court’s ability to be a true upholder and enforcer of international law.

With respect to the deficits of the ICJ and the international legal system to function as something akin to a “rule of law” system, Judge Rosalyn Higgins, former president of the ICJ, in addition to noting the curtailment of the court’s ability to adjudicate based on the requirement of state consent and incomplete enforcement mechanisms, also notes that the executive of the United Nations, the Security Council (which is not itself representative of the UN membership as a whole) is not subject to judicial review. Furthermore, there is a lack of clear hierarchy in the application of international law due to the range of modern international courts and tribunals (e.g., without the ICJ or another tribunal clearly serving as a designated apex “Supreme Court”).⁵⁵

Despite these challenges, the ICJ has increasingly been made use of by states, with a noted increase in cases it hears, in particular beginning after the Cold War. At the time of writing, there were 17 cases pending before the Court, and six contentious cases already concluded in 2018. A great range of diverse countries, for example, from Asia, Africa, Latin America, and the Middle East – from all regions of the world – have sought recourse at the court, particularly in recent years. Multiple cases, currently and in past years since the court was established (more than 20 concluded and nine pending), concern territorial and boundary delimitation issues, which, as noted, are, historically, an empirically determined prime cause of interstate war.

Moreover, current cases pending on the ICJ’s docket testify to the court being sought as an arbiter within complex or potentially volatile geopolitical conflicts which may pose a risk to regional or international security, and which have proven in whole or in part immune to diplomatic negotiation or solution. Such cases currently include, for example: Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v. United Arab Emirates); Alleged violations of the 1955 Treaty of Amity, Economic Relations, and Consular Rights (Islamic Republic of Iran v. United States of America); Relocation of the United States Embassy to Jerusalem (Palestine v. United States of America). The Marshall Islands, in a series of applications to the ICJ concluded in 2016, on “Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament,” sought to hold the nuclear weapons states of the United Kingdom, India, and Pakistan to account under their

⁵⁴ For example, Australia carves out, among other things, certain maritime delimitation issues, Canada, among other things, certain fisheries matters, and India, among other things, disputes relating to situations of hostilities, armed conflicts, self-defense, etc. *Ibid.*

⁵⁵ Higgins, R. 2007. “The Rule of Law: Some Skeptical Thoughts. Lecture at the British Institute for International and Comparative Law.” Annual Grotius Lecture, London, October 16.

international obligations. While these latter cases were narrowly dismissed on a conclusion that “no legal dispute” was found (not uncontroversially), and did not proceed to an evaluation on the merits of the complaints, it shows the potential of even the smallest states to seek justice in the international arena before the court.

A redrafted Chapter XIV should give the ICJ general, compulsory jurisdiction under a revised UN Charter, with the General Assembly or Executive Council (replacing the current Security Council), in a binding fashion, also enabled to submit particular international disputes directly to the ICJ, if extrajudicial dispute resolution processes such as mediation or conciliation have proven unsuccessful or inappropriate. The jurisdiction of the ICJ over international legal disputes would thus be mandatory for all UN members, overturning the current voluntary approach of the court which requires states’ agreement. The ICJ would henceforth have compulsory jurisdiction over all substantive matters pertaining to the interpretation and/or enforcement of international law, thus covering the matters outlined in Article 36(1) and (2) of the Court’s statute, and other matters deemed appropriate within the revised Charter system (for example, judicial review of executive action), including the interpretation and application of a UN Bill of Rights (see Chapter 11) and a revised Charter itself.

Reforms are also needed of both the statute and procedural rules of the ICJ, in order to make it more modern, fair, and effective.⁵⁶ To protect the Court’s independence and impartiality, the tenure of the 15 ICJ judges could be limited to one 9-year or 12-year term and the practice of appointing judges from the Security Council’s “P5” nations, as well as ad hoc judges from the states party to litigation, would cease.⁵⁷ The judges of the reformed ICJ could be elected through strengthened procedures to ensure impartiality and the highest levels of competence; for example, by the General Assembly from candidate lists provided by the International Law Commission (giving due regard to global/regional distribution), after seeking recommendations from members of the highest courts of justice of member states, associations of international lawyers, and prominent legal academics. Other reforms could enhance the Court’s advisory functions (expanding those bodies able to request an advisory opinion); powers to collect evidence and compel

⁵⁶ See, for example, the range of reforms proposed by Sir Geoffrey Palmer, who served as Attorney General, Deputy Prime Minister and Prime Minister of New Zealand, as well as a Judge ad hoc before the ICJ. Palmer, Geoffrey. 1998. “International Law and the Reform of the International Court of Justice,” in A. Anghie and G. Sturgess (eds.) *Legal Visions of the 21st Century: Essays in Honour of Judge Christopher Weeramantry*. Alphen aan den Rijn, Kluwer Law International, pp. 579–600.

⁵⁷ Under the statute of the ICJ, “judges of the nationality of each of the parties” retain a “right to sit in the case before the Court” (Article 31(1)). Practice has shown that in the great majority of cases, these judges appear to side consistently with the party to the dispute with which they share a nationality. See, e.g., the analysis of Posner, Eric A. and Miguel de Figueiredo. 2005. “Is the International Court of Justice Biased?” *Journal of Legal Studies*, Vol. 34, June. www.ericposner.com/Is%20the%20International%20Court%20of%20Justice%20Biased.pdf.

testimony; supervise and oblige compliance with provisional or interim orders and final decisions; grant access to additional interested parties beyond states to intervene, submit amicus briefs or to be granted standing in certain contexts; and generally increase the resources of the Court and support for its judiciary. This would include the capacity to employ additional court-management and legal staff having expertise in the diverse, specialized areas of international law which are more frequently coming before the court. Enforcement of the judgments of the ICJ would also be supported by the Executive Council, in consultation with the General Assembly, through enforcement supervision and dialogue, sanctions or other measures deemed necessary to ensure compliance. As the international court system is enhanced, the hierarchies and interactions of the various international courts and tribunals and main organs of the United Nations (e.g., in relation to judicial review of executive action or international legislation passed) will also have to be thought through and coherently mapped.

One important model to explore (and/or improve upon) in the reform of the ICJ is the supranational Court of Justice of the European Union (CJEU), with its evolved architecture and functions (for example, the ability to issue binding preliminary rulings and the possibility of infringement procedures, among other things). Before the CJEU, not only states, but also organs of the European Union and individuals can be admitted as parties in certain circumstances. Such a wider granting of standing, subject to certain thresholds and criteria, as well as other capacities that the CJEU has acquired over time to be a more genuine interpreter and enforcer of European law, should be considered for a renewed ICJ, given the very crucial issues which are addressed by modern international law (e.g., biodiversity and climate among a range of other crucial issues). Efforts should be made to ensure that the ICJ may systematically activate actual implementation and enforcement of international law at the national level.

The International Criminal Court

Among the most dramatic achievements in the updating and enhancement of the international legal architecture in the post-1945 Charter world was the adoption of the constituting Rome Statute in 1998, and the commencement of operations of the International Criminal Court (ICC) some four years later, with its seat in the Hague, Netherlands. The then UN Secretary General Kofi Annan recognized the Statute of the ICC as a “gift of hope for future generations.”⁵⁸ Certainly, since opening its doors, the Court has, in the public imagination, often become synonymous with a tribunal of last resort for civilian populations around the world seeking redress for ills

⁵⁸ United Nations, July 20, 1998, *Secretary General Says Establishment of International Criminal Court Is Gift of Hope to Future Generations*, Press Release SG/SM/6643 L/2891. www.un.org/press/en/1998/19980720.sgsm6643.html.

committed by unchecked powerful actors. The Court receives a regular surfeit of communications from civil society actors and others, complaining of general human rights abuses and other malfeasance outside its remit, and it has been argued, for example, that generalized governmental corruption (see Chapter 18) and a crime of “ecocide” should be added to the types of issues it may prosecute, among other matters. However, under its statute, the ICC currently has a mandate to prosecute individuals for the serious international crimes of genocide, crimes against humanity, war crimes, and the crime of aggression, although, as noted, many have called for a wider mandate that could include other well-established international crimes.⁵⁹ Prosecution of the notorious international crimes currently included in the Rome Statute might be considered to uphold the most basic tenets of an international civilization, with, in particular “war crimes,” forming one of the oldest areas of international law found within the corpus of international humanitarian law (the source of those offenses considered to be “war crimes”), dating from at least the first Geneva Convention of 1864.

Such an “international penal tribunal” was also foreseen in the Genocide Convention of 1948,⁶⁰ adopted in the same year as the Universal Declaration of Human Rights. The modern foundations for the establishment of such a permanent international court are usually traced to the Nuremberg and Tokyo Trials of 1945–1948 in the wake of World War II, which were in turn preceded by unsuccessful attempts to prosecute leading figures responsible for World War I.⁶¹ The idea received a further substantial boost when the Security Council took the unique and unprecedented step of establishing two ad hoc, supranational tribunals in the light of the global moral outrage felt in response to the brutal conflicts and humanitarian massacres witnessed in Rwanda and the former Yugoslavia.⁶² In 1993, the International Criminal Tribunal for the Former Yugoslavia (ICTY), and in 1994, the International Criminal Tribunal for Rwanda (ICTR). Other ad hoc tribunals, specific to certain situations, have followed since (for example, the Special Court for Sierra Leone (SCSL), the Extraordinary Chambers in the Courts of Cambodia (ECCC), the Special Tribunal for Lebanon (STL), the Special Panels for Serious Crimes in East Timor (SPSC), the State Court of Bosnia Herzegovina (Court of BiH), the Kosovo Specialist Chambers and Specialist Prosecutor’s Office (KSC), etc.).

⁵⁹ The model of the 1994 International Law Commission draft Statute, in fact, included a much wider range of international crimes that linked subject matter jurisdiction to the relevant treaty that states had signed up to, for example, those addressing terrorism, drug trafficking and piracy.

⁶⁰ *Convention on the Prevention and Punishment of the Crime of Genocide*, Article VI.

⁶¹ The “grave breaches” as a category of war crimes included in the 1949 Geneva Conventions also placed a duty on contracting states to criminalize these crimes, to search out, punish or extradite perpetrators, and to prevent and suppress the commission of these crimes.

⁶² Many would argue that this was a “fig leaf” response, due to the inability of the UN Security Council to agree on and adopt more robust measures to intervene to halt the carnage at the time (see Chapters 7 and 8).

Rather than focusing on discrete or regional conflicts in an ad hoc manner, the ICC is designed to be a permanent fixture in the international order, open to all states of the world to join. In order for the ICC to take jurisdiction and prosecute a given case, the territorial and nationality principle applies as a general rule:⁶³ Either the state on whose territory the crime in question has taken place or the state whose nationality the alleged perpetrator possesses must be contracting parties to the Rome Statute.⁶⁴ Furthermore, the ICC will only act if national proceedings in relation to a given case do not take place, based on the principle of “complementarity” which gives a priority to domestic proceedings. Only if national authorities are inactive or otherwise “unable” or “unwilling” to genuinely investigate or prosecute a particular case will the ICC step in. ICC proceedings can be triggered by three mechanisms; (1) upon referrals by states party to the Rome Statute; (2) by the UN Security Council, in which case the Court’s jurisdiction is potentially universal; or (3) on the independent initiative of the Prosecutor, subject to judicial authorization. The range of ICC investigations since the establishment of the court have been triggered by all three of these means, with the UN Security Council referring two situations concerning nonparty states, in Darfur, Sudan,⁶⁵ and Libya, to the ICC.

The ICC has managed, to date, to issue 45 public indictments and to secure eight convictions (including four contempt of court convictions) and two acquittals, while several cases have been terminated (due to death of the suspect, insufficiency of evidence, or a transfer of the case to the national level), with upwards of 15 suspects remaining at large. This latter statistic illustrates, among other things, the difficulty often found in bringing indictees into custody, in particular if they are highly ranked political figures or powerful warlords. Reflecting its universal mandate, the ICC Office of the Prosecutor, at the time of writing, had “preliminary examinations” open in connection with situations in countries as disparate as Afghanistan, Bangladesh/Myanmar, Colombia, Iraq/UK, Palestine, Nigeria, and The Philippines, among others. It had moved to the investigation phase in 11 additional situations, including in relation to situations in Georgia (South Ossetia), and a range of African nations, the majority of which were self-referrals to the court by the individual states or by the UN Security Council.

⁶³ If it is the UN Security Council that refers the situation, however, these limitations do not apply.

⁶⁴ Or have otherwise accepted the jurisdiction of the Court under Article 12(3); a state which is not a party to the Rome Statute may, “by declaration lodged with the Registrar, accept the exercise of jurisdiction by the Court with respect to the crime in question.”

⁶⁵ This referral led to the issuance of arrest warrants for Sudanese President Omar al-Bashir in 2009 and 2010 for crimes against humanity, war crimes and genocide in Darfur. This was the first head of state wanted by the ICC, and also the court’s first genocide charge. The UN Security Council, although referring the situation to the ICC, has subsequently not ensured al-Bashir’s arrest.

The ICC weathered significant active opposition, in particular by the US, in its early years in terms of its potential jurisdiction over nonparty nationals,⁶⁶ as well as more recent campaigns again by the US, and led by some governments affiliated with ICC suspects, such as in Sudan and Kenya, accusing it of neocolonial bias. Recent criticisms have also plagued the court in relation to the length of proceedings, and low numbers of convictions to date; however, these issues are not unknown “growing pains” witnessed in other novel international legal institutions (for example, those confronting the ICTY and ICTR after they first opened their doors; see, e.g., those described by Prosecutor Carla Del Ponte⁶⁷). The court has also faced a range of other exogenous challenges that have negatively affected cases, such as witness tampering, and lack of cooperation by states, leading to noncompliance findings under its statute. However, as Human Rights Watch has recently noted, and, as seen by the list of situations currently being examined – the court is unfortunately needed now more than ever as human rights crises marked by international crimes continue to proliferate;⁶⁸ ways must be found to strengthen the court and make it more effective, so that it can better achieve its far-reaching mandate.

The ICC and its Rome Statute, remarkably, have attracted no less than 122 of the 193 UN member states, located in every region of the world, which have voluntarily accepted the court’s jurisdiction. One of the main and oft-heard criticisms of the court, however, is that it lacks true international universality, with key international or regional powers such as China, India, Iran, Israel, Russia, Turkey, and the US remaining outside of the ICC’s membership.⁶⁹ Moreover, because of veto-wielding at the UN Security Council, other situations that might warrant referral to the ICC can currently be thwarted at the UN (for example, efforts to have the Syria situation referred to the ICC have been vetoed by some permanent members of the Security Council (see Chapter 7). Article 16 of the Rome Statute in fact also empowers the Security Council to seek a suspension of an ICC investigation or prosecution.

Therefore, a revised UN Charter should make acceptance of the jurisdiction of the ICC mandatory for all member states of the UN, with the Executive Council (with General Assembly authorization) also referring situations to the ICC, as

⁶⁶ Bosco, David. 2014. *Rough Justice: The International Criminal Court in a World of Power Politics*, Oxford, Oxford University Press.

⁶⁷ Del Ponte, Carla (in collaboration with Chuck Sudetic). 2009. *Madame Prosecutor: Confrontation with Humanity’s Worst Criminals and the Culture of Impunity*, New York, Other Press.

⁶⁸ See, e.g., Human Rights Watch, December 8, 2018, *Human Rights Watch Statement for the General Debate of the International Criminal Court’s Seventeenth Assembly of States Parties*. www.hrw.org/news/2018/12/08/human-rights-watch-statement-general-debate-international-criminal-courts).

⁶⁹ However, because of its territorial jurisdiction, several ICC situations have involved allegations against nationals of nonstate parties accused of committing crimes on the territory of ICC state parties (Russian nationals in Georgia or Ukraine, US nationals in Afghanistan, or Israelis in Palestine, etc.).

necessary and without the threat of the use of a veto power.⁷⁰ The revised Charter should universally and explicitly oblige member states to fully cooperate with ICC investigations, assist in the execution of its arrest warrants and comply with its decisions, with clear mechanisms for UN remedies and sanctions in response to ICC findings of noncompliance. Outside of UN Charter review and incorporation of the Court as an integral part of Charter obligations owed by all states within the international community, there is much that could be done in terms of interim measures, whether by the strengthening of the Rome Statute through amendment, or within the current Rome Statute framework. For example, this could include protocols in relation to expected or obliged state cooperation with investigations, apprehension of indictees and enforcement of decisions (e.g., the suggestion by former ICTY Prosecutor Carla del Ponte for a small, independent unit under or in cooperation with the Office of the Prosecutor to quickly apprehend and arrest indictees⁷¹). Adequate and reliable funding, also given the expanded case load of the Court remains also a perennial issue at the Assembly of States Parties.

More generally, in terms of its place in the overall international legal and governance system, the ICC, in the subject matter it covers, charts a transitional pathway toward a rule-based international order where the use of and threat of mass armed force ceases to play a dominant role in the conduct of internal and international affairs. As “great or regional powers” who wish to retain their “military flexibility” (or other nations who are concerned about possible scrutiny in relation to systemic domestic human rights violations; see Chapter 11) have to date avoided commitment to the Rome Statute, yet wider acceptance of the Court would signal a readiness of the international community to hold itself to account for the most basic standards of conduct. It would also likely signal that the international community has made significant steps toward a true collective security regime beyond balance of power politics, genuine progress on systemic disarmament, and the evolution of the Security Council as described in Chapter 7, where no state is to be considered to be “above the law” (see Chapters 7, 8 and 9). It has been noted that India, for example, has expressed its reservations about the role of the UN Security Council (e.g., its investigation/prosecution deferral powers under Article 16), which, from the perspective of that country, is too strong and not representative. Here, the criticism of the ICC may be enmeshed with the well-known criticism of the no longer representative composition of the Security Council.

⁷⁰ On this issue a current campaign, in fact, seeks to establish the possibility for a UN General Assembly vote for an ICJ advisory opinion on the legality of the exercise of UN Security Council vetoes over ICC referrals, promoted by the Open Society Justice Initiative (OSJI) and several states.

⁷¹ See, e.g., “Del Ponte calls for snatch squad,” *BBC News*, March 21, 2002. <http://news.bbc.co.uk/2/hi/europe/1884953.stm>. Del Ponte called for a special squad of plainclothes agents, rather than uniformed soldiers, that should be sent to search for a fugitive at the time, Bosnian Serb leader, Radovan Karadzic, after two NATO raids seeking to capture him in Bosnia had failed.

Institute(s) for International Judicial Training

With strengthened international judicial bodies and mechanisms, there will be a heightened need for a skilled and well-trained international judiciary, to lend legitimacy to and confidence in its genuine impartiality and detachment from national or regional political concerns, and a sound understanding of international norms. Currently, there are persistent challenges at various international tribunals; for instance, international criminal tribunals, in relation to the interaction of various legal traditions and judicial approaches to procedural law, among other issues (e.g., with respect to divergences in civil and common law traditions, to highlight one example). There is a pressing need as well to ensure training that fully imprints upon international judges the nature of their international ethical duties and requirements of independence, and more dialogue, formation and education on court management and the conduct of international proceedings.

We propose the establishment of a modern and well-resourced international judicial training institute, possibly in cooperation with or under the auspices of the Hague Academy of International Law. The Institute could undertake and facilitate important, intensive international, national and regional capacity-building and training activities regarding international law – not only in relation to the functioning of the ICJ and the peaceful settlement of disputes, but also, for example, regarding the responsibility of national courts to conduct effective and genuine national proceedings under the ICC Rome Statute, and concerning international human rights norms, when the latter become subject to binding review. Depending on the domestic system for judicial formation, such an institute could take national nominees (to be confirmed subsequently by an international expert body), upon their completion of national judicial training or appointments. International training of a fixed term could be a prerequisite before sitting on any core international tribunal.

Office of the United Nations Attorney General

Many mature legal systems have established a general office of the Attorney General, at the national level, sometimes overlapping with the cabinet level position of a minister of justice, with oversight and system-wide functions related to the maintenance and improvement of the rule of law system of that jurisdiction. In civil law systems, such a posting or similar function (or parts of functions) might be found in the office of the “public prosecutor general” or “advocate general.”

Clark and Sohn suggested the establishment of a post of UN Attorney General, to support a strengthened United Nations, in particular to help with enforcement of new laws and regulations under the revised Charter that they suggested, including

violations of law under the comprehensive disarmament plan that they set forth.⁷² Their centralized posting for Attorney General was to be complemented by a civil police force (which could carry out inspections and investigations), and by regional attorneys general, assisting regional courts in relevant prosecutions with respect to the international norms that they established concerning disarmament, and more broadly.

If the maintenance and integrity of a true international legal system is a key, refreshed and renewed goal of the international community, within a modern, 21st century institutional architecture, the establishment of Attorney General functions and institutional resources could be an important consideration. The (albeit limited) independent prosecutorial functions established already within the ICC, at the macro scale, are an extraordinary step forward in this respect, lighting the way for such offices at the international level, with new institutionalized and independent actors surveying the facts and law for matters in the global public interest, among other functions.

Appointed by the Executive Council and confirmed by the General Assembly, a new office of Attorney General of the UN system could perform functions similar to those provided nationally; for example, to be guardian of the rule of law; to serve as independent legal advisor to executive and legislative bodies on the constitutionality and legality of proposed action or legislation; to advise regarding types of international litigation pursued before various international courts in the global public interest; and to ensure proper administration of justice – including independence of the judiciary – across the international system.

CONCLUSION

It would be nice to see the international community get “back to basics” with respect to the building up of an appropriate, modern infrastructure for a significantly strengthened international rule of law and the peaceful settlement of international disputes, as mandated by the 1945 Charter, but insufficiently followed through; we are currently both blessed and plagued by institutions that are only half-built. It seems that it would be a highly productive investment to fortify and enhance key international legal institutions and explicit state obligations in this respect, given the enormous potential benefits to be gained by the international community. As a value and as a principle, the international rule of law and the peaceful settlement of disputes has been widely and repeatedly affirmed at the highest levels of international governance. Since 1945, work of the International Law Commission, case law of the ICJ, proliferation of international treaties, norms established within the frame of other international organizations or emanating from various UN organs,

⁷² Clark, Grenville and Louis B Sohn. 1966. *World Peace through World Law: Two Alternative Plans*, Third ed. Cambridge, MA, Harvard University Press, p. 336.

the academic writing on a wide variety of areas by “highly qualified publicists” from various nations, etc., form and provide an extraordinary resource and an important body of work as a basis for the next evolutionary steps to be taken in the international legal system. Moreover, today there are viable models seen in the European Union and elsewhere that can significantly assist in charting the way forward.

As the second decade of the 21st century draws to a close, we seem to be living in a time where – to draw upon Francis Fukuyama’s pronouncement – history appears to be restarting, with deeply uncertain and shifting global power configurations and doubt as to whether the so-named “liberal international order” established after World War II will survive. Middle power democracies have begun to band together and are being encouraged to take a global leadership role, in the interests of a stable, rule-based international order.⁷³ German Foreign Minister Heiko Maas, for example, recently proposed to a Japanese audience in Tokyo, “If we pool our strengths . . . we can become something like ‘rule shapers,’ who design and drive an international order that the world urgently needs.”⁷⁴ Basic to any rule-based order are effective, systematic mechanisms for the implementation and enforcement of rules, with properly endowed, legitimate institutions to interpret and uphold those rules; strengthening key institutions for peaceful dispute settlement and to further the international rule of law should be central to the agenda of all those interested in a sustained international peace.

⁷³ Daalder, Ivo H. and James M. Lindsay. 2018. “The Committee to Save the World Order: America’s Allies Must Step Up as American Steps Down.” *Foreign Affairs*, November/December.

⁷⁴ *Ibid.*