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Abstract

The objective of this study is to determine the link, precedence, and interplay between contemporary politics and the laws of war. A particular focus is attached to the political pressure exerted by great powers as well. This study has adopted a qualitative approach and has concluded, in light of scholarly literature, case studies, and media reports, the grim reality that all such bodies are influenced in one way or the other by international politics—largely succumbing to the pressure exerted by great powers—but structural and budgetary restraints also contribute to the malfunctioning of some of them. Another factor undermining the effectiveness of these mechanisms is the ambiguity of some provisions of international law, as well as their absurdity and silence, which are cleverly manipulated by some states in their maneuvers to secure their political interests. The paper re-examines how politics plays a role in molding the Law of War to suit the needs and interests of great powers.

Keywords: *Politics, Law of War, International Criminal Court*

Introduction

In the aftermath of the devastating effects of the two world wars, the UNC of 1945 rendered war[1] illegal.[2] Exceptions were foreseen in limited cases, such as for self-defence.[3] The UN Security Council (UNSC) has the authority to intervene and resort to collective self-defence should a member state become subject to aggression. This could materialize in the form of one or more states taking defensive actions or deploying peace-keeping forces, both under the issuance of a UNSC Resolution. When questions of the legitimacy of one state's use of force against another arise, the International Court of Justice (ICJ), an UN-affiliated body, is mandated to issue a ruling based on international law, including international treaties.

[1] The terms "war", "armed attack", "armed conflict", "armed hostilities", "use of force" and "aggression" are used interchangeably in this paper as inspired by the reviewed literature.
[2] UNC in its Article 2(4) asserts that "All members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the purposes of the United Nations". For full version of the UNC, see: https://www.un.org/en/sections/un-charter/un-charter-full-text/ <Last accessed: 21.11.2020).
[3] Article 51 of the UNC provides that "Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security."

Once an armed conflict erupts, the applicable law regulating the conduct of hostilities aims to limit the "means and methods" of warfare and confer obligations upon the parties to respect a minimum set of rules. This is called International Humanitarian Law (IHL). However, trust in the impartiality, effectiveness, and independence of such mechanisms has always remained an issue of contestation.

But the question remains: to what extent have these international mechanisms succeeded in discharging their responsibilities in preventing aggression and violations of the law of war by states without bending to political pressure? The intimidation of the ICC in March 2019 by the United States of America (USA) is one of the latest examples of the force of politics potentially overriding international law.[4] As a result, the former withdrew from its initial plans to conduct investigations into war crimes alleged to have been committed in Afghanistan.[5]

Legal Framework Applicable for Waging War and During War

This section reviews the international legal provisions that regulate resort to waging war and conduct during war. Additionally, the international bodies entrusted by the international community to be the guardians of the relevant international law and ensure the legal order are also briefly covered and linked to the legal instruments.

The first is the field of international law established to regulate the legality or prohibition of waging war. Under the UNC, states shall resort to peaceful settlements of disputes under formal and legal procedures rather than by resorting to force.[6] In its old-fashion terminology, this is called *Jus ad Bellum* or *Jus contra Bellum* (Justice/Law of War).[7]

The other body of law is to set a minimum set of standards and rules binding the parties once armed conflict has erupted.[8] This is IHL, which is also referred to as the Law of Armed Conflicts (LOAC) or Law of War (LOW).[9] In its old-fashioned terminology, this is called *Jus in Bello* (Justice/Law in War).[10] It is adopted to regulate the conduct of hostilities[11] – and seeks to minimize suffering in armed conflicts, notably by protecting and assisting all victims of armed conflict to the greatest extent possible.

[4] Courtney McBride, "*U.S. Swipes at International Criminal Court Over Afghanistan Investigations*", *The Wall Street Journal (*March 15, 2019). Last accessed on 07 May 2019 at https://www.wsj.com/articles/u-s-swipes-at-international-criminal-court-over-afghanistan-investigations-11552666336

[5] Unknown Author, "*ICC Judges Reject Request to Probe Possible War Crimes In Afghanistan*", Radio Liberty (April 12, 2019). Last accessed on 07 May 2019 at https://www.rferl.org/a/icc-rejects-afghanistan-war-crimes-probe/29877309.html

[6] James Crawford, "*Brownlie`s Principles of Public International Law*" (Oxford: Oxford University Press, 8th Edition, 2012), 718 & 746. UNC, Articles 2(3)-(4), 33.

[7] Nils Milzer, "*International Humanitarian Law – A Comprehensive Introduction*" (Geneva: International Committee of the Red Cross, 2016), 27, 34.

[8] *Ibid*.

[9] *International Humanitarian Law, answers to your questions* (Geneva: International Committee of the Red Cross, 2015), 4.

[10] Nils Milzer, "*International Humanitarian Law – A Comprehensive Introduction*" (Geneva: International Committee of the Red Cross, 2016), 34.

[11] Malcolm D Evans, "*International Law*" (Oxford: Oxford University Press, 4th Edition, 2014), 821.

Jus ad Bellum/ Jus contra Bellum (Law of War) and Jus in Bello (Law during War)

Also referred to as the "Law Regulating the Use of Force"[12], its purpose is to regulate the use of force or legality in waging war, which is set out in the UNC.[13] The Charter provides that "States shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state.[14] Only two exceptions are stipulated to the prohibition of the use of force by States.[15] The First State's inherent right to resort to individual or weapons and the protection of victims in situations of armed conflicts[16] both International Armed Conflicts (IAC)[17] and Non-International Armed Conflicts (NIAC).[18]collective self-defence in the event of an armed attack occurs.[19] [20] Second, the UNSC may also authorize the use of force needed to maintain or restore international peace and security[21].

Jus in Bello (Justice/Law during War) is interchangeably used with LOAC, LOW, but most commonly as IHL.[22] The purpose of this body of law is to restrict the means and methods of warfare that parties to the conflict employ[23] and to protect people who do not or no longer participate in the conflict, such as prisoners, injured soldiers, civilians, and so on.[24] IHL does not question the legality of the war in the first place.[25]

[12] UNC, Articles 2(3)-(4), 33.
[13] Articles 2(3)-(4).
[14] Article 2(4) of the UNC.
[15] Article 51.
[16] ICTY. *Prosecutor v Dusko Tadic (the Tadic Jurisdiction decision)*. The ICTY Appeals Chamber found that an armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups, or between such groups within a State.
[17] "International armed conflict" (also known as "inter-State conflict") means a situation where: an armed conflict is fought between two or more States, even if the existence of war is not recognized by one of them; there is a partial or total occupation of the territory of another State, even if that occupation meets with no armed resistance; or People are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination.

Geneva Conventions Common Article 2 provides that the Geneva Conventions "shall apply to all cases of declared war and or any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them".

Geneva Conventions Additional Protocol I Article 1(3) provides that Geneva Protocol I shall apply in all the situations referred to in Geneva Conventions Common Article 2. Article 1 provides that Protocol I applies to "armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination, as enshrined in the Charter of the UN and the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the UN".
[18] A "state of armed conflict not of an international character" (also known as "internal", "non-international" or "intra-State" conflict) exists where:
the conflict is fought within a State between the government forces and non-State forces opposed to that government; or
the conflict is fought between or amongst armed groups, none of whom qualify as a legitimate government; such other rules of LOAC which the parties to the conflict have agreed or declared to be applicable.
Geneva Conventions Additional Protocol II Article 1 provides that "the protocol applies to all armed conflicts which "take place in the territory of a high contracting party between its armed forces and dissident armed forces or other organized armed groups…" This definition excludes armed conflicts between organized armed groups none of which are the armed forces of the government.

Geneva Conventions Common Article 3 requires that the conflict be occurring in the territory of a State party. The obligations fall upon "a party to the conflict" regardless of the status of that party.

Rome Statute of the ICC Article 8(2)(f) provides that the crimes under paragraph 2(e) apply "… to armed conflicts that take place in the territory of a State when there is protracted armed conflict between governmental authorities and organized armed groups or between such groups".
[19] Article 51 of the UNC.
[20] Quincy Wright, "The legality of intervention under the unc", *proceedings of the american society of international law at its annual* meeting 51: 1 (1957), 79-90.
[21] Michael Wood, *"Unilateral acts — Collective security — international peace and security — peace keeping"* (Oxford: Oxford University Press, 2007), 2.
[22] Nils Milzer, *"International humanitarian law – a comprehensive introduction"* (Geneva: International Committee of the Red Cross, 2016), 17.
[23] *A manual on the domestic implementation of international humanitarian law* (Geneva: International Committee of the Red Cross, Advisory Service on IHL, 2015), 13.
[24] *Ibid.*
[25] *Ibid.*

International Human Rights Law

International Human Rights Law (IHRL) is a set of international rules that provide the basic protections that all individuals are entitled to.[26] States are required to respect, protect, and fulfil these rights.[27] Unlike IHL, which applies only in situations of armed conflict, IHRL applies in conflict and peacetime alike.[28] The ICC, like IHL, has complementary jurisdiction over serious violations of IHRL (with States parties to its Statute bearing primary responsibility).[29, 30]

International Criminal Law

International criminal law is a body of public international law that prohibits some categories of conduct that are deemed to be serious crimes.[31] It establishes and regulates procedures that govern the investigation, prosecution, and penal repression of those categories of conduct, and holds accountable the perpetrators of those prohibited acts.[32] It is essential to ensure the repression of serious violations of IHL/IHRL, especially given the gravity of certain violations, such as war crimes, punishing which is in the best interest of the whole international community.[33]

Review of the Main Challenges and Concerns

This section outlines some of the main challenges arising from (a) openness to interpretation of the law and thus its exploitation for political reasons, (b) the conflicting rulings and decisions by various international mechanisms on the same case; and, eventually (c) politics overshadowing the appropriate and just application of the law. To maintain a balance between analyzing reasons in favour and against the perception of the bodies under question and avoiding undue biases, a sub-chapter is also included as an appraisal of the UN and ICC.

Legal Gaps, and Different Interpretations

A longstanding issue lingering over the intended application of the law of war is the persistence of gaps, vagueness, and openness to interpretations of some provisions of the instruments regulating the conduct of states. The provisions are therefore subject to the vulnerability of being read and used at will, especially for the advancement of political agendas by great powers in pursuit of their national interests. The following is a non-exhaustive reference to some of these issues. The UNC and different interpretations of international law are presented as follows:

The UNC, remaining as the centrepiece of the whole international system has its effectiveness often challenged and the expectations of its authors remain

[26] Unknown Author, "*Human rights in the administration of justice – a manual on human rights for judges, prosecutors and lawyers*" (Geneva: United Nations, 2003), 2.
[27] *Ibid.*
[28] *Ibid.*
[29] Articles 6 (Genocide) and 7 (Crimes against Humanity) of the ICC Statute.
[30] Article 1, ICC Statute.
[31] Articles 6-8 of the ICC Statute.
[32] Nils Milzer, "*International humanitarian law – a comprehensive introduction*" (Geneva: International Committee of the Red Cross, 2016), 34.
[33] ICRC's advisory service on international humanitarian law, factsheet on the icc statute.

unaccomplished to date.[34] This is especially the case with maintaining international peace and security. Critical commentators argued that it often failed to address the primary political issues it had to face and resolve. The Cold War (1945-1989) paralyzed the UN mechanisms.[35] The problem of the effectiveness of the UN is not always in a technical sense. The problems arising from politics and interpretations of international law are the deepest.[36]

The right to self-defence and the notion of a preemptive strike in self-defence are also matters of concern. The right of states to resort to self-defence arising from the UNC[37] implies that only if "an armed attack has occurred or is imminent to occur" against it, can a state employ means of self-defence proportionate to thwart the attack and defend itself.[38] However, there is a broader definition of the notion of self-defence lingering around, making for a different, broader interpretation of the Charter[39].

Two prominent schools of thought prevail[40]. One thought claims that only when one state has begun an armed attack can the other side resort to an act of self-defence. The other thought considers "the inherent right of states to self-defence" as unimpaired, which means that the natural right retained by states to protect themselves from threats was not intended to be limited by the Charter.[41]

The United States of America (USA) is one state holding the second opinion of the Charter and therefore constitutes a significant element in this debate. The US Constitution[42] provides: "No State shall, without the Consent of Congress... engage in War, unless invaded, or in such imminent danger as will not admit of delay," US Constitution states. The wording "in such imminent danger as will not admit delay" clearly allows for a pre-emptive strike, a war before actual hostilities whereby it is not necessary to wait to get hit first and then react.[43]As another example, the National Security Strategy, announced by the US President in September 2002, recognizes the right to resort to the use of force in self-defence, preemptively, when encountering an imminent threat. When it is threatened with an attack by weapons of mass destruction (WMD), the United States has a history of taking preemptive action, such as in the context of the Cuban Missile Crisis in 1962.[44]

The States also have the competence to enter into "treaties of guarantee, mutual assistance, collective self-defence, and cooperation". This type of treaty may permit one party to intervene, even militarily, in another party's territory or in another state's action

[34] Danilo turk, "international law and effectiveness in the post—cold war era source: Proceedings of the annual meeting", *American Society of International Law* 108: 1 (2014), 403.
[35] *Ibid*.
[36] *Ibid*., 405.
[37] Article 51.
[38] Aparna Singh, "Legitimacy of the Use of Force in International Relations: Analyzing the State Practices", *Indian Journal of Law and Human Behaviour*, Vol 4, Nr 2 (2018). Last accessed on 07 May 2019 at http://dx.doi.org/10.21088/ijlhb.2454.7107.4218.6
[39] *Ibid.*
[40] Aparna Singh, "Legitimacy of the use of force in international relations: analyzing the state practices", *Indian Journal of Law and Human Behaviour*, Vol 4, Nr 2 (2018). Last accessed on 07 May 2019 at http://dx.doi.org/10.21088/ijlhb.2454.7107.4218.6
[41] *Ibid.*
[42] Article 1, Section 10, Clause 3.
[43] Sol Slonim, "The U.S. constitution and anticipatory self-defense under article 51 of the u.n. charter", *The International Lawyer* 9: 1 (1975), 118.
[44] William H. Taft, "Preemtive action in self-defense", proceedings of the annual meeting, *American Society of International Law* 98: 1 (2014), 331.

to restore domestic order and defend itself from external aggression.[45] Collective security measures like the UN not only allow for but even require member states to resort to forcible measures to counter an attack and ensure international order and law.

The verbal Threat of the Use of Force

What constitutes a *threat* (emphasis added) to use force - a prohibition under the UNC[46] has so far remained underexplored[47]. The term "threat of force" is not defined in the Charter, and there is no record of a detailed discussion of the concept at the San Francisco Conference, leaving the subject open to interpretation. The general understanding, however, is that states shall refrain from verbal excesses escalating, which would otherwise amount to a breach of the prohibition on the threat of use of force under the Charter.[48]

Military Intervention Against a State for the Actions of Non-State Actors

Contemporary development in international law not initially foreseen is the armed attack against a state in self-defence against attacks from a non-state actor in that state. The Israel-Lebanon military intervention provides an example. The Israeli attack in Lebanon in 2006 against *Hezbullah* is viewed to be an example of this. The State of Lebanon was viewed as being implicated in the actions of *Hezbullah*[49] which was used by Israel as a justification to intervene militarily against *Hezbullah* and the State of Lebanon. In the case of Lebanon-Israel, *Hezbullah* conducted a raid inside Israeli territories and captured two Israeli soldiers while killing three others.

When Israel sent a group of soldiers into Lebanon to rescue the abducted soldiers, four more soldiers were killed in an ambush. Israel thus conducted a large military operation into the territory of Lebanon and invoked Article 51 of the UNC, depicting its operation as an act of self-defence.[50]

International Court of Justice, the International Criminal Court and the United Nations Security Council: Conflicting Stances

The ensuing details reveal that, in certain cases, conflicting rulings and declarations were issued by different relevant international legal and political bodies. Factors contributing to distorting the conclusions in particular cases include different positions asserted in official statements of prominent politicians, which further exacerbated the issue.

[45] William H. Taft, "Preemtive action in self-defense", proceedings of the annual meeting, *American Society of International* Law 98: 1 (2014), 332.
[46] Article 2(4).
[47] Hannes Hofmeister, "watch what you are saying: the unc's prohibition on threats to use force", *Georgetown Journal of International Affairs* 11: 1 (2010), 108.
[48] *Ibid.,* 113.
[49] *Ibid.*
[50] *Ibid.,* 89.

Western countries and ICC vs Arab countries in the case of Sudanese President

The right of states to practice their independence of free will is a fundamental and traditional right established in international law.[51] For a long time, it was a historic view that this right could not be enjoyed by the head of the state, the ministers of foreign affairs and diplomatic staff feared being subjected to investigation, indictment, and possible apprehension abroad, and for this reason, international law granted to them the protection of immunity.[52] However, many international courts have accepted cases against people who were initially thought to enjoy immunity. The ICC's arrest warrant issued in March 2009 against Sudan's President Omar Al-Bashir is an example of this, which is quite controversial.[53]

Americans and Europeans insist on the view that the legality of a warrant is vital. However, many Muslim and Arab states tend to criticize it, especially because Sudan had no membership in the ICC Statute in the first place.[54] Those defending the arrest warrant argue that it was legal under international law since the case was referred to the ICC by a UNSC resolution[55]. Based on Resolution 1593, it was rendered irrelevant whether Sudan was or was not a member of the ICC[56].

The Caroline doctrine as a customary law challenge to the UNC

The doctrine emanated from an incident in 1837 during a rebellion by Canadians in opposition to British rule.[57] The British took hold of and destroyed an American steamer (which was named the Caroline). Caroline was used to supplying the rebels on the Canadian side of the Niagara River. US-British relations were strained about this incident. This famous doctrine was codified in written communication by US Secretary of State Daniel Webster, who stated that "the use of force in self-defence was only appropriate when the necessity of resorting to force was instant, overwhelming, and leaving no choice of means and no moment for deliberation."[58]

This doctrine allows for self-defence not only against an armed attack that is occurring as well as when an armed attack is imminent in the future or already ongoing. It created a distinction between two types of anticipatory self-defence. One is preemptive self-defence (a lawful act under the Caroline doctrine), which is undertaken to thwart an imminent attack or one underway. The second type of anticipatory self-defence is preventive self-defence. This refers to the use of force against an actor aimed at stopping it from pursuing a particular course of action that has not yet reached a direct

[51] Article 2(4) of the UNC.
[52] Samar El-Masri, "The legality of the international criminal court's decision against omar al-bashir of sudan", *International Journal* 66: 2 (2011), 371.
[53] *Ibid.*
[54] States party to the ICC Statute can be seen here: https://asp.icc-cpi.int/en_menus/asp/states%20parties/pages/the%20states%20parties%20to%20the%20rome%20statute.aspx

[57] Eric A. Heinze, "The evolution of international law in light of the global War on terror", *Review of International Studies* 37: 3 (2011), 1073.
[58] *Ibid.*

threatening level but has the potential to end up in an armed attack. This type of anticipatory self-defence is not permitted under the Caroline doctrine.[59]

Entebbe case, military action abroad to protect nationals in mortal danger

The Caroline doctrine outlined above set a precedent for other cases, including the Entebbe Raid of 1976. Israel conducted a military operation in Entebbe, Uganda to rescue its nationals who were taken to this country in a hijacked plane by German and Iraqi nationals whose demands were the release of Palestinians from prisons in several countries, including Israel.[60] Extensive damage was inflicted on planes and property in Uganda by the Israeli forces. Israel claimed that Uganda had supported the hijackers, a claim the latter denied. Without seeking prior authorization from the UNSC, Israel carried out the raid and later invoked the right to self-defence, which it claimed encompassed "the right of a state to take military action to protect its nationals in mortal danger, whom the local government is unable or unwilling to protect," relying on the Caroline doctrine.[61]

The view of the Bush doctrine is in contrast with the UNC and ICJ jurisprudence

In September 2002, US President George W. Bush issued the NSS, which constituted what later became the Bush doctrine. In response to the 9/11 attacks on US soil, a section of the NSS states, "we will not hesitate to act preemptively against terrorists to prevent them from harming our people and our country."[62] This refers to preemptive self-defence. Associated with the element of "imminence" of the threat, this would be compatible with customary international law but not recognized by the UNC`s Article 51.

Humanitarian intervention, a phenomenon beyond the UNC

Humanitarian intervention is understood as a military intervention to save innocent lives in other countries[63]. However, for the sake of clarity, examples are the peacemaking intervention in Liberia led by Nigeria and NATO's Kosovo/Serbia operation, which was carried out without any authorization by the UNSC. In the latter case, thousands of civilian deaths were inflicted by high-altitude aerial bombardment by NATO itself.[64] Then, in the second half of 1999, the Australian-led peacekeeping operation in East Timor received a UN sanction.[65] However, in 2011, NATO conducted an operation in Libya and a French peacekeeping operation in the Central African Republic got UN authorization[66].

Political view: International Law is not Law

Some politicians and commentators adamantly assert what they have read somewhere that "international law is not law". In that sense, the mentality is that law is merely the

[59] *Ibid.*
[60] Claus Kreb, *"The Entebbe Raid—1976"* (London: Oxford Scholarly Authorities on International Law, 2018), 220.
[61] *Ibid.*, 221.
[62] Eric A. Heinze, "The evolution of international law in light of the global War on terror", *Review of International Studies* 37: 3 (2011), 1073.
[63] Alexis Heraclides and Ada Dialla, *"Humanitarian intervention in the long nineteenth"* (Manchester University Press, 2015), 1.
[64] *Ibid.*

[66] *Ibid.*, 3.

projection of power, and it is that power that shall be "enforced on evil-doers through the international police force, international courts, and international jails".[67]

The spectrum of domestic constitutional barriers toward international law

Besides the lack of consensus between international bodies such as the UN and States in the interpretation of international legal texts, challenges spelt out in some literature also point to the spectrum of constitutional rules of some states—such as the USA—as a challenge.[68] The receptiveness of the USA to international law has been challenged at both the federal and state level by a series of bills that prohibit the use of international law.[69] A typical example is the "Save Our State" resolution of the US State of Oklahoma[70].

Lack of Consensus in Perception of Conduct, Structure and Functionality

The following cases are indicative of the view that structural malfunction, budgetary issues, etc. are factors inevitably contributing to the ill-functioning of the mechanisms. Because the majority of the budgets of international organizations are sourced from great powers who would not pay for them unconditionally, it is widely assumed that the flow of the budget is regulated towards the pursuit of a political agenda by great powers.

The Budgetary deficit of the International Criminal Court

During the first decades of its existence, the ICC has managed to carry out twenty-one investigations and convicted only one suspect[71]. With a fiscal year budget of about USD 100,000,000 and 800 employees, the ICC comes short of performing what is expected of it[72]. It fails to open investigations around the globe.

Slowness and selectiveness of the International Criminal Court

The court is perceived to have been extremely slow in reaching decisions, and its perceived lack of fairness in deciding which cases to hear has been a source of disappointment.[73] The ICC passed its first judgment only on the tenth anniversary of its creation. Only two convictions have been handed down in twelve years, and states' failure to cooperate in arresting and handing over indicted individuals has made the ICC appear ineffective.[74] A prominent example is that of picking President Assad of Syria as referred to by the UNSC—the resolution of which Russia and China vetoed.[75]

[67] Ivan Shearer, "In fear of international law", *Indiana Journal of Global Legal Studies* 12: 1 (2005), 15.
[68] Malcolm D Evans, "*International Law*" (Oxford: Oxford University Press, 4th Edition, 2014), 422.
[69] *Ibid.*
[70] *Ibid.,* 424.
[71] Andre Mbata Mangu, "The international criminal court, justice, peace and the fight against impunity in africa: An Overview", *Africa Development* 40: 2 (2015), 19.
[72] *Ibid.*
[73] Henrietta J.A.N. Mensa-Bonsu,"The icc, international criminal justice and international politics", *Africa Development* 40: 2 (2015), 33.
[74] *Ibid.,* 36.
[75] *Ibid.,* 42.

Amnesties and impunity

Under international law, war crimes cannot be pardoned – even by the state president[76]. However, a challenge is posed to this notion in some countries, including Afghanistan. Afghanistan's parliament members endorsed the "National Reconciliation, General Amnesty, and National Stability Law" (shortly referred to as the Amnesty Law)" in 2008[77]. All past and future crimes are subject to amnesty under this law in general for groups who join the reconciliation process. Agreements between the Afghan State and NATO[78]/USA[79] grant the latter exclusive jurisdiction over their personnel for criminal acts committed in Afghanistan. Under the 2001 Bonn (Germany) Agreement, the Afghan Independent Human Rights Commission (AIHRC) was established. The Commission has documented war crimes in the country since 1978 and has advocated for transitional justice, but to no avail.[80] In the most recent case, Donald Trump, the President of the USA, was reported to have issued a presidential pardon to three soldiers who were accused or convicted of having committed war crimes in Afghanistan or Iraq.[81]

International Criminal Court, the influence of UNSC and Superpowers

In the Proceedings of the Annual Meeting of the American Society of International Law, one participant explained that "There is a growing narrative that the ICC has been more of a heartbreak for victims—and an impotent protagonist for offenders—than its supporters had imagined." "The concept of the ICC remains valid, but the results point to an institution that is under siege**".**[82] This office did not have anything to demonstrate in its decade of existence[83]. Structurally, the introduction of the UNSC—which is a political entity—into the operations of the ICC, a legal body, unduly subjected the latter

[76] Jean-Marie Henckaerts and Louise Doswald-Beck, *ICRC's study on customary international humanitarian law, Volume I: Rules* (Cambridge University Press: 2009) (CIHL), Rule 159.

[77] Official Gazette Nr 965 dated 3 December 2008, available at: http://old.moj.gov.af/Content/files/OfficialGazette/0901/OG_0965.pdf

[78] Agreement with NATO:

Article 11

Status of Personnel

1. Afghanistan, while retaining its sovereignty, recognizes the particular importance of disciplinary control, including judicial and non-judicial measures, by NATO Forces Authorities over Members of the Force and Members of the Civilian Component and NATO Personnel. Afghanistan therefore agrees that the State to which the Member of the Force or Members of the Civilian Component concerned belongs, or the State of which the person is a national, as appropriate, shall have the exclusive right to exercise jurisdiction over such persons in respect of any criminal or civil offenses committed in the territory of Afghanistan. Afghanistan authorizes such States to hold trial in such cases, or take other disciplinary action, as appropriate, in the territory of Afghanistan.

[79] Agreement with USA:

Article 13

Status of Personnel

1. Afghanistan, while retaining its sovereignty, recognizes the particular importance of disciplinary control, including judicial and non-judicial measures, by United States forces authorities over members of the force and of the civilian component. Afghanistan therefore agrees that the United States shall have the exclusive right to exercise jurisdiction over such persons in respect of any criminal or civil offenses committed in the territory of Afghanistan. Afghanistan authorizes the United States to hold trial in such cases, or take other disciplinary action, as appropriate, in the territory of Afghanistan.

[80] Sari Kouvo, "*New Commissioners for Human Rights: An End to the Standstill, or an End to Human Rights?*", Afghanistan Analysts Network (November 28, 2012). Last accessed on 07 May 2019 at https://www.afghanistan-analysts.org/new-commissioners-for-human-rights-an-end-to-the-standstill-or-an-end-to-human-rights-amended/

[81] Kate Clark, "*Presidential pardons: Trump sets his seal on a record of US impunity in Afghanistan*", Afghanistan Analysts Network (November 20, 2019). Last accessed on 30 November 2019 at *https://www.afghanistan-analysts-network.org/presidential-pardons-trump-sets-his-seal-on-a-record-of-us-impunity-in-afghanistan.html*

[82] *Ibid.*, 272.

[83] *Ibid.*, 275.

to politicization. The Security Council referred the case of Libya (Gaddafi) to the ICC, which does not reconcile well with the ignoring by NATO and the UNSC of the African Union's efforts to mediate in terminating the conflict. Power and geopolitics trump the law, the very meaning of impunity.[84] As a result of a paradox, the structural deficits of the ICC's entrenched impunity rather than fighting it.

International Criminal Court and focus on small fish in Africa

Plenty of criticism has been voiced of the ICC for its failure to bring about "justice, peace and national reconciliation", particularly what was expected of it on the African continent[85]. This demonstrates the ICC's prosecutorial strategy of focusing on "small fish" while ignoring those most responsible for serious international crimes. Germain Katanga, Matthieu Ngudjolo, Thomas Lubanga, and Bosco Ntangana, all of whom were indicted and therefore arrested, were small fish as opposed to political and military leaders of Congo and Uganda, both of whom supplied them with military assistance in perpetrating crimes in the north-eastern DRC under Ugandan occupation.[86] Leaders of certain African states have labelled the ICC a "neocolonial tool in the hands of the big powers, manipulated and biased against Africans".[87]

Development of the Security Council

Among the challenges and setbacks, UNC faced from the outset was the non-materialization of the establishment of a military force of its own. Its demands are instead met by individual states or groups thereof. The situation is further complicated by these states' reliance on their power of veto in the Security Council.[88] This inevitably impacts the Security Council`s ability to address threats adequately. Until the end of the Cold War (1945-1989)[89], there was never a consensus achieved among these states at the Security Council and states resorted to the unlawful use of force unilaterally or collectively without any fear of reprisals from the Security Council.[90]

UN facing an allegation of endorsement of unlawful transnational use of force

A trend based on realities on the ground has prompted the transnational use of force, in flagrant violation of the principle of respect to sovereignty[91], on the pretext of responding to large-scale targeting of civilians. NATO's 2011 invasion of Libya, and America`s drone targeting campaigns in Yemen and Pakistan[92] around 2004 show that Article 2(4) of the UNC, as it was originally construed, is violated[93]. In both cases, without

[84] *Ibid.,* 270.
[85] Andre Mbata Mangu, "The international criminal court, justice, peace and the fight against impunity in africa: An overview", *Africa Development* 40: 2 (2015), 18.
[86] *Ibid.*
[87] *Ibid.,* 28.
[88] Graham Cronogue, "State prosecution of terrorism and rebellion: a functional examination of the protection of civilians and the erosion of sovereignty", *The Comparative and International Law Journal of Southern Africa* 46: 1 (2013), 130.
[89] Danilo Turk, "International Law and Effectiveness in the Post—Cold War Era Source: Proceedings of the Annual Meeting", *American Society of International Law* 108: 1 (2014), 403.
[90] *Ibid.*
[91] Article 2(1) of the UNC.
[92] Yolandi Meyer, "The legality of targeted-killing operations in Pakistan", *The Comparative and International Law Journal of Southern Africa* 47: 2 (2014), 229.
[93] Graham Cronogue, "State prosecution of terrorism and rebellion: a functional examination of the protection of civilians and the erosion of sovereignty", *The Comparative and International Law Journal of Southern Africa* 46: 1 (2013), 121.

the targeted states posing any threat to international peace and security, their sovereignty was blatantly violated[94].

The UNSC has been demonstrating double standards in response to Gaddafi's actions against rebels in Libya and the United States' actions against al-Qaeda. It considered the situation in Libya a threat to international peace and security. By contrast, it allowed the United States to engage in transnational raids and drone strikes against *Al-Qaeda*. Yet, under the Charter, Gaddafi's domestic actions were not illegal, while the United States' violations of other states' sovereignty were.[95] This is clearly against the text and spirits of the UNC[96] whose purpose was a "commitment to peace, non-intervention, sovereignty and stability".

Kosovo and the sidelining of the UN for fear of veto by Russia and China

Quite a controversy arose over the legality and legitimacy of the situation of war in Kosovo in 1999 when mounting evidence surfaced pointing to Serbia`s ethnic cleansing.[97] The United States organized an invasion within the framework of NATO. Fearing vetoes from Russia and China, NATO's military action in Kosovo was not brought to the UN Security Council for prior authorization. This was one case of a violation of the use of non-defensive force (intervention) without UN authorization.[98]

The mutual threat of war between Egypt/Palestine and Israel; viewed inaction of the UN

Egypt/Palestine and Israel both tend to resort to the threat of use of force for the issues surrounding Gaza, Tiran, and the Gulf of Aqaba. In that case, the UN is either unable or unwilling to enforce the Charter and prevent the parties from settling their dispute peacefully.[99] Israel is claiming to be undertaking defensive measures, yet its actions in October 1956 are intended to acquire more territory in the Gaza Strip and Aqaba areas It seems to have more in mind than self-defence.[100]

The invasion of Iraq in the absence of UN endorsement

A coalition comprised mainly of the USA, the UK, and Australia began a military intervention in Iraq in March 2003. This was a vivid example of military intervention in sheer violation of the legality stipulated in the UNC and the absence of an endorsement by the UNSC. [101]

[94] *Ibid.*
[95] *Ibid.*, 124.

[97] Richard Falk, "Legality to legitimacy: the revival of the just war framework", *Harvard International Review* 26: 1 (2004), 3.
[98] *Ibid.*
[99] Quincy Wright, "The legality of intervention under the unc", proceedings of the *american society of international law* at its annual meeting 51: 1 (1957), 84.
[100] *Ibid.*, 86.
[101] Ivan Shearer, "In fear of International Law", *Indiana Journal of Global Legal Studies* 12: 1 (2005), 15.

Humanitarian interventions not endorsed by the UN but still carried out

The UNC[102] says **"**In their international relations, all members shall refrain from threatening or using force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the goals of the United Nations." This text tends to imply that there may be situations of use of force that are "not in a manner inconsistent with the purposes of the United Nations".

In the case of the Indian military intervention that resulted in the creation of Bangladesh (former East Pakistan) as an independent state on December 16, 1971,[103] India called it humanitarian intervention. The US and UN could have disrupted the intervention, but India also had its allies; Russia, most notably, served as a barrier to a potential US effort to stop the Indian intervention.[104]

Another case of so-called humanitarian intervention was the military invasion of Tanzania in Uganda (1978–1979), which ousted the notorious leader Idi Amin from power in April 1979. The President of Tanzania, Julius Nyerere, argued that the attack was to stop the "brutal dictatorship" of Amin, a move silently welcomed by most African leaders.[105]

The verbal threats to use force gone unheeded by the UN

The UN has, on numerous occasions, remained silent on verbal threats that flagrantly violate the prohibition on the use of force enshrined in the Charter. Examples of this are the statements of the Iranian President, Mahmoud Ahmadinejad, on October 27, 2005, who declared that "Israel must be wiped off the map." Furthermore, China threatened to resort to a "sea of fire" if US aircraft carriers were to enter the Taiwan Strait.[106]

UNSC`s perception of being above the law

There is unfortunately a view that the Security Council is not bound by international law and can act above the law.[107] The view is derived from a reading of Article 24 of the UNC, which reads that the Security Council has the "primary responsibility for the maintenance of international peace and security".[108] Based on the argument, this provision does not include international law, which suggests that international law does not affect the functions of the Security Council.

The counterargument for this is that although promoting international law is not a purpose of the UN, it does not relieve the Security Council from the bounds of

[102] Article 2(4).
[103] Shuva Das, "Indian military involvement in the 1971 crisis of east pakistan: A justification of level of analysis", *American Journal of Theoretical and Applied Business* 11:1 (2019), 84.
[104] Daniel C Park, "India's intervention in east pakistan: A humanitarian intervention or an act of national interest?", *Synergy, the Journal of Contemporary Asian Studies* 1: 3 (2016), 6.

[106] *Ibid*.
[107] Erika de Wet Franck, "Fairness in international law and international institutions", *South Africa and International Law* 31: 1 (2006), 234.
[108] Michael Wood, *"Unilateral acts — collective security — international peace and security — peace keeping"* (Oxford: Oxford University Press, 2007), 2.

international law. The Security Council is created by the UNC, which itself is a legal document. The Security Council, therefore, has to act by international law.[109]

Somalia pirates or national resource defenders? UN favouring Western Economy

Somalia has experienced volatile situations for decades. A non-state armed group named Somali pirates surfaced under the fall of Somalia, which led to the emergence of this piracy in the Aden Gulf in 1991. Hijacking and ransoming international fishing ferries are acts by pirates that have caused international concern which the Somali government has failed to contain. The pirates claim to be the sole defenders of their seas in a bid to counter illegal dumping and overfishing by foreign ships, which exacerbates the economic problems and affects the means of livelihood and survival for many Somalis.[110] However, the actions of pirates are seen as a threat to international peace and security by the UN. The European Union (EU) and NATO sent naval forces to protect the Aden Gulf and reinforce security for international commercial vessels, an act allowed by the UNSC.[111]

UNSC`s perceived influence by the USA to establish the Counter-Terrorism Committee

The author notes that it is by and large a drive by the endeavours of the US to use the authority of the Security Council to advance a rigorous agenda against terrorism.[112] Resolution 1373 was thus adopted by the Counter-Terrorism Committee, which was established in 2001.[113] The Committee has the role of observing the implementation phases of extensive obligations extended to States as imposed by the Council in the mentioned resolution.[114] International conventions and human rights are outside the scope of the mandate of the Committee. This added to the fear existing since the outset of the 9/11 events when some international human rights entities and non-government organizations (NGOs) noticed the risks posed to human rights and were seeking to give a reminder to international organizations and national administrations of the significance of complying with human rights in devising their counter-terrorism responses.[115] Human rights abuses were inevitable when counter-terrorism measures were placed on top.

What these actions result in is regulating terrorism outside international law and the adoption of measures against terrorism that in plain sight ignore prescriptions and actions of international law, undertaken secretly and with the intentional aim of avoiding scrutiny and accountability vis-à-vis the international community.[116]

[109] Erika de Wet Franck, "*Fairness in international law and international institutions*", South Africa and International Law, 31: 1 (2006), 235.
[110] *Ibid.*
[111] *Ibid.*
[112] Andrew Byrnes, "*More law or less law? the resilience of human rights law and institutions in the war on terror*" (ANU Press, 2008), 131.
[113] *Ibid.*
[114] *Ibid.*
[115] *Ibid.*, 133.
[116] *Ibid.*, 150.

UN Security Council endorsement if Charter does not work

When the USA initially wanted to attack Iraqi forces in Kuwait in 1991, it invoked Article 51 of the UNC for self-defence. However, it would have had to go to this war alone with that weak invocation. After finding out it wouldn't work, the UNSC issued resolution number 678 to endorse the invasion, following which forces from the US, UK, Saudi Arabia, and Kuwait launched the attack.[117]

Hesitant NATO intervention in Bosnia and its legality

In Bosnia and Herzegovina in 1995, the murder of 100,000 citizens was witnessed by the UN forces, yet NATO had held a position of non-intervention.[118] When it eventually intervened and brought the conflict to a provisional halt, the legality of the intervention was called into question. It was viewed that the purpose initially was to avoid any risk to the UN forces.[119]

Reasons in Favor of UN and ICC: *An appraisal of the ICC*

The ICC was mandated to address the most serious crimes that affected the sentiments of the larger world population, namely "war crimes, crimes against humanity, genocide, and aggression". In the process of national ratification of the ICC Statute, many states are required to amend their criminal legislation to adopt clear definitions of international crimes and criminalize them as appropriate. The State of Afghanistan, for example, albeit late, reflected the provisions of the Statute in its revision of the Penal Code[120] that entered into force in February 2018. The Statute had its influence even on states not a party to it. India, for example, inspired by the instrument, has reformed its national law to fight impunity for state complicity in violence.[121]

Conclusion

Despite positive and well-commented endeavours being undertaken by the international organizations to ensure the application of the law on war since 1945, the influence of political agendas by states in pursuit of their interests has been an inevitable element of hindrance in the functioning of the former. The ICC was expected to turn a new page concerning human rights, peace, justice, and reconciliation and address war crimes, crimes against humanity, genocide, and aggression; but it failed to maintain a respectable balance.

During the process of national ratification of the ICC Statute, many states have been required to amend their criminal legislation to ensure their compatibility with the

[117] Thomas Yoxall, "Iraq and article 51: a correct use of limited authority", *The International Lawyer* 25: 4 (1991), 967.
[118] Marc Weller, "The relativity of humanitarian neutrality and impartiality", proceedings of the annual meeting of *american society of international Law* 91: 1 (1997), 443.
[119] *Ibid*.
[120] 2017 Penal code of afghanistan. Chapter one to four (genocide, crimes against humanity, war crimes and aggression). Official gazette number 1260, published by the Ministry of Justice of the Islamic Republic of Afghanistan on 15 May 2017.
[121] Andre Mbata Mangu, "The international criminal court, justice, peace and the fight against impunity in africa: an overview", *Africa Development* 40: 2 (2015), 19.

provisions of the Statute, adopt clear definitions of international crimes and criminalize them as appropriate.

Mandated by the UNC, the Security Council has the primary responsibility to maintain "international peace and security". Its resolutions are binding on all UN member states. During the first 45 years of its existence, the Security Council was largely viewed as paralyzed as a result of the Cold War (1945–1999). However, since 1990, it has become active in a wide range of issues concerning international peace and security. However, there is a substantial array of dismay demonstrated against the effectiveness and functioning of the UN bodies.

International law is viewed by many scholars as too often a game of power where the mighty make rules to keep the weak bound by them. Manipulation of international law by the strongest in pursuit of their national interests is therefore inevitable.

The UNC, which remains the centrepiece of the entire international system today, has had its effectiveness and efficiency called into question on numerous occasions, and the expectations of its authors have yet to be met. However, sidelining the UN is not always viewed to entail negative consequences, except for its illegal nature. In the case of NATO's intervention led by the United States in Kosovo in 1999, a humanitarian disaster was avoided because no prior UN authorization was sought.

Overall, the research found that distrust in the effectiveness of the international mechanisms mandated to ensure respect to and compliance with international law on war is quite visible and vocally expressed, which cannot be outweighed by the certain positive elements indicated above. The International sanctioning mechanisms are facing substantial challenges in discharging their responsibilities equitably owing to (a) a lack of consensus over a unified interpretation of international law; (b) great powers not being party to the majority of international treaties; (c) budgetary deficiencies faced by the ICC; and, most notably, (d) influence imposed by great powers on the UN in pursuit of the latter's political interests.

Recommendations

The international community as a whole should strive to reaffirm and implement the very purpose for which the UN was established and the UNC adopted. The same goes for the global implementation of the law of war. Further, to ensure compatibility and relevance of the law of war adopted post-1945 to contemporary realities, a thorough review shall be conducted and the law updated. An example of an area for the latter is post-human humanitarianism—robotic warfare. Absence, absurdity, and silence of the law, and more so, the lack of enforcement thereof, will inevitably be pursued by anarchy, which is in no nation's interest.

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