International Law in the Times of Crises: Imperatives and Prerogatives

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Abstract

This paper addresses the current state of International Law during the accented and no less far-reaching global crises. It aims at seeking ineffectiveness of International Law due to the deterioration within the structures and strictures of international society and not to inherent flaws in the law itself. In this regard, the need for the development of a vigorous international law, corresponding to new challenges, with special regard to the question concerning the reform of the United Nations (UN), is discussed against the backdrop of the political and legal obstacles and the ongoing debate for systemic overhaul. The present article is structured in four parts: the first of which highlights the critical state of global affairs, characterised by growing geopolitical tensions, economic divisions and worldwide social unrest. Secondly, it addresses the relationship between international law and society, emphasising that a healthy socio-political process may produce good law. In contrast, a social fabric battered by tensions and fragmentation inevitably leads to legal inefficiencies. The third section briefly illustrates the difficult debate on reforms, particularly of the UN system, reviewing the position of different groupings among the member states while giving special attention to the stance taken by Italy and Pakistan. The concluding section emphasises the aspirational value of international law, which may allow a glimpse of some silver lining, based on the consideration of a pendulum-like trajectory of history and, thus, of international law itself.

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Introduction

When confronted with a world of cascading and intersecting crises embodying immense atrocities and costs in human losses, increasingly battered by natural disasters following the unstoppable climate change phenomenon, one cannot sit aside letting the taxing events take their toll. Added to pervasive violence, the sordid fact remains that a quarter of the world's population remains deprived of fundamental freedoms spawning wider questioning of the effectiveness, if not the mere relevance, of international law. Inevitably, the United Nations (UN), which is an integral part and instrument of the international legal system, gets indicted by public opprobrium.

The paper will argue that, however understandable, this attitude is flawed as it conflates cause and effect, especially when most of the international legal rules are silently complied with as a matter of routine without registering any wider public acclaim or ire. There is no denying that the member states increasingly abuse and even infringe upon human rights spawning insecurity and disorder. However, a vital point worth noting here is that the increase in irreverence towards international law is not attributable to ostensible flaws in within the legal framework, rather accrue from a poor state of health of the international society itself. Next to its rules-making and enforcement mechanisms, international law, we attempt here a judicious evaluation of the sanguinity or its diminution within the *body politic* of our "global village," which remains the mainstream as well as the fulcrum of this international diplomacy.

This paper is organised in four parts: Firstly, it refers to the current critical state of global affairs and its manifold manifestations. Secondly, the relationship between law and society receives some spotlight against the backdrop of contemporary international social malaise. Thirdly, the focus turns to the sense to be made of the quest for reforms emanating from different quarters, with special regard to the UN as the primary institutional pillar of the international legal system. In the concluding remarks, the aspirational value of the rules of law will be emphasised

together with a call on states to engage in the avoidance of pursuing a double-standard approach to international legality which may smack of shallow expediency.

Global Malaise

As recently mentioned by Shivshankar Menon, "[the world (…) is adrift,"[1] where international relations are increasingly characterised by a widespread 'revisionist' attitude concerning the multilateralistic approach to an international order itself based on global cooperation through international institutions. Major Powers "pursue] their ends to the detriment of the international order and seek to change the order itself."[2]

This gloomy picture depicted in 2022 was confirmed a year later in his speech to the General Assembly by the UN Secretary-General António Guterres, when he observed:

> *Divides are deepening. Divides among economic and military powers. Divides between North and South, East and West. We are inching ever closer to a Great Fracture in economic and financial systems and trade relations; one that threatens a single, open internet; with diverging strategies on technology and artificial intelligence; and potentially clashing security frameworks.*[3]

And from Ukraine to Gaza, we keep witnessing increasing security clashes, on both cyber and physical spaces. However, international divisions and conflicts go hand in hand, or, rather, reflect the increasing polarisation of cultural, social and political varieties at the national level across the globe. Whilst social and cultural diversity represents an immense potential asset in any society, the lack of dialogue and

[1] Shivshankar Menon, "Nobody Wants the Current World Order. How All the Major Powers – Even the United States – Became Revisionists," *Foreign Affairs*, August 22, 2022, www.foreignaffairs.com/world/nobody-wants-current-world-order (last accessed May 28, 2024).
[2] Shivshankar Menon, "Nobody…"
[3] "Secretary-General's address to the General Assembly," September 19, 2023 www.un.org/sg/en/content/sg/speeches/2023-09-19/secretary-generals-address-the-general-assembly (last accessed May 28, 2024).

competing attitudes among the diverse social components are engendering social and political fissures across their societal fabrics. Moreover, the widening chasm between the rich and poor adds to domestic instability around the world, rendering populations even more vulnerable to economic and financial chaos, as official responses increasingly turn authoritarian.

The expanding severity of social and political malaise in an increasing number of countries was stressed by the UN Secretary-General in his address to the General Assembly in its 2023 session in the following words:

> "Divides are also widening within countries. Democracy is under threat. Authoritarianism is on the march. Inequalities are growing. And hate speech is on the rise. In the face of all these challenges and more, compromise has become a dirty word."[4]

Such security, social and economic challenges put international law — especially its rules regarding the use of force, genocide, warfare, human rights, international trade, the environment and poverty alleviation — under an extraordinarily heavy stress test.[5]

International Law amidst Societal and Political Crisis

As stressed by the great master (doyen!) of international law of the last century, Louis Henkin, "[the health of the law (...) will depend largely on the health of the society, on its ability to contain explosive forces and

[4] "Secretary-General's address to the General Assembly," September 19, 2023 www.un.org/sg/en/content/sg/speeches/2023-09-19/secretary-generals-address-the-general-assembly (last accessed May 28, 2024).

[5] See Stefan Lehne, "After Russia's War Against Ukraine: What Kind of World Order?," *Carnegie Endowment for International Peace*, February 28, 2023 https://carnegieeurope.eu/2023/02/28/after-russia-s-war-against-ukraine-what-kind-of-world-order-pub-89130 (last accessed May 28, 2024) and Oona A. Hathaway, "War Unbound: Gaza, Ukraine, and the Breakdown of International Law," *Foreign Affairs*, April 23, 2024 www.foreignaffairs.com/ukraine/war-unbound-gaza-hathaway (last accessed May 28, 2024).

mobilise creative ones for general welfare."[6] It is thus inevitable that with the international and domestic societies facing similar turmoil and lodged in such a state of ill health, international law may not now enjoy good health as well. This further reaffirms the observation made more than a century ago by the eminent Russian lawyer and diplomat, Friedrich de Martens one of the brains behind two peace conferences held in The Hague in 1899 and 1907,[7] to the effect that "the flaws of international law (…) are only the inevitable consequence of the imperfections and instability that characterise the domestic legal system that has prevailed in all states to date."[8]

The contribution and impact of social and political processes within the international law are no less crucial than they are in any domestic legal system. The more homogeneous the social components and their shared values, the smoother the legal process, as opposed to a conflicting situations characterised by a highly fragmented society. Consensual homogeneity certainly eases legislation since the ensuing rules would reflect generally shared social and political values, registering spontaneous compliance.

In international relations, just like in any given society, when the law is recurrently violated, this is hardly because the law is bad; instead such malady accrues due to social, ethical and political circumstances prevalent in that country at a given time. Suffice is to consider a country typically plagued by organised crime, drug cartels and corruption, money-laundering and even terrorism and how its internal proverbial million mutinies has a stark bearing on its domestic and external trajectories. When criminal gangs raid its population, the national financial system

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[6] Louis Henkin, *How Nations Behave* (New York: Columbia University Press, 2nd ed., 1979), 44.

[7] On the historical relevance of the two Hague conferences, see Betsy Baker, "Hague Peace Conferences (1899 and 1907)," in *Max Planck Encyclopaedia of Public International Law*, ed. Anne Peters (online edn: Oxford University Press, 2009). Also, see *Actualité de la Conférence de La Haye de 1907, Deuxième Conférence de la Paix: colloque La Haye, 6-7 septembre 2007*, ed. Yves Daudet (Leiden: Martinus Nijhoff Publishers, 2008).

[8] Friedrich de Martens, *Traité de droit international* (Paris: Libraire Marescq Aine, Vol. 1, 1883) 287 (English translation by the present author).

gets undermined by widespread financial villainy, and law-abiding enterprises fall victim to thuggery. This can seldom be blamed on legal procedures; instead the malfeasance goes deeper than this apparent facet. Criminal law reform, in and of itself, can hardly be the solution to the problem. Even when an appropriate legislation is lacking, the problem is inherently political, to the extent that there is no sufficient identity of views or political will among lawmakers for new suitable legislation to be adopted.

Theories equating the international legal order to the collective expression of the sovereign wills,[9] or updated conceptions of international law based on the natural law of the kind were revived in the 1990, in the postscript of the Cold War. Political globalisation even seemed to lead to the reduction, if not a total disappearance of national sovereignty.[10] However, it sits increasingly uncomfortably in today's divided world, ever more characterised by nationalistic unilateralism and cross-regional antagonistic alliances with intense forms of populism feeding into exclusive manifestations. In line with the above reasoning, the current difficulties are impinging dramatically on the effectiveness of fundamental rules of international law. They appear to reflect the lack of political capacity, or willingness, by the major and mid-sized powers to engage in multilateral diplomacy and international cooperation. The latter represents the indispensable framework and catalyst through which we can collectively address the global challenges—varying from climate change to migration flows, demographic growth, pandemics, poverty, use of cyberspace, increasingly advanced digital technology, and the finite character of vital natural resources. Individual states, however powerful they are, cannot solve wide-ranging problems all alone in an interdependent world where

[9] Paul Gragl, *Legal Monism: Law, Philosophy, and Politics* (Oxford: Oxford University Press, 2018), 34.

[10] From a strictly legal standpoint, see Oscar Schachter, "The Decline of the Nation-State and Its Implications for International Law," *Columbia Journal of Transnational Law* 36, nos 1–2 (1998): 7–24 and Christoph Schreuer, "The Waning of the Sovereign State: Towards a New Paradigm for International-Law?," *European Journal of International Law* 4, no. 4 (1993): 447–471.

multilateral solutions anchored on legislative vigour and collective will remain the primary imperative.

Breaching the Law, Invoking the Law

Even though it is of meagre consolation, one cannot fail to note that the most serious breaches of international law today hinge on the ban on the use of force, genocide, or violations of international humanitarian legislation accompanied by attempts at legal justification. The two main justifications constantly invoked are self-defence and humanitarian intervention.[11] Both arguments have been invoked by Russia—concerning its invasion and ongoing use of force against Ukraine[12]—and, in different variations, by Israel persistently mounting its military operations in Gaza.[13] From a legal, political and communication perspective, this attitude renders the disputes

[11] An earlier example can be found in the case *Military and Paramilitary Activities in and against Nicaragua*, 27 June 1986, ICJ, Judgment, 98 and ff. www.icj-cij.org/sites/default/files/case-related/70/070-19860627-JUD-01-00-EN.pdf (last accessed June 17, 2024), where the US justified its activities in support of the Contras guerrillas as acting in collective self-defence for the benefit of El Salvador, Honduras and Costa Rica against alleged hostile activities carried out by the Sandinista government of Nicaragua. However, the Court excluded on the basis of the evidence produced that the circumstances of the case justified the actions of the US.

[12] One should recall the speech in which Russian President Vladimir Putin tried to provide justification under international law for the Russian invasion of Ukraine in February 2022, as follows: "[I]n accordance with Article 51 of Part 7 of the UN Charter, with the sanction of the Federation Council of Russia and in pursuance of the treaties of friendship and mutual assistance ratified by the Federal Assembly on 22 February this year with the Donetsk People's Republic and the Luhansk People's Republic, I decided to conduct a special military operation. Its goal is to protect people who have been subjected to bullying and genocide by the Kiev regime for eight years," "Full text: Putin's declaration of war on Ukraine," English translation by *The Spectator*, August 24, 2022, www.spectator.co.uk/article/full-text-putin-s-declaration-of-war-on-ukraine/ (last accessed June 17, 2024).

[13] See the remarks by Israeli Prime Minister Benjamin Netanyahu, who insisted on Israel's right to self-defence in the face of growing criticism from the US and other allies on the conduct of military operations in Gaza after Hamas' terrorist attack on October 7, 2023, Eugenia Yosef and Eyad Kourdi, "Netanyahu insists Israel will defend itself even if 'forced to stand alone'," *CNN*, May 6, 2024 https://edition.cnn.com/2024/05/05/middleeast/netanyahu-icc-warrants-israel-intl-latam/index.html#:~:text=Israeli%20Prime%20Minister%20Benjamin%20Netanyahu%20said%20Israel%20will%20defend%20itself,its%20expected%20incursion%20into%20Rafah (last accessed June 17, 2024).

arising from the events in question akin to domestic litigation of criminal nature.

Even though it may be of little solace, this self-justificatory attitude on behalf of perpetrating regimes should not be taken as foregone. For it comes in contrast to previous policies and attitudes aiming at dismantling the very legal authority of the key legal pillars of international law in question including the UN, the International Criminal Court. One may recall the initial stand taken by US Presidency under George Bush in 2001. He advocated the abrogation of the UN Charter's Chapter VII and of the Customary Law constraints on the use of force exclusively for the US, apparently in pursuit of hegemonic design aimed at some kind of *Pax Americana,* reminiscent of the imperial *Pax Romana.*[14] It was based on the US self-perception of being the sole global superpower, positing it as an extra-judicial power.[15]

In legal terms, the meagre consolation that we can draw from the self-justificatory attitude in question follows the reasoning that the International Court of Justice (ICJ) put forward in its landmark case on the *Military and Paramilitary Activities in and against Nicaragua* between Nicaragua and the US, whereby:

> *For a rule to be established as customary, the corresponding practice must be in absolutely rigorous conformity with the rule. In order to deduce the existence of customary rules, the Court deems it sufficient that the conduct of States should, in general, be consistent with such rules, and that instances of State conduct inconsistent with a given rule should generally have been treated as breaches of that rule, not as a recognition*

[14] James MacDonald, *When Globalization Fails: The Rise and Fall of* Pax Americana (New York: Farrar, Straus & Giroux, 2015) and Marcos T. Berger, "From *Pax Romana* to *Pax Americana*? The History and Future of the New American Empire," *International Politics* 46, nos 1–2 (2009): 140–156.

[15] Nico Krisch, "International Law in Times of Hegemony: Unequal Power and the Shaping of the International Legal Power," *European Journal of International Law* 16, no. 3 (2005): 369–408, José E. Álvarez, "Hegemonic International Law Revisited," *American Journal of International Law* 97, no. 4 (2003): 873–887 and Detlev F. Vagts, "Hegemonic International Law," *American Journal of International Law* 95, no. 4 (2001): 843–848.

> *of a new rule. If a state acts prima facie incompatible with a recognized rule but defends its conduct by appealing to exceptions or justifications contained within the rule itself, then whether or not the State's conduct is in fact justifiable on that basis, the significance of that attitude is to confirm rather than to weaken the rule.*[16]

This reasoning does not prevent a widespread deep demand for innovation and development within the international legal remit.

The Quest for Reforms

The need for new international law-making addressing unregulated areas of international social interactions or phenomena is increasingly invoked in authoritative quarters as a matter of urgency.[17] However, in such a divided world as the one we are currently confronted with, it is very difficult to find the necessary widespread consent to produce new multilateral legally-binding instruments, perhaps, with the rare exception of politically neutral subject areas.[18]

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[16] *Military and Paramilitary Activities in and against Nicaragua*, 98, *supra* note 11.

[17] Daniel Bethlehem, "The End of Geography: The Changing Nature of the International System and the Challenge to International Law," *European Journal of International Law* 25, no. 1 (2014): 9–24. From the same Author see also, more recently, "Project 2100—Is the International Legal Order Fit for Purpose?," *EJIL Talk!*, November 29, 2022 https://www.ejiltalk.org/project-2100-is-the-international-legal-order-fit-for-purpose/ (last accessed May 28, 2024).

[18] One may recall the significant challenges encountered in the reform of international economic law, particularly with respect to investment law and arbitration. The production of new legally binding instruments in this domain has proven to be particularly contentious. By way of example, mention should be made of the still ongoing discussions within the UN Commission on International Trade Law (UNCITRAL) Working Group III, set up in 2017, with the task of exploring reforms in the field of investor-state dispute settlement (ISDS). Its last report of April 2024 confirms the difficulties in reaching a consensus on hard and fast solutions, let alone in a conventional format. The fate of various free trade agreements negotiated by the European Union (EU), which include provisions for the establishment of permanent investment courts, as an alternative to the existing arbitration system - such as the Comprehensive Economic and Trade Agreement (CETA) with Canada and the Transatlantic Trade and Investment Partnership (TTIP) with the US - illustrates broader struggles in achieving comprehensive reform in the field. The TTIP negotiations have long been suspended, if not discontinued, and more recently, the EU member states have shown reluctance in ratifying Chapter 8 of CETA establishing an Investment Court System (ICS). A similar fate has been earmarked by the dispute settlement chapter in other free trade agreements, such as those between the EU and Vietnam, and Singapore, respectively, with the ad-hoc Agreements on Investment Protection still to enter into force.

One such topic could for example be that of the *protection of persons in the event of disasters*, which has been thoroughly addressed by the UN International Law Commission (ILC) through an authoritative set of draft articles acknowledged by the UN General Assembly in 2016.[19] States are still discussing the recommendation by the ILC stipulating that a convention be elaborated based on the draft articles, and a decision may be taken by the UN General Assembly's Sixth Committee at its seventy-ninth session in 2024.[20]

The present-day difficulty in cajoling the necessary widespread consent towards multilateral conventional law-making is generally testified by increasing resort to some kind of quasi-law-making through the use of soft-law instruments.[21] In times of less international political fragmentation, reliance on the latter kind of instruments could prove to be an expeditious way to produce international law through complementary widespread spontaneous compliance with the soft-law standards in question, which would thus evolve into customary law. Conversely, nowadays going down the route of negotiating international instruments falling short of a conventional format is pursued primarily as a diplomatic means for states to engage in exercises whose end product is characterised by its non-legally binding nature as such.[22]

[19] "Protection of persons in the event of disaster," Resolution 71/141 of 13 December 2016 (UN Doc. A/RES/71/141) para. 2, https://documents.un.org/doc/undoc/gen/n16/437/02/pdf/n1643702.pdf?token=JYzG5AsoM6g7cHWwxu&fe=true (last accessed May 28, 2024).

[20] "Protection of persons in the event of disaster," Resolution 76/119 of 9 December 2021 (UN Doc. A/RES/76/119) point 2, https://documents.un.org/doc/undoc/gen/n21/389/89/pdf/n2138989.pdf?token=no196yOTIZeXbCAf7C&fe=true (last accessed May 28, 2024).

[21] On the importance of soft-law instruments in the dynamics of international law see, for all, *Research Handbook on Soft Law*, ed. Mariolina Eliantonio, Emilia Korkea-aho and Ulrika Mörth (Cheltenham-Northampton: Edward Elgar Publishing, 2023).

[22] Attila M. Tanzi, "The Role of the UN in the Codification and Progressive Development of International Law," in *Reimagining the International Legal Order*, ed. Vesselin Popovski and Ankit Malhotra (Abingdon-New York: Routledge, 2024), 95–125.

The Reform Discourse in the UN

As far as international institutions are concerned, the UN Secretary-General Guterres has significantly launched an appeal for reform by arguing that "the alternative to reform is not the status quo. The alternative to reform is further fragmentation. It is reform or rupture."[23]

However, the same considerations made above on the difficulties in the present time about international law-making in general would inevitably apply with specific regard to the UN Charter. Moreover, given the weighted procedure under Articles 108 and 109 of the Charter, consent of two-thirds of the member states and, especially, that of all Permanent Members of the Security Council will be required for either "amendment" or "revision" of the Charter, respectively.[24]

Under such a procedural framework, a review process may be set in motion that could well lead to the *adoption* of a change by a two-thirds majority. The process could risk stopping in the middle of the ford if obtaining the ratification of the five Permanent Members within the required two-thirds ratifying member states turns untenable. In the unlikely worst-case scenario, the mere adoption of a new text would undermine the authority of the original text of the Charter while falling short of the *entry into force* of the adopted text.

The above appeal for reform by the UN Secretary-General does not seem to be one involving the review of the Charter. It rather addresses the deeper attitude of the major and middle-sized powers currently inclined towards unilateralism. This approach smacks of abandoning the international cooperative mechanism in multilateral forums which is the precondition for the functioning of the UN system in the pursuit of the Charter's goals, with special regard to the peaceful settlement of international disputes. For instance, in view of Chapter VIII of the Charter

[23] *Supra* note 3.

[24] Cf. Attila Tanzi, "Notes on the 'Permanent Conference of Revision' of the United Nations Charter at the 50th Anniversary of the Organization," *Rivista di diritto internazionale* 78, no. 4 (1995): 723–737.

on the 'regional organisations first' principle, the Conference on Security and Co-operation in Europe, later renamed as the Organisation for Security and Co-operation in Europe (OSCE) comes to mind regarding its powerful role as a multilateral forum for negotiation and mutual understanding. It was a key to containing the East-West confrontation during the Cold War, to the extent of catalysing its end.[25] Against such a backdrop, it is regrettable that similar precious multilateral forums for a rules-based dispute-preventive and confidence-building dialogue have been neglected before, and especially following the Crimean crisis of 2014. Possibly, this could have prevented the 2022 Ukrainian invasion.

Similarly, the UN Secretary-General's appeal for reform, perceived as inducting some amendment, rather than a total revision of the Charter, is an attempt to resuscitate a multilateral cooperative spirit among the member states. It is also reflected in the language on the UN website, particularly with reference to the preparation of the "Summit of the Future" to be held on 22–23 September 2024, as it reads: "The Summit of the Future is a once-in-a-generation opportunity to enhance cooperation on critical challenges and address gaps in global governance."[26] The summit appears to have been conceived as a solemn opportunity to "reaffirm existing commitments including the Sustainable Development Goals (SDGs) and the United Nations Charter, and move towards a reinvigorated multilateral system."[27]

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[25] See, amongst others, Ulrich Fastenrath and Christian Fastenrath, "Organization for Security and Co-operation in Europe (OSCE)," in *Max Planck Encyclopaedia of Public International Law*, ed. Anne Peters (online ed.: Oxford University Press, 2019), *The OSCE: Soft Security for a Hard World: Competing Theories for Understanding the OSCE*, ed. Roberto Dominguez (Bruxelles: Peter Lang, 2014), David Galbreath and Malte Brosig, "OSCE," in *Routledge Handbook on the European Union and International Institutions: Performance, Policy, Power*, ed. Knud Erik Jørgensen and Katie Verlin Laatikainen (London-New York: Routledge, 2013), 271–81. See also, with a more political overtone, *Conflits, sécurité et cooperation/Conflicts, security and co-operation, Liber amicorum, Victor-Yves Ghebali*, ed. Vincent Chetail (Bruxelles: Bruylant, 2007).

[26] https://www.un.org/en/summit-of-the-future (last accessed May 28, 2024).

[27] Ibid.

The rationale behind the Secretary-General's call for change while referring to the attitude of member states, instead of amending the Charter, can also be found to have been clearly expressed in the 2023 policy brief "A New Agenda for Peace," stated as follows:

> *In the declaration on the commemoration of the seventy-fifth anniversary of the United Nations, heads of State and Government undertook to promote peace and prevent conflicts. Honouring this pledge will require major changes by Member States, in their actions and in their commitment to uphold and strengthen the multilateral system as the only viable means to address an interlocking set of global threats and deliver on the promises of the Charter of the United Nations around the world.* [28]

The message to treasure the existing UN system as originally envisaged and pursue its realisation has been sent across by other UN Secretary-Generals during the pertinent moments. One may recall Kofi Annan's address to the plenary session of the UN General Assembly in 2003, when, after recalling the fundamental aims of the Charter, he stated: "[t]he world may have changed, Excellencies, but those aims are as valid and urgent as ever. We must keep them firmly in our sights."[29] Similarly, in January 1992, during heightened anxieties unleashed by the Bosnian crisis and other post-Cold War issues, Secretary-General Boutros Boutros-Ghali reiterated the urgency by observing:

> *The powerful must resist the dual but opposite calls of unilateralism and isolationism if the United Nations is to succeed. For just as unilateralism at the global or regional level can shake the confidence of others, so can isolationism, whether it results from political choice or constitutional circumstance, enfeeble the global undertaking. Peace at home and the urgency of rebuilding and strengthening our individual societies necessitate peace abroad and cooperation among nations.* [30]

[28] https://dppa.un.org/en/a-new-agenda-for-peace (last accessed May 28, 2024).
[29] "Secretary-General's address to the General Assembly," September 23, 2003 www.un.org/sg/en/content/sg/statement/2003-09-23/secretary-generals-address-the-general-assembly (last accessed May 28, 2024).
[30] Boutros Boutros-Ghali, *An Agenda for Peace: Preventive Diplomacy, Peace-making and Peace-keeping* (New York: United Nations, 1992) 46.

In recent times, we have seen a passage in the Secretary-General Guterres's speech to the plenary session of the 2023 UN General Assembly, where he referred to an aspect which would bring into question action requiring some kind of formal review of the Charter regarding the question of the reform of the Security Council.[31]

The issue of the revision of the Charter was in the mind of its drafters since the San Francisco Conference to reconsider the veto power of the five Permanent Members and the membership of the Council. Article 109(3) provided that the proposal to convene a conference of revision of the Charter should be placed on the agenda of the 10th annual session of the General Assembly in case such a conference had not taken place by then. The package deal conceived at the constituent San Francisco Conference was meant to assuage the concerns of small and medium-sized states about the privileged status of the five Permanent Members, as well as their right of veto. It was suggested that such a setting would only be provisional, just until a conference for revision would be held. The issue was placed on the agenda of the 10th annual session of the General Assembly, but the votes of two-thirds of the Assembly, together with the concurring vote of nine members of the Security Council, required to convene the conference of review were clearly out of reach. Therefore, the issue was not put to vote, and it was decided that such a conference should be held "at an appropriate time."[32]

Such considerations of substance concerning the options for revision, was, and possibly still is, important considerations of a procedural nature that militate against embarking on the route of a conference of revision. The most important of such considerations have already been mentioned concerning the highly weighed procedure for the entry into force of the would-be revised text. Even if a new negotiated text managed to obtain the two-thirds of the votes necessary for its adoption, its entry into force would remain hostage to the

[31] *Supra* note 3.
[32] "Proposal to call a General Conference of the Members of the United Nations for the purpose of reviewing the Charter," Resolution 992 of 21 November 1955 (UN Doc. A/RES/992) www.refworld.org/legal/resolution/unga/1955/en/7494 (last accessed May 28, 2024).

collective attitude of the member states necessary to reach the minimum two-thirds ratifications. It would especially include each and all of the five Permanent Members, possibly denting the authority of the original text.

Combined with this, there is the other procedural consideration militating against convening a general conference of revision of the Charter under Article 109. There is, however, a strict time constraint, typical of a diplomatic conference, within which to close the negotiations, with success or failure. Convening a second session to provide further latitude for reaching general consent is not unusual. One may recall the two sessions of the diplomatic conference leading to the 1969 *Vienna Convention on the Law of Treaties*. However, given the fundamental political stakes involved in the Charter's review discourse, the risk of a double failure within a strict temporal framework would be extremely high.

It is fair to say that it is against this procedural backdrop that amending the Charter, with special regard to changes in the composition of the UN organs, including the Security Council, have realistically been discussed within the framework of the General Assembly under Article 108 on amendments. This is without the above discussed time constraints required under Article 109. One may recall the well-known amendments to Articles 23 and 27 enlarging the composition of the Security Council and adjusting its voting procedure accordingly. The membership of the Economic and Social Council (ECOSOC) under Article 61 of the Charter, adopted by the General Assembly in December 1963 and entered into force in August 1965 is yet another precedence. A further amendment to Article 61 was adopted by the General Assembly in December 1971, which entered into force in September 1973.[33] Article 109 itself was amended in December 1965, so that its first paragraph now provides that a general conference of member states to revise the Charter may be held at a date and place to be fixed by a two-thirds vote of the members of the General Assembly and a vote of nine members of the Security

[33] See the amendments in "United Nations Charter: Amendments to Articles 23, 27, 61, 109," www.un.org/en/about-us/un-charter/amendments (last accessed May 28, 2024).

Council.[34] Based on these somewhat loose procedural boundaries, with special regard to the temporal framework, the General Assembly has provided the forum for some kind of a 'permanent conference of revision' under Article 108, instead of an ad-hoc diplomatic conference under Article 109.

The negotiation process dormant since the early 1990s was revived following the Cold War but has yet to yield any tangible formal results. Since 2016, it has focused on the Security Council within the Intergovernmental Negotiations framework (IGN), which is composed of international groupings characterised by different views for reform. For instance, the African Union, supporting a procedural approach centred around a 'treaty based negotiations' and informal top-down 'quick-fix,' the G4 nations (Brazil, Germany, India and Japan), aiming at acquiring permanent membership, possibly with the right of veto, the Uniting for Consensus Group (UfC), co-ordinated by Italy and including Argentina, Malta, Mexico, Pakistan and South Korea, amongst others, which procedure-wise calls for the required consensus before engaging into any decision process, while it substance-wise shows openness to the addition of new seats for non-permanent members, provided this be through consensus to be expressed in the negotiation process. Similarly, the L69 Group of Developing Countries, comprising states from Africa, Asia, Latin America, the Caribbean, and Pacific Small Island States, united by the common intent of reaching an expansion of permanent and non-permanent seats to attain a more equitable representation in the Council, concurrently, the Arab League expressed a mild inclination towards a comprehensive reform of the Council based on consensus. In this regards, the shared Chinese-Russian position is also worth noting, which is mildly open towards informal consensus-based formulas, provided consensus goes clearly beyond the two-thirds majority and is opposed to imposed quick timelines.

A recent significant development is noteworthy against the above divergences on formulas of reform concerning the composition and voting procedure of the Security Council. For instance, a non-legally binding, but authoritative instrument like a General Assembly resolution, aiming to enhance the Security

[34] See the amendments in "United Nations Charter…"

Council's accountability, especially of the Permanent Members placing their veto offers a viable consideration. It provides some form of residual competence by default for the General Assembly on the issues concerning which the Security Council could not act because of the veto in question. This is Resolution 262/76, adopted by the General Assembly in April 2022, which, in the relevant part for our purposes, states that:

> i. The General Assembly shall convene a formal meeting of the General Assembly within 10 working days of the casting of a veto by one or more permanent members of the Security Council, to hold a debate on the situation as to which the veto was cast, provided that the Assembly does not meet in an emergency special session on the same situation;
> ii. Also decides, on an exceptional basis, to accord precedence in the list of speakers to the permanent member or permanent members of the Security Council having cast a veto;
> iii. Invites the Security Council, in accordance with Article 24 (3) of the Charter of the United Nations, to submit a special report on the use of the veto in question to the General Assembly at least 72 hours before the relevant discussion in the Assembly (…)."[35]

This resolution is reminiscent of the so-called "Uniting for Peace" resolution adopted in 1950 at the time of the Korean War to sidestep the Soviet veto against a draft resolution in the Security Council, aimed at taking enforcement action against North Korea which had invaded South Korea.[36] However, Resolution 262/76 falls short of any attempt at residually affording the General

[35] "Standing mandate for a General Assembly debate when a veto is cast in the Security Council," Resolution 76/262 of 28 April 2022 (UN Doc. A/RES/76/262) https://documents.un.org/doc/undoc/gen/n22/330/37/pdf/n2233037.pdf?token=uWapGlz4tAGgGCBXtO&fe=true (last accessed May 28, 2024).

[36] "Uniting for Peace," Resolution 377 A (V) of 3 November 1950 (UN Doc. A/RES/377 (V)) www.un.org/en/sc/repertoire/otherdocs/GAres377A(v).pdf (last accessed May 28, 2024). For a doctrinal commentary from the time this resolution was adopted, see Keith S. Petersen, "The Uses of the Uniting for Peace Resolution since 1950," *International Organization* 13, no. 2 (1959): 219–232 and Juraj Andrassy, "Uniting for Peace," *American Journal of International Law* 50, no. 3 (1956): 563–582.

Assembly with enforcement powers with which the Security Council is vested under Chapter VII on the collective security system. After all, the "Uniting for Peace" never achieved its original objective of introducing some kind of unwritten modification to the Charter by way of Constitutional Customary law, since it was immediately contested by the Soviet delegation and soon abandoned by the proposing Western delegations themselves, once they lost their majority in the General Assembly amidst the fast-unfolding decolonisation process.

Conclusion

The paper has argued and tried to illustrate how, in the relationship between law and society, the former is the by-product of the latter and its political processes. Therefore, societal crisis cannot be attributed to alleged shortcomings of the law. Blaming the law for not being able to fix major social conflicts and crises flow from a misrepresentation of reality where putative limitations of the law become the scapegoat of the political incapacity, or unwillingness, to properly address such conflicts and crises in pursuit of the general interest.

A harmonious society and its government can produce good laws for the community at large in a long-term perspective, which may easily adjust to evolving social needs, becoming effective through spontaneous compliance and functional enforcement mechanisms generally regarded as authoritative and legitimate. On the other hand, whatever in the abstract may be good law, it cannot change a troubled society.[37]

In the international society, the issue is doubly complex. The difficulties are around the international balance intersect with those in a plurality of national societies. They are inevitably reflected in the international sphere. It has already been stressed how the fact that we are living in times of increasingly divided and polarised societies, which produce authority and

[37] See also "Addendum to Attila M. Tanzi, A Concise Introduction to International Law, Second Edition," 4–14 www.giappichelli.it/media/catalog/product/aggiornamenti/9788892145337_Tanzi_Addenda.pdf (last accessed May 28, 2024).

legitimacy crises in many nation-states and, consequently, on the international level, can impact international law and its effectiveness.[38]

The Gazan and Ukrainian crises are claiming an extremely heavy toll from international peace and security efforts and institutions, as well as debilitating international legality and confidence reposed in them. The Ukrainian conflict, apart from its intense humanitarian aspects, has reintroduced the East-West confrontation to an unprecedented degree, catalysing further fragmentation on the international scene.

The attack by Hamas on Israel on October 7, 2023, also represented an attack on the diplomatic peace process in the Middle East, which was being conducted by several Muslim countries, especially in the Gulf. The ripple effect of this attack and the disproportionate military reaction by Israel, in combination with the other internal and ongoing and potential conflicts around the world could be disastrous.

Against the backdrop of the gloomy international and domestic picture worldwide described above, one may think of international law and international lawyers at the time preceding the two World Wars, between and during them. The following words by Judge Anzilotti, in his individual opinion in the 1931 Permanent Court of International Justice, Advisory Opinion in *Customs Regime between Germany and Austria* may come to mind with a degree of disenchantment: "Independence (...) is really no more than the normal condition of States according to international law; it may also be described as sovereignty (*suprema potestas*), or external sovereignty, by which is meant that the State has over it *no other authority than that of international law*."[39]

Upon further reflection, also prompted by the positive thinking by one of the most authoritative successors of Judge Anzilotti, based on the

[38] See Friedrich de Martens' remarks above.
[39] *Customs Regime between Germany and Austria*, 19 March 1931, PCIJ, Advisory Opinion, Individual Opinion by M. Anzilotti, 57.

recurrent lessons of history, such disenchantment may be tempered by the objective consideration that no war or systemic atrocity has prevented international law to resuscitate and grow each time stronger than before. Indeed, as authoritatively stated by ICJ Judge, and former President, Abdulqawi Yusuf:

> *History teaches us that the manner in which humanity engages with international law depends on the nature and scale of the challenges that it faces. When faced with the cruelty and inhumanity of slavery in the nineteenth century, States adopted in 1890 and 1926 binding legal instruments to prohibit slavery and to cooperate with a view to its suppression. When faced with the death of 75 million civilians during the Second World War, States adopted the Fourth Geneva Convention in 1949 devoted to the protection of civilians in times of international armed conflicts. When faced with the uprising, opposition and rebellion of peoples all over the world against colonialism, States established the right of peoples to self-determination, which enabled colonial peoples to accede to independence and facilitated the process of decolonisation. When non-international armed conflicts became the leading type of conflicts, they adopted Additional Protocol II, which extends to these types of conflicts the elementary considerations of humanity*. [40]

One only wonders how many more wars and humanitarian crises this time the international society needs to go through before an equitable rules-based system is to resuscitate and apply evenly around the globe. In the meantime, it would be ideal, next to idealistic, if nation-states, peoples, minority groups and individuals, would go by the minimum common regulatory inter-cultural and inter-religious "Golden Rule" denominator, expressing the importance for each one to "love for his brother what he loves for himself"[41] or, in other words, whereby "*all things whatsoever ye would that men should do to you, do ye even so to them*,"[42] or "hurt not

[40] Ahmed Abdulqawi Yusuf, "Engaging with International Law," *International and Comparative Law Quarterly* 69, no. 3 (2020): 505–520, 518.
[41] Hadith 13, 40 Hadith an-Nawawi (Islam).
[42] Matthew 7:12 (Christianity) *in The Bible: Authorized King James Version*, ed. Robert Carroll and Stephen Prickett (Oxford: Clarendon Press, 1997).

others in ways that you would find hurtful."[43] And if war were to be considered as an unavoidable evil on earth, International Humanitarian Law has been devised throughout the centuries by the international society to contain its horrors and protect civilians. It has been convincingly argued that, for confidence in international law to be re-established, those who invoke international humanitarian legal principles and wish wrongdoers to be held accountable must engage in some 'ethics of reciprocity' and show that they are prepared to hold their military and those of their allies to the same standards that they invoke.[44]■

[43] Udana-Varga 5.18 (Buddhism) in *Udânavarga: A Collection of Verses from the Buddhist Canon*, ed. W. Woodville Rockhill (London: Routledge, re-printed, 2000). Hathaway, *supra* note 5.
[44] Hathaway, *supra* note 5.