International Law Programme
Conference Summary

United Nations at 70:
International Law and the
Achievement of UN Aims

A day conference at the Foreign and Commonwealth Office, hosted by Chatham House in partnership with the UN Office of Legal Affairs

16 October 2015
Introduction

One of the most distinctive features of the new world order is the greater interconnectedness between global actors and the reduced significance of international borders. It is the goal of the UN and the international community to work together through international institutions and international law to improve global governance and to uphold the three pillars of the UN: peace and security, development and human rights. To mark the 70th anniversary of the establishment of the UN, on 16 October 2015 the International Law Programme of Chatham House held an event in partnership with the UN Office of Legal Affairs at the UK Foreign and Commonwealth Office to consider the extent to which the current international legal framework is and has been able to live up to this task.

In the context of the four preambular clauses of the UN Charter (set out below), the discussions analysed the performance of the international legal framework in response to evolving threats and challenges. How does international law contribute to the achievement of the aims of the UN articulated in the opening of the UN Charter? This summary draws together the main points and themes discussed throughout the conference.1

The conference was not held under the Chatham House Rule.

We the peoples of the United Nations determined

- to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind, and
- to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small, and
- to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained, and
- to promote social progress and better standards of life in larger freedom

1. To save succeeding generations from the scourge of war

Chair: Elizabeth Wilmshurst, Chatham House
Panellists:
Professor Dapo Akande, University of Oxford
Professor Guglielmo Verdirame, King’s College, London; 20 Essex Street Chambers
Cathy Adams, Foreign and Commonwealth Office

The rules regulating the use of force under the UN Charter

- The UN Charter lays down foundational rules for the international community, thus sharing features with a constitutional document. The question was raised: is this capable of regulating new and unforeseen challenges over time?

1 This conference summary was prepared by Victoria Barlow.
Although the rules on the use of force are embedded in a document with a strict amendment procedure, the International Court of Justice (ICJ) determined in the *Nicaragua* case that the rules are found in customary law as well as in the UN Charter. It is typical to see extensive reference to state practice in arguments relating to the adapting of the rules regulating the use of force. Yet it is problematic to suggest that the rules change in accordance with state practice. Even if these rules are customary, they are nonetheless treaty rules of the Charter, which has superiority over other treaties. We may therefore be using practice in two ways when we say that the rules have adapted to respond to new challenges:

- To underpin an argument that customary international law has changed, requiring both state practice and *opinio juris*, or
- In the interpretation of treaty rules to suggest that there is an agreement of the parties as to how the treaty provision is to be interpreted (as under Article 31 of the Vienna Convention on the Law of Treaties).

With respect to the use of force, it is often impossible to demonstrate that the practice of states establishes the agreement of the parties, as practice is often not uniform. It is therefore difficult to use state practice to make interpretive claims, and more common to claim an evolution in customary international law or formation of a new customary rule.

The relationship between changes in customary international law and the UN Charter is of crucial importance. If there is a divergence between the law of the Charter and customary international law, this is hugely subversive of the entire international legal system, and something that the ICJ avoided in *Nicaragua*. There are three obstacles to accepting that customary law changes can affect the law on the use of force in the Charter, despite the customary nature of those rules:

- The presumption is that treaty rules prevail over customary rules. There is, therefore, an immediate problem in suggesting that customary law can amend the Charter.
- Under Article 103 of the Charter, obligations under the Charter prevail over obligations in any other treaties. Parties to the Charter, therefore, may not amend their Charter obligations, even explicitly, except by amending the Charter itself. If parties cannot amend the Charter by treaty, it is an odd claim that they might amend the Charter implicitly by custom.
- The prohibition on the use of force is widely considered to be a peremptory norm of international law, from which no derogation is permitted. Such norms can only be amended by another peremptory norm of international law.

Despite these obstacles, the rules regulating the use of force are not static and may be adapted to meet new challenges in the following ways:

- There are occasions where subsequent practice can legitimately be used to interpret the Charter, as opposed to forming custom. For example, under the collective security scheme in Chapter VII the practice of the Security Council has often been endorsed by the membership as a whole and is regarded as establishing the agreement of the parties as to

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*Case concerning the military and paramilitary activities in and against Nicaragua (Nicaragua v. United States of America), Merits, 1986, ICJ Rep 14.*
the interpretation of the Charter (e.g. under Article 39 the Security Council has interpreted threats to the peace to include internal matters).

- Organs of the UN are given specific duties and responsibilities under the Charter; these bodies have a form of legal institutional authority that is different from that of states acting unilaterally. The interpretation of the Charter is not always the same as that of other treaties, as it is not necessarily the interpretation of the membership that is relevant, but rather the authentic interpretation of the organ that is given the mandate to take action.

- It is possible to develop the rules of the Charter by reference to custom in the specific context of self-defence. The reference to the ‘inherent’ right of self-defence under Article 51 of the Charter, as affirmed by the ICJ in *Nicaragua*, is a reference to customary international law. As the law of self-defence changes, the Charter accommodates those changes since its content refers back to customary international law. The same arguments cannot be made in relation to Article 2(4).

- It was noted that we must remain cautious about making arguments about changes to the law on the use of force.

**Application of the *jus ad bellum* and the *jus in bello* in non-international armed conflict**

- The international community has had some success at controlling certain forms of violence, particularly inter-state war. What remains problematic is the spread of destructive military capability, particularly through terrorism and the phenomenon of the ‘lone wolf’.

- Article 2(7) of the Charter appears to pose an obstacle to international law interfering in domestic affairs and therefore to the regulation of non-international armed conflict (NIAC). However, the Permanent Court of International Justice (PCIJ) resolved this conceptual difficulty in the *Nationality Decrees* case, stating that domestic jurisdiction is a relative concept, and therefore depends on the development of international relations. There were attempts in state practice after the Charter came into force to assert a more essentialist view of what the reserved domain is, but the analysis of the PCIJ has prevailed.

- It was noted that through Article 2(7) of the Charter, ‘good’ sovereignty has been strengthened (e.g. the right of a state to exist safely without fear of invasion), whereas ‘bad’ sovereignty has been reduced (e.g. the right of a state to suppress minorities).

- From the *jus ad bellum* perspective, the Charter’s main instrument in relation to NIAC is the system of collective security provided for under Chapter VII. In spite of criticisms about the legitimacy of Security Council action, such interventions are still capable of commanding significant respect on the ground.

- Although the Charter’s original collective security scheme has not worked, this is not due to a failure of the law but to strategic and political failures.

- From the *jus in bello* perspective, the relationship between international human rights law and international humanitarian law (IHL) is still unclear. The European Court of Human Rights has

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3 *Nationality Decrees Issued in Tunis and Morocco*, PCIJ Series B, No. 4 (1923).
preserved IHL as the *lex specialis*. In NIAC, however, this relationship is difficult. It was suggested that this should not be addressed through the Charter, but through the practice of states or the adoption of a further protocol to the Geneva Conventions.

- It was noted that the Charter has played a crucial role in the *jus post bellum* through evolving practice.

### Military intervention with humanitarian aims

- On a plain reading of Article 2(4) of the Charter, the prohibition on the use of force is subject to only two exceptions: self-defence and collective security. It has been proposed, however, that international law should not stand in the way of intervention wherever it is morally right or legitimate.

- The United Kingdom’s approach to humanitarian intervention has evolved over time, from an ambiguous and less supportive approach in the 1980s, to a gradually clearer invocation of a doctrine as legally justified in exceptional circumstances in the face of an overwhelming humanitarian catastrophe, triggered by the no-fly zones in Iraq and reaffirmed in the subsequent intervention in Kosovo.

- In 2013, in response to the use of chemical weapons by the Assad regime in Syria, and prior to the vote against military action by parliament, the UK government stated that if action to take all necessary measures to protect civilians was blocked, the United Kingdom would be permitted under international law to take exceptional measures to alleviate the scale of the humanitarian catastrophe, by deterring and disrupting further use of chemical weapons by the Syrian regime.

- Among the main schools of thought with regard to humanitarian intervention, there are those that advocate it as a legal right, and those that accept that it may be politically or morally justified under certain conditions, but maintain that such intervention is, nevertheless, a violation of the Charter.

- Under the ‘illegal but legitimate’ school, it is argued that the language of the Charter does not clearly admit further exceptions to the prohibition on the use of force; that there is insufficient state practice to support such a doctrine; and that, from a legal policy perspective, exceptions to the use of force must be kept tightly constrained in order to prevent states from acting in support of their own interests.

- Arguments supporting a legal doctrine of humanitarian intervention state that it may be possible to read Article 2(4) as permitting such intervention. Practice also exists in which states have acted on humanitarian grounds and have not been criticized. Practice in relation to the responsibility to protect might also be relevant to the development of the doctrine. Although the 2005 UN World Summit Outcome Document suggested that a unilateral right of humanitarian intervention without Security Council authorization is not accepted, it did not necessarily preclude unilateral action, in the speaker’s view, where the Security Council is blocked.

- It was noted that one of the problems of discussing humanitarian intervention is the assumption that it is going to be successful.
• Regardless of the lawfulness of humanitarian intervention, there is a question of whether it should be lawful. Advocating a conclusion of ‘illegal but legitimate’ gives rise to problems of establishing who determines legitimacy, inevitably leading to abuse of the doctrine.

• The United Kingdom believes that it is better to have clear objective criteria agreed upon by states, rather than leaving this to subjective state determinations. In 2013, it laid out conditions: the emergency must be extreme; the intervention must be generally accepted by the international community as a whole; there must be no practicable alternative; and the intervention must comply with the requirements of necessity and proportionality. In the aftermath of the Kosovo intervention, the United Kingdom led an initiative to seek agreement by states on the set of criteria for humanitarian intervention. This was unsuccessful.

• It was acknowledged that it is dangerous to refer to humanitarian intervention as a ‘right’.

• It was suggested that, where the Security Council has failed to act, the General Assembly might be a suitable forum for initiating action, under the Uniting for Peace resolution. The Certain Expenses case might also be used to support the view that the General Assembly is able to authorize peacekeeping forces. The trend however has been towards action by regional institutions. Although the General Assembly does have a role to play in these matters, experience demonstrates that when regional institutions are involved, the sense of legitimacy and prospects of success in the Security Council tend to increase.

• It was emphasized that it is risky to put the system of the UN Charter and the rules pertaining to the use of force into question. If changes are allowed to the rules on the use of force, why not to the rest of the Charter?

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2. To reaffirm fundamental human rights

Chair: Sonya Sceats, Chatham House
Panellists:
Dr Bertrand Ramcharan, former acting UN High Commissioner for Human Rights
Professor Shiyan Sun, Chatham House; Chinese Academy of Social Sciences
Dr Tawanda Mutasah, Amnesty International

The UN vision of human rights

- The Commission on Human Rights, established under Article 68 of the Charter, was given the task of drafting an international bill of human rights. This came to include a Universal Declaration on Human Rights (UDHR), the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR), as well as measures of implementation. This was the great vision of the UN that continues to inspire developments today.

- The strategic value of the human rights movement can be seen through its invitation to states to establish national protection systems. However, these systems require a level of political order, established by three criteria laid out by Francis Fukuyama: a strong state; the rule of law; and democratic accountability.\(^5\)

- As many states remain weak or fragile and lack democratic accountability, adequate national protection systems have still not been established in many countries.

- International law will always be indeterminate due to the number of norms that are not precisely formulated. Vision cannot therefore be static, but rather it must be a construction site where we are able to uphold standards and norms and increase the protection of rights on a continual basis.

The legal framework for the protection of human rights

- There are nine core human rights treaties: the ICCPR, the ICESCR, the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), the International Convention on the Elimination of All Forms of Racial Discrimination, the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the Convention on the Rights of the Child (CRC), the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICMW), the International Convention for the Protection of All Persons from Enforced Disappearance (ICPPED) and the Convention on the Rights of Persons with Disabilities.

- With the exception of the ICMW and the ICPPED, the other seven core treaties have more than 150 states parties. The United States is the only member of the Security Council permanent five that has not ratified the ICESCR, while China is the only one of the permanent five not to have ratified the ICCPR. There are varying levels of ratification amongst global powers and populous states, with some states and regions having far better ratification records than others.

- Regardless of these issues of ratification, human rights protection on paper is different from practice, and the realization of human rights goals in the Charter depends on the implementation of human rights treaties. This is monitored by human rights treaty bodies.

• These bodies have five mechanisms at their disposal to encourage implementation:
  
o  State reporting: every state party is required to submit a periodic report to the body. In practice, delays are a serious issue.
  
o  Inter-state communication procedure: this is an optional procedure that has never been resorted to.
  
o  Individual communications/complaint procedures: none of the human rights treaty bodies are judicial bodies, therefore their views and decisions are not legally binding. This procedure can however be a litmus test for how effective the international human rights treaty regime has been or can be, and the extent to which a state commits itself to human rights norms.
    ▪ None of the permanent five member states has accepted the individual communication procedure under the ICESCR, the ICMW or the CRC. China, the United States and several other populous states have not accepted any of the individual communication procedures, hindering implementation.
  
o  General comments or observations.
  
o  Inquiries.

The current state of affairs

• Although we are not necessarily where we want to be at the normative level, the international code of human rights has been and remains useful and worthwhile. It provides a normative basis and institutional framework for UN human rights work, and informs domestic legislation, judiciaries and domestic human rights discourse, equipping civil society with a powerful instrument to demand rights promotion and protection from the government.

• There is an extensive set of human rights jurisprudence from treaty bodies and the ICJ (e.g. in Bosnia v Serbia the ICJ elaborated on the responsibility of states to act for the prevention of genocide), and strong guidance in general comments (e.g. General Comment No. 31).

• Strict standards of implementation appear to be giving way to a soft law approach of dialogue, cooperation and consensus. For example, the Human Rights Council’s mandate is based on dialogue and cooperation in the enforcement of human rights.

• Formal universality has held up, but there has been a lack of universality in application. The Universal Periodic Review (UPR) process is helping to promote universality.

• Human Rights Special Procedures, the High Commissioner for Human Rights, and human rights NGOs, such as Amnesty International, perform valuable services in exposing violations.

• The universal culture of human rights has not yet taken root but human rights norms do have a role to play in prevention.

• Beyond norms, the real challenge is implementation. After the commitment that states have signed onto in the UPR process or after states have received a normative outcome, difficulties arise.
in actual implementation – not just in terms of what it is that normatively has been agreed, but also at the level of committing resources, local technical expertise and the political will to implement these norms and standards.

- The international community is not always capable of protecting vulnerable people from human rights abuses, as implementation is not always easy to achieve. Sometimes the most it can do is to record abuses and hope that the documentation can be used in the future.

- It is difficult to assess the impact of international human rights law and institutions on the human rights situation in a state. The situation is also affected by interconnected and mutually reinforcing international pressures, and domestic motivations.

- It was suggested that international treaties have had a positive impact through:
  - Informing domestic legislation: many laws have been copied from the UDHR, covenants and conventions.
  - Informing interpretation: in some states human rights treaties are directly applicable; in others human rights norms may be used as an aid to interpret domestic laws. For example, although China has not ratified the ICCPR, many Chinese scholars use it as an instrument to assess the current legal framework and advocate for change in the Chinese legal system.

Accountability for mass atrocities

- There has been significant progress in accountability for mass atrocities, particularly through the establishment of the International Criminal Court (ICC) in 2002 and the advancement of international criminal law jurisprudence in the international criminal tribunals and hybrid courts.

- In turn, through the complementarity formula for jurisdiction of the ICC (Article 17 of the Rome Statute), and the concurrency-and-referrals formulae of the international tribunals (e.g. Rule 11bis of the International Criminal Tribunal for Rwanda Rules of Procedure and Evidence) we have seen how these international or internationalized accountability regimes have also fostered domestic accountability in some countries.

- However, as seen in the ongoing case of lack of accountability for the tens of thousands of civilians who have died in the ongoing conflict in Syria, and even the seeming inability of the international community to stop the commission of mass atrocity crimes in that country, international justice mechanisms often fail. There have also been large numbers of civilian deaths in the conflicts in Ukraine, Central African Republic and elsewhere. There clearly remains a challenge within the UN system in circumstances where the ICC does not have jurisdiction, either on the basis of a state being a party to the Rome Statute, or where the Security Council has failed to refer a situation to the Court.

- It is necessary for members of the Security Council voluntarily to renounce their use of the veto in situations of mass atrocity.

- The interstate adjudication system is also important in the search for accountability for mass atrocity crimes. As ad hoc Judge Sur observed in his separate opinion in *Belgium v Senegal*, the

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ICJ is increasingly trying to catch up with international criminal tribunals in its approach to accountability. Through a number of cases, including Belgium v Senegal and Congo v France, the ICJ is helpfully, if slowly, developing an accountability platform that complements the accountability platforms proper, the criminal courts.

- Fewer norms have been elaborated and are available to non-state actors, as this goes beyond the usual framework and thinking of the inter-state system. This needs to be addressed though some steady progress is being made in areas such as the developments on crimes against humanity.

- Increasingly we are seeing a fragmentation of international law, particularly through regional arrangements under Article 52 of the Charter. This recognizes regional arrangements in a context where their activities are consonant with the principles and values of the UN. Some of what we have now is not necessarily consonant with these principles:
  
  o There has been significant divergence between what the ICC and regional organizations may call upon states to do in relation to accountability. For example, there is a clear difference in approach to the al-Bashir case by the ICC and the African Union.

  o There have also been controversies in relation to Security Council deferrals under Article 16 of the Rome Statute, again including cases such as al-Bashir.

  o The veto continues to be used in situations where, had the veto been voluntarily waived by the permanent five in situations of mass atrocities, a better outcome for the protection of human rights and accountability would possibly have been achieved.

- Although originally lagging behind in developments, we now see a greater prioritization of human rights law, which is a result of the humanization of international law.

- As we look at the evolution of human rights norms and the legal framework under the auspices of the UN in the last 70 years, questions still remain about how much the individual is occupying her appropriate place in international law – evolved traditionally as an inter-state system – and how we can make the human rights system genuinely available for the individual, beyond the inter-state level.
3. To establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained

Chair:
Sir Franklin Berman, Essex Court Chambers

Panellists:
Judge Theodor Meron, International Criminal Tribunal for the former Yugoslavia and Mechanism for International Criminal Tribunals; University of Oxford

Professor James Sloan, University of Glasgow

The International Court of Justice

- The peaceful settlement of disputes is one of the core purposes of the UN.

- The extent to which the ICJ can, through its judgments and advisory opinions, contribute to this purpose depends not only on its capability, but also on the issues that states are willing to entrust to it.

- Where parties have been willing to refer disputes to the Court and to abide by the results, judgments have had a notable impact on peacemaking and the avoidance of armed conflict.
  
    - *Cameroon v Nigeria*: this case led to the resolution of the territorial dispute over the Bakassi Peninsula and the end of armed confrontations taking place there. The end came after an intervention by the UN Secretary-General and the establishment of a mixed commission. The situation clearly had potential to develop into a general war.

    - *Libyan Arab Jamahiriya/Chad*: the ICJ awarded the Aouzou strip to Chad, and Libya agreed to evacuate its forces from Chad in accordance with an agreement between the parties, following involvement by the Security Council and the UN Secretary-General. This kind of involvement is often decisive in whether a judgment achieves the desirable results.

- Despite a lack of cooperation by some parties, other cases have also had important impacts.
  
    - *Nicaragua v United States*: this may have contributed to a more restrained approach to the use of force, to constraints on forcible countermeasures, to the strengthening of the principle of non-intervention, to clarification of rules pertaining to self-defence and customary law.

    - *Tehran Hostages case (United States v Iran)*: this contributed to the elaboration of human rights and to some degree of normalization in the relations between the United States and Iran.

    - *Oil Platforms (Iran v United States)*: despite the narrow jurisdictional basis of this case, it has had a positive impact on encouraging constraints on the use of force.

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*Territorial Dispute (Libyan Arab Jamahiriya/Chad), 1994, Judgment, ICJ Rep 6.*

• Despite these positive impacts, the overall picture is less reassuring. Powerful states often do not refer cases that constitute immediate threats to international peace and security to the ICJ (e.g. the Cuban Missile Crisis and the Israel/Palestine conflict). It is also regrettable that so few states are willing to be bound by the jurisdiction of the Court.

• It was suggested that limitations on the degree to which the ICJ has made contributions to international peace and security should not be seen as deficiencies or failings of the ICJ, but rather as a lack of desire of states to refer disputes to the Court.

• Nevertheless, the ICJ has also contributed to the development of human rights:
  
  o **Palestinian Wall Advisory Opinion:** the ICJ affirmed the parallel applicability of the protective systems of international human rights law and IHL in occupied territories.
  
  o **Barcelona Traction:** the Court clarified the principle of *erga omnes* obligations.
  
  o **Legality of the Threat or Use of Nuclear Weapons Advisory Opinion:** the Court determined that the protection of human rights under the ICCPR does not cease in times of war, except in the context of derogations under Article 4. The question of arbitrary deprivation of life falls under the *lex specialis* of IHL. The Court also made a contribution to the notion of peremptory norms.
  
  o **Belgium v Senegal:** the Court confirmed that the prohibition on torture is established both as customary international law and as a peremptory norm.
  
  o **Genocide Convention case:** the Court elaborated on the responsibility of states to prevent the commission of genocide. It also gave its clear imprimatur to the jurisprudence of the ICTY on international criminal law.

• The ICJ frequently emphasizes that it does not have the power to legislate. Instead it favours a characterization of its role as a clarifier of laws. While the ICJ has arguably not single-handedly made law, many areas of international law have been deeply affected by the jurisprudence of the Court. ICJ pronouncements are always treated as relevant contributions to the development of legal norms: it is often considered to have clarified the law in areas where it is contested; many decisions have been acknowledged as having recognized certain legal developments and thereby ratified them; and its pronouncements have often been incorporated into international law through codification.

• The ICJ has had variable impacts from one subject area to another. Cases that are referred to the ICJ typically pertain to territorial, environmental and maritime disputes. It was noted that even small territorial disputes which, in the beginning, result in boundary skirmishes and incidents could eventually lead to larger armed conflicts.

• In other areas, the Court has been less influential. This may be for a number of reasons:

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14 *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, 2012, Judgment, ICJ Rep 422.
16 See for example *Nuclear Weapons*, [18].
It may reflect the fact that very few cases in that subject area made their way to the Court.

It may be a reflection of the existence of the advanced nature of the sources of international law in that particular area.

It may be due to the existence of other agencies capable of deciding on the legal issues in that area, resulting in less need for the ICJ (e.g. specialized human rights treaty bodies or other principal organs of the UN). This reflects the concept of complementarity: the ICJ is only required to step in rarely, showing a healthy level of deference to other agencies.

- It was acknowledged that the ICJ has strongly adhered to its role as the principal judicial organ of the UN, in particular, through giving its imprimatur to technical, legal and evidentiary issues in other courts, thereby providing them with the added authority of an endorsement of the ICJ. This is a particularly positive aspect of the co-existence of several international courts.

- After 70 years, we see a Court that is indisputably influential. Despite the establishment of new international courts and tribunals the ICJ remains strong due to its quality and reputation. Decisions of the Court are rarely ignored and even when they are, their influence on subsequent legal discussions tends to be hugely significant.

**International criminal courts and tribunals**

**Peacemaking**

- By indicting international criminals for committing atrocities and removing them from society, international criminal courts and tribunals have a direct role in the peace process. Even in issuing indictments and arrest warrants an individual’s role may be neutralized.

- Generalizations must, however, be avoided. Although it is argued that the indictment of Karadzic played a key role in facilitating the Dayton peace accords, this has not been the case with regard to President al-Bashir, who has not been arrested or removed, and neither his indictment nor his arrest warrant has much affected his role in Sudan and neighbouring countries.

- In other cases, the prospect of indictment or insistence on an arrest warrant may arguably be used by some actors to destabilize the peace process, for example, the submission of the Palestine situation to the ICC, though it is not universally agreed to have had this effect.

**Reconciliation**

- Although reconciliation is almost always cited as a reason for establishing international criminal courts, a focus on reconciliation might contradict the narrow mandate of international criminal tribunals, which is to determine whether an individual is criminally responsible for an international crime beyond reasonable doubt based on the law and the evidence.

- To push the reconciliation agenda to the forefront might in some cases result in a lack of objectivity by the prosecution and the judges. The role of reconciliation may therefore be better served by such bodies as truth commissions.

**Deterrence**

- There is not enough evidence to suggest that international criminal tribunals have a concrete deterrent impact. Nevertheless, even public discussion of the possibility of prosecution may have some deterrent effect in relation to the planning for and conducting of military operations.
• The possibility of prosecutions, restrictions on travel and targeted economic sanctions may begin to weigh on the thinking of military leaders.

The promotion of human rights by international criminal tribunals
• International criminal courts apply international criminal law and IHL as the substantive law; they are not human rights courts.

• The work of these tribunals has nevertheless been profoundly influenced by human rights principles. As a result, these courts have fostered a much greater understanding and protection of human rights.

• While formally mandated to apply IHL, international criminal courts have rigorously conformed to human rights standards, such as the principle of legality (nullum crimen sine lege). The courts have dealt with issues such as the right to self-representation, the scope of the principle of equality of arms, establishing fitness to stand trial, and so on.

• In addition to due process and procedural rights, these courts have made tremendous contributions to substantive human rights through:
  o The elaboration of the content of Common Article 3 of the Geneva Conventions, which is a quintessential statement of human rights, not only of IHL.
  o In the Tadic interlocutory decision, the ICTY established that many of the rules and principles governing international armed conflicts also apply to non-international armed conflicts.
  o In construing the material elements of crimes under IHL, these courts have dealt with the notion of torture. For example, in Kunarac, through invoking the jurisprudence of human rights bodies, the ICTY established the constitutive elements of the crime of torture in such a way as to exclude the necessity of the presence of a public official. In other cases, courts have established what kind of sexual assault constitutes torture, and the degree of harm necessary for the crimes of torture and inhuman treatment.

Respect for the principles of justice, international law and the rule of law
• Tribunals have clearly served UN purposes by encouraging respect for the principles of justice and the rule of law, and adherence to international legal obligations through upholding the same principles of fairness and due process that we expect advanced and progressive national jurisdictions to comply with.

• In order to achieve international criminal justice on a more global basis, the robust cooperation of national jurisdictions is required. International criminal courts can only address a handful of cases: those who have committed the gravest crimes and those who are most responsible. It is hoped that international criminal tribunals are creating a model of justice, due process and fairness of trials for national jurisdictions.

• International criminal tribunals have promoted legal certainty, procedural transparency and the avoidance of arbitrariness by creating a doctrine of robust precedents.

• They have contributed to a general understanding of the professional and ethical duties of judges, prosecutors, and criminal defence at the international level.

• Despite failed attempts to encourage states to invoke universal jurisdiction for grave breaches of the Geneva Conventions, grave breaches have become part and parcel of statutes of international criminal tribunals and are routinely prosecuted before these tribunals. They have developed a significant body of jurisprudence, translating the rules stated in the Geneva Conventions into detailed norms.

• They have also contributed to the exponential development of IHL and international criminal law.

Ongoing challenges

• International criminal courts and tribunals face the inherent problem of selectivity. This poses an enormous challenge for international criminal justice as the rule of law demands equality of enforcement and non-arbitrariness.

• Selectivity is however a political and practical necessity. Criminal tribunals are courts of limited jurisdiction that may be exercised only over situations in which states have acceded to their jurisdiction or by mandate of the Security Council. This subjects international criminal justice to the vagaries of politics where some states will prioritize alliances and self-interest over the rule of law.

• We have witnessed a paradigm shift in thinking in the international order: impunity is no longer an acceptable option.
4. To promote social progress and better standards of life in larger freedom

Chair: Professor Sir Nigel Rodley, University of Essex
Panellists:
Professor Christine Chinkin, London School of Economics and Political Science
Professor Ben Saul, Chatham House
Dr Margot Salomon, London School of Economics and Political Science

The protection of economic and social rights

- The purpose of economic and social rights was to create minimum conditions of a dignified life.

- They are often said to be the poor relations of civil and political rights, particularly in the West. Upon drafting, they were chronologically second-generation rights, following civil and political rights, but there was near unanimous support for their inclusion in the UDHR.

- Drafting disagreement arose over how to implement and supervise them. Most states believed that they were not capable of being immediately fulfilled or adjudicated in the same manner as civil and political rights, but instead required progressive governmental action through the mobilization of resources over time. Many states ratified the ICESCR as it contained aspirational goals with no adjudication procedures. The treaty was so ambiguous that it meant all things to all people.

- What has been problematic is the actions of states since the drafting of the ICESCR.
  - Although many states have legislated for economic and social rights, formal recognition does not necessarily mean that these are effective or enforceable.
  - These rights are less embedded in national legal systems than civil and political rights.
  - Historically they have been neglected by different actors.

- The two main challenges to the realization of economic and social rights are:
  - Progressive realization: this provides flexibility to accommodate developmental differences between states, but is often invoked by states to mask non-compliance. The UN Committee on Economic, Social and Cultural Rights (CESCR) has demanded that states commit to implementing these rights, fulfilling a minimum core of each right on a non-discriminatory basis with attention to the most vulnerable groups and a presumption against retrogression. States claim to lack resources even when this is manifestly not the case.
  - Justiciability: objections to justiciability include that these rights are too vague or political with no clear standards to apply; judges lack expertise; and governments are better placed to manage social policies or budgets.

- However, civil and political rights are also vague, political and expensive. Economic and social rights are not innately beyond judicial expertise, just historically so. In practice, economic and social rights are increasingly treated as justiciable in many national legal systems. The issue is therefore how economic and social rights can be adjudicated: the focus has now shifted to the
standard or intensity of judicial review, from the CESCR’s minimum core approach to a public law reasonableness review.

- These approaches preserve the government’s discretion to determine and implement budget and policy, but differ on the degree of judicial intervention and deference to the executive. Courts rightly do not displace government action but hold it accountable.

International supervision and normative developments

- Whereas periodic state reporting is mandatory under both covenants, only the ICCPR dedicates a supervisory body to this: the UN Human Rights Committee. The ICESCR initially only provided for looser reporting to ECOSOC. In 1995, the CESCR was created by an ECOSOC resolution to resolve this imbalance.

- While the CESCR has elaborated on rights through its general comments, its concluding observations have often been criticized as being too general or formulaic and failing to engage with the hard economic questions. This is partly because the Committee lacks economic expertise.

- An optional protocol to the ICESCR was adopted only in 2008. The protocol has low ratification – 21 states in seven years, compared with 115 parties to the CPR Protocol – suggesting significant treaty fatigue and scepticism about even weak adjudication of these rights. However, the CESCR has issued its first decision in *I.D.G. v Spain*,18 on remedies for foreclosures for mortgage default, adding to the jurisprudence on these rights.

- Other parts of the human rights systems have neglected economic and social rights, including regional human rights bodies and the Security Council.

- The duty of international cooperation entrenched in the ICESCR remains weakly fulfilled.

- Economic and social rights are not well integrated into development, trade and investment.19

- The *Palestinian Wall Advisory Opinion* states that economic and social rights apply extraterritorially; however it is not clear whether the test is different from that of the ICCPR.

- The human rights framework is limited by its state-centric nature. There is a clear need to consider ways in which duty-holders can be found in actors other than the state. The international criminal law framework might provide a model. The current approach of designating certain non-state actors as terrorists and refusing to deal with them is counter-productive. Many non-state actors are *de facto* territorial authorities that have incentives to uphold human rights in order to be seen as legitimate parts of the international system. Other initiatives to impose obligations on certain non-state actors include the Montreux Document on private military companies and the business and human rights framework.

A gender approach to economic and social rights

- In 1945, the starting point for gender was Articles 1(3), 55 and 56 of the Charter, requiring non-discrimination on the basis of sex. The term ‘gender’ controversially entered into the international

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19 As the Special Rapporteur on Extreme Poverty, Philip Alston, noted, ‘the World Bank is a human rights-free zone.’ Report of the Special Rapporteur on extreme poverty and human rights, 4 August 2015, A/70/274.
arena through the Global Summits on Women held in 1985 and 1995, and the work of the CEDAW Committee.

- Gender mainstreaming – the integration of gender perspectives into all policies and practices of the UN – was asserted as a policy of the UN in the 1990s by the Secretary-General.

- In the late 20th and early 21st centuries definitions began to proliferate. Gender was defined by various human rights treaty bodies as an ideological and cultural construct that affects the distribution of resources, wealth, work, decision-making, political power and enjoyment of rights and entitlements within the family and public life. Despite variations across cultures and over time, gender relations entail an asymmetry of power between men and women as a pervasive trait.

- Most recently it has been accepted – through the work of special procedures and the UPR process – that gender also includes gender identity and sexual identities. This, however, remains highly controversial.

- Despite an understanding of gender as relational, and as including multiple gender and sexual identities within the UN, there remains slippage between the concept of gender and women. Gender has become the language within the UN to respond to inequality. It is, however, variously a cause of inequality, a feature in programmes (gender mainstreaming), a basis of principles (gender equality) and a tool (gender-disaggregated data and gender analysis).

- UN Women is the lead body for promoting social progress for women. Its goals are: to support women’s leadership; to strengthen women’s economic empowerment; to end violence against women; to promote women’s participation in security and peace processes; and to ensure that public planning and budgeting respond to the needs of women.

- These objectives have been drawn from the three different agendas outlined at the global summit meetings for women: equality, development and peace.

**Equality**

- Equality is the basis of CEDAW. This diverged from the trend of separating economic and social rights from civil and political rights, recognizing in a single convention that social progress for women depends on the interaction between these two sets of rights. The CEDAW Committee has developed a sizeable jurisprudence, notably around combating violence against women, which is perhaps one of the greatest obstacles to the social progress of women.

- This raises a significant issue within the UN: whether specialization that seeks to promote women’s progress through the application of CEDAW rather than through general human rights treaties is the most effective method, or whether this risks marginalization. Conversely, gender mainstreaming might risk losing the specialization required for considering issues relating to gender.

- Mainstreaming is exemplified through General Comment No. 16 adopted by the CESCR. This explicitly addressed issues relating to the obstacles facing women with respect to housing, the right to choose when and if to marry, marital property and inheritance upon a husband’s death.

- Yet CESCR has been far less ready to apply a gender-based discrimination analysis systematically throughout the covenant. While it is willing to express its concern that women still do not enjoy economic, social and cultural rights on the same level as men, it fails to consider these issues when
it looks at such rights of other vulnerable groups. Such groups are instead approached as gender-neutral.

- A number of special procedures have more explicitly addressed the obstacles facing women with respect to their mandates, and made recommendations to confront them.

### Development

- At the UN, the focus has shifted from women in development programmes, to the role that women actually play in development, and now to gender mainstreaming.

- The Beijing Platform for Action in 1995 urged an approach that was more egalitarian, inclusive, participatory and sustainable, but ignored the role of capitalism in promoting inequality.

- In the 21st century development objectives for women shifted from the Beijing Platform to the Millennium Development Goals (MDGs), and now to the Sustainable Development Goals (SDGs).

- Critics of the MDGs argued that the rights-based approach to implementation was underplayed, as women’s empowerment was only relevant to Goal 3 (to promote gender equality and empower women), without any reference to the importance of the rights-based approach in CEDAW.

- The SDGs also have a stand-alone gender equality and equality empowerment clause. In the debate when the SDGs were presented, several states expressed disagreement with respect to the reproductive and health aspects of the SDGs and lesbian, gay, bisexual, transgender and intersex rights.

### Women, peace and security

- This discourse has been driven by the Security Council, which has linked issues relating to the impact of conflict on women to the international peace and security agenda. The Security Council urges women’s participation, integration of a gender perspective into all policies and programmes, protection of women in armed conflict, accountability and combating of impunity.

- Broader feminist agendas of disarmament, reduction of military expenditure and restrictions on small arms appear to have had little or no impact on these Security Council resolutions.

- One major goal of this agenda has been the increased participation of women in UN bodies, including human rights treaty bodies. Gender diversity in decision-making bodies is crucially important, as it ensures that a greater number of issues are addressed.

### Ongoing challenges

- Over 70 years normative standards have been developed across the different UN institutions. Largely through the motivation of civil society and women’s organizations, there have been some achievements and social progress for women. But the structural basis of inequality has not been challenged; conflict, the arms trade, militarization, the economic global order and the sexual division of labour can all contribute to the unequal delivery of economic and social rights, hence to poverty and gender-based violence against women.

- Aspirational development goals have been set over the past few decades with the aim of constructing international policy on socio-economic development endorsed by various institutions, starting with the UN. The SDGs are the most recent addition to these efforts.
• The inclusion in the SDGs of a target on the eradication of extreme poverty for all people everywhere offers an attempt to redress the under-ambitious MDG target of cutting poverty in half by 2015. There is now a goal on reducing inequality within and among countries; a greater focus on and recognition of the need for domestic policy space; and an emphasis on implementation, although this requires further elaboration.

• The MDGs were a humanitarian project founded upon the idea of collective good and shared responsibility. But according to one critique these were merely appended to a grander economic project, which was based on economic logic that protected powerful private interests and advocated for individualized gain and minimal regulation. They were not set up to confront structural inequality or to present economic alternatives, but served to embed the private sector in the sustainable development agenda. Their focus on private sector-led solutions was based on the belief that private appropriation is the only viable way to get economic goods, with all the consequences for the poor and disadvantaged that this entails. They ignored the empirical evidence that foreign direct investment has not contributed to the targeted objective of economic development in host states.

• Target 10.b of the SDGs encourages inter alia foreign direct investment to states where the need is greatest as part of reducing inequality within and among countries. Target 17.5 encourages the adoption and implementation of investment promotion. Investment promotion regimes for less developed countries are intended to revitalize global partnerships for sustainable development. It is not clear how the SDGs anticipate reconciling investment ambitions with the recognition of domestic regulatory policy space, human rights and environmental protection.

• Economic issues are deliberately dealt with outside the UN. It was suggested that the idea that the UN is impotent in this area should be challenged, and that it should be ensured that such issues are not left to institutions and regimes outside its framework.
Concluding remarks

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- In all three of the pillars of the UN, the conference discussions recognized challenges and limitations. But the basic goals and principles of the UN Charter remain valid.

- There will always be new challenges to which the international legal system will have to adapt. There is room for evolution, but the Charter system must not be put at risk.

- The pillar in which the conference revealed the least satisfaction is development. Although there have been some important achievements over the past 70 years, this area has enjoyed the least investment. In an international system preoccupied by the impacts of war, the sometimes more devastating impacts of poverty have received less attention.

- There is a vast array of norms established under the auspices of the UN, and the real challenge is implementation of the law.

- It was clear from discussions that the phenomenon of non-state actors and the role that they play in the international arena requires further study.

- Judicial settlement is now a critical and essential part of the international system, something which was not predictable 70 years ago. With the proliferation of international courts and tribunals, however, there appears to be an absence of international administrative law binding international judiciary and international counsel; states have this at the national level, but it is lacking at the international level. Further consideration of the ethical and legal obligations on judges and counsel in international courts and arbitrations might be beneficial.