Rethinking International Law

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European institutions established in the immediate post-World War II period have undoubtedly aged faster, and more poorly, than those from any other comparable period. The failure of these national institutions—such as centralized welfare organizations and government-owned monopolies—is widely acknowledged; even their defenders recognize that they must be radically reformed if they are to survive. The problems are all too obvious: They lack proper oversight, are not adapted to a changing world, and are both costly and startlingly inefficient.

On the international level, however, the establishment of the United Nations in July 1945 is still described as an event of unmitigated progress. Yet this international institution has much in common with the national institutions founded in the same period. In both cases, the declared objectives were certainly noble. Indeed, the United Nations Charter of June 26, 1945 boasts the most lofty of objectives: To outlaw war, defend the right of peoples to self-determination, and grant equality to all sovereign states. It is exceedingly unfortunate, then, that this institution is also weakened by the same problems that plague its national counterparts: Insufficient oversight, increasingly archaic mechanisms, and poor performance.

The lack of adequate oversight was recently exposed by two affairs that would have seriously damaged the UN's credibility—if, that is, the organization were in fact judged by its results. The first was the revelation of large-scale misappropriations in the administration of the

Oil for Food program, which was designed to permit humanitarian exceptions to the embargo imposed on Iraqi oil sales after the 1991 Gulf War. Under its terms, Iraq was permitted to sell oil in exchange for basic necessities; revenue from these sales was to be placed in a fund administered by the UN in exchange for a commission of roughly two percent, which was then to be used to purchase food, medicine, and other such items as authorized by UN administrators.

Details on the way the funds were actually used are still emerging, but it has already been firmly established that several billion dollars were misappropriated, ranking it among the greatest financial frauds in history. Payments were consistently approved for expenses not the least bit humanitarian, such as subsidies to the Iraqi Information Ministry and real-estate deals that enriched Saddam Hussein's coffers. Meanwhile, international businessmen and politicians were corrupted by gifts of oil vouchers: Sold at a fraction of their real value, these vouchers gave the right to resell oil at the market price (only the first, underpriced payment made its way into the UN fund). According to Iraqi documents, the senior UN official in charge of administering the program and a former French ambassador to the UN were among the beneficiaries of this largesse. Both men have since contested the authenticity of the incriminating documents. Whatever the case may be, the program's oversight was clearly inadequate in light of the sums involved. Moreover, the blatant misappropriation of funds meant to alleviate Iraqi suffering adds a discordant note to proclamations of solidarity with the Iraqi people uttered of late in certain diplomatic circles.

In December 2004, shortly after the Oil for Food scandal came to light, UN auditors published a report on a child prostitution ring organized by and for UN peacekeepers in the Congo. Similar accusations had already been made against UN troops in Eritrea and Bosnia. This time, however, the UN itself confirmed the charges and admitted to cover-ups by commanding officers in the field. Nonetheless, the officers and soldiers involved emerged without so much as a slap on the wrist: They are not, we were told, subject

to UN discipline. Ironically, the UN sex scandal did not arouse great interest among the same Western media who gave such broad coverage to sexual humiliations committed by American soldiers in Iraq—who, it should be noted, have since been severely punished.

The UN is also handicapped by the persistence of founding ideas that no longer correspond to today's threats. The most striking example is the principle of non-interference in the internal affairs of its member states. This principle, which has been clearly and regularly reaffirmed by the General Assembly, is sometimes stated as the corollary of the principle of the "sovereign equality" of states, set forth in Article 2 of the UN Charter. Certainly the principle of sovereign equality is logically necessary to validate a body of international law based primarily on treaties between states. Yet it does not follow that those same states should forswear the possibility of intervening in the affairs of another state, particularly if the conduct of that state seriously jeopardizes others.

Indeed, the most widely accepted exceptions to the principle of non-interference do not correspond to the most urgent needs. For instance, the first exception—the right of a state to protect its citizens abroad—raises no special problems, but is useless in cases in which world peace is endangered by a state's treatment of its own citizens. The second, more recent and more controversial exception is the "duty of humanitarian intervention," which obligates states or non-governmental organizations to give emergency aid to distressed populations, even without the permission of the government in charge. This justification was invoked in 1991 to help the Iraqi Kurds after Saddam Hussein's ruthless suppression of their uprising. Although the principle is admirable, however, it rarely responds to situations that provoke a serious destabilization of international relations.

Furthermore, international law still lacks responses to two situations—defaulting on public debt, and aiding and abetting terrorism—in

which the domestic competence of states may have serious international consequences. As regards the first situation, there is no reason why state sovereignty should serve as a pretext for the non-payment of debts; this only encourages states to make decisions that endanger the international financial system. International law would have everything to gain by giving states or international organizations the right to intervene in the domestic affairs of a defaulting state until its creditors obtain satisfaction. The very existence of such a public bankruptcy procedure would serve to modify behavior and thereby to stabilize international finance.

A far more serious limitation of the non-intervention principle, however, is revealed in the case of state support for terrorism. The laws of armed conflict are adapted to situations in which one state directly threatens another with its own military forces. Those laws did not envisage the current practice of states financing, arming, and housing terrorist organizations, and in turn using them to intimidate and obtain concessions from others. These states cannot be condemned as aggressors, because they do not use their own armed forces. Thus they are able to hide the details of their relations with terrorists—even when such relations undoubtedly exist—and avoid the consequences of armed aggression prescribed by the UN Charter. This is why Iran, for instance, can give organized support to Hezbollah without the slightest bit of trouble from the UN.

This blind spot in international law is unacceptable in a world in which it is quite easy to supply biological, chemical, radiological, or nuclear weapons to terrorist organizations while denying complicity. In order to remove the possibility of easy denial—without question, their greatest advantage—from states that aid terrorists, the right to resort to force under the UN Charter should at least be revisited in such a way that would allow intervention against states whose conduct makes it obvious that they do not wish to combat terrorism.

These reforms would greatly improve the performance of a UN system that since its inception has had rather limited success in meeting the aims assigned to it by the 1945 Charter. In fact, as regards the organization's most

important mission—the promotion of world peace—it is much easier to list the conflicts that the UN has been either unable or unwilling to resolve than those it has brought to a favorable conclusion. Even when the Charter objectives were attained, it was not necessarily the result of UN efforts. A case in point: In the spring of 2003, it took a coalition of states, acting without a Security Council mandate, finally to enforce respect for seventeen resolutions passed by that same Council explaining how Saddam Hussein endangered world peace. If not for that coalition, the UN, faced with the threat of a veto from a permanent member that had nonetheless voted for all the preceding resolutions, would have been in the embarrassing position of issuing threats *seventeen times*, yet never once acting. Strangely enough, those who defend the organization did not seem especially grateful to the allies who spared it this embarrassment.

In fact, when UN institutions *do* choose to act, those same defenders do not bother to evaluate whether that action results in increased credibility. The 2004 Security Council decision to discuss possible reactions to the massacres of black Muslims in Darfur by Arab militias encouraged by the Khartoum government was met with great satisfaction. Lively debates exposed the pros and cons of applying sanctions against Sudan, and several commissions filed reports. Sudan was by turn scolded, congratulated for reducing the pace of the massacres, then scolded again. In the meantime, the wells of Darfur filled with cadavers, and skeletal survivors trudged through the dust to the border with Chad. Most important, however, was that the essential principle was preserved: No state had the effrontery to take unilateral action.

Despite these failures, the UN still has its defenders, who argue that the UN governs international relations by law instead of by balance of power; consequently, if governments bow to UN dictates and accept limitations on their power, they are rewarded with the blessing of living in an international community subject to the rule of law.

Yet this discourse has a serious flaw. If the world is to be governed by the rule of law, decisions of UN bodies must be voted upon by states that have shown some attachment to the rule of law in their own territories. But the rule of equality of member states has a most unfortunate result: The majority vote in UN bodies, from the General Assembly down to associated commissions and organizations, comes from a mixture of kleptocrats, theocrats, president-colonels, and old-fashioned communists. The UN representatives of these heads of state couldn't care less about the rule of law; they deny it to their own citizens.

The power of self-delusion that convinces certain Western diplomats that such assemblies can indeed advance the cause of international law is not only wasteful, it discredits the very notion of international law itself. Substantial resources are squandered when the Bandar-logs of international legality endlessly repeat "approved elements of language" from one resolution to another without the slightest effect on reality. This gives rise to many a bureaucratic dream, such as the "World Summit on Information Society" to take place in Tunis in November 2005 in order to "develop a common vision and understanding of the information society and adopt a declaration and an action plan to be implemented by governments, international institutions, and all sectors of civil society." This is an admirable goal indeed; however, no one would have complained if the cost of this summit had been spent in such a way as to bear actual results in our world.

But entrusting the preservation of international law to a majority that is either indifferent or hostile to the rule of law has another, much more serious consequence: The contempt these regimes rightfully inspire reflects on international law itself. For example, the appointment of Libya's representative to the presidency of the UN Human Rights Commission in 2002 caused a minor scandal. But that nomination was just a slightly more outrageous example of a permanent contradiction within the UN system. For whatever objectives the UN claims to pursue—world peace, human rights, respect for international law, the rights of women and children, environmental protection, and so forth—it is condemned to ridicule

when resolutions on these subjects are drafted by states that have proven a thousand times over their disregard for those same values. Indeed, when issues of urgent concern are reduced to a session's worth of arguments by inept or detestable regimes, the gravity of those issues tends to be obscured. Thus, for instance, in December 2004, the UN representative from Sudan, a country soaked with the blood of both Darfur Muslims and southern Sudanese Christians, stood up at a session of the General Assembly to declare that Israel was building a "racist wall" and had "violated the UN Charter and international humanitarian law." The effect of this hypocrisy did little service to the Palestinian cause, much less the victims in his own country.

The credibility of international law is even more seriously undermined by the growing craze of certain states and organizations for draping their political preferences in the toga of international law.

It is particularly difficult to elaborate a coherent system of international law, as compared to other legal systems, because of the complexities of its foundations. International law is based on a combination of elements: Treaties signed by hundreds of different states or international organizations, judgments and opinions rendered by dozens of jurisdictions, and customs that some states and organizations deem binding. Yet unless international law attains coherence, it will lack the credibility and predictability that are essential to any legal order.

There is no overarching international jurisdiction empowered to guarantee this coherence. Consequently, the responsibility falls to the actual interpreters of international law, such as the top bureaucrats of international organizations and the legal commentators, who must stick very closely to the texts and intentions of parties to the treaties while respecting the general principles of judicial interpretation. Above all, they must refrain from giving the impression of disguising their personal prejudices as law. Otherwise, since nothing prevents other interpreters with different prejudices from taking the same liberties, there is nothing to prevent several incompatible

positions from being defined simultaneously as "international law." This would either lead to the conclusion that there is no such thing as international law, or that, if it exists, it deserves no respect whatsoever.

In recent years, international organizations and states (including some that respect the rule of law in domestic affairs) have made any number of declarations in the name of "international law" that simply reflect the political preferences of their authors. For example, in December 2004 the International Committee of the Red Cross (ICRC) announced its opinion that the treatment of al-Qaida terrorists held by the United States in Guantanamo Bay was "tantamount" to torture. This declaration shows that the ICRC, after having proudly claimed its absolute neutrality for 150 years, has now decided that the Bush administration does not deserve to be treated with the same objective dispassion that the Red Cross once showed to the Third Reich. It also shows that the ICRC considers itself better qualified to formulate the definition of torture in international law than the states entrusted to do so through international treaties.

In fact, the ICRC's use of the word "tantamount" proves that its representatives had seen nothing at Guantánamo that contravenes American obligations with respect to the UN Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment. This convention, ratified by the United States in 1994, limits the definition of torture to acts that provoke "severe physical or mental pain or suffering." Rather, the Red Cross had seen practices that displeased it: Prisoners isolated, humiliated, maintained for hours in artificial postures, underdressed and chilled in an air-conditioned room, forced to endure strong light and loud music. Had the ICRC dropped the bogus question of legality and admitted that those practices do not contravene American commitments, officials could have engaged in constructive dialogue on the inhumanity of imposing a full blast of rock 'n roll and a chilly 55 degrees Fahrenheit on a jihadist captured in the Pashtun Mountains with a Kalashnikov in his hands. The Americans might have had some convincing arguments in defense of these practices: They could, for instance, have asked Afghani women to explain

to the Red Cross what inhumanity really means. But the ICRC does not want to hear these arguments. It has determined instead to modify international law, hoping that the constant repetition of its allegation of practices "tantamount" to those prohibited by the Convention will eventually result in a new interpretation of that Convention altogether.

This new interpretation would stray radically from the intentions of the American legislators who ratified it. And that is exactly what the ICRC wants to achieve. The Red Cross, an organization for whose existence and on whose practices no one ever voted, an organization that could well do some soul-searching of its own on how its absolute neutrality affected victims of despots in the past, now hopes to repeat its own interpretation until it acquires the force of common law. Convinced of its superiority over American democracy, it aims to usurp its prerogatives.

The determination to modify international law by imposing one's own interpretation on it entails two dangers. First, it leads to the transformation of international law, which now stands at the intersection of multiple intentions of sovereign states, into a battlefield for interest groups lacking in the realism associated with the experience of power. Even if each group achieves but a fraction of its objectives, democracy will have receded and international law, tossed between the intentions of states and the ideological interpretations of interest groups, will become more chaotic and less respected.

Further, the reinterpretation of international law aimed at weakening certain states is particularly selective. The ICRC didn't discover anything "tantamount" to torture in Syria, for example—just in the United States. The calls for "international legality" constantly repeated after the invasion of Iraq did not refer to the seventeen Security Council resolutions violated by Saddam Hussein, but rather condemned the invasion by virtue of which those resolutions were finally enforced. In many circles, the expression "international law" does not designate a judicial system at all, but rather a blend of purely political arguments aimed at the United States and its allies—especially Israel.

It should be tautological to state that a community cannot claim to be lawful if it does not treat all its members as equals before the law. In particular, it must not assign blame to any individual member out of proportion to the damage caused by that member. A community that refuses to hold certain members responsible for their acts, while at the same time punishing a scapegoat for the faults of the others, admits thereby that it refuses to abide by the law. Yet this is precisely how the United Nations treats Israel.

For starters, the UN created a permanent, plethoric administration solely in order to deal with the Arab-Israeli conflict, mobilizing resources many times greater than those allocated to countless other, far more murderous wars. These resources are thus lost, for example, to the people of Darfur and the Congo; unavailable to the displaced Azeris, starving Zimbabweans, and civil-war torn Nepalese; denied to the Chechens, Kosovo Serbs, and all other victims of wars that do not provoke the passionate interest aroused in the UN by the Arab-Israeli conflict.

On several occasions, the UN has created two different, contradictory laws—one for the Middle East, and another for the rest of the world. As a result, there are two definitions for the word "refugee" in international law, which is another way of saying that there is no international law on refugees. The first definition covers the 150 million refugees of the twentieth century; it requires a durable attachment to the land from which one was expelled, and its status is not transmissible to descendants. The other definition applies solely to the Palestinians who fled Israel in 1948. It requires only two years of presence prior to the date of departure, and it is unlimitedly transmissible to descendants. Furthermore, two UN organizations are dedicated exclusively to the welfare of refugees: the High Commissioner for Refugees (UNHCR) for the rest of the world, and the UN Relief and Works Agency (UNRWA) for the Palestinians. UNRWA's sheer ineffectiveness is glaring:

Nearly sixty years later, the refugees' descendants are still living in camps, and have not been integrated into their countries of residence. Other refugees from the same period—Germans from the Sudetes and Pomerania, and Jews from Iraq and Egypt—would probably have the fortune of living under similar conditions if they, too, had benefited from UNRWA's tender attention.

Moreover, although the UN Human Rights Commission has never passed a single resolution against China or Zimbabwe, more than a quarter of its resolutions directed against a specific country condemn Israel. Additionally, the regional groups that prepare Commission meetings are organized so that Israel alone, of all the 191 UN member states, is not allowed to participate in preparatory meetings.

An extraordinary session of the General Assembly, as the name suggests, is an exceptional procedure; only ten such sessions have been convened since 1945. Neither the massacre of a million Rwandans in 1994 nor the killing of some two million Sudanese over the past twenty years merited an extraordinary session. Yet six of those ten sessions were called for one reason: To denounce Israel. The tenth session was turned into a permanent court, which has met eleven times since 1997. More astounding, the special UN reporter on the Palestinian territories must list Israel's wrongdoings, but has no mandate to mention violations of human rights by the Palestinian Authority or terrorist groups.

On July 9, 2004, the International Court of Justice rendered a consultative opinion on Israel's anti-terrorist barrier at the behest of the General Assembly. Remarkably, the court decision rejects Israel's argument of a right to self-defense recognized in Article 51 of the UN Charter, on the grounds that Article 51 applies exclusively to threats from a state, which the disputed territories are not. Yet this limitation is not expressed in Article 51, or anywhere else in the Charter, or in any prior treaty or jurisprudence. It was, very obviously, invented for the occasion. Then, in a striking paradox, the court concludes that Israel must withdraw from all the territories occupied

in 1967 and make them available for the "constitution of a Palestinian state." It seems, then, that Palestine is *not* a state when one wants to protect oneself from its bombs, but *is* a state when it suits the purpose of requiring Israel's withdrawal.

The court begins by rejecting Israel's request to postpone the question of dismantling the barrier to an eventual settlement of the conflict. Noting that Israel's arguments extend beyond the question raised, the court judges that replying to a precise question on the legal consequences of the construction of the barrier does not deny the existence of a broader problem. Then, after concluding that Israel has an obligation to dismantle the barrier, the court denies the principles it has just established and gives its own uninvited opinion on the future overall resolution of the conflict, pronouncing a long series of principles pursuant to this comprehensive plan. Those principles, surprisingly, are as unfavorable to the Israeli position as they could be.

In shamelessly drafting such cynically incoherent opinions, the International Court of Justice openly renounced the ideal of judicial impartiality, adopting instead the method of a horde unleashed upon its prey. This may well move human beings who still cherish the notion of justice to do away once and for all with international law. Like the phlogiston of eighteenth-century chemistry and ether in the nineteenth, international law would be a wonderful explanatory principle if not for the inconvenience of being unobservable just where it is most needed.

Reassuringly, the UN secretary general, aware of the problems encountered by his organization, last year asked a group of "eminent persons" to produce a report on institutional reform. Less reassuringly, the suggested reforms do not address any of the problems mentioned above.

Indeed, the sixteen wise men made no mention of the practice of laws being drafted by delinquent states, nor did they address the pathological anti-Israel craze, nor, finally, did they acknowledge the continual threat to

world security that will exist as long as the world lacks the tools to intervene in the affairs of states that are either bankrupt or accomplices to terrorism. On this last point, in fact, the advisers made several suggestions that would arguably *aggravate* the current situation: They proposed five conditions that should be fulfilled prior to recourse to pre-emptive force, such as verification of the "proportionality" of the riposte, and proof that the use of such force really is a "last resort." Clearly, this would leave a terrorist state free to order attacks, deny complicity, and indefinitely pursue its blackmail of the free world by claiming to be open to dialogue and persuasion.

The only possible conclusion that can be drawn from this deliberate blindness is that the UN, in many of its central capacities, is beyond reform. This is not to say that the organization is entirely useless; after all, as the sole forum in which all states are represented, it should be maintained as the site of negotiations, and, after a thorough reform of its internal control mechanisms, it should continue to function in its humanitarian role. But surely the preservation of international law, peacekeeping, and the defense of human rights should be entrusted to others.

All it would take to effect this change is for states that still believe in the ideals of international law, peacekeeping, and the defense of human rights to remove themselves from UN discussions on the subjects and opt to hold them instead in the framework of a new organization reserved for democracies. Prospective members will be subject to admittance according to political and judicial criteria far simpler than the examination currently imposed on candidates to the European Union. The organization's credibility will be maintained by a policy of easy expulsion in the event of a deterioration of democracy or human rights.

This union of democracies will hopefully prove a strong incentive for democratization for states that are initially excluded. In addition, the new organization will have greater legitimacy than the UN in rendering collective decisions related to war and peace, human rights, and the fight against terrorism. Though democratic states are in the minority with regard to the

total number of states, they nonetheless represent a good half of the world population. They are also, on the average, richer and better armed than the oppressors of the other half. This new organization would quickly become the standard-bearer of international law, and the last hope for the just governance of conflicts and protection of human rights.

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