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# Journal's presentation

Hello everyone!

We are proudly presenting to you the eighth edition of the **Journal of the Masters in International Law at the Université Jean Moulin Lyon III**. It is the outcome of a common initiative of the two Masters in International Law: the 'Public International Law' research track and the 'Law of International Organizations' professional pathway.

Spearheaded by the nascent **Association des Masters de Droit International (AMI)**, the aim of the project is to bring together students from the two programs to explore the current landscape of international law and share the results of their findings. In a collaborative approach, each student of international law will be encouraged to contribute and publish their work. We hope to build a **collective body of work in which everyone can add their own input**.

The journal will be **released every two months**. Each publication will contain the same features, including an up-to-date overview of the activity of international organizations, a follow-up of important rulings handed down by the major instances of international law, a presentation of one or more key legal cases, as well as reflective articles. We would particularly like to thank our teachers for their great enthusiasm and the precious help they have provided for this initiative.

This **special back-to-school 2023 edition is written entirely in English**. This choice is prompted by the students' desire to practice legal writing in English, which, in today's masters and international law contexts, strikes us as both appropriate and essential.

We are keen to pass on our interest in a wide spectrum of matters and hope that this content will stimulate the curiosity of both experienced jurists and readers who are less familiar with the issues involved in international law.

Enjoy your reading and see you soon!

The editors in chief



LAURINE  
ADAM



INES  
FRIKECH LARAKI

# Legal Monitoring



KENZA  
CHOUKROUN



ZOÉ ESCOBAR-  
CAMELEYRE



ANNA  
LABORDÈRE



GABRIELLE  
VAUTHIER

## INTERNATIONAL COURT OF JUSTICE

*The ICJ is the principal judicial organ of the United Nations. Based in The Hague, it settles disputes between states in accordance with international law. Its Statute is annexed to the Charter of the United Nations, signed in San Francisco on June 26, 1945.*

### **APPLICATION PROCEEDINGS BY THE ISLAMIC REPUBLIC OF IRAN AGAINST CANADA CONCERNING ALLEGED VIOLATIONS OF ITS IMMUNITIES**

The **Islamic Republic of Iran filed an application instituting proceedings against Canada** on 28 June 2023 before the International Court of Justice, for alleged **violations of its immunities**, on the basis of Article 36, paragraph 2, and Article 40, paragraph 1, of the Statute of the Court, as well as Article 38 of its Rules. Iran claims that *"Canada has adopted and implemented [since 2012] a series of legislative, administrative and judicial measures against Iran and its assets, in violation of its international obligations"*. These measures have allegedly *"deprived Iran of the immunities to which it is*

*entitled, both in terms of immunity from jurisdiction and immunity from coercive measures"*. Iran submits that, *"as a sovereign State, [it] is entitled to sovereign immunities from jurisdiction and execution under customary international law"*, and requests the Court to adjudge and declare that, *"by failing to respect the immunities of Iran and its property, Canada has breached its international obligations towards [it]"*.

### **JOINT APPLICATION AGAINST THE ISLAMIC REPUBLIC OF IRAN CONCERNING A DISPUTE RELATING TO THE CONVENTION FOR THE SUPPRESSION OF UNLAWFUL ACTS AGAINST THE SAFETY OF CIVIL AVIATION**

**Canada, the United Kingdom, Sweden**

and **Ukraine** filed a joint application **against the Islamic Republic of Iran** before the International Court of Justice on 5 July 2023, for alleged violations of the **Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation**, based on Article 36(1) of the Statute of the Court and Article 14(1) of the Montreal Convention. They claim that *"Iran has failed to fulfil a series of obligations under the Montreal Convention as a result of the destruction by soldiers of the Iranian Revolutionary Guard Corps of a civil aircraft in service, Ukraine International Airlines flight PS752, on 8 January 2020"*. They consider that Iran has *"failed to take all reasonable measures to prevent the unlawful and intentional commission of an offence referred to in Article 1 of the Montreal Convention, including the destruction of the aircraft carrying flight PS752. It then failed in its obligation to investigate and prosecute the crime impartially, transparently and fairly, as required by international law"*.

#### **CASE CONCERNING THE QUESTION OF THE DELIMITATION OF THE CONTINENTAL SHELF BETWEEN NICARAGUA AND COLOMBIA BEYOND 200 NAUTICAL MILES FROM THE NICARAGUAN COAST (NICARAGUA V. COLOMBIA)**

On 13 July 2023, the International Court of Justice delivered its judgment in the case concerning the **Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 nautical miles from the coast of Nicaragua**, brought before the Court in September 2013 by an application instituting proceedings by Nicaragua against Colombia. The dispute concerned the delimitation between

Nicaragua's continental shelf and Colombia's continental shelf. In its Order of 4 October 2022, the Court considered that before proceeding with any examination of the technical and scientific issues relating to the delimitation, it was necessary for it to rule on the following two questions: *Under customary international law, can the right of a State to a continental shelf beyond 200 nautical miles from the baselines from which the breadth of its territorial sea is measured extend to maritime areas within 200 nautical miles of the baselines of another State? and What are the criteria under customary international law for determining the limits of the continental shelf beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured? In this respect, do paragraphs 2 to 6 of Article 76 of the United Nations Convention on the Law of the Sea reflect customary international law?* In its judgment, the Court concludes that, under customary international law, a State's right to a continental shelf beyond 200 nautical miles from the baselines from which the breadth of its territorial sea is measured cannot extend to maritime areas within 200 nautical miles of another State's baselines. In view of that conclusion, the Court considered that it was not necessary to rule on the second question. **The Court therefore rejected Nicaragua's request.**

#### **ADVISORY PROCEDURE ON STATE OBLIGATIONS IN RELATION TO CLIMATE CHANGE**

On 18 July 2023, the International Court of Justice **authorised the African Union to participate in the advisory procedure on the Obligations of States in respect of Climate Change**. Under Article 66 of its

Statute, the Court decided that the **African Union could provide information on the questions referred to it by the General Assembly.**

Furthermore, by Order dated 4 August 2023, the President of the International Court of Justice extended until 22 January 2024 the time-limit within which written statements on questions submitted to the Court may be submitted in accordance with Article 66, paragraph 2, of the Statute. In addition, States or organisations which have submitted a written statement may submit written observations on the other written statements until 22 April 2024, in accordance with Article 66, paragraph 4, of the Statute. This extension follows a request submitted by Vanuatu and 14 Co-signatory States on 24 July 2023.

## **REQUEST FOR MODIFICATION OF THE ORDER FOR PROVISIONAL MEASURES (ARMENIA V. AZERBAIJAN)**

On 6 July 2023, the International Court of Justice issued an Order concerning **Armenia's request to modify its Order of 22 February 2023** indicating a provisional measure in the case concerning the Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Armenia v. Azerbaijan). In its order, the Court recognised that Azerbaijan should **"take all measures at its disposal to ensure the unimpeded movement of persons, vehicles and goods along the Latchine corridor in both directions"**. Subsequently, Armenia asked to *"withdraw all personnel deployed on or along the Latchine corridor since 23 April 2023"*. In its Order of 6 July, the Court found that **the circumstances were not such as to require a modification** of the Order of 22 February 2023 and **reaffirmed the provisional measure previously indicated.**

## **INTERNATIONAL CRIMINAL COURT**

*The ICC is a permanent international criminal court, responsible for prosecuting those accused of genocide, crimes against humanity, crimes of aggression and war crimes. Established by the Rome Statute of July 17, 1998, it has its headquarters in The Hague.*



### **SITUATION IN THE REPUBLIC OF VENEZUELA**

On June 27th, the ICC Pre-Trial Chamber I authorized the resumption of the investigation on the Bolivarian Republic of Venezuela situation. The investigation regarding the situation in Venezuela since 12th February 2014 started on 3rd November 2021 after the conclusion of the preliminary examination by the

Prosecution. The situation was brought up before the Office of the Prosecutor on 27 September 2018 by a group of State Parties such as the Republic of Argentina, Canada, the Republic of Colombia. But in April 2022, Venezuela requested to defer the Office's investigations in favour of actions carried out by the national authorities of Venezuela. However, the Prosecution asked before the Pre-Trial Chamber to resume the investigation in

this case. The ICC Pre-Trial Chamber I concluded that the domestic investigations are not sufficient enough regarding the allegations of crimes against humanity and they appeared to be directed on lower level offender.

## NTAGANDA CASE

On the 14th of July 2023, the Trial Chamber II of the ICC, delivered an Addendum to the **Reparations Order for the victims in Bosco Ntaganda case**. To put in some context, on 18th July 2019, **Bosco Ntaganda was found guilty, by the ICC Trial Chamber VI, of 18 counts of war crimes and crimes against humanity** that he committed in 2002-2003, in Ituri and then he was sentenced to 30 years of imprisonment on November 7th 2019. Later, the Trial Chamber delivered its Order on Reparations to victims but an appeal was formed against this decision by the Defence and on 12th September 2022 the Appeals Chamber issued its judgement in which several issues were remanded for the Trial Chamber. In its conclusions, the Chamber gave the estimation of the approximate number of direct and indirect victims of the attacks to 7,500 individuals. Also, the Chamber assessed Mr Ntaganda's liability for reparations at USD 31,300,000. Following this decision, the Chamber will rule on all aspects of the Draft Implementation Plan that do not require further submissions from the ICC Trust Fund for Victims or the parties.

## THE 25TH ANNIVERSARY OF THE ROME STATUTE

On July 17th, it was **the commemoration of the 25th Anniversary of the Rome Statute**. The Statute is the founding treaty of the International Criminal Court.

On July 17th 1998, 120 States were gathered with the goal to create a permanent international penal court. The ICC was established on 1st July 2002 after the ratification of the Rome Statute by 60 States. This year, the commemoration was highlighted by several speeches such as the ICC Prosecutor Karim Khan KC who declared: *"This milestone should be used to accelerate our action in transforming the long-awaited promise of justice into a reality for those communities we serve. Our willingness to evolve, our focus on improving our work, and our determination to deliver results, will be central to deepening the impact of international criminal justice in the next quarter-century"*. In parallel, for the 25th Anniversary an exhibition "Common Boards" opened in The Hague at the ICC.

## SITUATION IN THE PHILIPPINES

On July 18th, **the Appeals Chamber delivered its judgement confirming the authorisation granted by the ICC Pre-Trial Chamber to resume investigations on the situation in the Republic of the Philippines**. To put in some context, the investigation regarding crimes allegedly committed between 2011 and 2019 in the Philippines during the "war on drugs" campaign by the government, started on 5th September 2021 after the Pre-Trial Chamber authorisation. But on 18th November 2021, the Philippines requested the investigation to be deferred. However, on 24th June 2022 the Prosecutor requested the resumption of the investigation which was granted by the Pre-Trial Chamber on 26th January 2023. **The Philippines appealed this decision before the Appeals Chamber arguing that the ICC was not competent** because the Philippines withdrew effectively from the Rome

Statute on 17th March 2019 while the Prosecutor's request for investigation was in 2021. **This ground was dismissed by the Majority of the Appeals Chamber.** They considered that this argument was not properly raised before the Pre-Trial Chamber.

## **MOKOMO CASE**

From 22nd August to 24th August, **the confirmation of charges hearing in the case *The prosecutor v. Maxime Jeoffroy Eli Mokom Gawaka* was held before the Pre-Trial Chamber II of the ICC.** The goal of this hearing that took place before the trial is to **determine whether or not there is sufficient evidence to believe that the suspect committed the crimes charged against him.** During this hearing, the Judges: Rosario Savatore Aitala, Tomoko Akane, and Sergio Gerardo Ugalde Godínez heard the oral arguments of the Prosecutor, the Legal Representatives of the Victims and the Defence and after their written submissions the Pre-Trial Chamber will issue their decision. In this case, **Mr Moko is suspected of having committed war crime and crime against humanity for his major involvements in the Anti-Balaka's attacks in Bangui and Bossangoa,** in December 2013. He was allegedly a senior leader of the Anti-Balaka (a movement opposed to the Seleka and supportive of former CAR president François Bozizé) since September 2013.

# UNITED NATIONS SECURITY COUNCIL

*The UNSC is one of the six principal organs of the UN. Its main responsibility is to ensure the maintenance of international peace and security.*

## SANCTIONS REGIME IN THE DRC

On June 27, the Security Council unanimously adopted resolution 2688. This resolution **extends the sanctions regime in the Democratic Republic of Congo (DRC)** until July 1, 2024. On the occasion of the adoption of this resolution, the Council recalled that the **sanctions adopted to reduce arms trafficking** still apply to non-governmental individuals and entities operating on the territory of the DRC. The UNSC specifies that the arms embargo will continue not to apply to Central African security forces. Many delegations welcomed the adoption of the **resolution in favor of "security sanitization" in the DRC and the fight against armed groups.**

## WITHDRAWAL OF MINUSMA

On June 30, **the UNSC unanimously adopted resolution 2690** (2023), and with it the end of the mandate of the United Nations Multidimensional Integrated Stabilization Mission in Mali (MINUSMA). After ten years of existence, MINUSMA must immediately cease operations, so that the process can be completed by December 31, 2023. With this resolution, the Security Council also authorized MINUSMA to respond to imminent threats of violence against civilians and to contribute to the safe delivery of humanitarian aid under civilian control until September 30, 2023. The UNSC called on the Transitional Government of Mali to respect the status-of-forces

agreement until the complete departure of the Mission. In view of the many challenges Mali and its region are facing, several States regretted the withdrawal of MINUSMA. Switzerland and the United Kingdom also expressed concern about a hasty withdrawal schedule, "six months is insufficient for a responsible withdrawal of a peacekeeping operation the size of MINUSMA". For its part, the Russian Federation welcomed the Council's decision considering the request was made by Mali as a sovereign decision to ensure the security and protection of its civilian population. After ten years of existence, **MINUSMA must immediately cease operations**, so that the process can be completed by December 31, 2023. With this resolution, the Security Council also authorized MINUSMA to respond to imminent threats of violence against civilians and to contribute to the safe delivery of humanitarian aid under civilian control until September 30, 2023. **The UNSC called on the Transitional Government of Mali to respect the status-of-forces agreement** until the complete departure of the Mission.

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**ensure the security and protection of its civilian population.**

### **MINUSCA, VICTIM OF ATTACKS IN THE CENTRAL AFRICAN REPUBLIC**

On July 11, the Security Council, via a press statement by its British President, strongly condemned the attack suffered by the United Nations Multidimensional Integrated Stabilization Mission in the Central African Republic (MINUSCA) the previous day. **A Rwandan peacekeeper was killed in the attack.** The Council asked the Central African Government to open an investigation to find the perpetrators of these acts. It recalled that, in accordance with UNSC resolutions, **acts of violence against UN peacekeeping personnel may constitute war crimes under international law** (S/RES/2518, 2020). The Council took the opportunity to stress the importance of MINUSCA's ability to ensure the safety and security of its peacekeepers.

### **HISTORIC FIRST DEBATE ON ARTIFICIAL INTELLIGENCE**

For the first time in its history, the Security Council addressed the issue of artificial intelligence (AI) and its consequences for international peace and security. The British presidency asserted that **the greatest transformations brought about by AI were still to come**, and that it was impossible to grasp their full scope; for his part, the Secretary General declared that AI has *"enormous potential for good and evil on a massive scale"*.

Aware of the stakes involved, **the majority of UNSC members are hoping for the adoption of principles of ethics and responsible behavior at**

international level. However, such principles have given rise to differences of opinion within the Council. For Ecuador, a legally-binding international framework would be better suited to preventing abuses in the use of AI. Conversely, the United Arab Emirates does not wish to over-regulate AI, so as not to hamper innovation.

### **SITUATION IN NIGER**

Two days after the events in Niamey on July 26, the Security Council **strongly condemned the coup d'état as an "unconstitutional attempt to change the legitimate government" of Niger.** The Council demanded the immediate and unconditional release of President Mohammed Bazoum, who has been held captive by the junta since that date. Preoccupied by *"the negative impact of unconstitutional changes of government in the region, the increase in terrorist activities and the disastrous socio-economic situation"*, the UNSC **stressed "the urgent need for the restoration of constitutional order in Niger"**.

### **THE BLACK SEA SITUATION**

On July 22, 2022 Russia, Ukraine, Turkey and the United Nations signed the Black Sea Grain Initiative to **facilitate the export of Ukrainian grain and foodstuffs to international markets, despite the war in Ukraine.** For almost a year, the Initiative has enabled the export of some 33 million tonnes of grain and other agricultural products. **Russia's withdrawal from the Initiative on July 17**, and the strikes on July 21 against the Ukrainian ports of Odessa, Chornomorsk and Mykolaiv, could have **considerable repercussions on global food security.** Moreover, the bombardment of Ukrainian Black Sea ports runs counter to Russia's

commitments under the Memorandum of Understanding with the United Nations as well as the international humanitarian law which prohibits attacks on civilian infrastructure. As a result, **the US presidency of the UNSC in August decided to focus on human rights and the fight against famine.**

In this sense, at its meeting on August 3, 2023, **the Security Council strongly condemned "the use of starvation of civilians as a method of warfare"**, as well as the *"unlawful denial of humanitarian access and the deprivation of civilians of objects indispensable to their survival"*, which may constitute a violation of international humanitarian law. **These terms echo the resolution 2417 (2018):** among other things, this resolution committed the parties to the UNSC to protect the civilian infrastructure essential to the delivery of humanitarian aid, and to **ensure the proper functioning of food markets and systems in situations of armed conflict.**

## GENERAL ASSEMBLY OF THE UNITED NATIONS

*The UNGA is one of the six principal organs of the UN. Composed of representatives of all the organization's member states, its role is mainly consultative.*

### ESTABLISHMENT OF AN INDEPENDENT INSTITUTION OF MISSING PERSONS IN SYRIA

On June 29, 2023, the General Assembly adopted **a resolution creating an Independent Institution for Missing Persons in Syria.** This resolution aimed to address the issue of missing persons in Syria, providing clarity on their fates during the conflict. Introduced by Luxembourg, the resolution highlighted

the humanitarian goal of this effort. **While official figures estimate 100,000 missing persons, the true number is likely higher.** The Independent Institution's responsibilities include ensuring the participation and representation of victims, survivors, and families, particularly women's organizations and civil society, with a victim- and survivor-centered approach.

## A POTENTIAL EXTENSION OF THE UNITED NATIONS SECURITY COUNCIL ?

The General Assembly discussed equitable representation on the Security Council, with many delegations supporting progress in the intergovernmental negotiations process and emphasizing the importance of wider Security Council membership. **Some countries called for greater representation of developing nations, including additional seats for specific regions**, and stressed the need for reform to address evolving international challenges.

## INTERNATIONAL LAW'S VITAL ROLE IN ACHIEVING PEACE AND UKRAINE'S TERRITORIAL INTEGRITY

On July 16, nine years after Russia's illegal annexation of Crimea and 500 days following its invasion of Ukraine, the General Assembly convened to **stress the urgent need for a peaceful resolution to the conflict**. This conflict has caused substantial casualties, millions of European refugees, and internal displacement in Ukraine. **The Assembly called for both parties to engage in negotiations** as the sole viable approach to ending the war, emphasizing a political solution rooted in the United Nations Charter and international law, with the goal of restoring Ukraine's sovereignty and territorial integrity. **Ukraine's Foreign Affairs Minister highlighted the conflict's devastating impact on civilians**, including displacement, injuries, and abductions. He called for international measures to hold abductors accountable and rejected territorial concessions as a false path to peace. The Russian Federation argued that the conflict resulted from Ukraine's 2014 actions, **accusing Western countries of**

**orchestrating an anti-Russian coup**. They emphasized the goals of demilitarizing and "denazifying" the Kyiv government for Russia's security.

## “LIVES SHOULD NEVER BE REDUCED TO GEOPOLITICAL GAMES”

The General Assembly met to address the fallout from **Russia's veto of a Security Council resolution concerning cross-border aid to northern Syria**. This veto has halted aid through the Bab al-Hawa crossing, severely impacting Syrians in dire need. Speakers expressed **grave concerns about Syria's humanitarian crisis and condemned the veto**. They stressed the importance of unhindered aid access while respecting Syria's sovereignty. Brazil and Switzerland praised the resolution's balanced, humanitarian nature. The United States highlighted **the life-or-death consequences of Russia's veto**, and the UK noted Syria's ongoing conflict. Costa Rica and Fiji **emphasized states' duty to provide aid** and supported UN agencies continuing cross-border deliveries to ensure uninterrupted aid flow. Russia defended its stance, highlighting that all cross-border operations will now require Syria's Government authorization. **Syria criticized some delegations for disregarding sovereignty** and aiding terrorists. Kenya called for a more balanced Security Council prioritizing vulnerable populations, addressing veto power's impact on humanitarian efforts.

## ADOPTION OF A RESOLUTION ON THE CULTURE OF PEACE

On the 25th of July, a resolution titled *"Promoting interreligious and intercultural dialogue and tolerance in countering hate speech"* called upon **Member States to engage in**

**interreligious and intercultural dialogue, respect differences, and reject hate speech** that incites discrimination, hostility, and violence. It also urged Member States and social media companies to counter hate speech and facilitate research into reducing it. Spain's representative, on behalf of the European Union, proposed an oral amendment **to remove the reference to violent acts against religious symbols and sacred books as a violation of international law from the resolution.** This sparked a debate within the Assembly about how such acts should be treated. Malaysia's representative **disagreed with the notion that defamation of religion is not a human rights violation**, emphasizing that it constitutes a derogation of the right to freedom of religion or belief. Denmark's representative, speaking for a group of countries, **condemned acts like burning holy books as offensive and provocative** but also emphasized the right to freedom of opinion and expression.

## COMMEMORATION OF THE 125TH ANNIVERSARY OF THE PERMANENT COURT OF ARBITRATION

Following up on the two new resolution, the AGNU expressed a warm welcome for **the celebration of the 125th anniversary of the founding of the Permanent Court of Arbitration.** It also urged Member States to utilize the Court's services for various peaceful dispute resolution mechanisms such as arbitration, conciliation, mediation, and commissions of inquiry. Additionally, the resolution called upon the Secretary-General to ensure that the current resolution is brought to the awareness of Member States, United Nations organizations, and all pertinent stakeholders.

# Fundamental Case

## BACK TO THE ICJ LAGRANDE 2001 CASE



GHADIR  
FADH

On the global stage, when States submit their international disputes for resolution to the International Court of Justice, they automatically exercise their entitlement to invoke the procedure outlined in Article 41 of the Court's Statute. This procedure enables parties to petition for an order prescribing provisional measures - an interim mechanism through which the presiding judge can recommend actions designed to refrain from any measures that could have a prejudicial impact on the execution of the impending decision and, generally, to abstain from taking any actions of any nature capable of exacerbating or extending the dispute [1]. The obligatory nature of such measures underwent extensive doctrinal debate before being conclusively established by the International Court of Justice in its landmark 2001 ruling, *Germany v. United States* ("LaGrand" case), wherein it confirmed their binding character. Therefore, a succinct reexamination of this case becomes imperative for comprehending this consistent practice

before the International Court of Justice and the implications it engenders within the framework of contemporary legal principles.

The facts of the LaGrand case began in the state of Arizona, a federal state of the United States of America, where two brothers, Karle and Walter LaGrand, both German nationals, were sentenced to death for armed robbery resulting in the death of one person. Germany brought the dispute before the Court, accusing the United States of non-compliance with its international obligation under article 36(1) of the Vienna Convention on Consular Returns of April 24, 1963 [2]. Germany maintains that the United States was obliged to inform the brothers of their right to request consular assistance from their State of nationality, a fact which the brothers learned belatedly from an outside source.

[1] *Compagnie d'électricité de Sofia et de Bulgarie*, ordonnance du 5 décembre 1939, C.P.J.I. série A/B no 79, p. 199)

[2] Vienna Convention on Consular Relations 1963, art. 36.

This delay resulted from the impossibility of raising this right due to an internal judicial doctrine known as "*procedural deficiency*" - A procedural request defect in a timely manner- which prevented the two brothers from exercising their right to consular assistance. On February 24, 1999 Karle LaGrand was executed, and his brother's execution was scheduled for March 3, 1999. In reaction Germany asked the International Court of Justice to order provisional measures, which the Court did. The Court granted the following measures: « *The United States of America should take all measures at its disposal to ensure that Walter LaGrand is not executed pending the final decision in these proceedings, and should inform the Court of all the measures which it has taken in implementation of this Order; (b) The Government of the United States of America should transmit this Order to the Governor of the State of Arizona. II. Decides that, until the Court has given its final decision, it shall remain seised of the matters which form the subject-matter of this Order* » [3]. Despite the Court's order of provisional measures, Walter LaGrand was executed as planned.

The Grand Judgment discusses several legal aspects, but we will focus on Germany's third allegation concerning the United States' failure to comply with the order indicating provisional measures ordered by the Court on March 2, 1999.

## **THE INTERNATIONAL COURT OF JUSTICE'S INTERPRETATION OF ARTICLE 41 OF THE STATUTE OF THE COURT AND ARTICLE 94 OF THE CHARTER TO SUBMIT THE BINDING CHARACTER OF PROVISIONAL MEASURES**

Firstly, the Court asserts that the doctrinal controversy persists, and thus declares the need to interpret Article 41 of the Court's Statute in accordance with international customary law expressed in Articles 31 to 33 of the Vienna Convention on the Law of Treaties of April 24, 1969. It begins, as anticipated, by interpreting the article according to its ordinary meaning. The Court observes that both authentic versions, the English and French versions, suffer from coherence issues.

In the French version, Article 41 reads : "*1. La Cour a le pouvoir d'indiquer, si elle estime que les circonstances l'exigent, quelles mesures conservatoires du droit de chacun doivent être prises à titre provisoire.*" The Court mentions in its interpretation that the term "*indiquer*" (indicate) has a neutral character with an obligatory effect, while the expression "*doivent être prises*" (must be taken) indicates an "*imperative character*". As for the English version, it reads as follows : "*1. The Court shall have the power to indicate, if it considers that circumstances so require, any provisional measures which ought to be taken, to preserve the respective rights of either party. 2. Pending the final decision, notice of the measures suggested shall forthwith be given to the parties and to*

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[3] LaGrand (Germany v. United States of America), Provisional Measures, Order of 3 March 1999, I. C. J. Reports 1999, p. 9

*the Security Council*". The United States argued that the use of verbs such as "indicate" instead of "order," "ought" instead of "must," "shall," and "suggested" instead of "order" affirms the non-binding nature of provisional measures.

Faced with this issue, the Court resorts to another method of interpretation found in Article 33(4) of the Vienna Convention on the Law of Treaties, which stipulates: "*Except where a particular text prevails in accordance with paragraph 1, when a comparison of the authentic texts discloses a difference of meaning which the application of articles 31 and 32 does not remove, the meaning which best reconciles the texts, having regard to the object and purpose of the treaty, shall be adopted*". The Court, therefore, studies the object and purpose of the statute, that the court consider as : to enable the Court to fulfill the functions entrusted to it by this instrument, and in particular, to carry out its fundamental mission, which is the judicial settlement of international disputes through binding decisions in accordance with Article 59 of the Statute. For the Court, Article 41 is a manifestation of a decision that should allow the Court to indicate provisional measures so that it is not hindered from rendering its final judgment. Therefore, deeming provisional measures as non-binding would challenge the object and purpose of the treaty, notably because these measures are justified by their nature of urgency and necessity.

The Court reinforces its decision by indicating a universally accepted legal

principle before international courts, "*according to which the parties concerned must refrain from any measure liable to have a prejudicial effect on the execution of the judgment to be given and, in general, must not take any action, of whatever nature, liable to aggravate or extend the dispute*". [4] The Court ultimately concludes that it is unnecessary to resort to preparatory works to justify the binding nature of provisional measures.

It concludes by examining Article 94 of the Charter, indicating that it does not hinder the binding nature of provisional measures. The United States raised the argument that Article 94 of the Charter obstructs the binding character of provisional measures: "*1. Each Member of the United Nations undertakes to comply with the decision of the International Court of Justice in any case to which it is a party. 2. If a party to a case fails to perform the obligations incumbent upon it under a judgment rendered by the Court, the other party may have recourse to the Security Council, which may, if it deems necessary, make recommendations or decide upon measures to be taken to give effect to the judgment.*" The question was whether the term decision of the International Court of Justice is limited to the Court's judgments or if it encompasses orders indicating provisional measures. To address this, the Court uses the ordinary meaning of the terms as a method of interpretation before concluding that no mode of interpretation obstructs the recognition of the binding nature of

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[4] Compagnie d'électricité de Sofia et de Bulgarie, ordonnance du 5 décembre 1939, C.P.J.I. série A/B no 79, p. 199)

provisional measures.

## **CRITICISM OF THE ICJ'S INTERPRETATION**

Negative critiques center specifically around a cardinal principle of international justice, namely the consent of States. Indeed, some commentators emphasize that by affirming the obligatory nature of provisional measures, the Court should have referred to the preparatory works of Article 41. They contend that, in accordance with the current state of international law, measures creating obligations towards States must be interpreted restrictively, as stated in the "Nuclear Tests" (Australia v. France) judgment of December 20, 1974: When States make declarations limiting their freedom of action in the future, a restrictive interpretation is required. Furthermore, they point to the principle that *"there is no need to resort to restrictive interpretation which, in case of doubt, might be recommended with regard to a clause whose interpretation could in no case exceed the expression of the will of the States that subscribed to it"*, as highlighted in the "Phosphates in Morocco" (Preliminary Objections) case of June 14, 1938. Thus, criticism is aimed at the Court's failure to consider the practice of States regarding these measures. State practice often shows that States have disregarded the obligatory criterion of these measures. Notable examples include the orders of June 22, 1973, from the International Court of Justice, requiring France to suspend its upcoming atmospheric nuclear tests

which did not prevent French atomic tests in the Mururoa region. Similarly, the orders of August 17, 1972, from the ICJ, specifically enjoining Iceland to refrain from measures aimed at applying the July 14, 1972, regulation to ships registered in the United Kingdom or the Federal Republic of Germany and fishing in the waters around Iceland beyond the 12-mile fishing zone, did not prevent the firing of the "Aegir" gunboat on the British trawler "Everton," which ventured within the 50-mile zone for "illegal fishing."

Other commentators applaud the decision made by the judge, particularly due to the repetition of such non-compliance instances. They consider that such a decision, passed by an overwhelming majority of 13 votes to 1, is a triumph of international justice and a demonstration of the Court's commitment to executing its decisions, even in the absence of enforcement power [5].

## **CONSEQUENCES AND SCOPE OF AFFIRMING THE COMPULSORY NATURE OF PROVISIONAL MEASURES: THE IMPLICATIONS OF THE RULING**

According to commentators, this judgment is not explicit about its consequences. However, it has uncovered a range of challenges that the judges will need to address incrementally. The main question revolves around the consequences of non-compliance with provisional measures. Firstly, the Court asserts that the claimant has the right to seek reparations in the case of non-

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[5] Martin Mennecke and Christian J. Tams, *The International and Comparative Law Quarterly*, Apr., 2002, Vol. 51, No. 2 (Apr., 2002), pp. 449-455

adherence to provisional measures. The Court further affirmed in this case that the relatively limited time granted to the United States to act in accordance with the ordered measures could be taken into account if Germany were to request reparations [6].

Nevertheless, the judgment remains silent on the means of enforcing such measures. The Court positions itself as the sole authority in this matter. However, questions may arise, such as the possibility for the claimant to resort to countermeasures in the event of the defendant State's refusal to comply with the Court's decision. Additionally, the possibility for a party to request Security Council intervention under Article 94 of the Charter to ensure the Court's decision is upheld, and the consideration of States with veto power within the Council. The extent of their intervention also remains a question. While the Court has yet to definitively address these questions, the judgment brings them to the forefront.

Another significant implication of this case that we can highlight is situated in the context of what is commonly referred to as "*judicial dialogue*". It's important to recall that the debate about the binding nature of provisional measures is not new within the International Court of Justice (ICJ). Similar discussions have arisen in various cases, such as the Iranian Oil Company case and the Diplomatic Staff case. However, these cases did not revolve around human rights issues, unlike the present case. In fact, Judge Jibola, in a separate opinion during the

Bosnia and Herzegovina conflict, emphasized that: the time has come for the Court to definitively address this point [7]. However, the international community wasn't yet prepared to consider human rights considerations. The LaGrand case asserts that human rights considerations may ultimately play a significant role in the Court's judgments, indicating an evolution in the field of international rule of law. Thus, the doctrine of necessity that the Court has chosen to adhere to has paved the way for the idea of possible obligatory recommendations, influencing quasi-judicial human rights bodies such as United Nations committees, to contemplate analogous argumentation to indicate mandatory measures despite the mandatory nature present in their respective statutes, based on necessity.

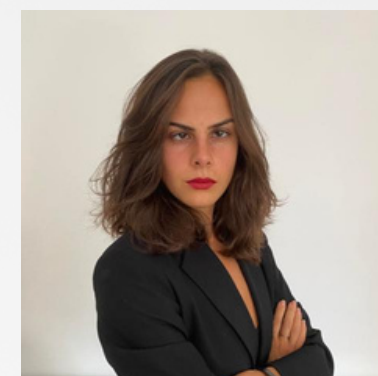


[6] Jean MATRINGE, Juridictions international, l'arrêt de la cour international de justice, (Allemagne c. États-Unis d'amérique du 27 juin 2001, Annuaire français de droit international XLVIII - 2002 - CNRS Éditions, Paris p. 237-247

[7] Ola Ajibola, Opinion individuelle: Application de la Convention pour la prévention et la répression du crime de génocide, (Bosnie-Herzégovine c. Yougoslavie), Ordonnance du 13 septembre 1993, [1993] C.I.J. rec. 325. aux pp. 394 et. s [Opinion individuelle Ajibola].

# Articles

## REFORMING THE UN SECURITY COUNCIL ?



ANNA  
PEDRAJAS

History of international law has proven its cyclical nature, and some observations can be relevant years later in a different context. Such is the case of United Nations Secretary-General Kofi Annan's statement : *"Unless the Security Council is restored to its pre-eminent position as the sole source of legitimacy on the use of force, we are on a dangerous path to anarchy"*[1]. Initially pronounced in the context of the Kosovo Crisis, those words could not ring truer in the year 2023.

Created in 1945, the United Nations Security Council (UNSC) was enshrined in the United Nations Charter as a key organ of the United Nations (UN) system. Indeed, Article 25 bestows the Council *"the primary responsibility for the maintenance of international peace and security"* whereas Chapter VII details its powers regarding this matter. Due the growing development of *"human security"* as a notion, its scope of action has never stopped to broaden, now encompassing, for instance, AIDS or humanitarian disasters. One has even argued that authorizing interventions to combat a state's climate inaction or to halt geo-engineering projects of planetary scale could fall under its mandate [2]. Undoubtedly, this key institution of the UN system is destined to

play a decisive and growing role in the face of these multiplying new threats to human security.

However, the structure, organization and functioning of the UNSC have remained stagnant since its creation in 1945. It still grants a special status to five winners of World War II — the United States (US), the United Kingdom (UK), France, China and Russia — who benefit from a permanent membership and a veto power. The only modifications to this established framework intervened in 1965, when four elected seats were instituted to broaden the participation, and in 1971, when the People's Republic of China took up Taiwan's status as the legitimate representative of China at the UN and, concomitantly, its permanent seat at the UNSC. Reforms have also addressed its working methods. To this day, all additional modifications have remained prospective.

In theory, the UNSC was intended to function on the basis of the permanent members' (PMs) willingness to compromise and limit veto uses.

However, this initial optimism was proven wrong over the years. The Council's work bears the mark of their national interests, is subject to frequent paralysis, and has been described as "*dominated by irresponsible and unrepresentative powers*" [3]. The US invasion of Iraq without authorization in 2003, the difficult diplomatic negotiations regarding the situation in Syria and the deadlock observed since Russia's aggression of Ukraine in February 2022 are significant examples of such a deplorable state of affairs.

Nevertheless, such events have unfailingly motivated calls for reform - with the gridlock the Council has been facing since the invasion of Ukraine in February 2022 being the most recent detonator. Calls for reform have been brought forward ever since. In September 2022, US President Joe Biden promoted the renovation of the UNSC, instilling dynamism to this topic. Indeed, preserving the Council's legitimacy and ensuring its ability to address burning issues would demand an unprecedented redesign. While those structural changes are essential to the future of the international security system, this prospect also obviously divides the international community.

Thus arises the question : is the reform of the UNSC a realistic project in the current international order ? Tackling this question will require to examine successively the necessary developments that have been proposed (I) and the hurdles on the road of such a renovation (II).

## **I- A REVIEW OF THE BROAD AND INSIGHTFUL PROPOSALS SUGGESTED TO STRENGTHEN THE SECURITY COUNCIL**

In theory, all UN members hold their own position on the UNSC's renovation. Those viewpoints, which constitute necessary reforms and would reinforce its ability to address security issues, pursue two objectives : reconsidering its composition (A) and its ways of functioning (B).

### **A- Reinforcing the legitimacy of the Security Council through its expansion**

Expanding the UNSC is not unrealistic. Indeed, five additional elected seats were instituted in 1965 to balance out diplomatic discussions, and the likelihood of a similar reform should not be ruled out. In this regard, as decision-making crises in the council have been multiplying over the past decades, UN member states have brought forward different plans to broaden its composition [4].

Some aim at rebalancing the number of permanent and non-permanent seats. The first project is backed by four candidates to permanent membership — the G4. Brazil, Germany, India and Japan are all campaigning to gain a regular seat at the UNSC's table and a veto power in the decision process. The African Union has been defending the same proposal since 2005 : the creation of two permanent and three non-permanent seats specifically destined for African states, while Ukrainian President Volodymyr Zelensky has called for an inclusion of under-represented world regions through permanent seats at the Security Council. Such demands have even been supported by President Joe Biden in September 2022 — a notorious shift in US positions in the matter [5].

Conversely, the UFC group — gathering regional rivals such as Mexico, Italy, and

South Korea - rather favors adding ten additional non-permanent seats. Instead of emphasizing the rift between permanent and elected members, this increase would make the Council more egalitarian and promote representativeness. Adding non-permanent seats constitutes a key development for these political powers as it would ensure them more allies and strengthen their position in the Council. As dissensions between PMs increase, this project appears relevant at the moment. Besides, the private initiative "*Elect the Council*" suggests a bold revolution : revoking permanent membership and establishing an "*automatic inclusion*" for states qualifying for certain criteria [6]. Such an upside-down shift would turn the UNSC into a dynamic organ, able to adapt to the ever-changing distribution of power by adding new countries to this category.

Regardless of the final product, these constitutional reforms would restore the legitimacy of the UNSC, which has been taxed for its unequal distribution of permanent membership among continents. To this day, Western states are prevalent in its composition, whereas Latin American, Pacific and African states lack a veto power — the latter continent representing a consequent share of the UNSC's work, making the absence of a dedicated permanent seat prejudicial for its countries, unable to rely on the veto as a leverage to defend their interests. This disparity reveals itself in the Council's decisions, that favors the five PMs' - and their allies' - interests.

Globally, those prospects would increase the Council's representativeness, balance its decision-making process, and

contribute to developing a more democratic international order - thus qualitatively transforming the international governance on security matters. It is a crucial objective regarding the rise of issues that require global and inclusive discussions.

Reforming the UNSC would not stop with its expansion but also requires, in order to strengthen its capacity to effectively address security issues, to consider procedural modifications.

### **B- Remediating to the blockage of the Security Council via redesigned decision processes**

While being firmly established as a key element of the international security system, the veto power has faced ongoing criticism as it blocks action and create diplomatic tensions between PMs - with the situation in Syria standing out as an notorious example. Basically, these five states benefit from the guarantee that the Council's action will never be detrimental to their national interests, and that they can define the current state of international security governance. Hence the many voices rising to question the persistence of such a privilege.

Responding to the UNSC's gridlock in front of Russia's invasion of Ukraine, the General Assembly did not only appeal to Resolution 377 ("*Uniting for Peace*") in order to denounce the aggression, but also affirmed, on April 26 2022, that every veto use would call for an assembly debate within ten days. However, this initiative encounters a limit since the Council's resolutions are purely recommendatory. In practice, nothing would compel PMs to stand before the

General Assembly and justify their *veto*. To render this relevant formality fully effective, it should be enshrined in the UN Charter and to be turned into a binding obligation.

Thus arises the question of a potential substantive modification in the functioning of the UNSC. As ambitious as it may sound, it has been at the core of numerous proposals. States, civil organizations, political figures and academics have understood the importance of such a prospect. In substance, it would imply a shift of perspective from a system centered around states' national interests to an approach focused on global governance and the common good.

Revoking the *veto* power is a first possibility, although idealistic in theory. The "*Elect the Council*" initiative intends to put an end to this practice and fix the detrimental issue to its functioning - that is to say, frequent cases of blockage [7]. Regulating its use could be a more fitting and pragmatic middle-ground. Since 2015, France has been advocating for limiting the *veto* to situations of mass atrocities [8]. This position has been joined by Ukraine, with President Volodymyr Zelenskyy suggesting in his recent UN reform proposal that the *veto* power should only be used in exceptional and limited cases [9]. Last but not least, changes in procedure could significantly improve security governance, especially by reuniting the General Assembly for a meeting after a *veto* use [10].

Realizing those projects would ensure the effective functioning of international security governance, eventually establishing the UNSC as the "*world*

*police*" it was originally intended to be. Consequently, the renovation of its decision-making process constitutes an adequate prospect which should not be excluded from any future constitutional reform of the UN system.

Clearly, the UNSC's ability to carry out international governance on security matters should not be condemned : indeed, many proposals have been voiced to ensure its adaptation to a changing world order and the adequacy of its action in addressing rising threats to peace. Nevertheless, it must be emphasized that the successfulness of such a reform is far from being ensured, as it would meet many hurdles that are worth an analysis.

## **II- AN EVALUATION OF THE UNDERLYING DELUSION IN RENOVATING THE SECURITY COUNCIL**

Transforming the UNSC is less probable and desirable than we might think at first glance. Not only this prospect is unlikely to be concretely realized (A), but it would be plagued with shortcomings in practice if it were to be carried out (B).

### **A- The uncertainty in the successfulness of a Security Council reform process**

Even though recent events have triggered a new momentum, reforming the UNSC would encounter several stumbling blocks, making it rather unrealistic for now.

The first obstacle lies in the procedural barriers limiting the possibilities to revise the UN Charter. Indeed, Article 108 requires the assenting of two-thirds of

states through the General Assembly and the ratification of the amendment in their national legal order, with the five PMs' consent being mandatory. This formality implies that these world powers reach a consensus and balance out their national interests, which explains why the UN Charter has only been amended five times [11]. All negotiations conducted in the General Assembly since 2008 have stalled, and there is no written project regarding a potential reform to this day [12].

However, all PMs have expressed unique viewpoints on its expansion. Whereas Russia has rejected any admission of a new elected or permanent member and the US has always been cautious about extending the number of non-permanent and permanent seats - a position explained by Washington's concern about the candidates' tendency to adopt a non-aligned stance on security issues, China has sided with the UFC coalition and supported the advent of a more representative institution, while France and the UK have brought forward an interesting compromise : attributing seats that could become permanent in the long run, but without gaining the veto power. Their different approaches on what this UNSC renovation should imply announce complex discussions and lowers the likelihood of reaching an agreement [13]. Furthermore, it is strongly unlikely for PMs to reach consensus about an ambitious reform of the veto power, given the skepticism the US, Russia and China would feel regarding such a prospect. Gaining their approval would require laborious negotiations and necessary compromises which could dilute the end result.

Notwithstanding the potential rifts between PMs and their certain rejection of any amendment targeting the veto power, talks about the reform raise more generally the issue of successfully reaching a common position among the community of states. Some burning topics could bring out dissension among all members reunited under the aegis of the General Assembly. For example, deciding which African countries would receive permanent membership announces tough debates. In a continent which has witnessed the rise of many regional powers in the past decades, it would require choosing between potential candidates such as Egypt, Algeria, Senegal, Nigeria or South Africa. Similarly, candidates to permanent membership have held dissenting views on whether they should claim a veto power or not. As a result, one could legitimately question the sincerity of some projects, which could be doomed from the start [14].

Most reforms to the international order intervene in the aftermath of major crises. However, a broad panel of authors have concluded that the Russian invasion of Ukraine does not represent such a turning point [15]. Not only this constitutional reform appears to be improbable, but it would also encounter new stumbling blocks in practice, leading to reconsider its relevancy and efficiency.

## **B- The guaranteed instability of a reformed Security Council**

A renovated UNSC would face many obstacles, whether they be unprecedented or inherited. Balancing enlargement and effectiveness - two

conflictual perspectives - is a challenging task, and making the council more representative would also turn it more dysfunctional and prone to blockages, especially if new permanent membership came with a veto right [16]. Indeed, adding more seats around the table would likely complicate discussions. In this regard, the African members' tendency to obstruct talks on the continent's affairs and defend resorting to its regional organizations is concerning [17]. Besides, it has been underlined that reforming international institutions has little to no effect on states' patterns of behavior and national interests [18]. Thus, nothing would guarantee an increased efficiency in addressing security issues. In that way, as valuable as it may be, a successful renovation of the UNSC should not be mistaken for a shift of paradigm in international relations, which would imply larger constitutional reforms to the international system.

Moreover, the specific proposal of including "*global powers*" fitting certain criteria has been perceived as a technocratic approach which would likely bring new issues and stumbling blocks [19]. For instance, it would disadvantage countries with less political weight, while also providing them with an authority and an ability to influence diplomatic discussions.

If the Council were to admit new PMs, the reform could arouse resentment among rejected candidates. In the long run, they could not only turn their back on this deliberative body and suspend participation, potentially reduce their diplomatic and financial input in the UN system. As alleged in the Carnegie Endowment's report, this could likely be

the case of India if, in the event of a constitutional renovation, it weren't granted the permanent seat it has been claiming [20]. Likewise, we could suspect such a crisis to occur if the decision-making process or the veto prerogative were to be modified. In the worst case, all forms of disappointment regarding the UNSC's hypothetical reform might even lead to an intensification of non-compliance with its resolutions. As a consequence, a successful reform on paper could be, by unintentionally creating new tensions and conflicts, the starting point to a new crisis of multilateralism.

Renovating the UNSC would call for a renewed outlook on its work and a change in expectations, perhaps through awarding more consideration to the way this decisional body is perceived, for instance in terms of inclusiveness, democracy and ability to build a sense of international community. However, given the current state of international relations, it is quite improbable for the developing notion of global interest to trump states' national concerns.

To conclude, only time will tell if renovating the UNSC will be the next step in strengthening the international legal order or will remain mere wishful thinking. In that case, turning to the General Assembly could be the next step in international security governance.

- [1] J. MILLER, « Annan Takes Critical Stance on U.S. Actions in Kosovo », *The New York Times*, 19 mai 1999.
- [2] C. MARTIN, « Atmospheric Intervention ? The Climate Change Crisis and the Jus ad Bellum Regime », *Columbia Journal of Environmental Law*, vol. 45:S, 2020, p. 335. ; C. MARTIN, « Geoengineering and the Use of Force », *Opinio Juris*, 20 janvier 2021, en ligne, consulté le 27 juillet 2023.
- [3] S. PATRICK, « Cutting the Gordian Knot: Global Perspectives on UN Security Council Reform », in S. PATRICK (ed.), *UN Security Council Reform: What the World Thinks*, Carnegie Endowment for International Peace, 2023, p. 2.
- [4] B. SCHAEFER, « A narrow path to reforming the UN Security Council », *www.gisreportsonline.com*, 18 novembre 2022, en ligne, consulté le 30 juillet 2023 ; F. GHASSIM, « Calls by Zelensky and Biden for UN reform are supported by people around the world – new survey », *The Conversation*, 22 septembre 2022, en ligne, consulté le 29 juillet 2023. These projects are discussed in detail throughout S. PATRICK (ed.), *UN Security Council Reform: What the World Thinks*, *op. cit.*, 68 p.
- [5] A. DARNAL, « Biden and the United Nations Security Council reform: true commitment or tokenism? », *www.stimson.org*, 5 octobre 2022, en ligne, consulté le 31 juillet 2023.
- [6] *Elect the Council, Avoiding Crisis : Towards a legitimate and effective UN Security Council. Concept note — Version 6*, Elect the Council, 2017, p. 2.
- [7] *Elect the Council, Avoiding Crisis : Towards a legitimate and effective UN Security Council. Concept note —Version 6*, Elect the Council, consulté le 29 juillet 2023, p. 2.
- [8] S. M. PATRICK, « Limiting the Security Council Veto in the Face of Mass Atrocities », *Council on Foreign Relations*, 23 janvier 2015, en ligne, consulté le 29 juillet 2023.
- [9] F. GHASSIM, « Calls by Zelensky and Biden for UN reform are supported by people around the world – new survey », *op. cit.*
- [10] UN Press, « General Assembly Adopts Landmark Resolution Aimed at Holding Five Permanent Security Council 10 Members Accountable for Use of Veto », *press.un.org*, 26 avril 2022, en ligne, consulté le 30 juillet 2023.
- [11] B. SCHAEFER, « A narrow path to reforming the UN Security Council », *www.gisreportsonline.com*, 18 novembre 2022, en ligne, consulté le 30 juillet 2023.
- [12] *Idem.* ; UN Press, « Following Debate over Text-Based Process, General Assembly Adopts Oral Decision to Continue Intergovernmental Negotiations on Security Council Reforms », *press.un.org*, 12 juillet 2022, en ligne, consulté le 30 juillet 2023.
- [13] S. PATRICK, « Cutting the Gordian Knot: Global Perspectives on UN Security Council Reform », in S. PATRICK (ed.), *UN Security Council Reform: What the World Thinks*, *op. cit.*, p. 4. ; B. SCHAEFER, « A narrow path to reforming the UN Security Council », *op. cit.*
- [14] A. DARNAL, « Biden and the United Nations Security Council reform: true commitment or tokenism? », *op. cit.*
- [15] S. PATRICK, « Cutting the Gordian Knot: Global Perspectives on UN Security Council Reform », in S. PATRICK (ed.), *UN Security Council Reform: What the World Thinks*, *op. cit.*, p. 8.
- [16] B. SCHAEFER, « A narrow path to reforming the UN Security Council », *www.gisreportsonline.com*, 18 novembre 2022, en ligne, consulté le 30 juillet 2023. ; E. ABRAMS, « Why “Reforming” the United Nations Security Council Is a Bad Idea », *Council on Foreign Relations*, 23 septembre 2022, en ligne, consulté le 30 juillet 2023.

**[17]** R. GOWAN, « The UN Security Council between Rifts and Reform », *www.crisisgroup.org*, 13 juillet 2023, en ligne, consulté le 31 juillet 2023.

**[18]** A. NOVOSSELOF, « France », in S. PATRICK (ed.), *UN Security Council Reform: What the World Thinks*, op. cit., pp. 18 22-24.

**[19]** S. PATRICK, « Cutting the Gordian Knot: Global Perspectives on UN Security Council Reform », in S. PATRICK (ed.), *UN Security Council Reform: What the World Thinks*, op. cit., p. 7.

**[20]** *Ibid.*, pp. 7-8. 20

# REFLECTIONS AROUND THE ENTRANCE OF FINLAND IN NATO AND THE NOTION OF NEUTRALITY



ANAÏS LANDON

*“Joining NATO is good for Finland, it is good for Nordic security, and it is good for NATO as a whole”* said the Secretary General Jens Stoltenberg when, on the 4th of April 2023, Finland became the 31st state member of the North Atlantic Treaty Organization (NATO). The entry of Finland in NATO, in a context of war in Europe with the Ukrainian war, remains questions around the urge to keep extending military alliance but also around the evolution of international conventional obligations of the State. Seventy-five years after the creation of NATO, this military cooperation organization plays a role more than important in Europe by influencing the relations between the different European and Eurasian countries such as the relations with Russia. Likewise, since the attack on Ukraine by Russia in February, Finland has decided to definitively breach its position of neutral country by applying to join NATO. This position is not surprising in a context of war, however, it may still question the conformity of international obligations of Finland with this application.

This position was affirmed by entering into conventional relations with international organizations to create and keep this position, such as the 1856 Declaration of Paris establishing the inviolability of goods at sea when the flag of the State remains neutral, signed by Finland. The neutrality principle is a psycho-legal term used to define the will of countries to not get involved in any military alliance. This is a policy adopted by a State that stays away from war, with abstention from directly or indirectly participating in the conflict [1]. However, this policy is not new. Indeed, back in 1919, the former president of the United-States of America Woodrow Wilson took this neutrality as its guideline for the foreign policy of the country. This position was taken as well by other countries such as Sweden, Denmark and the United Provinces of the Netherlands in the context of the war between Great Britain and France back in the 18th century. This position offers certain advantages.

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[1] Mario Bettati « La neutralité » Le droit de la guerre, 2016

Indeed, it allowed those countries to maintain stable diplomatic relations with countries without having to choose sides. This “no-choice” position is a key advantage to strengthen their international trade relations by multiplying trade partnerships. The aim of this article is to set out some key points which may question the legal context of the entrance of Finland regarding the existence of a neutrality principle.

## **NATO OVERVIEW**

The creation of NATO is a process achieved in the context of the end of the Second World War and the reduction of Western European countries’ defense abilities. With this reduction of the defense structure, some countries start to be afraid of not being protected enough if a new war were to take place in Europe or globally. In January 1948, the British Foreign secretary Ernest Bevin talked about the necessity of a treaty or an alliance for mutual assistance within the framework of the United Nations (UN) Charter. The United States of America at this time of the discussion agreed to send military support to Europe if the Western part of it was united. In response to the USA, the Brussels Treaty was signed in March 1948, creating the Western Union including Belgium, France, Luxembourg, the Netherlands and the United Kingdom. NATO is officially created by its founding treaty: the North Atlantic Treaty (or Washington Treaty), signed on April the 4th 1949 in Washington D.C by twelve founding member states. The Treaty, and hence the organization, take directly their authority from the article 51 of the UN Charter which stands that “*nothing in the present charter shall impair the inherent right of individual or collective self-defense*”. The North Atlantic Treaty is

founded as a collective defense organization that must protect each member (Article 5 of the Washington Treaty). The notion of collective defense is therefore a fundamental value of this organization, as the Allies share the risks, responsibilities and benefits of this defense. The founding treaty is a short instrument of fourteen articles that has never been modified, except to include the notion of a security environment. Today, with Finland, NATO now has 31 allies, different partners in Africa, Asia, South Africa and Oceania, around 20,000 military personnel participate in NATO operations around the world. NATO is also involved in counter-terrorism missions in Europe, North Africa and the Middle East.

## **HISTORICAL CONTEXT OF FINLAND’S NEUTRALITY: “FINLANDISATION”**

Back to the Second World War, after the Winter war opposing Finland to the USSR, Finland lost the Karelia region, representing 11% of its territory. A first peace treaty between the two countries was signed in 1940 and then on April the 6th 1948 was signed the Agreement of Friendship, Cooperation and Mutual Assistance also known as the YYA Treaty. This Agreement was setting the basis of the relation between Finland and the USSR from 1948 to 1992. This Agreement sets lots of obligations toward Finland specific to the second world war. Indeed, Finland was obliged by this Agreement to resist armed attacks by “*Germany or its allies*”, provided they were not directed against the USSR or Finland. This Agreement specifies as well in the article 4 that none of the parties will conclude any sort of military alliance against the other party. From this agreement appears the notion of “*Finlandization*”, which has been defined in various ways.

Indeed, some authors define this process as the one by which the USSR could take control of the foreign policy of an European country without transforming its internal regime [2]. Other authors consider this term as a political announcement describing the way Finland would conduct its international relations, not only in case of future conflicts but at any time: being outside of any military alliance, staying to the side of the conflict of the two blocks, staying independent in its reaction to any global status change, maintaining friendship relations with all the countries [3]. The second definition enacted a more active position of Finland in its neutrality when the first definition considers the “*Finlandization*” as the domination of the USSR over its direct European neighbor, to distance Finland from NATO specially. The YYA Treaty was reconducted in 1983 until 2003 to mark the continuity of the non-alignment policy of Finland in the context of cold war. However, the principal instrument binding Finland to keep his neutral politic has come to an end in 1992 with the fall of the USSR. The YYA Treaty is still existing in the Finnish legislation but does not contain any military obligations or any trace of the second world war on it. It is now a pure economic and trade agreement between the two countries [4]. The neutrality of Finland was not an impeachment to being involved in the international scene. Indeed, Finland will join lots of international and regional organizations such as the UN in 1955, the Nordic Council

in 1956 concluded several different agreements with the European Economic Communities in 1973. The ultimate illustration of the diplomatic play of Finland has been reached in 1975 with the signature of the “Helsinki Agreement” establishing the rules of conduct between states in the scope of the Conference on Security and Co-operation in Europe. Nevertheless, with the termination of the YYA Treaty Finland has directly started to enter in relation with NATO or other organizations such as the European Union with the Corfu Treaty of 1994. The cooperation with NATO started in 1994 when Finland entered the Partnership Peace Program (PPP) and became in 1997 a member of the Euro Atlantic council becoming one of the more active partners in the organization. As an example, Finland actively participated in missions in Iraq, Afghanistan and the Balkans. As soon as Finland was released from this treaty, the engagement of the country showed a will to erase neutrality from its doctrine.

## **THE DEVELOPMENT OF NEUTRALITY IN INTERNATIONAL LAW**

The neutral policy exercised by Finland during more than 45 years must be distinct from the neutrality born from international public law. One is born from the diplomatic practice of a country, whereas the other comes from the sources of international public law. In legal terms, a neutral state must exclude any partisan position in favor of one of the

[2] Georges-Henri Soutou *La Guerre froide* (Pluriel, 2011).

[3] Max Jakobson, *La neutralité finlandaise : apparences et réalités*, 1980

[4] Martti Koskenniemi & Marja Lehto, *La succession d'états dans l'ex-URSS en ce qui concerne particulièrement les relations avec la Finlande*, 1992

parties to a conflict. This statute involves specific rights and duties. This neutral state statute must be distinct from that of a non-aligned state. Indeed, non-alignment is not part of the scope of international law but refers to international politics. It refers to the Cold War conflict by the will of being distinct from the two existent blocks, at the time the East Block and the West Block. The position of non-alignment is in opposition to the neutral principle. Indeed, it represents an external position in alignment with itself. The development of the legal principle also came with the development of international public law and the codification of the “*jus gentium*”. The first trace of this principle can be found in the Paris Declaration of 1856, with respect on the neutral flag and therefore on the inviolability of the vessel. The different Conventions of the Hague of October the 18th 1907 develops the notion of neutrality, especially the fifth convention regarding the rights and duties of Neutral Powers and Persons in case of war on land and at sea, but also the thirteenth convention of the Hague of 1907 concerning the Rights and Duties of Neutral powers in Naval war. Finland is a party of its conventions as well as Sweden who led a similar foreign policy. However, at the time of the League of the Nations, the value and the bind of these conventions were more than relative. Indeed, it provided some guidance to states and a relative protection when a state enters in relation with another, but does not provide any sanctions. The lack of bind on these conventions explains by extension the lack of consideration to these ones by the states.

## **EFFECT OF THE TIME ON THE STATE'S PRACTICE AND ESTOPPEL**

Finland's policy change concerning its neutrality can be questioned regarding the constitution of customary law. Shortly, customary international law is constituted from a continual practice accepted by all as the law (*opinio juris*). The ICJ affirms again the constitution of the custom in the case *Continental Shelf (Libyan Arab Jamahiriya/Malta)* of 1985. Sometimes it happens to the Court to insist more in one aspect, such as in the mentioned case. Initially a customary rule could take a long time to be considered as such. However, since the seventieth, the ICJ has admitted that a custom can be established faster and thus become law. The neutral position of Finland was included in the legal instrument so the obligation of respecting this position could not come from the constitution of a customs but from an international treaty obligation. Furthermore, although the neutral obligation was coming from a customary law, this law can be modified over time. Indeed, when two different customs are in opposition, the more recent one erases the older one. However, modifying a custom over a certain period of time necessarily means infringing international law, and therefore being illegal until the new practice is considered legitimate. The change in policy and in the international obligation of Finland can be put in parallel to the principle of estoppel. This principle is operating “*on the assumption that one party has been induced to act in reliance on the assurances or other conduct of another party, in such a way that it would be*

*prejudiced were the other party later to change its position”* [5]. In the individual opinion of Ricardo J. Aflaro on the Preah Vihear temple case of 1962, the judge stands that the contradiction between the request or allegation presented by one State and its previous behavior is not admissible. A State is not authorized to profit from its own contradictions when the other party has been deprived of its rights or impeached in the exercise of its rights. Some authors attached this principle to a legal act when some others attached it to a moral perspective. The estoppel is a manifestation of good faith because it impeaches the subject to follow the guideline they wish and thus to keep a scope for their behavior. This link to the estoppel and good faith has clearly been established in the case of the Maine Golf of 1984 but also in the Nuclear Tests case of 1974. Finland's entrance into NATO reports a definitive departure from its neutral stance, which had characterized its position for several years. This entry could also be interpreted as a breach of its customary practice.

The only remaining instrument restraining the country from entering NATO was the Hague Convention, an instrument with limited scope. Changes in practices are recognized by the international community and ICJ, if they are not contradictory and in bad faith. Finland began preparations for its political shift in the early 1990s. The fact that Finland began collaborating with NATO during this period indicates a consistent and sustained cooperative policy. The impact of time on Finland's international obligations is no longer as binding as it was in the early 1990s. Another country in a similar situation to Finland, Sweden, has also applied to join NATO. Sweden, known for its neutral position with a unique essence and history, awaits a decision on its application, currently blocked by Turkey.

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[5] Hermann Mosler, *The international society as a Legal community Course*, p. 147, 1980

# FUNDAMENTAL PRINCIPLES OF HUMANITARIAN LAW AND THEIR APPLICATION IN THE RUSSIAN-UKRAINIAN CONFLICT



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In summing up this brief reflection, I think it would be wise to say that there are several crises in the world at the moment, and that all of them are equal because human dignity is a universal constant. The choice of the Ukrainian conflict is not guided by laziness; it can be justified by the media coverage it has received. Crimea was occupied and annexed by Russia in 2014. Shortly afterwards, a separatist uprising in the Donbass region of eastern Ukraine gave rise, with Russian support, to the Lugansk and Donetsk People's Republics. Since 24 February 2022, there has been a conflict between Russian and Ukrainian troops. Under international humanitarian law (IHL), these three scenarios qualify as an international armed conflict (article 2 common to the four Geneva Conventions).

It's hard not to draw a parallel with the battle between David and Goliath, when you consider the characteristics of the two belligerents, even if unlike David, Ukraine has accepted the weapons offered by its allies. Are we dealing with an asymmetrical war? That's not the question, but we must remember that 'just war' is no longer a topical issue in international law, and any unilateral use of armed force is prohibited (Article 2(4) of the United Nations Charter).

Violation of this rule is a matter for the law of international responsibility or self-defence: these questions are not the subject of our discussion. Once the norm has been violated, do we enter a zone of "lawlessness"? At the very least, what are the rules governing acts arising from the violation of the law?

During an internal conflict in Rome, Cicero argued: "inter arma silent leges" (In war, laws are silent). This thought by Cicero, often translated and interpreted out of context, does not call into question the primacy of the law, even in times of armed conflict, so dear to Cicero. Faced with the atrocities of war, States have chosen to humanize conflicts through principles that govern the proceedings of hostilities in order to provide a path to peace; among them three fundamental principles: the principle of distinction (I), the precautionary principle (II) and the principle of proportionality (III). These principles are certainly complementary, and their implementation is proving to be a delicate matter.

## I- VIOLATION AND DIFFICULT IMPLEMENTATION OF THE PRINCIPLE OF DISTINCTION IN THE CONFLICT IN UKRAINE.

In the ICRC's opinion, even before the tragic escalation of hostilities, it is civilians who are bearing the brunt of the conflict in Ukraine. This situation shows that the protection, which the state should guarantee, has not been respected.

The Ukrainian Head of State said at the beginning of the conflict: "*the enemy is not only hitting military targets, as he claims, but also civilians. He is killing people and turning peaceful towns into military targets*" (speech by Volodymyr Zelenskiy on February 25, 2022; excerpt broadcast on France24). The declaration drew the attention of the international community to a possible violation of the principle of distinction, which lies at the heart of humanitarian law. Indeed, in order to ensure respect for and protection of the civilian population and civilian structures, the parties to the conflict must at all times distinguish between the civilian population and combatants and between civilian structures and military objectives and, consequently, direct their attack against military objectives only (article 48 of the First Additional Protocol to the Geneva convention of 1949 (1-AP). This principle is also codified in articles 51(2) and 52(2) 1-AP and 13(2) of Additional Protocol II (2-AP). Formulated for the first time in the St Petersburg Declaration, this custom of international humanitarian law concerns the protection of the civilian population and civilian structures. Thus,

by virtue of the principle of distinction, only combatants and military objectives are legitimate targets.

According to Article 43(2) 1-AP, members of the armed forces of a Party to a conflict (other than medical and religious personnel referred to in Article 33 of the Third Convention) are combatants, that is to say, they have the right to take a direct part in hostilities. Article 52(2) 1-AP provides that military objectives are limited to those targets which, by their nature, location, purpose or use, make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the light of the circumstances, confers a definite military advantage.

It should be noted that in the context of the Ukrainian conflict, this binary vision is difficult to transpose. The urban nature of the conflict can blur the boundary between civilian objects and military objectives, to the extent that the assailants can take sides in the former and, we remember the Russian accusations about the use of human shields by Ukrainian troops from the beginning of the conflict. Indeed, as some authors have pointed out: "*(...) The days of hostilities between regular armed forces fighting on an equal footing, on a battlefield isolated from the civilian population, are well and truly over!*" [1]. And the International Committee of Red Cross (ICRC) stresses that: "*the effects on civilians as observed (...) in Mariupol should alert States to the need to clarify more clearly how they apply the principle of distinction, particularly in the use of*

[1] D'ASPREMONT (J), DE HEMPTINE (J), *Droit international humanitaire*, PEDONE, 2012, p.175 : « (...) le temps des hostilités entre forces armées régulières s'affrontant sur un pied d'égalité, dans un champ de bataille isolé des populations civiles, est bel et bien révolu ! ».

heavy weapons (...) The weapons used in urban combat around the world raise many questions about how States interpret the prohibition on indiscriminate attacks " (<https://blogs.icrc.org/law-and-policy/fr/2022/03/28/armed-conflict-in-ukraine-a-recap-of-basic-ihl-rules/>).

Despite these difficulties, it should be borne in mind that the principle of distinction, as set out by the ICJ, is one of the " (...) intransgressible principles of international customary law" [2].

We have seen through the media that the conflict in Ukraine is not limited to two regular armies; it is important to mention here the fact that some Ukrainian civilians are taking part in the hostilities, as well as the presence of the Wagner mercenary group.

Civilians are, according to Customary Rule 5, defined as persons who are not members of the armed forces. The civilian population includes all the aforementioned persons. This definition appears in Article 50 1-AP and thus the protection afforded to civilians by the principle of distinction is immutable. In fact, "practice indicates (...) that persons taking a direct part in hostilities lose the protection against attack afforded to civilians" [3], which is confirmed by customary rule no. 6 and article 51(3) of the 1-AP. However, the conventions do not provide any information on what constitutes participation.

Regarding mercenaries, it should already be noted that "a mercenary is not entitled to the status of combatant or prisoner of war" (article 47 1-AP). We understand that they do not qualify as combatants, but at the same time we can say that they do not qualify as civilians either. The International Community is aware that the Wagner Group has operated in Ukraine. The international convention adopted by the United Nations in 1989 to criminalise mercenarism has been ratified by Ukraine, not by Russia. The first additional protocol refers to mercenarism without outlawing it, "the practice recognises that the obligation to render quarter must benefit all persons who take a direct part in hostilities, whether or not they are entitled to prisoner-of-war status". This means that mercenaries, spies and saboteurs are also entitled to benefit from the neighbourhood rule and may not be summarily executed when captured [4].

But the principle of distinction is not enough; it must be combined with the principles of precaution and proportionality.

## II- THE PRECAUTIONARY AND PROPORTIONALITY PRINCIPLES IN THE LIGHT OF THE UKRAINIAN CONFLICT

The principle of distinction alone is not enough to protect civilians, so there is the need for the principles of precaution and proportionality, which are linked and

[2] ICJ, legality of the threat or use of nuclear weapons, AO, July 8th 1996, § 79.

[3] HENCKAERTS (J-M), DOSWALD-BECK (L), droit international humanitaire coutumier, volume I: les règles, BRUYLANT 2006, p.16

[4] Ibid., p.226

complement it, to strengthen the protection of the civilian population and civilian property. Unfortunately, these two principles also seem far from being respected in the Ukrainian conflict.

The precautionary principle set out in Geneva law states that military operations must be conducted with constant care to spare the civilian population, civilians and civilian objects. IHL imposes precaution in attack, but also precaution against the effects of attack to contain the actions of belligerents. This principle will require armies not to set military objectives in populated areas, which is why IHL prohibits the stockpiling of weapons near schools or hospitals. The bombing of the Mariupol maternity hospital is therefore clear evidence of a violation of this principle.

The precautionary principle requires parties to an armed conflict to take all feasible precautions to minimise civilian casualties and damage to civilian objects, even if there is no certainty as to the actual or potential threat. Article 57 (2) (a) (ii) provides that, States must take all feasible precautions in the choice of means and methods of attack with a view to avoiding, and in any event to minimising, incidental loss of civilian life, injury to civilians and damage to civilian objects. The precautionary principle also implies that the parties to the conflict must take protective measures for civilians not taking a direct part in hostilities, such as refugees, prisoners of war, the wounded, the sick and civilians in the conflict zone. And the bombardments carried out by Russian troops on Ukrainian territory are far from meeting these requirements, according to media reports from the theatre of hostilities. Although closely related to the

precautionary principle, practice tells us that the proportionality principle is often applied once all precautions have been taken. It applies whenever it is impossible to avoid accidental damage to civilians or civilian objects. How sad!!!

The proportionality principle stipulates that any military action must be proportionate to the immediate military threat and must be carried out with the aim of minimising collateral damage to civilians and civilian objects. It is also important to emphasise that this principle does not permit parties to an armed conflict to deliberately target civilians or civilian objects.

Article 51(5)(b) provides that *"attacks which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated"* are considered to be carried out without discrimination. Article 57(2)(a)(iii) provides that those preparing an attack must refrain from launching any attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated. In other words, a military objective may only be attacked if the assessment which must precede the attack, shows that the civilian casualties and damage will not be excessive in relation to the anticipated military advantage. An attack must also be cancelled if it appears that the circumstances that prevailed during this assessment have changed. Theoretically this holds, but how many civilian lives is an enemy military base worth? What

about a one-kilometre advance on the front line? ... There is no need here to blame the silence of the Geneva Conventions, because these issues are abject. No doubt that the civilian casualties in Butcha, discovered after the withdrawal of Russian troops, appear disproportionate to any military advantage gained.

In the context of the choice of weapons, the principle of proportionality requires parties to a conflict to consider the nature and extent of the harm anticipated from the use of a particular weapon and to assess whether that harm is proportionate to the military objective pursued. Parties to the conflict must also take into account the cumulative effect of the use of multiple weapons, as well as the impact on civilians, civilian objects and the environment. It has been reported by the Ukrainian government and Western intelligence agencies that Russia has been using Iranian-made Shahed-136 drones in the conflict since the autumn of last year. And according to the BBC, Russia has carried out repeated drone attacks against military and civilian targets in the Kiev, Odessa and Mykolaïv regions.

Although in an international society based on the prohibition of the unilateral use of force by a State, the development of international humanitarian law may seem anachronistic, Professor Catherine Roche nevertheless stated that international humanitarian law refers to the pragmatism of international law. It is a fact that armed conflicts have not yet been eradicated and that many are still ongoing, including the one between Ukraine and Russia. Laws cannot be silenced during conflicts, the principles of humanitarian law aimed at humanising conflicts are systematically violated and civilians suffer the heaviest consequences. Developments in the means and methods of warfare make it difficult to apply certain principles of humanitarian law, and unfortunately, in the context of the Ukrainian crisis, we are seeing the international community's inability to enforce them. It is crucial that the international community continues to work to find a peaceful and lasting solution to the conflict in Ukraine, to put an end to the suffering of those affected by the conflict, because although *"the law, as we know, is far from always being respected"* [5], no major crisis has been resolved by force since the end of the 19th century and as a famous Chinese proverb says, it's when you see a mosquito land on your testicles that you realise that there are ways of solving certain problems other than by violence ...

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[5] LAGOT (D), le droit international et la guerre : ambiguïtés et problèmes actuels in LAGOT (D), droit international guerre et paix, L'HARMATTAN, p.27 : "Le droit, nous le savons, est loin d'être toujours respecté"



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