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# Summary of Young-OGEMID Symposium No. 12: "The United Nations at 75: Looking Forward, Looking Back (October 2020)"

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# Summary of Young-OGEMID Symposium No. 12: "The United Nations at 75: Looking Forward, Looking Back (October 2020)"

**Prof. Strong, 5 October 2020 -** I am pleased to announce the start of Young-OGEMID's twelfth virtual symposium. As many of you know, a virtual symposium involves a series of pre-identified panelists who write somewhat detailed posts reflecting different perspectives on a particular issue. The panelists' presentations are sent over series of days so that other listserv members can comment on the various points raised by the panelists and by other listserv members. Although it is often best if people try to respond to the most recent presenter, sometimes a particular email string is so interesting that it inspires continued discussion among the listserv members. In that case, there is no prohibition on referring back to an earlier point.

Today's topic:

## The United Nations at 75: Looking Forward, Looking Back

2020 marks the 75th anniversary of the signing of the UN Charter and the birth of the United Nations, and Young-OGEMID will be celebrating the event with a virtual symposium that takes both a retrospective and prospective look at the institution. Speakers will touch on a number of subjects that fall firmly within Young-OGEMID's core concerns (international dispute resolution) but will also address some matters that go farther afield, so as to set the analysis of international legal disputes into broader context.

The virtual symposium will officially run from 5 to 14 October 2020, although people can certainly continue to comment past that date. Our primary presenters, with dates and initial topics (although the discussion may range further afield, as usual), are:

**Monday, Oct 5 - UN Reform: Fit for Purpose?**

*Dr. Joachim Mueller (consultant for change management in international organizations and former senior manager, UN)*

**Wednesday, Oct 7 - Negotiating at the UN**

*Ms. Wu Ye Min (Ministry of Foreign Affairs, Singapore)*

**Friday, Oct 9 - Access to Remedies for Corporate Human Rights Violations: The UN journey so far**

*Prof. Surya Deva (City University of Hong Kong and UN Working Group on Business and Human Rights)*

**Monday, Oct 12 - a double-header on the ICJ!**

*Fact-finding at the ICJ - Prof. James Devaney (University of Glasgow) and*

*The Role of the ICJ at the UN - Prof. Serena Forlati (University of Ferrara)*

Today's speaker:

**Dr. Joachim Müller** is a consultant for change management in international organisations. He previously was a senior manager in the United Nations system for 30 years, including the UN Secretariat, New York, the UN Office of Drugs and Crime (UNODC), Vienna, the World Intellectual Property Organization (WIPO), Geneva, and the World Meteorological Organization (WMO), Geneva. He has been with the Organization for Security and Co-operation in Europe (OSCE) and UN election observer in Namibia and Angola. Dr. Müller has written extensively on UN management reform, including Reforming the UN: A Chronology (2016), The Challenge of Working Together (2010), The Struggle for Legitimacy and Effectiveness (2006), The Quiet Revolution (2001), and New Initiatives and Past Efforts (1997). He is co-editor of the Annual Review of United Nations Affairs (ARUNA). Dr. Müller has a doctorate (D.Phil.) in Management Studies from Oxford University, Nuffield College.

Joachim, the floor is yours as soon as you are ready!

*Dr. S.I. Strong, Associate Professor of Law*
*The University of Sydney*
*The University of Sydney Law School*



***Dr. Joachim Müller**, 5 October 2020 - UN reform: fit for purpose at 75?*

On 21 September 2020, world leaders marked the 75th anniversary of the United Nations. On this occasion, they adopted a renewed vision for collective global action responding to the coronavirus pandemic, climate change, extreme poverty, armed conflict, disarmament, disruptive technologies, and other global challenges.

Can the United Nations address these challenges? Three years ago, the newly appointed Secretary-General António Guterres pledged to reform the United Nations to make the organisation fit for purpose. Has this been achieved by the 75th anniversary?

Indeed, most Secretaries-General, of which there were nine with Guterrez, had engaged in UN reform at the early stage of their term. As such, the UN has been under constant reform since its creation in 1945 changing mandate, structure, and process.

- Early on, the United Nations was set up as the centre of a network of loosely related specialized agencies (such as WHO, ILO, FAO) known as the UN system.
- The core mandate remained as preventing war, fostering economic and social development, and promoting respect for human rights.
- Membership increased from 54 to 193, now including essentially all countries.
- Organisational complexity evolved during the early years, with new commissions, programmes and funds, and remained rather stable from then on.
- The number of UN employees increased over the years although not as much as generally assumed, reaching about 20,000 staff by 2000 and remaining rather stable since. The exception is in peacekeeping which expanded considerably in recent years, with the number of peacekeepers reaching 80,000 by mid-2020 and

peace operations accounting for over half of the UN activities.

In the past, the UN reform process was characterized by a structural disagreement defined by the struggle for influence and decision-making power between different interest groups. This struggle unfolds within the organisation defined by its Charter. Interest groups include member states (donors, developing countries), secretariat staff, to mention the main. The UN Charter defines the structure of governing bodies (General Assembly, ECOSOC, Security Council) and decision procedures (majority rule, consensus, veto rights of permanent members). This is relevant for this part of the reform, which is under the control of member states. Changes to more technical issues are under the prerogative of the Secretary-General.

During his first year as Secretary-General, António Guterres developed in consultation with member states a reform package made up of three pillars: development, peace and security, and management.

Regarding Development, the global network of field offices and resident coordinators was adjusted to improve coordination. Essentially, the network was "upgraded" by moving control from UNDP directly to the office of the Secretary-General. Developing countries, organised in the UN as the Group of 77, insist that host countries maintain control of national development policy and management, whereas the prime responsibility of the United Nations should be service delivery and fundraising. The G77 also insists that the focus of development is poverty reduction, and issues of human rights or peace building should be dealt separately.

The Peace and Security pillar focuses on the peace continuum (prevention, conflict resolution, peace operations, peacebuilding). The proposal was to shift towards prevention and sustaining peace, to reduce the need for large peacekeeping and humanitarian missions. The reform proposals were modest in their adjustments of the peace architecture - the departments and offices involved in peace and security. Essentially, the change was limited to the move of organisational boxes. Developing countries, but also Russia, insisted that the reform should not modify existing mandates at all. Prior to addressing the peace continuum, from day one of his term the Secretary-General dealt with the issue of sexual exploitation and abuse in peacekeeping missions.

Finally, on Management, the Secretary-General proposed decentralisation of decision-making to management, and to strengthen accountability. This was to be achieved through restructuring of headquarters departments and changing rules and procedures. The new departmental management structure separates policy and operational function, aiming to delete duplications and increase efficiency. Again, similar to the peace and security reform, the change of departments at headquarters was the central reform proposal. Prior to the launch of the reform, the Secretary-General addressed successfully one of his priority issues: gender parity. Several important management issues were not addressed as part of the initial reform package but subsequently introduced: human resources, ICT, and outsourcing.

Reform assessment: The reform agenda of Secretary-General António Guterres focused on those proposals which were likely to get approved and did not encourage areas which did touch on the influence and decision-power of member states. Where there was disagreement despite previous consultation, reform proposals were amended to comply with the lowest common denominator. Moreover, the reforms were cost neutral, an important precondition of the United States. Where there existed structural disagreement, no reforms were advanced

despite urgent need, such as the reform of the Security Council or the human rights system.

Concluding comments: United Nations reform will be able to address the central organisational problems only when the structural disagreement is addressed. This requires that member states give up at least some of their decision prerogative - an unlikely scenario looking back at the history of UN reform. What is possible are more limited changes which improve efficiency and effectiveness without impacting on the prerogative of main groups of member states. This was the case for the reform of Secretary-General António Guterres. It succeeded only partially to make the United Nations fit for purpose.

**Prof. Strong, 5 October 2020:**

Dear Joachim,

Many thanks for your excellent start to the symposium. There is quite a lot to digest here, and I hope that our listserv members will identify various issues of interest for further discussion.

Just to start things out, I'd like to ask about your concluding statement that "member states [need to] give up at least some of their decision prerogative" if real and deep reform is to occur. That, of course, has long been the problem with the international legal endeavour - everyone is keen for change and improvement so long as they themselves don't have to do the changing and improving.

It seems that the only time states are willing to move away from that limited and purely self-interested perspective is when the world has been rocked by previously unimaginable difficulties. World War II provided that sort of incentive and generated a type of "constitutional moment." What kinds of modern-day incentives might be sufficient to bring about that kind of change to allow realistic reform? Is it only world wars that can shake governments out of their traditional ways of thinking, or do you think other kinds of threats (COVID, climate change, etc.) might ever be sufficient to bring about a change of attitude and practice?

**Joachim Müller, 5 October 2020:**

Dear Stacie,

Many thanks for your question. You put the focus on the "constitutional moment" and subsequent opportunities for reform. Let me first note that at the time of creation, the system of decision-making and control is established (through the Charter at the UN). Changing this system in order to facilitate reform is utmost difficult. The "original sins" tends to define and restrict opportunities for change. There have been major disruptions and opportunities to encourage fundamental reforms of the UN, such as decolonisation, end of the Cold War, or September 11. In response and within the limits set by the "constitutional moment" there have been changes such the strengthening of peacekeeping, initiative to combat terrorism or new mandates such as "responsibility to protect". Currently the threat of pandemic and climate change will force the international system to act. Nevertheless, the failure to reform

the Security Council captures best the limits of reform. Is the UN un-reformable? Rather than attempting to change, should one re-create the international system? Maybe it is best to start with a "coalition of the willing" rather than a body of 193 member states with hugely different interests and capabilities?

Best, Joachim

**Prof. Strong, 6 October 2020:**

It is now time to turn to our second panelist, Ms. Ye-Min Wu, who has prepared a series of posts designed to trigger discussion among the group regarding the topic of Negotiating at the UN. Since a number of us have had (or will have) the opportunity to attend or observe UN meetings, particularly at UNCITRAL, I hope that this will be a spirited discussion.

**Ms. Ye-Min Wu** has worked with the Ministry of Foreign Affairs, Singapore for over a decade. While at the Permanent Mission of Singapore to the UN in New York, she represented the G77 and China in UN negotiations on sustainable development issues. She was involved in climate change negotiations under the UNFCCC, and is currently Singapore's Deputy Permanent Representative to the WTO and WIPO. In 2019, she co-authored a book 'Negotiating at the United Nations: A Practitioner's Guide', with former US and Guatemalan diplomats.

Ye-Min, the floor is yours!

*Ye-Min has asked me to circulate her first post so that the day's discussion can start as early as possible. I look forward to responses to her question below!*

***Ms. Ye-Min Wu**, 6 October 2020 - The United Nations at 75: Looking Forward, Looking Back*

The UN is as strong or as weak as its Members allow it to be. When the UN is UNited (pun intended), it sends a strong signal to the world and sets the direction for action, e.g. the agreement on the Sustainable Development Goals. However, UN negotiators often find themselves rehashing old arguments instead of reconciling the various interests, making it difficult for the UN to move quickly to tackle current global challenges.

Our playbook "Negotiating at the UN", which provides tools and a roadmap for negotiators, was inspired by former UN Secretary General Dag Hammarskjöld's belief that any negotiator could learn how to *speak for the world* by balancing national interests and global responsibility. Each negotiator makes a significant impact (sometimes more important than the flag she represents) in a UN negotiation, as each person shapes the negotiation process and the negotiated outcome differently. Hence, how each negotiator wields this *power* and *responsibility* matters.

Qn. How can you harness your power and responsibility in a negotiation to forge meaningful outcomes? Let's share experiences.

**Mark Kantor, 6 October 2020:**

Ye-Min via Prof. Strong,

Thank you for your post and for participating in this symposium.

You described negotiating parameters as learning to "*speak for the world* by balancing national interests and global responsibility." That formula omits the role of interest groups, which have their own interests not necessarily congruent with either national or global perspectives. How do interest groups (whether political, business, civil society, cultural or other) fit into a framework for UN negotiations?

**Ms. Ye-Min Wu[1], 6 October 2020:**

Thanks Stacie for sending out the post, and thanks Mark for your question!

The belief that any UN negotiator could learn how to speak for the world by balancing national interests and global responsibility is actually a reminder to negotiators not to focus merely on national interests, but to take into account the views of others (including interest groups), and to forge the outcome with what is best for the world in mind. There is certainly a role for interest groups in UN negotiations and many government delegations meet with/consult them in the course of the negotiations. At the same time, we can't run away from the fact that decisions by the UN General Assembly/Security Council are ultimately done by the Member States.

Cheers

Ye-Min

**Prof. Strong, 7 October 2020:**

Dear Ye-Min

I realize some parts of the world are still asleep, but hopefully I can get some discussion going on your question, "How can you harness your power and responsibility in a negotiation to forge meaningful outcomes?"

Given the seniority level of people on this listserv, I think most of us are likely to represent NGOs at a UN negotiation rather than a state, although some of us might be called in as subject specialists to assist state delegations as we get more senior. Therefore, I'll focus on how an NGO might answer your question.

[1] I am writing in this forum in my personal/non-official capacity.

From my experience negotiating the Singapore Convention on Mediation at UNCITRAL, I would say the most important thing for NGOs to remember is that (1) they are representing an NGO and not themselves and (2) making an intervention at an international conclave is not a time to show off personally but is instead an opportunity to engage with the subject matter. I recall the first principle was violated by a very senior NGO delegate from a national organization who was making all sorts of allegations that were personal to him rather than the organization he represented (how did I know his statements were not reflective of the organization? Because I and several other NGOs were members of that organization, even though we were representing other entities on the day! It was the height of irresponsible behaviour). I also recall the second principle was violated by a very junior NGO delegate who sounded as if he was reading from his LLM or PhD thesis during his intervention. The statement was entirely divorced from practical considerations and only tangentially related to the topic under discussion. While not as problematic as the first person, it was still difficult to sit through and did not reflect well on the individual or his institution.

Before I attended my first UNCITRAL meeting, I was very worried about how to conduct myself. I conferred with my sister, who has been on national delegations in several interstate negotiations, and with the leader of the US delegation, and asked how I could be useful to the project, although I was participating only as an NGO. I was told that it was useful for me to get a reading from the NGOs in the room during informal break-out sessions, since that is often where breakthroughs occur. I was also told explicitly not to be "that" NGO - ie the singleminded individual who promoted a single, self-serving viewpoint without thought of other interests or consequences. In short, I needed to listen more than I spoke and I needed to see how my perspective fit into the larger picture - two points I think that are implicit in Ye-Min's opening post.

Hopefully that's helpful. I look forward to hearing more thoughts and experiences!

**Ms. Ye-Min Wu, 7 October 2020:**

Thanks for sharing Stacie!

Indeed, one of the negotiator skillsets that we highlight in our book is self awareness - a negotiator needs to know his/her bias (which can be different in different discussions on the same subject), and have a handle on his/her emotions. As such, it is useful to practice “the negotiator’s pause” (be it one or many times) in the negotiation process to self-evaluate and rebalance as needed. Otherwise it can lead to “legacy behaviors” (ie the not so positive actions of some negotiators that one remembers), which can be a problem since the circuit is small and credibility and reputation are key.

**Ms. Ye-Min Wu, 7 October 2020:**

Hi everyone! Here is more food for thought:

In a negotiation, a negotiator aims to secure his/her priorities without crossing his/her redlines, optimally while building trust and goodwill with the parties. This often requires the

negotiator to see beyond his/her counterparts' bargaining positions to identify their interests, e.g. by using the Ladder of Inference model. Self-awareness (e.g. to rein in bias, to manage emotions), timing (e.g. to harness momentum and ripeness), and the building of alliances are just a few among several other factors that the negotiator needs to take into account when negotiating.

Negotiations, including in the multilateral arena, have become even more challenging due to limitations to in-person meetings as a result of the COVID-19 pandemic. To mitigate these challenges, a negotiator may wish to meet new negotiation counterparts one-on-one before negotiating in a virtual group space. This is particularly important since one is now unable to physically cross the room and conduct social chatter to warm up the "personal dynamics" before launching into negotiations. More planning may also be needed to structure and "orchestrate" a virtual group negotiation that is anticipated to be divisive in order to better enable a fruitful outcome.

Feel free to share your ideas for mitigating the limitations of virtual negotiations.

**Prof. Strong, 7 October 2020:**

Dear Ye-Min

Thanks for your additional thoughts. The concept of (1) identifying and working against one's implicit biases is important in every aspect of life and law, and (2) looking past positions to interests is critical in all sorts of negotiations, not just those at the interstate level. We used to teach that concept in the mandatory lawyering class at my last institution. Those who are unfamiliar with the concept of interest-based negotiation should see William Uhry's seminal book, "Getting to Yes" (or the equally useful, "Getting Past No").

As for the problems of virtual negotiation, it does seem problematic given the amount of work that is done in informal breakouts. It seems to me that delegates will have to ramp up their pre-meeting consensus-building discussions with other state entities, hoping to build coalitions. Perhaps negotiations will have to be multi-phased, rather than single-meeting events, to allow that type of offline discussion to take place via phone, zoom and other means.

What do others think? You can draw on your experience in the commercial realm.

**Ms. Ye-Min Wu, 7 October 2020:**

Just leaving one more food for thought below. Have a blessed day everyone!

Large UN Member States can demand a lead role in multilateral negotiations; others de facto yield these countries or large groups (e.g. the Group of 77) that role. Although an enlightened use of such power can produce positive outcomes, the imbalance also has the potential to negatively affect the tone of a negotiation, as well as undermine the perceived legitimacy of an eventual agreement. Representatives from such "gorilla" delegations should thus (i)

display greater willingness to find mutual solutions; (ii) be respectful, listen responsively and not hog “airtime”; and (iii) choose their battles, to counteract the negative effects of asymmetric power.

Smaller countries/delegations - and their individual delegates - have some distinct advantages over larger countries/delegations and their representatives. As an “ant”, try (i) thinking outside the script; (ii) acting as a bridge; and (iii) taking on leadership roles, to maximize your impact in the negotiation. Forming alliances can also augment your influence and authority exponentially.

Feel free to share your experiences in mitigating asymmetric power in a negotiation.

**Mark Kantor, 8 October 2020:**

Ye-Min and All,

An "ant" that accepts the State-State framework may be less successful than one that reaches out beyond that scope.

An "ant" often needs alliances to have an impact. I see efforts to ally with interest groups and with sympathetic media (often accessible because that media has pre-existing ties with the interest group). I also see social media campaigns to widen the effort, again often in alliance with interest groups.

I hope this is useful.

**Prof. Strong, 7/9 October 2020:**

Dear all

While we encourage you to continue to engage with Ye-Min regarding best practices in interstate negotiation, it is time to introduce our third speaker, Prof. Surya Deva, who will discuss A*ccess to Remedies for Corporate Human Rights Violations: The UN journey so far*.

**Prof. Surya Deva** is an Associate Professor at the School of Law of City University of Hong Kong and a member of the UN Working Group on Business and Human Rights. Prof. Deva’s primary research interests lie in Business and Human Rights, India-China Constitutional Law, and Sustainable Development. He has published extensively in these areas, and has advised the UN bodies, governments, multinational corporations and civil society organisations on matters related to business and human rights. He is one of the founding Editors-in-Chief of the *Business and Human Rights Journal*, and sits on the Editorial/Advisory Board of the *Netherlands Quarterly of Human Rights*, the *Vienna Journal on International Constitutional Law* and the *Australian Journal of Human Rights*. Prof Deva is an elected member of the Executive Committee of the International Association of Constitutional Law.

Surya, the floor is yours!

***Prof. Surya Deva**, 9 October 2020 - Access to remedy for corporate human rights abuses: The UN journey so far*

The involvement of corporations in human rights abuses is much older than the 75-year old United Nations: the operations of the British East India Company[2] are a case in point. Although the post-Second World War birth of the UN was in a way a response to the corporate involvement in the Holocaust[3], seeking access to effective remedy against corporations for human rights abuses remains as difficult today as it was in the pre-UN days.

So has the UN not tried or made any progress over the last 75 years? Quite the contrary. The UN has tried, and also made some progress, in encouraging corporations to respect human rights. Let me outline briefly some of these attempts made at the UN level and their impacts on facilitating access to remedy for victims of corporate human rights abuses.

At least since the early 1970s, the UN has been exploring ways to grapple with adverse impacts of corporate activities on society. The UN Commission on Transnational Corporations had drafted an UN Code of Conduct on Transnational Corporations[4] in 1983 to address these concerns. However, the 1990 version of this Draft Code could not be adopted because of competing interests and priorities of developed versus developing states, and the project was ultimately abandoned in 1992.

Then came the launch of the UN Global Compact[5], a voluntary initiative comprising ten principles in the areas of human rights, labour, environment and anti-corruption, in 2000. In the last 20 years, the Global Compact has emerged as the largest corporate sustainability initiative. Although the Compact has some integrity measures in place to prevent "blue-washing" by companies, it offers no practical window to seek remedy for human rights abuses, even against those Compact companies which commit to respecting human rights.

The 2003 Draft Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises[6] with regard to Human Rights tried to impose binding human rights obligations on corporations and conceived monitoring and verification mechanisms at the international level, in addition to steps that states should take at the national level. However, the Draft Norms could not be adopted in view of opposition from several states and significant corporate lobbying against legally binding regulation.

The unanimous endorsement of the UN Guiding Principles on Business and Human Rights (UNGPs)[7] by the Human Rights Council in June 2011 was a watershed movement in promoting businesses respect for human rights. In the same year, the UN Working Group on Business and Human Rights[8], a group of five independent experts, was established to

[2] https://www.theguardian.com/world/2015/mar/04/east-india-company-original-corporate-raiders
[3] https://www.press.umich.edu/7719249/holocaust_corporations_and_the_law
[4] https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/2891/download
[5] https://www.unglobalcompact.org/
[6] https://digitallibrary.un.org/record/498842?ln=en
[7] https://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf
[8] https://www.ohchr.org/EN/Issues/Business/Pages/WGHRandtransnationalcorporationsandotherbusiness.aspx

promote the dissemination and implementation of the UNGPs. In the last one decade, the UNGPs have become the lingua franca of all stakeholders promoting responsible business conduct.

Pillar III of the UNGPs (Principles 25-31) underlines the importance of access to remedy for corporate human rights abuses and envisages three types of remedy mechanisms: state-based judicial mechanisms, state-based non-judicial mechanisms, and non-state-based grievance mechanisms. Principles 31 stipulates several "effectiveness criteria" for non-judicial grievance mechanisms, while Principle 26 identifies various barriers to access to remedy and expects states to take "appropriate steps" to remove these barriers. The Accountability and Remedy Project[9] of the Office of the High Commissioner for Human Rights has developed concrete guidance for states on how to remove these barriers. Moreover, in its 2017 report[10] to the UN General Assembly (which I had the pleasure of drafting), the UN Working Group made several recommendations as to what an effective remedy under the UNGPs entails, e.g., (i) rights holders should be central to the entire remedy process; (ii) remedy mechanisms should be sensitive to diverse experiences and expectations of different rights holders; (iii) victims should have freedom from fear of victimization in seeking remedies; (iv) both remedy mechanisms and remedial outcomes should be effective; (v) a "bouquet of remedies" are often needed to ensure full restitution of harms caused; and (vi) all roads should lead to remedy (e.g., locating remedies for communities affected by investment projects in bilateral investment agreements).

However, states - even those which have adopted a National Action Plan on Business and Human Rights[11] - have so far shown little appetite in taking concrete steps to implement these recommendations. Therefore, from the perspective of rights holders, these UN efforts seem to have made little difference on the ground. Barriers to remedy remain, and tend to become more acute in transnational cases with corporations exploiting complex group structures and global supply chains to deny or delay their liability for human rights abuses.

These continued frustrations have contributed to civil society organizations forming a "treaty alliance"[12] and pushing again for binding rules at the international level. In June 2014, the Human Rights Council adopted a resolution to negotiate a legally binding instrument[13] "to regulate, in international human rights law, the activities of transnational corporations and other business enterprises". The Second Revised Draft[14] of the proposed instrument, which was released in August 2020, is expected to inform state-led negotiations[15] later in October 2020. But it is still unclear whether states (in particular European Union) would show necessary political will to support this initiative[16], which should contribute partly to strengthening access to remedy for corporate human rights abuses.

In summary, while the UN continues to engage with the agenda of holding corporations accountable for human rights abuses, we should not expect too much from the UN or its

[9] https://www.ohchr.org/EN/Issues/Business/Pages/OHCHRaccountabilityandremedyproject.aspx
[10] https://documents-dds-ny.un.org/doc/UNDOC/GEN/N17/218/65/PDF/N1721865.pdf?OpenElement
[11] https://www.ohchr.org/EN/Issues/Business/Pages/NationalActionPlans.aspx
[12] https://www.treatymovement.com/about-us
[13] https://www.ohchr.org/EN/HRBodies/HRC/WGTransCorp/Pages/IGWGOnTNC.aspx
[14] https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session6/OEIGWG_Chair-Rapporteur_second_revised_draft_LBI_on_TNCs_and_OBEs_with_respect_to_Human_Rights.pdf
[15] https://www.ohchr.org/EN/HRBodies/HRC/WGTransCorp/Session6/Pages/Session6.aspx
[16] http://opiniojuris.org/2020/09/08/bhr-symposium-the-business-and-human-rights-treaty-in-2020-the-draft-is-negotiation-ready-but-are-states-ready/

processes, because states as key decision makers have generally proved to be unreliable and inconsistent actors in upholding human rights. States continue to prioritize economic development of few over realizing human rights of all and have shown little political will in protecting their own people from corporate actors. Although we should keep using and reforming various human rights processes and mechanisms at the UN level, "non-state centric" ways must also be explored outside the UN system to hold corporate actors accountable for human rights abuses. To remain relevant, international (human rights) law and its institutions in the 21st century should be responsive to changing needs and circumstances.

**Prof. Strong, 9 October 2020:**

Dear Surya,

Thanks for this very informative post. Of course, your last few lines are the ones I'll pick up on - non-state mechanisms to hold corporations accountable for their actions. How might you see that developing? Consumer groups who threaten boycotts or other legal actions (for example, negligence or some intentional torts) for failure to comply with certain standards of behaviour? Contracting parties who require a certain standard of behaviour of their counterparts? In either case, what standards might apply?

If litigation is determined to be the appropriate route, how might the imbalances in funding be addressed? Just to take one example, deep-pocketed tobacco corporations were able to avoid accountability for decades due to scorched-earth litigation tactics, among other things. How can such tactics be curtailed in the future?

All very interesting and of course very important to us all.

**Prof. Surya Deva, 9 October 2020:**

Dear Stacie

Thanks for these reflections and very good questions.

In my view, non-state centric conception of international law has two aspects: norm-setting, and the enforcement/implementation of such norms. As corporations use their proximity with political parties and governments to influence law and policy making to their advantage, networks of civil society actors should play a more active and coordinated role in counter-balancing corporate capture of state-based institutions. In addition, these networks should develop their own standards of conduct. For example, student unions should ensure that what is being sold in university campuses is manufactured/produced in a responsible and sustainable manner. Similarly, staff associations should be proactive in ensuring that their provident / pensions funds are invested only in responsible businesses. Consumers should demand that labels on a pair of jeans should list info as to how many litters of water is used in manufacturing it.

Regarding social enforcement of norms, various tools are emerging, such as social media campaigns, shareholder resolutions, protests, pressure on business partners with a public image, coordinated boycotts etc. At the same, we must continue to employ state-based mechanisms at national, regional and international levels. It is not an “either or” approach.

Imbalance between corporations and victims is a major issue - it is not merely about resources for litigation; information asymmetry is another example. Various strategies could be tried, e.g., crowd funding; support by philanthropic foundations; business tax to contribute to a national fund. Right/access to information legislation must also extend to corporations.

**Prof. Strong, 9 October 2020:**

Dear Surya,

Thanks for your note. I particularly like your suggestion that individuals qua consumers can have an important and powerful role in shaping corporate behavior, which can then shape individual behavior. For example, you suggest consumers could insist on knowing how many liters of water go into the production of an article of clothing. With knowledge comes power - consumers might (increasingly) choose not to purchase items that are more harmful to the environment, even if they are less expensive. For too long, the corporate world has operated on the assumption that consumers (or shareholders) are motivated solely by bottom line figures, but that is certainly not the case. The more individuals know, the more they can participate in a feedback loop that inures to everyone's good.

What thoughts do others have on these issues?

**Prof. Strong, 11 October 2020:**

Though it's doubtless still the weekend in most parts of the world, it's Monday in Sydney, which means it's time to introduce our last two speakers in our ICJ double-header! Serena and James will speak respectively on the role of the ICJ at the UN and on fact-finding at the ICJ.

**Prof. Serena Forlati** is professor of International Law at the Department of Law of the University of Ferrara and Director of Macrocrimes, the Department’s Centre for European Legal Studies on Macro-Crime. Former co-convener of the ESIL Interest Group on International Courts and Tribunals, former External Scientific Fellow, Max Planck Institute on Procedural Law, Luxembourg. Her current research interests focus on international courts and tribunals, International Human Rights Law and its interaction with International Criminal Law. Recent publications include The Gabčíkovo-Nagymaros Judgment and Its Contribution to the Development of International Law, Brill 2020 (co-editor, with M.M. Mbengue and B. McGarry) and Universal Civil Jurisdiction - Which Way Forward? , Brill 2020 (co-editor, with P. Franzina).

**Dr James Devaney** is Lecturer in Law at the University of Glasgow where he is Programme Convenor for the LLM in International Law. His research interests are varied, but focus mainly on international dispute settlement. His monograph, ‘Fact-Finding Before the

International Court of Justice', which focusses on the use of evidence before international courts and tribunals including the adjudicative bodies of the WTO and inter-State arbitration, was published by Cambridge University Press in 2016. He is a member of the International Law Association Committee on the Procedure of International Courts and Tribunals, and is also a member of the Bar of the State of New York.

Serena and James, whenever you're ready!



***Prof. Serena Forlati**, 11 October 2020 - The Role of the International Court of Justice at the United Nations: is the international society ready for a stronger 'World Court'?*

As Ye-Min Wu noted in her post a few days ago, 'The UN is as strong or as weak as its Members allow it to be'. This stance could describe also the role of the International Court of Justice (ICJ) within the UN - and more broadly in the international society.

The ICJ is instrumental in achieving the ideal of peace through (international) law enshrined in Article 1(1) UN Charter (cf President Yusuf's speech on the occasion of the celebration of the UN 75th Anniversary)[17]. The Court's busy docket - with several highly sensitive cases from all regions of the world - is an indication that it has earned the trust of States. Still, the proper exercise of its functions depends on State consent and cooperation.

This appears most prominently in the settlement of inter-State disputes, which is based on acceptance of the Court's jurisdiction but also requires the parties' active cooperation in the implementation of judgments (see Boisson de Chazournes and Angelini).[18] While not formally binding, advisory opinions also require States to take appropriate action, both when participating in deliberations of UN political organs and individually. The follow-up of the Court's advisory opinion in Chagos Islands[19] is just the last indication that this is not always the case. Even the ICJ's acknowledged role in the development of international law (see Legality of the Use of Nuclear Weapon,[20]) ultimately rests not only on its prestige or the soundness of its reasoning, but also on its ability to identify legal solutions that are acceptable for the international society as a whole, if not for the losing party in a specific procedure.

This structural weakness has been reflected in the ICJ's judicial policy, with the Court being at times criticized for its self-restraint on matters of jurisdiction and admissibility[21] or for the 'transactional' nature of its pronouncements.[22] At the same time, the ICJ's broad approach to the rule of law often looks beyond purely inter-State relations, covering the activities of international organizations and also encompassing individual rights. For instance, the Court's recent orders in Gambia v. Myanmar[23] - whereby Myanmar should submit regular reports on

[17] https://www.icj-cij.org/files/press-releases/0/000-20200626-STA-01-00-EN.pdf
[18] https://archive-ouverte.unige.ch/unige:43323
[19] https://theconversation.com/chagos-islands-uk-refusal-to-return-archipelago-to-mauritius-show-the-limits-of-international-law-127650
[20] https://www.icj-cij.org/files/case-related/95/095-19960708-ADV-01-00-EN.pdf, para 18
[21] http://www.sidiblog.org/2016/11/24/the-icj-decisions-in-the-marshall-islands-cases-or-the-unintended-consequences-of-awareness/
[22] para 6: https://www.icj-cij.org/files/case-related/142/142-20111205-JUD-01-01-EN.pdf
[23] (https://www.icj-cij.org/files/case-related/178/178-20200123-ORD-01-00-EN.pdf

the measures taken to implement provisional measures - and Congo v. Uganda (reparations)[24] - arranging for an expert opinion to assess damage ensuing from loss of human life, loss of natural resources and property damage in the territory of the Congo - adopt innovative procedural solutions aimed at ensuring effective protection of human beings. Whether these orders will actually be conducive to prevention of atrocities in Myanmar and to reparation for those occurred in the Democratic Republic of the Congo largely depends, once again, on the willingness of the respondent States to comply with the Court's indications, and on the ability of the UN as a whole to induce such compliance.

Should the ICJ be cautious in the exercise of its judicial functions, especially when these touch upon complex political issues, as argued eg by Vice-President Xue in the Ukraine v. Russia case?[25] Should it rather take a more proactive role without remaining 'hostage of State consent', as Judge Cançado Trindade forcefully contends in his individual opinions[26] - even at the risk of backlash? The question lingers at the background of every instance coming before the ICJ and calls for a more general reflection as to what States, and the international society as a whole, can accept from the principal judicial organ of the United Nations.

Your views on the issue are welcome!



***Dr James Devaney**, 11 October 2020 - The Role of the International Court of Justice at the United Nations: is the international society ready for a stronger 'World Court'? A Reply to Professor Forlati*

Professor Forlati's excellent and thoughtful reflection on the role of the ICJ at the time of the UN's 75th anniversary not only neatly encapsulates many of the challenges facing the Court today, but also finishes with an intriguing provocation:

> 'Should the ICJ be cautious in the exercise of its judicial functions, especially when these touch upon complex political issues…? Should it rather take a more proactive role without remaining 'hostage of State consent', as Judge Cançado Trindade forcefully contends in his individual opinions…even at the risk of backlash?'

My answer to these questions would be that, of course, the ICJ must also be cautious when exercising its judicial functions, but this does not prevent it from playing a proactive role in cases that come before it. In fact, in relation to the specific topic that I was asked to focus on for this symposium, namely fact-finding, I believe that the Court has already become more proactive in recent years. And rightly so.

How the ICJ goes about establishing the facts in cases that come before it has become somewhat of a hot topic in recent years, mainly as a result of the fact that a number of factually-complex cases have been brought before it including *Pulp Mills*[27]*, Whaling in the Antarctic*[28] and a number of cases between Costa Rica[29] and Nicaragua.[30] Criticism of the

[24] https://www.icj-cij.org/files/case-related/116/116-20200908-ORD-01-00-EN.pdf
[25] https://www.icj-cij.org/files/case-related/166/166-20191108-JUD-01-01-EN.pdf
[26] for example here, para 198: https://www.icj-cij.org/files/case-related/140/140-20110401-JUD-01-08-EN.pdf
[27] https://www.icj-cij.org/files/case-related/135/135-20100420-JUD-01-00-EN.pdf
[28] https://www.icj-cij.org/files/case-related/148/148-20140331-JUD-01-00-EN.pdf
[29] https://www.icj-cij.org/files/case-related/150/150-20151216-JUD-01-00-EN.pdf

way the ICJ dealt with fact-finding in these cases resulted in no shortage of criticism from both scholars and the ICJ's own judges in separate and dissenting opinions. To the ICJ's great credit, however, there is evidence that it has not only heard these criticisms, but is incrementally addressing them.

For instance, since the Court's criticism of the practice of parties presenting their experts as counsel in order to shield them from cross-examination, parties in subsequent cases have consistently put forward individuals as experts as such. Similarly, the Court's long-acknowledged practice of informally consulting experts (so-called *experts fantômes*) was the subject of particularly full-throated criticism from scholars, including myself, who argued that such a practice raised clear due process concerns. As such, the Court's decision to utilise its (long-neglected) fact-finding powers to appoint experts *proprio motu* in the *Maritime Delimitation*[31] case between Costa Rica and Nicaragua in 2016 was another reason to be cheerful. Particularly so since the report the ICJ's experts produced was heavily cited by both parties and in the judgment itself.

These examples speak to an ICJ that is not only mindful of criticisms made of its fact-finding process but also willing to do something about it. Most importantly, however, these proactive procedural decisions were not with 'backlash' from states party to these cases, as some doom-mongers had warned. Rather, as Professor Forlati mentioned, the ICJ's docket remains healthy, and in my opinion the Court's fact-finding process the better for its more proactive role.

All of this having been said, the ICJ's decision to appoint four experts in the long-running *Armed Activities*[32] case between the DRC and Uganda last month I believe will be the real litmus test for the ICJ's proactive approach to fact-finding. Why? This is the first time that the ICJ, without the consent of one of the parties, has nevertheless decided to press ahead and appoint experts to assist it. Uganda argues that the appointment of experts on the quantification of damages relieves 'the DRC of the primary responsibility to prove her claim…'. Were Uganda to refuse to cooperate with the Court's experts, this could potentially undermine their effectiveness and negatively impact on Uganda's perception of the Court's ultimate findings, raising the spectre of non-compliance.

Nevertheless, I believe that the ICJ is right to take the proactive approach it has here. More than fifteen years have passed since its original judgment in *Armed Activities*, and the parties have had ample time to reach consensus on the quantification of damages. Furthermore, while the ICJ can do little more than draw adverse inferences from any failure of the parties to cooperate with it, it is in Uganda's moral and practical interests to cooperate with the Court. In the words of Keith Highet:

> [I]f a state wishes to prevail in a litigation, it had better do what is asked of it by the tribunal, sovereignty or no sovereignty…Of course, states are always…free to conduct their cases as they see fit, but if they wish to win, they should…exercise that freedom consistent with any preferences indicated by the Court…'

[30] https://www.icj-cij.org/files/case-related/157/157-20180202-JUD-01-00-EN.pdf
[31] https://www.icj-cij.org/files/case-related/157/157-20160531-ORD-01-00-EN.pdf
[32] https://www.icj-cij.org/files/case-related/116/116-20200908-ORD-01-00-EN.pdf

The ICJ's jurisdiction is consensual, yes, and it must always be cautious in the exercise of its judicial function, but once the consent of the parties has been established it should not shy away from playing a proactive role in proceedings before it.

What does everyone else think?

**Prof. Strong, 12 October 2020:**

Dear Serena, dear James

Many thanks for your excellent interventions. Like you, I tend to think that the court should not shy away from politically contentious matters - that is, after all, why a court needs to exist (otherwise all matters would be settled amicably). One question I might have for the two of you is what the ICJ and other institutions/states might do to lessen any backlash that might occur. It seems that increased assertions supporting the legitimacy of the ICJ might be the best way to protect the court and indeed minimize additional grumblings from nations that dislike being held accountable. We in the arbitral world have discussed the need to publicize the good work that arbitrators are doing in both investment and commercial proceedings so as to offset both the grumbling that comes from losing parties and from those who do not understand the nature of the arbitral endeavor, and I wonder whether the ICJ would benefit from a similar sort of initiative.

For James, I was wondering if he could say a bit more about the backlash against use of experts in the ICJ - I think I heard about the use of *experts fantômes* and would agree that would be problematic (as it is in both domestic litigation and all types of arbitration), but I am not sure about the basis for an objection to use of experts in damages calculations or other technically complex matters. That seems a bit odd, though perhaps I'm misreading your post.

**Prof. Serena Forlati, 12 October 2020:**

I am grateful to James Devaney and Stacie Strong for their thoughtful remarks.

I entirely agree with James' view that there have been detectable shifts in the ICJ's approach to the management of cases in recent years, with the Court being less inclined to simply respect the choices of the litigating parties than in the past. I also consider that this enhances the integrity of the judicial process but, as James rightly points out, it is not straightforward that the litigating parties accept this new course. While I also hope it will consolidate, the overall reaction of States and other constituencies will be important in this regard.

Precisely in this phase, the ICJ will probably remain very mindful of the need not to overstep the boundaries of States' consent to its jurisdiction - while not shying away from exercising it even in complex cases, as Stacie argues. While each case has to be assessed in its own terms, this is in itself an important safeguard against backlash, and one the ICJ has often resorted to in the past.

As for the need for more publicity of the Court's work, much has been done also in this

respect. The Court's website and the webcast of hearings ensure a high level of transparency on its activities. In recent years, this has made it possible for interested communities to follow developments of cases; still, better awareness of the Court's role (and of its limits) beyond the specialists' relatively small circle could certainly enhance the ICJ's overall legitimacy. There is also an important role for scholars to play in this regard.

**Dr James Devaney, 12 October 2020:**

Thanks, Stacie.

With regard to your question about the ICJ's informal consultation of experts 'behind the scenes' without the knowledge of the parties (so-called experts fantômes) perhaps I can say a bit more. Why is it problematic that the ICJ consults such experts on purely technical matters or only in relation to damages?

Well, some would say it is not problematic, including ICJ Judge Bennouna, who has argued in favour of the consultation of experts fantômes 'to understand and clarify certain technical or scientific elements at dispute in a given case'.[33] Nevertheless, I strongly believe that any distinction between the informal consultation of experts on issues which lie at the margins of a dispute and those which form part of the crux is both impractical and problematic. Why?

It is clear to me that in practice issues are likely to arise as to whether an issue is marginal or important, and that often the characterisation of an issue as either one or the other will be very much in the eye of the beholder. More fundamentally, the fact that the parties are not privy to the drawing of this distinction, that they may have no input on what issues experts are being consulted on, no input on the substance of their advice, as well as no information on the identity of the expert being consulted (and their attending biases which are not capable of being tested, for instance, through cross-examination) means that any suggestion that the use of experts fantômes continue under any circumstances must be strongly resisted.

I would be interested to know what everyone else thinks.

James

**Ivaylo Dimitrov, 12 October 2020:**

Dear Serena and James,

Thank you for your excellent posts and thought through observations.

I do agree that the ICJ should not shy away from politically-sensitive matters (as it has been perhaps rightly accused of doing so in the past) provided that there is a legal question to be decided as within ICJ's competence. The Court itself correctly pointed out in Tehran Hostages case that the fact that certain issues have political aspects (that falls within the

[33] https://academic.oup.com/jids/article-abstract/9/3/345/4984493

competence of other UN bodies) does not automatically deprive such matters from their legal aspects that make them subject to the ICJ's jurisdiction. And exercising such jurisdiction (where all preconditions are met) and making sound and clear findings in fact and in law is precisely in line with the Court's role as a guardian of international justice and the rule of law. That said, one might argue that what the Court should do is to factor in the practical, political and economic implications of its judgments before sealing them. Tricky balance.

As regards the ICJ's fact-finding approach, it will be particularly interesting to see what will happen in the Gambia v Myanmar case. As James noted, the ICJ has been criticized in the past for being too passive in (or even totally delegating) its fact-finding functions and the instances where such criticism was strong, alongside the Armed Activities case (and its reliance on the Porter Commission's findings), were the Bosnian and Croatian Genocide cases in which the Court relied almost exclusively on the findings of the ICTY. While this is not necessarily wrong, and may indeed serve procedural economy, it remains to be seen how will the Court apply its standard in cases in which there are no judicial or quasi-judicial findings (or even no previous fact findings) that could be used. Michael Becker highlights the issue in this excellent post.[34] The ICJ's inclination to rely on previous fact-finding could be seen in its Provisional Measures Order in the Rohingya case in which the Court based its key determinations on references to GA Resolutions and findings of the Myanmar Fact-Finding Mission, but this begs the question what will the Court do in cases in which the Court should carry out primary fact-finding. The examples given by James and the recent Order in the Armed Activities are certainly relevant, but I tend to think that expert testing of evidence already presented by the parties is somewhat different than primary fact-finding. We should of course keep in mind the natural limitations of the ICJ's fact-finding powers (being bound to the evidence adduced by the Parties) and the fact that such exercises will inevitably affect the costs and the duration of the ICJ's proceedings, but the Rules of the Court certainly give the powers to the Court to request new evidence and to invite witnesses and experts proprio motu. While I appreciate the different views and the commend the developments described in James's post, my sense is that it is a bit too early to make conclusions as regards a shift in the ICJ's fact-finding approach. The Court's caseload will certainly give us the opportunity to reassess this issue in the next several years.

Thank you very much again for the interesting discussion.

*Ivaylo Dimitrov*
*Omnia Strategy LLP*

**Prof. Serena Forlati, 12 October 2020:**

Thank you for your comments; indeed, there is a tricky balance to be met in each specific case, in many different respects including the practical implications of pronouncements - incidentally, this is where the role of ad hoc Judges, that is also often criticized as a relic of the past, may still find its justification.

I also agree that the Gambia v Myanmar case is an important test for the Court: besides issues

[34] https://www.ejiltalk.org/the-challenges-for-the-icj-in-the-reliance-on-un-fact-finding-reports-in-the-case-against-myanmar/?fbclid=IwAR23aY0Nf7YOF1uDrvTM7gWSHhpbcZ-lKfC1MLbC0YElsWQqaoElF-wc-ww

of fact-finding that you righly point to, it also consolidates the notion that States 'not specially affected' by alleged breaches of erga omnes obligations are entitled to raise complaints before the ICJ (cf Article 48 ARSIWA). This would not have been possible hadn't the Gambia decided to exercise this prerogative as a Party to the Genocide Convention, which is in itself an important development, if not an absolute first in the Court's case law.

Perhaps more importantly, this is an instance where the ICJ may play a role in the prevention of mass atrocities, and not only in assessing ex post facto whether such atrocities have occurred and who should bear responsibility for them under international law. The Court has been mindful of this aspect in its Order on provisional measures; and it is also important to stress that it was unanimous in adopting the order (which also includes indications intended at safeguarding the integrity of evidence). The difference in approach from the 1993 Orders in the Bosnian Genocide case is clear.[35] One can only hope that the Order of January 2020 also has a different impact on the ground - and this is not in the hands of the ICJ.

Prof. Strong, 13 October 2020:

Our symposium is now drawing to a close, and I ask you to please join me in thanking our wonderful panelists: **Dr. Joachim Mueller, Ms. Wu Ye Min, Prof. Surya Deva, Dr. James Devaney** and **Prof. Serena Forlati**. They have given us much to think about as we consider the 75th anniversary of the United Nations.

[35] cf https://www.icj-cij.org/files/case-related/91/091-19930408-ORD-01-00-EN.pdf and https://www.icj-cij.org/files/case-related/91/091-19930913-ORD-01-00-EN.pdf

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