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The In/Ex-clusiveness of International Law: Some Remarks from the Concluding Panel of the 17th Annual Conference of the European Society of International Law

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1 Introduction

Looking into the history of international law, it can be said that it has moved from exclusiveness to inclusiveness. This is evident from the language of treaties that shifted from 'We the civilized nations' to 'We, the member states', 'the States Parties to the present Convention'.[1] However, the story of international law has continued to bounce between inclusiveness back to exclusiveness in our modern times. In international organizations' terms, 'consensus' can be said to reflect the most inclusivity in adopting treaties and resolutions. Consensus means all states agree to adopt the instrument, albeit sometimes with a few reservations that differentiate between consensus and unanimity, the latter not allowing any reservation during the adoption of an instrument.

Exclusivity can be traced in negotiations when some states negotiate an instrument, adopt it and request others to join it, such as some of the conventions adopted by the Council of Europe (CoE) and opened to ratification by other states. The CoE is an exclusive club of states that implemented the previously mentioned process in opening some of its instruments to ratification by other states that are not members of the CoE club. This can be considered as an attempt to seek inclusivity, yet it puts other states from outside the club at a disadvantage when they are faced with a 'take it or leave it' option about a treaty they did not negotiate.

Furthermore, some domestic laws are issued with extraterritorial jurisdiction, which forces other states to adhere since otherwise they will not be able to deal with

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[1] E.g., 1969 Vienna Convention on the Law of Treaties, United Nations Treaty Series, vol. 1155, 331.

the institutions of the issuing country of the legislation. This situation does not touch upon universal jurisdiction over crimes against humanity, for example, but it addresses the adoption of a national legislation that has to be honoured internationally. Hence, the obligations that are supposed to be carried out within a territory of one state have to be carried out by institutions of other countries. This is an example of the utmost exclusivity in decision-making, which turns into international obligations with no inclusivity at all.

This short article will discuss some aspects of exclusivity and inclusivity in international law and practice. It will do so by referring to some specific examples, including the Patriot Act adopted by the US Government post 9/11 to counter terrorism as well as the financial measures adopted that had to be carried out by financial institutions around the world. Moreover, this article will address some examples in relation to the paradox of inclusivity vs exclusivity and the reasons behind the need for inclusivity in the making of international law.

2 The Paradox of Exclusivity vs Inclusivity in International Law

In a trail of tweets, a former US State Department lawyer and currently Senior Advisor to the Crisis Group[2] gave an analysis of the letter sent by the US Government to the United Nations Security Council (UNSC) on the August 2022 strikes conducted against Syria.[3] As someone who used to draft such letters, his observations were very interesting and provocative, to say the least. He addressed the US interpretation of Article 51 of the UN Charter, which speaks of self-defence. He stated that the letter mentioned 'only the pre-planned US air strikes', but did not discuss the subsequent fighting. The letter spoke of militia groups without specifying which groups were targeted. Moreover, the justification given for the strikes was the deterrence of further attacks, while invoking the doctrine of 'unable or unwilling' on behalf of the Syrian authorities to effectively counter the threat posed by such groups.

This analysis can be read in conjunction with the interpretation of the lawful use of force by the US military and what is called the mitigation of damages to civilians vs. the avoidance, prevention or protection from causing damages to civilians.

The interpretation here is exclusive as it is different from the notion of self-defence in Article 51 of the UN Charter and the notion of the protection of civilians as stated in the 1949 Geneva Conventions. In fact, differences in interpretation of conventions based on the political interests of each state are well known in the diplomatic community. This creates back and forth movements from inclusivity to exclusivity. That is

[2] B. Finucane, *Twitter* 1 September 2022, available at https://twitter.com/bcfinucane/status/1565335833627860992.

[3] United Nations Security Council, Letter dated 26 August 2022 from the Permanent Representative of the United States of America to the United Nations addressed to the President of the Security Council (2022), available at https://www.justsecurity.org/wp-content/uploads/2022/09/8.26.2022-Art.-51-Letter-Syria.pdf (last visited 18 March 2023).

to say that states adopt exclusive positions to serve their interests while negotiating a legal instrument, then compromise to adopt that instrument by consensus which constitutes the maximum form of inclusivity. However, when a state ratifies the treaty and starts implementing its obligations, its lawyers start interpreting the rules exclusively to serve national interests, which will possibly lead to the same position that the state initially adopted during negotiations.

From a personal experience of close to 30 years in negotiating international instruments, a brief narration of how a UN convention came to be adopted might assist us in understanding the thesis of this piece. After many rounds of negotiations, the most controversial issues lingered on until we reached a deadlock. We do not fight on 'We, the UN member states' in the Preamble for example, but we fight on the salient points that may affect the interests of our states. After a few days of sleep deprivation in the meeting rooms, we came up with a formula that we were all able to live with. Here, it is important to note that none of the negotiators was happy with the outcome, but each negotiator got a piece of what he or she had asked for. This is what we call at the UN 'constructive ambiguity'. This means we came up with a constructive language to adopt a text, which was ambiguous enough to use in serving our interests and goals. Hence, we finally came out of the room with a text that was adopted by consensus. As previously mentioned, consensus reflects inclusivity that can be reached as an outcome of negotiations.

This consensus is held by lawyers and academics while analysing and interpreting the text of a treaty and its *travaux préparatoires*. Yet, the interpretation that they come up with and the theories that are derived from the texts are created by those academics and practitioners; hence, it comes back to exclusivity. This is similar to what national lawyers do at their ministries of foreign affairs. Their main job is to come up with an interpretation that serves the interests of their countries. Hence, the consensual text of a convention is used as the basis for an interpretation that will eventually lead to the original position of states in negotiations or will at least lean towards it.

In the same context, some examples from different negotiations may be pertinent to the debate on this paradox.

3 Some Examples from International Negotiations

A *The International Criminal Court (ICC) and the Crime of Aggression Negotiations*

In my opinion, the Rome Statute negotiations and consequently the definition of the crime of aggression were highly inclusive. They included not only all governments, but also NGOs. Every voice was heard, especially in relation to the crime of aggression. State parties and non-parties were listened to, despite the fact that the final decision was adopted by the parties, which led back to exclusivity.

Moreover, if the Rome Statute came up with the complementarity concept, the prosecution came up with the positive complementarity concept. One decision that was taken at the Kampala Conference, which adopted the definition of the crime of

aggression, included the positive complementarity concept. Some negotiators, representing mostly observers, were totally against this concept because it went beyond what was incorporated in the Statute. The complementarity concept was introduced into the Rome Statute in an inclusive manner, when all states were negotiating on an equal footing. Yet, the positive complementarity concept came in an absolutely exclusive manner, proposed by the ICC prosecution and brought to the negotiations in New York by The Hague negotiators, another exclusive format.

The Hague cluster was exclusive in comparison to the New York cluster because of representation. All states members of the UN are represented in New York but, for example, very few African countries are residents in The Hague and fewer among them are ICC experts. So, bringing a draft decision negotiated by The Hague group and imposing it on the negotiators in New York was an attempt to move from exclusivity to inclusivity.

Despite all the reservations raised during the negotiations, the positive complementarity decision remained on the agenda and was adopted in Kampala with complementarity and positive complementarity embedded in it. This is another example of inclusiveness vs exclusiveness in international law that might affect the call for attaining universality of the Rome Statute.

B *Negotiations of a New Instrument under the United Nations Convention on the Law of the Sea (UNCLOS)*

Another example of the inclusiveness of international law vs exclusiveness can be found in the negotiations of a new binding instrument under UNCLOS on the Conservation and Sustainable Use of Marine Biological Diversity of Areas Beyond National Jurisdiction (BBNJ). Although the decision to negotiate this agreement was initially discussed at the Assembly of States Parties of UNCLOS, which means exclusivity, all states in the UN General Assembly are taking part in the negotiations rather than only UNCLOS states parties, which leads to inclusivity. Some of the non-parties, like the US, have strong positions in negotiations and they are heard. This is another example of inclusiveness in international law negotiations.

C *Regional or Individual State-driven Dynamics*

Another example to consider in this regard, as mentioned earlier, is the adoption of certain regional arrangements or organizations to conventions, which are then opened for ratification to others, directly or upon invitation, from outside of that region. Also, some organizations adopt rules and decisions and expect others who are not members of the organization to respect and honour the obligations they adopt. Here are some of those conventions:

- Convention on the Protection of the Marine Environment of the Baltic Sea Area, 1992 (Helsinki Convention);[4]

[4] Convention on the Protection of the Marine Environment of the Baltic Sea Area, 1992 (Helsinki Convention), Article 35 on Ratification, approval and accession.

- Council of Europe Convention on Offences relating to Cultural Property, Nicosia 2017.[5]

In addition, domestic law can be used in a similar manner. An example is what is known as the USA Patriot Act 2001, formally the Uniting and Strengthening America by Providing Appropriate Tools Required to intercept and Obstruct Terrorism Act of 2001. This Act was adopted following the 9/11 terrorist attacks in the US with the purpose 'to deter and punish terrorist acts in the United States and around the world, to enhance law enforcement investigatory tools, and other purposes'.[6] So, this was the basis of the extraterritoriality in the Act. It is a national legislation with internationally imposed provisions that other states had to carry out. Robert J. Graves and Indranil Ganguli confirmed this approach in relation to the financial measures adopted by the US since then, including currency transfers and expanding US jurisdiction and even imposing sanctions on foreign persons and entities.[7]

This is the most exclusive form of adopting rules with international impact, with no means of attaining inclusivity. At least, the CoE conventions are opened for ratification by other states upon their consent, which may lead to a level of inclusivity despite the criticism of exclusivity in the law-making process. However, in the case of the Patriot Act, it was negotiated, adopted and enforced exclusively by one state, but with extraterritorial jurisdiction which by imposed practices becomes a norm at the international level.

The final example of exclusivity vs. inclusivity is in relation to peace and security decisions adopted by the UNSC under Chapter VII and others adopted by the African Union Peace and Security Council (AUPSC). These decisions, although not treaties, create legal obligations on all states members of the respective organizations. Both organs are exclusive in nature, by virtue of their membership and even more so when it comes to the UNSC, due to the veto powers which, lying in the hands of just a few states, is even more exclusive.

Many decisions by both the UNSC and AUPSC are adopted without any prior consultations with the countries subject to their decisions, which takes exclusivity to new

[5] Council of Europe Convention on Offences relating to Cultural Property, 2007, Article 28 in relation to Accession to the Convention.

[6] US Treasury, Financial Crimes Enforcement Network Official Site, available at https://www.fincen.gov/resources/statutes-regulations/usa-patriot-act.

[7] Graves and Ganguli, 'Extraterritorial Application of the USA PATRIOT Act and Related Regimes: Issues for European Banks Operating in the United States', *Privacy & Data Security Law Journal* (2007) 978; the authors mention that 'The US has long employed freezes and blocks of U.S. Dollar transfers, even transfers occurring outside of its borders, to accomplish foreign policy aims. The USA PATRIOT Act expands U.S. jurisdiction over foreign persons, increasing U.S. power to employ these tools to an extent that foreign financial institutions may find troubling. The U.S. government in many instances cannot directly impose sanctions on foreign persons or institutions suspected of money laundering or harboring and encouraging international terrorism. Where the government cannot do so, the USA PATRIOT Act broadens the government's power to sanction the intermediaries used by foreign persons and institutions to access U.S. markets. Cooperation with due diligence and compliance with subpoenas is necessary if a bank wishes to conduct business regularly with a U.S. financial institution. Furthermore, the USA PATRIOT Act has created unprecedented seizure powers over funds held in the United States, giving it effective power over funds held abroad'.

heights. For example, at the African Union (AU), when sanctions are imposed on a country in response to an unconstitutional change of government, the country is not allowed to participate in AU activities. Hence, it cannot attend or contribute to discussions in relation to matters concerning it at the AUPSC. The most recent example is Sudan. This country was put under sanctions and was therefore not able to contribute to the debate in relation to the extension of the mandate of the AU peacekeeping operation in Darfur. This is another example of exclusivity, which might affect the implementation of decisions of international organizations.

4 Conclusions

The paradox between exclusivity and inclusivity in international law is here to stay. From the point of view of the exclusive clubs, they are presenting a respectable outcome of lengthy negotiations for others to join and implement. Therefore, opening up for others to ratify is an attempt to reach inclusivity in an easy manner. Nevertheless, the other side, which was deprived from being involved in the negotiations, may regard it as an imposition of rules which give due regard to the situation of states in that exclusive club while disregarding the situation in others.

This notion was there when newly independent states were about to join conventions adopted at the time when the term 'We, the Civilized Nations' was used. Today, with the UN in place, while negotiations taking place there are not ideal, the world of international law has shifted from exclusivity to inclusivity. Yet, despite the fact that negotiations are more inclusive, interpretation brings it back to exclusivity.

There is a real need for inclusivity in order to hold states accountable for not carrying out their obligations under international law. Borrowing from the principles of criminal law, '*nulla poene sine lege*', and based on the law of treaties '*pacta sunt servanda*', it is imperative to ensure that states take part in the law-making process and that the process is as inclusive as it can be in order for states to consent to be bound by the obligations and effectively carry them out.

This is meant to provide food for thought for further in-depth research on the matter.