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Fundamental Institutions and International Organizations: Solidarist Architecture[1]

Tonny Brems Knudsen

As a world organization designed for the promotion of international order and justice the United Nations (UN) is based on, and continuously shaped by, older and more fundamental institutions of international society including sovereignty, diplomacy, international law, great power management, the balance of power and war (Bull 1977; Wight 1977; 1978). These historical and durable institutions have traditionally (and correctly) been seen as primary and ontologically superior to secondary international organizations (Bull 1977, xiv; Wendt and Duval 1989; Buzan 2004; 2014). In turn, international organizations like the UN have been considered as part of the supportive or auxiliary machinery of international society (Bull 1977, xiv, part II; Jackson 2000, 105-113), or, more specifically, as a means for the working of the more fundamental institutions which are preconditions of international order, justice and society as such.

This captures much of the essence and common rationality behind the establishment, operation, and politics of international organization. At the same time, however, it must be realized that organizations like the UN and the International Criminal Court (ICC) have the capacity to shape and even change the constitutive principles and reproducing practices of fundamental institutions and thus the basic social structure of international society (Knudsen 2016; Navari 2016; chapters 2 and 3 in this volume). In the following this mutually constitutive relationship between fundamental institutions and international organizations will be examined through an analysis of major changes in international law, war and great power management at the UN and the ICC.

First, it is argued that the reservation of the use of force for the (collective) defense of international peace and security in the UN Charter (articles 2.4 and 2.7 combined with Chapter VII) have affected the constitutive principles and reproducing practices of war (restricted and rationalized for the common good), great power management (providing for concerted action) and

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international law (providing for collective enforcement of common principles). These are constitutive changes in established fundamental institutions brought about by the creation and working of the UN, and they point to the development of a more solidarist international society as understood by Hersch Lauterpacht (1975/1946) and Hedley Bull (1966).

Secondly, it is argued that the UN and the ICC have given rise to the evolution of new, or rather revived, institutions which are fundamental to a solidarist international society, namely humanitarian intervention and the 'Responsibility to Protect' (R2P), international criminal jurisdiction and international trusteeship.

Pluralist and Solidarist Conceptions of International Society

The distinction between a pluralist and a solidarist conception of international society was introduced by Hedley Bull in 1966 in one of his contributions to *Diplomatic Investigations* edited by Herbert Butterfield and Martin Wight.[2] The distinction is, however, a reflection of the much older controversy between the legal traditions of positivism and naturalism over the nature of international society and the proper foundation of international law.[3]

According to the pluralists, the members of international society can only be expected to be able to agree on the minimum requirements of international order, such as mutual respect of sovereignty, non-intervention, the codes of diplomacy and conventional international peacekeeping. Furthermore, while the agreement on these basic principles may be universal and stable, it would be dangerous to assume that states will also be able to agree and act in common when it comes to the actual enforcement of such principles (Bull 1966, 52-53, 67-68). Consequently, order, justice and the rule of law in international society hang first of all on the ability of states to provide for these qualities in their own national societies, and in accordance with their own values. In other words, 'the good life' is to be defined and provided by the state meaning that there can be many different versions of the good society in the world at a given point in time. This is the essence of the term 'pluralism'.

It follows from this that the chief function of *international* rules and institutions is to stipulate the basic international agreement about the requirements of peaceful coexistence among different national

[2] See Bull 1966 and (for a broader use of the terms) Bull 1977, 148-151, 156-158 and 238-240.

[3] Bull 1966, 51-73. For discussions and developments of the distinction and the connote one of positivism and naturalism, see Vincent 1974, 283-285 and 340-349; Wheeler 1992; 2000, 21-52; Knudsen 1999, 48-91; Buzan 2004, 45-50, 56-57; de Almeida 2006; Weinert 2011; Buzan 2014, 16, 83-87, 89-167.

societies instead of establishing and enforcing a particular version of the 'good life' across the world.[4] Furthermore, the international order is first of all an order among states, and therefore it is, with a few exceptions (which the pluralists remain somewhat concerned about), only states that have rights and duties under international law. As for human rights, there is a risk that they will become a source of international conflict as long as there is no international agreement about human justice. Consequently, the pluralist view on such questions as collective enforcement of international law, human rights, humanitarian intervention, sovereignty and the potential of international organization amount to what some would call a less ambitious, others a more realistic conception of international society than the solidarist one.

In contrast, the solidarist conception of international society is based on the assumption of solidarity or potential solidarity among states (and other actors) with respect to the enforcement of international law (Bull 1966, 52).[5] Moreover, individuals too have rights and duties under international law, and under some circumstances the enforcement of these rights and duties may be a legitimate concern for international society as a whole, either on behalf of the individual (prosecution of war criminals) or on behalf of groups of individuals, for instance an ethnic minority in need of protection (humanitarian intervention).[6] In the solidarist conception of international society, the use of force is reserved for the defense and promotion of the common good. It also ascribes a central role to international organization, especially world organization (the UN) and international courts of justice (such as the International Court of Justice (ICJ) and the ICC) as bases of global governance and reflections of the constitutional structures of domestic societies. Furthermore, it implies a qualified notion of sovereignty, which is eventually going to 'lose the character of something standing fundamentally above the law', meaning international law (Lauterpacht 1975/1925, 398).

Informed by theoretical and historical evidence that the pluralist and solidarist conceptions of international society are not mutually exclusive (Knudsen 1999, 12-17, 74-82, 89-90, 403-407; Buzan 2004, 45-50, 56-57; de Almeida 2006; Weinert 2011; Buzan 2014, 16, 83-87, 89-167), this chapter will examine the role of international organization in the evolution of solidarist principles and

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4 Bull 1966; Bull 1977, 77-98. The most extensive and authoritative account of the pluralist theory of international society is Jackson's (2000) *The Global Covenant*.

5 On the solidarist conception of international society, see also Kingsbury and Roberts 1990, 1-64; Vincent 1990, 241-256; Wheeler 1992; 2000, 21-52; Knudsen 1999, 48-91; Buzan 2014. As for the original formulation of the solidarist conception, the most important source besides Grotius' work is Hersch Lauterpacht's comprehensive authorship.

6 See for instance Lauterpacht 1975/1946, 307-365, especially 354-358.

practices in established fundamental institutions, as well as the evolution of fundamental institutions that are basically solidarist. The key is to uncover the dynamics of solidarist change. As argued earlier in this volume (see the chapters by Knudsen and Navari), the relationship between fundamental institutions and international organizations (or, more broadly, primary and secondary institutions) are mutually constitutive. This means that the design, operation and evolution of international organization may introduce change into the constitutive principles and reproductive practices of more fundamental institutions with representatives of states, organizations and non-governmental organizations as the principal agents.

This was very much what Hersch Lauterpacht - the champion of the neo-Grotian or 'solidarist' conception of international society according to Hedley Bull (1966) – expected of the newly created UN. In a paper given at the Hebrew University of Jerusalem on 7 May 1950, he declared that the establishment of the UN and the associated developments and possibilities had opened "a new chapter in human government" (Lauterpacht 1975/1950, 167), meaning a solidarist one. More specifically, he summarized the record of legal and institutional progress in relation to the preceding period as lying mainly "in the undoubted improvement of the structure of international organization; in the growing acceptance of the principle of enforcement of international law not only in relation to states, but also against individuals acting on their behalf; and in the recognition of the inalienable rights of the individual conceived as the ultimate unit of all law" (Lauterpacht 1975/1950, 167).

However, solidarist principles and practices are not simply introduced into the institutional architecture of international society. They evolve, or they are consciously designed, by means of diplomatic dialogue and legal codification on the basis of, and with a view to, already existing rules and institutions. And most of the historically established institutions dealt with by classical English School theorists are of a rather pluralist nature. Understanding fundamental institutional change on the basis of the distinction between pluralist and solidarist conceptions of international society (which is just one of several possibilities as evident from the contributions to this volume) is therefore to understand how emerging solidarist institutions (or emerging solidarist principles and practices in established institutions) are shaped by more pluralist ones during their evolution and organization, and how they, in turn shape or affect pluralist ones (Knudsen 1999, 42-47, 74-89, 400-401; Buzan 2004, 185-186). The internal tensions in the machinery of international society at present (for instance between sovereignty and non-intervention on the one hand, and human rights, humanitarian law, and humanitarian intervention on the other) can be seen as reflections of this logic.

In other words, while the basic norms and institutions of international society make many forms of cooperation possible, there is also an element of resistance to change built into this society, especially when we are dealing with changes affecting its foundations.[7] Thus, compared to the extreme constructivist position of scholars like Alexander Wendt (1992) a theory of institutional change building on the insights of the English school must start with the idea of bounded constructivism. In the practices of international society, there are some important shoving and shaping factors, which influence the more or less conscious evolution of new rules and institutions.

Organizational Manifestations of a Solidarist International Society

In what follows, the focus is on the role played by the UN and associated international organizations in the evolution of solidarist principles and practices in already established and predominantly pluralist fundamental institutions. Furthermore, I discuss the role played by international organization in the revival and evolution of some basically solidarist institutions. In particular, the reservation of the use of force for the common good and the revival of humanitarian intervention, international criminal jurisdiction and international trusteeship are developments that owe a lot to the UN and the ICC. The examination of these changes will pay attention to evolving principles and practices as well as the agents and processes that are driving them. Moreover, I will discuss the politics of fundamental institutional change including the role played by international organizations in the adaptation of the larger institutional framework (shoving and shaping), and in the accommodation of divergent views in international society, for instance among the great powers and regional groupings.

The UN and Solidarist Change in Established Fundamental Institutions

First, the ban on the private use of force by states for other purposes than self-defence in Articles 2.4 and 51 of the UN Charter, and the provisions for the use of force for the maintenance of international peace and security by authorization of the UN Security Council in Articles 39-42 signaled fundamental changes in the constitutive principles of war as an institution. To that comes the more recent revival of humanitarian intervention in the post-Cold War practices of the UN Security Council (Wheeler 1992; 2000; Knudsen 1996; 1999; 2013), the associated stipulation of the R2P in the 2005 UN World

[7] This point can also been made on the basis of a distinction between constitutive and regulative rules. See Sørensen 1999, 590-604.

Summit Outcome Document (Ban 2009; Bellamy 2006) and the ongoing attempt to make the act of aggression by states a crime for which individual state leaders may be held accountable at the ICC (Clarke 2010; Scheffer 2010).

In terms of fundamental institutional change, these are principles and procedures reserving the legitimate use of force for the common good, namely to counter aggression, mass atrocity crimes and breaches of the peace. This is a solidarist principle of war, or the use of force, rather than a pluralist or realist one, as noted also by Bull (1966) at an early point, and by Lauterpacht (1975/1946, 1975/1950) before him. This signals a declining relevance of earlier constitutive principles of war as the right of states to challenge each other in contests of territory, status and interests, and the related principles that war is the institution for the final decision of differences (Wight 1978, 112), or the continuation of diplomacy by other means in the words of Clausewitz.

Obviously, war as the right to challenge other states for conquest or prestige is not entirely dead as evident from the occupasion of Kuwait by Saddam Husein's Iraq in August 1990, and the annexation of Crimea by Putin's Russia in 2014 (Crawford 2014). Neither is war as the final settlement of differences - one way of interpreting the unlawful US-led attack on Iraq in March 2003 (Dunne 2003; Knudsen 2004). But it is the collective use of force authorized by the UN Security Council for the defence of international peace and security, and the prevention of mass atrocity crimes, which have come to be seen as the legitimate resort to force today (together with self-defence). The restoration of the independence of Kuwait in February 1991 by a grand coalision of states acting on the authorization of the UN Security Council, the profound and widespread international condemnation of the 2003 attack on Iraq by states, the UN Secretary-General and the NGO community (Dunne 2003; Roth 2004; Knudsen 2004), and the condemnation of the annexasion of Crimea by the UN General Assembly in September 2014 (Crawford 2014) support this observation. This is basically a solidarist change of the constitutive principles and associated practices of war as an institution.

Second, the institution of great power management has undergone significant change following the establishment of the UN. The constitutive principle remains the special responsibility of the great powers for the maintenance of international order and justice and their associated rights and duties (see Knudsen chapter 2 in this volume). These rights and duties were further institutionalized with the establishment of the UN Security Council and the associated collective security system, of which the five great powers are permanent caretakers with the main responsibility for the maintenance of international peace and security, and a veto right to prevent their possible internal differences from destructing the system (Malanczuk 1997).

More importantly, *collective* great power management has become habitual and routinized at the UN Security Council due to this system of negotiation, compromise, mandate drafting and recurrent application of measures for the settlement of international disputes. By inviting and assuming mutual restraint and coordination, and by providing a program for international order and justice with the ambitious goals and principles of the UN Charter, the establishment of the UN is a deliberate and quite succesful attempt at selecting the Grotian-solidarist practice of great power concert over soft balancing (Paul 2005; Pape 2005), and soft balancing over harder forms of balancing. Moreover, this collective management has become imbedded in an inclusive organizational framework comprising other states (rotating membership of the Security Council and broader access), the UN Secretary-General (recommendations, reports) and non-state actors (agenda-setting by early warning and reporting).

In recent years, the concerted and multi-actor game of great power management has been evident in, for instance, the UN approach to the crises in Kenya 2008, Libya 2011 (with an unhappy ending), Côte d'Ivoire 2011, Mali 2012 to present, and Congo 2013, whereas the contribution of the UN to the crises in Syria since 2011 and Ukraine since 2014 has been to allow for softer forms of balancing along the harder ones, and to support the application of diplomatic and non-forceful measures (Knudsen 2014). Furthermore, the UN has increasingly relied on regional ownership (for instance by the African Union, ECOWAS and the Arab League) in dealing with a number of these crises (Bellamy and Williams 2011; Knudsen 2014). This may be seen as an attempt to respond to one of the downsides of the UN Security Council as a stabilizer of (cooperative) great power managent, namely that is very difficult to adapt the system to the ongoing changes in the balance of power (see Friedner Parrat, chapter 4 in this volume).

Third, this affects the practices of the balance of power as well. The practices of fundamental institutions are sometimes overlapping. As argued, the UN collective security system seeks to make the balance of power operate as a concert with mutual restraint and collective management of international order and justice as central practices, instead of arms race, competition for allies and the pursuit of relative gains. As evident from the Cold War (and to some extent after), such organizational changes are not enough in themselves to secure the envisaged change in fundamental practices. But concerted action including mutual restraint has been evident in recent decades - relatively sustained in the management of the international economy, recurrently or occasionally in the maintenance of international peace and security. Tensions between the USA, Russia and China should not lead us to overlook the fact that the balance of power is maintained today in ways that involve mutual restraint and coordination, even in hard cases like Syria (US-Russian coordination of air-strikes) and Ukraine

(strategic sanctions by the West). The UN has thus supported and promoted the idea of the balance of power as a political and voluntaristic institution of international society, rather than a mechanic aspect of the international system.

Fourth, the creation of the UN Security Council and its provisions for the defence of international peace and security in Articles 39-42 in the UN Charter has endowed international society with the potentially most effective instrument for the collective enforcement of international law that the world has seen (Lauterpacht 1975/1950). According to the Grotian-solidarist view, principles and institutions of enforcement are essential to all law, since to the extent to which they are lacking, the legal nature of rules of conduct is weakened (Lauterpacht 1975/1950, 165). The UN system of enfocement transcends the sporadic 'decentralized' enforcement of legal rules by means of 'self-help' pointed to by Hans Kelsen and other legal-positivist writers of the 19th and early 20th century. In practice we have only seen an occational enforcement of inter-state peace and security on the basis of chapter VII of the UN Charter (Malanczuk 1997), but there are numerous cases of post-Cold War enforcement of international humanitarian law in the form of humanitarian intervention and R2P-measures based on Chapter VII (Malanczuk 1997; Knudsen 1999; 2013; Wheeler 2000).

Equally important, the United Nation as a whole has become an important site for the creation, interpretation and adjudication of rules of law - in recent years for instance humanitarian law (Knudsen 2013) and rules for the suppression of terror (Tams 2009) - thereby providing international law with some of the qualities of domestic law that H.L.A. Hart and Bull were searching for on the basis of the idea of secondary rules supporting the primary ones (Bull 1977, 133-136). This is an advanced way of reproducing international law as a set of binding rules having the status of law. This is the reason why Lauterpacht put so much hope in the UN. For in spite of the fact that their efficacy has from the very beginning depended on the ability of the permanent members of the Security Council to act in unanimity, the provisions for the enforcement of international law established under the Charter *envisage* a regular and collective enforcement of the rules of international society. No matter what the particular great power climate of the day may provide for regarding collective action, this has given international society a permanent vehicle of international governance.

Fifth, the establishment of the UN supported the 20th century evolution of rights and duties of the individual, and groups of individuals, in international law, a key element in the solidarist conception of international society. With the preamble and Articles 55 and 56 of the UN Charter, and the ensuing adoption of the 1948 Universal Declaration and the 1966 covenants, human rights were introduced and codified along with the older bodies of the laws of war and international humanitarian law (Roberts

and Guelff 2000; Forsythe 2012). In other words, international law became constitutive of human justice and not just international order. The distinction between lawful and unlawful behavior now comprised individuals and groups and not only states. This constituted a different game among states, providing for humanitarian dialogue, international criminal jurisdiction, and, after the Cold War, humanitarian intervention. International humanitarian law and human rights were also constitutive of state actors who could now legitimately take human rights initiatives at the international level.

Even more importantly, these changes in international law constituted new actors with rights and duties in international society: Individuals (having human rights and also duties under the laws of war which can now be enforced on the basis of the dual court system of the ICC); the UN and its organs and agents (being entitled to act on human rights and humanitarian law cf. in recent years the periodic reviews of the Human Rights Council, the early warning role played by the special reporter on the R2P, and the humanitarian role played by the UN Security Council, the General Assemby and the Secretary-General); and non-governmental human rights- and humanitarian organizations. These changes in international law as an institution are the combined effect of the stipulation of humanitarian principles as law, and the sets of procedures and practices supporting them.

Given that fundamental institutions are not completely independent of each other, but rather mutually dependent and intertwined, these changes also relate to other fundamental institutions. For instance, mutual recognition of sovereignty and associated principles like non-intervention and inter-state equality have become qualified or conditional: Full sovereign status and rights depend on the respect of the 1948 Genocide Convention and other parts of humanitarian law cf. also the adoption of the R2P.

Summing up, the establishment of the UN can be seen as a deliberate attempt to introduce solidarist change in the working of the more fundamental institutions of international society by the stipulation of new constitutive principles and the promotion of new procedures and practices. More importantly, the legal and institutional framework of the UN has given rise to some of the changes hoped for including the de-legitimization of aggressive warfare, habitual collective great power management, and recurrent enforcement of international law and international humanitarian law.

The UN and the Evolution of Solidarist Fundamental Institutions

Equally important, these organizational and institutional changes have made other solidarist inventions possible. As indicated, the ones I have in mind are the introduction (or rather the revival) of humanitarian intervention, international criminal jurisdiction and the reconstruction of war-torn socities on the basis of de facto trusteeship arrangements: Institutions that can be seen as fundamental to the solidarist conception of international society as envisaged by scholars of the Grotian tradition of thought.

Humanitarian Intervention and the R2P

According to the solidarist conception of international society, states have an obligation to try to defend the minimum standards of humanity for instance by preventing genocide and crimes against humanity (Lauterpacht 1975/1946, 340-346, 354-358). Lauterpacht was not prepared to give up on the old Grotian idea of a right of humanitarian intervention, even at a time when this right had almost disappeared completely from state practice and positive international law. Instead, he maintained that although it had hardly been visible in state practice in the first part of the twentieth century, the principle of humanitarian intervention had continued to provide "a signpost and a warning", and that it was furthermore possible for the UN to undertake such interventions, when persecutions and atrocities implied a threat to international peace and security (Lauterpacht 1975/1946, 357; 1950, 167). Here, Lauterpacht anticipated the solidarist turn towards humanitarian intervention in the post-Cold War practices of the UN Security Council and beyond.

In fact, the idea, right and practice of humanitarian intervention had been quite evident in the history of early European and modern international society, and in the 1990s it evolved again from a number of situations in which force was used for real or declared humanitarian purposes including Liberia, northern Iraq, Somalia, Bosnia, Rwanda, Haiti, Sierra Leone, Kosovo and East Timor (Knudsen 1997; 1999; 2013; Wheeler, 2000). In most of these cases the UN Security Council authorized measures of dictatorial interference or military intervention so protect minorities or populations from genocide, crimes against humanity, war crimes or a humanitarian disaster. After disputes over especially the non-authorized humanitarian intervention in Kosovo, the possibility of humanitarian intervention was reconfirmed inside the framework of the R2P at the 2005 UN World Summit (Bellamy 2006). The principle and practice of humanitarian intervention has thus been relatively durable in modern history.

As a solidarist fundamental institution, humanitarian intervention makes it possible for states and organizations to come to the assistance of minorities exposed to genocide and mass atrocities.[8] As such, it is an institution shaped towards the pursuit of human justice in its most basic sense. Based on the solidarist tradition of thought, international humanitarian law and state practice, the constitutive principle of humanitarian intervention is that there must, at the very least, be a possibility of the prevention of such crimes in the machinery of international society. The associated practices, procedures and rules by which this principle is reproduced, and specific action is made possible, include collective UN Security Council authorization of humanitarian intervention and interference, criteria defining the situations in which humanitarian intervention will be legitimate (contained in the R2P, Article 4H of the Charter of the African Union, and the practice of the UN Security Council among other places), and mutual understandings concerning the need to prevent abuse of this right (Knudsen 1996; 2013; Wheeler 2000; Ban 2009).

As a fundamental and solidarist institution of international society, humanitarian intervention is not only constitutive of certain 'rules of the game' (Buzan 2004) such as the rules for outlawing and preventing mass atrocity crimes (the ultimate enforceability of humanitarian law), but also for the game as such (making the pursuit of international human justice possible). At the same time, the institution of humanitarian intervention empowers state actors to raise proposals for humanitarian diplomacy, interference and intervention at the international level, and to take such steps based on the relevant sets of generally recognized principles and practices.

The post-Cold-War revival of humanitarian intervention was perhaps a logical consequence of the continuing evolution of international humanitarian law through the 20th century, and the possibilities that opened up with the end of the Cold War. As it happened, it was also an unexpected consequence of a chain of actions, beginning with 'safe havens' for the Kurds of northern Iraq, which led to the revival, evolution and shaping of this institution based on the adoption of UN Security Council resolutions and their implementation in a series of cases (Knudsen 1997; 1999; 2013).

The establishment of 'safe havens' for the Kurds of northern Iraq is a good example of the general capacity of the UN and other international organizations to trigger and shape fundamental institutional change by providing norms, rules, legitimacy and an institutional framework for the solving of international crises by a multitude of actors. The rebellion and the ensuing humanitarian disaster of the

[8] Humanitarian intervention can be defined as dictatorial or coercive interference in the sphere of jurisdiction of a sovereign state to protect or relieve individuals facing genocide, crimes against humanity, war crimes or a humanitarian disaster (Knudsen 1999; 2013).

Kurds of northern Iraq in the aftermath of the Gulf War in the spring of 1991 was widely considered to be the consequence of Western encouragements (especially by US president George Bush) to the people of Iraq to take matters in their own hands and topple Saddam Hussein, the Iraqi president and dictator (Freedman and Boren 1992, 46). When the rebellion failed, and 1.5 million Kurds were facing a humanitarian disaster in the mountains, a sense of guilt and an urgent responsibility to try to rescue the Kurds spread over the western world, enabled by the real-time television coverage of the catastrophe (Freedman and Boren 1992, 48; Freedman and Karsh 1993, 421). Humanitarian NGOs, UN agencies, experts on international law and politics, and state actors called for emergency measures and humanitarian access which was subsequently demanded in UN Security Council resolution 688 on the 5th of April 1991. Then John Major, the prime minister of Great Britain proposed to create 'safe havens' for the Kurds to protect them from the threatning assult by Iraqi forces (Freedman and Boren 1992). After some American hestitation this was done by means of a military intervention led by the three western great powers with reference to the urgent need to rescue the civilian population and the indication in resolution 688 that something like this was necessary (Freedman and Boren 1992, 57-58). Faced with the almost immediate humanitarian success of the intervention, UN Secretary-General Perez de Cuellar, the non-Western great powers and many other state actors expressed their content with the result and their support of an institutionalization of this 'right of humanitarian intervention' inside the framework of the UN Security Council (Rodley 1992, xi; Knudsen 1997; 2013).

Although ECOWAS had conducted an intervention in Liberia the year before with maintenance of order and standards of humanity as the stated reasons, the creation of 'safe havens' for the Kurds in 1991 set the precendent for the ensuing humanitarian interventions in Somalia, Bosnia, Rwanda, Haiti and Kosovo later in that decade. As for humanitarian results and concerted action, the record was mixed, and tentions grew among the great powers and regional groupings due to the unauthorized NATO intervention in Kosovo in 1999, and the widely perceived unlawful US-led intervention in Iraq in 2003 in the context of the war on terror (Weiss 2004; Roth 2004; Knudsen 2014). This led to the so-called 'sunset of humanitarian intervention' (Weiss 2004), in which the diplomatic interference in Kenya in 2008 and the UN-AU humanitarian peacekeeping operation in Darfur in 2007 were the main practical manifestations of the institution of humanitarian intervention (Knudsen 2013). However, the R2P was adopted at the 2005 UN World Summit, and the UN-based practice of humanitarian intervention was resumed after 2011 in the context of the 'Arab Spring' in the cases of Libya, Côte d'Ivoire, Mali, Congo and the Central African Republic, though not in the Syrian civil war (Knudsen 2013; 2014; Thakur 2013; Bellamy 2014). As a reflection of international tensions during the 'sunset

of humanitarian intervention' some additional rules, procedures and practices are now taking shape, including regional involvement and ownership of third-world organizations (Bellamy and Williams, 2011), stronger measures of accountability in the drafting of UN Security Council resolutions, and a determination among the non-Western great powers to maintain a balance of power and interests in humanitarian interventions and R2P-politics (Knudsen 2013, 2014; Thakur 2013; Bellamy 2014).

In other words, the revial of the solidarist principles and practices of humanitarian intervention owes a lot to the UN as the legitimate site of multi-actor humanitarian crisis management and institutional innovation. In the theoretical terms of this volume - namely the mutual constitution of primary and secondary institutions - the UN organized and institutionalized the working of the fundamental institutions of great power management, international law and war along the lines of solidarist principles and practices. After the end of the Cold War this revised institutional framework made it possible for a number of UN and other actors to (re)invent the solidarist institution of humanitarian intervention, meaning that the UN was constitutive of this fundamental institutional change.

In that process, the principles and practices of humanitarian intervention affected and transformed existing pluralist institutions like the mutual recognition of sovereignty (now qualified), international law and humanitarian law (now ultimately enforceable) and great power management (now empowered with, and burdened by, the controversial notion of intervention for human justice). In turn, the formulation, legitimization and implementation of the idea of humanitarian intervention was accommodated to rules of sovereignty (last resort, only mass atrocities), and the working of great power management (requiring ad hoc UN Security Council authorization to control the risk of abuse and maintain expectations of mutual restraint and collective governance) (Knudsen 1996; 1999; 2014).

The careful formulation of the R2P principles at the 2005 UN World Summit may be seen as the product of this mutual shoving and shaping of the solidarist institution of humanitarian intervention and the more established fundamental institutions. The UN was the site where the various positions of states and groups of states were played out and negotiated in a political background of the quite far-reaching proposals by the International Commission on Intervention and State Sovereignty, supported by officials, NGO activists and academic experts in the years leading up to the world summit. The more pluralist quarters wanted to avoid too strong a qualification of the principles of sovereignty leading to a stipulation of the state itself as having the primary responsibity to protect its own population and a relatively high (mass atrocity) threshold for interference and intervention by the international community who has the secondary responsibility (the three-pillar framework of the R2P

cf. Ban 2009). The non-Western great powers wanted to maintain collective great power management and the right of veto in deliberations on humanitarian intervention leading to the requirement of UN Security Council authorization. The third world wanted a say - and to avoid being subject to hasty interventions or neo-colonialism - in future humanitarian interventions, leading to the reference to regional involvement in the formulation of the R2P (Bellamy 2006; Ban 2009). In turn, the key solidarist principle of the post-Cold War revival of humanitarian intervention was maintained and strengthened by the adoption of the R2P in the 2005 UN World Summit Outcome Document (as norms or soft law), namely that international society can act to stop or prevent mass atrocities, not withstanding the mutual recognition of sovereignty.

This was a compromise among the various political quarters at the 2005 UN World Summit, but more profoundly, it was an adaptation of the fundamental institutional framework of international society evolving from the practice of humanitarian intervention in the 1990s, the fall-out during the 'sunset of humanitarian intervention', and the negotiation of the R2P itself. The politics of humanitarian intervention is a two-level process pertaiting to the real-political interests of especially state-actors on the one hand, and, on the other, the adjustment of the institutional framework of international society. In this two-level process, new ideas, principles and practices are shaped by more established ones in the the framework of international organization.

International Criminal Jurisdiction

International criminal jurisdiction – the prosecution of crimes under international humanitarian law – is another solidarist institution that has been revived after the end of the Cold War. Hersch Lauterpacht (1975/1950) and other solidarist writers hoped that a permanent world court would evolve from the ad hoc war crimes tribunals in Nuremberg and Tokyo after World War II, but this soon turned out to be premature in the divisive, pluralist and power political climate of the Cold War. In the early and mid-1990s, however, the UN Security Council established ad hoc tribunals for crimes commited during the Rwanda genocide and the atrocious civil wars in former Yugoslavia. The crimes shocked the international community, and the UN Security Council wanted to demonstrate its ability to act. But the ad hoc model, in which the great powers retained their veto power over the initiation of specific process of criminal jurisdiction – and thus the ability to design them – seemed to suit especially Russia, China and the USA better (Weller 2002). Still, a group of like-minded states continued to work for the

establishment of a permanent court, an idea that enjoyed strong support not only in Europe, but also in Latin-America and Africa as it turned out.

The ability of the group of like-minded states to push forward and agree on the adoption of the Rome Statute of the ICC in 1998 in spite of opposition from three of the five great powers in the UN Security Council was stunning, and so was the swift completion of the required ratification process in 2002 allowing the court to start functioning (Weller 2002; Forsythe 2012). The opposing great powers could not prevent the ICC from becoming a reality because the group of like-minded states came together as such, outside any other organizational machinery, to share their territorial and national jurisdiction over war crimes, crimes against humanity and genocide with the new court. In spite of especially American counter-arguments, citizens of non-parties to the Rome Statute of the ICC may still fall under its jurisdiction if they commit crimes covered by the statute on the territory of another state, if that state is a party to the statute. This is because the member states have shared their own territorial and national jurisdiction over the relevant crimes with the ICC and because some of the crimes stipulated in the Rome Statute, and in earlier bodies of international humanitarian law, are ius cogens crimes that states cannot legally opt out of (Weller 2002).

This element of universality means a lot to the enforcibility of international humanitarian law, but the point to make on the creation of the ICC is that the binding nature of international law and the practices of treaty making provided the supporters of the creation of an international criminal court with authority and means to do so. In turn, the ICC has strengthened the binding and enforcible nature of international humanitarian law. This is a further pratical indication of the mutually constitutive relationship between fundamental institutions, international organizations, and actors. As for the process and politics of solidarist institutional change, international law allowed the more solidarist quarters of international society to create a court which even the opposing pluralist great powers cannot fully ignore or escape in terms of its jurisdiction.

The system of enforcement created by the group of like-minded states rests on a system of complementary jurisdiction between national courts and the ICC, the latter having the authority to raise charges against individuals, if their own state is “unwilling or unable to genuinely carry out the investigation or prosecution”. More specifically the Court has the authority to determine unwillingness in a particular case if the national authorities attempt to shield the concerned person from criminal responsibility, if there has been an unjustified delay in the proceedings, and if the

proceedings are not being conducted independently or impartially, or in a manner which is inconsistent with an intent to bring the person concerned to justice.[9]

The constitutive principle of international criminal prosecution is that impunity is not acceptable in international society. This was already indicated by the post-Word War II tribunals in Nuremberg and Tokyo and the post-Cold War tribunals for the former Yugoslavia and Rwanda, but with the establishment of the ICC, the principle was imbedded in a permanent world court with potentially universal jurisdiction.[10] At the same time, the (re)introduction of international criminal jurisdiction by means of connected national and international courts of justice may provide for a general structure of complex and effective legal enforcement. Lauterpacht's (1975/1950) solidarist vision on this point was exactly a union of national and international courts of justice providing for a coherent and internally consistent division of labour in the global rule of law.

The key actors in this complementary court system are the state parties which may refer situations on their own territory to the court or alert it to other situations of possible crimes under the statue; the prosecutor who may initiate investigations into possible crimes under the courts jurisdiction; and the UN Security Council which have the authority under the Rome Statute of the ICC to refer situations on the territory of non-parties to the court. To that come more informally the NGO community, UN agencies and the UN Secretary-General who can bring possible cases of mass atrocity crimes to the knowledge and attention of the international public and provide the evidence which a competent actor need to bring a case before the court.

The politics of international criminal jurisdiction have been highly evident in the US resistence to the ICC, especially under US president George Bush (Weller 2002), and in the UN Security Council referral of situations on the territory of non-parties to the court (Cryer 2006). The link to the Security Council means that the jurisdiction of the court is potentially universal, but this has turned out to be a dual sword because the power to force non-parties under the jurisdiction of the court rests with a political organ which has recurrently been accused of selectivity and double standards due to the veto power of the permanent members, among other things (Ayoob 2004). The UN Security Council referral of the situation in the Sudanese province of Darfur to the ICC in 2005 (UN SC resolution

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9 Rome Statute of the International Criminal Court, Article 17.

10 Nationals of non-parties may be tried at the ICC for crimes committed on the territory of state parties. Furthermore, the UN Security Council may refer any situation of suspected crimes to the ICC. Due to the veto right of the great powers in the Security Council only their citizens are effectively out of the reach of the court, unless they commit crimes on the territory of a state party to the 1998 Rome Statute.

1593) was particularly controversial because the USA used its veto power to introduce an unconstitutional provion in the article, namely the impunity of the nationals of all non-parties in this territory apart from the nationals of Sudan (Cryer 2006). European, Latin-American and African members of the council were furious, and they put their vigorous denial of this double standard on record at the adoption of the resolution. However, they would rather have a problematic UN Security Council referral of the atrocious situation in Darfur – a referral which was, after all, groundbreaking - than no referral at all.

The renewed and intensified African frustration over the court in recent years is even more alarming to the ICC and its supporters. The African support of the court was highly important to its establishment and its ongoing functioning, since the great majority of cases before the court are African (self-referred, referred by the UN Security Council, or initiated by the prosecutor). The court needs African cooperation and African legitimacy, but the African Union and a number of its member states have been frustrated over the indictment of state leaders like Sudan's President Omar Bashir and especially Kenya's Uhuru Kenyatta. There are several reasons for this including a suspicion of double standards (only African state leaders must stand trial), fears that the indictment and possible prosecution of African state leaders will destroy the critical process of state-building, and – in a few presidental quarters – presumably also a fear for ending up before the court themselves (cf. the recent withdrawal by Burundi and Gambia at critical moments of national crisis and division, and the decision of the new leadership in Gambia in February 2017 to remain a party to the ICC). The relatively uncontroversial UN Security Council referrals of the situations in Libya and Côte d'Ivoire to the ICC in 2011 indicate that Africa will not turn its back on the court after all, though it would prefer a degree of sensitive political judgement at the UN Security Council and – more difficult due to the legal nature of the court – the ICC itself.

The accommodation of international criminal prosecution to other fundamental institutions is evident in the complementary court system (which strikes a balance between national courts, and thus state sovereignty, and the ICC), the checks and balances of the ICC (designed to convince states that some rights and duties of their citizens can safely be transferred to the court), and the relation between the ICC and the UN Security Council which permits the later to transfer situations on the territory of non-parties to the Court (giving it universal jurisdiction in principle), or to postpone prosecution (provisions accommodating the ICC to great power management of international order and justice). As in the case of humanitarian intervention, fundamental institutional change involves a mutual shoving

and shaping of pluralist and solidarist institutions with international organizations in a key role as actors (here for instance the UN Security Council and the prosecutor of the ICC).

International Trusteeship

The breakup of Yugoslavia in the early and mid-1990s presented the international community including the UN, the European Union (EU), the Organization of Security and Cooperation in Europe (OSCE) and the great powers with the difficult task of handling civil war, mass atrocity crimes and difficult questions of secession and recognition at one and the same time. In the case of Bosnia and Herzegovina 1992-1995, the UN and its peacekeeping contributors went through three years of difficult and at times humiliating attempts at crisis management culminating in the taking of UN peacekeepers (among them French and British) as hostages, the genocide on Bosnian men and boys by Serb forces in Screbrenica, and the fall-out among the great powers over the US-led 'Operation Deliberate Force' against the Serb side in August 1995.

The great powers found common ground in the UN Security Council by resorting to extraordinary measures, namely a comprehensive political restoration of Bosnia and Herzegovina backed by a broad military coalition which included Russia, the main ally of the Serb side. In 1999, the same model was applied to the crises in Kosovo and East Timor, again in the context of civil war, atrocities, secession and difficult questions of recognition. Formally, the UN, regional international organizations, states and NGOs were resorting to 'interim' or 'transitional' administrations - referring to the temporary assumption of governmental functions by the UN and its partners over territories and peoples that have been left in a potentially fatal political vacuum, for instance, because of civil war, crimes against humanity, state failure, territorial disputes or outside military intervention (Caplan 2005, 16-17). However, these transional administrations were quite obviously a variant of the international protectorates of the League of Nations, which were administrated (and prepared for independence) by "advanced" states, and the early trusteeships of the UN which were prepared for self-government or independence by a state entrusted with this task under the supervision of the UN (see Jackson 2000; Bain 2003; Chopra 2000; Knudsen and Laustsen 2006; Murray 1957, 7-19, 43-45). The institution of international trusteeship was thus invented or adjusted for the third time within the 20th century.

The contemporary trusteeship institution involves a temporary assumption of governmental authority over a territory and its population by the UN or other representatives of the international community. This assumption of UN authority is based on a relatively stable and institutionalized set

of habits and practices by which state officials are managing the reconstruction of war-torn societies and the administration of contested territories as in the cases of Bosnia-Herzegovina, Kosovo and East Timor. In the case of Kosovo (1999–2008) this included a joint venture by the UN, the EU, the OSCE, force-contributing states and humanitarian NGOs (Knudsen and Laustsen 2006). In the case of East Timor (1999-2002), the province became a 'UN kingdom' (Chopra 2000), until it gained its full independence from Indonesia. The solving of difficult international problems led to the reinvention of the trusteeship institution by a multitude of actors based on Chapter VII of the UN Charter and UN Security Council authorization in each particular case. At the end of the 20th century, the sanctity of state sovereignty and the steady discrediting of all forms of colonialism left little room for a formal reopening of the UN Truteeship Council, but the informal and ad hoc version of it contained the same basic elements of outside administration, development and preparation for independence.

The purposes of such contemporary trusteeship arrangements include the (re-)establishment of orderly and just affairs in domestic society, a progression to self-rule or, sometimes, independence from the former sovereign authorities, and the normalization of the international relations of the territory in question. It is this full assumption of governmental authority by international organizations and the possibility of recasting the sovereignty of the former authorities in various ways that makes the institution of international trusteeship qualitatively different from the practice of peacebuilding (Knudsen and Laustsen 2006).

The constitutive principle of international trusteeship is that international society has a responsibility for peoples living under war-torn or chaotic conditions, or for domestic order. This is basically a humanitarian inclination. At the same time, trusteeship may restore such defects in the pluralist architecture of international society, before domestic disorder turns into international disorder. At the very least, war-torn territories or failing societies are typically unable to assume the rights and duties of normal states under international law, which is in itself a problem to international order. International trusteeship is thus an institution for the promotion of human justice and responsibility as well as international order. This is of constitutive importance to both the rules of the game and the actors participating – given that strong actors are temporarily empowered to administrate weak ones, who will temporarily lose some of their formal rights and duties and their status as state actors.

Once again, the tensions in the basic machinery of international society are plain to see, cf. Jacksons (2000) thrilling dialogue with solidarist Mervyn Frost concerning the pros and cons of

international trusteeship, in particular the dilemma of international humanitarian responsibility versus the risks of paternalism and neo-colonialism. However, the retreat from full-scale international trusteeships after Bosnia, East Timor and Kosovo indicate a lack of resources more than a belief by key actors that international trusteeship is subversive to international order. However, charges of paternalism and malfunction of the trusteeships in Bosnia and Kosovo led to a so-called lighter footprint in the case of Afghanistan in the attempt to respect the sovereignty and will of the people in question. More recently, the UN has framed the concept of stabilization missions, Mali being the key example since 2013.This indicates that international trusteeship, or at least the more moderate versions of temporary administration of war-torn societies, is likely to be a durable institution of international society, in spite of its potentially problematic relation to principles of state sovereignty and self-determination as well as controversial notions of colonialism and paternalism (Jackson 2000).

Solidarist Institutional Architecture: Concluding Observations

This chapter has shown how the UN, the ICC, and other international organizations have played an independent and enabling role in the development of a number of institutional foundations of a solidarist international society. These developments include the reservation of war for the collective defense of international peace and security in the UN charter and machinery; the institutionalization of concert and soft balancing over harder forms of great power management in the UN Security Council; the stipulation of rights and duties of the individual, and groups of individuals, at the UN and the ICC; the move to collective enforcement, in principle and in practice, of international law and international humanitarian law at the UN and the ICC; and the associated qualification of state sovereignty. Furthermore, the UN and the ICC have contributed to the evolution or revival of an additional set of fundamental institutions which are at the heart of the solidarist conception of international society, namely humanitarian intervention, international criminal jurisdiction and international trusteeship. The later group of institutions calls for some further observations.

First, as argued by Buzan (2004), primary institutions are independent in the sense that they can stand alone. They are not derived from a more fundamental master institution. This raises the question whether the genuinely solidarist institutions discussed in this chapter are subordinate to the more established ones sometimes associated with order and pluralism (Bull 1977; Jackson 2000). Humanitarian intervention (and the R2P) might seem to be derived from international law, or

maybe great power management or war. But humanitarian intervention is not reducible to international law and war, and it is not enforceable by great powers alone. Rather, it can be said to stand alone as a constitutive principle making intervention against mass atrocities - and a number of associated practices – possible. Without this set of principles and practices, international society would hardly be a society in the solidarist meaning of this term. Similarly, international criminal jurisdiction is not reducible to international law, but the dual court system associated with the ICC is arguably constitutive of a solidarist international society with stronger elements of constitutionalism including legal checks and balances, the enforceability of international humanitarian law, and the consolidation of rights and duties of individuals. Finally, international trusteeship allows for the collective reconstruction of war-torn societies and failing states with the dual purpose of restoring domestic and international order (which depends on functioning states) as well as minimally acceptable living conditions. These are mainly solidarist purposes, and the institution is not reducible to older institutions like sovereignty, diplomacy or great power management.

Second, the magnitude of the constitutive importance of genuinely solidarist institutions may be discussed. It is possible to have a minimal international society producing a degree of order (and some elements of justice) without these three institutions (Bull 1977). But as indicated above it would hardly be a solidarist one without the possibility of especially humanitarian intervention (Knudsen 1999).

Third, although the solidarist institutions were initially created by state- and other actors, they are evidently also constitutive of them in terms of identity and empowerment cf. the self-image and role of France as a humanitarian great power, the Médecins sans Frontière as a champion of international humanitarianism and successive UN Secretary-Generals as promoters of humanitarian initiatives and reforms (Knudsen 1997; 2013). Solidarist institutions are also important for the international status of states and regional organizations cf. the attempt by rising powers like Brazil, South Africa, India and increasingly also China, and regional organizations like the EU, the AU, ECOWAS and the Arab League, to be seen as responsible stakeholders in a humanitarian sense (Knudsen 2014).

Fourth, solidarist institutions may be stronger in some regions than in others - either because they are in a process of development or institutionalization, or because of regional societal differences (Buzan 2004). Their constitutive principles and practical usages may vary across regions, shaped as they are by regional international society dynamics. Humanitarian intervention is certainly an institution for Africa (as expressed in Article 4H in the AU Charter and acted upon in the practices of African organizations in cooperation with the UN in recent years), but it works differently on the basis

of regional characteristics (i.e. the anti-coup norm) and regional ownership. However, the three genuinely solidarist institutions discussed above are all developed and designed as universally valid possibilities with the UN and the ICC at the heart.

Finally, as theorized in the first part of this volume, international organizations are immensely important for the working of fundamental institutions and for fundamental institutional change. This includes the organization, reproduction, selection, development and change of the vital practices by which a multitude of actors maintain the constitutive principles of fundamental institutions. Sometimes, basic constitutive changes in established institutions like war, or the development of new fundamental institutions as the solidarist ones discussed in this chapter, are also initiated and shaped inside the framework of international organizations like the UN and the ICC. Though they are secondary to primary institutions in terms of historical origins and international societal fundamentality, international organizations are not pseudo-institutions as Hedley Bull (1977, xiv) once indicated. They are, rather, the most important frameworks for the reproduction and change of fundamental institutions, and thus for the maintenance and development of international order and justice. The picture that materializes show entangled or intertwined primary and secondary institutions rather than nested ones (Holsti 2004; Buzan 2004). Most of them depend on others for their reproduction, or they are mutually constitutive.

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