**University of Pretoria Expert Lecture**

**Can International Law address the Most Pressing Concerns of Society? In Search of Solidarity**

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Colleagues, friends and honoured guests,

**Introduction**

It is my absolute pleasure to deliver this Expert Lecture under the Title “Can International Law address the Most Pressing Concerns of Society? In Search of Solidarity?”.

The theme of this lecture was inspired by several factors, of varying importance and significance:

The first, and by far the most important, significant and immediate, of these factors is the COVID-19 pandemic under whose spectre the world has lived in the last few months. This pandemic has highlighted the plight of the most vulnerable in our society and the cracks in the purported solidarity often declared in the international legal scholarship.

Here I speak about a world in which some are able to engage in social distancing and are able to afford hand sanitiser – several bottles for the house, a small bottle for the car, a bottle for the office and maybe one for the handbag. It is a world in which we are able to share a laugh when one of us jokes “I have to sanitise my hand sanitiser”. Yet, in this same world, others do not have access to clean running water for washing their hands, let alone sanitiser to sanitise their sanitisers.

In this world in which we live, others can move to the virtual world to earn their living – indeed I must confess, that my own work has increased three-fold because, through the virtual world I am able to be in three meetings at the same time (and very often have had to be). The poor are told to stay at home, but yet they cannot ply their trade online – I leave unsaid the reasons, but we all know what they are. The authorities that demand that we work from home seem oblivious to the poverty of those without the possibility to ply their trade online. They seem oblivious to fact that Brian, who tends to your garden, cannot tend to your garden by using his laptop. That Dorah, cannot keep your house spick and span using zoom. And that not everyone who employs Brian and Dorah are willing to pay them for three months while they have not been coming to work.

In our world we all accept that education is key. Well, everyone except the twenty-year-olds whose vast life experiences tell them that they, like Bill Gates and the guy who started Facebook, can be wealthy beyond their wildest dream without education. But for the rest of us, we can guide our own children through the study materials while online classes continue. For those left behind by the benefits of globalisation – those in the townships and villages scattered on this continent and other continents of the South, online learning is but a figment, a dream, a Unicorn, a fairy.

I could go on, but I do have to get to the question posed.

The second and third factors that led me to this topic have far less of an immediate significance:

First, in the course of this year I presented a paper in Stellenbosch on whether populism has had a negative impact on international law. That paper forced me to consider the underlying nature and s*tatus quo* of international law.

Finally, also this year, I was asked to prepare a chapter for collection called the *Cambridge Handbook on International Law and the SDGs.* I was asked by the editors to write on the SDG that I believe is the most important of them all. Eradication of Poverty. Writing this chapter, engaging with the other authors of the book in an online authors’ conference and considering the comments of the editors, all compelled me again to think about the nature of international law and whether it can address the challenge of poverty, and indeed whether it can addresses other challenges facing our global society. And no, it is not lost on me that this very question assumes the existence of a global society.

The challenges I have described so far are mainly socio-economic and are related to poverty and inequality. But by no means should I be understood as suggesting these are the only challenges facing our world today.

Environmental degradation, in various forms, presents also one of the most pressing challenges facing us today. Perhaps no environmental challenge is as pressing as climate change, which has rightly been described as an existential threat. The consequences of anthropogenic climate change are numerous, but amongst some of the more serious consequences include the increase in the number and intensity of natural disasters, food and water shortages, sea-level rise, with its own consequences such as the disappearance of the low-level lying islands. It goes without saying that the effects of climate change exacerbate the effects of poverty and inequality described above.

There are also security issues, such as the increase in terrorism, the continued instability in the Middle East, easy access to weapons of mass destruction, including chemical weapons. All of these also constitute threat to our society.

These problems are such that they cannot be addressed by States individually. Indeed, as I believe, they cannot be addressed by States collectively through cooperation. To address them, requires more than just cooperation. To address these challenges these challenges, require a sense of solidarity. And If law is meant to be a vehicle to address these challenges, then surely it must embody this sense of solidarity.

The question that this lecture addresses is thus whether international law can serve as a tool to address these challenges. It is to this this question that I now turn:

**The Nature of International Law**

From the perspective of classical international law, the answer to the question posed is so obvious, it almost goes without saying! Indeed asking the question might appear puerile! If, as is my point of departure, addressing these problems requires solidarity, then of course, as a matter of classical international law, international law is not the answer to these problems and it arguably cannot address these problems.

Classical international law can best be described as a system of law that is based on a network of bilateral relations: simply put, a system of bilateralism. In classical international law, State sovereignty and the consent of the State are supreme.

Because of its “sovereignty” and “consent” centred nature, international law in its classical model can be described as a legal order in which “States are nominally free” and “enjoy supreme authority over all subjects and objects within” their territories.

The resulting framework is one in which the individual interests of States drive the content and development of international law. The objective of this legal system, and the cooperation on which it is founded, is to enable each individual State to pursue and enhance their individually determined objectives and interests. Under this system, where consent and sovereignty are king, the only real constraint on States is the ability to bargain, which in turn is dependent on the States’ influence – influence itself is derived from military, economic and political power.

I think you will all agree that such a system – a system in which individual interests of States drive the content of law and in which the only real constraints on States flow from the the ability to bargain - is not based on any normative objectives, such as the pursuit of the common good, morality or values, but rather on the will of States, in particular the will of the most powerful States.

So under this conception of international law, the answer is a simple no: international law cannot be the vehicle for addressing the most pressing concerns facing our world today.

That could be the end of our lecture ... but it is not ...because

... not everyone believes that that classical conception of international law best describes the s*tatus quo.* There has certainly been a trend in academic literature suggesting that the classical, state sovereignty-centred international law is giving way to a more value-based system of international law and that the idea of international law as a network of bilateralism is being replaced by a system based on community values and solidarity.

German scholar, and former Judge of the International Court of Justice, Bruno Simma described this shift in his now famous Hague Academy Lectures. In those lectures, Simma observed that international law was “overcoming the legal and moral deficiencies of” bilateralism inherent in the State-centred classical international law and was “maturing into a much more socially conscious legal order”: The type of order that could address itself to the social issues raised in the introduction of this lecture. In Judge Simma’s view the legal system emerging to replace classical international law is one characterised by the “social responsibility and accountability” of its subjects.

Our very own son, John Dugard, described this emerging international law as one premised on “a brave new world” in which “State sovereignty is no longer a factor … in which the community of personkind is governed by the rule of law … in which peace and human rights are secure and in which the energy of personkind is addressed toward resolving poverty and inequality.” This new vision of international law is one that is characterised by a commitment to solidarity – that after all is the essence of community.

Under this conception of international law, which is displacing classical international law, concepts and phrases such as “the international community”, “*erga omnes*” and “peremptory norms of general international law (*jus cogens*)” have assumed a pride of place in international law. In this system of international law, hierarchy of rules, is possible and there are real constraints on States, beyond their ability to bargain. Law moderates power, law demands solidarity.

Under this conception of law, both as a system but also the individual rules, international law reflects solidarity, which, according to former Judge of the International Court of Justice from Sierra Leone, Abdul Koroma “represents more than a general notion of ‘neighbourliness’”. For Koroma, solidarity “establishes concrete duties on States to carry out certain measures for the common good”.

I think we can all agree, that if we were living under such a conception, then the answer to our question would be very different: Why of course, under this new vision, international law can serve as a vehicle to address the most pressing concerns of humanity. Indeed, such a conception of international law would be designed for just that purpose.

**Honeymoon Interrupted**

I suspect you can tell from the tone of the lecture that I do not believe that this new conception of international law exists at all. It is, like online learning is for many in our society, but a figment, a dream, a Unicorn, a fairy. Indeed even those that have declared that this new conception of international law has arrived or is emerging, have begun to express concerns and doubts, but these doubts have been levelled not at the system itself, but rather on populism and its effects on international law.

I do not propose to address fully the question of populism’s effect on international law fully – it was addressed in the Stellenbosch paper I referred to earlier and in an article due to appear in the next edition of the *Chinese Journal of International Law* – but I do want to highlight some of its main elements and my responses to them. I leave aside the fact that there is very little agreement on what constitutes populism.

The basic argument, as I understand it, is that the honeymoon of the new vision of international law, has been interrupted by the jolt of populism in the more powerful States. Without fail, Donald Trump is presented as the posterchild for populisms attack on the new vision of international law. Based on the sometimes bizarre decisions and outbursts of the current US President, it might perhaps be hard to argue against the proposition that populism represents an attack on the new vision of international law which, but for the emergence of populism is said to be directed at the common challenges facing our world.

Last week’s decision by the Trump administration to place the Prosecutor of the ICC, Fatou Bensouda, and my good friend Phakiso Mochochocko on the US sanctions list, its decision to pull the plug on the US participation in the Paris Agreement, the withdrawal from UNESCO and the decision to withdraw from the World Health Organisation at a time when the world is facing a pandemic are but examples of many other acts that arguably undermined international law and its multilateral foundations.

Those that point the finger at populism for the QUOTE UNQUOTE decline of international law, do not, of course stop with the Trump administration. The Zuma administration’s relationship with international courts (the ICC and the SADC Tribunal) and Brexit also feature in the examples of how populism undermines the nirvana of international law.

The truth however, is less romantic. International law is not a victim of populism. Rather, international law presents a fertile ground for States, populist or not, to support multilateralism when it suits them, but also do undermine it when that is in their best interests.

It is easy to pick on Trump – I admit it. But previous US administrations fare no better when it come to the undermining multilateral institutions when it suits US national interests. Decisions to defund an international organisation or sanction one because it acted, or threatened to act, in a manner inconsistent with the US policy does not begin with Trump. Admittedly, Trump has taken this to another level, but this is only a matter of degree. Elsewhere, I have described the current US administration as simply dishing out US foreign policy on Steroids.

At any rate, the point is that it is overly simplistic, to place the blame for international law’s inadequacy at the feet of Donald Trump and other populist movements. It seems to me that whatever our consternations about the increase in populist movements and their normative policies, their actions and rhetoric is a reflection of, and is made possible by, the structure of international law as it currently stands. The populist movements are not a threat to international law, they are a reflection of it.

I wish, if I may, to illustrate this point by referring to some of the challenges facing us today.

**International Law’s Responses to Current Challenges**

**(a) Poverty**

I begin with poverty. Quite frankly the statistics are quite frankly staggering:

According to a recent World Bank report – and I recognise the potential problem on World Bank statistics, but please bear with me – According to the World Bank in 2015 the levels of “extreme poverty”, defined as persons living below 1 Dollar 90 cents a day, stood at 736 million. It has been said this is an improvement when compared to the nearly 2 billion people living below this threshold in 1990.

Yet, these statistics do not reveal all (in fact there is a rather impolite description of how statistics never reveal all). First, the threshold of 1 dollar 90 cents is a rather unambitious threshold, which permits us to exclude from this portrait of the human family, the multitudes of people living in poverty.

Indeed, the World Bank’s more complex measure of poverty, that goes beyond consumption levels, shows that “the number of people who are poor stood at 2.1 billion as of 2015”, a figure that is three times that of persons living on below USD 1.90 a day. Second, whatever the decrease in the rate of extreme poverty, if we accept the slogan “leave no one behind”, then by these numbers the “international community” is failing at least 736 million times over. Third, the World Bank report indicates that the rate of reduction in levels of extreme of poverty has been on the decline in recent years. Fourth, while extreme poverty has been on the decrease globally, it has been on increase in sub-Saharan Africa, making extreme poverty “a sub-Saharan African problem”.

With social media one never knows when a quote attributed to someone is authentic or not, but I recently saw a quote attributed to Pope Francis that I absolutely have to share:

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The promise was that when the glass was full, it would overflow benefitting the poor. But what has happened instead is that as the glass became full it magically grew bigger so that nothing ever came out for the poor.

UNQUOTE

So the poor remain poor.

This picture of poverty is one which *ought* to trouble the “international community”, if such a community exists. It should be of concern to the international community that the number of hungry people is increasing while there is enough food to feed everyone in the world. The international community should be concerned, from an ethical and legal standpoint, that while a few have plenty, the vast majority are impoverished and live in squalor.

International law, in particular the post-classical, value-based international law, is a vehicle through which the concerns of the international community are expressed. Yet there is no obligation under international law to act to eradicate poverty. There isn’t even an obligation to cooperate to eradicate poverty: an obligation of conduct.

If there was any area of international law that could be said to, at least potentially, be directed to poverty it would be international human rights law. This should be self-evident: International human rights law, more than any other area of international law, is, at its core, about the human condition. Poverty is also about the human condition. So let’s see whether international human rights can be a vehicle for addressing the challenge of poverty.

Socio-economic rights are the rights most closely associated with the fight against poverty. These rights are established precisely to ensure the protection of “the poor and otherwise marginalised” in society. Osuji and Obibuaku have noted that socio-economic rights “can serve as a powerful tool for reducing and eliminating poverty.” A survey of the catalogue of rights in the International Covenant on Economic, Social and Cultural Rights (ICESCR), reveals that they concern, directly, the fight against poverty.

The recognition of socio-economic rights in international law has the potential to play an important role in poverty eradication. However, that potential is limited by several factors. For one thing, treaties, in which socio-economic rights are found, apply only to states parties to the treaties. In the second place, treaty provisions on socio-economic rights are generally couched not as immediately and absolutely enforceable rights, but rather as a obligations on the state to progressively realise the right, and that such rights are subject to resource constraints of each individual state. These are generally well-known constraints which can be overcome and I won’t say more about them.

There is a third, and potentially more crippling, constraint to the potential of socio-economic rights under international law to impact on poverty. Socio-economic rights in human rights treaties are couched as rights owed by a state to the population in its own territory. While there has certainly been movement towards some sort of extra-territorial application, this has largely been limited to those instances where the state in question exercises some control or jurisdiction over activities or actors in a third state, where that actor or activity impacts on rights in a treaty.

Indeed, in respect of socio-economic rights, the International Court of Justice determined that the ICESCR “guarantees rights which are essentially territorial”, noting that it may also apply to a state in respect of territories “over which that state exercises territorial jurisdiction.” A recent advisory opinion of the Inter-American Court has often been interpreted, incorrectly, as somewhat expanding the scope of extraterritorial application of human rights and socio-economic rights. Yet in that opinion the Court emphasised that QUOTEthe situations in which the extraterritorial conduct of a State constitutes the exercise of its jurisdiction are exceptional and, as such, should be interpreted restrictively. UNQUOTE.

As a tool for addressing poverty, the problem with this general construction, which is understandable from the perspective of classical international law, is that it places the burden of dealing with most serious cases of poverty – those in developing countries – on precisely those states that are not, due to their economic situation and developmental state, in a position to allocate resources necessary to effectively address poverty. This sounds to me like the very definition of insanity. Expecting the poor to pull the poor out of poverty while the rich are obliged to pull the rich out poverty. It undermines the idea of solidarity implied by the transition of international law from bilateralism to a system based on community interests. To truly enable socio-economic rights to play a meaningful role in the eradication of poverty, an interpretation of the relevant international human rights instruments that establishes the idea that the international community as a whole is responsible for ensuring that the socio-economic rights recognised under international law are enjoyed by all, is necessary.

Yet international law is very far from such an interpretation and this limitation cannot be laid at the feet of so-called populist movements.

The pursuit of free trade – one of the basic principles of international trade law – has often been said to be an important tool for the eradication of poverty. The preamble of the Agreement establishing the World Trade Organisation (WTO) itself states that the activities under the WTO should be carried out “with a view to raising standards of living”, and with view to “ensuring full employment”. The claim has been made that “free trade is *required*” for this purpose, i.e. that free trade is a sine qua non for raising standards of living.

The claim that free trade can be an instrument for poverty alleviation has, however, been the subject of severe criticism. It has been noted that the “WTO’s *raison d’être* is the elevation of property interests above the protection of human rights”. The idea that wealth created through globalisation and free trade has trickled down is highly contested and, if anything, it has been said that the “gap between rich and poor has widened geometrically *because of* the global trading system.” The glass did not over flow, it only grew bigger so that those inside simply drank more.

In a report to the Human Rights Commission – the predecessor to the Human Rights Council – Oloka-Onyango and Deepika Udagama described the WTO rules as “grossly unfair and even prejudiced” and a “veritable nightmare” for “certain sectors of humanity” in particular those from developing countries. The truth is that in the era of globalisation, under the watch of free trade, the “chasm between the rich and the poor has become unfathomable.”

Even those who take a somewhat more sympathetic view of free trade note that there are “good reasons to be sceptical of the claim that free trade is always the best way to reduce poverty ..”.

International financial institutions, creatures of international law and their economic bedrock, have not been spared the criticism for not only failing to help end poverty but very often for contributing to the creation of condition of poverty. While many international financial institutions have, at least on paper responded to these criticisms, the reforms have been seen as nothing more than a façade. Easterly, for example, after empirical analysis, describes the IMFs Poverty Reduction and Growth Facility as the “new Structural Adjustment Programmes”. The position of the IFI’s is perhaps by summed by the IMF’s Deputy General Counsel who is quoted by Philip Alston, then Special Rapporteur on Extreme Poverty, as having said in an interview that it is not bound by human rights.

My argument is not that international law promotes poverty – though I suspect that many hold this view. I myself am not able to substantiate that broader argument, and so I make a more modest argument, which is that international law as a system is agnostic towards poverty; the rules of international law will direct themselves to poverty, such as in ICESCR, when States deem the costs to be bearable and subject to whatever constraints imposed through bargaining. These constraints, in the case of the ICESCR, include non-absolute rights in the case of socio-economic rights and the exclusion of extra-territoriality. As such, the notion that all States and all institutions should be responsible for poverty wherever it may occur – a notion implied, even required by solidarity – cannot exist in this system composed of a bundle of bilateral relations.

Allow me, albeit, briefly to turn to the second major challenge: environmental challenge.

**(b) environmental protection**

The pressures that human activity places on the natural environment is well-known. Already in 1976, the International Law Commission made the following observation:

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The risks to which the environment is exposed by man armed with his present resources are well known: the pollution, by one means or another, of vast areas of the atmosphere, the sea and the land; the destruction of fauna over huge areas in the oceans, and thus of essential sources of food for whole populations; the transformation of fertile regions into arid and unproductive land; the spread of poisons, bacteria and other chemical agents fatal to man or animals; modifications of weather and climate; and the degradation of groundwater supplies and of the quality of drinking water and irrigation water. These are just examples, for what can happen is beyond imagination.

UNQUOTE

Without a sense of solidarity, and a legal system reflecting solidarity, only Hardin’s tragedy of the Commons can result: For those not familiar, Hardin’s tragedy describes graphically how, because of self-interest, shared spaces come to be destroyed, even with knowledge that failure to act responsibly will result in disastrous consequences for all.

Nothing exemplifies, and brings to life, in vivid terms Hardin’s tragedy of the commons like our response to climate change.

Climate change has been described as one of the most serious threats facing the world and its population. Given the seriousness of the threat, the response of an international law system which places community interests above sovereignty and national interests would be an effective instrument capable of addressing the perils of climate change. Such a system of international law would demand tough rules even if inconvenient. Yet international law’s response thus far has been nothing but disappointing. Seven years prior to the adoption of the Kyoto Protocol, the International Panel on Climate Change had determined that what was required to stabilise greenhouse gas emissions was “an immediate reduction in emissions from human activities of over 60%”. Yet the Kyoto Protocol provides a target of five percent reduction of only some countries and does so seven years later (I leave aside the so-called flexible mechanisms which further dented the effectiveness of the Kyoto Protocol). This target is grossly inadequate and illustrates that States (and not just those led by populist governments) were motivated not by the greater good (community interests and solidarity) but rather by “cost and economic feasibility” – the economic and political calculations so characteristic of classical international law.

The Paris Agreement is no more effective, probably less so, than the Kyoto Protocol. The Agreement itself does not provide emissions reductions targets for States, leaving it to States to determine nationally their own targets. Indeed even those that heap praise on the Paris Agreement, do not suggest that it is an effective agreement capable of protecting the earth from the ravages of climate change. Rather, the Paris Agreement, when it is praised, is praised as an illustration of diplomatic achievement and as a framework for potential future cooperation in addressing climate change.

There is no question that international law’s response to the problem of climate is one based on cooperation. It illustrates the limits of cooperation and the necessity for solidarity – acting beyond immediate self-interest. In the face of the threats posed by anthropogenic climate change, States opted for least effective options because of economic expediency and national interests. In other words, the ineffective Kyoto Protocol and Paris Agreement, were all that is possible in the scheme of bargain, where narrow national interests trump common interests (pun intended), under which international law exists and operates. It is the very re-enactment of Garret Hardin’s tragedy.

Shortly before his death, Sri-Lankan jurists and former Vice-President of the International Court of Justice, well-known for his inspirational separate opinion in the *Gabcikovo-Nagymaros* case, wrote the following foreword in a book to which I had the pleasure to contribute:

QUOTE

Today, on a massive scale, the earth’s resources are being depleted and the environment is being polluted for thousands of generations to come. Our generation is polluting the environment with a degree of irresponsibility never shown by any generation since the human race began. We are doing so with the full knowledge of the consequence and it is time legal professionals and legal systems moved into action to prevent this. An enlightened legal profession geared to the high ideals of a noble calling has the potential and the obligation to render this to the community today. This is an enormous trust. It is a tragedy of our time that this trust is not being adequately discharged.

UNQUOTE

These words amplify that Hardin’s tragedy of the commons is unfolding right before our eyes.

I haven’t mentioned security challenges and international law’s approach. I will just mention one example. Nuclear weapons. In 1991 the General Assembly in resolution 46/37 D, declared that QUOTE that the existence and use of nuclear weapons pose[s] the greatest threat to the survival of mankind UNQUOTE and QUOTE that nuclear disarmament is the only ultimate guarantee against the of nuclear weapons UNQUOTE. These are strong words and one would expect, given these strong words, that international law would prohibit the possession and use of nuclear weapons.

There is no such a rule in international law. In fact, there is a treaty, with around 190 States Parties, explicitly recognizing the right of some States to possess nuclear and prohibiting other States from possessing them. Now those of you that know more about the law on nuclear weapons might say, yes, but that it is a treaty from 1968, it was before the emergence of Dugard’s “Brave New World” and Simma “Community Interests”- based international law.

Of course, in 1996, the International Court of Justice in a famous advisory opinion, decided

QUOTE

There is neither in customary nor conventional international law any comprehensive and universal prohibition on the threat or use of nuclear weapons as such

UNQUOTE

I admit, the Advisory Opinion is rather nuanced and both sides of the argument claimed victory. But here are the final words of the Court on the question:

QUOTE

However, in view of the current state of international law, and of the elements of facts at its disposal, the Court cannot conclude definitively whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self-defence, in which the survival of a State would be stake.

UNQUOTE

What those words actually mean about the lawfulness or not of the nuclear weapons has been the subject of much analysis in scholarly writing. But remember the Court here is talking only of the threat or use of nuclear weapons. If there is uncertainty over the threat or use, and if the Court leaves open the possibility that in some circumstances it may be lawful to threaten to use or use nuclear weapons, then by definition possession must be lawful. This even though, according to the States in the General Assembly, nuclear weapons pose the greatest threat and the only solution is disarmament. I might pause to mention that in 2009, just before the Rome Statute Review Conference, Mexico proposed to the Assembly of States that the use of nuclear weapons be added as a crime under the Rome Statute. States Parties to the Rome Statute could not agree to this amendment.

I know, I didn’t speak about the 2017 Treaty which does prohibit possession of nuclear weapons. But that is because that treaty is only binding on States that don’t have nuclear weapons, so it does not take the matter very far.

**Common Interests in Current International Law**

I wish to make three brief points in conclusion:

First, this lecture is not a critique of international law. I accept international law for what it is. A tool in the arsenal of international relations and thus a reflection of it. You cannot expect international law to be what its context, international relations, is not. It is like expecting the law of South Africa in the 1960s to be fair and democratic and when the political context was not.

Second, I should not be misunderstood: I do not mean to suggest that international law is bad or evil. Quite the contrary. International law is neither good nor evil. It is a tool in the hands of those with influence (read power). Those with the influence, the power, will yield it, that is will yield the power and international law, for either good or bad. Whether international law makes a difference, either good or bad, ultimately depends on those that wield *it.*

Third, and perhaps this is just an extension of the second point, there are many examples of international law being used to further a common good. The emergence of human rights, the prohibition on the use of force, prohibition of genocide, even the common heritage of mankind regime in the Law of the Sea Convention. The argument is NOT that international law is incapable of producing rules that are directed at the shared values and that exemplify solidarity. It is that when this does happen, States, in particular the most powerful States have done the necessary cost-benefit analysis and have determined that costs are worth bearing. A case in point is the prohibition genocide.

Most of the times, however, the cost-benefit analysis involves molding, or even ex-post facto remolding, of the rule in such a manner that their interests are not negatively affected. The current contestations over the prohibition on the use of force and exceptions thereto as well as the scope of the common heritage of mankind principle under the Law of the Sea Convention are pertinent examples:

I wish to share an anecdote that best illustrates this point. In 2014 the International Law Commission adopted a set of Draft Articles on the Protection of Persons in the event of disaster. These draft Articles were inspired by human rights and an apparent deep desire to protect the dignity of the human being in times of disaster. One of the provisions intended to give effect to the notion of solidarity was that, where an affected state was unable to deal with a disaster, it had the obligation to seek assistance and to accept any assistance offered. Sounds good doesn’t it? My question was, if this was really intended to reflect a sense solidarity, why was there no corresponding duty on third State to provide assistance where assistance was requested by an affected State. Why does this solidarity only apply to the geopolitical disadvantage of the vulnerable State? This is an example of molding the rules in such a way that essential interests of the powerful are maintained, why putting forward semblance of solidarity.

An example of the remolding of rules, ex post facto, can be seen by the approach of the more powerful States to the prohibition on the use of the force. The prohibition on the use of force is one of the many examples of constraints by States in the pursuit of the greater good. Subject only to the narrow exception of self-defence and authorization by the UNSC, the prohibition is intended to “save succeeding generations from the scourge of war.” For militarily powerful States, this would constitute a major sacrifice and might be put forward as an example of how law can be used to advance the interests of the common good. Yet in recent times we have witnessed a trend and a gradual chipping away of the prohibition, using interesting legal doctrines such as “unwilling and unable”- test, to the point where the prohibition would lose an objectively determinable content; under some of the doctrines advanced, the determination of whether an action is prohibited by the law on the use of force ultimately rests in the eye of beholder.

My final point, in conclusion, is the following: the fact that international law is itself ill-equipped to address the most pressing challenges facing the world does not mean that all is lost. First, international law remains a possible vehicle for positive action in specific areas of human endeavour. It just cannot be the answer because it remains constrained by geopolitics. Second, we should not forget that while States are abstract entities, they are ultimately accountable to real people. You want international law to change the world, hold your government accountable for the positions it adopts in the international forum.