



## The Crisis of the Existing Global Paradigm of Governance and Political Economy

**Winston P. Nagan**

Chair of the Board, World Academy of Art and Science;  
Samuel T. Dell Research Scholar Professor of Law,  
Levin College of Law, University of Florida

### Abstract

*This article seeks to underline the central challenges to world order that are outcomes of our current system of global, social, power and constitutional processes. The article outlines these major problems which it is suggested represent a crisis for the future trajectory of human survival and well-being. The paper then uses the problem of the emergence of transnational criminal activity in order to underline the limits of the current global paradigm of governance. In effect, in the criminal law context the jurisdiction of sovereign states to attack the problem of transnational crime is hedged with severe limitations. The most important of these limitations is the fact that the jurisdiction over crimes by sovereigns is limited by the territorial character of the definition of sovereignty. Thus a sovereign has a limited capacity to control and police criminal activity whose main locus of operation is generated outside of the territorial reach of the sovereign state. This essentially means that the element of global governance generates a juridical vacuum which permits organized crime to flourish outside of the boundaries of the state but at the same time, having the capacity to penetrate and corrupt the social, political and juridical processes of the sovereign state. The article explores the effort of the UN to provide some form of response to this crisis in the form of an international agreement.*

The most important global expectation about global governance is reflected in the Preamble of the UN Charter and it is authorized by “we, the people” of the earth/space community. That expectation includes the high priority humanity gives to international peace and security; the reaffirmation of faith and fundamental human rights, in the dignity and worth of the human person, and equal rights for men and women and nations of whatever size. It also underscores the importance of the global rule of law as well as the promotion of social progress, better standards of life, and expanding freedoms. That is the promise. However, at the practical level the institutions of global governance have been to a large extent a captive of their own history. That history emerged with scholars in the late 1500s and early 1600s (Bodin and Hobbes) and later was given a juridical imperator in the Treaty of Westphalia (1648). In the early 19<sup>th</sup> century Bodin, Hobbes, and Westphalia were given a powerful juridical imprimatur when John Austin published his influential book *The Province of Jurisprudence Determined*. In effect, from Bodin to Austin we have the developments from scholarship, to political agreement to creation of a jurisprudential foundation for the

notion of the territorially organized sovereign state. The sovereign state became the currency of international relations, diplomacy, international law, as well as a powerful limitation on the force and efficacy of both international law and constitutional law.

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In the 20<sup>th</sup> century the sovereignty idea contained no obvious constraints that could limit a drift into a global war (WWI). Moreover, the creation of the League of Nations system and the Covenant of the League was itself limited in a context of facilitating international peace and security by state claims to sovereign absolutism. At the end of WWII the victorious powers adopted the Charter of the United Nations. The Charter reflected ambiguity of its authority resting in “we, the people” and the residual strength and ambition of sovereign state powers, claiming frequently the competence to trump activities challenging their ambitions and interests. The current paradigm is thus responsible for generating problems that now seem to challenge the survivability of humanity, as well as undermine the prospect of global policy and practice that moves in a trajectory that secures humanity’s wellbeing for the future. We list several of the most obvious scenarios where the state/sovereign-centered paradigm is limited in its capacity to respond effectively to the crisis of humanity’s future survivability and wellbeing. These are listed as follows:

1. ***The crisis of the global war system.*** States no longer have an effective monopoly on war making. States have been involved in privatizing the functions of the military with unforeseeable consequences. There continues to be the emergence of mercenary-like forces for hire in the global environment. The proliferation of the flow of arms and armaments in the global arms market remains significantly unregulated. The existence of weapons of mass destruction (nuclear, chemical and biological) still represents a major crisis regarding the acquisition of the technologies and assets of these weapons systems falling into the hands of terrorists groups or organized crime cartels.<sup>1</sup>
2. The growth of civil society deviance may threaten world order when it develops into forms of apocalyptic terrorism, state terrorism, organized crime, human trafficking, global drug production and distribution, and trading in small arms and/or components of mass destruction.
3. ***Global political economy of radical inequality.*** Conventional economic theory seems to lead a global race to the bottom. More wealth is produced than ever before and greater inequality is produced as well. Greater wealth concentrations often result in plutocracy which favors the wealthy and greater alienation for the impoverished. What

is needed is an economic paradigm that is not confined to a single state or sovereign but a paradigm that functions within the context of a global, social and political process and responds to the problems that emerge from this process from a global inclusive perspective.

4. ***The depreciation of a human right to development, a depreciation that undermines the value potentials of human capital for the improvement of the human prospect.*** Clearly, the right to development is a human right of global dimensions and requires a global solution to effectively respond to it. The solution here is beyond the parochialism of national sovereignty.
5. ***The importance of a viable ecosystem for the survival of humanity requires policy making that is beyond the nation states' competence.*** In short, global warming and climate change are matters of inclusive global concern. All must participate because all have a stake in preserving a viable ecosystem for all.
6. ***Human demographics and human survivability.*** The radical population increases raise the question of whether food security and accessibility to clean healthy water may be put at risk when earth's population exponentially increases. Demographic growth may well challenge eco-social and economic capacity of the earth to indefinitely sustain such increases without important radical innovations in birth control, food production, and water conservation. These issues transcend any particular nation state.
7. ***The global capacity to respond to natural catastrophes (tsunamis, earthquakes, hurricanes, asteroid collisions).*** It's now well accepted that such catastrophes require global action because the capacity of any particular sovereign is limited in this regard.
8. ***The global health crisis (AIDS, malaria, TB, Ebola, etc).*** It is clear today that any emergent global pandemic will be beyond the capacity of any single sovereign state. Such health threats are really beyond the current paradigm.
9. ***The global crisis of human rights and humanitarian values.*** Notwithstanding the vigorous advocacy for the promotion and defense of basic human rights, it is still the case that we have a great human rights crisis on the planet. At the heart of this crisis is the muted claim of unlimited sovereign absolutism. The human rights crisis cannot be solved exclusively within the sovereign state. It is a global problem that implicates the global authority of "we the people."

The issues listed above represent a crisis for global humanity and as well underline a weakness of the existing paradigm which is a state sovereign dominant paradigm. This underscores the need for new and fresh thinking, nothing short of a new paradigm for understanding and responding to the global crisis of our time. To provide a more detailed explanation of the limits of the state sovereign paradigm we provide an overview of the background and possible value for humanity of an important UN initiative to enhance a global paradigm of governance with regard to a particular problem that defies the exclusive

authority of the sovereignty approach. In this initiative we underscore the effort to strengthen the global rule of law, as an indispensable element for a new paradigm of global governance.

The initiative that we focus on is the Convention Against Transnational Organized Crime. In general, this instrument defends the rule of law precept as a stabilizing and transformative component of a world order that honors and respects the dignity of all the people. How then does the UN convention against Transnational Organized Crime,<sup>2</sup> in general, impact on the major themes just specified? What does the convention have to do with the rule of law and the earth-space community?

## **1. The Convention, Organized Crime and Sovereignty**

The convention represents recognition of the harsh reality that crime is not simply a localized phenomenon. Indeed, it recognizes that a huge segment of crime is international; it is transnational; it is indeed global. In particular, the identification of a critical segment of global crimes namely the phenomenon of ‘organized’ crime, underlines the particular threat that this form of crime presents for world order, and in particular the rule of law foundations of world order.

The historically territorial nature of criminal law had a close correspondence with the principles of juridical and political sovereignty.<sup>3</sup> The functions of sovereignty directly conditioned the reach and efficacy of the prescription, application and enforcement of criminal law, with serious territorial limitations.<sup>4</sup> This undermined the efficacy of the state to control and regulate crimes having trans-state or transnational character. From an international perspective, the global system is still largely a constitutionally state-centered system.<sup>5</sup> The system has limited the power of organized global society to control and regulate crimes of the magnitude represented by transnational organized criminal syndicates and gangs. In effect, it provides a loophole in our global system of law and public order. It is a dangerous loophole because it tolerates a juridical and political vacuum within which organized crime can thrive.

The success of transnational organized crime means that vast amounts of ill-gotten proceeds are outside the reach of organized political authority. These proceeds are better seen as bases of power and material resources for the support of organized transnational crime. They permit it to become globally institutionalized, to become competitive for power, to become a threat to states large and small. Indeed, organized crime might be seen to represent an alternative normative order (a negative utopia) which supports brute force over law, order and civility.

The Convention against Transnational Organized Crime is a truly significant milestone in international law and cooperative world order. The problem of organized crime as indicated is an especially dangerous threat to world order and to the basic principles of the UN Charter, which is the living symbol of the constitutional order upon which the contemporary international rule of law is based. Transnational organized crime is not simply antisocial, apolitical and economically exploitative, it is much more.

Traditionally, crime is a socially deviant aberration. Organized law enforcement must simply be effective in the detection, apprehension, prosecution, trial, conviction and punishment of the perpetrator. The perpetrator is often randomly created. Even when working in groups, the deviance is *ad hoc*, occasional, and certainly, like all deviant behavior, a threat or potential threat to public order and civic freedom. When crime gravitates from the occasional, isolated and random experience to systematic organization and sustained practices of institutionalized deviance, it is a particularly dangerous threat to world order. Indeed, when organized crime marshals vast resources such as capital, functionaries and instruments of violence, the attack on public order moves from the random and anecdotal to the systematic and sustainable. Organized crime moves from the challenge of deviance to the challenge of an alternative structure of normative priority. Law and authority become challenged by a 'non-law' scenario and the 'values' of an immoral and amoral negative utopia, where force is the rule and legal authority is extinguished. Organized crime is thus a clear and present threat to the sovereignty of the state, especially democratic states whose authority is rooted in the people. Large and powerful states may be more capable of limiting the power of organized crime to compromise and or challenge their constitutional and public order foundations. Smaller states may indeed be more vulnerable to the assaults and challenges of organized crime activity. It is thus possible that some sovereign states may be politically vulnerable to the penetration of cartels of organized crime syndicates. Some states may be effectually drug controlled or indeed subject to levels of penetration and corruption so that they may be fairly labelled 'thug' controlled. When the level of corruption becomes so great, the term 'kleptocratic' state may be appropriate.<sup>6</sup>

The core characteristics of the challenge of organized crime to the sovereignty and independence of the sovereign state may be that its power rests on the unrestrained use of brute, arbitrary force, intimidation and coercion. Moreover, its reach may corrupt the vital social process of the state such as business, governance, family, education, labor, law, and even possibly the institutions of religious affirmation. The threat organized crime presents to sovereignty, self-determination, independence, good governance and democratic values is serious. But the threat of organized crime to the state is even more critical. Organized crime is often unconstrained by territorial or political boundaries. Political and juridical sovereignty may be limited by the restraints inherent in sovereignty itself. Thus, territorial boundaries crucial to sovereign law enforcement may be a hindrance to the control of systematic, institutionalized crime, sustained by bases of power that are rooted in violence, with vast unaccountable financial resources and animated by the capacity to corrupt and coerce the legitimate institutions of governance and civil society. Organized crime in this context threatens the very constitutional foundations of world order; it is thus a threat to the rule of law, indeed to the idea of law itself.

The political, geographic and economic 'space' between sovereign nation states has long been seen as an arena where organized crime can function without an effective process of control and policing. There is no 'super sovereign' with a centralised mechanism that might readily fill the spaces between sovereigns. More than that, weak states and new states, often styled as emerging market states, may be stuck with powerful institutions of organized crime.

South Africa is a case in point. The corruption of law enforcement processes during the period of repressive apartheid created a vacuum in law enforcement. The new, post-apartheid democratic order was challenged by the penetration of organized crime groups during and immediately after the miracle of transformation. The legacy the new regime had to confront was an incredible wave of crime, a huge quantum of which was inspired by the ‘imperialist’ character of transnational criminal syndicates. It is also remarkable how speedily the new authorities acted to reorganize law enforcement agencies and to enact vital legislation to empower the authorities to attack organized crime in the new emerging democracy.<sup>7</sup> Even older states, unaccustomed to the overreaching nature of organized crime, have felt the influence of its activities.<sup>8</sup> Weaker states may not be able to effectively bring the power of law to constrain or limit the power of organized crime. Indeed, its power might penetrate and undermine the legitimate institutions of state and society in many contexts.

The convention thus attacks a critical world order problem. It seeks to fill the cracks in the global, political and juridical vacuum created by a system primarily organized around territorially based nation states. It also recognizes the problem that sovereignty may be abused, through inadvertence, incompetence or gross astigmatism, to create safe havens for the operatives of organized crimes as well as their assets. The convention prescribes a situation in which safe havens will become increasingly rare. It recognizes that cooperation among sovereign states is a necessary basis for effectively attacking the threat posed by organized crime.

The limits of traditional extradition are apparent when we recognize that traditional extradition law does not permit the exercise of jurisdiction over the movement or laundering of money.<sup>9</sup> Asset forfeiture and international controls over bank secrecy mean that the convention effectively prescribes a serious limitation on safe havens for the assets of organized crime.<sup>10</sup> Very importantly, asset forfeiture has long been known to be a critical tool in the fight against organized crime. With procedures and rules to facilitate investigations, particularly regarding the status of assets, as well as cooperation in the protection of witnesses<sup>11</sup> and the general framework for broadening the mutuality of legal assistance,<sup>12</sup> there has been a major step forward in the development of an effective regime in the fight against organized crime. A quick perusal of issues of bank secrecy, forfeiture,<sup>13</sup> witness protection<sup>14</sup> and money laundering<sup>15</sup> suggests that the cooperation required to make this regime work is itself the outcome of the harsh and brutish reality of transnational organized criminal behavior. It also suggests that there is a changing idea of the relationship of the international rule of law to the idea of state sovereignty. The expression of cooperative sovereignty<sup>16</sup> in this kind of treaty is a vital and important constitutional principle of the new millennium.

## **2. International Rule of Law Responsibilities and Harsh Global Realities**

The millennium coincides, as noted, with the post-Cold War world. Former U.S. President George Bush once visualized this world as a ‘kinder and gentler’ world. Bush’s optimism coincided with an unvarnished armed attack on Kuwait by Iraq. The central problem posed by the attack was that it was a clear violation of one of the core principles of international

constitutional order,<sup>17</sup> which prohibits and declares unlawful acts of aggression. Although the Cold War was awash in acts of 'indirect' aggression or aggression through surrogates, the specific use of armed forces to extinguish the sovereignty of an independent state immediately raised the stakes of the post-Cold War world, as a world subject to even the attenuated restraints of the rule of law, and the rejection of even minimal restraints.

As the Gulf War came to an end, the disintegration of former Yugoslavia presented a huge threat to human rights and humanitarian concerns. In effect, thoughtful scholars contemplated a 'non-law' state characterized by so called 'ethnic conflicts'. At the back of the ethnic cleansing policies of the Serbian and other ethnic elites were challenges to the rule of law in a global sense. If ethnic cleansing and ethnic conflict were both incomprehensible and not amenable to the restraints of law, did policy makers then not contemplate the rejection of the juridical and normative restraints of the UN Charter itself? Were these crises matters of global concern or were they indicators of the limits of global concern, and global law?<sup>18</sup> Was the stress on 'limits', a disguised claim to repackaged isolationism, to parochial identifications, to chauvinism and unilateralism at the expense of responsible, cooperative internationalism? Defining the 'universal' scope of the international rule of law is vital to any lofty vision of world order based on universal ideals of security, peace and dignity.

As the international community slowly responded to the problems of South-East Europe, the ethnic conflict in Rwanda spiraled out of control when Hutu militias systematically butchered nearly a million of their Tutsi countrymen. These problems (and many others) underlined the idea that the rule of law is not a national or international luxury, a symbol of pure impractical lofty idealism. Rather it is also a critical restraining element in the core global issues of peace, security, human rights and a minimal respect for humanitarian concerns; it was and is a vital component of the effort to constrain globalism's harsh realities as well.

The crises of South-East Europe and later Rwanda led to a level of international institutional paralysis which culminated, somewhat belatedly, in a renewed interest in the rule of law foundations of basic international human rights and humanitarian law. The establishment of the Ad Hoc Tribunals for the Former Yugoslavia<sup>19</sup> and Rwanda<sup>20</sup> was an important response to these issues, although it may fairly be said that these events and public opinion virtually compelled action of some sort from the UN Security Council. The mandate of these tribunals was limited and precluded crimes against peace. On the other hand, the relative success of these institutions has generated a renewed interest in the idea of an International Criminal Court as well as a Human Rights Court for Africa. Although the USA strongly supported the creation and work of the Ad Hoc Tribunals, it surprisingly opposed the passage of the Rome statute for creating the International Criminal Court.<sup>21</sup> In particular, it opposed the codification of crimes against peace (aggression). Although opposition to the Rome statute is motivated by political factors as well as security concerns, it is also highly influenced by the resurgence of the idea of 'sovereignty',<sup>22</sup> and the concern that international obligations are corrosive of this idea. In short, positivism, often nurtured by the impulse to chauvinism, still influences in important ways the legal perspectives of critical actors in the international system.<sup>23</sup>

Whatever the full importance of these issues is, a few general considerations about globalism seem obvious from the perspective of the rule of law. The world of global events, facts and occurrences might require that the rule of law be more adequately defined in a more comprehensive (universal) context and that normative values in some important degree are inherent in the broader identification with the international rule of law. If the rule of law is seen as controversial in the context of war and security matters, other areas of globalism may directly impact on rule of law responsibilities, especially in the area of development which often implicates demographics, including population policy and reproductive freedoms. In short, impact of demographics on development and the capacity of states to deliver an adequate standard of living. Development dysfunctions can nurture criminal behaviors and be a fertile arena for penetration by organized crime syndicates.

### **3. Harsh Realities Generated by the Current Paradigm**

The socio-political reality of globalism may be symbolized by numbers and statistics. For example, the tensions between the right to life and the right to a higher quality of life may be given a distinctive perspective when it is considered that every day 365,000 babies are born in the world. Ninety per cent of these babies are born in poor, underdeveloped countries. Notwithstanding the scope of global poverty, over 2 billion people worldwide have significantly improved their standard of living over the past ten years. India, a country long seen as an economic development basket case, has the world's largest middle class (200 million). However, there are still 750 million who live in dire poverty globally. China with a population of over 1 billion has one-fifth of the earth's population. And finally, in this regard it is estimated that in 1804 the world's population stood at 1 billion. In 1927, it was estimated to stand at 2 billion. By 2027, it is projected to increase to about 8-9 billion. The connections between population, development and criminal deviance may be one of the important challenges confronting the harsh reality of globalism.<sup>24</sup> In other words, what exactly will be the role of the rule of law in the new vision of global order? Some of globalism's harsh realities are listed here:

- law and global apartheid or global poverty (development, poverty, income distribution, economic equity, population policy etc);
- law and the global public health crisis (eg. AIDS); law, emerging markets, and the trend toward corruption and fragmentation; law and proliferation and threat of nuclear arsenals; law and the global war system (arms race, armed conflict, ethnic conflict etc); law and basic human rights ( the epidemic of gross abuse of human rights and human atrocity); law and global constitutional crisis; law and the crisis of the rule of law (failed states, corrupt states, drug-controlled states, terrorist states, garrison states, authoritarian states, totalitarian states);<sup>25</sup>
- law and the threat of organized transnational criminal behavior.

The idea of cooperative sovereignty is connected below to the nature of the international rule of law and its relationship to the international constitutional system and the promise of a lofty ideal.



#### 4. The International Rule of Law Precept

In September 2000, President Jacques Chirac of the French Republic said the following:

*‘The Charter of the United Nations has established itself as our “World Constitution”. And the Universal Declaration of Human Rights adopted by the General Assembly in Paris in 1948 is the most important of our laws.’<sup>26</sup>*

Like all laws, the UN Charter has been under constant pressure to affirm its promise and its universal lofty ideals. There has also been insistent pressure sought to limit the effect of the charter as a critical, indispensable framework for a defensible world order. It was a former US Secretary of State<sup>27</sup> who suggested that in the aftermath of the atomic age, the charter itself had become a near-obsolete instrument of world order. Indeed, assertions of power to intervene by the superpowers as they declared exclusive zones of security-based extra-territorial interests created real tensions between the letter and the spirit of the charter, and the exigencies of claims to expanded spheres of national security influence.

Even if one believes that the end of the Cold War represents a demise of ‘history’, its legacy for the international rule of law will linger long after its causes are forgotten. Events confronting international legal order after the Cold War brought back a sobering reality. There is indeed a harsh sociopolitical reality in global society. Moreover, this reality represents a real threat to the UN Charter system if it is not effectively confronted. Transnational organized crime as well as the epidemic of humanitarian crimes are only a part of the global problem, as the list of harsh reality issues illustrates.

The harsh reality of globalism also confronts us with the public policy challenge of how to change the harshness, which includes the widespread suffering humanity experiences under current world order conditions. This challenge requires a more articulate normative road map – a more explicit form of policy guidance. Such guidance may be rooted in many sources of comparative, cross-cultural and moral experience, as well as in the UN Charter’s promise of a deepening awareness of the importance of human dignity as a universal moral, ethical and juridical imperative.

Normative guidance found in the scholarly discourse of morality, ethics and value analysis might also provide incentives to policy makers to enhance the prospects of transformation, at least in the direction of a global public and civic order founded on the universal ethic of respect for the dignity and worth of all of humanity, as well as the earth-space environment which makes human survival and transformation possible. The prospect of an improved human future is therefore an important expectation of the normative guidance based on an ethic of universal human dignity.

The central problem some modern philosophers and moralists have grappled with is that human dignity based on universal respect is in fact a cluster of complex values and value processes. In order to enhance human dignity in policy contexts, integration of many of these values is required. Specific prescription and application of values to enhance human dignity is indeed a complex matter.<sup>28</sup> At an abstract philosophical level, these values may indeed

seem to be incommensurable.<sup>29</sup> At an operational policy level, ostensibly conflicting values may have to be contextualized and more deeply analyzed in light of broader, more abstract formulations of value judgment. Thus, values such as power, respect, rectitude, affection, enlightenment, wellbeing, skill and wealth must be construed and interpreted in terms of their enhancement of a more abstract human dignity/human rights postulate. The policy maker seeking enhancement of the ethic of universal dignity must develop complex techniques of decision making, including sophisticated standards of construction and interpretation.<sup>30</sup> Does evaluating the value of liberty induce the sacrifice of the value of equality? It is at this 'operational' level that practical lawyers, social scientists and real-world policy makers must make critical decisions about how to integrate often ostensibly conflicting values and norms genuinely to enhance the universal ethic of human dignity.

For example, in South Africa the Constitutional Court was confronted with a claim by a political party actively involved in the struggle against apartheid that the 'Truth and Reconciliation' statute which provided amnesty for those who should otherwise be prosecuted for grave violations of human rights was both unconstitutional and a violation of international law.<sup>31</sup> In effect, the court was confronted with a truth and reconciliation procedure which was a critical component of the internal peace process as well as the process whereby the disenfranchised mass of South Africans could gain their political freedom. This procedure was, however, in ostensible conflict with universally accepted norms of international law which do not provide derogable excuses for heinous crimes against humanity.

Does the ethic of universal respect and human dignity demand absolute, universal compliance at the expense of other universally accepted values? To ensure that the values of respect, democratic entitlement and humanitarian law standards are honored requires fine-tuned analysis and great subtlety in the structure and process of decisional interventions. Rules of construction and 'interpretation' are painfully worked out, which hold, for example, that even if a peremptory principle (*jus cogens*) of international law embodies an obligation *erga omnes*, it should be evaluated, appraised and construed so as to enhance rather than disparage similar rights which may also have to be accommodated. The currency behind the universal ethic of essential dignity and respect is that it provides practical decision makers with goals, objectives and working standards that permit the transformation of law and practice into a greater and more explicit approximation of the basic goals and standards built into the UN Charter system itself, which prescribes a public order committed to universal peace and dignity for the people of the entire earth-space community.

Practical decision makers and interpreters might gain more normative guidance about the universal ethic of human dignity, since this is expressed in six keynote concepts embodied in the UN Charter. These concepts embody the global community's fundamental expectations about global constitutive and public order priorities.<sup>32</sup> Indeed, these concepts are vital if the interpretation of international law is to be guided by explicit standards of normative understanding built into the ethic of universal respect for human dignity. In short, the construction and interpretation of modern international law (i.e. its specific prescription and application) may be rootless, arbitrary, and even quixotic if it is not subject to explicit standards of

normative guidance, which are expressed, *inter alia*, in the concrete terms of the UN Charter itself.

## 5. Keynote UN Charter Precepts and Values Relevant to a New Paradigm

The opening of the preamble expresses the first precept that the charter's authority is rooted in the perspectives of all members of the global community, i.e. the peoples. This is indicated by the words, '[w]e, the peoples of the United Nations.'<sup>33</sup> Thus, the authority for the international rule of law, and its power to review and supervise important global matters, is an authority not rooted in abstractions like 'sovereignty', 'elite', or 'ruling class' but in the actual perspectives of the people of the world community. This means that the people's goals, expressed through appropriate fora (including the United Nations, governments and public opinion), are critical indicators of the principle of international authority and the dictates of public conscience as they relate to the conditions of harsh global realities, as well as aspirations encompassing lofty ideals. The charter's second key precept embraces the high purpose of saving succeeding generations from the scourge of war.<sup>34</sup> When this precept is seen in the light of organized crime syndicates' involvement in the illicit shipment of arms, the possibility that they might have access to nuclear weapons technologies, and chemical and biological weapons, the reference to 'war' in this precept must be construed to enhance the principle of international security for all in the broadest sense. The third keynote precept is the reference to the 'dignity and worth of the human person'.<sup>35</sup>

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*"There is no law without the idea of community and there is no community without the idea of law."*

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The eradication of millions of human beings with a single nuclear weapon or policies or practices of ethnic cleansing, genocide and mass murder hardly value the dignity or worth of the human person. What is of cardinal legal, political and moral importance is the idea that international law based on the law of the charter be interpreted to enhance the dignity and worth of all peoples and individuals, rather than be complicit in the destruction of the core values of human dignity. The negative utopian ideals of transnational organized crime make this principle a crucial component of normative guidance. The fourth keynote precept in the preamble is emphatically anti-imperialist. It holds that the equal rights of all nations must be respected. Principles such as non-intervention, respect for sovereignty, including political independence and territorial integrity are also issues that remain under constant threat of penetration by organized criminal activity. The fifth keynote precept in the charter preamble refers to the obligation to respect international law (this effectually means the rule of law) based not only on treaty commitments but also on 'other sources of international law'.<sup>36</sup> These other sources of law include values which complement efforts to promote ethical precepts built into expectations of the universal ideals of morality. The sixth keynote precept in the preamble of the charter contains a deeply rooted expectation of progress, improved standards of living, and enhanced domains of freedom and equality. Organized crime represents the antithesis of this prospect.

## 6. UN Charter Values, the Rule of Law and a New Paradigm for Global Governance

The idea of the rule of law built in these keynote precepts is as controversial, or indeed obvious and noncontroversial, as the idea of law. What then is the idea of law from a historic, cross-cultural, international perspective that inspires these keynote concepts? It is simply this: human beings belong to communities. Communities cannot exist without some culturally approved and supported rules of conduct. There is no law without the idea of community and there is no community without the idea of law. Law is a condition and a consequence of community and community is a condition and a consequence of law. Justice Oliver Wendell Holmes once indicated that the notion of a legal right was so basic to the idea of law and community that without it, a 'dog will fight for his bone'. One might add to Holmes's insight that in this 'fight', the big dog would 'win' and acquire all of the bones, the marrow and the meat. The smaller dogs would get nothing. A way to understand this almost 'symbiotic' relationship between law and community is to ask the audience to imagine a society without an expectation that

- a) agreements and exchanges made in good faith and according to law will be honored;
- b) wrongs (delicts) inflicted upon innocent parties will be compensated;
- c) basic interests and expectations of entitlement as in fundamental property interests will be honored;
- d) conduct which violates the basic fundamental norms of right and wrong shall be sanctioned by a collective community response;
- e) basic structures of governance and administration respect the rules of natural justice such as *nemo iudex in sua causa* or *audi alteram partem*, and in general constrain the abuse of power and thus the prospect of caprice and arbitrariness in governance.

The idea of law, based on a comparative, cross cultural, historic reality, is that human beings interact within and without community lines. In so doing, they exchange, they commit wrongs intentionally or unintentionally, they require some security over their possessions and entitlements, and their systems of governance aspire invariably to constrain the impulse for abusing power. In this anthropomorphic sense, law protects or secures the most elementary conditions of social coexistence. Let us describe this as the function of minimum order and assume that it is an aspect of 'law', and of 'justice'.

It is also in the nature of human beings that they are transformative in their capacity for growth and in their relations with others. Human beings exist not only spatially but also in terms of the duration of time and events. There is hopefully a tomorrow, a next week, next month, next year, or next century. Human beings are transformative agents who make things happen, and in doing so, underline the question also embedded in the nature of law and community, i.e. that we can change things for better or worse, for the common good or the special interests, for the sense of expanding human dignity or the prospect of a negative utopia, the rule of human indignity. It is in this sense that law as minimum order confronts

the idea of justice and potentiality. It is commonly thought that minimum order is a critical, but not absolute, condition of a more just, more decent, more optimistic human prospect. The rule of law precept is uncontroversial in the sense of minimum order and its 'boundaries'. Peace, security, and minimal standards of human rights are reflections of these values in international, constitutional and municipal law.

The rule of law idea in the above sense protects both the individual and the community (the village). By seeking to secure the conditions of basic security for human coexistence, by seeking to ensure that coexistence will not be subjected to arbitrary and capricious exercises of power, the rule of law provides a constitutive architecture which permits human beings to transform themselves in terms of loftier ideals; in terms of something akin to the Palermo renaissance. The great British political scientist, Leonard Shapiro, was once asked what the real difference was between a totalitarian state and one committed to the culture of democracy. He unhesitatingly responded that it was the rule of law, in the sense that it was the basic mechanism for constraining the prospect of arbitrariness in governance. In short, the rule of law is the protective shield against the abuse of power by arbitrary means, by both private and public actors.

What, then, is the relationship of the rule of law to the notion of cooperative sovereignty which is suggested here to be a cornerstone of the convention? One of the most important values embedded in the UN Charter is the obligation of national sovereign states to cooperate in the achievement of its purposes and objectives. This charter precept is codified in the Declaration on Principles of International Law Concerning Friendly Relations and Cooperation among States in Accordance with the Charter of the United Nations.<sup>37</sup> The principle of cooperative sovereignty recognizes the limits of traditional sovereignty and sees the prospect of strengthening the sovereignty of the state, through cooperation, to realize common objectives and common interests. If such cooperation can be achieved in the sensitive area of jurisdiction over criminal activity, then an enlargement of the boundaries of cooperation may bring an even greater awareness of how common problems and mutually experienced crises can be more effectively confronted and resolved. The UN Charter's constitutional promise as the Rule of Law Cornerstone of cooperation is thus the key to making the rule of law a critical component of an improved world order.

## 7. Conclusion

The rule of law is an idea rooted in the principle of practical realism. Yes, human social process can have systemic dysfunctions creating harsh realities. The rule of law is critical in the process of ameliorating and then changing those harsh realities. If it is successful it will maximize the prospect that loftier ideals of human organization and reciprocal respect can occur. Those values are no mystery. They include Roosevelt's four freedoms: the freedom from fear and from want, the freedom of expression, and the freedom of conscience and belief. They are today reflected in President Jacques Chirac's 'universal and emblematic values', namely, 'liberty, equity and solidarity, tolerance, non-violence, respect for nature and shared responsibility.'<sup>38</sup> They are reflected as well in the International Bill of Rights and its commitment to universal human dignity. As the Palermo experience aptly demonstrates,

the rule of law issue is not someone else's problem: it is everybody's. It is a moral and juridical problem. It requires the collective effort and solidarity of all – individuals, institutions of civil society (professional, academic, voluntary) and institutions of law as well as governance at all levels to move the being and becoming of our global village from the harsh reality of deprivation to the abundant reality of mutual respect and universal dignity. The Palermo renaissance invites us to renew our commitment to the rule of law as a crucial pillar for the lofty ideals that give us a reason for being.

In conclusion, it is important to stress the place of the Organized Crime Convention in a renewal of the promise of the international system based on the UN Charter. The cooperation inherent in the sovereign obligations of this treaty will enhance the realization of the ideals of a universal international ethic as the basis of a truly universal rule of law. The principle of cooperative sovereignty is an ethical and juridical milestone. Both ordinary individuals and state representatives must work toward the adoption and the effective application of this convention (and its protocols) with all deliberate speed. To delay ratification and adoption in effect supports the criminals. To obstruct ratification and adoption is, effectively, to demonstrate solidarity with a common enemy of mankind. To expeditiously adopt the convention and give it full efficacy is to cement the ties between state and people. It will give genuine meaning to the ringing words of the UN Charter 'We the peoples...' upon which the authority of law and ultimately international ethical comments are based. Finally, the Organized Crime Convention underlines a critical problem in the current paradigm and takes a small step in the direction of a new paradigm of cooperation and solidarity for the earth/space community.

#### Author Contact Information

Email: [nagan@law.ufl.edu](mailto:nagan@law.ufl.edu)

#### Notes

1. Among the most important global organized crime cartels is the Mafia. The role of the 'mafia' in Sicilian political culture and criminal deviance is well described in James Fentress (2000) 'Rebels and The Mafiosi: Death in a Sicilian Landscape'. The book is also favorably reviewed by Peter Robb, 'Family Business', in the *New York Times Book Review*, 7<sup>th</sup> January, 2001, at 23. The term 'mafia' appeared in the national vocabulary (of Italy) in 1885. According to Robb, 'Mainland Italy's alarmed discovery of how deeply rooted organized crime was in Sicily was part of a wider shock experienced by bourgeois northern Italians when they began to discover the hidden culture of southern Italy and the dramatic lives of their new fellow citizens.' *Ibid.* at 23. About the historic character of the mafia: it is according to Fentress and Robb an '... old form of criminal exploitation of the Sicilian people by a small number of their fellows.' An important contemporary insight into the Palermo renaissance lies in the political fact that '[a] strong indigenous civil culture today is implacably opposed to the ways of the Mafia'. The re-establishment of the mafia in Sicily as a potent 'political' and criminal syndicate is partly due to the conduct of the United States Army in 1943: 'Mussolini's fascist regime had effectually brought the Mafia under state control and many of its leaders were imprisoned.' As Robb indicates, 'Mafia opportunism had worked brilliantly in 1943 by serving the American invaders and regaining for the Mafia overnight all the territorial control it lost under fascism. Only in Sicily did Cosa Nostra perfect that parasitic vesting of criminal interests in the body politic that has been a model for the rest of the world's organized crime.' *Ibid.* Finally, criminal networks like Cosa Nostra do 'control a significant part of the global economy. ...', they 'impinge in terrible ways on many millions of lives, and they all follow Cosa Nostra's example of growth through political alliances'. On the Palermo renaissance, see 'New Ways To Fight Back', from CIVITAS, Palermo World Congress: Civic Education Works (1999), <http://www.civnet.org/civitas/palermo/cived.htm>. See also Umberto Santino, 'Law Enforcement in Italy and Europe Against the Mafia and Organized Crime', CSD. <http://www.centroimpastato.it/publ/online/mcdonald.htm>
2. United Nations Convention against Transnational Organized Crime, 55<sup>th</sup> Sess., Agenda Item 105, UN Doc. A/55/383 (2000) (hereinafter the convention).

3. Winston Nagan, 'Strengthening Humanitarian Law: Sovereignty, Criminal Law and the Ad Hoc Tribunal for the Former Yugoslavia', *Duke Journal of International Comparative Law*, Vol. 6, No. 1, (1995): 135-146.
4. Winston Nagan, 'Lawyer Roles, Identity and Professional Responsibility in an Age of Globalism', *Florida Journal of International Law*, No. 12 (2000).
5. *Ibid.*
6. The term 'kleptocratic' is a neologism.
7. L. de Koker, (2000) 'Money Laundering Control in South Africa – A South African Response to an American Comment', unpublished manuscript, on file with the author.
8. B. Ryder, (n.d.) 'The Enterprise of Crime: Organized Crime in the United Kingdom', unpublished manuscript, on file with the author. For example, see the European Convention on Extradition (13<sup>th</sup> December, 1957) Europ. TS 24, 359 UNTS 274. The convention provides for confiscation of assets, including forfeiture which is defined as 'the permanent deprivation of property by order of a court or other competent authority'. The Convention, ref. 2 above, Art. 2(g) at 25.
9. *Ibid.*
10. *Ibid.*
11. The Convention, *ibid.*, Art. 24, at 43.
12. *Ibid.*, Art. 18, at 37.
13. *Ibid.*, Art. 12, at 31.
14. *Ibid.*, Art. 24, at 43.
15. *Ibid.*, Art. 7, at 28.
16. UN Charter, Arts 55, 56.
17. UN Charter, Art. 2, para. 4.
18. For a skeptical appraisal of new world order interventions, see Chomsky, N. (1999) 'The New Military Humanism: Lessons from Kosovo', Common Courage Press, Monroe, Maine.
19. United Nations Security Council Resolution 827 on Establishing an International Tribunal for the Prosecution of Persons Responsible for Serious Violations of Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991. SC Res. 827, UN SCOR, 48<sup>th</sup> Sess., 3217<sup>th</sup> mtg, at 29, UN Doc. S/Res/827, 32 ILM 1203 (1992).
20. United Nations Security Council Resolution 955 on Establishing the International Tribunal for Rwanda (with annexed statute). SC Res. 955, UN SCOR, 49<sup>th</sup> Sess., 3453<sup>rd</sup> mtg, at 15, UN Doc. S/Res/955 (1994); reprinted in *Weston* I.I.E.12.
21. *Is a UN International Criminal Court in the US National Interest: Hearings Before the Subcomm. on International Operations of the Senate Comm. on Foreign Relations*, 105<sup>th</sup> Cong. (1998).
22. See generally Nagan, ref. 4 above.
23. *Ibid.*
24. For a skeptical appraisal of the economic foundations of neoliberal 'globalism' see N. Chomsky (1999) *Profit and People: Neo Liberalism and Global Order* Seven Stories Press, New York/London. See also *PIOOM Newsletter and Progress Report*, (1999-2000) Vol. 9, No. 1, Leiden, The Netherlands, 3.
25. The literature on these crises themes in international law is extensive. For a general orientation see Falk, R. A. (1989) 'Revitalizing International Law', Iowa State University Press; Mohammed Bedjaoui, M. (1979) 'Towards A New International Economic Order', UNESCO, Paris; Kohler, G. (1978) 'The Three Meanings of Global Apartheid: Empirical, Normative, Existential', *Alternatives – A Journal of World Policy*, Vol. 4; Falk, R. and Meyrowitz, E. (1980) 'Nuclear Weapons and International Law', *Julian Journal of International Law*, 29, 541; Nagan, W. (1999) 'Nuclear Arsenals, International Lawyers, and the Challenge of the Millennium', *Yale Journal of International Law*, Vol. 24, No. 2; Weeramantry, C. (1987) 'Nuclear Weapons and Scientific Responsibility', Kluwer, Cambridge, MA; Charlesworth, Chinkin and Wright (1991) 'Feminist Approaches to International Law', 85 AJIL 613; Purvis, N. (1991) 'Critical Legal Studies in International Law', 32 HILJ 81; Falk, R. A. (1997) 'The World Order Between Interstate Law and The Law of Humanity: The Role of Civil Society Institutions', reprinted in *Weston*, Falk and Charlesworth, 'International Law and World Order', p. 49.
26. J. Chirac, (2000) 'Universal Values', The United Nations Millennium Summit, 6<sup>th</sup>-8<sup>th</sup> September, 2000, p. 6.
27. The tension between the technological advances of nuclear weapons and the UN Charter is indicated in Dulles's idea that the UN Charter was 'a pre-atomic age' constitution; it was, he held, 'obsolete before it actually came into force. As one who was at San Francisco, I can say with confidence that if the delegates there had known that the mysterious and immeasurable power of the atom would be available as a means of mass destruction, the provisions of the Charter dealing with disarmament and the regulation of armaments would have been far more emphatic and realistic.' Foster Dulles, J. (1953) 'The Challenge of Our Time: Peace with Justice', ABAJ 1063, 1066.

28. Values considered widely to implicate the human dignity precept are deemed to be implicit in the Universal Declaration. These values include power, wealth, respect, rectitude, enlightenment, wellbeing, health, skill, affection, rectitude and possibly aesthetics. See McDougal, Lasswell and Chen (1980) 'Human Rights and World Public Order', Yale University Press, Connecticut; Nagan, W. (1993) 'Africa's Value Debate', *East African Journal of Peace and Human Right, Vol. 1*; (1991) 'African Human Rights Process: A Contextual Policy-Oriented Approach', *Southwestern University Law Review*; (2000) 'African Jurisprudence', *Encyclopedia of the Philosophy of Law*.
29. J. Gray, (1996) 'Isaiah Berlin', Princeton University Press, New Jersey, especially chs 2, 3, 4 (Pluralism, History, Nationalism).
30. See generally, Vienna Convention on the Law of Treaties, 1155 UNTS 331; 1969 UNJYB 140; 1980 UKTS 58, Cmnd 7964; reprinted in 8 ILM and 1 *Weston IE, 1*.
31. See *Azanian People's Organization v President of the Republic of South Africa, CCT 17/96*; see also Nagan and Adkins (2001) 'Conflict Resolution and Democratic Transformation: Confronting the Shameful Past – Prescribing a Humane Future', SALJ, forthcoming.
32. See 'Legality of Nuclear Weapons' (1996) LCJ at 443 (Weeramantry J, dissenting).
33. UN Charter, Preamble.
34. *Ibid.*
35. *Ibid.*
36. *Ibid.*
37. See GA Res 2625, UN GAOR, 25<sup>th</sup> Sess., Supp. No. 28 at 21, UN Doc A 8028 (1971).
38. See Chirac, ref. 26 above, at 6.