AMSTERDAM LAW FORUM

Scientific Article

GREAT POWER PRIVILEGE

*Wala Al-Daraji**

ABSTRACT

Great Power Privilege is well rooted in the United Nations through state practice of permanent members of the Security Council. The forward recognition of Israel by the USA in comparison with lack of recognition of Kosovo by Russia, and the invasion of Iraq without Security Council authorisation provide contrasting examples of Great Power Privilege that arguably does not help international peace. An internal renaissance of the Security Council may be the only route to a more inclusive global decision making mechanism to maintaining international peace and security.

I. Introduction

This paper will discuss great power privilege in the context of co-operation of key states and the future of international law ("IL"). It will argue against great power privilege guaranteeing co-operation of key states and that power privilege does not paint a bright future for the global order. The first example to support the argument is the forward recognition of Israel by the USA, in comparison with lack of recognition of Kosovo by Russia. The second example is the unilateral invasion of Iraq without Security Council ("SC") authorisation. The paper will then provide a conclusion of the main findings with recommendations for SC reform and further research.

II. Origins of Great Power Privilege

Historically, the idea of recognising the superior status of powerful countries started in the late nineteenth century by British writers who were supported by other European empires' writers.[1] The idea crystallised when the United Nations ("UN") was created. The organisation gave the SC veto power to its permanent members ("PM"). These states were the victorious states of World War II. The primary responsibility for the maintenance of international peace and security is placed on the SC.[2] The consideration for this responsibility is the unqualified power of any of the five PM to block UN resolutions through veto. The failure of the League of Nations was blamed on equality of power between great and small states,[3] which is avoided in the new SC.

* FCIArb, LLM, Lecturer at the University of Westminster

[1] L. Mälksoo, 'Great Powers then and now: Security Council reform and responses to threats to peace and security' in Peter Danchin & Horst Fischer (eds), *United Nations Reform and the New Collective Security*, Cambridge: Cambridge University Press 2010, p. 97.

[2] United Nations, Report of the High-level Panel on Threats, Challenges and Change, 2004, A/59/565, at: https://www.un.org/ruleoflaw/files/gaA.59.565_En.pdf (accessed 15 July 2020).

[3] Mälksoo 2010, supra note 1, p. 97

Theory producers of the SC powers, as per Baxi's classification,[4] are arguably the five PM who drafted and legalised the veto system, while *theory consumers* are non-permanent members. The degree of theory consumption arguably varies depending on state power. Borgen used a similar grouping: he called some states to be *norm makers* while the majority are *norm takers*.[5] This also meant that the PM are largely not subjects of IL which goes back in history, when the globe was the "playground" of European powers who produced theories to legalise their expansion.[6] A prime example is the work of Grotius on advocating free trading routes as Customary International law ("CIL") to serve Dutch economic concerns.[7] This reinforces Chimni's argument that CIL originated from a shared European legal consciousness that was reinvented following World War II,[8] at the time of establishing the SC. A positivist method developed the distinction between formal and material sources of CIL. The SC provides the Great Powers with CIL authority under A rticle 39 and the veto power. Following the creation of the UN and SC, we find that CIL is being shaped mainly by state practice of the great powers especially Western states.[9]

III. Great Powers' Recognition of Israel and Kosovo

The primary example to support the argument against guaranteed co-operation of key states is the contradiction in state recognition in the cases of Israel and Kosovo. There are two theories of recognition: *constitutive* and *declaratory*.[10] The *constitutive* theory of recognition is based on gaining recognition from other states,[11] while the *declaratory* theory does not depend on recognition. President Truman is arguably known for recognising the "Provisional Government as the *de facto* authority of the new State of Israel".[12] The USA recognition was granted within hours of the proclamation of establishing a Jewish state in Palestine by the National Council and the Zionist movement.[13] Israel followed the *constitutive* theory, while the *declaratory* theory adopts the Montevideo Convention. It could be inferred that Israel took into account UN Resolution 181 which paved the way for state recognition for either an Arab or a Jewish state.[14] Part I (F) of the resolution provides that "a sympathetic consideration should be given to its application for admission to membership in the United Nations in accordance with Article 4 of the Charter of the United Nations."[15]

---

[4] U. Baxi, 'Why Social Theory, Especially of Human Rights? (Beyond Frames of Rights Weariness and Rights Wariness)' in *Human Rights in a Posthuman World,* Oxford: Oxford University Press 2009, p. 5.

[5] C. Borgen, 'The Language of Law and Practice of Politics: Great Powers and the Rhetoric of Self-Determination in the Cases of Kosovo and South Ossetia', *Chicago Journal of International* Law 2009-10(1), p.29.

[6] J. Klabbers, *International Law,* Cambridge: Cambridge University Press 2017, p. 7.

[7] Idem, p. 9.

[8] B.S. Chimni, 'Customary International Law: A Third World Perspective', *American Journal of International Law* 2018-112(1), p. 6.

[9] Idem, p. 21.

[10] Klabbers 2017, supra note 6, p. 78

[11] Ibid.

[12] P. M. Brown, 'The Recognition of Israel', *The American Journal of International* Law 1948-42(3), p. 620.

[13] Ibid.

[14] UN General Assembly, Resolution 181(II), Future Government of Palestine, 29 November 1947, A/RES/181(II), at: https://unispal.un.org/DPA/DPR/unispal.nsf/5ba47a5c6cef541b802563e000493b8c/7f0af2bd897689b785256c330061d253?OpenDocument (accessed 11 July 2020).

[15] Ibid.

Brown argues that the USA recognition of Israel was because of traditional USA state practice as explained by Secretary Stimson, in 1931, to be based 'not upon the constitutional legitimacy of the new government but upon its *de facto* capacity to fulfil its obligations as a member of the family of nations.'[16] A similar opinion could be made about the USA practice when it comes to recognising dictators based on their *de facto* capacity to satisfy USA interests rather than their legitimacy. The USSR recognition of Israel went further than that of the USA by recognising not just the Provisional Government but also the State of Israel. Moreover, the USSR explicitly granted *de jure* recognition.[17] Thus, Israel was granted both *de facto* and *de jure* recognition by two Great Powers within three days of its proclamation. It is worth asking whether the USSR and smaller countries would have recognised Israel if the USA had not done so. Many of the first small countries to recognise Israel arguably did so to please the USA.

Turning to the requirements of statehood, Article 1 of the Montevideo Convention is considered as codifying CIL.[18] It remains arguable that Israel met the criteria at the point of proclamation because it didn't have a permanent population in Palestine at the time[19] and the alleged government was "provisional."[20] In 1932, the Secretary of State Stimson United States announced that the USA would not recognize any government formed by conquest.[21]
Both the Montevideo Convention and Stimson criteria do not take into account the question of occupation or right to the land on which a state is formed. This is debatably a serious shortcoming of CIL in blindly accepting and not questioning the legitimacy of how a state has possessed land. If one compares the territory of a state to property of individuals, then the English concept of *adverse possession* could be extended to states.[22] In the case of Israel, the entire Arab state of Palestine, as defined by UN resolution 181, has been adversely possessed by Israel and is now under Israeli control.

Accordingly, one can only concur with Brown that there are no rules governing the subject of recognition.[23] Klabbers calls it an "illusion" to think that state recognition is based only on legal criteria,[24] while Morrison asserts that recognition is "an artificial concept."[25] Similarly, Hakimi argues that there is no rulebook for CIL and that it is a "contingent and variable kind of law."[26] Moreover, Article 38(1) ICJ 'does not establish a rigid hierarchy of sources.'[27]

Having established that there are arguably no solid rules in CIL in relation to state recognition, particularly by Great Powers, it should not come as a surprise that Russia refused to recognise

---

[16] Brown 2018, supra note 12, p. 622.
[17] Jewish Virtual Library, 'Israel International Relations: International Recognition of Israel', at: https://www.jewishvirtuallibrary.org/international-recognition-of-israel (accessed on 5 July 2020).
[18] Klabbers 2017 supra note 6, p. 75.
[19] 1934, Montevideo Convention on the Rights and Duties of States, Article 1(a), 165 LNTS 19, at: https://www.jus.uio.no/english/services/library/treaties/01/1-02/rights-duties-states.xml (accessed 5 July 2020).
[20] Idem, Article 1(c).
[21] Editors, Law Review, 'Non-Recognition: A Reconsideration', *The University of Chicago Law Review* 1954- 22(1) pp. 261–278.
[22] *J A Pye v Graham* [2002] UKHL 30.
[23] Brown 1948, supra note 12.
[24] Klabbers 2017, supra note 6, p. 79.
[25] F. L. Morrison, 'Recognition in International Law: A Functional Reappraisal', 1967-34(4) *University of Chicago Law Review*, pp. 866.
[26] M. Hakimi, 'Making Sense of Customary International Law', *Michigan Law Review* 2020-118 , pp. 1491.
[27] Klabbers 2017, supra note 6, p. 27.

Kosovo after it made a unilateral declaration of independence in 2008, which falls under the *constitutive* theory. This is because of Russia's historical ties with Serbia. The US and the EU relied on the vagueness of the term *sui generis* to justify their recognition of Kosovo.[28] This may arguably be explained by 'For the EU, Kosovo is almost what Iraq is to the United States.... This is the latest example of the undermining of international law.'[29]
Russia relied on IL language to support its argument for sovereignty and territorial integrity being cornerstones of the international system, and supremacy of parent state consent over self-determination.[30] At the same time of arguing for saving IL fundamentals, Russia invaded Georgia and used IL to justify aiding the secession of South Ossetia and Abkhazia.[31]

Contradicting state practice is not the only confusing variable in CIL, but also UN resolutions that attempt to accommodate different interests resulting in different, if not contradicting, interpretations. UN resolution 1244 provides an example of the fluidity of semantics used in CIL; 'reaffirming the commitment of all Member states to the sovereignty and territorial integrity of the Federal Republic of Yugoslavia.'[32] The wording of resolution 1244 creates grounds for the two camps arguing either for Kosovo's recognition or considering its recognition a breach of IL. The Russian example in Kosovo and Georgia demonstrates self-contradiction of state practice, by a Great Power, in relation to secession and state recognition. Moreover, it demonstrates that IL can be used to justify opposite practices by the same state at the same time.

Secession or external self-determination clashes with territorial integrity of states provided for under the UN Charter Article 2 (4). The ICJ advisory opinion concluded that Kosovo's "declaration did not violate any applicable rule of international law."[33] International lawyers mainly believe that outside colonisation secession can not be claimed as a right or a remedy.[34] This puts *peoples* who were put by colonisation, Great Powers of the time, under states that they do not want to be part of at an existential disadvantage. This is because they do not have a 'right' to secession under CIL, but may be given internal self-determination rights through devolution agreements.

IV. Great Powers & the War on Iraq

The second example to illustrate lack of guarantee of co-operation of key states is the invasion of Iraq. The 2003 invasion without an authorisation from the SC was a violation of Article 2(4)

[28] Borgen 2009, supra note 5, p. 31.
[29] D. Medvedev, Foreign Policy Speech to Russian Ambassadors, July 15, 2008, Russian Foreign Ministry, at: https://www.rferl.org/a/Medvedev_Unveils_Russian_Foreign_Policy_Course_/1184185.html (accessed 12 July 2020).
[30] Borgen 2009, supra note 5, p. 13.
[31] Idem, p. 16.
[32] C. Borgen, 'Introductory Note to Kosovo's Declaration of Independence', *International Legal Materials* 2008-47(4) , pp. 461.
[33] Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion of July 22, 2010, ICJ General List No. 141, at: https://www.icj-cij.org/files/case-related/141/141-20100722-ADV-01-00-EN.pdf (accessed 12 July 2020).
[34] Borgen 2008, supra note 30, p. 463.

of the UN Charter.[35] The USA avoided a possible French veto by President Chirac,[36] and acted with other states outside the legitimacy of the UN and the SC. The "production of legitimacy" post the invasion of Iraq through alleged humanitarian intervention by the Anglo-American coalition faced both criticism and defeat.[37] This demonstrates that lack of legitimacy under the UN can not be made legitimate by arguing for humanitarianism post war action. Nesiah emphasises the overlap and dichotomy between military and humanitarian intervention in the absence of UN authorisation in Kosovo,[38] which could also be applied to justifying the intervention in Iraq. Building on Nesiah's analysis, the Canadian 'Responsibility to Protect' project needs to be guarded from Great Powers' abuse of power under the pretext of humanitarianism.[39] This makes state sovereignty a qualified concept rather than absolute based on international human rights law, where individuals are subjects of IL.[40] This in turn may give Great Powers a 'right' to interfere when a state violates the human rights of its citizens.

Collective security is enshrined in Article 39 of the UN Charter which gives Great Powers the 'right' to decide when there is any threat to peace, breach of peace or act of aggression.[41] However, the USA and the UK acted *unilaterally* in Operation Iraqi Freedom despite calling themselves a 'coalition'. Both countries further argued that they did not need a new SC resolution and relied on resolution 1441 to use force.[42] The USA went as far as invoking self-defence as ground for the 'Freedom' operation without justifying the basis of such position.[43] However, Iraq has not evolved as a 'free' country following the USA intervention. On the contrary, it ranks 162/180 on the corruption index,[44] and 172/190 on the ease of doing business.[45]

V. Conclusion & Recommendations

After nearly 75 years since World War II, great power privilege continues with no appetite for reform from the PM. Past consideration is no consideration, as known in contract law.[46] However, IL and politics are arguably more complicated than contract law. The concepts of state practice, *constitutive* theory and *de facto* recognition worked for Israel but not for Kosovo. This is because of the diverging interests of the Great Powers rather than legality of the

---

[35] H. Blix, 'UN Security Council vs. Weapons of Mass Destruction', *Nordic Journal of International Law* 2016-85(2), p. 156.
[36] AP Archive, 'French President Chirac: French position and the veto right against war on Iraq', at: https://www.youtube.com/watch?v=7R9Q9yopHAU (accessed on 6 July 2020).
[37] V. Nesiah, 'From Berlin to Bonn to Baghdad: A Space for Infinite Justice', *Harvard Human Rights Journal* 2004-17, p. 13.
[38] Idem, p. 3.
[39] United Nations, 'Responsibility to Protect', at: https://www.un.org/en/genocideprevention/about-responsibility-to-protect.shtml (accessed 11 July 2020).
[40] Klabbers 2017, supra note 6, p. 135.
[41] United Nations, 'Charter of the UN', at: https://www.un.org/en/sections/un-charter/chapter-vii/index.html (accessed 12 July 2020).
[42] C. Gray, 'The Use of Force and the International Legal Order' in Malcolm D Evans (eds), *International Law*, Oxford: Oxford University Press 2018, p. 623.
[43] Ibid.
[44] Transparency International, 'Corruption Perceptions Index' (2019), at: https://www.transparency.org/en/countries/iraq# (accessed 16 July 2020).
[45] World Bank, 'Ease of Doing Business Index' (2019), at: https://data.worldbank.org/indicator/IC.BUS.EASE.XQ?locations=IQ&most_recent_value_desc=false (accessed 16 July 2020).
[46] *Re McArdle* [1951] Ch 669.

statehoods recognised. Moreover, the invasion of Iraq proves lack of legality by Great Powers establishing unprecedented state practice that may become acceptable as CIL.

The SC faces increased criticism of its legitimacy and need for reform.[47] Inconsistent or ineffective practice by the SC in the face of atrocities such as genocides have "gravely damaged its credibility".[48] While some scholars talk of democratic deficit in the EU,[49] it is reasonable to argue that the SC has an oligarchy surplus. The distribution of power among SC members has changed.[50] Klabbers argues that both the UK and France are no longer great powers.[51] However, understandably no PM would want to give away such privilege unless it is forced to. An internal renaissance of the SC is the shortest route to a more inclusive global decision making mechanism in maintaining international peace and security, however, it remains the most unlikely route. Sixteen years have passed since the High level panel UN report on reform and arguably no change has happened to the SC.[52] The only recommendation that unsurprisingly has been maintained is not expanding the veto.

The dynamics of great power privilege could be researched from other angles, such as a feminist, Jewish or Islamic analysis. Further research could adopt a *class approach* to great power privilege of CIL.[53] Such focus may help understand whether leaders' social groups affect co-operation of great powers. For example, Bush and Blair gave an image of belonging to 'one' social group, while arguably Chirac did not belong to such a group. In conclusion, great power privilege solely guarantees the interests of the powerful or ex-powerful club whose interests may converge as in Israel, or diverge and paralyse as in Kosovo and Iraq.

[47] Mälksoo 2010, supra note 1, p. 109.
[48] UN 2004, supra note 2, p. 66
[49] D. Chalmers, G. Davies & G. Monti, *European Union Law*, Cambridge: Cambridge University Press 2019, p.151.
[50] UN 2004, supra note 2, p. 66
[51] Borgen 2008, supra note 30, p. 87.
[52] UN 2004, supra note 2, p. 67
[53] B.S. Chimni, 'Prolegomena to a Class Approach to International Law' *The European Journal of International Law* 2010-21(1), pp. 57.