From International Constitutionalism to Global Constitutionalism: Vision and Modernity of the Thought of Rolando Quadri[*]

di

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Abstract

Professor Rolando Quadri was a leading scholar of the 20th century. He anticipated the vertical changes to the structure of the modern global community**.** His vision of the international community was as a "*supra partes*" entity or authority distinct from its constituent members. What was extraordinary was his theoretical-methodological approach to the "principles" of international law, seen as the supreme source of law, which he contended as the authoritative expression of the will of the international community as a whole.

Some of his theoretical insights on "principles" allow to consider him as a precursor of international constitutionalism.

This paper remarks on the modernity of the thought of this outstanding scholar, comparing Quadri's vision of constitutionalism to modern visions of global constitutionalism and addressing the links thereof.

I. Introduction

Rolando Quadri[1] belongs to the generation of international lawyers who, after World War II, strongly contend that international law is a true law, like national law, against the illogical position that international law is not really law.[2]

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[1] Born in 1907 in San Casciano de' Bagni (Siena), Professor of International Law at the Universities of Padua, Urbino, Pisa, Naples, Rome and Cairo and Alexandria in Egypt. *See* amongst his general works: DIRITTO PENALE INTERNAZIONALE (1944); DIRITTO INTERNAZIONALE PUBBLICO (1949; 5th ed. 1968); LEZIONI DI DIRITTO INTERNAZIONALE PRIVATO (1955; 5th ed. 1969); DIRITTO COLONIALE (1959, 4th. ed.); *id.*, *Cours général de droit international public*, 113 RECUEIL DES COURS 237 (1964). *See also* other works of his reprinted after his death (in 1976) collected in three volumes, ROLANDO QUADRI, SCRITTI GIURIDICI,

He was an innovator when he dealt with the more traditional sectors of international law, already endowed with consolidated norms (territorial sovereignty, colonial law, the law of the sea, treaty law and maritime law),[3] when he researched sectors of the law that had not yet been explored (namely, cosmic law),[4] and when he extended his interest into different spheres of the general theory of law,[5] so today we can still discover new ideas and new sources of inspiration in his theoretical thinking.

Quadri anticipated the vertical changes to the structure of the modern global community. In order to illustrate the views of this distinguished scholar, let us quote him on the topic.[6] His vision of the international community was vertical like a "*supra partes entity*", or authority, distinct from its constituent members, interested in the enforcement of objective international law (i.e. based on "principles"; its existence not deriving from the will of the states);[7] an idea re-enforced by the perspective representation of an evolution of the political structure of global society that, as he maintained, "[…] théoriquement, pourrait se transformer en Etat mondial et passer de la phase 'internationaliste' à la phase 'universaliste'. Internationalisme et universalisme ne sont […] que terme de comparaison en ce qui concerne la structure politique possible de l'humanité." [8] Hence, Quadri's views on the structure of the international system were not unchangeable; the international system could evolve, thus envisaging a future evolution of the international legal order.

His theory of the sources of international law is vertical, both in his conception of making and enforcing primary law, i.e., principles of general international law (the original source of law, seen as the supreme source of law) and his vision of the relationship between national and

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I–III (1988), on the initiative of the Faculty of Law of the University of Naples where he taught from 1954 until 1970.

[2] JOHN AUSTIN, THE PROVINCE OF JURISPRUDENCE DETERMINED, 12, 127, 142, 201 (1954). *Id*., THE PROVINCE OF JURISPRUDENCE DETERMINED (1832, repr. 1967, 3 vol.)

[3] *See* the reprinted articles in QUADRI, SCRITTI GIURIDICI, *supra* note 1, vol. I, 1–844 and vol. III, 3–568; *adde*, ROLANDO QUADRI, LA SUDDITANZA NEL DIRITTO INTERNAZIONALE (1936).

[4] Rolando Quadri, *Droit International Cosmique*, 98 RECUEIL DES COURS 505 (1959-III), 509; *id*., PROLEGOMENI AL DIRITTO INTERNAZIONALE COSMICO (1960).

[5] *Id*., PROBLEMI DI TEORIA GENERALE DEL DIRITTO (1959); *adde*, *id*., SCRITTI GIURIDICI, *supra* note 1, vol. III, Section III, at 569–805.

[6] When we quote from *the original* texts in English, the translations are mine.

[7] *Id*., DIRITTO PENALE INTERNAZIONALE, *supra*, note 1, at 12; *id*., DIRITTO INTERNAZIONALE PUBBLICO, *supra*, note 1, at 28, 104, 231.

[8] *Id*., ENCYCLOPAEDIA UNIVERSALIS, IX (1975), reprinted in SCRITTI GIURIDICI, *supra*, note 1, at 836.

international law. He envisioned an international system in which social authority emanates directly from the major political-economic forces in the system (often referred to as "dominant states and social forces", "great powers", "superpowers", "hegemons") at different periods and times,[9] acting on everyone's behalf ("*uti universi*", to use his terminology), capable of expressing the will of the entire international community, through legal principles (that he calls in Italian "*principii*" or "*principî*" (hereinafter "principles") protecting general values,[10] and to impose their enforcement on all members of the community, through the "social action of intervention".[11] The verticality of the international legal order he envisaged was accentuated, on a normative level, by subordinating custom to principles, placed at the top of the hierarchy of international norms;[12] by the supremacy of international law over national law;[13] and by the concept that the legal orders of international organisations are not autonomous "but ideally incorporated in the international legal order".[14] Questioning ideas of contemporary legal theory, Quadri was opposed—even strongly—to voluntarist theories of law, like positivism or contractualism (above all, to the dogmatism of Anzilotti who identified the foundation of international law in the basic norm *pacta sunt servanda*)[15] and to trends of thought that attributed the international community with a horizontal dimension based on (express or tacit) agreement,[16] as well as to "trends that do not recognise the dichotomy: principles and customs and the supremacy of the former over the latter".[17] Already in 1936, he

[9] *Id*., DIRITTO INTERNAZIONALE PUBBLICO, *supra* note 1, at 36.

[10] *Id*., at 119 *et seq*.

[11] *Id*., at 105.

[12] *Id*., at 106 *et seq*., 109.

[13] *Id*., p. 79.

[14] *Id*., at 87.

[15] DIONISIO ANZILOTTI, CORSO DI DIRITTO INTERNAZIONALE (3rd ed., 1928), at 44, 47. In the early part of last century a debate took place at The Hague Academy of International Law between dualists, such as Heinrich Triepel and Dionisio Anzilotti, and monists, like Alfred Verdross and Kelsen. For background on monist and dualist perspectives, *see* Jordan J. Paust, *Basic Forms of International Law and Monist, Dualist, and Realist Perspectives*, in BASIC CONCEPTS OF PUBLIC INTERNATIONAL LAW—MONISM & DUALISM 244–265 (Marko Novakovic ed., 2013). *See also* IAN BROMWLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 32–35 (4th ed., 1990); LOUIS HENKIN, INTERNATIONAL LAW 64–67 (1995); MÓNICA GARCÍA-SALMONES ROVIRA, THE PROJECT OF POSITIVISM IN INTERNATIONAL LAW (2013).

[16] Rolando Quadri, *Positivisme et realisme dans la science du droit international*, INTERNATIONALRECHTLICHE UND STAATSRECHTLICHE ABHANDLUNGEN, FESTSCHRIFT FUR WALTER SCHATZEL ZU SEINEM 70 (1960), reprinted in *id*., SCRITTI GIURIDICI, *supra* note 1, Vol. I, at 649–659, especially, at 655, 658.

[17] QUADRI, DIRITTO INTERNAZIONALE, *supra* note 1, at 109.

identified the international constitution with "the way dominant forces are and function"[18] and formulated the theory of primary law as *inorganic*, instinctive, spontaneous law. This was such a fundamental aspect of his theoretical-methodological approach—its "international constitutionalism".

Quadri's idea of the verticality of the international system is realised, therefore, through the centralisation of the power of objective law-making and enforcement (i.e., making and implementing principles) within the hands of the predominant social forces, operating *uti universi*, and capable of interpreting and enforcing the will of the international social body as a whole. This also justified the "imposition" of principles on all states through unilateral coercive action by the superpowers (so-called dictatorial pressure).[19] Here Quadri indicates another important aspect of his methodological approach—an approach that he broadly characterizes as "realist". If we can regard him as a realist, his realism is, nonetheless, far from being extreme, because he did not deny that actors (including the powerful states) on the international scene are subject to moral judgement as well as to supreme international principles. In his view, the state agent *uti universi* can only intervene to protect legally recognised general interests. He, in fact, pointed out that:

> […] le terme "realisme" dans la conscience commune évoque parfois l'idée d'un conception matérialiste, utilitaire, voire même immorale du droit. Ceux qui considèrent que dans le monde réel il n'y a pas de place pour des vues idéales, ceux qui dégradent la réalité au niveau de la matière, sont libre de condamner au nom de leur scepticisme et de leur pessimisme (caché sous la masque d'un idéalisme purement verbal) notre réalisme.[20]

His declared membership of the realist school lead him to a realistic evaluation of the situation at that time, that of the international community of the blocs, an "inorganic community",[21] dominated by the two superpowers (the United States and the Union of Soviet Socialist Republics).[22] Therefore, while paying great attention to the institutionalisation of international society at the hands of the newly created United Nations, he not only always

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[18] *Id*., at 104.

[19] *Id*., at 275.

[20] Quadri, *Positivisme et realisme*, *supra* note 16, at 656.

[21] *Id*., DIRITTO INTERNAZIONALE PUBBLICO, *supra*, note 1 at 552, *passim*.

[22] *Id*., at 30.

distinguished the so-called "Relational Society", the "inorganic" nature of which he affirmed, from the "Institutional Society", but also opposed the common trend of that period to substitute the former with the latter.

It is really interesting that these ideas were expressed in particular in his famous *Cours général de droit international public* and in the *Diritto internazionale pubblico*[23] considering the period during which these works were written (namely, during the 1950s and 1970s).

Despite the different definition of the verticality of today's global community, which we shall discuss later, some of his theoretical insights on "principles" have paved the way to "new approaches" to international law[24] and international constitutionalism. In the wide and deep debate that began in the final decades of the last century on the concept and characteristics of "global constitutionalism", contemporary international lawyers, despite their different views, pointed out—and I was one of them— [25] the development of the basic principles aimed at advancing universal human society and especially designed to safeguard the values for global society as a whole (such as peace, human rights, democracy, economic welfare, ecological integrity, social justice, and the like), to create and organise centres of power and decision-making processes that guarantee compliance with the principles that have been laid down by ascertaining violations and using new instruments for the coercive enforcement of objective international law. Norms created for the protection of the supreme interests of humanity are a body of peremptory principles (*jus cogens*), which must prevail over the interests of the states considered *uti singuli* because of the higher value attributed to the common good compared to those of single states, individuals, groups, entities, etc. The former are guaranteed by a more

[23] Both quoted *supra*, note 1

[24] *See* David Kennedy, *New Approaches to International Law: A Bibliography*, 35 HARV. INT'L L.J. 397 (1994).

[25] *See mainly*: Richard A. Falk, *The Pathways of Global Constitutionalism*, in THE CONSTITUTIONAL FOUNDATIONS OF WORLD PEACE 13 (Richard A. Falk, Robert C. Johansen & Samuel S. Kim eds.,1993); Ernest Ulrich Petersmann, *Time for a United Nations 'Global Compact' for Integrating Human Rights into the Law of Worldwide Organizations, Lessons from European Integration*, 13 EUR. J. INT'L L. 621 (2002); Giuliana Ziccardi Capaldo, *A New Dimension of International Law: The Global Law, Editorial*, 5 GLOBAL COMMUNITY YILJ xvi (G. Ziccardi Capaldo ed., 2005-I); Armin von Bogdandy, *Constitutionalism in International Law: Comment on a Proposal from Germany*, 47 HARV. INT'L L.J. 223 (2006); Anne Peters, *The Merits of Global Constitutionalism*, 16 IND. J. GLOBAL LEGAL STUDIES 397 (2009); CHRISTINE E. J. SCHWÖBEL, GLOBAL CONSTITUTIONALISM IN INTERNATIONAL LEGAL PERSPECTIVE (2011); *see also* the contributions in JEFFREY L. DUNOFF & JOEL P. TRACHTMAN, RULING THE WORLD? CONSTITUTIONALISM, INTERNATIONAL LAW, AND GLOBAL GOVERNANCE (2009); THE TWILIGHT OF CONSTITUTIONALISM? (Petra Dobner & Martin Loughlin eds., 2010); Lars Viellechner, *Constitutionalism as a Cipher: On the Convergence of Constitutionalist and Pluralist Approaches to the Globalization of Law*, 4 GOJIL 599 (2012).

onerous system of responsibility than that which guarantees mutual obligations.[26] However, it should be understood clearly from the outset, that the current global community is establishing norms, standards, principles, and procedures and is creating institutions and mechanisms for protecting the values, common good and interests of humanity as a whole through decision-making and enforcement processes in which the great powers continue to play a crucial role by using their veto power in the UN Security Council and by retaining leadership in the integrated decision-making processes of global governance that we will focus on later.

In the light of this, we shall explore below the views of this outstanding scholar on the key features of the verticalisation of the international law system (section II) especially focusing on more current democracy and control in creating and enforcing supreme global principles and we shall compare his vision of constitutionalism to modern visions of global constitutionalism (and modern practice), addressing the links between them (sections III and IV).

II. The "Verticality" of the International System

The "verticality" of the international system acquired different definitions in doctrinal analysis after World War II. Quadri's views did play a role in the reasoning about the concept in question and, therefore, they offer a good start point in defining this concept.

A. Quadri's Perspective

Quadri believed the international legal order to be an "objective structure".[27] He envisaged the verticality of the international community as the centralisation of the power to make, interpret and enforce objective international law in the prevailing social forces (major powers and hegemons/superpowers), capable of implementing the will of the entire social body, operating *uti universi* in a situation of structural decentralisation, in an inorganic international community with no forms of institutional control over state behaviour.

In identifying "les bases essentielles" of a realistic reconstruction of international law, he stated that in the international community,

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[26] *See* ICJ, Barcelona Traction, Light and Power Company (Belgium v. Spain), Limited, Judgment (Feb. 5, 1970), 1970 ICJ REPORTS 32, paras. 33–34.

[27] QUADRI, DIRITTO INTERNAZIONALE PUBBLICO, *supra* note 1, at 87, *see also* at 27.

> [f]ace chaque Etat *uti singulus*, il y a les Etats *uti universi*; face le phénomène individuel, il y a le phénomène collectif. Le phénomène collectif peut bien se présenter aussi de manière anorganique, c'est à dire spontanée. L'autorité sociale, en d'autres termes, peut prendre corps soit dans un ensemble organique, rationalisé, présentant des caractères de stabilité, soit dans un ensemble anorganique, changeant, pas institutionalisé ou organisé.[28]

Surmounting the horizontal conception of international law, Quadri advocated the establishment of "international constitutionalism" conceived as a system of basic principles establishing and regulating international public power and affirming the notion of social authority within the international system. However, he did not believe that the activities of states and governments were regulated through those basic norms incorporating the values linked to human rights and/or democracy (fundamental norms of "global constitutionalism").

Within the political and normative structure of the international community observed by this outstanding scholar, "legality" was not a requisite for gaining access to government and exercise governmental power. At the end of the 1960s, Quadri observed, with regret, that "unfortunately" the international community had not yet developed democratic-legitimist notions according to which the only effective power was that which had been established peacefully and in respect of so-called human rights.[29] According to him, oppressive regimes had the same right to claim respect for territorial sovereignty. He based his theoretical views on the key criterion of the *effectiveness* of sovereign power, one of the cornerstones of classical international law.[30]

Historically, effectiveness has overridden legality. The principle of effectiveness required effective territorial situations to be internationally valid regardless of the legality of the title of acquisition and the way the power to govern was exercised. The *ex factis oritur jus* principle legitimized any situation as long as it was effective.[31] Hans Kelsen strongly maintained that

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[28] Quadri, *Positivisme et realisme*, *supra* note 16, at 657.

[29] QUADRI, DIRITTO INTERNAZIONALE PUBBLICO, *supra* note 1, at 710.

[30] During the twentieth century, the effectivity principle found full affirmation in jurisprudence and arbitral practice. *See* Tinoco case (Great Britain v. Costa Rica), 1 REVIEW OF INTERNATIONAL ARBITRAL AWARDS 369 (1923); ALBERT GEOUFFRE DE LA PRADELLE & NICOLAS POLITIS, RECUEIL DES ARBITRAGES INTERNATIONAUX (1865–72) 404 (1932- II); HUMPHREY M. WALDOCK, *Disputed Sovereignty in the Falkland Islands Dependencies*, 25 BYIL 311 (1948).

[31] On this, *see* HERSCH LAUTERPACHT, RECOGNITION IN INTERNATIONAL LAW 98 (1948), at 141 *et seq*., 331 *et seq*.; JEAN TOUSCOZ, LE PRINCIPE D'EFFECTIVITÉ DANS L'ORDRE INTERNATIONAL 122 (1964); JAMES CRAWFORD, THE CREATION OF STATES IN INTERNATIONAL LAW (2nd. ed., 2006), at 45–46.

the only test of legitimacy of territorial acquisitions is the *effectiveness* of control of that territory; *effectiveness* rectifies the illegality of the title of acquisition[32]. In fact, for classical international law and up until the Stimson Declaration (7 January 1932), the problem of the consequences deriving from a government's "illegitimate" exercise of power had not acquired importance in its own right;[33] and attempts to make the birth of new states subordinate to legal criteria did not translate into legal norms,[34] despite the fact that so called legitimist doctrines proceeded to define the criteria for recognition and sought to impose a control test for attribution.[35]

In Quadri's development of his conceptual framework, within the political-legal context of the international community of the late 1960s, effectiveness prevailed over legality, as there was no institutional power for controlling the activities of the dominant states and social forces, because of the ineffectiveness of the institutions and the United Nations.

B. The Institutional Perspective

"Legality" in territorial matters is a UN principle consolidated in the practice of non-recognition of unlawful territorial situations, initiated by UN bodies at the end of the 1960s.

Possibly, having died in 1976, Quadri did not have enough time to comment on this new praxis.

In the second half of the twentieth century, the United Nations, with increasing insistence, stated the non-recognition of unlawful territorial situations, that is to say, those situations that did not comply with the principles of legality that the United Nations was asserting through its bodies (namely, the prohibition of occupation, of possessing colonies, of massive pollution, of

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[32] HANS KELSEN, GENERAL THEORY OF LAW AND STATE (1949), at 228–229; *id.*, THÉORIE GÉNÉRALE DU DROIT INTERNATIONAL PUBLIC, 261 323–324 (1932-IV).

[33] On the principle *ex injuria jus non oritur*, *see* Hersch Lauterpacht, *Règle générale de droit de la paix*, 62 RECUEIL DES COURS 95 (1937- IV), at 286–287, 290.

[34] LAUTERPACHT, *supra* note 31, at 116, 124; TI-CHIANG CHEN, THE INTERNATIONAL LAW OF RECOGNITION, WITH SPECIAL REFERENCE TO PRACTICE IN GREAT BRITAIN AND THE UNITED STATES (London 1951). On this and the relevance of democracy to ensure recognition, THOMAS M. FRANCK, THE POWER OF LEGITIMACY AMONG NATIONS (1990); Sean Murphy, *Democratic Legitimacy and the Recognition of States and Governments*, 48 ICLQ 545 (1999), at 546, 566; BRAD ROTH, GOVERNMENTAL ILLEGITIMACY IN INTERNATIONAL LAW (1999).

[35] The weakness of legitimistic theories has been pointed out by Oscar Schachter, *Is There a Right to Overthrow an Illegitimate Regime?*, LE DROIT INTERNE AU SERVICE DE LA PAIX, DE LA JUSTICE ET DU DÉVELOPPEMENT. MÉLANGES MICHEL VIRALLY 430 (1991).

coercive government practices such as apartheid, genocide and other gross violations, etc.).[36] The practice in those and the following years consolidated these principles in international law, leading to the consequent erosion of the principle of sovereignty. That practice marked the new role played by UN bodies "at the service" of the international community, to ensure the legality of the international legal order through a control exercised over enforcement action carried out by state agents "in the common interest" (*uti universi*); a role that has been added to the institutional role of those bodies under the UN Charter.

After that practice it could no longer be ignored that there had been a radical change at the international level, in as much as the principle of effectiveness (*ex factis oritur jus*) was pitted against that of legality (*ex injuria jus non oritur*); that effectiveness no longer rectified the situations in conflict with the principles of legality that were being established; that basically effectiveness was heavily eroded by them and that mechanisms were needed for institutional control over the activities of the states operating in the common interest and limits to the omnipotence of the great powers.

At that time, the need to protect emerging global values fuelled doctrinal trends which viewed the Charter as the constitution of the entire international community.[37] Imagining the possibility of replacing the "Relational Society" with the United Nations, the idea was the verticalisation of the international community by centralising powers of general law-making and enforcement within UN bodies. This theory, supported by Anglo-American legal theory, that also found authoritative supporters in Italy,[38] even if in a variety of different theoretical positions, believed it was possible for the General Assembly (GA) to act as the global legislator through Declarations of Principles[39] and that the Security Council (SC) could act as the watchdog of global public order, by virtue of the coercive powers conferred on it by Chapter VII of the Charter.

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[36] For an analysis of the constitutional norms on the basis of which the legitimacy of territorial situations are evaluated, and for broader reflections on the UN practice of non-recognition, *see* GIULIANA ZICCARDI CAPALDO, LE SITUAZIONI TERRITORIALI ILLEGITTIME NEL DIRITTO INTERNAZIONALE/UNLAWFUL TERRITORIAL SITUATIONS IN INTERNATIONAL LAW, 27 *et seq.*, 46 *et seq*., (1977).

[37] *See* B. Fassenbender, *The United Nations Charter as the Constitution of the International Community*, 36 COLUM. J. TRANSNAT'L L. 529 (1998).

[38] PIERO ZICCARDI, *Les Caractères de l'Ordre Juridique International*, 95 RECUEIL DES COURS 263 (1958-III); *id*., *Règles d'organisation et règles de conduite en droit international*, 152 RECUEIL DES COURS 119 (1976-IV), at 275;

[39] *See*, for a critique of this position, GAETANO ARANGIO-RUIZ, *The Normative Role of the General Assembly of the United Nations and the Declaration of Principles of Friendly Relations*, 152 RECUEIL DES COURS 419 (1972-II), at 434, 460, 629.

Quadri kept his distance from this theory.[40] He believed that the Charter was formally a convention, which could not be regarded as a "constitution", not having "an apparatus sufficient in its own right, which could execute its deliberations with coercive measures" and the United Nations, depending on the member states,[41] was constitutionally incapable of functioning with regard to the permanent members of the SC.[42] He argued that the international community as a whole did not have the bodies and that it manifested and implemented its will "in an inorganic, instinctive or spontaneous form ... not being able to even consider the UN as a 'central' body in a general sense".[43] He admitted, however, that "the institution [the UN] exists beyond the provisions of the Charter ... [that] the authority and value of the acts of UN can go well beyond their formal value ... and express the will of the prevailing forces, as well as principles in the form of a simple 'recommendation', formally, so-called 'non binding' act ('desires' that are 'orders')".[44]

C. The Integrated Perspective

The United Nations, in fact, has failed to take over the governance of the global community, despite its significant role and even though the public law dimension of the international legal order is growing. With the rise in globalization, the creation of international rules is increasingly oriented towards a structuring process for a universal human society (that is, the global community) and the protection of common values accompanied by objective safeguarding mechanisms and procedures.

The global legal system introduces multilateral decision-making processes and sharing of responsibilities for managing social and economic development, health and the global environment, as well as threats to peace and world security. It establishes systems of *shared governance* under UN control involving the forces of the global community (states, UN bodies, international governmental organizations, non-governmental organizations (NGOs), together with global civil society and the private sector). It creates integration procedures and

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[40] On this point, *see* QUADRI, DIRITTO INTERNAZIONALE PUBBLICO, *supra* note 1, at 357, especially the critique of the theory by PHILIPPE CAHIER, LES DROIT INTERNE DES ORGANISATIONS INTERNATIONALES (1963), at 563.

[41] QUADRI, DIRITTO INTERNAZIONALE PUBBLICO, *supra* note 1, at 89.

[42] *Id*., at 360.

[43] *Id*., at 552.

[44] *Id*., at 362.

mechanisms between the "Relational Society" (namely, the states and other new international actors), and the "Institutional Society" (that is, the United Nations and other intergovernmental organizations).[45]

This emerging system was brought about by the growing role the United Nations and other international organizations play in the management of world power. The verticalisation of international power has taken place beyond the Charter through integrated processes of decision-making and the public co-management of interests and emerging global values in which more and more international institutions are taking part. This marks the dawn of the global governance era, characterized by radical changes in international law-making and law-enforcement processes. This phenomenon started in the second half of the twentieth century and was accelerated by the demise of the bloc-based international structure, the reduction of the hegemony of superpowers, and the emergence of new dominant global agents.

I elaborate these ideas more fully in my book *The Pillars of Global Law*, arguing about an "integrated system" of global governance,[46] where I demonstrate and exemplify an integrated theory of global law that combines some of central concepts from two prior existing theories of international law—the realist and the institutional theories. More specifically, I have sought to understand and explain, through building a comprehensive theoretical reference model based on the concept of shared governance, the changes that have occurred in global law-making, law-enforcement and judicial processes related to globalization.

International practice supports the idea of verticalisation towards integration between global operational and normative activities and systems of states, international organizations and non-state actors. The developing "integrated system" establishes basic values and principles for a global society as a whole, promotes the rules and collective-action mechanisms for the protection and sustainable use of global common resources to increase the well being of all humanity, determines the allocation of global power, coordinates the functions of the global community, and guarantees the world's governance.

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[45] GIULIANA ZICCARDI CAPALDO, RÉPERTOIRE DE LA JURISPRUDENCE DE LA COUR INTERNATIONALE DE JUSTICE—REPERTORY OF DECISIONS OF THE INTERNATIONAL COURT OF JUSTICE (1947–1992), 2 VOLUMES (1995), at lix–lx.

[46] GIULIANA ZICCARDI CAPALDO, THE PILLARS OF GLOBAL LAW, 2008 [hereinafter, THE PILLARS] mainly at 19, 43, 89, 265. For an in-depth analysis of this theory and application to a specified area, *see* Anna Oriolo, *Revisiting the Interaction between the ICC and National Jurisdictions as a New Gateway to Strengthening the Effectiveness of International Criminal Justice*, 83 REVUE INTERNATIONALE DE DROIT PENAL 195 (2012).

In this constituent process, the international community and the institutional society continue to exist separately and to have a dialectic relationship in establishing shared decision-making embodying a model of shared global governance (this practice will be examined further in the following sections III and IV). In these decision-making processes, the hegemonic global social forces continue to play a dominate role driving forward the development of global constitutional principles and in the enforcement for their protection. Taking this into account, the current verticality under way in global society can be seen as a partial realization of some of Quadri's predictions.

III. Comparing Quadri's Vision of Principles with a Contemporary Approach to Global Constitutional Principles

In Quadri's vision, principles are the "immediate and direct" expression of the will of the international community as a whole.[47] They are the result of the determination of the prevailing forces within international society (that is, the so-called superpowers) interpreting and expressing the will of the entire international social body. Society's dominant forces act *uti universi*, that is to say, in name of the international community; therefore, they "authoritatively" state the values and goals of the entire community as a whole.[48]

The theory—proffered by Quadri—argues that principles are rules of international law different from custom, the former being a process of vertical and centralised formation of the law; the latter being rather more apt to be considered as a rule-formation process of the horizontal type, expressing the will of "the large majority of states". [49]

In constructing the system of sources of international law, Quadri defined principles as "fundamental, primary, general rules",[50] above custom, thus anticipating the debate on the relationship between these two sources of law which is still questioned today.

The epoch events in the East at the end of the 1980s were at the basis of a wide doctrinal debate as to whether there were formation processes of general international law norms, different from custom (as well as different from the general principles of law recognized by civilized nations, as mentioned in Article 38(1)(c) of the Statute of the International Court of

[47] QUADRI, DIRITTO INTERNAZIONALE PUBBLICO, *supra* note 1, at 106

[48] *Id.*, at 109, 119–120.

[49] *Id.*, at 133.

[50] *Id.*, at 104, 119.

Justice (hereinafter "general principles of law"). Since the 1990s, several new rules have been added to international human rights law.[51] The fact that many of them came into being *instantaneously*, by way of the immediate transformation of the will of the international community into law, without the need for custom (or, in other words, *omisso medio*), raises critical questions as to their legal nature and role in the system of sources of international law.[52] In particular, this means that the widespread opinion that rules of general international law are almost exclusively customary international law norms needs to be reconsidered.

Both the International Court of Justice (ICJ) and the overwhelming majority of scholars maintain that rules of general international law are customary norms. General principles of law are also regarded by some authors as a sort of *sui generis* custom. Yet, what is more relevant here is that new principles, which have spontaneously emerged, are subsumed under the so-called "instant custom" rubric.[53] Other authors, instead, assert that the GA has the power to lay down general principles, attributing binding power to its declarations.[54]

In actual practice, the instant formation of general principles to protect the supreme interests of humanity turns out to be a process of law-making which is working its way into the current global order which cannot be traced back to custom. At present, "principles" are created by way of an integrated process; they are sources of general international law different from

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[51] *See mainly*: HUMAN RIGHTS: THIRTY YEARS AFTER THE UNIVERSAL DECLARATION (Bertrand G. Ramcharan ed., 1979); THE INTERNATIONAL DIMENSION OF HUMAN RIGHTS (Karel Vasak & Philip Alston eds., 1982); Philip Alston, *A Third Generation of Solidarity Rights: Progressive Development or Obfuscation of International Human Rights Law?*, 29 NILR 307 (1982); Christian Tomuschat, *Human Rights in a World-Wide Framework—Some Current Issues*, 45 ZAÖRV 547 (1985); JACK DONNELLY, UNIVERSAL HUMAN RIGHTS IN THEORY AND PRACTICE (1989); ANTONIO CASSESE, HUMAN RIGHTS IN A CHANGING WORLD (1990); Bruno Simma, *International Human Rights and General International Law: A Comparative Analysis*, COLLECTED COURSES OF THE ACADEMY OF EUROPEAN LAW 153 (1995-IV); CHRISTIAN TOMUSCHAT, HUMAN RIGHTS: BETWEEN IDEALISM AND REALISM (2nd ed., 2008).

[52] On the debate over the nature and sources of international human rights law, *see especially* THEODOR MERON, HUMAN RIGHTS AND HUMANITARIAN NORMS AS CUSTOMARY LAW (1989); Isabelle Gunning, *Modernizing Customary International Law: The Challenge of Human Rights*, 31 VAND. J. INT'L L. 211 (1991); Bruno Simma & Philip Alston, *The Sources of Human Rights Law: Custom, Ius Cogens, and General Principles*, 12 AUSTRALIAN YEARBOOK OF INTERNATIONAL LAW 82 (1992), at 213 *et seq*.

[53] Bin Cheng, *UN Resolutions on Outer Space: 'Instant' International Customary Law?*, 5 INDIAN JIL 23 (1965). *See* in this regard Richard Baxter, *Treaties and Custom*, 116 RECUEIL DES COURS 25 (1970), at 44, 67; Robert Jennings, *The Identification of International Law*, in INTERNATIONAL LAW: TEACHING AND PRACTICE 3 (Bin Cheng ed., 1982); GEORGES ABI SAAB, *La coutume dans lous ses états ou le dilemme du droit international général dans un monde éclaté*, LE DROIT INTERNATIONAL À L'HEURE DE SA CODIFICATION, ETUDES EN L'HONNEUR DE ROBERTO AGO 53 (1987), at 60; ANTHONY D'AMATO, IDENTIFYING RULES OF CUSTOMARY LAW 107 (1997).

[54] For this approach *see supra* text accompanying note 39.

custom as well as from "general principles of law". I have called these new global principles "integrated principles of law"[55] because states, the United Nations, other international institutions and civil society participate in the law-making process. This process of the formation of primary general rules takes place outside the Charter system, for the Charter does not give UN bodies general law-making powers.

Today, these changes in the creation of general international law through integrated rule-formation processes involve the protection of the fundamental interests of the international community as a whole (for example, peace and security, self-determination, human rights, the fight against terrorism, democracy, the environment, space, sustainable development, etc.). Effectively protecting these public interests necessitates objectivity. An unorganised community, like the inter-state community, could not guarantee this and, therefore, more inclusive processes of globally integrated governance have developed whereby international organizations and civil society actors actively participate in global law-making processes.

One example of new global principles is the principle of democratic legitimacy which *immediately* came into existence at the end of the twentieth century, on the basis of the "initiative" of the dominant political forces within the international community in that given period. The opposition of the Eastern bloc, strictly defending domestic jurisdiction and sovereignty, prevented broadening the notion of gross violations of human rights to include serious and systematic violations of civil and political rights, as proposed by the Western bloc. The change in attitude of the former Soviet Union had an *immediate* impact on the content of international human rights law, substantially widening it. In the second half of the 1980s, the Soviet Union formally recognized the principle of democratic legitimacy after initial steps were taken at the Geneva summit of November 1985 between Reagan and Gorbachev and the subsequent meetings between the two leaders. This principle was meant to come into effect *immediately* and to be legally binding on all, regardless of the constant repetition of a given behaviour over time (*diuturnitas*), which is the typical requirement for creating customary international law. International organizations were the arena where the démarche taken by the two superpowers in Geneva fostered the emergence, on a general level, of an international principle mandating governments to let their citizens freely choose, consistently with democratic methods, their own form of government and representatives (a

[55] ZICCARDI CAPALDO, *supra*, note 46, at 33, 36.

principle set out in Article 21 of the Universal Declaration of Human Rights and in Article 1 of the 1966 International Covenant on Civil and Political Rights). Scholars consider the global democratic revolution as the most significant development of the end of the twentieth century.[56]

However, we should realistically consider that this phenomenon is, after all, the result of the propulsive will of the great powers. This is consistent with Quadri's view that, when it comes to "instant" international law-making, the preponderant role is played by the will of powerful states acting *uti universi*, instead of by "acceptance of each state" that a given rule is part of general law, as is required for the creation of a norm of customary international law[57] (which, it goes without saying, includes "instant" custom).

Today, the statements emanating from the annual G8 summits represent the "proposals" of the prevailing forces of the contemporary global community, around which consensus may form in world institutions for the creation of principles of international law. The power of G8 members to initiate new basic international rules is being strengthened because of the annual institutionalization of the meetings and because of greater participation and dialogue with countries, groups of countries, and institutions outside their group, especially emerging countries and global civil society (NGOs). For instance, the Group of 20 (G20) is a forum for cooperation and discussion on financial globalization. The mechanism of regularly meeting and consulting developed by the G8, therefore, largely contributes to the progressive institutionalization of the formation process of new global principles.

Interactive mechanisms play a similar role in the management of major global issues developed, from the end of the last century, in UN procedures and in efforts to reform the Security Council's working methods, with the aim of increasing the involvement of states which are not members of the SC in its work and of developing more general links with groups of NGOs and representatives of non-state actors.[58] The growing number of activities undertaken by the SC, closely related to the widening interpretation of its competence, has

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[56] Thomas M. Franck, *Fairness in the International Legal and Institutional System. General Course on Public International Law*, 240 RECUEIL DES COURS 9 (1993-III), at 100.

[57] Bin Cheng, *Hazards in International Law Sharing Legal Terms and Concepts with Municipal Law Without Sufficiently Taking into Account the Differences in Structure Between the Two Systems—Prime Examples: Custom and Opinio Juris*, STUDI DI DIRITTO INTERNAZIONALE IN ONORE DI GAETANO ARANGIO-RUIZ 469 (2004-I) at 488.

[58] *See* <http://www.securitycouncilreport.org>.

fostered the emergence of Security Council Open Debates. Since the late 1990s, various thematic discussions on certain current issues of global relevance (such as peace and security, protection of civilians in armed conflict, children and armed conflict, women, HIV/AIDS, climate change) have become frequent and continue to be held regularly.[59] Another important mechanism for SC interaction with outsiders has been the availability of draft decisions before they are adopted, as well as the practice of meeting with local NGOs during Council travel and inviting NGOs and other actors to Arria formula briefings (the Arria Formula is an informal and flexible instrument which enables SC members to hear NGOs and non-state representatives and to hold dialogues with non-members of the Council on matters which fall within the responsibility of the Security Council). Through these instruments and all these forms of interaction, member states of the SC seek to reach consensus on their "proposals" by setting up a legal framework of agreed general international regulations (soft law) in key sectors of the life of the global community, as a basis on which to continue the search for consensus and for realising general principles of law.[60]

In the integrated process(es) for the creation of principles, the dominant social forces simply put forward what is believed to be the general will of the global society. This will eventually turn into legal substance through agreements reached within institutional regional, inter-regional and universal fora, like international organizations, clearly the most fair and suitable arena to breed more rapid consensus at the international level. The will of dominant political/economic forces, mitigated by the dialectic influences of other active social forces becomes "law" binding on "all" because (and provided that) it represents the intersection and the acme of the equilibrium achieved in the international fora between the interests of the prevailing powers and public interest. Starting from the "proposal" by the dominant powers, through diplomatic consultations, consensus increasingly spreads to a growing number of international actors as it is discussed, examined, combined, and patched together. As consensus expands to various international fora at different levels, the original proposal becomes the will of the global community.

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[59] *SC Report Publications on Thematic and General Issues*, available online at <http://www.securitycouncilreport.org>.

[60] Such informal meetings started in 1992. For more information, *see Global Policy Forum*, available online at <http://www.globalpolicy.org/security/mtgsetc/brieindx.htm>.

We should add that the stages of this "quasi-organic" principle-making process have not yet been formalized. The process is still only in its embryonic stage. However, in the contemporary changing political and social context, where new rules and new governance processes are emerging,[61] the creation of principles by searching for convergences, reached within international institutions, between the interests of the great powers and the public interest heralds the new course of international law; a course where custom, as a source of primary general law, is in decline.[62] Acts of international organizations are different stages of the process of the generalization of a proposal. They are the "moments" in the dynamic process of creating global constitutional principles.

The foregoing explains why Quadri's theory of principles no longer seems adequate to fully explain the present process of the creation of global principles, although powerful states will still continue to guide general political and economic policy. Current practice shows that the will of the dominant forces within the global community (that is to say, the dominant forces driving globalization, which include not only major states but also NGOs, multinational corporations, religious movements, the media, etc.) does not turn into law (principles) because it is "imposed" (as Quadri argued). It only becomes law insofar as it is supported by a wide consensus about the public interest and its protection reached within institutional fora. The principles are created through integrated processes. Today, the process of the creation of principles is a dynamic process in which the great powers continue to play a significant role in propelling general law-making. But, the will of the most powerful states and no states only provides the spark, while consensus reached in international fora provides the fuel.

However, there is no doubt that many of Quadri's ideas about principles are still valid, firstly, with regard to the autonomy of this source of law related to other sources of general international law, secondly, with regard to the characteristics of immediacy and authoritativeness that principles have as "primary" and "original" source of law, and lastly, in terms of their formation, that, although using the organic structure of the United Nations (i.e., UN organs), depart from the normative framework of the Charter which does not confer on its bodies general law-making powers.

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[61] Christine Chinkin, *Global Summits: Democratizing International Law-Making?*, 7 PUB. L. REV. 208 (1996); Edward MacWhinney, *Separation or Complementarity of Constitutional Law-Making Powers of the United Nations Security Council, General Assembly and International Court of Justice*, STUDI DI DIRITTO INTERNAZIONALE IN ONORE DI GAETANO ARANGIO-RUIZ, *supra* note 57, at 339.

[62] On the identity crisis of custom, *see* Simma & Alston, *supra* note 52, at 88.

IV. Quadri's Theory of Intervention Compared to Today's Changes in the International Enforcement System

In Quadri's view, "social" (collective) intervention is the "typical form of the main/*primary* coercive guarantee of international law".[63] The eminent scholar supported the legitimacy of unilateral military intervention, also led by states that were not directly affected, operating in the common interest, to crack down on violations of basic rules of international law (principles). As he writes, by intervening, states act *uti universi* "as managers of the international legal order" because "through intervention it is the international community which is acting as an Authority, both to safeguard the violated legal order and to create a new legal order".[64] This perspective requires us to go beyond the traditional positivist theory that regards international law as being solely concerned with the protection of "individual" state interests but incapable of protecting "collective" interests, which are, therefore, a matter for the UN Charter system. It overcomes the difficulty stemming from both the bilateral character of the classic law-enforcement system, and the ineffectiveness of the Charter's collective security system under Chapter VII to ensure that the public interest is protected.

A wide-ranging doctrinal debate has taken place since the 1980s about changes to the international enforcement system,[65] mainly focusing on the power of states to act unilaterally

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[63] QUADRI, DIRITTO INTERNAZIONALE PUBBLICO, *supra* note 1, at 122.

[64] *Id*., at 277.

[65] *See* GIULIANA ZICCARDI CAPALDO, TERRORISMO INTERNAZIONALE E GARANZIE COLLETTIVE/INTERNATIONAL TERRORISM AND COLLECTIVE GUARANTEES, at 7, 73, 121 (1990); Christian Tomuschat, *Obligations Arising for States Without or Against Their Will*, 241 RECUEIL DES COURS 353–369 (1993-IV); Jochen A. Frowein, *Reactions by Not Directly Affected States to Breaches of Public International Law*, 248 RECUEIL DES COURS 355–366 (1994-IV); Bruno Simma, *From Bilateralism to Community in International Law*, 250 RECUEIL DES COURS 256–284 (1994-VI); Michael Reisman, *Unilateral Action and the Transformations of the World Constitutive Process*: *The Special Problem of Humanitarian Intervention*, 11 EUR. J. INT'L L. 3 (2000), at 7–11. *See also* the contributions in THE FUTURE OF INTERNATIONAL LAW ENFORCEMENT, NEW SCENARIOS—NEW LAW? (Jost Delbrück ed., 1993); and those in ALLOCATION OF LAW ENFORCEMENT AUTHORITY IN THE INTERNATIONAL SYSTEM. PROCEEDINGS OF AN INTERNATIONAL SYMPOSIUM OF THE KIEL INSTITUTE OF INTERNATIONAL LAW**,** MARCH 23 TO 25, 1994 (Jost Delbrück ed., 1995) [hereinafter, ALLOCATION OF LAW ENFORCEMENT]. For further doctrinal contributions, *see Symposium: The Changing Structure of International Law Revisited*, 8 EUR. J. INT'L L. (1997) and 9 EUR. J. INT'L L. (1998); Jean d'Aspremont, *The Collective Security System and the Enforcement of International Law (or a Catharsis for the Austinian Imperatival Complex of International Lawyers*) (Feb. 20, 2013), THE OXFORD HANDBOOK OF THE USE OF FORCE IN INTERNATIONAL LAW (Marc Weller ed., 2013), available online at SSRN <http://ssrn.com/abstract=2221477>.

to protect common interests of the international community as a whole.[66] Contemporary emerging global practice allows state action performed in the common interest and the integrative action of international institutions to interact. Over the past tirthy five years, mechanisms and procedures for the collective protection of community values have emerged that envisage "integrated" decision-making processes in which UN demands play a "central role". This practice is developing global principles for integrated actions characterized by complementarity among the actions of participants. While these procedures envisage the use of the UN institutional structure, they are not carried out within the legal bounds of the UN Charter and, therefore, fall outside the collective security system set out in Chapter VII.

The dynamics of shared governance (states/UN) that developed in the 1990s enabled the international legal order to enforce human rights' standards. The consensus amongst most states on some of the standards of objective legality stated by the United Nations, together with the introduction of external scrutiny of territorial issues and the exercise of power by governments, reduced the states' leeway. This also laid the groundwork for the development of a public-law function, wielded multilaterally, to safeguard global human and social values.

Nowadays, the international legal system for the protection of the human rights and public-law interests of the global community is characterized by states, international institutions (including the United Nations), and NGOs partaking in decision-making and cooperating in activities aimed at safeguarding the common good. To safeguard global human and social values, states that are not directly affected may act to reinstate the law that has been violated. This entails acting in the common interest (*uti universi*), with the cooperation of the UN bodies vested with control powers (over states) by the international legal order. Thus, the control exercised by international bodies gives any action undertaken "unilaterally" by states or groups of states the objectivity needed to endow it with a "public" nature and avoid abuses, providing thereby an institutional control of legitimacy. I called this system of shared global

[66] Some authors, emphasizing the individual state's authority to react to a violation of community values, maintain that, in these cases, states act 'in the public interest', 'as agents' of the international community. *See* PHILIP ALLOTT, EUNOMIA. NEW ORDER FOR A NEW WORLD 168, 170–171, 298 (1990); RUDOLF SMEND, STAATSRECHTLICHE ABHANDLUNGEN UND ANDERE AUFSATZE 309–310, 418 (3rd ed., 1994); Jost Delbrück, *The Impact of the Allocation of International Law Enforcement Authority on the International Legal Order*, *in* DELBRÜCK, ALLOCATION OF LAW ENFORCEMENT, *supra*, note 65, at 135, 154, 174; Torsten Stein, *Decentralized International Law Enforcement Agent*, *id.*, at 107. For the first contribution in this sense, *see* HANS KELSEN, PRINCIPLES OF INTERNATIONAL LAW 25 (1952).

governance between states, international institutions and civil society the "integrated system of law enforcement".[67]

In my view, underpinning the integrated law enforcement system is the principle by which the right of states to sanction *uti universi* breaches of fundamental rules (*erga omnes* obligations) must be "integrated" with the powers conferred on international institutions for "determining" the breaches themselves and for "control" over the states' activities. Hence, the enforcement action by states operating in the common interest is subordinate to both objective determination and to control carried out by UN bodies. This proposal of an integrated theory of global law enforcement explains changes in law enforcement practice that allow major problems currently facing the global community which has few centralized enforcement mechanisms to be solved.

The main problem with this theoretical proposal is the allocation of public powers (that is, law enforcement powers) among different components of the integrated system and the harmonization of policies at all levels. There is always a risk of arbitrariness in determining and distributing this type of authority. Distribution of participation in various decision-making processes between states and non-state components is the crucible of the integrated enforcement system; a system that is still lacking an equilibrium between those states (and scholars) that want to confer on the United Nations the monopoly of decision-making power on the use of force against illegitimate governments (namely, those governments responsible for gross violations of human rights and other core principles of international law) and those dominant states that want to keep this power for themselves and for regional organizations to which they belong.

Over the last twenty-five years, the interchanging of effectiveness and ineffectiveness in the UN Security Council has affected the integrated enforcement system and the distribution of powers and responsibilities within it. The first post–Cold War decade was one of remarkable activity for the United Nations with all the activism of the SC not only in responding promptly and effectively to Iraq's act of aggression against Kuwait (2 August 1990). Starting from the First Gulf War, new forms of participation of the states were developed that, on the "authorisation" of the Security Council, led to military actions to put an end to occupation and/or serious violations of human rights.

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[67] Giuliana Ziccardi Capaldo, *The Law of the Global Community: An Integrated System to Enforce "Public" International Law*, 1 GLOBAL COMMUNITY YILJ 71 (G. Ziccardi Capaldo ed., 2001), at 97.

At the end of the last century, with the breakdown in cooperation among the five permanent members of the SC, the non-institutional component claimed power to override ineffective institutions. States claimed they had the right to decide to unilaterally use force without the authorization of the SC against governments whose responsibility for serious violations of human rights has been ascertained by the SC. They claimed they had the right to use force in cases where the SC had already determined the illegality of the situation but could not take the necessary steps to restore legality. The apex of this sensitive phase was the Kosovo crisis, during which NATO countries, with the approval of other states, used force against the Yugoslav government to halt the serious and flagrant violations of human rights that had been ascertained by resolutions of the Security Council.[68] Not authorized because of Russia and China's vetoes, the Kosovo intervention was largely approved by states and international organizations. A vast majority of states and public opinion endorsed NATO's actions. Upon completion of military operations, the SC re-established its leading role by legalizing the intervention *ex post*.

Since NATO's 1999 war in Kosovo, the United Nations has been gradually losing the central role it gained in 1990. Subsequent international crises have shown alarming signs increasingly marked by UN ineffectiveness and the lack of institutional control over unilateral action by the dominant states. The situation that arose in Iraq during 2003 demonstrated the United Nations' powerlessness. The unauthorized military intervention of the United States and the United Kingdom in Iraq did not receive the consent of the global community and was condemned by the United Nations.[69] Since the first resolution adopted after the military

[68] NATO's military intervention in Kosovo was largely justified, *see* Thomas M. Franck, *Lessons of Kosovo*, 93 AJIL 857 (1999); Michael Reisman, *Kosovo's Antinomies*, *id*. *at* 860 *et seq*.; Louis Henkin, *Kosovo and the Law of 'Humanitarian Intervention'*, *id.* at 824 *et seq*, 827; Jonathan I. Charney, *Anticipatory Humanitarian Intervention in Kosovo*, *id.* at 834, 840; Christine Chinkin, *Kosovo: A 'Good' or 'Bad' War?*, *id.* at 843 *et seq*.; Bruno Simma, *NATO, The UN and the Use of Force: Legal Aspects*, 10 EJIL 22 (1999).

[69] On this topic, *see* above all: John C. Yoo, *International Law and the War in Iraq*, 97 AJIL 563 (2003); William H. Taft IV and Todd F. Buchwald, *Preemption, Iraq, and International Law*, *id*., at 557 *et seq*.; Ruth Wedgwood, *The Fall of Saddam Hussein: Security Council Mandates and Preemptive Self-Defence*, *id*., at 576 *et seq*; Richard Falk, *What Future for the UN Charter System of War Prevention*, *id*., at 590 *et seq*; Christopher Greenwood, *International Law and the Pre-Emptive Use of Force. Afghanistan, Al-Qaida, and Iraq*, 4 SAN DIEGO ILJ 7 (2003); Abraham D. Sofaer, *On the Necessity of Pre-emption*, 14 EJIL 209 (2003); Surya S. Prakash, *The American Doctrine of 'Pre-emptive Self-defence*', 43 IND. JIL 215 (2003); Giuliana Ziccardi Capaldo, *Legality vs. Effectivity in the Global Community: The Overthrowing of Saddam Hussein*, 3 GLOBAL COMMUNITY YILJ 107 (G. Ziccardi Capaldo ed., 2003-I); Robert M. Lawrence, *The Preventive/Preemptive War Doctrine Cannot Justify the Iraq War*, DENVER JIL POL'Y 16 (2004); Robert Kolb, *Self-defence and Preventive War at the Beginning of the Millennium*, ZEITSCHRIFT FÜR OFFENTLICHES RECHT 111 (2004); Joseph Darby, *Self Defence in Public International Law. The Doctrine*

operations, the SC spoke of "occupied territory" and defined the intervener states operating in the territory as "occupying powers". Nevertheless, Resolution 1483 indicated that Anglo-American authority was the only institution that had effective governing power, albeit temporarily. The United Nations had "a vital role in humanitarian relief, the reconstruction of Iraq, and the restoration and establishment of national and local institutions for representative governance".[70] Clearly, this is not comparable with the central role played by the United Nations in similar situations, when it took over the administration of certain territories whilst waiting to rebuild a representative national government (such as in Kosovo and East Timor). In the Iraq case, the United Nations' control function was drained of its content and downgraded to the mere supervision of the implementation of the conditions contained in Resolution 1483.

In an even more marked departure from international law, the dangerous development of the situation in Syria "has exposed the ineffectiveness of the UN's decision-making process" as Komorowski said at the GA in September 2013.[71] Additional confusion has been caused by Russia-Crimea issue. On 27 March 2014, the GA, with an overwhelming majority of the states in support, adopted a resolution declaring the referendum in Crimea in mid-March that led to Russia's annexation of Crimea as "having no validity" and called upon states, international organizations and specialized agencies "not to recognize" any changes in the status of the Crimea region.[72] The adoption of the resolution was preceded by unsuccessful attempts by the SC to take action which Russia blocked because of its veto power in the Council.

It clearly emerges that there is no stable equilibrium in the allocations of powers within the integrated enforcement system in which the components continuously self-reconstruct thereby generating disintegration processes. Given this dangerous instability, it is understandable that little has been done to develop substantive rules and procedures to consolidate the authority

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of Pre-emption and Its Discontents, INTERNATIONALE GEMEINSCHAFT UND MENSCHENRECHTE 29 (2005); EYAL BENVENISTI, THE INTERNATIONAL LAW OF OCCUPATION (2nd ed., 2012).

[70] SC Res. 1483 (May 22, 2003).

[71] 68th UN General Assembly in New York (Sept. 25, 2013).

[72] GA Res. 68/262 (Mar. 27, 2014), paras. 5 and 6.

and control of the institutions and effectively counter the primacy of the interests of the superpowers in the global society.

V. Conclusions

The foregoing analysis shows the modernity of Quadri's thought in anticipating that the classical international community of the Westphalian era would be left behind and replaced with the new vertical structure of the international order, attentive to safeguarding the values and interests of the entire world community.

Quadri considered that international constitutional principles are collectively guaranteed. His idea that prevailing social forces, especially dominant states, would ensure the functioning of primary law-making and enforcement by establishing general principles of law and the use of "social" intervention to ensure compliance, is still confirmed, albeit only partially, in the current integrated system of making and enforcing objective international law.

In present practice, integrated processes have evolved at the international level and are multiplying and becoming more refined that see the prevailing forces within the global community to promote, boost and manage together with international institutions, especially UN bodies, the creation and enforcement of principles protecting the fundamental values of humanity. Nowadays, integrated decision-making processes play a paramount role. They are increasingly relied upon in international practice to implement legality and objectivity in the new world order. And it is reasonable to consider that the process of shared governance that has already begun, inspired by the global solidarity rather than mere force, can boost the level of the legality of the international legal order and protect human and other fundamental rights.

Nevertheless, it must be clearly stated that the integrated collective enforcement system in its present form is not entirely effective. The participation of states (especially hegemonic states) as co-agents in the decision-making process in implementing public international law fuels the misgivings of those who emphasize the increasing arbitrariness of the current integrated system of collective guarantees due to the intermittent ineffectiveness of the institutions and the betrayal of the promise of global cooperation made in the immediate post–Cold War period (1989–1999).

Admittedly, there is a risk that world crises are controlled predominantly by the permanent members of the SC, or by some of them, as occurred recently during the US/UK occupation of Iraq in 2003/2004; the 2011 military intervention in Libya of a multi-state coalition to

implement SC Resolution 1973, which was initially largely driven by France, the United Kingdom and the United States; and the current crisis in the Ukraine mainly involving Russia and the United States**.** After these and other recent events mentioned earlier, there is the well-founded fear that some powerful states might monopolize the function of safeguarding the common interests of the whole world society depriving any action in the public interest of its necessary objectivity and legality. The powerlessness of the United Nations in the face of the effectiveness of the occupants in the Second Gulf War, and in the Russian annexation of Crimea raises the question of whether the classical principle of effectiveness (argued by Quadri) is not dangerously gaining ground over the principle of legality.

The truth is that the changes initiated by the integrated decision processes, intended to replace the role of imperialist hegemonic states with co-managed actions presuppose and require institutional structuring of the global community, at least sufficient integration of state systems with the systems of other international organizations as well as UN bodies and civil society, if the aim is to prevent, in the name of fundamental values, that abuses are perpetrated.[73] There is the need for co-management mechanisms to evolve in a manner best suited to the interest of the world community into a dynamic global process of consensus building appropriately tuned to meet the changing needs of the global society. Achieving this goal requires the growth of the process of global constitutionalisation that defines common values and core principles, designed to be realized within a framework of appropriate rules and procedures underpinning the authority of decision-makers and organizations involved in the decision-making processes.

That the United Nations is in dire need of reform is not in dispute. The SC must be reformed to prevent its permanent members from prioritising national interests. It must consolidate the United Nations' "central role" and position of superiority in relation to states and the other actors in the integrated processes. This position can only be assured through the control or supervisory power assigned to the United Nations as part of the integrated system, operating with the main focus on reform of the SC, whilst strengthening and enhancing the respective competences of the GA and the International Court of Justice.

[73] Giuliana Ziccardi Capaldo, *Managing Complexity Within the Unit of the Circular Web of the Global Law System: Representing a 'Communal Spider Web', Editorial*, 11 GLOBAL COMMUNITY YILJ xvii–xxii (G. Ziccardi Capaldo ed., 2011-I).

For their part, by working together in a fair way, the superpowers must take ownership of their role in global society, as defenders of the common good of the entire community, and charged with the responsibility that Quadri already attributed them of interpreting and implementing the will of the whole international legal order. The hope is that, through the development of global constitutional processes and the improvement in different forms of integrated governance, international society can move towards the "universalism" envisaged by Quadri[74] and advocated by many of today's scholars.[75]

[74] QUADRI, DIRITTO INTERNAZIONALE PUBBLICO, *supra* note 1, at 100.

[75] *See* Simon Thompson & Paul Hoggett, *Universalism, Selectivism and Particularism: Towards a Postmodern Social Policy*, 16 CRITICAL SOCIAL POLICY 21 (February 1996), available online at <http://csp.sagepub.com/*content*/16/46/21.full.pdf+html>; Emmanuelle Jouannet, *Universalism and Imperialism: The True-False Paradox of International Law?*, 18 EUR. J. INT'L L. 379 (2007); Andrew M. Fischer, *Towards Genuine Universalism within Contemporary Development Policy*, 41 IDS BULLETIN (January 2010), available online at <http://networkideas.org/featart/feb2010/Development_Policy.pdf>; Leon R. Calleja. *Universalism, Relativism and the Concept of Law*, 5 JOURNAL OF THE PHILOSOPHY OF INTERNATIONAL LAW 59 (2014).