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## **In Cool Mind: What International Arbitration Can Do For The (New) World Order?**

**Keynote address delivered by Yves Fortier on March 2,  
2023 at Harvard University, in Cambridge, Massachusetts**

Yves Fortier

I am delighted to join you here in Cambridge, Massachusetts, today. Thank you for your invitation. Last year’s conference dealt with the “past and future of international arbitration”.<sup>1</sup> It centered on the dispute resolution system writ large.<sup>2</sup> This year’s focus is on a bigger and bolder picture; how can international arbitration serve the world order? This suggests an outward look. I agree that it is unnecessary to worry about arbitration’s survival or self-image in these changing times or compare it to litigation or negotiation as if only one method of resolving disputes should be available. I invite you today to explore how these three methods of dispute resolution do or can affect the world as it experiences horror after horror. Two parallels come to mind.

The first is that of storytelling. Everything we do as lawyers is about the story we tell. The “genre” we choose, be it mediation, diplomacy, or arbitration, will influence the documents to be drafted, the meetings to be held, and the outcome of the dispute. Many stories will be misunderstood and remain a mystery, but there is much which can be done in order to tell the right stories.

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1 Dietmar W Prager, Address (delivered at the 8<sup>th</sup> Harvard International Arbitration Conference, 31 March 2022) [unpublished].

2 *Ibid.*

The second parallel is training for disastrous landslides. There are spaces where avalanches, tsunamis, and earthquakes happen when certain factors coincide. All three spaces involve a shift in major solid surfaces, be they layers of snow or tectonic platforms on land or underwater. The slides have been well-researched, but there is still no way to predict their date or extent. We now see the painfully tragic outcome of this uncertainty in Turkey and Syria.<sup>3</sup> International relations of a similar magnitude, whether you look at the creation of new states, title over a valuable or vast territory, human rights, vital resources, and so on, are classic avalanche terrain. When certain conditions are met, the question of a disaster is “when,” not “if.” Peaceful dispute resolution, like training for avalanches or earthquakes, will not avert the disaster; it is impossible to cancel a slide that is coming or to predict how deleterious its effect will be. What peaceful dispute resolution does is prepare and mark dangerous terrain and propose solutions to mitigate the consequences of the apprehended disaster. From this perspective, I will now reflect on some of the most significant events that shaped my career and which I suggest help to understand the world as we know it today.

It has been three decades since my term at the United Nations (UN), from 1988 to 1992. Those years were eventful. This was a time of dramatic change and hope. I recall, in particular, the fight against apartheid in Africa<sup>4</sup> as well as the independence of Namibia after years of bloodshed and failed attempts to help by the international community.<sup>5</sup> The Lockerbie bombing in 1988 strained diplomatic relations between the United States and the Middle East.<sup>6</sup> It marked the start of large-scale terrorism and the fight against it that intensified after 9/11.<sup>7</sup> The fall of the Berlin Wall in 1989 and

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3 United Nations Development Programme, “UNDP’s Response Türkiye-Syria Earthquakes” (last visited 4 July 2024), online: <undp.org> [[perma.cc/8Z2V-96QK](https://perma.cc/8Z2V-96QK)].

4 South African History Online, “Apartheid – The Early 1980’s” (31 March 2011), online: <sahistory.org.za> [[perma.cc/C3YF-UTSG](https://perma.cc/C3YF-UTSG)].

5 Christopher S Wren, “Namibia Achieves Independence After 75 Years of Pretoria’s Rule”, *The New York Times* (21 March 1990) A1, online: <nytimes.com> [[perma.cc/6JZT-QLJD](https://perma.cc/6JZT-QLJD)].

6 “Timeline: Lockerbie Bombing”, *BBC News* (12 December 2022), online: <bbc.com> [[perma.cc/46L9-4TTR](https://perma.cc/46L9-4TTR)].

7 Council on Foreign Relations, Council of Councils, Global Memo, “The 9/11 Effect and the Transformation of Global Security”, *Council on Foreign Relations* (1 September 2021), online: <cfcr.org/councilofcouncils> [[perma.cc/74RQ-EAZ6](https://perma.cc/74RQ-EAZ6)].

the disintegration of the Soviet Union that ensued put an end to the Cold War.<sup>8</sup> The Gulf War<sup>9</sup> and the release of Nelson Mandela<sup>10</sup> were also events of note during those years. These events, some horrendous, some very positive, heralded the world order, which is being challenged today principally by the war waged in Europe. Is a cooler Cold War in the offing? Is there a role on the world stage for a dispute resolution process such as we lawyers are familiar with? Let us look at recent history. Together with devastating natural disasters in Syria and Turkey,<sup>11</sup> there are man-made disasters still unfolding further north.

These recent developments are disasters that have been decades in the making. We are nearing the 9<sup>th</sup> anniversary of the annexation of Crimea by Russia through invasion and a sham referendum in March 2014.<sup>12</sup> It is a week since the first anniversary of the full-scale invasion of Ukraine by the Russian Federation at dawn on 24 February 2022.<sup>13</sup> The public outcry and massive worldwide support we now see for the people of Ukraine followed prior stifled protests, overlooked manipulations, and irreversible disasters of yesteryears.<sup>14</sup> Think of the recognition of Ukraine as an independent state in 1918,<sup>15</sup> the largely unnoticed Red Famine of the 1930s,<sup>16</sup> and decades later

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8 US, Department of State, Office of the Historian, “Fall of Communism in Eastern Europe, 1989” (last visited 4 July 2024), online: <history.state.gov> [[perma.cc/GAF8-LG4U](https://perma.cc/GAF8-LG4U)].

9 US, Department of State, Office of the Historian, “The Gulf war, 1991” (last visited 4 July 2024), online: <history.state.gov> [[perma.cc/R42H-RQDG](https://perma.cc/R42H-RQDG)].

10 Myles Burke, “In History: Nelson Mandela walks out of prison a free man”, *BBC News* (7 February 2024), online: <bbc.com> [[perma.cc/BU8J-EW4W](https://perma.cc/BU8J-EW4W)].

11 United Nations Development Programme, *supra* note 3.

12 Wojciech Konończuk, “Russia’s Real Aims in Crimea”, *Carnegie Endowment for International Peace* (13 March 2024), online: <carnegieendowment.org> [[perma.cc/HH8G-LYZS](https://perma.cc/HH8G-LYZS)].

13 David Leonhardt, “War in Ukraine”, *The New York Times* (24 February 2022), online: <nytimes.com/2022/02/24/briefing/ukraine-russia-invasion-putin.html>.

14 Sam Jones, “Fact Sheet: Global Demonstrations Against the Russia Invasion of Ukraine”, *Armed Conflict Location & Event Data (ACLED)* (9 March 2022), online: <acleddata.com> [[perma.cc/38EX-UV4E](https://perma.cc/38EX-UV4E)].

15 Joshua D Zimmerman, “Ukrainians have fought for independence for more than a century”, *The Washington Post* (13 June 2022), online: <washingtonpost.com>.

16 Anne Applebaum, “How Stalin Hid Ukraine’s Famine From the World”, *The Atlantic* (13 October 2017), online: <theatlantic.com> [[perma.cc/Y8PB-T44D](https://perma.cc/Y8PB-T44D)].

in 1995, the admission of Ukraine to the United Nations in 1991.<sup>17</sup> Since 2014, Ukraine has resorted to diplomatic channels, International Court of Justice (ICJ) proceedings, international arbitration, and negotiations with respect to Crimea to assert its cause.<sup>18</sup> The website, called “Lawfare,” is a testament to the high hopes for a peaceful resolution of disputes.<sup>19</sup>

These past events in Ukraine put other wars waged by the Russian Federation into perspective. Previous instances of Russia’s involvement or outright aggression in Chechnya,<sup>20</sup> Georgia,<sup>21</sup> Moldova,<sup>22</sup> Syria,<sup>23</sup> the Balkans,<sup>24</sup> Iran,<sup>25</sup> and even the annexation of Crimea<sup>26</sup> were clouded by pseudo-legal reasons. These countries and regions were seemingly riddled with differences, their local narratives unknown in so many other parts of the world. The global response to these Russian aggressions was belated and uncertain. There is no doubt in my mind that President Putin believed that the West would blink again in February. The full-scale invasion of Ukraine one year ago can be explained by Russia’s opposition to the free world and the legal order. This opposition transcends nationality, borders, and minor political differences. It became painfully evident that the *modus operandi* and methods of war the Russian Federation espouses have not changed at

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- 17 United Nations, “Member States – Ukraine” (last visited 4 July 2024), online: <un.org> [[perma.cc/34MK-G7V8](https://perma.cc/34MK-G7V8)].
- 18 Center for Preventive Action, “War in Ukraine”, *Center for Preventive Action – Global Conflict Tracker* (24 April 2024, updated 25 January 2025), online: <cfr.org> [[perma.cc/VZ6Z-7EAH](https://perma.cc/VZ6Z-7EAH)].
- 19 Lawfare, (last visited 4 July 2024), online: <lawfaremedia.org>.
- 20 Andrew Higgins, “The War That Continues to Shape Russia, 25 Years Later”, *The New York Times* (10 December 2019), online: <nytimes.com>.
- 21 Peter Dickinson, “The 2008 Russo-Georgian War: Putin’s Green Light” (7 August 2021), online: *Atlantic Council* <atlanticcouncil.org> [[perma.cc/4VED-4QCU](https://perma.cc/4VED-4QCU)].
- 22 Paula Erizanu, “My Country Knows What Happens When You Do a Deal With Russia”, *The New York Times* (23 April 2024), online: <nytimes.com>.
- 23 Center for Preventive Action, “Conflict in Syria”, *Center for Preventive Action – Global Conflict Tracker* (13 February 2024, updated December 11 2024), online: <cfr.org> [[perma.cc/7MCT-BUBL](https://perma.cc/7MCT-BUBL)].
- 24 James McBride, “Russian’s Influence in the Balkans”, *Council on Foreign Relations* (last modified 21 November 2023), online: <cfr.org> [[perma.cc/8S4S-ZW3C](https://perma.cc/8S4S-ZW3C)].
- 25 Ellie Geranmayeh & Nicole Grajewski, “Alone together: How the war in Ukraine shapes the Russian-Iranian relationship”, *European Council on Foreign Relations* (6 September 2023), online: <ecfr.eu> [[perma.cc/HSE3-JVM3](https://perma.cc/HSE3-JVM3)].
- 26 Konończuk, *supra* note 12.

all since its prior territorial conquests, which remained unchallenged. Some may look for imperialistic undertones in other countries' actions and watch reconciliation processes in the afterlife of political trauma in some parts of the world, measuring how far we have come from the Old World Order and despairing at its imperfection. At the same time, Russia is demonstrating that it still believes nothing is wrong with that Old World Order; that it wants to bring it back or it launches a so-called special military operation to this end. This marks a belated and tragic reminder that nothing can be assumed or taken at face value in the world order, not even what may look like a persuasive international legal argument. As has been often proven, if the international community ignores history, history will recur.

These past and ongoing events make the month-long presidency of the Russian Federation in the UN Security Council in April 2023<sup>27</sup> an eerie prospect. I return to my analogy. The best advice with respect to avalanches is to avoid the so-called avalanche terrain, choose a safer path, avoid backcountry skiing, and not build homes on dangerous slopes. As with shifting snow that is most common on the same slopes where the standard skiing trails are located, the horrid disasters in the world happen where the most coveted resources exist: human rights, territory, wealth, and energy. Avoiding a deadly wave may not be possible when you deal with such resources. A landslide may happen if three prerequisites are present at the same time. The first is the so-called 'avalanche terrain,' that is, a specific angle and direction of the slope; then comes weather and human factors. As skiers know, you can try choosing steeper or shallower slopes than the usual 30-45 degree angle, determine whether your slope has a convex roll, watch out for snapped trees that signify an avalanche happened there before, and steer clear of chutes and gullies. Yet there is no way to guarantee you will not get caught in an avalanche. How bad might it be? Much depends on chance, but you can still prepare. As my friend James Crawford said, "it is worth hoping for a chance but not taking any chances". How true!

With tsunamis and earthquakes, there is less choice involved and thus more chance. Research on tectonic slides has progressed, but in some

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27 George Wright, "Russia assumes UN Security Council presidency despite Ukrainian anger", *BBC News* (1 April 2023), online: <bbc.com> [[perma.cc/HQ8D-DXUQ](https://perma.cc/HQ8D-DXUQ)].

regions of the world, it was too late after people built their cities and vital infrastructures. Interstate relations cannot be guaranteed a constant streak of good luck. They should not be left to chance. Poor decisions, bad faith, and hypocrisy ruin otherwise promising prospects. International law and dispute resolution methods are not insurance packages against chance. Rather, they are ever-evolving mitigation tools that will help even out the terrain in the long run.

I come back to my prior parallel: storytelling. As I said earlier, we lawyers tell stories. Our narrative will be influenced by different facets of our personal and professional lives, and the listeners, the judges, will find perspectives they may not have been privy to. I open a parenthesis. “Objectivity” was the hallmark of American journalism before the 1960s, a virtue set into the official code of ethics for journalists. Truman Capote, the author of *Breakfast at Tiffany’s*,<sup>28</sup> wrote the first non-fiction novel or a true-crime story, *In Cold Blood*,<sup>29</sup> with his friend and colleague Harper Lee.

Together they were the first American writers to challenge the perspective of being ‘objective.’ After the introduction of non-fiction novels and before the notion of unconscious bias, it became clear that objectivity needed to be replaced. It was replaced with “fairness” and “accuracy”. As you know, *In Cold Blood* tells the story of two men facing the death penalty.<sup>30</sup> Truman Capote’s voice was more accessible to the general public and more powerful than that of attorneys involved in the case. Both voices were heard in real time as the jury deliberated. Capote maintained that the title of the novel had a double meaning. The first meaning was obvious: merciless, ruthless, an act devoid of any human trait, but he never revealed to anyone what the second meaning was.

And so the stories we lawyers tell can be powerful; this particular one positively influenced the world of journalism, but the question can be asked whether or not it influenced the proceedings. In arbitration, media involvement may be addressed in the proceedings, and its impact

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28 Truman Capote, *Breakfast at Tiffany’s* (New York: Random House, 1956).

29 Truman Capote, *In Cold Blood* (New York: Random House, 1966).

30 *Ibid.*

on the arbitrators' decision-making may be discussed. The flexibility of the mechanism can bring the stories together. This was done in the case of *Caratube v Kazakhstan*,<sup>31</sup> as a media campaign was alleged to have impacted the claimant and possibly the proceedings. Accordingly, it was brought to the tribunal's attention. The stories lawyers tell are often highly impactful and are more publicized nowadays. Think of the Murdaugh trial,<sup>32</sup> the Anna Delvey process,<sup>33</sup> the Johnny Depp and Amber Heard<sup>34</sup> divorce, etcetera. The world order is to be shaped by everyone to be accepted; these events may not be global landmarks, but they captivate the attention and divert the focus from life-changing issues such as the war still raging in Ukraine. Lawyers' speeches may be very colorful, and a lawyer's work is important in even the smallest case. But do not forget, what you watch shapes what you do, and the world order is not a spectator sport. As Marshal McLuhan said, "the medium is the message";<sup>35</sup> the mechanism the lawyer chooses is paramount in shaping the story. I have had the privilege of dabbling in diplomacy, mediation, and adjudication as a litigator and as an arbitrator. I can confirm that each one of these avenues impacts how you tell the story as much as the storyline's direction. Whatever criticism Richard Yates may have voiced about legal writing style, litigation gives you a sound basis for telling important stories since it obliges you to get your point and arguments to a judge, be exacting with your sources and precise with your pleadings. Motivation is important, but you need to be realistic with your expectations and steer clear of emphatic calls for change or justice.

Diplomacy anticipates and seeks to prevent disputes. All diplomats know that interests are at the heart of the dispute and that the dispute will last for as long as the interests remain unbalanced. Ideally, it should not be

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31 *Caratube International Oil Company LLP v The Republic of Kazakhstan* (2008), ICSID Case No. ARB/08/12 (International Centre for Settlement of Investment Disputes) (Arbitrators: D' Gavan Griffith, D' Kamal Hossein).

32 John Koblin, "The media industry raced to capitalize on interest in the trial", *The New York Times* (3 March 2023), online: <nytimes.com>.

33 Jan Ransom, "Sorokin, Who Swindled N.Y.'s Elite, Is Sentenced to 4 to 12 Years in Prison", *The New York Times* (9 May 2019), online: <nytimes.com>.

34 Maureen Dowd, "Johnny and Amber: Trouble in Paradise", *The New York Times* (4 June 2022), online: <nytimes.com>.

35 Marshall McLuhan, *Understanding Media: The Extensions of Man* (New York: Mentor, 1964).

influenced by procedural deadlines, the importance of judicial awards, or the sanctity of contracts. Diplomats should strive to ensure that the means and the end are always clarified.

Negotiation and mediation allow us to uncover those interests and find the will to solve the dispute without the intensity of adversary proceedings. Often, interests will be discarded. These two avenues are not necessarily antithetical to arbitration. In my experience, I have seen these avenues complement each other. They are procedures that can be used at different times for the same dispute. Negotiation and mediation can help an arbitrator solve a dispute to both parties' satisfaction: hence the med-arb process.

Arbitration was first offered as a means of resolving specific highly technical disputes. It became an *ad hoc* mechanism for the resolution of such disputes. With time, arbitration became a coveted mechanism across party identities and industries. Its procedural features were favorably compared to those of national courts or permanent international tribunals.

None of the major events I referenced, either past or happening today, exist in a political vacuum. I know first-hand that each benefited from diplomacy, negotiation or mediation, and adjudication through courts or arbitral tribunals. I will now share with you the role of peaceful dispute resolution in two events that happened under my watch. You will see how the world and legal order each influenced their outcome. Their history could assist the international community today in modifying and even improving the existing legal order.

I start with the Lockerbie bombing in December 1988.<sup>36</sup> It was the worst terrorist attack before 9/11. It put a strain on the relations between the United States and the Middle East.<sup>37</sup> Crucial issues arising from the bombing, including the right to demand the extradition of the two individuals accused of executing the bombing and allegedly employed by the Libyan intelligence service under Colonel Muammar al-Qaddafi, were submitted to

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36 "Timeline: Lockerbie Bombing", *supra* note 6.

37 *Ibid.*

the International Court of Justice.<sup>38</sup> The proceedings before the ICJ lasted eleven years.<sup>39</sup> After the UN Security Council issued a resolution in 1998<sup>40</sup>, the parties requested the discontinuation of the ICJ proceedings.<sup>41</sup> The UN, the United States, and Libya then went into another decade of sanctions and negotiations before Libya, in 2008, released a payment of USD 10 million per family to more than 200 victims of the Lockerbie bombing.<sup>42</sup> It was a lengthy peaceful process where the rules of international law prevailed. There was no retaliatory violence, no military confrontation. The outcome was very much influenced by the then-existing legal order resting on international law.

I now turn to the second defining event. When I served as the Ambassador of Canada to the United Nations and, in particular, during my term as a member of the Security Council in 1988 and 1989, the UN dealt with a number of crucial issues, many of which related to the decolonization of countries in Africa. The most time-specific issue on the 1989 agenda was the independence of Namibia.<sup>43</sup> It was a long, complicated struggle made particularly intense because of apartheid. The UN was taking over the work started in Namibia (then called South West Africa) by the League of Nations. I recall that Namibia was a former colony of the German Empire. It was ruled by South Africa pursuant to a mandate conferred by the League of Nations. The mandate of South Africa was based on the principle of “non-annexation” and “well-being of people”. It was intended to help a country transition to independence with the necessary resources to run a democratic government. The Security Council searched for a solution.<sup>44</sup> It adopted many resolutions.<sup>45</sup> The solution, the independence of Namibia, was crafted over the

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38 *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v United Kingdom)*, [1998] ICJ Rep 9.

39 *Ibid.*

40 *Resolution 1192*, UNSC, 3920th Meeting, 1998, UN Doc S/RES/1192 (1998).

41 *Ibid.*

42 Matthew Weaver, “Families of Lockerbie bombing victims receive compensation from Libya”, *The Guardian* (21 November 2008), online: <theguardian.com> [[perma.cc/Y4MN-EWG9](https://perma.cc/Y4MN-EWG9)].

43 Wren, “Namibia Achieves Independence After 75 Years of Pretoria’s Rule”, *supra* note 5.

44 “Namibia – UNTAG Background”, *United Nations Transition Assistance Group (UNTAG)* (last visited 4 July 2024), online: <peacekeeping.un.org> [[perma.cc/GU22-9B8D](https://perma.cc/GU22-9B8D)].

45 *Ibid.*

period of twenty years principally by two organs of the United Nations, the ICJ and the Security Council.<sup>46</sup> In 1971, the ICJ issued an Advisory Opinion that, in effect, encouraged UN member states to address the implications of the mandate.<sup>47</sup> But the solution proved elusive. Then in 1978, came the bombing by South Africa of Namibians in Angola, the Cassinga massacre.<sup>48</sup> There were strident condemnations of South Africa by New York and the Security Council.<sup>49</sup>

Finally, ten years later, in January 1989, the Security Council declared the mandate illegal and ordered that elections be held.<sup>50</sup> I was in Namibia with Kofi Annan during the voting. The elections were certified as “free and fair” by the Special Representative of the Secretary-General, and Namibia became the last African state to gain independence.<sup>51</sup> Again, the eventual resolution of the Namibian question and the confirmation by the UN Security Council of the inalienable right of the people of Namibia “to self-determination and national independence” was a very lengthy process but save for the Cassinga massacre, it was a peaceful process.<sup>52</sup> Diplomacy, negotiation, and intervention of the United Nations eventually led to this outcome. It is no exaggeration to say that the world order then in place facilitated the solution.

With these two events in mind, which gave prominence to international law and the organs of the United Nations, I return to recent events. Are we on the threshold of a “new” global legal order shaped by the Russian Federation’s aggression against Ukraine and China’s rise as an economic superpower? Russian and Chinese legal scholars, as well as some political commentators, believe that the current legal order should be dismantled and

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46 *Ibid.*

47 *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, [1971] ICJ Rep 16.

48 “South African Defence Force (SADF) attacks a Namibian refugee camp in Cassinga, Angola”, *South African History Online* (25 April 2012), online: <sahistory.org.za> [[perma.cc/3MP9-NUAS](https://perma.cc/3MP9-NUAS)].

49 Katherine Teltsch, “Angola, in U.N. Says South Africa Presses Attack”, *The New York Times* (6 May 1978), online: <nytimes.com>.

50 “Namibia – UNTAG Background”, *supra* note 49.

51 *Ibid.*

52 *Declaration on Namibia and Programme of Action in Support of Self-Determination and National Independence for Namibia*, UNGA, 9th special Sess, UN Doc A/RES/S-9/2 (1978) GA Res A/S-9/13.

a new world order imposed that would elevate and legalize totalitarianism and autocracies and remedy the perceived injustices.<sup>53</sup> This narrative is similar to the one used at the beginning of the 20<sup>th</sup> Century to justify Soviet crimes against its people: the so-called “Marxist” or “Soviet” law. Attempts to explain dissatisfaction with the current legal order by blaming the world’s bipolarity miss the point. Any change in the world order needs to be based on international legal principles. In my view, this cannot happen with totalitarianism, autocracy, disregard for human rights, and military aggression. I am not saying that the present world order is perfect and that it could not be improved. But I am saying that any change should be introduced peacefully and under the aegis of international law. Diplomacy, negotiation, and even arbitration have a role to play. Will recent events bring about a new or improved world order which could shape the world for many generations? We can adopt a narrow view of it and focus on the comfortable minutiae, but we risk missing a major disaster. Or we can get lost in the “one-inch” discussions about perceived promises with respect to the expansion of the North Atlantic Treaty Organization (NATO) and tacitly confirm that the world order is that of predatory territorial fantasies. Hopefully, the international community will accept to submit to the rule of law.

There should be no room for shortcuts and loopholes in the global order. Withdrawal from major conventions and organizations and adoption of legislation declaring international judicial decisions in breach of public order are not just frustrating to the parties involved. It also confuses the order of interstate cooperation. The late Professor James Crawford effectively challenged the Hartian idea of compliance and taught that lack of compliance does not deprive a legal system of its essential elements.<sup>54</sup> The compliance problem is outside the attributes that the dispute resolution system or, indeed, an entire legal order offers. But responsibility for disobedience and abuse of the system lies with the perpetrators.

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53 Savanna Poghosyan, “Russia’s Discourse on Democracy in International Law” (2023) 43 *Polish YB Intel L* 175 at 205; Lauri Mälksoo, *Russian Approaches to International Law* (Oxford: Oxford University Press, 2015) at 81; Rush Doshi, *The Long Game: China’s Grand Strategy to Displace American Order* (Oxford: Oxford University Press, 2021).

54 James Crawford, *Chance, Order, Change: The Course of International Law* (The Hague: Hague Academy of International Law, 2014) at 179–91.

If we criticize the current system, it is because a swift course of action to counter its abuse does not exist. When submission of a claim to an international court or tribunal can now be made relatively quickly and without additional discussion and decision-making with the global community, with the exception, for instance, of criminal cases concerning states that have not signed the Rome Statute,<sup>55</sup> decisions of international courts and resolutions of the UN Security Council still require the back-and-forth of interstate negotiations and the inevitable albeit unwritten “cooling-off” period to recalibrate every state’s geopolitical interests after every crisis. Current international legal mechanisms were established without easily imposable sanctions based on the understanding that all UN member states would value cooperation and treat each other respectfully.

International processes, be it under the aegis of the UN or international arbitration, do not account for the possibility of someone coming to benefit from the system while acting contrary to its values. The overall order works every time, and justice is served, even if it is delayed.

The world order conceived after the two world wars was meant to be ever-adapting. Kofi Annan stressed in his commencement speech to this University in 2004 that cooperation between states is vital to this world order.<sup>56</sup> We still have not achieved the final version of this order. We must recognize and accept that the legal order, unlike a communist ideal, exists and is a process rather than an end goal. And it will be improved by diplomacy, negotiation, and adjudication.

Was the jury in Kansas motivated by *In Cold Blood*? It is impossible to tell. Unless you are writing a mystery novel, your priority is transparency and a range of options over decision-making cul-de-sacs. That is what the choice between adjudication, mediation, and diplomacy offered in the Lockerbie and the Namibia cases making justice possible ultimately. There will always be what-ifs. The outcome will never satisfy everybody’s idea of fairness, but it must be accepted that it is a reasonable minimum. In the current reality

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55 *Rome Statute of the International Criminal Court*, 17 July 1998, 2187 UNTS 38544 (entered into force 1 July 2002).

56 Kofi Annan, “Secretary-General’s commencement address at Harvard University” (Commencement Address delivered at Harvard University, Cambridge, Massachusetts, 10 June 2004).

of avalanche terrain, arbitration has a seat at the table with diplomacy and negotiation. To this table, arbitration brings significant strengths: bridging the gaps and protecting the blind spots.

Its flexibility regarding deadlines is indispensable in matters of high political sensitivity. Emergency solutions adopted by most arbitral institutions since 2021 for minor commercial disputes are a good model for more significant conflicts, including interstate ones. Importantly, arbitration employs a constant reality check to parties' arguments and conflicts of interest. Arbitration brings out the constructive power of the parties to resolve their disputes by appealing to law and order as opposed to war, assassination, threats, and lack of cooperation. To paraphrase James Crawford again, when it comes to resolving major international disputes, it is important to maintain order but be aware of its limits and aspire to change for the better. The war in Ukraine and the emergence of China as an economic superpower<sup>57</sup> present the world with a crucial historical moment. I am not starry-eyed about the power of the law. I am aware of its limits, but I am confident, as has happened before, that the world order may be adjusted and improved.

Diplomacy, negotiation, and adjudication will not give you the superpower to prevent an avalanche, nor will they allow you to avoid it by taking another slope. But they offer tools that, if— and only if —used consistently and tirelessly, will enable people to create safer slopes, alert more people to the danger, break down a large avalanche into smaller ones, and try to make things right again after the snow has settled.

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57 Keith Bradsher & Li Yuan, "The Chinese thought they had little to learn from conventional wisdom. Now it's the West that's taking notes", *The New York Times* (25 November 2018), online: <nytimes.com>.