



International & European
Criminal Law Observatory



UNIVERSITÀ DEGLI STUDI
DI SALERNO



Co-funded by
the European Union

A Value Test of 'Global Europe' in the Context of United Nations Law

Dr. Prof. Anja Matwijkiw

Ph.D., University of Cambridge; Post-Doc, University of Chicago.
Professor of Ethics & Human Rights, Philosophy Program & Indiana
University Graduate School; Affiliated Faculty, Institute for European
Studies, IU Bloomington

Project funded by European Commission Erasmus + Programme – Jean
Monnet Action Project No. 101126599.

Funded by the European Union. Views and opinions expressed are
however those of the author(s) only and do not necessarily reflect those of
the European Union or the European Education and Culture Executive
Agency (EACEA). Neither the European Union nor EACEA can be held
responsible for them.

EU GLOBACT
TRANSNATIONAL CRIME AND EU LAW:
towards Global Action against Cross-border Threats to
common security, rule of law, and human rights

Coordinator Prof. Dr. Anna Oriolo



International & European
Criminal Law Observatory



UNIVERSITÀ DEGLI STUDI
DI SALERNO



Co-funded by
the European Union

2. 'Global Europe'

M. Cherif Bassiouni rejects a “value neutral” approach (to international criminal law)

'Global Europe'

“... to uphold and promote the Union’s values, principles and fundamental interests worldwide in order to pursue the objectives and principles of the Union’s external action.”

“Union action should promote respect for and be rooted in international human rights law, including the Universal Declaration of Human Rights, and in international humanitarian law, and should be guided by the universality and indivisibility of human rights.”

> United Nations (UN)

“Shaping the global agenda and support initiatives on the integration of a strong pillar on equity and social justice in accordance to European values.” > “European Perspective” (EU)



International & European
Criminal Law Observatory



UNIVERSITÀ DEGLI STUDI
DI SALERNO



Co-funded by
the European Union

3. Interdisciplinary Jean Monnet Module

“The EU-GLOBACT Module aims to promote excellence in teaching and research in the field of EU legal studies offering a high-quality, specialized, and interdisciplinary course on the emerging EU counter-crime policy, paramount to ensuring security and protecting European values, including the rule of law and fundamental rights, both in the EU and worldwide.”

Within the discipline of philosophy, placing an emphasis on legal studies, on values, on norms and attitudes to norms, takes scholars to the core of the subbranch of practical philosophy, first and foremost ethics, philosophy of law, and political philosophy.

From formal fairness to “just, fair and equitable laws.” See UN, GA, *Declaration of the High-level Meeting of the General Assembly on the Rule of Law at the National and International Levels* (A/RES/67/1, 30 November 2012).

EU & UN > Stakeholder frameworks: R. Edward Freeman (philosopher) v. Milton Friedman (economist).

See www.globact.org; <https://www.fil.lu.se/en/department/subjects-at-the-department/practical-philosophy/>;
<https://www.undp.org/european-union/press-releases/european-union-and-undp-partnership-key-tackle-global-development-emergency-1>;
<https://documents.un.org/doc/undoc/gen/n12/478/66/pdf/n1247866.pdf?token=GojPvYgGvGXpn2j8Xu&fe=true>

4. Stakeholder Frameworks

Narrow Approach

- “Parties with monetary interests” first and foremost private business owners and investors of capital but also participants in the marketplace.
- Ideological program: Privatize, deregulate and decentralize, because socialism “undermines the free fabric of society.”
- Ethics: against paternalism and other illiberal analogies in ethics, such as utilitarianism.
- Rights Conception: H.L.A. Hart’s Choice or Will Theory of Rights whereby the “small-scale sovereign” has claim-rights in terms of fundamental civil/political rights is value-compatible with *laissez-faire* capitalism, but not an integral part of Friedman’s free market model.

... Problematic “rights” from the European Pillar of Social Rights (proclaimed in 2017) and the EU’s *acquis*, e.g., under Article 12: right to social security and social assistance; Article 15: Freedom to choose an occupation and right to engage in work; Article 16, the right of the family to social, legal and economic protection; and Article 35: healthcare, protection of health.

“The groups in our society that have the most at stake in capitalism are those minority groups which can most easily become the object of the distrust and enmity of the majority,” according to Friedman.

See Herbert L. A. Hart, *Bentham on Legal Rights*, in OXFORD ESSAYS IN JURISPRUDENCE 92 (1973); MILTON FRIEDMAN, CAPITALISM AND FREEDOM 26 (2002) (1962).

Broad Approach

- “Parties that either affect or are affected by the activities, consequences or outcomes of policies” constitute stakeholders.
- In principle, everybody everywhere (globally) may count as stakeholders. But, the broad approach is only a “conceptual revolution.” It remains a pro-capitalist outlook, and its “pragmatic” version leaves prescriptions to managers.
- Ethics: universal rules/values, including peremptory norms of general international law = “higher ethical norms.”
- Rights Conception: (Post-Bentham) Modern Interest or Benefit Theory of Rights whereby “Freedom to” is not more rights-constitutive as a value than “freedom from want” (*because* the logical correlativity thesis, the interest-compatibility thesis for freedom v. welfare as values, and the separation thesis for law and morality can be refuted under international law).
- Effective enforcement in terms of rights-protection is a question of value-consistency in the sense that it is about *taking rights seriously*.
- UN law and provisions like Part II, Article 2.1 of the ICESCR confirm that fulfillment/protection is not a condition for credentials-checking.

R. EDWARD FREEMAN, STRATEGIC MANAGEMENT: A STAKEHOLDER APPROACH 7 (1984);



International & European
Criminal Law Observatory



UNIVERSITÀ DEGLI STUDI
DI SALERNO



Co-funded by
the European Union

5. ARSIWA

According to the 2022 document entitled *Draft Conclusions on Identification and Legal Consequences of Peremptory Norms of General International Law (Jus Cogens)*, “[a]cceptance and recognition by a very large and representative majority of States is required for the identification of a norm as a peremptory norm of general international law (*jus cogens*); acceptance and recognition by all States is not required.”

Furthermore, since “[i]t is not the form of a general rule of international law but the particular nature of the subject-matter with which it deals that may, in the opinion of the Commission, give it the character of *jus cogens*,” legal formalism is downplayed.

Article 1 of the ARSIWA “covers all international obligations of the State and not only those owed to other States,” including human rights violations and “other breaches of international law where the primary beneficiary of the obligation breached is not a state.”

The ILC included a “non-exhaustive list” of *jus cogens* examples “in an annex” contains “substantive rules of conduct that prohibit what has come to be seen as intolerable because of the threat it presents to the survival of States and their peoples and the most basic human values.”

See UN, ILC, *Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries* (ARSIWA), 87, 283 (2001), https://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf; UN, ILC, *Draft Conclusions on Identification and Legal Consequences of Peremptory Norms of General International Law (Jus Cogens)*, 6 (2022), https://legal.un.org/ilc/texts/instruments/english/draft_articles/1_14_2022.pdf; UN, ILC, *Draft Conclusions on Identification and Legal Consequences of Peremptory Norms of General International Law (Jus Cogens)*, with Commentaries, 19 n19, 85 (2022), https://legal.un.org/ilc/texts/instruments/english/commentaries/1_14_2022.pdf.



International & European
Criminal Law Observatory



UNIVERSITÀ DEGLI STUDI
DI SALERNO



Co-funded by
the European Union

6. Crime

Focus Area: “Transnational crime, EU law and global partnership.”

“Together, the EU and the UN work to uphold the multilateral system based on universal rules and values. In multilateral fora and in the majority of countries around the world, the EU and UN respond to global crises, threats and challenges in their common pursuit of a peaceful, just, and sustainable world. Effective EU-UN cooperation is fundamental to tackle today’s interconnected global challenges, which individual nations cannot address alone.”

Global and trans-national and “emerging threats mainly...: (a) threats to law and order, and to the security and safety of individuals including terrorism, radicalisation leading to violent extremism, organised crime, cyber-crime, **hybrid threats**, illicit trafficking, trade and transit” (see *Global Europe*, p. 67 (3.2 of Areas of Intervention for Peace, Stability and Conflict Prevention)).

Note:

- (1) Interdependency (global law and governance) / independence (sovereignty and express state consent) > broad / narrow.
- (2) “Hybrid threats”, according to *Global Europe*, may involve stakes in sustainable development goals (SDGs) > broad / narrow.

See EU External Action, https://www.eeas.europa.eu/eeas/eu-and-un-partnership-delivers_en



International & European
Criminal Law Observatory



UNIVERSITÀ DEGLI STUDI
DI SALERNO



Co-funded by
the European Union

7. Values & Norms - Law & Policy (& Politics)

Ordinary crime = placeholder for cross-border or transnational (organized) crime:

“environmental degradation” (*Global Europe*) / ecocide

“corruption” (*Global Europe*) / grand corruption (UNCAC/UNTOC)

UN: International Criminal Court (ICC) in a stalemate:

Crimes are likely to be consigned to “the graveyard” *unless* they have a “**narrow**” subject-matter... to maximize political support.

The ICC’s residual notion of other inhumane acts (cf. Article 7(1)k) “must be interpreted conservatively and must **not be used to expand uncritically** the scope of crimes against humanity.”

EU: Specialized Anti-Corruption Court

In 2023, the European Parliament passed a resolution to this effect

See **United Nations Convention against Corruption (GA Res 58/4, Oct. 31, 2003) (UNCAC); United Nations Convention against Transnational Organized Crime and the Protocols thereto (GA Res/55/25, 15 November 2000) (UNTOC or Palermo Convention)**; Phoebe Okowa, Conference marking the 20th anniversary of the entry into force of the Rome Statute of the International Criminal Court (July 1, 2022), www.icc-cpi.int/icc-20a-cpi; European Parliament resolution of 18 January 2023 on human rights and democracy in the world and the European Union’s policy on the matter – annual report 2022 (2022/2049 (INI), www.europarl.europa.eu/doceo/document/TA-9-2023-0011_EN.pdf ; Tobias Ackermann, *COVID-19 at the International Criminal Court: Brazil’s health policy as a crime against humanity?*, VÖLKERRECHTSBLOG, Aug. 14, 2020, <https://voelkerrechtsblog.org/covid-19-at-the-international-criminal-court-2/>.



International & European
Criminal Law Observatory



UNIVERSITÀ DEGLI STUDI
DI SALERNO



Co-funded by
the European Union

8. Between chairs...to fight emergencies

'Global Europe'

UNCAC

UNCAC Coalition (civil society association)

States *should* recognize 'the collective rights' affected by grand corruption... rights and to a clean, healthy and sustainable environment'

UNTOC

Stop Ecocide International

To make ecocide the "fifth crime"

ARSIWA

The prohibition of aggression;
The prohibition of genocide;
The prohibition of crimes against humanity;
The basic rules of international humanitarian law;
The prohibition of racial discrimination and apartheid; > Responsibility of states
The prohibition of slavery;
The prohibition of torture;
The right of self-determination

8. Narrow Legal Doctrine

Legal Process Theory

- When we talk about *jus cogens* or peremptory norms of general international law --- with the paradigm being proscriptions of genocide, crimes against humanity, and war crimes --- as implying violations of fundamental human rights, we must and, *mutatis mutandis*, *should* limit [the nature and scope of] those rights – for they **cannot** include “affirmative” or positive rights (to education, to “labor rights” (oriented towards “benefits”) and to “a healthy environment”), *however basic* from a human(istic) perspective.
- the “trend in bold claims” *should be* brought to a halt, that is, rights-conferring norms that “require a commitment to resources.”
- **Only** negative human rights / non-interference “merits peremptory treatment.”
- EU analogy: “*Only if* positive obligations do *not* exceed the possibilities and resources of states will they be a last normative category accepted by all states.” If so, they may be perceived as compelling solidary with our own first.

See Mary Ellen O’Connell, *Jus Cogens: International Law’s Higher Ethical Norms*, in THE ROLE OF ETHICS IN INTERNATIONAL LAW 80, 92, 97-98 (Donald E. Childress III ed. 2012); Cordula Dröge, *Positive Verpflichtungen der Staaten in der Europäischen Menschenrechtskonvention*, Beiträge zum ausländischen öffentlichen Recht und Völkerrecht, Band 159, 2003, 380.

Broad Stakeholder Jurisprudence

- Ethics: universal rules/values, including peremptory norms of general international law = “higher ethical norms.”
- Triple Thesis Error: The logical correlativity thesis, the interest-compatibility thesis for freedom v. welfare as values, and the separation thesis for law and morality work together to prescribe “Ought Implies Can” (cf. economic realism).
- The conventional axiom that “international crimes are confined to certain violations of civil and political rights to the exclusion of their socioeconomic and cultural counterparts.” > Violations of economic, social, and cultural rights “are beyond the scope of international criminal law.”
- ARSIWA: The error of equating “non-derogation clauses in human rights treaties with non-derogability of *jus cogens*... as if

There is no distinction between the claim that absolute guarantees of protection constitute a prerequisite for the definition of inviolable human rights and the claim that inviolable human rights generate obligations to effectively protect – as regards both fulfillment and enforcement.

...It is back to square one.

See BIOLAW AND INTERNATIONAL CRIMINAL LAW: TOWARDS INTERDISCIPLINARY SYNERGIES 159 (Caroline Fournet & Anja Matwijkiw eds., 2021); Anja Matwijkiw, *When Human Needs and Peremptory Norms Are Still Made to Separate: A Call for Ethics Enhancements in the Era of Globalization and COVID-19*, forthcoming in Hans Köchler & Joël Christoph (eds.), RESPONSIBILITY IN INTERNATIONAL RELATIONS: SELECTED PAPERS FROM AN INTERNATIONAL ROUNDTABLE CONSULTATION IN VIENNA. STUDIES IN INTERNATIONAL RELATIONS, Vol. XXXIX. International Progress Organization, Vienna, 2024. ISBN 978-3-900704-37-7.



International & European
Criminal Law Observatory



UNIVERSITÀ DEGLI STUDI
DI SALERNO



Co-funded by
the European Union

A Value Test of 'Global Europe' in the Context of United Nations Law

Thank You!

For questions, write to:

Professor Anja Matwijkiw

amatwijk@iu.edu

Project funded by European Commission Erasmus + Programme — Jean Monnet Action Project No. 101126599.

Funded by the European Union. Views and opinions expressed are however those of the author(s) only and do not necessarily reflect those of the European Union or the European Education and Culture Executive Agency (EACEA). Neither the European Union nor EACEA can be held responsible for them.

TRANSNATIONAL CRIME AND EU LAW:
towards Global Action against Cross-border Threats to
common security, rule of law, and human rights

Coordinator Prof. Dr. Anna Oriolo