

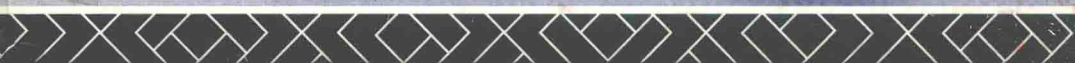
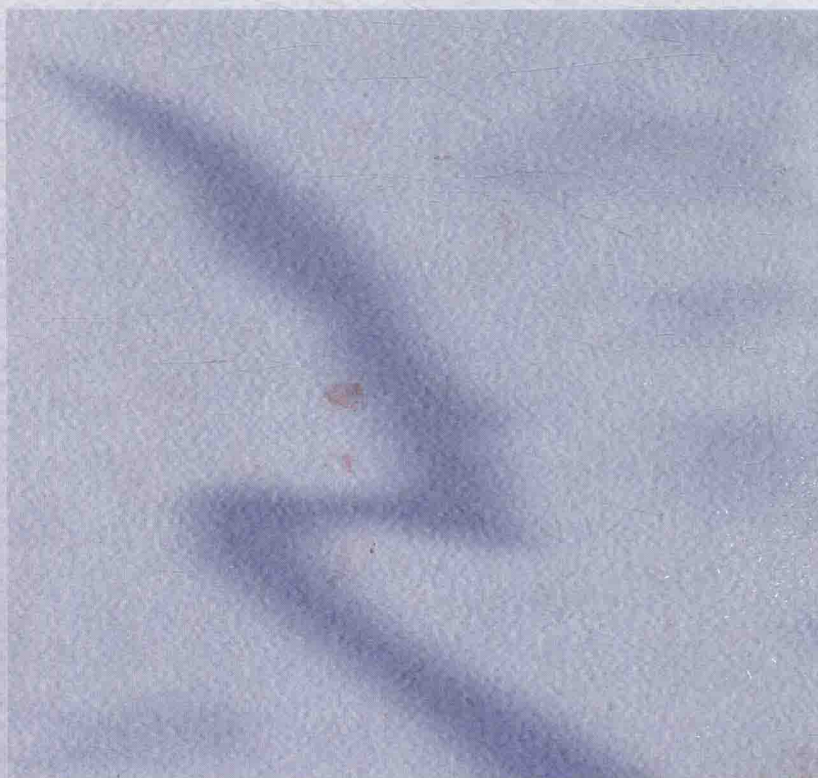
Global Governance, Economy and Law

Waiting for justice

Errol Mendes and Ozay Mehmet

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**Errol Mendes and
Ozay Mehmet**

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Preface

The idea for this book arose in the dying days of the twentieth century. Both authors felt that the implications and impact of the historic times that we have been living through will not fully be understood for many years, perhaps decades, to come. However, we felt that there was an obligation to those who have waited for justice to no avail, to describe and analyze one of the most important evolutions in the history of humanity in the twentieth century, namely the emergence of the institutions of global governance. The idea for most of these institutions emerged during one of the most destructive and cruel of human conflicts to have ever taken place: the Second World War. It is there we start our book in Chapter 1.

Organization of the book

In Chapter 1 we focus on the historical paradoxes that gave birth to the United Nations and the system of protection of international human rights. We have chosen the area of human rights, the global secular religion, to examine the moral regime of the present-day structures of international peace and security. The conclusions of our examination are both pessimistic and optimistic given what we see as the “tragic flaw” in the institutions of global governance and, indeed, in humanity. In our attempt at a multidisciplinary analysis, we have tried to show how history, philosophy, ideology, military strategy, international law, and international politics have clashed with each other to evolve a most fragile system of protection of international human rights, peace, and security. This fragility has been underscored by the events of 11 September 2001.

In Chapter 2, we focus on the main institution of global trade and commerce, formerly called the General Agreement on Tariffs and Trade, now the World Trade Organization. Again, we begin the chapter by discussing the historical origins of this institution and its present-day status. We focus on two areas in particular to examine the moral regime of this area of global governance, namely the discussions surrounding trade and labor standards and trade and the environment. We also examine the question regarding who is presently benefiting and losing from the regulation of global trade and the democratic deficit of

such regulation. In our conclusions to this chapter, we are again both pessimistic and optimistic about the benefits of global trade.

In Chapter 3, we focus on the most unregulated of global activities, the operations of the global private sector. In this chapter, we discuss the challenges of the exercise of great economic, and increasingly political, power without responsibility by the multinational enterprises. In this largely unregulated area of global governance, we examine how these new global giants are learning that there are consequences to not internalizing their responsibilities as global players. We look at how such consequences can range from damage to corporate reputations to increasing legal regulation of the global private sector. Finally, we consider the emergence and effectiveness of values-based codes of ethics and corporate integrity.

In Chapter 4, the direction of the text switches to a primarily economic analysis of the functioning of the global labor market and the need for integration of social justice into the workings of this fundamental aspect of global governance. We argue for upward harmonization of wages and labor standards to prevent a “race-to-the-bottom” that can marginalize and exploit the most vulnerable on the planet. We demonstrate how the hotly contested “race-to-the-bottom” actually comes into being, and the critical reforms that must be taken by national and international institutions of governance to promote a fair global labor market.

In Chapter 5, we describe and discuss the history and evolution of the international financial institutions that were designed to promote economic and social stability in the aftermath of the Second World War but in the view of many have failed in their basic missions. We examine the shortcomings of the key institutions in this area, namely the International Monetary Fund and the World Bank. We then consider and analyze the potential for their reform, in order to effectively prevent the kind of financial crises that we saw in Asia in 1997 and Argentina in 2002. We also discuss how these institutions can most effectively promote sustainable development in the South. We conclude that present or even increased aid or other forms of charitable flows to the South will not suffice to deal with those marginalized or missed by the globalized economy. We propose, and discuss in the conclusion to the chapter, a global Marshall Plan that is funded, in part, by the main beneficiaries of globalization, the multinational enterprises.

In our concluding Chapter 6, we propose a new vision for the task of integrating justice into the institutions of global governance. “Global pluralism” is the title we give to this vision, which attempts to depart both from the insularity of national self-interest bound only by international law and also from the empty rhetoric of global universalism. We propose that this new vision will be the foundation of creating a global community of solidarity, dignity, and compassion among all members of the human family that will not only take into account national and cultural differences but will also transcend them.

Throughout our long careers in the area of law and economics we have written, taught, and advocated a return to the high visions that were first dreamed of for the institutions of global governance discussed in our text. Our book discusses how the loss of those original high visions today has abandoned

and marginalized billions of our fellow human beings and made the future of so many so uncertain. It is for them that we have written this book. However, because this book would also not be possible without the support and love of our own families, we also dedicate it to them. Finally, we also wish to acknowledge and thank those who have professionally supported our efforts to complete the book.

Acknowledgements

Professor Errol Mendes dedicates this book to his family, Sharon Lefroy, Alexander Mendes, and William Mendes. They are among my chief reasons for living a good life and desiring to write. I would also like to thank some professional supports and intellectual motivators, who were key to the completion of my work on this text. First, I want to thank Alan Fleichman, one of the great information specialists in the field of human rights, and documentalist at the Human Rights Research and Education Centre at the University of Ottawa. His assistance in obtaining research materials and logistical support to the book was indispensable. Second, I want to thank Bruce Newey for his great work as a research assistant and editor who was not afraid to question or red-pencil his former professor's writing. I also want to thank Aya Bouchédid for her assistance in the research task. The intellectual motivators for this book, who are also friends, are numerous. I wish to mention, in particular, Richard Goldstone, Justice of the Constitutional Court of South Africa, the first Chief Prosecutor of the Ad Hoc War Crimes Tribunal for the Former Republic of Yugoslavia and co-chair of the Independent International Commission on Kosovo; Paul Martin Jr, a leading thinker and actor on the reform of the international financial architecture and a former Canadian finance minister, who included me in his discussions on global governance; Marcus Gee, one of Canada's most eminent journalists in the area of international peace and security; and finally, all my friends and colleagues in the Office of the Secretary General of the United Nations with whom I have worked on the Global Compact. In this text, we have critiqued the workings of the United Nations. However, to adapt Winston Churchill's quip: The UN is the worst institution of global governance, except for all the others which are much worse. It is also clear that we owe much to the inspiration of the great historian of the international human rights movement, Paul Gordon Lauren; Amartya Sen, winner of the Nobel Prize in Economics in 1998; author and philosopher Michael Ignatieff; and my Canadian law professor colleagues, Bill Schabas and Anne Bayefsky.

Finally, I want to thank the former Rector of the University of Ottawa, Marcel Hamelin, and the present Rector, Gilles Patry, who gave me the opportunity to continue my life's work in the field of globalization, justice, and law. Of

course, it also goes without saying that my co-author Professor Ozay Mehmet has continued the intellectual jousting and companionship that I so cherish and which led to the completion of this book.

Professor Mehmet would like to acknowledge his appreciation for his long association, on and off since 1968, with the International Labor Organization. The opportunity to work with the ILO in various countries in Southeast Asia, Africa, and the Middle East sparked a lifetime dedication to the pursuit of social justice, and the insights gained in these policy assignments put a "human face" on his economics in the classroom and in his research writings. In the ILO, past and present, he wishes to record, in particular, his debt of gratitude to Don Snyder, Eddy Lee, and Frank Lisk.

Professor Mehmet would also like to express his thanks to numerous academic and professional colleagues in several countries for the fruitful discussions and exchanges over the years. Though not always ending in agreement, these discourses clarified his ideas on international development and the great themes of equity and growth, investment and technology, human and social capital, justice and exploitation in the global village. In Professor Mehmet's global village, Southeast Asia has occupied a special place. Without slighting anyone by omission, it is a pleasure to record the influence of Malaysian friends past and present, Ungku Aziz, Yip Yat Hoong, K.S. Jomo, S. Husin Ali, and James Puthuchearay. Similarly, it is with gratitude that his Indonesian friends Sayuti Hasibuan and Sritua Arief are remembered. In his country of birth, North Cyprus, Professor Mehmet acknowledges the support and encouragement of President R.R. Denktas, M. Tahiroglu, Ergun Olgun, and Tareq Ismael.

In Ottawa, Professor Mehmet wishes to express his thanks to his colleagues at Carleton University, in particular Martin Rudner, John O'Manique, and Fraser Taylor. A particular word of thanks is due to his co-author, Errol Mendes. The idea of "waiting for justice" in this book is Errol's, but their collaboration goes back many years. This has been a productive as well as an enjoyable collaboration, a happy blending of law and economics tempered by their own personal experiences in the developing world, resulting in an earlier book co-authored with Robert Sinding, *Towards a Fair Global Labour: Avoiding a New Slave Trade* (Routledge, 1999), to which the present volume is a sequel. They both share an abiding commitment to justice for all in the global village, the foundation stone of global governance, based on global pluralism, dignity, and equality. Their joint work is but a small testament of this commitment.

Professor Mehmet wishes to dedicate this book to his wife, Karen Ann Mehmet, as a token for all the love and support over the years.

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1 The “tragic flaw” of humanity reflected in the United Nations and the struggle for human rights

Prelude to the United Nations: the Age of Hope

The institutions of global governance and law that we know today have their roots in one of the darkest periods of human history. Their beginnings showed a mirror up to the tragic flaw within the nature of humanity.

In this work we define global governance to include not only the institutions set up to deal with issues of global scope, but also the situations that evolve in the absence of appropriate and effective institutions to deal with such global matters. Our concept of the “tragic flaw” is adapted from Shakespearean tragedy, and encapsulates the notion that there can be one or more particular characteristics of an individual, a group, a nation, or indeed institutions organized by humans that can eventually undermine their other good qualities and potentially threaten their existence. We describe human nature as including the inclination toward justice which promotes human progress as well as the inclination toward domination and exploitation that retards such progress. The history and texts of moral philosophy worldwide are filled with both the analysis of and the tension between these two fundamental characteristics of human nature. In this chapter, and to a lesser extent throughout this text, we will use this notion of the tragic flaw as an instrument to critically examine the moral regime of some of the key institutions of global governance. Finally, given our above definitions of these universal contradictions in human nature, the simple definition of justice we use in this work is one based on the notion of the universal moral Golden Rule, or is one that approximates the Kantian categorical imperative, which can be recast as a Golden Rule of Justice to “do unto others as you would have them do unto you.”

In this first chapter, our thesis is that the aspirations of humankind to eradicate the conditions that led to the Second World War and the evils that occurred during the war were soon overwhelmed by the tragic flaw within the nature of humankind. This tragic flaw, as we will demonstrate in this chapter, is the urge in human nature, which is then reflected in the institutions of global governance, to seek the supremacy of territorial integrity over human integrity and dignity in the pursuit of perceived collective power and self-interest. We argue that this occurred even among those who showed the greatest enthusiasm for advancing

human progress and human rights through institutions of global governance in the aftermath of the Second World War. We will demonstrate how these enthusiasts even turned the other way in the face of the most brutal genocides since the Holocaust during the Second World War.

It was August of 1941, “somewhere in the Atlantic,” that President Roosevelt agreed to meet and discuss with Winston Churchill the growing threat of aggression from Hitler’s Nazi Germany and the increasing desire for world dominance of the Axis Powers. The United States (US) was still not at war, but the pressure was building from within the US to assist the British in what increasingly looked like a last-ditch attempt to save Europe, and Britain itself from the shadow of Fascist totalitarianism.

The location of the naval force that brought the two world statesmen together should be of special interest to Canadians, for it was at Placentia Bay in the waters off Newfoundland. A leading historian of human rights, Paul Gordon Lauren, describes the meeting of the leaders as an almost desperate attempt to save the peoples of Europe and the rest of the world from a cataclysm of evil.¹ The primary focus of the discussion between the two leaders, according to Lauren, concerned the role of the United States in the war. While the United States was still a non-belligerent, discussions took place on how it could assist in the fight for the survival of freedom and human dignity in Europe, North Africa, and Asia. The plan needed a foundation of principles that could serve to inspire and lead their respective populations into action. Those principles, drafted in haste by Churchill and Roosevelt on the waters off the coast of Newfoundland, were announced to the world as the Atlantic Charter. The Charter would become the catalyst for the idea of the United Nations (UN). The Atlantic Charter was the first international document (conceived in the midst of the greatest carnage ever seen in human history) in which two great world leaders had the courage to declare the right of all peoples to “live out their lives in freedom from want and fear,” and the need for “a wider and permanent system of general security for the world.” It should also be noted that at this time, before the General Agreement on Tariffs and Trade (GATT), the World Trade Organization (WTO), the International Monetary Fund (IMF) or the World Bank had taken shape, the Atlantic Charter contained principles that linked the imperative for a new global security institution and respect for human rights with improved labor standards, economic advancement, and social security.²

The approval of the Atlantic Charter was swift from all the Allied powers at the first meeting of the Inter-Allied Council (which included the Soviet Union).

With the torpedoing of American isolationism at Pearl Harbor in December of 1941, the need was great for the Atlantic Charter to galvanize more nations, especially in the Asian theater of war, into the fight against the evil of the Axis Powers. Lauren describes vividly how in January of 1942, twenty-six nations at first, and later forty-six nations, endorsed the Declaration of the United Nations. In doing so, these nations vowed to unite in the struggle against the Axis Powers and to adhere to the Atlantic Charter, including its call for the human rights of all peoples to be respected and for the creation of a global institution to ensure

international peace and security. There was a consensus among the nations that agreed to the Declaration of the United Nations that sovereignty and territorial integrity could not be had at the expense of the fundamental rights of all human beings. The principles contained in the Atlantic Charter would be the rallying cry for the “people’s war” against the crushing of human dignity and rights perpetrated by the Axis Powers.³

However, history seemed determined to show the other side of human nature in operation, thereby demonstrating the tragic flaw in the character of humankind. In stark contrast to the conception of the Declaration of the United Nations, Lauren reveals that it was also in January of 1942, when the Declaration was being promulgated, that an unspeakable act of evil was also being planned. It was during this month that the Wannsee Conference was held just outside Berlin, where the genocide of entire races, and one in particular, was being planned with meticulous care and attention to detail. This plan was called the “final solution of the Jewish Question.” What was planned at Wannsee translated into the deaths of over eleven million people, including six million Jews, exterminated with the utmost cruelty solely on the basis of their race, ethnicity, religion, language, disability, sexual orientation, or simply because they were too young, too old, or too sick to be of any use to the Nazi forces.⁴

What is staggering about this dark period of human history is that Germany did not enter into this program of genocide devoid of an intellectual, religious, and moral history that would have proffered a myriad of reasons for not engaging in this barbaric plan. The instinct for dominance, self-interest, and territorial grandeur seems hardwired into the nature of humankind. This instinct creates a moral blind spot that centuries of intellectual, religious, and moral learning cannot undo. The only restraint against this blind spot that afflicts those with pretensions to civilization, and all others alike, is an effective rule of law together with regional and global governance institutions that ensure the rule of law, not individuals.

January of 1942 was the point in history when the tragic flaw in human nature became truly global. As discussed above, we define the tragic flaw in the nature of humankind as the struggle between the desire for dominance, self-interest, and territorial grandeur against the universal appeal of human dignity, conscience, and compassion. In the early millennia of human history, these human instincts battled against each other in small places on the planet, between and within tribes, settlements, villages, fortified towns, and cities and ultimately nations. But the defining moment when this struggle became global and laid the foundations for the institutions of global governance that included this tragic flaw was in the month of January of 1942.

However, no sooner was the end of the Second World War in sight, than the states that promoted the instinct toward human dignity, conscience, and compassion, contained in principles of the Atlantic Charter and the Declaration of the United Nations, also seemed to succumb to the temptations of the quest for dominance, self-interest, and territorial grandeur. As Lauren has stated:

When pressed, most of those leaders who spoke so eloquently about human rights quickly noted that statements like the Atlantic Charter and the Declaration of the United Nations represented only goals rather than legal agreements that might jeopardize national interests or threaten national sovereignty. It is in this context that Churchill made his celebrated statements about not allowing stated principles such as that of the right of self-determination to precipitate the liquidation of the British Empire, and describing the Atlantic Charter as "no more than a simple, rough and ready, war-time statement of a goal" toward which the supporting governments "mean to make their way" instead of a binding treaty with firm commitments.⁵

Even in Churchill, the tragic flaw was beginning to take hold in the scramble for collective power and self-interest in the aftermath of the Second World War.

Birth of the United Nations: one step forward, two back

While many nations had joined with the Great Powers in the fight to win the war against the Axis Powers, they were excluded from the first deliberations at Dumbarton Oaks in the fall of 1944. It was at Dumbarton Oaks that the United States, Britain, the Soviet Union, and China met to sketch out the Charter of the new global security organization that would come to be known as the United Nations. All but one Great Power agreed that the Charter would not contain any substantial provisions on human rights.⁶

It is an irony of history that the only participant at Dumbarton Oaks that wanted a reference to the right of all people to equality and non-discrimination was China. China reflected the concern of many countries of the South, and Asian countries in particular, that the new institutions of global governance would allow the colonial powers to prevent decolonization and self-determination of colonized peoples.

And so at Dumbarton Oaks in 1944, the struggle swung entirely in favor of the human instinct for dominance and self-interest when the Great Powers developed a post-war global security institution which was to be dominated by them. The Great Powers were able to ensure their dominance by creating a new Security Council that gave them both permanent membership and the power of veto. Their design for the organization, which involved the formation of a weaker General Assembly where the secondary powers could "blow off steam" without endangering the interests of the Great Powers, also assisted in cementing their hegemony. The emphasis by the Great Powers at Dumbarton Oaks and in the period that followed was on national sovereignty, territorial integrity, and political independence, which meant non-interference in the domestic affairs of the Great Powers. The only reference to human rights was in the context of general economic and social cooperation.⁷ According to Lauren, the then US secretary of state, Cordell Hull, poured derision on the efforts of his own under-

secretary, Sumner Welles, to promote an International Bill of Rights, stating that no concept of universal human rights would undermine the national sovereignty of the United States.⁸

In the struggles of human nature that comprise the tragic flaw of humankind, the history of the Second World War and its aftermath show that enfeebled law-making that promotes dominance, self-interest, and territorial grandeur usually comes out stronger in the short term. Justice takes much longer to surface.

The catalyst for justice often begins with an outcry against law-making that does not include it. So it was with the creation of the United Nations Charter that we know today. When the Dumbarton Oaks proposals for the creation of the United Nations were made known, there was a storm of criticism that went around the world from citizens, non-governmental organizations (NGOs), and those countries left out of the Great Powers' self-interested power structures inherent in the proposed Security Council and the General Assembly. There was particular anger over the omission of any substantial global protection of human rights and the right to self-determination. In 1945, with the end of the war in sight, the Great Powers eventually accepted that another conference, this time involving states from all parts of the world, should be held to hammer out the final version of the Charter of the United Nations. This conference would take place in San Francisco in April of 1945.

While the gathering constituted the largest number of states assembled at that time to lay the foundations of the United Nations, they were also mindful of the failure of the product of the last similar gathering at the end of the First World War which led to the ineffectual and ultimately doomed League of Nations.⁹

The rhetoric for the ideals of peace, global security, human dignity, and human rights flew high at San Francisco, but the Great Powers stuck in large part to their Dumbarton Oaks proposals. Before the conference was over, the surrender of Germany also saw the first stirring of the Cold War at the birth of the United Nations. This reinforced the non-human-rights focus of the Great Powers. It was the representation from the rest of the international community, such as from India, South Africa, New Zealand, Australia, Egypt, the Philippines, and the countries of Latin America, that pushed for the democratization of the Dumbarton Oaks deliberations as described by Lauren.¹⁰ It was from these countries that proposals to amend the Dumbarton Oaks text came. In particular, these proposals called for the insertion of the primacy and protection of human rights into the Charter. These countries were joined in their efforts by an army of individuals, groups, and NGOs from around the world. Of particular concern to many of the smaller nations that were either former colonies or were fighting for independence were the human rights of those in colonies and dependent territories.

The Great Powers eventually succumbed to the pressure from the rest of the world. They agreed to a substantial number of their demands to put in place provisions for human rights in the Charter and for specific parts of the new United Nations to take lead roles in the promotion and protection of human rights, but without substantially altering the entrenched power structures agreed

to at Dumbarton Oaks. The stage was being set for the insertion of the tragic flaw in the Charter of the United Nations. In particular, the drafters of the United Nations Charter seemed determined to include the supremacy of territorial integrity and political independence, while allowing weaker language on human rights to enter the constitution of the global body.

On 26 June 1945, there was a signing ceremony for the world leaders assembled at San Francisco, two months after the work on the United Nations Charter had begun. Fresh from victory in the war and with the chill of the Cold War starting to take effect, the Great Powers had managed to insert the two dueling concepts into the United Nations Charter at the signing ceremony in the Veterans Building Auditorium in San Francisco.

One of the concepts, as noted above, was the supremacy of territorial integrity. The central purpose of the new world body as stated in Article 1 was to maintain international peace and security. The principal condition for such peace and security was territorial integrity and the concomitant principle of political independence of the nation-state. The five permanent members of the new Security Council, whose primary responsibility would be to maintain international peace and security, could guarantee their own territorial integrity and political independence (and those of their allies) by the veto powers that the Charter bestowed on them.

The foundational principle based on territorial integrity and political independence in the United Nations Charter was that, if one nation did attack the territorial integrity of another, the Security Council would have the means through the Chapter VII enforcement powers to take effective collective measures. These powers allow for the prevention and removal of threats to the peace, and for suppression of acts of aggression and other breaches of the peace. Indeed, so sacred was the principle of territorial integrity and political independence that at the San Francisco conference, most of the Great Powers were adamant that not even the United Nations itself could intervene within the domestic jurisdiction of the nation-state. While, in theory, the new powerful Security Council could conclude that serious human rights violations might constitute a threat to international peace and security and follow up with its enforcement powers, as we shall see, the Cold War and the power of veto have effectively denied this potentially powerful machinery for the enforcement of global justice.

The other dueling concept concerned the references in the United Nations Charter to human rights. The reinsertion of human rights principles in the Charter, at the strong and forceful demand of the other members of the international community and the NGOs, set the stage for later conflicts between territorial integrity and human justice. However, the provisions relating to human rights allowed into the Charter by the Great Powers were never meant to be as strong as the provisions pertaining to territorial integrity and political independence. These provisions seemed in places more rhetorical than substantial. Justice waits for rhetoric to be hammered into reality. The opening lines of the Charter confirm “faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large