

Stand

Conditionality and Sovereign Inequality

On 3 October 1935, Mussolini's troops crossed the Mareb River separating the Italian colony of Eritrea from the Empire of Ethiopia, starting a war of legendary brutality. Barely equipped Ethiopian troops, defenceless villagers and livestock were attacked using flame-throwers, aerial bombardment and banned poison gas. This was an unvarnished deployment of fascist hyper-modernity against what the Italian government portrayed as a bizarre, backwards relic of African feudalism.¹ Like the Ethiopian Empire itself, at the time of the invasion Italy was a member of the League of Nations and a signatory to the Covenant, the League's founding treaty. As such, both states were understood axiomatically to be sovereign equals, meaning both were bound to 'respect and preserve as against external aggression the territorial integrity and existing political independence of all Members of the League', as the Covenant put it at Article 10.² Under the League's innovative collective security provisions, any violation of that obligation was to be regarded as 'an act of war against all other Members of the League' entailing collective economic, financial and ultimately military sanctions.³

However, by the time Ethiopia's Emperor Haile Selassie I had fled, and King Emanuele III of Italy had been proclaimed *Imperatore d'Etioopia* in his stead on 9 May 1936,⁴ Italy was not the only League member to have

¹ See generally Anthony Mockler, *Haile Selassie's War* (New York: Olive Branch Press, 2003); George W. Baer, *Test Case: Italy, Ethiopia, and the League of Nations* (Stanford, CA: Hoover Institution Press, 1976), 12–13.

² *Covenant of the League of Nations*, annexed to *Treaty of Peace between the British Empire, France, Italy, Japan and the United States (the Principal Allied and Associated Powers), and Belgium, Bolivia, Brazil, China, Cuba, Czechoslovakia, Ecuador, Greece, Guatemala, Haiti, the Hedjaz, Honduras, Liberia, Nicaragua, Panama, Peru, Poland, Portugal, Roumania, the Serb-Croat-Slovene State, Siam, and Uruguay, and Germany*, Versailles, 28 June 1919, Art. 10 ('Covenant').

³ Covenant, Art. 16.

⁴ Italian Government, 'Royal Decree placing Abyssinia under Italian Sovereignty, 9 May 1936', in Stephen Heald (ed.), *Documents on International Affairs 1935*, Vol. II (Oxford University Press, 1937), 472–3.

violated its obligations under the Covenant. Although the Italian invasion of Ethiopia was condemned as illegal by the League's Council (precursor to the United Nations (UN) Security Council),⁵ the economic sanctions that were eventually imposed on Italy excluded oil and other essential war materials, and were halted within a year. Military sanctions were avoided altogether. Over the next five years, Italy's sovereignty over Ethiopia was recognised by all but five of the world's existing states.⁶ The Ethiopian Empire was abandoned to its fate as a fascist colony until its 'liberation' became of strategic significance after the outbreak of the Second World War.⁷

This rendition of the so-called 'Abyssinia Crisis', as it is still known today, in spite of the fraught ethnic connotations of the term 'Abyssinia',⁸ is one of the most infamous episodes of twentieth-century history – a staple of undergraduate international relations and international law textbooks, and a regular feature on school history curricula. The reason for its notoriety concerns not so much an interest in Ethiopia's history or welfare, but rather the role of the Crisis as a trigger for the Second World War. Ethiopia's annexation, as historian A. J. P. Taylor once put it, was 'the deathblow to the League as well as to Abyssinia'.⁹ In the field of international law, the verdict is very similar. Peter Malanczuk, editor of the seventh edition of *Akehurst's International Law*, asserts, for example, that '[t]he League system failed for a variety of institutional and political reasons, the most important of which was 'inherent contradiction in the concept itself of collective security in the form of a mere association of self-interested and sovereign states'.¹⁰ According to Malanczuk, it was for this reason that the League 'remained incapable of dealing with the Japanese aggression against China in 1932 [*sic*] when it occupied Manchuria, and with the Italian aggression against Abyssinia in 1935–6'.¹¹ The Abyssinia Crisis is, in other words, generally understood as the first episode in a long and tragic

⁵ 'Report of the League of Nations Council Committee' ('Committee of Six'), 7 October 1935, in 30 *AJIL*, Sp. Supp. (1936): 37–40 at 40.

⁶ These were the US, Mexico, the USSR and China, as well as the British dominion of New Zealand.

⁷ See Bahru Zewde, *A History of Modern Ethiopia, 1855–1991* (2nd edn Oxford, Athens OH, Addis Ababa: James Currey, Ohio University Press, Addis Ababa University Press, 2002), 166–77; David Shirreff, *Bare Feet and Bandoliers: Wingate, Sandford, the Patriots and the Part they Played in the Liberation of Ethiopia* (London, New York: Radcliffe Press, 1995).

⁸ See below, Item 4. I will stop using scare quotes from this point, but the term Abyssinia Crisis should continue to be understood as problematic.

⁹ A. J. P. Taylor, *The Origins of the Second World War* (London: Hamish Hamilton, 1961), 95.

¹⁰ Peter Malanczuk, *Akehurst's Modern Introduction to International Law* (7th edn London, New York: Routledge, 1997), 25.

¹¹ *Ibid.*, 25.

series of attempts at fascism's 'appeasement' which culminated ultimately in the notorious Munich Agreement of September 1938.¹²

The lesson offered in this account by the Abyssinia Crisis, and by the 'failure' of the League more generally,¹³ is clear: international law had not yet, in the League era, been codified and institutionalised sufficiently strongly, such that its core principles (in particular that of sovereign equality) were overwhelmed by the toxic power politics of the 1930s. In this way, the failure to enforce international law during the Crisis is framed as an instructive example of precisely how the international order ought not (or ought no longer) to operate – one that, indeed, is still brought out regularly by global leaders today whenever a diplomatic crisis requiring collective action is at hand. During the run-up to the 2003 Iraq War, for example, a group of the world's most powerful world leaders met in Munich to discuss the rationale for invasion. As then-US Defense Secretary Donald Rumsfeld asserted in his address to the conference:

To understand what is at stake, it is worth reminding ourselves of the history of the UN's predecessor, the League of Nations. When the League failed to act after the invasion of Abyssinia, it was discredited as an instrument of peace ... The lesson of that experience was best summed up at the time by Canadian Prime Minister Mackenzie King, who declared: 'Collective bluffing cannot bring about collective security'. That lesson is as true today, at the start of the 21st century, as it was in the 20th century. The question before us is – have we learned it?¹⁴

This standard mobilisation of the Abyssinia Crisis encourages us to understand international law as a discipline, and as a set of institutional practices, which re-emerged from the debacle of the Second World War all the stronger for the lessons 'we' (the 'international community') learned from

¹² *Agreement for the Cession by Czechoslovakia to Germany of Sudeten German Territory, with Declarations*, Munich, 29 September 1938 ('Munich Agreement'). For a brilliant critical comparison of the two crises, see Nathaniel Berman, 'Beyond Colonialism and Nationalism? Ethiopia, Czechoslovakia, and "Peaceful Change"', in Berman, *Passion and Ambivalence: Colonialism, Nationalism and International Law* (Leiden: Martinus Nijhoff, 2012), 319–83.

¹³ For a brilliant contestation of the assumption that the League of Nations was a failure, see Usha Natarajan, 'Creating and Recreating Iraq: Legacies of the Mandate System in Contemporary Understandings of Third World Sovereignty', *24 Leiden Journal of International Law* (2011): 799–822.

¹⁴ Earlier on the same day, Senator John McCain had expressed his anxiety to the conference that 'Iraq could be to NATO what Abyssinia was to the League of Nations'. Speeches presented on 8 February 2003, 39th Munich Conference on Security Policy, Munich, 7–9 February 2003, at www.acronym.org.uk/old/archive/docs/0302/doc12.htm#07 (accessed 25 February 2017).

it. For example, the Covenant's failure to prohibit war outright is assumed to have been addressed, in 1945, by the prohibition against the unilateral use of force under Article 2(4) of the UN Charter.

This assumption – bolstered by the standard account of the Abyssinia Crisis – that international law has progressed away from the dark days of the 1930s, has been given a new twist over the last couple of decades by the emergence of the narratives of 'failed' statehood, 'earned' sovereignty and the 'responsibility to protect' (R2P). Advocates of these ideas, such as the historian of international legal personality, Janne Nijman, claim that:

If a state functions well and its citizens are represented properly by the government, the ILP [international legal personality] which the state derives from its citizens remains with the state. The state is then the legitimate representative of its citizens at the international level with the authority to pursue their interests. However, if the state fails, collapses or falls victim to civil war or the oppression of minorities, the ILP of that state is withdrawn or returned to the people it was supposed to represent. In situations such as these, humanity, by way of its international community, has to open up its institutions and law, even if only temporarily, to include these human beings and by this international recognition to reaffirm their 'personality' ... The well-functioning state has full ILP, but only derived from its citizens.¹⁵

From this perspective – shared, at least in principle, by the UN¹⁶ – the rights and duties possessed by states as 'subjects' or 'persons' of international law,¹⁷ should be, and increasingly are being, treated as *conditional* on their willingness to 'protect' a core set of rights belonging to the individuals within their jurisdiction. It is the responsibility of 'humanity', in the guise of the 'international community', to police the adherence of states to this standard, and to take on that 'responsibility' if they 'fail'.

This framing of state sovereignty as conditional has an important consequence. It allows manifestations of sovereign *inequality* – for example, when certain states are subject to military interventions, non-consensual occupations, onerous 'conditionalities' limiting domestic social policy in return for 'development' loans, externally authorised 'statebuilding' missions and so on – to be characterised as legitimate responses, on the part

¹⁵ Janne Elisabeth Nijman, *The Concept of International Legal Personality: An Inquiry into the History and Theory of International Law* (The Hague: TMC Asser Press, 2004), 468.

¹⁶ See especially '2005 World Summit Outcome', GA Res. 60/1, 24 October 2005, paras. 138–9.

¹⁷ The terms 'sovereignty', 'international legal subjectivity' and 'international personality' under international law will be used interchangeably in this book to refer to the set of rights and duties possessed by states (in the 'full' sense), and (to a lesser extent) by certain other entities under international law.

of the international community, to the ‘failure’ of certain states to uphold a set of supposedly universal individual rights. The case of Libya, for example, subjected in 2011 to the first full-scale military intervention to be justified explicitly under the rubric of the ‘responsibility to protect’, offers a useful illustration of international personality’s ‘logic’ or ‘dynamic’ (as we might call it) of conditionality.¹⁸ See, for example, the language used by then-US Secretary of State Hillary Clinton before the UN Human Rights Council as she made the case for the use of force to ‘protect’ Libyan civilians from forces loyal to the government of Muammar Qadhafi:

Colonel Qadhafi and those around him must be held accountable for [their] acts, which violate international legal obligations and common decency. Through their actions, they have lost the legitimacy to govern ...

The international community is speaking with one voice and our message is unmistakable. These violations of universal rights are unacceptable and will not be tolerated ...

Ultimately, the people of Libya themselves will be the ones to chart their own destiny and shape their own new government. They are now braving the dictator’s bullets and putting their lives on the line to enjoy the freedoms that are the birthright of every man, woman, and child on earth ...

[S]upporting these transitions [in Libya and elsewhere in the Arab world] is not simply a matter of ideals. It is also a strategic imperative. Without meaningful steps toward representative, accountable, and transparent governance and open economies, the gap between people and their leaders will only grow, and instability will deepen ...

So the process of transition must be protected from anti-democratic influences from wherever they come. Political participation must be open to all people across the spectrum who reject violence, uphold equality, and agree to play by the rules of democracy. Those who refuse should not be allowed to subvert the aspirations of the people ...

These are not Western principles or American ideals. They are truly universal, lessons learned by people all over the world who have made the difficult transition to sustainable democracy ...¹⁹

¹⁸ I borrow these images from B. S. Chimni and Antony Anghie, to whose thinking this book is profoundly indebted. See B. S. Chimni, *International Law and World Order: A Critique of Contemporary Approaches* (2nd edn Cambridge University Press, 2017), 30–5; Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge University Press, 2004), 4.

¹⁹ Hillary Clinton, Address to the UN Human Rights Council, New York, 3 March 2011, at <https://geneva.usmission.gov/2011/02/28/sec-clinton-hrc-geneva-2011/> (accessed 6 Apr 2018). A fortnight later, the UN Security Council authorised a NATO-led force to use ‘all necessary measures’ short of ‘foreign occupation’ to ‘protect civilians and civilian populated areas’ (SC Res. 1973, 26 February 2011, para. 4 and Preamble).



Figure 1 Workers weigh spaghetti in a factory established with assistance from the World Bank, Sarris, Ethiopia, January 1959. Photograph by Terence Spencer/Black Star for the World Bank. Country Photographs/Ethiopia/Loan 32/Ref. 32-ET-20. Courtesy of World Bank Group Archives.

For Clinton, only states which display ‘representative, accountable, and transparent governance and open economies’ can be assured that their actions will be ‘tolerated’ by the ‘international community’.

Radically progressive as it might have sounded, however, Clinton’s assertion was, in fact, far from new. On the contrary, and as I demonstrate in this book, drawing on a long and complex history dating back to the early sixteenth century, ‘sovereignty’ has always been conditional in precisely this way – since the dawn of the very ideas of the state and of international law. As the following pages will demonstrate, using a very wide variety of case studies and illustrations, the process of becoming a state, and in doing so becoming eligible for the full set of international rights and duties, has historically been a costly one. Only those entities deemed to be in possession of a particular set of legal and institutional arrangements – arrangements dedicated to offering the individuals within that jurisdiction a very specific and very narrow set of rights and duties – have, under international law, been able to pass as states. The name given to this legal and institutional apparatus is, of course, ‘government’. Thus, to put it more schematically, my argument here is that international legal subjectivity has always been

conditioned, in practice, in the reproduction of individual legal subjectivity. As the case studies examined in this book reveal, the rights associated individual legal subjectivity in this context – that is to say, the individual rights which aspiring sovereigns have been asked to protect in order to obtain rights and duties under international law – have, historically, been restricted to a very specific, narrow, and indeed (from a Western political theory perspective) classic set, comprising the rights of the individual to ‘property, that is, ... life, liberty, and estate’ (as the philosopher John Locke articulated them in 1689),²⁰ or to ‘life, liberty and the pursuit of happiness’ (in the interpretation of the American Declaration of Independence of 1776).²¹ As we shall see, in the practice of creating new states (and other subjects of international law), this set of rights has consistently included individual rights to personal security, private property, freedom of travel, trade and contract, equality before the law, freedom of worship and (for the full set of sovereign rights, as we shall see) also political participation. These are, of course, the basic individual rights associated with the ‘rule of law’ – a term (though used in many ways) which at its core refers to a set of ‘formally neutral and objectively ascertainable rules, created in a process of popular legislation, whose purpose it is to ‘reconcile’ individual freedom with social order.’²² These are the rights, in other words, whose purpose it is to establish and maintain a ‘level playing field’ within the state, upon which questions of distribution among individuals can (and should) be worked out privately. Consistently excluded from the set of individual rights upon whose protection the acquisition of international personality has, historically, been conditioned, meanwhile, are rights whose purpose it is to bring about greater material equality. This goes for material equality among humans and human groups (for instance, rights to food, water, housing, education, healthcare, rest, childcare and so on) and between the human and the non-human world (as we might characterise animal welfare and environmental protection laws). In short, as I will explain further below, the type of domestic legal system upon which ‘sovereignty’ is conditioned amounts, no more and no less, to the set of individual rights and duties which capitalist relations of production and exchange require to thrive and expand.

²⁰ John Locke [1689], ‘Of Civil Government’, in Ian Shapiro (ed.), *John Locke: Two Treatises of Government and a Letter Concerning Toleration* (New Haven, CT, and London: Yale University Press, 2003), 247–484 at 327–8.

²¹ *American Declaration of Independence*, Philadelphia, 4 July 1776, Preamble.

²² Martti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (Cambridge University Press, 2005), 71.

If this argument is correct, the implications are twofold. Firstly, far from being a neutral discipline dedicated to facilitating the capacity of states to make their own 'sovereign' decisions about how to organise their internal affairs, international law has, in fact, been engaged, over the course of some five centuries of emergence and consolidation, in reproducing a very particular mode of human self-organisation, which is based on a historically and geographically extremely specific understanding and organising the relationship between individual human beings, human communities and the non-human world. Secondly, this apparatus, the self-governing state, whose reach has now become virtually universal, is itself dedicated, at a fundamental level, to the widening and deepening of capitalist relations of production and exchange, and to the systematic upwards redistribution of wealth, power and pleasure which those relations imply.

In making this argument, this book builds on a longstanding and extremely rich body of critical international legal scholarship. Contributors to this body of work have been pointing out for some decades now that the tendency of international legal practitioners and mainstream scholars of international law to understand the history of their discipline as a teleological story of evolution from violence and barbarism to 'international legal obligations and common decency' (as Clinton put it) is deeply problematic. Gerry Simpson, for example, argues that the 'juridical sovereignty' of states (their rights and duties as subjects of international law) has historically been 'marked' not only by the language of sovereign equality, but also by two other languages: those of 'Great Power prerogative' and 'outlawry (or anti-pluralism)'.²³ On the one hand, the principle of sovereign equality interacts, in practice, with regimes of 'legalised hegemony: the realisation through legal forms of Great Power prerogatives'. On the other hand, however, Simpson points out that international law is also involved in 'the constitution and regulation of outlaw states' – states which are 'mad', 'bad' (being 'serial violators of the dominant mores of the international legal order') and/or 'dangerous' (presenting 'a threat to the international legal order because of some internal malfunction or propensity to disorder').²⁴ Sovereignty in international law should therefore be understood as irrepressibly 'protean and flexible'.²⁵ Sara Kendall, too, has noted that, in the era of the 'war on terror' in particular, inter-

²³ Gerry Simpson, *Great Powers and Outlaw States: Unequal Sovereigns in the International Legal Order* (Cambridge University Press, 2004).

²⁴ *Ibid.*, x–xi.

²⁵ *Ibid.*, ix–x.

national law is increasingly coming to be divided between ‘states that can adequately handle threats of force and those who cannot, either due to a lack of will or capacity’. For the latter, sovereignty becomes ‘contingent’.²⁶

Moreover, and as many contributors to this body of critical work point out, those states that are deemed to have ‘failed’ are usually located in the Global South. Post-colonial states are historically much more likely to be subjected to what Anne Orford calls ‘military and monetary interventions’ than the wealthy and powerful states of the Global North.²⁷ Moreover, the afterlife of the European colonial project (from the long-term effects of racist social categorisation to the ‘path dependency’ experienced by territorial entities that have been groomed to become exporters of primary products) is connected directly to the vulnerability of post-colonial states to international interference of various kinds. Third World states have, in other words, been destined, if not designed, to ‘fail’.²⁸ One scholar who has made this point forcefully is Anthony Anghie. Anghie’s work flips international law’s progress narrative on its head with the argument that it was, in fact, in and through the process of denying international legal subjectivity to the ‘natives’ found, inconveniently, to be inhabiting desirable tracts of land in the Americas, Africa, Asia and the Pacific, that the very idea of sovereignty was forged. As a result, ‘Third World sovereignty is ... rendered uniquely vulnerable and dependent by international law’.²⁹ For Anghie, indeed, ‘no adequate account of sovereignty can be given without analysing the constitutive effect of colonialism on sovereignty’.³⁰ Anne Orford has made an equally powerful argument in relation to the contemporary international order. International law, she notes, ‘has always operated to constitute as its subjects those who resemble the idealized self-image of European sovereign peoples’.³¹ Today, as she argues, ‘only one “choice” is being made available to the new subjects of international law’,³² namely ‘to

²⁶ Sara Kendall, ‘Cartographies of the Present: “Contingent Sovereignty” and Territorial Integrity’, in Martin Kuijer and Wouter Werner (eds.), *47 Netherlands Yearbook of International Law* (2016): 83–105 at 100.

²⁷ I borrow this phrase from Anne Orford, ‘Locating the International: Military and Monetary Interventions after the Cold War’, 38 *HJIL* (1997): 443–85.

²⁸ See e.g. Makau wa Mutua, ‘Why Redraw the Map of Africa? A Moral and Legal Inquiry’, 16 *Michigan Journal of International Law* (1995): 1113–76.

²⁹ Anghie, *Imperialism, Sovereignty*, 6.

³⁰ *Ibid.*, 37.

³¹ Anne Orford, *Reading Humanitarian Intervention: Human Rights and the Use of Force in International Law* (Cambridge University Press, 2003), 27.

³² See e.g. Orford, ‘Locating the International’; Orford, ‘Muscular Humanitarianism: Reading the Narratives of the New Interventionism’, 10 *EJIL* (1999): 679–711.

be governed by economically rational governments under the tutelage of the international economic institutions who follow the military as representatives of the international community.³³

Feminist literature on the concepts of statehood and personality, meanwhile, has also connected the inequality of non-European subjectivity under international law to the unequal subjectivity of women under domestic law. Hilary Charlesworth and Christine Chinkin point out, for example, that '[I]ike the heterosexual male body, the state has no "natural" points of entry, and its boundedness makes forced entry the clearest possible breach of international law'. This applies only to sovereign equals, however; whereas '[e]ntities that cannot assert control over a coherent unified territory, or that straddle borders, such as many indigenous minority peoples' are 'seen as having permeable, negotiable, penetrable, vulnerable boundaries in the same way that women's bodies have been constructed in criminal law'.³⁴ Similarly, a number of queer theorists of international law have highlighted the way in which colonial patterns of independence and domination continue to be narrated in heteronormative terms. Teemu Ruskola, for instance, has analysed 'the injury of colonialism as a kind of homoerotic violation of non-Western states' (would-be) sovereignty', pointing to 'the normative masculinity that is attributed to sovereign states' to argue that 'non-Western states' variously deviant masculinities, together with their civilizational and racial attributes, rendered them rapable' during the heyday of the European colonial project.³⁵

In different ways, all these arguments converge on the same fundamental point: that, whether deliberately or accidentally, the 'progressive' bias of international law's autobiography eclipses the discipline's colonial history, and hence its ongoing implication in precisely the problems it purports to resolve. The first aspect of the argument that I make in this book, concerning international law's instrumentalisation of Ethiopia's annexation by Italy, dovetails straightforwardly with this post-colonial critique. As we shall see, the Ethiopian Empire was not, at the time, formally 'equal' to Italy, Britain or France in any straightforward sense. This makes it difficult

³³ Orford, *Reading Humanitarian Intervention*, 27.

³⁴ Hilary Charlesworth and Christine Chinkin, *The Boundaries of International Law: A Feminist Analysis* (Manchester University Press, 2000), 129–30. See also Gina Heathcote, *The Law on the Use of Force: A Feminist Analysis* (London: Routledge Cavendish, 2011); Karen Knop, 'Re/Statements: Feminism and State Sovereignty in International Law', 3 *Transnational Law and Contemporary Problems* (1993): 293–344.

³⁵ Teemu Ruskola, 'Raping Like a State', 57 *UCLA Law Review* (2009–10): 1477–536 at 1477. See generally Dianne Otto (ed.), *Queering International Law: Possibilities, Alliances, Complicities, Risks* (New York: Routledge, 2017).