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Whataboutism in International Law

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"Whataboutism," as a response to allegations of wrongdoing, is everywhere in contemporary public discussion, and international law is no exception. Unsurprisingly, it has been central to Russia's justification discourse regarding its invasion of Ukraine. Whataboutism evokes conflicting responses. On the one hand, it can be treated as a logical fallacy and frequently employed as a cheap tactic to derail public debate. On the other hand, we often feel that there might be something to such arguments and that they cannot be dismissed offhand.

This Article seeks to offer a general theory on the potential normative relevance of whataboutism in international law. Utilizing insights from the theoretical framework of informal logic, it shows that whataboutism should be addressed as a potentially valid argumentative scheme, rather than as a pure fallacy. The Article argues that since whataboutism in international law frequently invokes notions of unfairness, the question of whether whataboutism is relevant in international legal argumentation requires establishing whether there are indeed obligations of fairness between the alleger and the whataboutist objector.

Since obligations of fairness generally require the exercise of public power, the salient question concerning the relevance of whataboutism in international law is whether international actors interact under assumptions of private or public law. The Article explores both traditions in international legal theory, offers indications for the existence of such public functions in specific instances, and suggests preliminary implications of a relevant whataboutist claim in international law.

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Introduction

"Whataboutism"[1] is everywhere in current public discourse, but seems especially prevalent in international law. In fact, whataboutism is often the first line of defense that states invoke when condemned by other international actors. For instance, in recent years, whataboutism has been the key argumentative tactic deployed by Russia to defend its invasion of Ukraine. It is reflected, in particular, in Russia's allegations that the West has engaged in similar conduct in the past.[2] Oftentimes, whataboutist

1. As explained in further detail below, "whataboutism" is a response to an allegation in which the accused invokes, in its defense, the accuser's own character, previous behavior, or positions.

2. Vladimir Putin, President, Russ. Fed'n, Address by the President of the Russian Federation (Feb. 24, 2022), http://en.kremlin.ru/events/president/news/67843 [https://perma.cc/NE5D-EHD6] [hereinafter Putin]; Statement of the Presidium of the Russian Association of International Law (Feb. 25, 2022), http://www.ilarb.ru/html/news/2022/7032022.pdf [https://perma.cc/3GR2-X9NG]. Another recent example is Israel's immediate response to South Africa's initiation of proceedings at the ICJ against it, alleging violations of obligations under the Genocide Convention during the war in Gaza following the October 7 attack by Hamas: A government

arguments are vehemently rejected. When responding to Russia's whataboutism on Ukraine, the board of the European Society of International Law ("ESIL") went as far as to state that "[t]o contend that other States—especially in the West—have no better record when it comes to respecting international law is a morally corrupt and irrelevant distraction."[3] While many could relate to the sentiment behind ESIL's response, others were highly critical about what they saw as self-righteous indignation.[4] Indeed, the fact remains that Russia's line of argument has had an impact in the Global South, where allegations of "double standards" against Russia have gained traction, at least concerning the imposition of sanctions on Russia and the arrest warrant issued by the International Criminal Court ("ICC") against its president, Vladimir Putin.[5]

Thus, when confronted with whataboutist claims, we are often torn. On the one hand, most of us think that such arguments have—or should have—little purchase, both on moral and logical grounds. Morally, past

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spokesperson claimed that "collaborating with perpetrators of genocide . . . is not new to South Africa, which backed Omar Al-Bashir after he was indicted for genocide in Darfur." Eylon Levy (@EylonALevy), X (Jan. 2, 2024, 5:48 PM), https://twitter.com/EylonALevy/status/1742211234798170141 [https://perma.cc/72Q6-PGK8]. For a further example pointing to South Africa's alleged previous behavior, see Rosalie Abella, *The Genocide Case Against Israel is an Abuse of the Postwar Legal Order*, The Globe and Mail (Jan. 9, 2024), https://www.theglobeandmail.com/opinion/article-south-africas-genocide-case-against-israel-exploits-the-post-war-legal/ [https://perma.cc/6348-P46D]. For the Decision under Article 87(7) of the Rome Statute on the non-compliance by South Africa with the request by the Court for the arrest and surrender of Omar Al-Bashir, see generally *Prosecutor v. Al Bashir*, Case No. ICC-02/05-01/09-302, Pre-Trial Chamber II Decision (July 6, 2017).

3. President and the Board, Eur. Soc'y Int'l L., Statement by the President and the Board of ESIL on the Russian Aggression Against Ukraine (Feb. 24, 2022), https://esil-sedi.eu/statement-by-the-president-and-the-board-of-the-european-society-of-international-law-on-the-russian-aggression-against-ukraine/ [https://perma.cc/P7AU-MGVK] [hereinafter Statement by the President and the Board of ESIL].

4. Ralph Wilde, *Hamster in a Wheel: International Law, Crisis, Exceptionalism, Whataboutery, Speaking Truth to Power, and Sociopathic, Racist Gaslighting*, Opinio Juris (Mar. 17, 2022), http://opiniojuris.org/2022/03/17/hamster-in-a-wheel-international-law-crisis-exceptionalism-whataboutery-speaking-truth-to-power-and-sociopathic-racist-gaslighting/ [https://perma.cc/TEX4-STRZ].

5. *See* Alonso Gurmendi, *Tracking State Reactions to the ICC's Arrest Warrant Against Vladimir Putin*, Opinio Juris (Mar 29, 2023), https://opiniojuris.org/2023/03/29/tracking-state-reactions-to-the-iccs-arrest-warrant-against-vladimir-putin/ [https://perma.cc/BS9L-97BM]. Regarding the reactions in South Africa to the Putin arrest warrant, see generally *Asymmetrical Haircuts*, *Another BRIC(S) in the Wall with Hanna Woolaver and Allan Ngari* (June 23, 2023), https://www.asymmetricalhaircuts.com/search-episodes/ [https://perma.cc/XUQ5-HHMY] (scroll to find Episode 80).

wrongs by Actor A do not make a current wrong by Actor B right, and therefore, such arguments seem normatively irrelevant. Logically, past wrongs by Actor A do not make its current allegation against Actor B false. Thus, we may feel that such claim is nothing more than a cheap diversion tactic meant to dodge an allegation.[6]

On the other hand, there seems to be *something* to such claims.[7] Otherwise, they would not be so common, and leading international lawyers would not put so much effort into rebuffing them. For example, in a recent editorial, the Co-Editors-in-Chief of the *American Journal of International Law* found it necessary to reject Putin's whataboutism not by simply pointing out the allegedly fallacious nature of his arguments, but by highlighting why, in their view, "the invasion of Ukraine is unlike the others."[8]

Is whataboutism in international law, then, always a morally corrupt, irrelevant distraction? Or, rather, could it be something more? Could there be cases in which a dismissive approach to whataboutism is itself an attempt to deflect our attention from structural problems?[9] If so, in what cases? And, specifically, is there something unique in the international legal system that affects our understanding of this issue? These are the questions that I seek to address in this Article. In general terms, I aim to offer a novel theory of the potential normative relevance of whataboutism in light of the specific characteristics of international law as a decentralized legal system. As I claim, the uniqueness of the problem of whataboutism in international law stems from the fact that states are perceived, on the international level, as both quasi-private *and* public actors. The

6. Meenakshi Ganguly, *Engaging in Whataboutery Instead of Protecting Rights*, 24 Brown J. World Aff. 39, 39 (2017).

7. And indeed, such claims often elicit a sympathetic "gut reaction" even among the most principled and rational people. *See* Trudy Govier, *Worries About Tu Quoque as a Fallacy*, 2 Informal Logic Newsl. 2, 3 (1980).

8. *See generally* Ingrid (Wuerth) Brunk & Monica Hakimi, *Russia, Ukraine, and the Future World Order*, 116 Am. J. Int'l L. 687, 691 (2022) (arguing that the Russian aggression post-2022 is not comparable to previous aggressions because it is a direct attack on the foundational norm of the international system). Note that Brunk and Hakimi do not *justify* the previous acts but argue that Russia's actions are worse. *Id.* But see generally Anastasiya Kotova & Ntina Tzouvala, *In Defense of Comparisons: Russia and the Transmutations of Imperialism in International Law*, 116 Am. J. Int'l L. 710, 710 (2022). In conversations about Russia and Ukraine, the discussion almost naturally flows into such comparisons, which highlights their practical importance. *See, e.g.*, *JIB/JAB: The Laws of War Podcast*, *Episode 28 – The War in Ukraine: Jus ad Bellum Implications* (Mar. 8, 2022), https://jibjabpodcast.com/tag/use-of-force/ [https://perma.cc/99QY-G4DR].

9. *See* Wilde, *supra* note 4.

potential relevance of whataboutism—as I show—oscillates in accordance with these differing roles.

In public discourse, the label "whataboutism" is usually perceived as implying a negative judgment of this argumentative form, but for the sake of this Article, it is used, for convenience, in a purely descriptive sense. In philosophical terms, this type of argument is viewed as a subset of an *ad hominem* argument, which involves "inferring qualities of views from the qualities of those who hold them."[10] In other words, we assign relevance, when judging the correctness of a statement—whether about facts, morality, or legal validity—to the character or previous behavior of the person making the statement. In the basic structure of *ad hominem* arguments, thus, "speaker (B) charges another (A) with inconsistency on an issue of dispute."[11] Perhaps the most common form of whataboutism is known as *tu quoque (you too)*, in which the initial alleger is accused of committing similar wrongs.[12] Significantly, however, a whataboutist claim can just as well come in the form of *illi quoque (they too)*, in which (B) counters that alleger (A) has supported, or overlooked, similar wrongs by others. In their best light, such charges of inconsistency aim to undermine the factual credibility of the statement or the normative standing of the alleger.

This Article demonstrates that, in fact, the controversy in international legal discourse concerning whataboutism mirrors an ongoing discussion in philosophy, specifically in the field of informal logic. In general terms, this field deals with methods for the evaluation of arguments as they are made and used in real life. Very broadly speaking, there are two approaches in informal logic for assessing arguments. The *fallacy* approach condemns a set of fallacies and stringently assesses arguments in light of these definitions. *Ad hominem*—and whataboutism as one of its subcategories—is a classic fallacy within this tradition.[13] Conversely, the *argumentative scheme* approach reverses the presumption. Rather than "fishing for fallacies," so to speak, it seeks to ask critical questions in order to ascertain whether a certain scheme of argument can be valid in

10. Scott F. Aikin, *Tu Quoque Arguments and the Significance of Hypocrisy*, 28 Informal Logic 155, 155 n.1 (2008).

11. *Id.* at 155.

12. *See generally id.*

13. For a discussion of types of *ad hominem* arguments and their potential fallacious nature, see Douglas N. Walton, *The ad Hominem Argument as an Informal Fallacy*, 1 Argumentation 317, 318–20 (1987).

particular circumstances.[14] In the context of whataboutism, this approach would seek to uncover when the alleged inconsistency could be *relevant* for the objector's argument. This Article utilizes this insight to inquire when such an argumentative scheme could be relevant in international law, focusing on the latter's salient characteristics.

In assessing how inconsistency can be relevant in the international legal context, this Article distinguishes between relevancies that are applicable to any and all contexts in which whataboutist arguments are made and normative questions of relevance that seem salient to international law. Indeed, whataboutism as an argumentative scheme raises questions of relevance in every possible human interaction, far beyond international law or even law in general. One type of such potential relevancies is *factual*. For example, when a doctor who smokes urges a patient to quit, a question arises whether the doctor's personal practice reflects on their professional authority, or, in other words, whether we should *believe* them that smoking is, in fact, bad.[15] Precisely in the same way, when State A, which recently engaged in aggression, blames State B for doing so, the question is whether State A's previous violation casts doubt on the correctness of its statements about law. Perhaps the inconsistency implies that State A's international lawyers are not good enough, or that State A is prone to lying. The question in this sense is whether inconsistency can indeed have *factual* purchase, in terms of undermining the alleger's professional authority, seriousness, credibility, or the evidentiary weight that should be given to their statements. Since these questions of relevance are universally applicable and do not necessarily raise particular or interesting questions in relation to international law *specifically*, I do not address them in detail here.

Yet, another possible relevance of inconsistency is *normative*. A normative whataboutist argument claims that the alleger's inconsistencies adversely affect the latter's moral or legal standing to make the allegation. Like the factual version, normative whataboutism has some potentially universal relevancies such as where relationships are based on expectations of reciprocity, or when the moral standing of a particular

14. *See generally* Leo Groarke, *Informal Logic*, *in* Stanford Encyclopedia of Philosophy (Edward N. Zalta & Uri Nodelman eds., 2022).

15. For a comparable example, see Aikin, *supra* note 10, at 157.

person to make an allegation is questioned due to their own failures.[16] This Article, however, is concerned with problems more particular to international legal discourse: or, in other words, the specific theoretical aspects of international law that might affect the normative relevance of whataboutism in international law's particular context.

As I argue, in international law—owing to its decentralized nature—the salient question in relation to normative whataboutism is whether the alleger is *under a duty to act consistently* vis-à-vis the whataboutist objector. A duty of consistency, I claim, is essentially an obligation of fairness;[17] and such obligations, in legal settings, generally follow the exercise of public power. The question of normative whataboutism on the international level is therefore tied to a fundamental theoretical problem of international law: whether states and other international actors interact as "public" or "private" entities on the international level.

This question is central to the discussion since, as I argue, whataboutism does not do much work in *horizontal* relations between parties to private disputes. In such situations, unless there are specific obligations of reciprocity between the parties, or, in narrow circumstances, the alleger has committed a wrong related to the specific case at hand,[18] the inconsistency of the alleging party has negligible normative weight within the current dispute. Arguably, the reason for this is that at least on liberal assumptions, individuals are not bound *inter se* by strong obligations of

16. Unsurprisingly, some of these relevancies are reflected in common legal doctrines—both domestic and international—such as termination of contracts due to non-performance or the doctrine of "unclean hands." For an example of the potential application of the "unclean hands" doctrine in international law, see generally Aloysius Llamzon, *Yukos Universal Limited (Isle of Man) v The Russian Federation: The State of the 'Unclean Hands' Doctrine in International Investment Law: Yukos as Both Omega and Alpha*, 30 ICSID Rev. 315 (2015).

17. As detailed at *infra* Section D, this Article adopts, as a working definition, the view of fairness as encompassing a notion of equality, as well as a notion of non-arbitrariness, in the sense that law must be applied coherently. Inconsistency might be unfair—in this sense—by reflecting bias, as well as arbitrary exercise of (public) power. Of course, other notions of fairness exist in the literature, but their discussion is beyond the ambit of this Article. For a more general discussion of fairness in international law, see Thomas M. Franck, Fairness in International Law and Institutions (1998).

18. This qualification is found in the equitable defense of "unclean hands" in civil litigation. *See, e.g.*, Precision Instrument Mfg. Co. v. Auto. Maint. Mach., 324 U.S. 806, 814 (1945) ("The guiding doctrine in this case is the equitable maxim that 'he who comes into equity must come with clean hands.' . . . It is a self-imposed ordinance that closes the doors of a court of equity to one tainted with inequitableness or bad faith *relative to the matter in which he seeks relief* . . . ." (emphasis added)).

fairness, among them, to act consistently. However, such obligations *do* exist when one party could be said to exercise public power over another.

Now, whether this is the case in international law is a vexing question because of the Janus-faced position of states on the international level. Sometimes, they are analogized to individuals, interacting with one another in an international system of private laws. In other times, they are constructed as exercising public functions—such as law enforcement—in favor of the international community as a whole.[19] This duality also partly explains why whataboutism in the international sphere elicits such conflicting reactions, at least among international lawyers. Simply put, such allegations seem simultaneously irrelevant *and* relevant.

After establishing this distinction, this Article suggests a non-exhaustive typology of interactions that have stronger *public* characteristics, in which allegations of inconsistency—or whataboutism—might be relevant on account of the exercise of public power. Arguably, situations in which public power can be inferred are those where the allegation or measure—which is subject to a whataboutist objection—takes place as part of actions in favor of collective interests. This could be the case when the conduct is in the framework of an institution explicitly endowed with public powers; when an international actor claims to defend the "international rules based order," or when it acts against alleged violations that concern the international community as a whole; when power is exercised directly vis-à-vis individuals such as in the context of international criminal law ("ICL"); or when significant power gaps exist between the alleger and the whataboutist objector.

Three caveats before we proceed. This Article does not focus, in detail, on the possible doctrinal outcomes of relevant instances of whataboutism: for example, whether such relevance results in lack of formal standing in various institutions, or in invalidity of claims, in exoneration in criminal proceedings, and so forth. Rather, it inquires more generally and theoretically whether and when whataboutism can be of normative relevance in international legal argumentation, taking into consideration international law's specific characteristics.[20] However, as a point of departure

19. *See* Yishai Blank & Issi Rosen-Zvi, *The Persistence of the Public/Private Divide in Environmental Regulation*, 15 Theoretical Inquiries L. 199, 202 (2014).

20. Since I approach international law as primarily an argumentative practice, it is crucial to understand when such an argument can be considered *sound*, in the sense of resting on principles relevant to legal argumentation. On international law as argumentative practice, see generally Ingo Venzke, *International Law as an Argumentative*

for further inquiry, this Article does suggest that relevant whataboutist claims might shift the burden of argumentation towards the alleger, but they should not automatically override competing interests.

Second, an important distinction must be made between the relevance of whataboutism in undermining the (factual or normative) legitimacy of an allegation and its relevance for justifying the impugned act *itself*. Except in *very* particular instances—such as, perhaps, when a claim of inconsistency successfully undermines a norm of customary international law, or when a previous violation justifies a countermeasure—a normatively relevant whataboutist claim can never *permit* the impugned act itself.

Third, it should be noted that questions relating to whataboutism were given some specific attention in the context of the "selectivity" of ICL and particularly in relation to *tu quoque* defenses occasionally invoked by defendants.[21] These writings place much emphasis on the problem of "victor's justice," in the sense that in several historical cases—Nuremberg chief among them—the prosecuting authorities represented countries that committed similar violations.[22] However, this literature does not address the more general theoretical question on whataboutism within the international legal argument at large. This Article, conversely, offers a broader theory about relevance, which might be applicable also to ICL.[23]

Practice: On Wohlrapp's The Concept of Argument, 7 Transnt'l Legis. Theory 9 (2016); Monica Hakimi, *Why Should We Care About International Law?*, 118 Mich. L. Rev. 1283, 1299–1300 (2020).

21. *See generally* Katerina Borrelli, *Between Show-Trials and Utopia: A Study of the Tu Quoque Defence*, 32 Leid. J. Int'l L. 315 (2019); Sienho Yee, *The Tu Quoque Argument as a Defence to International Crimes, Prosecution or Punishment*, 3 Chinese J. Int'l L. 87 (2004); Robert Cryer, Prosecuting International Crimes: Selectivity and the International Criminal Regime (2005); Wolfgang Kaleck, Double Standards: International Criminal Law and the West (2015); Patryk I. Labuda, *Beyond Rhetoric: Interrogating the Eurocentric Critique of International Criminal Law's Selectivity in the Wake of the 2022 Ukraine Invasion*, Leid. J. Int'l L. 1 (2023).

22. *See* Cryer, *supra* note 21, at 200–02.

23. In one study, for instance, it has been argued that since *tu quoque* defenses were generally rejected in the international criminal context, such arguments have no legal role but might have "political consequences." Borrelli, *supra* note 21, at 317. The theory presented in this Article can supplement this debate by highlighting that even if the defense was rejected in ICL, this does not mean that it has no relevance as an international legal argument altogether, if we consider that international legal relations possess the characteristics of public law that impose obligations of fairness.

The Article proceeds as follows. Part I addresses several theoretical aspects of whataboutism, such as its forms, potential wrongfulness, nature as an argumentative scheme, and the relation between normative whataboutism and fairness. Part II delves deeper into the practice of whataboutism in international legal arguments in light of international law's structure, jurisprudential assumptions, and basic inequalities. Part III inquires whether and when normative whataboutism can be relevant in international law, arguing that this is the case where the alleger can be said to exercise public powers. Explaining the problem of the private-public duality of the state in international law, this Part suggests indications for the existence of public powers and offers, in a preliminary manner, possible implications of relevant normative whataboutism. This Part concludes by highlighting the need to balance between the moral wrong of the alleged inconsistency found at the core of a whataboutist argument and the moral wrong of the impugned action.

I. Theorizing Whataboutism

A. The Forms of Whataboutism

At the heart of whataboutist objections, there is always some form of inconsistency attributed to the alleger. This claim of inconsistency typically comes in two forms that are sometimes referred to in the philosophical literature as "cognitive" and "practical."[24] Cognitive inconsistency concerns previous *positions* held by the alleger. In international law, this usually manifests in critiques regarding the alleging international actor's previous positions, as reflected in actions or inactions concerning similar acts by third parties. For example, State B argues that State or Institution A, which now accuses B of doing some action, has in the past encouraged, or refrained from condemning, a similar action by others. This is a hallmark, for instance, of Israel's argument in U.N. fora, in particular the Human Rights Council, that the Council singles out Israel while refraining from criticizing other states to the same degree.[25] A recent example

24. Aikin, *supra* note 10, at 155–56.

25. *See, e.g.*, Jamey Keaten & Josef Federman, *Israel, Citing 'Bias,' Won't Cooperate with UN Rights Team*, AP News (Feb. 17, 2022), https://apnews.com/article/europe-middle-east-israel-geneva-race-and-ethnicity-d71a6a9692959a73806c8356cd7bf2dd [https://perma.cc/6ZM5-8SRR]. For a general argument from the Israeli perspective, see Eytan Gilboa, *The Palestinian Campaign Against Israel at the United Nations Human Rights Council*, 27 Isr. Aff. 68, 70 (2021).

can be found in South Africa's response to the 2023 arrest warrant that the ICC issued against Vladimir Putin.[26] In justification of South Africa's reported intention, at the time, to amend its domestic law to allow the government to refrain from arresting Putin during his planned visit to the BRICS summit in the country, a South African official invoked the ICC's "double standard:" As he claimed, the ICC "never indicted Tony Blair, they never indicted [George W.] Bush for their killings of Iraq people" and that "Mandela would have said [that] the inequality, the inconsistency by the ICC, is a problem."[27] In 2024, when South Africa accused Israel of violating its obligations under the Genocide Convention in Gaza, it faced a whataboutist objection by the latter, pointing to the former's failure to arrest Sudan's Omar Al-Bashir following an ICC arrest warrant against him on counts of genocide.[28]

Practical inconsistency, conversely, is about similar conduct by the alleger itself: Here, State B claims that State A—which now accuses it of doing some action—is itself engaging, or has engaged, in the same or comparable action. This has been a central feature of Russia's justification discourse in relation to its invasion of Ukraine. In his speech declaring Russia's "special military operation" against Ukraine, President Putin devoted significant time to alleged previous violations by the West: NATO's unilateral intervention in Kosovo in 1998, the invasion of Iraq in 2003, the intervention in Libya in 2011, and the ongoing strikes in Syria.[29] Similarly, when Israel alleges that Iran is violating its obligations regarding nuclear non-proliferation, Iran frequently responds that Israel itself possesses nuclear weapons and that other states criticizing

26. On the warrants, see Press Release, International Criminal Court, Situation in Ukraine: ICC Judges Issue Arrest Warrants Against Vladimir Vladimirovich Putin and Maria Alekseyevna Lvova-Belova (Mar. 17, 2023), https://www.icc-cpi.int/news/situation-ukraine-icc-judges-issue-arrest-warrants-against-vladimir-vladimirovich-putin-and [https://perma.cc/J9UL-AVXB].

27. Farouk Chothia & Robert Greenall, *South Africa Plans Law Change over Putin ICC Arrest Warrant*, BBC (May 30, 2023), https://www.bbc.com/news/world-africa-65759630 [https://perma.cc/CS3J-MC2G]. Eventually, Putin delivered a video message. *See* Pjotr Sauer, *Putin Defends Invasion of Ukraine in Brics Summit Address*, The Guardian (Aug. 23, 2023), https://www.theguardian.com/world/2023/aug/23/putin-defend-russian-invasion-ukraine-brics-summit-south-africa [https://perma.cc/QG2B-KT56].

28. *See* sources cited at *supra* note 2.

29. Putin, *supra* note 2.

Iran also violate the Non-Proliferation Treaty.[30] Yet another example was the calls to reform the membership rules of the now defunct United Nations Commission on Human Rights, due to the dismal human rights records of some of its members.[31]

Because in law—and perhaps more so in international law—expressing positions is not just a reflection of a cognitive mindset, but is also an *action* in and of itself, the distinction between cognitive and practical forms of whataboutism largely collapses.[32] A better way to think of these forms of whataboutism, as they appear in international law, is in terms of the normative thrust underlying them. This is addressed later, in Section D.

B. The Potential Moral Wrong of Whataboutism

It is certainly true that whataboutism, in any form, can be a morally wrongful and abusive pattern of argumentation.[33] For example, whataboutism is oftentimes a tactical maneuver meant to dodge or deflect a just allegation.[34] In this sense, it adds insult to injury, which evokes moral indignation in and of itself. This is precisely the sentiment driving ESIL's angry allegation that Russia's whataboutism on Ukraine was

30. *Zarif in New York: Nuke Deal, ISIS, Syria*, The Iran Primer (Apr. 29, 2015), http://iranprimer.usip.org/blog/2015/apr/29/zarif-new-york-nuke-deal-isis-syria [https://perma.cc/M5L2-D9LJ] (arguing that Israel's allegations are "laughable" on account of its own nuclear program).

31. Françoise J. Hampson, *An Overview of the Reform of the UN Human Rights Machinery*, 7 Hum. Rts. L. Rev. 7, 14–15 (2007) (discussing the reforms in the U.N. human rights system, including the formation of the Human Rights Council as a replacement to the Commission on Human Rights).

32. In international law, in particular, expressing positions can be said to be an "action" with legal effects because of the nature of international law as a process of contestation, in which states and other agents deploy legal language to advance their legitimacy or to delegitimize others. For this type of thinking, see generally Hakimi, *supra* note 20. Moreover, expressing positions is part of the lawmaking process of customary international law, not only as opinio juris but also as practice in itself. *See Draft Conclusions on Identification of Customary International Law, with Commentaries*, [2018] 2(2) Y.B. Int'l L. Comm'n 122, U.N. Doc. A/73/10 (holding in Conclusion 6(1) that practice may include formal acts and holding in 10(2) that opinio juris can be inferred from public statements).

33. For a normative approach towards methods of arguing, see generally Andrew Aberdein, *Virtue in Argument*, 24 Argumentation 165 (2010).

34. *See* Tracy Bowell, *Whataboutisms: The Good, the Bad, and the Ugly,* 43 Informal Logic 91, 91–92 ("Whataboutism functions rhetorically to redirect attention from the specific case in hand.").

nothing but a "morally corrupt" distraction.[35] Particularly in social media, whataboutist deflections are not only subjectively wrongful as an attempt to evade responsibility, but they also cause objective "argumentative harm" by derailing the public discussion, wasting time, and flooding the debate.[36]

Abusive whataboutism can take many shapes.[37] One is by attempting to shift the discussion to other unconnected situations. For instance, as a response to a letter by thirty-eight states protesting Hungary's discrimination against the LGBTQ community, a Hungarian official invoked the riots in France in 2023, "gang wars" in Sweden, drug problems in the Netherlands, unfair elections in the United States, and more.[38] Another abusive practice is to purposely focus the public attention on the putative inconsistency of the alleger, which even if it is a wrong in itself, it is much less wrongful than the condemned act. Again, Russia's emphasis on Western inconsistencies in the context of Ukraine is a case in point. Even if it is true that some Western states are hypocritical, this seems to be of secondary importance at best when people are wrongfully killed in the present. In sum, as a pattern of deflection and a generator of argumentative harm, whataboutism might be a tactic that supports the initially wrongful act and is therefore morally wrongful in itself.[39]

However, this cannot be the end of the discussion since whataboutist claims are not *always* made in bad faith in an attempt to deflect

35. Statement by the President and the Board of ESIL, *supra* note 3.

36. On whataboutism and "argumentative harm," see Bowell, *supra* note 34, at 92, 107–11. More generally, see Tamar Megiddo, *Online Activism, Digital Domination, and the Rule of Trolls: Mapping and Theorizing Technological Oppression by Governments*, 58 Colum. J. Transnat'l L. 394 (2020).

37. An example is when whataboutism is done by invoking "other" cases which are unrelated or not sufficiently similar to the initially criticized conduct. *See* Bowell, *supra* note 34, at 108.

38. Ambassador David Pressman (@USAmbHungary), X (Jul. 14, 2023, 12:55PM), https://twitter.com/USAmbHungary/status/1681241189134004224?s=03 [https://perma.cc/M9HZ-FCG4].

39. On the other hand, it can be argued that these moral costs of whataboutism are somewhat alleviated, if exposing inconsistencies by states can dissuade them from committing, in the future, the same acts they are now condemning. However, this seems to be a hypothetical, future benefit that does not possess the same weight as the immediate wrong which inheres supporting a current wrongful act with a whataboutist objection. Also, fear of a whataboutist objection can perhaps disincentivize states from criticizing now an act worthy of criticism, just because they have engaged in similar action in the past. This, too, seems to be an unwanted consequence of some whataboutist claims.

allegations. Furthermore, it could be that the objective argumentative harms of whataboutism are merely incidental to a genuine argument of normative importance. For example, one case that is more difficult to dismiss as purely abusive is the response by some Global South states to the alleged selectivity of the ICC's Putin arrest warrant. Why does the latter argument not seem to spark the same indignation provoked by Hungary's LGBTQ whataboutism? Several explanations come to mind.

One possible answer is that while Hungary's LGBTQ objection seems to intentionally flood the debate with issues largely disconnected from the substance of the critique leveled against it, demanding the arrest of the President of Russia is such a major burden on any state—*not least* a less powerful one which enjoys close ties with Russia[40]—that we expect those making a demand of such magnitude to be especially consistent. Another potential explanation is that the Putin arrest warrant was issued within certain institutional settings, in relation to which our expectations of consistency are higher—perhaps because such institutions presume to act for the common good. It might also be the case that because criminal law affects the rights of individuals directly, consistency is required as a matter of human dignity. Last, the history of North-South relations, as well as the current power gaps between them, might also play a part in our intuitions.

Be that as it may, these dynamics make it clear that the question of whataboutism calls for a deeper engagement, beyond merely pointing out its potential wrongfulness and argumentative harm. Different instances of whataboutism seem to elicit different intuitions, which implies that something normative—and worthwhile of exploring—is at play.

C. Whataboutism in Informal Logic: Between Fallacy and Argumentative Scheme

While the study of argumentation is as ancient as philosophy itself,[41] the analysis of whataboutism as an argumentative form in recent decades is mainly found in the field of *informal logic*: a branch of philosophy that combines "accounts of argument, evidence, proof and justification

40. So much so that South Africa's president argued that arresting Putin by South Africa would be tantamount to a declaration of war. Natasha Booty & Will Ross, *Arresting Vladimir Putin in South Africa Would Be 'Declaration of War', Says Ramaphosa*, BBC (Jul. 18, 2023), https://www.bbc.com/news/world-africa-66238766 [https://perma.cc/EZ7J-8GEW].

41. Groarke, *supra* note 14.

with an instrumental outlook, which emphasizes their usefulness in the analysis of real life arguing."[42] In simple words, the field of informal logic is interested in what makes arguments *good* in a particular context. It therefore shuns the formal language that characterizes traditional logic, in favor of a more "realist" or pragmatic analysis of the role that arguments play. This is why, in my view, this theoretical prism is especially helpful in the international legal context, the "real life" of which is a process wherein actors compete for authority or legitimacy in a multitude of settings and fora.

In general, two main approaches for the assessment of arguments are found in informal logic. One approach deploys "fallacy theory" to uncover bad arguments—for example, those that fail to justify their conclusions by "providing good (strong, credible, etc.) reasons" for believing them.[43] *Ad hominem* arguments—of which whataboutism is a sub-branch—are often discussed as one type of these fallacies.[44] And indeed, the potential fallacious nature of whataboutism, beyond its possible *moral* wrongfulness discussed above, is well documented. One fallacious aspect of whataboutism is that even if it is invoked sincerely, whataboutism in itself does little justificatory work, either in law or in morality.[45] The fact that "other people do it" alone does not make what I do right. A whataboutist claim that implies otherwise is essentially a conflation between *is* and *ought*: What others do is a factual statement, from which normative judgments cannot be inferred directly.[46] The missing link here is *why* the alleger's inconsistency *ought* to make a difference. It seems that ESIL's board alluded to this when stating that Russia's invocation of previous Western violations "offers no legal *justification* for the aggression that has been unleashed."[47] For a similar reason, tribunals generally rejected *tu quoque* defenses raised in international criminal proceedings because "two wrongs don't make a right."[48]

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42. *Id.*
43. *Id.*
44. *See, e.g.*, Jacob E. Van Vleet, Informal Logical Fallacies: A Brief Guide 15–17, 21–22 (2011).
45. In law, there are some exceptional doctrinal circumstances, discussed later on, where arguments that appear whataboutist can have some doctrinal implications. *See infra* Part II, Section B.
46. *See, e.g.*, Scott J. Shapiro, Legality 45–47 (2011).
47. Statement by the President and the Board of ESIL, *supra* note 3 (emphasis added).
48. 12 U.N. War Crimes Comm'n, Law Reports of Trials of War Criminals: Volume XII The German High Command Trial 64 (1949); *see also* Cryer, *supra*

This relates to another logical fallacy which is common in whataboutist claims. *Tu quoque* is considered a traditional fallacy also because—like ad hominem claims more generally—it often presumes that a person's claim is wrong because it is inconsistent with that person's previous position or behavior. Transposed to law, such a fallacious argument would be to claim, absent any other supporting positive doctrine, that an agent's previous position or behavior somehow affects the legal validity or truthfulness of their current allegation. In sum, whataboutism may be a *fallacy of relevance*: The person's previous position or behavior is neither relevant in relation to the justification of the impugned act nor in terms of the truthfulness of their allegation.[49]

However, once relevance becomes the yardstick, the question is whether whataboutism can *never* have any relevance, either in general or in the specific context of international law. This ties into a wider critique of fallacy theory as an approach through which to assess arguments. One key concern is that fallacy theory places emphasis on what makes a bad argument, rather than a good one.[50] As one commentator pointed out, teaching argument through fallacies is like teaching sports by demonstrating how *not* to play.[51] Moreover, some point out that fallacy theory is too formalist, as it fails to account for the reasonable role that traditional "fallacies" may have in "real life argument."[52] An alternative school of thought seeks to identify and assess recurring patterns of reasoning. Rather than simply pointing out traditional fallacies, this approach understands such patterns as *argumentation schemes* that, when properly used, can become legitimate forms of reasoning.[53] Stated this

note 21, at 20–21 ("The defence has never been accepted in an international tribunal as a legal defence *per se*"); Borrelli, *supra* note 21, at 322 ("In fact, the reason why the *tu quoque* defence is so maligned in international law is that the argument is solely understood as a defence to the crime, voicing the claim that 'two wrongs make a right.'"). There is some debate in the literature on whether the case of Admiral Karl Dönitz in Nuremberg reflected some acceptance of a *tu quoque* claim. This specific controversy is beyond the scope of this Article. *Compare* Borrelli, *supra* note 21, at 326–27 *with* Yee, *supra* note 21, at 123–24.

49. Aikin, *supra* note 10, at 156.

50. *See generally* Groarke, *supra* note 14.

51. David Hitchcock, *Do Fallacies Have a Place in the Teaching of Reasoning Skills or Critical Thinking?*, *in* FALLACIES: CLASSICAL AND CONTEMPORARY READINGS 319, 324 (Hans V. Hansen and Robert C. Pinto eds., 1995).

52. *Id.*

53. *Id.*

way, many traditional fallacies "can be regarded as deviations from an inherently correct scheme of reasoning."[54]

Groarke claims that *ad hominem* arguments are prime examples of the need to move beyond the traditional fallacy approach because there are many situations under which criticisms of a person or institution can be relevant in undermining their arguments. The way to assess this is to pose "critical questions," which seek to uncover whether—due to their character, positions, or behavior—there is good reason not to take the person's views seriously (for instance, if they lack expertise or are biased).[55] On the basis of this approach, Govier argued that actually, most whataboutist arguments are made in reasonable contexts: not to claim that the arguer's proposition is *per se* wrong because of their previous positions or actions[56] but to point out that because of their inconsistencies, the arguer's proposition should be discredited.[57]

Much of the scholarship in informal logic follows this frame of thought, seeking to expose situations in which arguments from inconsistency might be relevant as challenges to the speaker's *credible authority* in terms of sincerity or competence.[58] This type of analysis—which explores the *factual* relevance of inconsistency—is universally applicable to expertise across the board, including in law.[59] However, in

54. *Id.*

55. *Id.*

56. *See* Govier, *supra* note 7, at 3 ("A fallacy seems to be committed by B . . . only if B wants to argue from A's failure to practice what he preaches to the erroneousness of what A preaches."). This might be an overly optimistic view, considering the pervasive temptation in contemporary politics to make abusive use of such arguments, whether through social media or otherwise. But, the basic claim still stands.

57. *Id.*

58. Aikin, *supra* note 10, at 157. Aikin also suggests posing questions, the positive answer to which could make the inconsistency more relevant, and accordingly, the proposition less credible. For example, does the alleger deny its previous wrongdoing, or present itself as a positive "model" of behavior for those claims? Is the inconsistency close enough in time in relation to the current proposition? *Id.* at 159–60.

59. Transposed to the context of legal arguments, this type of relevance would be about diminishing the arguer's credibility or authority in relation to *legally relevant facts*. In the international sphere, if State A alleges that B has resorted to force unlawfully, while in the past State A has undertaken similar actions, then State A might lack credible authority to make judgments on legality—for instance, whether the law of self-defense indeed recognizes the unwilling or unable doctrine. Or, that we cannot trust State A's claims regarding physical facts such as which state attacked first. In purely legal terms, it affects the evidentiary weight that should be ascribed to the alleger's statements.

discussion of consistency and credible authority, there is little indication that the international legal context differs in any meaningful way from other contexts. As later Sections show, it is in the context of *normative* whataboutism where the international legal context raises unique questions.

D. Normative Whataboutism: Fairness, Bias, and Hypocrisy

Beyond the potential factual relevance of inconsistency, whataboutism might also be relevant by undermining the alleger's *normative* standing. Writing in the field of informal logic, Bowell has recently addressed the distinction between whataboutism as a fallacy of relevance and whataboutism as a "good" argument in the normative sense.[60] As she demonstrates, sometimes whataboutism can legitimately function to call out unfairness and specifically to expose bias in the alleger's conduct.[61] Interestingly, Bowell identifies a claim of unfairness not only when the objector points out the alleger's bias in relation to similar acts by *third* parties, but also when a classic *tu quoque* argument is made. This is based on the argument that the essence of the objection in such cases is a claim against a "self-directed exclusionary bias that favours oneself by excusing oneself from the prescription."[62] In other words, the alleger sees themselves exempt from the same rules that bind the criticized individual. Nonetheless, as Bowell argues, the relevance of unfairness-based whataboutist claims, as well as their outcomes, are heavily dependent on context.[63]

Indeed, the notion of fairness is a subject of much debate in political theory, the intricacies of which are beyond the scope of this Article. For our purposes, it is sufficient to adopt the Rawlsian view of fairness as encompassing a notion of equality, the deviation from which can be justified only when it benefits the least advantaged.[64] On most views, fairness also encompasses a notion of non-arbitrariness, in the sense that law must

60. Bowell, *supra* note 34, at 92.

61. *Id.* at 100 (citing Axel Arturo Barceló Aspeitia, Whataboutism Defended: Yes, the Paris Attacks Were Horrible, . . . But What About Beirut, Ankara, etc.? (unpublished manuscript) (available at https://www.academia.edu/19390431/Whataboutism_Defended_Yes_the_Paris_Attacks_were_horrible_but_what_about_Beirut_Ankara_etc) [https://perma.cc/D49Q-S2A6]).

62. Bowell, *supra* note 34, at 100–01.

63. *Id.* at 95.

64. *See generally* JOHN RAWLS, JUSTICE AS FAIRNESS (1971).

be applied coherently.[65] In this context, claims that relate to inconsistency in relation to previous actions by *third parties* (*illi quoque*) are essentially about *bias*, or equal treatment. Here, the objector claims that, by applying standards to them that have not been applied to others, they have been treated unfairly.[66]

When the whataboutist claim is that the alleger has been inconsistent by engaging in similar wrongdoings themselves (*tu quoque*), the argument is about *hypocrisy*. But, such an allegation of hypocrisy is also about unfairness, if viewed—as suggested by Bowell—as pointing out the speaker's self-directed exclusionary bias. Actually, there are two types of arguments from unfairness *qua* hypocrisy, the distinction between which is important for the purpose of this Article. One, which I call *particular hypocrisy*, is when State B claims that alleger State A engaged in similar or comparable action towards State B *specifically*. In international law, as we shall see, this type of argument is close to the logic invoked in the context of countermeasures in bilateral relations, which has some doctrinal purchase, under strict conditions, in positive international law.[67] However, owing to their basis on reciprocity—considering that the initial obligation rests on assumptions of mutual performance—and their goal to induce compliance with a specific mutual obligation, arguments from *specific hypocrisy* do not fit neatly with the whataboutist form.[68]

The second type of argument from hypocrisy is one of *general hypocrisy*: Here, State B claims that alleger State A is, or has been in general, engaged in comparable behavior even if towards *others*.[69] Again, this is

65. *See* Thomas M. Franck, *Legitimacy in the International System*, 82 Am. J. Int'l. L. 705, 741–42 (1988); building on Ronald Dworkin, Law's Empire 176-224 (1986).

66. *Compare with* Yee, *supra* note 21, at 91 (making a similar argument in the context of international criminal law).

67. This also resonates with "clean hands" doctrines in domestic law, which generally apply where the alleger's misconduct is related to the specific controversy at hand. In the United States, see *Precision Instrument Mfg. Co.*, 324 U.S. at 815 (stating "[a]ny willful act *concerning the cause of action* which rightfully can be said to transgress equitable standards of conduct is sufficient cause for the invocation of the maxim [of unclean hands]." (emphasis added)).

68. *See infra* Part II, Section B.

69. For the sake of completeness, it should be pointed out that the alleger in cases of general hypocrisy can overcome this allegation if it argues that precisely because of its previous wrongdoing, it is now under a special duty to prevent similar infractions by others. This is frequently pointed out by Germany. *See* Rana Taha, *Baerbock Says Germany Has a Duty to End Russian War Crimes*, DW (July 18, 2023), https://www.dw.com/en/germany-has-a-duty-to-end-russian-war-crimes-in-ukraine-says-baerbock/a-66260261

the type of argument Russia is making, for example, when it invokes NATO's unilateral intervention in Kosovo in response to condemnations of its invasion of Ukraine.[70] This type of argument, when made in international legal settings, is less grounded on clear doctrinal footings and is not necessarily based on bilateral reciprocity.

It is in relation to whataboutist arguments that invoke unfairness in the sense of *bias* or *general hypocrisy*, I argue, that international law raises unique questions. This is because, as detailed later on, their normative relevance assumes the exercise of public power. This, in turn, requires us to establish whether and when such power is indeed exercised in international law.

II. The Prevalence of Whataboutism in International Law: Structural, Jurisprudential, and Theoretical Factors

This Part turns to international law in more detail, seeking to do two things. *First*, it aims to explain, descriptively, the special attractiveness of whataboutism as an argumentative tactic in international law. As is shown here, this is the case for several reasons. Some concern the structure of the international legal system, others stem from its traditional jurisprudential assumptions, and still others relate to the prevalence of theories that highlight the inequality at the core of international law. *Second*, while this Part shows that the structural and jurisprudential explanations have little bearing over the general normative relevance of allegations of inconsistency, the theoretical insights on international law's inequality can inform and set the stage for a normative discussion, to which the Article turns in Part III.

A. Long-Term Repeat Play, Super-Availability, and Decentralized Enforcement

That the international legal discussion is rife with whataboutism seems beyond debate. One structural explanation for this is simply the massive *availability* of such arguments on the international level. In contrast to interactions between individuals, all states are repeat players in

[https://perma.cc/WYJ3-KBT7]. But this, of course, requires taking full responsibility for the past transgressions, which is not the usual case.

70. *See* Putin, *supra* note 2.

ongoing relationships, many of them going back centuries.[71] As such, some sort of whataboutist argument can almost always be found against virtually every actor in the international system. During the Cold War, such arguments were frequently employed, especially by the USSR and its allies.[72] For instance, when addressing the 1983 U.S. intervention in Grenada before the U.N. Security Council, Nicaragua countered the United States' arguments by invoking numerous U.S. interventions in Latin America from 1846 onwards.[73] In a more recent example, when responding to the ICC's arrest warrant against Putin, South Africa easily invoked the U.K.'s failure to extradite Augusto Pinochet a quarter of a century earlier.[74] The super-availability of whataboutist arguments is not only a product of repeat play across time, but also of the broad scope of state action at *any* given time. Thus, for instance, in response to criticisms of its 1956 intervention in Hungary, the USSR argued that the debate in the U.N. Security Council was a mere "smokescreen" for the contemporaneous intervention by the U.K. and France in Egypt during the Suez Crisis.[75]

Beyond super-availability, whataboutism is attractive in international law also because of the latter's decentralized nature. International law is notoriously lacking in central enforcement mechanisms. For this reason, many view it chiefly as an argumentative practice in which different actors compete for legitimacy and authority while utilizing legal forms of argumentation and narrative building.[76] Under this view, international law is a process of contestation, rather than a moment of decision, on legality or illegality. Reputation and public opinion are paramount—no less, if not more, than formal adjudication.[77] When an actor is successfully

71. *See* Andrew T. Guzman, *A Compliance-Based Theory of International Law*, 90 Calif. L. Rev. 1823, 1846 (2002).

72. *See* Bowell, *supra* note 34, at 98.

73. U.N. SCOR, 38th Sess., 2487th mtg. at 1–5, U.N. Doc. S/PV. 2487 (Oct. 25, 1983).

74. Chothia & Greenall, *supra* note 27.

75. U.N. SCOR, 754th mtg. at 13, U.N. Doc. S/PV.754 (Nov. 4, 1956).

76. *See generally* Ingo Venzke, *International Law as an Argumentative Practice: on Wohlrapp's Concept of Argument*, 7 Transnat'l Leg. Theory 9 (2016); Hakimi, *supra* note 20, at 1299–1301; Douglas Guilfoyle, *The Rule of Law and Maritime Security: Understanding Lawfare in the South China Sea*, 95 Int'l Aff. 999, 1002 (2019); Aurel Sari, *Norm Contestation for Strategic Effect: Legal Narratives as Information Advantage*, 83 ZaöRV 119 (2023).

77. *See generally* Andrew T. Guzman, *Reputation and International Law*, 34 Ga. J. Int'l & Comp. L. 379 (2006).

portrayed as an international pariah, it is easier to initiate a process of othering, which leads to its "outcasting."[78] This contributes to the power of whataboutism in international law, since an important effect of such arguments is to complicate the narrative in a manner which reduces the public's sympathy towards the alleger. In a legal environment in which legitimacy is a key currency, and public mobilization is almost a precondition for enforcement, exposing the arguer's inconsistency creates a clear benefit.[79]

Be that as it may, it is difficult to infer direct conclusions on the normative purchase of such arguments from these structural factors. The nature of international law as a process, and its decentralization, may explain *why* actors would be tempted to deploy whataboutism, but does not tell us whether such arguments *should* matter.

B. Voluntarism, Reciprocity, and Customary International Law

International law is amenable to whataboutist argumentation also because of its traditional jurisprudential assumptions. Key in this context is the widespread perception that international law is voluntarist, meaning that all binding rules must be traceable to explicit or tacit consent of states.[80] Voluntarism, in turn, arguably includes the presumption that consent to be bound in an agreement cannot imply the consent to engage in continuous performance if the opposing party fails to perform its own obligations. Hence, the notion of voluntarism is closely related to the expectation of reciprocity.[81] In the most immediate sense, reciprocity means that a state can justify its own deviation from a rule in response to

78. On "outcasting" as a means to enforce international law, see generally Oona Hathaway & Scott J. Shapiro, *Outcasting: Enforcement in Domestic and International Law*, 121 YALE L.J. 252 (2011).

79. In this context, Borrelli gives the fascinating example of the 1957 trial of Algerian National Liberation Front member Djamila Bouhired by a French Military Court in Algeria. Her lawyer, Jacques Vergès, advanced explicit and unapologetic *tu quoque* reasoning—invoking the horrors of French colonialism—being acutely aware that this defense was unavailable in positive terms. He aimed, rather, to stir public opinion, which eventually pressured the French president to pardon Bouhired. Borrelli, *supra* note 21, at 328.

80. *See, e.g.*, Prosper Weil, *Towards Relative Normativity in International Law*, 77 AM. J. INT'L L. 413, 420 (1983).

81. *See generally* Ernst Schneeberger, *Reciprocity as a Maxim of International Law*, 37 GEO. L.J. 29 (1948).

a previous violation, either as a *countermeasure* or, in the face of a material breach, as grounds to terminate an agreement altogether.[82]

Of course, as much as reciprocity plays a wider role as a basis for obligations in international law, there would be more instances in which the alleger's inconsistencies could be invoked as a relevant factor when countering its allegations. This is the case because if international law is just a complex web of reciprocal obligations, the alleger's own failure to perform can virtually always be molded into a seemingly relevant argument. Indeed, in the past, the notion of reciprocal violation applied to all aspects of international law, including in fields such as the laws of war (*jus in bello*), which permitted "belligerent reprisals."[83] The idea survives—although in a more limited manner—in the modern law of countermeasures within the law on state responsibility.[84]

The notion of reprisals under *jus in bello* has been subject to much debate, which sheds light on the relationship between whataboutism and reciprocity. Within this debate, some international lawyers claimed that reciprocity-based arguments essentially reflect *tu quoque* logic, according to which a previous violation by State A releases State B from its obligation, and also provides a substantive justification for deviating from it.[85] However, others, such as Frits Kalshoven, point out that reprisals depart from the logic of *tu quoque*, since they are not justified in and of themselves, but only insofar as they constitute a "law enforcement" measure meant to induce compliance with a specific reciprocal obligation.[86] In

82. Int'l L. Comm'n, Draft Articles on Responsibility of States for Internationally Wrongful Acts, *in* the Report of the International Law Commission on the Work of its Fifty-Third session, art. 22, U.N. Doc. A/56/10 (2001) [hereinafter ARSIWA]; Vienna Convention on the Law of Treaties, art. 60, May 23, 1969, 1155 U.N.T.S. 331 [hereinafter VCLT].

83. *See* Frits Kalshoven, Belligerent Reprisals 362–63 (11th ed. 2005). Even today, reciprocal whataboutism remains prevalent in the justificatory discourse of states involved in conflicts against organized armed groups, emphasizing that the latter systemically defy international law. *See* State of Isr., The 2014 Gaza Conflict: Factual and Legal Aspects viii (2015) (claiming that Israeli operations in Gaza should be understood in light of the fact that "the conflict involved non-state actors who defy international law, including the Law of Armed Conflict applicable to the hostilities within the Gaza Strip.").

84. *See* ARSIWA, *supra* note 82, arts. 49–52.

85. *See* Kalshoven, *supra* note 83, at 364; *compare id.*, at 362–63 with Yee, *supra* note 21, at 97–99 and Borrelli, *supra* note 21, at 321–22.

86. Kalshoven, *supra* note 83, at 362; ARSIWA, *supra* note 82, art. 49(1) (providing that countermeasures can only be taken "in order to induce that State to comply with its obligations . . . .").

other words, in reprisals (and countermeasures), State B might be justified in violating its obligations towards State A not for an external reason, but for one internal to the reciprocal obligation in order to uphold it.[87]

The latter point reveals that when claims of inconsistency are made on the basis of reciprocity, they are theoretically and normatively distant from the general scheme of whataboutist arguments, or, at most, represent a very narrow category of such arguments.[88] When the mere initial obligation is a product of the reciprocal agreement, the lack of consistency by State A is *ipso facto* relevant for potential deviations by State B. This is not the case, however, where it is harder to trace claims of inconsistency to a reciprocal obligation. And indeed, reciprocity as the key basis of international obligation is not as predominant in modern international law as in the past. Some international obligations, such as humanitarian ones, are nowadays beyond reprisals or countermeasures.[89] Precisely for this reason, the International Criminal Tribunal for the former Yugoslavia ("ICTY") rejected the *tu quoque* defense in the Kupreškić case by reference to the fact that norms of international humanitarian law are not reciprocal.[90] In the same vein, peremptory norms, which "reflect and protect fundamental values of the international community,"[91] cannot

87. Some have argued for instance, that even if not a substantive justification, *tu quoque* is in fact an independent, *procedural* doctrine in international law according to which State A cannot complain about a practice by State B which it itself engages in relation to A. *See* U.S. Dep't of Def., Law of War Manual §§ 3.6.2, 18.21.2 [hereinafter DoD Manual]; KALSHOVEN, *supra* note 83, at 364 (this is the logic of "unclean hands.").

88. This is reflected also formally, in the constrained and structured way in which reciprocity-based deviations must be made. *See* ARSIWA, *supra* note 82, art. 52 (setting forth the detailed procedure for countermeasures).

89. Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol 1) art. 51(6), June 8, 1977, 1125 U.N.T.S. 3 ("Attacks against the civilian population or civilians by way of reprisals are prohibited."); ARSIWA, *supra* note 82, art. 50(1); DoD Manual, *supra* note 87, §18.2.2.

90. Prosecutor v. Kupreškić, Case No. IT-95-16-T, Trial Chamber Judgment, ¶ 23 (Jan. 14, 2000); *see id.*, ¶ 511 ("The Trial Chamber wishes to stress, in this regard, the irrelevance of reciprocity, particularly in relation to obligations found within international humanitarian law which have an absolute and non-derogable character. It thus follows that the *tu quoque* defence has no place in contemporary international humanitarian law.").

91. Int'l L. Comm'n, *Draft Conclusions on Identification and Legal Consequences of Peremptory Norms of General International Law (jus cogens)*, Conclusion 2, [forthcoming] Y.B. INT'L L COMM'N, U.N. Doc. A/77/10 [hereinafter *Conclusions on Jus Cogens*].

be derogated from even by reciprocal consent.[92] Therefore, in many fields of international law, to the extent that a whataboutist claim might have any relevance, it clearly cannot be reduced to the logic of reciprocity.

However, here lies a paradox, the implications of which are discussed in detail in Part III. Indeed, weakening the reciprocal basis of international law has distanced it from a private-law-like system of mutual obligations and diminished the ability to invoke reciprocal inconsistency against an allegation of a violation. However, the international legal system's "shift" towards non-reciprocal norms such as *jus cogens*[93] reconstructed the system as closer to one of public law, which makes inconsistency-based arguments from *fairness* more relevant.

Another way in which international law can be susceptible to whataboutist argumentation stems from the specific way customary international law develops and changes. At least according to the orthodox view, establishing a norm of customary international law requires state practice and *opinio juris*.[94] State practice must be of course consistent, otherwise it would be impossible to observe a pattern of behavior.[95] Importantly, contrary state practice and *opinio juris* can serve to change an already binding norm.[96] Accordingly, an argument that might on its face look like a pure whataboutist claim can be relevant *at least* by raising doubt about whether the customary international norm, presumably prohibiting the conduct, is still valid.[97] A comparable point was made by Admiral Karl Dönitz's defense in Nuremberg. Dönitz was charged with unrestricted submarine warfare in World War II. In his defense, he claimed that the Allies had engaged in the same type of warfare at the time, in order

92. VCLT, *supra* note 82, art. 52; *see also* Prosecutor v. Kupreškić, *supra* note 90, ¶ 520; *Conclusions on Jus Cogens*, *supra* note 91, Conclusion 10.

93. *See* Borrelli, *supra* note 21, at 330.

94. *Draft Conclusions on Identification of Customary International Law*, Conclusions 2–3, U.N. Doc. A/73/10 (2018), *reprinted in* [2018] 2 Y.B. Int'l L. Comm'n 65, U.N. Doc. A/CN.4/SER.A/2018/Add. 1 (Part 2).

95. *Id.* Conclusion 8.

96. *See generally* Rebecca Crootof, *Change Without Consent: How Customary International Law Modifies Treaties*, 41 Yale J. Int'l L. 237 (2016).

97. A somewhat related example, albeit not in the context of customary international law, is to argue that previous practice amounts to "subsequent practice" which shapes the interpretation of a treaty norm, as per the laws on treaty interpretation. VCLT, *supra* note 82, art. 31(3)(b). For an argument of this type *see generally* Eugene Kontorovich, *Unsettled: A Global Study of Settlements in Occupied Territories*, 9 J. Legal Analysis 285 (2017).

to demonstrate that his own conduct was not illegal.[98] However, such arguments—like those relating to countermeasures—require a specific doctrinal form, which somewhat tempers their potential. Namely, for a claim of inconsistency to be relevant as an argument about the validity of customary international law, it would not be sufficient to point to a breach by others. Rather, it would also be necessary to conform with the doctrinal requirements of such arguments, for example, to demonstrate that this breach is accompanied by *opinio juris* reflecting a position that the norm is no longer binding.[99]

Nonetheless, the interaction between whataboutism and claims about customary international law can be more important if our view about the sources of international law tends towards legal realism. In this context, some argue that there is no single "rule of recognition" for the development of customary international law. Rather, they claim, normative positions might be treated as customary or not in some settings and by some actors, depending on a myriad of factors.[100] If this descriptive observation is correct, arguments on previous positions or practice might have significant traction on the perception of customary international law in certain instances, even if the strict doctrinal requirements are absent. In general, this will be the case when the arguer manages to convince others that previous inconsistent practice has in fact diminished the authority of the rule.

Be that as it may, as with reciprocity, the majority of whataboutist claims are not made in the specific context of an argument about the validity of a customary norm. The question remains as to the relevance of such claims in wider contexts that do not fall squarely into the doctrinal forms of reciprocity or customary law.

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98. *See* Borrelli, *supra* note 21, at 326 (referring to Trial of K Dönitz, Judgment, 1 I.M.T. 171, at 310–15 (Oct. 1, 1946)).

99. Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. 14, ¶ 186 (June 27) ("If a State acts in a way prima facie incompatible with a recognized rule, but defends its conduct by appealing to exceptions or justifications contained within the rule itself, then whether or not the State's conduct is in fact justifiable on that basis, the significance of that attitude is to confirm rather than to weaken the rule.").

100. Monica Hakimi, *Making Sense of Customary International Law*, 118 MICH. L. REV. 1487, 1510 (2020).

C. Inconsistency and Empire

A step closer to a discussion on the potential normative relevance of inconsistency can be found in the increasing critical preoccupation in recent decades with international law's close relationship with empire.[101] As part of their multifaceted critique of international law, writers in the tradition of Third World Approaches to International Law ("TWAIL") highlighted how postcolonial international law condemns as unlawful the same practices empires employed in the past to achieve their comparative advantages. One contemporary example is some Global South states' claims concerning obligations pertaining to the climate crisis. As the argument goes, emerging economies should not *now* be subjected to environmental standards that would hinder their development in relation to the Global North, since the latter was completely free to exploit the environment and achieve its comparative advantages in the past.[102]

In fact, this type of argument is central to what is widely considered a foundational moment of TWAIL: Judge Radhabinod Pal's famous dissent in the Tokyo Trial.[103] In his dissenting opinion, Pal held that Japanese leaders in World War II could not be convicted of crimes against peace, mainly because in the period before the trial, "no war"—even if unjust—was considered "[a] crime in international law."[104] Therefore, a conviction in this case would run afoul of the principle of no ex post facto punishment. To this statement Pal added what seems to be the underlying normative impulse of his ruling: "any interest which the Western powers may now have in the territories in the Eastern Hemisphere was acquired mostly through armed violence during this period" and that none of their wars could be considered just.[105] While in formal legal

101. *See generally* Antony Anghie, Imperialism, Sovereignty and the Making of International Law (2004).

102. *See, e.g.*, Paul G. Harris, *Fairness, Responsibility, and Climate Change*, 17 Ethics & Int'l Aff. 149, 155 (2003).

103. Antony Anghie, *Rethinking International Law: A TWAIL Retrospective*, 34 Eur. J. Int'l L. 7, 76 (2023); Int'l Mil. Trib. for the Far East, Dissentient Judgment of Justice Pal (Nov. 4, 1948) (1999 ed.) [hereinafter Pal's Dissent]; Adil Hasan Khan, *Inheriting a Tragic Ethos: Learning from Radhabinod Pal,* 110 AJIL Unbound 25, 27 (2016) ("In his Tokyo Tribunal dissent, Pal argued that in a world that was still very much under imperial control, the Tribunal's effort to authorize the outlawing of 'aggression,' while undertaken in the name of the 'universal,' would ultimately operate to preserve the imperial status quo by criminalizing any anti-imperial revolt.").

104. Pal's Dissent, *supra* note 103, at 36.

105. *Id.*

terms Pal's invocation of previous Western conduct served as evidence that unjust wars were not previously criminalized, his emphasis on past Western actions—in the same geographical area—clearly served an additional critical function. Japan's World War II practice, he pointed out, merely "emulated the western powers," but "unfortunately [for Japan] they began at a time" where this was made impossible precisely because of Western dominance.[106]

Granted, this form of "critical whataboutism" did not develop into a broader theory on inconsistency in international law. Still, by pointing out inequalities at the basis of the international legal system, it does make an important connection between the normative intuition that there might be *something* to these arguments and the particular history and reality of international law. What is needed is a theory on why, and when, the inequality reflected in inconsistency is relevant in international legal argumentation. The following Part explores this question.

III. Relevance and Fairness

What, then, is the salient question pertaining to the relevance of inconsistency in international law? To recount: Possible effects of inconsistency—such as undermining the speaker's authority or credibility—might be relevant in international legal argumentation, but are not by any means unique to it. Reciprocity is important, but as shown in the previous Part, such arguments are not purely "whataboutist," and even if they are, they only represent a specific and narrow form of such arguments. The same is true concerning arguments about customary international law. As this Part claims, the theoretically unique question about the relevance of whataboutism in international law is whether the original alleger is under a duty to act fairly towards the whataboutist objector. This question, in turn, is further complicated by the particular position of the state as simultaneously a "private" and "public" actor on the international level.

This Part first demonstrates that the distinction between "private" or "public" relations between the parties indeed makes a dramatic difference in our intuitions on the relevance of a normative whataboutist argument. It then proceeds to discuss the private/public duality of the state and suggest indications for the exercise of public power that would

106. *Id.* at 499.

breathe relevance into such an argument. It concludes with preliminary implications and limitations of this distinction.

A. Horizontal and Vertical Whataboutism and Obligations of Fairness

If whataboutism is advanced by invoking the alleger's inconsistency in terms of bias or hypocrisy, the critical question in international law would be, I argue, whether the objector has grounds to claim that the alleger is under an obligation to act fairly towards them. This, in turn, requires sorting out whether the relations between the parties can be viewed as exercises of public power. This is because the obligations of fairness that might establish relevance in such arguments generally exist when public powers are exercised, and not in private, interpersonal relations.[107]

To see this, consider the following examples. Jamal sues Nur for breach of contract. Nur argues, however, that Hassan breached a similar contract with Jamal a short while ago, but for some unknown reason, Jamal refrained from suing Hassan in that case. Nur feels that she is being wronged because Jamal is suing her but has not sued others in similar circumstances. Perhaps she feels Jamal is being misogynistic or that he is more lenient with Hassan because they have mutual friends. Essentially, Nur is leveling an argument based on *fairness* against Jamal, that Jamal exhibited *bias* towards her. Now, this argument seems to have little purchase as a legal argument in private law. On liberal assumptions, there is no underlying web of obligations that makes Jamal's inaction in relation to Hassan's previous violation pertinent to his contractual relations with Nur. What drives this intuition is that we do not normally think that individuals are under an obligation to enforce their rights equally against all that breach an agreement with them.

Now, imagine that Jamal sues Nur for breach of contract, but this time, Nur argues in her defense that a short while ago, Jamal violated a similar contract with Shada. Nur feels that by taking legal action against *her* on account of a violation that Jamal commits against *others*, he is being

107. This is not to say that obligations of fairness never apply in private relations, but while in the exercise of public power this is the default, obligations of fairness in private law are more limited, and are usually bound to a particular interaction, and as this Section demonstrates, do not seem to exist in the context in which most whataboutist claims are made, i.e., relation to equality in enforcement. On fairness obligations in the private law of enforcement of contracts, see, for example, Stephen Waddams, Sanctity of Contracts in a Secular Age: Equity, Fairness and Enrichment 2–3 (2019).

hypocritical and excludes himself from being bound by the same standards that he now invokes against her. As in the example above, however, Jamal's *general hypocrisy* will not help Nur. On liberal assumptions, his violation towards Shada is none of Nur's business, and accordingly she cannot invoke it as a legal defense against him. In both examples, Jamal's bias or general hypocrisy might portray him in a bad light but do not seem to be of any normative purchase in this specific context.[108]

The parallels in international legal settings are straightforward: Recall, an argument from *bias* would be, for instance, that international actor A, which sanctions or condemns State B for human rights violations, failed to condemn or sanction similar or worse human rights violations by State C. An argument from general hypocrisy would be that international actor A, which sanctions or condemns State B, has itself committed similar wrongful acts in other contexts. The bottom line is this: If we view inter-state relations as private-law-like relations between sovereign equals, such claims of "horizontal whataboutism" would be irrelevant just like those made by Nur against Jamal.

That there might be such cases on the international level becomes evident when we consider the example of dispute settlement in the World Trade Organization ("WTO"). Assume that State A initiates a dispute settlement procedure against State B, alleging that the latter has discriminated against its products in violation of its national treatment obligations under WTO law.[109] In general, it would be strange if State B would claim, in its defense, that State A has not pursued a similar case against a similar violation by State C, or that State A has violated similar norms in relation to State D. This is because, for better or for worse, we tend to view trade relations between states, in general, as closer to private law interactions.

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108. This is as opposed to arguments of particular hypocrisy. In such cases, Jamal would have acted wrongly against Nur in the context *of the specific action*; whereas here, Nur could perhaps argue for unclean hands and similar defenses. *See supra* Part I, Section D.

109. General Agreement on Tariffs and Trade 1994, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 U.N.T.S. 187, 33 I.L.M. 1153 (1994) art. III. On the dispute settlement procedure under WTO law, see Dispute Settlement Rules (DSU): Understanding on Rules and Procedures Governing the Settlement of Disputes, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 U.N.T.S. 401 [hereinafter DSU].

Our intuition changes at once, however, if relations of public authority exist.[110] Returning to Jamal and Nur: Imagine that in the first example, Jamal was not a party to a contract with Nur but a law enforcement official that failed to act against Hassan and is now moving to punish Nur for the same offense. Or, in the second example, that Jamal is a public official who personally committed wrongs that he now presumes to eradicate in his public capacity. Since public authority presumes obligations not to act in a biased manner, whataboutism claims seem potentially relevant in such cases. Indeed, domestic law doctrines of "selective enforcement" are common only in relation to the exercise of public power.[111] It is also expected from those exercising public power not to view themselves as exempt from the law, and if they do so, their legitimacy to continue performing their public function is greatly diminished.[112]

On the international level, whether such obligations exist is a corollary of a complicated question: Do international actors relate to one another horizontally as free individuals, or are they also exercising *vertical* public power vis-à-vis each other? Indeed, evidence for the relevance of both the considerations of bias and general hypocrisy in international law can be found in some cases where states exercise manifestly public functions: for instance, when they are elected to bodies mandated to enforce or supervise collective interests. The U.N. Human Rights Council ("HRC") is a case in point. Following critiques concerning the alleged selectivity and composition of its predecessor—the U.N. Commission on Human Rights—the U.N. General Assembly 60/251 recognized the importance of "objectivity and non-selectivity in the consideration of human rights issues, and the elimination of double standards and politicization" as

110. Although there are important theoretical distinctions between public *authority* and *power*, for the purpose of this Article, I use them interchangeably. *See, e.g.*, Jiří Přibáň, Constitutional Imaginaries and L*egitimation: On Potentia, Potestas, and Auctoritas in Societal Constitutionalism*, 45 J.L. & Soc'y 30, 30–31 (2018).

111. On selective enforcement by public authorities, see generally Terrill A. Parker, *Equal Protection as a Defense to Selective Law Enforcement by Police Officials*, 14 J. Pub. L. 223 (1965).

112. *See, e.g.*, U.S. Const. art. II § 4 ("The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors."); Martin Fletcher, *We Cannot Have a Criminal Prime Minister*, The New Statesman (Apr. 12, 2022), https://www.newstatesman.com/comment/2022/04/we-cannot-have-a-criminal-prime-minister [https://perma.cc/N5GC-8C6J].

grounds for the decision to establish the HRC.[113] This is an explicit reference to the normative relevance of *bias* whataboutism. The relevance of *general hypocrisy* is also reflected in the Resolution. The Resolution requires that when electing states to the HRC, considerations should be given to "the contribution of candidates to the promotion and protection of human rights."[114] Similarly, when electing non-permanent members to the U.N. Security Council—the quintessential public body of the international system, mandated with the "primary responsibility for the maintenance of international peace and security"[115]—the General Assembly must pay special regard to the candidate state's contribution "to the maintenance of international peace and security and to the other purposes of the Organization."[116] Both of the latter examples reflect the notion that a state that is itself violating human rights or endangering international peace and security cannot claim legitimacy to exercise public power, in such matters, vis-à-vis others.[117]

However, most international interactions take place outside such formal "public" settings; they take the form of states condemning each other, or imposing sanctions on one another, in looser contexts. Here, the question of the relevance of normative whataboutism in legal argumentation becomes its most complex. This is because competing perceptions of states as individuals conducting private relations, *and* as exercising public power in relation to one another, seem to exist side by side in international law. The next Section exemplifies this problem.

B. The Relevance of Whataboutism and the Duality of the State

The simultaneous perception in international law of the state as both analogous to an individual and as a public actor is one of the basic features of the international legal system. This duality at least partly explains, I argue, international lawyers' conflicting intuitions on the relevance of

113. G.A. Res. 60/251, pmbl. (Apr. 3, 2006).
114. *Id.* ¶ 7.
115. U.N. Charter art. 24, ¶ 1.
116. *Id.* art. 23, ¶ 1.
117. The same impulse could be found in the Nuremberg trial of Admiral Dönitz, in which the Court—apparently fearing for its own public legitimacy—excluded from his punishment his participation in unrestricted submarine warfare, because the Allies have acted the same. *See* Borrelli, *supra* note 21, at 327. Borrelli interestingly uncovers that one sitting judge feared that punishing Dönitz in these circumstances would make the court "look like fools." *Id.* (citing FRANCIS BIDDLE, IN BRIEF AUTHORITY 452 (1962)).

whataboutism. Indeed, the "individual analogy" in international law, which constructs states as autonomous actors interacting under a presumption of liberty, could be found in the earliest writings on international law, from Vitoria to Hobbes.[118] This view has endured in modern times, most famously in the Permanent Court of International Justice's *Lotus Case*, where the Court held that in absence of a constraining legal norm, states—by virtue of their independence and sovereignty—were free to act as they wished. [119] By doing so, the Court has extended the liberal presumption of individual liberty to the international level.

At the same time, however, the state has consistently been constructed in international law as possessing some sort of public authority, not only in relation to its own citizens but also on the international level. Most fundamentally, even according to the voluntarist tradition which cherishes sovereign equality, the state is viewed as the lawmaker, chief interpreter, and enforcer of international law—all clearly public functions.[120] For centuries up until the era of the U.N. Charter, it has been taken for granted that states could wage war not only as self-defense, but also to enforce rights and even to *punish* other states in order to "correct" the offender and set an example to others.[121] That one is in a position to punish another, in this sense, is also a hallmark of public power. This understanding has also persisted among positivist thinkers, such as Hans Kelsen, who believed that decentralized sanctioning of "delicts" (even by war, at the

118. *See* Edwin DeWitt Dickinson, *Analogy between Natural Persons and International Persons in the Law of Nations*, 26 YALE L.J. 564, 566–70 (1917).

119. S.S. Lotus (Fr. v. Turk.) 1927 P.C.I.J. (ser. A) No. 10 (Sept. 7), at 18 ("International law governs relations between independent States. The rules of law binding upon States therefore emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law and established in order to regulate the relations between these co-existing independent communities or with a view to the achievement of common aims. Restrictions upon the independence of States cannot therefore be presumed.").

120. *See, e.g.*, Michael Waibel, *Demystifying the Art of Interpretation*, 22 EUR. J. INT'L L. 571, 584 (2011) ("auto-interpretation, from the beginnings of the discipline to the present day, has been a structural feature of the international legal order"). This putative lack of secondary rules has famously led Hart to classify international law as a "primitive" legal system. *See* H.L.A. HART, THE CONCEPT OF LAW 227 (1961). This mix between private and public is found, for instance, in Kalshoven's treatment of reprisals: he considers them simultaneously as means to enforce bilateral obligations but also refers to them as means of "law enforcement." KALSHOVEN, *supra* note 83, at 362.

121. *See generally* David Luban, *War as Punishment*, 39 PHIL. & PUB. AFF. 299 (2012).

time) is one of the characteristics of international law as a "primitive" legal system.[122] Furthermore, the simultaneous public/private construction of the state is reflected in the idea that treaties may serve transactional-private purposes as well as public-lawmaking functions, although all treaties are regulated by the same secondary rules.[123] For example, a bilateral treaty between states for joint infrastructure investments,[124] which is clearly akin to a contract between private individuals, would be subject to the exact same rules of international treaty law that apply to universal, general, and forward-looking treaties such as the U.N. Charter, which are more reminiscent of legislative, if not constitutional, norms.[125] The public/private duality is also found in the recognition in the international law of immunities, that state actions can sometimes be undertaken in the state's sovereign capacity (*acta jure imperii*) and thus subject to sovereign immunity, and sometimes as quasi-private commercial actions (*acta jure gestionis*), regarding which no immunity exists.[126]

A similar tension is found when analyzing conduct within international organizations. For example, how should we understand opportunistic use of the veto power by the permanent members of the U.N. Security Council? Is this an exercise of a treaty-based prerogative, or a breach of public-law-like responsibilities?[127] And do international organizations

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122. *See, e.g.*, Hans Kelsen, Law and Peace in International Relations, 13, 34 (1942).

123. This remains true as the *lex lata* although some have argued that different norms should regulate treaties of different characters. *See* Arnold D. McNair, *The Functions and Differing Legal Character of Treaties*, 11 Brit. Y.B. Int'l L. 100, 101 (1930) (arguing that because of the different functions of treaties, the traditional view that they are governed by the same system of rules creates difficulties).

124. *See, e.g.*, Treaty Concerning the Construction and Operation of the Gabcikovo-Nagymaros System of Locks, Hung.-Czechoslovakia, Sept. 16, 1977, 1978 U.N.T.S. 235.

125. *See, e.g.*, Bardo Fassbender, *The United Nations Charter as Constitution of the International Community*, 36 Colum. J. Transnat'l L. 529, 531–32 (1998).

126. For a recent discussion, see generally Yohei Okada, *Can Acta Jure Gestionis Be Attributable to the State? A Restrictive Doctrine of State Responsibility*, 34 Eur. J. Int'l L. 383 (2023).

127. *See generally* Jennifer Trahan, Existing Legal Limits to Security Council Veto Power in the Face of Atrocity Crimes (2020). The requirement to hold a debate following a veto, adopted in 2022 in the U.N. General Assembly, strongly suggests the public law nature of such decisions, as it implies a duty to give reasons. *See generally* G.A. Res. 76/262 (Apr. 28, 2022). For an analysis, see Rebeca Barber, *The U.N. General Assembly's Veto Initiative Turns One. Is it Working?*, Just Security (Apr. 26, 2023), https://www.justsecurity.org/86140/

only possess the powers of their separate member states in aggregate, or, rather, do they possess broader authority emanating directly from their public functions in relation to the international community?[128]

This duality is also found in cases where the alleged violations are putatively against the interests of the international community as a whole, since the legal doctrine, in such cases, raises the question whether the alleging state acts in a "private" or "public" function, so to speak. Consider the peculiar opposition between two central concepts of modern international law: obligations *erga omnes* and peremptory norms (*jus cogens*). Obligations *erga omnes* are perceived as obligations towards the international community as a whole, the violation of which provides *standing* for all states to invoke the violator's responsibility.[129] The international law of state responsibility accordingly recognizes that third states are *entitled* to invoke the responsibility of another state, if, *inter alia*, the latter breached an *erga omnes* obligation.[130] In other words, the third state has a Hohfeldian liberty to invoke state responsibility in such cases: As put by Special Rapporteur Dire Tladi, "[t]he *erga omnes* character of . . . norms does not create obligations for third States," but "explains the interest of third States" in the wrongful act committed.[131] Presumably, then, if two states breach similar *erga omnes* violations, a third state is entitled to decide whether to invoke the responsibility of both, of one, or none at all. This perception of *erga omnes* reflects private-law thinking, as exemplified in Jamal and Nur's hypotheticals in the previous Section. On this logic, a fairness-based whataboutist allegation against a state based on its inconsistency in reacting to other *erga omnes* violations would be unfounded.

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the-u-n-general-assemblys-veto-initiative-turns-one-is-it-working/ [https://perma.cc/F96E-L48E].

128. See, in this context, the debate on whether the ICC is subject to the same laws on immunity that bind the separate member states, or, rather, that it exercises the *jus puniendi* of the international community as a whole and is therefore not bound to the same rules. *See* Claus Kress, Preliminary Observations on the ICC Appeals Chamber's Judgment of 6 May 2019 in the Jordan Referral re Al-Bashir Appeal 19 (2019).

129. Case Concerning the Barcelona Traction (Belg. v. Spain), Judgement, 1970 I.C.J. 3, ¶¶ 33–34 (Feb. 5).

130. ARSIWA, *supra* note 82, art. 48(1)(b).

131. *See also Third Report on Peremptory Norms of General International Law (jus cogens)*, ¶ 110, U.N. Doc. A/CN.4/714 (Feb. 12, 2018) [hereinafter *Third Report*].

At the same time, however, the same body of law of state responsibility provides that when there is a serious breach of a peremptory norm (*jus cogens*), third states are under certain *duties* in relation to the breach: not to recognize the situation created by the breach or to assist in its maintenance, and also to positively cooperate to bring it to an end.[132] Here, as opposed to the regime of *erga omnes*, this notion envisions the state as an international enforcer, bearing *obligations* to act in the face of serious violations. In contrast to the former, the latter does not presuppose "private" discretion, but seems to assume a uniformity of enforcement obligations characteristic of public authority.[133]

Now, for obvious reasons, there is a broad overlap between the content of *erga omnes* norms (that spawn *rights* to invoke state responsibility) and peremptory norms (that spawn *obligations* to act).[134] It therefore follows that the state as an international actor could simultaneously be a possessor of a private-law-like right to act *and* a public-law-like obligation to act.[135]

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132. ARSIWA, *supra* note 82, arts. 41(1), 41(2). This remains true despite some confusion spawning from ICJ advisory opinions that seemed to derive third-party obligations from the *erga omnes* nature of the violation. *See* Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. Rep. 136 ¶ 159 (July 9). Japan, for instance, claimed that positive duties spawn from "particular norms of international law" such as those relating to non-annexation or decolonization, rather than from the *erga omnes* or *jus cogens* nature of these violations. *See Int'l L. Comm'n, Peremptory Norms of General International Law (jus cogens), Comments and Observations Received from Governments*, at 87, U.N. Doc. A/CN.4/748 (Mar. 9, 2022) [hereinafter *Comments and Observations Received from Governments*].

133. It is perhaps for this reason that some Western states frequently blamed for such inconsistencies argue that these duties have not crystallized as positive international law. Arguably, such states seek to maintain such "enforcement" actions in the realm of private law-like liberties rather than in the sphere of public law-like obligations. *See Comments and Observations Received from Governments*, *supra* note 132, at 84–90, particularly comments by Australia, Israel, U.K. and the United States—the latter stating that that "there is no basis to assert that there is a binding obligation on non-breaching States to address the wrongful act." *Id*. at 89.

134. *See Conclusions on Jus Cogens*, *supra* note 91, Conclusion 17; *see also Third Report*, *supra* note 131, ¶¶ 103–11.

135. One could say that the "entitlement" to act relates to any violations of an *erga omnes* norm, while the obligation is only spawned by "serious" breaches of peremptory norms. *See Conclusions on Jus Cogens*, *supra* note 91, Conclusion 19(3). However, this still represents an oscillation between the state as a "private," rights-bearing actor to one possessing "public" obligations. Furthermore, it is difficult to envision actual violations of *jus cogens* that would not be serious.

This duality explains why normative whataboutist claims might at the same time be perceived as relevant *and* irrelevant in international settings and thus elicit conflicting reactions from international lawyers. But this does not imply that it is impossible to conceive analytically cases in which inter-state interactions might be closer to public than to private ones, and accordingly, that normative whataboutism alluding to fairness might be relevant. The next Section offers some preliminary indications for the existence of such relations of public power or authority. Indeed, although the dual perception of the state in international law is an enduring feature of the system, it is possible to distinguish cases where the public role of the state is more accentuated. If this Section demonstrated why the line is often times blurry, the next Section exemplifies where the line is clearer.

C. A Typology of Public Power

It is beyond the scope of this Article to offer a general theory of public functions in international law. Indeed, its basic claim about the potential relevance of whataboutism, when public authority is exercised, does not require committing to any single approach regarding the nature of such authority.[136] For our purposes, it is sufficient to proceed from what I think is an uncontroversial notion, that a presumed exercise of public power exists *at least* whenever an international actor acts, or claims to act, in favor of interests of the international community as a whole; to safeguard "the common heritage of mankind;"[137] or for "the interests of others" more widely.[138] This is the case whether the act is in the form of condemnation, sanction, or any other enforcement measure. In such cases, accordingly, claims of *bias* or *general hypocrisy* would have normative relevance as a response to the action. From this point of departure, it is

136. *See generally* Rüdiger Wolfrum, *Identifying Community Interests in International Law: Common Spaces and Beyond*, *in* Community Interests Across International Law 19 (Eyal Benvenisti & Georg Nolte eds., 2018) (arguing that governance of spaces beyond national jurisdiction constitutes a community interest and must be guided by the interests of the international community).

137. *See* United Nations Convention on the Law of the Sea, Dec. 10, 1982, arts. 136, 156, 1833 U.N.T.S. 3 (establishing the International Seabed Authority, mandated to administer the resources found on the international seabed, and defining it as common heritage of mankind).

138. *See* Eyal Benvenisti & Georg Nolte, *Introduction*, *in* Community Interests Across International Law 3 (Eyal Benvenisti & Georg Nolte eds., 2018).

possible to offer some indications of when such power is indeed exercised in international law.

The easiest case where the exercise of public power can be said to exist is when the action, towards which the whataboutist objection is leveled, is taken within an international body or governance framework which is mandated to act in favor of collective interests. Such interests could be, for instance, maintaining collective security, promoting human rights, or the governance of commons. Actions within such frameworks may include introducing or vetoing resolutions, imposing sanctions, authorizing the use of force, and so on. Indeed, it is unsurprising that precisely in the sphere of global governance, there has been growing demand that those exercising power would apply administrative, public-law-like principles in their decision-making.[139] As mentioned in Part II, Section A, bodies such as the U.N. Security Council and Human Rights Council are obvious examples, and, of course, the ICC is another important instance.[140] However, such bodies can also exist on the regional level. For instance, the Economic Community of West African States' security protocol establishes a mechanism mandated with several regional "public order" objectives.[141]

Another case is where states act individually, but the basis for their action is a power, obligation, or "responsibility" to act in the interests of the international community as a whole. For example, when a state claims to discharge, explicitly or implicitly, the duties imposed by the

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139. *See* Nico Krisch & Benedict Kingsbury, *Introduction: Global Governance and Global Administrative Law in the International Legal Order*, 17 EUR. J. INT'L L. 1, 2 (2006) ("[W]e see an overall picture of widespread, and growing, engagement with principles of transparency, participation, reasoned decision and review in global governance."). For a book-length engagement with these ideas, see generally EYAL BENVENISTI, THE LAW OF GLOBAL GOVERNANCE (2014).

140. It is important to point out that in relation to the ICC, there are two levels on which public power is exercised. The first is vis-à-vis indicted individuals. The second is concerning states, since they are also affected by ICC decisions to act against their officials or of their allies. In the latter context, public power is exercised where the Court orders states to act, for instance by arresting a person or cooperating with the Court more broadly. It is in this context, for example, that South Africa has attacked the ICC in relation to the arrest warrant against Vladimir Putin. *See* Booty & Ross, *supra* note 40. While there is some overlap between such claims, they also raise different normative considerations.

141. Protocol Relating to the Mechanism for Conflict Prevention, Management, Resolution, Peace-Keeping and Security, art. 3, ECOWAS Doc. A/P10/12/99 (Dec. 10, 1999).

law of state responsibility in relation to violations of peremptory norms (*jus cogens*); when it decides to invoke its *erga omnes partes* standing against another state within a convention which aims to safeguard collective interests;[142] claims that it seeks to preserve the "international rules-based order" (or a similar construction);[143] or acts according to an international "responsibility to protect"[144]—the state essentially invokes its public authority.

Another key case in which public power is evident is when an international actor exercises jurisdiction over individuals. The most obvious case is in the context of ICL. Indeed, most literature in international law on whataboutism, which mainly focuses on its *tu quoque* variation, has been written in this context.[145] It is controversial, in this literature, whether there is indeed precedent for such a defense claim in positive international law, with the key disagreement being the proper understanding of the reasoning of the Dönitz case at Nuremberg.[146] Resolving

142. For instance, when states invoke the Genocide Convention against a third state, they could be said to assume a public function and thus incur obligations of fairness. Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Gam. v. Myan.), Preliminary Objections, 2022 I.C.J. 477, ¶¶ 107–13 (July 22); Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (S. Afr. v. Isr.), Provisional Measures, 2024 I.C.J. 192, ¶ 33 (Jan. 26). In her recent Declaration, Judge Charlesworth alluded to the special duties entailed when invoking collective interests, by holding that "invocation of responsibility for the breach of *erga omnes* obligations carries duties with it." Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (S. Afr. v. Isr.), Declaration of Judge Charlesworth, 2024 I.C.J. 192, ¶ 8 (Mar. 28).

143. *Compare* John Dugard, *The Choice Before Us: International Law or a 'Rules-Based International Order'?*, Leid. J. Int'l L. 223, 232 (2023) (criticizing the notion of "rules-based order" as implying a competing framework to widely accepted international law).

144. *See* G.A. Res. 60/1, ¶¶ 138–39 (Sept. 16, 2005). For an analysis of the Responsibility to Protect as a public law function, see Eliav Lieblich, International Law and Civil Wars: Intervention and Consent 185–86 (2013) (arguing that the doctrine "reflects a transition from a perception of the international community as comprised of self-interested unitary actors, acting to fulfil their 'rights'—perhaps in a manner similar to individuals acting in the realm of private law—to a system in which actors on the international level play a role which is closer to that of an administrative or executive function, perhaps acting as public-global trustees.").

145. *See* sources cited at *supra* note 21.

146. *Compare* Yee, *supra* note 21, at 123–24 (arguing that the Dönitz case accepted the *tu quoque* defense in relation to the ability to punish Dönitz, but that other forms of *tu quoque* were rejected in international jurisprudence) *with* Borrelli, *supra* note 21, at 326–27 (arguing that in Dönitz, the judges decided to self-impose a restriction on their ruling because of their uncomfortable position, not on the basis of legal principle).

this doctrinal debate is beyond the scope of this Article. It suffices, for our purposes, that to the extent that—as argued here—the existence of public power breathes relevance into normative whataboutist arguments, this would clearly be the case concerning ICL.[147]

Furthermore, a crucial point made by feminist legal scholars is that discerning whether public power is in fact exercised in a particular case cannot be done only on the basis of formal distinctions; it must also consider power gaps that enable subordination.[148] In this sense, since public power presumes some exercise of *power*, it makes a difference whether the alleger actually possesses such power in relation to the objector. The more power that the alleger in fact possesses in relation to the objector, the more potentially relevant the whataboutist claim. For example, a normative whataboutist claim that would be made by Nicaragua against the United States would seem to have more purchase than such a claim made by the United States against Nicaragua. Arguably, this is because the de facto public power of Nicaragua in relation to the United States is much weaker.[149] For similar reasons, whataboutist claims by a superpower, such as Russia, against another superpower with roughly equal capabilities (at least in some respects, such as nuclear capabilities) seems to carry much less normative weight than when such claims are made when clear power gaps exist. And indeed, traces of this sliding scale of private/public relations, responsive to relations of power, can be found in positive international law. For instance, in WTO dispute settlement, "due restraint" is required when adjudication is pursued by a member state against a "least-developed country,"[150] precisely reflecting the intuition that power gaps might transform private-law-like relations into something different, more akin to public-law relations. Perhaps such intuition partly explains why Russia goes at length to portray the hegemonic

147. This is the case both in relation to indicted individuals and in relation to states ordered to act by international tribunals. *See* discussion at *supra* note 140.

148. *See* Hilary Charlesworth et al., *Feminist Approaches to International Law*, 85 Am. J. Int'l L. 613, 625–29 (1991); *see also* Natalie R. Davidson, *The Feminist Expansion of the Prohibition of Torture: Towards a Post-Liberal International Human Rights Law?*, 52 Cornell Int'l L.J. 109, 117–21 (2019) (discussing the critique of the formalist public/private divide in the context of the definition of torture).

149. This is not to say that a normative whataboutist claim by a stronger state—such as the U.S. in this example—would not in fact resonate more precisely because of the latter state's power. However, this factual resonance does not lend more *normative* weight to the claim itself.

150. DSU, *supra* note 109, art. 24(1).

position of its Western adversaries,[151] as this strengthens the relevance of its allegations of unfairness against them.

D. Preliminary Implications and the Question of Override

Of course, a question immediately arises regarding the practical legal consequences of the relevance of whataboutism in a particular instance. As stated earlier on, this Article is less about outlining the particular legal technique in relation to whataboutism but is rather about the general question of whether such claims can be "good" legal reasoning in light of sound legal principles.

Nonetheless, as a point of departure for further exploration, one possible consequence of such relevance concerns the shifting of the argumentative burden: When a whataboutist claim is fallacious, it can be set aside summarily. But when it is presented as a potentially relevant argumentative scheme—and as argued in this Article, this would be the case where public power is exercised—the international actor, if it wishes to maintain its authority in making the claim,[152] must at least rebuff the objection against it. It must explain why it is not acting unfairly in the case at hand, or how it intends to rectify this unfairness. For example, in the case of Russia's whataboutist claim against the West, this would mean that the relevant Western states would incur the burden to present, in a legally reasoned manner, the case that there is indeed a valid difference between their previous actions and Russia's aggression against Ukraine. Or, in the context of South Africa's claims against the ICC, the latter would have to offer a detailed response to these allegations.

But what if the argument on unfairness cannot be rebuffed or rectified, and it is apparent that at hand is a case of bias or general hypocrisy? In such cases, the normative dilemma is at its starkest. Are we willing to defend a claim that a prosecution in relation to mass atrocities should be dropped, that the ICC should not investigate a situation or issue an arrest warrant, or that a state would not have any legitimacy to act against *jus cogens* violations, due to its inconsistency, relevant and valid as it may be?

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151. *See, e.g.*, Charles Maynes, *Russia's Putin Lashes Out at the U.S. and Claims Victory Over Sanction,* NPR (June 17, 2022, 3:02 PM), https://www.npr.org/2022/06/17/1105896419/russia-putin-speech-sanctions [https://perma.cc/4S5V-MMH6].

152. On authority in this sense, see Hakimi, *supra* note 20, at 1294–95 ("Law signals not just that certain outcomes *can* be produced but that . . . what is being done is in some sense right or legitimate.").

In such situations, there are two competing normative imperatives: the necessity to address atrocities versus the fairness obligations inherent in public authority. Does a relevant claim of inconsistency always override the competing imperative? Of course, the answer must be in the negative.[153] Whether this is the case is a question which must be sensitive to the normative context: chiefly, to the gravity of the unfairness reflected in the *inconsistency*, in relation to the gravity of the alleged *conduct* itself.[154]

Put this way, the dilemma of whataboutism is part of a family of dilemmas which ask whether a flaw in the fair process of justice, so to speak, should result in the negation of the allegation.[155] Dilemmas of this family have indeed arisen in international law in the past. When addressing post-WWII prosecutions of Nazi criminals, Hans Kelsen identified a comparable clash of normative imperatives: between the moral wrong of ex post facto punishment and the moral wrong inherent in the atrocities of World War II.[156] Kelsen's solution was to claim that since the core wrong of ex post facto punishment is a moral one, and that when the impugned acts were committed they were indeed morally wrong, there is no moral problem of retroactivity to begin with.[157] Another way to approach this problem was through balancing: Since in normative terms, the wrongfulness of the alleged Nazi crimes was much greater than the moral wrong inherent in ex post facto punishment, the former should trump the latter.

The gist of this reasoning seems applicable to many cases in which we wonder "what to do" with normative whataboutism. It might be the case that Russia's claims against Western bias and hypocrisy are relevant, and that accordingly, Western states acquire a significant burden to explain

153. This is not to say that in real life, there are no situations in which the wrongfulness of the bias would be so grave that it would not only negate standing but also justify the impugned action. *See, e.g.*, Bowell, *supra* note 34, at 95–96 (presenting a hypothetical in work relations, where there is "an instance of unfairness that, on the face of it, is relevant to refusing the request to work—the unfairness seems to override any obligation to take on the . . . work.").

154. On override, see Adil Ahmad Haque, Law and Morality at War 7 (2017) ("Rights may be *overridden*—and therefore infringed but not violated—when the moral reasons in favor of infringing them outweigh the moral reasons against infringing them.").

155. These dilemmas are rife in the law of evidence, for example, in the context of "fruits of the poisonous tree" doctrine. For a survey, see generally Stephen C. Thaman, *Fruits of the Poisonous Tree in Comparative Law*, 16 Sw. J. Int'l L. 333 (2010).

156. Hans Kelsen, Peace Through Law 87 (1944).

157. *Id.* at 87–88.

why they have not acted against *other* violators; why *they* should not be sanctioned; why *their* leaders should not be arrested; or why *they* are in a justifiable position to act against Russia. It might also be the case that such claims cannot be easily rebuffed.[158] Yet, even if we would presume that the wrongfulness of Russia's actions and those of the West are similar, it is clear that the wrongfulness of the Western *inconsistency* itself is not weighty enough to justify refraining from action—right here, right now—against the mass atrocity of unprovoked aggression.[159]

Conclusion

This Article sought to advance a theory on the relevance of normative whataboutism in international law. It suggested to part from the view of whataboutism as a fallacy and rather to analyze it as an argumentative scheme. In its normative sense, whataboutism invokes unfairness and appeals to the relevance of bias and general hypocrisy. As this Article demonstrated, for such allegations to be of relevance, there must be an exercise of public power, which spawns, in turn, obligations of fairness. This evokes a fundamental question in international law on the nature of inter-state relations as private versus public.

As the Article shows, there are indeed many cases in which international actors clearly exercise public functions, and normative whataboutism may have argumentative relevance. These involve situations where the international actor acts or claims to act for the benefit of the international community. Usually, this takes place when the action is undertaken within an institution mandated to promote collective interests; when a state acts to fulfill third-party obligations such as those deriving from breaches of *jus cogens*; or when an international actor acts vis-à-vis individuals, such as in the context of ICL. In all cases, the

158. *But see* Brunk & Hakimi, *supra* note 8.

159. It should be noted that in such cases, the reasons against inconsistency do not "disappear" but remain in the normative background, although they are overridden. In this sense, the inconsistency remains condemnable, even if it should not result in negating the allegation or the alleger's standing altogether. For comparable reasoning, see Federica Paddeu, *Military Assistance on Request and General Reasons Against Force: Consent as a Defence to the Prohibition of Force*, 7 J. Use of Force Int'l L. 227, 235–36 (2020); *see also* John Gardner, Offences and Defences: Selected Essays in the Philosophy of Criminal Law 144 (2007).

conclusion that public power is indeed exercised is strengthened when there are significant power gaps between the parties.

The question concerning the exact doctrinal consequences of relevant whataboutism provides ample directions for further research, beyond the scope of this Article. Such a research agenda would need to engage with many fields of international law separately, since it seems impossible to provide a comprehensive answer on the implications of inconsistency that can be applicable to all international legal fields. Be that as it may, one limitation seems clear across the board: The relevance of whataboutism cannot have overriding importance in all of these cases, lest it become a license to atrocity—and as such, an argumentative tactic available for the sole benefit of the most cynical of international actors.