Leiden Journal of International Law, 16 (2003), pp. 839–847
© Foundation of the Leiden Journal of International Law Printed in the United Kingdom DOI: 10.1017/S0922156503001523

INTERNATIONAL SYMPOSIUM ON THE INTERNATIONAL LEGAL ORDER*

Introduction

DAVID KENNEDY

That the international system has changed dramatically in the years since the end of the Cold War has become a commonplace. But which changes are most profound, and what is their significance for international legal order? The last decade of the twentieth century generated dozens of books and articles hailing a transformed world order and interpreting its political, economic, and social consequences. We have more distance now. The first years of this century have underscored the significance of changes in the structure of international affairs – but they also demonstrate how difficult it is to interpret them with confidence.

The tradition of international law, across the globe, has been associated for more than a century with a set of political and ethical commitments – to multilateralism, institutionalism, humanitarianism, liberalism in the broadest sense. The international legal order was a focal point for some the last century's most fateful political dramas – decolonization, human rights, arms control, responses to genocide and environmental degradation – as well as the site for any number of more routine pragmatic endeavours – law of the sea, of the air, of space. But not all problems of significance found their way onto the international legal agenda. The world of trade and investment, the world of the market, of development, of technological change, these were largely constructed outside public legal order. Public law has seemed innocent of the choices by which the world's wealth is distributed and of the instruments which bind the world's cultures. Many of the most significant aspirations expressed by international judgements and encoded in international instruments have not been implemented.

The international order has changed – less 'co-operation and coexistence' among states than the 'globalization' of 'governance' for an international market. What are the consequences for the legal order? In this century will international law again be a centre for political drama? Will issues of significance again slip from its grasp? What will be its contribution? There is broad agreement that the conditions for security, the institutions of global governance, the structure of economic prosperity and social welfare, and the meaning of solidarity and pluralism have all changed in the last years. But what do these changes suggest that we do?

* Held on 4–5 November 2002, at the International Institute for Peace, Vienna. Proceedings edited by David Kennedy, Manley O. Hudson Professor of Law, Harvard Law School.

The International Institute for Peace convened a two-day symposium on 4–5 November 2002 to reconsider the international legal order in the light of the dramatic changes which followed 1989 and which have been given new focus by the events of 2001. We were hosted by Dr Michael Häupl, the mayor of Vienna, at the Austrian Diplomatic Academy. Recognizing that the international legal order is the work of people with projects, commitments, expertise, the Institute brought together leading international academic and institutional figures from various legal cultures. We asked them to focus on four key areas of transformation in the international system, and on their implications for international legal order.

Our objective was to spark debate and new thinking. We present here, in shortened form, some of the papers which sparked our discussion and some highlights from the debate which ensued. Participants, in addition to those whose papers are published here, included

Deborah Cass, Senior Lecturer in Law, London School of Economics

Antongiulio De Robertis, Professor, University of Bari

Günter Frankenberg, Professor of Public Law, Philosophy of Law, and Comparative Law, J. W. Goethe University, Frankfurt am Main

Ben Novak, Lecturer in Philosophy and International Law, City University, Bratislava

Max Schmidt, Professor Emeritus, Humboldt University, Berlin; Member of the Executive Board, International Institute for Peace, Vienna

Nodari A. Simonia, Director, Institute for World Economy and International Relations, Russian Academy of Sciences (IMEMO)

Peter Stania, Director, International Institute for Peace, Vienna

We divided our work into four working themes. In considering each theme, we asked whether the most fundamental ideas in the international legal tradition retain their usefulness – like the idea that international governance is separate from both the global market and from local culture, or that it is more a matter of public than of private law. Do these foundational commitments narrow our sense of what is possible and appropriate for foreign policy? for international legal order?

Economy, prosperity, and social justice

Despite the salience of the international market, it has been difficult to contest its terms. The market of neo-liberalism, market shock, and the passive state has now given way to a more chastened practice of ongoing economic management and attention to market failures. Meanwhile, the institutional and legal machinery associated with the global market has expanded. Not everyone lives in the same international market – there remain intense disparities in the legal and political conditions for economic transactions within the first world and between the first world and the third. What role remains for the international legal order in contesting the conditions of economic justice and market participation? Would it be useful, for

example, to develop an international public regulatory scheme for international capital movements? How might international legal order now respond to the challenges of facilitating and regulating the global market, the persistent problems of development and corruption, and the social dislocations that accompany market transitions?

The international market is not a force of nature – it is a legal construct, an array of economic activities made possible by a structure of public and private law. What choices are now available to us in structuring the global market? What have been the distributional choices and consequences of constructing the market in this particular way, and what alternatives remain?

The construction of this global market has transformed the content of public and private law at the national and international levels – we should explore those changes and assess their consequences. Although often presented as necessary consequences of 'globalization', most of these changes represent choices to globalize in one way rather than another – how might we recapture the capacity for choice?

Security, new threats, and new strategies

International security is no longer a matter only of defending with force the territorial integrity of states. Military issues have been tempered by economic and social considerations, while the threats to security have become more varied. Technological, political, and economic changes have transformed the balance of power – placing the United States in a new relationship to its traditional allies, changing security calculations for regional powers, altering the definition of vulnerabilities, threats, and dangers and catapulting a variety of non-state actors into strategic visibility. Military science is changing definitions of defence, strategies of offence, significance of alliance, the role of communication, culture, information. The military has emerged from the collapse of the social welfare state as the only bureaucracy broadly thought capable of acting successfully across a range of issues, so long as the mission is clear and does not bleed back into economic or political matters. The military can be seen as global governor, development planner, of last resort – but also ever more deeply embedded in civilian culture and the economy. Warfare has been woven into the bureaucratic structure of global administration, the break between war and peace eroded. Traditions of social solidarity and of openness and tolerance must also be secured in this new global environment.

Has international law stagnated in the face of new types of warfare and new conceptions of security? Are international legal efforts to regulate warfare still important to safeguard the rights of the small and the poor – or have they become more important in legitimating than in limiting the use of force? To the extent that the world's military has become a police force, and 'world order' the internal security of a dominant power, what role remains for the discourses and institutions of international law?

Global governance: institutions

For a hundred years the international legal tradition has harnessed itself to the fate of the intergovernmental system of institutions. But governance is no longer,

if it ever was, something which takes place there. The politics and decisions of experts, technical people, managing background norms in myriad locations, are far more the site for the political decisions which structure our world. Governance has become a matter for private actors, non-governmental institutions, a matter of communication and legitimacy rather than acts of state. We see decentralization, disagregation, proliferation, judiciary bodies overtaking plenaries, private parties surpassing public administration. What role is there for international institutions in a world governed by experts managing a network of background rules? Does it make sense any longer to think about the legal framework for, say, decisions of the Security Council? Are international legal regulations – say, against warfare – applicable to non-state actors?

These issues are made particularly pressing by the emergence of the United States as a predominant global power. Just as the conventional institutions of sovereignty lose their authority and exclusivity throughout the world, the United States emerges as a new kind of sovereign superpower. What role is there for international institutions and law in a world configured around this sort of power? Much depends now on the nature and intentions of US power – how will the international order that we build now respond to the emergence of other 'super' powers? Nor can we expect the United States to be modifying the terms of debate about them. How has the military and economic hegemony of the United States become so dominant? What, moreover, about sovereignty, including the sovereignty of the United States?

International politics and the role for law

The fragmentation of international political life has long been under way – new states, many with economic and military power surpassing the old great powers, multitudes of splinter groups with access to weapons and the media, myriad private actors who play a role in global policy-making. This has meant a democratization and proceduralization of international relations, an opening to new actors and agendas. But there has been a dark side as well – the erosion of the state as a site for political mobilization, the erosion of the ambitions for public policy and public law, and the expansion of private initiative and private law.

As international lawyers, we are used to thinking of the world as a place of politics, over which we have thrown only the thinnest veneer of legality – but is this concept any longer correct? Increasingly we have a surfeit of law – but only the most tenuous possibilities for political contestation and mobilization. If the work for the last century was to build a law which might constrain politics – our work now may be to build a global politics which can contest the outcomes of a technocratic law.

What should global politics become? How might international legal order be harnessed to that political vision? Might international law become a framework for the development of new forms of governance – forms which go beyond the traditional repertoire of liberal and social democratic constitutional traditions? To an extent this is already occurring, the European Union offering perhaps the

most dramatic example. But the dark side is starkly visible: a newly technocratic governance, shrunk back from political vision and democratic engagement. Can we imagine a project for international law to build a political life, a vibrant global politics on the shifting sand of diverse claims about the distribution of resources and the conditions of social life? How should social pluralism be secured in a globalized world? How could the possibilities for contestation and resistance, for experimentalism and plasticity be strengthened?

Opening address

Paul Andreas Mailath-Pokorny*

Ladies and gentlemen, we are not living in a peaceful world. Multinational states are disintegrating, people are afraid of globalization, terror as a means of gaining ground, fighting terrorism, all this threatens an international legal order. But such an international legal order, a binding legal order, is a prerequisite for prosperity and international peace. To enforce international law is of great importance; international law is the foundation of a changing world order at the beginning of the twenty-first century, at a time when we witness violence and counter-violence, when there are weapons of mass destruction still used in international conflicts. It is all the more important to draw our attention to the biases that exist and to fight against biases. It is also important not to have a simple relativism in terms of values, because this would lead rather easily to a fight of cultures: the international world order or disorder might be a result of that. This is not only true of values in spiritual, idealistic, or other terms, but also in quite concrete terms. As a framework we need an international legal order, in some areas needing to upgrade it in order to establish it, especially where there is resistance to such an order. How politicians managed the situation in the former Yugoslavia is an interesting example of the attempt to implement an international legal order and international legal culture. The city of Vienna, as the representative of its open-minded citizens and the only city within the European Union which hosts a UN organization, supports this symposium organized by the International Institute for Peace. We are looking forward to your expertise, to your assessment of the international situation, of the perspectives of society and the growing role of law at an international level. Those who are without voting rights, who do not have a voice in the international arena, need special protection. Some three or four hundred years ago there was a move to an international order before the nation states came into existence, and I think that we are again at such a point, where changes will take place. I presume that all of us are striving for a more peaceful community of nations, a more just community of nations, and it is in this sense that I want to welcome you to Vienna and wish you all success in your debates.

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* Executive City Councillor for Cultural Affairs, Vienna.

Welcoming speech

Erwin Lanc*

When we started planning this Symposium not even half a year had passed since the terrorist attacks in the United States on 11 September 2001. Terrorism – until then warfare by limited means – developed a new dimension, not only by the extent of damage and killing but by the internationality of its new political background. A political reaction was to be expected. The solidarity of nations committed to human rights was announced, fears of unilateral politics on the part of the United States vanished.

Meanwhile, 2002 is – in any respect – the year of lost illusions.

The gap between the understandable reactions of the victims of terrorism and the legal basis of how they intend to respond is obvious. Terrorism has spread to other continents and countries. Why? Because Islam is violent? Because Huntington proves to be right about the inevitable historic clash of civilizations?

At the same time the so-called regime of liberalism exercised by the World Trade Organization (WTO), the International Monetary Fund (IMF) and the World Bank, which so often favours the strong, industrialized countries, is under criticism. Formerly fearless business has been discovered to be lawless. Price losses on shares are dramatic, damaging not only for shareholders, including pension funds, but also the companies concerned.

Our International Institute for Peace welcomes you as distinguished scholars from four continents. Feel at home in Vienna. Our Diplomatic Academy seems to be the right location for such a meeting. The city of Vienna and its mayor, Dr Michael Häupl, recognize the importance of high-level discussion of the international legal order in their sponsorship of this event.

Welcome to the participants and to the academics and experts who will follow our discussions, and to the representatives of the media interested in our deliberations. We wish all of you two interesting days.

Keynote address: the international legal order

Manfred Rotter†

Avant-propos

To some it may come as a surprise: public international law is law and not just custom[1] or regional folklore. It carries all the elements of a legal system, its virtues and its weaknesses. The so often referred to differences between international and national law are on the institutional, not on the legal, plane.

I am the last one not to realize the difficulties we face on the international plane at present. And yet, careful analysis of what happens shows clearly that the difficulty is not the weakness of international law as such, but rather the

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1. See H. Lauterpacht, *Oppenheim's International Law* (1955), 3; see also H. Kelsen, *General Theory of Law and State* (1946), 15, 328.

unwillingness of many actors to resort to international law in attempting to prevent, avoid, or solve bilateral or multilateral conflicts. The purported or real deficiencies[2] of international law are rather used as excuses for disregarding its provisions altogether rather than as incentives for striving for its improvement to our common benefit.

International law being a legal system, we should first turn to some basics as to the interaction between law and society.

Law and society in general

Law and society are inseparable.[3] A truism, of course, and yet it nevertheless is often disregarded. As long as that disregard originates from sheer incompetence it may be harmless. But if it is used purposely as part of a strategy to mould society to individual values or interests outside valid legal parameters it becomes highly dangerous. It is one thing to commit a 'simple' breach of law and quite another to justify illegal behaviour by challenging the societal adequacy of exactly those rules of law that are in one's way.

The independence of the validity of legal norms from their acceptance and from compliance with them is crucial. Only in this way can law serve as an effective and commonly shared frame for defining behaviour and for solving conflicts.

Lawmaking is a very subtle procedure which, to many laymen, even carries a certain touch of the esoteric. And indeed, it is not all that easy to understand why a group of carefully selected individuals is endowed with the capacity to issue a constant flow of binding rules of conduct, rules which can be executed even by means of the use of force.

If a given legal norm should turn out to be immoral, unreasonable, impractical, or simply senseless in its content, its normative power is unimpaired until it is amended by the competent lawmaking authorities or abolished by competent courts. It is not for the subjects of a legal system on their own account to decree the validity of legal norms.

Many of us might be tempted to consider this statement to be self-evident and not particularly worthy of mention. And yet it appears to be imperative to make it clear that this is not just another among the various societal values, which of course it is. But, above all, this principle is a logical as well as a functional constituent element of law as such, without which law cannot carry out the numerous tasks ascribed to it. Whoever is unhappy with a legal norm has to pursue the onerous processes of politics eventually leading to the lawmaking procedure. The membrane between societal acting and lawmaking, however thin, must be preserved.

We have to admit, of course, that some features of law seem almost to invite unilateral action in order to overcome the moral or practical deficiencies of the contents of legal norms. There is for instance the time lag between making a law and

2. See R. Jennings, 'International Law', in R. Bernhardt (ed.), *Encyclopaedia of Public International Law*, II (1995), at 1159.
3. See P. Allott, 'The Concept of International Law', (1999) 10 EJIL, at 31; see also A. Watson, *The Evolution of International Society* (1992).

its application. Discrepancies between the creation of law and its application are inevitable. Legal systems are linguistic systems, and language requires a reduction in complexity. The text of a legal norm can only represent a raw, condensed picture of the original ideas and intentions of its authors. Interpretation, bridging the gap between original intention and actual application, inevitably allows for a certain ambiguity, which reduces the predictability of decisions. This is a small price to be paid for the achievements of a legal system, without which a society could not function.

International law

International law is the legal system of the international system.[4] Of course it reflects the strengths and weaknesses of that system: the lack of central lawmaking authorities and the absence of a central executive for law enforcement. Both in the societal as well in the legal world decision-making is based on co-ordination, computed through sovereignty,[5] which lies at the root of international law. Construing states as being in themselves the highest authorities puts them on an equal footing formally, notwithstanding the enormous real differences among them. Also, in highly complex national legal systems we assume the equality of individuals, irrespective of the obvious material inequalities among citizens.

Every norm of international law must be traceable to the authority of the states concerned. Even the jurisdiction of the International Court of Justice in The Hague is in every case directly dependant on the submission of the defendant state. Hence law enforcement is in the hands of the states.

Whoever challenges the adequacy and propriety of international law has to depart from state sovereignty as a fact. Any idea of enhancing the density of legal norms to achieve real integration in the international system is far beyond any intellectually sound grasp.

Erga omnes *values and duties*

The point, however, is that states as well as the international system form one stage in the process of human integration. A glance even at the development of our central European states community reveals that the path to philosophical and ethical integration was all but straight. It took us through all kinds of unspeakable abysses and horrible deviations, leaving marks even on the latest international treaties, such as the Statute of the International Criminal Court.[6] There we find among numerous others the crime of 'forced pregnancy'[7] a clear response to what happened only a decade ago some 400 kilometres from Vienna.

International law is, and is meant to be, the legal system for the global international system. Therefore the values it carries should be globally acceptable. Our

4. On the international system see K. Holsti, *International Politics* (1995), at 52.
5. On the concept of sovereignty see I. Brownlie, *Principles of Public International Law* (1998), at 289.
6. For a critical appraisal see H. Kissinger, 'The Pitfalls of Universal Jurisdiction', (2001) 80 *Foreign Affairs* 4, at 86.
7. See M. Boot, 'Article 7 Para. 1(g)', in O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court* (1999), 144.

notion of humanity and human rights is based on the individualistic approach of the Age of Enlightenment. Even now, we have not really succeeded in finding the right balance between individual interests and the needs of society as a whole. It takes a considerable amount of hypocrisy to deem our values to be the solution to all problems in every society.

Societies with other philosophical and historical backgrounds consider our pluralistic democracy, our civil rights, our individual freedom, and, last but not least, our free trade economy to be answers to problems that are not at the top of their agendas. Even less are they ready to accept them as the justification for military intervention without the consent of the UN Security Council.[8]

We should realize that our insistence on the global legitimacy and usefulness of our values outside the lawmaking processes will add tremendously to the potential for conflict in the international system. The global maintenance of the European–Anglo-American values will require a military presence in various regions. And yet our dominance is an incentive to other societies to gain sufficient strength to promote their values and their master plans for shaping the global system.

In the international law discussion arising after the terrorist attacks on the United States on 11 September 2001,[9] it was suggested that military action for humanitarian or counterterrorist reasons should be considered as legitimate in the absence of action sanctioned by the UN Security Council, if it is executed by another international organization such as NATO. It does not take a huge effort of imagination to visualize the emergence of groups of states availing themselves of the same principle to promote other values, such as the right of self-determination or the right to just distribution of the global wealth.

Conclusion

The arguments can be summarized as follows.

The existing structure of the international legal system corresponds to the structure of the international system.

Purported or actual weaknesses of international law offer no justification for unilateral action outside its parameters.

The structure of international law offers all kinds of possibilities for amending and improving its normative capacities.

The system of collective security with the monopoly of the use of force lying with the UN Security Council is the keystone of international peace and security, preventing us from falling back into the anarchic power politics of the end of the nineteenth century.

8. On that problem see P. Hipold, 'Humanitarian Intervention: Is there a Need for a Legal Reappraisal?', (2001) 12 EJIL 437; see also D. Joyner, 'The Kosovo Intervention: Legal Analysis and a More Persuasive Paradigm', (2002) 13 EJIL 597.
9. See, e.g., N. Schrijver, 'Responding to International Terrorism: Moving the Frontiers of International Law for "Enduring Freedom?"', (2001) XLVIII *Netherlands International Law Review* 271.

Leiden Journal of International Law, 16 (2003), pp. 849–871
© Foundation of the Leiden Journal of International Law Printed in the United Kingdom DOI: 10.1017/S0922156503001535

Theme I: Economy, Prosperity, and Social Justice

AN ARGUMENT FOR ALTERNATIVE GLOBALIZATION

Leopold Specht*

In this presentation I shall describe (i) a process of expanding the institutional frameworks of economic and social development that apply on a global scale principles found in the Anglo-American world; (ii) the reinterpretation of these institutional frameworks by ascribing to them a narrow – to a certain extent ideological – meaning which does not reflect the variety of meanings carried by those institutions in the Anglo-American world; and (iii) the undermining of sovereign decision-making by states in order to regulate economies and social systems in a manner that does not pose limitations to the expansion of the institutional framework as described above. This hegemonic programme of 'globalization' is at the heart of policies promoted by the United States and such international institutions as the International Monetary Fund (IMF) and the World Bank.

Here, I intend to focus on the limitations on state sovereignty, and make some suggestions concerning the institutional pillars to support an alternative programme of globalization. To advance my argument, it will be necessary to provide a description of the course along which the hegemonic programme of globalization is currently being achieved.

1 The understanding of economic and social development encapsulated in the hegemonic programme is crystallized around an image of markets which function according to a generalization of certain US experiences. Such an understanding implies a hierarchy of markets, with capital markets at the top and labour markets at the bottom. This view of markets focuses on a repertoire of instruments developed to facilitate market transactions in the Anglo-American context. In translating this image of markets and specific instruments of transactions into a programme operating on a global scale, economies are being reorganized according to a blueprint which aims at changing the system of decision-making in enterprises – through corporatization and privatization – and at imposing so-called hard budget constraints upon enterprises by strictly limiting the aggregate quantity of money available in a particular national economy.

2 The politics generated by this programme are anchored in a perception of its substance which is narrow in two ways. The hegemonic programme suggests a particular version of monetarist laissez-faire as inherent in its institutional programme, and also that this monetarist laissez-faire would be prevailing, generally, in Anglo-American economies (and not only during certain periods). And the

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potential of using the mechanisms evolving from the institutions, the hegemonic programme argues, is only limited to a monetarist and laissez-faire programme of economic policies.

The alternative view underlying the proposal advanced in this paper suggests that the institutional arrangements around which markets are being structured result in an (often) 'unruly pluralism' of apparently conflicting policies and, thus, in a multitude of contents and forms of such institutional arrangements. The alternative view furthermore argues that these institutional arrangements are capable of taking on many different and potentially indeterminate meanings.

The hegemonic programme of globalization advances its agenda by circumscribing the regulatory powers of states and of entities with legislative powers, such as the European Union.

These limitations usually operate on two levels. First, international institutions make their monetary support for states conditional, in most cases, on the implementation of policies which conform with the hegemonic programme. Second, global firms are ascribed rights which amount, in many circumstances, to (quasi) sovereignty. This 'normal' course of expanding the hegemonic programme of globalization owes its being to the power constellations in existence after the end of the Cold War. The cause of the demise of the Soviet bloc is interpreted as being attributed to the supremacy of a 'Western' system which is reduced – in its prevailing descriptions – to the ideological (mis-)representation of Anglo-American economic and social systems described above.

Furthermore, and increasingly often, the weight of US military power is used to support the hegemonic agenda. In doing so, the United States exploits its ability to impose a state of emergency on states and societies in any part of the world without having to contend with another sovereign power or being checked by the United Nations.

Most descriptions of the hegemonic programme of globalization note the limitations posed on state sovereignty. Accordingly, in a quasi-natural process, the power of states to regulate the economy and to intervene in the social arena is constantly being weakened. The curtailment of the powers traditionally perceived as falling within sovereignty (of states) are argued to be a main reason for the advancement of the hegemonic programme.

I suggest that the weakening of sovereignty is only one component to note when analyzing the impact of globalization on state sovereignty. Of similar importance, it seems to me, is a broadening of the concept of sovereignty; that is, the institutional framework of the hegemonic programme of globalization is transforming or redefining the concept of sovereignty as intended by the United States and its allies (the so-called 'international community'). States which do not subscribe to the hegemonic programme are viewed as a threat to the sovereignty of the members of this 'international community'.

Let me refer – as an example – to the so-called 'Interim Agreement for Peace and Self-Government in Kosovo' that contained the mandate to introduce a 'Western style market economy' in Yugoslavia. Initially, the relationship between the economic

programme and the dilution of sovereignty was camouflaged. It was obfuscated by a human rights discourse (Kosovo). Lately, this connection has increasingly been unveiled.

The prevailing view is that social systems that deviate from those promulgated by the hegemonic programme of globalization are perceived as a mounting threat to the members of a so-called 'international community' and to the international community itself. A particular economic and social order becomes a salient element affecting the sovereignty of states. And the drive for the imposition of such order on a global scale is viewed as part of the expansion of the sovereignty of the 'international community'.

This devolution transforming the hegemonic programme of globalization into a defining element of the sovereignty of certain states is noteworthy because it reveals the invisible hands which are busy crafting a new world order that reflects the inherent values of the hegemonic programme of globalization. In recognizing this shift in paradigm, the expansion of particular institutional arrangements ceases to be a quasi-natural phenomenon. To argue in favour of alternatives is, hence, not an exercise in futility.

Also, alternative social and political programmes find some cogency in the institutional arena if elevated to the level of reasoning about sovereignty. That is: if economic and social orders become generally recognized as defining elements in the exercise of sovereignty, interventions by states or international institutions in favour of one particular economic (social) order – against other ones – would be recognized as a violation of the sovereignty of the non-conforming state. In view of public international law currently in force, this statement seems to summarize prevailing wisdom. An analysis of the so-called IMF or World Bank conditionalities that a state must implement or undertake in order to implement within its national economy as a condition of any financial support (soft and hard loans, or grants) demonstrates the hegemonic programme (of globalization) abandoning the precepts of international law; which is even more apparent in the light of the unbridled, official rhetoric of the remaining superpower.

An alternative programme of globalization may use the traditional panoply of concepts found in the body of public international law as an instrument for arguing in favour of decisional and regulatory powers on the level of states and intergovernmental organizations (such as the EU). The reference to public international law requires, however, a review of its underlying institutional and doctrinal precepts. In this respect, I shall limit myself for the purposes of this presentation to referring, for example, to David Kennedy's account of the perpetual reproposition of the narrative on (state) power with continuously changing grammar and unaltered content. The primary positioning of doctrinal accounts described in his analysis – from the move of the secular to institutions, and from institutions to procedure – reconstitute previous dilemmas throughout the following stage of the narrative of international law. Kennedy's analysis of the shift within international law doctrine provides for sufficient instrumentation critically to view the institutional programmes proposed by the hegemony programme and also the alternative set forth below.

The alternative view on globalization, as proposed here, relies on and broadens the concept of 'functional antagonism' emerging from Nathaniel Berman's review of the notion of 'neutrality' in his account of the concepts of international law that dominated the debate during the period of the Spanish Civil War (1936–39). Berman describes a 'functional agnosticism' towards competing claims to sovereignty as a sophisticated doctrinal turn in the meaning of neutrality aimed at upholding world peace along the lines established by the League of Nations.

I shall borrow this concept of functional agnosticism to allude to an institutional framework for competing tenets of social development on a global scale.

To institutionalize competition and pluralism of programmes of social development on the largest possible scale is the core of the alternative programme. This programme suggests that the world needs to re-examine socially sustainable development encapsulated in the Bretton Woods system. It envisions institutional arenas providing for the amalgamation of competing visions of social and economic development and an unbiased allocation of resources for experimentation with such competing visions.

Let me briefly speak about the contents of the alternative programme and afterwards allude to the institutional framework within which to promote this alternative.

Social institutions as developed in the Anglo-American world and in the rich societies of the north Atlantic basin are potentially indeterminate as to their purpose and function. They assume particular meanings and take on such forms as are required by regulatory tasks in specific circumstances. The abstractions of a variety of meanings of institutional arrangements into the prevailing ones are therefore context-bound. The narratives on the development of social institutions are in most cases nothing but an *ex post facto* legitimization which justifies such developments. By way of example, let me refer to property rights. Robert Gordon's work on early modern concepts of property in the United States draws an instructive picture of the genesis of property rights as not being linear. He describes an extensive number of institutions with contradictory purposes, and, in many cases, the prevailing exceptions to the doctrines which are described as the origin of contemporary concepts of property rights.

The same can be claimed for other social institutions, in any given time and for all 'intern' societies. The design of a blueprint for social development on the basis of generalizations or even with reference to a given set of institutions in a particular society is, at best, an inaccurate description of such a society.

To solicit an 'unruly pluralism' (Robert Gordon) of meanings and forms of social development is the task of alternative globalization. This pluralism might encompass conflicting understandings of Western institutions. And it should extend over social institutions in societies which are not Western in terms of their genesis.

The most important aspiration of a programme aiming at soliciting the pluralism of form and content inherent in any given society is the trust in the process of continuous experimentation and the understanding that social problems are never resolved but are in a state of permanent 'resolution'. And, notably, it is built upon the trust in the ability of people to act in inspired ways.

The hegemonic view of globalization is supported by international institutions which promote 'globalization' of the kind described in the first part of my presentation. An institutional framework for the alternative programme of globalization must be 'functionally agnostic' with respect to the particular features of varying social and economic programmes (policies). It should allow for the promotion of different and distinctive programmes and for a continuous assessment of each programme. Crucially, an institutional framework developed as part of such alternative must be agnostic with respect to the particular institutions which constitute the framework itself.

A traditional understanding of sovereignty, conceptually enriched by the notion of 'functional antagonism', helps us to rethink the 'state' as one (of various) institutional framework(s) for promoting alternative models of globalization.

THE LEGAL REGULATION OF TRAFFICKING, MIGRATION AND TERRORISM: THE IMPACT ON CROSS-BORDER MOVEMENTS AND WOMEN'S RIGHTS

Ratna Kapur*

I raise three issues for discussion. The first issue is the way in which global economic processes have triggered a contemporary wave of migration, legal and illegal, and the international and domestic responses to this phenomenon. Second is the gender impact of anti-trafficking initiatives in the domestic and international arena, which have adversely affected women's economic choices, curtailed their rights to mobility, and produced a clandestine migrant-mobility regime. The third issue is the way in which recent legal responses to cross-border movements have been informed by the 'war on terror' and have converged with the discourse of the conservative right, building on xenophobia predating the terrorist attacks on the United States of 11 September 2001 to produce hostility towards, and fear of, the 'other', who seems to threaten the security of the nation.

The political and legal agenda that is currently being pursued in relation to cross-border movements is diametrically opposed to women's rights and to the rights of others who cross borders as migrants, refugees, or asylum-seekers. The contemporary legal interventions in the lives of the transnational 'subordinate subject' are being articulated primarily from the perspective of the host country and within the overarching concern for the security of the nation.

Nearly 150 million migrants cross borders in our world today – from rural towns to urban centres, from the periphery to the metropolis, from the global south to the global north. Evicted from their homelands by powerful forces of exclusion and disadvantage, a growing mass of floating migrants is squatting on global borderlands – searching for a new home, waiting to arrive. The residents of the global borderlands are non-nationals, non-citizens, and practically non-existent to those who reside in and manage the business and defence of homelands. This new breed of migrants is

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gendered. These crossings challenge our most basic notions of women's reproductive labour, family, community, nation, culture, and citizenship.

Globalization is invariably used to refer to the free flow of goods and capital, thought to be critical to the efficiency of the market and intrinsic to the globalization process. The market also triggers a global flow of labour, yet the free flow of labour is not addressed within the discourse of market management. It is addressed by initiatives dealing with trafficking, human smuggling, border controls, terrorism, and sexual morality.

Countries of origin and destination gain from migration, including clandestine migration. In the context of globalization, migrations do not just happen – they are produced. They are partly an outcome of the actions of governments' foreign policies and their economic involvement in migrants' countries of origin. Earlier colonial patterns also inform current migration patterns, captured in the slogan, 'We are here, because you were there'. In countries of destination, the demand for an abundant supply of low-wage labour and a shrinking supply of a local workforce sustains the economy of the global metropolises and produces migration. At the same time, cash remittances to countries of origin have registered phenomenal increases over recent years, often sustaining household, community, local, and national economies.

At the international level, cross-border movements have been addressed as 'trafficking' and 'smuggling'. This approach has had a particularly adverse impact on women, pushing them further into situations of violence and exploitation. At the domestic level, these movements have been addressed through appeals to assimilation and tests of fealty to the nation, as well as the criminal law and the 'othering' of the 'alien migrant', who fails to assimilate and continues to enter countries by illegal means.

While the avenues for regular, legal, and safe migration have decreased worldwide due to the restrictive migration and immigration policies of countries of transit and destination, this phenomenon has actually produced a growing market for clandestine migration services under the migrant-mobility regime. Irregular labour services, smuggling, facilitation of illegal migration, provision of false passports and visa permits, underground travel operations, trafficking, and other clandestine migration services are not an aberration or 'rogue' regime. They are produced by the legal order erected to address cross-border movements.

Half of nearly all migrants are women and girls, and many of these are migrating independently rather than as part of a family. Women's cross-border movements continue to be addressed primarily through anti-trafficking initiatives at the international, regional, and domestic level. Under these initiatives, a woman's consent is irrelevant and her subjectivity denied. She is addressed primarily as a victim, to be rescued, rehabilitated and repatriated. At times her consent is acknowledged only to implicate her in the discourses of immorality (for such migration is consistently and erroneously conflated with sex work) and criminality, to be penalized together with traffickers and terrorists for exposing the porosity of borders and the vulnerability of the nation-state. These responses do not engage with the premise that migration is a manifestation of globalization – that it is indeed globalization.

The movement of women is engendered by factors that render them amenable to migration and expose them to human rights violations: the insecurity of food and livelihood, the growing reliance of households on the earnings of women and girls, the erosion of social capital and the breakdown of traditional societies, the transnationalization of women's labour in sectors which do not comply with labour or human rights standards and often rely on exploitative labour, forced labour, and slavery-like practices. Women's migration is rendered vulnerable by assumptions about gender and sexuality: the assumption that women's primary work is in the home, underscored by the sexual division of labour. Trafficking regulations, like border controls relying on deportation or incarceration, ignore the economic engine that drives transborder female migration. Instead, women migrants become more attractive when their status is illegal, and their social and economic options and demands are constrained.

The choice of women to move in response to these push and pull factors is not facilitated or protected by international legal mechanisms. Instead, women's migration is treated as sex work and trafficking. The trafficking in women and girls is routinely conflated with their sale and forced consignment to brothels in the sex industry. Equating migration with trafficking leads to simplistic and unrealistic solutions focused on preventing those who are deemed vulnerable from migrating. This reinforces the gender stereotype that women and girls need constant male or state protection from harm, and must not be allowed to exercise their own right to movement or to earn a living in the manner they choose. This logic has resulted in viewing all consensual migrant females as trafficked. Further, curbing migration drives the activity further underground, *pushing the victims further into situations* of violence and abuse.

The choice of women to cross borders needs to be viewed within the context of empowerment and their search for better economic market opportunities. Their consent must be located in the matrix of the global economy, market demand, and cross-border migrations. The international legal order should facilitate women's freedom of mobility and safe migration, especially, though not exclusively, from the south to the north. Instead, her consensual movement is rendered illegal, through the foregrounding of the security of the nation-state, the conservative sexual morality that informs anti-trafficking laws, and the xenophobic responses to global movements that increasingly inform immigration laws. These legislative measures are de facto partners with the parallel 'underground migrant-mobility regime', where travel agents and transporters, complete with route maps, directions, and a list of the most vulnerable points of entry, negotiate how their human cargo will cross borders, avoiding apprehension by state agents and border patrols.

The problems have been made worse by the new global war on terror. We are witnessing a heightened anxiety about the 'other', perceived as a threat to the security of the nation. The boundary line of difference is being redrawn along very stark divides – between friend and enemy, those who are good and those who are evil. The 'alien migrant' has become one of the primary targets and casualties of the failure to define either the purpose or limits of the 'war on terrorism'.

This new war has created space for a more strident and alarming response to the global movements of people. Because the smugglers offer travel services to illegal migrants, they easily fall within the category of transnational organized crime, criminals, and potential terrorists. At the very worst they are terrorists and at best they are criminals who have sought to cross the border illegally. The conflation of the migrant with the terrorist is not new, but it has received greater attention since 11 September.

The space for the migrant is being eroded through the discourses of trafficking and terrorism. Both justify initiatives designed to keep the 'Rest' away from the 'West'. The security of the alien migrant may be less threatened by people smugglers than by the international system of protection offered to people who move as migrants, refugees, or asylum-seekers.

The legal interventions in the lives of the alien migrant have been articulated primarily from the perspective of the host country. Subordinate voices are omitted from these conversations, yet only these voices can untangle the conflations and confusions between trafficking, migration, and terrorism. The voice of the subordinate needs to be foregrounded – not as a terrorist, nor as a victim, but as a complex subject who is affected by global processes, and seeking safe passage across borders.

The agency of women also needs to be foregrounded. Her choice to move must be distinguished from other situations where her consent is absent or her movement is compelled by strife or conflict. Regardless of why women move, their assertion of the right to mobility, self-determination, and development must not be confused with the violence, force, coercion, abuse, or fraud that may take place in the course of migration or travel. The crime rests in the abuse and violations committed against women along the continuum of women's migration and not because of the movement or mobility per se.

In order to address the issue of cross-border movements, we cannot simply remain confined to the domestic arena, where regulatory enforcement is focused on the individual and the border. Nor can this process be addressed in the international legal arena purely in terms of criminality or trafficking. Transnational movements require a transnational response and analysis – they cannot be caught within older frameworks.

We should modify immigration laws to accommodate their transnational reality, expanding immigration laws that acknowledge and facilitate the entry of people other than those who are part of the information technology, highly skilled work force, or economic migrants with a big bank balance.

At the same time, by virtue of her subordinate status, the transnational subject also brings a normative challenge – to the porosity of national borders and the emergence of non-state entities as a significant force in the international arena. The liberal state and the liberal subject are based on the idea of fixed borders, with clearly identifiable interests and identities. The complexity of new global formations and the dynamic character of the individual who crosses borders challenge the notion that the state and individual are hermetically sealed from one another and breaks down the binaries – the us and them, here and there distinctions – and enables us to

recognize how these oppositions are produced and made to seem natural through historical power relationships.

The Economic Ideology of Human Rights

Balakrishnan Rajagopal*

My remarks are drawn from work I have done recently on the jurisprudence of second- and third-generation human rights in international courts and the relationship between globalization, development, and standards (human rights, environmental and labour) in specific industrial sectors. I criticise the economic ideology of human rights discourse deployed in the context of globalization. The issue of social justice is framed as a matter of human rights, I want to make us more cautious about using this frame.

The 1999 US State Department report on human rights identified human rights along with money and the Internet as a universal language of globalization. The implication was clearly that the relationship between rights and economic globalization is positive. Other groups think that the relationship between rights and globalization is negative. Many developing countries think that globalization should in fact come ahead of basic human rights, including labour rights. Many non-state actors and social movements see globalization as undercutting human rights.

The position that rights and globalization are positively correlated rests on an emasculated and market-friendly concept of human rights that actually does not include economic, social, and cultural rights. This stripped-down version of human rights continues to be the mainstream view, at least in the United States. Such a human rights theory would not question any social arrangement that results from the 'impartial' operation of the market, judged to be either, as the economists say, Pareto-optimal or in conformity with the so called Kaldor-Hicks compensation principle.

Developing states that place development before human rights in fact share the assumptions of neo-classical economic theory and see globalization and human rights as incompatible. We can see this in the debate over labour rights, even regarding the labour standards that have been included in the 1998 principles of the International Labour Organization (ILO). Leading trade economists argue that different labour standards constitute a source of comparative advantage. These economists recognize that economic competition under the assumptions of neo-classical economic theory, including insatiable and ever rising consumption or the idea of scarcity, would lead to losers also. But the idea here is that as long as the losers could in theory be compensated, the economic competition is beneficial or efficient. But in reality, as we all know, in the international legal order particularly, there is no mechanism for offering any compensation to losers.

In trade, for example, it is recognized that there will be losers, but the way in which it is justified is according to the Kaldor-Hicks principle, while international trade law does not have any mechanism for ensuring compensation. Even at the micro-level

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within countries, in the decision to build a dam for example, it is recognized that there will be losers and it is justified according to the compensation principle. But in fact, most of the losers, which include the poorest and most vulnerable, are not compensated.

But, more importantly, developing states believe that the losers could be taken care of not through a principle of compensation that is integrated into economic decision-making through market decisions, but through something external called *development*, and not through, for example, legally entrenched economic and social rights to land, housing, or education. But designating development as the sole way of taking care of losers reduces the issue of social justice to one of *state capacity*. It becomes a question of whether, for example, the Ministry of Urban Development has the capacity to engage in slum redevelopment to deal with a housing crisis. So it is a very narrow approach to social justice that emerges from the critique of developing countries.

The third group – social movements and non-state actors – seem to have a broader description of human rights that includes economic, social, and cultural rights relating to, for example, land, cultural autonomy, housing, or livelihood for survival. This is true in movements ranging from Brazil to India to Thailand that I have researched. And this expanded conception also coincides with emerging trends in international human rights law, including emerging practice even by leading non-governmental organizations (NGOs) such as Amnesty International and Human Rights Watch, as well as the UN Commission on Human Rights and the Sub-Commission towards a more expansive notion of human rights.

Recently there have been some 'insurgent' judgements, marginal to the mainstream, that show a richer, more nuanced understanding of economic, social and cultural rights. Judge Weeramantry's concurring opinion in *Hungary v. Slovakia* blazes a new trail by re-articulating the legal basis for the principle of sustainable development in international law to connect the environment, human rights, and cultural survival. A recent judgement by the South African constitutional court, *Grootboom v. Government of South Africa*, involving housing rights, is also very promising. Such cases take the idea of economic, social, and cultural rights more seriously.

What do all these judgements show? They show that the equation of social justice and human rights is a work in progress, grounded in the politics of struggle by social movements. To assure prosperity with social justice, the notion of prosperity must itself be critically examined and a broader human rights theory should be formulated that reflects how the most vulnerable actually use human rights.

THE DYNAMIC OF INSTITUTIONAL DISCREPANCIES AND GROWING CONTRADICTION WITHIN THE INTERNATIONAL ECONOMIC ORDER

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I want to focus on discrepancies in institutional capacity within the international legal order, and the growing contradiction within the international economic order

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between a dynamic of liberalization and a dynamic of prohibitionism. Following on from Professor Rotter's discussion of lawmaking, and the idea that lawmaking follows the normative identity of lawmakers, it is important to look into the actual process of decision-making, where we can see the traces of inequalities that continue to plague the international legal order. One example is the very severe discrepancies in institutional capacity between the developed and developing states. So this is not an ideological or normative issue. It is a very concrete question of who actually gets to sit around the table and who has a level of capacity that makes their participation a valuable one. If one goes to the offices of the World Trade Organization in Geneva, one discovers that the actual plenary rooms are too small for the 146 states that are now WTO members, and the reason for that is that only a sub-portion of the member states actually are able to sit in plenary discussions on an ongoing basis, only a sub-portion of the full membership of the WTO can afford permanent representation in Geneva and can afford to have even one representative in plenary discussions. This disables developing states from participating effectively in the process of shaping international legal norms. This is happening as we speak in the negotiations for the World Trade Organization following Doha. There is a call for an early harvest of concessions in the WTO on services, on agriculture, and on a number of other fronts, and a number of developing governments are pressured to concede without even having the opportunity to read the documents in their own languages – or without even having the opportunity to read documents at all. In the wake of the events of 11 September 2001 there is a lot of pressure on developing states to agree to norms which they have very little ability to participate in generating.

Efforts to address the problem of institutional capacity are inadequate. The WTO's technical assistance function brings in people for a couple of weeks for seminars on very basic elements of trade law, most-favoured-nation principle, and so on, but does not enable governments to identify what their interests would be in concrete negotiating situations. We also see a discrepancy in institutional capacity between the political bodies and the judicial bodies. Within the WTO the judicialization of international trade law has the effect of constraining the politically negotiated intentions behind a standard, so that even when there is some recognition of the importance of development, for example within the negotiations, it often becomes limited in the process of actually applying the law. For example, in the bananas case, the European Community was able to negotiate a waiver of Article 1 of the General Agreement on Tariffs and Trade (GATT) to enable the continuation of its performance scheme for developing nations. In the judicial dispute, the waiver was read very narrowly, despite the intent.

There is also a significant discrepancy in institutional capacity between 'hard' law and 'soft' law. In the negotiations at the Johannesburg Summit on Sustainable Development, for example, the United States, Canada, Australia, New Zealand and Japan argued for a hierarchy of norms, whereby the WTO would trump any attempt by the EU or the developing states to negotiate a norm of, for example, environmental conservation or development. Such concrete institutional discrepancies elevate a very formal and narrow interpretation of trade over and above other competing concerns.

The other issue I want to address is the contradiction between the norm of liberation on the one hand and the increase of prohibitionism on the other. It is very clear that the dynamics of globalization enable both legal trade and illegal trade. First, improvements in technology and communication that generate the possibility of multinational production of cars and sports shoes also enable the multinational production and creation of heroin, of cocaine, of illegal migrants, and so on. There is no economic difference between legal aspects of the economy and illegal aspects of the economy on this score: they are equally enabled by technological developments that have generated globalization. Second, as trade agreements have streamlined the process of international trade in legal sectors, they have also streamlined trade in illegal sectors. Smuggling of illegal products such as narcotics or illegal migrants in containers that are themselves legally crossing borders as the result of trade liberalization is easier. Globalization also produces illegal trade. Agricultural imports displace domestic production. Clearly one result of generating a surplus of labour is going to be an increase in migration pressures. So there is a very intimate interconnection between legal trade on the one hand and illegal trade on the other, but of course there is a contradiction in the way that these elements or aspects of the economy are regulated, a contradiction between the norm of liberalization on the one hand and an increasing attention to criminalization on the other. The criminalization of illegal products is a criminalization of illegal persons. This is a very problematic dynamic. Criminalization does nothing to stop the flow of illegal products and services – if anything it makes the flow more lucrative by imposing a black market premium on these sectors. At the same time it provides a justification for repression, domination, and control of certain producers and certain persons that itself tends to perpetuate global inequality.

Social rights in a global economy

David M. Trubek*

The topic of my talk is the changing relationship between national law, social rights, and the international order. I shall focus on the protection of workers' rights and the promotion of labour standards, but the analysis can be applied more generally to other social and economic rights. The traditional approach has been to employ national law to protect workers' rights and improve labour standards, through labour law and collective bargaining. Both are normally regulated through national laws.

While actual regulatory processes have always been carried out at the national level or through private bargaining that is supervised and enforced by national authorities, there is a long tradition of international action in the field of workers' rights and labour standards. Two moments deserve special note: the formation of the International Labour Organization (ILO) and the creation of the Bretton Woods System in the aftermath of the Second World War.

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In both cases the primary focus of international activity was to buttress national regulatory systems. The ILO sought to define workers' rights with precision and to create international labour standards. But the ILO system leaves the nation-states with the primary, indeed almost the exclusive, responsibility for the protection of these rights. Similarly, the postwar system of 'embedded liberalism' created by Bretton Woods was explicitly designed to give nations leeway to develop strong industrial relations systems and welfare states. The Bretton Woods system said little specifically about workers' rights, but its architects thought that if the rules were followed those nations wanting to protect such rights would not be undermined by world economic pressures.

The result was a governance system which relied on national regulation but ensured a supportive international environment for nations choosing to build strong systems of industrial relations. In the twentieth century, the system, while far from perfect, worked fairly well for some countries. It facilitated the creation of effective unions, allowed nations to promote some degree of equality, and made it possible to promote reasonable working conditions at least in the rich countries of the North. While the system was much less effective in the developing world, it did have some effect even for poorer nations. And although the system worked reasonably well in richer countries where support for worker's rights were strong, even in those countries rights were not always implemented effectively and international standards could easily be ignored. In recent years the system has proved to be completely inadequate to the task at hand. It no longer works that well in the North, and continues to be limited in the South.

There is no question that globalization is a factor in the unravelling of the postwar system, which in the last analysis relied on the capacity of the nation-state to implement workers' rights. But globalization can weaken the regulatory capacity of the nation-state. Because capital is more mobile, countries may find it harder to raise standards when companies threaten to move to locations where standards are lower. For the same reason, it is harder to impose taxes needed to fund social protection systems. The globalization of production creates new problems, since the ensuing commodity chains cut across national borders.

The result may be a governance gap in which national law cannot be fully effective and international action, which was designed solely to strengthen national legal systems, is inadequate to fill the resulting void. Globalization has undermined many of the protections against global shocks that were set up in the postwar period. There is no international body with regulatory power capable of replacing national law.

While for some the solution is to roll back globalization, most recognize that this is unlikely to happen. Moreover, efforts to reduce international economic integration in the name of social justice could harm the very interests whose protection is being sought. If globalization is to be compatible with the protection of workers' rights, some way must be found to fill the governance gap. To do that, we must forge a new approach to global governance based on a new vision of the relationship between national law and international regimes.

It is easier, however, to see that a new approach is needed than to say what it might look like. And it is easier to see what will not work than to say what might prove to be an effective strategy to fill the gap I have described. One thing is relatively clear: simple models, taken from the history of federal systems such as the United States, are not the solution. The US solution was simple: we moved the regulation of legal matters from the state to the federal level, creating an effective national labour law.

This model is not available to the world community, and were it available, it could well be undesirable. There is no institution at global level remotely qualified to take this on. There is also reason to believe that any effort to create a comprehensive global system of mandatory labour norms enforced by a central organization would be a bad idea even if it could be accomplished. Workers' rights and the methods of enforcing them are deeply embedded in national systems, and there is great diversity in the paths nations have chosen and the instruments they have selected to deal with these issues. The changes in the world brought about by globalization have occurred so rapidly, and the situation remains so volatile, that it is hard to know what issues should be addressed at global level. Because of the novelty of the issues, the diversity of the institutions, and the volatility of the situation, we lack knowledge of how to proceed.

Even at the regional level, there is no easy path to follow. The European Union (EU) has evolved a very complex approach that eschews primary reliance on a central legal code or regulatory body. EU rules deal only with a limited number of areas: the free movement of workers, health and safety, worker participation, and job discrimination. The rules are largely implemented through national statutes and regulations and are enforced by national authorities. Many key areas of workers' rights, including freedom of association, and many dimensions of labour standards, including remuneration, are left to the exclusive jurisdiction of the EU member states.

The most recent EU foray into the labour areas is called the European Employment Strategy or 'EES'. This process, dubbed an 'open method of co-ordination', avoids central legislation altogether. Instead, the EES seeks to identify a number of major goals related to the elimination of unemployment which are shared by all the EU countries, but leaves the choice of means and implementation to each state while requiring that they exchange experiences and engage in multilateral surveillance of each other's efforts. This system encourages each country to seek its own solution in the light of everyone's experience. A key feature of the EES system is the use of guidelines, targets, indicators, and benchmarking.

Nevertheless, the EU system lacks a set of justiciable social rights at the European level. There are two overlapping sets of social rights that affect the EU's 15 member states. The first are the provisions of the European Social Charter, in force since 1965, which is administered by the Council of Europe and which covers all the EU countries and other European countries as well. The second is the recently promulgated EU Charter of Fundamental Rights (2000). The Social Charter is enforced through a system of reporting and monitoring. The Charter of Fundamental Rights has no explicit enforcement mechanism.

Summing up, the EU system encourages problem-solving through decentralization and experimentation, but makes each country accountable to the others for results. It also knits together all levels, from the supra-national to the local. It engages private actors as well as governments, even to the degree of bringing unions into the lawmaking process itself. The EU governance system does not rely exclusively on legal regulations. Rather, it employs a wide variety of tools that include not only formal legislation but also statements of principle, declarations of rights, non-binding guidelines, common indicators, benchmarking, and multilateral surveillance. The EU has created a multi-level system that provides for decentralization and flexibility but co-ordinates the activities of the member states and creates strong pressures on all the states to seek the best path towards common goals.

What lessons can we take from the European system for a new international architecture for social rights? Clearly, what works in Europe, with its long history of workers' rights at the national level, strong unions, dense systems of labour management, and democratic political systems, cannot automatically be transferred to other parts of the world. Further, no one would pretend that the EU system is perfect: Thus, some think that the lack of justiciable social rights at the EU level is a serious flaw. Nonetheless, there are lessons to be learned that would apply to Latin America and other parts of the world. The European case clearly suggests that simple models, drawn from domestic law or even from strong federal systems such as the United States and Brazil, are not necessarily the only answer to the challenge. It shows us that new forms of governance are available. The European case offers some concrete lessons. The creation of a unified market requires attention to social as well as economic issues. Highly specific and uniform rules enforced by a strong central regulatory agency are inappropriate for the complex task of enforcing workers' rights, even at regional level. It is possible to combine decentralized experimentation and national diversity with centralized monitoring, co-ordination, and collective pressure for progressive change. Common indicators and benchmarking can play a role in ensuring progress towards commonly accepted goals. Regional co-operation demands the close integration of national and regional levels of government in the evolution of objectives, guidelines, targets, and action plans. It is essential that social partners and civil society participate at regional and national level in the development of guidelines, assessment of performance, and pressure for improvement. I believe these lessons will be of value for people in the Americas and other parts of the world as they seek to develop an architecture for the protection of workers' rights and other social rights in the face of globalization.

GROUP I DISCUSSION

Erwin Lanc. I refer to Specht's last sentences and I quote: 'An institutional framework for the alternative programme of globalization must be "functionally agnostic" with respect to the particular features of varying social and economic programmes (policies). It should allow for the promotion of different and distinctive programmes and for a continuous assessment of each programme. Crucially, an institutional framework developed as part of such an alternative must be agnostic with respect

to the particular institutions which constitute the framework itself.' My question is: how should this gathering function? Will it be a meeting of the powerless to get power – how do you think about that?

Norman Birnbaum. I have a question: to what extent is the entire working population or very nearly the entire working population of the northern hemisphere, of the advanced capitalist countries with their higher standards of living, a kind of global labour aristocracy, whose interests through political as well as ideological, economic, and cultural developments are more anchored to the interests of their own property-owning and managerial elites than to some abstract notion of solidarity? I know that is contradicted by the ideology and by the political behaviour of some of the Western trade unions. John Sweeny, the president of the American Trade Union Confederation, AFL-CIO, was at both Seattle and Genoa. Nonetheless, the problems of mobilization at the base and of international solidarity remain and are problems worthy of our attention because they do deal with the political potential of any movement of this kind.

Manfred Rotter. Maybe we would gain in clarity if we distinguished between sovereignty as a legal term and autonomy as a social scientific term. I think dealing with the actual capacity of a state or a government, as Ms Thomas said, is one thing, and quite another is dealing with sovereignty as one of the component elements of the international legal system. That brings me to Ms Kapur. If I got you right, it was your thesis to say that we should somehow change the concept of international borders. Very well: but we should keep in mind that borders do not only have the function attributed to them in international law, of being the membrane, distinguishing between the public power of two states, to separate the public authority of two states; borders also entail a social and an economic dimension and it is the borders that limit the territorial dimension of the redistribution of wealth. So the point is: if we jeopardize the function of borders in the economic sense of the word we will have problems. Weakening the economic power of the 'haves' cannot be the real aim of enhancing the possibilities of the 'have-nots', if I may say so. This is to say that the formal system also provides security to the have-nots. The so-called *Lotus* principle is also a protection for the weaker. This is an aspect that we should not forget.

Max Schmidt. I have also questions to Dr Specht and Professor Thomas. The first is: what is your opinion about the future role of the economic and social task of the United Nations? Do you see any future in this direction? And more in detail: what do you think about the role of the Economic and Social Council as a forum for developing countries to play a more efficient role?

Günter Frankenberg. As I am not an international law scholar I prefer to step back from the current debate. My observation: there seem to be two dominant models of the relationship between international law and politics, which were both represented today. The first is based on the assumption that politics dominate law, which has a renaissance in the post-11 September United States. The second model invokes the *genius loci,* Hans Kelsen, and holds that law dominates politics. I interpret Professor Rotter in this sense – if I have misunderstood him, I hope it is a creative misunderstanding. I understood the papers this morning to say that

they tried to come to grips with a third model which would be characterized by an uneasy relationship between law and politics of reciprocal control. I think the legal domination model seems to be in trouble because of a reinvention of imperial laws as politics. First, it has grown to be strictly hegemonic – not only recently – and it is unilaterally dominated by empire number one, the United States. It seems to be guided by the imperative of security to an extent that all other normative concerns, which would have to be included to make it at least acceptable to a broader community of nations, have been relativized, if not extinguished. Today the system of concepts seems to be in disarray. We no longer have to deal with a couple of principles we can easily order in a hierarchical fashion or balance certain factors to reach results that could make us happy or not. I heard you talk about legal hybridity, which seems to be a fitting metaphor. This uneasy coexistence of law and politics seems to be more promising than any of the other models.

Friedrich Kratochwil. I wonder whether not the liberal project per se, but rather *the limits* of the liberal project have come to the fore in these discussions. For example: the paper on migration seems to suggest that the greatest possible freedom for the individual – which is only now extended from males to females – is progressive. Although I am very sympathetic to arguments attacking the paternalistic state and its alleged protective function, which is mostly used to keep others 'out', the espoused position does not seem to consider all the social ramifications of such a policy, which consists of the absolute subordination of questions of the social order to questions of individual preference. Similarly, Professor Thomas talks about the paradox or the contradiction of liberalization and what she calls an increasing 'regime of prohibition'. It is a paradox only on the most superficial level, because everybody knows that the more you liberalize something the more you have to regulate that area, or you are likely to have social consequences which are disastrous. For example, Latin American states had to find out that you needed a very strong state in order to liberalize the market. Finally, Dr Specht's argument has particularly emphasized a point made by Mr Lanc's reading of the crucial passage. It reinforces Mr Rajagopal's argument which to me sounded a bit like the claim of the primacy of the right over that of the good. But such a stance raises exactly and perhaps most sharply the question of the limits of the liberal project. While it might be prudent not to have too much packed into a proposal when one engages with other people with other political projects, the primacy of the right over the good, and the necessary agnosticism as to ultimate goals that go with this position, it is nevertheless a *substantive political* ideal, identified with the liberal project, not simply a neutral procedural yardstick. I might not have anything against this particular project, I might even adhere to it, but it needs further justification.

Thomas. I am happy to go first. On the paradoxical relationship between liberalization and prohibitionism, we must look at the way in which the state is involved in enabling or legalizing trade and compare that to the way in which the state is involved in criminalizing. The state is involved on both sides, and I do not suggest that the state was withdrawing from the process of liberalization. Rather, I think it is important to focus on the differences between the kind of state intervention that one sees within the project of liberalization and the kind of state intervention

that one sees within the project of prohibitionism. Professor Kapur identified migration as integral to international trade and yet at the same time it is portrayed as a problem that is separate and apart from the global economy. And yet if we look at it analytically, the impulses that lead to migration are part of the dynamics of the global economy.

Kapur. I want to proceed from what Professor Thomas has said. As to the idea that it is for the protection of the 'have nots', if that were the case, it should then lead to other initiatives that states could adopt, such as decriminalizing sex work or providing rights and benefits to migrants and migrant workers' families or ratifying a convention on migrant workers' families as well. But clearly that is not the case. Instead, they criminalize or victimize the migrant. I want to reiterate what Professor Frankenberg said, that the big challenges now are how to accommodate these transnational movements and this transnational phenomenon without resorting to the rigid notions of borders and nation-states, or protecting some nation-states' borders while in fact aggravating problems relating to the borders of other nation-states.

Specht. I would not talk about autonomy, but about sovereignty. We are now able to witness an attack on the sovereignty of one state and the attitude of an alliance brought about by this attack, which leads to a broad intrusion by this one state for reasons other than the protection of sovereignty. I am sure that our Russian friends here can tell us a lot about the oil routes around Russia or through Russia, and what difference it makes that US troops or the so-called allied troops of the International Community are now legally authorized to operate out of Uzbekistan. Look at the IMF or World Bank conditionalities for loans or interventions and then try to explain to me again the difference between autonomy and sovereignty.

Of course, it is very ambitious to think of a 'new' Bretton Woods, but I would be content merely with some steps in this direction. Some examples: first comes a change of discourse. As a practical lawyer I can tell you that in many parts of the world 'corporation' means 'US corporation' and if you want to explain that there are other legal orders which have developed much earlier than the US idea of corporation then you are not going to be heard. Or take barter, a significant aspect of trade between the less developed countries (LDCs). It is presented to us as only a problem resulting from the inefficiency of state-owned enterprises. I think this is laughable. But this power to interpret reality had huge bearings on the way in which international institutions have behaved and dealt with the needs of developing – whatever this means – social and economic realities in parts of the world.

Deborah Cass. Dr Specht, how different are the outcomes of an 'unruly pluralism' or a 'new paradigm' and our more familiar regimes? In the trade system, some liberal theorists rely on concepts which could be seen as being very open – for example, John Jackson has spoken about trade operating as an 'interface'. It is a very functionally agnostic concept. Jackson describes it as making a world open to diverse values both political and cultural. Other writers, Francis Schneider or Teubner, for example, promote a global liberal pluralism. So there are lots of routes towards something that seems to be alternative. Sure, stand up and say that the conventional routes do not really want more openness. Your particular route may end up in the same place.

I mean, it is not as if a conventional liberal author gets up every morning and says, we want to restrict economic possibilities only to the First World. They genuinely believe that an open interface trading system would create opportunities for others. I have great sympathy with wanting to recognize different forms and contents of social organization, and I think that is true of most people around the table, but we may need to be able to work out how that differs from existing mechanisms.

David Kennedy. This panel puts us in front of a difficult question. There is a conventional European social democratic response to the problems of unilateralism in politics and neo-liberal globalization and economics. It is a familiar and well-trodden response, with a deep history. All of the papers from the panel this morning seem to me to be asking whether that response is enough and whether that response is even a good idea.

The conventional European social democratic response in the domain of economics arises out of a social tradition. It advocates a chastening of neo-liberalism, which would harness it to human rights and be attentive to market failures, which serve as justifications for intervention by some state apparatus. The conventional response by social democrats in Europe accepts the efficiency frame for the economic analysis of policy, but supposes that market failures are more common than others suspect, so that the opportunities for intervention are more numerous. There is no attention to the multiple possible efficient markets, or to their quite different distributional effects – nor is there much attention to mobilizing resources for growth and development. In the domain of politics the conventional social democratic response to the problems of unilateralism are multilateral legal institutions and a rejuvenated global civil society. Both are seen as responses to the loss of political capacities in nation-states, but neither is imagined as the site of an engaged or vibrant politics which could challenge existing institutional arrangements in any significant way. They are sites for symbolic acts of humanization and complaint against the existing arrangements, but not for their contestation. And in the domain of law, the conventional European social democratic response to unilateralism has been an invigorated attention to human rights and humanitarianism. Each of these traditional sources of energy for the left was drawn into question by the papers on the panel. Yet each one of the papers also drew on those traditions in trying to develop an alternative. I want to try to sharpen our discussion of the limits of this traditional European social democratic alternative and how it is that we want to resurrect pieces of it.

Professor Kapur's paper suggested that the anti-trafficking movement, which is conventionally understood as the humane and left position, has tried to strengthen international human rights norms to protect the position of women. But migrants encounter new difficulties as a result. Professor Kapur emphasized that this effort to humanize the international migration system is not enough, but is rather part of the problem. This is a challenging argument, and I think it is not surprising that we keep coming back to that example and asking for more clarification. It picks up on something Professor Thomas said in identifying the unacknowledged repressive corollary to traditional social democratic ideas. The development of a labour aristocracy, identified by Professor Birnbaum with efforts to solidify borders and to create a repressive apparatus to maintain them, or in Professor Thomas's

terms with the effort to demonize certain forms of trade as the sorry underbelly of the liberalization effort – these were parallel examples of a traditional European social democratic response to globalization run amok. It also struck me in Professor Rajagopal's presentation on economic and social rights that this has been the United Nations' major response to globalization as well. As I understood Professor Rajagopal, not only are they not enough, but as they are being applied they are part of the problem, not part of the solution. He emphasized quite clearly that human rights are not sufficient to chasten economic globalization, and we on the left should refuse the temptation to place our hopes there. We should also refuse to confine our interests in distribution within the current vocabulary of development – and in particular the subset of that vocabulary associated with economic and social rights. Doing so, if I read Professor Rajagopal correctly, would be to overlook opportunities to humanize the market itself in its fundamental institutions.

Taken together, these papers seem to me to present an extremely strong challenge to conventional European social democratic thinking about globalization, both economically and politically. I would like to ask the group what we think about that. Let us assume for a moment that we agree with the paper presenters that the traditional European social democratic response is part of the problem. We are in the very depressing situation that there is no existing alternative on the table. Each of the papers seemed quite angry at the European social democratic response. But I did not read any as having a strong other road, other than some pieces of the traditional programme which might be lifted up in a new constellation. Professor Trubek suggests: let us lift up the idea of civil society and advocacy groups and promote it in some stronger way, but then it seems that the question is: what stronger way? And a question for you, David Trubek, might be: let us take the Tobin tax, could we imagine the Tobin tax implemented by cities, by towns, and by professional associations? Is there any way to imagine slowing the gears of capital flight other than through Malaysian-style national regulation? How do we imagine lifting up this element of civil society and giving it a stronger relevance?

Another idea which I read from both Professor Thomas and Professor Kapur, would be to embrace aspects of the market. If I really understood you, I heard you to be saying legalize drugs and sex trafficking. A regulated market would be a more humane response than criminalization. How should the left think about situations in which we would want to embrace some forms of a regulated market and lift them up in particular contexts as the less repressive alternative? It is an interesting idea. I think the question for you both would be: when? In the narrow area of trafficking I can understand that this might provide us with something, because it attacks so strongly the idea of borders and it has a role in opening up the broader problem of migration on analogy to the free flow of capital. This seems to have some analytic appeal, so maybe there is a way in which we could generalize from the instance of trafficking to identify other places where a regulated market idea can be lifted up and be part of our post-European social democratic alternative.

The third proposal I heard was exactly the one Professor Cass mentioned: hybrid organizations and constitutional fluidity, let us raise them up, and rethink the institutional backdrop for global commerce. So the challenge here would be to say:

if flexibility about institutional form is going to be part of our new left agenda, can we identify particular sorts of cases in which particular kinds of alternative corporate forms or alternative transactional forms might be more part of the solution than part of the problem? I guess that for me the overall problem we are faced with over these two days is: what do we do with our disappointment about the conventional European social democratic response to unilateralism? As an American who feels in one way or another involved in a project of critique of my own country's unilateralism, I would like to believe that I could reach out to a stronger alliance with the European social democratic tradition. Yet I share a lot of the doubts that were expressed by the panel, and I share the feeling that we are only at the very beginning of figuring out which pieces of that can be effectively put back on the table.

Rotter. Somehow it seems to boil down to the question of revolution or evolution. The narrowest definition of revolution as we may know is the break-up of the existing constitution of order, be it on a states level or be it on the level of international systems. The point I was trying to make is that the international legal system is under attack from both sides. Say, for example, that the Unites States puts forward the proposition that the traditional notion of Article 55 of United Nations Charter (self-defence) is outdated, that we no longer need self-defence in the sense of Article 51: what we need is pre-emptive self-defence. Now everyone dealing with law knows that there cannot be a model of pre-emptive self-defence in a legal system. That is the end of any legal system.

You all know the riot the Unites States has created over the International Criminal Court – without any need, because my colleagues in Washington need only to have looked into the statute of the International Criminal Court. If you read it, and you do not have to do so particularly carefully, you will find that the jurisdiction of the International Criminal Court is only meant to be subsidiary to national jurisdiction. Thus if the United States were to say that it does not want the International Criminal Court to have jurisdiction over US personnel working outside the United States, we do it on our own, the case would not have arisen. And if we look at the legal situation in Bosnia and Herzegovina we know that the United Nations including the US personnel working in Bosnia is completely exempt from Bosnian jurisdiction. The point is that we witness states, the United States, but not alone, that try to get rid of legal arguments without trying to explain what are they really up to. They simply said that is our case and everyone that is able to use the Internet could have found out within a couple of minutes that the position was absolutely ridiculous. But what is behind? Behind is the attack on the international system as such and thus attacking the basis of construing new policies. What I mean, Mr Frankenberg, is, take the international law as it is. So to say: the instruments are here, the instruments are at our hands.

Trubek. In response to Prof. Cass: you asked how different would it be to the present situation. Not so different, but very different. Not so different in that there is a reality of pluralism, but a unity of discourse in authoritative circles, and that discourse reinforces and is reinforced by real institutional actions, barriers, allocation of resources, rules and so on. So while there is a discourse that seems on the surface

to favour pluralism and there is a reality of pluralism in part because no discourse and no hegemonic system is truly all encompassing, there is a tilt in a certain direction that comes from a vision which while promising a diversity actually leads to uniformity. I think there are two dichotomies on the table that I wanted to question. One was revolution versus reform, a distinction that seems to me no longer of much value, everything is sort of in the middle. Professor Frankenberg's idea, it is not only law with no politics or politics with no law, but some complicated mixture of law and politics. You do not pretend that law alone is all-powerful; you do not pretend that law is meaningless and you move ahead. So get past those two dichotomies, that is, between law and politics as separate spheres, get past reform versus revolution, pick of the shards of the past and try to make it into a vision for the future.

Susan Marks. I would like to take up Professor Kennedy's question: what do we do with our disappointment about the social democratic project? It made me think of something a British Marxist theorist, Terry Eagleton, once wrote about the position of Marxists generally. He said, rather than turning their backs on the great modern ideals of freedom and equality, Marxists should adopt the position of the 'faux naïf', and ask why it is that those ideals never seem to enter upon material reality. In other words, they should insist that the ideals be made more real than current understandings or conceptualizations allow. The reason I mention this is that what I heard from these wonderful presentations we had earlier this morning was that current understandings of the social democratic project do not have to exhaust our understanding of what that project has to offer. It contains untapped emancipatory potential, as the history of struggles in the political arena and in law indeed confirms. Feminists, for example, did not throw out the idea of equality; they did not say 'we should not be reposing our hopes in that concept'. Instead, they worked to reappropriate the concept for emancipatory ends. They made it mean more than people had hitherto wanted it to mean; they exposed the limitations of earlier understandings. This is another way of putting Professor Trubek's point: what we do with our disappointment is that we try to recuperate the shards of what is already there.

Frankenberg. I want to enrich David's question: what can be salvaged from this social democratic vision in the centre? We have to make an assessment of who is being excluded by new transnational treaty regimes such as the WTO and others, and after we have made this assessment we may then address his question as to what part of the centre may be helpful and not just create new problems. To me, it seems that we have a significant shift in international law from the instrumental to the symbolic, in so far as many conventions originally designed to help victims, even prevent victimization, now just have a symbolic meaning – they make you feel good but they don't do anything good. That is why I am not comfortable with the idea that we should just progress on this middle road hoping that this might be better than nothing. I think that we really have also to rethink this middle road.

Joel Paul. The theme of social justice has quickly been transformed into a discussion about the disparity of state power and institutional capacity. I think that it is interesting that there has been as much discussion about internal social justice issues. The sense of victimization from globalization is common to all states – including the

hegemonic power. In the United States we do not perceive that we are in charge of globalization. We feel ourselves disempowered by the process of globalization and the need of some who compete more effectively with imports from south-east Asia and we feel pressured by the competitive forces that the European Union represents. So there is the sense of states not being in control. When we talk about liberalization, there are two aspects to it: there is a liberalization of trade – opening our borders to certain goods and services capital, which of course implies the immobility of labour and the problems that come from that – but also there is the idea of trade liberalization being paralleled with the notion of liberalizing internal regulation – having flat taxes, moving away from redistribution efforts. So the argument made by economists that trade, for example, expands the pie for everybody, is in fact not true, but because we know that that is part of the liberalization effort to expand that pie, we also undertake efforts to make sure that the pie does not get distributed at all. There is therefore a way in which that liberalization is defeating its own justification. And I think somehow that the way out of this trap of liberalization comes with the notion of wanting to reconceptualize liberalization, so that it is understood not as something that happens to us out there, something external to us, but as something embedded in the state itself. That is to see globalization not as external force, not to see us as a victim of globalization, but to see us as an instrument of globalization, as something that we undertake to do. And liberalization is as much a policy, as much an act of state regulation, as is any other form of economic regulation. It is a choice we make and how we shape that choice is up to us.

Leiden Journal of International Law, 16 (2003), pp. 873–895
© Foundation of the Leiden Journal of International Law Printed in the United Kingdom DOI: 10.1017/S0922156503001547

Theme II: Security: New Threats and New Strategies

SECURITY: NEW THREATS AND NEW STRATEGIES

Vladimir Petrovsky*

New challenges for security

Among many goals which governments and individuals always pursue, the broadest and most common is security. It is the basic context in which most other values are enjoyed, in the expectation that they will last for a long time. However, the meaning of security has always been ambiguous. At the end of the twentieth century the world held great promise: the Cold War was over and we hoped to see a peaceful, secure future after the century of interstate conflicts, taking full advantage of globalization and minimizing its negative effects. Now, at the beginning of the twenty-first century, new challenges to security are looming over the horizon. We are facing today the emergence of a global society, which crosses national borders and makes the world closer economically and technologically.

Unfortunately, the fruits of global changes are not shared equally through the spectrum of social groups. Globalization seems to act as a two-edged sword, opening tremendous opportunities for some while creating new risks and challenges for others and thus challenging security in all its aspects. Poverty and backwardness, the gap between the rich and poor, as well as the almost unthinkable dangers posed by climate change, constitute a dangerous reality in the new world security situation. Conflicts and hot-spots such as the Middle East and Kashmir are now even more volatile than during the Cold War, not to speak of the 56 major conflicts on our planet.

The terrorist attacks on the United States on 11 September 2001, as well as the tragic event in a theatre in Moscow, which affected the whole of humanity, have demonstrated the appearance of new non-state actors in the field of security. Never before in history could such actors represent a danger to the nation-state, let alone to a superpower. While we rightly refer to terrorists, we cannot, however, underestimate organized crime. Though technological, political, and economic changes have transformed the balance of power, placing the United States in a new relationship with its traditional allies, the interests that unite the key proponents of the anti-terrorist campaign (United States, Europe, Russia) outweigh the problems that divide them.

During the Cold War international security was provided because the two superpowers adhered to the rules of the game, which they both understood and appreciated. By way of analogy, one can think of this game as chess. The number of players is known, the number of moves is finite, and the consequences largely known ahead

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of time. Today, however, the game is no longer chess, but rather billiards, where it is very difficult to gauge the repercussions of certain shots.

The international security agenda: continuity and change

When the Agenda for Peace was in the process of preparation in 1992 (I was the chair of the preparatory committee), we had the romantic expectation that peace would automatically bring stability and security, based on the rule of law. The Agenda for Peace provided the guidelines for peace promotion through the four Ps: Preventive diplomacy, Peace-making, Peace-keeping, Peace-building. The Agenda for Peace has rightly concentrated on conflict prevention and resolution and opened the door for dealing with security matters beyond military threats.

Although much has been undertaken in the last decade, I feel more strongly than before, that in the last 12 years peace could bring only the absence of conflict. None of the 56 conflicts, of which three were interstate, has brought security. Today we need to be assured not only of a peaceful but also of a safe future for all of humanity. That is why the Agenda for Peace seems to me to be a minimum programme and an Agenda for Security a maximum programme for practical deeds.

Strategic security as political guideline

The new concept of strategic security proclaimed last May at the Moscow summit of the US and Russian leaders combines two leading concepts – strategic stability and security in all its aspects – which have served as guidelines in the period of transition from a confrontational to a co-operative approach in both bilateral and multilateral diplomacy.

I should like to point out that towards the end of 1991, Washington and Moscow created a high-level working group on strategic stability which had its only meeting in November that year, before the disintegration of the Soviet Union. At that meeting the idea of strategic stability which was previously applied only to the military field was reconceptualized and extended to all international activities. For the Soviet Union it was an important change: hitherto, it could not accept stability beyond the military field, because, in the ideological sense, stability was incompatible with revolutionary change. At that meeting the concept of strategic stability was associated with the concept of security in all its aspects, and jointly proposed by Moscow and Washington, to be unanimously adopted by the United Nations at its 44th session in 1989 (Resolution 44/21). According to this resolution, security should be treated not only in military terms, but in a comprehensive multifaceted manner as the security of individuals from violence, hunger, disease, environmental degradation, and the violation of their human rights.

In other words, if we look at the concept of strategic security from a historical perspective, it represents the further development of internationally accepted ideas, and it is oriented towards constructive parallel actions in political–military, social, economic, and also environmental areas. In view of this I deeply believe that the idea of strategic security should be accepted as the political guideline for the International Security Agenda.

The security guarantees

In a new security environment, the appearance of new non-state actors makes the traditional mixed-motive games approach to security, including the zero-sum game, out of date. Nowadays we need to apply new planetary thinking to security. Indeed, if we look at ourselves from outside, from the galaxy, we are reminded of a small spaceship, and all of us look like the passengers on this ship. It does not matter in which class we travel, first, business, or economy: we need to provide for the safe flight of our spaceship in the galaxy. This planetary thinking has nothing to do with the Cold War mindset, in which ideologically oriented national interests very often prevailed over common sense. The new planetary thinking should accept a new emerging global society as a unity through cultural diversity.

Security arrangements should be based on the strict observance of existing norms of international law. Referring to the continuing debate between idealists and realists, I should like to express my strong belief that without moral conviction you can be neither idealist nor realist; a purely pragmatic approach would offer too narrow a range of alternatives, while morality provides the opportunity to make the choice between widely differing options.

The question we are facing now is that of the kind of deterrence needed in a new security framework which makes it necessary to influence the actions not so much of states but rather of non-state players. In the new security environment, the aim of deterrence remains the same: to sow the seeds of doubt in an opponent's mind by undermining his confidence in his capability of achieving the desired outcome.

The message should be very clear. Deterrence is based on the rule of law. The level of punishment should be such that the political gains associated with pursuing a particular course of action are significantly outweighed. The punishment threatened should be strengthened by the denial of access to finance and new technology. The emphasis today should be made on legal rather than military deterrence. In other words there should be a clear understanding that justice is best served before the bar and not by dropping bombs. Legal deterrence also implies coercive actions, but actions undertaken in accordance with the UN Charter. These actions include sanctions and, as a last resort, the use of military force.

One more observation. I think that it is wrong to use the expression 'rogue states', because it does not make a distinction between the decision-makers and the population at large. It would be more appropriate to speak about 'rogue governments'. Whenever coercive actions are to be employed, it is necessary to keep in mind the 'humanitarian threshold', in other words, to undertake coercive actions in such a way as to minimize the damaging effect on the most vulnerable groups of population (the elderly, women, children) who always bear the heaviest share of burden. Such an approach in practice would facilitate positive changes in the countries of concern.

It is worth pointing out one lesson of the Cold War. Overmilitarization could lead to a collapse of political and social structures. This has not only been the Soviet experience: in his farewell address in January 1961, President Eisenhower of the United States warned of the danger of 'unwarranted influences' of what he called

'the military–industrial complex', including the danger it poses for national 'liberties and democratic process'.

That is why the principle of reasonable sufficiency should be applied to the military build-up, which should not be undertaken at the expense of social programmes and humanitarian activities abroad, because poverty, hunger, and disease create favourable conditions for terrorism and other extreme actions. Material safeguards also include arms regulation and disarmament.

As for disarmament, we now need to make clear what we are striving for. During the Cold War we spoke about disarmament and arms control, because major players could not accept the UN Charter's words 'arms regulation and disarmament'. I deeply believe that now is the time to revive this concept. Arms regulation is less than general and complete disarmament, but more than arms control. Its focus is the creation of the norms of behaviour which should be strictly observed by all actors. Arms regulation does not exclude disarmament in certain most dangerous fields.

Arms regulation is a reality today. We have six broad-based international regimes, which seek to limit the expansion of various capabilities: nuclear, and biological and chemical weapons, missile technology control (MTC), multilateral export control (CoCom) and a nascent multilateral effort to regulate conventional weapons. These regimes are based on and provide strength to the same partnerships and coalitions that are now so essential for fighting terrorism. They are rules-based and contain clear terms for compliance, implementation, and verification. They also underscore the principle of preventive action – the greatest assurance of security that we can have. The regimes could serve as a beacon for creating the required system of arms regulation and disarmament in a new security framework.

Constitutional democratic governance

We often speak of 'good governance', but for me the meaning of this phrase is not clear; good governance to some people is democratic, while to others it is authoritarian. I prefer to speak of purpose-oriented, democratic constitutional governance.

Purpose-oriented governance means commitment to internationally accepted aims – peace and security, sustainable development, democracy, and the protection of human rights – as well as the adherence to fundamental human values – freedom, equality, tolerance, solidarity, and shared responsibility. In a new civilizational paradigm – global society – purpose-oriented government means the definition of the national interest within the global context.

What is no less important is to develop the balance of interests as a guiding principle. In other words, reasonable, enlightened egotism should be brought into relations at all levels of interaction in the world today. Democratic governance implies the existence of a system based on respect for human rights and the active participation of all non-governmental sectors – civil society, business community, and church – and on transparency and accountability in the management of public affairs. As for democracy at global level, it means collective leadership in all the UN bodies. Democracy at global level is inseparable from responsible multilaterism. By this I understand, on the one hand, the recognition of the role required by key actors for bilateral and multilateral policy formulation including security matters,

and on the other hand the responsiveness by the same key players to the broadly representative views of the global community.

For me, responsible multilaterism does not exclude unilateralism, which provides a certain degree of freedom of action. But unilateralism should be exercised within multilateral bodies in a reasonable way and by taking into account the opinion of other members of the global community.

At national level, democratic governance remains the top priority. A new study produced by the UN Development Programme (UNDP) warns that despite two decades of the extension of democracy around the world, many countries have fallen back to authoritarian rule or are facing increasing economic and social hardships. In theory the world is more democratic than ever: 140 countries now hold multi-party elections. In practice, only 82 countries with 57 per cent of the world population are fully democratic in terms of guaranteeing human rights, with institutions such as a free press and an independent judicial system. Important civil and political freedoms are still limited in 106 countries.

Enhanced democratic governance at all levels is intimately connected to legal governance. At global level, constitutional law-based governance implies the effective functioning of the international legal order. The new security environment reinforces the need for states and international bodies to take every possible measure consistent with the rule of law and with human values to assure the safety of citizens and the security of nations.

Despite ups and downs in the global situation, efforts to enhance the rule of law in international affairs are continuing. The Statute of the International Criminal Court entered into force in July 2002. The pace of ratification was very impressive, demonstrating a firm international resolve to hold individuals who commit war crimes responsible for their actions. The International Tribunal for the former Yugoslavia has made significant strides during the past year towards completing all trials by 2008 and dealing with all appeals by 2010. There were positive developments in the proceedings of International Criminal Tribunal for Rwanda and the Special Court for Sierra Leone. Only in the past year, a total of 135 treaty actions (involving 65 signatures and 70 ratifications and accessions) were carried out by 61 states in respect of 23 treaties relating to the advancement of the rights of women and children. With respect to the four conventions on preventing terrorism, even more states carried out an even greater number of treaty actions that resulted in the entry into force of the International Convention for the Suppression of the Financing of Terrorism on 10 April 2002. Another treaty event was held during the World Summit on Sustainable Development, held on 26 August–4 September 2002, to encourage participation in 25 conventions, aimed at achieving economic advancement while ensuring the preservation of the environment.

However, the strengthening of the rule of law globally is hampered, first of all by a shortage of technical expertise at national level. Many countries are prevented from participating within the framework of international treaties because they do not possess the relevant expertise to implement the treaty, or to enact national legislation to ensure compliance. What is very much needed is a worldwide educational dialogue, multicultural in nature, to encourage the new vision of a security

environment which makes the strengthening of international legal order a categorical imperative. Within this dialogue it is necessary to encourage participation in multilateral treaties, the preparation of necessary implementing legislation, and the acceptance of dispute resolution mechanisms. Along with the dialogue it is important to encourage the training of judges, practising lawyers and others who are involved in the application of the law, as well as to inform the general public about international law and about means of recourse in the event of violations of this law.

In conclusion I should like to stress that now, when new strategic security directions are being explored and new strategic bargains are being canvassed, what is needed to ensure new global security arrangements based on the international legal order are action-oriented discussions which pool collective wisdom and help to pilot changes in an evolutionary, non-violent, democratic way.

THE 'LEGALIZATION' OF WORLD POLITICS?

Friedrich Kratochwil*

In introducing the *problematique* of law and international politics I shall frame my argument by addressing a few works concerned with the intersection of (inter) national law and international relations analysis that are in a way representative of such an interdisciplinary effort. Although I shall refer almost exclusively to American works, I think that treating them, for better or for worse, as 'ideal types', is useful for the wider debate. The problems with such interdisciplinary 'visits' result from two dilemmas that traditionally fall under the rubric of 'theory' versus 'practice', and 'disciplinary' versus 'interdisciplinary' research. Below I shall address only the second problem, that is, the issue of interdisciplinary research.

If interdisciplinary efforts are not simply method-driven, that is, by the goal of colonizing another field by some new approach, they are usually rather naive in the determination of their starting point. Instead of beginning with some reflections on the function and constitution of the respective disciplines, that is, engaging in a conceptual analysis or disciplinary 'archaeology', the predominant mode is rather to start with a concrete phenomenon to which the different disciplinary tools are applied. Such a strategy results occasionally in some respectable works of 'translation' ('we lawyers say . . .', 'we IR people deal with this . . .'), but it is more likely that it results in neither good legal nor good social theory. Instead, one becomes often a captive of some current notion of progress or development that then provides the framework. Thus, economic and social factors supposedly driving the process of globalization are adduced in order to explain, for example, the emergence of a new *lex mercatoria*, or some new 'third' version of law transcending the traditional categorization of domestic and international law.

Similarly, if one begins with the observation of an increase of judicial decision-making nationally and internationally, the policy-making by judges provides grist for the mill for the thesis of the judicialization of world politics. As, for example, the

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contributors to *The Global Expansion of Judicial Power* [1] suggest, such a focus indicates a more comprehensive change in social relations, since quasi-judicial procedures are on the rise in other domains (science, health care, and so on). A closer investigation of these trends in various legal systems is, therefore, necessary. This leads for example to a somewhat uneasy coexistence between the functionalist logic of the narrative on the one hand, and the comparative studies of closed (legal) systems and 'countries' on the other hand. Finally, the contributors to *Legalization and World Politics*[2] try to examine the 'move to law' in international transactions either by grafting a theory of law on to an allegedly 'liberal' theory of politics,[3] or by invoking the development of professional networks.

Although these works emphasize different aspects of the expansion of legal modes of decision-making, all have in common a rather narrow focus on courts and on the formal aspects of law. As if this narrowing of scope were not problematic enough, even more surprising is the proposed analytical framework in *Legalization*. The authors claim that focusing on aspects of 'precision', 'delegation', and 'obligation' represents a heuristic innovation that is also conducive to an interdisciplinary dialogue. Since, however, no justification for these indicators is provided, they remain 'under-theorized', and the advanced claims appear to be unfounded. What one sorely misses in this volume is any type of systematic engagement with jurisprudence, or social (Habermas, Luhmann) or legal theory, or with the previous regime debate or the governance literature. Instead, we are confronted with a nearly autistic attempt to theorize about law and politics, pretending that flying by the seat of one's pants is as good as learning from others or engaging with the serious issues of previous debates.

Even if one were to concede that law should be studied largely in the context of legal proceedings before a tribunal, the suggestion that this narrowing of 'law' is heuristically fruitful is hardly persuasive. It is as if the great controversies between legal realists, advocates of 'neutral' principles, the critical legal studies movement, and those arguing for *Law's Empire*, the controversies about interpretation, the feminist challenge, or the new public law movement had never occurred, or contributed to our understanding. Norms are reduced in this recent attempt simply to 'hooks' – obviously a mechanical metaphor has then to carry all the weight in an 'explanation' – or they are treated as 'signals' for a commitment. But such a reduction is unwarranted and not only because imagery rather than analysis has to provide the 'insight', but also because all approaches to communication have insisted on the fundamental difference between signalling and the use of *concepts*, a difference that is simply ignored.

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1. C. N. Tate and T. Vallinder (eds.), *The Global Expansion of Judicial Power* (1995).
2. J. Goldstein, M. Kahler, R. Keohane, and A. Slaughter (eds.), (2000) (summer) *Legalization and World Politics*, special issue of *International Organization*, 54.
3. See for example A. Slaughter, 'International Law in a World of Liberal States', (1995) 6 EJIL, at 508–38; 'The Real New World Order', (1997) 76 *Foreign Affairs* 5, at 183–97; 'A Liberal Theory of International Law', *Proceedings of the 94th Annual Meeting of the American Society of International Law* (2000), 240–53. For the claim of having developed a comprehensive 'liberal' theory of society see A. Moravcsik, 'Taking Preferences Seriously', (1997) (fall) 51 *International Organization* 513–53.

Two points are of particular importance in this context. One is the limitation of the legal *problematique* to manifestations of behaviour, since this prevents us from developing a half-way realistic theory of obligation. It excludes precisely the 'pull' that results from the 'internal' point of view of law (Hart) that is constitutive of the legal enterprise. The other point is the total neglect of language and narratives that frames 'law'. In Robert Cover's words, law is part of an encompassing 'nomos', that is, a normative world that informs our practices. Cover's point in his well-known article, 'Nomos and Narrative', is that legal rules abstracted from a culture's authoritative narratives are likely to wither and can thus neither successfully inform individual and collective action nor provide the justification and consensus necessary for buttressing a court's 'decisions'. By neglecting the problem of context, interpretation, and the peculiarities of the normative world, one cuts oneself off from some of the most interesting puzzles in an interdisciplinary dialogue. In addition, one is also likely to bark up the wrong tree when one wants to explain the impact of law on social life. One example may suffice.

Allegedly the precision of a rule tells us a lot about compliance. But a moment's reflection suggests that there is first a problem with the idea that rules are influential because they are *precise*. As if such 'principles' as 'due process', 'good faith', and so on did not play an overriding role in virtually all legal systems, despite their notorious imprecision! Second, the dimensions of 'precision' and 'delegation' stand in a peculiar tension. After all, only by delegating to the courts the interpretation of what the imprecise legal principles mean, can they become precise and the legal system attain closure. One need not adhere to Dworkin's 'Herculean' notions in order to see the mutual interdependence of these concepts. Thus, as in the case of the 'British constitution' (or in Luhmann's system theory), it is 'delegation' and not the clarity of the rule itself that explains its normative 'pull'!

Finally, behind the idea that law will be efficacious when it is 'precise' lies a whole host of mistaken epistemological assumptions, the most important of which is naturally the one that intimates that 'law' works like an 'efficient cause' in an explanation. To that extent our 'predictive success' will increase when we are able to identify the sufficient cause that can account for a particular action. Thus it can easily be shown that the notion of 'precision' amalgamates two diverging standards – that of 'determinacy' and that of 'uniqueness'. Both, however, often work at cross-purposes. Thus, an outcome might be fully determined (multiple equilibria) but not result in a unique solution, and thus does not allow a 'prediction'.

These remarks should alert us to the dangers of reducing reasons to causes and to the error of treating our 'concepts' as 'mirrors' of an independently existing social reality, instead of analyzing their constitutive function and their embeddedness in a whole vocabulary marking the limits of sense. In this context the most important neglected issue in this approach is that of interpretation. Given the (epistemological) positivist orientation, the authors – by their focus on precision – seem to suggest that difficulties of interpretation arise because 'norms' lack a firm grounding in 'reality', while concepts dealing with 'empirical matters' are precise, or at least can be made so by looking more closely at the 'facts'. This, however, is a fundamental misconception. Even purely descriptive terms, such as 'big' or 'small', have no meaning as

free-standing concepts despite their 'empirical' nature, until and unless one establishes a system of co-ordinates to which they are related. It is this backgrounded system of co-ordinates rather than the term itself which determines the meaning for us, as Aristotle has already remarked.

In the anthology *The Global Expansion of Judicial Power*, there is at least a realization that local customs matter and that, therefore, social structures and law are closely intertwined via substantive understandings. Due to the comparative focus of the work, special attention is paid to national traditions, since they provide for rather different trajectories of development of the social and the legal system alike. From this we can gather that far from giving us an adequate first cut at how the legal system works, the narrow focus on formalism and adjudicative procedures is likely to mislead us. Even if the 'law', for example that of contract, is represented as a purely formal enterprise, the actual adjudication of contract disputes shows that a considerably wider set of issues – including those of 'ideologies' – emerges and decisively shapes the decisions of the courts. Although these issues were extensively discussed in the US legal theory, particularly in the aftermath of Lochner and its various 'revisitations', it is indeed surprising how little impact these discussions have had on legal theory in its present dialogue with international relations. [4]

The alleged non-existence of a 'community' might indeed explain the emphasis on the 'private' contract model of law in international politics. International lawyers and regime theorists alike provided important correctives. Nevertheless, we have to go further if we want to develop a heuristically fruitful new framework for analyzing the role of law in the domestic and international sphere. As legal theorists have pointed out, the idea of 'law's empire' might be an inapt and 'jurispathic' metaphor for analyzing law in a 'domestic' setting, and thus projecting it onto the international sphere might be even more problematic.

Thus, for example, Michelman has advanced the idea of the 'law's *republic*', in which the role of the judge is 'jurisgenerative', that is, not limited to the selection of an alternative and to considerations of coherence with past decisions alone. Rather, the quality of the decision hinges upon its capacity to provide opportunities for reconciliation between clashing communities. Certain characteristic themes bind together this 'reconciliatory project' of law, which is opposed to the traditional 'all or nothing' selection of a binary choice made by the judge. In this view, the concern with *dialogic* themes that accept the 'other', rather than the impersonal demonstration or recourse to special or privileged knowledge, are important in this context. In addition, this approach stresses issues of responsibility and autonomy as intrinsic values that law is to protect, as opposed to the criteria of simple efficiency, professionalism or the allegedly 'neutral principles' in administrative and constitutional law. After all, the adherence to procedures and the deferral to an agency's decision are based on belief – even in the process-oriented approaches to law – that the procedures are not faulty and that the 'competence' of an agency is evidenced by decisions commanding respect also on substantive grounds. Only in this way can

4. See, e.g., the extensive discussion of different trends in US legal theory in W. Eskridge and G. Peller, 'The New Public Law Movement: Moderation as a Postmodern Cultural Form', *(1991) 89 Michigan Law Review* 707–91.

we establish a baseline against which we assess procedural fairness and legitimate discretion based on competence.

The omission of this entire area from the *Legalization* issue of *International Organizations* is all the more surprising, since the debates within the US legal community – not to speak of their continental brethren – has been characterized by a vibrant discussion of several substantive issues. One issue that could easily have bridged the gap between law and the social sciences in general was that of 'post-modern constitutionalism', that is, how law as an institution was influenced by the broader patterns of culture in general. In the United States the New Public Law movement has tried such an approach.

> What makes the New Public Law something more than just one more and newer legal process is its conscious rejection of the pluralist political features of legal process theory. Where even progressive legal process scholars tended to assume that people's preferences are predetermined, that politics primarily consists in the aggregation or compromises of preferences and that norms are less important than process, New Public Law scholars of the 1980s suggested the outlines of an anti-pluralist conception of law. Where the people's preferences are formed through politics and not prior to it, where law and politics are socially constructed, and where law and politics are heavily normative. [5]

In short, the value added is the recognition that law is characterized not only by process and formalist criteria, but by its embodiment of substantive values; that its 'function' is not simply to help along a political project – the hidden or manifest 'purpose' emerging from interpretation and construction – but that it is also formative and transformative, instead of simply external to the actors and their preferences; finally that it is 'dialogic' and not simply an empty rhetoric moving between an apology and a utopia, providing an uncertain algorithm for arriving at a decision.

Contrary to these debates and controversies in legal theory, it seems strange that the outlook and sensibilities shared by those who visit the intersection between law and international relations exhibit most often a distinct preference for the 'professional' ideal and for some type of, even if largely 'private', legal bureaucratization. Among these professionals there prevails a

> loose melange of cosmopolitan or metropolitan ideas – that more things should be done internationally, that the nation and the state are things of the past, that internationalising pretty much any endeavour is a good thing, that progress means globalisation, that cross-cultural contact will advance understanding . . . and so on. [6]

What seems entirely missing are not only the traditional concerns of jurisprudence, such as sources, consent, sanctions, coherence of the system of rules, but also any of the traditional issues of politics, such as power, inclusion or exclusion in a community, and questions of redistribution and of representation. Instead of the largely 'constitutional' concerns of previous international lawyers, the present cohort

5. *Ibid.*, at 737.
6. D. Kennedy, 'A New World Order: Yesterday, Today, and Tomorrow', in S. Mendlovitz and B. H. Weston (eds.), *Preferred Futures for the United Nations* (1995).

focuses nearly exclusively on 'governance', that is, processes in which decisions are arrived at by some mode of legal decision-making, and in which the issue of the institutionalization has virtually totally eclipsed an interest in outcomes. Indeed the narrative that is usually supplied – either directly or as a subtext – is one of 'progress', from preoccupation with consent to one of problem-solving, from sovereignty to erasing the distinction between the inside and outside (municipal law and international law), from centralization and hierarchy (buttressed by authority) to one stressing the importance of decentralization and expertise. But in this discourse 'society' is no longer contained by states or by culturally defined distinct entities, but is conceived as one in which 'actors' make their preferences count. How these preferences and patterns of solidarity form, however, remains a puzzle.

The result of this omission is a strange 'liberal' theory in both a descriptive and normative sense. While the 'rationality' of social aggregates acting as a unit is unmasked as a fiction by this 'liberal' approach – since 'preferences' of groups are identified as the driving forces of preference formation – the formation of the actors' projects and goals remains under-theorized. Preferences remain not only exogenous to the analysis, they can no longer be criticized, since they are – like private property – sequestered to the 'private' realm.

Here the events of 11 September 2001 serve as a sobering reminder not only that the vision of a new professional class that will be able to solve political problems 'objectively' and 'rationally' is unjustified, but that the technocratic vision underlying such a research programme is thoroughly illiberal in terms of the participatory notions underlying the liberal project. Fundamental issues of social life have been eliminated, and even the possibility of establishing some form of communication across heterogeneous cultures and political projects has been displaced by the ideal of technocratic professionalism. The evidence that negates this 'liberal' vision is sequestered to some spatial or temporal domains: 'zones of peace' are contrasted with those of 'turmoil' (even if terrorism has shown the futility of such a division), and 'atavism' is sublated by 'progress' in the temporal dimension.

But despite the attempts to view the terrorists of 11 September as backward traditionalists who were unfamiliar with the workings of the modern world and with the liberal project itself, such a reduction will not do, as the historical facts clearly indicate. To that extent the narrative of modernity misdiagnoses the possibilities and limitations of law and policy alike. We had better understand that the role of law in a globalizing world is not a simple 'move' from public to private ordering, from the old notion of 'sovereignty' to that of 'democracy' supported by the emergence of a 'world civil society', in which 'forum shopping' and litigation carried out by 'professionals' determine the outcomes. Even if states no longer have the same status and monopoly of raising issues and being empowered to deal with them, the politics of identity and the 'narcissism of small differences' are potent and quite often fuelled by legal professionals and their claims to 'self-determination'. Both phenomena decisively counteract the development of a largely technocratic modus of decision-making.

In short, homogenization as well as fragmentation is part of our predicament. These trends are not two opposing views, separable in space or time. Rather both are constitutive elements of global reality in which 'law' plays a decisive role. The issue

is not so much to achieve some consensus on certain norms, for which networks and norm entrepreneurs are indeed important, it is rather how these commitments and recommended policies can be realized under conditions of great differences in material capabilities and in the midst of social and cultural diversity.

THE ACTUAL RIGHTS TO SECURITY

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The first question is whether really new facts threatening security have emerged. There are viewpoints from which to seek an answer: the perspective of the means of warfare, the perspective of a more and more liberalized and globalized market, and the perspective of common people.

The only player with the ability to wage war apart from local conflicts is the United States. According to the recent publication, 'Transforming America's Military', by the National Defense University, US homeland defence is ranked first, with a three-pronged strategy: prevention, protection, and response. It only seems that the nuclear deterrence policy is outdated: the US strategic posture is shifting to nuclear as well as non-nuclear offensive and defensive capabilities, and a robust nuclear weapon infrastructure. Russia is no longer qualified to be an enemy. But how is China to be assessed? It supported the US response in Afghanistan to the terrorist attacks on the United States on 11 September 2001. In return, the United States started to accept China's actions against the Islamic uprising in Xinjiang as part of fighting terrorism, but there is obviously no nuclear relationship with China. Russia, not officially but practically, accepted the US withdrawal from the 1972 ABM Treaty, getting in exchange major reductions in strategic nuclear offensive forces and the finance to carry them out in Russia. ABM cancellation made the way free for ballistic missile defence (BMD). The programmes for defending against short-range missiles, such as the Iraqi missiles targeting Israel, have been recently cancelled. An air force programme based on a freighter aircraft with laser equipment seems to be too vulnerable.

The Clinton administration's land-based BMD was directed in practice against threats from North Korea. The Bush administration is now favouring a new sea-based system against long-range ballistic missiles, but its range will not extend far enough to cover countries such as Iran. Such a system would most likely have to be based in a neighbouring country – a chance for Saddam Hussein?

Two space-based systems are under consideration but are unlikely to be developed before the end of this decade. High-tech Airborne Warning and Control Systems (AWACs) aircraft are to be upgraded, and navy and air force fighters modernized as a direct consequence of 9/11. Will they shoot down a civilian aircraft hijacked by terrorists?

Apart from the sense or nonsense of such planning measures, what is the legal basis of such actions in the air and in exo-atmospheric space, especially if it is

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combined with deployment of offensive weapons? The United States is widely transparent because it is a democracy, but how about other states in possession of means of high-tech warfare which may not be under any form of control? Which global legal regulations are in existence, and which are to be established, in order to stop a new deterrents race and to establish a better system of prevention than can be provided by any high-tech defensive arms? Can a discussion about global legal thinking replace the old-fashioned idea that security can only be achieved by arms? Isn't it an encouragement, or even a confirmation, to fundamentalists that there are no limits to their acts of violence as long as states develop their means of offensive and defensive warfare without international legal restrictions?

The superiority of industrialized rich countries in the field of high-tech arms is accompanied by their dominant position on the global markets and in the regulating institutions such as the IMF, the World Bank, the WTO and G-8. Developing countries are forced to liberalize before they can build up a functioning competitive home market. Even the rich oil countries feel pushed to the back and dominated. This – much more than cultural and religious antipathy – forms the background of recent terrorism. There were no Muslims among the German terrorists of the 1970s; the latter had the (wrong) idea that German society, even though a democracy, was not capable of reform. It is this breeding-ground which produces the fighters who are enlisted by present-day terrorist organizations.

It is unsurprising that ordinary people will take conflicting positions on the solutions to threats against their society. Americans, without having experienced modern warfare at home, are feeling strong and want to see their government acting correspondingly. The country is large, the sources of danger far away. Threats should be warded off by the administration: they will know how to do it.

Europeans in general also incline towards military defence, but this confined to their territory and without the illusion that war can replace political solutions. They doubt more and more whether preventive strikes can replace sound political solutions. This, and not anti-Americanism, is the reason why even Tony Blair's Britain does not want to intervene in Iraq. The different positions taken by third world countries have one thing in common; they feel powerless. Some of them, even those with an income that ordinary people in the United States or in Europe can only dream of, feel their pride hurt by what they call the West. This is the breeding-ground for Bin Ladens. The strategy to counter new threats is not new, but widely forgotten: negotiate to establish mutual trust and understanding. The military option should be chosen in the same way as the use of force by the police in a democratic society – on a legal basis.

Group II discussion

Nodari Simonia. First, it bothers me that, at least in Russian academician political circles, the cause of the last two world wars is thought to have been the result of ideological differences. Consequently, if there is no longer an ideological confrontation between two so-called systems, then there is no danger of another world war.

I think this analysis is wrong. First, the two world wars were mainly the result of the conflicts between primary capitalist countries and secondary or 'catching-up' countries. If we look around today, the same mechanism is present There is a large group of 'catching-up' countries that are arming themselves, and we ignore these tendencies at our peril, because the next war will be the last war.

Second, the widespread opinion throughout the US administration that the United States defeated the Soviet Union is worrying. This opinion is wrong: all those who have studied Soviet history have come to the conclusion that it was self-defeat for the Soviet Union. We did everything possible to destroy not only the country but our economy, and we must take the blame for it. The United States repeats endlessly that it perceives itself to be the victor and that it is still a superpower, but 'superpower' does not only mean a big power; a superpower is a leader of a group of countries fighting another leader with its group of countries. Today there are no bipolar system and no grounds or foundation for being a superpower. However, if one country pretends to be at the same time judge and executor of its decisions, then other countries can think: why not us, why only America? This is a very dangerous situation. Moreover, President Bush's position is not constructive. If you avow your willingness to solve a problem, you must speak wisely, not just menacingly about what your military might be able to do.

Peter Stania. In the field of security a new US military doctrine has been recently published. I do not want to elaborate on this doctrine of pre-emptive defence, but I would ask how it fits today into the system of international law.

Chantal Thomas. Looking closely at the UN Charter, there is significant ambiguity around the provision of self-defence. One can argue in favour of the kind of action that the United States took against Afghanistan and might take against Iraq even with reference to the text of the original Charter. Or take the UN resolution that has been claimed as an argument for US action. Again that is ambiguous; it could be argued in different ways. This is one of the weaknesses of international law. In these times of very intense conflict, where you might expect a very clear signal of multilateralism and order, international law is in fact very ambiguous on the question of the role of law in times of conflict.

David Kennedy. First, I completely agree with Professor Simonia that the threat of war has not disappeared with the disappearance of the ideological clash. The problem of the catching-up countries is precisely that global inequality has led to war before and is likely to lead to war again. In that sense the situation is grave. I also agree that the United States is not as militarily superpowerful as it thinks. We need to remember that although the United States says it is militarily superpowerful and although no other military may be able to challenge it directly, this does not mean the United States can actually accomplish anything in the world. This is something the US administration forgets, but other people forget it as well, and I agree that it is very dangerous to forget the limits of even predominant military force. Now the question is what to do. I take the suggestion of the papers to be that we might restrain the United States through law. They suggest an informal alliance between the Russians, the Europeans and the third world – and I presume also Americans of good heart – to hold international law up against US power. This, they propose,

will also be good for us in the United States, because it will prevent us from making terrible mistakes.

In my own view this simply will not work. *To think that it will work is to imagine* that our ideology is going to destroy our empire in the way in which Soviet ideology destroyed the Soviet empire. Our ideology is the ideology of international law, and we have made it flexible enough to accommodate our imperial power. We are not going to get into the situation of finding ourselves tied up in our own ideology in a way that leads us into crisis. Our ideology is simply much more plastic. Indeed, the transformation of international law into a tool of empire – which seems to me to have been the thrust of Professor Frankenberg's remarks – is to me the most astonishing transformation of the last ten years. State power is now exercised in the vocabulary of the helping professions. Military forces invade as an application of humanitarian and human rights law. Yes, it is true that you have to stretch Article 51 to be able to do something pre-emptively, but 51 can be stretched. There just is nothing in the materials of international law which can definitively protect us from ourselves.

So what is the alternative? Responsible action – not hiding behind the law. Let me phrase it sharply, in terms of what I would have hoped could come from an alliance of Russia, Europe and Americans of goodwill: power and money. I would have hoped that the European Union and Russia would have had an alternative image of geopolitical security, an alternative vision of peace in the Middle East, of humanitarian engagement with the populations of the Arab world, an idea about the route to security through prosperity rather than through force – and that they would have backed it up with power and money. For example, if the European Union is serious about expressing an alternative based on commerce and law – and wants to do more than simply complain about international law – they should come up with some money. Take a feasible figure equivalent to what the United States spends for military hegemony, so some billions of euros a week, or equivalent to what the United States proposes to spend in a war on Iraq – something like US$200 billion. They should put this on the table for the Palestinian entity's immediate membership of the EU, for Turkey or Morocco, for a transformation of the geopolitical situation for the sale of oil in the Middle East, or for a development assistance plan which would dwarf all that we have come to think of as development aid. Or they should open their borders to the east and permit free trade, liberating the movement of people from outside the EU alongside the liberation of commerce and finance. They should offer an alternative, a serious alternative, for the establishment of secure and prosperous societies in the Middle East and elsewhere. But until somebody in Europe or somebody in Russia says something different, and says it with money and with power, the United States will continue to do what it does. It is simply a fantasy to imagine that the professional vocabulary of international law will stand in their way.

Günter Frankenberg. What we experience at national level under the term 'war on terrorism' is an absolute hysteria of security, and I think we cannot even hope to find rational concepts on the international level if we cannot even appease the national. The chairman has suggested that one ingredient of a new concept of security might

be moral conviction: for example, once I have been convinced that terrorism is bad I shall argue that something should be done about it without disrupting the whole international legal scene. But I do not trust our moral convictions to get us far. The second ingredient suggested is that of legal deterrents, international law used in an appropriate way – without unilateral action and imperial legal claims. Again we have to confront the question that Professor Kennedy has just posed: what can law do in this situation?

Vladimir Petrovsky. A moral approach to these issues can be practical. I was involved in a number of such discussions at governmental level, and whenever this situation was confronted the government had different options. How is the choice to be made? One is guided by national interests, but at the same time national interests should be enriched by moral understanding. At the beginning of my career I was president of the first United Nations summit in 1961. All the heads of state were endlessly searching for answers to the question of what was to be done. They could not even agree upon 'peace', because 'peace' was advanced by Western countries, and some of the third world countries and the Soviets pushed very strongly for 'peaceful co-existence'. There was an endless discussion on human rights and civil, economical or social rights. What very much impressed me was that at the last millennium General Assembly session, where there were 162 heads of states, all agreed on what is to be done. Everybody understood that they needed peace, security, human rights, democracy. It was tremendously important that all of them agreed that certain moral values should be applied. They talked about freedom and equality, tolerance, shared responsibility. Even from a pragmatic point of view, when we are guided by the general understanding of what is to be done politically and morally, it is much easier to find the right options and alternatives.

You also ask about material correctives. I fully understand that in view of the new security situation, it would be too idealistic to demand general and complete disarmament. We need to be realistic and under new conditions countries have certain differences in capabilities. But what kind of defensive capabilities should one have? Defensive capabilities should take into account the recommendations of international law. Nodari Simonia once argued that money set free by disarmament measures should help developing countries. It is my deep conviction that hunger and the gap between rich and poor create favourable conditions for all extremist activists.

The question was also raised about pre-emptive action; I think that this is the most effective way to deal with crisis situations. From a practical point of view it is less expensive to carry out pre-emptive actions than to send peacekeeping troops. During the Cold War it was very difficult. Now we have accepted the consequences of pre-emptive diplomacy and through international law we need to encourage much more strongly sending missions to the countries of concern and to act on an early basis with regard to this matter.

Leopold Specht. I want to articulate an impression which I have when assisting friends and colleagues from the former Soviet Union in discussing issues of security. The impression is always one which is similar to what Siegfried Krakauer describes in his essay on employees: employees get up and dress and

look at themselves in the mirror and they see themselves in the eyes of the employer. I always have the feeling that many contributions from friends from the former Soviet Union, from the Russian Federation in particular, to a certain extent, and I say this with all sympathy, pay tribute to the idea of defeat. You analyze your situation in terms and apply notions which are not yours: they are those which you think that those who have won the Cold War would apply in such a situation and in such a conversation and in making a contribution to such a symposium.

This brings me now to the question of morality. I thought that I understood you when you talked about the moral component, because it reminded me of a notion that Mikhail Gorbachev used in 1995 and 1996 when he talked about the common value base between nations. I hear this because 'moral' is a term you are taking from Western discourses on law and politics, and so on. This is where the Soviet frame of mind kicks in and it somehow distorts the presentation. We are talking about morality as the common basis between peoples and nations, and all we have to say about terrorism is that we should feed people in order for them not to turn into terrorists; this is no longer a moralistic approach but a functional one. It is an instrumental approach. The problem of the current position which your government takes in certain debates and which is echoed in such contributions is that you want to be super-realistic and buy into the ideology and the slogans of what is put forward by the hegemonic power. For what purpose? For the purpose of gliding over the disruptions which have occurred in context of the demise of the Soviet Union. Chechnya is not a question of hunger, Chechnya is not a question of international terrorism, Chechnya is not a question of Muslim fundamentalism. It is a question of the corrupt way in which the Russian Federation came about at the beginning of the 1990s. It is a sign of the weakness of the federal system, a system which gave itself up and bought support from anyone who was ready to give support, including those who led Chechnya into the situation in which it now is. So I think that we need a genuine return to the moralistic part of the question: let us allow ourselves to take morality for its Soviet meaning, which we know and with which we can work. But then we have to apply it also at home.

Petrovsky. I should like to make it quite clear that I fully agree with you. Now, in the face of the challenge of shared terrorism, of course an instrumental approach is very much in demand. I participated in negotiations both in the United Nations and here in Vienna at the Organization for Security and Co-operation in Europe (OSCE) – the major point was the need for legal precision as well as moral clarity. There is no definition of terrorism in international documents. Attempts have been undertaken in the United Nations, but they have not been able to achieve common ground. There is a general feeling that terrorist acts are directed against the most vulnerable group, the civilian population. From this point of view the terrorist attack in Moscow sounds like the terrorist attack on 11 September or the terrorist attacks in Bali, and so on. But an instrumental approach, and I wish to make that point very clear, should go hand in hand with moral clarity. I think that the Security Council's Counter-Terrorism Committee works in this direction. Of course, absent a shared definition, countries work according to their own parameters, but taking

into account the experience of international law. Here messages from the academic community could be very helpful.

Specht. The special legal context in which to put the measures you are addressing is called a state of emergency. It has been part of legal reasoning for many hundred years and it is an unfortunate aspect of the history of this part of the world that law is unable to govern or control in a state of emergency. I am interested in how we can avoid dealing with such situations in the manner now proposed by your government, for example in Chechnya.

Petrovsky. From an instrumental point of view, it would be ideal to ratify the twelve existing international conventions on terrorism; the international community pushed in this direction. I strongly focused my statement on constitutional democracy and I should like to explain why. Even in the history of my country, democracy is very often associated with honour, but for me democracy has its limits: it is a constitution. If I take for example the United States, the American people chose their constitution; later they felt the need to make some amendments and they worked within the constitution. The constitution on the global level is the Charter of the United Nations – we need to give a new reading to the Charter! Nothing prevents the UN Security Council from meeting at the ministerial level to re-read, if not amend, the charter. Nothing prevents the Security Council from having meetings outside New York – why not have them in Vienna, in Geneva, or even in the Balkans? Even during the Cold War, Security Council meetings were twice held outside New York, once in Guatemala and the other time in Africa. It has to be much more mobile. The Charter, for me, is still a kind of a sleeping beauty.

Kratochwil. I want to refocus the discussion on international law. I think the task of law is to worry most about questions of constitution, rather than arms control or the underlying causes of war. In constitutional affairs, the task of lawyers is not to become social engineers. It is not the task of lawyers or those engaged in legal philosophy to prevent people from misusing law or not abiding by law. It is rather their task of elaborating what the relevant issues are and how they can be clarified by the development of law and the legal process. I think these are questions that are important in their own right, even if I agree with David Kennedy's assessments that most US decision-makers are probably not going to pay terribly much attention to them.

Manfred Rotter. I'd like to take up Professor Kratochwil here, by trying to make two points. I think the concept of fighting terrorism, even international terrorism, on the basis of international law is wrong from the beginning. Terrorism is a crime, is a crime that has to be fought by police methods, that has to be fought by methods of internal security organizations and it is the obligation of each state – under international law – to take care that its territory is not used as base for attacks against the territories and societies of other states. So it is a big misconception and in my view a terribly dangerous misconception, to think of the possibility of fighting terrorism by military measures.

Security is a psychological phenomenon and basically meant for living individuals, and to speak of the security of a nation or of a society is already weak, in the sense that you have to transfer elements of individual life or individual feelings into

a society, which is difficult and to a certain extent dangerous. So the question is not what is security, but what ought security to be in the interests of each actor? And there we are heading for trouble. NATO's strategic paper from the 1999 Washington meeting in its final version contains what is found in all the strategic papers of NATO: several elements of what the alliance considers to be its security. There is one point that is potentially worrying and that is the maintenance of supply lines. The maintenance of supply lines could obviously apply anywhere, so that the alliance or the United States can decide what constitutes their security, and warn of action in the case of a threat to it by their supply lines being endangered, without even explaining what is really meant by supply lines.

Petrovsky. I remember that as soon as the UN Charter was signed, there were lots of discussions among international lawyers on why the UN Charter uses the terms 'peace' and 'security'. When we started to work with our American colleagues on this resolution of comprehensive security, the idea of security had to be introduced, since the initial charter concept was that security belongs only in the field of military policy. The resolution covered the protection of individuals from the different dangers of their existence, and later the United Nations accepted the concept of human security from violence, disease, hunger, and adverse environmental conditions.

Lanc. What is our view about the Afghanistan intervention? I think that this question has already been partly answered by Professor Rotter, but I would say that from my experience I never expected that Bin Laden could be caught there. I never expected that what the CIA told politicians in Europe at the time of the intervention would be true: that all the mountains were full of hard- and software serving international terrorism that would be discovered by US and allied troops when they went there. Even deputies from the Green Party in Austria believed this information. Meanwhile we are still waiting for reports that something has been found in these mountain caves.

A second question is more general: what happens to a country which is more or less blamed for supporting or at least hosting passively a group planning terrorist actions against other peoples and other states? There is a new dimension of terrorism, caused by new technical means. There were no airplanes before, so they could not be sent to the World Trade Center, because there was no World Trade Center before. Terrorists came to Austria in the 1970s. I had to deal with this as the Minister of the Interior; I visited Saddam Hussein in this connection because of his illegal action, about which everyone knew. But how could you prove that such states, especially a dictatorship, are supporting and hosting terrorists if you had no access to documents proving this? On the other hand, what could you do with such material if you had it? – nothing. There would have been no support for the assertion that Saddam Hussein, or also Hafiz al-Assad at that time, had to be removed from power. I therefore went the other way: to Baghdad to tell the Iraqis that if they wanted good and friendly relations they had to stop these activities, which led to the shooting and death of one of my best friends, Heinz Niltl, a former town councillor of Vienna.

The question now, in connection with Afghanistan and the intervention there, is what is the consequence of implementing international law? It is only the installation of somebody who is the legal representative of those oil companies who

are drilling north of Afghanistan and want a short and safe pipeline to the Indian Ocean. That's it, that's the background of the Afghanistan intervention. It is possible to read of a 1998 US Senate committee interview with representatives of the oil companies involved, who told them at that time that the Taliban could not guarantee security there any longer, and therefore there must be a change of government in Afghanistan. Now they have the local oil representative as prime minister.

I am very grateful to David Kennedy, because in relation to this particular unpleasant policy of the US administration, he mentioned that a combination of the EU and Russia might have sufficient power to counter the only present superpower. But there are two different philosophies here. There is a completely different philosophy in United States foreign policy, not only since Bush. They have another approach, they have the approach of those people who came to a country where, except buffaloes and Indians, nobody was there and when they felt confined, then they went west. That is their mentality and this is the way of the growth of this country and therefore there must be another philosophy like in countries which were always confined to a certain region and densely settled for many centuries at least. There is another approach and what Europe, and I would say even the majority in the Russian federation, qualifies as a power is different from the qualification of the United States and therefore an establishment of counter-power just by combining all abilities will not lead to a result that there is more than a balanced power globally seen, apart from the fact that there are existing China, India and other powers, which will come up soon. I am sure.

Kennedy. I should like us to drop the idea that the UN Charter is a constitution. Let us start from a different idea. Imagine we said that the Charter was the project of some people at a particular moment, people who had an idea about what to do with power. It had its moments and it still has some usefulness, but the idea that the UN Charter is a constitution is simply the wish of a particular group of elites and a particular profession. It is not an even slightly plausible description of political reality. The actual constitution of the world, the actual legal constitution of the world, is much more a function about rules about jurisdiction, procedural rules, national rules, private law rules, expert opinions, commercial practices. If we ask what the real constitution is that undergirds the current distribution of power and the structure of decision-making in global society, we would say that way down in some corner there maybe would be the UN Charter. But the actual global constitution is the doctrine of sovereignty and all of its various permutations.

I would also propose that we drop the idea that we use morality and international law ever in the same sentence. If we had two people here, one who wanted to destroy the environment or commit genocide or be a terrorist, and the other who wants to protect the environment, avoid genocide or terrorism, and we asked who will be helped more by the existing structure of international law, it seems clear to me that international law would give more aid and comfort to the person who would want to destroy the environment, the person who wanted to commit genocide and the person who wanted to be a terrorist. Not that international law has nothing to put on the other side of the balance, it has many things, but not *as* many things. I

remember a moment shortly after 11 September when the American political class began to worry about what we would do if we managed to capture a terrorist. The American international law community went on television and radio and said that we need to address this problem as a judicial matter and we need to send them to an international judiciary and we need to make sure that there are judges from a wide variety of different places and legal cultures. They made impressive, if familiar, arguments about the long-term values of multilateralism, being seen to engage the world, and so forth. We should not treat this as a war, they said, but as a judicial matter. It all sounded wonderful, but I just had one question at the end: will the amount of terrorism in the world to go up, go down or stay about the same if we do it that way? And the people who were advancing the legal arguments had no answer to that, because the reason they were proposing the legal analysis was an ideological idea about how things would always be better and more humane if done through international law. There was nothing consequential in their analysis about what would actually happen to terrorism if we placed international law in charge. The fact that the international legal community would put forward such an analysis, with so little attention to the consequences, leads me to believe that they're simply not politically responsible. They are putting forward the legal analysis for a different reason – as a religious incantation perhaps, or as a way of appearing to be engaged while remaining confident that no one will actually ask them to take over. They are putting forward their legal proposals as a mode of apology, disengagement, and legitimization for not taking the political decisions to do something about terrorism. In short, people who want to associate international law with morality do so to avoid taking political responsibility for the consequences of what they are proposing.

Balakrishnan Rajagopal. After 11 September I spoke at a number of public rallies, and one of the questions that always came up was: was what happened on 11 September a violation of international law? A second question was: if the United States actually engages in an attack on Afghanistan, would that be a violation of international law? I found myself deeply puzzled about both questions, because I was not sure that there was a clear answer to either. But a lot of ordinary people seemed to care about the UN Charter; they seemed to place a lot of trust in the fact that there was something that was imposing some sort of a constraint, and they seemed to be taking it into account in formulating their politics. What was their politics? Writing letters to their representatives, maybe holding a march, maybe writing an article in the local newspaper, basically trying to influence public opinion on the issue of war and peace. If you look at the public's support for war against Iraq in the United States it was two-thirds initially, but now it is almost down to a half, a number of cities are actually proposing resolutions against the war, and the church establishment is involved in an anti-war rally; the anti-war movement is picking up momentum and recently there was an anti-war rally in Washington with more people participating in an anti-war rally than since the famous anti-nuclear rally in Washington in 1981. So there is something going on here in terms of the engagement of ordinary people with the text, and that might constitute a different way of framing the whole issue of politics.

Susan Marks. If international law is not only working to repress insecurity but also to enable it, then that is a problem for us as analysts of international law. And that problem comes into particularly stark relief if, as Professor Petrovsky highlighted at the beginning (and I think this is right), security is not just about military threats, but is also about a much wider range of threats. That takes us back to our discussion this morning. What the papers this morning signalled so clearly is that insecurity is about hunger and poverty and indignity and so on, and we need to think about the investment of international law in these phenomena. We need to see that investment as part of the security problematic.

Rotter. The two contributions from Cambridge, Massachusetts, raised an interesting problem: namely to what degree the citizens in democratic countries, or to what extent civil society or a civic consciousness are aware of the functioning of legal institutions, particularly international ones. In the United States, as everybody knows, the Supreme Court is highly politicized. There are certain pressure groups on issues such as school prayer, abortion, and women's rights who would frequently demonstrate in front of the court. The interesting question I think is whether in the democratic citizenry there is anything more than a vague feeling that there *ought* to be an international structure of a constitutionalized kind, like people are now accustomed to in the democratic countries and to what extent therefore do these vague references to the sudden appearance of international lawyers who never expected to be on television who became experts/celebrities for 15 minutes after these events, to what extent they were in fact responding not technically to some vague sense that these matters ought to be regulated, controlled, brought into the public sphere, removed from either a kind of historical black hole and not lead to the technocratic judgment of obscure professors and judges. In the United States Bush and the Republicans are very, very effective at mobilizing nationalist resentment against participation in the international court. There is a great residue in the United States of feeling that is summarized in the not quite immoral question, 'why do they hate us?' – a great residue of feeling that the world is against us and therefore to subject American soldiers to international jurisdiction would expose them to a terrible and unjustified fate when, after all, 'we only go out into the world to help the lesser folks to raise themselves to a reasonable level'. Bush used this nationalistic stupidity to his great political advantage; it is a very, very old theme. There is another issue behind it, which is a very personalized and specific theme: the fear felt by an increasing number of people in the US legal political establishment. Henry Kissinger does not travel without asking a foreign government whether they could guarantee his round trip. This applies to Germany, it applies to Austria, and it applies to England.

Talking of law and politics, of politics and law, what degree of public consciousness of the functioning of these institutions exists? What educational and political mechanisms or agencies are available to us to break through some of the encrusted nationalisms and prejudices? Probably one of the most remarkable processes of the last half century has been the internationalization or the Europeanization of a good deal of European consciousness. Whether a similar internationalization can be attempted in the United States is also an interesting question.

Joel Paul. I just want very briefly to expand on something Professor Rajagopal said a moment ago to contrast two examples of the way in which international law is operated domestically in the United States. Many are familiar with our unfortunate policy of executing prisoners who are foreign nationals who have been denied their consular rights in the United States, in violation not only of the consular convention, but also in violation of specific provisional orders of the International Court of Justice. We have done this now on at least two occasions that I am aware of, and on both of those occasions there was virtually no acknowledgment in the United States – in the press or the public imagination of any kind – of international law violation. When I teach these cases to my students, generally speaking they have never heard of them. My students have no idea what the conflict convention is, they do not know who Rayard was and they are surprised that in Europe more people are aware of these violations of international rights. By contrast it is really very striking that in the case of 11 September and the United States invasion of Afghanistan and our threatened invasion of Iraq international law has very much formed a part of the public discourse. I for one am extremely encouraged by that fact; even if it does not necessarily stop the Bush administration from doing all the terrible things it wants to, it has really legitimated and authenticated the opposition to the administration and given it a strength that it would not otherwise have. We do not believe in law as a neutral instrument, we do not believe in law as something which tells us what the right answer is. We believe in law as a form of advocacy and I think as a form of advocacy international law is working rather brilliantly at the moment in the United States in slowing down the administration in what it might otherwise do.

Stania. I agree with Professor Kennedy, but not with Professor Paul. I think it is our duty as international lawyers and teachers to show our students, and the public if we are asked, what international law is about, what it can achieve and what are its limits. I think we should prevent misjudgments as to its all-solving capacity. Basically a national crime is to be judged according to national law with national means. There is nothing wrong in declaring international solidarity against terrorism, but that is not really the point. The point is that anti-terrorism or counter-terrorism is more and more going to be used as a threat to other nations. The President of the United States said that 'we have to look carefully at who is with us and who is not with us'. I do not want to go into detail about what is happening in Afghanistan and I am certainly not the best informed about it, but the results are not all that convincing. The result of that is that every terrorist attack is labelled as being an Al Qaida attack, which of course is wrong, but it does make sense against the background of frustration of powerful authorities trying to fight terrorism without really having great success. Not even the legalized procedures in Cuba are of great help. The US authorities are very clandestine and had to admit that they had to release some of the suspects kept there because even their methods did not lead to any usable result whatsoever. So for both international legal reasons and practical reasons I am at this point unable to agree with Professor Paul.

Leiden Journal of International Law, 16 (2003), pp. 897–913
© Foundation of the Leiden Journal of International Law Printed in the United Kingdom DOI: 10.1017/S0922156503001559

Theme III: Global Governance: Institutions

INTERNATIONAL ORGANIZATIONS TODAY

B. S. Chimni*

Introduction

The network of international economic, political, and social organizations established at the initiative of the first world constitute a nascent global state whose function is to realize the interests of the powerful states to the disadvantage of third world states and peoples. The evolving global state formation may therefore be described as having a neo-imperial character.

In all areas of international life, international organizations limit the autonomy of sovereign third world states. Sovereign economic decision-making authority has been relocated from states to international economic organizations which possess effective enforcement powers. The UN system is being geared to promote the interests of transnational capital, among other things, by increasing the role that the private corporate sector can play within the organization(s). The relationship between the state and the UN system is being explicitly reconstituted through reconfiguring the principle of sovereignty and its relationship to the protection of human rights. The globalization process is breaking the relationship between states and international organizations. Non-governmental organizations (NGOs) participate in diverse ways in the norm creation and decision-making process within international organizations. While a large number of NGOs bring the critical voice of civil society, others promote the cause of transnational capital. Even the critical voices often neglect the concerns of the third world. Powerful states resist the establishment of a transparent and democratic decision-making process within international organizations. Together, these features limit the possibilities of global redistributive justice and the genuine democratization of both inter-state and intra-state relations.

The class which exercises the most influence in international organizations today is formed by the transnational fractions of the national capitalist class in advanced capitalist countries, with the now ascendant transnational fractions in the third world playing the role of junior partners. Together, the first and third world fractions of the world bourgeoisie constitute a transnational capitalist class (TCC) which is in the process of congealing and establishing a global state constituted of diverse international organizations – economic, political and social – that help actualize and legitimize its worldview.

The World Trade Organization (WTO) is the key institution to which sovereign economic space is being seceded. In crucial areas such as agriculture, technology policy (intellectual property rights), and regulation of foreign investment and

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services, sovereign powers have been relocated from third world states and peoples to the WTO through the adoption of uniform global standards. But the WTO is not alone.

The international financial institutions (IFIs) encroach on other sovereign areas through the prescription of conditions or of a structural adjustment programme for 'loans' taken. The IFIs also subject national currencies in the third world to growing pressure by insisting on their deterritorialization. The International Monetary Fund (IMF) 'encourages' states to accept capital account convertibility, eroding their autonomy and ability to regulate marauding and hyper-mobile global capital. The private corporate actor is also coming to play a greater and more active role within the UN system.

The reconstitution of the relationship between the state and the UN system is also taking place through an explicit declaration of the principle of sovereignty as an anachronism, particularly in the context of human rights violations. This has allowed, for example, the UN Security Council to justify the idea of armed 'humanitarian intervention'. Finally, the UN system is seeking to recast its relationship with third world states by prescribing the neo-liberal state as the norm in the reconstruction of post-conflict societies. 'An accountable post-conflict state' means a state which can deal with the legitimacy crises and social protest generated by the implementation of a neo-liberal adjustment programme and greater integration into the world economy. The parties which participate in 'post-conflict' elections are compelled, given the absence of adequate resources, to follow World Bank and IMF prescriptions. The post-conflict state therefore continues to be repressive and its resources continue to be privatized. There is consequently little possibility of implementing a reconstruction agenda which pays heed to people's needs and frames policies with their participation.

There has also been established a whole range of social international organizations in the field of the environment, human rights, and humanitarian law (the different environmental secretariats, the range of human rights treaty bodies and the thousands of humanitarian non-governmental organizations, and the international criminal courts) which diminish the autonomy of third world states and peoples and their ability to adopt social policies that suit their individual cultures and stages of development. For example, international environmental laws and organizations redistribute property rights in favour of the advanced capitalist countries. When these countries developed, global private rights were granted to polluters; now, developing countries are asked to agree to a redistribution of those property rights without compensation for already depleted resources.

The relocation of sovereign powers in international organizations has also transformed the meaning of electoral democracy in the third world. Thus, irrespective of which party or coalition is voted into power in a general election, the economic and social policies pursued would remain the same in their essentials. This is a function of the state in undertaking to fulfil international obligations backed by sanctions that hurt. To put it differently, international law and organizations are today institutionalizing polyarchy or formal democracy rather than substantial and participatory democracy.

The relocation of sovereign space in international organizations has undermined resistance in third world countries. Accountability is not even theoretically envisaged today. Those affected in the third world are prevented from expressing their doubts directly to the concerned international organization. Thus, for example, the WTO has no address in India. It is impossible for Indian farmers to protest, like their French and Belgian counterparts, in front of the WTO office in Geneva.

Furthermore, international organizations not only enforce unjust rules but also legitimate them by suggesting that the interests of the transnational capitalist class represent the general interests of humankind. International organizations offer an 'intellectual and moral unity' to a particular vision of world order in whose matrix their mandate and functions acquire meaning. To facilitate this process, and to seek symbolic validation, third world academics and bureaucrats are co-opted.

First, the legitimacy or justness of rules and policies of international organizations should instead be judged by the impact they have on the following groups in the third world: (i) the working class(es); (ii) the landless and poor peasants; (iii) women; and (iv) other marginal sectors.

Second, there is an urgent need to inject greater transparency and openness of governance at the global level. At the ideological level, we must unmask the pretence of international organizations being 'neutral' actors that are in hot pursuit of the common good, as opposed to helping realize sectoral interests. At the pragmatic level, there is above all the need to establish international negotiating and decision-making processes that allow the meaningful participation of third world states and peoples.

Third, there is the need to hold international organizations accountable in international law for the consequences of their acts of omission and commission. Fourth, the powers of the UN Security Council must be limited. Fifth, international organizations concerned with human rights must be used to raise the concerns of the marginal and oppressed sectors in the third world. Sixth, steps should be taken to make the transnational corporate actor responsible in international law. Imperialism is in the process of constructing a factional global state. Third world peoples are hoping that it will turn out to be a *failed state.*

AN OLD WORLD ORDER IN A NEW GUISE

Norman Birnbaum*

Is there a new international legal order? The United Nations, its Security Council and its Economic and Social Council, its associated organizations (the International Labor Organization, the Food and Agriculture Organization), the economic complex consisting of the World Trade Organization, the World Bank, and the International Monetary Fund, and the judicial complex consisting of the International Court of Justice and the International Criminal Court, tell us that one is emerging. There are, additionally, matters like the Kyoto Treaty and international arms control

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agreements – as well as the older Geneva Conventions. Then, too, there are strong regional developments – first and foremost the European Union, with its transformation of national sovereignty.

Still, a large measure of doubt persists. If many nations have experienced losses of sovereignty, then at least one (the United States) seems ever more powerful and ever more negative about binding itself to an international rule of law. National formations apart, other economic and social forces – above all, the global market and the international power of capital – make the national exercise of self-determination seem like a disappearing remnant of a distant past. According to this account, technologically displaced American and German workers and Asian and Latin American peasants fleeing an impoverished countryside are all victims of globalization – and without political recourse. Then there are problems (the environment, the rights of women and children, the integrity of cultures threatened by the commodification of culture) which do not fit into the conventional political categories – or schema of conservatism, liberalism, socialism.

Is it possible that the emerging international legal order expresses an underlying historical disorder, a nascent global society running out of control? Insofar as we understand law, national and international, as a codified response to social constraints, the new international legal order, like the older one, is Darwinian, and reflects the rule of the strongest. Law, however, is morally ambiguous – and can also express society's determination that the weakest shall be treated as the strongest. We have debated these definitional and substantive issues for two days, but much remains to be thought about.

Co-operation and transparency between international legal institutions

Gerhard Loibl*

If you look at the developments in the last twenty to thirty years, the number of international institutions which have come into existence have been growing. International lawyers and international political scientists have been speaking in relation to treaties about treaty congestion. Have we also had institutional congestion in recent years, or are these international institutions helping to advance international development in a number of fields such as economics, social development, development co-operation, and the environment? We have to think about how we deal with institutional congestion, how we improve co-operation between international institutions.

The second point is transparency, transparency not only within international institutions, but also transparency towards the outside world. Transparency within international institutions is a question of the way in which the institutional arrangements should be structured. How can the inclusion in the decision-making process

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of all member states be ensured? And this is not a question vis-à-vis North and South only, it is also a question of large and small.

Transparency towards the outside world: we have all seen the demonstrations in Seattle, where requests for more transparency were addressed to the WTO. I would say that that is just the tip of the iceberg. Other international institutions which are less prominent in the eyes of the media have similar problems, although the situation has been improved over recent years by increasing the number of participants from civil society – civil society, NGOs, and grass-roots organizations, but also businesses and industries participating in international fora. The Johannesburg Summit on Sustainable Development saw a large number of participants, only a small percentage of whom came from non-governmental delegations. So while we are making some progress in this direction, how do we ensure in future that decision-making processes are going to reflect the interests not only of the state representatives, but also of the NGOs?

I would also mention that in relation to NGOs there is always the question of democratic legitimacy. When intergovernmental organizations accredit an NGO, they do not investigate its social basis. The accountability of international organizations has already been mentioned. I should like to add that there is also the question of legal accountability, which should be addressed by the United Nations International Law Commission. Should we follow the rules of state responsibility or do we need particular rules for international organizations?

Finally, let me note the increased role of law in international institutions. The WTO has increased the role of law in international economic relations. Similar developments are taking place in other areas, the role of law having increased, for instance, in the climate change negotiations and the Kyoto Protocol. This leads to standards setting, raising a number of questions in regard to how these standards are set, and whether they are in the interests of all the participants. Here we will see how far international law can take us and to what extent states are willing to accept the rule of law.

THREE CONCEPTS OF EMPIRE

Susan Marks*

On the cover page of one section of the *Guardian* recently there was a picture of George Bush dressed to look like Julius Caesar, with some columns – the Forum perhaps – behind him. The caption read: 'Hail, Bush: Is America the New Rome?' and the article itself began as follows:

> The word of the hour is empire. As the United States marches to war, no other label quite seems to capture the scope of American power or the scale of its ambition. 'Sole superpower' is accurate enough, but seems oddly modest. 'Hyperpower' may appeal to the French; 'hegemon' is favored by academics. But empire is the big one, the gorilla of geopolitical designations – and suddenly America is bearing its name.[1]

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1. J. Freedland, 'Rome, AD . . . Rome, DC?', *Guardian*, 18 Sept. 2002, G2 at 2.

Of course, the United States has been bearing that name for quite some time, particularly in the United States, but the claim that empire is the word of the hour is not perhaps wholly hype. At any rate I should like to run with that idea, and to explore in what follows something of the relationship between empire on the one hand and international law and institutions on the other.

Empire as colonialism

In the passage I have just quoted, the term 'empire' is obviously being used to denote supremacy in international affairs, especially supremacy over the means of coercive violence. But in what is probably its more normal usage, 'empire' refers to something much more specific, namely, the historical phenomenon, beginning in the sixteenth century and culminating in the late nineteenth and early twentieth centuries, whereby most of the non-European world came to be subordinated to European rule. In other words, it refers to colonialism.

How does empire in this sense relate to international law and international institutions? It used to receive support from international law. Indeed, as Tony Anghie and others have shown, the legitimation of colonial conquest and dispossession was a (and perhaps even *the)* defining project of international law as it developed from the sixteenth century down to the twentieth. But, at least since the 1960s, international law has set its face against colonialism. And international institutions, most notably the United Nations, have adopted resolutions and created committees in support of a global programme – now nearly complete – of decolonization.

When empire is used to mean colonialism, then, it appears that, although things were different in the past, today *international law and institutions oppose empire*; they are against it, quite emphatically in fact.

Empire as hegemony

To consider a second sense of the term 'empire', let us return now to the conception with which I began, the conception that gets conjured up by phrases like 'Hail, Bush'. Here what is at issue is not the historical phenomenon of European colonialism but the present reality of American economic, political, cultural, and especially military power, the fact that the US defence budget is bigger than the military spending of the next nine countries put together, and so on. Let us call this empire-as-hegemony.

What is *its* relationship with international law and institutions? Writing at the beginning of the 1990s, Noam Chomsky remarks that, for empire in this sense, '[d]iplomacy and international law have always been regarded as an annoying encumbrance'.[2] Thus, more recently he and others have stressed the unilateralism of US action, its willingness to act outside the framework of the United Nations over Kosovo and now seemingly again over Iraq, its successful scuppering of international agreements and its catalogue of high-profile treaty denunciations and treaty non-adherences.

2. N. Chomsky, *Deterring Democracy* (1992), 3.

When empire is used to mean hegemony, then, the record of recent events appears to confirm that international law and institutions are casualties of empire, flung aside and trampled down as surplus to imperial requirements. Whereas in the context of empire-as-colonialism international law and institutions are against empire, here, it seems, *empire is against them.*

Empire as globalization

The third and final sense of the term 'empire' that I should like to draw into this discussion is less familiar, or at any rate less idiomatic, than the first two. I take it from the eponymous book by Michael Hardt and Antonio Negri, published in 2000, in which the authors use the word 'empire' to refer to the political order that is emerging in connection with processes of economic globalization.[3] In other words, what they have in mind is the widely remarked decentring of the nation-state and its relocation within a large, diverse, and shifting field of other sites of initiative and authority. Although, as I have just noted, this is an unidiomatic and perhaps even eccentric usage of the word 'empire', in some respects it is quite conventional, in that it follows in the 'classical' Marxist tradition of viewing empire, or imperialism, as a particular stage in the development of capitalism. For Lenin, that stage was monopoly capitalism; here it is globalization.

How, finally, does 'empire' in this sense – let us call it empire-as-globalization – relate to international law and institutions? Very differently from the way in which it relates when 'empire' is used in the other two senses I have just considered. For as soon as 'empire' is used to refer to the political order associated with contemporary globalization, it becomes clear that, far from international law and institutions being against empire, or empire being against them, *empire and international law and institutions are for one another.* This is not to say that the latter only ever act, and are capable of acting, in the service of powerful economic forces. A key aspect of Hardt and Negri's argument is that the new global configuration contains within it new possibilities for redistributive change, and international law and institutions can and do lend support in the realization of these. What it does mean when expressing the relationship in this way, however, is that international law and institutions are implicated in the constitution and reproduction of this new order. They help to shape it, just as it in turn shapes them. In the context of the other two meanings of 'empire', the respective phenomena appear as counterpoised and antagonistic. Here, by contrast, we must recognize them as interlinked and, at least in part, mutually determining.

Hardt and Negri's book has been the subject of much critical comment, and certainly there is a lot in it with which one might want to take issue. But their basic conception of empire seems to me very helpful, and let me end now by mentioning some of the reasons why I think this.

In the first place, it reminds us that global relations of exploitation and domination did not end with the demise of colonialism. Of course, we know that,

3. M. Hardt and A. Negri, *Empire* (2000).

but we often talk about it in terms of arguments about core and periphery, North and South, First World and Third World. What Hardt and Negri's conception reminds us is that the patterning of contemporary hierarchies is complex, and cannot fully be grasped through dichotomies of this sort. As they observe, we 'find the First World in the Third [and] the Third in the First', and so on.[4]

Likewise, and second, Hardt and Negri also help us to see that US hegemony does not exhaust the meaning of empire in contemporary circumstances. To say that is not to dispute the vast, and unique, concentration of power and resources in the United States. It is simply to acknowledge the ways in which US policy remains constrained by forces outside its control. No state, not even the United States, stands at the head of today's global order, because what defines that order is precisely its acephalous, anonymous, and partly deterritorialized character.

Third, this way of conceptualizing empire brings out the implication of international law and institutions, indeed their central role, in contemporary processes that are creating a better world for some at the expense of others. In doing so, it unsettles perceptions of international law and institutions as converts to anti-imperialism. At the same time, it challenges assumptions, so prevalent in progressive commentary, that international law and institutions are casualties of empire.

Finally, and in consequence, this way of conceptualizing empire highlights that our most pressing problem may not be the impotence of international law and institutions in the face of US unilateralism. It may well be useful to get the United States to sign up to more treaties or be more positive about international institutions. But those things should not be allowed to get in the way of a more pressing problem, which is the need to understand better the ways in which international law and institutions *retain their potency* in contemporary conditions. In other words, our highest priority, I believe, is to investigate how international law and institutions work to sustain global relations of exploitation and domination – and how they might also be used to transform those relations.

This idea that the potency of international law and institutions is more significant than their impotence is not a novel point. It is something which David Kennedy (among others) has been insisting on for quite some time. But it does cut against the grain of a very standard trope not only of conservative realism, but also of progressive internationalism, and for that reason seems to bear, and indeed require, re-emphasizing and rethematizing in relation to contemporary debates. Hence my interest in empire. And hence too my attempt to show today that, if empire is the word of the hour, it may be Hardt and Negri's sense of that word, rather than the more widely circulating alternative senses, that provides the most adequate basis for grasping its international legal and institutional significance.

4. *Ibid.*, at xiii.

Multiple best practice in global governance

Matjaz Nahtigal*

I should like to make only three comments with reference to the previous speakers and perhaps put forward one or two propositions for discussion.

First, the dilemma pointed out by Professor Chimni with reference to the third world is also going on right now within the European Convention on the Future of the European Union. As a member of this convention, I noticed similar difficulties for some states in running their own autonomous policies. They are confronted with globalization pressures, their hands are tied. Debates on the democratic deficit within the countries of the Organization for Economic Co-operation and Development (OECD) in their decision-making processes are strikingly similar to those of the developing countries.

Second, let me dispute the claim that small countries are less informed about international relations and can contribute less. The truth is exactly the opposite: the large countries are less interested in the international arena and are more self-absorbed, and I think that small countries within international institutions can contribute much more to finding certain compromises. For example, in the European Union, small countries contribute more to supranational ideas, to supranational compromises. Luxembourg, a tiny country, has often found productive compromises where Germany and France could not. Slovenia, a non-permanent member of the UN Security Council in 1998–99, played a highly constructive and helpful role during that time.

My last remark concerns Kosovo. Without military intervention in Bosnia and Kosovo the war would be still going on in the whole Balkan region, and then we would probably be complaining about the inaction, inactivity and lack of interest of the great powers around the world about the civil war in the Balkans. Now, as a result of military intervention and the continuing presence of the military, there is peace there, and we know that were the military to leave conflict would resume the very next day. We must be very realistic about that.

I now return to my original topic, models of development, which has become more important since 1989. During the last ten years experts from academia, governments, think tanks, the World Bank, and the IMF learned a lot. There was no pre-existing knowledge, and nobody was prepared to give advice regarding such large-scale institutional changes as actually occurred in central and eastern Europe. It was a great learning process and we know who paid the price. However, I think it would be wrong for us to start blaming each other and asking who gave wrong advice and so on. Countries in transition and international institutions should draw lessons from this experience and develop our ideas about how to approach the future management of the economy. There is no single, possible developmental model. I am sure that Brazil will not make the same kind of mistakes during the next few years, but possibly others will, especially if the EU and US markets are closed to them.

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Group III discussion

Antongiulio De Robertis. Let me make four points. We see now a few people with a very special mental attitude grouped around a president belonging to a dynasty, elected by chance. Because their attitudes are, in my opinion, scientifically speaking, absolutely inconsistent, the best strategy would be to encourage the type of discussion we have had here, normally held in very restricted circles, in the small groups where real discussion is developing. We need to disprove these people on their own ground. The proper strategy should be for our US friends to present criticism in articles and essays in the same widely read magazines and papers where they publish their strategies. I am astonished at the way in which very complicated scientific topics are treated by these people, and how fast they come to very hard political judgements founded on very inconsistent historical analysis.

My second point is that sovereignty, which in fact is important, must be voluntarily renounced in small areas, under conditions of absolute equality, in order to achieve a just, and slowly increasing, global sovereign authority. The model we have in the European Union can be a very useful historical precedent for the future of the world.

The third point relates to the concept of empire. I would like to draw your attention to the meaning of 'empire' used by at least some of these US thinkers. The Roman Empire was something that existed and was based on the use of law, conceived in terms of a very effective ability to allow people to interact freely. This concept of empire is not absolutely unacceptable, because it can also permit local governance, and can be accepted as a starting point of a discussion.

The last point I should like to mention is Kosovo. I am a professor at Bari University, I live in Bari, I am a very old resident in the sense of tradition, and my family has lived there for many centuries, perhaps a millennium. Because I have been a member of the Italian Atlantic Committee for a very long time, I am accustomed to wearing a NATO insignia when I talk; however, during the bombing of Serbia I took it off, because I did not accept the NATO bombing, which was based on a technicality of the negotiations in Rambouillet and waged by one side with a total lack of good faith.

David Kennedy. A comment to Professor Chimni and Professor Marks: one paper without the other has a problem. I would say to Professor Marks that there is nothing inherently wrong with organizing the world in an imperial way, unless you link the analysis with some idea of what the consequences are in the mode that Professor Chimni did. He said that there are very specific consequences for democratic possibilities and developmental opportunities. The question of who exercises influence over whom needs to be judged on the basis of the outcome, and if the outcome needs to be contested, we should contest it. But the fact that there is one large power and many small powers does not tell me anything about what we should think about the situation. At the same time I would say to Professor Chimni that an analysis of the negative consequence of the political order within the context of Third World political possibility is important, but I think that your argument would be strengthened by combining it with that of Marks, by having some sense of what

the mechanism is through which these consequences are brought about. When you had your conversation with the trade union leader and the trade union leader said: 'where can we go to protest here in India, the WTO is in Geneva', I think that even if that person went to Geneva, they'd find that the WTO was not there, or anywhere, and that the structure of the imperial power, to adapt Professor Marks's terms, is not located in those institutions which we now in a form of shorthand associate with global governance. The WTO is an empty signifier in some sense, and we need to have a stronger understanding of the way in which the forms of power whose dark side you experienced constitute themselves and operate in the world. So I guess the question to both of you is: do you see some relationship between your two projects and how they might be combined?

Vladimir Petrovsky. When we are dealing with global governance and institutions it is really important to concentrate on the vision of governance at global level. I do not think that any global state will arise.

Global society does not mean that nation-states stop playing a role. In the past we had only nation-state delegations. Now that parliaments are involved, we see local and regional authorities at international level. The local authorities have created their own international organization in Geneva. Though the nation-state remains the major unit, the form of its representation at global level is changing completely.

The United Nations is reviving its effort to become a centre of agreed action. We need to keep in mind that decisions of the United Nations are very much diversified; it is only the Security Council which makes decisions which have to be abided by. Decisions of the General Assembly are its recommendations. I was very much impressed during my ten years in Geneva that about seventy or eighty heads of state visited Geneva. The purpose of such visits is different from those to New York: in New York they are some kind of public relations exercise, to make statements from the conference room of the General Assembly. They came to Geneva to arrange consultative meetings with the heads of the agencies, because the United Nations nowadays is becoming a sort of know-how centre. We speak about the UN structure. We should reconsider the existing structures. I think the time has come to create a new machinery; to put under one roof all the six existing reviews of arms regulations and to create one Arms Regulations Agency. Here in Vienna we need to create an Outer Space Agency, because what we are facing today in outer space is the necessity to create the rules of traffic there.

As for global partners, it was rightly mentioned that one of the major partners is the business community. The United Nations is very much open to that. We suggested a global compact; today 1,000 companies, mainly from the Western world and Asia, participate in this compact. Civil society should become a partner of the United Nations. Last July in Geneva there was a civil society forum. The idea is to create some kind of parallel structure, perhaps like a parliamentary assembly, with the same committees, and then to start to overturn the old rules whereby a recommendation is issued only centrally, if civil society has a good recommendation regarding some military or political affairs, or the environment or other areas. We need governments and the academic community to contribute to these changes, in order that they should take place in an evolutionary and non-violent way.

Günter Frankenberg. Governance has not been criticized adequately today. It is an interesting coincidence that the fall of sovereignty coincides with the rise of the concept of governance. Today we have grown accustomed to the idea that sovereignty can be shared, which of course five hundred years ago would have been a ludicrous thought. Today we can say that sovereignty is a bundle of powers which can be shared, which can be exercised on different levels. So, while sovereignty has changed its appearance and, probably, substance and has become a fairly soft concept, governance, on the other hand, has been rising to a position of high esteem. We can discern four different concepts.

The first is straightforwardly descriptive: you just try to describe or pretend to describe what is going on in the world. Hence, governance just happens. The second discourse is mainly prescriptive and operates with governance as a normative concept. Hence, governance is how things should be, and don't even bring up the difference between government and governance. Both concepts and discourse relate in a complicated way to two other discourses: the first, I claim, is an apologetic sanctifying of the way in which matters are regulated in this world; the WTO would be a fine example of (good) governance. The last notion of governance has some critical bite. It seems to me that if you combine the descriptive discourse on governance with the apologetic discourse you get a positive response to international law. Notwithstanding the difficulty that some of the concepts may have to be adapted, international law is basically working well. This picture gets more complicated and ambivalent when people try to describe and criticize governance. Then it is clear that the answer cannot be that one should resort to international law, because it is tied in with the concept of governance. The fourth combination would unite the prescriptive and the critical valence. Here the result is rather ambivalent. Critics may say, as we did yesterday, that they can invoke the social democratic vision of international law, perhaps enrich it with a few other principles and then, yes, hold on to international law – perhaps reform it a little. There may be situations where to refer to international law or to resort to it, or to seek international legal help, is probably unavoidable; if so, we should at least critically scrutinize and clarify why we do so.

David Trubek. When you speak of empire or a global state, are we to envision this as the hegemony of a nation, the United States, or are we thinking of the hegemony of a transnational class, and if so, what is the relationship between the nation and the class?

Second question: when you relate concepts of empire and the global state to international law, do you see international law as an instrument of empire, something that strengthens the empire or the hegemony of a class, or is it a shield to protect something against the bad things that are signified by words like empire and global state? The third question is: in evoking and discussing this, when you use the term international law, is that a stable category with a structure, or is it just a bunch of stuff that you can grab and use anywhere you want in a project to be defined, one way or the other, as a political project, resistance, whatever word you want? And finally: if it is just a bunch of stuff and you can grab anything you want from it, how do you know what to grab and on behalf of what interests are you grabbing it?

Marks. Professor Cass clearly put a finger on the crucial issue: resistance, transformation of exploitation into emancipation and the identification of emancipatory possibilities. Hardt and Negri had a conception of resistance to the empire which is their attempt to update the proletariat or at any rate reconceive a Marxist conception of the proletariat in terms of contemporary social movements, transnational social movements. I do not know whether it is naive, but in any event their optimism about contemporary emancipatory possibilities arises from the fact that some of the same processes that allow capital to move freely around the world also help to enable the activities of transnational social movements that have to do with information technology, communications, and so on. One point you mentioned was the jettisoning of the state as a vehicle for resistance. Maybe that is what they are saying, but I do not think that is necessarily what they are saying; at any rate I certainly would not see the need for that and I would not want to see that. On the contrary, I think, as many have highlighted, that the state's role as a corrective to the injustices of the market as a redistributor and as a protective force has become heightened, and so the nation state remains a major focus for resistance activities, and they clearly also need to reach beyond territorial confines and they do so. And a lot of people see the embryonic international civil society in global social movements and anti-capitalist protests; however easy they may be to caricature, they none the less may point to possibilities, and certainly they do point to forms of dissatisfaction and frustration with current circumstances and alert us to the injustices that they involve.

Professor Frankenberg spoke of governance. Governance is of course often used to suggest this rather technocratic approach to international regulation as if it does not involve politics, but we can turn that around, and we can use governance as a reminder that politics is involved. I see description normatively in a different context: I was thinking that you could use governance as a description of existing political structures, but also as a normative call for politics and, as Professor Chimni highlighted, for democratization in the regulation of global affairs and as a reminder of the relevance of democracy beyond the nation-state.

And finally I come, very briefly, to Professor Trubek's four points. Part of the point of the conception of empire I was trying to defend is that it is not purely synonymous with US hegemony; that is not to deny the pre-eminent role of the United States in many respects, but the suggestion would be that it goes beyond that. And I would infer that as well, though I will let him speak of it himself, from Professor Chimni's account of the transnational capitalist class, that this includes but goes beyond US hegemony. Is international law an instrument of empire or is it a shield? Again I was trying to say and would want to say that it can be both. In that sense I come to your third point: international law is just a bunch of stuff. And to come to your forth point, in other words it is a strategic tool that can be used and it is used in different ways, and if you want to use it in emancipatory ways you have to be constantly alert to the ways in which it gets used for the reverse kinds of ends and the ways in which emancipatory projects get turned into ideology as well and used in the service of domination. How do you know what stuff to grab and on behalf of whom? What is the stuff to grab is what you have to work out, but on behalf of whom and of what interests is a political choice that points to the

embeddedness of all of this in political struggles. It is just a political choice that one makes in terms of the kinds of interests or that one wants international law to advance.

Birnbaum. I will attempt an answer to Professor De Robertis's request that I say more about internal debate in the United States. There is, as you know since you can follow it on the Internet, a considerable policy debate with a great many experts writing. What is not in the public field very much is a systemic debate in which people like David Kennedy, whom I enlist for these purposes and others, would say that we need to reconsider some of the foundations and assumptions of the way our democracy works both internally and externally. For that debate all I can do is quote an answer. A couple of months ago in Spain I was asked why system critics could not publish in the press and I said that this was not true: we publish all the time in *Le Monde* and *El País* and elsewhere. But I do want to make one point, if I may, which is a warning footnote. We speak of the historical novelty of our situation: a weakening of the state, the transfer of powers to a transnational capitalist class, the existence of which is clearly a fact of our political lives and political experiences. We overlook possibly the possibility, even in the heart of Europe, with the domestication of European interstate conflicts in at least western Europe through the European Union, of the possibility of the return of violence. After all, the last century brought not only unprecedented changes and historical turbulence, but an extraordinary intensification of the violence that, let us say in the year 1900, most prophets and critics would have thought belonged the nineteenth century. It was the cover of war or the initiation of war that allowed the Third Reich to move from medieval anti-Semitism to the actual extermination of the Jews, that provoked the British–US attacks on the German cities and later the US bombing of the cities of Hiroshima and Nagasaki. Hannah Arendt after all understands fascism as the application of methods of overseas colonialism and imperialism to Europe. The danger for us is still very, very great.

Loibl. Is international law an instrument or a shield? As Susan Marks has said already, you can take it both ways. I would agree with this answer, but you have to think of how international law came into existence and what it is. It is an evolutionary process, it changes, and its changes are controlled by those who create law, who are the subjects of law. This evolution of international law is never static, and stabilization efforts, which have been undertaken by creating treaties, have lasted for a certain period and for qualification processes. Smaller states perhaps regard international law as a shield, because for them it is an instrument to protect their interests. Larger states would perhaps see it more as an instrument which they can use to put forward their interests. Regarding the acceptance of the jurisdiction of international bodies, it is the smaller states which are more willing to do so, since they see it as a shield; the number of large countries to have accepted these restrictions on their sovereignty are rather limited. If the rule of law is extended there are problems, as Professor Chimni has pointed out, in that more specific norms have to be created, to be adjudicated by international institutions, which limits flexibility and works against countries which have not participated from the beginning in the creation of international law.

Nahtigal. We need to produce a more concrete specific institutional analysis. Take, for example, the settlement of disputes in front of the WTO, where we know that the developing countries can be very successful. They are able to win cases, or at least to present their arguments, to the detriment of some of the most developed countries in the world. Sometimes even the existing institutions are very well approached by the developing countries, can work also for them, if you know the legal framework regardless of which interest it was written for, but once the international legal framework is in place, it can work also for other parts of the world as successfully and of course pressure from the bottom always helps, but only to some extent, and sometimes I am sure that the Indian government or other governments know very well where to go and to argue the cases in front of the WTO.

Chimni. First of all: is international law a shield or an instrument of hegemony? I think for long time it was seen to be both. The developing countries actually did believe that international law offered them an enormous shield. But I think that they are gradually realizing that there is a very large hole in the shield that they are holding. This hole is created by forces on the ground: international finance capital moving from place to place prevents the shield from working; new concepts such as humanitarian intervention allow outside forces to intervene, even when this is not required. And what is worse is that when the developing countries have given their support to some international legal institutions which they believed would actually benefit them, things have worked the other way. Thus to take exactly the example given by my friend, the dispute settlements system of the WTO caused the developing countries seriously to believe that the rule of law would be established, but the record suggests that the developing countries are at the receiving end of the disputes settlement system. The interpretative route is being used by the Appellate Body in the WTO to achieve results, which the developed world cannot get through open negotiations, for example, bringing the subject of the environment squarely into the WTO even without negotiating it. In sum, the shield is thin and we need to take cognizance of this.

Now whose hegemony is it? Is it that of the United States? I agree with Professor Marks that the transnational capitalist class goes far beyond the United States. To me it is really a strangulating alliance between the transnational capitalist classes of the first and the third worlds and the transitional economies. This alliance becomes extremely difficult to resist, because the rules of international institutions leave you with very little space in which to articulate and advance your own positions. What can we do about this? I think that is probably the toughest question posed by David Kennedy and Professor Frankenberg. I think that we should try everything. We should look to see what did happen in Venezuela – what went right, what went wrong – and what went right in Brazil. So I would try everything. And this, I thought, came out yesterday from Professor Kennedy's comments, because in the afternoon I thought he was taking a purely realist position, a classical position that if you want to counter US power you need a balance of power in the European Union. In the morning Professor Kennedy was asking for a completely alternative vocabulary. I think we need both: to me we are in a situation today where we really do not have much choice but to try to counter hegemonic strategies.

Erwin Lanc. Speaking of global governance, we have global governance. The question is: who is governing whom? Who is dominant in present global governance? My answer is 'the hegemon'. I find the system in which the hegemon, not alone, but decisively, governs, is an ongoing debate as to how to treat the hegemon. One group is saying that one must resist. My question is: by what means? The other group is saying: we must come to some arrangement with the hegemon; we establish a common interest. Some think that it is essential to come to an arrangement with the hegemon. I heard from many of you – maybe not accidentally from those of you who are not from Europe – that there is no social democratic concept that we should follow. I can assure you that there is no social democratic concept, because I have been a member of this movement since 1945 and I know every step taken since then. And this creates practical political difficulties – how to enter a discussion with the hegemon on the basis of a solid concept of one's own.

Dr Nahtigal observed that the problems with the present institutions exist not only for the third world countries but also for those in the first world. That is true, but it is much easier to carry the burden of international injustice with an average income of let us say US$5,000 or 6,000 a month, at least compared with only $100 or 200. I want to finish with one example. The first steps in India's involvement in the WTO or its predecessor GATT, as far as I am informed, came when it was asked to open up its textile market, because US companies wanted to export textiles there. India had to do so in order to receive reciprocal benefits, but thereby created big problems for its handicraft textile regions. We in Europe have lost a lot of textile production, maybe to the advantage of India and other parts of the world, but it is much easier for us to compensate for what we have lost at home. Thus while the point is made that the present situation is the same for all, some are feeling its disadvantages far more than others.

Joel Paul. The discussion about the hegemon reminds me of the reaction of the US government since 11 September. When the president and members of the Congress talk about Al Qaida, they describe it as if it were a satanic being possessed of will, knowledge, intelligence, and power. Indeed, Al Qaida appears powerful, large and omnipresent. It is a common psychological phenomenon to describe one's adversaries in these terms, but it is perhaps not realistic. One strategy for encountering the hegemon is perhaps to think about it not as a hegemon, but as many hegemons, as many competing empires and elites and networks that are often working at cross-purposes. One of the insights of international relations theory is the notion of epistemic communities, the notion that there are groups working transnationally with different kinds of purposes at different times in response to specific events or crises or purposes that can be mobilized in different ways. So rather than imagining the hegemon as a single unit, as a monolith, we begin to think about the hegemon as many different hegemons. Then we might be able to design a better strategy for holding it accountable.

Trubek. If international law is actually stuff and hegemons are multi-headed, then we all have to be sociologists. Because in that world there is no way to make purely a priori statements about cause and effect or vast generalizations about what is going to happen and what is good or bad for the interests with which you happen

to be concerned. I am using 'sociologist' in a very loose sense, but we really have to get down and deal with concrete questions and immediate issues, because a priori statements are always to be distrusted.

Marks. I share Professor Trubek's thought that we need descriptions of redistributive consequences. That was also the thrust of what Professor Kennedy was saying earlier and also the implication of Professor Chimni's presentation. It is a call for socio-legal research in international legal studies, something which has more of a tradition in some national legal academies, but has not really got much of a tradition in international law. But there are some other things one can do in the meantime. I think that there is a useful role to be played by those who look at some of the concepts in which we deal and some of the ways in which we as international lawyers talk about things or some of the categories that structure international law, and who could at least offer some preliminary thoughts about how those could be contributing to sustaining or constituting emancipation and domination in the world. We have actually to plunge into those contexts and find out what is happening and the ways in which they are producing winners and losers; that will also suggest some ways forward in terms of strategies of resistance. Part of that will also serve as a reminder of Professor Paul's point that we should not regard the empire as in any sense monolithic, just as resistance is not monolithic; there are a lot of things going on and people are not speaking with a single voice.

Leiden Journal of International Law, 16 (2003), pp. 915–927
© Foundation of the Leiden Journal of International Law Printed in the United Kingdom DOI: 10.1017/S0922156503001560

Theme IV: International Politics and the Role of Law

CONTESTATION OF THE OUTCOMES AND PROCEDURES OF THE EXISTING LEGAL REGIME

David Kennedy*

My thesis is that our problem is not a lack of law but a surfeit of law, that the situation of international political culture at the moment is not one in which we need to worry about making the legal culture more dense, rather that we should worry about finding sites and opportunities for increasing the possibility for politics, for contestation of the outcomes and procedures of the existing legal regime. The difficulty is how to do that. How does one build the possibility for politics, progressive or otherwise, in such a technocratic decision-making structure?

The new empire is not the United States. The United States is part of it, is a convenient way of referring to one set of political institutions and interests that participate in the new governance structure, but the United States is – and the US political class experiences itself – as vulnerable to international governance. The new technocratic decision-making empire is also not the United Nations and not the World Trade Organization (WTO) and not the General Agreement on Tariffs and Trade (GATT); it is not the institutions which we think of as at the foreground of international public law and I would also say that it is not a class conspiracy. My hesitation in adopting the class vocabulary is the impression it gives of there being people willing it in terms of their own interest. If you speak with major decision-makers in multinational corporations, they, like the US government, experience themselves as buffeted as much by financial instability and by the changing conditions for business as does the political leadership, even of the most powerful countries. I do not want to deny the very important point that Erwin Lanc put on the table, that just because everyone feels vulnerable does not mean that everybody is vulnerable in the same way. The vulnerabilities are different and the capacities are different, but I think we need to find a vocabulary for speaking about the technocratic decision-making empire, without mechanically invoking the WTO, the United States or the technocratic class. The Hardt/Negri book makes an effort to describe empire in a more disembodied way, but the end result is to make the whole thing seem much more mysterious than it is. In my view, it is actually far simpler. The global governance structure is wherever experts do things with rules. Wherever two experts are gathered in the name of deciding something there is governance. Experts contest among themselves in the terms of their expertise the best practice out of which they decide what to do. This is true even in a situation like Iraq. It appears that there is an important political conversation going on in the UN Security Council, but so much of the decision about what to do in Iraq is driven by a series of decisions taken by military experts, by

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political experts, by weapons experts, by economic experts, and by trade experts in a variety of different locations, so that their decisions come together in a timetable for the invasion of Iraq in a way that makes it very difficult even for the president of the United States to feel he has strong decision-making control. Treating this as Bush's war is an interesting locutional way of locating political contestation. If war happens, it will be a military exercise, which emerges out of a thousand decisions difficult to locate.

Contesting expertise means bringing things from the background into the foreground. It means not being bedazzled by the temptation to treat the foreground political choices and institutions as the most important ones. It means self-conscious disregard for the centrality of the Security Council or the US presidency in thinking about the invasion or potential invasion of Iraq. It means, where foreground is politics, let us look at the legal structure beneath it. Where foreground is the public law institutions of the World Trade Organization, bring to the fore the private law rules of contract and transaction in the background. In this we need a better theory of how these background rules and institutions concentrate authority, and a better theory of what the effects of these authorities are and of their distributional consequences. Both Professor Chimni and Professor Marks's papers were aimed precisely at developing that kind of improved expertise. Once having brought the background into the foreground we need to contest its terms. That requires entering into expertise in some way. I agree with Professor Rajagopal that there is no external position from which one can easily understand where the points of possible contestation are; there is just no other way but through. We need to get into the vocabulary of the experts and figure out where the soft and potential open points are, while at the same time avoiding the temptation to think that the choices the expert vocabulary puts before us are the only available choices. I think that, most importantly, I should like to see an international law that encouraged experts to experience themselves as not knowing what to do, to experience the gaps in their own expertise, to imagine experts who were disenchanted from their own best practice, or who were more attentive to the gaps and conflicts within their own expert vocabulary than to the easy solutions. The idea here is to encourage each expert to think of him/herself as deciding about the exception rather than applying the rule.

What is the possible role for law in all this? It has been the role of law to proliferate expert institutions and to provide the vocabulary for expert disputation. It has been the role of law to develop the easy expert alternatives to some of the most difficult global problems in the area of politics, security, and the economy, but most of the alternatives developed by international law, as we have described and discussed repeatedly over the past two days, are themselves part of what I think of as the overall expert vocabulary of the international legal order. The call for multilateralism, the call for human rights to chase political or economic decisions, the call for institutional reform and renewal are components of what experts have offered as they govern, not alternatives to the governance of experts. Law need not be on the side of the consolidation of expertise – we could imagine a law, an international law, which supported the translation of its decisions into political terms. Transparency alone

is not enough. It is not focused on the problem of contesting and translating, rather than simply exposing. We could imagine an international law which encouraged the idea of multiple best practice. We could imagine an international law which sought to disenchant its speakers from their own expert authority rather than to offer them the promise that theirs was the last, best, humanitarian position available. This would not be the international law of the multilateral left, of civil society and of human rights, but I think it would be an international law more attuned to human possibility, expert responsibility, and political contestation.

THE MODERNIZING PROJECT IN COLOMBIA: AN UNFINISHED GOAL?

Helena Alviar*

> For us, as Latin Americans, the search for poetic modernity runs historically parallel to the repeated attempts to modernize our countries. This tendency begins at the end of the 18th Century and includes Spain herself. The United States was born into modernity and by 1830 was already, as de Tocqueville observed, the womb of the future; we were born at a moment when Spain and Portugal were moving away from modernity. This is why there was frequent talk of 'Europeanizing' our countries: the modern was outside and had to be imported.[1]

During the nineteenth and twentieth centuries, the goal of modernizing Colombian society was an obsession that was translated into constitutional reforms and legal institutions. Right after independence, members of the liberal and conservative parties agreed that the organization of the state should be a democratic, liberal[2] regime.

> The nineteenth century in Colombia was the liberal modernizing century ... The elites devoted their energy to the forming of a modern nation, understood as a Western, culturally white – though based on the myth of a racially mixed – nation.[3]

These modernizing impulses mark the place of Colombia within the international order. This position within the global order is a response to the selective transplant of certain modernization ideals which were designed and structured as a consequence of the constant struggle between members of the conservative and liberal parties. This selection was done by transplanting half-heartedly Western/modern concepts, privileging some over others. Nevertheless, this import/transplant at the same time restrained the possibilities of the political, economic and social elites, in a way

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1. Octavio Paz, 'In Search of the Present' (Nobel Prize Lecture, 1990).
2. As a matter of fact, the liberal party was defined as the anti-colonialist party. This anti-colonialist quest was seen as a cultural, economic, and political break from Spain and the link to the ideals set out by the Enlightenment. Many historians have described this change of cultural, political, and economic influences, among them: J. Jaramillo Uribe, 'Etapas y Sentido de la Historia de Colombia', in M. Arrubla (ed.), *Colombia Hoy* (1990), at 15–52; G. Molina, *Las Ideas Liberales en Colombia*, I (1984), at 35–9; A. Gómez Muller, 'Las Formas de Exclusión: La Perspectiva de José María Samper', (1991) 11 (August) *Revista Gaceta*, at 31–4.
3. M. Palacios, 'Modernidad, Modernizaciones y Ciencias Sociales', in *idem*, *Parabola del Liberalismo* (1999), 31 (author's translation).

limiting the institutional arrangements they imagined and structured. As the quote from Octavio Paz suggests, 'the modern was outside and had to be imported'.

In Colombia, the two mainstream explanations surrounding the 'backwardness' of the country have been as follows. From a liberal/mainstream perspective, although all of the elements of modernization – a political revolution, meaning a liberal, sovereign, democratic regime; a socio-economic transformation, defined as the shift from a feudal economy based on the export of agricultural products to a capitalist, industrial system; and a cultural break, understood as a move away from tradition, the secularization of the educational system, and the separation of church and state – have been designed as legal transformations, Colombia has been unsuccessful in reaching what has been defined elusively as 'the modern', because the transformations take time to consolidate. In this sense it is a matter of time and of constant tinkering with the legal institutions to make them as Western as possible, incorporating all the changes and transformations that have been historically applied within the tradition of great democracies.[4] In this sense, they understand that not all of the revolutions have fully taken place, but progress cannot be stopped once it is set in motion.[5] This interpretation has a variation, according to which such failures can be explained because of the control of the democratic system by a set of particular group interests and because of the general backwardness of the population.[6]

On the other hand, the interpretation by the Dependency Movement[7] of Colombian backwardness is centred on economically dependent relations with 'core nations'[8] which have determined and limited the transformations necessary to reach modernity. This group of academics is pessimistic about the content, benefits, and structure of the modernizing project, given the actual setting of the international economic order and voices a critique of the process of importing foreign/imperialist ideas.[9]

The modernization project in Colombia

As I stated above, during the nineteenth and twentieth centuries, the goal of modernizing Colombian society was an obsession that was translated into constitutional reforms and legal institutions. In a peripheral country as Colombia, modernization ideals are inexorably linked to globalization in the sense that they are transmitted and transplanted through the encounter with the West.

4. During the nineteenth century France and England were the models, and during the twentieth century the United States has taken over as the example to follow.
5. Palacios, *supra* note 3.
6. See among others, D. Echandía, *Ideología y Política, Obras Selectas*, III (1981); A. Tirado Mejía, 'Colombia Siglo y Medio de Bipartidismo', in Arrubla, *supra* note 2, 102–86.
7. The Marxist-oriented theoretical movement of the late 1960s, which was very strong in Latin America and whose main figures were among others Fernando Henrique Cardoso and Enzo Faletto.
8. Core nations are the industrialized Western European countries as well as the United States.
9. Most of these are Dependency-oriented historians and more recently A. Escobar, *Encountering Development: The Making and Unmaking of the Third World* (1992).

The idea of importing Western/modern legal systems was always present, seeming as it did to guarantee the path to modernity.

> Independence came at a time when England appeared as the economic development model and the United States as the most successful growth process of a nation recently independent. Therefore, the modernization ideals were the establishment of a capitalist economy and a liberal political system based on popular sovereignty. By 1850 this modernizing project was part of the fundamental ideology of ruling elites who felt that the system was going in the right direction. After all, an independent state had been formed, whose institutional bases were both a constitutional and legal system transplanted from continental Europe: a written set of laws, separation of powers, the election of certain public officials, a criminal and a civil code imported from France.[10]

Nevertheless, the necessary elements of an economic, political, or cultural revolution were never truly incorporated. Although certain ideas were transplanted and translated into laws, this transplant operated more in terms of what is described by P. G. Monateri as 'interested non-neutral, purposive projects of governance' which grew 'within the frameworks of different legal traditions, responding to inner needs of legal elites'.[11]

In this sense, neither the progress narrative suggested by Colombian liberals nor the dependent economic structure suggested by the leftist-oriented academics provide a full picture of how modernization has been structured within the country and how it has determined the country's position within the international community. I propose to look at these modernizing ideals that have been translated into laws – through constitutional changes, economic development plans, and educational reforms – as a way of understanding the Colombian context and have become an ideology in the sense that they encompass 'the set of beliefs, ideas, and values embodied in the legal institutions and legal materials ... of a particular society'.[12] In this sense, there has been a partial ideal of modernization translated into norms (giving the legal system an instrumental role) that has given the appearance of unfulfilled, but existing, goals. The general agreement that these goals are part of the legal institutions has either distorted reality or marginalized alternatives.

Resisting culture

Joel R. Paul*

Cultural resistance to globalization takes many forms in international conflict: governments seek to protect national culture from the homogenizing influence of globalization by imposing restraints on trade and commerce; religious fundamentalists launch violent attacks against secular governments; national subgroups

10. J. Orlando Melo, 'Algunas Consideraciones Globales sobre "modernidad" y "modernización"', in F. Viviescas and F. Giraldo (eds.), *Colombia el Despertar de la Modernidad* (1991), 232 (author's translation).
11. P. G. Monateri, '"Everybody's Talking": The Future of Comparative Law', (1998) 21 *Hastings International and Comparative Law Review* 825, at 4.
12. J. D. Leonard, *Legal Studies as Cultural Studies: A Reader in (post) Modern Critical Theory* (1995), 23.

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fight for cultural autonomy. At best, international law has an ambivalent attitude towards culture, and this ambivalence has sustained, rather than resolved, conflict. International law needs to address culture by establishing rules and institutions that minimize conflict by containing culture.

I have three related points. First, the problem of culture is inherent in international law, and culture should be seen as competing against the universalist claims of international law. Second, international law variously denies and defends cultural claims in ways that facilitate globalization and undermine human rights. Third, progressive international legal scholars should resist every effort to reify culture as an exception to legal norms.

My first point is that cultural conflict is built into the architecture of international law. Our conception of the nation-state is centred on an idea of a national culture that legitimates the exercise of sovereign authority both internally and externally. Internally, the idea of a national culture creates a common bond of nationality among citizens and between citizens and the state. Externally, the state acts to promote national culture. Since positive international law is rooted in the consent of sovereign states, states often try to use international law as an instrument of cultural hegemony. The connection between sovereignty and culture leads to a fundamental conflict between cultural claims and international legal norms. International law's legitimacy derives from its claim of universalism. Cultural claims are a denial of universalism. Culture in this sense undermines international law and legal institutions.

Second, international law treats cultural claims inconsistently. Typically, the conflict between culture and international law arises when state actors and international lawyers seek to justify some derogation from an international legal norm by asserting a cultural claim. For example, Argentina, China, and Iran assert cultural exceptions to the international norm of gender equality. Deploying culture as a legal category is highly problematic; culture is a contested idea. Herder wrote that 'nothing is more indeterminate than this word, and nothing is more deceptive than its application to all nations and periods'.[13] The European powers enlisted this idea of culture as a justification for their colonization. The colonial powers offered culture and Christianity to indigenous peoples in exchange for land and wealth. Herder, by contrast, romanticized the culture of these indigenous societies as superior to the formalism of European culture. Modern anthropologists accept that our idea of culture is so intertwined with history, gender, race, and ethnography that no observer can escape the trap of subjectivity. Deploying culture as a legal category is a risky business.

Consider how international law both denies and accommodates culture using three examples concerning cultural claims against international environmental norms, free-trade norms, and human rights norms.

13. J. G. Von Herder, *Ideas on the Philosophy of the History of Mankind* (1784). Herder was reacting against the eighteenth-century idea of German philosophers that '*Kultur*', which had originally referred to the cultivation of crops or animals, could also describe the process of civilization.

First, international environmental norms generally have not accommodated cultural differences. The 1973 Convention on International Trade in Endangered Species (CITES) prohibits trade in certain threatened or endangered species of animals and plants. CITES does not contain an exception for cultural purposes, even though some of these animals and plants are highly valued in certain countries as decorative objects, medicines, and aphrodisiacs. A more specific example of the rejection of cultural claims concerns the moratorium of the International Whaling Commission (IWC) on hunting certain species of whales. Japan and Norway claim that they have a cultural right to engage in whaling. They argue that whale meat is a cultural delicacy consumed on special holidays and that whaling has sustained traditional communities for centuries. The IWC has rejected Japan's and Norway's cultural claims, despite evidence that there are authentic traditional practices and values associated with whale hunting in these countries.

Another example of how international law rejects cultural exceptions concerns the General Agreement on Tariffs and Trade (GATT) administered by the World Trade Organization (WTO). Canada fears the cultural dominance of the United States in its market.[14] It tried to prevent the import of US magazines into Canada by imposing tariffs, and the US publishers responded by printing the magazines in Canada with minimal Canadian content. Canada then imposed high excise taxes on the US editions printed in Canada. The United States responded by challenging the Canadian taxes as a violation of Article III of the GATT. Article III requires countries to extend national treatment to like products that originate in other member states. The United States argued that Canadian magazines were not subject to the same excise taxes as like US magazines. Canada's defence was that US and Canadian magazines were not 'like products'. They were distinguishable precisely because of their different national cultural content. In essence, Canada asserted a cultural exception to the GATT principle of national treatment for like products. In 1997 the Appellate Body of the WTO found that Canada had violated the national treatment provision of GATT.[15] The Appellate Body rejected Canada's argument that, based on national origin, cultural goods are inherently different. The Appellate Body instead took the view that cultural goods are homogeneous. No cultural exception to GATT's principles could be tolerated. This decision is consistent with a number of other opinions in which GATT panels have rejected cultural exceptions.[16]

By contrast, the international community is willing to consider cultural exceptions to the international norm of gender equality. In various international instruments states have accepted gender equality with a cultural qualification. For

14. According to one study, 95% of films shown in Canada are US productions, and 80% of Canadian television news originates in the United States.
15. WTO Appellate Body Report, Canada B, Certain Measures Concerning Periodicals, adopted 30 June 1997, WT/DS31/AB/R.
16. E.g., GATT Dispute Panel Report on Japanese Measures on Imports of Leather, adopted 15 May 1984, L/5623-31S/94, para. 44 (finding that an import licensing scheme to protect an import-competing cultural minority community violated GATT Art. XI prohibiting import quotas); Report of Panel in Japan B, Customs Duties, Taxes and Labeling Practices on Imported Wines and Alcoholic Beverages, adopted 10 Nov. 1987, L/6216-34S/83, para. 1.1 (finding that measures to protect the domestic producers of traditional wines and liquors used for ceremonial and religious occasions were GATT illegal).

example, at the International Conference on Population and Development at Cairo in 1994, the Final Declaration recognized the right of women to control their reproduction, but it provided that the implementation of this right 'is the sovereign right of each country consistent with full respect for the various religious and ethical values and cultural backgrounds of its people'. Again at the UN Conference on Women at Beijing, there was substantial negotiation among the delegates in order to accommodate cultural differences. The Beijing Declaration stated that 'women's rights are human rights', but then reaffirmed the idea that women's rights were culturally determined. The platform declared that these rights were subject to 'the significance of and full respect for various religious and ethical values, cultural backgrounds and philosophical convictions of individuals and their communities'. The Beijing platform stressed the importance of religious beliefs and asserted the need to respect religious differences.

One prominent example of subjecting international norms of gender equality to cultural exceptions is the debate over female genital cutting. Defenders of female genital cutting assert that it is central to their culture. Even among Western feminists, some have accepted the idea that in formulating a position on this issue, we must accommodate cultural attitudes of the developing countries.

It is nearly impossible to engage in a discussion of women's rights under international law without having to address cultural claims. By contrast, other human rights norms, such as the right to be free from arbitrary detention or torture or the right to worship and to self-expression, are not qualified by cultural exceptions.

In sum, international law does not treat cultural exceptions consistently. One explanation for this inconsistency may be the complex relationship between international law, culture, and globalization. As globalization has opened up markets, it has caused cultural dislocations. Import competition has displaced local producers and traditional communities. Foreign products and companies have introduced new attitudes, values, and practices.

Globalization has created a cultural backlash. In a rapidly changing and uncertain world, people are anxious to retain some of their traditions. The cultural backlash has taken many forms throughout the world. Examples include anti-immigration movements, anti-Semitism, Islamic and Christian fundamentalism, Hindu nationalism, opposition to birth control, and homophobia.

Cultural exceptions are a legalistic expression of displaced anxiety towards globalization. International law rejects cultural claims when they interfere with the process of globalization. When states argue for cultural exceptions against trade norms or economic regulations, including environmental regulations, they risk disrupting the free flow of globalized markets. Alternatively, when states argue for cultural exceptions to gender equality norms, there is no threat to globalization. Popular anxiety over globalization's cultural consequences can be safely displaced onto women without risking the process of globalization. Countries that feel powerless in the world market and dislocated by the rapid pace of cultural changes brought by the world market, seek to reassert their sovereignty through the regulation of gender differences. When politicians can no longer claim to maintain full employment, control prices, or restrict foreign companies, they can still restrict birth control and

abortion, limit the educational and occupational opportunities of women, and control the right to marry, divorce, and exercise personal autonomy within the family. Indeed, to an increasing extent in both the industrialized and developing world, gender difference may be one of the primary expressions of state power.

My final point is that international law has left open the question of how to relate to culture, and our project should be to resist cultural claims. Cultural autonomy is an incoherent idea because individuals have multiple cultural identities that are often in conflict. When states seek to create cultural exceptions to legal norms, they are privileging the traditions, values, and practices of one subgroup over another within the same territory. If we permit cultural exceptions to international legal norms, we are empowering the elites in each state to impose their values over disenfranchised groups. One group's cultural autonomy always subordinates another group's culture.

International lawyers should be deeply suspicious of all cultural claims by states, because culture is a contested concept that is deployed to divide us and deny international law's claim to universalism. Throughout the world nationalist parties are gaining power by promising to promote something they posit as 'national culture' against the 'alien' or non-traditional influence of immigrants, minorities, women, and other states. As cultural resistance to global governance has grown more violent and less predictable, we should find new legal strategies and institutions for containing culture and resolving conflict.

Group IV discussion

B. S. Chimni. I actually wanted one clarification from Professor Paul. How do you deal with the whole notion of cultural imperialism? On one hand we should resist the claims of a state when it is making these cultural claims, on the other hand at least the third world countries are recipients of market culture. 'Law and development' culture is one kind of culture that is exported to the third world and we need to do something about it. A second kind of cultural imperialism is where the contribution of the cultures of third world civilizations is not really recorded in the narrative of international law.

I wanted a clarification from Professor Kennedy: when you say that we need to translate the vocabulary of legal expertise into political positions, what exactly do you mean? Is this also part of the demystification process? Is it really opening up the text to suggest: look, here actually are some political positions, concealed behind the legal text, and politics which we need to contest? Or is there something more to this in the sense that our interpretations particularly of legal texts have to be linked to certain movements of people? Are we talking about an organic intellectual in the Gramscian sense or are we simply talking about an international law exercise where we simply try to bring to the fore political positions?

Ben Novak. Does Professor Paul include religion in his term 'culture', because some of the problems outlined in his paper can also be found in the relation between religion and international law.

Paul. I do take religion and culture together, because in practice community claims about culture are often linked with religion, or religious practices. I see a

kind of irony in the notion of the third world protecting its culture from Western culture. At least since the nineteenth century, culture has been used as a mark of evolution. Culture has been romanticized in indigenous societies as a mark of their underdevelopment. We have in a sense 'respected' culture in developing countries by romanticizing the primitive aspect of these societies as 'exotic'. Consider the different treatment by the IWC of cultural claims by Norway and Japan to whale and those by the indigenous populations. The IWC says that Norway and Japan have no right to engage in whaling, despite centuries of whale-hunting, but indigenous tribal groups such as the Makai in the north-west Pacific do have such a right. The Makai are an indigenous culture and somehow it seems more authentic in that context to talk about culture. Yet the Makai have not whaled for at least a century, and when they were given the right to engage in whaling, they had no idea how to do it. The US navy equipped them with harpoon guns so that they could engage in their 'tradition' of whaling. The IWC attaches cultural significance to the 'primitive' aspect of Makai culture and disregards the same aspect in industrialized states. That is why I have a very ambivalent response to claims about culture in the third world, because I do think it is a way in which the first world maintains a sense of its superiority over the third world.

Stania. I should like to know what Helena Alviar understands by the concept of modernization? Does she use it as a neutral concept or under ideological or social or economic or any other concepts? Second, is there not a revival of the wish to go back, for example, to agriculture? Third, say, for example, a neighbouring country is trying to revive the ideology, or whatever you might call it, of Bolivar, who was the founder of Gran Colombia. What does she think about the revival of ideology of that kind?

Alviar. The term modernization is not a neutral term at all. I try in my work to show how ideological the term is and how it is composed of political ideals. It is composed of ideas of how the economy and culture should look. It is not a neutral term at all, I think it is an ideological term.

The question about the revival of Bolivar's ideology in the case of Venezuela is very difficult. He has been considered the liberator of the continent, but there can also be a very conservative way of reading what he was and what he represented. Actually Bolivar was not that much of a pluralist, so I would be cautious about the revival of that type of ideology.

Kennedy. I should like to respond to Professor Chimni's question about the translation of expert vocabularies into political vocabularies. I wanted to evoke two traditions of political contestation. One is the tradition you describe of translating an expert vocabulary into terms which we understand to be in political contestation – we are used to political contestation in ideological terms, in terms of left, right and centre, or in terms of well-defined social interests, like labour, capital and so forth. There is a difficult intellectual work in doing this kind of translation, and I think it would be better for international law if there were more opportunities and more well-developed habits of making this kind of translation. But I do not see translations of this type as 'demystifying' – I see them as 'remystifying'. That is, the vocabularies of political resistance, which fantasize interests or ideological

positions in contestation, are very similar to the ideas of cultural resistance, national resistance, or to a term like modernization. These are all vocabularies that mystify a much more complex political situation. Here I would associate myself completely with Professor Simonia's earlier remarks on culture, that the actual situation is one of intense overlapping hybridization, which is very difficult to pin down in one idea or programme as in 'it is always better for the most primitive culture to win'. In my view, there is nothing a priori wrong with one culture exercising influence over another. It happens all the time. Similarly, I find nothing wrong with one people governing another, which also happens all the time. The question is, how do they do it and what are the distributive consequences of their doing it? What are the modes of engagement that are permitted and excluded? What space is there for which alternative cultures? What are the micro consequences of this rule rather than some other? And all this is much more difficult to tease out. So although I think that this first tradition of political translation, which focuses on the transformation of expert choices into ideological or interest contestations, is useful, it can also be a trap, because we can think that we have really got to the bottom of politics, when we have only just begun. We may have understood what is really going on with the interests of labour and the interests of capital, but we all know from a thousand disappointments that the interests of labour are multiple, the interests of capital are multiple, and all sorts of different possible alliances are overlooked in that kind of overstressed contestation.

Consequently, the tradition of politicization to which I am much more attracted is a much more Protestant one, if I might say that, in which politics is an experience the individual has. The experience of being political is the experience of having shed the idea of acting in accordance with expertise or best practice and being open to the responsible exercise of authority over other people in a situation of unknowing. This, basically, is how I would read the Protestant side of Karl Schmidt. My sense is that creating situations in which more individuals in the governing class experience what they do as political in this sense, precisely in the sense that they are deciding something for other people without knowing whether it is the right thing or not and nevertheless having to take responsibility, would be a good thing. We would be better off if our political culture encouraged experts to decide in a spirit of an unknowing hope for grace, rather than in a spirit of exercising complex expertise. I was trying earlier to stress this second idea of politicization – a politicization of the individual experience of the expert rather than a once and for all translation of the vocabulary so that we will know where politics lies. Politics lies where people believe they are free and that's it.

Leopold Specht. I have serious doubts about this proposal. I think that Kennedy's conversation with Chimni poses the following dilemma: what does emancipation mean? What does contestation mean? Does it mean solving the problem of mere existence, in political theory the decision of life and death, the preservation of the integrity of persons? You are discussing at the level of the Palestinian farmer who is no longer entitled to receive water, and there are many examples of this kind. And I think that on this level what you have put forward does not make sense, because it is very clear that for the Palestinian farmer his problem is a material situation. At

another level, where you start to talk about a proliferation of cultures, of expertise, your proposal makes sense entirely. Now what I would be interested in is how to link the first with the second. Of course I can imagine having problems in this country which at a certain point reduces our choice to that between life and death, to the bare existence of humanity, but this is not as likely as in the case of the occupation of Palestinian territory. My question is, after we have adopted your proposal, how do you combine these various levels?

Kennedy. I am agnostic but doubtful that there is a level of existence which we could call subsisting below the symbolic. It seems to me that in every culture, no matter how low the income level is, we will find a surplus above the conditions of existence. We might say that people are living everywhere in a cultural frame in which resources are allocated on a basis of norms and the judgements of experts, regardless of how impoverished they seem. Consequently, I do not share the vision of a farmer, Palestinian or otherwise, making decisions about his or her material needs in a kind of authentic lunge into life. I see people pursuing strategies through technical know-how and expertise. In that sense, it seems a continuous ladder from there all the way up to the level of the political leaders of a place like Colombia. We heard those political elites described as making decisions about modernization, experiencing their struggle as a relationship between their internal sense of themselves as liberals and conservatives, their sense of Colombia in a peripheral catch-up situation, their idea in a given historical period about what the dominant expertise on modernization offers as political alternatives and triage within these struggles. When I imagine members of the political class in this way, it seems that nine out of ten people are in flight from responsibility. They are hanging out with hegemonic actors, but none of them want to be the person who pushes the button. They all want to be the person who figured out that they had to do it this way for some reason. It is so common for people to feel that 'everyone else in this system has discretion, but me', because I am a leftist, because I am a conservative, because I represent the bank, because my boss will not let me, because modernization requires it, because of culture. So people are in flight from political responsibility, and the international legal order, in my view, encourages them to be. My only suggestion is that we rethink the situation, so that people operating in a symbolic world – from the Palestinian farmer to the Colombian modernizer – have more opportunities and are more often encouraged to reach towards the fire of responsible action in unknowing, rather than to flee from it into whatever forms of expertise the system makes available at that time. A concrete example would be Europe fleeing from responsibility for opposition to the Iraq war into the idea of multilateral decision-making. That goes for the American left. The whole discussion – 'if only the UN decides to do it, then it is fine' – puts to one side the questions of whether it is a good idea or not, who will suffer by it, how long will it take, what actually will be the consequences for political life in the Middle East afterwards. Those things are lost because we found another way of talking about it as the debate between multilateral and unilateral. Or take the International Criminal Court. I personally oppose the International Criminal Court because my intuition about the consequences of institutionalizing an International Criminal Court is that it will offer the opportunity for political elites to shed the

problem of responsibility. Of course it will have many other effects, some good. On balance, it seems an opportunity, like so much of the human rights judicative machinery, for political elites to avoid the experience of distributing resources to other people and accepting the consequences in their own name.

Lanc. Do we have enough or too much international law? That German Chancellor Gerhard Schröder did not want to take part in the action against Iraq proposed by President Bush was very surprising. Soon after Schröder was first installed he had to visit Washington for the fiftieth anniversary of NATO, and there he was immediately confronted with the decision, counter to the 1949 North Atlantic Treaty, that NATO could intervene militarily outside NATO territory. It was thus felt that from the start he had not been very pleased to be confronted with this decision. It is significant that there was another president of the United States at that time, so that it is not just a question of Bush being president. But what options in the long term has the newly re-elected Schröder vis-à-vis Bush? There is Daimler Chrysler, the presence of 100,000 US military personnel in Germany, using air bases in Germany as a vital facility for actions in various parts of the world, especially in our part of the world. So to some extent many countries, not only Germany, are occupied. How far can these countries make free decisions? Are they partners coming together to make a legal decision under the same preconditions, or not? It is another kind of situation described by our friend Chimni as arising in the case of underdeveloped countries. This all influences, in my opinion, the way in which a legal order can be implemented even if one thinks that what is existing in international law is sufficient.

Specht. I think that David Kennedy and I agree that they get up in the morning, do it, and then think about something else. Is this right? Can I come back to my doubts? Can I rephrase my question? So, if mention of the Enlightenment is not helpful, let me try it in another version: are you suggesting a turning from the Catholic to the Protestant version of representation?

Leiden Journal of International Law, 16 (2003), pp. 929–932
© Foundation of the Leiden Journal of International Law Printed in the United Kingdom DOI: 10.1017/S0922156504001761

Summary

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It would have been a good deal easier to write the summary of the events, given the extreme complexity, contradictoriness, diversity, and above all the richness of contributions, had I not listened to them.

First came the question of international order or international disorder. And here the word order has its own, shall we say, resonance, which is in my opinion different in different languages, also in different conceptual languages: 'Ordnung' in German has something of a normative flavour, one thinks of the discussion of ordo-liberalism and of a certain kind of social market, whereas 'order' in English sometimes, indeed more often than not, has the implications of a historical entity and the crystallization for the moment of social and cultural relations that has a certain fixity to it. But here we had the question regarding the international order as to its hierarchical and indeed its oppressive or exploitative dimensions, and the question of its position in time. The notion again emerged in the form of a very large argument as to whether international law was capable at all, under present circumstances, of even tentatively stabilizing international order or international society.

Here another discussion emerged, as an important and maybe critical subtext: do we face surface disorder with a hidden underlying order? Let us say a process of the centralization of control of wealth, power and politics or do we face a superficial order, an apparent order on the surface of world politics accompanied by the deepest and most contradictory kind of hidden and emerging disorders beneath that invalidates the pretensions, let us say of the United States, to be the sole power. I think of Madeleine Albright, whom one does not accuse of excessive imperial ambition, or one of her speechwriters at any rate, using the phrase the 'indispensable nation'. We got into a historical argument as to where this order could be located, what were its dimensions, how it could be identified, and what kind of world we were living in.

This brought up a third set of questions: about historical agencies for change or the maintenance of a given order, about elites, about populations, about the participation of new historical actors and their roles, rights, and responsibilities, and obviously the emergence of women on the active historical scene as categorical actors with demands for rights. We again confronted the problem of control and domination: is there an international capitalist elite, whatever its national and international dimensions? To what extent is it unified? Is it unified by the system of national borders? This of course raises the question of particular interest these days to those concerned with the United States. Again, do we have a hegemonic power, namely the United States, and, if so, how long can this power last in the face

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of external challenges? We dealt much less with the internal stress, which some of us know, but which may prove rather strenuous.

We then went on to a theme which I think interests us all. I noted it as 'the responsibility of intellectuals' and indeed that was the title of a remarkably effective article in the *New York Review of Books* during the Vietnam War by Noam Chomsky, who later expanded it into a book called *American Power and the New Mandarins*. And the 'new mandarins' were the very same people referred to by David Halberstam in his book *The Best and the Brightest*, by which he meant the Kennedys and also Harvard professors and other intellectuals, recruited to serve power. Here I think most of our discussion – the intellectuals were a subtheme – in fact concentrated on technocratic experts, that is persons who have a claim to the mastery of a specific technique or area of knowledge or segment of reality, which they could in expert fashion manipulate. Above all David Kennedy served us well, I think, by asking if the experts, in effect, are so expert, and how we, inhabiting the same cultural and social space, may prevent ourselves from being subjected to a kind of dictatorship of experts. I call your attention to an American programme currently running on German television, a programme recreating the time of the Cuban missile crisis, when it turned out that the least expert person there, namely John F. Kennedy (even though he had been a senator), was able to use common sense and with Khrushchev oppose their own cabinet ministers, generals, and bureaucrats and say that this thing is getting out of control, it must be stopped. I was reminded of the famous conversation between McNamara and Kennedy, when Kennedy offered him the job of secretary of defence and McNamara said: 'I don't have any particular training for this job', and Kennedy said: 'Neither I for mine.' I think that this discussion of the limitations of expertise then flows over into a discussion that interests us all as members of a learned profession, namely the responsibility of intellectuals or of custodians of culture for the wellbeing and the continuation of the world, which by cultural tradition is entrusted to us.

That brings us then to the theme that I have summarized here as culture and opposition. It is clear that law, as an instrument of culture, is used differently in different cultures. The accretion and development of international law in the West since the treaty of Westphalia was limited to given kinds of state forms in a very specific historical environment, and even the emergence, one hardly needs to stress this in Vienna, of nation-states was accompanied by severe arguments over their cultural definition. It was suggested earlier that the great international triumph of Hobbes was that he substituted in politics an argument or at least a set of observations about the conflict of interests and the necessity of maintaining a common political structure for the intrusion upon social life of the absolutism of a religion, raising our questions as to whether our hopes for a secular solution to some of these problems might not also constitute a secular religion, namely a doctrine of liberal democracy and tolerance, which again may clearly be under strain.

That brings us to the question of the future. Here there was an argument as to whether the international structures that have been created in the past fifty years in and around the United Nations – the Security Council, the various agencies, international legislation – could continue. A good deal of the international legislation

was, I think, correctly analyzed for its social and political effects, that is to say, as being organized in defence of some particular interests rather than others, and here the continuing refrain was that the social democratic solution is at an end. I am reminded of a point most emphatically made by Erwin Lanc, our senior president, who actually was a social democratic minister in a social democratic government. I am reminded of a remark about social democracy made by an American colleague, Dennis Wrong: social democracy is the highest form of capitalism. But if that was in fact the case, something in capitalism, some dynamic in capitalism concerned precisely with internationalization, is breaking down the stability, validity, and future of social democratic solutions, as evidenced by the various internal crises of the developed welfare states. Here again we get to cultural questions. Germans will know the word 'Lebensraum' (living space), which had an awful significance in late nineteenth-/early twentieth-century German debate. 'Living space' has more recently been used by the left to indicate the colonization processes, which intrude into the cultural integrity even of groups integrated into the more prosperous countries. This debate calls into question the easy universalism or the assumed universalism under which the social democratic solution has been proceeding. Finally, we arrive at phrases which are vaguely reminiscent of the old ideas of regression and progress, and I was struck by how few people used the vocabulary of progress and yet how difficult it was for people ultimately to remove themselves from the notion that there was such a thing as progress, that is to say that human agency could attain a morally just, much less violent and more humane society. At that point there was considerable discussion of religious and other fundamentalisms as a threat to the stability of any order, precisely because of their absolutist demands, including observations on the presence of religious fundamentalism in the United States. I think I can offer, along with the other Americans, reasonable reassurance that in a population of 280 million there are no more than about 90 or 100 million to worry about, most of them of course highly mobilized and politically available. But religious fundamentalism of one kind or another can also have a certain value, because if you think about the colonization of living space you arrive at the question of the defence of certain structures or of a culture of uniqueness, in the face of the homogenizing factors of a world market. There obviously are national, political, and ethnic kinds of fundamentalism. As we walk from the hotel down the Kärtnerstrasse there is a poster of one the candidates for the chancellorship, Alfred Gusenbauer, and on it somebody has scrawled 'traitor to Austria', indicating a kind of nationalism, or fundamentalism, at work. I suppose Gusenbauer can comfort himself, if that is the word, with the thought that this person denouncing him as a traitor to Austria might well be someone who yearns for Austria's incorporation into a much larger political entity, which I do believe occurred towards mid-century. But that is another question.

Law obviously has a social regulatory function, and finally we get to the question of violence: the persistence of violence, the putative permanence of violence. While it was not much discussed, it underlay some of the discussions: modes of dealing with it, kinds of violence, or whether the newer forms of terror, in itself a highly indeterminate term, represent a totally new form of historical violence adapted for

the destruction of an old state system and the internationalization of certain kinds of cultural and social conflicts. We could also have spoken of a delegated violence, that is to say of international sub-systems, which responds to imperatives from a putative centre.

This is a highly personal reading of what took place and I will not conclude without expressing my deepest gratitude to everyone who came and to my colleagues. I learned an untruth. There is a saying in the English-speaking world: you can't teach an old dog new tricks. I find it untrue: at an age – and I hope I won't be accused of fundamentalism if I describe it as biblical or at least pre-biblical – at an age which is pretty biblical I learned an enormous amount from all of you and I am personally very grateful.