

*Alexander Somek*

Seminar:  
Rethinking Public International Law

Introduction

1. The paradoxical coincidence of downfall and success

Public international law is in a crisis. Or is it not?

It undoubtedly is. The government of the United States has demonstrated, repeatedly, that it is determined to break the chains of international discipline when its political leader believes that the pursuit of some greater good, such as human rights or collective security, coincides with the national interest. No one seems to be capable of taming the “colossus” (© Niall Ferguson). What is more, the United Nations have been crushed by scandals and corruption and hence fallen into a calamitous state. As regards their long overdue reorganisation, no one seems to find a convincing solution.

In a word, the world community and international law have not witnessed a more profound crisis since the Second World War.

At the same time, however, international law has scarcely ever been more successful. More and more areas of state activity are submitted to one or the other form of transnational co-operation. It comes in a variety of forms, ranging from informal networking among national bureaucrats and the global pooling of technical expertise to the emergence of prodigious institutional mutants such as the European Union. Warfare aside, the nation state seems to have had its day. In one of the most important areas of co-operation, i.e. international trade, international relations have become less a matter of diplomacy and been transformed more into a question of adjudication. The dispute settlement system established under the new GATT and the WTO is the case in point. Moreover, the prosecutor serving at the International Criminal Court recently claimed jurisdiction to bring an acting Head of State to justice (<http://www.icc-cpi.int/press/pressreleases/406.html>).

## 2. The basic tension

What is one to make of both downfall and success? In the first round, nothing else needs to be done than to sharpen the awareness that the ground is shifting and to examine some of the causes.

There is one promising account of the reasons that explain the vicissitude of public international law. It says that public international law is not the product of only one but at least of *two* different, potentially conflicting, systems of law. More precisely, the foundations of existing public international law were laid in the wake of two major European wars—the Thirty Years' War (1618-1646) on the one hand and the Second World War (1938-1945) on the other. As a result, the older system has come to be overlaid (and overdetermined) by the more recent. For want of a better description, I would like to refer to these systems as the “Westphalian” system and the “American system”, respectively.

The Westphalian system of public international law rests on the assumption that the international society is composed of states. Its most basic normative principle is, arguably, that promises have to be kept (*pacta sunt servanda*). States enjoy ample liberties under this system, in particular the freedom from interference by others and the right to go to war whenever they feel that their interests have been adversely affected. War, in turn, is the equivalent of a tournament among states. It is not meant to become “total”.

In the wake of the Second World War (one can argue that to some extent already with the creation of the League of Nations), a different system of public international law has come into place. The United States decisively influenced its gestation. The basic assumption is that there is a world community. The most elementary normative principle requires the preservation of world peace. The conduct of war is officially outlawed. Self-defence aside, any use of force needs to be authorised by the community of states acting through the Security Council. Also, the range of subjects that are to be included into the system has been extended. They now range from insurgents over international organisations all the way down to real flesh and blood human beings. The protection of human rights is a major concern. Human rights not only proliferate—at any rate at the level of

international documents—their gross violation is sometimes treated as though it were tantamount to a threat to “world peace”. Accordingly, the enthusiasm for human rights and the belief that resort to force may be necessary to their protection have come to coexist uneasily with the outlawing of war. The military rescue of humans who suffer at the hands of their own governments is difficult to square with the preservation of world peace. What is more, the premium put on human rights and the authority of the world community appear to be incompatible with the old order of Westphalia.

The situation of tension and conflict has been exacerbated by a recent turn of American foreign policy. In a sense, this turn can be understood as an attempt to arrive at a synthesis. It asserts the right of one state to act unilaterally as long as its action comports with the right universal moral principles. As a result, the new approach has no qualms about breaches of international legal rules if they appear justified from the high ground of (the right) morality. For obvious reasons, however, this position is sustainable only for as long as there is merely one military hegemon on the globe. What is more, the hegemon, in order to sustain itself, has to be capable of creating the spectacle of military success. Evidently, the existence of two self-righteous major forces with conflicting political beliefs would set off the final disaster of humankind. Similarly, the impression of military failure would effectively undermine the hegemon’s claim to authority. It would rather appear to be merely one rouge state amongst others.

### 3. Our task

We would be aiming too high if we were to define the task of the seminar as having to resolve, once and for all, the tensions and complexity of current public international law. I surmise that this would be a futile quest, in any event. The task lying ahead can only be more modest. Rest assured, though, that it will be demanding enough.

We are going to examine certain issues by bearing the basic tension between the two systems in mind.

At the same time, we should be suspicious that the trouble created by this tension may account for the fact that international law encounters great difficulties in confronting existing social realities.

It may indeed be the case that public international law is suffering from a “learning block” simply because it is intellectually stuck in a tension that it inherited from the twentieth century. More precisely, public international law may still be wedded to false “ontological commitments”. Such commitments are manifest in beliefs about what there is. The world of public international law is currently inhabited by states and international organisations. But maybe the real world is composed of different agents? Maybe states have indeed already become “disaggregated” (Slaughter)?

We are going to examine selected issues with both the awareness that new principles conflict with old ones *and* the keen suspicion that both may already have become problematic today. This can be done all the more successfully if it is done with a certain penchant for impiety.

Take, for example, the law of war. How can it be transferred to the “war on terror” where the enemy is neither a state nor based on one state’s territory but rather a global association of mass murderers? What is the consequence of treating their members, for example, as “enemy combatants”? Are they just “like” PoWs? Many more examples can be explored. That the international society is composed of states may well turn out to be fictitious. Maybe we are looking at “networks” instead? Again, the ontological commitment to a world community of states might blind us to existing realities.

There is also a naïve belief, widespread in Europe, that “more public international law” is good whereas “less” is in and of itself bad. This belief explains the excitement about the international criminal court and the constant push for more centralisation, possibly even the creation of a world state. It may turn out, however, that the international bureaucracies emerging from international law are not at all benign. They may be precisely as menacing as ordinary state bureaucracies.

Even if we are not likely to succeed at re-creating international law, the task of rethinking it is still an arduous one. We will be confronted, repeatedly, with

the dual challenge of having to examine the incoherence of the current system *and* its potential inaccuracy with regard to what it has been designed to regulate.

Lest I forget, I encourage you to bear in mind the issue of legitimacy, that is, the question of how the international system looks from the perspective of democratic theory.

#### 4. Basic schedule

We are going to study selected basic problems over roughly the first half of the semester.

Students are then given time to work on their papers and to consult with me during that process.

The plenary meetings of the seminar will resume as soon as the student papers will have taken on a presentable shape.

Students will then have opportunity to present their research to their peers and to receive feedback from them.

The final version of the papers is due two weeks after the end of classes (December 16th). Papers that are not in my mailbox at this date will be downgraded by 0.1 for each day they are turned in late. This is a sanction. This is America. You better believe that the sanction will indeed be imposed.

Deadline for choice of topic and rough outline: 10/6

#### Useful websites

European Court of Human Rights <http://www.echr.coe.int/>

International Committee of the Red Cross <http://www.icrc.org/>

International Court of Justice <http://www.icj-cij.org/>

United Nations Organization <http://www.un.org/>

UN Office for the Co-ordination of Humanitarian Affairs (OCHA): Relief-Web <http://wwwnotes.reliefweb.int/>

US Department of State <http://www.state.gov/index.html>

## Materials

In addition to photocopied materials, the class will use the following basic text: Antonio Cassese, *International Law* (2d. ed., Oxford, 2005).

I have chosen this book not because it was written by a European but for two different reasons: it is short and it covers much of international law by examining certain problems. It is not another comprehensive, but tedious, treatise.

If you feel that you need more background readings in public international law I would suggest, again, Antonio Cassese, *International Law* (2d ed. Oxford UP, 2005). Reliable resources are also Ian Brownlie, *Principles of Public International Law* (6 ed., Oxford UP, 2003) and Malcolm N. Shaw, *International Law* (5th ed., Cambridge UP, 2003).

## Syllabus for the reading and discussion period

Discussion of the syllabus, general orientation  
and skeptical perspective on public international law

1. Jed Rubenfeld, 'The Two World Orders' (2003, autumn) *Wilson Quarterly* 22-36

date: 8/26

The emergence (and present state) of modern international law

2. Cassese 22-35
3. Martti Koskenniemi, 'The Fate of Public International Law: Between Technique and Politics' (2007) *70 Modern Law Review* 1-30

date: 9/8

New perspectives: networks

4. Anne-Marie Slaughter, *A New World Order* (Princeton University Press, 2004) 1-35, 216-257

date: 9/15

An old perspective on the new perspective: imperialism

5. B. S. Chimni, 'International Institutions Today: An Imperial Global State in the Making' (2004) 15 *European Journal of International Law* 1-37

date: 9/22

New perspectives: fragmentation

6. Andreas Fischer-Lescano & Gunther Teubner, 'Regime-collisions: the vain search for legal unity in the fragmentation of global law' (2004) 25 *Michigan Journal of International Law* 999-1046

date: 9/29

An alternative new perspective: constitutionalisation

7. Anne Peters, 'Compensatory Constitutionalism: The Function and Potential of Fundamental International Norms and Structures' (2006) 19 *Leiden Journal of International Law* 579-610

date: 10/6

Old problems: compliance

8. Oona Hathaway & Ariel N. Lavinbuk, 'Rationalism and Revisionism in International Law' (2006) 119 *Harvard Law Review* 1404-1443
9. Ian Manners, 'Normative Power Europe. A Contradiction in Terms?' (2002) 40 *Journal of Common Market Studies* 235-258

date: 10/13

### Hegemony

10. (optional) Anne-Marie Slaughter & William Burke-White, 'An International Constitutional Moment' (2002) 43 *Harvard International Law Journal* 1-21
11. José E. Alvarez, 'Hegemonic International Law Revisited' (2003) 97 *American Journal of International Law* 873-888
12. ECJ, Case C-402/05 P Kadi v Council and Commission (Opinion of AG Maduro, 16 January 2008)

date: 10/20

### Discussion of draft papers

First group 10/27

Second group 11/3

### Presentation and discussion of student paper drafts

#### **First round**

date: 11/10

#### **Second Round**

date: 11/17

### Third Round

date: 11/24

## Suggested Topics

The short list below reflects my own research interests. It is meant to give you an idea but it is definitely not intended to prejudice your own choice.

### Blueprints

Philip Allott, *Eunomia. New Order for a New World* (2d ed. Oxford UP, 2001)

John Rawls, *The Law of Peoples* (Harvard UP, 1999)

Martti Koskenniemi, 'International Law as Therapy: Reading The Health of Nations' (2005) 16 *European Journal of International Law* 329-341

John Rawls, *The Law of Peoples* (Harvard UP, 1999)

Allen Buchanan, *Justice, Legitimacy, and Self-Determination. Moral Foundations for International Law* (Oxford UP, 2004)

### The European approach to international law

Bardo Fassbender, 'The Better Peoples of the United Nations? Europe's Practice and the United Nations' (2004) 15 *European Journal of International Law* 857-884

Helen Keller & Daniela Thurnherr, *Taking International Law Seriously. A European Perspective on the U.S. Attitude Towards International Law* (Staempfli Pub., 2005)

### The ambivalence of human rights

Martti Koskenniemi, 'The Effect of Rights on Political Culture' In P. Alston (ed.) *The EU and Human Rights* (Oxford UP, 1999) 99-116

Volker Heins, Giorgio Agamben and the Current State of Affairs on Humanitarian Law and Human Rights Policy (2005) 6 *German Law Journal* 845-860

Jack Goldsmith, 'Should International Human Rights Law Trump US Domestic Law?' (2000) 1 *Chicago Journal of International Law* 327

### A democratic world order?

Susan Marks, *The Riddle of All Constitutions. International Law, Democracy and the Critique of Ideology* (Oxford UP, 2000)

Andrew Kuper, *Democracy Beyond Borders. Justice and Representation in Global Institutions* (Oxford UP, 2004)

Armin von Bogdandy, 'Globalization and Europe: How to Square Democracy, Globalization, and International Law' (2004) 15 *European Journal of International Law* 885-906

Philip Allott, *The Health of Nations. Society and Law beyond the State* (Cambridge University Press 2002)

## A reformed United Nations

Dame Rosalyn Higgins, The New United Nations: Appearance and Reality, in: David Freestone/Surya Subedi/Scott Davidson (eds.), *Contemporary Issues in International Law. A Collection of the Josephine Onoh Memorial Lectures* (Kluwer Law International 2002) 143-159

David Scheffler, 'Blueprint for Legal Reforms at the United Nations and the International Criminal Court' (2005) *Georgetown Journal of International Law* 683-701

Jürgen Neyer, 'The New World Order: From Unilateralism to Cosmopolitanism' (2004) *Die Zeit* – Reden [http://zeus.zeit.de/text/reden/weltpolitik/200406\\_neyer](http://zeus.zeit.de/text/reden/weltpolitik/200406_neyer)

See also <http://www.un.org/reform/>

## Imperialism and hegemony

Anthony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge UP, 2004)

Martii Koskeniemi, International Law and Imperialism, in: David Freestone/Surya Subedi/Scott Davidson (eds.), *Contemporary Issues in International Law. A Collection of the Josephine Onoh Memorial Lectures* (Kluwer Law International 2002) 197-218

William Scheuerman, *Carl Schmitt. The End of Law* (Rowman & Littlefield, 1999) 141-173

Richard A. Falk, *The Declining World Order. America's Imperial Geopolitics* (Routledge 2004)

Nico Krisch, 'Weak as Constraint, Strong as Tool: The Place on International Law in U.S. Foreign Policy' In D. Malone & Y. Foong Khong (eds.), *Unilateralism and U.S. Foreign Policy. International Perspectives* (Lynne Rienner, 2003) 41-70

José E. Alvarez, 'Do Liberal States Behave Better? A Critique of Slaughter's Liberal Theory' (2001) 12 *European Journal of International Law* 183-246

Dino Kritsiotis, 'Arguments of Mass Confusion' (2004) 15 *European Journal of International Law* 233-278

## Networks and management

Kenneth Anderson, 'Squaring the Circle? Reconciling Sovereignty and Global Governance Through Global Government Networks' (Bookreview of: 'A New World Order' by Anne-Marie Slaughter) (2005) 118 *Harvard Law Review* 1255-1312

Karl-Heinz Ladeur, Towards a Legal Theory of Supranationality. The Importance of the Network Concept (1997) 3 *European Law Journal* 33-54

Anne-Marie Slaughter, 'Global Government Networks, Global Information Agencies, and Disaggregated Democracy' *Harvard Law School Public Law Working Paper* No. 018, <http://papers.ssrn.com/abstract=283976>

Anne-Marie Slaughter, 'Sovereignty and Power in a Networked World Order' (2004) 40 *Stanford Journal of International Law* 283-327

Mattias Kumm, 'The Legitimacy of International Law: A Constitutionalist Framework of Analysis' (2004) 15 *European Journal of International Law* 907-931

Abram Chayes & Antonia Chayesm, *The New Sovereignty* (1995)

Michael Barnett & Martha Finnemore, *Rules for the World. International Organisations in Global Politics* (Cornell UP, 2004)

## The Humanitarian Dimension

Ralph Zacklin, Beyond Kosovo: The United Nations and Humanitarian Intervention, in: David Freestone/Surya Subedi/Scott Davidson (eds.), *Contemporary Issues in International Law. A Collection of the Josephine Onoh Memorial Lectures* (Kluwer Law International 2002) 219-234

David Kennedy, *The Dark Sides of Virtue. Reassessing International Humanitarianism* (Princeton UP, 2004)

J. L. Holzgrefe, 'The context for humanitarian intervention', in: J. L. Holzgrefe/R. O. Keohane (eds.), *Humanitarian Intervention. Ethical, Legal and Political Dilemmas* (Cambridge University Press, 2003) 15-52

Tom. J. Farer, 'Humanitarian intervention before and after 9/11: legality and legitimacy', in: J. L. Holzgrefe/R. O. Keohane (eds.), *Humanitarian Intervention. Ethical, Legal and Political Dilemmas* (Cambridge University Press, 2003) 53-89

Thomas M. Franck, 'Interpretation and change in the law of humanitarian intervention', in: J. L. Holzgrefe/R. O. Keohane (eds.), *Humanitarian Intervention. Ethical, Legal and Political Dilemmas* (Cambridge University Press, 2003) 204-231

Robert O. Keohane, 'Political authority after intervention: gradations in sovereignty', in: J. L. Holzgrefe/R. O. Keohane (eds.), *Humanitarian Intervention. Ethical, Legal and Political Dilemmas* (Cambridge University Press, 2003) 275-298

Henry Shue, 'Limiting Sovereignty', in: Jennifer M. Welsh (ed.), *Humanitarian Intervention and International Relations* (Oxford University Press, 2004) 11-28

Jennifer M. Welsh, 'Taking Consequences Seriously: Objections to Humanitarian Intervention', in: Jennifer M. Welsh (ed.), *Humanitarian Intervention and International Relations* (Oxford University Press, 2004) 52-68

## The Use of Force

Richard Tuck, *The Rights of War and Peace. Political Thought and the International Order From Grotius to Kant* (Oxford University Press 1999)

Christine Gray, *International Law and the Use of Force* (Oxford UP, 2d ed 2004)

Thomas M. Franck, *Recourse to Force. State Action Against Threats and Armed Attacks* (Cambridge UP, 2002)

Colin Warbrick, 'The European Response to Terrorism in an Age of Human Rights' (2004) 15 *European Journal of International Law* 989-1018

Garry Wills, 'What is a Just War?' (Bookreview of: 'Arguing About War' by Michael Walzer) (2004) 51 *The New York Review of Books*, <http://www.nybooks.com/articles/17560>

### Schools of Thought

Hidemi Suganami, 'The English School and International Theory', in: Alex J. Bellamy (ed.), *International Society and its Critics* (Oxford University Press, 2005) 29-44

Gerry Simpson, 'The Situation on the International Legal Theory Front: The Power of Rules and the Rule of Power' (2000) 11 *European Journal of International Law* 439-464

R. Beck et al (eds.), *International Law Rules. Approaches from International Law and International Relations* (Oxford UP, 1996)

George Rodrige Bandeira Galindo, 'Martti Koskenniemi and the Historiographical Turn in International Law' (2005) 16 *European Journal of International Law* 539-559

### Supranational Authority

Edward T. Swaine, 'The Constitutionality of International Delegations' (2004) 104 *Columbia Law Review* 1492-1614

Lord Mackenzie-Stuart, 'The European Community: Catchwords and Reality', in: David Freestone/Surya Subedi/Scott Davidson (eds.), *Contemporary Issues in International Law. A Collection of the Josephine Onoh Memorial Lectures* (Kluwer Law International 2002) 115-127

Neil Walker, 'After the Constitutional Moment' (2003) 32 *Federal Trust Online Paper*

Hans Kelsen, 'Sovereignty' In S. L. Paulson & B. Litschewski Paulson, *Normativity and Norms. Critical Perspectives on Kelsenian Themes* (Oxford UP. 1998) 525-536

J.H.H. Weiler, 'The Transformation of Europe' In *The Constitution of Europe* (Cambridge UP, 1999) 16-23, 26-38

Ian Manners, 'Normative Power Europe. A Contradiction in Terms?' (2002) 40 *Journal of Common Market Studies* 235-258

Walker, Neil, "Making a World of Difference? Habermas, Cosmopolitanism and the Constitutionalization of International Law" (December 2005). *EUI Working Paper Law No. 2005/17* Available at SSRN: <http://ssrn.com/abstract=891036>

### Is public international law without a future?

Peer Zumbansen, 'Sustaining Paradox Boundaries: Perspectives on Internal Affairs in Domestic and International Law' (2004) 15 *European Journal of International Law* 197-211

### Hard-nosed realism or idealism?

Jack Goldsmith & Eric Posner, *The Limits of International Law* (Oxford: Oxford UP, 2005)

Alexander Somek, 'Kelsen lives' 2006/4 IILJ Working Paper, [www.iilj.org/2006\\_4\\_HT\\_Somek.htm](http://www.iilj.org/2006_4_HT_Somek.htm)

### Public International Law and US Domestic Law

Curtis A. Bradley & Jack L. Goldsmith, 'Customary International Law as Federal Common Law: A Critique of the Modern Position' (1997) 110 *Harvard Law Review* 815-876