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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.

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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

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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,

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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

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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.

* Executive City Councillor for Cultural Affairs, Vienna.

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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.

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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).

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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.

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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.

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