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# *Law and Politics in the Age of Globalization*

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## **Abstract**

*The volume under review contains a collection of contributions dealing with the role of law in international politics. In the process of globalization, law is torn between resistance to and the embrace of political change. This volume explores this situation in challenging, sometimes provocative articles. Three themes stand out: the relationship between legal and political theory, the search for legal regulation of globalization and the role of the Security Council. In all of these areas, international lawyers should not be blind to the political environment of international law, but nevertheless insist on legal accountability as a precondition for the legitimacy of the exercise of political power.*

Confronted with revolutionary political change, there may be a tendency for law to either resist change, which all too often condemns it to irrelevance and pure moralism, or there may be a drive to embrace change, with the risk of collapsing into an apologism of brute power. The volume reviewed in this essay<sup>1</sup> constitutes one of the most complete and thorough explorations of the relationship between international law and international relations in the age of globalization. It is the outcome of a conference of the British branch of the International Law Association, held in Oxford in 1998, on 'The Role of Law in International Politics'.<sup>2</sup> The editor, Michael Byers, does not fail to note in his introduction that 24 March 1999, with its twofold significance of marking the beginning of the NATO air campaign against the Federal Republic of Yugoslavia in an attempt to protect the human rights of the people of Kosovo and the judgment by the House of Lords in the Pinochet affair, has brought to the fore the double-edged nature of this relationship. While some have heralded these

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<sup>1</sup> Byers, M. (ed.). *The Role of Law in International Politics. Essays in International Law and International Relations*. Oxford: Oxford University Press, 2000. Pp. xvi, 347. Index. £50, \$80. Page numbers in parentheses throughout this article refer to this volume.

<sup>2</sup> Cf. Skouteris and Korhonen, 'Under Rhodes' Eyes: The "Old" and "New" International Law at Looking Distance', 11 *Leiden Journal of International Law* (1998) 429.

two events as the dawn of a new era of international law, in which respect for human rights and the self-determination of peoples trumps the formal constraints of the protection of state sovereignty, Byers gives a totally different connotation to them: the Pinochet judgment, in Byers' opinion, was indeed a triumph of law over politics, but the Kosovo conflict, on the other hand, signifies the marginalization of international law in favour of a unilateral defence of political values. Whichever view one adopts, these events illustrate the dilemma faced by law between form and substance, community institutions and community values.

Three main themes stand out in the thoughtful and sometimes provocative articles included in this volume:<sup>3</sup> the relationship between international law and international relations theory, the impact of globalization on international law, and the role of the UN Security Council. All the contributions point out that international law cannot remain loftily above the fray of politics, but must resist the temptation to forego considerations of legitimacy for a simple observation of political events.

## 1. Political Science as a Threat to the Distinctive Character of International Law

To what extent can international law embrace international relations? In his essay on 'Carl Schmitt, Hans Morgenthau and the Image of Law in International Relations', Martti Koskenniemi traces the origins of international relations theory back to the Weimar experience of an ineffective, formalistic law which proved incapable of providing security and order. Emphasizing the differences between these two fields, Koskenniemi interprets recent calls for interdisciplinary cooperation between international lawyers and international relations theorists as a threat to the formal distinctiveness of international law. Just as Morgenthau's turn from international law to the 'real laws' of international relations,<sup>4</sup> with its emphasis on the power of the benign hegemony, resembles, in Koskenniemi's view, Carl Schmitt's reliance on the *Reichspräsident* (President of the Empire)<sup>5</sup>—and later the *Führer* Adolf Hitler<sup>6</sup>—as the authoritative protector of the law, one should not separate more recent calls for 'interdisciplinarity' of international law and international relations from its political implications, namely the defence of American hegemony. Within such a functionalist understanding, law amounts either to (instrumentalist) sociology or to (normative)

<sup>3</sup> Contributions not included in this review: Watts, 'The Importance of International Law', in Byers, *supra* note 1, at 5; Allott, 'The Concept of International Law', *ibid.*, at 69; Toope, 'Emerging Patterns of Governance and International Law', *ibid.*, at 91; Benvenisti, 'Domestic Politics and International Resources: What Role for International Law?', *ibid.*, at 109; Makau Wa Mutua, 'Politics and Human Rights: An Essential Symbiosis', *ibid.*, at 149; Lowe, 'The Politics of Law-Making: Are the Method and Character of Norm Creation Changing?', *ibid.*, at 207.

<sup>4</sup> See Morgenthau, 'Positivism, Functionalism, and International Law', 34 *AJIL* (1940) 283.

<sup>5</sup> Schmitt, *Der Hüter der Verfassung* (1931), at 158–159.

<sup>6</sup> Schmitt, 'Der Führer schützt das Recht', 39 *Deutsche Juristen-Zeitung* (1934) 945.

morality. In Koskenniemi's view, however, the legal project consists in the search for 'a middle ground between that which is sociological description (of what works) and that which is moral speculation (of what would be good)' (at 31). The legal vehicle for that middle ground is the concept of 'validity'. Revolution – Schmitt's '*Ausnahmezustand*' (state of emergency)<sup>7</sup> — is a time for brute power, not law. By doing away with the state, 'liberal millenarianism' — a term coined by Susan Marks<sup>8</sup> to characterize those international lawyers advocating a 'dual agenda' of international law and relations<sup>9</sup> — amounts, in that perspective, to 'an abandonment of law altogether': 'in as much as that concept [validity] gets thrown away, nothing is left of law but a servile instrument for power' (at 33).

Regardless of the question whether the rather unfavourable association of (neo)-liberalism with the deeply illiberal, so-called 'crown jurist of the Third Reich' is convincing, is this apparent return to a positivist orthodoxy<sup>10</sup> the end of the story of an interdisciplinary cooperation between international law and international relations? Friedrich Kratochwil's remarkable contribution to the present volume convincingly shows that it is not. In his article, entitled 'How Do Norms Matter?', Kratochwil analyses the role of norms in the theory and practice of international politics.<sup>11</sup> Nevertheless, he clearly separates law as such from the political processes of decision-making. Instead of following the traditional theory of these two disciplines, which in a 'strange symbiosis of Realism and Legalism' juxtaposed legal hierarchy and power politics, he wants to redeem the role of practical criteria against any claim to fulfilment of the 'unrealizable logical ideal of uniqueness' (at 37). Argument over the alleged indeterminacy of law obscures the fact that norms, if not able to 'cause' outcomes, nevertheless provide 'reasons for action'. As Kratochwil observes, practical experience shows that the lack of a unique solution to legal problems does not justify the rejection of law altogether: 'the recognition of plural possibilities on the one hand, and the need to justify particular choices on the other, is the basis for "pluralism" and orderly change, which are the central goods a legal system is supposed to preserve' (at 45). In this perspective, law and politics constitute 'distinct styles within practical reasoning' (at 51). Invoking Wittgenstein, Kratochwil takes the intersubjective character of language — and therefore of norms — seriously. Norms and common understandings exclude idiosyncratic political choices and therefore represent 'some form of governance' (at 53). This understanding enables Kratochwil to criticize the treatment of norms as pure epiphenomena by political realism as well as the 'indiscriminate aggregation of values and norms' by (neo)-liberal theory. A pluralist understanding of the role of norms in politics allows both disciplines to continue as social practices, but renders futile the foundationalist hope of finding an 'absolute

<sup>7</sup> Schmitt, *Politische Theologie: Vier Kapitel zur Lehre von der Souveränität* (2nd ed. 1934), at 1 *et seq.*

<sup>8</sup> Marks, 'The End of History? Reflections on Some International Legal Theses', 8 *EJIL* (1997) 449, at 450.

<sup>9</sup> See, e.g., Slaughter (Burley), 'International Law and International Relations Theory: A Dual Agenda', 87 *AJIL* (1993) 205.

<sup>10</sup> Cf. Koskenniemi's reference to the 'odd alliance' of formalists and neo-Marxists of the Frankfurt school, in Byers, *supra* note 1, at 32.

<sup>11</sup> Kratochwil, in Byers, *supra* note 1, at 35 *et seq.*

point of view which would end all debates ... by subsuming [decisions] under some universally valid law or by hitting upon the single “right” answer’ (at 68).<sup>12</sup> Thus, the choice between facts and norms, legalism and realism, apology and utopia turns out to be a false one.

## 2. Economic Globalization in Search of Law

Debates on the impact of globalization on international law provide further illustration of this point. Is an international law based upon the ‘sovereign equality’ of states viable in a globalized world in which markets seem to escape the regulatory power of the state and in which non-governmental actors all too often set the political agenda?<sup>13</sup> Most of the contributors to the present volume detect fundamental changes in this regard, but reject claims of an outright decline of the state.<sup>14</sup>

Christine Chinkin uses Richard Falk’s image of the challenge to the state both by ‘globalization from above’ and ‘globalization from below’, that is by economic actors and the emerging ‘international civil society’.<sup>15</sup> As an example of the influence of non-state actors, Chinkin analyses the impact of the women’s movement on human rights and the inclusion of crimes against women in the statutes of international criminal tribunals. But she also diagnoses a ‘fighting back’ on the part of states. They still control both the law-making process and access to international fora. NGOs are appropriated by both states and economic players. She calls for a radical rethinking of the global social and economic agenda by confronting its gendered dimensions. In her view, this requires addressing the divisions and fissures within international civil society so that alternative voices to those of economic globalization may be heard.

Anne-Marie Slaughter analyses the role of more or less informal government networks in economic regulation.<sup>16</sup> She draws the conclusion that globalization leads to a power shift within, and a disaggregation of, the state rather than to its decline or disappearance. This also implies, however, changes in the nature of regulation, which becomes horizontal rather than vertical, informal rather than formal, persuasive rather than enforceable. She mentions two categories of government networks: so-called TROs, ‘transgovernmental regulatory organizations’, comprising members of domestic national or subnational agencies, and agreements between domestic regulatory agencies of two or more states. Both are said to be fast, flexible, cheap and, somewhat surprisingly, accountable. Being made up of competent national decision-

<sup>12</sup> Cf. MacCormick, ‘Beyond the Sovereign State’, 56 *Modern LR* (1993) 1, at 15–16.

<sup>13</sup> Cf. Anderson, ‘The Ottawa Convention Banning Landmines, the Role of International Non-governmental Organizations and the Idea of International Civil Society’, 11 *EJIL* (2000) 91.

<sup>14</sup> For the thesis of a retreat of the state from an international relations perspective, see, e.g., S. Strange, *The Retreat of the State* (1996).

<sup>15</sup> Chinkin, ‘Human Rights and the Politics of Representation: Is There a Role for International Law?’, in Byers, *supra* note 1, at 131, citing Falk, ‘The Nuclear Weapons Advisory Opinion and the New Jurisprudence of Global Civil Society’, 7 *Transnational Law and Contemporary Problems* (1997) 333.

<sup>16</sup> Slaughter, ‘Governing the Global Economy through Governmental Networks’, in Byers, *supra* note 1, at 177.

makers, networks do not require formal adoption of their agreements by the state. In Slaughter's view, domestic accountability is to be preferred to the 'burgeoning supranational bureaucracy' of traditional intergovernmental organizations. The functional orientation and informal nature of these networks are said to enhance the participation of actors from different quarters, be they private or public, national or international.

For the first time, Slaughter tries to counter some of the criticisms voiced against her admittedly rosy picture of those networks.<sup>17</sup> In her opinion, networks are not the cause of the perceived decline in the provision of global public goods such as welfare and human rights. Using as an example the case of central banks, Slaughter considers independence from democratic domestic processes not as a vice, but as a virtue. Generally, the legitimacy of formal intergovernmental organizations or NGOs fares no better than that of informal networks. Cooperation of legislative networks might counter power shifts from legislative bodies to the government. Finally, the power of networks is soft, working more by persuasion than by binding agreements. But all of these responses hardly contribute to lessening the criticism. If networks are nothing more than the traditional back room for deal-making, one wonders what all the fuss is about. On the contrary, if their importance is growing, the question of accountability is not answered by reference to the 'softness' of their power. Describing these organizations as effective, secret and voluntary is not entirely benign. The secrecy of international dealings is not particularly helpful for public scrutiny. Voluntary membership does not compensate for a practice of exclusion. And at least in the Western liberal tradition, effective exercise of power requires democratic accountability. Nevertheless, Slaughter is correct when she argues that intergovernmental networks are an important area for both political and legal research. While political research might analyse the means and nature of their power, lawyers must ask whether and how they may acquire more accountability and legitimacy.

Perhaps, however, the argument for a fundamental change in world affairs through the processes of globalization of markets, technology and media proves too much. Some contributors are not at all certain that globalization does actually lead to a decline of the state or, at least, to a greater realization of non-state values. Edward Kwakwa, Assistant Legal Counsel of WIPO, emphasizes the importance of effective state systems, especially in the developing world.<sup>18</sup> In his view, globalization enhances rather than diminishes the role of the state. However, the separation between 'paradigm-setting' and 'paradigm-receiving' states challenges the legitimacy of international legal norms. Brigitte Stern also stresses the lasting role of states as the main actors in international relations in spite of economic globalization, though she does see their role as having been diminished.<sup>19</sup> She remains critical of the prevalence

<sup>17</sup> See, e.g., Alston, 'The Myopia of the Handmaidens: International Lawyers and Globalization', 8 *EJIL* (1997) 435; Korhonen, 'Liberalism and International Law: A Centre Projecting a Periphery', 65 *Nordic Journal of International Law* (1996) 481; Marks, *supra* note 8, at 449.

<sup>18</sup> Kwakwa, 'Regulating the International Economy: What Role for the State?', in Byers, *supra* note 1, at 227.

<sup>19</sup> Stern, 'How to Regulate Globalization', in Byers, *supra* note 1, at 247.

of economic efficiency over other values as well as of the uneven distribution of the gains produced by economic liberalization. In Stern's view, this situation demonstrates the complex relationship between law and politics: law is an element which may reinforce, ignore, or (attempt to) modify political reality. In order to counter instances of both economic and political unilateralism, for instance the Helms-Burton Act, she calls for a 'truly world-wide international law system of regulation' (at 255). For her, this requires not a weakening, but a strengthening, of the state as a mirror of identity, guardian of non-mercantile values, arbitrator between market and society, and organ of solidarity.

In fact, however, very few international law measures have been put in place to 'regulate' globalization and the role of new actors at the international level. Nor, with the notable exception of the creation of the World Trade Organization, has existing law been significantly changed. In the absence of the creation of new norms, international law seems doomed to political irrelevance. The recent Seattle conference permits doubts about whether states are ready to meet that challenge.

### 3. The Security Council between Political Irrelevance and Legal Constraints

While economic globalization raises the question of the political impact of states, the debate over the Security Council shows that the relationship between international organizations and state sovereignty is as relevant as ever. But while the debate at the beginning of the 1990s centred on whether the exercise of the prerogatives of the Security Council would transform the Charter from a multilateral treaty to a true constitution of the international community — raising concerns about a lack of constitutional checks and balances<sup>20</sup> — the Kosovo conflict has demonstrated that the authority of the Council is once again more threatened by unilateralism than by an abuse of the prerogatives of the permanent members. Marc Perrin de Brichambaut, Legal Adviser of the French Foreign Ministry, presents the Security Council in its conventional role as creator of rights and obligations of member states, and as implementer and interpreter of the law, without attributing it legislative or judicial functions. '[T]hose acts which are frequently referred to as new forms of Security Council intervention turn out, in practice, to fit within the Council's traditional role...'<sup>21</sup>

At the other extreme, Vera Gowlland-Debbas emphasizes the 'extensive, discretionary powers' of the Council. Following Niklas Luhmann, she suggests combining the normative closure of the legal system with its cognitive openness to social

<sup>20</sup> For a particularly forthright presentation of this argument, see B. Fassbender, *UN Security Council Reform and the Right to Veto* (1998), at 89 *et seq.* For a critique of that view, see Paulus, 'Book Review', 10 *EJIL* (1999) 209.

<sup>21</sup> Perrin de Brichambaut, 'The Role of the United Nations Security Council in the International Legal System', in Byers, *supra* note 1, 269, at 272. For a review of recent literature on the subject, see Fassbender, 'Quis iudicabit? The Security Council, Its Powers and Its Legal Control', 11 *EJIL* (2000) 219.

developments.<sup>22</sup> Arguing that the legal system establishes its own 'legal reality', Gowlland-Debbas sees law exposed to the 'contradictory pulls' of centrifugal and globalizing forces, universality and compartmentalization. The establishment of an international '*ordre public*' transforms international law from a mere 'society' to a 'community', a true social grouping with rights and obligations of its own,<sup>23</sup> embodied in such 'umbrella concepts' as *jus cogens*, obligations *erga omnes* and individual criminality. In that vein, Gowlland-Debbas argues for the use of Chapter VII by the Security Council as a legal sanction to violations of international law. Security Council resolutions are said to contain all the necessary elements for the attribution of responsibility: breach, imputability and legal sanctions. Their legal consequences consist in the nullity and non-recognition of situations brought about by the violation of international law. In Gowlland-Debbas' view, this demonstrates 'the way in which law operates in the selection and transformation of political decisions into legally significant elements ... which escape the ambit of political processes and in turn set new constraints on political action' (at 287). The prime example for such measures is, of course, Resolution 687 (1991) on legal sanctions against Iraq.<sup>24</sup> The attribution of individual criminal responsibility by the Council, either directly or through the creation of ad hoc tribunals, provides a further clear example. Such wide discretion of the Security Council naturally raises the question of its legal control. Gowlland-Debbas regards not only Charter Articles 24, 25 and 27 as such (formal and substantive) limits, but also all norms of *jus cogens*. Given the largely absent judicial control of the International Court of Justice, she considers the Security Council not as a quasi-judicial body, but rather as a political organ acting on behalf of the international community in support of an injured state. She thus aims for an institutionalization of the enforcement of fundamental community norms.

In the absence of a clear rule empowering the Security Council to enforce community norms beyond the maintenance of international peace and security, this approach does not resolve questions of legitimacy. Against such activism, Georg Nolte's warning, citing Castlereagh, of a new 'Holy Alliance' which 'was never intended as a Union for the government of the World, or for the Superintendence of the Internal Affairs of other States'<sup>25</sup> seems well in place. Nolte has 'no doubt that the

<sup>22</sup> Gowlland-Debbas, 'The Functions of the United Nations Security Council in the International Legal System', in Byers, *supra* note 1, 277, at 278–281, referring, among others, to Teubner, 'Introduction to Autopoietic Law', in G. Teubner, *Autopoietic Law: A New Approach to Law and Society* (1988) 1, at 2; Luhmann, 'The Unity of the Legal System', *ibid.*, 12, at 20–21.

<sup>23</sup> Cf. F. Tönnies, *Gemeinschaft und Gesellschaft* (1887); Simma and Paulus, 'The "International Community": Facing the Challenge of Globalization', 9 *EJIL* (1998) 266, at 267–269; A. Paulus, *Die internationale Gemeinschaft im Völkerrecht* (forthcoming).

<sup>24</sup> Cf. the critiques by Graefrath, 'Iraqi Reparations and the Security Council', 55 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (1995) 1; Reisman and Stevick, 'The Applicability of International Law Standards to United Nations Economic Sanctions Programmes', 9 *EJIL* (1998) 86.

<sup>25</sup> Nolte, 'The Limits of Security Council's Powers and its Functions in the International Legal System: Some Reflections', in Byers, *supra* note 1, 315, at 315, citing Lord Castlereagh, in Martens, 'Supplément au Recueil des Principaux Traités' (1828), at x.

Council is a law-making body in so far as its decisions are binding. These decisions are only binding, however, if the Security Council has acted within its powers.’ (at 320). He finds such limits in the preliminary and situation-specific character of Security Council measures. Thus, the Council is empowered to create subsidiary judicial organs performing functions it could not perform itself, but only if the subsidiary organ is independent and subject to procedural safeguards.

However, it will be difficult, if not impossible, to draw the line between the permissible interpretation of law and new trends in the *opinio iuris* of states and the — in this view impermissible — creation of new law. And the provisional character of attribution of responsibility cannot hide the fact that, in practice, such attributions will in most cases be ‘politically’ final. Therefore, in many instances, the only control will be the *political* acceptance by states of Council measures. As recent experience has shown, however, this means of control might be more effective than any conceivable judicial instrument. Thus, law again turns out to depend more on political will than on legal criteria.

#### 4. Conclusion

In an area in which judicial control is still the exception rather than the rule, ‘external’ and ‘internal’ perspectives of law<sup>26</sup> will often be difficult to separate. Thus, as Andrew Hurrell emphasizes in his conclusion to this volume,<sup>27</sup> international law is (only) part of a broader social process which encompasses both the domestic and global levels. Nevertheless, to preserve its normativity and transformative potential, law must not merge with politics in a single concoction which will be difficult to digest, but must nevertheless strive to maintain its relationship with an actual societal consensus. As the ‘end of the magnificent illusion’<sup>28</sup> of an effective Charter system of collective security has shown, law does not only constrain politics, but also *vice versa*. In the same vein, economic and cultural globalization does not leave international law untouched. This is neither an entirely benign nor malign development: on the one hand, international law increasingly embodies common values, embraces a broader variety of actors, and leads to an increasing institutionalization and greater accountability of both states and private actors. On the other hand, globalization confirms rather than challenges the inequality of the distribution of wealth and power at a global level and implies a power shift from formalized (inter-)state structures to private actors of doubtful legitimacy and accountability. In that environment, international lawyers should insist on the legal bounds of all political power, without being blind to the political imperatives in times of ever more rapid change.

<sup>26</sup> On the distinction between internal and external views of law, see H. L. A. Hart, *The Concept of Law* (1961), at 99.

<sup>27</sup> Hurrell, ‘Conclusion: International Law and the Changing Constitution of International Society’, in Byers, *supra* note 1, at 327.

<sup>28</sup> An expression used by Antonio Cassese, cited in *ibid.*, at 335.