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Less is More: International Law of the 21st Century—Law without Faith

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TODAY'S INTERNATIONAL LAW deeply differs from what it has been until recently. And this difference is rather paradoxical in that:

- on the one hand, the need for law has never been as intense as it is in the contemporary international society; while,
- on the other hand, confidence in international law (and in some respect, the veritable mystique of international law) which had developed after World War I, has faded in favour of a much more practical or utilitarian approach.

These are the two aspects I will successively deal with in this brief contribution.

FIRST PROPOSITION: NEVER HAS THE THIRST FOR LAW BEEN MORE INSATIABLE THAN IN THE CONTEMPORARY INTERNATIONAL SOCIETY

It is commonplace to note that international law was born, much before Grotius' systematisation, with the modern state (beginning during the 12th or the 13th century), characterised by its sovereignty—that it alone enjoys at the international level. The state, as the usual form of organisation of human societies, and international law have grown hand in hand and for a good reason: international law is as necessary to the state as air is to human beings or water to fish. In a society characterised by the pure juxtaposition of entities pretending to be, at one and the same time, 'sovereign over all' (*souveraines par-dessus tout*) and equal with one another, law is the only means to ensure that each state's sovereignty is limited only by the (equal) sovereignty of other states.¹

Indispensable as it has always been for regulating the relations in inter-state society, this traditional law was limited to a small number of international rules, applicable to a small number of subject matters: war; diplomatic relations and *jus communicationis* (including law of the sea and trade)—and this was all. Things moved only slowly until

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¹ This principle is reflected in Max Huber's famous dictum: 'Sovereignty in the relations between States signifies independence.' (Arbitral Award, 4 April 1928, *Island of Palmas* case, RIAA, vol II, 838).



the First World War when the collision of European imperialisms (a result of a distorted and absolute notion of state sovereignty) led the World to its first apocalyptic disaster and induced the people of the first post-war years to show and organise solidarity to fight against the scourge of war, or illness (just think of the 1918 ‘Spanish flu’—infinitely more devastating than the H1N1 influenza...). Consequently, a first normative quantitative threshold is obtained: in parallel with the proliferation of the ‘offices’ of the League of Nations (LoN), international law—*jus gentium* as it was still commonly called—starts its inflationist growth in grasping topics which were, until then, parts of the ‘reserved domain’ of the state—that is, exclusively regulated by domestic laws.² Labour law, intellectual cooperation, health, agriculture, public education, and even nationality (think of the famous 1930 Convention) become the object of international rules.

The Second World War gave a new impulse to this phenomenon, with, for example, the bursting out of human rights within the international legal sphere. This was in large part a reaction to the inability of the democracies which, at the eve of the war, could not have lawfully interfered (had they wanted to...) with the threat of extermination of the German Jews. The contemporary legal discourse says the opposite to what Goebbels is said to have declared following Franz Bernheim’s claim to the LoN’s denouncing the fate of the Jews within the Third Reich:³ ‘Gentlemen, the Third German Reich is a sovereign State and we are masters of our own home. All that has been said by this individual is not your business. We do what we deem necessary with our own socialists, our pacifists and our Jews’⁴ (although this version is not an exact reflection of this dark and infamous episode).

However, during the after-war period, the increase in the scope of international law has been quantitatively limited. Indeed more and more treaties, including codification conventions, were concluded and treaty rules tended to overtake non-written rules which traditionally regulated inter-state relations: diplomatic and consular relations, law of the sea, international responsibility—just to mention the most well-known parts of the codification enterprise. The purpose was mainly to complete and refine existing customary rules.

During the last ten, maybe fifteen, but certainly not more than twenty years, we can witness a fundamentally different phenomenon. In sharp contrast to the slow process of filling up the lacunas of traditional international law, we now see an unmanageable

² For early criticisms of this theory, see N Politis ‘Le problème des limitations de la souveraineté’(1925) 1 *Recueil des cours*, 5–117 or G Scelle ‘Critique du soi-disant domaine de compétence exclusive’ (1933) *RDILC* 365.

³ For the French text of that petition, introduced by application of the German-Polish Convention of 15 May 1922 on Upper Silesia, which provided for a right of petition for minorities, see the LoN document: C.314.1933.I.B, (19 May 1933) (1933) 7 *J.O.S.d.N.* 838.

⁴ See Marc Agi, *De l’idée d’universalité comme fondatrice du concept des droits de l’homme d’après la vie et l’œuvre de René Cassin*, 354 (Alp’azur, Antibes, 1980) or Mario Bettati, *Le droit d’ingérence – Mutation de l’ordre international*, 18 (Odile Jacob, 1996). See also: René Cassin ‘Les droits de l’homme’ (1974) IV 140 *R.C.A.D.I.* 324. The examination and suites devoted to the Bernheim petition are more ‘scientifically’ presented by Greg Burgess, who remains nevertheless faithful to the emblematic character of this episode, ‘The Human Rights Dilemma in Anti-Nazi Protest: The Bernheim Petition, Minorities Protection, and the 1933 Sessions of the League of Nations’, CERC Working Papers Series, n° 2/2002, 56 or by Jan Herman Burgers ‘The Road to San Francisco: The Revival of the Human Rights Idea in the Twentieth Century’ (1992) *Human Rights Quarterly* 455. The German text of Goebbels’ speech, read to the journalists (and not before the LoN Assembly), was published in *Joseph Goebbels, Signale der neuen Zeit (Messages de l’ère nouvelle)* (Munich: Zentralverlag der NSDAP, 1934).

eruption of international law rules, a true normative big bang or tsunami. If I may indulge myself in a page of self-advertising, I finished, just one year ago, the update and revision of the big handbook in public international law that I co-author with Patrick Daillier and Mathias Forteau.⁵ As we had let more than eight years pass between the 7th and 8th edition, the simple update of what wishes to be a comprehensive panorama of modern international law has been a Herculean task—with nothing in common with the first seven editions. Up to now, the successive editions could be prepared mainly on the basis of the case-law of the International Court of Justice, the work of the International Law Commission, some arbitral awards and a limited number of multilateral conventions which, from one edition to another, could be counted on one hand's fingers. Since we were meticulous, we added some important judgments of the European and American Courts of Human Rights, and, of course, the international law books published in between. The task of updating did not amount to nothing but it was manageable.

However, all at once, from the mid-1990s, the machinery has grown out of control and it has become virtually impossible for one, two or even three authors to 'swallow' and 'digest' the impressing mass of legal information—which is indispensable to introduce a full picture of the existing general international law. The new rules appear in heaps of treaties and soft-law instruments, adopted by, or within the framework of, a greater number of institutions and in domains that are ever more diversified. And these luxuriant legal norms ('more or less legal'—whether the opponents of 'relative normativity'⁶ like it or not...) are implemented through varied and heterogeneous mechanisms on which information is not always easy to be found notwithstanding the internet God.

Following the work of the ILC on fragmentation initiated by Bruno Simma and subsequently addressed by Gerhardt Hafner and Martti Koskenniemi,⁷ it has become fashionable to speak of the 'fragmentation' of international law. But the word does not properly describe the new state of things—at least it does not describe it completely. Indeed, there is a dispersion and a 'crumbling' of international law in that the fora where it is created and implemented have become scattered in at least two ways:

- there exists a 'vertical fragmentation' since the international legal norms are elaborated and applied not only at the universal level, but also at the regional

⁵ P Daillier, M Forteau, A Pellet, *Droit international public* (Paris, LGDJ, 2008).

⁶ The fame of the concept is much due to P Weil's article, 'Vers une normativité relative en droit international?', (1982) *RGDIP*, 5, and in English: 'Towards Relative Normativity in International Law?' (1983) *AJIL* 413. See also A Pellet 'Le "bon droit" et l'ivraie – plaidoyer pour l'ivraie', *Mélanges Charles Chaumont* (Paris, Pedone, 1984) 465; Ch Leben 'Une nouvelle controverse sur le positivisme en droit international public' (1987) *Droits* 121 and more recently, two opposite perspectives by A Boyle 'Soft-Law in International Law-Making', in M Evans (ed), *International Law* (Oxford, OUP, 2003) 2, 141 and D Shelton 'International Law and "Relative Normativity"', *ibid*, 151.

⁷ For the Report of the Study Group on the Fragmentation established by the ILC see Erik Castrén Institute of International Law and Human Rights, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law* (Helsinki, 2007) III-306 (see also A/CN.4/L.682 (2006)). A rich literature exists on the subject: see, inter alia, P-M Dupuy 'The Danger of Fragmentation or Unification of the International Legal System and the International Court of Justice' (1999) *NYUJIL* 791, G Hafner 'Pros and Cons Ensuing from Fragmentation in International Law' (2004) *Michigan JIL* 849, B Simma 'Fragmentation in a Positive Light' (2004) *Michigan JIL*, 845, A Gattini 'Un regard procédural sur la fragmentation du droit international', (2006) *RGDIP* 303, R H Vinaixa and K Wellens (ed) *L'influence des sources sur l'unité et la fragmentation du droit international : travaux du séminaire tenu à Palma, les 20–21 mai 2005* (Bruylant, Bruxelles, 2006) XXII.

level⁸—or levels since the continental organisations must be distinguished from the sub-regional and bilateral levels;

- there is also a ‘horizontal fragmentation’ in that specific branches of international law flourish, all of them aspiring to some degree of specificity and, at least, give rise to abundant normative developments which, more often than not, are accompanied by the creation of implementing mechanisms that even a ‘generalist’ in international law cannot set aside.⁹ One cannot neglect what happens in environmental matters, human rights, international criminal law or investment law.

And, it is noticeable that in *all* these fields, not only international legal instruments (hard or soft) blossom, but also that the instruments create mechanisms, the ‘jurisprudence’ of which constitutes an indispensable and inseparable complement to the norms they edict. Today, one cannot decently do general international law (either as an academic or as a practitioner) without some knowledge (which, by necessity, can only be superficial) of the judgments of the regional human rights courts (which grow exponentially in number), of the criminal courts and tribunals, of the WTO Appellate Body, of the ICSID—or ICSID-like—arbitrations, etc. And I leave aside the rules applicable in the regional organisations of economic integration like the European Union, NAFTA or the Mercosur since, even though they are ‘a new legal order of international law’¹⁰—whether the Court in Luxemburg likes it or not¹¹—they are sufficiently autonomous vis-à-vis the international legal order to be apprehended separately.

Today’s international law covers virtually all fields of human activity. It has become impossible reasonably to accept the very idea of a ‘reserved domain’ or, in the words of Article 2, paragraph 7 of the Charter of the United Nations, of ‘matters which are essentially within the domestic jurisdiction of any State’. Nowadays, there simply does not exist anything of the kind.¹² There is definitely no exaggeration in speaking of the ‘big bang’ of international law. It is therefore paradoxical to note, at one and the same time, that there has never been such a need for legal rules at the international level, and that law is no longer envisaged as a tool for peace—or, in other words, that the World has lost confidence in international law. This latter observation is my second proposition.

SECOND PROPOSITION: LAW IS NO LONGER ENVISAGED AS A TOOL FOR PEACE—
OR, IN OTHER WORDS, THE WORLD HAS LOST CONFIDENCE
IN INTERNATIONAL LAW

The title of the well-known book by Clark and Sohn, *World Peace through World Law*,¹³ has been the motto of the international community since the end of the First World War (even though the first edition of the book appeared only in 1958). At the end of the war the trauma was such that the world’s leaders were desperately in search of the miracle

⁸ See for instance J Dutheil de la Rochère ‘Mondialisation et régionalisation’ in Loquin (ed), *La mondialisation du droit* (Litec, 2000) 435.

⁹ B Simma and D Pulkowski ‘Of Planets and the Universe: Self-contained Regimes in International Law’ (2006) 17 *EJIL* 529.

¹⁰ ECJ, Judgment of 5 February 1963, *Van Gend en Loos*, Case 26/62, *EC Rep.* 1.

¹¹ See the Judgment of the ECJ in *Costa v ENEL*, 15 July 1964, case n° 6/64.

¹² Or the concept, as it is used today, has a completely different meaning (see R Kolb, ‘Du domaine réservé – Réflexions sur la théorie de la compétence nationale’ (2006) *R.G.D.I.P.* 597).

¹³ G Clark and L B Sohn *World Peace through World Law* 2nd edn (Cambridge, Harvard UP, 1966) 535.



recipe for avoiding the renewal of the nightmare and putting a final end to the use of force in international relations. They thought they had found it by adopting legal rules to that end and by ensuring the application of those rules through an international organisation with global competence: the League of Nations. This was an apparently sensible reaction to the purely inter-state Westphalian world predating the ‘Great War’. However, it was quickly apparent that the construction was purely abstract and unrealistic. So were the legal theories which then flourished in reaction to the cynical positivism that was the quasi-exclusive analysis of international law before 1914: the Kelsenian theory of ‘pure theory of law’, the jusnaturalism of Verdross, another Austrian professor, or the ‘sociological objectivism’ of the French professor Georges Scelle. These theories were certainly more attractive morally and politically than the ‘positivist voluntarism’ inherited from Vattel but they share the failure of the League of Nations after 1935: the new post World War law could bark but it could not bite.

After World War II, the reaction was the adoption of the Charter and the creation of the UN, which certainly represents progress—if only because it has avoided an apocalyptic Third World War—even though the UN largely remains a paper tiger. But the creation of the UN does not address the problem of today on which I focus. The interesting thing for us is that the ‘mystique’ of international law did not disappear after the failure of the League of Nations.

Indeed international law is more than discrete in the UN Charter.¹⁴ The expression ‘international law’ appears only three times:

- in Article 13, which mentions ‘the progressive development of international law and its codification’ as one of the functions of the General Assembly;
- in Article 1, paragraph 1, according to which one of the purposes of the United Nations is ‘[t]o maintain international peace and security, and to that end ... to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace’. International law can appear as one (among others) of the means to maintain international peace and security, which is the aim of the new organisation;
- but at the same time, in the preamble the ‘peoples of the United Nations declare themselves to be determined’ ‘to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained’. This rather inverts the formula: it is not ‘world peace through world law’, but rather, ‘world law through world peace’!¹⁵

The least that can be said is that the ‘Peoples of the United Nations’ pay lip service to international law in the Charter but do not show a spectacular enthusiasm to praising it as a credible means to ensuring international peace and security or the welfare of mankind. And yet...

¹⁴ For a systematic view on the question, see M Forteau ‘Le droit international dans la Charte des Nations Unies’ in Cot, Pellet, Forteau (ed), *La Charte des Nations Unies. Commentaire article par article* 3rd edn (Paris, Economica, 2005) 111.

¹⁵ The perversion of the initial logic of the system, through its instrumentalisation, has been denounced as dangerous, see eg A Cassese, ‘Return to Westphalia? Considerations on the Erosion of the Charter System’, in Cassese (ed), *The Current Legal Regulation of the Use of Force* (Leiden, Martinus Nijhoff Publishers, 1986) 503.



In fact, the practice of the majority of states was far ahead of this limited expectation. International law was the object of a very intense hope and states toughly fought legal struggles. It is probably no accident that one of the first subsidiary organs created by the UN General Assembly was the International Law Commission whose first achievements were impressive, for instance the adoption of the Vienna Conventions on diplomatic and consular relations and the Vienna Convention on the Law of Treaties. Georges Abi-Saab has aptly referred to the 1960s as 'the prodigious decade'.¹⁶ Even though recourse to the ICJ was parsimonious, the Court enjoyed unanimous respect (at least in the West) and had opportunity to adopt positions of principle on crucial issues with politically important impacts (the best example being probably that of the 1949 Advisory Opinion on *Reparation for Injuries Suffered in the Service of the United Nations*). The legal offices inside the Ministries of Foreign Affairs and international organisations rapidly developed and achieved a growing influence.¹⁷

During the 1960s and the 1970s, classical international law was the object of vociferous attacks by the new countries of the Third World with the support of the Soviet bloc, through their global challenge of the former colonial order and old economic international order.¹⁸ But this, too, bore witness to the confidence they put in international law as a means for change.

But all of this is over. For the worse or the better, this mystique of international law has vanished.¹⁹ I leave aside the cynical contempt for international law shown by the US Bush Administration, for instance its partly unsuccessful attempt to torpedo the International Criminal Court, or the 'sovereignist' approach of emerging powers such as China, India and Brazil, or the blunt disrespect for international law of Iran or Israel. I am referring to the usual behaviour of 'normal' states (even if they probably are a minority), which 'normally' abide by international law—most European countries for example (including mine usually—even if President Sarkozy has a very special idea of what international law allows regarding deprivation of nationality or the treatment of the Roma in France...).

Then, let's only focus on these countries which usually will comply with their international obligations. They have become incredibly conservative, resistant to change, not cautious but cowardly. Apart from the WTO Agreements or Rome Statute of the ICC, no 'great' multilateral conventions have been concluded over the past decades. However, many multilateral technical conventions or conventions on secondary or 'residual' issues have been agreed upon. This is not to say that these numerous instruments are negligible (I include among them the 2007 Disappearance Convention and the important Ottawa Convention on Anti-Personal Mines) but they are not part of a global enterprise of

¹⁶ 'Cours général de droit international public' (1987) 207 *Recueil des cours* 149.

¹⁷ See eg G Fitzmaurice, 'Legal Advisers and Foreign Affairs', (1965) *A.J.I. L72*; G Guillaume 'La direction des affaires juridiques du ministère des Affaires étrangères', in *Guy Ladreit de Lacharrière et la politique extérieure de la France* (Paris, Masson, 1990) 267; Symposium, 'The Impact of International Law on Foreign Policy Making, The Role of Legal Advisers' (1991) *E.J.I.L.* 131; A Cassese, 'Role of Legal Advisers in Ensuring That Foreign Policy Conforms to International Legal Standards' (1992) 14 *Mich. J. Int'l L.* 139.

¹⁸ For an engaged Third-World vision, see for example G Abi-Saab, 'The Third World and the Future of International Legal Order' (1973) *Egyptian Review of Int'l Law* 27. As for the Soviet approach, see W E Butler (ed), *Perestroika and International Law* (Nijhoff, Dordrecht, 1990) VI-330.

¹⁹ This is actually the credo of the critical legal studies school. See Ph Allott, *Eunomia*, 2 (Oxford UP, 2001) 487 or M Koskeniemi, *From Apologia to Utopia: The Structure of International Legal Argument* (Lasismelton Kustannus, Helsinki, 1989). And for an outside view of the phenomenon, see J P Cot 'Tableau de la pensée juridique américaine' (2006) *RGDIP* 537.

deepening the global approach to international law. They reinforce the existing network but they do not expand it nor improve its character.

The same could be said of the recent judgments of the International Court of Justice. Some are debatable or disappointing, others are objectively good, but that is not the point. While the Court complies rather well with its dispute settlement role, the present judges in The Hague, contrary to their predecessors, do not see themselves as ‘improvers’ of international law. The authors of the glorious Advisory Opinions in *Count Bernadotte*²⁰ and *Reservations to the Genocide Convention*²¹ had dared to grasp opportunities to do so. In the best of cases, as in *Romania v Ukraine*,²² the ICJ synthesises the existing law and clarifies the contentious issue. For the rest, caution and ‘just the dispute’ or ‘just the question’ seem to be the motto.

Finally, a lack of achievement can also be observed in the ILC.²³ There is the *magnum opus* on State Responsibility but it has remained in the form of (draft) Articles of which the General Assembly has taken note. In my point of view this half way is fortunate: had a diplomatic Conference been conveyed, no doubt that all which makes it a success—the very fortunate balance between conservative rules and some prudent step forwards—would have been ‘killed’ by a conservative coalition. In letting the Articles live their own life there is some chance for the balance to be preserved. Apart from the Articles on State Responsibility the ILC has achieved very little. Unilateral Acts of States, the only topic which had some ambition, has been killed in its *status nascendi*;²⁴ the working group on Shared Natural Resources has given birth to a decent but limited draft²⁵ on the Law of International Aquifers; the Guide to Practice on Reservations to Treaties is a hopefully useful but very technical instrument. I am curious to see how states will welcome the ILC proposal to include an aspect of the making of customary law on its agenda.

The truth is that states—which have virtually proposed *no* topic to the ILC during the two last decades (even the draft Statute of the ICC was more or less an invention of the ILC itself)—have no project, no design, no ambition for the ILC. And I am afraid that this holds true for international law as a whole: states do not ‘trust’ international law; at worst they breach its rules (but this has always been the case: unbreachable rules are not legal rules); at best they consider it a useful tool for day-to-day conduct but, ‘World Peace through World Law’, ‘Development through a New International Legal Order’, clearly appear as slogans of a remote past. There are signs of new partial ‘faiths’, in human rights and environmental law in particular. However, confined to ‘isms’ (‘human-rightism’; ‘environmentalism’), they lose sight of the global common interest. And I am not sure that we, the supposed Vestals of the Temple, have kept the sacred fire either: either we content ourselves with a ‘pragmatic’, breathless approach or we wallow in sterile ‘critical’ approaches.

²⁰ ICJ, Advisory Opinion, 11 April 1949, *Reparation for Injuries Suffered in the Service of the United Nations*, (1949) Reports 174.

²¹ ICJ, Advisory Opinion, 28 May 1951, *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, (1951) Reports 15.

²² ICJ, Judgment, 3 February 2009, *Maritime Delimitation in the Black Sea (Romania v. Ukraine)*.

²³ I will abstain here from continuing to harp on the change of its composition—from eminent scholars to diplomats See A Pellet ‘La Commission du Droit international, pour quoi faire?’, in *Boutros Boutros-Ghali Amicorum Discipulorumque Liber – Paix, développement, démocratie* (Bruylant, Bruxelles, 1998) 583.

²⁴ The *Guiding Principles Applicable to Unilateral Declarations of States Capable of Creating Legal Obligations* were adopted in 2006 (see the ILC Report on the work of its fifty-eighth session, doc. A/61/10, 369).

²⁵ On the law of transboundary aquifers, the Draft Articles on which were adopted in 2008, see the ILC Report on the work of its sixtieth session, 2008, A/63/10, 27–79.



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Without being a *laudator temporis acti*, I cannot help myself but to think that we have missed something...

