DEVELOPMENTS

Conference Report – Global Fragmentations: A Note on the Biennial Conference of the European Society of International Law (Paris, la Sorbonne, 18 – 20 May 2006)

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> [Editors' Note: This article, a non-comprehensive conference report based on the author's impressions, originally appeared in German in the *Frankfurter Allgemeine Zeitung* on 19 June 2006. It appears here having been translated, slightly amended and annotated by the author.]

Power is power. And the Law is the Law. But the Law, it is said, is changing. As the steady proliferation of rule systems and jurisdictions corresponds to an ever accelerating differentiation and fragmentation of global law, institutions become regimes, rules become regulations, and government becomes governance. It is not responsibility that matters, it is compliance. Lawyers reinvent themselves as experts in international relations. They argue, as do Harvard professor Jack Goldsmith and his colleague Eric Posner of the University of Chicago Law School, that international law is only an argument in international policy discourse.[1] And to avoid the illusionary *naïveté* of a legal formalisation of the International, they argue, international law should undergo a regular cost-benefit-analysis.

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[1] *See* JACK L. GOLDSMITH / ERIC A. POSNER, THE LIMITS OF INTERNATIONAL LAW (2005). For lucid critiques, *see* Oona A. Hathaway & Ariel N. Labinbuk, *Rationalism and Revisionism in International Law*, 119 HARVARD LAW REVIEW 1404 (2006), *available at* http://www.harvardlawreview.org /issues/119/march06/hathaway_lavinbuk.pdf; and Anne van Aaken, *To Do Away With International Law? Some Limits to the 'Limits of International Law'*, 17 EUROPEAN JOURNAL OF INTERNATIONAL LAW 308 (2006), *available at* http://www.ejil.org/journal/Vol17/No1/art11.pdf. For a more contextual discussion, *see also* Alexandra Kemmerer, *Den Grenzen auf den Grund gehen. Im Schatten des Hegemons verhandelt das Völkerrecht sich selbst*, 60 INTERNATIONALE POLITIK 112 (AUGUST, 2005).

"International Law: Do We Need It?" Following the so-titled invitation issued by the *Société Européenne de Droit International*, several hundred international lawyers, both academics and practitioners, gathered at the Sorbonne. The task was to examine the question, as the official program put it, "what international law really contributes to contemporary international society, a society still marked by strong inequalities and injustice." The debate again focused on the search for a "European Vision" for the discipline, which had already been the key issue at the Society's inaugural conference in Florence in May 2004.[2] But the Law is the Law, even if it is fragmented, differentiated or contingent. Of course, the dispute over whether conflicts of norms, legal regimes and jurisdictions could and/or should be resolved by constitutionalisation and formalisation persisted. The alternative was that the contradictions and conflicts arising from interdependencies and parallelisms of jurisdictions and legal regimes on a global level could only be resolved by a new "international law of conflicts."

But even more salient turned out to be the question of power, and of power's relation to normativity. Is power no more than cold Machiavellian tactics? Or, can power be seen more brightly, as through Hannah Arendt's lenses, as an enabling system of interrelated political options and possibilities?[3] In the conference's closing plenary session, David Kennedy of Harvard Law School declared the failure of modern international law's humanitarian project.[4] For Kennedy, power is also an issue for academia, both as a tool and a challenge. And it has, as has the humanitarian, many faces: naïve, technocratic, revolutionary.

The night before Kennedy's rebuke, power had disclosed its self-indulgent technocratic face. For more than two hours, WTO Director General Pascal Lamy delivered to the crowd of experts assembled in the Sorbonne's picturesque Amphithéâtre Richelieu an introductory lecture on his organization's structure and procedures. His uninspiring presentation slipped entirely into absurdity when he described the WTO as the "motor" of an international law, which, for him,

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[2] *See* Morag Goodwin and Alexandra Kemmerer, *As Sounding Brass, or a Tinkling Cymbal? Reflections on the Inaugural Conference of the European Society of International Law*, 5 GERMAN LAW JOURNAL 849 (2004), *at* http://www.germanlawjournal.com/article.php?id=461. For a report on the first ESIL/SEDI research forum (Geneva 2005), *see* Euan MacDonald, *Some Reflections on the European Society of International Law Research Forum 2005,* in 6 GERMAN LAW JOURNAL 1209 (2005), *at* www.germanlawjournal.com/pdf/Vol06No08/PDF_Vol_06_No_08_12091216_Developments_Macdonald.pdf.

[3] HANNAH ARENDT, THE HUMAN CONDITION (1958).

[4] On Kennedy's critique, *see also* DAVID KENNEDY, THE DARK SIDE OF VIRTUE: REASSESSING INTERNATIONAL HUMANITARIANISM (2004).

obviously is no more than the abstract construction of an esoteric discipline. "That is the place of the WTO in your international legal order!," he declared to the public assembled in the auditorium. Yet, international lawyers are used to being chagrined about politics and politicians. Being faithful diplomats, they listened impassively while writing postcards to Heidelberg or Bologna, reading Balzac or drafting grant applications on the Amphithéâtre's narrow benches. Pascal Lamy was warmly thanked for his "brilliant presentation," but not without pointing out the fact that he had not provided his audience with even the slightest hint of a proposal for resolving conflicts of norms in international law.

Anyway, who would still believe in "soft power,"[5] the tender force of argument and deliberation that Georges Abi-Saab (Geneva), former judge at the ICJ and president of the WTO's appellate body, so passionately described as the profession's task? Abi-Saab, a silver-haired *grandseigneur* of modern international law, praised gently David Kennedy's deconstructionist work while, at the same time, calling it into question: "Where does that lead us?" According to Kennedy, the discipline's total deconstruction allows for a fresh start towards the establishment of an international order. "If I were not interested in power, I would not be sitting on this podium," Kennedy confessed. His confidence in the options and opportunities of political steering mechanisms is based on a profound distrust towards the executive. "My vision is that we [international lawyers] reign by providing institutions, terminologies, by providing a new language of law."

Not everyone was ready to join in Kennedy's witty farewell to modern international law. To save legal humanism in times of global plurality, Mireille Delmas-Marty (Paris) proposed a pragmatic approach, case by case, simple and non-dogmatic.[6] Therefore, she recommended the contemplation of the virtue of the "concordantia discordantium" as described by the medieval canon lawyer Gratianus, a permanent striving for the dissolution of conflicts of norms, created by colliding legal systems and jurisdictions.

Yet, that canonical virtue was felt rarely in the conference's discussion about "The Constitutionalisation of International Law,"[7] moderated by Martti Koskenniemi

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[5] As lawyers tend to be reluctant to look too closely into the substructures of the normative power of facts, it comes as no surprise that that notion was coined by a political scientist. *See* JOSEPH NYE, SOFT POWER. THE MEANS TO SUCCESS IN WORLD POLITICS (2004).

[6] On her approach, *see also* MIREILLE DELMAS-MARTY, LE PLURALISME ORDONNÉ. LES FORCES IMAGINANTES DU DROIT II (2006); MIREILLE DELMAS-MARTY, LE RELATIF ET L'UNIVERSEL. LES FORCES IMAGINANTES DU DROIT (2004).

[7] While the debate on questions of a constitutionalisation of international law proliferates, the key arguments are still to be found in Bardo Fassbender, *The United Nations Charter as Constitution of the*

(Helsinki) with Anne Peters (Basel), Bardo Fassbender (Berlin), Erika de Wet (Amsterdam) and Sandra Szurek (Paris) on the panel. Despite the moderator's gentle provocations and repeated attempts to create dialogue through irony, the panelists' spirited discourse remained fairly disconnected. The architects of constitutionalisation and "legal unity," as well as their critics, just unfolded a multifaceted kaleidoscope of well-known arguments pro and contra with regard to the possibility of a vertical re-ordering of the fragmented global law.[8]

Throughout the conference, Eastern European voices were mostly absent, with the exception of Iulia Motoc (Bukarest) who slowed down the fast-paced discursive dynamics of the concluding plenary session with an epic lecture on the morality of pluralism. The Society's next research forum, to be held in spring 2007 in Budapest, might help to bridge the gap and also to provide a counterweight to European international law's strong and – despite all the differences debated in Paris – still rather exclusionary transatlantic orientation.[9]

Fragmentations and disruptions in the discipline's traditional narrative of progress were brought to the surface by a panel on "International Law and Non-State-Actors," raising disquieting and pressing questions. The positive assessment of non-state-actors is increasingly complemented by a darker flipside of legal and

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International Community, 36 COLUMBIA JOURNAL OF TRANSNATIONAL LAW 529 (1998); Jochen Abr. Frowein, *Konstitutionalisierung des Völkerrechts*, 39 BERICHT DER DEUTSCHEN GESELLSCHAFT FÜR VÖLKERRECHT – VÖLKERRECHT UND INTERNATIONALES RECHT IN EINEM SICH GLOBALISIERENDEN INTERNATIONALEN SYSTEM 427 (2000); and ANDREAS PAULUS, DIE INTERNATIONALE GEMEINSCHAFT IM VÖLKERRECHT: EINE UNTERSUCHUNG ZUR ENTWICKLUNG DES VÖLKERRECHTS IM ZEITALTER DER GLOBALISIERUNG (2000). *See also* JÜRGEN HABERMAS, *Hat die Konstitutionalisierung des Völkerrechts noch eine Chance?*, *in* DER GESPALTENE WESTEN 113 (2004); and Brun-Otto Bryde, *Das Völkerrecht zwischen Konstitutionalisierung, Hegemonie und Renationalisierung*, *in* DIE ZUKUNFT DES VÖLKERRECHTS IN EINER GLOBALISIERTEN WELT 88 (Heinrich-Böll-Stiftung ed., 2006). For a critique of contemporary generalisations and "legal unity thinking," *see, e.g.*, Gunther Teubner, *Societal Constitutionalism: Alternatives to State-Centred Constitutional Theory?*, *in* TRANSNATIONAL GOVERNANCE AND CONSTITUTIONALISM 3 (Christian Joerges, *et al.* eds., 2004); and ANDREAS FISCHER-LESCANO & GUNTHER TEUBNER, REGIME-KOLLISIONEN. ZUR FRAGMENTIERUNG DES GLOBALEN RECHTS 10 – 24 (2006).

[8] Quite surprisingly, no one among the panelists or from the audience engaged the moderator, Chairman of the International Law Commission's Study Group on the Fragmentation of International Law, in a discussion about the findings regarding the elaboration of an "international law of conflicts" that was laid out in his final report, published on 4 April 2006 and currently under consideration at the ILC's 58th session (Geneva, 1 May – 9 June and 3 July – 11 August 2006). S*ee* Martti Koskenniemi, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law. Report of the Study Group of the International Law Commission*, UN Doc A/CN.4/L.682 (1 August 2002), *available at* http://www.helsinki.fi/oik/globalgovernance/Mallisivusto/tutkimus/untitled/A%20CN4%20L682%5B1%5D.pdf.

[9] The next biennial conference will be held in 2008 in Heidelberg.

political analysis, as the rather vague classical NGO-definition encompasses not only the Red Cross and Amnesty International, but also multinational corporations, terrorism networks, lapsed humanitarian activists and private security forces – and, as Karen Knop (Toronto) explained, even dubious religious groups such as the evangelical preacher Bruce Wilkinson's "African Dream Villages."[10] Yishaï Blank (Tel Aviv) presented "The City as Non-State-Actor," but behind his pleading for a "re-enchantment" of the Law in a spirit of subsidiarity, there seemed to be lurking an ambivalent search for "wholeness," homogeneity and controllability.

In the ongoing process of legal and political, social, cultural and economic transnationalisation, the discipline of international law transcends continuously long-established inter- and intradisciplinary borders. Traditional differentiations between public and private, national and international are blurring, and a host of new questions are emerging.[11] Answers are often sought in international law's history. Yet, sometimes they are posed from an all-too-present perspective, which, at times, also leads to the temptation to idealize the past.[12] In Paris, Paz Zarate (Oxford) was obviously delighted to have discovered the idea of "good governance" already in early modernity, in Italian city states as well as in the Holy Roman Empire of the German Nation. To the latter's legal and institutional structures, Théodore Christov (Los Angeles) set out to trace back core elements of the European Union's political architecture.

Doctoral candidate Anne-Charlotte Martineau's (Paris) paper was a true treasure of intellectual precision. Rich and profoundly argued, Martineau's paper unveiled the phenomenon of legal fragmentation in classical sources of the nineteenth and twentieth century. Martineau's voice remained, as Benedict Kingsbury (New York) remarked, at a soft pitch and in the background of her analysis. But this did not affect or diminish the splendid insights her paper had to offer. Her professional self-constraint merely appeared as a stark reminder that deconstruction and reassessment always start out from a diligent analysis of texts and norms.

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[10] For a thorough examination of the legal status of NGOs in international law, placed within a wider discussion on the representation of groups in the international legal system, *see also* ANNA-KARIN LINDBLOM, NON-GOVERNMENTAL ORGANISATIONS IN INTERNATIONAL LAW (2005).

[11] *See* Peer Zumbansen, *Transnational Law*, *in* ENCYCLOPEDIA OF COMPARATIVE LAW 738 (Jan Smits ed., 2006); and, of course, Philip Jessup's strikingly timeless observations: PHILIP C. JESSUP, TRANSNATIONAL LAW (1956).

[12] For some reflections on this phenomenon, *see* Alexandra Kemmerer, *On the Use and Abuse … International Law's Historical Turn*, *in* PROGRESS IN INTERNATIONAL ORGANIZATION (Russell A. Miller and Rebecca Bratspies eds., forthcoming 2007).