

# Martti Koskenniemi

## Global Governance and Public International Law

### Martti Koskenniemi

#### I.

We, citizens of the European Union, Paradise, Americans ironically remark, share an intuition about how the world – the international world – is and how it will be in the future. We think it will be like we are. We are familiar with our national governments, our neighbourly relations, the Commission in Brussels, the Strasbourg Court of Human Rights. Romano Prodi appears to us as a serious leader of an impressive, supermodern bureaucracy. All this is very familiar, domestic, domesticated. And we need not travel far – just cross one border – to arrive in Geneva where we encounter a rather similar-looking environment: office-buildings of glass with acronyms on their roofs: WTO (World Trade Organization), WIPO (World Intellectual Property Organization), WHO (World Health Organization), UNHCR (High Commissioner for Refugees), High Commissioner for Human Rights, the United Nations European headquarters, *Palais des Nations*.

Thus, when in Geneva or New York, the two great cities of public international law, we Europeans interpret the architecture and the acronyms in light of our experience. National governments govern at home; the Commission governs in Europe, and the UN administers a world society – the »international community« so dear to international lawyers.<sup>1</sup> Perhaps the thickness of government diminishes as we proceed from the domestic to the global. But at each level – national, European, international – common affairs are administered by a law providing order and security to the respective societies. The international, we Europeans think, is fundamentally just another domestic – larger, perhaps more complex, but there is no qualitative difference between it and what we experience at home.<sup>2</sup> What possible reason could there be, we ask, to apply in the international world principles of criminal accountability that differ from those we apply at home? The International Criminal Court is not just another diplomatic manoeuvre but an expression of political logic: if the legitimacy of the domestic realm depends on its being administered by law, why would it not be equally important for the legitimacy of the international that it be so administered? Three European traditions converge here.

Six years into the French revolution, in his *Zum ewigen Frieden* (1795) Immanuel Kant sketched the structure of a cosmopolitan federation, the international world as a society of free states under the rule of law, individuals as the ultimate subjects of a single global order. This followed from his *Idea of Universal History with a Cosmopolitan Purpose*, which had appeared a few years earlier, articulating world federation as a necessary end-point of the development of human societies. Even if there might not be a world government, there will be a »cosmopolitan situa-

1 See Andreas Paulus, *Die internationale Gemeinschaft im Völkerrecht. Eine Untersuchung zur Entwicklung des Völkerrechts im Zeitalter der Globalisierung* (München: Beck, 2001); Emmanuelle Jouannet, L'Idée de communauté humaine à la croisée de la communauté des Etats et de la communauté mondiale, 47 *Arch. De Philo de droit* (2003), p. 191–232.

2 For the analogy in international thought, see Hidemi Suganami, *The Domestic Analogy and World Proposals* (Cambridge University Press, 1989).

tion« of a domestic world politics (*Weltinnenpolitik*) whose principles of legitimacy will be familiar: human rights and the rule of law as the implicit constitution of a decentralised global public realm.<sup>3</sup>

Many of us believe in this philosophical narrative, though we may find it difficult to say with conviction, why we do. Instead, it is often easier to adopt the language of the economic-technological tradition: interdependence, as Auguste Comte and Durkheim prophesied, will turn an ultimately pre-modern system of sovereignties into a single world society, governed by a single rationality, mastered by technical experts. If rationality is one, and universal, and if it is right to administer societies rationally (because this will ensure the absence of political bias), then the boundaries of nations can only appear as jurisdictional limits between local administrators of a single worldsystem. Reason and modernity as the *telos* of history. Were Spencer and Marx alive today, they would have no difficulty to view globalization as the end of human pre-history. And clearly, it their undeclared epigones who do rule much of the international world.

These two traditions – one philosophical, the other sociological – provide the background for a third one: the quintessentially European reading of public international law in the image of the law of the nation-state, an instrument of the government of a single world society. Multilateral treaties will appear as legislation – and why not, during 1975–1995 over 1.600 of them were adopted on every conceivable aspect of social life<sup>4</sup> – supplemented by an amorphous custom, sometimes pronounced dead but always resuscitated by a legal formalism unable to conceive of »gaps« in a system that seeks to be else than sovereign privilege. International courts appear as an independent judiciary. And they do proliferate. It is instructive to view the surprise of the negotiators of the WTO Treaties of 1994 as they witness the development of the Appeals Body into a proper jurisdiction, even a kind of constitutional court of the world trade system. One cannot, apparently, take just one part of the law and leave the rest aside.<sup>5</sup> If the legal idiom is chosen – as it was in the WTO Dispute Settlement Understanding (DSU) – the everything else follows: a practice conceived of as »case-law« from which legal experts derive precedents and principles that emerge into an autonomous set of constraints not only on the Appeals Body but on policymakers, suddenly situated in a thoroughly legalised environment. And finally, international organizations as the functional equivalents of branches of domestic government, organised under the United Nations Charter understood (especially in Germany) not merely as an act of diplomatic co-ordination but a constitution of humankind: world citizenship as constitutional patriotism under the UN.<sup>6</sup>

3 The domestic analogy of States living like human beings in a State of nature from which the only reasonable exit is provided by joining into a federation comes from the Seventh Proposition in Immanuel Kant, *Idea for a Universal History with a Cosmopolitan Purpose*, in *Political Writings* (Hans Reiss, ed. Cambridge University Press, 1991) p. 47–49. This is then given the form of a federation of free republics in the First and Second Definitive Article of *Perpetual Peace: a Philosophical Sketch*, id. p. 99–105. Kant's movement from a single, coercive world State into a federation of free States is traced carefully in Georg Cavallar, *Kant and the Theory and Practice of International Right* (Cardiff: University of Wales Press, 1999), p. 113–131. Kant's cosmopolitanism has been recently updated and given a decentralised form in Jürgen Habermas, »Das kantische Projekt und der gespaltene Westen«, in: *Der gespaltene Westen* (Frankfurt: Suhrkamp 2004), p. 133–142.

4 Charlotte Ku, *Global Governance and the Changing Face of International Law. The 2001 John W. Holmes Memorial Lecture* (ACUNS Reports and Papers 2001: No. 2), p. 4 and tables on p. 28 and 29.

5 As the Appeals Body observed in one of its first cases, the WTO treaties could not be read »in clinical isolation from public international law«, *Unites States – Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB R, 35 ILM (1996), p. 621.

6 For a discussion, see e.g. Jürgen Habermas, »Hat die Konstitutionalisierung des Völkerrechts noch eine Chance?«, in: *Der Gspaltene Westen* (Frankfurt: Suhrkamp 2004), p. 132–142, 174–178. For a rather confident Luhmannian account see Andreas Fischer-Lescano, »Die Emergenz der Globalverfassungen«, 63 ZARöRV (2003), p. 717–760.

Today, however, the idea that the world can – or should – be governed through a single international law just like the domestic is undermined by three developments. One I call, following Max Weber, *deformalization*, the increasing management of the world's affairs by flexible and informal, non-territorial networks within which decisions can be made rapidly and effectively. Think about the G8, the world economic forum in Davos, the collaboration between huge transnational corporations, financial and trade institutions and regulatory branches of governments. International trade is not regulated by international law but by *lex mercatoria* and private international arbitration the volume of which by far outweighs any public dispute-settlement; globalization invokes not government, but *governance*, a spontaneous process, pushed by private interests and actors in a thoroughly pragmatic process, accountable to no functional equivalent of a public realm but to an amorphous aggregate of stakeholders.<sup>7</sup>

The second threat to the traditional image arises from what international lawyers call »fragmentation«, the division of international regulation into specialised branches, deferring to special interests and managed by technical experts.<sup>8</sup> Instead of a single international law, we have today human rights law, environmental law, international trade law, international criminal law and so on, with little unifying ethos. More often than not, special regimes are created with the distinct purpose to undermine or deviate from general law. Such fragmentation is not – as it is often treated – a technical problem but best understood as set of *hegemonic* manoeuvres whereby new institutions seek to articulate special preferences as universal ones. This pits functional regimes against each other: trade institutions *versus* environmental or human rights regimes; the jurisprudence of the International Court of Justice versus the jurisprudence of the International Criminal Tribunal of the Former Yugoslavia. Impunity here, accountability there.<sup>9</sup> No wonder that in US law schools, what used to be taught as public international law has been broken down into foreign relations law, human rights law, international business transactions, law and development. A sociologically sensitive view sees in place of a single world society an increasing number of functionally differentiated regimes and institutions with different biases and priorities linked into complex networks.<sup>10</sup> Under such conditions the antics of a Grotius or a European public law provide insufficient training for a legal profession whose clientele is looking for the realisation of special preferences.

Deformalization, fragmentation, and a third – empire. The facts of American disengagement from law are staggering. In arms control, the Treaty on Anti-Ballistic Missiles (ABM) was replaced by a bilateral negotiating »framework«.<sup>11</sup> The US declined to join the Anti-Personnel Mines Convention (Ottawa Convention) and the Comprehensive Nuclear Test Ban Treaty (CTBT) despite having been an initiator in both. It rejected the Biological and Toxin Weapons Convention (BWC)

7 Out of a wealth of literature, see e.g. Günther Teubner, *Global Law without a State* (London: Ashgate 1997); Claire Cutler, *Private Power and Global Authority: Transnational Merchant Law in the Global Political Economy* (Cambridge University Press, 2003).

8 See Martti Koskeniemi & Päivi Leino, »Fragmentation of International law? Postmodern Anxieties«, 15 *Leiden Journal of International Law* (2002), 553–579. See also Martti Koskeniemi, »Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law. Preliminary Report«, ILC (LVI)/SG/FIL/CRD.1 (4 and 7 May 2004).

9 See Martti Koskeniemi, »International Law and Hegemony: A Reconfiguration«, 17 *Cambridge Review of International Affairs* (2018), p. 197–218).

10 See Andreas Fischer-Lescano & Gunther Teubner, »Regime-Kollisionen: Kompatibilität durch Vernetzung statt Rechtseinheit«, *ZaöRV* 2004 (forthcoming).

11 Nico Krisch, »Weak as Constraint, Strong as Tool: The Place of International Law in US Foreign Policy«, in: D. Malone (Ed.), *Unilateralism and US Foreign Policy. International Perspectives* (2003), p. 49.

in 2001 as well as the inspections regime of the Chemical Weapons Convention (CWC) as too intrusive for American industries. The disarmament conference in Geneva has become what it was seventy years ago.

The United States has also rejected most human rights treaties and all of their supervisory mechanisms, including the 1989 Convention on the Rights of the Child that has otherwise managed to collect an astonishing 189 parties. It neither signed the Kyoto protocol nor became a party to the 1992 Convention on Biological Diversity or its related protocol on Biosafety. It has remained outside the Basel Convention on Hazardous waste. It has also so far refrained from joined the UN Convention on the Law of the Sea which took eight years to negotiate – not even after the provisions on distribution of revenues from seabed activities were amended in 1994 to appease the West.

Then there is Guantánamo, of course, and everything about the »war on terror«. In two consecutive years (2002 and 2003), the US succeeded in pushing through decisions in the UN Security Council that shielded American soldiers participating in UN peacekeeping from suit within the ICC; the Council yielded after the US had threatened to prevent the renewal of the peacekeeping operations in Bosnia-Herzegovina.<sup>12</sup> And we all know what the doctrine of pre-emptive strike threatens to do to the law of collective security. Let me quote professor Michael Glennon writing in *Foreign Affairs* last summer:

»With the dramatic rupture of the UN Security Council, it became clear that the grand attempt to subject the use of force to the rule of law had failed... ›Lawful‹ and ›unlawful‹ have ceased to be meaningful terms as applied to the use of force.«<sup>13</sup>

These three developments – deformalization, fragmentation, and empire – threaten the European idea that the world is on the move to a rule of law: instead, it seems increasingly governed by special interests through flexible regimes whose decisionmakers have no accountability beyond their constituencies. Against this, Habermas, and most European international lawyers have insisted that the acceptability of the postnational constellation will require functional equivalents to the administrative state to interact with individual rights on the one hand, and a cosmopolitan social realm on the other and that this will require the submission of these developments under a unified rule of law.

Can public international law be used as world government? I am sceptical about this. But before outlining what I see as the proper role of international law, let me first briefly recapitulate how it has been thought to govern the world during the brief period of its existence. I want to take seriously the postmodern call: »*historicize, always historicize!*« After a mini-history, I would like to attack the view of international law as an instrument of international governance and end with a few words on how we might begin to think of international law as something else than an instrument of governance.

12 For the story, see Marc Weller, ›Undoing the Global Constitution: UN Security Council Action on the International Criminal Court, 78 *International Affairs* (2002) 693–712.

13 Michael J. Glennon, ›Why the Security Council Failed‹, *Foreign Affairs* May/June 2003.

Public international law was first understood as a system of law in a modern sense by German public law experts after the French revolutionary wars. In books they wrote in French and German, Georg Friedrich von Martens from Göttingen and Johann Ludwig Klüber from Heidelberg articulated the principles of the post-Napoleonic settlement in terms of a *Droit public de l'Europe*, a purely procedural law that consisted of the complex rules of co-ordination of the activities of European sovereigns: how treaties were to be concluded, what was the order of monarchic precedence, how territory was to be acquired, how war was to be waged. It built on the absolute rights of European sovereigns, indeed, arose as a defence of national absolutism.<sup>14</sup>

It was only towards the end of the century – after the Franco-Prussian war – that a generation of liberal internationalists started to advocate a new international law that would be responsive to the internal transformations in European societies: democracy, liberalism, industrial modernity. Public international law needed to be distinguished from mere co-ordination of diplomacy. It ought to give an expression of the progress of European societies.<sup>15</sup> The first professional journal of international law started to appear in 1869 and contained a manifesto. What international law would seek to achieve read like a shopping-list of liberal domestic reform:

»In the matter of personal status, the abolition not only of slavery but of servitude; in civil matters the freedom of establishment; in penal matters, the creation of a more just relationship between the crime and the punishment and the application of the punishment in the interests of the criminal as well as that of society; the suppression of the criminalisation of usury, and of privileged corporations, the liberation of the value of gold and silver, and the freedom of association...«<sup>16</sup>

In other words, international law would not just to co-ordinate the activities of kings and diplomats. It would have a political agenda, coinciding with the liberal agenda. This was soon reflected in the establishment of the first international institutions – the international unions, the Universal Postal Union, the International Telecommunications Union – in the 1870's, and the first chairs in the discipline at universities. The first person to articulate the new ethos for students was the Baltic-German Frederic von Martens who titled volume II of his 1888 textbook »International Administrative Law« – this was to cover the various treaties of economic, technological and scientific co-operation of the period as forms of international governance. Yet none of this could prevent the diplomatic crisis of 1914 from escalating into the first world war. The Peace Palace that had been donated by Andrew Carnegie to house the Permanent Court of Arbitration in the Hague was left unopened.

After the war, international lawyers turned their attention to international institutions.<sup>17</sup> The League Covenant was interpreted as not just as another treaty but a »constitution« – however odd that might have seemed to the diplomats in Versailles who negotiated it. A French professor, a »solidarist«, Georges Scelle articulated the whole of international law in the 1930's in terms of the domestic law of an international realm: through a cosmopolitan theory of *dédoublement fonc-*

14 See also Richard Keene, *Beyond the Anarchical Society. Grotius, Colonialism and order in World Politics* (Cambridge University Press, 2002), p. 16–22.

15 See Martti Koskenniemi, *The Gentle Civilizer of Nations. The Rise and Fall of International Law 1870–1960* (Cambridge University Press, 2001).

16 Gustave Rolin-Jaequemyns, »De l'étude de la législation comparée et de droit international«, 1 *Revue de droit international et de législation comparée* (1869), p. 11.

17 See David Kennedy, »The Move to Institutions«, 8 *Cardozo Law Journal* (1987), p. 849.

tionnelle he described national governments as merely the local administrators of a universal law, based on natural human solidarity.<sup>18</sup> Through the language of legal formalism, the same was preached many other internationalists, among them Hans Kelsen in Vienna, and Walther Schücking and Hans Wehberg in Germany. A whole generation of European lawyers attacked sovereignty and re-imagined diplomacy – especially multilateral diplomacy – as the administration of a world society.

One of the voices of that generation was the young Max Huber who had been a Swiss delegate at the Second Hague conference in 1907 and been thoroughly disillusioned about the selfishness and short-sightedness he witnessed there. For him, sovereignty and statehood were just atavistic residues or pre-modern times. In his *Die soziologische Grundlagen des Völkerrechts* Huber adopted something like Durkheim's theory of the *solidarité sociale* as a groundwork for a theory of international interdependence. Even as States were different, and had different interests, they needed each other and were joined together in something like a de facto federation by the very laws of modernity.<sup>19</sup>

It is truly amazing how far the confidence of that inter-war generation went. Here is one of the leading lawyers, Hersch Lauterpacht, speaking in Chatham House in London in 1941, as bombs were falling over Coventry and as his family was being pushed to the Ghetto in Lwow, Poland:

»The disunity of the modern world is a fact; but so, in a truer sense, is its unity. Th[e] essential and manifold solidarity, coupled with the necessity of securing the rule of law and the elimination of war, constitutes a harmony of interests which has a basis more real and tangible than the illusions of the sentimentalist or the hypocrisy of those satisfied with the existing *status quo*. The ultimate harmony of interests which within the State finds expression in the elimination of private violence is not a misleading invention of nineteenth century liberalism.«<sup>20</sup>

»Harmony of interests« – little of that was visible during the Cold War. Instead, a critique of that idea became the basis of realist thought in the 1950's,<sup>21</sup> while a rejection of the domestic analogy was crucial for »international relations« to emerge as a special field of study.<sup>22</sup>

Many post-war lawyers were impressed by these critiques. Julius Stone, for example, one of the few who actually sought to provide a sociological grounding for international law in the 1950's, conceded that a mere introduction of technical lawyers' law into the international world would never suffice to bring about peace and order. For the rule of law to function, »certain rules of decency« would have to be followed. Between contending political blocks no such decency could be expected. Like Morgenthau and political realists, he stressed that »programmes for the rule of law among nations« were not only useless but harmful: »they can, in fact, do very real disservice to the cause of conflict management«.<sup>23</sup>

But where Stone was looking for a realistic place for law at the margins of high policy, other lawyers – especially in the United States – sought to accommodate the realist insights into a fully instrumentalist view of law. If »most States comply with most of international law most of the time«, this could not be assumed to

18 Georges Scelle, *Précis de droit des gens III* (Paris, Sirey, 1933/1935).

19 See Max Huber, *Die soziologischen Grundlagen des Völkerrechts* (Berlin 1928).

20 Hersch Lauterpacht, »The Reality of the Law of Nations«, Published in: *International Law, being the Collected Papers of Sir Hersch Lauterpacht* (ed. by Eli Lauterpacht, 5 vols, Cambridge University Press 1972–2004) Vol 2 p. 26.

21 See especially the famous critique in EH Carr, *The Twenty-years' Crisis 1919–1939* (2<sup>nd</sup> edn., London, Macmillan, 1946).

22 Suganami (*supra* note 3), p. 10–11.

23 Julius Stone, *Quest for Survival. The Role of Law and Foreign Policy* (Harvard University Press, 1959), p. 4–5, 8.

follow from altruism but had to mean that they saw it useful for the co-ordination of their activities. Even international institutions might be fitted within the realist world-view without implausibly altruistic assumptions by focusing on how they took care of collective action problems and lowered transaction costs.<sup>24</sup> Other lawyers – especially in Europe – simply ignored the realist criticisms and fell back on a legal formalism that could, if needed, be defended by evolutionary generalisations and the need not to rock the boat: if realism meant war, then little was needed in Europe to buttress an anti-realist, perhaps even democratic spirit as a pragmatic necessity – after all, this is how large parts of Europe itself had come to adopt it.

From both sides, however, lawyers continued to be impressed by the functional activities of international organisations, work of the Specialized Agencies of the UN whose facades we can today admire in Geneva. By the 1960's they had learned to divide international law into two parts: the old law of co-ordination, still alive in the Cold War antagonism, and the new law of »co-operation« in the economic, social and technological fields, and in human rights.<sup>25</sup> That this became rooted in UN parlance followed from the predominance of the developing States on the one hand, and the paralysis within the Security Council on the other. In the 1970's the UNCTAD – UN Conference on Trade and Development – projected an ideal of international governance in terms of assisting the Third World in development. A social-democratic and regulatory spirit flourished. And yet the development of the law – and the Kantian project – continued to be obstructed by the Cold War.

#### IV.

And then all began to change. I remember the Soviet Union's *Perestroika*-period proposals at the UN – made often at the highest level – for the development of the Rule of Law in the international world. After 1989 the Security Council suddenly woke up. First Iraq, then Somalia, Libya, Angola, Haiti, the former Yugoslavia, and so on. International lawyers saw it working »finally« as it was supposed to do under the Charter. At an euphoric moment in 1992, the Council itself declared that it had competence to deal not only with military but also economic, humanitarian and even ecological crises.<sup>26</sup> Sanctions were widely applied – something many saw – wrongly, but understandably – as collective enforcement against law-breakers.

Many other things started to happen. The UN organised an unprecedented series of World Conferences on the environment (Rio, 1992), Human Rights (Vienna 1993), Women (Beijing 1995), World Social Summit in 1996, and Human Settlement 1997 – each exceeding the prior in the number of delegations, especially NGO delegations, and in the number of pages for documents produced. This was a true governmentality: world government by world conferences adopting universal standards.<sup>27</sup> It was topped by the establishment of the WTO in 1995 with, above all, a unified dispute-settlement mechanism – a constitution for international trade law, some claimed. The piles of reports by States parties in the offices of human rights treaty bodies grew, like the case-load at the European Court of Human Rights in Strasbourg and its inter-American equivalent.

24 Very influential in this regard proved to be Robert Keohane, *After Hegemony. Cooperation and Discord in the World Political Economy* (Princeton University Press, 1984).

25 See especially Wolfgang Friedmann, *The Changing Structure of International Law* (London 1964).

26 S/23500 (31 January 1992).

27 For a useful overview, see J. A. Lindgren Alves, »The UN Social Agenda against »Postmodern« Unreason, in: *Might and Right in International Relations*, 28 *Thesaurum Acroasiarum* (1999), p. 56–105.

And yet, there was some uneasiness about whether this did suggest international governance through international law. I recall that as I read the invitation to the UN Conference on International Law in 1995 in New York, to celebrate the UN's 50<sup>th</sup> anniversary under the label »international law as our common language« (a global Esperanto) – the letter carefully explained that the invited participants should finance their trip themselves. Something was amiss.

All this activity was precisely parallel to the three developments I outlined at the outset: deformalization, fragmentation, empire. The Security Council did not enforce a rule of law. Quite the contrary, it remained as selective as ever while its sanctions administration met with significant rule of law problems and has more recently fallen into a corruption scandal concerning Iraq's »Oil for Food« Program.<sup>28</sup> The World Conferences did not create law: their wish-lists remain largely unfulfilled, as the UN's Millennium declaration of 2000 made clear and as international priorities since September 2001 have moved elsewhere.

Two years ago I became a member of the UN's International Law Commission, the body entrusted by the General Assembly in 1947 with the task of codification and development of international law.<sup>29</sup> Carrying an electoral campaign I visited several UN agencies in Geneva: High Commissioner of Human Rights, High Commissioner for Refugees and the International Committee of the Red Cross. For each I asked, »what can the Commission do for you?« In each, the response was predictable, and crystal-clear – »nothing«. »Keep out of this field, please«. Public international law could apparently give nothing to human rights, refugees, or victims of armed conflict. Much better that those three organisations themselves deal with the problems. I suppose they were right. It is hard to see how the 34 seasoned lawyer-diplomats of the Commission could have improved upon the performance of those organisations, committed for decades to the cause of human rights, relieving the plight of refugees or the victims of armed conflict. Had I walked over to the WTO, the response would have been the same. But I knew already beforehand that would have been pointless.

So in the 1990's a fundamental discrepancy was revealed between the international *governance ethos* and public international law. The latter seemed always somehow pointless if not obstructive. Either it set too stringent standards, allowed too loose standards, or made standards otherwise unsuited for the latest technology, the latest need. The year 1989 was indeed a key moment in that it did open the door to the governance ethos in the international world: finally we can do things, nobody threatens us with nuclear weapons. The world could be governed like the domestic. In the light of that ethos, however, international law did not begin to govern the world. Instead, it was revealed as part of an old world – part of the problem, not of its solution.

There were in particular two problems. First, most of international law continued to focus on purely procedural co-ordination of State action – diplomatic relations, treaty-making, territorial distribution, jurisdiction, the conduct of warfare. These were not where the action was. Whatever substantive principles were declared in environmental or human rights fields, or in trade and development, were either so open-ended as to allow any policy – or then had effect only within special or geographically limited regimes in which it seemed that the hegemonic powers could dictate the content of the relevant developments. Large UN conferences continued to declare universal principles of action – but they received applicability only through selective interventions by the Great Powers, including techniques

28 See [http://www.economist.com/agenda/displayStory.cfm?story\\_id=2618260](http://www.economist.com/agenda/displayStory.cfm?story_id=2618260).

29 For one overview of its activities, see *Making Better International law. The International Law Commission at 50. Proceedings of the UN Colloquium on Progressive Development and Codification of International Law* (UN, New York, 1998).

such as the human rights conditionality employed by the European Union vis-à-vis some of its third world trade partners.

But second, where the law was clear, the direction it offered was often simply the wrong direction. And let me be clear: it was the internationalists who thought this. It was *they* who felt that, well, if the law does not permit us to do what is right, then all the worse for law. This became clear in the Kosovo crisis in 1999.

Now the rules on the use of force are surely among the least disputed aspects of international law. And yet, in the spring of 1999 many international lawyers and humanitarian activists advocated their violation: the bombing of Serbia was »illegal but necessary«.<sup>30</sup> »Illegal but necessary« – the two parts of that sentence were not weighted equally: law was secondary to the needs of ethically informed governance. This illustrates what could be called the *paradox of governance*. This is the paradox. Under the domestic analogy, we think law justifiable only as an instrument of governance, as a pointer to good purposes. If the law fails to lead to those purposes, or worse, obstructs them, then of course there is no reason to apply it. Legal rules on the use of force, sovereignty or non-intervention, for instance, are not sacred myths. We honour them to the extent that they enable the attainment of valuable objectives – human rights, democracy, self-determination.

But if such are really the objectives of the law, and the law is no more valuable than its objectives, then a people taken hostage by a tyrant must be surely assisted, and by breaking the law if necessary. Anything else would mean retreat to an irresponsible pacifism, appeasement, the legal absolutism that characterised the League and was discredited by what happened to it. Surely the law should not be interpreted so as to bring about precisely the enslavement that we want to prevent through it.

The same with all international law. We follow the emission reduction schedule of chlorofluorocarbons (CFC) under Article 2 of the 1987 Montreal Protocol on the protection of the ozone layer because we assume that it will reduce the depletion of the ozone layer and the incidence of skin cancer.<sup>31</sup> But what if it were shown that ozone depletion or skin cancer bore no relationship to the emission of CFC's? In such cases we would immediately look to the purposes of those rules so as to avoid applying them. Who would be ready to close a profitable refrigerator factory, and send its workers on the dole, merely because some obscure international rule says so. The European Union will continue to uphold its ban over the import of hormone meat whatever may be said by the WTO. And so it should.

In other words, the governance mindset builds on a rejection of what it views as legal formalism and ethical absolutism. That mindset is part of the post – 1945 move to think of international law realistically – not as external to power and policy but as (responsibly) embedded in both. The United Nations itself came about through such an effort. Where the League was thought to be legalistic and inflexible – and to have failed because it had been so – the UN Charter, including the provisions on the use of force, was written so as to accommodate power and make room for diplomacy. And so, international lawyers have learned to interpret the provisions of the Charter in a »realistic« fashion.<sup>32</sup> If these provisions have a compliance pull, it is independent from their being dressed in the pure form of law. After all, that form is just a set of diplomatic compromises made under du-

30 See further Martti Koskeniemi, »The Lady Doth Protest too Much«: Kosovo, and the Turn to Ethics in International Law», 65 *The Modern Law Review* (2002) 159–175.

31 Montreal Protocol on Substances that Deplete the Ozone Layer, 16 September 1987, 26 ILM (1987), p. 1550.

32 See especially, David Kennedy, *The Dark Sides of Virtue. Reassessing International Humanitarianism* (Princeton University Press, 2004) p. 256 et seq.

bious circumstances for sometimes dubious objectives.<sup>33</sup> Instead, they seem constraining to the extent they appear to protect valuable purposes. And if they do not appear to do this? Then surely it is hard to see why they should be honoured.<sup>34</sup>

Here is where the analogy with domestic society starts to break down. There are no clear and easily identifiable purposes behind international rules. International agreements typically come about as bargains, complex packages of conflicting considerations and criss-crossing political or economic objectives. If we now open the rules up to realise such objectives – well, then no-one is constrained. At home, law constrains as it is embedded in the routines of our social lives. A rule is a rule: shut up and obey! The driver must stop by the red light on a clear Sunday morning with no car in sight. This is so because we do not want to encourage drivers to think for themselves. The benefits of abstract rule-obedience weigh so much more heavily than the little inconvenience of waiting until the light turns green. Perhaps in one of the thousands-upon-thousands of cases where the rule is applied, some real benefit ensues: a pedestrian was saved, after all.

None of this works in the international world where instances of law-application are few, and the benefits of abstract law-obedience obscure in comparison to the shortterm gains of acting decisively *now* – realising the reasonable purpose rather than following the empty form of the rule.<sup>35</sup> Heaven knows, international lawyers have tried to argue otherwise. They have appealed to enlightened self-interest that should make it rational for them to comply; all the benefits that an orderly society with a rule of law will bring. But no such explanations have force against an actual perception, based on a State's best calculation of its present preference *now* dictating the need to deviate. However ingenious the reasons we adduce to defend obedience, none of such reasons is proof against contrary reasons. Remember Kofi Annan's point after the genocide in Rwanda: had there been an intervention force just outside the frontier, and had the Security Council been blocked – would this have meant that the force should have had to stand put and watch as the killing continued? Should the Rwandans have become a sacrifice for the pure form of the law? The problem is not about finding a good enough reason to comply – it lies in the need to have recourse to reasons in the first place, reasons that may sometimes – perhaps often – require the overruling of the empty form of the law.

Reference to reason and interests (whatever other problems such references have) cannot escape the problem that State views about what reason and interest say, differ. Therefore, others have defended international law by insisting that it remains indispensable as a »framework for cross border interactions« that al-

33 The American attitude that sees international law rules not as ends in themselves, but as pointers to useful purposes is usefully summarised e.g. in Eric A. Posner, »Do States have a Moral Obligation to Obey International Law?«, 55 *Stanford Law Review* (2003). See also Richard Pildes, »Conflicts between American and European Views of law. The dark Side of Legalism, 44 *Virginia Journal of International Law* (2003), p. 145–168.

34 As Kennedy points out, it is odd that many humanitarian activists were unwilling or unable to think of the question of »regime change« in Iraq in the spring of 2003 in this way. Instead, they insisted on going by the Security Council – thus making action dependent on French or Russian acquiescence in a fashion that made it impossible for them to take seriously (or even to formulate) the point about the degree to which the Iraqi status quo may have been a violation of human rights and self-determination. Whether or not adherence to the Charter here would, on balance, have been better or worse for the Iraqi population may, or course, be debated. But the legalism of many humanitarian activists may have prevented them from even asking that question. Kennedy (*supra* note 32), p. 300–309.

35 Formalism, realist lawyers point out, works where there is a »predominance of typical or general over particular situations« – for instance in domestic civil law by comparison to which international situations are much more individualised, with the main interest rarely generalisable. Charles de Visscher, *Theory and Reality in Public International Law* (2<sup>nd</sup> edn. transl. by P. Corbett, Princeton University Press 1969), p. 138, 139–143.

so »shap[e] the values and goals these interactions are pursuing«<sup>36</sup> – that international law is in some sense *prior to* and determinative of State behaviour. This, too, may be right. But whatever the causal force of such a »constructivist« explanation, it fails as a normative argument about why a State should refrain from doing something that it seems good for it to do *now*.<sup>37</sup>

The governance mindset has learned the lesson of political realism. For it, the question of international law's »relevance« in the world of high politics has become a matter of life and death for the discipline. To respond to that question, it has learned to think of law as secondary to its justifying reasons – compliance is produced by a rational choice calculation.<sup>38</sup> As such, however, the law will always vanish into thin air. From a rational choice perspective, the law can only appear either as an enabling devise or an obstruction. It may sometimes enable the realisation of good purposes. A peace treaty may, for example, often be instrumental for a just and lasting peace. But just like a peace treaty may well provide a reason for the next war, the law, too, may turn out to be obstructive of the purposes which it was supposed to realise. This is why the governance mindset will ultimately undermine any project for a rule of law in the international world where the power of some actors so vastly overweighs the power of others. For the former, in possession of many policy-alternatives, the law as an enabling devise seems pointless inasmuch as it can anyway carry through its purposes, and as an obstruction, not only counterproductive, but indefensibly so. That is what seems apparent in the slow demise of public international law through deformalization, fragmentation and, above all, empire.

## V.

Examining international law through the governance mindset, however, is not innocent. It creates a consistent bias in favour of interests well-represented in international institutions and actors with sufficient resources to carry out their policy choices. It is the mindset through which the conservative legal theorist and international lawyer Erich Kaufmann in 1911 characterised the international law applicable to the German Empire: »Wer kann, darf auch«. <sup>39</sup> For the emperor having decided what the right course of action will be, just like for the technical expert seeking to advance the special interest for which that expert works, the form of the law can only make sense as a pointer towards one's objectives. If those objectives are known – as they are to both the emperor and the expert – then following the law's form presents no added value. On the contrary, insistence on the form will always seem obstructive; reliance on myth over reason.

But I suggest that the governance mindset is itself a form of mythical thinking, a thinking that believes that *behind* the law's form there is – accessible to all of us – a blueprint of a better world, a world of freedom, democracy, good governance, market economics. But there is no such blueprint. On the realist's own premises, law reflects legislative compromises, is open-ended and bound in clusters reflecting conflicting considerations. No doubt Article 2(4) of the UN Charter aims for »peace«. Yet it is equally clear that »peace« cannot quite mean what it seems to say. It cannot mean, for instance, that nobody can ever take up arms: the UN

36 Ku (*supra* note 4), p. 6.

37 On these and other »realist« explanations for why and when international law should be held binding, see Judith Goldstein et al. *Legalization in International Politics* (2000).

38 For a clear articulation, see Jack L Goldsmith & Eric A Posner, »International Agreements: A Rational Choice Approach, 44 *Virginia Journal of International Law* (2003), p. 113–143.

39 Erich Kaufmann, *Wesen des Völkerrechts und die Clausula rebus sic stantibus* (Tübingen, Mohr 1911).

Charter allows self-defence and action under the Security Council. The Charter is both pacifist and militant at the same time and received its acceptability from being so: on which side of the lawful/illegal dyad some particular action should fall is then a matter of diplomacy, bargaining in the Security Council or possibly endless deferrals of decision within the International Court of Justice.<sup>40</sup>

The meaning of the UN Charter – or indeed *any* international treaty – is the language of the instrument. Beyond that, there is only speculation about what might be a good, realistic, reasonable way to apply it. Is it not better, the governance mindset argues, that such speculation take place with open reference to consequential policy-arguments than by dubious extrapolations from the »normal meaning« of a text or some presumed intention of the drafters?

Yet, there is no point at which this argument stops. And as the law slowly vanishes behind its utilitarian reasons, the governance mindset will itself come to rely on a myth – the myth of full knowledge, manifest destiny, the Messianic myth of the better tomorrow, coupled with the heroic myth: *we can do it!* This is the myth that perpetuated colonial domination, drove Stalin to collectivization, motivated the Khmer Rouge and the Interahamwe, the dream of a greater Serbia. *You cannot make an omelette without breaking the eggs.* The governance myth sacrifices today for a better tomorrow, an eternally postponed tomorrow. Perhaps Iraq will be democratic, and free. But today, suspect Iraqis must be tortured so that victory is assured. Maybe free trade will bring prosperity to Africa tomorrow. But today, the Africans must live in poverty and social dislocation as their economies are restructured to as to meet with World Bank standards.

The governance mindset proposes a new vocabulary to replace the law's antiquated one: globalization, ethics, democracy, market. These are words whose meanings it can control due to its predominant position in the deformalised, fragmented and imperial institutions that manage its rationality-regimes. To enquire about the meaning of such words, one should ask what they reveal and what they hide. Do they, for instance, draw attention to the fact that, according to a recent UNDP report, the combined wealth of 200 richest families in the world is eight times as much as the combined wealth of the 528 million people in all the least developed countries? That more than 6 million children under 5 years die annually of malnutrition created of causes that we have the economic and technological resources to prevent? The governance mindset upholds the policy of those who are in a determining position in governance institutions. But what does it offer to Third World social movements seeking to prevent the construction of a dam as part of development project financed by the world bank?

The governance mindset looks beyond formal law into the purposes of that law. But as there are no single, agreed purposes behind the pure form of the law, it in fact liberates the decision-makers to apply *their purposes*. As Max Weber knew, the deformalization of the law transfers decision-making power from the legislator to the governor: privileging the latter's preferences against those of the former. The same with fragmentation and empire. The division of international regulation into functionally delimited branches empowers technical experts and rationality-vocabularies wellpositioned in the specialised bodies administering those branches. At the same time the decreasing role of the State will undermine the emergence of any countervailing control or public accountability. The absence of a space for global politics will ensure that even as functional rationalities do become global, the result may mean simply a transformation from a territorial to a functional differentiation of the political space – with the European ideal of a global politics

40 This latter was in evidence in the *Legality of the Threat of Use of Nuclear Weapons*, ICJ Reports 1996.

carried out in an inclusive global public realm remaining as distant as it has been in the past.

To take seriously the ideal of such a public realm, it is necessary to defend international law beyond the instrumental reasoning emanating from the governance mindset. This involves taking seriously the »empty form« of the law as something more than merely a melancholy fall-back from conflicting purposes and instead focusing on the law's cultural meaning as a *surface* over which diverse social groups can make their claims heard as other than idiosyncratic preferences or expressions of individual interest. In invoking *law* such groups articulate their claims in *universal* terms. They thereby reconfigure the relationship between themselves and the institutions to which those claims are addressed in two important ways. One is the recognition that it involves of the position of the claimant as a (legal) subject with entitlements that belong to him or her not as a matter of good will or charity but as a matter of duty. The other is the accountability that such claims project on those in powerful positions for the decisions they make.

The words in the Charter of the United Nations such as sovereignty, self-determination, human rights, and non-intervention do not have self-evident purposes. They are what »we« want them to mean – and »we« may, of course disagree on this. But what they do achieve, independently of what we mean by them, is that they enable the formulation of our (particular) grievances in generalizable terms. The private violations appear as not only something that happened to *me*, but as something that happened to everyone in my position. To claim a right is in this respect different from claiming a benefit or appealing to charity. To be able to say that some act is »aggression« or that the deprivation one suffers is a »human rights violation« is to lift a private grievance to the level of public law violation, of concern not only to the victim but to the community. As German formalist jurisprudence well knew, law constructs a community, a *Rechtsgemeinschaft*. As it describes individuals and groups as possessors of rights or beneficiaries of entitlements, it situates them as members of a public order, to whom the institutions and decision-makers of that order are accountable.

In other words, international law is not only about governing things: indeed, governing things will remain a matter of power and policy, utilitarian calculations, expert vocabularies and the existential »decision«. It is also – and perhaps above all – about constructing a public space within which also groups whose interests are not well represented in governance bodies receive a voice. It enables those groups to articulate their claims not as claims of special interest but as the interests of the (international) society. This is visible in international law's utopian, aspirational face, expressed in general notions such as »peace«, »sovereignty«, *ius cogens*, non-combatant immunity and so on – expressions that in countless legal texts appeal to solidarity within a community. Because there is no agreement about what such words mean, law's virtue cannot reside in such meanings. Instead of what it says, law's virtue resides in how it says it. As the flat surface of the legal form, law expresses the universalist principle of inclusion at the outset. »Only a regime of noninstrumental rules, understood to be authoritative independent of particular beliefs or purposes is compatible with the freedom of its subjects to be different.«<sup>41</sup> The governance mindset that always looks to the purposes of the rules creates a hierarchical structure that is built on this: either you are with us, or against us. The breach is total: not sharing my idea of the good, or my functional rationality, there is nothing that we share. That is why Guantánamo is so shocking: the

41 Terry Nardin, »Legal Positivism as a Theory of International Society«, in Mapel-Nardin, *International Society. Diverse Ethical Perspectives* (Princeton, 1998) p. 31. See also further my »What is International Law For?«, in: Malcolm D. Evans, *International Law* (Oxford University Press, 2003), p. 89–114.

completeness of the exclusion it realises. By contrast, *the pure form of the law* invokes also my opponent, the alleged wrong-doer, as part of the universal that the legal system represents, if always only as a horizon, or a possibility – the moment before we move from the form's indeterminacy to the substance (and the violence) of the particular decision.

## VI.

It is a paradox that while diplomats and academics now often declare key aspects of international law »dead« or at least in a severe crisis, there has never in the past halfcentury been such widespread invocation of international law as today, especially in view of the US-led intervention in Iraq and the scandal of torture of Iraqi and Afghanistani prisoners. This is significant. The demonstrations against the Iraqi war of February 2003 brought to the streets all over the world more people than any event has done since the end of the Second World War. The critiques voiced in Europe, Latin America, or in Africa not only by anti-globalisation lobbies and human rights organisations but social movements and political actors of the most varied stripe and composition illustrates the theme of the law conceived not in terms of a programme of governance, but as the surface on which political claims may be articulated as something more than claims about special interests. The struggles in these various locations are of course different and rise from different experiences. But though the global trade regime, environmental degradation and the occupation of Iraq may have different victims and follow different paths of rationality, indeed differ as *problems of governance*, they are nonetheless not hermetically isolated. They form a pattern, a hierarchy, and reflect a particular configuration of forces.

In the reaction to Iraqi war, law acted through scandalization – creating a community from its ability to articulate a particular act as not just a violation of a particular interests, but a *universal wrong*. That the war was condemned as a »violation of international law« or an attack on the »rights« of Iraqi civilians was to appeal to something beyond special interest, a violation that touches no-one in particular but *everyone in general*. Through law it was possible to make the point that the coalition actions were not just an affair between the Iraqis and the Americans (or indeed between Bush and Saddam) but that everyone had a stake in them. »I do not condemn this action because it is against my interests or preferences. I condemn it because it is objectively wrong, a *violation not against me but against everyone*.«

Through international law particular grievances may be articulated as universal ones and the administrators or »governers« of the affairs of this world may be called to account not in front of disparate individuals or interest-groups but a community, constructed as a *Rechtsgemeinschaft* through the act of invoking it. From such a perspective, the project of universal justice appears as a horizon at the intersection of a public realm of States regulated by international law and the civil society reaching beyond sectarian interests. That this intersection appears only occasionally, and even then in connection with events of exceptional magnitude, even scandal, is an aspect of the difficulty involved in any fundamental challenge to the iron laws of power.