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The global challenge to public international law: Some first thoughts.

Randall Lesaffer and Rianne Letschert[1]

Public international law as we know it is by and large the product of Western civilization. Its roots lay in the modern system of sovereign States which arose in Europe between the Late Middle Ages and saw its heyday in the 19th century. Through the processes of European colonization and decolonization international law spread its wings over the globe. Since the 1960s at the latest, public international law has been 'global law' in the sense of universally applicable law. Notwithstanding this, public international law is not left untouched by the current debate on the globalization of law. Much to the contrary, the globalization debate has turned into a debate on the very nature of public international law. It has turned into a debate whether there is a future for public inter-national law as a law between States.

The challenge which the sovereign State faces is not novel; it goes back to the early 20th century. By and large, international lawyers and historians of international law reflect upon the development of international law during the 20th century in terms of the gradual loss of the monopoly of States over international law. To this purpose, many writers have construed a dialectical opposition between the 'Westphalian' or 'Hobbesian' classical international law of the 19th century and the 'post-Westphalian' or 'Grotian' international law that arose during the 20th century. Under the Hobbesian system, the sovereign State ruled supreme; it was at the same time the sole subject, author and enforcer of international law. Over the 20th century, the State's monopoly was gradually eroded through the rise of

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international organizations and more fundamentally, the return of the individual – mainly through the international protection of human rights and the emergence of international criminal prosecution – on the scenery of international relations and law.[2] By the midst of the 20th century, some leading voices in the debate claimed that the legal order of the world had reached a middle-point between the old historical Hobbesian reality and the Kantian cosmopolitan ideal: that of a 'Grotian' international law that was next to being the law of an inter-national community of States also that of a world community of people.[3]

Since the end of the Cold War (1989), changes that erode the monopoly of the State over international law have increased in speed and depth.[4] Moreover, over the last few years, the debate on the relative decline of the State in international law has fallen within the orbit of the debate on globalization. While globalization is not a new phenomenon either – the integration of the world economy goes back to the Age of Discoveries and was much a fact by the 19th century –[5] it has gained a lot of traction over the last few decades. Through technological evolution, far more people than ever before are involved in activities that cross national borders. Globalization challenges the central position of the State in the world's political and legal order in two different ways. First, globalization enhances the role of non-State actors on the international scenery, from individual human beings to non-governmental

[2] Randall Lesaffer, 'The Grotian Tradition Revisited: Change and Continuity in the History of International Law', *British Yearbook of International Law,* 73 (2002) 103-39, at 103-10.

[3] Hedley Bull, 'The Grotian Conception of International Society', in Herbert Butterfield and Adam Watson, eds., *Diplomatic Investigations: Essays in the Theory of International Politics,* London 1966, 51-73; Hersch Lauterpacht, 'The Grotian Tradition of International Law', *British Yearbook of International Law,* 23 (1946) 1-53.

[4] James Crawford and Sarah Nouwen, eds., *International Law 1989-2010: A Performance Appraisal,* Select Proceedings of the European Society of International Law 3, Oxford/Portland, Or. 2012.

[5] K.H. O'Rourke and J.G. Williamson, *Globalization and History: The Evolution of a Nineteenth-Century Atlantic Economy,* Cambridge, Mass. 1999.

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organizations and global corporations, and stimulates the rise of a body of transnational law outside the confines of public international law. Second, the growing interdependency of the world and the global challenges mankind faces jeopardize the relevance of States, even the biggest ones, as vehicles for attaining the aspirations of people and peoples.

International legal theorists have not been slow to pick up on decline of the State. In 1956, Philip Jessup proposed the term 'transnational law' to catch all laws that transcend national borders under, thus indicating the growth of a global law distinct from public international law.[6] In the 1950s and 1960s, Wilfred Jenks laid out a roadmap for the construction of a cosmopolitan 'Common Law of Mankind'; in his view existing international law could only be considered an early, underdeveloped version of the law the world needed.[7] In 1993, John Rawls pleaded for the reconstruction of world order as a society of people*s* instead of States.[8] Over recent years, more and more voices have spoken out for the radical relocation of the nucleus of authority in world order away from the State and the construction of a cosmopolitan, Kantian order in which people and not States would be the ultimate focus and purpose. A good example thereof is the work of the Spanish legal historian Rafael Domingo.[9]

Jenks, Domingo and other scholars all in a more or less radical way propose the relocation of the locus of authority in 'international' or 'global' law from the State to the

[6] Philip Jessup, *Transnational Law*, New Haven 1956.

[7] Wilfred Jenks, *The Law of Mankind,* London 1958; idem, *Law in the World Community,* New York 1967; idem, *A New World of Law?* London, 1969.

[8] John Rawls, 'The Law of Peoples' (1993), in Samuel Freedman, ed., *Collected Papers*, Cambridge, Mass. 1999; idem, *The Law of Peoples, with the Idea of Public Reason Revisited,* Cambridge, Mass. 1999.

[9] Rafael Domingo, *The New Global Order*, Cambridge 2010. An example of a more moderate approach to the relocation of the locus of authority in international law from State to person is offered by Ruti Teitel, *Humanity's Law*, Oxford 2011.

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individual. This relocation plays out at two levels. First, there is the foundational question who or what constitutes the purpose of international law. Is international law a law *for* States or a law *for* persons? It is meant to serve the interests of States or that of human beings themselves? The mere fact of the debate itself – which again, is not novel but goes back to at least the Interbellum – indicates the demise of the State's claim that its interests coincide with the interests of the nations and ultimately with those of its citizens – the core of the theory of popular sovereignty and the nation-State. Second, there are the practical questions about who are the subjects, authors and enforcers of international law? Is international law a law *of States* or is it a law *of* people?

On the latter level, Domingo and others construe a global law that directly recognizes individuals and private associations of individuals as bearers of rights and duties of global law, which they can enforce at any level of governance and jurisdiction. In this vision, 'global law' becomes next to being a universal law which regulates relations between States and a myriad of other public and private actors also a common law of minimal standards of human dignity, security and development.

In its more radical guise, as that of Domingo, the challenge of globalization stretches public international law to its vanishing point. Domingo, as did Jenks, conceives of existing (public) international law as an underdeveloped law of mankind, a stepping stone towards the 'new global law'. But once the point is reached where the State becomes one unprivileged player among many on the scenery of global law and where (inter-)State law becomes just one form of law, the existence of public international law as an autonomous body of law – which was hard 'won' in Europe between the 16th and 19th centuries – ceases. Domingo and others are, at the same time, not blind to the dangers these developments might entail. Indeed, some important *caveats* need to be brought into the debate on global law.

First, whereas it is according to the authors undeniable that we are living through a paradigmatic shift that is profoundly changing international legal order, we must be careful not to avert ourselves from the lessons that can be learned from the past. *Primo*, as was indicated above, the developments we are living through are a radicalization of a development that already started in the early 20th century. *Secundo*, the idea that 'international law' is *for* the people as much as *for* the State is not novel. It was an inherent part of the classical law of the European sovereign States system of the 17th and 18th centuries. Under that classical law, the sovereign princes of Europe had as much a duty to serve the interests of the prosperity and wellbeing of their, and in some cases, other princes' subjects, as they had to their selves. Later international lawyers have often been blind to this at the time self-evident understanding of the European political order because these duties to mankind had been relayed to the world of natural law, while a prince's duties to his peers fell in the domain of the positive law of nations. That natural law only applied in conscience and was only upheld in the court of God made it no less relevant to an age where princes and politicians were deeply religious and sincerely concerned about their eternal souls. The correct understanding of this historic dualism of early-modern international legal order is highly relevant to the debate today. It indicates that an international legal order wherein States hold a central role can go very well together with the existence of international law as a law *for* people. What needs to be done, and what is indeed happening, is that what was relayed to natural law is merged into the domain of positive international law.[10] *Tertio*, there exist historical precedents for a multilevel international legal order where the 'State' plays a central role but without holding a monopoly over law making and law enforcement or even holding a monopoly over the core issues of 'international' relations. The main and most relevant historical example is no doubt late-

[10] Emmannuelle Jouannet, *The Liberal-Welfarist Law of Nations. A History of International Law,* Cambridge 2012.

medieval, pre-Westphalian Europe. That Europe, often referred to as the *respublica christiana*, was an amalgam of very diverse political players and entities who all held a certain modicum of 'sovereignty' while at the same time standing for some aspects of public government in a hierarchical relation to one another. This Europe was also one of overlapping jurisdictions and legal systems that sometimes worked together but often vied with one another. It is out of this context that the sovereign Stare grew and successfully bid its claim to the monopoly over first matters of war and peace and ultimately all public authority and law. But before that point was reached in the 19th century, the European States system was one in which the State monopolized some law, but not all. It was a system in which State sovereignty was not absolute but relative. It only stretched to some domains of public governance. In other domains, it had to leave room to others or even recognize higher authority.

The latter historical remark, second, is a warning that, while we may rejoice in the ending of the State's claims to monopoly over law, we should not be too hasty to do away with the State altogether. As Domingo and other have warned, the State is historically and presently the primary locus of democracy and the rule of law. It has also played an instrumental role in the suppression of large-scale violence within societies. As we are striving to overcome, through international law and collective security, the terrible downside of the monopolization of force by the State, we should not ignore the lessons of the prize of State failure from recent decades. This all implies that within the growing reality of 'global law' there is and will remain for the foreseeable future a separate spot for a 'public international law'. This public international law is that part of the wider 'global law' which deals with basic matters of the public order of the world, such as security, the enforcement against gross violations of human rights and the upholding of the world's basic values. While the inroads on the authority of States by third actors and increasingly vocal if diffuse world public opinion*s* may be very beneficial to this public international law, the concern should as

much go towards strengthening the legitimacy of State-based world order by making it more multi-polar and democratic.

Third, and closely related to this, is the concerns we should feel about a too enthusiast embracing of non-State law and alternative ways of dispute resolution. The rise of non-State 'soft' law as a function of civil society taking responsibility for itself is laudable, but we should be well aware that one of the great drives and merits behind the rise of public law in the 20th century is the protection of weaker players against the stronger in the field of private law relations. And while the stories abound of how the most redoubtable multinational corporations today must take heed of the power international pressure groups in the service of a good cause can harness, they cannot assure the neutrality formal State law can. In the same sense, the rise of alternative ways of dispute resolution is in itself not something to applaud or deplore. It is a fact which puts us in front of the double challenge of improving the accessibility and effectiveness of formal adjudication while at the same time strengthening the guarantees for fairness, effectiveness and accessibility alternative dispute resolution can provide.

Fourth, all this is not meant to mount a defense of the old in favor of the new or to deny that the world of international law is fundamentally changing. But at this point the debate seems to be too concerned with slashing at the status quo and doing away with the old. This is understandable as it stems from unease with the paradigm of the sovereign State most legal scholars have been raised on and now find unsatisfactory to explain the complexities of current international order. But how strong the desire may be to do away with that paradigm and how influential some mental constructs scholars built may prove, these constructs cannot suffice as they are as yet not real. Therefore, the debate on the 'globalization' of international law should move outside the confines of legal theory. This means that beyond looking from a new paradigm at what international law is, we also need to look at what international law does

as an instrument of world policy. If we are dissatisfied with the paradigm from which we have learned to think about international law, we should also be dissatisfied with the way it is traditionally implemented at the level of its scholarly systematizations and doctrines. So the old system of international law, as it was laid down in the great textbooks of the 20th century does not satisfy any more to comprehend the purpose, meaning and life of international law. Therefore, a new doctrine of international law, with a new structure and maybe even a new vocabulary will have to be developed. This will be a long and tedious process and one that will be the work of more than one generation. But it is a task we should not wait to start with until a new paradigm of international legal theory has crystallized. A more pragmatic approach to the new realities is as if not more expedient. What we need is new doctrines which depart from the global challenges international law is faced with today.