



## **ESIL RESEARCH FORUM ON INTERNATIONAL LAW: CONTEMPORARY ISSUES**

**Graduate Institute of International Studies (HEI), Geneva  
Thursday 26-Saturday 28 May 2005**

### **Workshops Paper Synoptic Report**

prepared by  
Vittorio Mainetti & Vasileios Pergantis

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## **FORUM DE RECHERCHE DE LA SEDI SUR LE DROIT INTERNATIONAL: PROBLÈMES CONTEMPORAINS**

**Institut universitaire de hautes études internationales (HEI), Genève  
jeudi 26-samedi 28 mai 2005**

### **Rapport synoptique des travaux présentés dans les ateliers**

préparé par  
Vittorio Mainetti et Vasileios Pergantis

Workshop / Atelier N° 1:

## **REVISITING CONTEMPORARY INTERNATIONAL LEGAL THEORY / REVISITER LA THÉORIE CONTEMPORAINE DU DROIT INTERNATIONAL**

*Convener / Responsable:* Thomas Skouteris

### **Biographical Note**

Thomas Skouteris lectures in the Faculty of Law of Leiden University. His research interests include general international law, dispute settlement, and international legal theory. He currently serves as General Editor of the Leiden Journal of International Law and Chairman of the Foundation for New Research in International Law. He is also a Founding Member of the ESIL and member of its Board.

### ***Selected research papers / Travaux de recherche sélectionnés :***

#### **Unearthing structural uncertainty through neo-Kelsenian modernist consistency**

Jörg Kammerhofer

### **Biographical Note**

Jörg Kammerhofer (Mag. iur., *Vienna*; LL.M., *Cambridge*) has published on international legal theory and the International Court of Justice and is currently in the process of finishing his doctoral thesis at Vienna on the topic of 'Uncertainty in international law'.

### **Summary**

Hans Kelsen's *pure* theory of a normative science achieved dialectical completion between the normative and the positive elements of a positive normative system. My development of his theories endeavours to eliminate the remaining influences of effectiveness and enforcement in his theory. I intend to demonstrate what would happen if my particular neo-Kelsenian theory were consistently applied to 'traditional' or 'orthodox' conceptions of international law, for it is not a legal tradition that copes well with the strictness required by the normativist approach.

My paper will show the *structural uncertainties of international law* by analysing some well-known theoretical problems: (1) We may be tempted to conclude that there is too little law in places, that there are *gaps*. After analysing the famous Lauterpacht-Stone debate as well as Hans Kelsen's views I use the arguments in the *Nuclear Weapons* opinion as a contrast to offset my own, neo-Kelsenian view. (2) We may also believe that there is too much law and that *norms conflict*. Conflict may be unavoidable and unsolvable if a strict focus on positive law is maintained. Orthodox approaches (such as Martti Koskenniemi's and Joost Pauwelyn's recent contributions) with their traditional 'resolving devices' of *lex specialis* or *lex posterior* can be challenged in numerous ways, including by counterpositing Kelsen's and Adolf Merkel's 'Stufenbau des Rechts'. (3) Where does 'validity' come from, what is it? My theory is that Kelsen's *Grundnorm* is not just another theory, but is *necessarily presupposed by anyone* (even non-Kelsenians) in order to be able to perceive norms as norms. The *Grundnorm* is nothing but the categorical distinction between Is and Ought.

Where do we stand? I submit we stand at the juncture where we finally realise the paradox: the absolute, the 'one correct view' does not exist. However, without *dogma*, without imposition of ideas, law as *Gedankending* does not exist. As humans we must realise our immense responsibility to shape our ideals by employing our will, rather than falling for the illusion that our ideals are predetermined.

## **Cultural Relativism the American Way: The New Nationalist School of International Law in the United States.**

Alejandro Lorite Escorihuela

### **Biographical Note**

Alejandro is assistant professor of international law at the Université du Québec à Montréal. He is a graduate of the Université de Genève, the Graduate Institute of International Studies, and Harvard Law School.

### **Summary**

This paper in progress aims at opening lines of discussion on a fairly recent, increasingly visible, and (at least in the way it will be presented here) methodologically coherent body of United States-based scholarship in international law, which will be tentatively labeled "Nationalist international law" (NIL). The paper suggests approaching this line of writing in a way that hinges upon the role of its producers as engaged in a structured debate in the academic field of international law. From that general perspective, it reconstructs NIL's seemingly dispersed and varied writings on the basis of a structural division between three domains of academic intervention, corresponding to different modes of methodological commitment and substantive argument, as well as different audiences and therefore different writing styles. These domains are presented as separate fields of argument that are held together subjectively, by individual scholars' traveling from one to the other, as well as objectively, by the way they relate as an interlocked whole to international law's division of the world between national spheres and international planes. This contrived set-up will be used to highlight international legal scholarship as transcending again the never vanishing science/politics divide into a form of political activism. The second phase of the argument, once NIL has been fragmented to be put back together, is to consider therefore the political nature of the dialectics between schools of thought as they appear through that picture of the academic world, and focus critical attention on the shape of the dialogue resulting from the baselines supporting the apparently opposed views of NIL and presumed competitors or opponents. The overall project is, briefly stated, to take a seemingly very politicized scholarly movement, then pause to reflect on what that politicizing might mean for international law's self-understanding, and from there go back to both NIL's (self-)perceived American-ness and international law's own disciplinary *Weltanschauung*, to finally question the national sphere as the repressed site of unspoken or unspeakable nationalism, once again conceived as international law's only brand of legitimate politics.

## **The Double Impossibility of International Law: Navigating the Practical Philosophy of the International Legal Project**

Akbar Rasulov

### **Biographical Note**

Akbar Rasulov ([a.rasulov@law.gla.ac.uk](mailto:a.rasulov@law.gla.ac.uk)) lectures on international law at the University of Glasgow, Scotland. He was educated at the University of World Economy and Diplomacy in Uzbekistan (LLB, 1999), the University of Essex (LLM, 2000), and Harvard Law School (LLM, 2003). Currently he is also completing a doctoral thesis at the University of Hull. His main research interests lie in the areas of international legal theory, world public order studies, and the international law of minority protection. He is the author of several publications on the law of state succession, protection of national minorities, and international environmental law.

### **Summary**

This paper investigates the practical philosophy of international law as a social-professional project. It presents a series of tentative propositions about a certain sensibility that has formed in the ideological discourse surrounding the international legal project (ILP) in the closing decades of the 20th century, which, because of its structural makeup, can be dubbed the

"double impossibility of international law" doctrine. In structural terms, the main thesis at the heart of the "double impossibility" doctrine mirrors the following sequence of reasoning: (i) the ILP may no longer be

performed on those terms on which "we" have come to expect it to be performed, since its modernist ethos is no longer compatible with its post-modern contextual condition; nevertheless, (ii) "we" cannot afford to have this ethos changed, since doing so would mean sabotaging the ILP as a social-professional project; as a result, (iii) "we" have to pretend as if nothing happened and go on with the ILP as "we" have to come know it before we learned of post-modernity.

## **Lost in Translation: What is Postmodern International Law and Is It Good for Women?**

Barbara Stark

### **Biographical Note**

Barbara Stark is a Professor at Hofstra University, NY, where she teaches international law. She has published over 40 articles, presented over 65 papers, and last year served as Distinguished Visiting Professor of International Law at New England Law School.

### **Summary**

This paper is part of a larger project exploring the relevance of postmodern theory to various aspects of international law. It explains why the metanarratives of an exhausted modernism can no longer be relied upon in the context of women's human rights and how postmodern theory would help women's human rights become more credible, more flexible, and better integrated with local cultures.

While 'many doubt whether the term [postmodernism] can ever be dignified by conceptual coherence,' three concepts widely viewed as characteristically postmodern are particularly pertinent here. First, as Jean Francois Lyotard explains, postmodernism is 'incredulity toward metanarratives.' Second, as critic Fredric Jameson points out, postmodernism is the 'cultural logic of late capitalism. Third, as geographer David Harvey observes, 'The most startling fact about postmodernism . . . [is] its total acceptance of . . . ephemerality, fragmentation, discontinuity, and the chaotic.

Sofia Coppola's critically-acclaimed 2003 film, *Lost in Translation*, provides a heuristic. Like its characters, women's human rights law is *Lost in Translation*. In the film, Bob (Bill Murray) and Charlotte (Scarlett Johansson), chronically jet-lagged, meet in the early morning hours in a luxurious Tokyo hotel. They are far from home, and equally far from any intelligible conception of themselves. Charlotte is bright but unformed, her identity anachronistically dependent upon that of her hip young husband. Bob is a has-been in his own country, mystified by the adulation he receives from the young Japanese. Women's human rights law, similarly, evokes both the bright, albeit inchoate, "new streams of legal scholarship" described by David Kennedy, as well as the 'second wave' liberal feminists, earnestly welcomed by some abroad even as their relevance is increasingly questioned at home.

The characters in the film become friends tentatively, gradually recognizing their shared skepticism ("incredulity toward metanarratives"). By doing so, they eventually manage to connect to the foreign culture in which they are immersed. That culture is not simply 'Tokyo,' but the fragmentation and flux of postmodernism itself. Finally, whatever happens next, it will play out in the context of "the cultural logic of late capitalism. Charlotte and Bob are not redeemed at the end. Their future paths remain murky. But they are better off than they were at the beginning of the movie. Postmodernism, similarly, would not redeem women's human rights law, but it would leave it better off than it is now.

Workshop / Atelier N° 2:

## **LAW AND POLICY IN THE INTERNATIONAL PROTECTION OF THE ENVIRONMENT / LA PROTECTION INTERNATIONALE DE L'ENVIRONNEMENT : ASPECTS JURIDIQUES ET POLITIQUES**

*Convener / Responsable:* Francesco Sindico

### **Biographical Note**

Francesco Sindico is a Researcher in International Law at the Universitat Jaume I. He is a former EU Marie Curie fellow at the Institute for Environmental Studies of the Free University of Amsterdam and he is working on the relationship between climate change law and trade law.

### ***Selected research papers / Travaux de recherche sélectionnés :***

#### **Looking for Adequate Tools for the Enforcement of Multilateral Environmental Agreements: Compliance Procedures and Mechanisms**

Haroldo Machado Filho

### **Biographical Note**

Haroldo Machado Filho is a PhD. Candidate at the Graduate Institute of International Studies – IHEI (Law Section). He has been a delegate of Brazil in negotiations under the United Nations Framework Convention on Climate Change and its Kyoto Protocol since 1998.

### **Summary**

The debate on whether the traditional rules of state responsibility are a valid means to guarantee the observance of environmental norms is the starting point of this paper. The paper assesses the greatest obstacles that can be identified regarding the adequacy of the State responsibility regime in dealing with environmental norms.

Most multilateral environment agreements are made by consensus and rely on States' good behaviour in respecting the agreement's explicit rules. Since breaches of States' obligations are a real possibility, how then to deal with it? The trend in environmental law is that punitive sanctions generally do not provide solutions. Instead, the focus must be on an intensified persuasive process towards the respect for international obligations - what have become known as compliance procedures, involving incentives to change. As an alternative to the traditional and coercive bilateral procedure focused on the breaches, it represents a movement towards a more consultative, multilateral, and co-operative procedure.

The 1987 Montreal Protocol to the Vienna Convention on the Protection of the Ozone Layer was the first agreement to establish an innovative "non-compliance procedure". Similar procedures have been adopted in the last decade. "Soft responsibility" based on monitoring and reporting is increasingly used for compliance control. Notwithstanding this progress, it is doubtful whether such procedures are sufficient to deal with serious or persistent breaches.

Recently, the international community was able to agree on even a more robust non-compliance regime regarding climate change, which includes real consequences for States failing to meet their targets under the Kyoto Protocol. This regime, adopted in Marrakech in 2001, sets up both procedures and institutions needed to enforce compliance under this Protocol. Most other multilateral environment agreements have weaker compliance systems, which are often based on reporting requirements and *ad hoc* procedures. The Kyoto Protocol compliance procedure and mechanisms are considered in a more detailed manner in the paper.

The paper also analyses the pending issue of whether the consequences of non-compliance will be accepted as legally binding in the first CoP/MoP (which will be held later this year, considering the entry into force of the Kyoto Protocol in February 2005), linked to the question of the compliance regime's mode of adoption. Only then will

we be able to verify if a significant progress in attempts to improve enforcement of multilateral environmental agreements, especially in the sensitive issue of climate change, will be achieved.

## **The Role of Customary Rules and Principles in the Environmental Protection of Shared International Freshwater Resources**

Owen McIntyre

### **Biographical Note**

Owen McIntyre leads the Environmental Law Research Group at University College Cork., National University of Ireland. In July 2004, he was appointed as a member of the Independent Recourse Mechanism (IRM) of the European Bank for Reconstruction and Development (EBRD).

### **Summary**

Notwithstanding the provisions of the 1997 UN Convention on the Non-Navigational Uses of International Watercourses and other conventional provisions expressly concerned with the environmental protection of international watercourses, a number of customary international legal rules and principles can be argued to have developed which might be expected to have a significant role to play in this regard. These include, the obligation to prevent transboundary pollution, the obligation to co-operate and the requirement for transboundary environmental impact assessment, while customary principles include the precautionary principle, sustainable development, intergenerational equity and common but differentiated responsibility. Other, emerging principles can be identified which may eventually form part of the corpus of relevant customary international environmental law, including the so-called 'ecosystem approach'. Also, a suite of related procedural obligations provide a framework for the early and amicable resolution of environmental disputes by ensuring that interested parties are adequately informed of proposed projects and their potential environmental implications, by providing a form of procedural due process for the participation of interested parties, and by providing an opportunity for compromise to be reached.

In recent years, debate has raged over the precise legal status and normative content of many international environmental norms and principles, some of which are often assumed to enjoy binding force in customary international law. While some commentators characterise these norms as 'declarative' rather than customary law, suggesting that their usefulness may be limited in relation to third-party dispute settlement by courts and arbitral tribunals, this characterisation possibly ignores the fact that such norms have an important role to play in terms of voluntary compliance and in terms of bilateral and multilateral negotiations. Further, certain international environmental norms, though declaratory in nature, can be expected to play a significant role in informing the rules and principles, in particular those relating to the equitable and reasonable utilisation of watercourses and the prevention of significant harm to other watercourse States, contained in the 1997 Convention and other treaty instruments.

This presentation outlines the results of an extensive survey of international conventions and soft law instruments, State, judicial and arbitral practice, and academic commentary, relating to the normative development and substantive content of each of these purported customary environmental rules and principles and to their application in the area of shared freshwater resources. In addition to commenting on the status and content of such rules and principles, the presentation examines the complex interactions between many of them.

## **Le mécanisme d'observance du Protocole de Kyoto : un mécanisme de contrôle dur au sein d'un instrument flexible**

Ana Peyró Llopis

### **Note biographique**

Ana Peyro Llopis est chercheur à l'Université de New York et au CERIC d'Aix-en-Provence. Qualifiée maître de conférences en droit public, ses recherches portent sur différents domaines du droit international (pénal, maintien de la paix, environnement et relations droit constitutionnel américain–droit international).

## Résumé

L'incorporation d'un mécanisme de contrôle dans le protocole de Kyoto mérite une analyse approfondie dans la mesure où ce mode de contrôle diffère des systèmes de garantie inclus jusqu'alors dans des accords internationaux pour la protection de l'environnement. Bien que la nature du mécanisme demeurera incertaine jusqu'à ce qu'il ne voit le jour, elle peut néanmoins être déjà profilée. Il s'agit notamment d'examiner dans quelle mesure ce mécanisme constitue un mode de contrôle du non-respect d'engagements internationaux réellement novateur dans le domaine de la protection de l'environnement.

Le mécanisme d'observance, de prime abord, peut être qualifié de mécanisme « dur », dans la mesure où il prévoit l'imposition de sanctions en cas de non-respect des obligations découlant du protocole. L'inclusion d'un tel mécanisme invite à une réflexion plus large : pourquoi se décider pour un mécanisme de contrôle dur alors que des mécanismes plus souples ont démontré leur efficacité dans d'autres domaines du droit international de l'environnement ? Il n'est possible d'ébaucher une réponse à cette question qu'au regard du protocole de Kyoto dans son ensemble. En effet, les mécanismes de flexibilité qui y sont prévus (articles 6, 12 et 17 du protocole) ainsi que la nature particulière des obligations définies dans le protocole permettent de mieux comprendre le passage d'une approche basée sur la coopération et l'assistance entre Etats (« *managerial approach* ») à une approche reposant cette fois-ci sur la contrainte (« *enforcement approach* »).

Dans les conventions environnementales, les moyens de sanction du non-respect proprement dit sont en effet peu nombreux et encore moins utilisés. Le Protocole de Kyoto, fondé sur des mécanismes économiques et marqué par une dimension commerciale, est à la base d'un système élaboré d'incitations pour la réduction des gaz à effet de serre et de sanction du non-respect des engagements. Tout semble donc indiquer qu'il s'agisse là d'un nouveau mode de contrôle.

## The Contours of Differential Treatment in International Environmental Law. Sharing the Burden of Climate Protection

Lavanya Rajamani

### Biographical Note

Dr Rajamani is Lecturer in Environmental Law, Director of Studies & Fellow in Law, at the Queens' College, University of Cambridge.

### Summary

The legacy and continuing practice of environmental exploitation has unleashed forces of destruction, any impact on which will have, of necessity, to be driven by fundamental changes in global resource use, development patterns and lifestyle options. It is critical that the community of sovereign states arrives at a common environmental goal and participates effectively in its achievement. Yet the community of sovereign states, confronted as it is with the increasing disparities between and within nations and a worsening of poverty, faces significant hurdles in crafting a common platform for environmental action. Different actors in the community of sovereign states derive their priorities and compulsions from divergent historical, economic and political realities. The integration of countries from these divergent spaces into international environmental regimes is the central challenge in the modern era of international environmental dialogue.

Of the techniques available to integrate countries from divergent spaces into international environmental regimes, differential treatment is the most effective as well as the most controversial. Differential treatment refers to the use of norms that provide different, presumably more advantageous, treatment to some states. Real differences exist between states: economic, political and others. Norms of differential treatment recognize and respond to these real differences between states by instituting different standards for different states or groups of states.

This paper seeks to determine whether differential treatment is a valuable tool in engaging countries in environmental treaties, given the need for universal participation in service of a common environmental goal and the existence of manifest inequalities between states. The term "inequalities" here refers to inequalities not just in wealth but also in levels of contribution to global environmental degradation. A second and subsidiary question

addressed is whether, if differential treatment is a valuable tool, certain boundaries exist in the use of differential treatment in environmental treaties.

In response to the first question, this paper finds that differential treatment in international environmental law, since it has its roots in the equitable principle of common but differentiated responsibility, tailors treaty commitments to the twin markers of contribution to environmental degradation and capacity to take remedial measures. In so doing it forms the essence of the compact between industrial and developing countries with respect to international environmental protection and is therefore a valuable tool in engaging developing countries in environmental treaties. In response to the second question, this paper finds that considerations of the ecological imperative and universal participation necessitate boundaries in the use of differential treatment in environmental treaties. Three boundaries are identified. First, differential treatment should not detract from the overall object and purpose of the treaty. Second, it should recognize and respond to differences across pre-determined political and other categories. And, third, it should cease to exist when the relevant differences between states cease to exist. This paper illustrates the application of these boundaries in the climate regime which, in recent times, has been subject to intense scrutiny over the differential treatment it embodies.

Workshop / Atelier N° 3:

## **INCREASING THREATS AGAINST HUMAN RIGHTS IN THE WAR ON TERRORISM / LES NOUVELLES ATTEINTES AUX DROITS DE L'HOMME DANS LE CADRE DE LA GUERRE CONTRE LE TERRORISME**

*Convener / Responsable:* Nathalie Stadelmann

### **Note biographique**

Nathalie Stadelmann (DEA HEI) est collaboratrice scientifique, section droits de l'homme/Conseil de l'Europe à l'Office fédéral de la justice, Berne.

### ***Selected research papers / Travaux de recherche sélectionnés :***

#### **Rethinking Security and Human Rights in the Struggle against Terrorism**

Jessica Almqvist

#### **Biographical Note**

Jessica Almqvist is Researcher at the Fundación para las Relaciones Internacionales y el Dialogo Exterior (Madrid), in the field of Human Rights and Terrorism, International Criminal Justice. She is also Adjunct Professor, Department of Social Sciences, New School University, New York.

#### **Summary**

Human rights and security are commonly known as contending values. Their conflictual relationships are borne out in the 'war against terrorism'. Since 9/11, states – including democratic states – have adopted counter-terrorist measures that seriously curtail fundamental and inviolable human rights. The continued protection of freedom from torture, the right to fair trial, freedom of expression, freedom of assembly, and so on, are believed to aid terrorist organizations to achieve their objectives to destruct free and democratic societies. The insult on human rights that the counter-terrorist measures amount to is deemed necessary to achieve a more secure world, a world free from fear. More complex approaches to the relationship between human rights and security – approaches that recognize that the two values are closely intertwined, mutually dependent, and interrelated with one another - have come in the background.

However, in its report 'A More Secure World – Our Shared Responsibility' (2004) - the UN Secretary General's High Level Panel on Threats, Challenges and Change identifies the need for a comprehensive multilateral strategy to fight terrorism that not merely regards human rights as constituting a set of 'side-constraints' on the counter-

terrorist measures pushed for in this fight, but also understands human rights violations as breeding terrorism. Indeed, the Panel believes that terrorism cannot be effectively eliminated unless human rights are protected. Human rights and security cannot be compartmentalized at an institutional level; counter-terrorist policymakers must address and incorporate substantive human rights concern in their own programmes of work. In this light, a more complex outlook on the relationship between security and human rights and its immediate relevance to the fight against terrorism is slowly gaining momentum. Such an outlook aspires to constitute the backdrop against which the eventual success of counter-terrorist measures should be measured. Nevertheless, the more precise relationship between security and human rights as well as its practical implications remain unclear. For such an approach to win support and credibility among troubled states it will be necessary to offer more concrete and substantive insights on what a human rights-based comprehensive strategy to fight terrorism consists of, and how successful it is likely to be. It will also necessitate a more engaging stance by multilateral institutions. These institutions must take the lead in working out the specifics of such a strategy. Against this background, the purpose of my research paper is to examine the potential need for a more complex outlook on human rights and terrorism and what such an approach would usefully consist of in more concrete and practical terms. It also provides a critical overview of the UN actions and initiatives undertaken so far as well as what are main tasks that lie ahead in order to effectively fight terrorism in a way consonant with a more complex human rights approach.

## **Sanctions of the Security Council against Individuals – Some Human Rights Problems**

Noah Birkhäuser

### **Biographical Note**

Noah Birkhäuser, born in 1976 in Basel. Studies in law at Basel and Geneva Universities, licence in 2002. Research assistant to Anne Peters in public law and international law; doctoral candidate. Subject of the doctorate: Sanctions of the Security Council against individuals.

### **Summary**

The whole system of the United Nations has been conceived to deal with the primary actors in international law: states. In this spirit, a mechanism of international security has been created that gives the United Nations Security Council a unique power to deal with threats to the international peace and security. The Security Council can deal with such threats by imposing sanctions against the source of the threat. But it has never been thought of during the San Francisco Conference to sanction individuals. Nevertheless, ever since the Security Council has applied sanctions, it has targeted them also against individuals and other non-state actors.

The very first time the Security Council chose to apply sanctions it did not target a state but the white minority government of Southern Rhodesia, at the time not a sovereign state but a British colony. In recent years, hundreds of individuals have been 'blacklisted' by the Security Council as suspected terrorists. Usually such sanctions include the freezing of assets and restrictions on travel.

A discussion of the legal problems that follow from international sanctions against individuals has not begun until recently. Human rights that might be threatened by Security Council action include the right to life, the right to health, property rights, the liberty of movement and freedom to choose a residence, the right to respect for private and family life and, above all, procedural rights. Since the system of sanctions under Article 41 of the Charter of the United Nations has been created as a means to act against states, the procedures of the Security Council leave no room for problems in relation with other actors of international law. Targeted individuals have no instruments to defend themselves against Security Council action.

Are there any legal limits to the power of the Security Council? And in what way is this relevant in this context? What can states do in order to protect their residents and citizens against illegal Council action?

## **Collateral Damage in the War against Terrorism: the Prohibition of Torture**

Jacques Hartmann

### **Biographical Note**

BA from the University of Copenhagen, 2002 - LL.M. in international law from the University of Durham, 2003 - Doctorial Candidate and research assistant at the University of Durham.

### **Summary**

Since the events of 11th September 2001 States have claimed that the commitments to the rule of law are too demanding for an effective response to terrorism, and even that the doctrine of human rights has functional implications for the survival of the liberal state. The paper assesses whether the fight against terrorism provides for a new legal regime in international law, which alters the importance of human rights considerations, or whether the term counter-terrorism is just a convenient euphemism to disguise the systematic violation of human rights.

The first part of the paper considers the international counter-terrorism legal framework prior to the events of 11th September. Such analysis has the purpose of underlining the essentially criminal characterization of terrorism and the cooperative nature of the international law approach to counter-terrorism - i.e. transnational criminal co-operation on the basis of multilateral conventions. The analysis attempts to give an account of the impact of human rights on it.

The second part of the paper makes the proposition that after September 11th a new counter-terrorism regime has been established in international law, with the possible effect of radically changing the importance of human rights considerations. The paper assesses whether human rights present a substantive limit to the powers of the Security Council (SC) from the perspective of international as well as national law.

The final part evaluates counter-terrorist measures against the established legal framework of human rights law, focusing on the prohibition of torture.

Workshop / Atelier N° 4:

### **INTERACTIONS BETWEEN CULTURAL HERITAGE LAW AND OTHER FIELDS OF INTERNATIONAL LAW / LA PROTECTION INTERNATIONALE DE LA CULTURE ET SES INTERACTIONS AVEC LES AUTRES BRANCHES DU DROIT INTERNATIONAL**

*Convener / Responsable:* Vittorio Mainetti

#### **Note biographique**

Vittorio Mainetti est assistant de recherche et d'enseignement à l'Institut universitaire de hautes études internationales, où il prépare une thèse (en cotutelle avec l'Université de Milan) consacrée à la protection internationale du patrimoine culturel.

#### ***Selected research papers / Travaux de recherche sélectionnés :***

#### **La protection des biens culturels dans le contexte des conflits armés non internationaux (par le droit international humanitaire)**

Veronika Bílková

#### **Note biographique**

PhDr. Mgr. Veronika Bilkova, E.MA, graduated from the Law and Philosophical Faculties of the Charles University in Prague, Czech Republic, and from the European Master Programme in Human Rights and Democratization. Currently, she is an internal PhD. student at the Law Faculty of the Charles University in Prague, writing her

dissertation on the legal regulation of non-international armed conflicts in international humanitarian law. At the same time, she works as a research fellow at the Institute of International Relations in Prague.

## Résumé

L'exposé se concentre sur la problématique actuelle de la régulation juridique de la protection des biens culturels dans le contexte des conflits armés non internationaux. Il montre que cette régulation est bien complexe et compliquée, étant créée à la fois par des normes générales sur les biens civils et par les normes spécifiques concernant exclusivement les biens culturels. Ces dernières sont, formellement, contenues dans les traités séparés (la Convention de la Haye de 1954 et le Deuxième Protocole à celle-ci de 1999), les traités généraux du droit international humanitaire (l'article 16 du Deuxième Protocole additionnel aux Conventions de Genève adopté en 1977), ainsi que la coutume (les règles 38-40 de l'Etude du CICR sur le droit international humanitaire coutumier). Les normes spécifiques ne s'orientent, sous l'influence de la conception homocentrique soutenant tout le droit international humanitaire, que sur les biens culturels les plus importants, laissant d'autres objets culturels, n'ayant pas une telle valeur, couverts juste par les normes générales sur les biens civils.

En vue de son prétendu caractère complexe et cohérent, de certains traits typiques particuliers, et des tendances évolutionnaires vues comme différentes, la régulation juridique de la protection des biens culturels (ou plus exactement une partie de celle-ci, créée par les traités spécifiques séparés et la coutume spécifique) est quelquefois considérée comme autonome et indépendante du droit international humanitaire. L'exposé s'efforce de montrer que cette assertion n'est pas fondée: la complexité et la cohérence de la régulation ne s'avèrent que relatives; les points de convergence entre elle et le droit international humanitaire prévalent sur les points de divergence; et les deux systèmes suivent un chemin de développement pratiquement identique. En bref, il y a beaucoup plus de ce qui unit les deux que de ce qui les sépare, et cela est vrai tant au plan statique (traits typiques et complexité) qu'au plan dynamique (tendances évolutionnaires). Considérant tous ces faits, l'exposé conclut que la régulation juridique de la protection des biens culturels dans le contexte des conflits armés non internationaux constitue une partie intégrale du droit international humanitaire.

## **An Inquiry into the Compatibility of the 2001 UNESCO Convention on the Protection of Underwater Cultural Heritage with the 1982 United Nations Convention on the Law of the Sea**

Keun-Gwan Lee

### **Biographical Note**

Ph.D. Assistant Professor, College of Law, Seoul National University.

### **Summary**

The 2001 UNESCO Convention is a normative response to the growing threat to the underwater cultural heritage which constitutes "an integral part of the cultural heritage of humanity". Despite its noble objectives, however, the Convention has garnered only 3 ratifications up to now. The major threat to the viability of the Convention is posed by some powerful maritime states such as the United States, the United Kingdom, Russia and France that regard the Convention as disturbing the delicate balance of interests established by the 1982 UNCLOS.

In this article, an investigation is made into the question of compatibility *vel non* of the 2001 Convention with the 1982 UNCLOS. In so doing, I will raise the following questions and try to answer them. Does the 1982 Convention, often referred to as "a constitution for the oceans", really have "une caractère constitutionnel ou institutionnel dans l'ordre juridique maritime international"? Or is the expression of "constitution for the oceans" merely figurative or rhetorical? What is the normative hierarchy, if any, between the provisions of the UNCLOS and those of what a commentator calls "complementary agreements", e.g., the 1995 Fish Stocks Agreement and the 1993 Convention for the Conservation of Southern Bluefin Tuna. Do (at least, part of) the provisions of the UNCLOS constitute *lex superior* and prevail over the incompatible clauses of the "complementary agreements"? In other words, does the UNCLOS fall under the "particolare categoria di trattati normativi di rango superiore"? Or, on the premise that the UNCLOS and complementary agreements, *qua* treaties, enjoy an equal normative

status, should the provisions of the latter be regarded as *lex specialis* and, as such, prevail over the stipulations of *lex generalis*, i.e., the UNCLOS?

In this paper, an attempt will be made at a critical reconstruction of the thorny problem of “priority application of successive treaties” by revisiting the distinction between “Vertrag” and “Vereinbarung”. After sketching out a new approach to the question that I would call a “principled balancing”, I will apply this approach to the problem at hand, i.e., the compatibility or otherwise of the 2001 Convention with the 1982 UNCLOS, suggesting that the two Conventions could be interpreted in a mutually compatible way.

## **Beyond the Divide: Minorities, Cultural Rights and the Protection of Intangible Cultural Heritage**

Ana Filipa Vrdoljak

### **Biographical Note**

PhD (USyd), LLB (Hons) and BA (Hons) (USyd), Jean Monnet Fellow, Department of Law, European University, Florence and Senior Lecturer, Faculty of Law, University of Western Australia.

### **Summary**

The protection of intangible cultural heritage has often been regarded as the long neglected area of international cultural heritage law. Indeed, while international conventions for the protection of movable and immovable, tangible heritage have been operational for several decades, a specialist multilateral instrument covering intangible heritage was only finalised in 2003. However, this paper suggests that the safeguarding of intangible cultural heritage has preoccupied international law for well over a century. It is argued that the question of intangible cultural heritage in international law, and European law, has influenced, and is influenced by, the protection of minorities and the articulation of cultural rights. This paper examines the interconnectedness of intangible heritage, cultural rights and minorities through their concomitant rise and decline during specific moments in modern international law. These moments are defined by the importance placed on cultural diversity in attaining stability and prosperity by the international community and States.

## **UNESCO’s Convention on Cultural Diversity and WTO Law: Complementary or Contradictory?**

Jan Wouters & Bart De Meester

### **Biographical Note**

Prof. Dr. Jan Wouters is Professor of International Law and the Law of International Organizations, Leuven University; Of Counsel, Linklaters De Bandt, Brussels.

Bart De Meester is scientific collaborator, Institute for International Law and Leuven Interdisciplinary Research Group on International Agreements and Development (LIRGIAD), Leuven University.

### **Summary**

The global reach of certain cultural products and services and their interaction with specific local cultural expressions has induced States to negotiate, in the framework of UNESCO, a Convention on the Protection of the Diversity of Cultural Contents and Artistic Expressions. Besides clarifying the scope and content of the Convention, the paper addresses the contentious position of this Convention in the international legal framework, especially its relationship with the WTO Agreements. Even though the WTO Agreements are not entirely cultural-insensitive and the Convention recognizes the importance of free trade to foster cultural diversity, clear conflicts between these two instruments can be identified. These frictions cannot be solved satisfactorily by applying the customary rules of international law on conflicts between international legal norms. In order to tackle this problem, negotiating States proposed a conflict clause to include into the Convention. An analysis of the proposed clause shows that it can hardly limit the existing WTO obligations or future commitments of the contracting parties effectively. The clause should express firmly the obligation of the Parties not to defeat the object and purpose of the Convention in later agreements. Yet, the use of such clause will always suffer from the fact that it is only binding upon the

Parties to the Convention. Furthermore, it is discussed whether WTO dispute settlement bodies might rely on the Convention as a tool for interpretation, and thus give due account to the distinct characteristics of cultural goods and services when confronted with clashes between free trade principles and the protection of cultural diversity. More generally, the concrete example of the Convention gives guidance on how the WTO may deal with other societal values that are recognized in other international instruments.

Workshop / Atelier N° 5:

## **INTERNATIONAL LEGAL PROTECTION OF MIGRANTS AND REFUGEES – GHETTO OR INCREMENTAL PROTECTION? / LA PROTECTION JURIDIQUE INTERNATIONALE DES MIGRANTS ET DES RÉFUGIÉS : GHETTO OU PROTECTION RENFORCÉE ?**

*Convener / Responsable:* Vincent Chetail

### **Biographical Note**

Dr. V. Chetail is Lecturer in international law at the Graduate Institute of International Studies (Geneva) and Head of the Research Department at the University Center of International Humanitarian Law (Geneva).

### ***Selected research papers / Travaux de recherche sélectionnés :***

#### **Victims to Be Saved? Migration, Crisis Intervention and the Logic of Disaggregation in International Law**

Gregor Noll

### **Biographical Note**

Gregor Noll, LL.D., is an associate professor of international law at the Faculty of Law, Lund University, Sweden. He is the editor-in-chief of the Nordic Journal of International Law. Dr. Noll has inter alia authored texts on asylum and migration, the security concept in international law, theoretical approaches to human rights and the effects of the EU enlargement process on refugee protection. Recently, he has edited and co-authored a volume on *Proof, Credibility and Evidentiary Assessment in Asylum Procedures* (Brill, Leiden/Boston 2005).

### **Summary**

In this paper, I will look at the impact of international law on individual political agency. Empirically, the paper shall mainly draw trafficking, while the model it uses could be applied to humanitarian intervention, the elaboration of U.N. model codes or the externalisation of refugee protection as well. A specific focus is on the invocation of human right arguments and their function.

For the analysis of these processes, our understanding of the discursive construction of an appropriate "victim to be saved" is crucial. From the perspective of intervening power, the "victim to be saved" is no individual person, no political agent, but a figure of speech in conversations about legitimation. Saving such a victim is to make it into a mere object of security. The presumed interest of the "victim to be saved" not to become or remain a victim of a human rights violation provides for the likewise assumed consent to state intervention. These assumptions work, because they rest on a discourse of inalienable and universal human rights. From the perspective of the intervening power, there is no need to seek the actual consent of those affected by interventive policies – the "victims to be saved" have already given it by their mere existence as human beings.

Legal instruments in the area of anti-trafficking reflect that international law is actively contributing to the discursive construction of "victims to be saved". The language of victimization in these instruments, their circular definition of trafficking, the elimination of consent in this definition, the selectivity in human rights references and the truncated autonomy of the victim-witness in criminal proceedings are analyzed. On that base, the paper

concludes that the trafficked person is reduced to an object of security, deprived of the critical agency to determine his or her own security situation.

## **Externalisation of EU Action in the Field of International Protection to Persons in Need: Prospects and Constraints**

Luis Peral

### **Biographical Note**

Luis Peral is Researcher at the Center for Constitutional Studies of the Minister of the Presidency under the *Ramón y Cajal* Research Program of the Spanish Government, as well as at the *Global Governance* Program of FRIDE (Fundación para las Relaciones Internacionales y el Diálogo Exterior).

### **Summary**

The June 2003 Thessaloniki European Council invited the Commission "to explore all parameters in order to ensure more orderly and managed entry into the EU of persons in need of international protection and to examine ways and means to enhance the protection capacity of regions of origin". Especially regarding the second part of the mandate, which relates to previous proposals made especially by the United Kingdom, the European Commission has proposed to launch *Regional European Programmes* in the 'regions of origin' of large groups of refugees. These Programmes will entail a major shift of the EU in its response to the refugee problem. The emphasis is now placed on the granting of collective asylum by third countries *in the region of origin*, which, as a form of compensation, will be helped technically and perhaps financially by the EU.

The proposed measures constitute a true challenge both for International Refugee Law and the European integration process as such, since not only its external dimension is involved. The obvious risk in financial terms is that European funds are likely to be diverted for countries which, in spite of their population needs, are willing to cooperate with the EU endeavour a shift which would not be consistent with the EU expressed commitment to the UN Millennium Development Goals. From the legal point of view, risks could be even more substantial, as they entail questions relating to coherence and consistency within the EU legal order, together with the possible consequence of extraterritorial application of EU human rights standards.

This paper analyses Member States' and Commission's proposals regarding externalisation of aid and protection to persons in need, as well as the potential risks, both financial and legal, of the new approach. On the one hand, the question of mainstreaming development programme resources so as to prevent admission into the EU territory of refugees in cases of mass influx may lead to a new form of conditionality. Moreover, the future European Regional Protection Programmes may be inconsistent with the human rights *acquis communautaire*, and thus contrary to the obligation of coherence enshrined in the EU Treaty. In this case, the application of the consistency test requires a prior identification of the relevant *acquis* in the 'internal' legal order; that is, the Directive 55/2001 on displaced populations. The two main consequences of the test are that European regional Protection Programmes would be considered in most situations inconsistent with the absence of a Council decision to create a category of protected persons under Directive 55/2001 embracing refugees coming from the relevant region. Also, the fact that Directive 55/2001 is in force should prevent the Union institutions from engaging in the promotion of any international protection statute that is less protective for refugees staying in third countries.

## **Identifying States' Responsibilities towards Refugees and Asylum Seekers**

Catherine Phuong

### **Biographical Note**

Catherine Phuong is a Senior Lecturer in Law at the University of Newcastle in the UK. She was educated at the Institut d'Etudes Politiques de Paris (Sciences Po), the Universities of London, Durham and Nottingham. She recently published "The international protection of internally displaced persons" with Cambridge University Press. She has been a visiting lecturer at the University of Lyon II, the Independent University of Lisbon, and a visiting

research scholar at the University of Michigan. She also teaches on the International Summer School on Forced Migration at the Refugee Studies Centre (Oxford).

### **Summary**

Debates about which states should provide refugee protection and how they should do so are not new. Nevertheless, they have taken on a new dimension over the last few years as states are exploring elaborate proposals to “manage” refugee movements and/or “improve” refugee protection. At the heart of these discussions sometimes lies a confusion as to exactly what duties states owe to refugees and asylum-seekers under international law. The aim of this paper is thus to go back to some fundamental issues in international refugee law and identify what specific responsibilities states have towards refugees and asylum-seekers. Do states have a duty to admit a refugee and if so, for how long? Do states have a duty to process asylum applications lodged on their territory and if not, to whom can they transfer this responsibility? Are these duties dependent on the number of refugees concerned? Which states should protect which refugees? The questions that will be explored in this paper are relatively basic, but the answers are definitely not simple. One of the main reasons for this is that despite the 1951 Refugee Convention’s tremendous contribution to defining states’ responsibilities towards refugees, important gaps in the protection regime still remain. To some extent, the aim of this paper is to explore the limits of the international refugee regime and reflect on the possible approaches to filling these gaps.

### **Victims of People Trafficking and Entitlement to International Protection**

Ryszard Piotrowicz

#### **Biographical Note**

Ryszard Piotrowicz is Professor of Law at the University of Wales, Aberystwyth. He specialises in refugee law and international humanitarian law. He previously taught at the Universities of Glasgow, Durham and Tasmania.

#### **Summary**

Trafficking in Human Beings is not a new phenomenon but its prevalence has expanded significantly, especially in the European region, since the collapse of communism. Other factors have contributed towards expansion of THB worldwide. While the precise extent of THB is unclear, its gravity, and its impact on victims (mostly but not only women and children) is severe, entailing breaches of the most fundamental human rights.

The last few years has seen a significant expansion of hard and soft law aimed specifically at THB, both from the perspective of victim protection but also with regard to criminal prosecution. There is widespread recognition that, for most victims of THB, the best option is repatriation to their home state. Much of the developing legal regime reflects this. However there is a significant number of victims who may reasonably feel unable, or are unwilling, to be repatriated.

My paper addresses the international legal protection regime with regard to victims of THB, in particular by considering the extent to which general international law (and European Union law) relating to international protection may be valid. In this context I address specifically the role of the Refugees Convention and the regime of subsidiary, or complementary, protection. There is certainly some scope to use the Refugees Convention; the main challenge is the extent to which victims of THB may be considered members of a particular social group. My paper will consider this and take into account recent municipal decisions that address the point. It would also consider the relevance of the issue of gender-related persecution (bearing in mind that a high proportion of victims, especially where trafficked for the sex trade, are women).

The paper will also consider the possible entitlement to subsidiary protection of victims of THB and discuss critically the legal regime, in particular through ECHR case law and EU developments in the context of the common European Asylum System. Finally, the paper will take into account (as far as possible) the draft European Convention Against Trafficking in Human Beings, and the forthcoming UNHCR Guidelines on the applicability of the refugees Convention to victims of THB.

Workshop / Atelier N° 6:

**LEGITIMACY AND ACCOUNTABILITY OF INTERNATIONAL ADMINISTRATIONS / LÉGITIMITÉ ET RESPONSABILITÉ DES ADMINISTRATIONS INTERNATIONALES**

*Convener / Responsable:* Riikka Koskenmaki

**Biographical Note**

Riikka Koskenmaki is legal officer in the office of the Legal Council of the WHO and Phd candidate at the HEI.

***Selected research papers / Travaux de recherche sélectionnés :***

**Les administrations internationales de territoire à l'époque contemporaine ou la création internationale d'Etats démocratiques**

Jean d'Aspremont Lynden

**Biographical Note**

Jean d'Aspremont Lynden is a Research Fellow at the University of Louvain. He holds a *LL.M.* from the University of Cambridge. He is finalizing his doctoral dissertation on the topic of *Non Democratic States in International Law*. He is also the author of various articles in the *Revue générale de droit international public* or the *Revue belge de droit international*.

**Summary**

For various reasons, international practice has led to the international administrations of many foreign territories whether by an international organisation or by States themselves. The legitimacy of these wide-ranging operations are usually put into question whereas their success is partly subject to the extent to which they are painted as legitimate. It is submitted here that the legitimacy of international administrations of territory is flowing from their outcome: the instauration of democracy. There is no doubt that, nowadays, international administrations of territories entail the creation of democratic institutions. It is demonstrated by the administrations of Kosovo, Iraq and Bosnia. The once envisaged administration of Somalia leads to the same conclusion. Though being unrelated to administration of territory as such, the contemporary trends towards the creation of democratic States is also illustrated by the extent to which States drive foreign governments, in the wake of a civil war or internal disorder, to adopt a new democratic constitution. It is also exemplified by the way self-determination of colonial and oppressed peoples has recently been construed. There is hardly one contemporary case where a people has exercised its right to self-determination (or is on the verge of doing so) which has not led to the creation of an independent and democratic State (e.g. East-Timor or Palestine). Some would contend that the aforementioned practice is consistent with international obligations of States. Indeed, major Human Rights conventions provide an obligation to be democratic (see art. 25 ICCPR or art. 3 CEDH AP I). And it is widely accepted that these conventions apply "extraterritorially" when a State party wields some effective authority on a foreign territory. Should they apply on the administered territory, it is however difficult to infer from an obligation to be democratic another obligation relating to the establishment of democratic institutions for the period ensuing the administration. It is submitted here that the creation of democratic States rather stems from a new contemporary conception of self-determination, a principle widely relied on in the cases considered here. Whatever the legal ground of this practice may be, it is beyond doubt that whilst the international community cannot entirely control the birth of States, it strives to choose the gender of the « newborn child », that is to say, to impose a precise type of political regime.

## **Beyond Brahimi: The Effectiveness and Sustainability of UN Legal Codes in Post-Conflict Situations**

Erica Harper

### **Biographical Note**

Erica Harper (BCom, LLB Hons) is a doctoral candidate at the Faculty of Law at the University of Melbourne, Australia (expected April 2005), now works at the UN High Commissioner for Refugees in Geneva.

### **Summary**

In 2000, *The Report of the Panel on United Nations Peace Operations*, known as the 'Brahimi Report', was released. The publication made strategic and operational recommendations for improving the way in which the UN undertakes the challenge of reconstructing collapsed or dysfunctional legal systems in post conflict situations. The report concluded that future exercises in transitional administration would benefit from the development of an international legal code to which mission personnel could be pre-trained. Such a Code would be based upon the principles, guidelines and procedures contained in several international conventions and declarations and would apply pending the re-establishment of local rule of law and local law enforcement capacity. The development of such codes has the potential to modify the way in which legal reconstruction efforts are undertaken — not just by the UN, but also by non-UN authorities. As recent events have shown, it is not just the UN who may become involved in the transitional administration of states affected by unforeseen political and military events. Military intervention by the United States of America and other forces in Afghanistan and Iraq come immediately to mind.

Since the release of the Brahimi Report the debate surrounding the use of pre-formulated legal codes has attracted interest from academics, international organisations and military establishments. Several projects designed to develop such law will be completed in 2005. The rush to develop a model UN code, however, has not accompanied by strategic and extensive research into how such law would be applied and how it would be received by populations in post-conflict states.

The following presentation considers the utility, viability and long-term consequences of importing pre-fabricated UN legal models in transitional situations. The context is a case-study of the UN-led judicial reconstruction process in East Timor and Kosovo. The information presented draws upon the results of a two-year field research project conducted in rural East Timor and Kosovo as part of the author's doctoral studies at the University of Melbourne, Australia (to be submitted 2005). The data collected relies on first-hand observations of formal court proceedings, traditional dispute resolution procedures, and the workings of the civilian police force and the penitentiary system. These observations were supplemented with information collected during 116 interviews. Interviewees included members of the civilian population, formally appointed and traditionally recognized local leaders and international and indigenous employees of the transitional administration and non-governmental organizations.

This research indicates that when governing bodies are charged with judicial administrative functions, there is not just one way for this model to be built, nor is there just one form for this model to take. Success and sustainability will be linked to the legal culture of the target population. While the concept of pre-formulated legal codes is salient, the production of a methodological template applicable to all transitional administrations is fraught with difficulty. Although codes have their place, and will probably become more common, their utility will be limited to certain situations. Missions endowed with medium to long-term powers of legal rehabilitation and administration, such as the ones in East Timor and Kosovo, are among the least suitable.

This article draws upon the author's field experience in East Timor with the United Nations (2001–2002), and a research program directed by the author (2002–2004) which investigated the effects of UN judicial reconstruction and administration on rural populations in East Timor.

## **Toward Enhanced Legitimacy of Rule of Law Programs in Multidimensional Peace Operations: Global Trends, Local Concerns**

Agnès Hurwitz

### **Biographical Note**

Agnès Hurwitz is Associate in the Security-Development Nexus Program, head of the rule of law project at the International Peace Academy, New York

### **Summary**

In the last decade, the international community has supported the implementation of programs designed to strengthen the rule of law in countries susceptible to or recovering from violent conflict. Programming activities have included advice on constitution and legislation drafting; judicial and law enforcement reforms; support to civil society and human rights organizations; and the establishment of transitional justice mechanisms. There is now a growing body of literature on the subject and greater awareness about the importance of these programs than ever before. This interest has recently culminated with the release of the Secretary-General's Report on 'The rule of law and transitional justice in conflict and post- conflict societies.' The paper will evaluate the successes and failures of these programs and their growing significance in UN multidimensional peace operations, e.g. Afghanistan, Liberia, Haiti, Sudan or Burundi. The paper will be divided into three sections. The first section will examine the progressive coalescence of international discourses on human rights, security and development, and how these have contributed to the establishment of international administrations and multidimensional peace operations. In the second part, the paper will be devoted to a review of evolving strategies to strengthen and rebuild the rule of law. The final level of analysis will focus on rule of law programmatic approaches at the implementation level. The paper's findings will highlight the need to address these three distinct sets of issues in conjunction in order to enhance the legitimacy of complex multidimensional peace operations.

## **Accountability and Legitimacy in Practice: Lawmaking by Transitional Administrations**

Carsten Stahn

### **Biographical Note**

L.L.M. (NYU), LL.M. (Köln-Paris), Associate Legal Officer, International Criminal Court

### **Summary**

The exercise of regulatory authority by international administrations has an established tradition in international practice. It has not only recently emerged in the cases of Bosnia and Herzegovina, Kosovo, East Timor and Iraq, but can be traced back to earlier experiments in the Saar, Namibia, Cambodia and Somalia. However, neither the foundations nor the implications of this type of lawmaking have been thoroughly reflected in international practice and thinking.

Lawmaking by international actors raises fundamental authority questions. What authorises international actors to exercise public authority on behalf or instead of domestic authorities? On which normative basis may international administrations enact legislation? Where are the limits of regulatory authority?

International practice has not yet provided fully satisfactory answers to these questions. Lawmaking has been largely handled in an ad hoc fashion by international administrations, following the will or rule of the governing administrations. It has sometimes led to severe transformations of the legal and political system of territories under international administration, through a definition of the law applicable in the territory (East Timor), a re-organization of the judicial system (Kosovo, Iraq) or comprehensive private sector reform (Bosnia and Herzegovina, Kosovo and Iraq).

This presentation reviews some of these conceptions in the light of the status of international administrations as public authorities and their authority under international law. It calls for moderation in law reform and argues that regulatory action should focus on institution-building rather than on legal transformation.

Workshop / Atelier N° 7:

## **HOW DOES CONTEMPORARY INTERNATIONAL LAW ACCOMMODATE PRIVATE ACTORS? / QUELLE PLACE POUR LES ACTEURS PRIVÉS EN DROIT INTERNATIONAL CONTEMPORAIN?**

*Convener / Responsable:* Frédéric Mégret

### **Biographical Note**

Frédéric Mégret est professeur assistant à la faculté de droit de l'Université de Toronto où il enseigne notamment la protection internationale des droits de l'homme et le droit de la guerre. Ses intérêts de recherche sont le droit international public, la théorie du droit et le droit pénal international.

### ***Selected research papers / Travaux de recherche sélectionnés :***

#### **Une société servile à l'ONU ?**

Olivier de Frouville

#### **Note biographique**

Olivier de Frouville est Maître de conférences à l'Université de Paris X-Nanterre. Il enseigne le droit international des droits de l'Homme, le droit international pénal et le contentieux en droit international général. Il est l'auteur d'une thèse intitulée *L'intangibilité des droits de l'Homme en droit international. Régime conventionnel des droits de l'Homme et droit des traités*, publiée aux éditions Pedone, collection de la Fondation Marangopoulos pour les droits de l'Homme (FMDH), en 2004 et d'un ouvrage consacré aux *Procédures thématiques de la Commission des droits de l'Homme des Nations Unies* (Pedone, coll. FMDH, 1996).

Il a suivi pendant plusieurs années les travaux de la Commission des droits de l'Homme des Nations Unies au sein de la délégation d'une organisation non gouvernementale internationale et a représenté cette ONG au sein du Groupe de travail chargé de la réforme du statut consultatif des ONG en 1995. Il suit actuellement les travaux du Groupe de travail de la Commission chargé de la rédaction d'une convention sur les disparitions forcées.

#### **Résumé**

Depuis plusieurs années, les acteurs et les observateurs du système de protection des droits de l'Homme des Nations Unies constatent la présence de plus en plus voyante d'Organisations Non Gouvernementales (ONG) dont le discours s'apparente à celui des Etats. Ces organisations sont couramment désignées sous le sigle de *GONGOS* pour *Governmental Non Governmental Organizations* ou *Government Oriented NGOs*, terme qui fait bien ressortir l'ambiguïté du phénomène.

L'objectif de cette étude n'est pas de « mener l'enquête » ou de « démasquer » qui que ce soit. Aussi se contentera-t-on ici, en vue de délimiter l'ensemble des ONG concernées, d'un constat factuel et d'une catégorie volontairement non juridique.

Le constat factuel résulte de la lecture attentive des comptes rendus de séance de la Commission des droits de l'Homme des Nations Unies, ceci afin d'identifier les ONG dont le discours est exclusivement ou quasi-exclusivement articulé autour de la défense d'une position gouvernementale.

La catégorie non juridique est celle de « société servile » : font partie de cette société servile, au sens de la présente étude, toutes les ONG dont il apparaît, à la lecture de leurs discours, qu'elles ne poursuivent pas d'autre but que de « servir » l'Etat dont elles ont par ailleurs, en général, la nationalité.

Le phénomène – somme toute limité – de l'introduction d'ONG serviles à l'ONU doit être analysé conjointement avec les actions menées par certains Etats – le plus souvent ceux dont les ONG serviles ont la nationalité – contre des ONG de défense des droits de l'Homme indépendantes. Des attaques, dont l'ampleur ne cesse d'augmenter, sont en effet conduites contre les ONG au sein de la Commission des droits de l'Homme. Elles sont relayées efficacement par les mêmes Etats au sein du Comité chargé des ONG du Conseil économique et social (ECOSOC),

un organe intergouvernemental chargé de faire des recommandations au Conseil en vue d'octroyer, de suspendre ou de retirer le statut consultatif auquel les ONG peuvent prétendre.

Ainsi, la stratégie tendant à la création d'une société servile s'accompagne-t-elle d'une vigoureuse politique de mise au pas de la société civile.

## **New Approaches to the International Legal Personality of Multinational Corporations. Towards a Rebuttable Presumption of Normative Responsibilities**

Karsten Nowrot

### **Biographical Note**

1992 – 1997 Law Student at the Christian Albrechts University Kiel, Germany and the University of Surrey, U.K.; 1997 First State Exam in Law; 1998 LL.M. (Indiana); 2001 Second State Exam in Law; since 2001 Lecturer and Research Assistant at the Transnational Economic Law Centre, Faculty of Law, Martin Luther University Halle-Wittenberg, Germany.

### **Summary**

The growing importance of multinational corporations as economic and political actors results in chances for, but especially also risks to, the promotion of community interests which are increasingly regarded as constituting the central aim of the current international legal order. Taking into account this ambivalent potential, the question arises whether these non-state actors, in addition to their *de facto* significance, are also in a normative sense integrated into the international legal order, and thus under an obligation to contribute to, *inter alia*, the protection of human rights and the environment.

According to the predominant view, not all of the *de facto* influential actors participating in contemporary international relations can be regarded as subjects of international law. Rather, international legal personality requires some form of community acceptance through the granting of rights and/or duties under international law to the entity in question. On the basis of these prerequisites, the still prevailing view is that multinational corporations cannot be regarded as subjects of international law in the sense of being addressees of international legal obligations.

However, it appears to be questionable whether these requirements of international subjectivity can, in light of the changing structure of the international system, still be regarded as an appropriate approach for the identification of normative responsibilities. There is a broad consensus that the international society can be characterized as a community governed by the rule of law. Thus its purpose is to pursue international stability and to avoid the arbitrary use of power. In order to pursue these goals effectively, the international legal order needs to set the relations between all the *de facto* powerful entities in the international system on a legal basis, since a failure to bring major actors under the international rule of law imposes unnecessary risks on the inherently frail international legal system.

Thus, it follows from these findings that in light of the aims to be pursued by the international legal order, a rebuttable presumption arises – already on the basis of a *de facto* influential position in the international system – in favour of the respective actor being subject to applicable international legal obligations with regard to the promotion of community interests. It is submitted that this new concept is more in conformity with the evolving image of an international legal community which has as its central aim the civilization of international relations and the promotion of global public goods.

## **Beyond Repair: Accomplice Liability under International Law and the Apartheid Reparations Case**

Mia Swart

### **Biographical Note**

Mia Swart is a lecturer at the University of the Witwatersrand, Johannesburg. She is currently a Phd Candidate at Leiden University.

## Summary

Can multinational corporations accused of supporting and funding Apartheid be held accountable under international law? In December 2004 Judge Sprizzo of the District Court of New York dismissed three lawsuits launched by victims of apartheid seeking reparations in the case *In Re Apartheid Litigation*. The defendants in this case included such companies as IBM, EXXON, Schindler, American Isuzu Motors and Barclays National Bank. Three groups of plaintiffs (the "Ntsebeza plaintiffs", "Digwamaje plaintiffs" and the "Khulumani plaintiffs") filed actions in which they alleged that the defendants violated international law and are thus subject to suit in United States federal district courts under the Alien Tort Claims Act (ATCA).

Although Judge Sprizzo acknowledged the relationship between big business and apartheid he believed the suits had to fail because the scope of ATCA was not broad enough to allow them to claim compensation in a New York court. In Sprizzo's view doing business with apartheid - even knowingly reaping the economic fruits of political repression - might be morally indefensible, but such "secondary liability" was not recognised under generally accepted international law. In his judgement Sprizzo relied on the *Sosa v. Alvarez Machain* (2004) judgement. In this case the Supreme Court left the door "slightly ajar" for the federal courts to apply ATCA "to a narrow and limited class of international law violations." In Sprizzo's view the crime of aiding and abetting Apartheid did not fall in this "narrow and limited class". I will examine the jurisprudence of the ICTY and ICTR on aiding and abetting in international law. American cases such as *Kadic v Karadzic* (1995) and *Presbyterian Church of Sudan v. Talisman Energy Inc.* (2003) in which it was ruled that genocide committed by private actors is actionable under ATCA will also be examined.

The second basis of Sprizzo's decision which I will discuss was that even if companies could in principle be liable as accomplices to apartheid, no US court should hold them liable because such a ruling might hurt relations between the US and South Africa. The Sprizzo court relied on the political question doctrine as well as the "international comity" argument. I will look at the relative weight of these doctrines when a court adjudicates on the most serious international crimes such as apartheid.

## **A Legal Status for NGOs in Contemporary International Law? A contribution to the Debate on "Non-State Actors" and Public International Law at the Beginning of the Twenty-First Century**

Emanuele Rebasti & Luisa Vierucci

### **Biographical Note**

Luisa Vierucci is a lecturer in International Law, University of Florence (Italy). She is specialised in human rights and international humanitarian law. She served as a Red Cross delegate in Uganda and Uzbekistan in 1998-2000. E-mail: [luisa.vierucci@unifi.it](mailto:luisa.vierucci@unifi.it)

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### **Summary**

The dramatically increasing activity of Non-Governmental Organisations (NGOs) in setting the international agenda, influencing the international rule-making and contributing to the implementation of international rules, raises the problem of whether and how to redefine the traditional NGOs (non) legal status in the international order.

Following the outcome of a Workshop held at the European University Institute (Florence) under the direction of Prof. P.-M. Dupuy, we focus on two fields of NGOs action: the relationship with Inter-Governmental Organisations (IGOs) and the participation before international jurisdictions. In both cases the new NGOs involvement largely overcomes the scope of the existing participatory tools and raises new issues: on the one hand, civil society is increasingly called upon to justify its legitimacy; on the other, the growth in participation requires streamlining existing patterns of relationship.

In the case of NGOs-IGOs relationship, the model proposing a more institutionalised role for civil society is opposed to the one promoting higher degrees of self-regulation by non-state actors. We argue that the two

approaches will finally combine in order to provide tailored solutions to the problems caused by civil society's enhanced participation. In light of IGOs practice we thus identify four emerging models of interaction which answer, with a decreasing degree of institutionalisation, the differing needs raised by the nature of the contribution NGOs seek to make to the intergovernmental process.

In the case of NGOs participation before international jurisdictions a different solution is likely to be adopted. While the extensive use by NGOs of participatory instruments, such as *amici curiae* brief, allows general interest considerations to enter the international process in an unprecedented way, the need to safeguard the rights of the parties and the consensual nature of international jurisdiction require the establishment of a clear legal framework for NGOs' participation.

In conclusion, while to date it is impossible to draw definitive conclusions on the overall legal status of NGOs in international law, the emergence of a new role for civil society in the international legal order is a clear step forward in the long way from an order of sovereign States to a cosmopolitan community where 'les fins humaines', to use the words of Charles de Visscher, are privileged.

Workshop / Atelier N° 7:

## **IMPLEMENTING DECISIONS OF INTERNATIONAL ORGANIZATIONS IN DOMESTIC LAW / LA MISE EN ŒUVRE DES DÉCISIONS DES ORGANISATIONS INTERNATIONALES EN DROIT INTERNE**

*Convener / Responsable:* Martin Björklund

### **Biographical Note**

Martin Björklund is Research Fellow at the Erik Castrén Institute of International Law and Human Rights at the University of Helsinki where he is preparing his doctoral dissertation on Constitutionalization and Issues of Legitimacy of the WTO dispute settlement system under the supervision of Professor Martti Koskenniemi. Before joining the Erik Castrén Institute MB worked at the Finnish Ministry of Trade and Industry. MB has recently been appointed Assistant Professor at the Helsinki Swedish School of Social Science of Helsinki University. His interests include International Economic Law, External powers of the EU and International Organisations Law.

### ***Selected research papers / Travaux de recherche sélectionnés :***

#### **La mise en œuvre des décisions de l'ORD en matière de propriété intellectuelle par les pays en développement**

Shujie Feng

#### **Note biographique**

Doctorant en droit à l'Université Paris I Panthéon-Sorbonne, LL.M. (l'Université du Peuple de Chine (Beijing)), Diplômé du programme sino-français Le Droit en Europe.

#### **Résumé**

A part des problèmes législatifs qui ont déjà suscité des différends contre les pays en développement (PEDs) devant l'ORD, l'application de lois et réglementations nationales en matière de propriété intellectuelle dans ces pays entraînerait encore des conflits entre eux et les pays développés. Cependant, le mécanisme de règlement des différends ne peut pas régler ces problèmes d'une manière efficace. D'abord, vu des termes vagues et abstraits employés par certaines dispositions de l'ADPIC et la situation diverse de la protection des droits de propriété intellectuelle (DPIs) dans les PEDs, le groupe spécial ou l'Organe d'appel aura déjà des difficultés de juger une non conformité avec l'ADPIC de l'application du droit national en matière de propriété intellectuelle. Ensuite, le mécanisme de surveillance défini par l'article 21 du Mémoire d'accord de règlement des différends ne peut

pas garantir la mise en œuvre d'une éventuelle décision de l'ORD contre un PED en cette matière pour deux raisons suivantes : d'une part, sans exigence d'efforts spécifiques pour l'application du droit en matière de PI d'après l'article 41.5 de l'ADPIC, l'amélioration de la protection des DPIs dépend davantage du progrès de l'Etat de droit dans un PED concerné, ce qui rend inadéquat à cette fin un « délais raisonnable » maximum de 15 mois ; d'autre part, la diversité de l'état de protection des DPIs dans les Membres de l'OMC rend impossible un état uniforme de conformité avec l'ADPIC, et la marge nationale d'appréciation devrait être envisagée. Enfin, les mesures de contrainte auront des effets très limités à la mise en œuvre d'une telle décision par un PED. La compensation trouverait déjà mal l'occasion de s'appliquer aux PEDs en raison de leur modeste capacité financière et de la manque de volonté. Au surplus, comme la pratique américaine de *Special 301* l'a montré, les sanctions commerciales ne sont efficaces qu'à l'égard de l'imposition d'une législation à un PED, mais pas à son application. En conclusion, il convient de remarquer que la protection des DPIs dans les PEDs est un sujet systémique, ce qui nécessite de multiples efforts à long terme au lieu d'une manière simplifiée telle que des mesures de contrainte.

## **Decisions of International Organizations in EU and Domestic Legal Orders**

Nikos Lavranos

### **Biographical Note**

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### **Summary**

As a major trading power and Member of the WTO, the EC and its Member States are regularly faced with WTO dispute settlement reports that find EC measures to be incompatible with WTO law.

Due to the supremacy of EC law and the far-reaching competence of the EC in external trade, the EC institutions determine whether or not, and if so, how WTO reports are implemented in the Community and domestic legal orders of EC Member States. In several cases, the EC has openly refused to implement WTO reports, often to the detriment of some EC Member States and private parties. From the ECJ/CFI jurisprudence on WTO law so far, it can be concluded that a direct effect of WTO law is only possible within the very restrictive confines of the *Nakajima/Fedio*-conditions. Similarly, a procedure against the EC for its liability for failing to implement a binding WTO report is almost impossible. Consequently, effective judicial review of Community law acts, which is a fundamental right, is not available regarding WTO law. Whereas German and Dutch courts tried to deviate from the ECJ/CFI jurisprudence in order to accommodate the claims of private parties, at the end of the day they were bound to follow the ECJ/CFI jurisprudence. Since the European Constitution does not contain any changes to the current situation, the only ultimate hope for a change lies with the European Court of Human Rights, that could adjudicate *à la Matthews* Community acts that have been found to be incompatible with WTO law and come to the conclusion that also fundamental rights are violated. In short, the implementation of WTO dispute settlement reports by the EC illustrates the major impact Community law and EC institutions have on the implementation of decisions of IOs in general. The effects are far-reaching in particular for the EC Member States and their courts and thus should pay more attention to this interaction of different legal orders.

## **The Formation and Transformation of Trading States: GATT/WTO Rules and State Institutional Change Since 1947**

Richard Steinberg

### **Biographical Note**

Richard H. Steinberg is Professor of Law at the University of California, Los Angeles, where he teaches and writes about international law and politics. He is a member of the Council on Foreign Relations and serves on the editorial boards of the American Journal of International Law and International Organization. Prior to joining the

UCLA law faculty, Dr. Steinberg was Project Director for International Trade Studies at the Berkeley Roundtable on the International Economy (1993-96), an associate at the international law firm of Morrison & Foerster (1991-93), and Assistant General Counsel to the United States Trade Representative (1989-91). Dr. Steinberg holds a Ph.D. degree in Political Science (International Relations) from Stanford (1992), a J.D. degree from Stanford Law School (1986), and a B.A. degree in Economics and Political Science from Yale (1982).

## **Summary**

The conventional view is that liberalization is weakening the state. While trade liberalization has favored the transformation of state-led and formerly centrally planned economies, changes in the state are not fully explained by liberalization in the abstract. The conventional story about the state needs to be modified to take into account the distinctive institutional form and process of contemporary liberalization (i.e., the evolving nature of embedded liberalism) and ways in which state institutions have strengthened. In short, we need a more complete understanding of the relationship between the contemporary institutions of liberalization and state institutional change. This project attempts to do that by explaining how GATT/WTO rules and processes have transformed the state.

The form and content of twentieth century liberalization have been negotiated between states, primarily powerful ones, creating demands and incentives for change in the constituent states of the trading system. The United States drafted the GATT 1947 (making some concessions to the United Kingdom), establishing a process for and rules about trade liberalization, but allowing the United States (and other contracting parties) to maintain several non-liberal laws and associated state institutions. Moreover, the GATT 1947 rules silently incentivized certain characteristics about the states that would accept the agreement; many of those characteristics mirrored U.S. and British state economic institutions. Hence, when the United States accepted the GATT 1947, it had to legislate nothing and modify none of its state institutions. Similarly, the agenda-setting that led to the WTO agreements was dominated by Washington and Brussels, establishing agreements that demanded relatively little legal or institutional change in the EU or the United States.

For most other countries, the procedural and substantive requirements of joining and participating in the GATT/WTO, and the opportunities and incentives created by the regime, have required or favored substantial change in state institutions. These changes suggest convergence toward some aspects of U.S. and Western European models of the state. The demands on state institutions acceding to the GATT/WTO system have increased over time as liberalization has deepened.

The contemporary form of trade liberalization has facilitated a bounded-convergent transformation of the state along five dimensions: (1) a reduced role for state-led and central planning institutions; (2) new elements of state capacity; (3) shifts of authority upward (in federal systems) and toward the external affairs bureaucracies within the executive; (4) changes in national trade policy-making processes associated with the foregoing; and (5) improved rule of law. The extent and direction of change depends upon a country's starting point—whether it is/was developed or developing, transitional or market-oriented, federal or centralized, etc.

For all but the world's most powerful countries, implementation of GATT/WTO rules must be seen not simply as an exercise in national codification, but as a process of establishing or transforming state institutions.

## **Can the Doctrines of Transformation and Incorporation Provide the Best Answer to the Question of the Implementation of International Law in Internal Law?**

Ales Weingerl

### **Biographical Note**

Ales Weingerl is a Doctoral Candidate in International Law at Oxford University with his Thesis on the Concept of Unilateral acts of States. He has published articles on international legal personality, unilateral acts, and enforcement of international law.

## **Summary**

The Paper advances the view that both the doctrine of transformation and the doctrine of incorporation cannot successfully solve all the issues regarding the implementation of international law in internal law; they thus have only a limited applicability and are successful in addressing only some of the relevant issues.

The Paper initially explains the essence of the doctrine of transformation on one hand and of the doctrine of incorporation on the other. It then contrasts the two doctrines with the State practice which they seek to rationalise.

In considering the above, the Paper focuses upon the question whether the two doctrines can provide a coherent and convincing answer to the question of the *conditions* and the *method* of the admittance of international law into internal law and thus to solve the problem of implementation of international law in internal law.

The Paper demonstrates that the debate regarding the transformation and the incorporation of international law in internal law appears to have missed the main point as it cannot provide a coherent and convincing answer to the question *whether* and *to what extent* is international law a formal source of internal law. In other words, the doctrines cannot provide an answer to the question of the *conditions* of the implementation of international law in internal law. They thus have a limited scope and their applicability appears to be limited. They can indeed provide an answer to the question of the *method* of admission of international law as a formal source of internal law, i.e. what kind of an internal legal act embodies the legislative approbation. This means that they can explain the differences between the transformational legal act and the incorporating legal act and their consequences. The two doctrines can thus coherently rationalise only the differences between the two methods of implementation of international law in internal law. However, they are less successful in accommodating the very problem of implementation, i.e. the *conditions* for the implementation of international law in the internal law. The doctrines have to *postulate the implementation* and thus cannot solve the problem of the implementation itself.

The Paper will further demonstrate the essence of the problem of implementation of international law in internal law, i.e. the relationship between the different branches of power and especially the legislative approbation on one hand and the differing nature of international legal norms on the other.

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