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Sous la direction de
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cependant, grâce aussi à sa banalisation, on est déjà en train de s'accoutumer), ou vice-versa à la croyance que les gouvernements puissent tout sacrifier au nom de la « guerre » à quelqu'un ou à quelque chose. Ainsi, en passant à un autre sujet, on est porté à voir dans l'OMC le dernier maillon de l'« axe du mal » composé par le FMI et la Banque mondiale, ou vice-versa le dernier garant de la paix et de la prospérité planétaire.

Quel rôle pour le droit international dans un monde devenu hystérique par les incessantes impulsions, par la voracité et la crainte ? Pour anti-historique et poussièreuse que cette pensée puisse sonner à des oreilles frappées par le fracas contemporain, il est peut-être revenu le temps de se souvenir des premiers pas du droit international classique, au lendemain de la guerre de Trente ans en Europe (ou bien celle des Quatre-vingts ans dans les Pays-Bas, qui illustrent encore mieux les profondes tensions et les bouleversements politiques, sociaux et économiques qui secouaient le continent en ce temps là). Rationalisme pragmatique fondé sur un socle de valeurs partagées⁹, esprit d'équilibre et de tolérance, on pourrait même dire esprit tout court, cela est le legs du siècle des lumières qui fut aussi le siècle dans lequel le droit international trouvait le terrain propice pour s'épanouir, en dépit des moqueries d'un Voltaire¹⁰. Si on me pardonne une comparaison qui pourrait sembler quelque peu irrespectueuse, on serait tenté d'appliquer au droit international la morale que Da Ponte et Mozart nous apprennent à la fin d'une histoire de couples d'amants égarés dans le tourbillon des sentiments réveillés pendant le temps de la révolution française :

« Fortunato l'uom che prende ogni cosa pel buon verso e tra i casi e le vicende da ragion guidar si fa. [...] E del mondo in mezzo ai turbini bella calma troverà »¹¹.

⁹ On pourrait bien appliquer au droit international et à ses adeptes, ce qu'un célèbre professeur de philosophie du droit, Joseph Raz, a dit à propos de la notion de valeur, en la comparant à l'opéra : « The thesis is that the existence of values depends on the existence of sustaining practices at some point, not that these practices must persist as long as the value does... Once they come into being, they remain in existence even if the sustaining practice dies out. Sometimes they are kept alive, as it were, by small groups of devotees », in J. Raz, *The Practice of Value*, Oxford University Press, 2003, p. 22.

¹⁰ Dans *Candide*, Chapitre Onzième, la Vieille raconte ce qui lui était arrivé pendant une attaque corsaire : « Mais ce qui me surprit davantage, c'est qu'il nous mirent à tous les doigts dans un endroit où nous autres femmes nous ne nous laissons mettre d'ordinaire que des canules. [...] J'appris bientôt que c'était pour voir si nous n'avions pas caché là quelques diamants : c'est un usage établi de temps immémorial parmi les nations policées qui courent sur mer. J'ai vu que messieurs les religieux chevaliers de Malte n'y manquent jamais quand ils prennent des Turcs et des Turques ; c'est une loi du droit des gens à laquelle on n'a jamais dérogé ». Et plus loin, à propos d'un siège où les assiégés turcs lui avaient coupé une fesse pour s'en nourrir, la Vieille dit qu'un chirurgien français « nous assura que dans plusieurs sièges pareille chose était arrivée, et que c'était la loi de la guerre ».

¹¹ Da Ponte, *Così fan tutte*, ossia *La scuola degli amanti*, Deuxième Acte, Scène XVIII. Scène finale, Molto allegro.

AFTER THE FALLS: INTERNATIONAL LAW BETWEEN POSTMODERNITY AND ANTI-MODERNITY

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I - TIMELY AND TIMELESS QUESTIONS

«What is your vision of international law at the turn of the twenty-first century?» This is the question the editors of this book posed to twenty-seven members of the «college of international law»¹.

The tradition of inviting different writers to reflect on a specific question is at least as old as the Enlightenment. I hope that recalling in this context the 1784 survey of the *Berlinische Monatsschrift* inviting responses to the question «Was ist Aufklärung?»² will not appear too pretentious. Perhaps the best known response is that of Immanuel Kant, who famously talked of the Enlightenment as mankind's exit from immaturity, defined as a situation where one cannot use one's own understanding without the guidance of another. He suggested instead «*Sapere aude!* Have the courage to use your own understanding!» as the motto of the Enlightenment. Only the free public use of reason, argued Kant, can bring about enlightenment³. The resonance of this question even today⁴ attests to its paradoxical nature as both timely and timeless. Even when asked to define our vision of international law at the turn of the twenty-first century, we cannot elude the question of what the Enlightenment means for us today. If the traditional narrative views 1648 as the accepted starting point of modern international law, the history of international law cannot be dissociated from the age of modernity, which is also the age of the Enlightenment⁵. This is the background, then, to which

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¹ O. Schachter, «The Invisible College of International Law», *New York University Law Review*, 1977, Vol. 72, p. 217.

² See *What is Enlightenment: Eighteenth-Century Answers and Twentieth-Century Questions* (J. Schmidt ed.), 1996.

³ I. Kant, *An Answer to the Question: What is Enlightenment*, in *id.* at 58-64.

⁴ *What is Enlightenment: Eighteenth-Century Answers and Twentieth-Century Questions*, *supra* note 2; M. Foucault, «What is Enlightenment», in *The Foucault Reader*, 1984, Vol. 32 (P. Rabinow ed.).

⁵ The connection between the Enlightenment and modernity, which for him is an attitude rather than a period, is explored by Michel Foucault. See Foucault, *id.*

the challenges to international law in the era of globalization as well as the phenomena collectively known as terror and the war declared against it must now be added. As a result, many of the values of international law associated with the Enlightenment and with modernity are now not only subject to critique but are also under attack. In my answer to the editors' question, I will argue that international law confronts today the 'dual challenge of postmodernity and anti-modernity. The dilemmas facing international jurists are evidence of modernity's dual crisis, distinguishing the challenges to international law in its current era from those it had faced before.

II - THE PERIODIZATION OF INTERNATIONAL LAW

October 24, 1648, traditionally viewed as the date marking the onset of modern international law, is part of what is known as the early modern period, the Age of Reason, the beginning of the Enlightenment. This is the time of John Locke (the *Two Treatises on Government* were published in 1689), of Thomas Hobbes (the *Leviathan* was published in 1651), and of René Descartes (*Méditations de prima philosophia* was published in 1641). The history of modern international law, then, cannot be dissociated from the history of modernity and of the rise of the Enlightenment.⁶

The modern international order linked to the rise of the modern state, the so-called Westphalian order, began over one hundred years before Immanuel Kant and others answered the "What is Enlightenment?" question. By then, Kant's precursors had published what have since become several of the founding texts of modern political thought. It is the association of the Peace of Westphalia with the beginning of modern international order that marks October 24, 1648 as the birthday of modern international law: this is when the so-called "Westphalian modernity" came into being.

In an introductory essay on international law published in 2001, Antonio Cassese and Andrew Clapham suggested dividing the evolution of the international legal community into two basic periods: from 1648 to World War I, and from World War I to the "present day".⁷

This fairly common and widely shared narrative of international law divides its history into two major periods. This narrative is typified by an understanding of international law as progressing from an era where it mostly regulated the relationship between states to a humanist era with an emphasis on human rights. Against this narrative, critical approaches that

⁶ For an argument on international law as growing out of the Western philosophical heritage of the Enlightenment, see G. Borradori, "Introduction: Terrorism and the Legacy of the Enlightenment", in *Philosophy in a Time of Terror: Dialogues with Jürgen Habermas and Jacques Derrida*, Vol. 1 (2003).
⁷ A. Cassese & A. Clapham, "International Law", in *The Oxford Companion to the Politics of the World*, pp. 408-411 (J. Krieger ed., 2001).

will be described below challenge this "grand history" as reductionist and as containing a "progress narrative" about international law. I briefly describe below the two approaches to the history of international law, which will provide the context for my arguments about international law at the turn of the twenty-first century.

Cassese and Clapham describe the community as conceived in the first of these periods as comprising a relatively small number of states, all "Western", all relatively homogenous, and all sharing, for most of this period, a common ideological, religious, and socio-economic outlook. This era was also marked by an absence of international political organizations. Legal rules protected sovereignty and did not place restrictions on the use of force. Responsibility for internationally wrongful acts was a "private affair" involving only the offending and victim states and without a common interest in complying with the law: only states directly injured by a wrongful act were entitled to take the remedial steps provided by law.

This first era of international law, to which I shall refer as the early modern era, began to vanish at the beginning of the twentieth century. Cassese and Clapham point to World War I as the beginning of the second period. They describe the loss of homogeneity in the international community after 1917 as due to the emergence of the Soviet Union and of decolonization in the 1960s and 1970s. Much of this period was characterized by a split of the international community into three segments (Western, socialist, and developing countries). Another feature of the post 1917-8 order is the proliferation of international organizations. Perhaps the key feature of this period, as characterized by Cassese and Clapham, is the imposition of sweeping legal restrictions on the recourse to military force and the recognition of certain values – peace, self-determination, and the protection of human dignity. As a result, violating this set of values is no longer the "private business" of the relevant states but a "public affair" involving the entire international community: any state can step in and raise concerns about respect for international law even though it has not suffered direct injury from the wrongful act. Furthermore, concerning some of the specified values, international law allocates personal criminal responsibility to people who engage in prohibited acts, in addition to state responsibility.

The values of peace (and the correlated prohibition on the use of force), human rights, and self-determination are indeed central values of late-modern international law. This era embodies values associated with modernity *per se*, and in order to distinguish it from the rise of post-1648 international law in the early modern period, we may refer to the later period as the "super" or "hyper" modern era of international law. Relying on the distinction drawn by Hedley Bull, Cassese and Clapham describe what they

call the first stage of international law as shaped by Hobbesian (realist) and Grotian (internationalist and statist) conceptions of international law and politics, and the second by the Kantian (universalist and cosmopolitan) outlook.⁸ The ideas advocated by Kant in his writing on cosmopolitanism and "perpetual peace" attest⁹, coming from the person who gave the most famous answer to the question "What is Enlightenment?", to deep intellectual connections between modern international law and the ideas associated with modernity and the Enlightenment.

Cassese and Clapham note that, although the international community embarked on a shift in this direction after 1917-8, it is only after World War II that human rights, self-determination, and the prohibition of the use of force coalesced into binding legal norms. Because these values are part of the United Nations Charter (and listed among the UN's purposes and principles¹⁰), and because the establishment of this organization is a crucial landmark in the definition of these values as binding norms, June 26, 1945 – the date the UN Charter was signed in San Francisco – can be viewed as a symbolic date marking the transformation of international law¹¹. But the roots of these developments are obviously much earlier, as evident in the rise of international humanitarian law by the end of the nineteenth century. Even humanitarian law, however, was expanded and articulated anew in the Geneva Conventions of 1949 as part of a process that has been described as the "humanization" of this law, emphasizing the protection of individuals and populations. This process unfolded only after WWII, influenced by human rights law.¹²

Cassese and Clapham's discussion of international law as comprising two eras is an instance of what Martti Koskenniemi has critically called the "epochal" or "grand history" approach to international law. Such an approach is typified, according to Koskenniemi, by conceptual abstractions implying philosophical, methodological, and political assumptions that are hard to sustain. At the same time, this approach flattens the work of individual lawyers and assumes the existence of single homogeneous periods in which international law has meant something specific, whereas international law is in fact a complex set of practices and ideas as well as

their interpretation.¹³ Moreover, Koskenniemi challenges the thesis that modern international law began with the Peace of Westphalia, pointing to the rise of modern international law scholars who advocated liberal internationalism in the second half of the nineteenth century.¹⁴ His criticism echoes that of David Kennedy who criticized, from a different perspective, the historicism that focuses on 1648 as assuming that "[b]efore 1648 were facts, politics, religion, in some tellings a 'chaotic void' slowly filled by sovereign states", whereas after 1648, "after the establishment of peace, after the 'rise of states', after the collapse of 'religious universalism', after the chaos of war, came law – as philosophy, as idea, as word".¹⁵ Kennedy points out how this narrative, which associates the rise of modern international law with the peace ending the Thirty Years War rather than with the eruption of the war, portrays international law as a response of reason to the war and as not sharing anything "with the messy collapse itself".¹⁶

Reading the "grand history" of international law together with its critiques, we might indeed conclude that this grand history is somewhat reductionist and consider the flaws of its "progress narrative". At the same time, if we consider the changes in legal norms against the background of changing political circumstances, we could indeed recognize moments of critical change in the international order that, in turn, effected critical changes in international law. Notwithstanding the developments described by Koskenniemi in the scholarship of international law from the end of the nineteenth century, it was only after WWII that self-determination, human rights, and the prohibition on the use of force became binding norms within positive international law. But the sources of these developments are in the interbellum period, in the earlier rise of international humanitarian law, and in developments in legal thought that Koskenniemi dates back to the late nineteenth century. Like Koskenniemi, then, I view international law as part of modernity, with the values of modernity and the Kantian outlook assuming primacy from the nineteenth century onward, but becoming positive legal norms only after 1945. In what follows, then, I will consider the changes at the turn of the century, another pivotal moment for the international order and for international law.

Cassese's and Clapham's narrative was published in 2001 and did anticipate various changes in its discussion of "future prospects", including a less state-

¹³ M. Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870-1960*, at 6-10 (2001).

¹⁴ *Id.*, pp. 3-5.

¹⁵ D. Kennedy, "A New Stream of International Law Scholarship", *Wisconsin International Law Journal*, 1988, Vol. 7, No. 1, p. 14.

¹⁶ *Id.*, p. 19.

⁸ *Id.* at 409; see also A. Cassese, *International Law*, 2d ed., 2005, pp. 21-45.

⁹ I. Kant, "Idea for a Universal History with a Cosmopolitan Purpose", in *Political Writings*, Vol. 41 (Hans S. Reiss ed., H.B. Nisbet trans., 1970); I. Kant, *Perpetual Peace: A Philosophical Sketch*, *id.*, p. 93.

¹⁰ UN Charter arts. 1-2.

¹¹ Possible alternative dates are October 24, 1945, the date the Charter became binding, and December 10, 1948, the date the General Assembly adopted the Universal Declaration of Human Rights.

¹² See T. Meron, "The Humanization of Humanitarian Law", *AJIL*, 2000, Vol. 94, p. 239, espec. pp. 242-248.

centered approach and growing attention to international crime and terror¹⁷. But I assume that a text published in 2001 could hardly have construed the scope and the immediacy of these changes. No one expected that 2001 would become the turning point, marking the transition to what may become, if we were to adopt the division of international law into the early modern and later modern periods, the third era of international law. Whereas the transition to the second era began in the late nineteenth century, saw the events of 1917-1918 as a watershed, and culminated in 1945, one can date the transition to the third era as beginning in 1989. If asked to choose a date to symbolize this era that would continue the highlights chronology of international law after October 24, 1648, and June 26, 1945, it would be September 11, 2001.

Two falls, then, mark the transition to this era, the fall of the Berlin Wall on November 9, 1989, and the fall of the Twin Towers on September 11, 2001. The first of these two events set in motion the transition to the current era, and the second accelerated the process leading to the new age of international law. But one could also choose September 20, 2001, when George W. Bush declared the "war on terror"¹⁸, or March 20, 2003, when the United States launched its war on Iraq, as the dates marking the transition to the new era.¹⁹ Despite the temptation to refer to it as the postmodern era of international law, one that I too will succumb to, I will argue throughout this chapter (at the risk of lacking sufficient historical perspective) that this era is actually typified not only by postmodernity but also by anti-modernity.

What follows is an attempt to substantiate my discussion of the shifts in international law after 1989-2001, when the post-1945 legal order began to reorder into the era of postmodernity and anti-modernity.

¹⁷ Cassese & Clapham, *supra* note 7, p. 411; in the 2005 edition of his treatise *International Law*, Cassese suggests a fourfold division of the "historical evolution of the international community": from 1648 to 1917, from 1917 to 1945, from 1945 to 1989, and from 1989 to the present. Cassese, *supra* note 8, pp. 22-45.

¹⁸ Address before a Joint Session of the Congress on the United States Response to the Terrorist Attacks of September 11, pub. Papers 1140 (Sep. 20, 2001), available at <http://www.whitehouse.gov/news/releases/2001/09/20010920-8.html>

¹⁹ For other suggestions to look at 9/11 and at the war on Iraq as transformative moments in international law see, respectively, A.-M. Slaughter & W. Burke-White, "An International Constitutional Moment", *Harvard International Law Journal*, 2002, Vol. 43, No. 1; I. Gassama, "International Law at a Crossroads: The Invasion of Iraq in Context", *Emory International Law Review*, 2004, Vol. 18, No. 1. Jacques Derrida pointed out, in the context of 9/11, the problematic practice of choosing specific historical dates to represent a supposedly universal calendar, the need to consider the politics of this choice, and the way that comparative human losses outside American or European spaces do not create as intense an upheaval as that generated by 9/11. See G. Borradori, "Autocommunity: Real and Symbolic Suicides - A Dialogue with Jacques Derrida", in *Philosophy in a Time of Terror: Dialogues with Jürgen Habermas and Jacques Derrida*, *supra* note 6, pp. 85-92.

III - BETWEEN FALLS

Both 1648 and 1945 mark war endings. David Kennedy, as noted, criticized the choice of 1648 as the inception date of modern international law instead of, for instance, the date marking the beginning of the Thirty Year War. Indeed, we apparently tend to mark the ending dates of great wars as the beginning dates of new eras in international law. Thus, after 1648, the second era is associated with 1917-8 or 1945. By contrast, the date chosen in an "epochal" approach to the history of international law to represent the third era, 2001, does not mark the end of a war but rather the *beginning* of one. The earlier date marking the beginning of the transition to this era, 1989, does mark the end of a war although still very different, in two important senses, from that of 1648 and from that of 1918 or 1945. First, it marks the end of a *cold* war, and second, unlike 1648 or 1945, although perhaps like 1918, it marks the end of a war but begins a process that culminates in the beginning of another. Hence, when thinking of the current era of international law, we should keep in mind that this era develops in the shadow of two wars, albeit wars very different from those marking transitions in previous eras. The transition to the "third era" begins in the shadow of a fall representing the end of the Cold War, and culminates in a fall representing the beginning of a so-called "war on terror"²⁰. Our era, then, is marked by the beginning rather than (or not only by) the end of a war, thus starting, in Kennedy's terms, with the "messy collapse" rather than with the peace that comes after it. This is a significant fact that cannot be overstated, especially given the nature of this war, as discussed below.

Although any narration of history and any periodization is obviously problematic and reflects the narrator's choices, I would still like to address briefly the relationship between the two falls, that of 1989 and that of 2001.

Does anyone still recall the talk about the "peace dividend", the cash flow we would supposedly enjoy after 1989 from the money previously invested in war and security? As the cold war was coming to an end, a few buzzwords were used to describe how the world would look like in the post-Communist era, be it the enticing promise of the "peace dividend" or Francis

²⁰ For an insightful critique of the use of the term "war" in the context of the "war on terror" and on the implications of using this terminology in this context for legitimizing violence see F. Megret, "War? Legal Semantics and the Move to Violence", *EJIL*, 2002, Vol. 13, p. 361; see also M. Koskeniemi, "International Law in Europe: Between Tradition and Renewal", *EJIL*, 2005, Vol. 16, p. 113, p. 122, (on the "fight against terrorism" as a form of kitsch invoked to defend an easy truth, a nostalgic longing for an abstract mankind, and to curtain off the death caused by this very fight itself). For Derrida's critical discussion of the use of such terms as "terror", "international terrorism", and "war on terror" in the wake of 9/11, see G. Borradori, *supra* note 19, pp. 102-109.

Fukuyama's then popular thesis on the "end of history"²¹. For a while, some were tempted to believe in a "new world order", a faith supported by the prospects of peace that in the early 1990s seemed to emerge in three major areas of protracted ethnic, national, and religious conflicts – South Africa, Northern Ireland, and Israel-Palestine – and by the earlier demise of the military juntas in the Southern Cone.

Iraq's invasion of Kuwait on August 2, 1990 did not dim this picture in the eye of the beholders. Quite the opposite: the Security Council exercising its authority under Chapter VII of the United Nations Charter and authorizing the use of the collective security system, thus legitimizing the U.S.-led war against Iraq, strengthened faith in a new world order where individual rogue actors can be identified and effectively treated. President Bush's announcement of a "new world order" epitomized this faith²². The 1991 Gulf War was thus understood, at first glance, as an illustration of how the post-Cold War order had rescued the Security Council from the mutual superpower vetoes that had so far largely frozen its work, and allowed its original purpose to finally materialize in the form of an effective use of the collective security system.

But new conflicts erupted soon after, most notably the 1993-1994 events in Yugoslavia and Rwanda. As the strong grip of the Communist regimes loosened, national and ethnic interests in Central and Eastern Europe re-emerged. The bloody turn that these developments assumed in Europe, the discovery that after fifty years Europe was again burning, demanded a response from the Security Council. The most notable decision in 1993 concerning this threat to international security and peace under Chapter VII of the UN Charter was the decision to establish the International Criminal Tribunal for Yugoslavia (ICTY). This crucial development, contested by defendants at the Court who argued that establishing a court was *not* within the Security Council's mandate according to Chapter VII²³, is important on several levels. It appeared to resemble the Nuremberg model but with many crucial differences, including the fact that, unlike Nuremberg, the ICTY was established as the war was still under way and its creation marked a turn to law as the international community's major answer to an ongoing humanitarian crisis. The following year, when news came of the genocide in Rwanda, the "international community" could not afford to be seen as failing to take a similarly serious step when Africa was burning. Thus, when

²¹ F. Fukuyama, "The End of History?", *The National Interest*, No 16, pp. 3-18 (Summer 1989), available at <http://www.wesjones.com/ech.htm>.

²² President George H. W. Bush's Address to a Joint Session of Congress and the Nation (Sep. 11, 1990), available at http://en.wikisource.org/wiki/Toward_a_New_World_Order.

²³ An argument that the ICTY rejected in the *Tadić* decision. See *Prosecutor v. Tadić*, Case No. IT-94-1, *Decision on Defense Motion for Interlocutory Appeal on Jurisdiction*, at 26-48 (Oct. 2 1995).

the Rwandans asked for help, the Security Council put the ICTY statute on the screen and clicked "replace all" to substitute "Yugoslavia" for "Rwanda"²⁴. The establishment of these two courts marked the revitalization of international criminal law and led to renewed interest in a permanent International Criminal Court (ICC), which was indeed created by the Rome Statute of 1998. This development, together with the Pinochet litigation in Europe that determined Augusto Pinochet could be extradited from the UK to Spain for crimes he had committed when officiating as president of Chile²⁵, rejuvenated the second prong of international criminal law – universal jurisdiction.

While the Security Council was using its authority under Chapter VII to establish Courts, NATO intervened in Kosovo in 1999 without legal authorization from the Security Council. A crisis of legitimacy was thereby created in international law, *inter alia* raising an idea later cited to support the 2003 war on Iraq stating that use of force can be "legitimate" even if illegal (see below)²⁶.

By the mid-1990s, then, the "new world order" was already collapsing, clarifying that the end of the Cold War had created a new era of instability in Europe. At the same time, the American presence in the Gulf enabled by the Security Council's endorsement of the 1991 Gulf War made possible by the end of the Cold War, which had allowed for consensus around this war to crystallize in the Security Council, materialized as a continued American presence in Saudi Arabia. This presence played a central role in the creation of anti-American hostility in such groups as Al-Qaeda, leading to the 9/11 attack on the World Trade Center and the Pentagon²⁷. Thus, the chain of events that started with the fall of the Berlin Wall, culminated in the fall of the Twin Towers in New York. The events that were supposed to lead to the "peace dividend" and "the end of history" led to the era of the so-called "war on terror"²⁸. The "new world order" was actually found to be a new form of disorder, typified by ongoing conflict and lack of security. The 9/11 attacks and the subsequent "war on terror" were characterized as wars with no clear

²⁴ "We asked for help to catch people who ran away and to try them properly in our own courts", a Rwandan diplomat told Philip Gourevitch. "But the Security Council just started writing 'Rwanda' under the name 'Yugoslavia' everywhere". P. Gourevitch, *We Wish to Inform You that Tomorrow We Will be Killed with Our Families: Stories from Rwanda*, 1998, p. 252. Obviously, this is only a metaphor and other differences prevail between the two statutes.

²⁵ *Regina v. Barthe and the Commissioner of Police for the Metropolis and others EX Parte Pinochet*, 2000, 1 A.C. 61.

²⁶ "Independent International Commission on Kosovo", *Kosovo Report* (2000).

²⁷ See The National Commission on Terrorist Attacks, *The 9/11 Commission Report: Final Report of the National Commission on Terrorist Attacks Upon the United States*, 2004, p. 48, p. 59.

²⁸ As Derrida has noted, however, the 9/11 events are also a distant effect of the Cold War, leading back to the time the U.S. had provided training and weapons to the enemies of the Soviet Union in Afghanistan, who now became the enemies of the U.S. See Borradori, *supra* note 19, at 92.

beginning and no distinct end, and without defined parties. They are not fought between states and blur the lines traditionally drawn between war and peace, and between civilians and combatants.²⁹ The understanding that today's and perhaps tomorrow's wars are not fought between states may perhaps cause many to wonder whether the post 9/11 order, or rather disorder, marks a departure from the Westphalian system. Note that the events from the fall of the Berlin Wall, through the fall of the World Trade Center, and up to the war against Iraq in 2003 are linked by a major characteristic of this era: the existence of only one superpower at the global level. This outcome at the end of the Cold War allowed the U.S. to wage the two Iraq wars – the first after achieving Security Council authorization for the war given it was the only superpower, and the second by ignoring the lack of such authorization given it was the only superpower. The shift from the Westphalian system may thus be evident not only in new forms of armed conflict, in the rise of non-state-actors, and in globalization³⁰, but also in the existence of only one superpower, which de facto challenges the post-1648 and post-1945 state-based global orders³¹.

IV - CHANGES IN INTERNATIONAL LAW AFTER THE COLD WAR

A - International Law between Universalization and Globalization

The new world disorder that emerged in the late twentieth century is characterized by the effects of globalization. In this sense, whereas the post-1945 order put universalization at its center, the current era is typified by globalization. The two should not be confused. As Jean Baudrillard noted, it may be worthwhile to distinguish between "universalization", which is about values, human rights, freedom, and democracy, and "globalization" which is about technology, market, and information. Baudrillard points out that universalization and globalization are not only not identical but also mutually

²⁹ Thus, Orna Ben-Naftali recently described the period when "we had some clarity: boys were boys; girls were girls...; war was distinct from peace, wars were fought between states and against combatants, as distinct from civilians", as belonging to "that by-gone era known as modernity". O. Ben-Naftali, "The Extraterritorial Application of Human Rights", *ASIL Proceedings*, 2006, Vol. 100, pp. 90-91. On the declared "war on terror" as open-ended and infinite in both space and time, given the lack of clarity about the identity of the enemy and the deviance from the model of wars fought between states, see Megret, *supra* note 20.

³⁰ On globalization and post 9/11 geopolitics as, together, challenging the Westphalian order that was centered on sovereign states, and for a discussion of the possible future of this order, see R. Falk, "Revisiting Westphalia, Discovering Post-Westphalia", *International Journal of Ethics*, Vol. 6, p. 311; on globalization as challenging the Westphalian paradigm and on the need to shift to a "transnational conflict" paradigm, see E. Benvenisti, "Exit and Voice in the Age of Globalization", *Michigan Law Review*, 1999, Vol. 98, p. 167.

³¹ International relations theory and public debate in the U.S. have been discussing the "unipolarity" question since 1989. See e.g. C. Krauthammer, "The Unipolar Moment Revisited", *The National Interest*, 2002, Vol. 70, p. 5.

exclusive".³² The Universal Declaration of Human Rights and the human rights regime that followed represent the universalization project, whereas international law in the later twentieth century develops against the background of globalization, of which it is indeed part.

The two processes, then, are separate but still interrelated, and the threat of globalization to universalization can hardly be overstated. One area illustrating this tension in the realm of international-law is the legal controversy concerning the supply of generic AIDS drugs in South Africa and Brazil, where the right to health that is part of the universal human rights project clashed with globalized intellectual property rights.³³ Developments in international trade law following the end of the Cold War with the establishment of the World Trade Organization in 1995, even as it includes a sophisticated legal system in the form of the Dispute Settlement Mechanism and the Appellate Body, challenge the universalizing values of late modern international law.³⁴

B - The Rejuvenation of International Criminal Law and the Turn to Transitional Justice

The creation of the International Criminal Tribunals for Yugoslavia and Rwanda and the Pinochet litigation that, as noted, took place in the period between the two falls, strengthened the previously limited discipline of international criminal law and eventually led to the establishment of the ICC. This upturn in international criminal law and, specifically, the decision that establishing a court is a measure within the Security Council's authority under Chapter VII, makes international criminal law a central response to threats to, or breaches of, international peace and security. The new world order, or indeed disorder, turned out to be a new world legal order, largely focusing the energies of international law on international criminal law. Notably, in the context of the humanitarian crisis in Darfur, the Security Council chose in 2005 to refer the situation to the ICC.

Regardless of the importance of accountability for war crimes and crimes against humanity and the need for stronger enforcement mechanisms of human rights and humanitarian law, and without entering the debate on whether criminal law is indeed a proper response to wide-scale crimes committed during conflicts, or whether retributive justice furthers or delays

³² See J. Baudrillard, *Paroxysm: Interviews with Philippe Petit* (Chris Turner trans.), 1998, p. 11.

³³ I discuss this "patients v. patents" clash in A. Gross, "The Right to Health in an Era of Privatization and Globalization: National and International Perspectives", in *Exploring Social Rights* (D. Barak-Erez & A. Gross eds.), Oxford, Hart, 2007, pp. 289-332.

³⁴ On the WTO as part of "managerial" international law in an era where the "international" may mean either human rights or free trade, see M. Koskeniemi, "The Fate of Public International Law: Between Technique and Politics", *The Modern Law Review*, 2007, Vol. 70, p. 1.

peace, the turn to international criminal law attests to the need to address a series of bloody events. These events came about instead of the expected peace dividend, and the decision was to deal with them by setting up courts. The role of international criminal law in rejuvenating international law itself cannot be ignored either. With the rise of international criminal law, no one can again ask "is international law really law?": we can put people in prison. International lawyers can now be rescued from their previous marginality within the legal profession, which was further accelerated when the new world order turned into disorder, and can find new prestigious jobs in the various tribunals.³⁵

But if the Yugoslavia and Rwanda courts were *ad hoc* responses to two specific crises, the creation of the ICC marks the transition to a period of permanent insecurity. As Ruti Teitel puts it, it is part of an era "characterized by the *fin de siècle* acceleration of transitional justice phenomena associated with globalization and typified by conditions of heightened political instability and violence"³⁶, in a period typified by "war in a time of peace, political fragmentation, weak states, small wars, and steady conflict".³⁷

The backlash to the growing significance of international criminal law, however, should not be underestimated. Signs of it are, for instance, the limits on universal jurisdiction emerging from the amendments to the Belgian universal jurisdiction statute, and the International Court of Justice (ICJ) decision to favour the immunity of acting foreign ministers over international criminal law.³⁸ And yet, these developments do not undermine the importance of the rise and the "normalization", in Teitel's terms, of international criminal law as indicative of the current era of international law. International criminal law embodies the promises of universalism and cosmopolitanism, the idealism of international law and its cherished dream of universal values enforceable, at least in theory, anywhere and against anyone. At the same time, the turn to international criminal law reflects a need to make international law relevant when it appears to be at its vanishing point³⁹, and when the faith in it as shifting us to universal and *perpetual peace* – the Kantian idea – confronts a reality of *perpetual war*. At times, it seems that the logic behind the rise of international criminal law is that this

³⁵ For a reflection on the role of international law professionals in the creation of the ICC see I. Tallgren, "We Did It? The Vertigo of Law and Everyday Life at the Diplomatic Conference on the Establishment of an International Criminal Court", *LJIL*, 1999, Vol. 12, p. 683.

³⁶ R. Teitel, "Transitional Justice Genealogy", *Harvard Human Rights Journal*, 2003, Vol. 16, pp. 69-71.

³⁷ *Id.* p. 90.

³⁸ *Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v. Belg.)*, ICJ, 3 (Feb. 14, 2002).

³⁹ "[I]f international law is, in some ways, at the vanishing point of law, the law of war is, perhaps even more conspicuously, at the vanishing point of international law", H. Lauterpacht, "The Problem of the Revision of the Law of War", *BYBIL*, 1952, Vol. 29, p. 360, pp. 381-382.

is the only thing we international lawyers can *really* do about this war and still remain relevant: pretend we can contain it through recourse to international criminal law. More broadly, the turn to international criminal law and its model of retributive justice is one side of the coin in the rise of the overarching theory and practice of "transitional justice". The other side is the turn to restorative justice, most notably in the South African Truth and Reconciliation Commission. Together, with the exponential growth of transitional justice as both an academic discipline and an expert export industry, they attest to the role of transitional justice (and international criminal law as part of it) as perhaps the only progressive narrative available to the postmodern age.⁴⁰

V - A NEW WORLD DISORDER: ANTI-MODERNITY AND POSTMODERNITY

A - Postmodernity: The End of the Grand Narrative

It is tempting to call the current era of international law the postmodern era, not only because it succeeds modernity chronologically but also because of its features. If postmodernism refers both to the era in which we live and to the cultural response to it, each nurturing the other⁴¹, the era "after the falls" could be said to include these two features of postmodernism. Lyotard argues that the Enlightenment narrative of the hero of knowledge working toward a good ethico-political end of "universal peace" (recall Kant) is typical of the metanarratives of modernity. His famous definition of the postmodern is "incredulity toward metanarratives" replaced by a "multiplicity of justices"⁴². The processes of globalization, as distinct from universalization, the transformation of the Westphalian state-centered order and the so-called "fragmentation" of international law⁴³ – all may mark the transition from modern and late or "super-modern" international law to postmodernity. Yet, this transition is marked not only by developments in international law but also by related changes in international law scholarship. Developments within this scholarship, especially since the 1990s, have sought to challenge the modern narrative of international law that had attempted to hold on to

⁴⁰ I discuss some of the problems in this progress narrative of transitional justice in A. Gross, "The Constitution, Reconciliation and Transitional Justice: Lessons from South-Africa and Israel", *Stanford Journal of International Law*, 2004, Vol. 40, p. 47.

⁴¹ J. M. Balkin, "What is Postmodern Constitutionalism?", *Michigan Law Review*, 1992, Vol. 90, p. 1966, pp. 1968-1972.

⁴² J.-F. Lyotard, *The Postmodern Condition: A Report on Knowledge* (G. Bennington & B. Massumi trans.), 1984.

⁴³ M. Koskeniemi & P. Leion, "Fragmentation of International Law? Postmodern Anxieties", *LJIL*, 2002, Vol. 15, p. 553. As Koskeniemi and Leion note, in the post-1989 period the structure provided by the East-West confrontation was replaced by a "kaleidoscopic reality" in which competing actors struggle to create competing normative systems. *Id.*, p. 559.

one metanarrative of progress about humanity. Feminist critiques⁴⁴, postcolonial critiques⁴⁵, queer critiques⁴⁶, all pointed to the failure of international law to tell one story of humanity. More generally, these and other forms of critical legal scholarship (*inter alia* following the post-structuralist work of such scholars as Derrida and Foucault) pointed to contradictions in international law, showing how, as a discipline and a body of knowledge, it is a product of power⁴⁷. Examining the relationship between law and power is obviously not a novelty in the scholarship of international law. Unlike the realist approach to international law, however, which in its extreme version had argued that international law hardly matters in the face of power politics, critical legal scholarship claimed that law mattered a lot, but tried to show its complex relationship with the power/knowledge system⁴⁸. By pointing to the role of international law as inherent in the colonial project, critical scholarship showed how the modern artifact called international law actually served not just for "progress", and exposed its dark side. Later scholarship also exposed the "dark side" of human rights and humanitarian law as such⁴⁹.

The rise of this scholarship in the 1990s, following the first fall, reflected developments taking place more generally in academic scholarship and social movements with roots in the late 1960s but gaining new shape and momentum after the end of the Cold War. Certainly, not all feminist or third world scholarship is postmodern or post-structuralist in its internal methodology and much of it uses modern and liberal arguments. But despite the differences between the various forms of critiques, all are postmodern in their challenge to the grand story of mankind that had previously been told by international law. Together with the fragmentation of international law, globalization, and the shift from state-centered law and order to a growing focus on non-state-actors, this change is part of the transition to the current era. In this sense, the "third era" is characterized by features of postmodernism, namely, the death of man (and the critique of the essentialist conceptions of human being built around western white man), the death of history (the criticism of history as progress) and the death of metaphysics

⁴⁴ See, e.g., H. Charlesworth, C. Chinkin & S. Wright, "Feminist Approaches to International Law", *AJIL*, 1991, Vol. 85, p. 613.

⁴⁵ See, e.g., T. Anghele, *Imperialism, Sovereignty, and the Making of International Law* (2004); B. Rajagopal, *International Law from Below* (2003).

⁴⁶ See, e.g., W. Morgan, "Queering International Human Rights Law", in *Law and Sexuality* (C. F. Stychin & D. Herman eds.), 2001, p. 208; A. Gross, "Sex, Love and Marriage: Questioning Gender and Sexuality Rights in International Law", *LJIL*, 2008, Vol. 21, No 1, pp. 235-253.

⁴⁷ See e.g. Kennedy, *supra* note 15; M. Koskeniemi, *From Apology to Utopia: the Structure of International Legal Argument* (Reissue with new Epilogue), 2005.

⁴⁸ The reference is of course to Michel Foucault, *Power/Knowledge: Selected Interviews & Other Essays* (C. Gordon ed.), 1980.

⁴⁹ D. Kennedy, *The Dark Side of Virtue: Reassessing International Humanitarianism* (2004).

(understood as a critique of the "metaphysics of presence" and the quest for the "real", which conceals the attempt to enclose the world within an illusory but absolute system)⁵⁰.

B - Anti-Modernity: Attacks on *jus ad bellum*, *jus in bello*, and Human Rights Law

An analysis of the third era of international law, especially since the second fall, must take into account that anti-modernity is as much a component of it as postmodernity. Discernible in the so-called "war on terror" declared after 9/11 is an attempt to rewrite the norms of international law so as to reverse some of the main norms associated with the late or super-modern era. For methodological reasons, I will divide the discussion into two. In the sphere of *jus ad bellum*, the most important development is the rise of the so-called Bush Doctrine. As part of the 2002 National Security Strategy of the United States of America⁵¹, the U.S. announced it would invoke "preemptive self-defense" to use armed force against "emerging threats before they are fully formed"⁵². As Thomas Franck noted, the meaning of the Bush Doctrine is that the U.S. is free to use force against any foe it perceives as a potential threat to its security, at any time of its choosing, and with any means as its disposal⁵³. This attempt to rewrite the law concerning the use of force, which served to justify the 2003 Iraq war, is clearly an attack on the prohibition of the use of force and the correlating value of peace and peaceful resolution of conflict enshrined in the post-1945 international legal order and in the UN Charter itself⁵⁴. The prohibition on the use of force as a - utopian - norm of international law survived many years of armed conflict. The International Court of Justice (ICJ) insisted on its status as a customary norm, at the price of relaxing the "general practice" demand required for the recognition of customary international law. But the ICJ did so based on its finding that breaches of the prohibition of the use of force were indeed viewed as transgressions rather than as indicators of a new rule⁵⁵. Such a determination

⁵⁰ These three theses are identified by Jane Flax as characterizing the postmodern position, see J. Flax, *Psychoanalysis, Feminism and Postmodernism in the Contemporary West*, 1990, pp. 32-35. For a discussion see S. Benhabib, *Situating the Self: Gender, Community and Postmodernism in Contemporary Ethics*, 1992, pp. 203-241.

⁵¹ The White House, *The National Security Strategy of the United States of America* (Sept. 2002), available at <http://www.whitehouse.gov/nsc/nss.pdf>.

⁵² For a discussion see C. Gray, "The U.S. National Security Strategy and the New 'Bush Doctrine' on Preemptive Self-defense", *Chinese Journal of International Law*, 2002, Vol. 1, p. 437; J. Paust, "Use of Armed Force Against Terrorists in Afghanistan, Iraq and Beyond", *Cornell International Law Journal*, 2002, Vol. 35, p. 533.

⁵³ T. Franck, "What Happens Now? The United Nations After Iraq", *AJIL*, 2003, Vol. 97, p. 607, p. 619. Which, in Franck's words, "would stand the Charter on its head." *Id.* p. 619.

⁵⁴ *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. U.S.)*, Merits Judgment, 1986 ICJ 14, pp. 97-100 (paras. 183-89).

may be more difficult to make today, following the announcement of the Bush doctrine and the war on Iraq. Indeed, the new U.S. policy regarding the use of force after 9/11 was aptly described by Franck as one that openly repudiates the obligation in Article 2(4) of the UN Charter. In his view, this repudiation is part of a broad plan to disable all supranational institutions and constraints of international law on national sovereignty.⁵⁶

In terms of *jus in bello*, and especially regarding international humanitarian law but also more generally affecting human rights law, some of the attempts to change current norms as part of the "war on terror" constituted an attack on the post-1945 international legal order as well. In this context, we should consider the different arguments attempting to justify norms excluding certain categories of persons from the protection of humanitarian and human rights law. The rejuvenation of the category of "illegal combatants", the suggestions that the Geneva Conventions may not apply to such individuals, the attempts (even if later abandoned) to dilute *ad maximum* the prohibition of torture⁵⁷, the actual recourse to torture⁵⁸, the establishment of military commissions that can detain people and the attempts to argue that no judicial review should be available for their detention, the power given to the president to decide on the detention of people without trial⁵⁹ – all marked a serious attack on human rights, humanitarian law, and their universality as central features of the post-1945 order.⁶⁰ Notably, the U.S. government

⁵⁶ Franck, *supra* note 33, p. 608 & p. 610. For an argument that the Bush doctrine did not change the customary international legal and UN Charter prohibition of the use of force except as authorized under Article 51 see J. T. Gathii, "Assessing Claims of a New Doctrine of Pre-Emptive War Under the Doctrine of Sources", *Osgoode Hall Law Journal*, 2005, Vol. 43, p. 67.

⁵⁷ See J. S. Bybee, *Memorandum for Alberto R. Gonzales, Counsel to the President, Re: Standards of Conduct for Interrogation under 18 U.S.C. §§ 2340-2340A*, August 1, 2002, available at: http://www.humanrightsfirst.org/us_law/etn/gonzales/memos_dir/memo_20020801_ID_%20Gonz.pdf

⁵⁸ For a discussion of the infamous "torture memo" (*id.*), and the practice of torture see M. Hatfield, "Legitimacy, Identity, Violence and the Law", *South Central Review*, 2007, Vol. 24, p. 131; M. Nowak, "What Practices Constitute Torture? U.S. and UN Standards", *Human Rights Quarterly*, 2006, Vol. 28, p. 809; J. Waldron, "Torture and Positive Law: Jurisprudence for the White House", *Columbia Law Review*, 2005, Vol. 105, p. 1681.

⁵⁹ For a critique of the Bush administration's position whereby the executive branch can classify persons as enemy or unlawful combatants and detain them without trial, see J. Paust, "Judicial Power to Determine the Status and Rights of Persons Detained Without Trial", *Harvard International Law Journal*, 2003, Vol. 44, p. 503.

⁶⁰ Executive and legislative actions taken by the U.S. in the "War on Terror" – including the establishment of military tribunals for aliens, detentions without charge or trial in ways that frustrate the possibility of *habeas corpus*, the president's authorization to designate people as members of such categories as "alleged international terrorists" thereby making them subject to detainment, attempts to deny the application of the Third Geneva Convention to people detained in Guantanamo, and attempts to obfuscate the prohibitions on torture accompanied by evidence of torture and inhumane treatment in Guantanamo and Abu Ghraib – all led commentators to argue that we are witnessing not just an abandonment of the rule of law but rather a "concerted attack" on it. See J. Magato & B. Sheehy, "Torturing the Rule of Law: USA and the post 9-11 Legal World", *St. John's Journal of Legal Commentary*, 2007, Vol. 21, p. 689. See also J. Paust, "Post 9/11 Overreaction and Fallacies Regarding War and Defense, Guantanamo, The Status of Persons,

argued that Common Article 3 of the Geneva Conventions does not apply to detainees at Guantánamo. This specific position was rejected by the U.S. Supreme Court⁶¹, and attempts to circumscribe judicial review and legal protections were to some extent restrained following dissent to these positions within the government, the civil society, and through legal action. The positions adopted by the U.S. administration regarding *jus ad bellum*, *jus in bello*, and human rights were also rejected by much of the international community. Nevertheless, expressions of support for these positions by the only remaining superpower that still trades on its reputation as, supposedly, the leader of the free and democratic world, marked a departure from the extensive attempts of human rights law and humanitarian law to create norms applying to humanity as a whole⁶². Forty-nine states from five continents, including some prominent members of the European Union, had been part of the so-called "Coalition of the Willing" assembled toward the 2003 war on Iraq⁶³. At least implicitly, then, they supported the legal theories behind it. Attacks on the value of modernity are indeed not new and, as Foucault has noted, modernity found itself struggling against what he called "countermorality" ever since its formation⁶⁴. What is new in the post-2001 era is the prominence and the relative success of the attacks on modernity and international law, which are not initiated by "pariah states", considered enemies of democracy, but by leaders of the "international community".

Unlike the critiques on the notion of universal humanism, which were postmodern and resting on modern values⁶⁵, attacks on the universality of rights invoking the war on terror represent an anti-modern move that seeks to deny this achievement of modernity. Coupled with the attack on the prohibition of the use of force unless in self-defense (or through the

Treatment, Judicial Review of Detention and Due Process in Military Commissions", *Noire Dôme Law Review*, 2004, Vol. 79, p. 1335.

⁶¹ *Hamdan v. Rumsfeld*, 126 S. Ct. 2749. The value of this ruling has been questioned, however, given the new Military Commissions Act of 2006 legislated in its wake, which arguably erodes the judgment's value. See M. Happold, "Hamdan v. Rumsfeld and the Law of War", *Human Rights Law Review*, 2007, Vol. 7, p. 418, pp. 430-431.

⁶² In this context, one should also recall the American failure to comply with precautionary measures of the Inter-American Commission on Human Rights regarding Guantánamo Bay, a failure the Commission held had resulted in irreparable prejudice to the fundamental rights of the detainees at Guantánamo, including their right to liberty and to humane treatment. Inter-American Commission on Human Rights, *Resolution 2006 On Guantánamo Bay Precautionary Measures* (July 28, 2006), available at: <http://www.whitehouse.gov/news/releases/2003/03/03030327-10.html>

⁶³ The White House, Operation Iraqi Freedom (Mar. 27, 2003), available at <http://www.whitehouse.gov/news/releases/2003/03/03030327-10.html>.

⁶⁴ Foucault, *supra* note 4, p. 39.

⁶⁵ After all, in Foucault's words, critique is "the handbook of reason that has grown up in the Enlightenment". See Foucault, *supra* note 4, p. 38. He also explored the relationship between critique and the Enlightenment (a topic that is also central to the work of the Frankfurt School) in M. Foucault, "What is Critique?", in *What is Enlightenment: Eighteenth-Century Questions and Twentieth-Century Questions*, *supra* note 2, p. 382.

authorized use of the UN collective security system), we can understand these manifestations of the post-9/11 order as anti-modern in their approach toward modern/super-modern international law. Although sweeping attempts to negate the application of humanitarian and human rights law to the war on terror have been somewhat curtailed, bodies of international law as well as laws regulating the use of force have clearly become the targets of an open war. The attack on modernity and its values, which rose to prominence in the post-1945 era, is evident in the denial of values typical of modernity and late-modernity, such as the universality of human rights, the prohibition on torture, and the separation of powers that denies authority to the executive on decisions concerning detention. Concerning the latter, Judith Butler noted that, when the executive branch assumes the power of the judiciary and invests the president with decisions on these matters, it is "as if we have returned to a historical time in which sovereignty was indivisible, before the separation of powers has instated itself as a precondition of political modernity."⁶⁶ The attempts to withdraw from the prohibition on torture, a prohibition associated with the rejection of the absolute sovereign model⁶⁷, and the Bush Doctrine licensing the use of force without the post-1945 constraints, should also be understood as attacks on some of the core values of modernity.⁶⁸

Ironically, the first fall, which was associated with the triumph of democratic values, is to a large extent what allowed this anti-modern stand to emerge after the second fall: the status of the U.S. as the only superpower enabled its unilateral proclamation of a new order for the war it waged after 9/11. Another irony is the fact that this anti-modernity came as a response to attacks that, in turn, may also be understood as attacks on some features of modernity.

These attacks on humanitarian law and human rights law, and specifically the detentions at Guantánamo, were famously described as creating a "legal black hole" where no legal norms supposedly exist⁶⁹. The analysis of this and

⁶⁶ J. Butler, *Precautions Life*, 2004, p. 54.

⁶⁷ Jeremy Waldron described the prohibition on torture as "a legal archetype emblematic of our determination to break the connection between law and brutality and to reinforce its commitment to human dignity." In his words, torture is widely understood as the "paradigmatic human rights abuse". See Waldron, *supra* note 58, pp. 1739-1744.

⁶⁸ In this context, see Koskeniemi's description of the war on Iraq. In his view, because it was carried out in the name of "freedom," this war violates the key Kantian sense of freedom as self-determination and autonomy, and is a scandal in its denial of the law of the law of peace under the United Nations Charter. M. Koskeniemi, "Constitutionalism as Mindset: Reflections on Kantian Themes about International Law and Globalization", *Theoretical Inquiries in Law*, Vol. 8, p. 9, p. 27.

⁶⁹ See, e.g., Amnesty International, *USA: Detainees in Guantánamo Bay Should Not Be Beyond the Protection of the Law*, AMR 51/186/2002 (Dec. 13, 2002), available at <http://web.amnesty.org/library/index/ENGLAMR511862002>, where the detainees at Guantánamo are described as being in a "legal black hole".

other situations as cases where law was suspended and replaced with power exercised over "bare life" was highly influenced by Giorgio Agamben's *Homo Sacer*, published in 1995 and translated into English in 1998, just in time for the events that unfolded after 9/11.⁷⁰ In his follow-up book, *State of Exception*, Agamben indeed described the situation of post 9/11 "detainees" as "the object of a pure *de facto* rule, of a detention... entirely removed from the law...." The state of exception is, in his words, "a suspension of the juridical order itself...."⁷¹ But although the abandonment of humanitarian and human rights law in the name of the war on terror does deprive individuals from the protection of these bodies of law, this abandonment is not *extra legem* but often *intra legem*. There is no "legal black hole" because the law itself, as re-articulated and although in a way that is *contra legem* from the perspective of international law, is constitutive of the detentions and deaths allowed by the new rules of the "war on terror".⁷² What disappears in this relationship is the set of laws purported to protect the person from power. What has been abandoned, then, are the rights, or, in Hannah Arendt's terminology, perhaps even the right to have rights,⁷³ but not law itself. The attempts to create what Harold Koh has called "extralegal 'rights-free' zones and individuals"⁷⁴, even if founded on law, are an attack on the values of international law, on its norms as enshrined in the post-1945 legal order, and on modernity itself because of their framing as rights-free.

VI - HUMANITARIAN LAW IN TIMES OF PERPETUAL WAR

The editors of this book asked international lawyers born between 1955 and 1965, what they called the "generation of the sixties", the following question: "What is your vision of international law at the turn of the twenty-first century?" This is a generation that arose, say the editors, after the May 1968 events, too young for this event to be its "landmark" but too old for the Berlin Wall in 1989 and 9/11 in 2001. Its coming of age between these landmark events, however, may actually be this generation's distinguishing mark. 1968 is often viewed in intellectual history as the harbinger of post-structuralism and postmodern thought, which were gaining ground in academia when this book's participants were coming of age. The Berlin Wall

⁷⁰ G. Agamben, *Homo Sacer: Sovereign Power and Bare Life* (Daniel Heller-Roazen trans.), 1998.

⁷¹ Giorgio Agamben, *State of Exception* (Kevin Attel trans.), 2005, pp. 3-4.

⁷² For an analysis of the way places such as Guantánamo are not places where law is suspended but rather places where law operates in excess, when the detainees are made the focus of legal classification and are subject to a panoply of regulations, see F. Johns, "Guantánamo Bay and the Annihilation of the Exception", *EJIL*, 2005, Vol. 16, p. 613.

⁷³ H. Arendt, *The Origins of Totalitarianism*, 1968, pp. 267-302.

⁷⁴ H. Koh, "On American Exceptionalism", *Stanford Law Review*, 2003, Vol. 55, p. 1479, pp. 1497-1502.

fell when the book's contributors were reaching a median age of twenty-nine, early enough in their career as international lawyers to be of influence.

1968 and 2001 are the two benchmarks the editors chose for the "sixties generation" coming-of-age period. For those of us living in the Middle East, and specifically in Israel/Palestine, there are two additional significant dates preceding each of these benchmarks by a year. 1967 marks the beginning of Israel's occupation of the West Bank and Gaza, and 2000 is the date marking the beginning of the second Intifada, a significant turning point in the Israeli-Palestinian conflict and in the role of international law within it. The history of Israel/Palestine is intertwined with the history of modern international law in more ways than can be discussed here. The UN partition resolution of 1947 and the subsequent establishment of the State of Israel in 1948 parallel the early years of the United Nations and the adoption of the Universal Declaration of Human Rights. After 1967, the Israeli Supreme Court sitting as High Court of Justice decided to hear petitions submitted by Palestinian residents of the occupied territories. A body of jurisprudence thus developed in a domestic court dealing with an issue that is primarily a matter of international law. Between 1967 and 2000, the Israeli Supreme Court rejected most of these petitions, leading some to hold that the main function it played in this context was not that of bringing the rule of law and protecting the rights of Palestinians living under Israeli occupation, but rather that of legitimizing the occupation and the violations of international law associated with it. This era is mostly associated with Israel's rejection of the *de jure* applicability of the Fourth Geneva Convention to the occupied territories and its evasion of the letter and spirit of international humanitarian law in general.⁷⁵ The second Intifada that erupted in 2000 differed from the first in that it involved the use of firearms and recourse to terrorist attacks within Israel, including suicide bombings. At the time of the 9/11 attacks, Israel was already engaged in what it insisted on viewing as a "war on terror", notwithstanding the significant differences with the American situation and resulting from an occupation that had persisted for over thirty years. Practices such as assassinations or the so-called "targeted killing" of those held by Israel to be terrorists, and a law concerning the detainment of "illegal combatants", albeit with judicial review, legislated in 2002 but conceived before, became part of its own policies. Israel did not need to wait for the U.S. to take a leading role in these matters, although the American reaction to 9/11 certainly gave legitimacy to extant Israeli practices. With these developments, more and more issues pertaining to the legality of Israeli

⁷⁵ For a comprehensive discussion, see D. Kretzmer, *The Occupation of Justice* (2002). More generally, on Israel's rejection of the main tenets of the law of occupation, see O. Ben-Naftali, A. Gross & K. Michaeli, "Illegal Occupation: Framing the Occupied Palestinian Territory", *Berkeley Journal of International Law*, 2005, Vol. 23, p. 551.

military activities in the occupied territories reached the Israeli High Court of Justice. In a process that can be attributed to an increasing turn to international human rights law within Israeli law,⁷⁶ to the growing shadow cast by international law generally⁷⁷ and international criminal law specifically⁷⁸, the High Court of Justice increasingly began to rest its decisions on international law. Included in this category are both international humanitarian law, with recurring *de facto* reliance on the Fourth Geneva Convention (though leaving open the question of its *de jure* application) as well as on human rights law, sometimes co-applying both bodies of law.⁷⁹ Although this development placed some limits on the actions of the army, especially concerning certain segments of the wall built by Israel in the West Bank and on some matters of due process, it mostly led to the continued legitimization of the occupation and of its violations of international law. This result can be attributed, at least partly, to the growing role of proportionality in the Court's jurisprudence. By applying more rather than less law, as well as by merging different concepts of proportionality within the different bodies of law, the Court has created a body of law that analyzes specific situations through a calculus of rights and security detached from questions of substantive justice and abstracted from the question of the occupation.⁸⁰ Israeli international lawyers concerned about injustices to the Palestinians still turn to international law lured by its promise. But we then discover that in current contexts such as that of the occupation and the "war on terror", the humanitarians and the military will often speak the same language and assess acts of violence from the same vantage point.⁸¹ The turn to international law, then, instead of being grounded in "universal emancipation, peace, and social progress" becomes, at best, a turn to a technique.⁸² At worst, however, it becomes a law whose overarching standpoint, instead of universal emancipation, peace, and social progress, is actually that of the "war on terror". This is indeed the discourse uncritically adopted by the Israeli Supreme Court as the framework for analyzing petitions submitted by Palestinians from the Occupied Territories.⁸³

⁷⁶ See D. Barak-Erez, "The International Law of Human Rights and Constitutional Law: A Case Study of an Expanding Dialogue", *International Journal of Constitutional Law*, 2004, Vol. 2, p. 611.

⁷⁷ A. Gross, "The Construction of a Wall between The Hague and Jerusalem: The Enforcement and Limits of Humanitarian Law and the Structure of Occupation", *LJIL*, 2006, Vol. 19, p. 393, pp. 430-437.

⁷⁸ O. Ben-Naftali, "A Judgment in the Shadow of International Criminal Law", *Journal of International Criminal Justice*, 2007, Vol. 5, p. 322.

⁷⁹ See Gross, *supra* note 77; Aeyal Gross, "Human Proportions: Are Human Rights The Emperor's New Clothes of the International Law of Occupation?", *EJIL*, 2007, Vol. 18, p. 1.

⁸⁰ I discuss these developments in detail in Gross, *supra* note 77, and in Gross, *id.*

⁸¹ Kennedy, *supra* note 49.

⁸² Koskeniemi, *supra* note 15, p. 516.

⁸³ See Gross, *supra* note 77, pp. 402-403.

VII - IDEALISM AND REALISM BETWEEN ANTI-MODERNITY AND POSTMODERNITY

Ruti Teitel has forcibly argued that the dramatic expansion in the reach of humanitarian law, through its merger with international human rights law to create "Humanity's Law", marks the most prominent change in the international legal system⁸⁴, giving rise to "the rule of law for contemporary political circumstances of heightened political disorder"⁸⁵. Rather than the new world order anticipated in 1989-1991, then, we have a world of disorder resulting from both the first and the second falls, in which the rise of "humanity's law" goes hand in hand with the denial of its application. At a time of perpetual war, war and the norms associated with it become the norm rather than the exception. When the norms associated with international law are denied by a power as significant as the U.S., it is forced to confront not only the challenge of postmodernity itself, as an era and as a critique of the law, but also the challenge of anti-modernity. International law is thus caught in a tension between the need of the law (and especially international law with its universal aspirations) to tell a big story about humankind, and the postmodern critiques of humanism. But while engaging in the question of whether a post-Enlightenment defense of universalism (what Seyla Benhabib calls a "postmetaphysical interactive universalism"⁸⁶) is at all possible, and while caught, as the editors of this book suggest, between utopia and realism or, in Koskeniemi's terms, between apology and utopia⁸⁷, additional challenges arise. Beyond the challenges posed by the critique of postmodernity, international lawyers today also face the noted challenges of anti-modernity. What does an international lawyer committed to substantive justice and to the ideals of "universal emancipation, peace, and social progress" do in the face of these developments? Do we argue for the need to adhere to international law, even when we know that more law in the era of proportionality will often mean a detachment from substantive justice? When we know that international law may often legitimize what is unjust and, in our view, even illegal? Do we insist on the importance of the current rules - of *jus ad bellum*, *jus in bello* including International humanitarian Law, and human rights law - when all of them and the promises they entail are attacked in the name of the war on terror? Even when we are aware of the limits and manipulability of these very rules and of how much abusive use of force they allow?

⁸⁴ R. Teitel, "Humanity's Law: Rule of Law for the New Global Politics", *Cornell International Law Journal*, 2002, Vol. 35, p. 355, p. 359.

⁸⁵ *Id.*, p. 371.

⁸⁶ Benhabib, *supra* note 50, pp. 3-6.

⁸⁷ Koskeniemi, *supra* note 47.

In the past, and certainly concerning the Israeli-Palestinian conflict, many of us used to argue that international law is ignored, not respected, or insufficient. Today, with the growth of "humanity's law", there is more human rights law, more humanitarian law, and a growing body of international criminal law. In the Israeli context, we see evidence of the growing presence of these bodies of international law. We now realize, however, that "more law" is not necessarily the answer, and international law can also be part of the problem. We thus face a dual challenge: problems arising from the denial or rejection of international humanitarian and human rights law in the name of the "war on terror", and problems arising from the application of these laws in a way that illustrates their limitations and their legitimizing effects. For international lawyers still seeking "universal emancipation, peace, and social progress", then, the dilemma at the turn of the twenty-first century is: how to go on adhering to these values given the anti-modern attack on international law, and the critical and postmodern skepticism about the ability of international law to deliver on them?

Are we doomed to continue treading the thin line between realism (or apology) and utopia? As Koskeniemi put it, in the new millennium everyone is finally both "idealist" and "realist"⁸⁸. So, when we are both idealists and realists, do we argue in bad faith when we insist something is legal or illegal under international law while we know that contrary arguments can be - and are indeed being - made? Is the hope, if not the faith, that international law can make the world a better place if only decision makers, legal advisors, and judges would choose the "right" results, something we just cannot give up?

On March 19, 2003, the day before the U.S. opened war against Iraq, I was called up by the legal correspondent of the leading Israeli daily *Haaretz*. He asked me whether the U.S. attack on Iraq would be legal. I replied it would not and explained that, under international law, the use of force is allowed only for self-defense or under the UN collective security system pursuant to a Security Council resolution, and that neither condition was fulfilled in this case. The next day, I was astonished to see an item entitled: "Jurists: The War is Legal without a Second [Security Council] Decision"⁸⁹. I thought I had been misunderstood or misquoted, but discovered that the reporter had quoted the legal advisors of the Israeli and British foreign ministries, who both held going to war would be legal. Taking up my suggestion, the correspondent also quoted an article in *The New York Times* where Anne-Marie Slaughter, then president of the American Society of

⁸⁸ *Id.*, p. 575.

⁸⁹ M. Goral, "Jurists: The War is Legal Without a Second Decision", *Haaretz*, Mar. 20, 2003, at A8 [Hebrew].

International Law, had written that, relying on the Kosovo precedent, the war on Iraq could be "illegal but legitimate".⁹⁰ Two of my Israeli colleagues were also quoted as agreeing, respectively, with the positions advocated by Slaughter and the two legal advisors. Toward the end, the item noted: "A different position is voiced by Dr. Aeyal Gross of Tel-Aviv University". I was cited as explaining why the war would be illegal and as saying that the interpretation requiring a Security Council resolution rather than relying on Security Council Resolution 1441 to make the war legal would be preferable, especially when the deployment of international force is involved. The title of the article and finding myself voicing a minority position undermined what I had held to be the conventional wisdom and the well-established doctrine of international law applicable in this case. Losing my self-confidence for a moment, I searched the Web to see what my international colleagues were thinking and quickly found the letter signed by fifteen scholars of international law, some of them personal friends and all but one based in the United Kingdom. The letter, published in *The Guardian* only three days previously, argued for the illegality of the impending war.⁹¹

Some of these scholars reflected later on this intervention and on the dilemmas involved. Did they, by writing this letter, partake in a vision of international law as a redemptive force that could save the world if only allowed to operate properly? Were they defending a formalistic concept of sovereignty? Did the letter encourage faith in international law as an agent of justice and peace, though its signers not only knew that law helps to legitimate oppression and justify violence but had also devoted much of their careers to showing how? What did this turn to formal legal argument mean to the signers as critical scholars? And did the letter, although noting that "[a] lawful war is not necessarily a just, prudent or humanitarian war", run the risk that, should there be an authorizing Security Council resolution, the letter's arguments may actually serve as a basis for saying the war was legal?⁹² These dilemmas, concerning the free public use of reason that Kant had seen as the defining feature of Enlightenment itself, were also the ones I faced in March 2003. An additional burden was finding myself cited in the Israeli press as the supposedly dissenting voice, a claim clearly attesting to where the winds of war were blowing. Some of my colleagues and students asked me why was I insisting on the illegality of the war and why, given my well-known critical penchant, was I raising a supposedly "formal" or "legally

⁹⁰ A.-M. Slaughter, "Good Reasons for Going Around the UN", *N.Y. Times*, Mar. 18, 2003, at A33, available at <http://www.princeton.edu/~slaughr/Commentary/GoodReasons.pdf>.

⁹¹ U. Bernitz et al., Letter, "War Would Be Illegal", *The Guardian*, Mar. 7, 2003, available at <http://www.guardian.co.uk/Iraq/Story/0,2763,909314,00.html>.

⁹² M. Caaven, S. Marks, G. Simpson & R. Wilde, "We Are Teachers of International Law", *LJIL*, 2004, Vol. 17, p. 363. See also Kennedy, *supra* note 49, pp. 301-302 (arguing on the problem entailed by the humanitarian insistence on claiming that the war's legitimacy would depend on a Security Council vote).

correct" argument. I replied that international law was worth having if it was there to restrain the use of force and the turn to war, not the opposite. That had certainly been a major aspiration of international law since 1945, and that was the interpretation of international law I wanted to defend.⁹³ When saying this, I was definitely clinging to the super-modern hopes of international law, notwithstanding our postmodern critiques of it. This choice was made against a reality where these aspirations and principles of international law were, as they still are, under serious threat from the anti-modern attempt to abolish the norms established after WWII in an attempt that characterizes our current era.

In hindsight, I understand this as a moment of recalling Kant's edict in *What is Enlightenment*: "*Sapere Aude!* Have the courage to use your own understanding". But it was also a moment for recalling Foucault's insight in his eponymous essay, whereby "the Enlightenment is the age of the critique", as well as his call to refuse the "blackmail" of the Enlightenment and resist the demand to be "for" or "against" it together with every formulation postulating simplistic and authoritarian alternatives. We must refuse the notion that the choice is between accepting the Enlightenment (and international law) and remaining within the tradition of its rationalism, or criticizing it and trying to escape its principles of rationality.⁹⁴ As Foucault suggested, following Kant,

⁹³ I will not enter here the debate about determinacy and indeterminacy in international law and will confine myself to the claim that, to use Koskeniemi's term, "decisionism" is certainly involved in choosing to take the position I endorsed. See Koskeniemi, *supra* note 47, pp. 590-596. At the same time, I believe it would be very difficult to defend the opposite view in positive international law. In Koskeniemi's terms, the war on Iraq was "patently and arrogantly illegal". M. Koskeniemi, "What Should International Lawyers Learn From Marx", *LJIL*, 2007, Vol. 17, p. 229, pp. 244-245. In his discussion of the debate surrounding NATO's bombing of Kosovo, Koskeniemi points to the way that insistence on rules, processes, and formalism may turn into a strategy of resistance, because formalism is about setting limits to the impulses of those in decision-making positions, and points to the way that the "turn to ethics" is conservative in its implications, as evident in the debate concerning Kosovo. M. Koskeniemi, "The Lady Doth Protest Too Much: Kosovo, and the Turn to Ethics in International Law", *The Modern Law Review*, 2002, Vol. 65, p. 159. He also points to delegalization, alongside fragmentation and "Empire" (i.e., the status of the U.S. and its disengagement from international law), as factors in the "slow demise of public international law". See M. Koskeniemi, "Global Governance and Public International Law", *Kritische Justiz*, 2004, Vol. 37, p. 241, p. 251. However, thinking that the formalist claim can give international lawyers a satisfactory answer for all situations would obviously be naïve. See A. Orford, "The Gift of Formalism", *EJIL*, 2004, Vol. 15, p. 179; A. Orford, "The Destiny of International Law", *LJIL*, 2004, Vol. 17, p. 441. For a discussion of Koskeniemi's turn to formalism and the meaning of "formalism" in this context see I. Beckett, "Rebel Without a Cause? Martti Koskeniemi and the Critical Legal Project", *German Law Journal*, 2006, Vol. 7, p. 1045. The way in which the "ethical" debate about Kosovo represents a turn that can be used to legitimize the use of violence by those in power can indeed be seen in the way the "illegal but legitimate" argument voiced around Kosovo resurfaced, as discussed in the text, in the debate around Iraq. On the risk entailed in the focusing on crises such as Kosovo – to which Iraq can now be added – to the development of international law, and for a plea arguing for an "international law of everyday life," see H. Charlesworth, "International Law: A Discipline of Crisis", *The Modern Law Review*, 2002, Vol. 65, p. 377.

⁹⁴ Foucault, *supra* note 4, pp. 38-43. On the role of international lawyers when interviewed on issues such as the Iraq war as one in which they are not expected to engage in technical analysis but rather resort to the vocabulary of justice, goodness, solidarity, responsibility, and secular faith, and on

In his discussion of the relationship between Enlightenment and critique, critique will be that which says to knowledge: "Reason as much as you like, but do you really know how far you can reason without danger?"⁹⁵

I had confronted similar dilemmas concerning the ICJ decision on

*Construction of a Wall*⁹⁶. On the one hand was the temptation to cite this

decision as proof of the illegality of the wall being built in the West Bank

and as another tool in the struggle against it. On the other hand, uncritically

endorsing the ICJ and this specific decision and singling them out as

a beacon to humanity was rather difficult, given the many weaknesses in the

advisory opinion and given several other famous failures of the ICJ. The last

thing I wanted to do was argue that international law in general and anything

coming from the ICJ in particular were words of wisdom that should never

be criticized or questioned. Yet, the hope and faith that international law can

sometimes deliver, together with the possibility of leveraging it to criticize

injustice, and the merits of some parts of the decision itself, made

it impossible to ignore it without explaining what could be learned from it.

In my academic writing, I both praised and criticized the Advisory

Opinion.⁹⁷ In my advocacy and public engagements endeavors, my reliance

on it as an authority that should be taken extremely seriously served to

buttress the authority of international law and of the ICJ. Indeed, the

dilemma for critical international lawyers is how to both consider

international law as an exercise of power, but also as a location of opposition

to power. Paradoxically, perhaps, critical international lawyers wanting to

critique the actions of the state and the building of the wall, were in this case

tempted to rely on the Advisory Opinion, while it was the State of Israel

which dismissed it as a "political" exercise of power.

In this era of anti-modern attacks on international law at the turn of the

twenty-first century, a further need confronts us besides the dilemma of

idealism and realism, and of how to be both an idealist and a realist when

facing the question of faith vs. scepticism. We must consider the values of

modernity not only while critically sceptical of international law's ability to

deliver on them and while relying on postmodern critiques based on

modernity and offering immanent critiques of it. We must also place the

values of modernity against the background of anti-modern attacks on them

and on the promises of modern international law.

international law at such times as the potential bearer of the Kantian cosmopolitan project, understood as a project of critical reason that measures the state of affairs from the perspective of an ideal of universality, see Koskenvarti, *supra* note 34, p. 30.

⁹⁵ Foucault, *supra* note 65, p. 387.

⁹⁶ Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 ICJ 136.

⁹⁷ Gross, *supra* note 77.