Dispute on the Past and Future of International Law. Transition From a National to a Postnational Constellation

Jürgen Habermas

After the first Iraq-war in 1990/1991, two opposite views for a new world order have emerged. The dispute no longer ranges between Kantian idealists and Schmittian realists. The issue is no longer whether "justice among nations" is possible at all, but whether law is the right medium for realizing that kind of justice. Both sides agree on the objectives –securing peace and stability, and implementing (the uncontroversial core of) human rights across the world. Not the goals are controversial, but the most promising way of their realization.

Does international law matters anymore, when a liberal and globally engaged superpower substitutes her own *moral arguments* for the procedures of *international law*? And would there be anything wrong with the unilateralism of a benevolent hegemon, if his well meant engagements promise a more efficient pursuit of legitimate purposes? Or should we rather stick to the project of a constitutionalisation of international relations?[1]

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Kant was the first to explain that project. He challenged the so-called right of the sovereign state to go to war –the *jus ad bellum*. This right forms the core of that classical international law which is the mirror image of the European state system in the period from 1648 until 1918. This system requires the participation of "nations" and constitutes "international" relations in the literal sense of the word. The collective actors are imagined as players in a stra-tegic game:

- they are supposed to be independent, so that they are capable to make and follow their own decisions;
- they are expected to decide according to their "national interests"; and
- they relate to one another as competitors in an enduring power struggle which is ultimately based on the threat of military force.

The rules of the game are set up by international law,[2] which defi-nes:

1. the requirements for participation: a state's sovereignty depends on inter-national recognition;

2. the qualifications for the status of a sovereign power: a sovereign state must be capable to effe-ctively control social and territorial boundaries, and to maintain law and order within these borders;

3. the status of sovereignty:

– a sovereign state enjoys the right to go to war any time without ju-stification (the *jus ad bellum*), whereas it must not interfere with the *internal* affairs of another state (the principle of non-intervention);

– a sovereign state can at worst fail by standards of prudence and efficiency, not by law or morality. Neither the state nor any individual functionary must be prosecuted by another authority;

– a sovereign state reserves the right to prosecute war crimes (violations of the *jus in bello*) under its own jurisdiction.

The moral content of classical international law is rather thin. Not regarding differences in size of territory, population and actnal power, the mutual recognition of sovereignty establishes a legal symmetry among states. The price for this *equality in legal status* is the release of violence and the instability of an anarchic state of nature in the international arena. That was too high a price for Kant, who did not believe in the promise that peace would result from a balance of powers stalling one another.

A more substantive kind of equality was at the time exemplified by those republics that emerged from the American and the French revolution. They embodied *civic equality* in symmetric relations among individual citizens, not states. Kant now conceived the international competition between collective aotors as an analogue of the original state of nature that is said to have once obtained between pre-social individuals, and then maintained that the social contract by which those individuals entered a *national* community of citizens remains incomplete until these same citizens find a similar exit from the hitherto untamed *international* state of nature. Kant thus arrived at the revolutionary idea of transforming international law, as a law of states, into cosmopolitan law, as a law of individuals who do not only carry the rights of citizens of their respective national communities but also the rights of citizens of a "cosmopolitan commonwealth" –rights of world-citizens (*Weltbürger*). And perpetual peace should be a result from such a transition of an international to a cosmopolitan order: "There is no possible way except through the constitution of a legal order among peoples, based upon enforceable public laws to which each state must submit (by analogy with the civil or political legal order among individual human beings)".

Kant speaks at this place of a *Völkerstaat*, a state of peoples.[3] But two years later, when he explicitly deals with the issue of "Perpetual Peace", he is willing to distinguish between a *Völkerstaat*, which is suspicious of degenerating into despotism, and a *Völkerbund*, a voluntary league of sovereign nation states.[4] Certainly, Kant did not give up altogether the idea of a "world-republic", but he was not convinced of the *feasibility* of that project under present conditions. He looked, instead, for an achievable surrogate and found it in a federation of sovereign states which retain a right to exit. It is in fact a federation of peaceful democracies, which is supposed to form the core of a future, ever more inclusive union of states, all of which will finally "feel obligated" to submit international conflicts to arbitration rather than military force.

So, Kant developed his idea of a cosmopolitan order (*weltbürgerlicher Zustand*) from a projection: the normative substance of both, democratic citizenship and human rights, is carried over from the national onto the international level. However, as a child of his times, he was struck by a kind of culture- and colour-blindness with regard to three important facts:

1. insensitive to the rise of a new historical consciousness and the growing awareness of cultural differences, Kant could not anticipate the explosive potential of nationalism of the 19th and 20th centuries;

2. bound to the view of a superiority of the European civilization and race, Kant did not realize the implications of the fact that international law was tailored to a small number of privileged Christian nations: they regarded only one another as equal, whereas the rest of the world was up for colonization and missionary purposes;

3. nor did Kant recognize the dependency of international law on the extralegal background of a shared Christian culture, capable of at least containing violence within the range of limited wars between cabinets rather than peoples.

These blind spots indicate a lack of the very kind of mutual perspective taking that Kant himself requires for transforming international into cosmopolitan law.

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The actual transformation had to wait for the shocking horrors of World War I. Hence, the attempt to constrain the right of sovereign states to go to war remained on the political agenda. The Briand-Kellog-Pact settled in 1928 the prohibition of wars of aggression. However, without a codification of international crimes, without a court with the competence to prosecute such crimes, and without an authority that is willing and capable to execute sanctions against

perpetrating states, the League of Nations could not prevent Japan from conquering Manchuria, nor Italy from annexing Abyssinia, nor Germany from devastating almost all of Europe –and the moral substance of its own culture.

The atrocities of World War II, culminating in the extermination of the European Jews, and the mass-crimes of totalitarian regimes against their own citizens, finally shattered the legal presumption of the moral indifference of sovereign states. The monstrous political crimes were sufficient evidence for the conclusion that states, governments and its military and civil functionaries must no longer enjoy immunity from international prosecution. In anticipation of what later has been incorporated in international law, the military tribunals of Nuremberg and Tokyo condemned individual representatives, officials and private collaborators of the defeated regimes for the crime of war, for crimes in war and crimes against humanity. That was the deathblow for the classical conception of international law as a law of states.

Compared with the shameful failure of the League of Nations, the second half of the short 20th century is marked by an ironical contrast between successful legal innovations and the cold war blockade of implementation. In the light of Kant's idea of a cosmopolitan order, these legal innovations were at the same time more radical and more realistic than Kant's own surrogate of a voluntary league of nations:

– At the level of principles, the coupling of the UN-Charter with the *Declaration of Human Rights* is a revolutionary step. The international community is thereby placed under the obligation to spread and implement worldwide the same principles that are so far embodied within constitutional states only.

– At the organizational level the United Nations follows an inclusive design, admitting liberal, authoritarian and despotic states alike. This creates a tension between the principles of the Charter and the actual human rights standards of many member states.

– The tension is intensified by the composition of a security council that integrates the great powers, apart from their internal constitution, by trading the concession of veto-power for active cooperation.

– The world-organization is expected to protect international security on the basis of a general prohibition the use of military force, except in the narrowly defined case of self-defense. Thus, the principle of non-intervention does no longer apply to deviating members.

– The agenda of the United Nations extends, beyond the Kantian focus on peace-keeping, to the promotion and implementation of human rights across the world. The Charter calls for sanctions against rule violating states, if necessary with military force.

> Finally, the *International Covenants on Civil and Political Rights* as well as on *Economic, Social and Cultural Rights* establish a world-wide watch and report system for human-rights violations, and they also provide channels for legal complaints of individual citizens against their own perpetrating governments. This fact is of principal relevance insofar as it confirms that the individual citizen is now recognized *immediately* as a subject of international law.[5]

In all these regards –the constitutional features of the world-organization, its composition and internal structure, the prohibition of wars of aggression and the corresponding limitation of the principle of non-intervention, the human rights agenda, individual legal responsibility of functionaries and the recognition of individuals as subjects of international law– the legal frame of the United Nations surpasses Kant's proposal for a voluntary League of Nations, heading in the very direction of a transition from international to cosmopolitan law.

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At this place it is appropriate to reflect for a moment on the influential counterargument raised by Carl Schmitt against that whole idea. The attempt to pacify the belligerence of nations must fail, and justice cannot prevail among nations, because any notion of justice will remain essentially contested between them. Any universalistic claim for the justification of violent interference with the sovereignty of another state is, so the argument goes, just a cover for the partial interests of an aggressor, who seeks an unfair advantage by incriminating his opponent. The denial of the status of an honest enemy, or *justus hostis*, introduces a moral asymmetry in the relationship between parties that deserve to be treated as equals. Worse, the inflammatory moral loading of an indifferent type of war intensifies the conflict itself. A moralized war can no longer be kept within the limits of a civilizing *jus in bello*.

At first glance, the argument is unconvincing. The complaint about *moralization* seems to go astray, because a constitutionalization of international relations would mean a *legalization*. Provided that the required legal procedures were only implemented, the shields of positive law would protect defendants against rush moral condemnations. When Schmitt nevertheless maintains that legal pacifism will yield to a moralizing unleashing of violence, he tacitly presupposes, that attempts at legalization must fail anyway and that these failures will set free destructive moral energies.

Schmitt denies the possibility of a consensus on a political conception of justice –e.g. democracy and human rights– among competing nations. But he never discusses the philosophical issue of moral non-

cognitivism on its merits. He rather grounds his skepticism about the priority of the right over the good in a dubious metaphysical conception of "the Political": Schmitt is convinced that the antagonism between self-asserting nations which must maintain their collective identities polemically against one another will persist forever.

This kind of political existentialism still depends on the model of an instable power balance between independent collective actors who are set free from any normative considerations and only pursue their self-defined interests. That model, however, does not apply anymore. The image of international conflicts is no longer shaped by the classical type of wars between states. They have been replaced by three new threats to international peace: criminal states, failed states, and international terrorism.[6] Once states are no longer the monopolists and masters of war, the fear of the moralizing consequences of mistaken efforts to outlaw wars is loosing its object.

The present political crimes and security problems are symptoms of a postnational constellation. This shift in constellation results from a globalization of trade and production, of markets arfd media, of traffic and tourism, of communication and culture, of risks in the dimensions of health and environment, crime and security. States are more and more entangled in the networks of an increasingly interdependent world society, the functional differentiation of which crosses national boundaries unconcerned.

These systemic processes destroy some conditions for the maintenance of that independence that once was a prerequisite for the recognition of state-sovereignty:

- national states face more and more functional problems that require international cooperation;
- they share the international arena with global players of different kinds (multinational corporations, non-governmental organizations, transnational organizations etc.);
- they form and enter supranational organizations (EU or ASEAN) or regional regimes (NATO or EOWAC);
- they loose competences (e.g. in the control and extraction of national tax resources) and gain new space for exerting different sorts of influence.

The quicker states learn to filter their national interests into various channels of transnational and supranational governance, the more they substitute soft power for traditional forms of diplomatic pressure and military threat, thus blurring of the lines between domestic and foreign policy.[7]

The legal innovations associated with the UN had more or less remained a fleet in being which could not start to move until the

dissolution of a bipolar world removed the main reasons for a blockade of the Security Council. Since then some of the rusty legal instruments of the UN were put to work:

1. the Security Council decided on several peace-keeping and peace-enforcing interventions in order to stop aggressions and civil wars (Iraq, Somalia, Rwanda, Haiti and Bosnia);

2. two of these engagements led to establishing war tribunals (for Rwanda and the former Yugoslavia), while the installing of an International Penal Court and the codification of international crimes are still in the making;

3. the new category of para- or outlaw-states reveals that the international recognition of sovereignty is more and more depending on compliance with security- and human rights standards.[8]

And yet, a sober cross-check for this apparent progress in the constitutionalization of international relations is far from being satisfying. The financial and military resources for UN-interventions are controlled by individual member-states. The international organization cannot yet dispose over forces of its own, but depends in each case on the good will of national governments which in turn depend on the support of their constituencies. Due to half-hearted commitments, the engagement in Somalia turned out to be a total failure. Even worse than miscarried interventions are non-interventions, e.g. in Sudan, Angola, Congo, Nigeria, Sri Lanka and, for too long a time, also in Afghanistan. The monstrous selectivity of what the Security Council takes into consideration and decides upon is telling for a shameless predominance of national interests over legitimate global concerns. And the veto-power can still paralyze the Council –as in the case of Kosovo, when the intervention of a regional regime of democratic states got a formal legitimation only after the fact. What is missing is a companion to national police law, namely strict regulations for the execution of peace-enforcing UN missions which always also threaten innocent lives.

The fact that the Bush Government refused to recognize the Rome Statute for establishing an International Penal Court in The Hague does, however, indicate something more troubling than mere time-lags, faults and failures in the more than 80 years of a legal development, of which the United States have been the driving force from the very beginning. The unauthorized intervention in Iraq, with the concomitant attempt to marginalize the United Nations, indicates a principal shift in direction of international law policies. Let me, therefore, return to the question: Is the United Nations' lack in efficiency and in capability to act a sufficient reason for a break with the normative premises of the Kantian project as a whole?

Let us assume, for the sake of my argument, which the high-handed policy for a *Pax Americana* is still meant to pursue the original goals of securing international peace and fostering human rights across the world. Even this best case scenario of the *benevolent hegemon* meets, for cognitive reasons, insurmountable obstacles in identifying those courses of action and those kinds of initiative that accord with shared interests of the international community. The most circumspect state that decides only in its own authority on humanitarian interventions, on cases of self-defense, on international tribunals etc. can never be sure whether or not it actually disentangles its national interests from the shared and generalizable ones. This is not a question of good will or bad intention but an issue of the epistemology of practical deliberation. Any anticipation from one side, of what should be acceptable for all sides, cannot be checked but by subjecting a supposedly impartial proposal to an inclusive process of deliberation, by the rules of which all parties involved are equally required to take into consideration the perspectives of the other participants, too. This is the cognitive purpose of impartial judgment that legal procedures are expected to serve, in the global as well as in the domestic arena.

Benevolent unilateralism is deficient in terms of a lack of legal provisions for impartiality and legitimacy. This deficiency cannot be compensated by an internal democratic structure of the good hegemon. Citizens face the same problem as governments. Citizens of one political community cannot anticipate the results of an appropriate local interpretation and application that universal values undergo in the different cultural context of another political community. The lucky circumstance that the present super-power is identical with the oldest constitutional democracy on the globe gives us, on the other hand, some reason for hope. The affinity in value-orientations between the domestic political culture of the only remaining superpower on one side, and the cosmopolitan project on the other, at least facilitates a possible return of a future US-Government to the original mission of the nation that was the primary promoter of a constitutionalization of international politics.

The postnational constellation meets that project half-way. The everyday experience of growing interdependence within a more and more complex world-society inconspicuously changes the self-perceptions of nations-states and their citizens. Formerly independent actors learn to accept the role of cooperating parties in transnational networks and that of committed members of supranational organizations. We must not underestimate the consciousness-raising impact of international disputes and discourses instigated by the construction of new legal frameworks. Through participation in legal communication and interpretation, norms which are at first recognized only verbally, in

terms of formal declarations, become more and more internalized. This is how independent nation states learn to see themselves at the same time as members of larger communities.[9] A continental superpower is certainly the last to feel these soft symbolic pressures for a change in self-image. But it may well learn from the less benign pressures of an international criticism that originates from an accommodation of the Schmittian argument to the asymmetric power relations of a unipolar world. Citizens of a liberal state remain, in the long run, sensitive for cognitive dissonances between the universalist claim raised for a national mission and the particularist nature of the actually vested interests.

NOTES

1 J.A.Frowein, "Konstitutionalisierung des Völkerrechts" , in BDGVR , *Völkerrecht und Internationales Recht in einem sich globalisierenden internationalen System* (C.F.Müller), Heidelberg 2001, pp. 427-447.

2 W. Graf Vitzthum, *Völkerrecht*, 2.Aufl., Berlin 2001.

3 Immanuel Kant, "Theory and Practice", in *Political Writings*, Cambridge 1970, p. 92.

4 Immanuel Kant, "Perpetual Peace", in op. cit., p. 105.

5 Kay Hailbronner, "Der Staat und der Einzelne als Völkerrechtssubjekte", in *Vitzthum* 2001, pp. 161-267.

6 B. Zangl, M. Zürn, *Frieden und Krieg*, Frankfurt am Main 2003, pp. 172-205.

7 M. Zürn, "Politik in der postnationalen Konstellation", in Chr. Landfried (Herausg.), *Politik in der entgrenzten Welt*, Köln 2001, pp. 181-204; and "Zu den Merkmalen postnationaler Politik", in M. Jachtenfuchs, M. Knodt (Herausg.), *Regieren in internationalen Institutionen*, pp. 215-234.

8 Frowein 2001, 429ff. und Zangl, Zürn (2003), 254ff.

9 For this social-constructivist view of the change in international relations cf. A. Wendt, *Social Theory of International Politics*, Cambridge 1999.