CRIO WORKSHOP
CENTRE OF RESEARCH ON INTERNATIONAL ORGANIZATIONS

CRIO PAPERS

N°. 22

DIEGO A. CIMINO

THE NEW HORIZONS OF INTERNATIONAL LAW
A TRIP INTO THE PAST, THE PRESENT AND THE FUTURE
A REVIEW PAPER FOR THE 2012 STIPIL COURSE

CRIO PAPERS N°. 22

DIEGO A. CIMINO

THE NEW HORIZONS OF INTERNATIONAL LAW
A TRIP INTO THE PAST, THE PRESENT AND THE FUTURE
A REVIEW PAPER FOR THE 2012 STIPIL COURSE

ISSN 2037-6006

University of Catania School of Law
CRIO Centre of Research on International Organizations
Villa Cerami
I – 95124 Catania Italy

Editorial Staff
Adriana Di Stefano
Federica A. Gentile
Giuseppe Matarazzo

Graphic Project
Ena Granulo
www.studioen.it

The CRIO Papers can be found at:
http://www.lex.unict.it/crio/crio-papers

THE NEW HORIZONS OF INTERNATIONAL LAW
A TRIP INTO THE PAST, THE PRESENT AND THE FUTURE
A REVIEW PAPER FOR THE 2012 STIPIL COURSE

Diego Antonino Cimino

Contents

I. A Preamble: the Fluidity of International Law.

The Fifth Season of the Selected Topics in Public International Law Series took place in 2012 Spring Term and was devoted to “Conflicting Approaches to International Law. A Political and Cultural Perspective”. This Review Paper shall elaborate on one of the main issues highlighted during the course i.e. the introductory seminar ”Mainstream Approach and Critical Approaches to International Law. A Confrontation to Overcome”. We do not aim at offering an account of the seminar, but rather at offering some fresh considerations on the subject it was devoted to. The responsibility for the ideas discussed remain therefore solely with the author.

International Law is probably the most discussed branch of law ever. Entire generations of scholars discussed about every single aspect and from every possible point of view the characters of it and usually they did not arrive to the same conclusion, or, often, to any conclusion.

When was it born? When did it change? How does it change? Who are the interested subjects? And more critical question such as: Is it useful? Or rather: Does it exist?

I believe that this strange phenomenon can be related to the essence of this branch of law, that I should define “Fluidity”. We cannot study, analyze or understand international law if we consider it by itself, as a perfect science, a technique or simply an “usual” legal order, which regulates the relationships between a certain type of subjects (countries instead of human beings) applied to a particular system (the international community of countries instead of the national legal order) .

Fluidity is due to the intrinsic peculiarities of international law:

- The absence of a complete codification
- The particular theory of sources of international law, open and not fixed
- The relative concept of “coercion” and the issue of the coercive application of the law
- The influence of politics and international relations in the making and interpretation of international law
- The rise of a new kind of international community and new actors influencing the process

Today international law needs to be studied and analyzed under a different point of view, which includes different coordinates. Scholars of every age encountered troubles and misconceptions every time they abstracted international law from its natural context and from those intrinsic characteristics.

We cannot argue about International law if we do not consider what lies behind it: the complex international relations in the process of decision-making, the making of a global governance system, the changing approach of dealing with global issues, the influence and power of private sector, the influence of economy and its relationship with politics and policies, the changing nature of classic concepts such as sovereignty, jurisdiction, subjectivity.

When scholars did so, although they found a definition of "international law" they had been unable to find the right balance between their definition and the rest of the context that was excluded. International Law in its concept cannot be scientifically broken down in laboratory. Nowadays international law needs to be observed into the same slide of post-modern international relations, economy, politics, globalization.

This evolution can be traced back to the XIX Century.

II. International law in XIX Century and the "Rift of the XX Century".

We shall start by a rapid perusal of David Kennedy's "International Law and the Nineteenth Century: History of an illusion", in which the author focuses the most important steps of the historical, philosophical, juridical and scholar evolution of the concept of international law.

Kennedy's analysis splits into two different perspectives: the relation between the 19th century with earlier centuries as first and between the 19th and the 20th century, later. 19th Century is considered a divide for international law in way that what has come until this moment is considered "Classic" or "Traditional" International law. Nevertheless, we cannot consider the XIX century as a final step of this evolution, it is quite another think, considering its relation with the XX century. We can read it as the final part of an ending process or as

the initial part of the new process. Probably, the most correct interpretation lies in both of them, in consideration of the 'transitional' moment that International Law had lived.

As Kennedy wrote

"*the nineteenth century offers an image of the pre-modern, a baseline against which to measure the discipline's progress and this century's exceptionalism. This image, of a method before frustration with formalism, a doctrine before the erosion of sovereignty, a legal philosophy before the pragmatic flight from theory, remains an active part of twentieth century disciplinary argument, although it reflects only dimly the actual doctrine, method or philosophy of the field before the First Word War*".

With Kennedy we can therefore read the XIX century in two different ways: as the century of the consolidation of positivism after the philosophical controversy against the "classic" naturalism of international law, and, on the other side as the century of the consolidation of basic doctrinal and ideological ideas before 20th century. In this moment, the shift was on the approach - the "way of thinking" - which was going to change radically, influencing every single consequential result. Scholars and International Lawyers would no more discuss about "theory" or "pure philosophy" of international law, rather they would go into the facets and the contents of it.

"*As legal scholars, we have progressed from legal theory split between incompatible philosophical explanations for the existence of international law, like "positivism" or "naturalism" , to a more pragmatic attitude about philosophical explanation in general, and increased disciplinary attention to what is useful, or functions, for real actors in concrete situations*"

However, such a renovated consciousness arose totally only in the XX century, and it opened the stage for neoliberalism - as we will see later with Marie Slaughter and her theory of networked power - .

The XIX century left us two new phenomena: the official rejection of Naturalism in international law with the consequential consolidation of international law as a legal discipline and the rise of the crisis of sovereignty. Both aspects are well argued by Kennedy.

"*The story of the nineteenth century is that of the defeat of these "naturalisms" by positivism … How can one have law among sovereigns, when sovereignty, by definition admits no higher authority? "*

As mentioned at the very beginning the source of the binding effect of international law for naturalists could be found alternatively in reason, religion, moral values or common traditions that the community of states acknowledged among themselves. The turning point of this theory came at the very end of the XIX century and consolidated in the XX.

"*In the traditional story, nineteenth century international legal theorists gradually came to realize that these various ideas could not, in fact, explain the source of law's binding force in a way consistent with the absolute nature of sovereignty and the equality of states, because they all implied some order, some enforcement beyond the sovereign which simply was not available in a world of sovereign states."*

This is the official rise of Positivism as a legal theory for international law.

"*Positivism… rooted the binding force of international law in the consent of sovereigns themselves on a loose analogy to the private law of contract, and found the law in expression of sovereign consent, either through a laborious search of state practice or a catalogue of explicit agreements…. "* and so, he can conclude, "*International legal positivism is simply the working out of the private law metaphor of contract for a public legal order*"

Honestly, positivism had not a long life. This concept was exasperated by international lawyers, scholars and the international community facts and breakout in pragmatism, a new theory of international law in XX century.

One of the few scholars who anticipated this conceptual evolution in XX century was John Austin ("Only one paragraph of the nineteenth century legal thought makes it into the 1500 page book – Austin's famous 1832 suggestion in The Province of Jurisprudence Determined", cit. Kennedy)

"*… the law obtaining between nations is not positive law… the law obtaining between nations is law (improperly so called) set by general opinion. The duties which it imposes are enforced by moral sanctions: by fear on the part of nations, or by fear on the part of sovereigns, or provoking general hostility*"

Austin's thought will receive more attention in the XX century than the XIX.

So, as I mentioned, the second salient aspect of the XIX century has been the beginning of the crisis of classic sovereignty inherited by Westphalian model.

"*In the first half of nineteenth century, it seemed obvious that there were restrictions on sovereignty, and natural to experience sovereigns always already enmeshed in a system of rules"*

This crisis meant the crisis of the entire international legal order because of the criticism to one of the pillar of the discipline. Many ideas changed and scholars and international lawyers turned into new issues. Kennedy, close to the end of his essay, resumed well the global situation:

"*Early in the nineteenth century, when international law was not thought different from other laws, had not unified as an alternative to national law, lawyers and judges approached international legal problems as they did all others.*

By late in century, international law seems quite different, and a separate profession and academic specialty has developed devoted to its study. With an increasingly uniform sovereignty and universal international law concerned more with the boundaries between sovereigns than with the norms which constrain their behaviour, with a sharpening of

distinction between public and private, law and politics, international and municipal, sovereigns and individuals, the international law came to seem quite distinct"

At the end we can argue that the classic international law finished with the XIX century. In fact, after all the XIX remained a century full of enthusiasm for international law in its classical characteristics, even if the attitude of the international lawyer to his own legal reasoning was profoundly changed:

"*Enthusiasm for rules takes the form of urgent calls for codification, which might both root law in norms which have actually received the imprimatur of sovereign consent and clarify, what the rules of international law actually are … At the same time, enthusiasm for the international judiciary and for arbitration evaporated "*

Although at the time was not yet clear towards which direction (it will be only after the Second World War), everybody had finally realized that "*International law must start again".* At the end of the XIX century, it was the time for a new concept given by a new sensibility for public law: there would have been one universal concept of sovereignty - no more just different sovereigns with different sets of rules and concepts related - and, moreover, one international law.

III. (Naturalism + Positivism) = Formalism. From Formalism to Pragmatism: the 20th Century.

The title of this paragraph looks like a math operation but probably the mathematical expression shows us effectively the conceptual change of this period.

After the Second World War scholars and international lawyers understood that international law must become "substantive", that it needed to deal directly with the regulation of international community, with war and peace as first, through institutions of

collective security, despite the failure of the League of Nations. Such an ambition was politically backed by the Allies who won the Second World War and by the vision of US President Franklin Delano Roosevelt and its "Grand Design" for the World Order. Such an ambition caused a sort of reject for XIX Century's ideas such as the absolute sovereignty, considered now "classic" and even regarded as "dangerous myth, inimicable to international law".

Classic international law was chided for being "formal" and such a label would be a crucial point for the theory of international law . Such a shift made difficult for contemporary international lawyers, to understand their predecessors (naturalists and positivists) . This was the real breaking point with past. The main question for them was practical, urgent, somehow 'contextualized' in the complex reality of the aftermath of the Second World War: "How was international law possible in a world of sovereign states? How was law to be possible in a world of politics?"

At that time, for moderns the naturalist or positivist answer or their predecessor was no more sufficient ("*What could they have been thinking?"*) . They were just formalist.

Thus, Formalism became a new school in the theory of international law arena , and it would bring to exasperating its findings. Indeed, it has been conducive to skepticism, relativism and progressivism.

But, what was regarded as "formalism"? Kennedy drew the right profile

"*Anyone who takes sovereignty too literally, separates international law from politics too cleanly, reasons about law without pragmatic balancing and reasonable differences splitting, who eschews political institutions for courts, defends sovereign rights without international responsibilities, will be accused of formalism"*.

In the XX century everything changed for international lawyers: the field, the language, the theories. No more naturalists and positivists on different sides but both labelled as formalists from one side and progressive, modern, pragmatic theories from the other. No more the typical philosophical preoccupations of XIX century related to the origin, sources and powers of international law in universal terms, now labelled "classical doctrinal formalism" but the rise of a "cooperative pragmatism in political terms", in the XX century.

Now it seems that XIX century has been the century of philosophy and the XX will become the century of pragmatism.

"*The deterioration of classical international law, its replacement by pragmatic institutions and functional doctrinal analysis, is told as a progressive story, a story of modernization, of internationalization."*

Now it should be clear the reason why the period between XIX and XX was delicate enough to be treated separately and certainly in the analysis of this historical moment, Professor David Kennedy's essay represents an inevitable cornerstone, but to put it bluntly, more for its analytic and descriptive point of view than for his personal conclusions, to be found in his "last page" idea of an "illusion" .

It is clear that the model imagined by international lawyers and scholars in the XIX century was not complete but at the same time the XX century evolution could not have been possible without the prosperity, evolution and success of the XIX century and the "failures" after the First World War. International law arose, was created and exists, with all its limits and imperfections, it is still in transition and in a codification process, it has evolved enormously, it is constantly in the making: this cannot be considered an illusion only because it did not achieve all the goals that there was given immediately.

Thinking in this way, historically, we would have never moved from the Ciceronian " Silent leges inter arma".

IV. International Law in the Age of Globalization.

The evolution of international law and the new dichotomy "Classic – Modern" opened the stage for several new theories on the re-interpretation of all the strongholds of international law. Not always these theories moved to positive perspectives rather they tended to raising criticism or skepticism, putting forward new questions, never seen before in International Law.

First, it is important to make a note. In acknowledging that David Kennedy's illusion marked the division for the interpretation of international law, it must be beard in mind that he wrote it in 1996. It is useless to add at this stage that several things happened in our world after 1996 in the political, social, cultural and international scenario.

This is the reason why probably Paulus's essay, written in 2001 can give us a more focused point of view on the ideological evolution of international law - after the long period (XIX-XX centuries) well described by Kennedy - which looks and speaks about that new context of the XXI century.

A clue of what I said can be given by the fact that in 35 pages of arguments Kennedy never used the term "Globalization".This term is, on the other hand, one of the keywords of Paulus's essay, and precisely the first word of his work.

The first "side effect" of the access of Globalization in our world and in our daily life, is the affirmation of what seemed just a threat in the XIX century and in the XX century moved its first steps: the erosion of the concept of sovereignty and the consequent rise of new subjects, non-State actors into the international arena.

The main change in the new 'globalized' legal theory occurred - as already reported- when the characteristic of 'sovereign countries' was replaced by the concept of "Sovereignty" as such.

Anne-Marie Slaughter, writing three years after Paulus's essay, well expressed this new phenomenon. Arguing about "Sovereignty and Power in a Networked Order", she spoke about "traditional conceptions of sovereignty *under assault*" .

Slaughter's analysis of Sovereignty in our age represents a cornerstone for the entire scholarship around this topic. She argued that the crisis of the so called "Westphalian Model" was caused in our age by two fundamental challenges in contemporary international relations: the ineffectiveness challenge and the interference challenge. Resuming her reflection:

- "*Westphalian sovereignty is the right to be left alone"*
- *"States* no longer govern effectively by being left alone and by leaving other states alone"
- "States c*an only govern effectively by actively cooperating with other states and by collectively reserving the power to intervene in other states' affairs"*

From the mentioned assumptions, she perfectly argued that “the concept of sovereignty needs to be redefined”.

In redefining sovereignty she found more distinguished allies than me: Abram and Antonia Chayes, for instance, who gave a new definition of Sovereignty for States diametrically in opposition to the Westphalian one

“*The new sovereignty is the right and the capacity to participate in the international institutions that allow their members, working together, to accomplish the ends that individual governments could once accomplish alone” , so, from the right to be left alone to the right to be in network, to cooperate, so, the right to be “active part in international institutions and the ability to join in collective efforts to address global and regional problems*”.

Under this interesting version, sovereignty, not only gives new incentives to international law in opposition to skepticism and pragmatism, but also it changes the keyword around the concept of sovereignty: no more absolute power, highest and untouchable prerogative of the State entity but … Responsibility.

It is not a coincidence that the United Nations in 1999 established the “International Commission on Intervention and State Sovereignty” (ICSS) that in December 2001 issued one of its most “important and influential” reports , “The Responsibility to Protect” , which presents to the International Community, under the influent effigy of United Nations, the redefined concept of Sovereignty as responsibility, finding the new duty and role of each State into the international arena:

“*The ICISS seeks to change the core meaning of the U.N membership from “the final symbol of independent sovereign statehood and thus the seal of acceptance into the community of nations” to recognition of a state “as a responsible member of the community of nations”.*

From sovereignty as a control to sovereignty as a responsibility in both international and external duties: “*there the states falls in that responsibility, a secondary responsibility falls on the international community acting through the United Nations”*.

Slaughter's research continues arguing and showing the functions and the structures of the Networks in the world, a topic we will deal later speaking about the non-state actors. At this stage, it was important to determine the new concept of sovereignty in the Age of globalization. Our main goal in this paragraph, after having seen the new concept of sovereignty, is to see the reactions of scholarship to the postmodern age and these "new" concepts.

V. The Rise of Criticism.

An "illusion" according to Kennedy, "Limited" for professors Goldsmith and Posner, "useless" for Koskenniemi. These are probably three of the most significant positions of the critical scholarship on post-modern international law.

Paulus designed David Kennedy as the "first to have applied the postmodern critique to international law" and we have already seen the reason why, after having analyzed his work.

Paulus "with considerable superficiality" - himself said - distinguished two main strands of "postmodern criticism":

- The internal critique which "unveils the internal inconsistency of mainstream international law
- The external critique which points towards the ideological and political bias of supposedly neutral legal rules

The external critique goes deeply into the main topic of this essay because focuses the strange and unclear relation between international law and international relations, between politics and law. The main question is: "Is international law still objective?"

Koskenniemi believed, for instance, that international law is today useless because it is useful only to justify the behaviors and political choices of the states before the international community.

Professors Goldsmith and Posner argued in their "The Limits of International Law" that international law does not check self-interest but instead it is used only until it can maximize the interest of states.

It is clear from these two positions that the “sin” of the lack of an inviolable objectivity, a coercive and absolute force, typical of any kind of law, is for the debate on international law the core point. In this point we find the melting pot between law and politics where the invisible border has to be drawn. The use of politics in international relations, or better, as Paulus said “the (ab)use of international for political purposes” caused the “politicization of International Law” (Kennedy) .

This phenomenon is peacefully registered from the entire scholarship but various schools reacted to it differently. Taking the extremes we can note something interesting:

On one side there is “the ultimate result of radical criticism of international law”, Realism, that argues *“Law results in Politics” .*

On the other side, we find more openly political approaches, therefore not totally “legal”, such as Neoliberalism and the so called “New Haven School” which “advocates the merger of international law with a certain branch of international relations theory, which cannot benefit any more of a superior “legal” character” .

So, we demonstrated the ‘presence’ of politics and international relations in the making and interpretation of international law as a fact. What changes from school to school is the reaction to this fact. One of the most equilibrate positions, probably closer to the New Haven School than to the realist one believes that a way can be the “open pursuit of political projects”.

To put it in the words of Paulus on International Law:

“*She must openly become part of the political process – as voice of moderation, even of reason, certainly, but also as conscious social actor. Even in the absence of legal guidance, the task of the lawyer is to contribute to reach acceptable solution for social problems…“*

Shall we speak about, in some way, a form of socialization of international law? I think so.

“*The lawyer has been transformed into a social engineer, a mediator between the parties, a manager of conflicts without a script and a method to follow*”

Within this framework of neoliberalism and socialization of international law Anne – Marie Slaughter theorized the new international arena occupied by different kind of networks, public and private, acting and being what I can call the new vertically and horizontally multipolar “International Community” .

She theorizes a perfect, balanced, fluid structure in which states are ‘just’ a part of the mechanism and in which this “networks” are the real motors of the international community. She explained the changed context of a globalized international community and envisions a new system for global governance, which fits for the purpose, taking into consideration the failure of the formal, structured International Organization, as set up in 1945. According to her vision that system has become too complex and slow, state-centric and far from the reality. Her system intents to create not only resolutions but real-solutions, communicates quickly and enhances cooperation between states, without repudiating the relevance of international organizations, but acting with them through the exercise of “hard and soft power” . One of the pillars of Slaughter’s teaching is “Generating reasoned solutions to complex problems” .

Actually these networks are already at work in our world, even within the UN system, which sometimes tries to re-invent itself in order to adapt to the new times. Slaughter gives us some indications: the Global Compact, for example, is the United Nations Program that brings companies together with UN organizations, international labor organizations, NGOs and other parties to foster partnerships and to build “a more sustainable and inclusive global economy” .

Slaughter convinced her readers of the concreteness of her theory, offering one of the most credible theories of international order in the post-modern age.

“*If the new sovereignty is the right and the capacity to participate in international regimes, networks, and institutions, accompanied by a responsibility to fulfill certain minimum requirements of membership, then becoming or being a sovereign state would mean the participation of as many government official as possible in plurilateral, regional and global government networks”*

VI. Other Reactions: Neopositivism, Revisionism, Neocostitutionalism.

Within the imaginary space between the extremes identified before, there are several other theories about international law in post-modern terms, whose most renowned of them are: neo-positivism, rationalism and neocostitutionalism.

The first one is mentioned by Paulus at the end of his essay and it is regarded as a natural reaction to neoliberalism. It is thought as a return to positivism :

"*The postmodern preference for the individual, the relative and the subjective, results in an embrace of old-fashioned positivism as the only means against the advance of neoliberalism .. The positivism's insistence on the value of sovereign equality, on the need to assure the consent of the marginal, and its preference for the public over the private."*

We found a theorization of rationalism and revisionism in the contribute of Oona A. Hathaway "Rationalism and Revisionism in International Law" , which faces the provocations of "The Limits of International Law". We can say that, according to this vision, rationalism and revisionism are two faces of the same coin.

Revisionism achieved the conclusion that international law does not carry any moral or legal obligation. Revisionist scholars cannot accept a theory of international law that describes state behavior as motivated by obligatory norms. If this is the theory, revisionists need some theorization in any case to develop an alternative to what they deny, a theory that will affirm that "state behavior under international law as arising from something other than obligation", and they eventually found it in Professors Goldsmith and Posner opera, "The Limits of International Law" . As we have already seen, it is a rationalist theory that is perfectly compatible with revisionism. Revisionists find in the rationalist approach of Professors Goldsmith and Posner the only element that was missing in their theory: the self-interest of the state.

The last theory, I called improperly "Neocostitutionalism" is an interesting theory argued by Susan C. Breau in her "The Constitutionalization of the International Legal Order".

Breau, in some part, is supported in her argumentation by Slaughters' theory. She draws a positive scenario for international law created by the new balance between the international organizations and governments, between international jus cogens and erga omnes obligations. She also valued the achievements of structures like the International Criminal Court - entered into force in 2002 - , or the United Nations Human Right sCouncil and the Peacebuilding Commission, established in 2005. All these subjects can be regarded as actors exercising a new set -yet provisional - of powers of an International Constitutionalized order.

From a personal perspective, an interesting trend in International Law which probably summarizes the theoretical positions collected above is what can be called the "Individualization of International Law" .

Such a phenomenon can be noticed at least in three branches of International Law: International Criminal Law, International Law of Human Rights and International Investment Law.

In the case of International Criminal Law, despite the disappointment given by the current performance of the International Criminal Court, the formalization, constitution, interpretation and application of this branch of law - applied not only by the ICC but also by the ad-hoc Tribunals such as the International Tribunals for Former Yugoslavia (ICTY) and Rwanda (ICTR) and others - is still an achievement which re-wrote International Law as a set of rules applicable not only to States and their representatives but also to individuals as such, generating an international individual responsibility in a concurrent and not exclusive regime with a potential international responsibility on the same matter.
In the case of the International Protection of Human Rights, more than the soft powers granted to individuals before the ad hoc Human Rights Committees, established as Guardians of each Human Rights Treaty, the most prominent and effective example is given by the work of the European Court of Human Rights based in Strasbourg, which allows individuals to sue the Countries of the Council of Europe - who therefore ratified the European Convention for Human Rights - for alleged violations of Human Rights.

In the case of International Investment Law, which is one of the most expanding branches of Law, we can clearly assist to the new 'triangolar' setting of the legal framework, when a role is juridically recognized not only to two States but also to the 'Investor' as a

private individual or entity. On this matter, the ICSID - International Center for the Settlement of Investment Disputes, created by the ad hoc Washington Convention as part of the World Bank Group, represents an innovative arbitral forum for legal disputes and conciliation among the parties, based upon the sources of this branch of law: the Bilateral Investment Treaties (BIT) between the States and the consequent Contracts between a State and an Investor.

VII. Global Governance - How to run the world?

This brief analysis of the conceptual, philosophical, historical and juridical evolution of International law demonstrated the fluidity of this branch of law, as I argued at the very beginning of this paper. Successes and misfortunes of International Law depends a lot from the context in which they operated: the historical momentum, political dynamics and from several other aspects that - has been argued - cannot anymore be considered as “not-linked” to international law, particularly in today's globalized world, but that in another way already need to find a permanent balance with it.

Changes and transitions are always traumatic and they can be addressed only with a longer term vision. When the first telegram arrived in the stationery office of an embassy, it caused the shock of the whole international community. They said: “The telegraph will be the end of diplomacy” . Nowadays, “Wikileaks” scandal and nowadays the new “Datagate” is shocking again the international diplomacy. Even if these events generated reactions in the fluid world of international relations, and consequently - to some extent - also in the behaviors of states in applying international law, and even if these scandals seemed to have jeopardized one of the most important characteristics of diplomacy - confidentiality- , international relations, international law and international community can change their physiognomy, but they will not end.

It is clear that Globalization, the rise of non-state actors, the role of politics in international relations and the role of economics in politics have generated a more confused framework that nevertheless needs to be re-ordered in some way. This is what every single

scholar did by giving his own interpretation of reality in a certain moment, clearly and naturally influenced by the context around him.

I mean, for instance, that the influence of the September 2001 terrorist attacks in the United States - dramatically passed to history as the 9/11 attacks - in Paulus'essay is visible and natural. As a consequence, he mentioned and talked about the presence of "terrorist organizations" as parts of the international arena.

In this sense, the last twenty years have been full of relevant events for international relations and therefore for the making and interpretation of international law.

Just to mention the macro-events, we can include: September 2001 and the war against terrorism, the wars in Iraq and Afghanistan, the global financial crisis started in 2008, the structural and juridical evolution of the European Union with the Treaty of Lisbon of 2009, the outbreak and deterioration of Middle-East conflicts, environmental disasters, the threat of global warming and debate on Climate Change, the creation of new States in the world, the Arab spring.

I may be 'labelled' as a neoliberal theorist but I must say that today's challenges for international law are indicated in finding the order in the world by giving to its actors the tools and the mean to address global issues and to conduct new dynamic international relations in consideration of a changed context.

Each event that I have previously mentioned contributed to re-shape the world order, determined the dynamics of international relations and influenced the making, the interpretation and the application of international law. Let's try to have a closer look and connecting the dots:

The 9/11 Attacks caused a strong reaction led by the United States. Those events generated heavy debates among international law scholars in the field of "Jus Ad Bellum" due to Bush's controversial doctrine on "Pre-Emptive War" or Self-Defense. A country - Afghanistan - was attacked due to its indirect role in hosting Talibans, enriching the practice about "Indirect Armed Aggression" . Not only, a new kind of War marked the stage: asymmetrical wars. The war waged 'against terrorism' was not against another State (against whom?) rather against a transnational entity.

The global financial crisis, outbroke in 2008, was the biggest side effect of Globalization. The crisis management gave to International or Transnational Economic Organizations a primary relevance. The International Monetary Fund, the World Bank, the European Commission - and to some extent even 'internal' - independent institutions like the US Federal Reserve and the European Central Bank indirectly - determined the future of several States in a decisive way. New tools were created in order to face the issue and these ones went even above the original prerogatives of these entities, overcoming the national sovereignty of the States. New international entities were formed such as the G-20. These phenomenon of re-shaping of the world order, creation of new legal and political tools for addressing the crisis somehow re-interpreted certain branches of international law and created new actors of international relations. These, had a strong impact as they have been able to give “binding” directives to sovereign states, thinking of Greece case, for an example.

The so-called Arab Spring is the process of regime transition occurring in several countries of the Middle East and North Africa Region. Such a process is extraordinary but now the peace-building process is going to become harder than expected and it is not clear, for example, which is the grade up to which foreign states can interact in conflicts before and in reconstruction later. This is caused also by the evolution and the “internationalization” of the civil wars under the flag of the humanitarian operations. Let’s think about the Libyan Arab Jamahiriya Case or the most recent case of Egypt. Formally the, democratically elected government headed by the Islamic President Morsi, has been deposed by the army but the international community did not intervened in violation of this right as provided, rather supported such an action. Without taking into consideration relevant arguments of political opportunity, these dynamics will influence the debate over the legitimacy of international intervention during conflicts as well as the building up of a "Post-Conflict Architecture" in the international system and potentially the evolution of a "Jus Post Bellum Theory" or , at least, practice.

The rise of non-state actors is also one of the most important elements of change in the international scenario. The alleged decline or retreat of the state and the concomitant rise of non-governmental organizations of all kinds has been uncontrolled and according to some point of views, “*not entirely benign” using Paulus's words*. For instance, non-state actors are even less accountable for their actions and less controllable by legal means than states. So,

also in this issue we should operate a classification of non-state actors with their different influence, utility and nature.

Nevertheless, the active and positive role played by the rising Global Civil Society is undeniable in terms of watch-dog activities, facilitation of process, content and evidence-based support of arguments, implementation of norms and practice from global to local level, interpretation and advocacy for new international rules and norms and humanitarian and development-cooperation delivering.

For instance, it is clear that global NGOs like the International Committee of the Red Cross (ICRC), Human Rights Watch, Amnesty International, Médecins sans Frontières, Greenpeace, Oxfam or even Transparency International, play an important "part" in the new game of the international community in several fields - from development and cooperation to protection of human rights and rule of law - and with different intensity . The ICRC represents the most developed case as it has played a crucial role in shaping and even collecting the rules, practices and then norms of International Humanitarian Law (IHL) and it has been granted an Observer Status to the United Nations General Assembly since 1990.

On a different level, we can consider also the influence of the most prominent colleges and universities in the world and their production, therefore the so called Academia. This idea was already valued by Schachter, in his image of the Invisible College of Lawyers. Simply, an essay from Berkeley University or Harvard can potentially influence world's decision in international law, economy or politics more than the declarations from Prime Ministers of one of the several micro-states or other less politically relevant States. Another relevant point in support of this argument is given from a human-resource based perspective, as it must be noted that these prominent scholars are often appointed in key-positions where they have to express their independent opinion, like in the top important cases of the 6th Commission of the UN General Assembly, the so-called International Law Commission, in charge of codification and harmonization of International law or in the cases of appointment of Judges in International Tribunals, in charge of applying and interpreting international Law.

On another different note, private-economic subjects such as multinational companies are the most important non-state actors we need to pay attention to. They probably are the most influent non-state actors exercising their power in the world in several different

directions: occupation, environmental impact, economy, quality of life. They influence government's actions in the most important agendas and usually their economic source is sensibly higher than the GDP of the 70% of the states in the world. Moreover, they can also spread messages quickly and more effectively than public institutions. Let's think about Apple, Samsung, and more over Facebook, Google or Twitter, we cannot forget the key-role of the social network in the Arab spring.

Paulus was right when he thought that the access of these subjects in the international arena would raise new problems, but there are also several instances of non-state actors that operated in a subsidiary way with respect to public subjects or governments. Charity Giants like the "Bill & Melinda Gates Foundation" with their patrimony of about 67 billion dollars give enormous help for the improvement of Health and Sustainable Development Agendas. To mention just one example: in 2006 they saved Bostwana from an epidemic that risked to delete the country from the maps. Some other times the action is driven by individuals like George Soros. He became one of the richest men in the world thanks to an hedge fund and he left its patrimony in favor of political dissidents persecuted all over the world. Such an action clearly has huge effect at political level.

A particular curiosity with regards non state actors, their influence and their key-role in the world is given by Parag Khanna in its bestseller "How to run the world" (200) which found out what happens in a small size college in Virginia. Every summer the youth-organization "American for Informed Democracy" (AID) organizes one of the hundreds Model United Nations Conferences (MUN), but absolutely updated to the time. Students there, not only represent sovereign countries but they represent also Non-State Actors, NGOs and individuals like Gazprom, Amnesty International, Greenpeace or Bill Gates, Nicholas Kristof, Al Gore etc. I think that students who joined Virginia's Model UN received a more precise and real image of the world around us than their colleagues attending Model UN all over the world. They probably don't know that they concretize in an academic sense the most relevant theory on international law and international relations of our time and more over they found a meeting point between the United Nations and the World Economic Forum, between private and public international interests. Marie Slaughter would be proud of them and personally I believe they understood earlier than the institutions they represented in which directions our world is going right now.

International scenario probably needs the order which Anthony Sampson tried to give in Great Britain in his book, mentioned by Khanna, too. He can be considered an English “Slaughterian” and, in 2004, wrote “Who run this place?” . He analyzed the influence, the potential and structure of the Britain “establishment” trying to find a balance in the chaos of interests and complexity of the actors present in UK: Prime Minister, the Courts of Justice, the Crown, lobbies, companies, richest class, diplomacy, the treasure, universities, the Church, parties, the armed force, the intelligence, insurances, medias, editors, unions. The system is so complex that it is hard to find a clear hierarchy so it is more effective and useful to understand the links, the connection, the network as it functions.

If we try to resume the world in a company, who will be the CEO? We cannot answer to this question. The world today is a vertically and horizontally “multi-polar” reality without a leading centre, and this is the reason why we cannot any more think about a Government of the World or a Super-State over the other.This has become structurally impossible. So, which are the poles? How and from where you can run the world? Politics, Economy, Energy?

Especially the last one changes the balance of power in the world: natural geography did not follow political geography and this is why country that politically are not strong but they are considered “strategic” for the entire planet. Another curiosity, to support the argument, suggested again by Khanna, who noticed appropriately that the Republic of Hungary, for example, nominated a special Ambassador with the only aim to manage the relations with Gazprom for the creation of the pipeline “Nabucco” which can grant the furniture of pipe allowing Hungary not to depend any more on Russian Federation.

To conclude, this is the reason why it is important to note that international lawyers (and not only) do not speak about “Global Government” but rather about “Global Governance” . The challenge is not anymore understanding "who run this world" but to understand "how to run this world" .

In such a different context, anyway and again, despite failures, criticism and ineffectiveness of the international legal order, there is and there will always be the need for international law and international lawyers. The challenge is to re-invent roles, tasks, aims, means and concepts in order to address the challenges of the current reality.

"*In their permanent search for the space between consent and justice, sovereignty and community, apology and utopia, international lawyers should both use the potentiality to accept the limit of their task. Only then they may become able to fulfil their share of responsibility in building a way for what we have got used to call, maybe prematurely, an international community*"

Bibliographical Notes and References

S. C. Breau, *The Constituzionalization of the International Legal Order*, in 21 *Leiden Journal of International Law*, 2008, pp. 545-561

A. Chayes, A. Handler Chayes, *The New Sovereignty: Compliance with International Regulatory Agreements*, Harvard University Press, 1998

J.L. Goldsmith, E.A. Posner, *The Limits of International Law*, OUP, Oxford, 2007

D. Kennedy, *International Law and the Nineteenth Century: History of an Illusion*, in 65 *Nordic Journal of International Law*, 1996, pp. 385-420

M. Koskenniemi, *From Apology to Utopia. The Structure of the International Legal Argument*, Cambridge University Press 2006 (originally published in 1989 by the Finnish lawyers' Publishing Company)

A.L. Paulus, *International Law after Post-modernism: Towards Renewal or Decline of International Law?,* in 14 *Leiden Journal of International Law*, 2001, 727-755

O. Schachter, *The Invisible College of International Lawyers*, in 72 *Northwestern University Law Review*, 1977, pp. 217-226

Anne-Marie Slaughter, *Sovereignty and Power in a Networked World Order*, in 40 *Stanford Journal of International Law,* 2004, pp. 283-327

.