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Introduction

International Governance – Theory and Practice

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While it might have been viable for states to isolate themselves from international politics in the nineteenth century,[1] the intensity of economic and social globalisation in the twenty-first century has made this choice impossible.[2] Not only have all major markets become 'internationalised', the ability of states unilaterally to guarantee internal or external peace have dramatically declined: 'Nation-states can no longer secure the boundaries of their own territories, the vital necessities of their populations, and the material preconditions for the reproduction of their societies by their own efforts.'[3] The contemporary world is an *international* world – a world of *collective* security systems and *collective* trade agreements.

What does this mean for the sovereign state and 'its' international legal order?[4] If each legal order tries to 'reflect the principles of the social order that it seeks to regulate',[5] what legal principles do or should govern the contemporary world? If the empirical conditions in which 'national' solutions were found to offer satisfactory regulatory responses are no longer with us,[6] is there not a postulate of practical reason that demands new

[1] On the US American policy of 'isolationism' until World War I, see G. C. Herring, *From Colony to Superpower: U.S. Foreign Relations since 1776* (Oxford University Press, 2011).

[2] On social and economic globalisation, see D. Held and A. McGrew (eds.), *The Global Transformations Reader: An Introduction to the Globalisation Debate* (Polity Press, 2003).

[3] J. Habermas, *The Divided West* (Polity, 2006), 176.

[4] On the dialectical relationship between the emergence of the modern state and modern international law, see W. G. Grewe, *The Epochs of International Law* (Walter de Gruyter, 2000), Parts III and IV.

[5] W. Friedmann, *The Changing Structure of International Law* (Columbia University Press, 1978), 3. For a similar point, albeit with a positivistic and conservative 'sting', see P. Weil, 'Towards Relative Normativity in International Law?' (1983) 77 *AJIL* 413.

[6] One illustration of this loss of 'boundary control' of most nation-states is the loss of 'public' power in the intense corporate tax competition that has resulted from globalisation and thereby weakened the modern welfare state (see D. Rodrik, *The Globalization*

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normative solutions? In other words: if the problems within today's world are international problems, should the regulatory solutions not be 'international' or 'supranational' solutions?

Two alternative approaches to the problem of 'governance' in the era of 'globalisation' developed in the twentieth century: universal internationalism and regional supranationalism. Both were born in the shockwaves of two terrifying World (!) Wars, which profoundly questioned the stability and permanence of an international 'order' founded on the idea of sovereign nation states. The post-war period thus sees the creation of global institutions,[7] such as the 1945 United Nations (UN) and the 1947 General Agreement on Tariffs and Trade (GATT) to stabilise world peace and to liberalise the world economy.[8] Nevertheless, modern international law retained its adherence to the 'sovereign equality' of all states.[9] In theory, the 'spheres' of international and national law have indeed stayed divided;[10] and by allowing each state to sovereignly determine the status of international norms within its domestic legal order, the 'normativity' of international law has remained contested.[11] Practically, the tension

Paradox (Oxford University Press, 2012), 193: 'There has been a remarkable reduction in corporate taxes around the world since the early 1980s. The average for the member countries of the OECD countries, excluding the United States, has fallen from around 50 per cent in 1981 to 30 per cent in 2009.').

[7] A. Verdross and B. Simma, *Universelles Völkerrecht. Theorie und Praxis* (Dunckner & Humblot, 1976). On the relationship between these formal 'universal' institutions and US American hegemony, see only: G. J. Ikenberry, 'Globalization as American Hegemony' in D. Held and A. McGrew (eds.), *Globalization Theory* (Polity, 2007), 41; and on the 'hegemonic stability thesis' for international institutions more generally, see C. Kindleberger, *The World in Depression 1929–1939* (University of California Press, 1986).

[8] For a historical introduction to the United Nations Charter, see H. Kelsen, *The Law of the United Nations: A Critical Analysis of its Fundamental Problems* (Lawbook Exchange, 2011). On the origins and historical background of the GATT, see J. H. Jackson, *World Trade and The Law of the GATT* (Bobbs-Merrill, 1969).

[9] See Article 2(1) UN Charter: 'The Organization is based on the principle of the sovereign equality of all its Members.' On the need of a 'hegemonic' superpower to be more equal than all others, see however above n. 7.

[10] The classic dualism doctrine was based on the idea that international law and national law form 'two circles that may touch, but never overlap' (H. Triepel, *Völkerrecht und Landesrecht* (Scientia, 1958), 111); and while this idea has been softened around the edges in the past hundred years, it is still part and parcel of contemporary international law. See only Article 2(7) UN Charter: 'Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state[.]'. This is also the case, mutatis mutandis, for the GATT.

[11] H. L. A. Hart, *The Concept of Law* (Oxford University Press, 1997), Chapter 10. See also: M. Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (Cambridge University Press, 2005).

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between binding international norms and state sovereignty is however generally resolved by a voluntarist doctrine of consent. The consent requirement, despite its 'legitimacy' pretensions,[12] nevertheless means settling for a 'governmental' minimalism in which the unanimity rule translates into a 'tyranny against the majority'.[13]

A second approach to transnational 'governance' has tried to remedy these shortcomings by re-establishing majoritarian governmental structures at the regional scale. This regional approach promised to reduce collective action problems, and it did so by inviting a limited group of states to share their internal sovereignty within a broader supranational 'union' of states.[14] The best analysed example here is the European Union (EU).[15] From the very start, European integration contrasted with international 'coordination' in two essential ways. Normatively, the status of supranational law within the domestic legal orders would generally not depend on national law; and decisionally, the creation of supranational norms would, as a rule, not require unanimous consent.[16] In both respects, the European Treaties clearly 'broke' with 'ordinary' international law because they set up a government endowed with 'real powers stemming from a limitation of sovereignty or a transfer of powers from the States'.[17] But what kind of 'government' has the EU; and what governance solutions did it have to offer?

This collection of essays wishes to analyse – and contrast – the two types of normative and decisional answers that have emerged as responses to

[12] For the idea that only a (unanimous) consent may legitimise 'international' or 'supranational' law, see J. H. H. Weiler, 'The Transformation of Europe' (1991) 100 *YLJ* 2403, 2473.

[13] A. McNair, 'International Legislation' (1933–4) 19 *Iowa Law Review* 177 at 181 (quoting N. Politis, my translation).

[14] See only the 'Spaak Report' on the advantages of creating a European Economic Community (cf. R. Schulze and T. Hoeren, *Dokumente zum Europäischen Recht: Band 1: Gründungsverträge* (Springer 1999), 756 (my translation, emphasis added)): 'And even if we much desire a far-reaching liberalisation of world trade, for the reason set out above, *a true common market can only be created by a limited group of States* – although their number should be as big as the creation of such a common market would allow.'

[15] P. Pescatore, *The Law of Integration: Emergence of a new Phenomenon in International Relations, based on the Experience of the European Communities* (Sijthoff, 1974).

[16] This dual supranationalism formula formed part of the 1951 European Coal and Steel Community. Within the 1957 European Economic Community it was however questioned by the Luxembourg Compromise; yet after 1979 and *Cassis de Dijon*, the dual character of supranationalism was restored first by the judiciary, and after 1987 by the Member States through the Single European Act. For the – mistaken – idea that normative and decisional supranationalism are or were in a state of 'equilibrium' within the European integration project, see Weiler, 'The Transformation of Europe' (above n. 12).

[17] Case 6/64, *Costa* v. *ENEL* (1964) ECR 585, 593.

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the 'international' problems within our globalised world: universal internationalism and European supranationalism. We have tried to chart this – enormous – intellectual terrain by dividing our analysis into two-times-two 'quarters'. The book is therefore divided into two parts – international and supranational – which are each further divided alongside a 'theoretical' (formal) and a 'practical' (substantive) dimension.

The theoretical dimension is to explore the 'formal foundations' of each legal order, that is: the normative 'resources' that were historically developed to 'explain' and 'justify' governance beyond the nation state. How has (inter)national legal theory justified the binding nature of norms adopted outside the state? How can a 'treaty' – a consensual instrument – be the fountain of *compulsory* international law; and 'how can one give meaning to concepts such as "crimes against humanity"'?[18] The discussion of the practical dimension is to complementarily offer an – impressionistic – arsenal of the substantive 'challenges' (and 'solutions') to the problems of our times; yet the book also hopes to show that the practical solutions are – of course – in a dialectic relationship with the theoretical 'superstructure' in which they are embedded. For us, the three 'common' concerns that pose the most pressing collective action problems today are: the maintenance of peace and security, the regulation of the economy (and finance), and the protection of the environment; and we have finally added 'criminal law' as this area of law traditionally enjoys strong 'emotive' associations with (national) 'communities'.

The central premise behind the book is as simple as it is (perhaps) uncontroversial: when contrasting internationalism with supranationalism, the 'formal' and 'substantive' tools offered by the latter to 'govern' collective transnational problems are distinctly firmer and sharper; and the contemporary solutions for global 'governance' problems therefore should lie – at least in the immediate future – in the creation of regional 'governments' beyond the nation state. The specific advantages of 'regionalism' in solving transnational problems are not new;[19] yet the rise of regionalism at the turn of the twenty-first century is impressive.[20] Offering a middle ground

[18] Cf. S. Benhabib, *Another Cosmopolitanism* (Oxford University Press, 2008), 20–1.

[19] For an excellent analysis here, see L. Fawcett and A. Hurrell (eds.), *Regionalism in World Politics: Regional Organization and International Order* (Oxford University Press, 1992), esp. Chapter 2; as well as: W. Mattli, *The Logic of Regional Integration: Europe and Beyond* (Cambridge University Press, 1999).

[20] For an overview of the 'new regionalism', see F. Söderbaum, *Rethinking Regionalism* (Palgrave, 2016); as well as: T. Börzel and T. Risse (eds.), *The Oxford Handbook of Comparative Regionalism* (Oxford University Press, 2016).

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between 'cosmopolitanism' and 'nationalism', 'regionalism' promises to contain the – external – pressures of globalisation while it also represents an – internal – compromise that combines unity and diversity.[21] And as long as the realisation of the 'positive idea of a world republic' is 'utopian', the best 'practical' solution here undoubtedly remains its 'negative substitute' in the form of a (regional) federation of states.[22] Importantly, then: regional supranationalism is not an argument against international 'universalism'. The two approaches to govern transnationally can complement each other;[23] even if there are – of course – normative tensions between a 'particular' and the 'universal' approach; and these divergences have in the past resurfaced both in the context of the United Nations and the World Trade Organization.[24]

Having outlined the overall structure and argument of the collection, let me briefly introduce the diverse voices within it. Part I(A) begins with

[21] On this combination in the context of the European Union, see H. Wallace, 'Politics and Policy in the EU: The Challenge of Governance' in H. Wallace and W. Wallace (eds.), *Policy-Making in the European Union* (Oxford University Press, 1996), 16: 'European integration can be seen as a distinct West European effort to contain the consequences of globalisation. Rather than be forced to choose between the national polity for developing policies and the relative anarchy of the globe, west Europeans invented a form of regional governance with polity-like features to extend the state and harden the boundary between themselves and the rest of the world.'

[22] I. Kant, 'Perpetual Peace: A Philosophical Sketch' in *Political Writings* (Cambridge University Press, 1991), 105. For the view that no 'government' – neither universal nor regional – is needed, see A.-M. Slaughter, *A New World Order* (Princeton University Press, 2004). However, the view that 'global governance though national governments' (ibid., 32) is the solution to global problems is at best naïve and at worst hegemonic.

[23] For the United Nations, see only Article 52(1) UN Charter: 'Nothing in the present Charter precludes the existence of regional arrangements or agencies for dealing with such matters relating to the maintenance of international peace and security as are appropriate for regional action, provided that such arrangements or agencies and their activities are consistent with the Purposes and Principles of the United Nations.' For the GATT, see only Article XXIV(4): 'The contracting parties recognize the desirability of increasing freedom of trade by the development, through voluntary agreements, of closer integration between the economies of the countries parties to such agreements.'

[24] In the context of the United Nations, the best-known example is the 'Kadi Saga'. For a discussion of this famous 'divergence', see only: R. Schütze, *Foreign Affairs and the EU Constitution* (Cambridge University Press, 2014), 65–90. For a discussion of the increasing divergence between the WTO rules and EU internal market law, see R. Schütze, *Framing Dassonville: Text and Context in European Law* (Cambridge University Press, in preparation), esp. Chapter 6. For the – contrary and indefensible – idea that international and European trade law are converging and not diverging, see however J. H. H. Weiler, 'Epilogue: Towards a Common Law of International Trade' in J. H. H. Weiler (ed.), *The EU, The WTO and the NAFTA* (Oxford University Press, 2000), 201.

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a historical exploration of the 'unsettled' formal foundations of international government in the eighteenth century, and here in particular the philosophy of Immanuel Kant (Robert Schütze). Leaping over the well-settled nineteenth century,[25] our second chapter then investigates the renaissance of 'objective' normativity at the beginning of the twentieth century through the work of Hans Kelsen (Jochen von Bernstorff). These historical pieces are complemented by two philosophical investigations on the normative structure of the contemporary world order seen through the prism of 'tyranny' (Aoife O'Donoghue) and the epistemological question of the relationship between a 'theory' of a 'new order' and the 'reality' of the 'new world' (Philip Allott).

How do these formal foundations translate into substantive international 'governance' solutions? Part I(B) offers a vision of a 'real utopia' through the 'international constitutionalisation and the use of force' (Marc Weller). It subsequently moves to an analysis of the changing legal structure of international trade law, where the world economy is less and less 'governed' by a universal World Trade Organization (WTO); and where the dramatic rise of 'regional' trade agreements or 'plurilateral agreements' has challenged and 'fragmented' global approaches within this area (Bernard Hoekman and Petros Mavroidis). The global environment and its governance problems is the subject of Chapter 7 (Markus Gehring), while the last chapter within this first part explores the theory and practice of international criminal law through the prisms of 'universalism' and 'pluralism' (Olympia Bekou).

What are the normative and decisional resources brought to transnational problems by the EU? The theoretical schism between the 'old' order of international law and the 'new' order of European law is the theme of Part II(A). For while there are excellent attempts to explain regional integration with the normative vocabulary of international law (Bruno de Witte), the EU has resolutely embraced a 'constitutional' paradigm in which it sees itself as exercising autonomous 'public' power – even if there remain significant 'governmental' deficits (Christoph Möllers). Based on the principle of subsidiarity, the Union conceives itself as a unity-in-diversity that aims to offer 'European' solutions only where the Member States are not themselves able to provide 'governmental' responses. The origins and components of the principle – as well as its shortcomings – will be analysed in Chapter 10 (Katarzyna Granat). European supranationalism

25 For a wonderful discussion here, see M. Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870–1960* (Cambridge University Press, 2001).

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also means dual citizenship in which citizens are members of two political orders. Far from being a 'cynical public relations exercise',[26] the EU citizenship provisions have had a 'constructive' function that has 'transformed' – at least to some extent – the 'logic' or 'mindset' of the European institutions (Dimitry Kochenov).

Have these – very – different normative foundations given rise to different substantive solutions in our four reference areas? Part II(B) begins to analyse this question by exploring the 'regional' approach that the EU has taken to foreign and security policy (Ramses Wessel). It is here argued that 'it is perhaps the best example of a combination of national, EU and international legal elements' that have been developed to cope with globalisation.[27] This hybridity, while no longer part of the internal market core, can also be found at the margins of European economic integration, where there has been a resurgence of intergovernmental techniques in the (executive) 'governance' of Economic and Monetary Union (Alicia Hinarejos). A much more 'positive' integration example however is, by contrast, offered in the subsequent chapters dealing with EU environmental law (Ludwig Krämer) and EU criminal law (Valsamis Mitsilegas). Especially the last chapter underlines the dialectical interplay between the theoretical foundations of an area and its practical challenges and solutions.

The 'European' solutions to the 'international' problems caused by globalisation are of course not meant to be 'universal'. They are 'particular' solutions generated within and for one particular region – Europe – and will neither necessarily nor directly offer substantive answers to different regions of the world.[28] Yet the European 'example' may be inspiring in at least one more general way: for it has shown a remarkable imagination and determination to go beyond the 'sovereigntist' thinking of the nation state era.[29] Indeed: the ability to formally imagine a European 'government' – not

[26] For this view, see J. H. H. Weiler, 'Citizenship and Human Rights' in J. A. Winter et al. (eds.), *Reforming the Treaty on European Union* (Kluwer Law International, 1996), 57, 68.

[27] For this point, see page 339 below.

[28] *Pace* neo-functionalists, there is indeed no universal logic of regional integration. For an excellent comparative analysis here, see only: L. Fioramonti (ed.), *Regionalism in a Changing World* (Routledge, 2013); and more recently: L. Fioramonti and F. Mattheis, 'Is Africa Following Europe? An Integrated Framework for Comparative Regionalism' (2016) 54 *JCMS* 674.

[29] See T. Börzel and T. Risse, 'Introduction' in T. Börzel and T. Risse (eds.), *The Oxford Handbook of Comparative Regionalism* (Oxford University Press, 2016), 3, 5: 'While the EU is the most developed regional organization and continues to be a model for comparison and emulation, we argue that it is not necessarily one of its kind, if it ever was. Systematic comparisons with regionalisms in other parts of the world deconstruct the allegedly sui generis "nature of the beast". For an interesting way to link 'European Studies' with

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just informal 'governance' – in which (formal) 'legislation' is adopted by a 'bicameral legislature' that comprises a 'Parliament' that is 'democratically' elected testifies to a remarkable change in the normative 'mindset' brought to the solution of collective transnational problems.[30] And despite the sirens of decline and doom,[31] Europe's imagination and determination are not confined to a generation of messianic patriarchs; nor do the Union's normative resources or substantive solutions lie in its nation states' past.[32] The EU must – and will – evolve into a more perfect union that will further develop its own 'constitutionalism' within which international problems will find supranational solutions. But these – broader and controversial – matters shall all be returned to in the 'Conclusion' (Martti Koskenniemi), while an 'Epilogue' lays out elements of a theory of global governance (David Held).

'Regionalism Studies', see A. Warleigh-Lack and B. Rosamond, 'Across the EU Studies–New Regionalism Frontier: Invitation to a Dialogue' (2010) 48 *JCMS* 993.

[30] M. Koskenniemi, 'Constitutionalism as Mindset: Reflections on Kantian Themes about International Law and Globalisation' (2007) 8 *Theoretical Inquiries in Law* 9. And see also: P. Allott, Chapter 4 in this volume: 'It is the task of *philosophy* to provide the emerging international society with the self-consciousness of a true society.'

[31] See only: G. Majone, *Rethinking the Union of Europe Post-Crisis: Has Integration Gone Too Far?* (Cambridge University Press, 2014); as well as J. H. H. Weiler, 'In the Face of Crisis: Input Legitimacy, Output Legitimacy and the Political Messianism of European Integration' (2012) 34 *Journal of European Integration* 825.

[32] See especially: G. Majone, *Dilemmas of European Integration: The Ambiguities and Pitfalls of Integration by Stealth* (Oxford University Press, 2009), 188: 'the absolute primacy of the territorial state over all competing principles of social cohesion' as well as Weiler, 'In the Face of Crisis' (above n.31), 837: 'primacy of the national communities as the deepest source of legitimacy of the integration project'.

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