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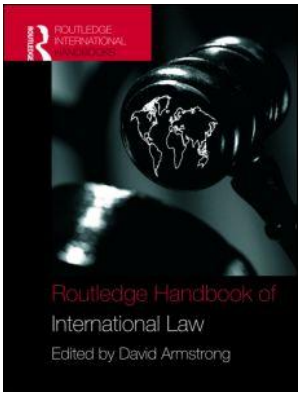

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International Law and International Community

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International law and international community

Andreas Paulus

The term "international community" adds a normative element of common values to the more factual notion of an interconnected international society composed of states and other international actors. The chapter analyzes institutionalist, liberal and postmodern views of the international community. It also looks at more recent claims that international law is fragmenting rather than developing into a community. The chapter concludes that a common ground of values is needed for international law to function. The international community does not constitute a system superior to all others, but is a shortcut for the dealings of states and non-state actors beyond state boundaries, and for a collective endeavor to tackle problems such as the protection of the environment and the prevention of genocide and famine.

> But do the nations constitute a community? . . . The history of International Law is, largely, the history of the formation of this community, so far as it may be said to have been formed – the building up of common opinions upon common practices and the writings of commonly accepted commentators.
>
> (Wilson 1969: 455; emphasis in original)

Introduction

In the age of globalization, the "international community" appears omnipresent: it acts and intervenes, as in the case of Kosovo (Klein 2000), it helps the victims of natural disasters, is called on to redouble its efforts to prevent and suppress terrorist acts, as after the attacks against the United States on September 11 (UN Security Council 2001a), or seems helpless and inactive in spite of the best of its intentions, as in Darfur (Paulus 2008a). Resolutions of international organizations and NGO conferences alike use the term in an almost inflationary way. It is invoked by statespersons around the world. Even the Bush administration, which came into office reluctant to use a concept so much tied to a more egalitarian view of international relations than its own (Rice 2000), is now using the term regularly in its press releases (White House 2008).

It is perhaps no coincidence that the popularity of the concept has grown along with the awareness of the consequences of globalization. Whereas the latter stands for the sometimes harsh economic realities of an age which seems no longer to allow for the territorial protection of local habits and mores, the "international community" connotes the emergence of a new global home, a worldwide village of human commonality emphasizing interpersonal bonds rather than territorial borders. And yet, it may also be used

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for the exclusion of others, such as rogue states, terrorists, and, at times, anti-globalization activists.

The term "international community" is sometimes used interchangeably with the term "international society" (Henkin 1995a).[1] As a more extensive inquiry has shown, the usage is far from uniform (Paulus 2001b: 9, 439). Nevertheless, one may say – with the necessary caution – that a community adds a normative element, a minimum of subjective cohesion to the social bond between its members. Whereas society emphasizes factual interconnections and interrelations, community looks to values, beliefs and subjective feelings. The differentiation between society and community thus echoes the German sociologist Ferdinand Tönnies' distinction between *Gemeinschaft* and *Gesellschaft* (Tönnies 1935). But despite the inclusiveness of the term, even a universal community knows an outside, an environment against which it defines and delineates its identity (Simma and Paulus 1998: 268). Hence the debate on "rogue states" and an "axis of evil" composed of states that do not seem to share the alleged consensus (Bush 2002a).

Recent developments, from September 11 to the war in Iraq, have pushed the idea of an international community based on common values and international law farer away than ever. The counter-image of international community, the "clash of civilizations" (Huntington 1996), appears nearer to reality. It is however precisely the multiplicity of religious and ethical approaches to the world that make the agreement on a minimum of common values so important. It is one of the main tasks of international law to provide rules of coexistence and, increasingly, to find avenues to solutions to global problems not in spite, but because of the global pluralism of value and belief systems.

Analyzing the international community requires more than the development of abstract concepts, however. It requires the analysis of the impact of the concept on legal, social, and political practice, including an analysis of its effects on the persons at the receiving end, so to speak. Which purposes does the term serve? Is the invocation of the "international community" a move to hide one's own lust for power behind a smokescreen of high-mindedness – or, in Martti Koskenniemi's provocative words, "kitsch" (Koskenniemi 2005b: 121–23)?[2] Or does it serve the useful purpose of pointing to a claim of authority rooted not in a domestic source, but in some internationally agreed basic values of global import? Obviously, to answer these questions in any comprehensive way is impossible.[3] But this chapter intends to show that most concepts of international law are based on a particular view of the international community.

We will look at three different understandings of the international community, institutionalist, (neo)liberal, and postmodernist. Whereas an institutional view couples the development of an international community to the establishment of successful international institutions (Abi-Saab 1987; Dupuy 2002; Simma 1994; Tomuschat 1999; cf. Miller and Bratspies 2008), liberal views are increasingly skeptical of public international institutions and base the international legal order on individual preferences and human rights instead (Buchanan and Keohane 2006; Reisman 1990; Slaughter 1995). Finally, postmodernist writers reject the universality of liberal principles and demand a regard for the other, for difference rather than unity, for unintended consequences rather than good intentions (Kennedy 1999).

We will proceed to conceptualize the emerging pluralism of legal orders and ask ourselves whether the increasing perception of the "fragmentation" of the international legal order will render any attempt at a holistic, communitarian view of the international legal realm impossible (Teubner and Fischer-Lescano 2004). We will also look at the emerging discipline of "global administrative law" that develops a view of the role of international law "from the bottom" rather than starting at the "constitutional" level of the

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ordering of the global international society (Krisch and Kingsbury 2006a; Kingsbury et al. 2005).

This contribution concludes that contemporary international law embraces parts of all the conceptions developed earlier. However, the different attempts to establish an international legal order are evidence of the need to develop a comprehensive vision, even if such conception will always remain partial and incomplete. Laying out one's view of the whole appears preferable to the holding of implicit assumptions without admitting much criticism or debate. *Ubi societas, ibi jus*, a Roman proverb says: No society without law. But the reverse is also true: *Ubi jus, ibi societas*. While law cannot create a community alone, it needs a minimum of common values and procedures to function. Thus, the debate on the legal character of international law is also a debate on whether a minimum of international community can be established to allow for international law to develop.

Conceptions of the "international community"

Every concept of international law is based on an understanding of the social structure international law applies to. Accordingly, every theory of international law involves, explicitly or implicitly, a concept of international community or society. At the same time, these background understandings are not of an exclusively legal character. Thus, international law does not require the acceptance of one, or any, of the following conceptualizations. And yet, conceptions of "international community" shed light on the way international law is understood and interpreted.

Concepts of international law and order do not exist somewhere in a vacuum. Rather, they are related to perceptions of political and legal events. Both the terrorist attacks on the United States of September 11, and the latest war against Iraq by the United States and a "coalition of the willing" (Benvenisti 2006), a war that was, according to most accounts, contrary to international law (Fisler Damrosch and Oxman 2003: 553–642; Paulus 2004b), challenge traditional concepts of an international community based on the "sovereign equality" of states, as Article 2, para. 1, of the Charter of the United Nations has it. September 11 puts into question the conceptualization of the international community as a "community of states" with little, if any, direct participation of individuals in global governance. When the main security threat does not emanate from states but from terrorist groups of individuals, states appear to have lost some of their monopoly of the use of force. When the remaining superpower feels free to ignore the most basic rules of international law regarding the prohibition on the use of force, but demands strict adherence from other states, sovereign equality cannot be taken for granted, not even as a normative ideal.

Do September 11 and Iraq uncover permanent flaws in the idea of an international community based on a global political "overlapping consensus" (Franck 1995: 14; Rawls 1996: 147; Roth 1999: 6) and the rule of law, or do they merely reflect the broadening of globalization from the economic to the political realm? International law can serve both as a constraint on power – for instance prohibiting the use of force – and as a translation of power into concrete orders and prohibitions. If the international community threatened the "right to survival" of societies by rendering the state incapable of countering new threats from non-governmental actors such as al-Qaeda by legal means, states might choose to protect themselves as they see fit and look for international justification later. Democratic constitutions may question the legitimacy of a legal order that emanates from the consensus of states independently of their democratic legitimacy. If, contrariwise, the so-called "global war on terror"[4] resulted in an international law embodying the writ of a superpower rather than sovereign equality, its worldwide acceptance would suffer. However, the United States does not seem

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to lay out a coherent vision of such a hegemonic international order (Alvarez 2003; Krisch 2005; Vagts 2001).

Let us have a look at some conceptualizations of the international community to see whether and how they accommodate the situation after "September 11" and "Iraq." This chapter will single out three strands of responses to these questions – institutionalist–communitarian, (neo)liberal, and postmodernist. We will use recent developments as a kind of "hard case" to test some of the conceptualizations of the international community.

Institutionalist theory and globalization

Many international lawyers base the development of a true international community or society on a societal consciousness encompassing the whole of humanity (Allott 1990; Dupuy 1986). Wolfgang Friedmann established the distinction between the law of coexistence and the law of cooperation (Friedmann 1964). Taking up that distinction, some contemporary scholars, especially in the German constitutional tradition, developed concepts of a more institutionalized international community. In that view, international law moves – or should move – "from bilateralism to community interest" (Simma 1994), is about to establish "world interior politics" (Delbrück 1993/4), or shall ensure "the survival of mankind on the eve of a new century" (Tomuschat 1999). Instances of such an order in contemporary international law can be seen, e.g. in *jus cogens* (Paulus 2005), obligations *erga omnes* (Tomuschat and Thouvenin 2006), in the concept of the common heritage of mankind (Dupuy 1986: 159–68), in the alleged "constitutionalization" of the UN security system (Fassbender 1998b) and of the WTO trading system (Petersmann 1997: 421), and in the establishment of the International Criminal Court.[5] Those who believe in a parallelism between legal norms and institutions – what Georges Abi-Saab has called the "law or fundamental hypothesis of 'legal physics'" (Abi-Saab 1998: 256) – demand the strengthening of global institutions to respond to the challenge of globalization.

However, institutionalism faces increasing difficulty with the current political mood after September 11 and Iraq. The terrorist attacks on the United States have confirmed the critical attitude of the United States towards European institutionalism. The U.S. government, at the time by-and-large supported by the American public, concluded that America needed to protect itself, and would not depend on the support of others.[6] Indeed, in the writings of Robert Kagan (Kagan 2002, 2003), which have been widely cited, European institutionalism is presented as a system for good times only. In the European paradise, slow and bureaucratic institutions may be useful, but the world writ large is a dangerous place, in which an America untied by international institutions needs to provide order – in the best interests of the world in general, and of Europe in particular.

Since the Iraq adventure has turned into a quagmire, such self-assuredness appears increasingly unwarranted. In a postscript to his book, Kagan admits that the exercise of power needs legitimacy to be successful, and that international institutions in general, and Europe in particular, can provide it (Kagan 2004: 65). However, he charges Europe with not fulfilling that role properly when it withholds legitimacy from American unilateral actions that the United States deems necessary for the maintenance of international peace and security. Thus, the display of military power needs to be grounded in legitimacy to provide for order. However, what power can legitimacy have if it has no other option than to approve the use of force? Nevertheless, there seems to be agreement that international institutions may indeed serve a useful function even for the single superpower.

Thus, the aftermath of September 11 has not led to a diminishing of the role of international institutions, and has not stopped

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the institutionalization of international or rather global relations. Indeed, one could make the point that the role of the Security Council has been enhanced rather than diminished: Its lack of approval made the attack on Iraq even more risky, and the result so far certainly does not invite repetition. Both the United States and the United Kingdom brought forward legal arguments that presented their action as an implementation of, rather than derogation from, existing Security Council mandates (Taft and Buchwald 2003).[7] Indeed, although they did not receive backing from the Security Council for the attack itself, the United States and the United Kingdom returned to the Council to legitimize the occupation and the establishment of a new democratic order in Iraq.[8]

In areas beyond security, from trade to health and human rights, it is even more difficult to question the idea of an unstoppable march of globalization towards the construction of global institutions. The German sociologist Niklas Luhmann has described this development as a move from territoriality to functionality (Luhmann 1997: 158–60, 1995b: 571), from a world of sovereign territorial states to a world of functional institutions. The main characteristic of international institutionalism consists in the multiplicity of institutions in the international realm without an overarching hierarchy (Teubner and Fischer-Lescano 2004; Paulus 2004a).[9] Thus, international institutionalism will not end in a world state, but will have to deal with pluralism and multiplicity of institutional designs, from governmental to non-governmental actors. Teubner and Fischer-Lescano regard collisions of different regimes as collisions between the diverse rationalities within global society. Their cure lies in a constitutionalization of the particular rather than in the search for a representation of the general.

Discourse ethics and democracy theory emphasize the need of embedding global democracy into institutional designs (Habermas 1996: 132, 672; Held 1995). Some suggest the development of global democracy – a people's chamber of the U.N. General Assembly might constitute a beginning (Franck 1995: 483). Others have insisted on the nation state as the primary place of democratic legitimation, control, and accountability (Habermas 1996: 225, 672). Further means of legitimation seem necessary, in particular for the more informal exercise of power by international bodies not subject to state control. But the pluralism of the international community seems not to fulfill a basic condition for a democracy based on simple majority voting. Rather, considerable modifications of domestic notions of democratic legitimacy are required to apply them to the international community (Besson 2007; Paulus 2008b).

Liberalism after September 11

The interstate model of international community, in which individual human beings acquire rights and duties only via their national states, appears to be in trouble when not only goods and services, but also individuals are increasingly moving internationally, and where their ideas cross borders via the internet or other means of global communication. A liberal concept of international community draws the consequences of these developments by focusing on individual rights and duties. Liberals and neoliberals demand a reconstruction of international law on an interindividual basis. Informal "government networks" may become effective regulators, balanced by a minimum of effective domestic control (Slaughter 2004b).

Anne-Marie Slaughter has concluded that the state as unitary actor has largely become an abstraction far from reality. Rather, the liberal state is "disaggregated" into its component parts, in particular in the three branches of government: legislative, executive, judicial (Slaughter 1995, 2004b: 131–65).[10] Accordingly, these branches of government are becoming separate, if not independent, actors at the international level, building "transgovernmental" networks with

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their counterparts from other liberal states. "Transjudicial networks" of judges and lawyers play an increasing role in the self-awareness of courts and tribunals all over the world: "The system these judges are creating is better described as a community of courts than as a centralized hierarchy" (Slaughter 2004b: 68; see also Slaughter 2003). Of course, this community also includes "legitimate differences." Nevertheless, lawyers from liberal states are considered to have as much, if not more, in common with each other than with their domestic counterparts in the other branches of government.

Whereas more moderate representatives of liberal ethics justified classical international law as allowing for multiple, diverse societies (Rawls 1999), more radical philosophers demand the establishment of a "world social order" fulfilling the promises of human rights at the international level (Beitz 1979; Pogge 1989). The international community is not based on formal legitimacy alone, but also incorporates material fairness, with "shared moral imperatives and values" (Rawls 1999: 10–11). The institutional expression of liberal values is less important than the protection of individual rights. In a liberal community of individuals, the justification of state sovereignty is removed when the state fails to protect the rights of its citizens. In the case of some writers, this position translates into a justification of unilateral intervention for the protection of human rights – from Kosovo to Iraq (Tesón 2005).

September 11 has bolstered the views of those who share both the belief in the superiority of western values and the disdain for strong international institutions beyond the (democratic) nation state (White House 2002). Control of the superpower seems less important than the confidence in its values and ability to act for the common good – or, rather, for the safeguard of individual rights of people everywhere. Islamic fundamentalists have literally declared war against liberal democracy, and the only recipe against these enemies of liberty is accepting the challenge. Mechanisms of negotiation, accommodation and consensus seem inapt to counter the threat. "Either you are with us, or you are with the terrorists" (Bush 2001). Thus, liberalism is (ab)used by neoconservatives for the benefit of a hegemonic project. As the Iraq war shows, this odd combination of liberalism with Schmittian concepts of friend and foe may become a self-fulfilling prophecy.

While the Iraq war separated a legalist and an imperialist wing of liberalism, these models share a potentially revolutionary individualist view of international law, in which statist models and ideas are discarded for the benefit of individuals (Buchanan 2004; Buchanan and Keohane 2006; Tesón 1992). Human rights are the new paradigm, also at the cost of delegitimizing interstate institutions. However, this raises not only the question of how to stabilize international law without institutions, but also the question of how the international community can cope with pluralism and difference. This question is at the core of the postmodern challenge.

Postmodern critique of international community

In a postmodern understanding, community is not possible without exclusion and suppression of "the other." And indeed, the exclusion of others is as much part of any community concept as their inclusion. Thus, community may be used as an ideological construct for the maintenance of structures of power, excluding the "other," the marginal, the different. Postmodernists criticize both the social–democratic enthusiasm for new international bureaucracies and the neoliberal reliance on unquestioned liberal values.

The liberal concept of community is rejected because it does not take account of the multiplicity of ethical approaches and marginalizes those opposed to the dominant model (Kennedy 1999: 123). Accordingly, in the last resort, liberal models of the international community stabilize – voluntarily or involuntarily – American hegemony. The

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reliance on the market hides the political nature of this choice and ultimately strives in vain to protect neoliberalism from critique.

The postmodern critique of institutionalism is no less acerbic than the neoliberal one: Accordingly, the vision of communitarian unity shares the vice of the ideal of a liberal community: it excludes and marginalizes the outsider. In addition, an international institutionalism cannot cure the lack of legitimacy of its universalism. In the eyes of some postmodernists, international community is thus nothing but a "reification"[11] of a theoretical construct for ideological purposes. In the words of David Kennedy: "[I]nternational law [is] not as a set of rules or institutions, but . . . a group of professional disciplines in which people pursue projects in various quite different institutional, political, and national settings" (Kennedy 1999: 83).

The reactions to September 11 by the Bush administration and many other governments have demonstrated how the language of community may be used for curtailing civil liberties. The language of "either you are with us or with the terrorists" shows the utility of community for the exclusion of critique. Nevertheless, the ideological (ab)use of international law in general, and the community concept in particular, should not obscure the need for finding a more than subjective basis for grounding an international legal order which appears under increasing strain, even existential threat. Maybe this is indeed the time for the defense of an international legal community of some sort, based on imperfect, but consensual legal rules as the expression of, in Martti Koskenniemi's term, a "culture of formalism" (Koskenniemi 2001: 494). In this vein, the true test for the emergence of an international community does not consist in the justificatory value of the community concept, but in the inclusiveness of its results.

More liberal mainstreamers – institutionalists and neoliberals alike – point to the postmodernist lack of a normative vision as either resulting in an unfettered political realism (Paulus 2001a),[12] or in a complete lack of defense against the fundamentalist challenge (Franck 2002). If any normative international legal project is rejected, no yardstick exists to evaluate international behavior of states, or terrorists, or anybody else. But such critique needs to differentiate between legitimate ideology critique and an extreme moral relativism – which many, if not all postmodernists reject.

The international community between fragmentation and unity

Any comprehensive vision of the international community will have to respond to the objection that the diversity of international society cannot be captured by one single concept. Indeed, it appears that in view of the diversity of contemporary international law, fragmentation rather than community has become the key term to describe contemporary international society (Koskenniemi 2006b; Koskenniemi and Leino 2002). Whereas some lament – or try to re-establish (Dupuy 2002) – the lost unity, others embrace the shift "from territoriality to functionality," from a world of sovereign territorial states to a world of functional institutions limited to specific issue areas (Luhmann 1995b: 571, 1997: 158–60). More radical representatives of this view claim that the different systems lack minimal commonality to maintain any coherent overarching system of general international law (Fischer-Lescano and Teubner 2004: 1004–16). This chapter argues that the perception of an increasing autonomy of the subsystems does not lead to a complete substitution of general international law. On the contrary, in a fragmented international legal order, some sort of bond between the different parts is necessary. The use of the concept of the international community is an expression of the need for such an overarching conception of the "whole" of international law, even if it appears, for

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obvious reasons, impossible to identify one single all-encompassing model.

According to the fragmentation critique, the increasing compartmentalization of international society requires specifically tailored solutions to common and indeed collective action problems of states. Legal regimes need to be specific, not general. The lofty abstractness of classical international law leads it to oblivion. Rather, international law ought to become divided up into different issue areas: criminal law, trade law, human rights law, etc. "General" international law has all but ceased to exist, or matter (Teubner 1997; Zumbansen 2001). Following the German sociologist Niklas Luhmann, Gunther Teubner and Andreas Fischer-Lescano have argued that legal systems can establish themselves in acts of "autopoiesis" (self-creation) without the need of a centralizing and overarching system of law (Fischer-Lescano and Teubner 2004: 1009, 1014, 1032; Teubner 1989). Accordingly, international law cannot constitute an overarching system of universal law because it lacks a subject in need of regulation. An international society or community is an abstraction that does not reflect social reality.

According to the proponents of autopoiesis, each subsystem of international law is itself capable of developing the relevant decision-making processes in a transparent and democratic fashion. But this proposition presupposes an analysis of the proper identification of those affected by the decisions within a given issue area. Due to the uncertainty and fallibility of all consequential analysis, however, the effects of decisions in one subsystem on others will also be indeterminate and uncertain. Therefore, the presumption underlying the general competence of states – namely that most decisions in the public sphere affect all citizens and must therefore be legitimized, directly or indirectly, by all of them – is also valid internationally, whether one deals with human rights, the environment, or trade and development. In turn, this demonstrates that the compartmentalization of political decisions into issue areas carries considerable political and democratic costs. As soon as public interests are at stake, only public decision making can claim to be representative of the whole of society independent of a specific issue area (von der Pfordten 2001: 128, 218).

Furthermore, general international law still provides the basic rules on international lawmaking and, at least subsidiarily, on their enforcement (Simma and Pulkowski 2006: 529). The subsystems often refer back to general international law on these matters (Koskenniemi 2006b). The legal regulations applied in the different issue areas, from internet regulation to the WTO, from environmental treaties to the International Criminal Tribunal for the former Yugoslavia, stem from the very state or interstate bodies that proponents of fragmentation have dismissed before as increasingly irrelevant. Thus, a trend from territorial to functional tasks will be followed by functional rather than territorial conflicts of norms. These conflicts, however, cannot be decided at the national level, but require international regulation. Hence the perceived need of some sort of international constitution as repository of conflict rules between different issue areas (Trachtman 2006: 627; but see Dunoff 2006: 674).

The parsimonious character of international law makes it quite malleable for the self-ordering of regimes, within certain limits. International law grounds its obligations either in consent or in custom and recognizes certain general principles, either internationally or as derived from domestic legal systems (Article 38 of the ICJ Statute). One may dispute whether such an order fulfills Hart's requirements for a legal system (Hart 1994: 213), but it certainly provides enough leeway for the *leges speciales* of functionally differentiated regimes. The main problem does not lie in the international legal requirements for binding norms, but in the limitation of its law-making subjects to states. Yet this problem is not impossible to overcome if one

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contemplates applying the same criteria – namely, the legally binding nature of formal commitments and of custom accompanied by a joint conviction regarding their legally binding nature – to the pronouncements of non-state actors. Moreover, different from political communities, non-state actors can only bind themselves, not others.

It is thus not surprising that the need for legitimation beyond one single subsystem leads to the acceptance of rules for the common ordering of the international realm, such as human rights or the protection of the global commons. Some of these rules will be more of a formal nature – how rules are to be made and to be interpreted – others will be substantive, setting material limits to the self-ordering of subsystems. Ultimately, of course, it is a matter of perspective whether one interprets the use of norms from other systems as an autonomous incorporation or as evidence for the existence of one common system. By the same token, however, recognition of the same body of non-derogable norms beyond the fallback rules of international law demonstrates the "staying power" of an international *jus cogens* over and above the ordinary norms of specific legal regimes (Paulus 2005; Tomuschat and Thouvenin 2006). The main problem with the theory of the autopoietic character of the law of new legal regimes most likely relates to its lack of attention for questions of legitimacy – a legitimacy that each subsystem alone cannot provide.

To give an example: In the Yahoo! case (Reimann 2003),[13] a French court decided that Yahoo! had to block a racist memorabilia-auctioning webpage as far as it can be accessed in France because its display there violates section R.645-2 of the French Criminal Code. In this case, a solution on the basis of internet self-ordering appears illegitimate. The 80-year-old Holocaust victim is affected (and offended) by neo-Nazi propaganda on right-wing websites even if she does not use the internet, but learns of the contents of the sites in her local newspaper. She is not represented, however, when the internet community is allowed to regulate itself. Likewise, everybody, not only the potential internet users, will be affected by the success of strategies to improve access to the internet. This would require, in turn, that legitimate decisions need to include representatives of society as a whole – and leads, in the absence of representative international fora, to a preference for local or national decisions based on democratic legitimacy rather than for international decisions of unaccountable expert bodies. The best solution, however, would consist in a truly international regulation that takes account of the non-systemic concerns – i.e. the integration of internet regulation in the general international legal regime – which may include the delegation of competences to the most subsidiary and most special level (Grewlich 2006; Mayer 2004; but see also Caral 2004).

Because decisions made within many systems profoundly influence the fate of those not within the system, some general system of accountability and legitimacy appears necessary. At the very least, functional systems should be built by processes of a general nature – such as public international law treaties – and not by custom-designed special procedures. In other words, the move from territoriality to functionality should not be accompanied by a move from democracy to technocracy. Subsystems must include a minimum degree of public control over the private exercise of power.

In the end, decision makers do not represent functional systems, but human beings, human beings who are not – or at least should not be – the objects, but the subjects of the system. Although each human being belongs to several functional associations, she is a whole, not a functionally disaggregated entity (von der Pfordten 2001: 125). As such, she needs not only functional systems that serve her specific needs, but also a comprehensive system of representation which is

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able to weigh different interests against each other. Thus, states as representatives of the public appear to be not at all redundant.

Attempts to reduce quasi-"constitutional" questions of the ordering of international society to an analysis of "global administrative law," have demonstrated the broad range of tasks international law has been fulfilling in different administrative settings, from administrating territory to the (de)regulation of global markets (Kingsbury et al. 2005; Krisch and Kingsbury 2006a). But for its valuable insights, this approach has not been successful in showing that the idea of an international public order should be discarded. Rather, it appears that, in reverse, the development of an international administrative law depends on the understanding of the "constitutional" grounding of such law (but see Krisch 2006).

Thus, fragmentation, whether cultural, ideological, or functional, does not do away with the need for the intervention by the general body politic. However, it makes the absence of a global public opinion, let alone a global democracy of a representative nature, even more glaring. If many global problems can only be solved at the world level, decisions should not be left to bureaucratic functionalists, but to representatives of broader constituencies.

Conclusion

This chapter has tried to identify the basic idea of international communitarianism, namely that international legal theory should not shy away from comprehensive views of the international society or from normative concepts of international community. Not as an imperialist idea of prescribing one single model of international community, but as a forum for debate, even contestation, of the differing views on the social fabric of international law and of the road ahead towards greater inclusivity of international law.

Such a result is compatible with each of our community models, but requires important qualifications. For an institutionalist, it entails a less hierarchical, pluralist understanding of community. There may be common values as expressed, in particular, in *jus cogens* norms. However, the profound pluralism of the contemporary international community prevents the emergence of a Kelsenian, monist structure. A (neo)liberal understanding of community correctly identifies the addressee of the decisions in question, namely the individual. But it may underestimate law's enmeshment into a particular social fabric or national community that may prevent the application of one solution to all. Indeed, postmodernists are right to insist on the contested nature of all values, local or global, and on the open, and at times compromising or even complicit, nature of each and every legal decision. However, the legal community beyond borders provides more guidance to local authorities and courts than a strong postmodern relativism would be prepared to admit.

The international community appears thus not as a superior system encompassing all other, lesser, domestic ones. Rather, it is a shortcut for the direct and indirect dealings of state authorities, non-state organizations and businesses, as well as individual citizens, beyond state boundaries, and for the endeavor to tackle common problems, from the protection of the environment to the prevention of genocide and famine, for which states alone are unwilling, incapable, or illegitimate to act unilaterally. While it may be still too early to call it a success, the endorsement by the heads of state and government at the 2005 UN anniversary summit[14] of the "responsibility to protect" of states towards their societies and individual human beings, and the need for collective action in case it is not met, constitutes the most recent harbinger for the advent of the international community in contemporary international relations.

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Notes

1 The term "international society" is preferred by the "English school" of international relations (see Bull 1977).
2 Koskenniemi has used the word "kitsch" for general concepts of international law such as *jus cogens* and obligations *erga omnes*. His critics (see Dupuy 2005; Gerstenberg 2005) have largely failed to see that Koskenniemi distinguishes between the slide of the use of these concepts into "kitsch" and, following Milan Kundera, the possibility of averting this danger by recognizing it (Koskenniemi 2005b: 123).
3 For pre-September 11-analysis, see, e.g. Abi-Saab 1998: 248–65; Dupuy 1986; Paulus 2001b; Simma 1994; Tomuschat 1999: 72–90; see also Allott 1990.
4 "Global war on terror" is the label attached by the Bush Jr. administration to the struggle against al-Qaeda and other terrorist groups. Attempts by the Pentagon to relabel the term to "global struggle against violent extremism" (see Packer 2005) appear to have failed to convince the President (see Stevenson 2005: 12).
5 Rome Statute of the International Criminal Court, July 17, 1998, 2187 UNTS 90, 37 ILM (1998) 999. The Preamble speaks several times of the "most serious crimes of concern to the international community as a whole."
6 See also Bush 2003 (George Bush, State of the Union Address. 39, Weekly Compilation of Presidential Documents, 109): "Yet the course of this nation does not depend on the decisions of others."
7 Letter dated 20 March 2003 from the Permanent Representative of the United States of America to the United Nations addressed to the President of the Security Council, UN Doc. S/2003/351 (2003); Letter dated 20 March 2003 from the Permanent Representative of the United Kingdom of Great Britain and Northern Ireland to the United Nations addressed to the President of the Security Council, UN Doc. S/2003/350 (2003). See also Lord Goldsmith 2003.
8 See UN Security Council (2003a, 2003b: 3). Finally, it was the UN who legitimized the end of the formal occupation (see UN Security Council 2004a: para. 2 and *passim*).
9 The disagreements between Teubner and Fischer-Lescano and the present author relate to the question of whether international law provides for a minimum of value glue between different legal regimes.
10 For a criticism from a "sovereignist" standpoint, see Anderson 2005. For a more institutionalist view, see Alston 1997.
11 For the meaning of this term, see Carty 1991: 67.
12 Cf. Habermas 1985: 11–12 et passim. Similarly Brown 1992: 218, 237.
13 In France see *LICRA et UEJF vs. Yahoo! Inc.* (2000). For the quite fragmented U.S. litigation drawing on questions of competence rather than substance, see *Yahoo! Inc. vs. La Ligue Contre Le Racisme et l'Antisémitisme* (2006).
14 See United Nations (2005c: para. 139): "[W]e are prepared to take collective action, in a timely and decisive manner, through the Security Council, in accordance with the Charter, including Chapter VII, on a case-by-case basis and in cooperation with relevant regional organizations as appropriate, should peaceful means be inadequate and national authorities are manifestly failing to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity."

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