

## 8. The Cosmopolitan Foundation of International Law

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### The crisis of international law

Since 11 September 2001 many people have begun to believe that international law as we have known it – that being since Francisco Vitoria (1483–1546), Hugo Grotius (1583–1645) and Samuel Pufendorf (1632–1694) and up to the international agreement on the Charter of the United Nations in 1945 – is in a deep crisis. A military intervention has been carried out against Iraq without the required permission from the Security Council of the United Nations, and prisoners from the wars in Afghanistan and Iraq have been transferred to prison camps at Guantánamo and elsewhere. These prisoners have, furthermore, not been given the right to a fair trial according to the 1949 Geneva Conventions and their later supplements.

But this is only the tip of the iceberg. It is true that terrorism and the proliferation of weapons of mass destruction appeared as new reasons for the use of force in the defence of the state, which was not a consideration when the United Nations Charter was made and when the Geneva Conventions concerning the protection of civilians and the rights of soldiers were ratified. But the crisis does not only concern warfare; it concerns the entire world order.

It is a crisis for the state itself, as it has been conceived since Jean Bodin (1529–1596) who defined sovereignty as ‘the absolute and perpetual power of a State’. This sovereignty, which means the

command over a territory and over the people belonging to that territory, is today increasingly fragile – not because it can only be a power within limits (it has always been), but because many new players in addition to the states and across all state borders have appeared.

There have always been religious movements and institutions who were alternative players, and there have been insurgency movements, etc.; however, it is the religious movements in particular which have become stronger and stronger today – sometimes out of the states' control. But at the end of the 19th century and throughout the 20th century transnational players have emerged, including international employers' and workers' organizations, multinational corporations, global banks, non-governmental organizations, and, particularly, international courts.

This means that political, economic, and legal decisions today are not only determined by governments and parliaments, but also by these new players who, rather than being universally accepted by the states, are sometimes in direct conflict with the states. Moreover, this is possible because the main political problems today are global problems.

Let me mention three of the complex, profound problems that concern the world today:

First, the problem of *financial globalization*. Transnational corporations and international banks function today thanks to the enormous telecommunication system, including the Internet and e-mail, which has transformed the world into a global market where the power of national states is limited. Therefore, a more or less open fight exists between this global system and the individual states. However, global financial problems cannot be handled by any one state alone, and states must recognize that they need international institutions and organizations if they want to control financial globalization.

Second, the problem of *intercultural coexistence*. Different cultures are currently discovering each other, and the dialogue, which is still very difficult, has just begun in encounters between people from different cultures. Many prejudices and biases have to be re-

considered, and they can be found not only in the so-called Third World, but also in highly developed countries, such as my own country, Denmark. Moreover, reconciliation between cultures, and especially between Islamic and Judeo-Christian cultures, will never take place unless both parties refrain from trying to resolve their differences through the humiliation of or violence against the other. We must learn to show respect not only for local and national cultures, but also for the great symbols of the religions.

Thirdly, the problem of *the physical sustainability of the Earth*. Human beings not only increasingly use up some of the planet's most accessible but non-renewable resources without the capability of replacing them with renewable resources, but we also use production methods that may permanently destroy the natural conditions for human life. We may therefore leave future generations with a world that has material conditions inferior to those known to us. We need a global democracy that includes a responsibility towards the Other in a future world where human beings should not have to blame us for the exploitation of the world's physical capital.

To add to these complexities of common global problems, we must consider that peace in our world today requires a legal order that can punish global crimes, which include not only the smaller crimes within trade, over the Internet, etc., but also the major 'crimes against humanity' such as war crimes, as in the cases of the Nuremberg and Tokyo tribunals just after the Second World War, or crimes against the future of humanity through the pollution of air and water, etc.

Therefore different international courts (both permanent and *ad hoc*) have been established. Further, as a consequence of the World Declaration of Human Rights in 1948, which was ratified by all member states of the United Nations, a court of human rights was created in Europe that allows a single individual to bring a lawsuit against his or her own state.

This is quite new in international law which, since Grotius and Pufendorf, was mainly law that regulated the relations between states and did not allow an individual to be considered as a legal subject.

It is this limitation of the role of the state on the international scene that is the real and profound reason for the current crisis in international law. We are now obliged to look for a new legal order that can take into account the new players in international politics and law. And my question is, therefore: What should be the basis of the new rules for a new international order if this order should be accepted by all people around the globe?

My answer is that this basis must be cosmopolitan. I shall now try to explain what that means.

## The cosmopolitan

The concept of the cosmopolitan or citizen of the world is quite old in European history, originating in ancient Greek Cynic and Stoic philosophy. The first philosopher who called himself ‘cosmopolitês’ or ‘citizen of the world’ was the Cynic Diogenes of Sinope, who lived from 412–323 BC, i.e., the time of Plato and Aristotle. If someone asked him where he came from, his only reply was: ‘I am a citizen of the world’.

Three centuries later, the Roman philosopher Cicero (106–43 BC), and a little later Seneca (AD 4–65), developed the idea of a *societas generis humani*, a society of humankind as the most extensive society to which human beings belong. Thus, every human being belongs to two societies: the society into which they are born, and the society of the world. Even a head of a major state could thereby understand himself to be a member of a more comprehensive social reality than his own state.

This was the case with the Roman Emperor Marcus Aurelius (AD 121–180), who wrote in his *Meditations*: ‘I am a member of the enormous organism of Humanity’ (VII). This membership, however, had a purely spiritual or personal character. It was the feeling of belonging to a community of thought between all human beings, even individuals who, as Marcus wrote, were ‘interfering, ungracious, insolent, full of guile, deceitful and antisocial’ (II.1). In practice, this meant openness to everyone irrespective of whether they lived close by or far away. Marcus wanted to put himself in

everyone else's shoes: 'Accustom yourself not to be inattentive to what another person says, and as far as possible enter into his mind' (VI, 53). As Martha C. Nussbaum points out in her book *Cultivating Humanity* (1997), this idea thought by a powerful politician could only diminish his anger towards other individuals and cultures he spontaneously disliked and rationally criticized.

However, the Stoic citizens of the world were not united by common political and cultural problems, only by general human conditions. Their cosmopolitanism remained on the purely personal level and was not concerned with global peace.

This changed in modern times when Kant proclaimed in his work *The Metaphysics of Moral* that the cosmopolitan law is more developed than the law of peoples.

The law of peoples – *das Völkerrecht* (Section 53–61) – was at the time considered by Kant to be a law of states or nations in relation to one another, i.e., their right to go to war with one another, the conditions they must fulfil in order to wage war, how as victors they must and must not treat their enemies, and how they may make alliances in order to renounce war. According to this concept of 'the law of peoples', which was rather a 'law of states', the citizens of a state tolerate citizens of other states, even though they have no concept of belonging to a common world. Jeremy Bentham introduced the name international law to replace the term 'law of peoples' in order to prevent the misunderstanding that it was anything other than a law for the relation between nations or states.

In contrast, the cosmopolitan law – *das Weltbürgerrecht* according to Kant (Section 62 of his *Metaphysics of Moral*) – presupposes that every human being has the right to be treated as a member of the common human community, and hence that perpetual peace is not – as with the law of peoples – an unachievable idea. A parallel exists between the moral law for the individual and the cosmopolitan law for the citizen of the world: both have universal validity and must be able to guide practice. Kant sees the reason for the latter in the fact that human beings as 'citizens of the Earth' originally inhabit a community of land forming a *globus terraqueus* (the globe of the world), and as reasonable beings must therefore adopt

the idea that they have the right to live together in peace and conduct commerce with each other in all regions of the world.

## Cosmopolitanism versus nationalism and liberalism

Today we must apply this idea of the cosmopolitan to the question of the basis of international law and, thus, to the basis of reason regarding the invention of new rules for a global legal order. We can only overcome the crisis in international law that involves the reliability of international institutions and rules if we can refer to a normative basis which legitimates them. This legitimacy must be based on a conviction that can create a good and just global social life under the given conditions. Further, the conviction must consist of the commitment to a vision about the good, or rather the best possible world, in the same sense that we speak about a vision of the good society.

After Kant and Fichte, cosmopolitanism disappeared from philosophical and political discourse, and nationalism, based on the romantic ideal of the individual and the people, was mostly opposed to cosmopolitanism, as can be seen in Max Weber's inaugural address when he received the chair in national economy in Freiburg in 1895. Later, during the 20th century, a cosmopolitan often became tantamount to a national traitor, and the most violent accusations against the cosmopolitans came from Nazi Germany: they considered the Jews in the concentration camps to be cosmopolitans.

However, cosmopolitanism was also seen as being in opposition to liberalism, according to which the relations between states were based on competition and trade agreements.

Therefore, during most of the 20th century there was no discussion about cosmopolitanism.

After the Second World War, the Nuremberg and Tokyo tribunals were certainly judging the criminals in the name of humanity, but these tribunals were creations of the victors; the defeated were condemned by the victorious. They were not tribunals created by

an international jurisdiction, as were the later international courts concerning the former Yugoslavia and Rwanda, which were created by the UN Security Council in 1993 and 1994. So in 1946 the recognition of the fascist war criminals at the Nuremberg and Tokyo tribunals was not an occasion for real cosmopolitan thinking. On the contrary, at that time the conflict between East and West had already begun.

However, the situation changed in the 1990s. Before that time no philosophers and no sociologists, at least of whom I am aware, discussed the cosmopolitan. But suddenly Habermas, Derrida, Nussbaum and others began to defend cosmopolitanism, and sociologists such as David Held and Ulrich Beck presented analyses of the societies which showed that the idea of cosmopolitanism was the only idea that could guide people in our time to develop democracy on a global scale. *Democracy and Global Order: From the Modern State to Cosmopolitan Governance* is the title of David Held's book from 1995.

What has happened since cosmopolitanism took the floor again after nearly 200 years of silence? It is true that the complex problems mentioned here have become more and more urgent, but environmental problems were also discussed before the 1990s without ever raising the question of cosmopolitanism.

What then has happened? A great political event indeed: the end of the East-West conflict was symbolized by the fall of the Berlin Wall in 1989. Before this point, it was virtually impossible not to be caught up in the focus on the fight between the so-called free world in the West and the Communist world in the East. After the fall of the Berlin Wall, people discovered that the real issue was not a clash between two superpower spheres but rather a plurality of conflicts crossing various borders. In Europe, we had the Balkan conflicts, in the Middle East the Israeli-Palestinian conflicts, in Iraq the Kurdish-Iraqi conflict, and so forth. Furthermore, these conflicts were not only military; they were also economical and cultural. The anti-globalization movement of the late 1990s was a revolt against worldwide financial repression, and the demonstrations in 2006 against 12 cartoons in a Danish right-wing newspaper re-

veal a wide gap between common people in the Islamic world and common people in the Christian world.

## A global contract

If we aim to find a global agreement on a world order that all peoples and all individuals might be able to accept we must, first of all, agree to a cosmopolitan basis, which means an idea of belonging to two citizenships: the national and the cosmopolitan. But the cosmopolitan citizenship must have a content, just like the national citizenship has. And how do we express this content? It must be a vision that can be formalized to an idea about rights and duties, as we have a vision and an idea about rights and duties within a single society.

Moreover, the ultimate end for the cosmopolitan must be superior to the ends of a particular society. If this were not the case, it would thus be meaningless to be a citizen in the world at the same time as one is a citizen of one's own country. Further, if this end should be more than a dream, then it must refer to the tasks and challenges that a particular state cannot handle alone and therefore must be dealt with through institutions aiming at an international or transnational order: for example, politically through the United Nations, legally through international courts, economically via a world bank and various global trade organizations, and culturally through societies and networks of researchers, artists, philosophers, etc.

In European political philosophy the reason for social coherence has been expressed by the idea of the contract. For instance, the philosophers of the Enlightenment – except Rousseau – all combined the idea of the contract with their cosmopolitanism. This is, in particular, the case in the works of the great pre-Kantian philosopher Christian Wolff (1679–1754) and Kant himself. They developed the idea of a global contract.

The idea of a social contract first appeared in the 17th century in Thomas Hobbes' work, although his idea of a social covenant only referred to the coherence of the state and the dependence of the

citizens on the state's power, the Leviathan. The idea was transformed, as has been shown by Francis Cheneval in his great work *Philosophie im weltbürgerlicher Bedeutung* from 2002, by Abbé de Saint-Pierre and Leibniz, wherein it became a contract between states or princes, and then by Wolff and Kant therein becoming the great fiction ('ens fictum', said Wolff) by which a people can express not only that they accept the order of their society, but also a real world order.

Some lawyers have claimed that this transfer of the idea of the social contract from the particular society to the whole of humanity is not reasonable, because the contract is only conceivable for small societies, such as Rousseau claimed. But what could prevent this transfer? It cannot be the fictive character of the contract, because a social contract for a small society is no less fictive than a contract for a world community. The idea of the social covenant does not presuppose that it was concluded at a certain moment in historical time. Even small societies have often been created by violence and not by a real contract.

Thus, the social contract only supposes that its citizens behave *as if* they themselves or their ancestors had instated the contract. All ideas about the formation of the contract are, in principle, fictive, regardless of some possible evidence of historical events in the representation of the social community. As mentioned, Christian Wolff called the contract an 'ens fictum'. Also in his work *The Social Contract* from 1762 Rousseau does not claim that the contract is other than fictive. The reason why he did not believe in a global social contract was that he could not accept representatives in the governance of a society. But Wolff and Kant did not have these hesitations with regard to a representative system of governance, and they could therefore very well imagine a world community based on a global social contract.

When today we ask about the legitimacy of international law, it may be fruitful to again discuss this connection between contractualism and cosmopolitanism. However, it will indeed not be the contract we find in the work of Thomas Hobbes, who assumed that all human beings 'by nature' are in a 'war of all against all'. On the contrary, it will be the contract that presupposes the Aristotelian

idea about the human being as ‘a social animal’ and expresses the knowledge that all people live in a common world, as when Kant reminded us that we are living on a globe and have to live here together.

Thus, there are two possible basic reasons for the formation of social life: the desire to escape death, as we find it in Hobbes’ work and in the 20th century in the work of Carl Schmitt and others, and the desire to live together in peace, as we find it in the work of Aristotle, Wolff, Kant, Ricœur and others. Only the latter desire can motivate the conviction that we are citizens of the world and have rights and duties as such. Thus, we must make a choice between the two ideas of a social contract. We must choose between Hobbes and Kant.

## Towards a new world order

The concept of state, however, has changed since the Enlightenment and, consequently, so has the role of the states on a global scale. Therefore, the idea of a global contract has to be applied in a different manner than in the work of Wolff and Kant. Although by using the concept of a cosmopolitan contract they both imagine a human community on a global level, this concept only embraced ‘hospitality’, i.e., the right to travel and to be kindly received everywhere in the world, which Kant calls the cosmopolitan law. To them, the political community on the global scale remained only as commercial and diplomatic relations between states.

Today the new political actors mentioned in the beginning have appeared and have reduced the importance of the boundaries between states. The interests of the states are now entangled in one another and the great problems of our time can only be handled by the assistance of other players, like multinational corporations, NGOs, scientific, legal and philosophical networks, and so forth.

This means that political power today is much more fragmented than in the past. What is political power? It is the capacity to transform social and physical conditions in different contexts or ‘sites of power’ (Held, 1995) which yields different forms of power. Thus,

there is power in health care and environmental protection, education, the market, the media, social and religious institutions, the use of force by the police, the army and other constraint relations, and in legal and administrative institutions, which makes the basis of the state as such – and all these forms of power are intertwined.

The fragmentation of political power consists, in fact, of the state no longer having absolute control of all these forms of power that are now more or less in the hands of other players. The state can only govern in collaboration with other political players, not only inside the state itself and outside in relation to other states, but also in relation to international and transnational non-state institutions and movements.

However, this can only work in a democratic way if states are ready to recognize a transnational institutional structure that reflects the different forms of power which have appeared and accept a corresponding decision-making process. In other words, the fiction of the global social contract in our time must imply that non-state companies and institutions, which are decisive for the future of the world, are given rights and duties in line with their co-responsibility for the new world order that is to come.

But then the global contract cannot be in accordance with the idea of Hobbes' social covenant, which supposes that all power is given to one political player, the Leviathan. This, on a global scale, can only mean a form of governance that gives few states or one single state all the power, or rather a world government that all other political players give all power to out of fear of mutual destruction.

The global social contract on which international law today must be founded and that includes the recognition of different political players and makes possible a democratic control of all use of power, can only be a contract based on the desire to live together with all other people in dialogue and generosity. International law is then not only the law by which cruelty and violence are sanctioned, but also the law by which international understanding, the good life and generosity are promoted in the world.

This idea of a new world order does not deny the hard necessities in politics and the interests of political power. But it supposes

that 'soft ideas' also can play a role, and that the strongest states can see their advantages in alliances with other players, even purely humanitarian players, in order to obtain their recognition.

The cosmopolitan basis of international law means a global order based on democracy. This would be a democracy where the desire to live together is stronger than the fear of death.

## Conclusion

It follows that the citizen of the world must be the ethico-political ideal for our new century. As an ideal, it has not yet been realized. It is not simply a product of the state, however, since it aims beyond the order of the particular state. It incorporates (or in German *aufhebt*) the state in the pursuit of a higher cause rooted in cultural traditions with a legacy of ideas concerning the good life.

The citizen of the world will always remain such an ideal. In the same way that the national state cannot become a collective individual that abolishes all particular human individuals as such, the cosmopolitan ideal cannot be realized in a world state that would abolish all national states.

We have to work on constructing international structures and networks and enforce a transnational legitimate authority able to watch the cosmopolitan ideal and coordinate the efforts to arrive at concrete solutions to our enormous international problems.

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