Can International Law Survive US "Leadership"?

*Alain Pellet**

Professor Zemanek's excellent introductory paper to the present *Agora* clearly gives a list of the most serious breaches of international law committed by the United States during the last few years. They are numerous; they raise serious concerns; but they are clearly violations and no honest impartial mind can see them otherwise. By themselves, breaches of legal rules do not mean that those rules or, indeed, international law itself do not exist any more in the legal sphere. On the contrary it can be sustained that law violations "reveal" the existence and content of the violated rules, if only through the disapproval they entail; "in any legal system, international or domestic, breaking the law does not make the law disappear"[1]. Now, this is unfortunately not the end of the question.

If one accepts that law is but a "successful policy"[2] or, to put it in "Marxian" terms, a "superstructure" resulting from a balance of powers between the actors in international relations, then, repeated breaches by the "dominant" actor cannot but result in dramatic changes in the law itself. This is not to say that "might is right", but that, in the long run, might deeply influences the evolution of law, which, unfortunately, might strengthen Professor Zemanek's conclusion that States (as well as scholars) could be "well-advised to face reality ... and to acknowledge the unique role of the United States, instead of persisting in the fantasy of a world order based on the equality in law of all members of the international system".

Therefore, the question is: have we already reached the momentum when the world legal order based on the "Westphalian" view that all States are juridically equal is no more tenable? and, if the answer is "no" or "not yet"—which, I think, is the case—is it worth trying to maintain it? to which extent? and how?

A first point must be made however: the sovereign equality of States is not and has never been, an "absolute" concept. "Sovereignty" only means that States have no "superior power" over them; however, contrary to what happens in the domestic legal

---

* Professor, Université de Paris X-Nanterre; Member and Former Chairman, ILC.

1 A.- M. Slaughter, "Misreading the Record", 82/4 *Foreign Affairs* 202, at 203 (2003).

2 "Une politique qui a réussi" (É. Giraud, "Le droit positif—ses rapports avec la philosophie et la politique", *Hommage d'une génération de juristes au Président Badevant* 210, at 234 [1960]).

Austrian Review of International and European Law **8**: 101-108, 2003.

sphere, they do meet with competing powers—hence the fundamental idea of "*equal* sovereignty" or "sovereign *equality*". As a consequence, States possess "the totality of international rights and duties recognized by international law"[3]—that is all rights and obligations (i) compatible with the same rights and obligations recognized to all other States and (ii) which can be based on a legal "title" (mainly territoriality or nationality)[4].

Moreover, exactly as the principle of equal rights and dignity of human beings is not incompatible with the *fact* that men and women are not equal in reality due to their physical and health conditions, financial and social situation, etc., the sovereign equality of States is by no means "descriptive" of the real situation. It is a legal concept, imperfectly protecting weak and vulnerable States from the pretence of the mighty States to domination.

In contrast with the Empire, the inter-states society is then characterized by an acceptance (even if purely verbal) of the "other" as an equal. While an Empire negates the others' rights, a State, by definition, accepts that its own sovereignty is restricted by that, equal, of all the other States.

The US aspirations to an imperial world governance, which it would lead, is not new[5] and, since World War I, the Administrations in Washington D.C. have constantly oscillated between the temptation of a superb isolationism and a proactive policy of intervention in world affairs and other States' domestic affairs. Reagan's and George Bush I's Administrations were clear examples of the latter behaviour. However, the conditions were different from the present situation:

- in the Reagan's case, the Soviet Union had still not collapsed and the US power was mitigated by the Soviet influence as well as by the, already declining, relative strength of the Third World; and even at the very beginning of the 1990s, the new unequal distribution of world power had not yet been integrated by US policy makers;
- in both cases, the UN was an influential actor (or "reactor") in the various crisis in question;
- the US celebrated system of "checks and balances" worked in its usual rather efficient way.

---

[3] *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion of 11 April 1949, 1949 *ICJ Rep.* 174, at 180.

[4] I refer here to the *théorie des compétences*, mainly developed by the French doctrine. *See, e.g.*, J. Basdevant, "Règles générales du droit de la paix", 58/IV *Recueil des cours*, 568-576, 588-618 and 628-637 (1936) and C. Rousseau, *Droit international public*, t. III, *Les compétences*, Sirey , XVI-635 (1977).

[5] *See, e.g.*, R. Aron, *The Imperial Republic, the United States and the World, 1945-1973* 339 (1974).

The picture has now changed dramatically in many respects. Not only there can be no doubt that the United States is now the only hyper-power and is seen as such, but also, as shown by the last Iraqi war, it has tried—with some success—to bypass the United Nations and the checks and balances have not functioned efficiently mainly because of the media self-censorship following September the 11th, with the result that the "liars' war"[6] launched by George W. Bush and Tony Blair and a few allies has not been seriously questioned by the press and the US public opinion, not to speak of the Congress and the Supreme Court. Moreover, with the triumph of the capitalist liberal ideology, the so-called "globalization" of the world economy has weakened the traditional inter-States system in unifying the global economic space under legal rules centrally inspired and enforced through international institutions largely controlled by the United States, such as the International Monetary Fund or, but less clearly, the World Trade Organization.

In itself the gradual elimination of borders as the legal limits of States' jurisdiction is not to be lamented: after all, the new trend superficially corresponds to an old dream of many international lawyers beginning with Georges Scelle, and could announce a new law of mankind rather than of inter-States relations. The 1919 Covenant and, even more strikingly, the 1945 Charter, have laid down the foundations of a new international law based on a paramount limitation of the traditional prerogative of States to use force in international relations while, at the same time, new categories of subjects were recognized international personality. This was the case e.g. concerning international organizations and private persons whether physical or juridical.

The idea behind these changes in the very nature of international law was to "humanize" and to "pacify" the international society. Far from calling into question the sovereign equality of States they aimed at reinforcing and concretizing it, making States the "implementers" of the measures decided by the Security Council[7] and the guarantors of human and investors' rights.

The new legal order takes a very different path. It is:

- global in that it includes important transnational elements, that is principles, rules and institutions which are not dependant upon the territorial division

---

[6] In his introductory paper, Professor Zemanek is rather generous in accepting that the reason for the armed attack against Iraq "was changed repeatedly". The reason constantly invoked has been the so-called Weapons of Mass Destruction (WMD) possessed by Iraq, a reason which has proved to be erroneous and deliberately so. The other reasons given from time to time by the leaders of the 'Coalition' are additional, complementary, but cannot be seen as the motives for the invasion, let alone as convincing legal justifications.

[7] *See, e.g.*, Art. 42 of the UN Charter: the Security Council acts to maintain or restore international peace and security through "forces of Members of the United Nations".

of the world between States; and

- hegemonic in that it is twisted by the United States according to its self-defined interests, needs and whims.

Both aspects largely overlap: the economic and military superiority of the sole hyper-power makes it the main beneficiary of the globalization and expanding economic freedoms; as Lacordaire put it "in relations between the strong and the weak, it's freedom that oppresses and law that liberates"[8]. At the same time, the US strength endeavours it to change the rules of the game when it deems it proper and, as aptly shown by Professor Zemanek, it can reintroduce national barriers and "territorialism" or exempt itself from the common rules when it fits its interests.

Among the most distressing examples of this latter phenomenon are the conclusion of agreements by which the US obtained an exemption from the ICC's jurisdiction for its nationals from States parties to the Rome Statute in clear violation of their commitments or the newly forged concept of "pre-emptive" self-defence when no armed attack is to be feared, or the clearly unlawful conditions of detention of alleged terrorists in Guantanamo Bay. More widely, the combination of "unilateralism" and "extra-territoriality" (both terms must be qualified) certainly threatens the classical international law and, most probably, the very existence of law in international relations. In many respects, the US uses international law exactly in the same way as the European States did during the colonial enterprise: while colonialism was based on superior force, France, Britain and some lesser lords used to conclude "treaties" with local Rulers as long as they served their interests; then they held those accords as scraps of paper as soon as the initial goal (territorial take-over) was obtained. Empire leads straight to imperialism...

However, I suggest that those dramatic (in all meanings of the word) changes have not occurred yet and are not inevitable.

First, it seems that the US cannot entirely do without international law and institutions—this, even when said rules and institutions are not favourable to it in the short run. Thus, while it could have been feared that the US would boycott the mechanism for the settlement of disputes instituted within the WTO[9], it willy-nilly complies with the decisions of the Appellate Body. Similarly, after the 2003 Iraqi war, the Bush Administration have had to accept that the UN be re-introduced into the picture and, at the time when the present paper is being drafted, it seems that the Secretary General of the United Nations, while reluctant to accept a strong UN

---

[8] *"Dans les rapports entre le fort et le faible, le droit protège le faible, et la liberté opprime".*

[9] *Cf.* the "conditional" or "threatening" ratification of the WTO Agreements—, *see* A. Pellet, Comments on "Law of Treaties", in M. Byers/G. Nolte, *United States Hegemony and the Foundations of International Law* 416, at 419 (2003).

involvement on the field, has his word on the future of Iraq and is gaining a position, if not of an arbitrator, at least of an influential mediator. And at regional or bilateral levels, there are encouraging signs not only of a "resistance" of international law, but of its strengthening—among those signs: the broadening of the European Union (a complex juridical construction) or the revival of the World Court.

Second and consequently, the worst is never certain. The Bush Administration is not in power for ever. Empires also die and the wakening of China, a possible political strengthening of Europe, or a new burst of energy, or simply of international "existence" at the universal level, of Russia or the Third World are not to be excluded and could restrain the drifts of international law engendered by the US imperial hegemonism. If one or several of these trends are confirmed, a new balance of power would occur with unavoidable consequences on international law which, again, would lay on some kind of "equality".

However, this is a remote possibility and, in any case, it is far from granted that all consequences would be positive. Just think of the influence China could have on the evolution of the protection of human rights at the international level...

It seems therefore tremendously important to envisage a realistic appraisal of the situation as it stands and of the possible means to mitigate its drawbacks and disadvantages and to strengthen its good aspects—some do exist.

In the first place, I would think that international lawyers would be well inspired not to lean on all and every aspects of the traditional "good old" international law. Some of its rules are obviously outmoded while some new trends are probably to be approved and encouraged, notwithstanding the fact that they stem from an hegemonic power's initiative. Let me just take four examples.

The establishment of the concept of *ius cogens* in the 1969 Vienna Convention, the creation of the *ad hoc* Criminal Tribunals, then of the ICC, the inclusion of Articles 40 and 41 in the ILC Articles on State Responsibility[10], the NATO action in Kosovo, bear witness of the growing concern of the "international community [of States?] as a whole" in respect with gross violations of human rights. A first (positive) answer has been the widening of the notion of "threat to the peace" in case of "humanitarian disasters" by the Security Council. However, it must be acknowledged that this might not be enough in cases when the Council is paralyzed. In such cases, a unilateral use of force of the kind of the US and UK intervention in Iraq would indeed not be acceptable[11]: it would ruin one century of progress of international law with respect to the prohibition of the use of armed force and achieve a "second killing" of Article

---

[10] Arts. 40 and 41 relate to "serious breaches of obligations under peremptory norms of general international law", that is the former "crimes" in Art. 19 of the 1996 Draft.

[11] Kosovo is less debatable in that (i) it was not based on a lie; (ii) its clear purpose was humanitarian; (iii) the NATO action was a collective one.

2(4) of the Charter[12]. But, within the spirit of Article 54 of the ILC Articles on State Responsibility[13], collective or unilateral measures not implying the use of armed force, should not, in such cases be considered as prohibited. In this respect and within those limits, humanitarian intervention should be seen as permissible.

Similarly, the US concerns about the spread of WMD either among States or non-States actors (beginning with terrorist groups) must be taken seriously. For the reasons I have already indicated, Iraq is not a convincing precedent. However, the results achieved in the cases of Libya or Iran shows that the diplomatic method can work and that there is a growing consensus on the idea that the dissemination of WMD is a serious threat to the peace and it can be hoped that, when negotiations fail, the Security Council (not the US alone) should decide measures in accordance with Article 41 of the Charter[14].

More generally, fight against terrorism has rightly become a matter of serious concern for the international community. In some respect, Resolution 1373 (2001) of the Security Council is controversial since it vests the Security Council with a quasi-legislative function in that it imposes measures on States at the detriment of democratic parliamentary control. On the other hand, Article 24 confers on the Security Council "primary responsibility for the maintenance of international peace and security" and terrorism is, rightly, recognized as a threat to the peace. A balance between those opposed considerations should be kept but, all in all, this precedent deserves attention and it is worth to be further explored.

The same holds true for an even more controversial doctrinal trend relating to the use of force to counter a use of military force by a State, not amounting to an "armed attack". In *Nicaragua*, the ICJ rightly recalled that the right of self-defense "is subject to the State concerned having been the victim of an armed attack"[15]; however, the Court left open the question "whether a State has a right to respond to intervention

---

[12] *See* T. M. Franck, "Who Killed Article 2(4)? or: Changing Norms Governing the Use of Force by States", 64 *AJIL* 809-837 (1970) and *id.*, "What Happens Now? The United Nations After Iraq", 97 *AJIL* 607-620 (2003).

[13] According to Art. 54, the Chapter of the Draft on Countermeasures "does not prejudice the right of any State, entitled [...] to invoke the responsibility of another State [even when it is not an injured State and, in particular, in case of "serious breaches"] to take lawful [which excludes recourse to armed force] measures against that State to ensure cessation of the breach and reparation in the interest of the injured State or of the beneficiaries of the obligation breached".

[14] In such a case, recourse to Art. 42 (military measures) would, of course, clearly be inappropriate.

[15] *Military and Paramilitary Activities in and against Nicaragua* (Nicaragua v. United States), Judgment of 27 June 1986, 1986 *ICJ Rep.* 103, at 195.

with intervention going so far as to justify a use of force in reaction to measures which do not constitute an armed attack but may nevertheless involve a use of force"[16]. In this respect, while the recent Judgment in the case concerning *Oil Platforms* is rather inconclusive[17], in his Separate Opinion, Judge Simma took the very clear position that at "a lower level of hostile military action, not reaching the threshold of an 'armed attack' ... a State may of course defend itself, but only within a more limited range and quality of responses (the main difference being that the possibility of collective self-defence does not arise, cf. *Nicaragua*) and bound to necessity, proportionality and immediacy in time in a particularly strict way"[18]. I am not sure that such a finding is that obvious; nevertheless, the question certainly arises and it must be recognized that the Charter is deficient or, at least, ambiguous, in this respect and the matter should be given careful consideration.

On the other hand, it must be clear that one single State cannot substitute itself to the international community for ascertaining the good and the evil. The Security Council might meet some problem of legitimacy; it is, nevertheless an emanation of the "international community of States as a whole" and its permanency and relative efficiency (when its Members find a ground for agreement) plead in its favour as a vehicle for changes. Moreover, its composition, if it can be changed and improved (but when?), is a token of both realism and relative fairness: it gives all international main sensitivities (including, of course, the US) a guarantee that their opposition cannot be bypassed. And, if it is paralyzed, either by a veto or a threat to use it or a lack of majority, Resolution 377(V) ("Uniting for Peace") offers a "soft alternative": indeed the General Assembly cannot take decisions nor impose measures implying "a coercive or enforcement action"[19]; it may however, make "appropriate recommendations to Members for collective measures, including in the case of a breach of the peace or act of aggression the use of armed force when necessary, to maintain or restore international peace and security"[20].

---

[16] *Ibid.*, 110, at 210.

[17] Case Concerning Oil Platforms (Iran v. USA), Merits, Judgment of 6 November 2003 (not yet published). The Court dismisses the US arguments in favour of its using force against Iran on the ground of "disproportionality" (*see., e.g.* para. 77), but it seems to reason exclusively in the framework of self-defence (while it should probably have envisaged the "measures necessary to protect the essential security interests" of the US in a wider context; it probably abstained from doing so because of the surprising position taken by the US during the pleadings).

[18] Para. 13 of the Separate Opinion.

[19] Certain Expenses of the United Nations, Advisory Opinion of 20 July 1962, *ICJ Rep.* 5, at 164 (1962).

[20] UN Doc. A/RES/377 (1950) at para 1.

Outside the UN too, instruments and institutions do exist which can be used with a view to "channelling" and, if need be, challenging the US *diktats*. As seen above (paragraph 14), the WTO is one of them: both at the normative (rules of majority) and implementation (Dispute Settlement Body) levels, no State, as strong as it might be, can unilaterally impose its views. Similarly, to take another example, the US (and China, and many other imprudent States...) have ratified the 1966 Covenant on Civil and Political Rights; as is well known, a treaty is a "trap for will" since conditions to denounce a ratified treaty are extremely constraining[21]; even though the Committee has, up to now, been extremely generous in examining the reports by powerful States, the situation could and should change.

This, of course, does not solve all the pending questions. What in case of breaches of well established and commendable international legal rules in the absence of international mechanism vested with monitoring powers? Here comes the responsibility of "the invisible college of lawyers". The "most highly qualified publicists of the various nations" must not behave as the guardians of an outmoded international legal order and they must accept the changes imposed by the evolving course of international relations. On the other hand, it is the responsibility of scholars to be clear (and reasonable) in their denunciation of obvious breaches of international law—a cat is a cat and an aggression is an aggression—and to warn about the consequences of unfortunate trends. However, absent political will and Governments' appropriate reactions, doctrinal positions alone cannot stop the decline of States' and public opinion's trust in the value of international legal rules thus opening the way for a world without law or, which is the same, for the law of the jungle. Law is too serious a matter to be relinquished to lawyers[22].

November 2003

---

[21] Contrary to the (first) Optional Protocol (Art. 12), the Covenant has no provision on denunciation.

[22] "No developed nation would allow its legislative policy to be decided upon just by the lawyers. They would be employed to advise and to draft; but the legislative policy would be decided by those who understood the matter the subject of the legislation", Sir R. Jennings, "International Law Reform and Progressive Development", in G. Hafner *et al.* (eds.), *Liber Amicorum Professor Ignaz Seidl-Hohenveldern in Honour of His 80th Birthday* 325, at 334 (1998); the same holds true at the international level.