The shifting allocation of authority in international law: considering sovereignty, supremacy and s

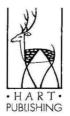
edited by Tomer Broude and Yuval Shany.

# The Shifting Allocation of Authority in International Law

Considering Sovereignty, Supremacy and Subsidiarity

Essays in honour of Professor Ruth Lapidoth

Edited by
Tomer Broude and Yuval Shany



OXFORD AND PORTLAND, OREGON 2008

# Acknowledgements

This collection of essays would not have seen the light of day had it not been for the efforts and support of numerous individuals and institutions to whom we owe a debt of gratitude. First, we thank our fifteen authors for taking the time and care to write thought-provoking and original contributions. It has been an honor and pleasure to work with them all! Second, we thank Ms Efrat Hakak, our dedicated assistant editor, who has provided us invaluable help in editing and proof-reading. Her work has been exemplary in terms of quality and efficiency. Third, we note with appreciation the financial support of the Feinberg Foundation for the advancement of international law research in this publication. Fourth, we are grateful to the Hebrew University, the University's International Law Forum, the Leonard Davis Institute for International Relations, the Jean Monnet Module of the European Community, the Dr Emilio von Hofmansthal Fund and the Hersch Lauterpacht Fund for their generous support of the conference which led to the present publication. In the same vein, we thank Ms Irit Magora-Levy, the Associate Dean of the Hebrew University Law Faculty and her assistant, Ms Mihal Leibel, for their help in organising the aforementioned 2006 conference. Finally, we thank Professor Ruth Lapidoth who provided us with a reason to initiate this publication. Her friendship and words of advice and encouragement have always been for us a major source of support and inspiration.

> TB and YS Reut, Israel

# THE SHIFTING ALLOCATION OF AUTHORITY IN INTERNATIONAL LAW

International law is fragmented and complex, and at the same time increasingly capable of shaping reality in areas as diverse as human rights, trade and investment, and environmental law. The increased influences of international law and its growing institutionalisation and judicialisation invites reconsideration of the question as to how the authority to make and interpret international law should be allocated among states, international organisations and tribunals—or in other words, 'who should decide what?'—in a system that formally lacks a central authority? This is not only a juridical question, but one that lies at the very heart of the political legitimacy of international law as a system of governance, defining the relationship between those who create the law and those who are governed by it in a globalising world.

In this book, leading international legal scholars address a broad range of theoretical and practical aspects of the question of allocation of authority in international law and debate the feasibility of three alternative paradigms for international organisation: sovereignty, supremacy and subsidiarity. The various contributions transcend technical solutions to what is in essence a problem of international constitutional dimensions. They deal, inter alia, with the structure of the international legal system and the tenacity of sovereignty as one of its foundations, assess the role of supremacy in inter-judicial relations, and draw lessons from the experience of the European Union in applying the principle of subsidiarity.

This volume will be of great interest both to scholars and practitioners of international law.

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## Introduction

#### TOMER BROUDE and YUVAL SHANY

HIS COLLECTION OF essays examines the evolving structure of the allocation of authority in contemporary international law through the prisms of three organising principles: sovereignty, supremacy and subsidiarity. It strives to offer a variety of theoretical, analytical as well as practical responses and approaches to what has become an increasingly complicated and tense situation: an attempt by certain international law-makers, regimes and institutions to exert their authority vis-à-vis states and sub-statal entities, while addressing, at the same time, challenges to their legitimacy and efficacy from other international, national and non-state actors and norms.

### THE ORIGINS OF THE BOOK: A TRIBUTE TO PROFESSOR RUTH LAPIDOTH

The essays published in this book were first presented at a conference held in June 2006 at the Hebrew University of Jerusalem, which celebrated the life and work of **Professor Ruth Lapidoth**. Ruth Lapidoth—to whom this book is dedicated—has had a remarkable international law career. After completing her doctoral thesis at the Sorbonne in 1956, she returned to Israel and became a member of the law faculty of the Hebrew University of Jerusalem for a period of almost fifty years. Through these years, Ruth Lapidoth also served Israel in a number of diplomatic and governmental capacities (including serving as the legal adviser to the Israeli Foreign Ministry and participating in the peace negotiations with Egypt) and served as an arbitrator in the famous Taba arbitration. Even after her retirement, Ruth Lapidoth has remained engaged with academic work—she currently chairs the Hebrew University's International Law Forum and teaches at the School of Law of the Israel College of

<sup>&</sup>lt;sup>1</sup> Boundary Dispute Concerning the Taba Area (Egypt/Israel) (1988) 27 ILM 1421.

Management Academic Studies; she also continues to publish on a regular basis on a variety of international law topics. This impressive life's work and record of achievements has received widespread acclaim and Ruth Lapidoth has been granted many prizes and awards, including awards on prominent contributions to law presented by the American Society of International Law and the Israeli Bar Association in 2000 and 2004, respectively. In 2006, she was awarded the Israel Prize—the highest honour and most prestigious award granted to Israeli citizens by the State of Israel.

Large parts of Ruth Lapidoth's scholarship are directly related to the theme of the present book: many of her numerous books and articles—particularly on the topic of autonomy,<sup>2</sup> Jerusalem,<sup>3</sup> the Middle East peace process,<sup>4</sup> the law of the sea,<sup>5</sup> and the relations between national and international law<sup>6</sup>—share a few common threads related to the allocation of authority in international law. First, she has embraced in her work functional arrangements, which deviate, on a pragmatic basis, from traditional models of regulation. Thus, autonomy deviates from long-established notions of statehood and absolute sovereignty; the holy places in Jerusalem ought to be governed by 'functional' not 'formal' sovereignty; and pragmatic harmonisation between national and international law should be developed, at the expense of traditional dualism. Second, in

<sup>2</sup> See, eg, R Lapidoth, Autonomy: Flexible Solutions to Ethnic Conflicts (Washington, United States Institute of Peace Press, 1997); R Lapidoth, 'Autonomie, unité et démocratie', in R Le Coadic (ed), Identités et Démocratie: Diversité Culturelle et Mondialisation—Repenser la Démocratie (Rennes, Presses universitaires de Rennes, 2003) 263; R Lapidoth, 'Autonomy and Sovereignty: Are They Mutually Exclusive?', in Mala Tabori and Amos Shapira (eds), New Political Entities in Public and Private International Law (The Hague, Kluwer, 1999) 3; R Lapidoth, 'Redefining Authority: The Past, Present and Future of Sovereignty' (1995) 17 Harvard International Review 8; R Lapidoth, 'Sovereignty in Transition' (1992) 45 Journal of International Affairs 325.

<sup>3</sup> See, eg, R Lapidoth, M Hirsch and D Housen-Couriel, Whither Jerusalem? Proposals and Positions Concerning the Future of Jerusalem (Dordrecht, Martinus Nijhoff and the Jerusalem Institute for Israel Studies, 1995); R Lapidoth, 'Holy Places' in N Cohen and A Heldrich (eds), The Three Religions (Munich, Herbert Utz Verlag, 2002) 19; R Lapidoth, 'Jerusalem—Some Jurisprudential Aspects' (1996) 45 Catholic University Law Review 661.

<sup>4</sup> See, eg, R Lapidoth, 'Israel and the Palestinians: Some Legal Issues' (2001) 76 Die Friedens-Warte 211; R Lapidoth, 'Security Council Resolution 242 at Twenty Five' (1992) 26 Israel Law Review 295; R Lapidoth, 'On the Relation Between the Camp David Frameworks and the Treaty of Peace—Another Dimension' (1980) 15 Israel Law Review 191.

<sup>5</sup> See, eg, R Lapidoth, Les détroits en droit international (Paris, Pedone, 1972); R Lapidoth, Freedom of Navigation with Special Reference to International Waterways in the Middle East, Jerusalem (Jerusalem, The Leonard Davis Institute for International Relations, 1975); R Lapidoth, The Red Sea and the Gulf of Aden (The Hague, Martinus Nijhoff, 1982); R Lapidoth, 'The Strait of Tiran, The Gulf of Aqaba, and the 1979 Treaty of Peace between Egypt and Israel' (1983) 77 American Journal of International Law 84; R Lapidoth, 'Le passage par le détroit de Tiran' (1969) Revue Générale de Droit International Public 30.

<sup>6</sup> See, eg, R Lapidoth, Les rapports entre le droit international public et le droit interne en Israël (Paris, Pedone, 1959); R Lapidoth, 'International Law within the Israeli Legal System' (1990) 24 Israel Law Review 451; R Lapidoth, 'De la valeur interne des traités internationaux dans le droit israélien' (1959) Revue Générale de Droit International Public 65, 221.

her work, Ruth Lapidoth has advocated the creation of distinct solutions specially tailored to accommodate specific problems. Hence, different principles may apply in Jerusalem to the management of municipal issues, on the one hand, and religious affairs, on the other; in the same vein, international straits are governed, according to Lapidoth, by unique rules (which derogate from the rules governing other parts of the sea). Third, Lapidoth's scholarship demonstrates the perforated nature of modern sovereignty—using the latter phrase, really, as an open-ended and loose framework of analysis always subject to overriding international public policy considerations.

#### THE GOAL OF THE BOOK: FOSTERING DEBATE ON APPROACHES TO ALLOCATION OF AUTHORITY

The present collection of essays builds upon Ruth Lapidoth's intellectual contributions. It represents an attempt by leading international law scholars and experts to systematically examine the tensions between traditional notions of sovereignty and the increasingly frequent allocation of decision-making authority to international organisations, courts and other international actors. This, in turn, facilitates a pragmatic examination of the usefulness of specific power-allocation rules, which may respond to some of the problems of legitimacy, effectiveness, predictability and co-ordination in international law. On a more theoretical level, the book discusses the legal configuration of the structures and meta-structures of international law, as a whole, as choices between (or combinations of) different theories on the allocation of power between international actors. It also assesses the feasibility and desirability of introducing or developing some general legal principles that would govern the allocation of power between the national and the international, as opposed to the case-by-case or regime-by-regime approach advocated by Ruth Lapidoth.

At all events, this book does not offer a single technical or formal solution to what is ultimately a political matter, nor does it argue that such a solution is either desirable or attainable. The book does not even purport to provide a unified theory or complete world view on these 'big' questions. This is partly because the allocation of authority in international law is constantly shifting, and may be in a permanent state of flux. Furthermore, considerable uncertainty and controversy still surround both the descriptive and normative elements of the discourse on the structure of authority.

What this book does seek to achieve, however, is a description and evaluation of important parts of the debate over the allocation of authority in international law, hoping to present a range of ideas on the topic and to foster discussion thereon by a diverse set of outstanding international legal scholars and experts. In other words, it aims to provide a comprehensive set of different approaches and entry points into this difficult debate.

# HISTORICAL DEVELOPMENT AND THEORETICAL BACKGROUND

The classical paradigm of international law (commonly known as 'Westphalian') is 'horizontal' in nature. It is based upon the fundamental principle of state sovereignty, the formal equality of states and the principle of non-intervention; it also views state consent to international norms and specific regimes of international governance as international law's ultimate legitimising factor. This traditional conceptualisation reflects the lack of central authority in the international political system, and is most commonly contrasted with the centralised character of the state's domestic legal order. Still, this traditional construction does not reflect the complexity of contemporary international relations. The development of sophisticated global and regional institutions for international co-operation, the intensification of international legalisation and the process of judicialisation of international relations (demonstrated, inter alia, by the sharp increase in the number of international courts in recent years and the expansion of their legal authorities) have all contributed to the emergence of a new complex international order—in fact, a multiplicity of legal relationships, with increasingly discernible 'vertical' elements.

First, the gradual strengthening of international norms and institutions seems to have led to a concomitant erosion of national sovereignty and to the subjection of the national to the international in several important contexts. In other words, different degrees of authority have been transferred from the states to the international plane under varying legal and political terms. Second, some international institutions have asserted the supremacy of their powers not only vis-à-vis their member states, but also with regard to other international institutions. Hence, vertical relations may now exist even between international organisations. Third, the increased influence, whether direct or indirect, of sub-state actors—autonomous regions, minority groups, business corporations and the civil society—upon the development of international law and the application thereof introduces another vertical dimension to the classical

<sup>&</sup>lt;sup>7</sup> The most advanced example, of course, is arguably the European Union.

<sup>8</sup> See, eg, Case T-315/01, Kadi v Council [2005] ECR II-3649.

<sup>&</sup>lt;sup>9</sup> For example, the right of individual petitions to the European Court of Human Rights under Protocol No 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms, ETS 155 (entered into force 1 November 1998).

horizontal paradigm. This is because these new sub-state actors remain subject in many important aspects to the overriding political and legal power of their 'parent' states.

These developments raise a host of practical problems: the uncoordinated nature of the shift in allocation of authority in international law encourages potentially conflicting decision-making processes, resulting in incompatible norm-promulgation, norm-interpretation and disputeresolution processes. In other words, it raises the questions of 'who decides what?' and how to settle normative and jurisdictional conflicts, which the present unsatisfactory delineation of authority encourages (eg, how to reconcile incompatible norms or judicial or quasi-judicial pronouncements? Or how to co-ordinate between parallel political or legal proceedings?). Significantly, such conflicts may arise with relation to power interplays subject to either horizontal or vertical configurations (eg, between states and international organisations and among different sets of international organisations). However, the resolution of such conflicts may very well depend on the allocation of power between the competing parties to the political or legal interaction.

In addition, the shifting allocation of authority introduces considerable normative implications. Of course, the classical horizontal paradigm has been fraught with difficulty and the power it confers upon states has often been abused—the result being the de facto insulation of states from effective international supervision and control. In addition, subjecting legal change to state consent has proven a tall obstacle against adjusting the existing status quo to changing realities and needs. The horizontal paradigm has also empowered the central authorities of the state, through granting it exclusive or almost exclusive international standing, at the expense of other domestic constituencies, such as minority groups or federal units.

One conceivable alternative to the classical allocation of authority in international law is a model of supremacy (or conversely—subordination), representing the predominance of international norms and institutions over state entities. The supremacy paradigm suggests a possible shift of power towards centralised authority created at the global or regional level. Indeed, super-state structures, invested with genuine political and legal power, such as the UN Security Council and the European Union (EU), operate in accordance with this modality.

Still, the movement towards a supremacy-based international system might be limited in its scope in actuality to several specific institutional contexts and projects, and wholesale digression from the horizontal paradigm might be improbable and, moreover, politically unworkable. Furthermore, one might argue that the empowerment of international norms and institutions is also undesirable and flawed from a normative perspective. In particular, such a development might conflict with democratic principles as it moves power from popularly elected national governments to unaccountable international bureaucracies.

An almost contrary organising paradigm that presents itself is based on principles of *subsidiarity*. This notion, which was originally developed in canonic law, is found today in the domestic administrative law of some European states and constitutes one of the basic principles of contemporary EC law. The principle of subsidiarity stands out for the proposition that normative, political and legal decisions should be taken by the competent authority that is closest to where the impact of the decision will be felt. Subsidiarity can thus serve as a bridge between 'Westphalian' state-centrism and the postmodern diversity of actors on the international field.

However, until now, subsidiarity has been mainly understood outside the EC/EU context as an auxiliary concept—eg, a rule of interpretation or decision-making procedure (such as the European Court of Human Right's margin-of-appreciation doctrine) that complements, but does not supplant, either the classic state-centred or modern configurations of power based upon notions of supremacy. Furthermore, application of the principle of subsidiarity might entail difficulties on a number of levels: the empowerment of states (or sub-state actors) under a subsidiarity principle might undermine the effectiveness of international organisations, hinder the development of global legal standards (eg, through customary international law and multilateral legal arrangements), and accelerate the fragmentation of international law

#### CONTENTS OF THE BOOK

The first of the volume's four parts ('The Structures of International Law'), provides a detailed conceptual overview of different approaches to the tensions that now pervade the structuring of authority in international law and politics, transcending the 'vertical' and 'horizontal' classification.

In the first chapter—'The Centripede and the Centrifuge'—**Professor Thomas Franck** introduces the tensions existing between centralised and decentralised decision-making processes and offers three neutral principles, which serve as guidelines for evaluating different configurations for the allocation of power between the centre and the periphery: (1) 'nearer my law to me'—decisions affecting individuals should be made by persons closest to those directly affected; (2) 'first do no harm'—decisions should be made by those closest to the persons directly affected provided that 'those directly affected' constitute persons similarly situated with respect to the matter being addressed, or, failing this, that persons differently situated had agreed that the imperatives of devising a

common solution must take priority over the preservation of existing differences. In other words, decision-making powers which entail redistributive implications must be negotiated with the affected constituencies; and (3) 'responsive governance'—the locus of power needs to be responsive to the preferences, needs and petitions of these individuals towards whom the governance is directed. Franck suggests that these principles, if applied to practical expressions of authority allocation, will allow international law to withstand the powerful strains between the global and the local that arise within the existing 'concentric circles of affinity' in international society.

In 'On the Causes of Uncertainty and Volatility in International Law', Professor W Michael Reisman addresses the shifting allocation of authority in international law by exploring the roots and sources of its dynamicism as a legal system. He emphasises that meaningful common interest is the critical political component in the effectiveness of all legal arrangements, and that this is no less true in the area of international law. To Reisman, the power of legal rhetoric is limited in the face of political opposition, and so is the power of historicist primacy. The world is a complex society, inherently volatile as a legal system in the face of shifting political pressures whose expressions are amplified by pervasive global class, religious and cultural diversity and law's dialectical character. Law reflects political arrangements but at the same time generates political opposition, leading especially in international relations to a temporal relativity of the meaning of 'justice', or 'justicial anachronsim'. Reisman notes other sources of volatility in international law, some of them institutional, and focuses on gaps between law's roles as a 'myth system' and as an operational code of international behaviour, creating a volatility that presents significant intellectual challenges to the international lawyer, made even more formidable by the relevance of power. This volatility presents both opportunities and pitfalls to students and practitioners of international law, bringing pause to anyone who would advocate simple structural solutions of authority allocation.

In his essay 'Structural Paradigms of International Law', Dirk Pulkowski approaches the overarching concept of a fragmented international legal order from an anthropological perspective of law, complementing the more familiar discussion of conflict between legal regimes as a problem of treaty interpretation to be reconciled through tools such as Article 31(3)(c) of the Vienna Convention on the Law of Treaties (VCLT), lex specialis, or general international law. He notes that a plurality of coexisting legal sub-systems is quite a normal state of affairs in any complex society. Building on definitions derived from the general sociolegal work of Boaventura de Sousa Santos, 10 Pulkowski examines three

<sup>&</sup>lt;sup>10</sup> B de Sousa Santos, Toward a New Legal Common Sense (London, Butterworths, 2002).

constitutive components of international legal practice: rhetoric, bureaucracy and power. With regard to each component, he observes a combination of three competing organisational paradigms. International law is simultaneously organised according to (a) 'Westphalian coexistence', a horizontal paradigm in which 'rhetoric' focuses upon sovereignty, 'bureaucracy' upon intergovernmental co-ordinative organizations, and 'violence' upon the obligation to refrain from the use of force, couched in its proper political context; (b) 'hierarchical constitutionalisation', whose rhetoric establishes a formally vertical paradigm, and whose bureaucracy is epitomised by the UN system, but whose main weakness is in the dependence of the use of collective force-violence-upon the will of states; and (c) 'heterarchical network', conglomerating the different visions of Slaughter, 11 Sassen 12 and Hardt and Negri, 13 a web-like concept of the international system, non-vertical or horizontal, whose bureaucracy is diffuse yet organic, whose rhetoric is sophisticated and complex, and whose assertion of violence is difficult to locate. According to Pulkowski, attempts at developing general principles for the allocation of authority in international law will succeed only to the extent that this complex structure of the international order is taken into account.

Dr Gareth Davies offers in 'Subsidiarity as a Method of Policy Centralisation' a sceptical view of the utility of subsidiarity as an organising principle of international decision-making processes—a view informed by the practice of the EU in applying this principle. According to Davies, resort to subsidiarity in the relations between international organisations and their member states might be useful in some limited circumstances, where there is a complete meeting of minds and interests between international institutions and the states comprising them. However, where conflicts of interests between international and national actors exist (especially where the objectives of the policy in question are controversial), application of a principle of subsidiarity can only bring disharmony and confusion. Worse still, Gareth posits that the very structure of subsidiarity actively suppresses these conflicts, making intelligent consideration of how to deal with them harder to attain.

In 'Fragmentation(s) of International Law: On Normative Integration as Authority Allocation', Dr Tomer Broude argues that the 'fragmentation' discourse is itself fragmented, with problems of norm fragmentation (eg, conflicting rules) discussed separately from those relating to the fragmentation of authority (eg, competing jurisdiction). However, authority and norms are the warp and weft of international law, with a basic correlation between them: norm integration necessarily leads to

<sup>&</sup>lt;sup>11</sup> A-M Slaughter, A New World Order (Princeton University Press, 2004).

<sup>&</sup>lt;sup>12</sup> S Sassen, Losing Control? Sovereignty in an Age of Globalization (New York, Columbia University Press 1995).

<sup>&</sup>lt;sup>13</sup> M Hardt and A Negri, Empire (Cambridge, MA, Harvard University Press, 2000).

pressures that integrate authority. As a result, some tribunals resist formal norm integration (as advocated with respect to Article 31(3)(c) VCLT) in order to avoid an erosion of their independent authority. It may therefore be necessary to develop methods of norm integration that are less intrusive upon the institutional authority of distinct political and legal actors.

The second part of the book ('International Authority and the State') focuses on conceptions of sovereignty and the tension between international authority and the sovereign state—the bearer of national authority.

In 'State Sovereignty, International Legality and Moral Disagreement', Professor Brad Roth defends the moral justification of the concept of state sovereignty, seen by many as an impediment to the global advance of legality. In this article, Roth focuses upon the ideas of self-determination and non-intervention, demonstrating their inherent paradoxesstriving to balance individual rights with collective prerogatives, and universalism with pluralism— through detailed references to contemporary practice and declarations in these areas. He suggests that differences over the depth and breadth of international law's respect for sovereignty are reflective of even deeper differences over the functions of the international legal order. To Roth, the principle of sovereign equality responds to institutional needs by establishing a doctrinal basis for respectful accommodation, or 'bounded pluralism', among international actors beset by persistent disagreement about what constitutes a legitimate and just internal territorial public order. While states may be censured and sanctioned for violating morality-based legal obligations, the practicalities of international relations require that states' core inviolabilities persist, notwithstanding those violations, in all but a narrow range of case. Roth insists that international law, even where prioritising pragmatic over moralistic considerations, generates moral obligations (rebutting Eric Posner's contrary view).14 He goes on to describe conflicting moral justifications of a pluralistic global order. In contrast to Walzer's<sup>15</sup> or Rawls's<sup>16</sup> culture-based pluralisms, Roth derives a justification of pluralism, and thus of sovereign prerogative, from the nature of political life. In conditions of ethno-national or socio-economic polarisation, informed persons of good faith and sound reason may disagree violently on questions of justice, for reasons bearing no relation to cultural dispositions. Consequently, foreign states need not be agnostic about the wrongfulness of measures invoked in internal political

<sup>14</sup> See particularly EA Posner, 'Do States Have a Moral Obligation to Obey International Law?' (2003) 55 Stanford Law Review 1901.

Michael Walzer, Just and Unjust Wars (New York, Basic Books, 1977); Michael Walzer, 'The Moral Standing of States' (1980) 9 Philosophy and Public Affairs 209. <sup>16</sup> J Rawls, The Law of Peoples (Cambridge, MA, Harvard University Press, 1999).