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Great Powers and Outlaw States

Unequal Sovereigns in the International Legal Order

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Gerry Simpson

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Great Powers and Outlaw States

The presence of Great Powers and outlaw states is a central but under-explored feature of international society. In this book, Gerry Simpson describes the ways in which an international legal order based on 'sovereign equality' has, since the beginning of the nineteenth century, accommodated the Great Powers and regulated outlaw states. In doing so, the author offers a fresh understanding of sovereignty, which he terms juridical sovereignty, to show how international law has managed the interplay of three languages: the language of Great Power prerogative, the language of outlawry (or anti-pluralism) and the language of sovereign equality. The co-existence and interaction of these three languages is traced through a number of moments of institutional transformation in the global order from the Congress of Vienna to the 'war on terrorism'. The author offers a way of understanding recent transformations in the global political order by recalling the lessons of the past, in particular in relation to the recent conflicts in Kosovo and Afghanistan.

GERRY SIMPSON is a Senior Lecturer in the Law Department at the London School of Economics where he teaches Public International Law and International Criminal Law. He has been a Legal Adviser to the Australian Government on international criminal law and was part of the Australian delegation at the Rome Conference in 1998 to establish an international criminal court. He has also worked for several non-governmental organisations and appears regularly in the media discussing the law of war crimes and the law on the use of force in international law. Previous publications include *The Law of War Crimes* (1997) with Tim McCormack and *The Nature of International Law* (2001).

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Foreword

International lawyers have become used to living with the tension between such formal rules as state equality or state sovereignty (it is rarely noted that sovereignty is a *formal* rule), on the one hand, and the pervasive facts of inequality and power differentials among states, on the other. The usual response is to relegate inequality to the realm of the political and contingent, and to take comfort in the positive values of formal equality, which after all allows for changes in hierarchies of power over time: just as everyone is free to dine at the Ritz, so everyone may aspire to permanent membership of the Security Council, one of international law's few concessions to formal hierarchy.

Dr Simpson's approach is different and strikingly original. No formalist, he sees in the interplay between equality and inequality, between great power and outlaw status, 'the essence of international law since at least 1815'. International law is a dialogue of power, and its uneven application to different states is fundamental, not accidental. The powerful we will always have with us, and even changes in the cast, or caste, of the powerful will be fewer than we might imagine. And this is not a contingency: formal equality is a device established by the powerful in order to underwrite and prolong their power. At the same time they can engage in the various forms of ostracism – particularly crude these days – which has over time relegated now China, now Vietnam, now Iraq, now Iran, to the outer reaches.

As a descriptive sociology of the international legal system, Dr Simpson's vision is of compelling interest, combining wit, lucidity and breadth of reference. But he does not put this work forward merely as a form of descriptive sociology; it is somehow prescriptive – a vision not only of an 'is' but an 'ought', based on the various imperatives of power. Unless this form of realism is integrated into our understanding of the

subject we will continue – Simpson implies – to be trapped in a sterile formalism, an international law of small places.

I hope that is not true. It seems to me that the struggle for equality – equality of a kind, even in the very different conditions of the international system – has a constraining value, and that we should struggle against the idea that, for example, France may use force where Monaco or Andorra may not, just as we should struggle against the view that 'civilisation' (and 'Western civilisation' at that) ever could be, or could have been, a criterion for legal personality. And yet Dr Simpson's long historical account has, among its many values, the special value of the shaking of a stereotype, of making us think whether our own visions of the subject can remain the same. It is thoroughly to be recommended.

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Preface

International law had barely escaped its 'ontological' phase when it was promptly declared dead.[1] The coroner, Slavoj Žižek, declared that the 'war on terrorism' has delivered the *coup de grâce* to an international order based on sovereign equality and capable of constraining power.[2] The global political order was now composed of enemies and friends, not sovereign equals. Others, of a less morbid persuasion, have argued instead that there is a new constitution afoot. On this view, international law has been not fatally wounded by the events of 2001 but transformed by them. The Great Powers are certainly 'impatient with the diplomatic niceties of international law enforcement' but international law, ever adaptable and endlessly pragmatic, will accommodate the new imperatives.[3]

These arguments are not absurd but they do reflect two common vanities in discussions of public international law and its role in international affairs: a tendency to accept the terminal impotence of the discipline and a belief in the novelty of 'new world orders' (a collective obsession since the Twin Towers fell).

In contrast, the image of international legal order presented in this book is of a system marked, since 1815 by a certain continuity of structure. Juridical sovereignty underpins this structure but this sovereignty

[1] See Thomas Franck, *Fairness in International Law and Institutions* (1995), 6 (heralding international law's post-ontological phase).

[2] Slavoj Žižek, 'Are we in a war? Do we have an enemy?', *London Review of Books* 24:10 (23 May 2002), 3 ('the new configuration [post-11 September 2001] entails the end of international law which, at least from the onset of modernity, regulated relations between states').

[3] T. Mills-Allen, 'US plans anti-terror raids', *Sunday Times*, 4 August 2002, 1 (paraphrasing Washington 'insiders'). For work along these lines see Michael Glennon, *The Limits of Law, Prerogatives of Power: Interventionism after Kosovo* (2001).

is protean and flexible and is marked through the interplay of three languages: the languages of Great Power prerogative, outlawry (or anti-pluralism) and sovereign equality. In other words, the categories of Great Powers, friends and enemies (or outlaws), and sovereign equals are each important to our understanding of the international legal order. In early 2003, as I wrote this preface, the Great Powers were once again preparing for war with an outlaw state. In the public pronouncements of world leaders at this time, these three languages and categories co-existed, sometimes uncomfortably.

The Great Powers, emboldened by the easy projection of authority in Kosovo and Afghanistan, geared up for a new intervention. In speeches and official statements, the United States and the United Kingdom governments have spoken of the need to apply power, sometimes in the absence of explicit UN Security Council authorisation.[4] This is often characterised as 'unilateralism' but I want to read this behaviour as part of a particular tradition of Great Power prerogative and privilege instituted in 1815. It is important that the Great Powers see themselves as acting in the shadow of international law. But, often, the shadow they see is their own. They make and remake (but rarely break) international law. In this tradition, the Great Powers are loath simply to step outside the law and use brute force. Instead, there has been a practice of willing into existence new legal regimes in moments of constitutional crisis in the international system. These new regimes are characterised by the presence of a phenomenon I want to call *legalised hegemony*: the realisation through legal forms of Great Power prerogatives. In this book I describe this tradition, its internal struggles, its external projections and legitimation through law, and its awkward relationship with law's egalitarian face.

At the same time, the public pronouncements of key officials are careful to invoke the international community at every turn. The Great Powers act not in the name of narrow self-interest but on behalf of a community of interests or, better still, of humanity itself, credentialising their mission with reference to common values. A necessary adjunct to this rhetorical and legal tradition is the presence of states and groups operating outside the universal community, acting in the cause

[4] E.g. Julian Borger, 'Straw threat to bypass UN over attack on Iraq', *The Guardian*, 19 October 2002, 1 (quoting UK Foreign Secretary Jack Straw stating: 'We are completely committed to the United Nations route, if that is successful. If, for example, we end up being vetoed . . . then of course we are in a different situation').

of inhumanity.[5] Wars are fought not between adversaries but between the international community and international renegades or between the universal and the particular, e.g. 'human rights' and 'Islamic terrorism'. This language has become more transparent in recent years. The word 'Manichean' has become a cliché of political commentary as observers struggle to come to terms with this idea. The central figure in all this is the outlaw state: a figure whose estrangement from the community of nations and demonisation by that community has long been required as part of the project of creating and enforcing international 'society'.

International law is important in the constitution and regulation of outlaw states. These states are mad, bad or dangerous, or all three. Some are incapable of forming the correct attitude towards the international legal order. They lack 'a reciprocating will' (mad). Some are serial violators of the dominant mores of the international legal order (bad). Others are a threat to the international legal order because of some internal malfunction or propensity to disorder (dangerous). In each case, law supervises the relationship between the community and the outlaw. James Lorimer wrote in 1888 of the need to respond to terror with 'the terrors of the law'. These 'terrors' have been regularly applied to those outside the 'family of nations'. As I indicate in this book, outlaw states are outside the law in one sense but thoroughly entwined in its terrors in another. This dual aspect to the position of outlaw states will be emphasised in some of the later chapters where a link will be drawn between the nineteenth-century practices of demarcation and the contemporary manifestations of it in the designation of states as 'criminal' or 'rogue'. Sometimes this connection is made explicit. Philip Henscher, writing in *The Independent* in early 2001, adopted nineteenth-century language in discussing the then-incumbent Taliban regime in Afghanistan when he remarked: 'Of course, the horrors perpetrated by the regime place it beyond the pale of any standard of civilisation.'[6] In 2002, the US National Security Council celebrated the fact that (in Afghanistan) 'our enemies have seen the results of what civilized nations can, and will, do against regimes that harbor, support, and use terrorism'.[7]

[5] Carl Schmitt, *The Concept of the Political*, trans. and ed. George Schwab, 54.

[6] Philip Henscher, 'We should still talk to the Taliban', *The Independent*, Monday Review, 5 March 2001, 5.

[7] *US National Security Strategy*, September 2002 at http://www.whitehouse.gov/nsc/nss3.html.

I describe this tendency as *anti-pluralism*: the practice of making legal distinctions between states on the basis of external behaviour or internal characteristics.[8] This book is also, then, about outlaw states in the international legal order. It describes their encasement in the legal order and separation from it, their role as threat and necessity and the relationship between the idea of outlawry and law's pluralist face.

Finally, international law is also a language of equality. Indeed, one of the most pervasive images of international legal order posits a community of equals engaging in relations through juridical forms. Equality is regarded as integral to sovereignty. In a lecture on the future of international law, in 1920, Lassa Oppenheim called the equality of states 'the indispensable foundation of international society'.[9] More recently Bruno Simma has asserted that 'all states in the world possess suprema potestas and are thus not placed in any kind of hierarchy, international law must proceed from the basis of equal sovereignty of states'.[10] This principle is usually described as *sovereign equality*. To what extent, though, are these articulations of sovereign equality accurate characterisations of the sovereignty order? The idea of sovereign equality does much work in international law but, for my purposes, it has two primary roles. First, it parlays into a commitment to a pluralist international legal order (bluntly, one in which state diversity is tolerated). Or as Vattel put it: 'Nations treat with one another as bodies of men and not as Christians or Mohammedans.'[11] Second, the principle of sovereign equality conveys the idea of an egalitarian international legal order (one in which states are legally equal). There is a tension between the pluralist, egalitarian aspect and the anti-pluralist, hierarchical (or hegemonic) aspect. This interaction establishes the conditions for what I call *juridical sovereignty*.

In this book, then, I offer a fresh understanding of sovereignty grounded in a complex of norms and ideas in which the competing claims of legalised hegemony, anti-pluralism and sovereign equality are arranged and ordered. In doing so, I tell a story about the Great Powers,

[8] In a later discussion of the war on Afghanistan and the treatment of the detained prisoners on Guantanamo Bay, I discuss also the way in which the position of outlaw personnel, i.e. Taliban and al-Qa'ida prisoners under US control, reflects the position of the outlaw state in international law: in a lawless space but subject to intense scrutiny and surveillance. See below at pp 343–6.

[9] L. Oppenheim, *The Future of International Law*, Carnegie Endowment for International Peace, Pamphlet No. 39 (1920), 20.

[10] B. Simma, ed., *The Charter of the United Nations: A Commentary* (1994), 87.

[11] Vattel, *The Law of Nations*, ed. J. Chitty (1863), 195.

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outlaw states and sovereign equality in the context of the post-1815 international legal order.

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What is at stake in all this? Every author must face his or her own moments of crisis. Why write? Why write *this*? I suspect there are intellectual and political imperatives (perhaps, even literary values) at work here, as well as serendipity. Intellectually, I wanted to explain a mystery or explore an intuition I had about the international legal order. It seemed to me that the presence of Great Powers and outlaw states was a central but under-explored feature of international society. This, alone, made the project at least plausible. In particular, I have always been frustrated at the mismatch between law's universalist pretensions and its partialities and discriminations. But more than this, the endless debates about humanitarian intervention or anticipatory self-defence or sovereign immunity seemed irresolvable, or at least unfruitful, without a consideration of identity. Much as we disparaged primitive realists for their billiard ball projections in which states were undifferentiated, our commitment to statism was just as remarkable. States were juridically equivalent on the orthodox view and any analysis of, say, sovereign immunity or humanitarian intervention had to proceed from this assumption. And yet, these doctrines seemed to be shaped by the specific identity of the protagonists as much as by a claim to universal application. Immunity was disposable in cases involving outlaws but tenaciously applied to the personnel of the Great Powers themselves. Self-defence expanded to meet the requirements of these powers but was suddenly subject to contraction when outlaws such as Vietnam, in 1979, attempted to justify their actions under the doctrine. This was, it seemed to me, not just international law perverted or applied unfairly. This was the essence of international law since at least 1815. The way international law worked, at least some of the time, was dependent on the identity of the protagonists involved.

At a very basic level, the book also has something to say about some of the most controversial matters in international law and politics. To what extent ought the international community be composed of like-minded states? Is there an advantage to be gained by restricting state diversity in pursuit of the democratic peace? Ought our treatment of 'uncivilised' states in the nineteenth century give us pause when we use the language of democracy, civilisation and decency today? Should international legal rules operate equally as between the Great Powers and the other states or is it unrealistic to expect Russia or the United States or France to be

bound by the same restrictions on, say, the use of force as the rest of the international community?

In all this there is the inevitable allure of studying high politics (the Great Powers) and international deviance (outlaw states), each set against the apparent innocence of an international legal order based on sovereign equality. Politically, this book was written as a way of reinterpreting international law's past by rejecting its bogus doctrinal innocence without collapsing it into mere politics. I wanted to understand the Great Powers and outlaw states as legal concepts, as relevant to legality as sovereign equality. The idea was to make a stand for relative autonomy without thereby suggesting that law was emancipation or progress to the brutish materialism of politics or international relations.

More specifically, the writing of this book was motivated by three experiences. First, I had long been drawn to international law theory. The people who interested me were described (though rarely self-described) as 'theorists' and their work simplified complex doctrine and complicated apparently simple propositions about the world. In my own work, I decided to begin tracing the development of an idea across time and study how theories participated in or modified this development. I was interested in the effects of, for example, 'liberalism' on the way people imagined what they were doing.

Second, I had been doing work on 'sovereignty' in international law, e.g. why indigenous peoples did not possess it and how ethnic groups got it. This work seemed unsatisfactory so I shifted from thinking of sovereignty as a given (the problem then being who should acquire it) to conceptualising it as a problem. Here, I became interested in the changes in the form of sovereignty wrought by the adoption of certain legal techniques, e.g. the grading of sovereignty in international organisations and the distinction in theory and practice between good and bad sovereigns.

Third, I had attended two international diplomatic conferences and sat in on various UN and governmental meetings on international criminal law. Here, I had noticed an increasing tendency to distinguish between members of the international community in good standing and dissident states or outlaws, and a long-standing requirement that special privileges be secured for powerful states. As a consequence, at these conferences sovereign equality was quickly displaced by all sorts of hierarchies. Sovereign equality operated in the plenaries but there were small groups of powerful states in meetings euphemistically called 'informal informals', good citizen middle-ranking states in 'like-minded groups'

and representatives from 'outlaw' states like Iran and Iraq exiled in coffee shops, ruminating under puffs of smoke. I became interested in explaining or understanding these hierarchies as part of a larger system of equality and hierarchy.

This book then combines these interests. It is a book about sovereignty (but understood in broader terms than my work on self-determination had permitted and in narrower terms than those used by many political scientists), a book that would satisfy my theoretical inclinations (understood here as an interest in the development of ideas across time) and a book that would help explain the puzzle of international law and organisations (being hierarchical and egalitarian, pluralist and anti-pluralist at the same time).

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Acknowledgements

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Two parts of this book have been published previously. Chapter 6, 'The Great Powers, Sovereign Equality and the Making of the UN Charter' appeared in a Festschrift for Don Greig in the *Australian Yearbook of International Law* and an early version of Chapter 9 appeared under the title, 'Two Liberalisms' in the *European Journal of International Law*.

I am unable to offer one of those unconvincing apologies for time spent away from children since my daughters frequently interrupted the writing of the book. But perhaps Hannah and Rosa should be thanked. Because, as my Grandmother would have said, when they were born, they brought their love with them, and because, but for them, the book would be much longer.

This book is for Deborah.

Abbreviations

AJIL	*American Journal of International Law*
ASIL	American Society of International Law
BFSP	*British and Foreign State Papers*
BYIL	*British Yearbook of International Law*
CWILJ	*California Western International Law Journal*
DO	Dumbarton Oaks
EC	European Community
EJIL	*European Journal of International Law*
EJIR	*European Journal of International Relations*
EU	European Union
FRY	Federal Republic of Yugoslavia
GA	(United Nations) General Assembly
GATT	General Agreement on Tariffs and Trade
ICLQ	*International and Comparative Law Quarterly*
ICJ	International Court of Justice
ICJ Rep.	*International Court of Justice, Reports of Judgments, Advisory Opinions and Orders*
ICTY	International Criminal Tribunal for the Former Yugoslavia
ILC	International Law Commission
ILM	*International Legal Materials*
ILR	*International Law Reports*
IMF	International Monetary Fund
IO	International Organisation
IR	International Relations
ISAF	International Security Assistance Force
KB	King's Bench
KFOR	Kosovo Force
LNTS	League of Nations Treaty Series

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