

International Law in a “New Medievalism”

Mikael Baaz

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1 Introduction*

And in today already walks tomorrow

(Samuel Taylor Coleridge, quoted in Heywood 2014: 533).

On an overall level, this text is about “international orders” – in the past, present and future. More specifically, it is a paper on (i) the transformation of the contemporary “international order” – which was “acknowledged” by the Peace of Westphalia (1648) and encapsulated the idea of a “society of states” (Armstrong 2011: 42); and (ii) some of the implications this transformation – commonly referred to as “globalisation” – may have on (future) international law, which is recognised as one of the fundamental institutions of the modern or Westphalian “international society” (cf. Baaz 2009). Is “globalisation” – which is simply understood as “the widening, deepening and speeding up of worldwide interconnectedness” – bringing about the decline of the sovereign nation states as global agents, and challenging the ability of governments to control their own economies, politics as well as law-making and enforcement? Or is the globalisation discourse merely “globaloney”? Will the states and “geopolitics” continue to be the key agents and forces that shape the international order and international law?

The point of departure for this paper is somewhat different. It approaches these issues from a “historical” and “transformalist” perspective and argues that (i) neither contemporary international society nor a future alternative order could be understood in “isolation”, but rather need to be dealt with as the result of a multi-faceted process that is played out over time; and (ii) both the “hyper-globalists” and “sceptics” alike overstate their arguments and, by consequence, misunderstand not only contemporary international politics, but also the future structure, fundamental institutions and pattern of relations among states and other agents – not least the nature and role of (international) law (McGrew 2011: 16; Heywood 2014: 9-13). In this paper, a particular interest is devoted to the Middle Ages and the idea of a “new medievalism” – an idea that, it will be argued further below, could help us to better understand the current processes of simultaneous globalisation and fragmentation.

2 International Orders

There are several ways to categorise the general structure and pattern of relations among “distinct” political entities. At one endpoint, on a hypothetical continuum, we might picture a state of *bellum omnium contra omnes*, in which war, conquest and the slaughter or enslavement of the defeated are the only

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forms of contact between these entities. At the other endpoint, we could imagine a world government, in which the individual societies retain their differences based on features such as language, culture and/or religion but their political and legal freedoms are no greater than, for example, the individual states of the United States. Between these two endpoints we find the many forms of interaction that have existed in different times and places throughout world history. These forms range from “empires”, which themselves could be more or less tightly organised, via various kinds of hierarchical orders (such as “suzerainty”), to different “international systems” of various geographical range that are organised on the basis of sovereignty of the constituent members (Armstrong 2011: 36; see also Baaz 2009; Watson 1992).

Generally speaking, David Armstrong (2011: 36) argues, the concept of “international society” could be applied to describe any modes of interaction between distinct societies that are governed, to some degree, by common rules and practices. Yet, it is most often applied more narrowly, referring to, on the one hand, a specific historical narrative and, on the other hand, a theoretical approach – the “English School of International Relations” – that is partly derived from this narrative (see e.g. Baaz 2009, 2013; Bull [1977] 1995); Bull and Watson 1984; Butterfield and Wight 1966; Watson 1992; Wight 1977, [1946] 1978, 1991). The narrative concerns the emergence and evolution of the European society of states from *the complex medieval* order that preceded it. The European “society of states” or “international society” was founded on the common interests of its members to protect sovereignty as well as a set of common values – a “standard of civilization” – that distinguished the members of this inner circle from those outside it. Within the inner circle, the members “conceive themselves to be bound by a common set of rules in their relations with one another, and share in the working of common institutions” and principles (Bull [1977] 1995: 13). Outside the inner circle, those societies considered “uncivilised” could be subject to different means of control or domination, reaching from “capitulations” to outright colonisation (Armstrong 2011: 36; Baaz 2009: 68-69; Bull [1977] 1995: 13; Cassese 2001: 22-23; Heywood 2014: 28).

3 The English School of International Relations and the Concept of “International Order”

In general, Robert Jackson (2009: 21-22) argues, the English School of International Relations could be thought of as form of “classical humanism” that focuses on human relations. The approach seeks to “*discern, clarify and elucidate* human conduct: that is, human activity that is assessed by reference to normative standards of some kind”, rather than to “*discover* patterns of social behavior, conceived as an objective external reality and to *explain* that reality in terms of falsifiable empirical propositions”. From this follows, that, “[t]here can be no positivist explanations of human conduct ... There can only be history, jurisprudence and related modes of understanding, interpreting, and elucidating its character and *modus operandi*” (italics in original).

The chief concept and distinctive marker of the English School is, as indicated above, the concept of “international society”; traditionally understood as:

... a group of states (or, more generally, a group of independent political communities) which not merely form a system, in the sense that the behaviour of each is a necessary factor in the calculations of the others, but also have established by dialogue and consent common rules and institutions for the conduct of their relations, and recognise their common interest in maintaining these arrangements. (Bull and Watson 1984: 1)

It is thus possible to separate the concepts “system” and “society”. If this is done, it is clear that the concept (international) “system” is the more basic one and that it precedes (international) “society”. International order could then be understood as the pattern of behaviour that maintains the fundamental values of international society.

The approach is “historical” as well as “transformationalist” and holds that contemporary international society, at least at the global level, has “developed from a more rudimentary international system that expanded and evolved over time” (Green 2014: 1; cf. Bull and Watson 1984). Even though, the societal element has increased over time, contemporary international society is still best thought of as an “anarchical society” (Bull [1977] 1995): that is, even though there exists no superior authority (*anarchy*), there exists a system of “rules” (including international law) that the states (as well as other agents) apply in their mutual relations (*society*) (see further Baaz 2009:13).

In addition to the more general account of history, the English School has also focused on the main “institutions” of international society – (i) the balance of power; (ii) *international law*; (iii) diplomacy; (iv) the managerial system of great powers; and (v) war, as well as sovereignty (including non-intervention) and territoriality – and, in particular, the role of these institutions in maintaining *order* in international society. The approach has, however, also defended an ethical and normative dimension of international relations – one that questions tensions between different values in international society, including “order” vs. “justice” and/or “pluralism” vs. “solidarism/ universalism” (Baaz 2013; see also Bull [1977] 1995: Ch. 4; Butterfield and Wight 1966: 12; Buzan 2014: 98–99; Cochran 2014; Green 2014: 1; Jackson 2009; Keene 2014: 175–178).

In order to make the somewhat abstract concept of international order more functional, Björn Hettne (2009) suggests that it should be operationalized along three dimensions: (i) “structure”; (ii) “governance”; and (iii) “legitimacy”. A (thorough) transformation in one or several of these dimensions means that the international order and, by extension, the international society transforms.

The *structure* – which is the simplest and most traditional way to characterise the international power structure (polarity) – can be (i) unipolar; (ii) bipolar; or (iii) multipolar. The *governance*, which should be distinguished from the structure, can, analytically speaking, be (i) unilateral; (ii) bilateral; (iii) plurilateral (with regional governance as a special case); and (iv) multilateral. A plurilateral form of governance is understood as a form where several but not all agents are represented. A version of this form is the regional one, where membership in the decision-making bodies is dependent on geography (e.g. the

European or African Union). A multilateral form of governance is a political form in which all potential agents are included, or at least could be included if they accept the rules connected to membership. The United Nations is commonly assumed to be a multilateral form of governance. However, in practice it is plurilateral, since the system is controlled by the five victorious powers of the Second World War (today: the United States, Russia, China, the United Kingdom and France). Put somewhat differently, plurilateralism is a form of a "managerial system of great powers" (cf. Bull [1977] 1995: Ch. 9). A unilateral form is understood as a decision-making form in which one agent is acting in a one-sided manner. A bilateral order is, by consequence, an order consisting of two parties. Finally, *Legitimacy* can vary from strict legality to full anarchy (i.e. an order in which the national interest rules completely). Alternatives in-between the two endpoints are more or less legitimate or morally justifiable, multilateral, plurilateral or regional "interventions" on various grounds (Baaz 2009: 32-33; Buzan 2004: Ch. 3; Hettne 2009: 15-16).

On the international level, the question about legitimacy is often connected to another fundamental idea, namely: "hegemony". Ultimately, this concept is about how to make an order "ordered". A well-functioning system requires some sort of underlying political and/or social order. Put simply, there must be a set of rules followed by the agents that are included in the system. It is this compliance that constitutes the foundation for the order. Hegemony is a multidimensional and subtle form of power that is put in place to maintain a system that includes the acceptance of the "dominated" as an element in the exercise of power. Hence, hegemonic power is, unlike pure dominance (i.e. empire), considered legitimate. Some scholars argue that an ordered international order requires a hegemonic power, which stands as a guarantor for the system of rules. This idea is known as the "thesis of hegemonic stability" (Baaz 2009: 33-34; Hettne 2009: 16-17; Heywood 2014: 17, 236).

The concept of international order thus contains structural as well as ideational elements, but also different material interests, political relations, military capability and discursive control as well as other relations of governance (and, as we will see further below, resistance) (see e.g. Armstrong, Farrell and Maiguashca 2003). It summarises the formal and informal system of rules and principles that gives certain conformity to international law and, by extension, predictability to international relations.

If the concept of (international) order is contextualised and operationalized, as briefly suggested above, it could serve as a "theoretical frame" for not only a better understanding of (international) order – in the past, present and future – but also for understanding transformations within a particular order and transformations from one order to another, as well as the development and transformations of individual institutions.

4 The Middle Ages

Western Europe is, as indicated above, considered to be the birthplace of the territorial state (as we know it today). The year of this birth is, by tradition, considered to be 1648, the year of the Peace of Westphalia, which ended the Thirty Year’s War. The (Western) European society of states, which came to replace the earlier “medieval order”, was however long in the making. In fact, the Westphalian order began to be constructed as early as the fifteenth and sixteenth centuries and was not completed until the eighteenth and nineteenth centuries (Hettne 2009: 12; Heywood 2014: 27; Jackson and Owens 2005: 52).

The medieval era in Western Europe lasted for some thousand years, roughly between the years 500 and 1500. It is often described as a *Respublica Christiana*: that is, a universal society founded on a dual structure of religious authority (*sacerdotium*) and political authority (*regnum*) that gave at least a minimum of unity and organisation to the people living in Europe, regardless of what their language or homeland happened to be. Even though it was this political order that was recognised formally in contemporary political theory, medieval Europe was in practice fragmented and decentralised along feudal lines – at a local as well as a regional level of society. The basic characteristics of feudalism – which here is understood as a political rather than an economic order – were reciprocity and contractual relationships between those in power at different levels of society. Put somewhat differently, feudalism was made up by an intricate web of different “patron–client relationships” (Hettne 2009: 38; Jackson and Owens 2005: 50-51).

Already in the middle of the medieval period – following the formal division of the Roman Empire (in 395) and, by extension, the schism between the Roman Catholic Church and the Greek Orthodox Church – the idea of a “universal” Christianity was in practice non-existent. In 1054, the schism, which then had escalated for centuries, turned irreversible. From now on, it makes sense to speak about two different religions as well as two different political orders (in the making) – one in Western Europe and another one in Eastern Europe (Hettne 2009: 39). While Eastern Europe continued to be organised as an empire (Byzantium, which lasted until 1453), Western Europe was much more loosely organised. Over and above, Western Europe was characterised by several, partly overlapping, levels of authority and multiple loyalty (Bull [1977] 1995: 245).

The Catholic Church, which was represented by the Papacy, was originally the only “association” that maintained some sort of “universalism” in Western feudal Europe. And it was accordingly the Church – who claimed to have inherited the universal authority of the Roman Empire – that came to define Western Europe from the beginning. To back up its claim, the Catholic Church created an extensive political and legal order, comprising of a system of sanctions (ultimately the threat of excommunication, but also fines and/or public penance), the use of arbitration, formal legal hearings and numerous specific laws – so called *canon law*. The Church also elaborated the most systematic doctrine to date on *jus bellum iustum*. The doctrine, however, was only applicable on Christian subjects. Despite what has been argued above, it should be emphasized that the role of the Church was mainly conceptualised in terms of its authority, not in terms of power (Armstrong 2011: 40).

To a certain extent, the imperial power was resurrected in Western Europe as a “political project” when Pope Leo III crowned Charlemagne as the Roman Emperor in 800. The Catholic Church was in need of protection and the Emperor in need of legitimacy. In 962, Otto I was crowned Emperor and by this, the European “imperial project” was transformed into a German rather than a Frankish one. The dualism between the religious and the political was – on a general level – characteristic for the Western European civilisation during the Middle Ages, at least until the Late Middle Ages (1300–1500) (Hettne 2009: 42-43).

The Late Middle Ages was a period of fragmentation and dissolution, and from the late-fifteenth century onwards it is possible to discern the emergence of a new political structure in Western Europe, following not only a fragmentation of the imperial power and subversion of the Church (due to the Protestant Reformation), but also the centralisation of political power to different regional territories in Western Europe – in, for example, what we know today as England, Spain, the Habsburg Monarchy and the Netherlands, as well as Sweden and Denmark. It was this political power centre, the *territorial* or the nation *state* – sandwiched between the “universal” and the feudal – that would eventually become the very foundation for the European international society and, roughly speaking some five hundred years later, the current global society of states, with some 200 members (Hettne 2009: 43-44).

In addition to the above, it is also worth noting that a number of cities – which were primarily located in the northern and central Italian peninsula, as well as around the Baltic and North Sea (the Hanseatic League, which was a defensive and commercial confederation of merchant guilds and their market towns) – developed into powerful city-states during the Middle Ages. It was in Florence, one of the Italian city-states, that Niccolò Machiavelli (1469–1527) developed the idea of the primacy of the national interest (*raison d'État*). In this regard, Machiavelli was truly “modern”; his ideas would simply have been unthinkable in a medieval context. The intellectual foundation underlying the European international society, based on a system of autonomous states, is thus traceable back to Renaissance Italy (Jackson and Owens 2005: 51-52; Heywood 2014: 27).

The transformation from the old to the new political order in Europe – from a pre-Westphalian order to a Westphalian one – was not only turbulent, but it was also violent. The transformation peaked with the outbreak of the Thirty Years’ Wars in 1618, which to a certain extent was a German civil war between Protestants and Catholics. It was also, however, a German civil war about constitutional matters between the Emperor – who wanted to centralise power – and his subjects – the different political entities that constituted “Germany” and who fought for their independence. In addition, it was an international war between France and the Habsburg Monarchy, between Spain and the Netherlands, in which the monarchs of Sweden and Denmark also participated. All the external parties also had allies within Germany (see further Hettne 2009: 48-49; Palmer and Colton 1965: 111-119).

During the Thirty Years’ War, several moderate Catholic and Protestant thinkers entered the scene; the lowest common denominator of them was that they believed that religion was allowed to play far too great a role in lives of

people. No faith, it was argued, was important enough to justify a perpetual war, and that after all there might be space for two churches in Western Europe. First of all people now lived in nation states and not in the Church, and what was needed, more than anything else, it was argued, was political stability (or order), internal as well as external (Olson and Groom 1991). Among these prominent thinkers, Hugo Grotius (1583–1645) stands out.

Grotius, who was a diplomat and (legal) philosopher from the Netherlands, in a way forms a link between the old vertical and the emerging horizontal political order discussed above (Hettne 2009: 45-46). In his classic book, *De Jure Belli ac Pacis Libri Tres* (eng. *On The Law of War and Peace*), which was written in 1625, Grotius deals with the legality of war – more specifically, how to restrict war and expand peace by developing standards of conduct that are insulated against religious doctrines and therefore able to govern the relations of independent states, both Catholic and Protestant (Jackson and Owens 2005: 54).

The ideas of Grotius had – at least in theory – a great impact on the international order that was established at the Peace of Westphalia in 1648. The Peace Treaty was, put simply, based on three principles: (i) *rex est imperator in regno suo* (the king is emperor in his own realm); (ii) *cuius regio eius religio* (the ruler determines the religion of his realm); and (iii) the balance of power. These principles (gradually) replaced the medieval *Respublica Christiana*. They established the legal basis of modern statehood and, by consequence, became considered to constitute the “constitution” of modern international politics (Jackson and Owens 2005: 54).

Even though the Peace of Westphalia encapsulated the system of sovereign states in Europe, it should be noted that the territorial or nation states that emerged out of the wreck of feudalism were from the beginning “absolutist” and not modern. The legitimacy of the absolutist state, Christian Reus-Smit (1999: 8-9) maintains, rested on a distinctly pre-modern set of Christian and dynastic constitutional values. For almost two hundred years after the Peace of Westphalia, the preservation of a divinely ordained, strictly hierarchical political and social order constituted the very justification of the sovereign state. In order to preserve this order, God had given the European monarchs supreme authority – bound by divine and natural law only. The monarchs were thus ruled by few restrictions and their commands constituted the sole basis of legitimate law. These meta-values contributed to the shaping of the institutional practices that were developed between absolutist states, informing the institutions of *naturalist international law* and *old diplomacy*. These values also came to serve as strong barriers to the development of modern institutions – in particular “contractual” international law and multilateralism (see further Reus-Smit 1999: Ch. 5).

5 The Expansion of the European International Society

However, the importance of individual historical events such as the Peace of Westphalia should not, Hettne (2009: 50) correctly argues, be exaggerated. Fundamental societal transformations seldom occur at a certain time, nor are the actors who are participating in a historical event aware of the long-term consequences of their actions. A societal transformation is often rather the result of a multi-faceted process that is played out over time (not always, but quite often reflecting the original intentions of the participating actors in a rather poor manner). But a transformation is nevertheless often manifested by a single event, which helps to make the process more tangible to the present by way of individual events that appear to form a pattern in which the individual event is one of several other events in a large and complex puzzle. At the same time, the history of events is not unimportant, but events do need to be contextualised. The decision as to which events are eventually made symbols for a disclosed transformation is dependent upon, among other things, the relative consensus that is reached by leading scholars and other specialists.

What is it then, in a historical perspective, that is considered to be fundamental to the Westphalian political order that evolved from 1648 onwards? The European society of states had, as Robert H. Jackson and Patricia Owens (2005: 54-55) display, several noticeable characteristics: (i) it was made up by member states whose political independence and juridical equality was acknowledged by international law; (ii) each member state was considered legitimate in the eyes of the other member states; (iii) the relations between the sovereigns (international relations) were, in an increasing degree, managed by professionals within a multilateral system of diplomacy; (iv) the religion of international society was Christian – but that was gradually indistinguishable from the culture, which was “European”; and (v) a balance of power between the states, which was intended to prevent any one sovereign state from making a bid for hegemony. By this, the first fully articulated conception of the theory of international society as an explicit treaty with a political and legal foundation was constructed in Europe among its sovereign states. There thus seems to be strong evidence that modern international society is rooted in the political thought and political culture of the European peoples.

From the late-eighteenth century onwards, the sovereign state became, Reus-Smith (1999: 9) argues, increasingly identified with the augmentation of individuals’ purposes and potentialities, not least in the economic sphere. Once the legitimacy of the state was defined in these terms, the absolutist principle that the formulation of laws was the sole preserve of the monarch lost all legitimacy. Step by step, a new legislative principle of procedural justice developed. Rightful law was considered to have two main characteristics. *Primo*, it had to be authored by those subject to it. *Secundo*, the law had to be equally binding on citizens, in all like cases. The earlier principle(s) of legislation was thus ousted by the legislative codification of formal, reciprocally binding treaties. Beyond the 1850s, the legislative principle of “procedural justice” informed the paired development of the two fundamental institutions of contemporary society: *contractual international law* and *multilateralism* or, perhaps more correct, *plurilateralism*. The principle that legal rules should be

authored by those subject to them came to license a plurilateral form of governance and legislation, while the precept that rules should be equally applicable to all subjects, in all like cases, warranted the formal codification of contractual law, to ensure the universality and reciprocity of international regulations (see further Reus-Smit 1999: Ch. 6).

Considering the above, the (global) expansion of the Westphalian political order is best understood as a coherent and dynamic historical process that began in the fifteenth century and only came to an end in the twentieth century. The transformation started with the centralisation of political power in medieval, feudal Europe and continued with the development of a European society of states and, by extension, European control and domination of the rest of the world. The European empires were eventually dissolved and the colonies transformed into nation states, which were modelled on their European predecessors. The globalisation of the nation state is thus related to the European colonisation of the rest of the world, as well as the latter process of de-colonisation, which dramatically increased the number of states in the world (see further e.g. Jackson and Owens 2005: 56-57; Heywood 2014: 36-38).

The final act of European de-colonisation, which completed the globalisation of international society, was the end of the "Cold War" – understood as (i) a wider opposition between two material civilizations both of which insisted that they represented the future; (ii) a strategic confrontation between the United States and the Soviet Union; (iii) an ideological clash between capitalism and communism; (iv) a geographical and military confrontation that kept Germany and Europe divided for more than four decades; and (v) an on-going struggle for the control of the Third World – and the following collapse of the Soviet Union. During the 1990s, for the very first time in history, there was now one inclusive international society of global extent. The collapse of the Soviet Union together with the simultaneous dissolution of states such as Yugoslavia, Czechoslovakia and Ethiopia, as well as the subsequent state formations during the twenty-first century, have increased the current number of states to some 200 (Cox 2005: 133; Hettne 2009: 65; Jackson and Owens 2005: 56-58).

6 The End of the Cold War, Globalisation and the "War on Terror"

The end of the Cold War, like the Peace of Westphalia some 350 years earlier, is an important historical event, which, among other things, marks the end of the chiefly bipolar structure, which was based on superpower rivalry between the United States and NATO, on the one hand, and the Soviet Union and the Warsaw Pact that had defined the international society since the end of the Second World War, on the other. The end of the Cold War also enforced a redefinition of the *raison d'État* on most, not to say all, states and in some cases a reshaping of the states themselves as well as new or at least modified roles for international organisations and bodies, such as the United Nations Security Council and the European Union. In short, the end of the Cold War came to mean profound changes in the international society, at the system level, in international

organisations and at the level of the nation state (Crockatt 2005: 112; Heywood 2014: 223-226).

If the Cold War period was characterised by a distinct and sharp divide between opposing ideologies and socio-economic system, the post-Cold War 1990s could be described as a period where states were compelled to play by a single set of rules towards and within an increasingly integrated *world economy*, that was based on a neo-liberal economic orthodoxy (the Washington Consensus) (see further Heywood 2014: 93-100). The concept that was most frequently used to describe this new international order was, as we now know, "globalisation"; a concept that was barely used before 1989, but which during the 1990s came to be increasingly employed to define world politics (Cox 2011: 69).

Globalisation is, as indicated briefly above, characterised by: (i) a "stretching of social, political, and economic activities across political frontiers so that events, decisions, and activities in one region of the world come to have significance for individuals and communities in distant regions of the globe"; (ii) "the intensification, or the growing importance, of interconnectedness, in almost every sphere of social activity, from the economic to the ecological, from the activities of Apple to the spread of dangerous diseases"; and (iii) "the accelerating pace of global interactions and processes as the evolution of worldwide systems of transport and communication increases the ... velocity with which ideas, news, goods, information, capital and technology move around the globe" (McGrew 2011: 18).

Following (the acceleration of) globalisation it has, among other things, become more and more difficult to uphold the idea of politics that is performed out in two relatively separate spheres – the domestic and the international – inhabited by different actors, interacting according to different logics and rules and with different agendas. A new international or, perhaps more correct, global or world order is developing and with it a distinct form of "global politics". The concept "global politics" – which is simply understood as politics on the global level referring all elements within a system and not only to the system as a whole – could help us to understand the global structures and processes of rulemaking, problem solving, the maintenance of order, as well the promotion of justice in the global system. Under conditions of globalisation, states are becoming increasingly embedded in thickening and overlapping "worldwide webs" – i.e. webs of: (i) multilateral institutions and politics (from the United Nations to the World Bank); (ii) transnational associations and networks (from the American Society of International Law to the World Muslim Congress); (iii) global policy networks of officials, corporate and non-governmental actors, dealing with various global issues; as well as (iv) formal and informal trans-governmental networks of government officials dealing with shared global issues (McGrew 2011: 24-25; Heywood 2014: 2-3).

The concept of global politics also implies the emergence of a (fragile) global polity, within which "interests are articulated and aggregated, decisions are made, values allocated and policies conducted through international or transnational political processes" (Ougaard 2004: 5, quoted in McGrew 2011: 25). An important question in this regard is if global politics and global polity

also imply "global law". We will return to this crucial question further below, but first some more on global politics and policy.

Since the creation of the United Nations in 1945, a substantial web of global and regional agencies has developed, which is progressively linked to the proliferation of non-governmental organisations and social movements that are seeking to influence the governance of global affairs. While the idea of a world government remains utopian an evolving "global governance complex", which embraces states, international organisations, transnational networks and other agencies, and functions with variable effect in order to promote and/or intervene in the common affairs of humanity, is a reality today (McGrew 2011: 25; Heywood 2014: 7, 464-466).

This evolving "global governance complex" comprises the large quantity of formal and informal structures of political coordination between governments, inter-governmental and transnational agencies, public and private alike, and has been developed to realise collectively agreed goals as well as common purposes through the making or implementation of global, international or transnational rules. Over recent decades, non-governmental and private agencies (such as Standard and Poor's and Moody's) have become increasingly influential in the formulation and implementation of "global public policy". In addition to this relocation of authority from states to private agencies, the last few decades have also witnessed the development of an (embryonic) "transnational civil society" (McGrew 2011: 26-27): that is, a political space where associations of citizens seek to – from outside international society and the global market – influence global governance and shape global public policy (this definition is inspired by Jan Aart Scholte; via a private conversation with the author in 2012). Transnational civil society, neither as a theoretical concept nor as a political space, is not yet particularly well theorised. On a very general level, however, it is possible to think of the global governance complex as carrying out "politics from above" and the transnational civil society as performing "politics of resistance". Put simply, the politics from above – "the politics of governance" – is associated with efficient maintenance and reproduction of a hegemonic or dominant system. It includes various structures, agencies (including, it should be admitted, various transnational civil-society agents) and processes. Supporters of these arrangements consider them to bring some sort of order (and justice) to world politics, particularly in the context of globalisation. The "politics of resistance", on the other hand, is transformative in nature and seeks to develop (more just) alternatives to the established order (Armstrong, Farrell and Manguerra 2003: 5; see further Heywood 2014: 154-159). A physical representation of the "resisting" and "transformative" transnational civil society and the politics of resistance is the World Social Forum (established as a counterpart to the World Economic Forum). The World Social Forum is an annual meeting (since 2001) of various civil-society organisations and social movements that are seeking to develop an alternative future through the championing of "counter-hegemonic globalisation". Sometimes the members of the World Social Forum are referred to as the "global justice movement" or the "alter-globalisation movement".

When speaking about transnational civil society, it should also be noted that not all its "members" are representative or, for that matter, "civil". Some

members – reaching from the Mafia to Al Qaeda – lack accountability and/or seek to further dubious, reactionary, as well as criminal causes. These agents, sometimes called “uncivil transnational civil society agents”, contribute, among other things, to the growth of informal organised violence or “post-international violence” (McGrew 2011: 27).

Global politics does not only involve a diversity of agents and agencies, but is also, as indicated above, characterised by a diversity of political concerns. The global political agenda is not only anchored in traditional geopolitical concerns but also in the proliferation of different economic, social, cultural and ecological matters. An increasing number of transnational policy issues, due to globalisation, cut across existing political jurisdictions and transcend territorial borders. Thereby they require intergovernmental and trans-border cooperation for their effective management (McGrew 2011: 27-28).

But globalisation and global governance is not the only obvious result of the end of the Cold War. In terms of power distribution, the most significant transformation was what (at least initially) appeared as the triumph of one superpower over its main rival and, by extension, the emergence of a unipolar order. During the 1990s it seemed that there was only one superpower left in world politics. By the turn of the century, one popular view was that the United States had transformed into what the French Foreign Minister Hubert Védrine termed in 1998 as a “hyperpuissance” (hyperpower). In spite of its hyperpower advantage in the 1990s there was, however, no clear evidence that the United States was particularly enthusiastic in directing its power towards any particular mission, beyond continuing to promote globalisation and spread democracy. During the decade that followed the end of Cold War, the United States could thus be described as a “curious hegemon” (Cox 2005: 69-70).

But if the end of the Cold War and the following acceleration of globalisation manifested one of the great historical turning-points of world politics, then 11 September 2001 (9/11) served as a painful reminder that the new, post-Cold War global governance and world order that was in the making was not one that found simple acceptance everywhere. Immediately after the attacks on the United States, the Bush administration could count on widespread support for its “War on Terror”, which at the time was considered the concern of everyone. Less than two years later, however, this support had shrunk considerable. “The coalition of the willing” – the countries that invaded Iraq in March 2003 – was made up of a very limited number of countries, including some with low international legitimacy. American hegemony was transformed into dominance, and was resisted not only by the subjects of this domination, states and non-state actors alike (Hettne 2009: 149; see also Baaz 2009; Heywood 2014: 45-51, 202-214).

The unfortunate interventions in Afghanistan, Iraq and Libya, together with the confused and ineffective responses to the civil war in Syria, have led to declining global influence and legitimacy of the West. The obstacles and barriers that are erected at the borders of Europe to stop refugees also show how tolerance and compassion are being replaced by fear, anxiety and isolation (Svenning 2016). At the same time, partly following the decline of Western influence and legitimacy, China is transforming East Asia through its extraordinary growth and active diplomacy. Most likely, future decades will see an even greater increase in Chinese power, influence and legitimacy. How this drama will be played out

more in detail is, however, still an open question. Will China become a part of the existing order or will it seek to overthrow it? Presumably China will try to use its growing influence to reshape the institutions of the international society to better serve its (national) interests. Will the drama end with the ascendance of China and the establishment of an Asian centred international order? (Heywood 2014: 52, 236-240; Ikenberry 2008).

It is now the right time to return to the question of whether global governance and global polity imply global (or world) law or not. Globalisation and the end of the Cold War have not only changed socio-economic, political and cultural structures, but also (international) law. Put simply, following the transformation of the constitutive structure of the modern international society, the international legal order is no longer Westphalian. Global law – understood as “a coherent legal system for a universal human society” – if existing at all, is at the outmost in an embryonic phase. The variety of power centres and decision-making bodies – including informal ones – has, on an overall level, rather led to (i) the multiplicity of supranational normative regimes and sub-systems; (ii) distinct sets of secondary norms or those relating to a branch of special international law (known as special treaty-regimes); and (iii) self-contained regimes that are awarded with their own principles, legal bodies, enforcement and dispute resolutions mechanisms. This “legal pluralism” can be illustrated by the fact that around ten years ago, the “Project on International Courts and Tribunals” identified some 125 international bodies, all of which issued decisions that had some effect on state legal authority. All in all, we are currently witnessing the growth of global regulatory regimes – not least in the economic and social areas. The fact that, in addition to states, other new emerging forces – emanating from a multitude of agents – are taking part in global governance, either through active participation in its framing or in opposition, through a politics of resistance, makes the current legal framework much more complex than before (Berman 2012: 6; Capaldo 2015; Heywood 2014: 345-350; Müller-Mall 2013: 2).

To summarise, since 1945, and particularly since the end of the Cold War, we have witnessed the evolution of a global governance complex – which embraces several other agents other than the sovereign nation state; agents located above, within and between the states – that seeks to bring some sort of order to global politics. In this complex, the United States has played a crucial role; first by hegemony and then by dominance. This attempt to fundamentally transform the international order has, however, as we now know, been met by a politics of resistance, peaceful as well violent, from agents as different as the Global Justice Movement and Al Qaeda (See further e.g. Heywood 2014: Ch. 12). Put somewhat differently, we are currently witnessing a struggle among a multitude of different agents that are seeking to influence the structure of the future political order.

The above is, however, not included in order to argue that the sovereign state is in decline. Rather, it is about displaying that the sovereign power and authority of national governments are transforming. Sandwiched between various forms of global and regional governance, states today assert their sovereignty more in the form of a bargaining tool than in the form of a legal claim to supreme power in the context of transnational systems of rule-making, with other agencies and social forces. Put somewhat differently, the old Westphalian concept of

sovereignty is gradually being replaced by a new form of sovereignty, which is understood as the shared exercise of authority and public power. In this respect, we are witnessing the emergence of a post-Westphalian "world order" (McGrew 2011: 28). Over and above this we are witnessing a global power shift from the West to the East (see e.g. Frankopan 2016), which is something that, together with what has been argued above, makes the development of a global law that is based on Western values less likely (cf. Baaz 2016b).

"Global politics is", summarises McGrew (2011: 28-29):

... a term that acknowledges that the scale of political life has altered fundamentally understood as that set of activities concerned primarily with the achievement of *order and justice* is not confined within territorial boundaries. It questions the utility of the distinction between the domestic and the foreign, inside and outside the territorial state, the national and the international since decisions and actions taken in one region affect the welfare of communities in distant parts of the globe, with the result that domestic politics is internationalized and world politics becomes domesticated. It acknowledges that power in the global system is not the sole preserve of states but is distributed (unevenly) among a diverse array of public and private actors and networks --- It recognizes that political authority has been diffused --- [I]t affirms that, in an age of globalization, national politics no longer function as closed systems. On the contrary, it asserts that all politics – understood as the pursuit of order and justice – are played out in a global context (*italics added*).

He continues:

However, as with globalization, inequality and exclusion are endemic features of contemporary global politics. There are many reasons for this, but three factors in particular are crucial: first, enormous inequalities of power between states; second, global governance is shaped by an unwritten constitution that tends to privilege the interests and agenda of global capitalism; third, the technocratic nature of much global decision-making ... tends to exclude many with a legitimate stake in the outcomes.

McGrew (2011: 29) concludes:

These three factors produce cumulative inequalities of power between the North and South – with the result that contemporary global politics is more accurately described as distorted global politics: "distorted" in the sense that the inevitably those states and groups with greater power resources and access to key sites of global decision-making tend to have the greatest control or influence over the agenda and outcomes of global politics. In short, global politics has few democratic qualities. This sits in tension with a world in which democracy is generally valued.

History teaches us that political orders can not only change, but have done so several times over the last centuries. Needless to say, we do not know for certain what the future holds. What we do know, however, is that the (emerging) post-Cold War order is not only complex, but it is also still very much in the making. Since the end of the Cold War, analysts and writers from different disciplinary,

ideological and cultural backgrounds have tried to understand as well as, at least in some cases, anticipate the future (Cox 2011: 113).

What will the future world order look like? Have we reached the “end of history” (Fukuyama 1992)? Are we “going back the future” (Mearsheimer 1990)? Could we expect “the coming of anarchy” (Kaplan 1994), “the clash of civilisations” (Huntington 1992, 1996) or a “new interventionism” (Chomsky 1999)? Are we witnessing the emergence of empire emerging and with this the establishment of a “universal” peace – a “*Pax Americana*” or a “*Pax Sinica*”? Could European hegemony and a universal peace – a “*Pax Europaea*” – develop in the future? The number of alternative perspectives of where we are heading is, needless to say, vast (see further e.g. Baaz 2009; Bull [1977] 1995; Hettne 2009; Cox 2001).

About 25 years after the end of the Cold War, some future perspectives or visions seem more likely than others. A key concern when discussing the future order is to decide where the political power centre of gravity will be located (Hettne 2009: 121; Heywood 2014: 240-244, Ch. 22). Predictably, considering the continual horizontal and vertical shifts in power as well as the lack of consensus among key agents, the future order will be a multi-level, multi-perspective and, by extension, a plural, not to say, hybrid order.

Considering some key aspects, the current situation is thus reminiscent of the one that prevailed during the Middle Ages. Put somewhat differently, an understanding of the Middle Ages can offer a background for the diagnosis of transformations in the current world order, which could be, by extension, projected into the future.

7 A New Medievalism

There is no medieval theory on the subjects of international relations properly speaking, because under what has been called the theory of universal community, political activity within European Christendom was not conceived in terms of a dichotomy between domestic and foreign policy; theoretically relations between pope and emperor and between feudal kings were expected to follow the same rules and moral principles as those between kings and subordinate feudal lords, or between kings and their subjects ... Even today it is not fantastic to speak of recent changes within the international arena as pointing toward a kind of “new medievalism”. The trend would seem to be towards complexities that blur the dividing lines between domestic and foreign policy. We are faced once again with double loyalties and overlapping realms of power. (Wolfers 1962: 241-242, quoted in Friedrichs 2001: 475-476)

The observation in the quotation above, which was made by Arnold Wolfers in 1962, indicates that, at least potentially, a proper understanding of the Middle Ages can serve as a point of departure to a better understanding of current transformations in the international society. However, he reaches the conclusion that although it is interesting, a neo-medieval perspective did not highlight what was going on in international politics at the time in a satisfying way (Friedrichs 2001: 476).

In 1977 Hedley Bull, the most prominent scholar of the first generation of the English School of International Relations, in his now classic book, *Anarchical Society: A Study of Order in World Politics* ([1977] 1995) reconsidered, refined and (once again) dismissed the concept of "new medievalism". He concluded that even though there were certain features providing *prima facie* evidence, there was no sufficient evidence for the emergence of a new medievalism (Bull [1977] 1995: 254-266). Following this, the concept was largely deserted and did not attract any attention until after the end of the Cold War (see e.g. Held 1995; Kaplan 1994; Kobrin 1999). None of these contributions, however, explore the concept thoroughly, from the perspective of international relations theory or, for that matter, international law (cf. Friedrichs 2001: 476).

In his inquiry about alternative paths to world order, Bull ([1977] 1995: 245) writes about a new medievalism in the following way:

It is also conceivable that sovereign states might disappear and be replaced not by a world government but by a modern and secular equivalent of the kind of universal political organisation that existed in Western Christendom in the Middle Ages. In that system no ruler or no state was sovereign in the sense of being supreme over a given territory and a given segment of the Christian population; each had to share authority with vassals beneath, and with the Pope and (in Germany and Italy) the Roman Holy Emperor above. The universal political order of Western Christendom represents an alternative to the system of the states which does not yet embody universal government ... All authority in mediaeval Christendom was thought to derive ultimately from God and the political system was basically Theocratic. It might therefore seem fanciful to contemplate a return to the mediaeval model, but it is not fanciful to imagine that there might develop a modern and secular counterpart of it that embodies its central characteristic: a system of overlapping authority and multiple loyalty.

He then continues to discuss if there is any evidence that the state system might be giving a place to a secular reincarnation of the system of overlapping authority and multiple loyalties that characterised the Middle Ages. He quickly concludes that the fact that sovereign states are not the only important agent in world politics, does not provide any indication of a trend towards a new medievalism. The crucial question is whether the inroads made by these other agents are undermining the ability of governments to control their own economies, politics as well as law-making and enforcement. Bull identifies five features of world politics in the mid-1970s that indicate such a trend: (i) the regional integration of states; (ii) the technological unification of the world (iii) transnational organisation; (iv) the disintegration of states; and (v) the restoration of private international violence (Bull [1977] 1995: 245-266). After having examined these features, Bull, as indicated above, reaches the conclusion that there was after all not sufficient evidence for the emergence of a new medievalism in the mid-1970s.

In 2001, Jörg Friedrichs proposed that in the "changed international environment of our present time", it was time to reassess Bull's judgment, since the evidence that we are moving towards a new medievalism was more convincing than ever before (p. 484). Some fifteen years ago he identified: (i) more regional integration, in Europe as well as in other regions of the world,

than in the mid-1970s. The European Union resembled a “dynamic multi-layer system” in which national sovereignty is getting more and more indefinable; (ii) progressive technological unification; (iii) a proliferation and increasing significance of non-governmental organisations, multinational corporations as well as other transnational agents; (iv) several examples of disintegrating states; and (v) a re-emergence of private international violence (p. 484).

Yet another fifteen years later, the conclusion seems unambiguous: the features indicating the move towards a new medievalism – which were originally identified by Wolfers in 1962, elaborated by Bull in 1977 and then (once again) emphasised by Friedrichs in 2001 – are today growing almost exponentially.

For example, we are currently experiencing an explosion of various forms of regionalism(s) and more regionalist projects around the world. The widening and deepening of the European Union is the clearest, but not the only, example of this trend. Regional processes can be observed in the Americas, Asia, Africa and so forth. Speaking about this renewed and worldwide trend of regionalism – known as “the new regionalism” – it should be noted that it is not confined simply to formal inter-governmental cooperation. The new regionalism is rather characterised by being multidimensional, complex, fluid and non-conforming, and involves non-state actors from corporations to social movements (Söderbaum 2003: 1-2; see also Heywood 2014: Ch. 20).

After having become publicly accessible in 1991, the Internet is today used by some 3.4 billion people. This means that close to 50% of the world’s population has access to the Internet. In 1995, the figure was less than 1% (Internet Live Stats 2016). By the early-2000s, cell phones became as omnipresent as computers and text messaging developed into a cultural phenomenon. During the 2010s, the widespread use and interconnectedness of mobile telephony and networked devices, internet websites and resources, as well social networking have developed into a *de facto* standard in digital communication. The Internet is bringing a revolution along with it, which is no less thorough and important than the Industrial Revolution some 250 years ago. The thoroughness of the digital transformation can, Micha Kaufmann (2012) argues, be illustrated by the word “local”. Once it referred to our own street, town or even state, but now everywhere is local. Where once our reach was restricted by physical boundaries, today almost everyone and everything is not more than a digital handshake away. Current international society, the global market and transnational society are “network” societies (Castells 1996, 1997, 1998), which interact with one another in an unprecedented way. Put in short, the modern society of states is moving towards increased global integration. This trend is, however, not only the obvious one in our modern, globalised international society. It is also possible to identify an opposite trend, namely “local fragmentation”. In addition to globalised states, we see several other agents, including non-governmental organisations, multi-national corporations, transnational civil society agents and social movements, which are seeking to, in different ways and with very different agendas, influence the governance of global affairs.

We have also, partly as a consequence of the failed attempts of the United States to establish a neo-imperial *Pax Americana* and the closely associated politics of “the new interventionism”, witnessed the collapse of a number of

sovereign states, including Afghanistan, Iraq, Libya and Syria, as well as the re-emergence of private international violence in various shapes, including terrorism, private military companies and organised crimes.

In addition to the above, we have also witnessed the emergence of a number of "global cities" over the last decades. These cities – including New York, London, Brussels, Tokyo, Hong Kong and Singapore – are performing roles not completely unlike the roles of the powerful city-states in Renaissance Italy or the Hanseatic League. They are considered to be important nodes in the global economy and sometimes have more in common with one another than they have with the sovereign state in which they are located. A recent and illustrative example of this trend is the "reaction" of the City of London after the referendum deciding that the United Kingdom should leave the European Union. The United Kingdom voted to leave, but London – with an economy as big as Sweden – voted to stay. Voices were then raised that the Londoners, after Brexit, should go alone (Baxter 2016). (This development – the emergence of new "city-states" – may appear to contradict the tendency of "regionalism" discussed earlier in this paper. However, the perspective of a new medievalism comprises several multiple and contradictory tendencies. The perspective is *per se* contradictory).

The list of examples could go on, but what has been put forward above serves as sufficient evidence, not necessarily for the emergence of a new medievalism *per se*, but certainly for the usefulness of going "back to the future" and making use of the neo-Medieval analogy as a heuristic device in seeking to understand the current "globalisation" of international society (Friedrichs 2001: 477).

For several scholars, such as Robert D. Kaplan (1994), going back to the future, to the Middle Ages equals a "nightmare" – characterised by disorder and violence, at best eased by a few civil strongholds of communitarian neighbourhoods. The Middle Ages are understood as the Dark Ages, "when reason had not yet illuminated mankind and life was brutish and nasty" (Friedrichs 2001: 485).

But, as displayed above, one does not have to know very much about history to understand that to equate the Middle Ages with the Hobbesian state of nature is simply wrong. The Middle Ages, just as our times, were characterised not only by fragmentation but also with universalism. The mediaevalist system was "a system of overlapping authority and multiple loyalty, held together by a duality of competing universalistic claims"; the nation-state system and the global market holds together the current world order. Put somewhat differently, "both the nation-states system and the [global] market economy can be interpreted as competing but independent (and anyway coexistent) hegemonic projects" (Friedrichs 2001: 486-490). By this, let us now turn to a discussion on the status of the institution of international law in this new and different political order.

8 International Law in a New Medievalism: Legal Pluralism and Hybridity

We thus live in a transformative period that is characterised by concurrent processes of universalization and fragmentation and, by consequence, several,

partly overlapping levels of authority, multiple loyalty and various and sometimes competing normative orders. These areas of complex overlapping legal authority are sites of confusion and conflict (Berman 2012: 9). At the moment there are few features, if any at all, which indicate that the current development will change shortly. On the contrary, most features indicate that the current transformation – towards a new medievalism – will continue in the foreseeable future, and possibly with the difference that it will go faster in the future than it does today. What implications may all this have for the future prospects of international law?

In this section, two features of international law in a new medievalism will be discussed, namely (i) “pluralism”; and (ii) “hybridity”. Legal pluralism is, put simply, when in a social field more than one source of “law” and more than one “legal order” is observable. According to Brian Tamahana:

Legal pluralism is everywhere. There is, in every social arena one examines, a seeming multiplicity of legal orders, from the lowest local level to the most expansive global level. There are village, town, or municipal laws of various types; there are state, district or regional laws of various types; there are national, transnational, and international law of various types. In addition to these familiar bodies of laws, in many societies there are more exotic forms of law, like customary law, indigenous law, religious law, or law connected to distinct ethnic or cultural groups within a society. There is also an evident increase in quasi-legal activities, from private policing and judging, to privately run prisons, to the on-going creation of the new *lex mercatoria*, a body of law that is almost entirely the product of private law making activities. (quoted in Müller-Mall 2013: 8-9)

One feature to be found (with)in pluralised law is “hybridity”. This concept, originally a botanical one, implies the existence of different legal, quasi-legal and non-legal orders, regimes, traditions, doctrines and discourses. Hybridity does not describe the coexistence of two or more legal orders, nor does it describe a pure overlap, without transferring at least one of the orders into another sphere. It rather describes, in a somewhat generic fashion, situations in which legal orders or laws overlap without fully replacing one another. Hybridity is about supplementing rather than replacing; less about a sum than a product. The concept of hybrid law seeks to describe different laws that supplement one another as well as interact with one another. By this, the concept of hybridity in a certain sense is at odds with the one of pluralism, since this latter quality of law contains the notion of legal orders or laws in parallel. Put simply, different orders, regimes or orders simply coexists, they do not amalgamate (Müller-Mall 2013: 12-13).

Hybrid law is not possible to examine by looking on the constituent parts, since the parts are no longer thinkable as discrete entities. In the book, *Legal Spaces: Towards a Topological Thinking of Law*, Sabine Müller-Mall (2013: 14), illustrates the quality of hybridity by using the example of cultivated apples. She writes:

[I]f an apple cultivator crosses an apple of the kind *a* and one of the kind *b*, obtaining a result that consists in an apple of the new kind *c*, we will not be able to understand this new kind as the sum of apple *a* and *b*, nor will it be an apple

that is completely different from both original kinds. Probably molecular biologists will be able to extract some DNA sequences of this new apple *c* that are identical to the ones found in apples of the kinds *a* and *b*. But they will also find parts of the DNA that are neither identical to the DNA of apple *a*, nor to apple *b*. Therefore, a description of apple *c* that draws only on the characteristics of apple *a* and *b* will never be sufficient. But neither will a description of apple *c* be complete without referring to apples *a* and *b*, or at least it will ignore important parts of the apple's genesis that are interesting not only from a historical point of view, but also concerning its characteristics. The same is true for hybrid law.

Other hybrid offspring that results from the "cultivation" of two entities includes: mules, ligers, plug-in hybrid cars and mixed martial arts.

In addition to the legal hybridity discussed so far, Müller-Mall (2013: 14-15) argues that it is possible that there is a second level of hybridity in law. "Law consists", she writes, "in a multiplicity of form that its normativity can adopt --- [T]hese forms do not only coexist, but they merge into each other --- [E]very single time one of these forms is applied ... other forms get involved and transformed by the procedure of application". To illustrate this point, she writes as follows:

[A] judge decides a case. In doing so, she applies a specific interpretation of a norm and/or a precedent. These interpretations fall back upon the norm text, the precedent text and case, and they probably also fall back upon legal doctrines as well as legal theory; and these are only the very simplest of settings --- In any case, the merging thesis consists in the idea that by applying a norm, a norm text, and/or a doctrine to a certain case, in a certain interpretation, we transform them, we add meaning that is able to do both: to influence and transform the arrangement of the applied norm with respect to other norms, but also to change the content of the norm by adding another application Müller-Mall. (2013: 15)

In a hierarchical legal system, every legal rule and act is derived from another rule or act. The legal system can thus be described in terms of a pyramid of rules and acts. Hybrid law, on the contrary, cannot be described like this, since its generic mix of origins is the very aspect of hybridity that constitutes the concept. Put somewhat differently, the concepts of hybridity and hierarchy draw on very different understandings of law. Hybridity refers to manifold and different origins of law as well as "relationality": that is, "the constituting aspects of law ... are not its elements, but the relations in between them. The relationality of hybrid law implies a number of things. Hybrid law includes a non-definite number of dimensions that it can take. It is 'multidimensional', since neither the dimension of verticality (hierarchy), nor the dimension of horizontality is sufficient to describe it. Hybrid law is also dynamic: that is, the law will not be the same at two different moments in time" (Müller-Mall 2013: 17-28).

In order to provide a better understanding of plurality and hybridity in international law – recognised not only as future features of international law in a new medievalism but also as features that are already characterising current international law – a concrete example will follow. The example is picked from the domain of international criminal law.

Between 17 April 1975 and 7 January 1979, the Khmer Rouge ruled Cambodia. During this period some 1.7 million people are estimated to have died from starvation, forced labour, torture and execution. In 1997, the Royal Government of Cambodia requested the United Nations to assist in establishing a Court to prosecute the senior leaders and those believed to be most responsible for grave violations of national and international law during the three years, eight months and 20 days of Khmer Rouge rule. In June 2003, following long and difficult negotiations, the United Nations and the Royal Government of Cambodia finally reached an agreement establishing such a Court, the Extraordinary Chambers in the Courts of Cambodia (ECCC) (see further Baaz 2015a, 2015b; Baaz and Lilja 2014).

The ECCC is constituted by three documents: (i) The ECCC Law (2001); (ii) the Agreement between the Royal Government of Cambodia and the United Nations (2003); and (iii) the ECCC Internal Rules (9 rev. ed., 2015). The court is a creation *sui generis*, it is a compromise between the civil law tradition, which uses investigating judges, and the common law tradition, which grants the prosecutor a strong position. In addition, the ECCC applies international as well as national law and the responsibilities of each office are shared between a Cambodian and a foreigner. By consequence, there are two Co-Prosecutors and two Co-Investigating Judges who share the responsibilities of each office. In practice this means that the Co-Investigating Judges and the Co-Prosecutors, respectively, must act in consent. A case is initiated by a written submission from the Co-Prosecutors requesting the Co-investigating Judges to open an investigation and to propose charges. The Co-investigating Judges then look into the case. During this process, parties may appeal against decisions made by the Co-Investigating Judges, apply to annul investigative action or require various sanctions against individuals who are allegedly interfering with the administration of justice. At the end of the investigation, the Co-investigating Judges write a closing order, deciding whether the person being investigated should be prosecuted or not and in the former case what the charges should be. During this process the Co-investigating Judges also decide who can be a civil party in a future trial. If the closing order concludes that an individual should be prosecuted, the case is put before the Trial Chamber that decides if the prosecuted individual is guilty or not, orders possible sentences and, if applicable, collective reparations to victims and civil parties. The Co-prosecutors, Civil Parties and the Defence can appeal the decision to the Supreme Court Chamber; decisions made by the Chambers are, however, final. According to the ECCC Law, the Court's procedure should, as we know, be in accordance with Cambodian Law, with guidance from international procedural law only where there are gaps in the Cambodian Law, uncertainty in interpretation or an issue with consistency with international standards. In this regard, the ECCC has faced even greater challenges than in the case of the combining of substantive law being discussed above (see further e.g. Baaz 2015a, 2015b).

The main issues concerning the rules of procedure are twofold. Firstly, when the ECCC Law was agreed, Cambodia in fact lacked a comprehensive criminal procedure code. Such a law – the Criminal Procedure Code of Cambodia – was not adopted until August 2007. Secondly, the Criminal Procedure Code, which

was drafted by French legal experts, is out-dated and, according to former International Co-Investigating Judge Marcel Lemonde, was “obsolete before it was even used” (quoted in Ciorciari and Heindel 2014: 63). In responding to this somewhat awkward situation, the ECCC has chosen to develop and adopt its own procedural rules – hybrid and *sui generis* rules (see the ECCC Internal Rules, 9 rev. ed., 2015).

And as if the above were not enough, it can also be mentioned that in addition to several states and intergovernmental organisations, several non-governmental organisations are working in Cambodia seeking to influence the negotiations in the ECCC as well as the outcomes of the proceedings in various ways, by contributing both to a politics of governance and politics of resistance. Illustrative examples in this regard are (i) how the crime of Joint Criminal Enterprise have been approached by the Court; and (ii) the way in which the crime “forced marriage” has, following an extensive civil society campaign, been integrated in the ECCC negotiations (see e.g. Baaz 2015c, 2016a; Baaz and Lilja 2013a, 2013b, 2016).

Taking the above into consideration, the ECCC is thus best understood as a hybrid court – as an extraordinary experiment in international criminal law (see further Baaz 2015c). Put simply, the ECCC can be seen as a reminder that the future is already here; a legal future implying legal pluralism, hybridity, “relationality”, “multidimensionality”, “complexity”, “dynamics” and “irreversibility”.

9 Concluding Remarks

The (speculations) above implies several things. Most implications, big and small, have been presented and discussed subsequently in the paper. Taking this into account, this final section will focus solely on an important but not yet discussed implication that follows from what has been put forward above, namely: what implications may the perspective of (the coming of) a new medievalism have on International Law? Put somewhat differently, what does a messy, multi-level and multi-perspective political order imply for the future study of International Law? For example, pluralism, not to mention legal hybridity, challenges more traditional perspectives on international law – including legal positivism and natural law by, among other things, indicating that there can no longer be a single answer to fundamental questions such as, which norms should prevail in world politics and who gets to decide this (Berman 2012)?

A new medievalism perspective requires a more “social constructivist” approach to International Law – one that acknowledge the linkages between law and politics and which departs from philosophical pragmatism and Legal Realism. Such an approach can serve as a *via media* in a divided, not to say dividing, discipline and thereby making it possible for various theoretical perspectives – including “dissident” ones, such as Critical Legal Studies, Post-Modernism, Third World Approaches to International Law (including Post-Colonialism), Feminism and Law and Literature – to communicate with one

another as well as contribute to our common understanding of the institution of international law (in the future) on a (more) equal basis.

Over and above this, a new medievalism perspective also indicates that scholars of international law need to acknowledge the messiness of the current and future world order and the complex political context in which future international law will be played out. International Law needs to benefit from and integrate with the knowledge and approaches from other disciplines, most obviously Philosophy, History, Politics and Economics but also, for example, Peace and Conflict Studies, Security Studies, Resistance Studies and, perhaps even less obvious, Cultural Studies and Anthropology. International Law in a new medievalism needs to be approached in a multidisciplinary, if not interdisciplinary, way. Fundamental questions – such as: What are the ontology, purpose and normative value of international law? – need to be asked again. Scholars of international law also need to be more open than they are today in applying non-traditional methodologies and methods for seeking to understand international law in a new medievalism, including humanistic as well as social scientific ones, and by admitting, among other things, that “international law is different in different places” (Baaz 2016b) as well as that much could be benefited from studying the institution of international law in a comparative perspective (comparative International Law), focusing not only international treaties, judgments and doctrine but also by applying e.g. ethnographic methods such as “participatory observation” and “interviews”. To conclude, making sense of international law in a new medievalism will place greater demands on legal scholars than previously has been the case.

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