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# *International Lawyers: Handmaidens, Chefs, or Birth Attendants? A Response to Philip Alston*

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## **Abstract**

*This article responds to a paper by Philip Alston published in a recent issue of this Journal. Alston gently chided international lawyers for not having paid greater attention to the possible impacts on international law of globalization. The timeliness of the wake-up call would be hard to dispute, but Alston's discussion of globalization serves to highlight the difficulty international lawyers face in assessing contemporary political developments given the inadequacy of dominant frameworks within which to understand how international law relates to the political and economic context in which it operates. International lawyers will need to be able to enunciate just what part international law has played in the globalization process as it has taken place to date before they can play a meaningful role in policy debates regarding the future of globalization.*

Think of a regime of international law with which you have been concerned over the past few months. Is it premised on the existence of a world of sovereign states? If so, Alston believes you may be dealing with an anachronism. The world has moved on and now belongs to the multinational corporations. As Susan Strange has expressed it: 'state authority has leaked away, upwards, sideways, and downwards. In some matters, it seems even to have gone nowhere, just evaporated.'<sup>1</sup> So, dealing as you may be with an anachronism, what, asks Alston, are you are going to do about it?

Alston does give us some guidance as to the specific issues he believes we need to consider. The first is that of the implications for international law of the changing internal role of the state as a part of the process of globalization. The second and greater focus of his paper is the changed international agenda. Alston points to significant new limitations on the aspirations of the United Nations. Work on a code of

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<sup>1</sup> Strange, 'The Defective State', 24 *Daedalus* (1995), at 56.

conduct for transnational corporations has been abandoned, a dramatic expansion has occurred in both the budget and the effective mandate of the Office of the UN High Commissioner for Refugees in an effort to stem refugee flows and expedite repatriation. The UN units coordinating the fight against drugs, crime and terrorism have been upgraded and strengthened in a new Office for Drug Control and Crime Prevention, corruption has become a major concern of both the World Bank and the IMF and hundreds of millions of dollars are being poured into the new Organization for the Prohibition of Chemical Weapons. Other changes on the international agenda have included the transfer of questions of social policy away from international organizations and back to the state, continuing budgetary pressures combined with an increase in the extent to which programmes and individual initiatives favoured by the West are funded and others are not, and consolidation of the power of the financial institutions and the WTO which are indifferent to much of the broader policy 'debates'.<sup>2</sup> Alston points to a shift of the international agenda away from equity concerns to those issues of importance only to the North but which states of the North cannot deal with adequately amongst themselves, such as drugs, corruption, weapons of mass destruction, and terrorism.

Alston has given international lawyers a wake-up call, gently chastising them for having paid inadequate attention to the globalization phenomenon. What I find most significant is the questions he is asking and what he does not regard as of much importance. As we have seen, the key question asked by Alston, is: What is the impact on international law of globalization (and in particular the changing internal role of the state and the new international agenda)? Secondly Alston asks 'who sets the new international agenda', what are the values inherent in it, and how comfortable are we with them? Alston does not place much emphasis on conceptualizing globalization. But to me any discussion of the significance for international law of globalization begs the question as to what the globalization process entails.

I would like to situate Alston's approach within some of the more general literature on globalization before responding briefly to the questions he poses.

## 1 What is Globalization?

Alston does not place great stress on the need to define globalization but we can elucidate some of his assumptions about the process from the questions he chooses to ask. By asking what is the impact of globalization on international law, Alston is suggesting either that international law and globalization are distinct phenomena (compare: what is the effect of heat on water?) or at least that international law is not a major causal factor within the process (it would be unusual to ask what is the impact of driving on the engine of a car — you could, but it would be unusual).

Alston is not alone in this regard. You could read much of the political literature on the demise of the state in the new globalized world order without being aware that

<sup>2</sup> Alston, 'The Myopia of the Handmaidens: International Lawyers and Globalization', 8 *EJIL* (1997) 435, at 438.

there was any such thing as international law. And, at the risk of slight exaggeration, you could read much of the economics literature on globalization without knowing there were any such things as either international politics<sup>3</sup> or international law. Economic liberals hail globalization as an economic inevitability.

So, to return to Alston, if the process of globalization is not primarily or largely one of law, what is it? By indicating, for example, that he does not regard it as ‘neutral’ Alston appears to regard it as political. So here we have the traditional conceptual distinction between international politics and international law that has been so endemic both in the realist literature on International Relations — which has largely excluded discussion of international law — and in the positivist tradition of international law scholarship.<sup>4</sup>

Of course, it may well be that international law has not been a significant aspect of the political process of globalization but I would suggest that we do need to have some explicit theoretical conceptualization of the relationship of international law to globalization as it has taken place to date before we can enter into any meaningful discussion about the impact of globalization on international law.

So the first point I wish to make is that Alston’s wake-up call — as with much of the political literature on globalization — highlights the inadequacy of existing theoretical understanding of the politics of international law.

## 2 International Lawyers and Globalization

Beyond the implicit assumption that international law has not been a prime causal factor in the globalization process, Alston does, however, appear to have some views as to the nature of the relationship. To deduce these I suggest we need go little further than the title of his article: ‘The Myopia of the Handmaidens: International Lawyers and Globalization’. This strikes me as a deconstructionist’s wonderland. Let me just make a few simple observations.

The most significant aspect of the title would appear to be his reference to international lawyers as ‘handmaidens’. ‘Handmaidens’ is not a word in common use at present and deserves some consideration. The term is an archaic one, presumably chosen by Alston to reflect his thesis that mainstream public international lawyers are still concerned with questions pertaining to states and institutions while multinationals and other non-state actors are busy reshaping the globe. International lawyers are ‘behind the eight-ball’. Secondly, a handmaiden is a servant as opposed to one who serves and yet retains some autonomy of action — such as a chef, waiter or flight attendant. And thirdly, the servant is female. Alston’s choice of ‘handmaiden’ thus conjures up gendered images of submission and of following the leads of others. So,

<sup>3</sup> Gill makes the point that in the discourse of neoliberal globalization economics is regarded as ‘beyond or above politics’. Gill, ‘Globalization, Democratization, and the Politics of Indifference’, in J. H. Mittelman, *Globalization: Critical Reflections* (1996), at 211.

<sup>4</sup> See discussion in Scott, ‘International Law as Ideology: Theorizing the Relationship between International Law and International Politics’, 5 *EJIL* (1994) 313.

use of the term 'handmaiden' confirms our initial assumption that Alston does not believe international lawyers — at least as self-directed actors — have been of much import in the globalizing process.

If, then, international lawyers are the servants, who are the masters/mistresses? Alston is quite elusive on this point. While he appears to view globalization as a political process in so far as it is not value-neutral — it is about winners and losers — he also appears to side with the state-as-victim approach more common to those who conceive of the process as market-led. Most writers I have come across who criticize globalization on grounds of equity also stress the role states have played in bringing about the process of globalization.<sup>5</sup> This is what I initially believed Alston was doing when he led into his discussion by comparing the role of international lawyers in the process to that of handmaidens. And Alston does, for example, acknowledge that developed states have advocated the new international agenda. So I began with the expectation that Alston would remind us that it was states — via mechanisms of international law — which established the WTO and which have been negotiating the MAI, etc etc; that while these have been far from sufficient causal factors in the process they have nevertheless been necessary ones. (A recent book by Linda Weiss refers to states as the 'midwives' of globalization.<sup>6</sup>) But, on reading the article I found that Alston does not regard international lawyers as the handmaidens of states but of the 'changes wrought by globalization'.<sup>7</sup> This is one of the best examples I have come across of the reification of globalization — of presenting a process as a thing and a thing beyond human, as in policy, control. Ultimately, Alston leaves it to *us* to decide who it is that sets and implements the new international agenda.

To me, the anomalies in Alston's conceptualization of the role of the state — and hence of international law — stems from the inadequacy of current theoretical understanding not only of the relationship of international law to international politics as alluded to above but of international politics to international economics.

As antiquated handmaidens of the changes wrought by globalization, so Alston's title suggests, international lawyers are also short-sighted. Being myopic is definitely some sort of disability but it is one which western medicine finds difficult to cure. Thus, in this article Alston is at once issuing international lawyers with a call to action, while at the same time denying them effective autonomous agency. If Alston's portrayal of international lawyers is accurate it is hardly surprising that they have not paid greater heed to the mammoth changes in train. What could they do about them anyway? To me, this article conveys something of the same futility about the role of international law in international politics as that which characterizes much of the 'critical' scholarship when it tells us, for example, that international legal discourse swings ineluctably between apology and utopia.<sup>8</sup> How can one draw positive

<sup>5</sup> For example, H. Martin and H. Schumann, *The Global Trap: Globalization and the Assault on Prosperity and Democracy* (1996), at 47 and W. Greider, *One World, Ready or Not: The Manic Logic of Global Capitalism* (1997), at 34–35.

<sup>6</sup> L. Weiss, *The Myth of the Powerless State: Governing the Economy in a Global Era* (1998), at 204.

<sup>7</sup> Alston, *supra* note 2, at 435.

<sup>8</sup> M. Koskeniemi, *From Apology to Utopia: The Structure of International Legal Argument* (1989).

conclusions about the real-world significance of international law from such an analysis?

As I have already indicated I believe that to respond adequately to the questions posed by Alston we need to start with the fundamentals — a conceptualization of international politics — even if of the pre-globalization (as in Alston’s sense of the term as a recent phenomenon) political landscape — in which international law plays some definable role. We will then have a framework within which to better understand the process of globalization; and within which to situate our consideration of the role of international law in, as well as the effects on international law of, globalization as political process.

### 3 The Changing Internal Role of the State and the International Agenda

Rather than devote the rest of this brief response to seeking to elucidate a comprehensive framework along these lines I would like to restrict myself to some brief observations about the role of international law in the relationship of minimalist domestic governance to minimalist governance as characteristic of the new international agenda. For minimalist governance is, of course, a key element common to both the changing internal role of the state and the altered international agenda, the impact on international law of both of which, Alston wishes us to analyse. As I am sure most readers are well aware, Western liberal capitalist democracies have, since the 1970s, swung away from the Keynesian interventionism of the early post-war years towards free markets and small government. This has involved a process of ‘marketization’: of privatization and deregulation, the goal of which has been greater efficiency and, ultimately, ongoing economic growth.<sup>9</sup> In a domestic context as with Alston in the international, critics have pointed to a swing away from concern with equity issues.<sup>10</sup> While the link between the domestic role of the state and the international agenda might at first glance seem obvious — Western governments pursuing what can be characterized as ‘pro-market’ policies both internally and externally, it was here that Alston most caused me to stop and think. For if this link is obvious, what are the implications for our understanding of the international agenda during the post-war heyday of the expansion of international law into subject areas such as the environment and human rights? Were these likewise core areas of domestic policy for Western governments at the time?

Well my gut reaction is ‘no’. In fact if we take the environment as one of the most ‘idealistic’ or ‘soft’ items on what we can now nostalgically refer to as the ‘traditional’

<sup>9</sup> Boyer, ‘State and Market: A New Engagement for the Twenty-First Century?’ in R. Boyer and D. Drache (eds), *States against Markets: The Limits of Globalization* (1996), at 109.

<sup>10</sup> See, e.g., Ayres, ‘Privatization and Distributional Equity: The Case of Brazil’, *International Journal of Social Economics* 22 (1995), 36 and F. Argy, *Australia at the Crossroads: Radical Free Market or a Progressive Liberalism?* (1998), at 134.

international law agenda, environmentalism with its goal of protecting the environment could perhaps better be characterized not as a core domestic ideology of Western governments at the time but as the most significant 'other' — as in most logically contrasting yet increasingly widespread ideology — to capitalism. Protecting the environment, if truly a prime goal of governments, would have wreaked havoc with the ideal of unlimited everlasting economic growth described by an observer of the 1993 G7 summit as one of the few things on which the leaders were able to agree.<sup>11</sup> By embedding the ideology of environmentalism into international law, governments were accepting some limits on the pursuit of economic goals as dictated by environmentalism but through so doing effectively removing environmentalism as an ideology with the potential (in logic anyway) to undermine the capitalist status quo.

Perhaps then, in addition to the political functions various authors have attributed to international law (mainly in the context of international crises),<sup>12</sup> international law during those years of relative stability served to absorb, embed, and hence 'rein in', other ideologies — whether they were logically oppositional to those of liberal democracy or capitalism — or more akin to an emphasis on a particular choice within, or extension of, the ideological status quo (as in the case perhaps of human rights or trade liberalization). International lawyers provided the mechanism by which to acknowledge such ideologies and the constraints they placed on the pursuit of core goals but through that very process to significantly disempower them as potential forces for fundamental socio-political transformation. On this reading the absorption of potential rival ideologies into international law was an essential aspect of the triumph of Western liberalism celebrated by Fukuyama as 'the end of history'.<sup>13</sup>

## 4 Conclusions

Even if disappointed by the 'new world order' as it has emerged to date, I believe we need to guard against Cold War nostalgia — of presenting the current situation as one of doom and gloom and idealizing the past. I am not sure that equity — lamented by Alston as a value largely lost from the international agenda — ever played a prime role in determining which issues the West placed on its operational international agenda.

From my perspective the qualitative and quantitative expansion of international law has been integral to the increasing interconnectedness which is the very stuff of political globalization — of which increased economic integration is one form. The

<sup>11</sup> M. A. L. Miller, *The Third World in Global Environmental Politics* (1995), at 3.

<sup>12</sup> These are summarized by Slaughter as: providing rules of the game, fostering stable expectations, establishing efficient baselines, positing criteria by which national governments and others can act reasonably and justify their action, providing a process of communication in a crisis, and creating opportunities for the intermeshing of national and international bureaucracies. Slaughter Burley, 'International Law and International Relations Theory: A Dual Agenda', 87 *AJIL* (1993), at 205.

<sup>13</sup> Fukuyama, 'The End of History?', *The National Interest* 16 (1989) 3.

state is better conceptualized not as a victim, but a catalyst,<sup>14</sup> of the increasingly globalized world order.

Meanwhile, the self-professed myopic handmaidens still busy themselves tidying up the detail of various ideological mergers while the masters/mistresses, having downsized their palaces and outsourced most of the maintenance, have moved on to fresh business.

Comments on this article are invited on the *EJIL*'s web site: <[www.ejil.org](http://www.ejil.org)>.

<sup>14</sup> Lind argues that the state remains the central actor in world politics but that what we are now seeing are 'catalytic' rather than 'integral' states. Lind, 'The Catalytic State', *The National Interest* (Spring 1992), 3.