

# Effectiveness and Legitimacy in International Law

## Heidelberg – Concluding Observations

*Christian Tomuschat\**

The Symposium held today and tomorrow extends far beyond the normative realm. Over the course of time, lawyers have become painfully aware of the necessity to consider the law within its societal context. Rigid positivism à la *Laband* or *Kelsen* is definitively a thing of the past. In international law, this insight has always been one of the paradigmatic bases of systemic analysis. States, the main addressees of international law, could never be conceived of as a flock of sheep ready at any time to follow the orders of a supreme commander. To date, there is no such commander. Under the Charter of the United Nations, States are defined as “sovereign” entities, i.e. human communities that shape their existence according to their own wishes without outside interference. Essentially, notwithstanding intense research on the issue, it remains an unresolved riddle why the governments of the world have agreed to regulate their mutual relations by a set of rules called “international law”. It is trivial to observe that all States have a vivid interest in a stable framework of normative precepts. Such a framework ensures predictability and reliability in international relations, permitting people to live according to planning for life in a rational fashion, avoiding incidental ruptures and impromptu decision-making.

But this structural interest in stability and durability of international relations does not constitute a full guarantee ensuring that everything ordered or prohibited by law will happen as forecast by the normative program. To this very date, the international legal order remains largely built on hope and trust. Undeniably, the maxim holds: *pacta sunt servanda*, and could be enlarged to read: *Lex internationalis est servanda*. Yet domestic legal systems and the international legal systems differ fundamentally in many key respects. Domestic legal systems are not only made up of substantive rules, but comprehend regularly sophisticated enforcement machinery that ensures actual implementation of the rules formally in force. An organization

---

\* Dr. Dres. h.c., em. Professor, Humboldt University Berlin, Faculty of Law; President, OSCE Court of Conciliation and Arbitration.

unable to enforce the law it has enacted would sooner or later break down or end up in chaos for its members. On the other hand, enforcement is traditionally the Achilles' heel of international law. In our time, under the auspices of peaceful cooperation, most States are prepared to enter into far-reaching commitments in many fields of life. But their attitude vis-à-vis appropriate remedies remain fairly reserved. Only the European States have to a great extent shed this reluctance. The European Union has constructed an admirable system of supervision, control and enforcement that comes close to what normally can only be found at State level – but has recently had to acknowledge that the juridical ought may all of a sudden be pushed aside by realities with an overwhelming impact: Rules for the Euro and rules for the admission of migrants and asylum seekers were made in paradise, i.e. in favorable conditions of optimism and confidence in the future, and were surprisingly fast overturned by unforeseen circumstances.

This Symposium has set for itself the objective to consider what specific factors and elements favor compliance with the applicable rules of international law. It was not the ambition of the organizers to develop a general theory of the effectiveness of international law. Such an endeavor would be doomed from the very outset since the key determinants lack precisely defined contours. First: What is international law? Only a few years ago I told my students that international law was the complex of rules regulating essentially the mutual relations among States, some openings *ratione personae* having extended the scope of application towards international organizations and even individual human beings. Today, this explanation would be considered an old-fashioned and overcome definition. In an article published by *International and Comparative Law Quarterly* a few days ago, *Rosalyn Higgins* underlined that “international law is not just a law for States. It impacts upon individuals, corporations, and NGOs”, creating for them both rights and responsibilities under international law.<sup>1</sup> To be sure, this expansion should not be ignored. However, it would certainly be premature to pronounce the demise of the State as the principal actor in international relations.

Another conceptual change is taking place regarding the notion of bindingness of international law. It is an implicit premise of the traditional doctrine of sources of international law, as it has crystallized in Art. 38 of the Statute of the International Court of Justice (ICJ), that the different classes of international norms listed in that provision are binding in the normative sense: they establish rights and duties under international law; their violation entails consequences covered under the title “international responsibil-

---

<sup>1</sup> The UN at 70 Years: The Impact Upon International Law, *ICLQ* 65 (2016) 1, 3.

ity”, and they are related to one another by some general principles which one might call – according to personal taste and preference – the constitution of the international community. Since many years, this somewhat static concept of international law, focused on Art. 38 of the ICJ Statute, has come under challenge. Rightly, attention has been drawn to the fact that alongside the classical sources of international law a voracious competitor, namely soft law, has conquered for itself a shadow seat. There is no need to explain that precepts of soft law have all the external features of genuine rules of international law with the one major exception in that they are not binding in the normative sense. Soft law abounds in all fields. Even States, which have the unchallengeable power to produce truly binding law, many times prefer to confine themselves to drawing up declarations, codes of conduct, or other instruments that do not partake of the specific quality of authentic rules of international law: their bindingness. Everyone present here knows the main examples of soft law, starting with United Nations (UN) General Assembly resolutions that set out the principles and rules governing a specific area of international relations, continuing with drafts of the International Law Commission (ILC) and ending up with artfully constructed mechanisms like the Organization for Security and Co-operation in Europe (OSCE) which calls itself an organization – but does not wish to be a phenomenon anchored in the word of the international legal order in the proper sense, taking its pride in being based on “political” commitments. Many diverse motives can be found to explain the preference thus shown for an architecture that remains outside the law in the strict sense. Mostly, governments feel that they fare better if they do not burden themselves with obligations that, in case the relevant promises are not kept, cannot be characterized as tortuous acts. In the case of the ILC draft on State responsibility, a simple calculation prevailed. It was anticipated that an international treaty-making conference would entail huge costs and that eventually such a conference could possibly fail on account of the unwillingness of a few States to deposit an instrument of ratification. It was felt that the draft set of rules prepared by the ILC was well balanced and amounted essentially to a codification of the existing body of rules of customary law on the matter. Why therefore incur tremendous costs and run the risk of failure since the rules to be included in an international treaty instrument existed in any event? This, of course, is a specific configuration where soft law is only the formal cloak that surrounds a body of binding rules in the true sense.

Soft law originates not only from the activity of States and intergovernmental organizations, but also from many organizations that are not State-founded or funded. The most diverse kinds of organizations endeavor to

ZaöRV 77 (2017)

establish model rules in their specific sectors of activity. Well-known organizations working with the aim of promoting the general interest are the Institut de droit international or the International Law Association. In a wider sense, their articulations may be called international law since in any dispute about legal issues they need to be taken into account inasmuch as they invariably provide solutions that have been carefully researched and have as their background the same materials that form the practice element of customary law and reflect in any event common sense and good judgment.

At this point, I come back to our Symposium. One of the presentations, *Evelyne Lagrange's* comparison between the expert bodies under the different multilateral conventions on human rights and the Universal Periodic Review (UPR), had as its task to ascertain the effectiveness of the two parallel procedures. In principle, the expert bodies act as agents for the implementation of the rights enshrined in the convention concerned. They supervise and control truly binding international agreements. On the other hand, UPR, which addresses all States irrespective of their membership in the relevant UN conventions, is essentially focused on the Universal Declaration of Human Rights (UDHR) of 1948. Every State member of the UN is subjected to intensive questioning, no substantial differentiation being made in that regard between the conventional instruments and the UDHR as the relevant yardstick. It has turned out that it is not so much the intrinsic character of the substantive rules concerned which matters but rather the specificities of the procedure. Experts are more objective, rarely can any kind of bias be detected in their observations – but they are just experts, appointed by governments, not decision-makers with political clout themselves. To be judged by its peers is much more scary for a country, a test taken more seriously, which has also led governments to trying at least to manipulate the procedure by mobilizing their friends and allies taking the floor with flowery words of praise and recognition only.

A short conclusion: It is true that soft law cannot be adduced before the International Court of Justice as the direct source of international rights or obligations. But it can always be presented as the reflection of a rule pertaining to one of the legal sources accredited by Art. 38 of the Statute of the ICJ. Additionally, because of its political aura, soft law can be more effective than a truly binding set of rules of international law. Thus, from 1977 onwards, the Helsinki Final Act proved to be a more effective push factor than the International Covenant on Civil and Political Rights whose worldwide applicability downgraded it in the eyes of many pessimistic observers.

Many authors claim that the enlargement of the concept of international law towards the field of transnational relations between and among private non-State actors is another necessary addition to its original scope *ratione materiae*. It is true that in many fields, in particular in international economic law, private and public law are so closely intertwined that it has often become difficult to disentangle that imbroglia of normative substance. However, this wide concept of international law is unsuitable for our current purposes. It is our aim to inquire into the effectiveness and legitimacy of State-made law, or law in whose production or implementation governmental authorities play a preponderant role. Business relations across borders constitute an important element of our globalized world. But the stability of such relations depends on other contingencies than the treaties concluded between States, and their legitimacy is a non-issue from the commercial point of view.

Saying that the legitimacy of a rule promotes its effectiveness is no more than a truism. In its entirety, law must be handled by human beings. Rules that are considered as being illegitimate and are therefore emotionally and intellectually rejected, will always risk being circumvented, side-lined, or applied contrary to their true meaning. Here again, it emerges that no comprehensive answers can be given. The effectiveness and legitimacy of international law varies depending on the spheres of societal life the relevant rules seek to regulate.

In its classical period before World War I, international law regulated mainly the external relations between States, with few links to their domestic space. States were conceived of as closed entities with firm borders that determined their scope of jurisdiction. At that time, the concept of matters pertaining exclusively to domestic jurisdiction, today codified in Art. 2(7) of the UN Charter, was coined. Indeed, internal and external matters could be neatly distinguished. Foreign matters comprised diplomatic and consular relations, issues of war and peace, the law of the sea and other matters visibly transcending State boundaries. In this regard, the billiard ball model of international relations arose, which still today is widely used in the theory of international relations. States were seen as closed entities, although some departures from this model of absolute territorial sovereignty occurred from time to time, especially regarding the agricultural sector where for instance one finds examples of transnational regimes for the protection of insect-eating birds.

The core regime of international law was reshaped after World War II by the UN Charter. It comprises in particular State sovereignty, the principle of non-use of force and the principle of non-interference. The legitimacy of

ZaöRV 77 (2017)

this regime is uncontested, enjoying general recognition. Fortunately, all the States and governments of this world are aware of the necessity of disposing of a solid groundwork of principles that ensure peaceful coexistence among nations. Not a single government takes the view that it may act exclusively according to its own will, without having to respect the applicable principles of international law. The new doctrine of Third World Approaches to International Law rights emphasizes that during the epoch of colonialism the Western States shaped many rules that worked exclusively to their own benefit. In particular, governmental structures existing in Africa or in Asia were generally not recognized as States so that their territories could be occupied without any infringement of the law. However, Third World Approaches to International Law (TWAAIL) abstains from challenging today's system of international law that has brought an enormous gift to the new nations: the concept of sovereign equality. Sovereign equality, stipulated in the UN Charter as the primary principle of international law (Art. 2(1)), is the key to self-determined development. It means emancipation and freedom. It would be incredibly unwise to reject sovereign equality as the cornerstone of today's architecture of international law. On the other hand, TWAAIL complains of a lack of solidarity among nations of the world, given the extreme degrees of poverty in many parts of the world. In this regard, TWAAIL is right, but their complaints amount to a call for active development of the law.

Or are we blind to the exigencies of the extant social components of contemporary international law? One can observe a current trend in the legal doctrine postulating that the traditional geographical division of spheres of jurisdiction is outdated. States should generally assume responsibility for occurrences beyond their borders if fundamental interests of the international community are at stake. The concept of universal jurisdiction for international crimes is a first step in that direction. But generally universal jurisdiction becomes operative only when an alleged offender is found in the territory of the State concerned. Can a State have obligations that go beyond its territory, having to come to the rescue of populations threatened by war, by famine, by environmental disasters? Such inferences do not fit within the traditional thinking in international law. *Malgosia Fitzmaurice* has given us ample food to think. Are we truly an international community where such duties of solidarity are a natural and self-evident element of the constitutive legal order, or would we be trying to construct a utopian architecture overburdening States with obligations that can at most have a moral character?

Not much new can be said about the effectiveness of the classical “negative” rules of international law in our time. The theory of international relations has been working for decades in order to find out what factors are determinative for compliance with the principle of non-use of force. Not a single one of the presentations we have heard has focused on the relevant criteria that may prompt a State to have recourse to, or to abstain from, armed force. The relevant motives, incentives and reasons cannot easily be influenced by legal mechanisms. The Security Council with its strengths and weaknesses is well known. We have not attempted to involve ourselves in the debate about the enlargement of the Security Council – which is largely utopian. To be sure, a composition more representative of the international community can be imagined without any difficulty. Africa, Latin America and the Asian countries have no permanent seat on the Security Council, China being a universe of its own. Yet it would remain to be seen whether the enlargement of the Security Council by the addition of supplementary permanent seats according to criteria of equitable regional distribution would really enhance the effectiveness of the Council.

Now a great stride has to be taken. The subject matter of international law has fundamentally changed during the last decades, starting with the advent of the United Nations in 1945. The authors of the Charter realized already at the time of the founding conference of San Francisco that international peace and security are profoundly affected by the internal situation in individual States. Internal violence breeds external violence, peace needs stable foundations in human societies everywhere. Therefore, they pledged to “promote social progress and better standards of life in larger freedom” (UN Charter, Preamble, para. 4). One may call this a turning point. To be sure, Art. 2(7) of the Charter stated categorically that the world organization shall not intervene “in matters which are essentially within the domestic jurisdiction of any state”. This proviso was taken literally for many years until the sixties of the last century. However, after the two International Covenants had been adopted, the door was flung wide open. It became evident that the practice of human rights does not come within the domestic jurisdiction: the way in which a State treats its citizens interests the entire international community.

At the same time, it was progressively realized that mankind has common responsibilities and that there exists an urgent need to settle by way of agreement issues that a single state cannot effectively address. One of those new fields of activity is constituted by environmental protection. It is significant that the Charter itself does not yet mention the word “environment”. Even many years after the coming into force of the Charter, one had to go

ZaöRV 77 (2017)

back to an arbitral award of 1938 in the US-Canadian *Trail Smelter* case to identify the determinative principles of good neighborhood in environmental matters. Only in 1972 did the UN make a great effort in identifying its own position by calling an international conference, which adopted the “Stockholm Declaration on the Human Environment”. Unfortunately, the outcome of this conference was marred by the absence of the socialist States that protested against the refusal to invite representatives from the German Democratic Republic (GDR), although this circumstance did not negatively affect the substance of the Declaration. This first step brought into motion a whole flurry of activities. Environmental protection became one of the key issues during the negotiations on the UN Convention on the Law of the Sea and was given an appropriate place within the Convention. Generally, it was recognized that it did not suffice to state lofty principles but that procedural mechanisms were essential in ensuring the success of a conventional instrument. The UN Commission for Europe adopted in 1998 the Aarhus Convention, which confers on individuals and private associations the right to initiate proceedings for the protection of the environment. *Karl-Peter Sommermann* has told us about the experiences with this truly progressive experiment which shifts responsibility for implementation partly away from States, permitting access to relevant information, guaranteeing public participation in environmental decision-making and providing even for access to justice. His result seems to be clear: by conferring on private non-state actors some responsibility, the objective of maintaining the quality of the environment can be better ensured. The principle now seems to be firmly established: recognizing the citizen as guardian of environmental integrity enhances the effectivity of any relevant environmental standards.

In the field of human rights, lawyers have also set their confidence on judicial methods of enforcement, being fully aware of the fact that judicial proceedings alone do not suffice to secure real enjoyment of human rights. With the Strasbourg Court of Human Rights, we encounter today the most successful experiment with this method of supervision and enforcement. The tremendous achievements of the Strasbourg jurisprudence are well known; it is also well known, on the other hand, that systemic deficiencies in the domestic mechanisms remain an open wound for many years until this very date. Four States regularly reach new negative records regarding new cases arriving and non-compliance with judgments rendered: Russia, Turkey, Ukraine – and also Italy, a country of rich legal traditions dating back two thousand years but seemingly unable, in our time, to meet the needs of its people for order and justice. Since this European misery is no mystery for anyone, *Armin von Bogdandy* has been requested to give an



account of the effectiveness of the judgments of the Inter-American Court of Human Rights. He provided us with a brilliant analysis of that jurisprudence which cannot compete with the performance demonstrated by the Strasbourg Court, measured in quantitative terms. While the Strasbourg Court has to deal with roughly 50,000 cases per year, the Inter-American Court has rendered, from the inception of its activity in 1987 to 2016, no more than 330 judgments. Must this modest balance sheet be deemed to amount to an open failure? Not necessarily. On the one hand, it should be taken into account that any application must first go to the Inter-American Commission, which proceeds to a first examination of the case, following the model that was in practice in Strasbourg until 1997. Many of the applications are dealt with by a report of the Commission, and only few cases are referred to the Court in San José, e.g. not more than 12 in 2015. Second, if the judgments rendered in San José were recognized as guiding parameters for the entire practice in all States parties, the low number of judgments could be discarded as pure formalism. What distinguishes the San José Court in particular is its tendency to establish, in the operative part of its judgments, a long list of orders that must execute in order to make good the injury caused. To what extent are these orders complied with? In Spanish, the appropriate term is: *cumplimiento*. *Armin von Bogdandy* has provided us with information that answers some part of our queries. Obviously, however, it is extremely difficult to penetrate the darkness that surrounds the implementation processes, which are controlled only by the Court itself, not by a political organ – a major weakness of the system.

Is punishment of the perpetrators of international crimes the panacea which permits to stabilize the international system by the deterrent effect which the existence of mechanisms of international criminal justice may produce? It needs not be stressed that the Nuremberg trial came about as a thunder stroke in 1945. In terms of classical international law, it was unthinkable to put on trial the leaders of a defeated nation. The atrocities committed by the Nazi regime swept away the defense of sovereign immunity for the perpetrators. After a project for the generalization of the Nuremberg model had been buried in 1957, a second effort by the International Law Commission commenced in 1983 dragged on slowly for many years with any great expectations of success. All of a sudden, as a consequence of the cruel war in the former Yugoslavia, the project gained speed, and the Security Council established one after the other the International Criminal Tribunal for the former Yugoslavia in 1993 and the International Criminal Tribunal for Rwanda in 1994. The logical consequence of these developments was the relaunch of the efforts to establish an international

ZaöRV 77 (2017)

judicial body with world-wide jurisdiction, which materialized in 1998 with the adoption of the Rome Statute of the International Criminal Court. Is this a success story? The two judicial bodies established by the Security Council acted diligently with great success for many years, as we were told by *Carsten Stahn*. However, some recent judgments have thrown a shadow of doubt over the International Criminal Tribunal for the former Yugoslavia (ICTY). Have they compromised the idea of establishing international criminal courts at world level? On the other hand, the International Criminal Court (ICC) has encountered many logistical difficulties. Its output might be characterized as ridiculous, considering the amounts of money necessitated for its operation. Do we have to acknowledge our deception – or is the modest balance sheet rather a call for a new start with ameliorated methods? The question seems to be open. Obviously, the panacea has not been found. The Nuremberg trial remains an unreachable signpost, it seems. Combating impunity is an imperative – but the system cannot avoid being assessed in terms of performance and costs.

The question remains whether we can place our trust, in the traditional field of classical inter-State relations, on judicial remedies. The balance sheet provided by *Pierre d'Argent* does not look too positive. In any event, the euphoria of former decades when the slogan “world peace through law” was widely shared has evaporated. We have to acknowledge that the strict consensual system under Art. 36 of the Statute of the ICJ still prevents disputes in which the major powers of the world are involved from being submitted to the ICJ. This state of affairs is not likely to change fundamentally in the near future. None of the three most powerful actors – China, Russia, and the United States – has any interest in being assessed by the judges of the ICJ concerning its operations. They all attach great importance to having one seat on the ICJ although disliking the Court. However, by associating themselves with the work of the ICJ through their participation in the composition of the Court, they confirm the legitimacy of the Court as the main judicial organ of the international community. It is worrying, though, that in some instances States have reneged on their obligation to respect, and comply with, a judgment rendered against them. Two years ago, Italy's Constitutional Court stated authoritatively that the Italian authorities are by virtue of the Italian Constitution debarred from taking the measures required for the implementation of a judgment rendered by the ICJ, and China has openly declared by anticipation that in the *South China Sea* case it will not heed the judgment of an arbitral tribunal set up under the provisions of the UN Law of the Sea Convention. Such an-

nouncements destroy the elements of trust on which the international legal order is founded.

Given that international law has to a great extent invaded the spaces formerly regulated by rules of national origin, the question arises whether the principle of State consent still constitutes a sufficient source of legitimacy for rules and regulations that directly affect the legal position of the individual citizen. Regarding the “classical” topics of international law, that question lacked any great relevance. Issues of diplomatic or consular intercourse lie outside the personal sphere of interest of the individual. Now that the everyday life of the individual comes under the grip of international law, the question must be re-examined. Do we have to provide for citizens’ participation in all matters that at the national level would require regulations adopted by democratically elected representatives? Does the democratic principle demand more popular participation in decision-making in particular with regard to bodies empowered to issue acts of secondary legislation? It appears to be much too easy to discredit such instruments derived from conferred powers as lacking requisite democratic legitimacy. Inevitably, if and when large international organizations are established, especially at world level, the democratic rights of the individual citizens shrink in size and importance. Even the most sophisticated mechanisms cannot defy that inherent logic. Only appropriate procedures of accountability can remedy that democratic vacuum. In any event, one should not hastily deny the legitimacy of a formal declaration of consent expressed by a government in full awareness of the relevancy of its pledge. It would seem that the defenders of democratic purity are chasing a ghost which can never be captured. *Alain Pellet* has rightly pointed out that consent is a valid device suited to stabilize international relations. It is at the national level that mechanisms must be found to ensure that governments do not overturn the democratic rights of their citizens. In international fora, considerations of trust and reliability must take the upper hand.

Very few concrete inferences can be drawn from our common effort of analysis for practical purposes. Yet one major conclusion emerges. Two core elements of international law can be identified, the complex of rules intimately connected to the principle of sovereign equality like primarily the ban on the use of force, and the complex of rules building a protective shield around the dignity of the human person. These two sets of rules may be characterized as the contemporary constitution of the international community. On the other hand, some consequences from the occupation of large sectors of ordinary societal activity by rules of international origin are “incontournable”, as we would have to say in French. Here, regarding in-

ZaöRV 77 (2017)

ternational treaties the time-honored rule "*pacta sunt servanda*" with its few accommodations appears much too rigid. The democratic principle demands that societies be empowered to shape their own fate according to the prevailing circumstances. As a scholar from this Institute has recently shown, revisability of the law is an indispensable ingredient of the democratic principle – as far as "ordinary" transactions are concerned. This can and should be left to the law-making bodies themselves. Governmental officials are neither blind nor deaf but it is certainly not futile to bring to their attention the necessity of disposing of mechanisms of adjustment and modernization for keeping the law in correspondence with the needs of the democratic sovereign, the population.