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Der Blog des Arbeitskreises junger Völkerrechtswissenschaftler*innen

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DEBATING "BEYOND HUMAN RIGHTS" SYMPOSIUM

Part 2: Simple international rights, global constitutionalism, and scholarly methods

The rejoinder to comments on “Beyond Human Rights” continued

ANNE PETERS — 3 February, 2016



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This post continues [Anne Peters rejoinder](#)

Roland Portmann's main point is that national (domestic) law principles and practices matters crucially for the legal status of the individual, and that we must study closely the "interface of domestic constitutional law and international law." He also highlights the importance of domestic law on the incorporation of international (treaty) law.

Portmann is right in pointing out that direct effect is crucial. I would like to repeat at this point my (controversial) claim that direct effect is governed both by international law and by the domestic law in question. According to a traditional view, direct effect was solely a question of domestic law, the answer to which was entirely left to the domestic courts. The reasoning for that view was that the issue was primarily one of *implementing* international law or of fulfilling international legal obligations. International law itself demanded only that it be implemented, but it left the way in which it was implemented to the States. The way in which it was implemented fell within the *domaine réservé* and thus – from this perspective – also the decision on direct or merely indirect effect. In contrast, direct effect can and should primarily be understood as a question of *interpretation* of the treaty provision concerned. The decision on direct effect depends crucially on criteria relating to the content of the norm, and thus inevitably requires interpreting those criteria. The interpretation of an international treaty must meet international requirements, even if the interpretation is made by a domestic court. The rules for interpreting international treaties are codified in the Vienna Convention on the Law of Treaties and have been further specified by international (and domestic) case law.

Of course, determining whether an international norm is self-executing is normally in the responsibility of the domestic authorities and courts called upon in the specific dispute. This situation corresponds to the normal case of international (decentralized) application of the law. The existence of centralized international requirements cannot guarantee that they are actually applied identically in concrete individual cases.

But because direct effect is a question whose answer – at least *also* – must be found in international law itself, the question may also be decided by international courts, as was the case in the PCIJ's *Danzig* opinion. The crucial argument is now that, because both levels are linked to each other as reciprocal catch-all mechanisms (*“wechselseitige Auffangordnungen”*, to borrow Hofmann-Riehm and Schmidt-Aßmann's felicitous phrase), notably linked due to the local remedies requirement and the principle of subsidiarity, the application of an international legal norm by domestic *and* international bodies should follow rules that are in turn compatible with each other. If they remain disjunct and incompatible, the whole architecture will be undermined – and this would run contrary to the telos of the mentioned principles of local remedies and subsidiarity and thus create an inner contradiction within international law itself.

One further important point on direct effect: To argue that it is imperative to grant a political leeway to the genuinely political bodies of the State, which may then decide whether they in fact want to comply with a treaty (e.g. the GATT) or the judgment of an international court – *or not* (by denying direct effect), implies a downgrading of the legal-ness of

international law. A rule which is not meant to be complied with resembles more a political guideline than a legal norm.

Under the premise that international treaties constitute genuine law, their violation must – from the perspective of the rule of law – be actionable in principle (as a rule), i.e. in domestic courts. Such a standpoint is not inevitably naïve in the sense that it disregards the political implications of the legal analysis but simply insists that law cannot be completely dissolved into or reduced to politics. From that perspective, we may admit that beyond these arguments lies the reality of power, as Hélène Ruiz Fabri has written (elsewhere). However, we can not admit that “*all* depends on the ability to resist and bargain over implementation”. To the contrary, under the rule of law, not “*all*” depends on power only. From that perspective, exceptions from applicability must be specially justified. A general reference to the lower level of legitimacy of international law in principle is no convincing argument against the normal case of application postulated here.

Investor rights in twilight: Evelyne Lagrange

In her blog on my chapter 10 on investor rights and obligations, Evelyne Lagrange rightly points out that I left some controversial issues in “enduring twilight”. In my English revisions I tried to illuminate those a bit more.

I now espouse Moshe Hirsch’s insight that human rights law and investment law “have evolved along radically divergent paths”. Although the new BITs negotiated or already concluded by the EU formulate a novel type of fair and equitable treatment standard which in part resemble guarantees of procedural human rights (denial of justice and

due process), and human rights to non-discrimination, the differences between human rights and investor rights prevail over their similarities.

Investor rights are not accorded to the investors for the sake of human flourishing. They are mainly instrumental, an incitement for the exportation of capital which is supposed to generate welfare effects in the host State. Second, enforceable investor rights are incumbent only to few and extremely wealthy entities (often moral and not natural persons) who are affluent enough to institute an extremely costly investment arbitration proceeding. The two types of rights thus have a different telos, and arguably have a different weight, too.

Evelyne Lagrange herself highlights an important third difference: International human rights are primarily protected by domestic courts (sometimes placed under the control of an international body) and thereby “domesticated”, whereas the investor rights are safeguarded by international arbiters only, and thereby completely denationalized (see also Evelyne Lagrange, *L’application des accords à l’investissement dans les ordres juridiques internes*, in: Sabrina Cuendet (ed.), *Le droit des investissements étrangers : approche globale* (Paris : Larcier 2016)).

Lagrange in that work also demonstrates that substantive investor rights flowing from investment treaties are from a legal-technical perspective the proper conceptualization, but that political considerations by the tribunals motivate their denial. What really matters is the lacking invocability of those rights in domestic courts. A more ready acceptance of the direct effect of investment treaties and the re-

introduction of domestic remedies in the host State (against what is foreseen in Art. 26 ICSID-Convention as the regular course) would remedy the normative problem of a potentially undue “*gouvernement des arbitres*” which is tainted by legitimacy problems and therefore currently regarded with scepticism.

The acknowledgment of substantive (not merely procedural) investor individual rights – even short of human rights – makes a difference to the mere objective protection of investors by international law. By relying on rights, investors are emancipated from their home States, are protected from too burdensome interpretive statements, enjoy protection during the survival period in the event of denunciation and termination of an investment protection agreement, and ultimately are immunized to a certain extent against countermeasures by the host States.

Finally, we should remember that the normal legal situation will be the co-existence of State rights *and* investor rights flowing from a given investment treaty. Follow-up questions are then the relationship among these two sets of rights and the procedural consequences of such a co-existence. In the ICSID-system, the investor claim enjoys a procedural priority: Art. 27(1) ICSID prohibits the investor’s home State to institute any proceedings once the investor is involved in an ICSID arbitration.

Obligations of individuals and the principle of legality: Raphael Oidtmann

Raphael Oidtmann’s contribution focuses on individual obligations. This field is among the most complicated in which the law as it stands (and the debate) is somewhat

chaotic, mainly because of its focus on criminal responsibility and the often lacking distinction between the level of primary and secondary obligations. I would however not side with Oidtmann that the ability to bear legal obligations is an “indispensable” corollary of the capacity to bear rights, “already for a logical reason”. On the contrary, it is perfectly possible to allow for rights without obligations, as domestic law foresees, e.g. for infants.

In *Beyond Human Rights*, I have sought to show that current international law imposes obligations on individuals in numerous sub-domains, to an extent Jacob Katz Cogan referred to as the *regulatory turn* in international law. Alongside these obligations, however, the normal international legal regulatory scheme – merely indirect imposition of obligations on individuals by way of the international obligations of States to enact national precepts and prohibitions, which in turn are addressed to private actors – persists and even prevails.

In light of the comprehensive and gapless responsibility of States, are parallel prohibitions and precepts directly addressed to individuals needed? Additionally, there is the danger that States might weasel out of their regulatory obligations by referring to the international imposition of obligations on individuals. There are also the practical difficulties of imposing obligations on 7 billion actors. And finally, direct international individual obligations raise specific problems of legitimation. For all these reasons, international law should not be viewed as a substitute for domestic criminal or civil law. Still, no reason exists in the nature and structure of international law that would prevent it from addressing individuals and imposing legal obligations on them.

But the imposition of obligations on individuals must be specially justified separately. And because the obligations imposed on individuals are not generated by other private persons – against whom private autonomy would have to be taken into account – but rather by a public authority, the *pacta tertiis* principle is not useful in this context. Nevertheless, the basic concern of the *pacta tertiis* rule, namely to secure the freedom and consent of those on whom rights are imposed, remains relevant. The legal requirements for imposing international precepts and prohibitions on individuals can be found in the reservoir of public law and global constitutionalism. I have submitted that the development of further individual obligations directly under international law should be recognized only under two conditions: There must in fact be a need for global regulation in that regard, and the principle of legality must be respected. In situations where these conditions are properly met, individual obligations may be established through treaties, customary international law, general principles of law, case law, and even secondary international law.

A transnationalized principle of legality

The principle of legality originates from the national (public) law of liberal constitutional States, and is now a general principle of law as referred to in Article 38(1)(c) of the ICJ Statute and hence also an international legal norm. This principle (as in national law) serves a dual protective purpose, which is slightly modified at the level of international law. In national law, the principle of legality secures the legitimation of limitations of freedom, firstly in terms of the rule of law and secondly in terms of democracy.

Within the scope of international law, preventing concentration of power is likewise a concern. The international principle of legality is – just as in national law – an element of the rule of law. As in the national domain, the purpose of the rule of *international* law is to secure freedom, namely by stabilizing expectations. Securing freedom through the distribution of power within the multi-level system of international and national law is achieved less through the “horizontal” separation of powers than through a “vertical” separation between international bodies for the enforcement of individual obligations (such as through monitoring bodies, compliance committees, and the like) and national authorities.

The second, democratic concern of the principle of legality can be taken into account in a limited way in international law, although international legal norms generally enjoy less democratic legitimation than national laws. A key demand of legitimacy which international law must fulfil, however, is that international actors be accountable. This principle has a similar containing function as the democratic principle, and therefore one of the well-known rationales of the principle of legality (namely to secure accountability) plays in international law, too. The democratic legitimacy deficit inherent in an international legal basis constitutes a handicap that must be compensated through enhanced requirements on specificity and, accordingly, foreseeability of the norm purporting to impose obligations on individuals.

Human rights obligations on business?

Based on these considerations it may seem warranted to make individual rights – and especially human rights – directly binding on enterprises under international law. In

the age of globalization, gaps in protection actually do exist at the level of national law, so that there is a specific and increased risk of under-regulation of the protection of workers' rights, conceived as global goods (so my first requirement is met).

On the other hand, it is relevant that the private persons in turn are also holders of basic rights. An international regulation of the enterprise should not amount to an inhibiting restriction of entrepreneurial freedoms that are in turn protected by fundamental rights (economic freedom and property rights). Moreover, the danger exists in the economic context that States might shirk their responsibility. If reformed international human rights bodies were to deal with human rights violations by enterprises as well, some States would presumably seize the opportunity to divert attention away from themselves.

All things considered, expanding the binding nature of human rights into the sphere of transnational business is neither normatively desirable without reservations, nor does it have good prospects as a practical matter. It would be more promising, and more tailored to the qualitative difference between States and enterprises, to strengthen only the *indirect* imposition of the obligation to respect human rights on enterprises by intensifying the duties of the State to protect, as demanded by the Ruggie Principles. So far, States are bound to discharge their duty to protect through national action plans which aim to translate the UN Principles into practical action at national level. The ongoing UN Working Group has issued a "Guidance" which provides recommendations on the development, implementation and update of these plans. For the EU, the European Commission has requested that EU Member States develop plans; and

some Member States have already done so. If this mediating scheme which is now being slowly and gradually established, turns out not to generate sufficient protection, the imposition of direct human rights obligations of business actors, through a new international treaty, respecting the principle of legality, is warranted.

Socializing States through rights beyond human rights

Returning to my initial reflection on scholarly “registers”, I conclude that international legal scholarship should be adapted to the novel period of international law we are living through, a period which is characterised by a high tension between interdependence and globalisation (economic, technical, and cultural) on the one hand, and stark cleavages and fencing (ideational, economic, territorial) among States, on the other hand.

In this period, the normative demands on the States should not be overstretched by overlegalizing the international rights of individuals, because of the ever-present threat of a backlash. The reason lies in the sociological truism that law which is too “strict” and too clearly contrary to interests of those subjected to the law will provoke backlashes that undermine the normative force of the law in general.

On the other hand, law – if it is to deserve its name – is counterfactual. It is not and should not simply reflect the actually existing power relationships and interests. Rather, the purpose of every legal norm is to influence the interests and conduct of those subject to that norm and to guide them in the direction desired by the law-makers. Then, law, including international law, itself has a reality-shaping significance. Put differently, social reality, including

international relations, is constituted in part by law and especially by rights. This interaction has been theorized and empirically demonstrated by the constructivist strands of political science. States can be “socialized” by international legal norms under certain conditions. More specifically even, changes to the international system have been often or even mainly brought about through the struggles of individuals for human rights and their predecessor, religious tolerance, as Christian Reus-Smit has recently demonstrated. Historical examples are the emergence of the Westphalian system of States, the independence of Latin American States, the reorganization of Europe after the First World War, and the collapse of the Soviet Union.

Although this constructive power of law – and of legal rights of the individual in particular – is precarious, an anticipatory resignation of legal scholars in light of political resistance would mean to give up exploiting the factual power of normativity and would betray the counterfactual nature of law and of rights. It is, I submit, the job of international scholars, as professionals, to develop ideas – ideas which may have the power of transforming international relations, and which therefore contribute to “realizing utopia” (Antonio Cassese). As Victor Hugo, to whom Cassese refers, wrote : *« On résiste à l’invasion des armées; on ne résiste pas à l’invasion des idées »*.

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