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Is International Law Fair? A Conference Report on the 18th Annual Conference of the European Society of International Law in Aix-en-Provence

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1 Introduction

With 600 participants, the 18th Annual Conference of the European Society of International Law (ESIL) was once again held in a hybrid format at the University of Aix-Marseille (France) from 30 August to 2 September 2023.

In the opening discussion, the President of ESIL, Pierre d'Argent from the University of KU Leuven (Belgium), pointed out the difficulty of defining the concept of fairness. In English, he said, it stands alongside the terms just and equitable; in other languages there is no equivalent, making translations imprecise and therefore problematic. The fairest rules of international law are not necessarily the most effective, said Sandrine Maljean-Dubois from the University of Aix-Marseille. Rostane Mehdi from the University of Aix-Marseille referred to the weakening of international law due to the (re)rise of nationalism and the associated crisis of multilateralism. Finding and building consensus is becoming increasingly difficult, the common good is taking a back seat to the individual interests of states and global solidarity is being marginalised by increasing nationalism.

2 Spotlights of the Discussion on Fairness in International Law

International law focusses primarily on effectiveness and not so much on fairness. Furthermore, values are not true or false per se, but rather correspond to the underlying perspectives and interests, said Slim Laghmani from the University of Carthage

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(Tunisia). Ineta Ziemele from the European Court of Justice (ECJ) emphasised the importance of procedural fairness, on which states could agree more easily than on substantive content. However, there is a risk of states exerting influence on independent institutions, including international institutions. Fairness is always concretised in institutions by individuals, so that it is also possible to undermine them. Ronny Abraham, Judge at the International Court of Justice (ICJ), noted that it was almost always the defendant states that invoked the argument of fairness before the ICJ. A more consistent application of international law would lead to more trust and respect for international law and its legally binding nature. The United Nations International Law Commission makes an important contribution to this, said Artur Kozłowski from the University of Wrocław (Poland).

Sara Seck from Dalhousie University (Canada) criticised state-centred international law as inherently unjust and unfair. It is still an expression and means of a civilising mission if, for example, indigenous law is not recognised as a legitimate source of law. If indigenous peoples are to be taken seriously in international law, they must be given a higher legal status. In the climate crisis, the environmental regimes of indigenous peoples are of particular relevance to general international law, which can and must learn from them. These rights should also be taught more at law faculties. Former colonial states in particular, but also companies, should listen more to indigenous peoples.

Despite the state-centred nature of international law, it grants individuals more and more individual rights, for example in the areas of state responsibility, diplomatic protection, state immunity and international treaty law, according to Paolo Palchetti from the University of Paris I Phantéon Sorbonne (France). Fairness in international law is improved when the (legal) situation of the individual improves. In international law, the state as a public institution fulfils an intermediary function for the communities it governs. In any case, international organisations are no alternative to states; they have no more political legitimacy than the latter. The trend towards individualisation in international law is sometimes accompanied by exaggerated optimism. This overlooks the fact that this can also be exploited by financially strong economic players.

Andreas von Arnauld from the Christian-Albrechts-University in Kiel (Germany) referred to the tension inherent in the demand for fairness in the application of international law. After all, (international) law itself must be perceived as fair and just per se. Nevertheless, legitimate interests must be taken into account both procedurally and substantively. The spatial and temporal dimensions (for the past and future) are crucial for this. In addition to the entire ecosystem, climate change affects practically everyone. Russia's war against Ukraine jeopardises the right to food, particularly in Africa. In the temporal dimension, crimes of the past, from the time of the world wars or colonial empires, could have an impact on later generations right up to the present day. By invoking fairness, unjust historical outcomes could at least be mitigated with the help of international law. Safeguarding the interests of future generations is more problematic due to the many intervening variables. The climate judgement of the German Federal Constitutional Court in 2021 shows a possible way forward here, and the ICJ could also achieve this through a dynamic interpretation of international law.

3 Perspectives from the Periphery of International Law

Moshe Hirsch from the Hebrew University of Jerusalem (Israel) subjected the moratorium of the World Trade Organization (WTO) on customs duties on electronic transfers (WTO 1998) (e.g. software, e-mails, digital music, films and video games) to a critical frame analysis. The moratorium was first agreed in 1998 and was initially intended to apply for two years; since then, it has been repeatedly extended, most recently until 31 March 2026, depriving the least developed countries (LDCs) in particular of urgently needed customs revenue. The moratorium is unfair, as high profits are being made in this dynamic trade segment with high growth rates without the LDCs benefiting from customs revenue. In this respect, the law is part of the problem. Although India, Pakistan, Indonesia, and South Africa have called for an end to the moratorium, it has so far been repeatedly extended at the instigation of the USA, China, the EU, Japan, and South Korea in particular, even with the consent of some of these LDCs. Why these countries in particular agreed to this can best be explained by the prevailing cognitive structures, which – unlike military coercion or economic sanctions – represent a more subtle means of securing power. In addition to the reference to tariff-related market distortions and the associated inhibition of technological progress, blind spots that had not yet been properly recognised – such as the observable new trend towards neo-mercantilism – also played a key role in the maintenance of unfair rules. The fact that the products of developing countries are subject to the highest import tariffs, particularly in the agricultural and textile sectors, is another example of an unfair trade regime, as these countries are unable to profitably utilise their comparative cost advantage in these areas.

Zhuolun Li from the University of Urbino (Italy) saw the human rights due diligence in global supply chains (HRDD), intended to improve the protection of social human rights in production, as a Western instrument of dominance and neocolonialism. Western legal concepts would be unilaterally outsourced to the global supply chain with extraterritorial effect. This leads to legal uncertainty on the ground and to a disruption of global supply chains. Western academics are also called upon to take these concerns into account in order to make such supply chain laws fairer from the perspective of non-Western countries. However, it was countered in the discussion that Western companies in particular would successfully lower the legal requirements with exactly the same arguments, as has happened in Switzerland.

4 Peace, Security, and Fairness in International Law

Kostiantyn Gorobets from the Rijksuniversiteit Groningen (Netherlands) analysed the fairness discourse in international law from today's Russian perspective. There, the world order that emerged after the end of the Cold War is perceived as unfair. Russia is denied the respect it deserves as a great power. NATO's eastward expansion jeopardised Russia's security, Ukraine was not a sovereign state, and the West had itself violated international law through its double standards in the Kosovo conflict in 1999 and the Iraq war in 2003. In general, the legitimacy of the development of international law since the collapse of the Soviet Union was fundamentally

called into question. Russia's criticism of international law, however, is at best only marginally based on arguments of international law, which makes its behaviour appear so bizarre, but also so dangerous, from a Western perspective. By referring to the (alleged lack of) fairness, arguments of historical justice and Russia's unique role (as the self-perceived legitimate successor of the Soviet Union) in the victory over Nazi Germany are used to justify the war against Ukraine. Russia is not trying to interpret norms of international law, but to test what can be used as a legal argument to justify its behaviour in the future, taking into account the reactions of other states. In doing so, it is attempting to expand the framework of justification under international law in its favour. One method of doing so is the analogy argument, such as the reference to the Kosovo intervention in 1999 and the Iraq war in 2003 (the last example obviously violated international law). The Russian reference to fairness does not correspond to the liberal understanding, which is based on norm-dominance and norm-conformity. Russia is rule-sceptical, the reference to a lack of fairness is a means of evading compliance with norms. This Russian approach, of which even more can be expected in the future, must be resolutely opposed.

Kelsey Rhude from the University of Galway (Ireland) reported that peace in Liberia remains fragile even 20 years after the end of the civil war in 2003, not least due to the lack of justice for the victims and their subordination to an – albeit fragile – peace, which is prioritised through securitisation. Frustration is growing in civil society due to the limited implementation of the resolutions of the Truth and Reconciliation Commission of Liberia (TRC) on the prosecution of civil war crimes. There is an increasing impression that the perpetrators are getting away with it and that violence and war are still worthwhile. As a result, Liberia remains trapped in a permanent transition and there is a constant risk of the civil war flaring up again. Without sufficient justice, a lasting and stable peace cannot be achieved. However, there is also a tension between peace and justice: opponents of the war would not lay down their arms if they feared punishment, and punitive measures could destabilise the peace process.

Marco Longobardo from the University of Westminster (Great Britain) argued in favour of a return to the classic approach of UN peacekeeping operations. These were based on three principles: 1) the impartial protection of the civilian population, 2) the use of military force only in the self-defence of UN troops, and 3) the consent of all parties to the conflict to the deployment of peacekeeping troops. Even if not explicitly proclaimed, these three principles are an expression of fairness. This model has undergone a radical change since the 1990s following the genocides in Rwanda and former Yugoslavia. The Brahimi report of 2001 was proof of the increasing robustness of such UN missions. With the establishment of an intervention brigade in 2013, the UN mission MONUSCO in Congo has undergone another change. This intervention brigade is a combat unit for the military neutralisation of armed groups, which uses armed force offensively and not just in self-defence on the side of the government and is therefore no longer impartial. It is no longer a UN peacekeeping mission, but an intervention at the invitation of the government. Due to the annual extension of the mandate over the last ten years, it can no longer be considered an exception. A similar picture emerges for the UN mission MINUSMA in Mali, which has been fighting terrorists since 2016. The UNMISS mission in South Sudan has

also changed its character as a peacekeeping mission with the deployment of the Regional Protection Force (RPF) in 2016. However, all three of these missions have not brought stability to the region. UN peacekeepers should therefore no longer be deployed as combat troops. This would jeopardise the meaning and purpose of UN peacekeeping missions, which would therefore have to be returned to their original operational principles.

Philipp Janig from the University of the Federal Armed Forces Munich (Germany) analysed the freezing of Russian central bank assets by the EU, the G7 states and Switzerland in their respective territories. These assets, totalling around 300 billion €, were blocked by state executive and legislative measures, but neither frozen nor expropriated. This merely temporarily prevents trade of these assets. The question arises as to the compatibility of these measures with the principle of state immunity. The teleological interpretation argues in favour of a broad application of state immunity. For the protection of the sovereign equality of all states, it is irrelevant which of the three state powers has issued coercive measures against the assets of a foreign state. The opposing view argues, with reference to state practice, that state immunity should only be observed in the context of court proceedings, but not in the case of measures taken by the executive and legislative powers. Janig himself takes a mediating view. According to this view, state immunity applies in principle, but exceptions should be possible in the case of extrajudicial coercive measures to prevent further violations of international law. There are more far-reaching approaches to compensating Ukraine. Firstly, the USA, Great Britain, and Canada propose confiscation and expropriation. Secondly, the EU recommends temporary active management of these assets in order to transfer the profits to Ukraine. Thirdly, certain member states of the EU pleaded in favour of a special profit tax on these assets. The countries of the Global South are very reluctant to take such far-reaching measures, even though most of them have condemned Russia's attack on Ukraine as a clear breach of international law at the United Nations General Assembly. The German Federal Foreign Office is also very sceptical about the use of these assets for reparations purposes, in contrast to large parts of the EU. It is possible that the judgement of the European Court of Human Rights (ECtHR), which obliges Russia to pay Georgia around 130 million € for the 2008 war (ECtHR 2023), could become the benchmark for future confiscations in favour of Ukraine.

Ida Asscher from the University of Leiden (Netherlands) spoke about the revocation of nationality in order to deny terrorists and their family members re-entry. In this way, the states wanted to get rid of their obligation to accept their nationals at any time. Such a withdrawal of nationality is only possible in the case of multiple nationalities, as international law prohibits the deliberate creation of statelessness. Overall, there are only a few cases. However, proportionality must also be maintained from a human rights perspective. The deprivation of the effective nationality is disproportionate. It would be unreasonable to simply shift responsibility to the other state by withdrawing the effective nationality, especially if it does not have the necessary capacities to deal with such radicalised offenders. From a security point of view, there is also a particular responsibility of states planning to withdraw the nationality, especially if the reintegration of the nationals in the alienated country of origin threatens to fail and an export of terrorism is imminent. For Clara van Thillo

from the KU Leuven (Belgium), it is a matter of justice to eliminate statelessness, which affects an estimated 10 to 15 million people worldwide and entails considerable disadvantages. Traditional international law is too state-centred and follows a technical approach. It needs to be expanded to include a human rights approach that places those affected more at the centre. This is because they are exposed to a wide range of discrimination due to their insecure legal status. The right to a nationality is still underdeveloped in international law.

5 Conclusion

In the final discussion, Mathias Forteau from the United Nations International Law Commission (France) said that it was ultimately necessary to translate fairness into concrete legal norms. The legal institution of equity was better suited to this, as it already had a basis in international law and did not have to be applied praeter legem against it. However, the question arises as to whether the associated shift of tasks away from the states as standard-setters and towards the courts is actually a good thing. According to Fuad Zarbiyev from the Graduate Institute of International and Development Studies in Geneva (Switzerland), international law is part of the world and it is not fair. He also pointed out the special responsibility of science. Colonialism, for example, was justified by former international lawyers with reference to the lack of civilisation of the subjugated peoples. Scientists from the global South should also be given a greater hearing at Western law faculties, he said, as anything else would be an epistemic injustice. It is impossible to say whether international law is fundamentally just or unjust, said Surabhi Ranganathan from the University of Cambridge. Both are true. For all its shortcomings, however, international law always carries the promise of fairness. Its incremental achievement of goals through the means of law is preferable to a radical enforcement of goals; the latter is much more difficult and could jeopardise the stability of the entire international legal system.

The next annual conference will take place on 5 and 6 September in Vilnius, Lithuania, on the topic of "Technological Change and International Law".

Supplementary Information The online version of this article (https://doi.org/10.1007/s12399-024-00986-8) contains supplementary material, which is available to authorized users.

Dedication I dedicate this report to the loving memory of Hubert Jörg (7.1.1945–23.10.2023).

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