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**Values and Power Relations –
The “Disillusionment” of International Law?**

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Values and Power Relations – The “Disillusionment” of International Law?

Alain Pellet¹

Thomas Franck Lecture at Humboldt-Universität zu Berlin, 13 May 2019

Let me start with two personal notes.

When Professor Zimmermann asked me whether I would be eager to give a lecture in Berlin, quite a long time ago (always difficult to fix a date...), I had enthusiastically said yes: I like Germany and very specially Berlin where I count many friends. But he had not told me – or, maybe I had not realised at the time – that this lecture would be part of a series of lectures in the memory of my dear and mourned friend Tom Franck. This makes this event particularly moving for me.

My first contact with Tom was through a letter to the editor-in-chief of the *American Journal of International Law*, as he then was, where I complained about the complete neglect of American scholars for foreign legal literature² – the picture has not improved since then! Following this, the first time I met him in the flesh was on the occasion of one of his visits to Paris some time later. He already was a very renowned and well known international lawyer; I was a young professor who had just started his career as counsel before the ICJ in the case of *Nicaragua v. the USA* and I was very excited to meet the great professor. Although he was a great man, I discovered a very accessible person, full of kindness and humour. We first spoke French – after all he was Canadian – but rather quickly I switched to English and it is only much later that he told me how scared he had been with me not recognising as a real French his mixture of *québécois* and British Columbian English. This has not prevented him to, very soon, become close friend with my wife and myself and we remained so until his death.

Besides this, he was a great scholar combining a perfect command of the techniques of international law with an unrivalled moral sense. Hence, the main line of his academic work is well described by the title of one of his masterpieces, his general course at The Hague Academy “Fairness in the International Legal and Institutional System”³.

The second personal note relates to a recent conference held last month in Geneva for celebrating the ILO hundredth anniversary. On this occasion, both Laurence Boisson de Chazournes and myself were invited, with some others, to participate in the final round table entitled “What

¹ Professor em. University Paris Ouest Nanterre La Défense; with thanks to Dr. Jean Baptiste Merlin, consultant in international and investment law, researcher (CEDIN Paris Nanterre) for his assistance in the preparation of this text.

² Alain Pellet, “Correspondence to the Editor in Chief”, *AJIL*, vol. 82, 1988, pp. 331-332.

³ Thomas M. Franck, “Fairness in the International Legal and Institutional System: General Course on Public International Law”, *Recueil des cours*, vol. 240, 1993-III, pp. 9-498.

future holds: Are international normative organizations still relevant?”. A good question but to which, I believe, my very good friend Laurence gave a bad answer; to summarise, she said: “Indeed there is a crisis of international law – a crisis which weakens the influence of international organisations, but they can ‘re-enchant’ international law since the real issue is the disillusion of the public towards international law”. This gave me the idea of the somewhat intriguing title of this conversation: I think that, in effect, there is disillusion *vis-a-vis* international law; however I don’t believe that this disillusion is fundamentally that of the public opinion since, unfortunately, I have the feeling that there has never been great illusion or to take Laurence’s words “enchantment” for international law – just think of the energy we have to deploy in order to convince our students of the legal character of international law. And I certainly do not share the view that international organisations have the power to “re-enchant” international law: they don’t have a magic wand as rightly observed by Pascal Lamy, the former Director-General of the WTO – another good friend of mine, who rightly added in this context that success of an international organization in reaching its objectives ultimately relies on good faith cooperation between member States, not on magic.⁴

Now, it cannot be doubted that there is a crisis of international law. It has been made particularly apparent with President Trump’s offensive against multilateralism, but its roots are probably much deeper.

I have been involved in international law for about 50 years, and I have heard for almost as long that international law is in crisis. It was said to be so as it got shaken by the new States born out of the decolonization process when I first became interested in the field in the second half of the 1960s. It was still so when Prosper Weil in his famous pamphlet on relative normativity referred to the “pathology of the international normative system” in the early 1980s.⁵ After the ephemeral euphoria of the first half of the 1990s, it was again so, for other reasons, when the United States attacked Iraq and, less conjuncturally, because of globalization and the new understanding of international law that it has imposed. But I do think that it is even more than ever in crisis today with... there is ample choice: the systematic demolition of the post-war international order by Donald Trump, the dubious annexation of Crimea by Russia, the refusal of several States (China, Colombia, Croatia) to respect judgments or arbitral awards that prove them wrong, etc.

As Jean-Marc Sauvé, the former Vice-President of the French *Conseil d’État*, said recently in a remarkable speech to the European Society of International Law: “Our time seems to mark a double rupture: the crisis is no longer punctual or periodic, it has become permanent; it no longer enlightens us on the meaning of an evolution; it has become a source of indecision, disorder and uncertainty as to its causes and effects, its diagnosis and its remedies. Crises are no longer as obvious as before in the post-crisis horizon. This double rupture is undoubtedly due to a profound shaking of our conception of progress and individual and collective identities. Today we are confronted with the vertigo of an endless, unrestrained and limitless crisis.”⁶

⁴ WTO, Statement to the media by Pascal Lamy upon taking office on 1 September 2005, available at https://www.wto.org/english/news_e/news05_e/dg_lamy_1sept05_e.htm; see also Opening Ceremony, Ministerial Conference, Sixth Session, Hong Kong, 13 December 2005, available at https://www.wto.org/english/news_e/sppl_e/sppl15_e.htm.

⁵ Prosper Weil, “Towards Normative Relativity in International Law?”, *American Journal of International Law*, vol. 77, 1983, p. 413.

⁶ Closing address by Jean-Marc Sauvé, Vice-president of the French Conseil d’État, at the 22nd Annual Conference of the European Society of International Law (ESIL) held in Riga in Latvia from 8 to 10 September 2016 (<http://english.conseil-etat.fr/Activities/Press-releases/How-international-law-works-in-times-of-crisis>).

Does all this mean that international law has come to an end? I don't think so. On the contrary in a way: most threats to it are rooted in the exacerbation of sovereignty; yet, contrary to a widespread belief, sovereignty is not incompatible with law but makes it absolutely necessary; it is the very concept at the origin of *ius gentium*. Either a single power is capable of completely dominating the world and then, yes, farewell to international law in favour of a global State without any external counterweight, or sovereign States - equally sovereign States - continue to coexist and then, unless they resort to war (which would be suicidal for humanity if it were to occur between great powers), law is indispensable to ensure their coexistence through a certain legal order.

What kind of legal order? Here probably is the very effect of the ongoing crisis. International law is, and indeed will be, more indispensable than ever but it appears to be evolving rapidly into a largely inter-States legal order, apparently looking like the one described by Vattel in the early years of the 18th century, and certainly a more "inter-sovereigns" order, less multilateral, with greater emphasis on new and "raw" power relations: the United States weakened (but far from defeated) by their denial of the less unjust order of which they were the main founders in 1945, in the name of a demagogic slogan – America first – and by their attempt to project their own law beyond their borders; China weaving its web by exalting State sovereignty for the greater benefit of its own through the "Belt and Road" initiative; and the others, whether it is Putin's Russia, Modi's India, or lesser lords – but just as worrying (and first and foremost regional powers such as Saudi Arabia or Iran) – by trying to take advantage of the new Cold War to make their way between the two giants who more than ever practice a somewhat obscene clientelism; as well as Europe, swarmed by populism, which scares itself with threats of exits and plays "colin-maillard" or "Blind Man's Bluff" with migrants...

This exacerbated sovereigntism is not only deployed in the international order. It also has an impact within States themselves: leaders flatter peoples' nationalism, plant the seeds of populism and maintain the "migrant crisis" even as the flow dries up. "Illiberalism" flourishes within the very heart of the "free democracies of Europe"; dictatorships have nothing more to fear; the duty to intervene died long ago and the responsibility to protect, which seemed more realistic and received a minimum consensus, is, at the very least, in a bad shape.

And that's not all: while States play these dangerous games, the planet is dying. Despite the increasingly distressed warnings of scientists, the irrefutable evidence of the degradation of the environment and its dramatic effects on climate, biological diversity as well as, ultimately, the very survival of humanity, nothing stands in the way of the financial appetites of large corporations and hedge funds. In the same vein, inequalities are increasing and are likely to become a factor of instability in the long run.

In the meantime, what are lawyers doing? What are we doing, we internationalists?

French original: «notre époque semble marquer une double rupture: la crise n'est plus ponctuelle ou périodique, elle est devenue permanente; elle ne nous éclaire plus sur le sens d'une évolution; elle est devenue source d'indécision, de désordres et d'incertitudes quant à ses causes et ses effets, à son diagnostic et ses remèdes. Les crises ne s'inscrivent plus avec autant d'évidence qu'auparavant dans l'horizon d'un 'après-crise'. Cette double rupture tient sans doute à un ébranlement profond de notre conception du progrès et des identités individuelle et collective. Nous sommes aujourd'hui confrontés au vertige d'une crise sans fin, sans ordre et sans limite.» (<http://www.conseil-etat.fr/Actualites/Discours-Interventions/Comment-le-droit-international-fonctionne-en-temps-de-crise>).

We think and we write – and indeed it is part of our job. But I believe that not all doctrinal views are equal. In my opinion, their coherence is less important than their realism, their intellectual appeal less important than their usefulness in enabling legal rules to provide the services expected of them. However, when we read the writings of some of our colleagues, we think that they might be better off “doing law” seriously as practising lawyers rather than simply offering a purely intellectual critic. Indeed, there are doctrines and doctrines. There are those that build by striving to facilitate and strengthen the role of law as a tool for the management and pacification of international society as opposed to those that destroy and deconstruct, an exercise that can be fun, perhaps even intellectually stimulating, but which is quite futile and dangerous because it challenges the very credibility of the law by striving to deny its utility or even its very existence.

Some of our colleagues – and it has become an influential and attractive trend, especially among young internationalists – indulge in sterile “navel-gazing” by denouncing the turpitudes (supposed or real) of the small world of internationalists (of which they are part or aspire to become part...): “new stream” and the new critical studies are scarcely interested in the substance of the law but only in criticising those who make or study it. Others, though fewer, use the law as an instrument to defend national and nationalist positions – I think, among others, of the “New Haven School” but we can also observe the growth of a Chinese group of international lawyers who develop more or less subtle analyses in defence of China’s imperialism. And then there is the so-called main stream, which strives to present the law as it is and to make it serve the purposes defined by the founders of the United Nations in Article 1 of the Charter.

This current is itself divided into two main orientations which, to put it simply, can be defined as, on the one hand, the voluntarist positivism whose supporters assert, with more or less nuances, that international law is reduced to the expression of the will of the State, and, on the other hand, the legal objectivism which is also intended to be positivism. Its supporters intend to describe the law as it is, but they affirm that the force of the law, or if one wants to explain the legal nature of its norms, must be sought outside the law itself. At this stage, thousand flowers bloom and jus naturalists or defenders of sociologist objectivism like Georges Scelle can be classified among objectivists as well as Marxist theorists.

I know that it is not very fashionable today to appear as being Marxist or Marxian. However, notwithstanding the horrific consequences of the communist ideology during the last century, I maintain that Karl Marx, although clearly not very well informed about legal technicalities, probably gave the best explanation of the formation of legal rules. They are part of what he called the “superstructure”, that is the juridico-political institutions, the State, the law, etc., resulting from the “infrastructure”, that is the economic structure of society. As Engels put it, “the economic structure of society always forms the real basis from which, in the last analysis, is to be explained the whole superstructure of legal and political institutions, as well as of the religious, philosophical, and other conceptions of each historical period.”⁷ In substance, you may recognise here a good reflection of the relations between what lawyers call in their jargon “material” and “formal” sources of the law.

This being said, whether “pure positivists” like it or not, a fundamentally unjust right – by which I mean a right felt as such in a given society at a given time (I do not believe in immanent fairness) – is simply not law. And I am convinced that a rule perceived as deeply unjust will

⁷ Friedrich Engels, *Anti-Dühring* [1878], Foreign Languages Publishing House, 1962, p. 41.

eventually lose all effectiveness. Either it will cease to be applied; either it will be replaced by another more in line with the needs – and values (but are values anything other than felt needs?) – of the society in question; or it will fall into disuse and lose all effectiveness; or a rule will be “invented” to make up for a lack of positive law.

In other words, there is law if, and only if, the norms invoked correspond to social needs, in a given society, at a given time. The law is, and is only, a tool of social management, making it possible to satisfy social needs. And it can only play this role if the applicable rules are perceived as legitimate, that is, as defined by the *Dictionnaire Salmon de Droit international public*, if they conform “to values considered essential by the environment in which they are situated”,⁸ at the time this assessment is made. As Manfred Lachs pointed out: “In law we must beware of petrifying the rules of yesterday and thereby halting progress in the name of process. If one consolidates the past and calls it law he may find himself outlawing the future.”⁹

Coming back to my Marxian perspective – even if it is tainted or counter-balanced or combined with a value oriented approach: while it is hardly deniable that the raise of classical capitalism engendered both the State as the dominant institution regulating social relations between human beings, and, consequently, international law as a means of ensuring coexistence between these sovereign entities, the new capitalism, dominated by financial considerations, and characterized by the transnationality of capital flows, data, and, in part, the fluidity of the movements of persons, cannot fail to have consequences on the applicable legal rules – and it has. In other words, I do not think that the return of sovereignism (or call it “unilateralism”) will completely – maybe not even partially – defeat the globalization of the world economy that marked the end of the 20th century and the beginning of the 21st century. Therefore, the most likely development I think we can expect will be the coexistence of two – I don’t know if we should say “legal orders”, perhaps more properly (and prudently vaguely) two “legal worlds”... . On the one hand, an inter-State law brutally regulating political relations between human groups whitewashed by nationalism; on the other hand, a transnational or “a-national” law regulating economic relations between private as well as public interests.

There are, I believe, two obvious victims – of very different nature – of this foreseeable evolution: the human being on the one hand, the certainty and effectiveness of the rule of law itself.

Let me say a few words first about this second collateral victim of the recessive situation of international law as it stands in 2019: legal certainty and the binding nature of the law.

I have always been a strong supporter of soft, or maybe better say, flexible law. It facilitates consensus-based compromises and, regardless of what is usually said, it is well constituted by *norms*: a norm does not necessarily lead to obligations, it indicates what is the normal behaviour that is expected of its recipient. And it does not seem obvious to me that a flexible standard is always (probably not usually) less effective than a hard rule: is it really obvious that a rule contained in a treaty that does not provide for any monitoring mechanism will be more effectively respected than a recommended standard whose implementation is subject to periodic monitoring?

⁸ Jean Salmon, *Dictionnaire de droit international public*, Bruylant, Bruxelles, 2001, p. 644 [original in French: «à des valeurs jugées essentielles par le milieu dans lequel elles se situent»].

⁹ Judge Manfred Lachs, President of the International Court of Justice, Commemorative Speech at the United Nations General Assembly, 28th session, 2151st plenary meeting, 12 October 1973, in A/PV.2151, p. 4, par. 36.

Moreover, regardless of how one may view the benefits of soft law, its use is inevitable in the current context of a return to sovereignty combined with the ever tightening net of interdependencies among all human societies. Technical progress, the shortening of time and distances, the economic unification of the world (the famous “globalization”), the (very relative) “death” of ideologies, the “consciousness of the finiteness of things” (according to an expression of Georges Abi-Saab)¹⁰ are all factors that can explain the birth of a “still darkened consciousness of what is common” (to borrow this time an expression of Monique Chemillier-Gendreau)¹¹. Flexible law is the expression of this “still darkened consciousness” while preserving the sacrosanct sovereignty of the State.

However, even if soft law is in line with the current state of international relations and as effective as it is in many circumstances, it is not appropriate or advisable in all situations. For example, there should be no “procedural soft law” despite the ICJ’s stupid and hypocritical invention of “Practice Directions”. Less anecdotal is the inappropriateness of soft law in terms of human rights or, more precisely, concerning the protection of civil and political rights because, for their part, economic, social and cultural rights, which are difficult to strictly enforce, are, in contrast, by necessity, a privileged area of flexible law.

This takes me to the second predictable victim of our time of recession of international law (recession by opposition to progress): I mean the human person, who, willy-nilly, had made a spectacular breakthrough in the public international law of the twentieth century, of which he or she had become a subject, a direct holder of rights and obligations, thus piercing what is called the “State veil”. And the good humanist and optimistic minds, as I tend to see myself (even if I am not what I call a “human rightist”), were enthusiastic about the legal advent of an international community whose interests transcend those of nation States in favour of those of humanity as a whole. I am thinking of *jus cogens*, of the notion of ‘international crime’ even if the expression has not flourished in positive law but the thing manifests itself there, or of the responsibility to protect (the famous R2P) that I mentioned earlier, which had somehow found its way to positive law through at least Security Council resolutions extending the notion of threat to the peace or through the chaotic development of international criminal law.

Although it is still only a creeping threat, it seems to me more than likely that there is a risk of a “dehumanization” of international law. And there are already signs of this evolution: the judgments of the European Court of Human Rights are more and more challenged by States whose responsibility is found to be entailed – and not only by Putin’s Russia or Erdogan’s Turkey, but also by the UK, this cradle of democracy and human rights; States withdraw from the International Criminal Court or threaten to withdraw from it; no major new human rights convention has been concluded since 2006; and many of the flagrant violations that were reportedly the subject of outraged reactions still ten, maybe even five years ago, are barely met with more than mere lip-service reactions or eloquent silences. I am also thinking of the questioning of the exclusion of criminal responsibility of State leaders, as evidenced by the rather scandalous attitude of African countries towards Omar Al-Bashir after the issuance of his arrest warrant by the ICC, but also of the debates of the Sixth United Nations Commission on the subject during the discussion of the ILC’s

¹⁰ «La conscience de la finitude du monde» (G. Abi-Saab, «Cours général de droit international public», *Recueil des cours*, vol. 207, 1987-VI, p. 90).

¹¹ «La conscience encore enténébrée de ce qui est commun» (Monique Chemillier-Gendreau, *Humanité et souverainetés – Essai sur la fonction du droit international*, La Découverte, 1995, p. 281).

reports; it is true that the ICJ had encouraged, if not prompted, this regression by what I consider one of the most unfortunate judgments it has ever rendered in the *Arrest Warrant* case.

I once warned against the excesses of what I had called the “*droits-de l’hommeisme*” (“human rightism”), which I defined as “the ‘stance’ that consists in being absolutely determined to confer a form of autonomy (which, to my mind, it does not possess) on a ‘discipline’ (which, to my mind, does not exist as such): the protection of human rights”.¹² And I still think that we must avoid mix-ups of issues: “While I believe that international protection of human rights is a fine cause and, for our present purposes, an essential ingredient of contemporary international law, I consider at the same time that human rights activism has no place in international law scholarship”.¹³ Nevertheless, human rights activism – for which I have the utmost respect – has had a profound influence on the humanization of contemporary international law. When clouds pile up on human rights, as is the case today, this activism is more necessary than ever.

And it is not only in the field of human rights that the recessive machine is on the move. It would be completely inconceivable today that treaties such as the UNCLOS or the Marrakech Accords which completed the post-war world economic order in 1994 could be signed today. They are cheerfully flouted, the first by China in its Southern Sea, the second above all by the United States, which succeeds in paralysing the WTO dispute settlement system in rather inglorious ways. And see the difficulties encountered in implementing the Paris Climate Agreement or the mistrust of the Global Compact for Safe, Orderly and Regular Migration, which is, however, not binding on the signatories. I have also in mind the misadventures of the Trans-Pacific Partnership Agreement (TPP) which was eventually replaced by the Comprehensive and Progressive Agreement for Trans-Pacific Partnership which finally entered into force at the end of 2018 without the USA participating. Similarly, the negotiations over the Transatlantic Trade and Investment Partnership (TTIP) between the United States and the European Union have stalled both because Trump initiated his trade conflict with the EU and because of significant opposition among European public opinions. For its part, the Comprehensive Economic and Trade Agreement (CETA) between the European Union and Canada seems to know a somehow better fate, although it is not without controversies either. As you well know, although it was signed in 2016 and ratified by the European Parliament in 2017, it is since then being provisionally applied pending ratification by all EU Member States and, despite the opinion of the European Court of Justice that the dispute resolution mechanism provided for in the treaty complies with EU law, it remains controversial with some member States. The time for ambitious major treaties might have passed.

The cases of TPP, TTIP and CETA are particularly interesting because they show that the crisis we are talking about is not limited to traditional aspects of international law but also extends to what I have called transnational law in the sense that, in all three cases, it is the aspects relating to international investment law and international trade law that have caused the most significant obstacles. This is all the more worrying since trade and economic relations have traditionally been a strong – if not the main – driver for developing international relations. Anyway, the halt, or recession, is not limited to economic relations. Think, for example, of the brutal denunciation of

¹² A. Pellet, “‘Human Rightism’ and International Law”, Gilberto Amado memorial lecture delivered at the United Nations in Geneva on 18 July 2000 and available at <http://pellet.actu.com/wp-content/uploads/2016/02/PELLET-2000-Human-rightism-and-international-law-G.-Amado.pdf>, p. 3 (text also published in *Italian Yearbook of International Law*, 2000, vol. 10, pp. 3-16 (in English) and *Droits fondamentaux*, n° 1, 2001 p. 167-179 (in French)).

¹³ *Ibid.*, p. 4.

the United States from the 1987 Intermediate-range Nuclear Forces (INF) Treaty with Russia or of their disastrous withdrawal from the Joint Comprehensive Plan of Action which has given rise last week to a partial suspension of its own commitments by Iran, or, more generally, of Mr Trump's denunciation mania.

That being said, the situation is serious, but not necessarily desperate.

First, as I said, the more we talk about sovereignty, the more the need for law is felt. I know, this seems paradoxical; in my opinion, it is simply logical. Contrary to a preconceived and stupid idea, sovereignty, in the international order in any case, is in no way an absolute concept from which it would follow that the holders – the States – have the right to act as they see fit without any limitation. First, if sovereignty goes hand in hand with rights, it also imposes obligations on States (an idea that is dear to me, but it is not my intention to develop it today). Secondly, it is precisely *because* they are sovereign but equal that States need international law, which establishes the framework for their coexistence: they have all rights, indeed ... but only those that are compatible with the equal rights of all other States.

But there is something more that I can illustrate with starting with an anecdote. Some time ago (but still at least two or three years ago) a Vietnamese senior official told me: "China will never be a great power comparable to the United States". I replied, "it's not that bad a start". "But", he told me, "unlike the Americans, the Chinese have not understood that instead of despising international law they should use it; they seek to be feared; the Americans have known how to be loved and that's how they could become a true planetary power." There is probably a fairly large amount of truth in this and it is indeed true that Chinese soft power does not, by far, currently match that of the United States. But the Chinese are learning fast and, for some time now, there have been significant shivers no doubt heralding a partly new posture.

In our field, these shivers coming from China are reflected in particular in a lesser allergy to international arbitration. Oh, certainly, time does not yet seem to be accepting the ICJ's competence and the big stick and the check-book and usury policy remain the privileged instruments of Chinese foreign policy. But, nevertheless, the ICSID now lists three arbitrations involving China as a Defendant since 2011. The first, which dates back to that year 2011, was interrupted in 2013 by agreement of the parties.¹⁴ But in the next two cases introduced respectively in 2014¹⁵ and 2017,¹⁶ China apparently participated normally in the proceedings. In addition, it seems that China introduced (as Claimant therefore), probably in early 2014, a case against Ukraine for breach of a loan-for-grain agreement before the London Court of International Arbitration – I say "it seems" because, as a Chinese commerce attaché at the China-Ukraine strategic partnership forum in May 2017¹⁷ remarked "money loves silence".¹⁸ And, gradually, China is struggling to comply

¹⁴ ICSID, *Ekran Berhad v. People's Republic of China* (ICSID Case No. ARB/11/15), case registered on 24 May 2011 and discontinued on 16 May 2013 on request of the parties (Malayan investor; China-Malaysia BIT and China-Israel BIT).

¹⁵ ICSID, *Ansung Housing Co., Ltd. v. People's Republic of China* (ICSID Case No. ARB/14/25), award rendered on 9 May 2017 (China-Korea BIT).

¹⁶ ICSID, *Hela Schwarz GmbH v. People's Republic of China* (ICSID Case No. ARB/17/19), case registered on 21 June 2017 (China-Germany BIT).

¹⁷ See communiqué on the event on the website of the Economic and Commercial Counsellor's Office of the Embassy of the People's Republic of China in Ukraine, <http://ua.mofcom.gov.cn/article/c/201706/20170602594337.shtml> (in Chinese language).

with the transparency rules that Western countries and international financial institutions are trying to impose on it,¹⁹ so much so that Ms Lagarde, the Managing Director of the IMF, said: “The new debt sustainability framework [adopted by the Chinese Government²⁰] that will be utilized to evaluate [Belt and Road Initiative] projects is a significant move in the right direction.”²¹ This, still in its infancy, integration of the world’s second largest economic and probably military power into the international legal game undoubtedly shows that China has understood that the legal isolationism of the United States offers it an opportunity to use multilateralism to its advantage. Notwithstanding the likely cynicism in this calculation, this may be promising in the long term. In any case, in the immediate term, it also shows that, decidedly, the law is a tool that can increase national influence at the international level.

That said, it is paradoxical, to say the least, that we should look to China for some encouraging signs of confidence in international law! Fortunately, there are other reasons for hope – even though also rather limited.

First, China is not alone in relying on judicial or arbitral dispute settlement mechanisms, which, apart from the WTO Appellate Body crisis, are now relatively prosperous. Whatever the ICJ Judges may think, the Court is not overwhelmed by cases, but it knows many more than it did in the past. It is often complained that the World Court is used for political purposes. So what? It is a way of recognizing the weight of law in international relations. Indeed, I can witness “from inside” that even if they have only limited illusions about the immediate effects that the Court’s decisions may have in their cases against the United States, Iran or Palestine consider that these decisions can strengthen David against Goliath, just like Nicaragua did more than 35 years ago. Similarly, it seems to me quite significant that Somalia, one of the poorest countries in the world and facing extreme problems in all respects, has brought before the ICJ its dispute with Kenya over the extension of their respective maritime areas. And, however discredited investment arbitration or commercial arbitration may be in some sectors, they are doing quite well judging by the number of cases handled and the fees of specialized lawyers and law firms.

Secondly, even if I am not very optimistic about the possibility of concluding new multilateral treaties in important areas, it is interesting to note that, despite the obstacles, the draft comprehensive conventions on terrorism or nuclear power continue to be discussed, and it is

¹⁸ See e.g. Dong Yan, “Ukraine and Chinese Investment: Caution Amid Potential?”, *Eurasianet*, 7 September 2017, <https://eurasianet.org/ukraine-and-chinese-investment-caution-amid-potential>; SCMP Reporters, “China sues Ukraine for breach of US\$3b loan-for-grain agreement”, *South China Morning Post*, 27 February 2014, <https://www.scmp.com/news/china/article/1435976/china-sues-ukraine-breach-us3b-loan-grain-agreement> or Frédéric Lemaître, «Il n’est pas exclu qu’à terme, le piège de la dette se referme sur la Chine», *Le Monde*, 7 May 2019, https://www.lemonde.fr/idees/article/2019/05/07/il-n-est-pas-exclu-qu-a-terme-le-piege-de-la-dette-se-referme-sur-la-chine_5459168_3232.html.

¹⁹ See *ibid.* or Marie de Vergès, «La Chine priée de revoir ses prêts aux pays vulnérables», *Le Monde*, 6 May 2019, https://www.lemonde.fr/economie/article/2019/05/06/la-chine-prie-de-revoir-ses-prets-aux-pays-vulnérables_5458817_3234.html.

²⁰ See “Debt Sustainability Framework for Participating Countries of the Belt and Road Initiative”, 25 April 2019 (issued by the Ministry of Finance of the PRC) available at <http://m.mof.gov.cn/czxw/201904/P020190425513990982189.pdf>, recognizing in particular that “[d]ebt sustainability needs to be taken into account when mobilizing funds to finance the BRI cooperation for sustainable and inclusive growth.”

²¹ “BRI 2.0: Stronger Frameworks in the New Phase of Belt and Road”, speech by Christine Lagarde, IMF Managing Director, Belt and Road Forum, Beijing, April 26, 2019, <https://www.imf.org/en/News/Articles/2019/04/25/sp042619-stronger-frameworks-in-the-new-phase-of-belt-and-road>.

not impossible that a convention on crimes against humanity may emerge on the basis of the ILC draft articles to be adopted this year on this subject.

I would not go so far as to say that the glass is half full. At least it is not completely empty even if you take a still picture of the current situation. But a movie going back in time to the pre-1945 situation in order to compare it with the present situation allows for more optimism. Indeed, so much progress has been made!

The prohibition of the use of armed force has not prevented the persistence of many open conflicts; since 1945, however, they have been limited, often within a single State (however atrocious they may be – whether in Syria, Yemen or Sudan, not to speak of the Yugoslav or Rwandese genocides). A document published in 2017 by the Peace Research Institute in Oslo shows that the number of international conflicts has fallen by more than half since the end of the Second World War, even though it is true that the number of non-international armed conflicts has increased by more than three times²² and they quite often involve significant external interventions.

The second half of the XXth century was probably the time of the World's worst humanitarian disasters (the Shoah, Gulag, the Great Leap Forward and the Cultural Revolution in China), but it was also the time when the World has equipped itself with legal instruments to deal with these disasters – at least when political will and balance of power permit. The Security Council can consider a humanitarian disaster as a threat to peace and those responsible for the worst international crimes are no longer guaranteed impunity even if they all too often they escape the punishment.

No State can claim today that the protection (or contempt) of human rights falls within its 'reserved domain'. Since 1945 – and this remains true today – Goebbels' speech to the League of Nations following Franz Bernheim's petition is not conceivable and no State can publicly claim to practice torture as a system of government – even if too many of them do not deprive themselves of it in the secrecy of their gaols and police stations.

There is no international court with jurisdiction to settle all differences between States. But while the World Court has long remained the only tribunal of its kind, the proliferation of international courts and arbitral mechanisms now offers a wide and diversified range of possibilities for the legal settlement of international disputes; long live forum shopping!

Perhaps we can also put on the right side of the balance the emergence of international criminal law and the deployment of universal jurisdiction which, *cahin-caha*, help to consolidate the feeling of the existence of an international community, even if much remains to be done, particularly with regard to crimes against terrorism and if the future of international criminal law seems very uncertain.

Despite the irresponsible attitude of a few States, starting with the most powerful among them, "the international community as a whole" has finally taken the measure of the challenge, vital for our planet, of defending our environment. Concrete measures are still awaited, but the

²² Kendra Dupuy, Scott Gates, Håvard M Nygård, Ida Rudolfson, Siri Aas Rustad, Håvard Strand and Henrik Urdal, "Trends in Armed Conflict, 1946-2016", *Conflict Trends* 02/2017, Peace Research Institute Oslo (PRIO), 2017, p. 2, available at <https://www.prio.org/utility/DownloadFile.aspx?id=1373&type=publicationfile>.

principles have now been established and it is to be hoped that they will eventually be implemented under the pressure of public opinion.

So, I have done my utmost to fill the glass containing international law with the hope that it will not turn into a barrel for the Danaids. Perhaps this is what Laurence Boisson de Chazournes means when she talks about re-enchantment in international law. But words are not enough; deeds are needed.

Law is not an end in itself, it is a means to ends external to it: power and values; power to enforce certain values. As rightly explained by Émile Giraud, a French professor of public law nowadays a bit forgotten, who was, during the war, the Legal Advisor of the League of Nations “the law represents a successful policy” (*une politique qui a réussi*).²³ This is true in both international and domestic law. When power relations turn to the disadvantage of certain values, the legal norms that reflect them weaken or disappear. It is undeniable that in the contemporary world we are witnessing the rise of obscurantist forces carrying beliefs that are incompatible with traditional humanist values. But, once again, there is no magic wand. It is the balance of power that we must try to change, not by unrealistically proclaiming unworkable legal rules, but by taking political action to establish the conditions for real change. To this end, I wonder whether the solution to the problem is not to be found, at least in large part, internally. There can be no gap between the values promoted by international standards and those prevailing within States: if populist doctrines such as Orban’s or that proclaimed by the inconsistent movement of “yellow jackets”, illiberal or frankly dictatorial, nationalist and chauvinist continue to spread as they do today, I have difficulty seeing how contemporary erratic and regrettable patterns in international law will be corrected and we risk continuing to slide down the wrong path. Lawyers, perhaps deploring this, will only be able to acknowledge it. But they are also citizens and as such, perhaps more enlightened than others, they can help prevent this shift. I believe deeply in the virtues of political action on the condition that, as very wisely warned recently by Donald Tusk, the President of the European Council, we keep in mind that “we are not right only because we are right. Our reason must meet people’s needs”²⁴. And it is through improvements in national policies that the international law in which we believe will owe its salvation or its descent into hell.

²³ E. Giraud, «Le droit positif – Ses rapports avec la philosophie et la politique», in *Hommage d’une génération de juristes au Président Basdevant*, Pedone, Paris, 1960, pp. 234. See also: Guy de Lacharrière, *La politique juridique extérieure*, Economica, Paris, 1983, p. 199.

²⁴ Adam Michnik, Jaroslaw Kurski and Bartosz T. Wielinski, “Donald Tusk: «Si les démocraties libérales ne peuvent garantir le sentiment de sécurité, elles perdront»”, *Le Monde*, 10 May 2019, available at https://www.lemonde.fr/international/article/2019/05/10/donald-tusk-si-les-democraties-liberales-ne-peuvent-garantir-le-sentiment-de-securite-elles-perdront_5460465_3210.html [free translation from the French: «nous n’avons pas raison seulement parce que nous avons raison. Notre raison doit répondre aux besoins des gens»].

The Author



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The Kolleg-Forschungsgruppe “The International Rule of Law – Rise or Decline?” examines the role of international law in a changing global order. Can we, under the current significantly changing conditions, still observe an increasing juridification of international relations based on a universal understanding of values, or are we, to the contrary, rather facing a tendency towards an informalization or a reformalization of international law, or even an erosion of international legal norms? Would it be appropriate to revisit classical elements of international law in order to react to structural changes, which may give rise to a more polycentric or non-polar world order? Or are we simply observing a slump in the development towards an international rule of law based on a universal understanding of values?

The Research Group brings together international lawyers and political scientists from five institutions in the Berlin-Brandenburg region: Freie Universität Berlin, Hertie School of Governance, Humboldt-Universität zu Berlin, Universität Potsdam and Social Science Research Center Berlin (Wissenschaftszentrum Berlin). An important pillar of the Research Group consists of the fellow programme for international researchers who visit the Research Group for periods up to two years. Individual research projects pursued benefit from dense interdisciplinary exchanges among senior scholars, practitioners, postdoctoral fellows and doctoral students from diverse academic backgrounds.