

An AGTER Thematic Public Meeting :

“Can International Law contribute to a more equitable global society?”

Summary of the conference/debate organized on the occasion of a
speech by Monique Chemillier-Gendreau,
Tuesday, October 13th 2009 at the Tropical Garden of Paris Campus,
Nogent sur Marne

Monique Chemillier Gendreau explores the reasons behind international law's current inability to construct laws that are not just proclamatory, but executable as well, through a comprehensive reform of international institutions.

Unresolved contradictions in International Law

A law based on the will of states

International law is based on the will of sovereign states, which do not accept any rule higher than their own.

Although the United Nations Charter limits sovereignty by suppressing the most fundamental of the regal functions (recourse to force), it does not significantly challenge the legitimacy of this model. In all other realms, states only conform to international values when they wish to; they are not obligated.

A sovereignty that yields to the market and to liberal capitalist logic

After decolonization, the sovereign nation state became the dominant political model. This contributed to the widespread withdrawal of political control from economic and market spheres. In spite of the proclamation of states' Permanent Sovereignty Over Natural Resources¹, decolonized countries were unable to efficiently exercise control in these areas, and attempts at recovering the benefits of their natural resources did not allow them to redistribute wealth in the ways anticipated.

Investment codes², international arbitration at the ICSID³, and national policies destined to protect foreign investment have consistently allowed the interests of the strongest members of society to take precedence over those of the weakest.

As with Permanent Sovereignty Over Natural Resources, the international recognition accorded to Food Sovereignty will not resolve certain fundamental problems. The solution does not lie in further proclamations of sovereignty.

International law upholds the values of economic and social equity, but it is a law without judges—and is therefore ineffective

In the International Covenant on Economic and Cultural Rights, Natural resource use rights (notably property rights) are framed with great clarity. These rights could easily be adapted to a variety of different situations in which individuals are either subjected to the consequences of land appropriation or excluded from the benefit of resources. But the covenant is lacking clauses of

¹ Fought for in battles from the 1950s onwards, this doctrine is enshrined in a variety of international legal texts with very little normative influence

² National laws dictating the investment conditions that a state is prepared to offer investors

³ International Centre for Settlement of Investment Disputes

judiciary competence that would, for example, invest the International Court of Justice with the power to condemn actors who violate commitments made within this framework, to impute responsibility, and to impose appropriate sanctions and compensations.

'International law is not justiciable' : with this statement, a Swiss Federation judge pardoned the Swiss state for disrespecting a commitment that it had made within the context of the ICESCR to progressively implement free secondary education. This was in response to a parents' association's charges concerning increased school fees.

International relations, as well as relations between states and economic actors, are structured by contractual logic

A contract only involves the parties that sign in the ways that these parties wish to be involved. Moreover, the terms of their commitment are influenced by the power relationships (economic, military, geopolitical) in place at the time that the contract is signed.

Laws stipulated by international treaties are therefore based upon optional justice; in other words, they are based upon a justice that is only convened with the accord of the accused. Many treaties concerning major global issues are signed by only a very limited number of states. Thus, disputes over the application of investment agreements do not interest the ICSID unless they contain a clause that attributes competence to someone and unless both parties seek recourse through arbitration.

The law provides points of reference that help to balance relations between a variety of different actors. It is established by individuals who represent the entirety of the society that will be asked to submit to it. A large range of stakeholders contributes to its elaboration, and when it is violated, sanction is obligatory. There is no legislative equivalent in international law.

Reinvent what is "public"⁴

Awareness of global challenges leads one to contemplate the possibility of a world community based on common values. If these values are to be universally respected, we must implement an obligatory international judicial system that can hold individuals and groups accountable when they violate minimum standards of social and economic equity or undermine the ecological sustainability of human societies.

Can what is 'public' be a common heritage?

In the international oceanic realm, debates about whether or not this concept could be applied to the exploitation of polymetallic nodules (rare and prized mineral resources found on the ocean bottom) have contributed to innovations that aim to benefit all of *humanity* (each time an underwater parcel is exploited by an individual state, an underwater parcel is exploited for the benefit of the global community⁵). But these innovations have been undermined by institutional mechanisms that reintroduce a more market-oriented logic, the management of which has been privatized by some states.

The concept of heritage implies that the bearer of said heritage be known. But can "humanity" be a legal actor? Can it make unanimous decisions about the disposal, and the future, of this heritage? Not unless we establish a global political community endowed with a government (or even a president) elected by universal suffrage. And yet, nothing is more dangerous than concentrating a large amount of power in the hands of one representational body. We must come up with a kind of

4 We have chosen to use the word 'public' here instead of the English words 'common' or 'commons' which do not have the same meaning as the French term 'common,' employed in the original text. When we speak of what is 'public' we are not discussing a group or groups of people, but rather those resources which, because of their global impact and limited nature, must be shared and managed for the benefit of all.

5 United Nations Convention on the Law of the Sea, in effect since 1994

universality that makes room for human diversity.

Reconceptualize overlapping resource rights

Historically speaking, land has only recently become the object of market-based exchange. If one truly considers the question, nothing justifies its exclusive appropriation. Land is the object of complex overlapping usage rights, which societies establish and manage to allow for the coexistence of a large number of users. When one individual or group's usage of the land has obvious consequences for everyone's future, it touches upon the 'public'. Hence the need to define specific common rights which can be superimposed upon private or individual rights.

What should these common values be based on?

- a) International customs are commonly employed as reference points in international arbitration. These must be used as the basis for universal law.
- b) The Vienna Convention on the Law of Treaties has designated the body of fundamental values that we are seeking as "imperative general law". Relations between states, and relations between states and transnational actors, should not depart from this law. But rather than establishing a universal legislator, which poses the aforementioned risks, we must clarify its content using principles that have already been established in a variety of different international contexts (in the United Nations General Assembly, the FAO, etc...).

Civil Society can have considerable influence in these two areas, in particular by helping judges to determine what will be designated as common. In its quest to reinforce the land rights of the weakest members of society, it can rely on both local custom and on arbitrations that are currently underway. It can work to include those aspects of the ICESCR of 1966 which most effectively protect the rights of land users within *imperative general law*, first and foremost by discussing a major aberration in current international law: its optional nature.

Conclusion

NGOs have an indispensable role to play when it comes to sharing international law's potential with the largest public possible. By helping to identify the limits that it must be made to overcome, they can promote indispensable reforms, and encourage the identification of those core values that international law should protect.

The first reform should confer obligatory competence upon international justice. This goes hand in hand with the effort to clarify essential common values. It also implies creating a hierarchy of values emanating from a large variety of sources (such as the Security Council, the General Assembly, various agencies, organizations and commissions of the United Nations, the International Court of Justice, regional human rights courts, international treaties, international arbitration authorities, civil society...). The European Union can certainly serve as a model in the elaboration of this new form of subsidiarity.

If we wish to reinforce the production of these fundamental values, and to imbue them with a large degree of legitimacy, a comprehensive reform of international institutions - in particular of the Security Council and of the United Nations Assembly - is indispensable.

It is only through such efforts to define inviolable common values and establish the rights attached to them - efforts that construct both the global community AND a sense of belonging to that community - that we can hope to move towards an international judicial system that effectively enforces them.

For more information on this topic or on this conference, please consult AGTER's website, www.agter.asso.fr

Translated from French to English : Jesse Rafert.