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Interview with Andrea Kay Bjorklund

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1) *In your field of expertise, could you describe what are the two or three most pressing challenges that you think international lawyers should tackle?*

In my primary areas of study – international economic law and arbitration, particularly investment-treaty arbitration – a great deal of activity is taking place already. Challenges to the legitimacy of investor-state arbitration have inspired the process on reform of investor-state dispute settlement occupying UNCITRAL's Working Group III. The mandate there is to focus on procedural reform, with the most likely innovations being the establishment of a two-tier international investment court or an appellate body. More attention needs to be given, however, to the question of whether the concerns with investment arbitration can be satisfied with procedural innovations only, or whether more robust attention needs to be paid to substantive provisions as well.

The specific issue of remedies for breaches of investment treaty obligations seems to be drawing welcome and long-overdue scrutiny. A great deal of attention has been paid to dispute settlement itself, as well as to certain substantive obligations undertaken by states. Yet the question of remedies has often been overlooked – indeed, it is often deferred in the arbitral process itself, so that there is a second or third stage on quantum that is divorced from the rest of the proceedings. But now increasing attention is being paid, at UNCITRAL and elsewhere, to the bigger topic of remedies, including but not limited to monetary compensation, and to related areas such as the applicability of the doctrine of contributory negligence and the powers (or lack thereof) of tribunals to order remedies aside from the typical award of monetary compensation. This is a welcome development that should improve both general understanding of investment arbitration on the part of critics and the technical capacity of counsel and decision-makers.

Finally, and speaking more generally, concerns about climate change and necessary governmental responses, including the embrace of clean energy, are at the forefront of many discussions about international economic law.

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There is some danger that criticisms of international investment law are leading to a presumption that investment protection is inevitably an enemy of the clean energy transition. This approach risks ignoring the need for private investment to bring about the energy transition, and the contributions that appropriately designed investment protection can make to the energy transition. A modernized Energy Charter Treaty, for example, might well help, rather than hinder, the green energy transition.

2) *What is your opinion about the multiplicity of fora which have a mandate to work on similar issues?*

In the first instance, the idea of multiple fora is not in itself problematic. More minds can create more and more diverse ideas. Indeed, conferring a monopoly on any one institution risks stifling innovation. This assumes, of course, that there are sufficient resources to support the various venues such that all are able to thrive. There could be some circumstances in which too many organizations try to engage that the resources, whether monetary or simply personal, are stretched too thin to function. Even with multiple reasonably functioning fora, however, at some stage – that of implementation, usually – different ideas generated in the different organizations have to be brought together and decisions made about which to prioritize, at least in the short term. This does not mean that the non-selected contributions need necessarily be wasted; they might inspire other solutions in related fields, or be picked up another day.

3) *What would be your recommendation for future work to be started by the ILA in cooperation (or not) with other bodies?*

A project we talked about at the ILA 150th celebration in Paris was that of judicial cooperation. Facilitating a trans-national dialogue between adjudicators has been in discussion for several decades now. Whether in family law matters or in insolvency disputes, we have witnessed the necessity for adjudicators based in different countries and dealing with similar cases, or seated in the same case, to coordinate, discuss and, sometimes, even make decisions together.

Over the same period, we have seen the development of '*juges de liaison'*, i.e. judges that are located in a foreign country to foster cross-cultural and better legal comprehension between the two countries. The network of '*juges de liaison*', which stemmed initially from criminal matters, has developed a broader capacity for judicial cooperation which could beneficially be broadened and strengthened.

More recently there have been calls to work on the overlap between judges and arbitrators on matters such as competition over the exercise of jurisdiction, on the taking of evidence, and on the coordination of provisional measures and like matters.

Exploring ways to expand these innovations and to develop new dialogical techniques is a project the ILA could take on in cooperation with the judicial institutes of various countries, for example, or with law reform organizations such as the American Law Institute.

REPORT ON THE WEBINAR ON MASS CRIMES AND IMPUNITY

Karla Lucero, *PhD Candidate, University Paris Panthéon Assas*

Gathered in Buenos Aires in 1922, convinced of the need for an international criminal court, the members of the ILA proposed a preliminary version of the statutes of a future court. It is therefore not surprising that, as part of the celebrations to mark the 150th anniversary of the association, a White Paper was released, whose title 'Mass Crimes and Impunity' inevitably catches the eye.

Coordinated by Raphaëlle Nollez-Goldbach, the contribution is notable for its methodology. By focusing on procedure, the White Paper opts to build on the existing law. It therefore assesses the effectiveness of the rules as they stand before the International Criminal Court, before concluding with a series of four questions: which powers should the judges have, which procedural time limits should be set, which methods should be used for international criminal investigations and, finally, which role should victims play? These questions and the related operational recommendations were at the heart of the webinar on 12 October 2023, chaired by Professor Leila Sadat.

With regard to the power of the judiciary, the debate quickly turned to the White Paper's proposals for developing a common legal culture. While these were welcomed by the panellists, some stressed the need, in order to maximize the Court's legitimacy, to strike a balance between fostering a common legal culture and taking full advantage of diversity. Subsequently, several speakers agreed on the fundamental role of judges throughout the procedure, and in particular on their importance with regard to reparations, as their role does not end with the conviction.

Procedural time limits also featured prominently in the discussions. Overall, the participants highlighted the factors that lengthen the proceedings before the Court: the number of victims, the need for translation and interpretation, for example. A number of avenues for reflection not mentioned in the White Paper were also outlined. Firstly, the need to raise the issue of excessive delays by considering not only the harm that may be caused to the victims, but also to the defendant acquitted after a long period of detention. Secondly, it is important to temper criticism: while delays are certainly very long, they are no more so than in the domestic courts. One need only think of the *Barbie* and the *Papon* trials. Therefore, while a delayed justice is a form of injustice, it does not mean that good justice is a swift one. The difficulty lies in finding the right balance.

Turning to the third question, and in relation to the White Paper's suggestion that documentary evidence be prioritized, a number of speakers pointed out that documentary evidence is not suitable for all cases. Furthermore, participants were unanimous in asserting that, more broadly, it is essential to resolve the 'evidence problem', the Achilles heel of the Office of the Prosecutor. To achieve that, not only the collection of evidence, but also the procedures for managing the volume of evidence should be improved.

With regard to the role of victims, the speakers began by welcoming the innovations of the International Criminal Court, for example on the issue of children born of rape. However, it is clear to them that there is still a long way to go. In addition to the White Paper's recommendations – including the creation of an international radio station to broadcast hearings and the development of mobile courts –, which were welcomed by the panellists, some stressed the need to take advantage of cross-fertilization, drawing on inter-American case law, for example. However, at least one participant pointed out that the International Criminal Court only deals with criminal law, and that a better place for victims would have to be found elsewhere. He added that, in his view, some of the White Paper's proposals were sometimes humanitarian.

Finally, moving beyond the White Paper, the discussion also provided an opportunity to explore the issue of complementarity between domestic and international courts. While participants felt that complementarity was the best approach, it was essential to strengthen it, build alliances and include in the discussion the improvement of procedures before domestic courts. The webinar also gave participants the opportunity to make their own recommendations. Many of them stressed the need to improve information sharing, but also to involve civil society more and to redress the Court's image of being too remote. Finally, while welcoming the method adopted by the White Paper, at least one participant raised the question of whether it was possible to abandon the holistic approach. Is it possible to think about procedural aspects without incorporating more encompassing questions, related to the legitimacy and acceptability of the institution?

REPORT ON THE WEBINAR ON LAW IN SUPPORT OF DEMOCRACY AND THE RULE OF LAW

Apolline Marichez, *PhD Candidate, University Paris 1 Panthéon-Sorbonne*

On 25 September 2023, Professors Maurice Kamto, Lauri Mälksoo and Arthur Roberto Capella Giannattasio, together with Maria Isabel Cubides, Kwamou Eva Feukeu and Emilie Palamy Pradichit, hosted the webinar on 'Democracy', chaired by Professor Catherine Kessedjian.

The debate opened with the conclusions of the White Paper, presented by its rapporteur, Professor Capella Giannattasio. There was unanimous agreement on one first point: democracy is under threat and it is therefore necessary to strengthen the legal tools to defend it. It was pointed out that the protection of democratic rules is already provided for in a number of binding international legal instruments, but remains undermined by their lack of effectiveness. Nevertheless, the panellists regretted that the White Paper was mainly inspired by Western thinking, and stressed the need to broaden the analysis to include the reflections and the instruments developed on other continents. Another important aspect of the White Paper is its focus on the future. To build the future, we must first analyze the past. The past enables us to understand why democracy has become an issue in international law and to establish the relationship between belligerence and the democratic state. Furthermore, to think about the future, it has been stressed the duty to listen, particularly to the claims of young people, and the duty to understand not only standards and values, but also people, so as not to disconnect the theorisation of democracy and practical issues. The latter reveal in particular the need to reduce social inequalities in order to preserve democratic standards. However, while it is necessary to include social justice in discussions about democracy, this must be done with caution: lack of access to social justice is an argument used by populists against democracy.

Regarding the role that international law can play in the governance of states, the speakers agreed on the need for a global approach to democracy: international law and domestic law cannot be dissociated. We need to build bridges between these two orders, which can influence each other. For example, the Draft Treaty on Business and Human Rights, despite the absence of any major breakthrough, is inspiring national legislation. Such influence is made possible in particular by the pressure exerted by civil society, which is therefore a means of ensuring respect for democratic principles and the effectiveness of international law, even if other tools need to be developed to counterbalance the sovereignty of states.

However, the fundamental difficulty for international lawyers remains the absence of a universal definition of democracy. The discussions highlighted several criteria for identifying a democratic society: respect for human rights, access to justice, freedom of opinion and assembly, respect for the rule of law, the distribution of power, the freedom to choose leaders through free elections, the possibility of change, the participation of the population and, finally, the recognition of political parties and the role of civil society. The importance of identifying common criteria is essential, as it enables to reject the idea that all states are democratic in their own way.

The jurisdictionalization of the international legal order also makes it possible to support democracy. While the establishment of an international constitutional court may seem a utopian project, because of state sovereignty, strengthening existing mechanisms is a more realistic solution that would still make it possible to foster democracy. In particular, it would be necessary to consolidate monitoring mechanisms, peer review and supranational jurisdictions, for example by granting interpretative jurisdiction over democratic principles through additional protocols. The Venice Commission is a case in point: similar to a peer review mechanism, it ensures dialogue between states and with experts on compliance with democratic standards and exerts a degree of pressure by making its legal opinions public.

In concluding the webinar, several recommendations were put forward. Concern for the effectiveness of legal mechanisms for protecting democratic principles must remain at the heart of the debate. In our globalised and interconnected society, it might be relevant to carry out a comparative analysis of the influence of changes in state legislation when regimes evolve in a more or less democratic direction. The codification of a list of warning signs of a slide towards populism or the codification of democratic rules could provide a better understanding of what democracy is. Above all, the panel agreed that democracy must continue to be theorised and thought through in a multidisciplinary way, involving a collective dialogue, as the White Paper made possible.

REPORT ON THE WEBINAR ON HUMAN RIGHTS

Eva Neuilly, *PhD Candidate, University Paris Panthéon Assas*

On 14 September 2023, as part of the celebrations to mark the 150th anniversary of the International Law Association, was held a webinar on human rights, chaired by Professor Willem van Genugten. Professor Laurence Burgorgue-Larsen, coordinator of the White Paper on Human Rights, launched the debate by presenting a pressing issue for the panellists to delve into: human rights should, by definition, be consensual, universal and functional, but they struggle to be so.

Past lessons, present hardships and future challenges are alternately the drive, the threat and the concern of this branch of international law, characterized as much by its expansion and sophistication as by its isolation and lack of effectiveness. The speakers pointed out that the current context is particularly unfavourable, regressive and aggravated by a growing disinterest in the idealism that is at the root of human rights; yet, this disinterest is concomitant with unprecedented global challenges. The coordinator of the White Paper underlined that the very history of human rights is questioned, particularly the impact of the Universal Declaration of Human Rights (1948). In addition to this doctrinal dispute, there is a more fundamental one, which is all the more thorny in that it no longer just concerns history, but the very nature of human rights: truly universal for some, merely the fruit of Western hegemonic self-righteousness for others. Anyway, one must conclude that if the human substrate is shared by all, cultures are not. Thus, the leitmotif of this discussion is inclusiveness, which can only be facilitated by an open dialogue, in order to discover a common ground for a legal system fully consensual and universal.

However, consensus and universality, if necessary to form the letter of this legal system and to ensure its legibility, do not mean effectiveness; this point was the next addressed by the participants. A number of difficulties have arisen, both specific to this *lex specialis* and to the international law in which it is embedded, as well as to the practical environment in which it operates.

Some impediments belong to this *lex specialis*: a law aiming to unite, and yet itself divided by a *summa divisio* – civil and political rights on one side, economic, social and cultural rights on the other – deplored as obscuring its logic, posing the risk of competition or of the establishment of a hierarchy between these two categories of rights that should be allied and, finally, hindering the harmonious implementation of this regime. The members of the panel therefore recommend that this division be eliminated, even more so that, if it exists in theory, practice shows that these two categories often overlap.

Other obstacles stem from the place that this *lex* holds in international law: the panellist strongly regret that human rights are still reduced to a special branch, instead of permeating the whole of international law, and in particular its economic sphere. This goes hand in hand with a broader concern: the fragmentation of international law, which undermines its effectiveness.

More hindrances are also in the environment in which human rights operate, which should be worked on in order to strengthen the legitimacy and the effectiveness of these rights. Consequently, more inclusiveness is therefore deemed necessary at the level of the actors responsible for their creation, implementation and monitoring. All parties, including the civil society, should be involved in order to redress a dynamic that is considered to be too state-centric, and also to overcome the lack of legitimacy which sometimes stains the courts adjudicating human rights. The latter are criticized by a wide set of actors, ranging from states to the public, as too or omni- present, forming a 'juristocracy' that is far removed from reality or of dubious impartiality.

The need for more inclusiveness is followed by the concern for the compliance of the different actors with human rights. This obviously entails applying court rulings, but also, further upstream, taking account of these rights in all the other branches of international law that ultimately affect these players. From this perspective, the responsibility of private economic actors must also be taken into account: they must no longer be protected by the shield of state responsibility. Private players cannot be ignored, especially as some of them are becoming *de facto* judges of human rights, as illustrated by the Supervisory Board of META, formerly Facebook, which raises the more general question of the role of the GAFAM. Beyond the private actors, it is, of course, the states which should strengthen their involvement and enforcement, but also their cooperation:

the pandemic stressed the urgent need for a stronger international cooperation ready to tackle our global challenges.

Finally, the panellists emphasized that, if human rights are a formidable ground for social justice and development, they cannot solve everything nor be weaponized against globalization or capitalism. If human rights are not a tool to change the social structure or to redistribute wealth, they are not constrained either to the sole guaranty of a necessary minimum. Some speakers recommend that a middle way be found, where human rights would not mean a revolution but could be the catalyst for more profound economic improvements in the future.

Closing of the 150th anniversary of the ILA – 14 December 2023

On 14 December 2023, we will be drawing conclusions from two and a half years of work devoted to thinking about tomorrow's international law, on the occasion of the ILA's 150th anniversary celebrations.

The event will be held online only and in the 'meeting' format, so as to have as many contributions from the audience as possible. It will start at 9:00 a.m. (CET) and will end at 6:00 p.m. (CET).

The provisional program is available HERE.

All those who have already registered for the 150th anniversary online events can participate. For them, no additional registration procedure is needed.

For those who have not registered yet, but intend to attend the meeting, in part or in total, there is still time to sign up.