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In this issue

Interview with Franck Latty

Professor, Paris Nanterre University (CEDIN), President of the French Branch of the International Law Association

1) *What do you personally retain from all the topics discussed on the occasion of the 150th anniversary of the International Law Association?*

What is immediately striking is the combination of the diversity of topics and the cross-cutting nature of the matters that have been tackled. In terms of diversity, think of the twenty-three white papers, which gave rise to as many webinars throughout 2023, on topics ranging from the Anthropocene to Civil status, from the Ocean to Intellectual property, from Energy to Cultural heritage, not forgetting Migration, Digital technology, Finance and so on. Most of the issues at the heart of contemporary concerns were addressed. As for transversality, this was particularly evident at the symposium in June and during the concluding day on 14 December, during which questions common to all the white papers were addressed (cooperation, due diligence, soft law, ethics, sanctions, judicial dialogue, *inter alia*), which concern the normativity and the implementation of international law. We are still looking forward to the series of recommendations that will be drawn from this anniversary year, which is expected to be published on the ILA 2023 website during the second quarter of 2024.

For those of us – by force of circumstances, the youngest among us! – who will be attending the ILA 200th anniversary in 2073, it will be instructive to consult the work carried out fifty years earlier, in 2023. I would like to think that some of the ideas will strike for their visionary nature.

Nor should I forget, alongside the forward-looking dimension that animated all this endeavor, the more retrospective book that has marked the Association's 150th anniversary and enables us to take stock of how far we have already come[1]. In a highly original way, the volume looks back at the '1873 Moment', and not only from a legal perspective, in order to understand the background against which the ILA was created. It then traces the history of the main national branches and analyzes the influence of the ILA's work on the development of international law. These contributions are essential in building the historical narrative of our association.

[1] C. Kessedjian, O. Descamps, T. Fabrizi (ed.), *Au service du droit international. Les 150 ans de l'Association de droit international / To the Benefit of International Law. 150 Years of The International Law Association*, Paris, Éditions Panthéon-Assas (en coopération avec les éditions Pedone), 2023, 720 p.

2) ***How do you see the future of the International Law Association, in the light of the work carried out to mark its 150th anniversary?***

Besides its worldwide federal structure, the ILA's strength compared to many other learned societies is its capacity to participate in the development of international law, as do the United Nations International Law Commission (ILC) and the Institut de droit international (IDI). There is no watertight seal between these three venerable institutions, neither in their composition, nor in the subjects they deal with, nor even – fundamentally – in their work of codification and development of international law. Things have been running smoothly for many years now, but I wonder whether we should not be thinking about a better articulation (a better division of labor?), or even a deeper collaboration on selected topics. Indeed, it is troubling that the ILA and the IDI have both celebrated their 150th anniversaries in 2023, just a few weeks and a few kilometers (the distance between Paris and Angers) apart, without any notable convergence. At the end of the XIXth century, stronger ties had been envisaged, without much success.

As for the working methods themselves, the work carried out on the occasion of the ILA 150th anniversary, in particular through the white papers, paved the way for new methods of thinking about tomorrow's international law. Not without some discomfort at times, the authors were led, once they had assessed the state of law, to imagine the future challenges and how they might be met through legal means. Only time will tell whether this new approach, which is more in keeping with the style of science fiction writers than lawyers, is likely to serve as a source of inspiration for the international committees and working groups of the ILA in their own work.

3) ***Many people were involved in the 150th anniversary events. Do you have a message for them?***

A heartfelt message of gratitude! I would like to thank all those people – and there are many of them (over five hundred), from all five continents – who have taken part in the reflections, carried out from before 2023 right up to the present day (the 'ideas lab' with young scholars, white papers, webinars, anniversary book, June symposium, concluding day).

This intellectual undertaking would not have been possible without the support of numerous institutions and individuals; my special thanks go to the generous public and private 'sponsors and donors', who enabled the Organizing Committee to carry out its ambitious plans. The support of the ILA, both from the London headquarters and from several national branches, was also invaluable.

Equally deep thanks are due to the volunteers involved in the practical organization of the 150th anniversary events, within the Organizing Committee, especially the younger ones, whether scholars or practitioners, who did not count their time (especially Yosr Bouassida, Teodolinda Fabrizi, Thomas Hayon). The Board of Directors and the Executive Committee of the French Branch provided for the necessary follow-up, the Treasurers (Arnaud de Nanteuil and Sarah Cassella) and the Communication Officers (Valère Ndior and later Arnaud Lobry) being particularly active.

Last but not least, the deepest thanks go, of course, to the one who, against all odds, was the soul and tireless linchpin of this anniversary, the President of the Organizing Committee and Honorary President of the French Branch: Catherine Kessedjian.

I have no doubt that the momentum created will continue. I look forward to seeing you all at the ILA events in the coming months and years, including the next biennial in Athens from 25 to 28 June 2024.

REPORT ON THE WEBINAR ON MIGRATION

Alice Bourgeois, *PhD Candidate, University Paris 8 Vincennes – Saint-Denis*

A fruitful discussion took place on 19 October 2023, delving deep into the crucial issues at stake for the international governance of migration. Chaired by Professor François Crépeau, the session drew on the conclusions of the White Paper coordinated by Professors Vasilka Sancin and Thibaut Fleury Graff. They provided a fertile ground for in-depth discussions on the manifold legal issues posed by migrations on a global scale.

Written with the aim of providing answers to two key questions – on the one hand, 'in which international society do you want to live by 2050?' and, on the other, 'to achieve this international society, what international law do we need?' – the White Paper offers an overview of the existing law on migration, analyzing developments at the global and regional levels and exploring the challenges of international migration regulation and governance. This enables the authors to raise crucial questions about the future of international migration law. Three major challenges are highlighted, pertaining to the architecture of the legal framework, with a greater inclusivity appearing necessary when considering the diversity of migrants, the protection of people displaced because of environmental reasons and the adaptation to global crises such as the covid-19 pandemic. Building on these observations, the discussions, organized around three axes for reflection, pinpointed several key issues.

Secondly, in addition to the wide range of realities associated with the term 'migrant' as set out in the White Paper, the panel underlined and regretted the persistent distinction between 'good migrants' and 'bad migrants', supported by states. Proposals emerged as to the criteria to be used. The 'constraint' criterion, according to which only expatriates would be distinguished from other migrants, appeared to be particularly relevant. Speakers also stressed the need to consider that gender is an element of discrimination, as well as the impact of climate change, whose far-reaching consequences on migration are raising new challenges for the law. Another source of difficulty is the special case of the ex-combatant refugees, whose determination remains subject to the discretionary qualification of states. This was also an opportunity to point out the disparities among the existing legal instruments, as illustrated for example by Article 3 of the Organization of African Unity Convention, which encourages refugees to mobilize against colonial powers. According to the panelists, this has the effect of distorting the refugee status.

Thirdly and lastly, the panel unanimously stressed the importance of empowering migrants. Access to more political rights was advocated to limit differential treatment. Today, this access is deemed to be highly inadequate, a reality further crystallized by the political stigmatization of migrants illustrated by Viktor Orban's phrase 'best migrants are migrants who don't come', discussed by the panel. The political instrumentalization of the negative image of the migrant could be further curbed if migrants had access to more political rights, or even nationality. In addition, migrants are exploited by governments, who see them as an easy source of labor with no long-term integration in return, as illustrated by the examples of Canada and of the Gulf States, including Qatar. The panel also stressed the need to ensure that the human rights of migrants are on an equal footing with those of nationals, and to limit differential treatment. Finally, the speakers called for an inclusive form of global governance, involving a 'galaxy' of actors and encouraging the adoption of 'circular' migration policies to improve the integration and living conditions of migrants.

REPORT ON THE WEBINAR ON THE FIGHT AGAINST CORRUPTION

Caroline Cormier, *PhD Candidate, University Paris 8 Vincennes – Saint-Denis*

On 16 May 2023, a webinar on the fight against corruption was held, featuring, under the chairmanship of Professor Catherine Kessedjian, Nicola Allocca, Mihaly Fazekas, Delia Ferreira Rubio, John Githongo, Xolisile Khanyile, Jonathan Mattout and Zakhona Mvelase, together with Nicola Bonucci and Pascale Dubois, respectively coordinator and rapporteur of the White Paper on the Fight Against Corruption.

Nicola Bonucci, coordinator of the White Paper on the matter, opened the debate by reminding the panel members and the audience of the scale of legal development at international and national level in combating corruption over the last thirty years. An unprecedented legal and institutional framework has been set up for tackling corruption, but there are still a number of challenges to be met in improving the effectiveness of the existing legal framework and in adopting a more holistic approach to both the notion of corruption and its transnational perspective, challenges whose various elements are identified in the White Paper.

In order to assess this phenomenon, the panel successively addressed four topics: the players involved in corruption, the effectiveness of legal standards, the role of new technologies and, finally, the prevention of corruption.

As for the actors involved in corruption, the panel drew a distinction between those who perpetrate it – beneficiaries or donors – and those who fight it. As regards the former, traditional actors such as the public and private sectors are now being joined by new ones who will play a supporting role when corruption becomes a political tool. With regard to the actors involved in the fight against corruption, the panel stressed the need for greater coherence in the approach to corruption at both institutional and educational levels. The fight against corruption should be everyone's priority, not just that of a specific group. In this sense, collective or civic action appears to be a powerful tool in fighting corruption. On the other hand, the institutional framework is proving inadequate since the prosecution of acts of corruption remains insufficient in view of their growing importance and complexity.

The panel then turned to evaluating the effectiveness of the law in combating corruption. Two factors were pinpointed as indicative of a lack of confidence surrounding the profusion of rules and regulations governing the fight against corruption. The first is the lack of knowledge and/or understanding of these norms by the various stakeholders. This lack of understanding of the norm, perceived as ineffective, results in a form of societal indifference and distrust towards the norm, and raises the need for educational efforts on two main aspects. In this respect, the panel emphasized the need to raise awareness among the youngest members of society by integrating these elements into their education. Efforts must also be made to raise awareness among the general public, for example by using tools such as impact assessments, to demonstrate the effectiveness of the norm.

The second factor is the dearth of data on this phenomenon, whether due to a lack of resources or a lack of transparency. The scarcity of data, both quantitative and qualitative, must also be combined with the lack of tools available to the stakeholders and the institutions involved in fighting corruption. In two respects, these tools appear deficient. They suffer from a lack of data traceability, which is associated with a lack of transparency in corrupt operations, thus revealing a certain difficulty as to their definition and objectives. Moreover, these tools suffer from a low level of accessibility, as their cost can be high for certain actors, such as developing countries. The panel therefore recommends the development of a new approach, based on the definition of best practices, which are still insufficiently recognized today, and which can be made binding by anti-corruption legal norms.

Finally, the panel recognized and affirmed that, despite the difficulties encountered by the law and public authorities, corruption can indeed be eliminated. For this to happen, it is essential to combine the efforts of all involved, i.e. to achieve a greater coherence between the tools and institutions available to fight corruption. International cooperation needs to be strengthened, in order to establish a more effective exchange of information and a broader and deeper multilateral coordination within the existing competent international authorities and organizations. To achieve this, it is essential to limit any competition or inconsistency between these bodies.

REPORT ON THE WEBINAR ON TAXATION

David (Zhongan) Zhang, *JD Candidate, Osgoode Hall Law School, York University, Canada*

While ILA is celebrating its 150th anniversary, the international tax system just marked the 100th anniversary of the 1923 report of the League of Nations which laid the foundation of the system. It may be a surprise to non-tax lawyers that the international tax system has changed very little despite tremendous changes in the world. Even the recent 'reforms' led by the G20/OECD Inclusive Framework (IF) are based on the 1923 ideas: allocating tax jurisdiction based on the nexus of the source of income and the residence of the taxpayer. The future is uncertain, but the challenges are clear: there are global crisis regarding climate, poverty, and democratic deficiency. What can the international tax system do to help manage these problems?

Taxing the Future, a White Paper coordinated by Marilyne Sadowsky, identifies the current state of the art, major tax challenges for the future, and possible tax policy options. To build on the White Paper and illuminate the debates on solving global problems through taxation, a panel of seven international tax thought-leaders offer their insights at the webinar. They are Professors Reuven S. Avi-Yonah, Annet Wanyana Oguttu, Wolfgang Schon and Irma Mosquera Valderrama, Marlene Nembhard Parker (Co-chair of Inclusive Framework), Michael Lennard (Secretary of the UN Tax Committee) and Juliane Kokott (Advocate-General, Court of Justice of the EU). The Webinar was chaired by Professor Jinyan Li.

The panel discussed four topics. First, since there is no legally constituted international tax body now, should the OECD, the Inclusive Framework, or the UN be the main decision maker? The OECD has been the *de facto* international tax organization and collaborated with G20 on the BEPS project. The Inclusive Framework has led the BEPS project and assisted developing countries, but there has not been true equal participation in decision making. The UN is more inclusive and has developed the UN Model Tax Convention, but some developed countries are reluctant in supporting a greater role for the UN in tax matters. Ultimately, the real decision maker about taxation should be the state and regional communities, while supranational bodies should coordinate national tax policies towards addressing global challenges.

Second, how to develop a coherent approach to achieve sustainable development goals (SDGs)? The speakers identified a wide array of issues, including the need of citizens and governments in developing countries to increase fiscal capacity to address the SDGs; the importance of creating a global tax instrument to fight climate change, such as a global carbon tax, and financing the SDGs; creating a holistic approach to connect various legal and fiscal instruments. Capital and resources are key issues for many developing countries, and taxation is a vital tool for them to mobilize domestic revenue to meet the UN 2030 Agenda for the SDGs.

Third, how to recast basic international tax principles in order to deal with a globalising digital economy? Pillar 1 adopts a new market-based nexus to allocate some taxing right and a global formulary apportionment method to replace the arm's length principle. Pillar 2 reflects the single tax principle by implementing a global 15% minimum tax. However, Pillar 2 has some disadvantages for developing countries as for the use of tax incentives and is extremely complex to implement. Pillar 1 is unlikely to be implemented if the United States is not on board. At a policy level, it is hard to reconcile efficiency-related goals and fairness-related goals. While efficiency would push taxation toward source taxation, the benefit principle underlying fairness considerations supports residence-based taxation in case of intangible property rights. In addition, if fairness and redistribution is the goal, the poorest countries have the smallest market and market-based taxation will not lead to tax fairness. There is no mechanism for inter-nation income redistribution.

Fourth, how to solve international tax disputes? The mutual agreement procedure (MAP) in bilateral tax treaties is difficult for many developing countries for constitutional or resource reasons. Tax arbitration faces political challenges in countries who are unwilling to cede their tax sovereignty. There is no international tax tribunal, although the WTO's Appellate Body deals with some tax issues. The European Court of Justice is the only supranational judicial body that adjudicates general tax disputes. Its future interpretation of Pillar 2 rules may even have an influence outside the EU, because the rules are based on the OECD Model Rules adopted in other countries as well. Dispute resolution under international investment law and trade law may offer some lessons, but since tax is different from tariffs, there is little hope that an international tax court be created any time soon.

REPORT ON THE WEBINAR ON CULTURAL HERITAGE

Marina Sim, *PhD Candidate, Paris Nanterre University*

As part of the 150th anniversary celebrations of the ILA, a webinar focusing on cultural heritage took place on 21 November 2023. The event, presided by Rolf E. Fife, ambassador of Norway to the European Union, brought together eminent experts, including academics, diplomats and individuals working at international organizations, to discuss the challenges that the preservation of cultural heritage poses to international law. The panel was composed by Marie Cornu, research director at CNRS in France; Keun Gwan Lee, professor at Seoul National University and member of the International Law Commission of the United Nations; Namira Negm, ambassador and director of the African Union Observatory on Migrations from Egypt; Edward Kwakwa, deputy director general at WIPO; and Laila Susanne Vars, Norwegian-Sami human rights lawyer and former politician, serving as an expert member of the UN Expert Mechanism on the Rights of Indigenous Peoples.

The discussions built upon the White Paper on Cultural Heritage, prepared under the coordination of Clémentine Bories, professor at Toulouse Capitole University, assisted by Philippe Gout, assistant professor of law at the same university, and Asoid Garcia Marquez, legal officer at UNESCO, who served as rapporteur. The purpose of the paper was to highlight the main challenges faced by international cultural heritage law and those faced by international law that resonate within international cultural heritage law. The document underscored the need to evolve the legal mechanisms, the actors, and the narratives within international law to effectively address them.

The discussion delved into the evolution of international cultural heritage law over the past century and a half. Specifically highlighted were the contributions made during the League of Nations years under the initiative of the International Museum Office, which as early as in the 1930s prepared three draft conventions – a historical fact omitted in the White Paper. The striking similarities between pre-1945 and post-1945 efforts underscore the significance of this legacy. Hence, a re-evaluation of these early codification endeavours is necessary to construct a more inclusive and comprehensive historical narrative. Indispensable is also a detailed examination of the role played by the decolonization process in shaping contemporary international cultural heritage law. Furthermore, the participants addressed the evolution of the concept of cultural heritage over the years, in particular its expansion to encompass immovable and intangible elements, the 'human-rightization' of the discourse on cultural heritage and the increasing participation of diverse actors in the formation and implementation of international cultural heritage law post-1945.

While an important normative framework is already in place, it is manifestly not sufficient, and a reform of the very foundations of international cultural heritage law is needed. In this regard, the panellists discussed various codification efforts and treaty negotiations; the importance of non-European legislative efforts and practice was highlighted. Insights from the African Union perspective revealed its pragmatic approach, exemplified through the adoption of the Cultural Charter for Africa in 1976 and the subsequent Charter for African Cultural Renaissance in 2006. These instruments do not address the question of what constitutes cultural heritage; rather, they focus on providing solutions. The 2021 African Union Draft Model Law on the Protection of Cultural Heritage was also mentioned.

At the global level, the World Intellectual Property Organization (WIPO) is currently working on a project of legal instrument on traditional knowledge, traditional cultural expressions and genetic resources, expected to be adopted in the coming years. More attention should also be paid to the valuable work of the WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC). At the same time, the participants agreed on the need for an enhanced implementation of the existing regulation.

A proposition expressed during the webinar was to elaborate further on an umbrella treaty aiming at filling up the existing gaps in cultural heritage protection and a framework convention of non-binding implementation instruments mentioned in the White Paper. The speakers also suggested to analyze the advantages and the disadvantages of other available options, such as the evolutive interpretation of current rules or adoption of the 'soft law' approach.

Another issue addressed by the speakers was the restitution of cultural objects to their countries of origin, especially those displaced during colonial or military occupation. Despite abundant practice, there remains a pressing need for more elaborate and systematic mechanisms to achieve equitable resolutions. Difficulties

persist, particularly as to the valuation of cultural heritage; there is also a need for international cooperation in securing facilities while returning the cultural objects and for the protection of cultural heritage during armed conflicts. In this regard, the participants suggested, *e.g.*, to create a marketplace of 'best practices' of restitution and raise awareness about alternative dispute resolutions mechanisms available in the field.

The involvement of non-state actors is another topic the panellists delved into. The reluctance of indigenous communities to pursue their interests in courts illustrates the disconnect that often exists between the legal system and the realities on the ground. The work of the UN Expert Mechanism on the Rights of Indigenous Peoples (EMRIP), the implementation of the UN Declaration on the Rights of Indigenous Peoples and, more broadly, the participation of indigenous peoples in the UN system should all be strengthened. Attention was also drawn to the need for greater focus on local communities, ensuring the protection of contemporary traditional cultural expressions, which are likely to be safeguarded by intellectual property (IP) rights. In particular, communities should be empowered to assert their IP rights. Notably, the WIPO has been active on this front in facilitating high-level dialogues between indigenous peoples, communities and private actors, such as the fashion industry. In this respect, it was suggested to rethink the very notion of property to include collective rights. Additionally, the discussion stressed the importance of monitoring mechanisms to oversee efforts made by State, indigenous peoples and minority communities, in *e.g.* repatriation.

The discussion also touched upon the use of technological advancements, including artificial intelligence (AI), for the preservation and protection of cultural heritage. Legal tools are necessary to regulate the use of AI in relation to cultural heritage but also the creation of 3D replicas of cultural objects.

Finally, participants underscored the necessity to overcome fragmentation, in particular by enhancing the institutional cooperation, strengthening coherence among the many branches of law, both public and private, that deal with cultural heritage issues – *inter alia*, human rights law, intellectual property law, international criminal law, international law of the sea, international urban planning law, digital law, and economic law or further integration of cultural heritage into general international law.


2022-3


Un rêve d'humanité
Par Golnaz Afraz (golnazafraz.com), Huile et acrylique sur toile, 2022-2023, 4,85 x 2 m.
Cette œuvre a été choisie, parmi 152 candidatures, par le jury de la Fondation Villa Seurat pour l'Art contemporain, pour fêter les 150 ans de l'Association de droit international/International Law Association, en 2023. Le thème de l'appel à projets était le suivant : « L'œuvre devra prendre en considération la paix entre les peuples, la diversité, l'universalisme et les valeurs humanistes ».
Cette œuvre est offerte à la Cité internationale universitaire de Paris par la Fondation Villa Seurat. Elle est exposée à titre permanent dans la Maison des étudiants de la francophonie. Elle a été installée le 21 juin 2023.