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In this Issue

Interview with Philippe Sands[1]

Professor at the University College London, Member of Matrix Chambers

1) You are known as a prolific researcher and author in international law, how do you choose the topics on which you will write?

I think it is important to write about things you know and care about. In making the transition from writing for a legal audience to a broader public, I have stuck to matters of international law, whether it be the illegality of the 2003 Iraq war or the embrace of torture after the attacks of 9/11, and more recently in relation to the origins of genocide and crimes against humanity (East West Street, 2016) or the consequences of justice being evaded (The Ratline, 2020).

In recent years, my writing has been part of a bigger project, namely to introduce the key elements of international law to a bigger audience, to the grand public. The audience is there, as the translations into so many languages make clear. I worry that the acquis of that revolutionary 1945 moment – that the power of the state is not unlimited, that individuals and groups have rights under international law etc – face a potentially existential threat.

In addressing that challenge, we should be honest and recognize that much of our own work is in the ghetto – we talk to ourselves, seek to persuade each other, and lose sight of the bigger struggle with which we are engaged.

Hence for a number of years I have chosen to write on subjects that might make a difference – I believe in the value of ideas for themselves, but I believe even more in ideas that can improve our well being. The law is a means, not an end.

[1] This editorial was drafted before Russia's declaration of war on Ukraine on 24 February 2022. Please see Ph. Sands' article in the Financial Times. Following this article, Philippe Sands proposed the formation of a special tribunal to prosecute the crime of aggression.

2) 2023 will see the celebration of the 150th anniversary of the ILA. What do you expect from the celebrations?

"Always have low expectation, and there is less chance you will be disappointed' – it's a motto I like to run with on my academic life, my cases and my books (although the truth is I somehow manage to retain an optimism).

I have few expectations for a 150th anniversary, but many hopes. Top of the list is surely that we can connect with other disciplines and the grand public, to make more people realize how vital is this project we call 'international law'. A couple of years ago, in The Hague, I sat close by Aung San Suu Kyi as she defended the indefensible, in the genocide case brought by The Gambia against Myanmar, saying much with which I strongly disagreed. But she also told the Court that 'international law may well be our only global value system', and on that she may have touched a powerful truth, which the ILA might want to run with.

3) If you had a magic power, what would you change immediately in international law?

Get rid of the men and the egos. Then get to work on re-inventing our understanding of sovereignty.

WHITE PAPER – INTERNATIONAL INVESTMENTS

Coordinators:

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Gérard Niyungeko
Former President of the Burundi Constitutional Court, Member of ICSID Panel of Arbitrators (Burundi)
August Reinisch,
Vienna University, Member International Law Commission (Austria)

3 questions for Claire Crépet-Daigremont et Arnaud de Nanteuil

1. Investment law has become central to international economic relations. To what do you attribute this fact?

The question of international legal protection of foreign investments has been a major issue in economic relations for a very long time. Strictly speaking, international investment law came into being recently, in the 1960s, with the creation of the ICSID within the framework of the World Bank and the conclusion of hundreds and then thousands of bilateral treaties for the reciprocal promotion and protection of foreign investments. This law however has its origins in ancient rules, crystallized during the 17th century, which imposed on sovereigns an obligation to protect foreigners and their property. Thus, the ancient trade treaties, and later the conventions of establishment, inspired the international legal regime devoted to foreign investments, which has continued to gain in importance with the global expansion of the world economy, the emergence of development problems in the countries that have emerged from decolonization, the question of the integration of countries in transition into the world economic order, and today's multiplication of free trade agreements. In addition, the last decades have been marked by a powerful privatization phenomenon in many economic sectors, which has led to a significant increase in investment flows. In many countries, certain public service activities are managed or administered by foreign investors. This development made it necessary to set up a framework for the protection of international investments, particularly during the 1980s and 1990s.

2. Many criticisms have been voiced against this law and its corresponding dispute settlement system. Do you already see these criticisms reflected in your work?

Until recently, the debate on international investment law issues was confined to a small club of specialists, but it made a spectacular entry into the public sphere at the time of the CETA negotiations between the European Union and Canada. Critics focused on international arbitration as a means of settling disputes between a State and a foreign investor. However, beyond the technical issues that can be resolved by improving the transparency of procedures and the consistency of case law, the attacks made reflected the divisions that are always present in this area of economic relations: the North-South divide, never really settled, the North-North divide concerning the level of liberalization of international investments, and today a public-private interest divide which is apparent in the debate on safeguarding the State's power to regulate in the general interest. Each of the actors in the field of investment law - States, multinational companies, NGOs - defends a certain conception of the issues at stake in the field, which is therefore faced with the real challenge of trying to reconcile them.

3. The international law of tomorrow is at the heart of our thinking in 2023. What are the first developments you see at this early stage of your work?

It is no exaggeration to think that international foreign investment law is at a turning point in its history. The successive failed attempts to adopt a major multilateral agreement on investment, as well as the current crisis of multilateralism, are compromising the chances of multilateralisation of this law. It is therefore in the still bilateral or restricted plurilateral framework that developments are taking place, in particular, in the context of the negotiation of the so-called new generation trade and investment agreements. It is here that new balances must be found for the legal protection not only of investments from countries of the North to countries of the South, but also for the regulation of South-North, South-South and North-North investments.

News: A disappointing Commission's proposal for a European Directive on Corporate Due Diligence

By Lisa Aerts

On 23 February 2022, the European Commission adopted the long-awaited proposal for a directive on corporate sustainability due diligence. The delay in publication is said to be partly due to the highly political nature of the proposal, with companies not looking favorably on the imposition of new obligations. The text is therefore intended to be a compromise between the particular interest of businesses and the general interest, the protection of which should be the aim of the Member States (MS). Compromise, certainly, but is it balanced? On reading the text, it seems to be clearly to the advantage of the businesses.

While we can welcome a new step towards uniform binding obligations concerning the diligence obligations for enterprises, the new text is not welcome unanimously. Indeed, the choice made is that of "compliance" in a contractual framework with "established business relationships" being the core concept within the value chain. Disregarding the terminology recognized by the OECD or the UN guidelines of "business relationship" or "commercial relationship", the European Commission is blurring the lines by introducing this new, more restrictive notion. While the use of the notion of "sphere of influence" in the Global Compact was criticized for giving too much importance to the physical proximity between the parent company and the entities in its value chain, the notion of "established business relationships" focuses on the durability and intensity of the relation between the entities, and could thus encourage short, ephemeral relationships to allow companies to escape their obligations. Moreover, it is at the beginning of a business relationship that companies need to be particularly vigilant, even though they do not know at that stage whether the relationship will become more permanent. Thirdly, the interests of affected third parties are not taken into account by the text.

The scope of the text is also criticized. According to the thresholds set by the proposed Directive (see Article 2(1)(a) and (b), and contrary to the UN Guidelines, small and medium-size enterprises are not covered by the text. As regards companies operating in risky sectors, only three areas - textiles, agriculture and mining - are concerned. For example, this directive would cover only 5% of textile companies in the Netherlands.

While we applaud the introduction of civil and administrative sanctions and the desire to create national authorities responsible for ensuring the implementation of diligence plans, we can only deplore the absence of any provision for access to justice by affected third parties and the total absence of employees. It is true that Commissioner Reynders announced that the Commission is working on a text on decent work. But it is quite possible that this future text will not be as complete as it should be. Moreover, the real danger with the "compliance" approach taken by the Commission is to transform the due diligence obligation into a simple "ticking the box" exercise, which would be the opposite of what civil society wanted.

PARTNERSHIPS

An updated list of the institutions listed having entered into a partnership with the French Branch of the International Law Association to participate in the preparatory work and discussions that will take place on the occasion of the 150th anniversary of the International Law Association (ILA) in 2023, is available at the following link:

https://www.ilaparis2023.org/

The Newsletter ADI/ILA 2023 n°6 will be released in May 2022.