

SERGE SUR

Professor at University of Paris II – Panthéon Assas

Thierry has invited us to be constructive, in order to help to improve, through ideas, world governance in every dimension. What could be said about international law in this respect ? I am afraid that the current situation, at first glance, is not so bright. As a matter of fact, one could ask whether international law has not suffered collateral damage in the globalization process, insofar as many of its main rules and regulations have been either forgotten or outdated.

This will be my first point.

I. - The decay of current rules of international law

It is not necessary to dwell extensively on a demonstration. A few examples will be more enlightening.

(a) Take the field of security, and first the UN Charter: the rules related to the limitation of armed force are more and more forgotten by numerous States, and some authors are even arguing that they are no longer in force. The legitimacy of the Security Council itself, which has the main responsibility in the establishment and maintenance of international peace and security, is more and more challenged, but reform of this institution, despite all the rhetoric about it, remains elusive.

Humanitarian law is subject to massive violations, which in fact fall rapidly in oblivion. And what about the criminal jurisdictions, supposed to be a main improvement of international law? Do they meet their purpose, do they justify the money used to keep them functioning ?

If we now look at some preventive rules, mainly in the field of arms control, it is crystal clear that the NPT is a weaker barrier than ever to the nuclear proliferation process, and that its provisions are not enough by themselves to stop it. The CTBT is still not in force, and probably will not be in the foreseeable future.

(b) In the other fields of international law, the picture is no more positive. The WTO negotiations are in a stalemate, and the spirit of competition is superseding the spirit of cooperation. Yet the

WTO is a recent institution, one of the few established after the end of the Cold War, and supposed to increase the dividends of peace. I will not even mention the difficulties of elaborating new regulations to overcome the current financial crisis and to prevent a new one. In the field of environment and climate change, we all know that the prospects of the Copenhagen Conference are gloomy. Multilateralism, one of the great achievements of the second part of the twentieth century is by now in a big crisis.

(c) If we now try to understand the reasons of this bleak situation, they seem twofold.

First, we still live with the heritage of the legal rules following the Second World War and responding to the relations prevailing during the Cold War. They do not respond to the needs of the new international disorder, and no one has undertaken the necessary efforts to adjust them or to establish new and agreed-upon rules.

Second, the main powers in international relations are less and less interested in international law as it stands. The United States has been more and more unilateralist, and probably will remain so for as long as pursuit of their national interest – at least as they perceive it – remains their main line of conduct. The emerging powers are not satisfied with various rules of international law which they were not in a position to negotiate effectively when these rules were established. Small powers feel neglected by many of the current rules. The European Union, which could be one of the main supports for a legalistic vision of an international order, is too weak in the international field and too inward looking to be a decisive actor in this respect.

So, is this a conclusion? Are we, international jurists, doomed to failure and depression? I don't think so, because, and this will be my second point, one must not merge the rules with the tools. And, if we consider international law as a tool for governance, it has a great contribution – still virtual, but still – to positively regulate international relations.

II. - International law as a necessary tool for governance

(a) By this I mean international law as it stands, with its current actors and mechanisms, not an alternative one, as claimed sometimes in the name of global governance by non-state actors. The idea is that emerging global problems of the international society can no longer be solved by States, and by States alone, because they are too jingoistic, unable to consider the universal dimension of these problems and to regulate the common goods for the future of mankind. Civil societies, public opinions, NGOs, scientists and experts, even transnational firms, would be more adapted to conceive and implement relevant regulations than are the States.

In my view, if we consider the need to elaborate new regulations for a world governance, such an approach is delusive. NGOs specifically are certainly useful in raising global concerns and in helping to draw an agenda for international society, but they are absolutely unable to create new legal regulations. As a matter of fact, the fuss about NGOs has largely faded after the 11TH of September. They remain useful in helping to implement peace building, nation building,

humanitarian assistance, but they neither the necessary legitimacy nor the political roots to become substitutes for sovereign States. So these States must claim, keep and exert their main responsibility in this respect.

(b) As far as the mechanisms of international law are concerned, one must stress their creativity and their flexibility.

Creativity : Treaty law specifically has been able to develop new concepts, such as confidence building measures ; peace keeping operations ; a mix of international rules and domestic obligations ; new forms of internationalization for Outer Space or for the law of the sea. Unilateral decisions of international bodies, such as the United Nations Security Council, have developed new mechanisms, like nation building, intrusive inspections, a various set of coercive measures, as well as a full spectrum of compulsory and universal means of prevention and struggle against international terrorism with the means to implement them.

Flexibility : International law has been able to develop new forms of international rules, like Soft Law, Guidelines, Codes of conduct, which adapt the stiffness of law to evolving problems and situations, and could explore new fields of regulation, in the areas of security, new technologies, financial regulations, environment for instance. These new forms are convenient for the kind of transitory periods that we are by now living. On the other hand, international law has also been able to create new categories of imperative obligations, without any possible derogation, regarding the main, common and permanent values of the international society.

(c) To conclude these remarks, let us stress that there is obviously an increased demand for international regulations in order to establish a world governance, and that international law is perfectly fit to meet these demands. But in itself, it is only a tool, a creative and flexible tool, as the disposal of the States. Decision making is not so as much as of a legal process as a political one. In other words, a political decision is a hot process, and a legal regulation is a cold one. The G 20 for instance is not a legal body, but it is in a position to initiate a legal process, provided that there is a combination of relevant concepts and commitments of the States concerned.

But let not forget that the States are often ambivalent about the law. In a way, they look like this old lawyer, in a recent movie, *Intolerable Cruelty*, who explains to a young one, namely George Clooney : *We respect the law, we honour the law, we obey the law, even sometimes we forget the law and we violate the law ...*