The European Journal of International Law Vol. 32 no. 4

The 16th Annual Conference of the European Society of International Law: Welcome Remarks

Pål Wrange*,

Your Royal Highness, Friends, colleagues, conference participants,

Good morning!

Let me, on behalf of the organizing committee, add my warm welcome to all of you.

For those of you who are here in person, it has not been easy to make your way to Stockholm. And for many of you, it will be even more difficult to return to your places of residence. We truly appreciate your efforts.

For those who follow us online, e-conferencing may be a poor second-best to being here and enjoying the excitement of the debates in the room and the meetings with old and new friends. But for some of you, to travel to Sweden and take part would have been unattainable even in normal circumstances, due to lack of funding, long distances or 'normal' border restrictions. We wish you a very warm welcome, too. We think that our efforts to organize this hybrid conference will be made worthwhile by the knowledge that what takes place here may be appreciated in many other places around the world.

We believe that hybrid formats are here to stay, in various variants, and we hope to make a small contribution to this development. However, the hybrid format is very difficult. It is complicated not only to organize, but also to experience. So I beg for your indulgence also on behalf of the speakers and, not least, of the moderators, who have to make the conversation flow between here and there.

We wish to thank the many people who have made the conference possible, through their labour, intellectual contributions and support. This includes my fellow members of the local organizing committee, the volunteers, the conference service and the technical staff, the programme committee, the ESIL Board and Secretariat, the financial sponsors, the board of the Stockholm Centre for International Law and Justice,

* Stockholm University, Stockholm, Sweden. Email: pal.wrange@juridicum.su.se. The programme of the 2021 Annual Conference of the European Society of International Law, 'Changes in International Lawmaking: Actors, Processes, Impact', is available at https://esil2021.se/conference-programme/.

Stockholm University and our colleagues and staff at the Stockholm Faculty of Law and Department of Law.

1 Covid-19, Politics and Law

You are all painfully aware of the circumstances that frame this conference. As a matter of housekeeping, I want to remind you all that even vaccinated persons can transmit the virus, and that we need to respect the restrictions that are set in place to ensure social distancing. While we enjoy the pleasure of finally meeting again, we still need to be mindful that things are not yet back to normal. Be careful when you move around, and consider that face-masks help protect others. May I also suggest that you take advantage of the nice weather and meet outdoors.

***

Some important international law-making implications of Covid-19 will be examined in Forum 8. Let me here give some general reflections.

The Covid-19 pandemic has prompted questions that touch upon the themes of several past ESIL conferences, including crisis (2016 in Riga), global public goods (2017 in Naples), universality (2018 in Manchester), sovereignty (2019 in Athens) and solidarity (2021 in Catania). One could ask, for instance, if the current legal system is fit to handle a crisis of this nature; if the concept of public good could or should be applied to vaccines or to herd immunity; what universality means for a virus that is borderless but which is countered nationally; and not least, what is the significance of sovereignty when a virus from one country affects the lives of all, in all other countries. And one could also, as in Catania this spring, ask whether solidarity, as a value or a principle, has or should have something to do with how we handle the crisis.

Of course, the pandemic also raises many other questions, such as what is normal and what is an exception (as in emergency exceptions to domestic and international law). It contrasts the sometimes ugly protectionism and egotism of governments (and their constituencies) to the borderless cooperation of scientists and health agencies. It made it graphically clear – for those who did not know – that even a virus which affects everyone does not affect everyone equally; however vulnerable we felt up here, we were still a lot more resilient than many others. And it asked vital moral questions, like why wealthy people should help poor people get vaccinated – out of solidarity or care for the human value of everybody or merely to protect oneself from new variants that may develop in other parts of the world. Further, it showed the difficulties for governments – even well-meaning ones – to balance different interests in a time of great uncertainty; Is it a patriotic duty to go to the pub and get the wheels turning again or is it an obligation to save as many as one can from the virus, no matter the consequences?

Sometimes, the measures taken were based on an ethics of care – as it should be when health is concerned – or on solidarity, but more often they were governed by nationalism, geo-politics, economic interests, conscious ignorance or even obscurantism.

2 Laws and Lawmaking

Many laws have been involved in dealing with the pandemic, both nationally and internationally. Most of the time, law did not determine the decisions, but it set the framework. It empowered actors and sometimes it suggested courses of actions, though perhaps too timidly. Very often, different laws had to be balanced against one another, or were even circumvented in order to find the best solution here and now. The legal knock-on effects of the virus, and the many countermeasures against it, will continue to unfold in courts and other fora.

As lawyers know, how legal issues are decided depends to a large degree on who the decision-makers are, how they think and what institutional interests they represent.

However, as lawyers also know – and as laypeople usually assume, I suppose – the outcome of a legal dispute depends as well on the content of the laws involved, or, to be more precise, on the wording of those documents that the decision-makers consider to be authoritative. It is to the process of making these laws that we will devote our attention during this conference.

Law-making, in the wider sense of the word, can take place in many ways:

- formal legislation by duly authorized bodies, like parliaments or councils of ministers;
- precedents from courts – national or international;
- the development of practice by states or by formal or informal international bodies;
- rules adopted informally by international or private bodies, which are then transformed into traditional hard law in national legislation or in private standardized contracts.

The procedure is important, of course. It has consequences for the distribution of authority. It is important for the status of the norms – whether they are perceived to be legitimate or fair by practitioners, commentators and those directly affected. And it is important for the outcome, the content.

It makes a difference, for instance, whether we think that freedom of speech on the Internet is regulated through a UN human rights convention, a regional agreement on cybersecurity or a user agreement with a social media company under the laws of the state of California. And it makes a difference whether the rules on the use of military force are developed in multilateral negotiations in the UN, in rules of engagement in defence organizations, in jurisprudential deliberations in an international court or through the unilateral practice of those few states that have the capacity and the will to use such force. For these different practices there will be different procedures, with different people at the table who have different ideas of what can be regulated, and how. The forum and the process will set the conditions for what can go into the process – government interests, shareholder value, the dignity of persons or something else.

However, it also depends on how we – as practitioners, as commentators, as experts – think about these things. Law cannot be effective, or perhaps law cannot be law at all, unless it is accepted as law by those who should apply it.

3 Changes in International Lawmaking

International law changes in times of great upheavals, like the current pandemic or like 9/11 – 20 years ago almost to the day. But it also changes through more incremental adaptations in the way people do business, diplomacy, politics or war.

This conference will examine changes in international lawmaking and how these changes are impacted by and impact on national and private norms and processes. The ultimate reason for this theme is that these changes eventually affect the daily lives of people.

In the ideal-type 'Westphalian system', international lawmaking took place primarily through international agreements that were initiated, negotiated and concluded by diplomats and governments, and thereafter submitted to national legislators for domestication into national law. International lawmaking, and its national implementation, was relatively easy to comprehend, oversee and control.

Today, the *sheer quantity and detail* of new norms from the traditional sources of law makes any overview difficult. On top of that, international lawmaking also includes new formal and informal mechanisms and new governmental and non-governmental actors.

In fact, much of what is going on beyond the national realm may not be adequately labelled 'international law' at all, since it is not covered by the traditional sources of international law in Article 38 of the Statute of the International Court of Justice. Certainly, one may stubbornly refuse to call such norms 'law', but their impact is nevertheless real, and they may arguably be studied with a legal scholar's tools and applied with the tools of a legal practitioner.

All of this leads to *broader discussions* about how we might understand and theorize the global world of norms, as well as about the identity of our discipline and about how we teach it.

4 So How Should We Think about These Changes?

Should we talk about the *politics* of global lawmaking? Which actors lose power or resources and which ones gain? Can we trace politics not only to the UN Security Council but also to more mundane discussions on model tax treaties, responsible fisheries or international health regulations?

Or should we be concerned about the lack of *formality* in many instances of lawmaking? Many commentators now believe that the distinction between law and non-law is not only increasingly difficult to determine, but also less relevant. Social science scholars (and some lawyers) use concepts like governance, regimes, regulations or norms, which may – or may not – constitute law, while international lawyers have long used terms like 'soft law'. Should one perhaps adopt a sociological definition of law? Or should one maintain that there are important values in a formal concept of law; i) epistemic (to know what is binding); ii) normative (to ensure that there is legitimate authority through state consent); and iii) jurisprudential (to delimit our field of study, and practice)?

Relatedly, should we worry about the many *non-state actors* involved? Should we welcome them because they may make up for the often failing representativity and responsiveness of governments? Or should we critically ask: Who are these actors and where does their legitimacy come from?

Or perhaps our deepest concern should be the changes in the *local implementation* of international law. International rules have to fit into established domestic legal systems in order to be applied, and domestic actors, with their different interests, will try to influence that process. Further, much contemporary international law is not implemented by way of parliamentary procedures or even governments but by other actors, including government agencies or private actors.

Further, if we change the lens, and look at some of this as *international lawmaking from below*, what will that tell us? Even global norms are born somewhere, out of some particular concerns, before they reach New York, Geneva or The Hague. Local actors lobby governments; individuals, business networks or indigenous groups file complaints before national and international bodies; coordinated local actions by NGOs influence state practice, and so on. What is universal is always a universalized particular. From where does the universalized norm come – from a community-based organization in the Narmada Valley in India or from a trade association in London?

And, conversely, what happens when the norms come back to hit the local ground? How do counter-terrorism norms adopted in New York in response to the 9/11 attacks play out in the Horn of Africa, in East Asia or elsewhere?

With all of these changes, what about *legitimacy and rationality* in international lawmaking? If the national legislator loses control, and norms from many quarters affect the legal situation in a state, who can ensure that there is rationality in the legal system and that different regulations do not contradict or counteract one another?

And, if many rules that affect the daily lives of people have not been passed by a democratically accountable legislature or even executive government, can the rule of law be legitimate?

An increasingly important issue is the effect of *technology* on lawmaking. Technological developments including the digital revolution pose challenges not only for how we delimit spaces of jurisdiction and governance, but also for our conceptions of how legal decisions are made – by humans or by machines?

What does all of this mean for those of us who study *how* international law works? The traditional way to study the impact of international law has been to examine how international regulations are being implemented domestically. But one could, perhaps, also start from the bottom, and find things that may not be accessible to doctrinal legal analysis. What sort of studies are useful to capture this – legal analyses of regime collisions, narratives of 'lived law' or both?

Can we even speak of all of that which we talk about here as international law, or is that just a nostalgic term from a bygone world? How should we think of our field of study and practice: global governance, constitutionalization, pluralism and fragmentation, 'assemblage', plain 'global law' or perhaps a more modest 'international law plus'? Or should we think that the quality of being 'international' and 'law' is still of value and relevance? After all, the traditional inter-state paradigm has always been

under more strain than the Westphalian model suggests, and the model has survived many black swans.

To go further: What would any answers that we might find to such questions mean for the identity of our discipline? Should we stick to what is uniquely ours – and perhaps defend the legal and political world of sovereign states that goes with it? Or should we study what we find, regardless of whether it is 'law' or 'international', and offer our particular insights in an open and pluralistic debate about governance?

These cross-cutting questions will all be discussed in the keynote, fora and concluding panel. However, of course we have to pay attention to the great diversification, if not compartmentalization, in international law. As the many agora presentations will bear out, things may look quite different in the law of the seas, international development law, the law of force, international humanitarian law, human rights law, international environmental law, international economic law, international criminal law, international bio law and cyberspace law (if it exists), and it may be different from the perspectives of international institutions, national parliaments or substate entities.

5 Final Words

All of these questions are immensely interesting and challenging. But perhaps we should also stop for a moment and think a little about what the law should be for – what kind of life together it should promote, proscribe or enable. What type of lawmaking does it take to protect 'the dignity and worth of the human person', to cite the preamble of the UN Charter? After all, most international lawyers joined the profession because they wanted to make a difference.

As practitioners we have to apply the law as we find it, and as scholars we have to study it. But we also know that how we practise and how we theorize matters. In a certain sense, just as the world is what we all make of it, law is what we lawyers make of it.

On that note, I want to welcome you all to our Aula Magna and hope that you will have engaging and inspiring conversations here – in and out of the conference rooms – and I pray that we will continue to be blessed with sunshine – outside and inside. I also hope that you will enjoy the breaks and social event, while ensuring social distancing and strictly respecting the time limits, because we have a very full programme.

I thank you for your attention.