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Legitimacy in International Law

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Begründet von Viktor Bruns

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* The reports by Hanspeter Neuhold, Volker Röben and Kong Qingjiang were submitted after the symposium took place and thus did not form part of the discussion.

Legitimacy of International Law from a Legal Perspective: Some Introductory Considerations

Rüdiger Wolfrum

I. Introduction – on Legitimacy in International Law in General

This Seminar is and is meant to be a continuation of the Conference in November 2003 on Developments of International Law in Treaty Making.[1] The issue of the legitimacy of new forms of international law-making was touched upon, but it was not in the focus either of the Conference or of the individual contributions. This Seminar should equally be seen as a continuation of the "American-European Dialogue: Different Perceptions of International Law"[2] Workshop since it is the question of the legitimacy of international law which is at the roots of such different perceptions.[3]

Before we deal with the legitimacy of particular international law measures as envisaged in the programme of this Seminar it is advisable for this Introduction to put the issue in a broader context, or in other

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1 R. Wolfrum/V. Röben (eds.), *Developments of International Law in Treaty Making*, 2005.

2 See the publication of the contributions in *ZaöRV* 64 (2004), 255 et seq.

3 See R. Wolfrum, "Introduction of the Workshop", note 2, at 255; H. Neuhold, "Law and Force in International Relations – European and American Positions", note 2, 263, T. M. Franck, "The Power of Legitimacy and the Legitimacy of Power: International Law in an Age of Power Disequilibrium", *AJIL* 100 (2006), 88 at 90 et seq.; F. Fukuyama, *State Building: Governance and World Order in the Twenty-First Century*, 2004, at 142 et seq.

words to touch upon the question of legitimacy of international law in general. Actually this question has to be subdivided into two, namely whether it is appropriate at all to raise the question of legitimacy in international law and, if the answer is in the affirmative, what does legitimacy mean in the context of international law and where does it lead to.

In recent years the question of the legitimacy of international law has been discussed quite intensively.[4] The focus of the questions raised varies considerably. Only some of those questions will be mentioned here. Such questions are, for example, whether international law lacks legitimacy in general; whether international law or parts of it has yielded to the facts of power; whether adherence to international legal commitments should be subordinated to self-defined national interests; whether international law or particular rules of it, such as the prohibition of the use of armed force, have lost their power to induce compliance (compliance pull);[5] and what the relevance of non-enforcement or failure to obey is for the legitimacy of that particular international norm?

The fact that seemingly identical questions concerning the legitimacy of international law or parts of it are being raised sometimes camouflages the fact that their authors represent different approaches towards international law and thus pursue different objectives. Although this may be considered an over-simplification, four such schools of thought will be identified and addressed here.

One school of thought argues that international law lacks legitimacy – at least if compared with the legitimacy of national democratic governance – and therefore that less authoritative weight should be given to international law.[6] This school of thought, which actually may be per-

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[4] Amongst others, T. M. Franck, *The Power of Legitimacy among Nations*, 1990; M. Kumm, "The Legitimacy of International Law: A Constitutionalist Framework of Analysis", *EJIL* 15 (2004), 907; J. L. Goldsmith/E. A. Posner, *The Limits of International Law*, 2005; A. Buchanan, *Justice Legitimacy, and Self-Determination: Moral Foundations for International Law*, 2004; H. L. Hart, *The Concept of Law*, 1961; Franck, note 3, 88.

[5] Franck, note 3, at 93.

[6] E. A. Young, "The Trouble with Global Constitutionalism", *Texas International Law Journal* 38 (2003), 527 at 544; Goldsmith/Posner, note 4, at 13; M. J. Glennon, *Limits of Law, Prerogatives of Power: Interventionism after Kosovo*, 2001, at 84; J. Rabkin, *Law Without Nations? Why Constitutional Government Requires Sovereign States*, 2005, at 69-70, for whom the potential dan-

ceived as reviving ideas voiced by Carl Schmitt[7] and his school, seems to be driven by the consideration that international law is to be seen from the perspective of national law or national interests. The Carl Schmitt school's view of international relations is State-centred, international law being perceived as directly controlled by each individual State.[8]

Another school of thought seems to argue that, as a result of global developments, international institutions should be remodelled with a view to increasing or even establishing their legitimacy to meet the new global challenges by setting up organs which may exercise parliamen-

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ger seems to lie in the authoritarian potential for people to begin to follow an international system that is not backed by a democratic constitutional structure.

7 Nationalsozialismus und Völkerrecht [1934], in: Carl Schmitt, Frieden oder Pazifismus, Arbeiten zum Völkerrecht und zur internationalen Politik, edited by Günther Maschke, 2005, 391-421. He says: „Die innerstaatliche Ordnung ist Grundlage und Voraussetzung der zwischenstaatlichen Ordnung, jene strahlt in diese aus, und es gibt überhaupt keine zwischenstaatliche Ordnung ohne innerstaatliche Ordnung." (The internal normative order is the basis and the precondition of any normative order among States. The former influences the latter and an international normative order cannot exist without an internal one). This statement is introduced by the assertion that internal political changes in a State (the reference is to Germany and the German people) result in changes of the international legal community (*Völkerrechtsgemeinschaft*).

8 For example, John H. Herz, "The National Socialist Doctrine of International Law and the Problems of International Organization", *Political Science Quarterly* 54 (1939), 536 at 539 summarizes the National Socialist doctrine as to reduce "international law to an ensemble of rules belonging exclusively to the German order of law. For Germany international law is only the law concerning its external relations which has been recognized by Germany and has been incorporated in its municipal law; its validity depends upon this incorporation and exists as long as this recognition lasts, for the competence of the national state cannot be limited by any norm binding its sovereign will" (references omitted). He emphasized that, in particular, Carl Schmitt argued strongly against the attempt to juridify international life and to over-emphasize law in international relations (at 548, referring to Nationalsozialismus und Völkerrecht, note 7, at 396). Certainly the philosophical starting point of Carl Schmitt and of modern critics of international law is a different one but the result is similar, namely that the relevance of international law to guide State conduct in international relations is given limited weight, if any weight at all, and that national interests, however formulated and motivated, should prevail.

tary and governmental functions[9] or by increasing the influence of NGOs.[10] This development is being seen as the institutional consequence of globalization. The objectives pursued by both schools of thought are diametrically opposed, since the former is concerned with the protection of the autonomy of democratically elected governments to act as required by State interests (at least as they perceive such interests), whereas the latter intends to replace or to supplement national governments by democratically legitimate world institutions. Nevertheless, they coincide at one point. Both have in common that they consider the legitimacy of international law from the point of view of the democratic legitimacy of national governance.[11] Whether or to what extent this starting point is appropriate for international law is open to challenge.

One may identify two further schools of thought. One raises the question of the legitimacy of international law with a view to enhancing the acceptability of the latter. This school is not concerned with the establishment of new international institutions but rather with adapting the traditional means of the development of norms and their content (determinacy, symbolic validation, coherence and adherence) to the needs of a globalized world.[12] The second school of thought in this context which, considering modern normative developments in international

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9 R. Falk/A. Strauss, "On The Creation Of A Global Peoples Assembly: Legitimacy And The Power Of Popular Sovereignty", *Stanford Journal of International Law* 36 (2000), 191; R. Falk/A. Strauss, "Towards Global Parliament", *Foreign Affairs,* Jan.-Feb. 2001; G. Teubner, "Globale Zivilverfassungen: Alternativen zu staatszentrierten Verfassungstheorien", *ZaöRV* 63 (2003), 1.

10 P. Spiro, "Accounting for NGOs", *Chicago Journal of International Law* 3 (2002), 161; in detail S. Charnovitz, "Nongovernmental Organizations and International Law", *AJIL* 100 (2006), 348, who also discusses under which circumstances the input of NGOs may have a legitimizing effect (at 366 et seq.). See also R.O. Keohane/J.S. Nye Jr., "The Club Model of Multilateral Cooperation and Problems of Democratic Legitimacy", in: Robert B. Porter (ed.), *Efficiency, Equity, and Legitimacy: Multilateral Trading System at the Millennium*, 2001, 264 at 282.

11 The term 'governance' as used in the context of this contribution means to embrace all forms of processes by which authority – not necessarily public authority – is being exercised; see World Bank, *Governance: The World Bank's Experience*, 1994, at XIV; different Christoph Möllers, "European Governance: Meaning and Value of a Concept", *Common Market Law Review* 43 (2006), 313 at 314 et seq.

12 Franck, note 3, at 93 et seq.; references to Franck are frequent.

law as a form of international governance, advocates strengthening the national parliamentarian influence on the conduct of international relations which is traditionally thought to be the domain of governments. This approach is inspired by the consideration that international law has reached – at least in part – a different quality which may be referred to as international governance.[13] It perceives that governance, undertaken on whichever level, requires legitimacy.

The two latter approaches sketched out here start from the same point of view, namely that certain parts of international law may have a legitimacy deficit. They seek to cure this deficit at different levels, though. Whereas the first school of thought intends to improve the mechanisms of international law, the second attempts to strengthen the national legitimacy chain. The approaches advocated by these two schools of thought are not necessarily mutually exclusive; they assess and approach an identified problem from different sides and thus may complement each other.

The following contribution will deal with two issues, thus hoping to contribute to the current discussion. The contribution will briefly summarize the reasons why it is possible to speak of the development of international governance, and thus why the quest of legitimacy of international law has become an issue. This is done without questioning the relevance of international law as law. On this basis the contribution will discuss to what extent proceeding from a model of legitimacy as developed over the centuries for democratic national governance is adequate for international law.[14]

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[13] Amongst others R. Wolfrum, "Kontrolle auswärtiger Gewalt", *VVDStRL* 56 (1997), 38, with further references.

[14] Critical in this respect J. H. H. Weiler, "The Geology of International Law – Governance, Democracy and Legitimacy", *ZaöRV* 64 (2004), 547 at 548, and M. Reisman, "The Democratization of Contemporary International Law-Making Processes and the Differentiation and Their Application", in: R. Wolfrum/V. Röben (eds.), note 1, 15.

II. Legitimacy and Public International Law Based on State Consent

1. On Legitimacy in General

The term legitimacy is being used differently, although it mostly means to refer to the justification of authority, this notion being understood as the equivalent of having the power to take binding decisions or to prescribe binding rules. Such decisions or rules may be general or specific in nature; this distinction may be of relevance for their legitimacy.

Different approaches to the elements which may induce legitimacy of a particular authority are discussed. Theoretically they may be source-, procedure- or result-oriented or a combination thereof.[15]

Authority can be legitimated by its source of origin. For public international law legitimacy rests – at least according to the traditional view – in the consent of the States concerned. According to this view international law is based upon the assumption that States have the ability to negotiate and to adhere to international agreements. By doing so they accept obligations *vis-à-vis* the other partners to that agreement or *vis-à-vis* a larger community. They also have the ability to commit themselves unilaterally.

Authority can also be legitimized if the decisions in question are taken in the course of procedures considered to be adequate or fair.[16] Rules concerning the composition or establishment of an institution and its rules concerning decision-making processes are to be seen from this point of view. Procedure, or rather adhering to a pre-agreed procedure, thus has a legitimising effect in international law as it has in national law.[17] In this respect we must mention that legitimacy may also depend on who participates in the decision-making process. For example, when professional judges consider expert opinions in their decision-making process this may increase the objective legitimacy of a judgment,

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[15] For details see R.A. Posner, *The Problematics of Moral and Legal Theory*, 1999, 90 et seq.; on input and output legitimacy see F. Scharpf, *Regieren in Europa, Effektiv und demokratisch?*, 1999, 16-28.

[16] T. Franck, note 3, emphasizes the 'right process' (at 91); D. A. Wirth, "Reexamining Decision-Making Processes in International Environmental Law", *Iowa Law Review* 79 (1994), 769 at 798, points out that procedural integrity in itself is an important source of legitimacy for international law.

[17] N. Luhmann, *Legitimation durch Verfahren*, 2nd ed., 1989.

whereas opening up proceedings to allow interested third parties to participate by way of amicus curiae briefs may increase the subjective legitimacy of a decision.

Finally, it has been argued that authority can be legitimated or delegitimated by the outcome it produces. This is a crucial issue and one which deserves further consideration. If a particular body, such as the Security Council or an international court or tribunal, although established in accordance with the applicable rules and taking decisions according to the established procedure does not achieve results which the community as the addressee of such decisions considers to be adequate, this may, in the long run, lead to an erosion of its legitimacy. The fate of the UN Human Rights Commission is an example to this extent. Political dissatisfaction with the UN Human Rights Commission has led to the establishment of the Human Rights Council whose composition is different from that of the former Human Rights Commission. It is, in this context, of particular relevance that a member of the Human Rights Council may be expelled if it significantly and systematically violates internationally protected human rights. However, having said that, it cannot and does not mean that the legitimacy of an international body should be judged merely according to whether its decisions are considered to be satisfactory by a State, a group of States or a community to which they are addressed.

2. Legitimization through Consent by States

A discussion on legitimacy in international law should proceed from international treaties as the main source of international law. International treaty law is developed on a consensual basis. States representatives negotiate international rules which are subsequently adopted by the national institutions in a procedure designed by national law. Thus, it is for national law to ensure that there is a chain of legitimacy justifying the implementation of the ensuing international obligations through national institutions. As a matter of principle it is safe to say that – as far as consent-based international law is concerned – the legitimacy of the consequential implementation is to be established through nationally imposed mechanisms.

This raises a generic question, namely how such chain of legitimacy may be established where some of the participating States are not democratically structured. Does this mean that the international law in question lacks legitimacy for that reason and that one has to distinguish