AGTER's Thematic Meetings

Can International Law Contribute to a More Equitable Global Society ?

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Video Excerpt #1

Permanent Sovereignty over Natural Resources : Soft law that offers no protection

After decolonization, countries in the third world discovered that they were sovereign, but miserable, and in looking for a way out of their situation, they called for international economic justice. But they used what they had already won — in other words, their sovereignty — to demand it. They ended up choosing a tool — a tool which eventually failed. They wanted to reinforce their political sovereignty through the addition of an economic dimension; this is what they referred to as 'Permanent Sovereignty over Natural Resources.'

This 'Permanent Sovereignty Over Natural Resources' was enshrined in what is called 'soft law' in legal jargon ; in other words, in a non binding law. Which is a contradiction in terms. Law is, by definition, that which is imposed on individuals. This is soft law, it is not imposed ; we are not even really sure if it counts as law… So, it was voted by the General Assembly, and there were many great ambitious resolutions – I won't list them here — and this whole 'Permanent Sovereignty over Natural Resources' affair was an immediate failure.

Sovereignty does not Modify Power Relationships: The Strongest will Always Control Investment Conditions

The failure was immediate because there was capital flight : since governments had been claiming that they would nationalize, foreign companies closed down and left. In only a few months, they took everything with them : the capital, the technology, the qualified workforce, etc… I have in mind certain countries that had iron mines, the *Miferma* in Mauritania, for example. Things became disastrous very quickly. Within months this company's products were no longer competitive on the world market, because they lacked technology ; leaders began to say, 'well, ok, we do need a bit of foreign investment, and some technology.' They did not want to change their policies right away, they said, 'we'll create investment codes, to reassure investors.' These are national laws, which make public the conditions that will be accorded to foreign investors: 'this will be your fiscal status, these are the social conditions you are required to offer to the workforce, the environmental regulations that you will have to respect.' But in the meantime, international investors had developed highly knowledgeable agencies that evaluate risk factors. In France, this is the COFACE. All developed countries had agencies of this kind. They say, 'investing in this country represents this or that risk, here, it's 3 times as risky, there, 2 times less.' And the investor, who is only looking for profit , invest in the least risky countries. And so, the investment codes were useless. Next – and it was quite terrifying, to witness this —developing countries began engaging in bilateral agreements with developed countries, so that both governments could guarantee the degree of security of these investments. And then the World Bank created a system of international arbitration, the ICSID, in 1965.

International Center for Settlement of Investment Disputes (ICSID)

Arbitration isn't the same as law. In an arbitration, there is a list of arbitrators, who are specialists in economic law ; the investor and the host country can also go to the arbitration, if there is any disagreement. So… not all of the sentences are made public. For jurists, this is a source which is difficult to… it's hard to have a very broad outlook because sentences are only made public if the involved parties want them to be made public… and we only have access to a sample of all of the arbitrations. When we look at this sample, which is, considering, quite consequential -- roughly 20 cases are examined per year – what do we see ? Investors' needs are superior to the needs of national populations, this much is obvious. This is the fundamental dynamic. So… there are some exceptions. Environmental considerations are very rarely taken into account, nor is what we call, in the legal domain, 'the state of necessity' : for example, a few years ago, when Argentina was going through a crisis, some investors who had contracts there, important ones, including some French companies, found themselves in very difficult conditions. They made a lot of noise to obtain the conditions that they wanted, and there was a large series of arbitrations at the ICSID. Argentina plead that it was in a 'state of necessity,' as it was. The crisis was so bad that it was impossible to provide the kind of profit that investors had become accustomed to. ICSID's arbitration tribunals did not take this factor into account when settling the disputes ; and it gets even worse: currently, ICSID requires that investors unhappy with the conditions of their reception be indemnified with a sum that is calculated to include compound interests. This began after well known dispute between Costa Rica and a huge American tourism company. After signing an agreement with this company, Costa Rica signed some conventions regarding the protection of the environment and biodiversity, with which the investment was incompatible ; so they went back on the concession agreement that they had made. The American company complained to the ICSID, and Costa Rica was condemned to compensate the company for all unperceived benefits since violation of the initial contractual conditions**.** The compensation, which included 'compound interests,' was calculated to cover a period of 10 years, the entire duration of the case. It was settled in 2001.

Unfortunately, in these cases that take place after the fact, the tribunals have embraced this 'compound interests' idea, which investors are of course very happy about. You can see that sovereignty is an inadequate tool in this context. Because the sovereignty of the weak is useless. For that matter, I dislike hearing about food sovereignty in agricultural circles. I don't think that this is a good path. What does food sovereignty do for a country like Guinea Bissau? Nothing. We need a protective international legal system. Sovereignty only protects the largest, not the smallest. It's necessary to move towards more binding international laws. Sovereignty is an obstacle to law. It doesn't allow for solidarity within the global community, it's every man for himself.

Video Excerpt #2

Contractual Relationships with No Legal Framework

Contracts are a confrontation between strong and weak. It's head on: what can be negotiated?What are you going to negotiate, if you're in need of work? Nothing at all, you're going to take the contract that the employer gives you. You're just happy to have a contract. And so 'contractual liberty' is totally unequal.

Internal, or national law, is an exception ; because of democratic progress, a certain number of laws that restrain contractual liberty have been put in place. For that matter, when judges are called upon to resolve a conflict regarding a contract, they immediately ask what contract law to use, what the legal reference is. In internal law, a contract must respect certain laws. In international law, the result of this distinction between what is public and what is private is an *inter*-national law based on treaty relationships between states — the enforcement of which depends on their good will — and, then, *trans*-national relations.

When a private Korean investor- which is not the same thing as the Korean state -- negotiates with the Madagascan head of state, the contract (and we don't know if it's been 'sort of' signed, not signed at all, or even whether it's still on the table) isn't a treaty ; a treaty is between two states. We're talking about a private investor. And so, this is the situation with *trans*-national relations. They're contractual relations, but they're contracts for which there is no contract law. And we don't even know who will judge the contract. Let's imagine that the contract has been signed, and that it is going to be applied, and that the Madagascans, the government itself feels that it is one-sided and unjust, that general principles have been violated, etc. What judge can it go to ? Or, even if an arbitration clause has been included, it can go to an arbitration tribunal like the ICSID, which I discussed earlier. Or, if the state has forgotten to include a clause, which is unfortunately quite common : well, in this case, we don't know. So we don't find a judge. This is most frequently the case. And for that matter, even if a judge was found, one would have to wonder, 'what law are we even applying ?' Madagascan law ? Korean law ? International law ? Some other legal point of reference? We don't know, so we're in a sort of legal grey area, which is obviously extremely problematic.

Contracts are relative tools. In civil legal theory, contracts only have relative effects, that is to say that they only affect those that sign them. They do not affect third parties. How can we reach universality with a relative legal tool, which will not affect everyone ? It's not sufficient, and we need to find something else.

Video Excerpt # 3

Two possible solutions : Peremptory norms of general international Law and truly compulsory Justice

Peremptory norms of general international law are one more thing. It represents the ensemble of values that are so fundamental as to be inviolable. In other words, they cannot be contradicted in a contract or in a treaty. This is key. This means that a land concession agreement could be declared invalid if in conflict with an inviolable principle. Where are such principles to be found ? Nobody really knows, because they've been mentioned in a convention, the Vienna Convention on the Law of Treaties **…** Paradoxes in law are innumerable, we've just spoken about peremptory norms of general international law, which is a universal category written into a treaty, which is contractual... Incidentally, it was for this reason that France refused to sign the treaty. Because France did not want the notion of peremptory norms to be imposed in this way. In any case, it was included in this convention, which states that 'a treaty is invalid when it is contrary to a peremptory norm of general international law.' This is well and good. But where are these norms to be found ? The same convention says that 'a peremptory norm of general international law is a norm upon which the entire international community agrees.' The *entire international community* but, what of those peoples that have not yet become states? What does 'entire' community mean ? A majority ? Does it imply unanimity ? We don't know, because the text is silent…we're in a grey area.

Where is the solution? This *law* is unwritten. Creating an institutional legislator is certainly not the solution, I will re-state my reticence concerning a single global government or legislator. This said, when principles are brought before the United Nations General Assembly one, two, ten, twenty times — the same, before the UNCTAD, the FAO, when governments refer to these principles in discourse - well, this means that we have a trend. Someone just needs to make it official. Which is why we need a judge.

In my opinion, we can only reform global society through truly compulsory justice. We need a judge. Moreover, when the International Court of Justice is called upon — if states appeal to it, as this is the rule, at least for now — well, it relies upon international 'custom,' in quite interesting conditions, and upon peremptory norms of general international law. For example, although it was an opinion, and not a judgment, delivered on the subject of the wall that Israel constructed in the occupied territories, the court said that 'the Palestinian people has a right to dispose of itself, it is a peremptory norm of general international law,' which it called 'Erga Omnes', (please excuse my legal Latin): a principle that is imposed upon all, you cannot say 'I haven't signed', no, the principle of the rights of peoples applies to everyone. As you can see, obligatory justice is the key.

A Prerequisite: Create a Global Political Community

I think it will be impossible to improve international law if an effort to explore the idea of a universal political community is not undertaken within the international political field. People within circles currently exploring this question are scared, because they feel that it will be a replacement. Which is, needless to say, the same fear that people have about Europe, because they don't understand the inventiveness of the European project. Europe is notable because it is not creating a federal state that will eliminate the individual member states. It's an absolute novelty in the context of the world's legal architecture. States remain, but a new political community is superimposed upon them, and combined with them, the principle is subsidiarity ; this is what we need to try to imagine on a global scale. Because today not all problems are global, but some are. For example, environmental problems — not all of them, of course, collecting waste is a municipal problem, but biodiversity, climate change, *etc.*.: these problems are on a global scale, not on any other. They cannot be dealt with on a national scale ; we know very well that even if a state makes a huge effort, it is wasting its time if other states do nothing. So, we are facing a certain number of problems… the fight against large sanitary risks is the same, one state cannot resolve a large scale sanitary risk on its own. So we need global responses, not national responses. Some problems occur on a continental scale ; this is for Europe, and for a few other organizations in the world — though none is as advanced as Europe. There are national problems, and states must remain political communities. But they mustn't be the only political communities, keeping all the power for themselves. They have to share with other levels.

Video excerpt #4

Relevance and limits of the International Covenant on Economic, Social, and Cultural Rights.

International Law Proclaims…

Rights are currently proclaimed but insufficiently guaranteed and weakened by contradictions. Proclamation has made some major progress. During the entire 20th century, rights were proclaimed ; this was all that was done. People participated in committees of experts, declarations were made, perfected ; it's true that since 1948, we've made a lot of international pacts, declarations, a litany of 'human rights.' These texts are well written…

… Values that could potentially be used to resolve certain problems (for example, the right to food or the right to natural resources)

'International Covenant on Economic, Social, and Cultural Rights.' Here, we've got all we need :

Article 1, paragraphs 1 and 2 (International Covenant on Civil and Political Rights, which includes the exact same text as the first article) :

1. All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

2. All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.

The rights based response to the problem of land and grabbing is clearly here ! But wait : When we start to discuss their efficiency, you will be disappointed. But first, I'll read one more article, article 11 :

1. The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international co-operation based on free consent.

2. The States Parties to the present Covenant, recognizing the fundamental right of everyone to be free from hunger, shall take, individually and through international co-operation, the measures, including specific programmes, which are needed :

(a) To improve methods of production, conservation and distribution of food by making full use of technical and scientific knowledge, by disseminating knowledge of the principles of nutrition and by developing or reforming agrarian systems in such a way as to achieve the most efficient development and utilization of natural resources;

(b) Taking into account the problems of both food-importing and food-exporting countries, to ensure an equitable distribution of world food supplies in relation to need.

But it is not obligatory !

(Question from the Audience: What text are we discussing?)

MCG: The International Covenant on Economic, Social and Cultural Rights (ICESCR), 1966, ratified by enough states to enter into effect in 1976. There is one for economic and social rights, and one for civil and political rights (ICCPR). It's the bible for human rights specialists. They're well done, but these pacts, if we want to legally enforce them, well, it doesn't work. Because their fatal weakness is… - there, the civil society actors were'nt informed - they lack of a clause that says that when they're not respected, the International Court of Justice is competent. This clause was not included. Instead, an 'optional protocol' was created and included in an appendix; states could sign or not sign, they did as they wished. A 'human rights committee' was also created, but exclusively for the ICCPR, which would 'receive petitions' and 'examine them.' So petitions are examined, and everyone is happy. And the problem is not resolved. And yet, in internal law… The 55th article of the French constitution — and, most states have a similar article in their constitution — says that signed and ratified international treaties become part of internal law. I have no particular case in mind for France. But I can cite a terrible example from Switzerland. There's a very nice article in the ICCPR about the right to education, which must be free of charge at the elementary level; secondary and higher education must 'tend towards being free of charge.' Well, there is an orientation ;which should avoid regression. And yet the Federal Swiss Government increased school registration fees in high schools. So a parents' organization who knew about the covenant went to the Tribunal in Geneva saying 'this decree raising school fees contradicts the covenant, it can't be maintained. To tend towards free education, well, that doesn't mean increasing fees. And the tribunal at Geneva said 'ha, I'm sorry, these covenants are not justiciable, which is of course totally arbitrary. It could and should have ruled the contrary, as the Swiss constitution is like ours [in France]: signed and ratified treaties become part of internal law. But no, because covenants on human rights are not justiciable. So, the poor plaintiffs wrote a beautiful letter to the Human Rights Committee, which responded that it was sorry, and that it would send a scathing letter or criticism to the Swiss Federal Government. So… it's Soft Law, non binding law, even when it's enshrined in a treaty.

Video Excerpt #5

Some questions from the audience

What about international law and land grabs ? What kind of recourse can it offer in this case ?

MCG : Well, this route is blocked : there are debris on it, that are blocking the way. But the road has been mapped out ; it just needs to be cleared ; this can be done with international agreements, by protecting laws. The individual right to survival, to food, *etc.*, and people's collective rights to natural resources, all of this has been written out in agreements that are supposedly binding. Why are there debris ? Because you can't go to a tribunal and defend them, because this justice isn't obligatory. This is the main stumbling block.

On that note, could you clarify this idea of 'obligatory justice?'

MCG : Ah yes, please excuse-me, it's not necessarily clear for non-jurists. In France, for example, if your upstairs neighbor leaves his bathwater running when he goes away for the weekend, and your apartment gets ruined, and you realize that nobody has insurance, you're going to call upon a judge, so that this person will be obliged to pay for the damage plus interest, so you can refurnish your apartment. You're going to send a bill to the judge. And the neighbor can't say 'no, I won't go to the tribunal.' He's going to get a piece of paper in the mail, possibly sent by the police, requiring him to go before the tribunal. International law is a law between sovereigns, and with this old vision of sovereignty, which still endures, come some lingering ideas : 'if I'm sovereign, there's nothing above me, so there's no tribunal, I won't go before any tribunal.' Within internal state law, if my state constitution says that in the case of certain administrative acts, I, the state, must go before a tribunal, well, this is an internal affair, and I, the state, have accepted it in my constitution, so ok. But when it comes to relations with other states, I'm not going before a tribunal unless I feel like it. This is what we call *optional* justice. We created the International Court of Justice. How is it called upon ? It can be called upon if states have signed the – prepare yourselves— '*optional* clause accepting *compulsory* jurisdiction.' And yes, this is very clear,the clause is optional, you sign it if you want to, once you've signed it, justice becomes obligatory. But there are 66 or 67 States out of 192 that have signed the clause, and this does not include our dear country, which signed in the beginning, but then pulled itself out of the clause when Australia and New-Zealand pursued it for Nuclear tests in the Pacific. We said 'oh no, we're not playing anymore, that's it.' Just like the United States, who signed the clause and then deserted it when they were condemned by little Nicaragua in 1986. It was horrible for the United States. Little Nicaragua was attacking them and winning. It was a big deal, since it was againsts the actions of *La Contra*. For those who knew the region well,, that was after the sandinists took power, Somozists were active from Honduras, we were calling them *La Contra*. They were armed, funded and trained by the United States.

Video excerpt #6

More questions from the audience. How can the damage caused by massive land grabs be limited ?

Would a global tax on land property rights be useful ?

Michel Merlet : *I'd like to revisit 2 or 3 important themes that we try to develop in our paper (Conceptual framing document for a study commissioned by the International Land Coalition, on the topic of large scale land grabs. Completed by Agter, Editor's note). I will comment that rights over the land are not the same everywhere ; in particular there are some significant differences between previously colonized countries and developed countries. This produces complex diversity of legal systems : what is considered legal in one place may be considered absolutely absurd elsewhere. That's one observation. My second comment concerns a subject that you also explored in your book, which we have tried to develop in our paper ; the fact that there is a phenomenon of resource monopolization, and excessive benefit, behind what we refer to as 'investments' but which have, in reality, very little to do with 'real' investments. To these two issues we can add a third, which is the impact of time. Even when there are voluntary codes of conduct which lead investors to be 'nice — in short to provide revenue, schools, and medical clinics to local populations - it's easy to create a situation that works for a few generations, but which becomes quite destructive over time.*

These three issues deal with 2 points in particular : firstly the different types of rights on land and natural ressources, and, the possibility of impressing upon people the idea that there is a communal right to the soil and to the earth, the recognition of which should transcend individual rights, and be institutionalized on a number of different levels ; and, secondly, if it would be extremely difficult to redistribute wealth — it might be possible to share oil, to declare that oil is a public good, we know this won't happen tomorrow... - there is a gradual, progressive way, which is taxation.

Is it realistic to look to international land taxes that transcend national sovereignty ? A sort of Tobin Tax that applies to land ownership, to resource ownership, and not just to transactions ?

MCG : Although it won't be easy, when addressing the problem of wealth monopolization and excessive benefit, it would be best to start with investors. Even in internal law, it's necessary to go through the judicial system. If condemnation cost them more than what they earn on the incriminated investments, investors would improve their behavior. This does exist in French law. French law has a horrible track record when it comes to environmental jurisprudence : when condemned, corporations are always asked to pay less than what they would earn by violating the law. So they don't gain anything by changing their attitude towards the law. You have to think like them ; the possibility of being convicted is too small to make them change their behavior. Then, it is possible that the content of the judicial system — and here, I'm coming back to what you said — is insufficient. For example, based on my experience with international jurisdiction, I can tell you that the International Court of Justice would never make a decision like the one that the ICSID made, I'm talking about this

compound interests affair, what a scandal... In these cases the investor just has a good laugh and moves on. So we should first try to make the capture of natural resources *expensive* when it's breaking the law, through a modification of the judicial system.

There is a terrible impact over time, because the poorer a society is, the more it tries to take advantage of immediate benefits. Obviously. So they take advantage of immediate benefits and avoid the fact that future consequences will be even worse. This is how significant damage has been caused in a number of different countries.

Moreover, land rights (which are of course different everywhere) are unfortunately eroded by globalization — a standardization of the worst kind. To come back to Madagascar, well, until very recently, until Marc Ravalomanana, there were laws prohibiting foreigners from owning Madagascan land. This came across as somewhat xenophobic, and plenty of people asked 'what's going on ?' But it was an excellent form of protection. The World Bank finally succeeded in convincing Ravalomanana ; obviously, the Bank was claiming that 'if you want investment in Madagascar, people have to be able to buy apartments in Antanarivo, they have to have a place to stay, and then, well, how are you going to have investments, if investors aren't property owners ? This will give them more security.' So Ravalomanana gave in, 2 years after his rise to power in 2003, I believe. So it's possible that land rights in Madagascar will end up the same land rights everywhere else, which is not necessarily a good thing. I don't think that any societies should be shaken up. Again : law comes out of social practice ; there is nothing more dangerous than destabilizing a society's legal structure. A society whose legal structure has been destabilized becomes disoriented, it loses its bearings, and can become violent very quickly. So even in cases where certain laws are limiting progress, etc. it's imperative to proceed very carefully, especially when you're not from the country in question. I think we need to place communal limits on rights that are already in place ; communal limits will help us to work on equitable redistribution.

So, I don't think that local rights should be shaken up. We have to put common universal limits on what investors can take away from the land, foreign or local because it's also possible for the individual benefiting from all the land's resources to be a local business man,, at the expense of local farmers and/or the general population. This is why we need effective international laws. When the idea of sovereignty over natural resources became popular, we were somewhat overenthusiastic and blind. Because… well, the thirdworldist movement was so delighted to when decolonization happened, and so horrified when economic catastrophe followed, after only a few years. So the idea that there was a legal way to resist this transition was very exciting. But when we think about the way that it was accomplished, the error of our ways is obvious. Our mistake was to view international law as a simple guarantor of state sovereignty. To the contrary, international law should have been viewed as a limit to state sovereignty. We should have done exactly the opposite. Now that we realize our mistake, we know what the correct path is.

Michel Merlet : *Certain research teams at the World Bank have advocated recognizing customary rights, rather than just formal rights. I find the idea of acknowledging these rights that have been constructed by populations over time, but which are often in conflict with the formal laws of the countries in question, very interesting.*

MCG : Even more so since the process of colonization and decolonization has been so damaging. Certain colonizers recognized customary rights to a certain extent, but then, in a number of cases, when countries wanted to 'modernize' they imitated European civil and rural codes, choosing to ignore these customary rights very suddenly. And so it's not a bad idea to integrate what is, once again, at the base of the social fabric, but it must be done on a case by case basis.

Biography :

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Until 2001, she presided over the European Association of Lawyers for Democracy and World Human Rights, which she created in May of 1993.

She is the author of 'International Law and World Democracy : Reasons Behind their Failure' (Droit international et démocratie mondiale : les raisons d'un échec), amongst other titles.

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