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*Christian Tomuschat**

THE RELEVANCE OF TIME IN INTERNATIONAL LAW

Abstract: *Law is grounded in time and is constantly shaped by historical circumstances. Treaties, produced by voluntary acts at a given point in time, remain generally in force without a formal endpoint, while customary law arises from practice and lacks specific points of departure and conclusion. Through the practice of their application, both treaties and customary law may change their content and meaning to a far greater extent than domestic rules. Generally, international law resists retroactive application. However the recognition of sovereign equality to all States in the process of decolonization represents an example of profound change. While the problems deriving from armed conflict and former colonial domination must be assessed by the standards of their epoch and not by having recourse to the rules and principles of our time, at the same time it must be borne in mind that many of the acts considered perfectly lawful when they occurred were marred by deep injustices, producing effects which need to be addressed by the law of our time.*

Keywords: International law today, the law of all nations, treaties and custom, decolonization, retroactive application of modern international law

INTRODUCTION

The topic "Time in International Law" could hardly be framed any larger: it has truly encyclopedic dimensions. Human existence is grounded in time, and it is shaped by historical circumstances that are continually changing. It should be noted at the very outset that reflection on time in international law does not focus on time as such, which knows only one direction, namely straight ahead; but on the developments

* Professor emeritus. Dr.-Dr. h.c. mult. (Zürich and Tartu), Humboldt University Berlin, Faulty of Law; email: Chris.Tomuschat@gmx.de.

that unfold in the temporal dimension. *Tempora mutantur* is not a new insight. Human beings have always had to accommodate themselves to their epoch; they cannot eschew the ongoing changes. Nobody is able to escape the impact of their environment, and neither can the law be conceived as a firm and solid normative fortress that invariably determines societal life forever. While law is meant as a firm framework aimed at regulating the life of society, at the same time it is also subject to societal developments. If it remains too rigid without any close contact with the social realities it will inevitably break down one day. On the other hand, if it is reduced to a reflection of the prevailing circumstances, it runs the danger of losing its autonomy and control capacity, thereby forfeiting its predictability and reliability.[1]

1. TODAY'S UNIVERSAL LEGAL ORDER: DETERMINED AND SHAPED BY INTERNATIONAL LAW

It is by no means evident that in the current epoch of the 21st century a universal legal order, shaped by international law and recognized by all nations, actually exists. Almost all States of the globe have become members of the World Organization of the United Nations,[2] and through their accession they have confirmed that today a binding regulatory framework, based on certain fundamental principles, is in force for humankind as a whole. Although concluded as an ordinary international treaty, the UN Charter, extended and particularized by the Friendly Relations Declaration of 1970,[3] has today essentially taken on the quality of a world constitution.[4] It is from this legal basis that the international rule of law is derived.[5]

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[1] For a general reflection on the topic see also Société française pour le droit international (ed.), *Colloque de Paris. Le droit international et le temps*, Pedone, Paris: 2001; Ch. Djeffal, *A Reflection of the Temporal Attitudes of International Lawyers Through Three Paradigmatic Cases*, 45 Netherlands Yearbook of International Law 93 (2014).

[2] The few outsiders, Taiwan and Palestine, owe their diminished status to specific political circumstances: they do not reject in principle the governing international legal order, but rather in contrast desire to be recognized as equal members of the international community. On specific economic grounds Cook Islands and Niue have voluntarily renounced membership in the United Nations, entrusting the representation of their interests to New Zealand.

[3] Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, Annex to UNGA Resolution 2625 (XXV), 24 October 1970.

[4] G. Abi-Saab, *The System of the Friendly Relations Declaration*, in: J.E. Viñuales (ed.), *The UN Friendly Relations Declaration at 50*, Cambridge University Press, Cambridge: 2010, at 12, 20.

[5] UNGA Resolution 70/118, 14 December 2015.

1.1. Legal Equality

A look back into the past reveals tremendous differences in the concept of international law. Through the process of decolonization of international law – which up to the 19th century had generally been characterized as European international law[6] – has since 1945 progressively become a truly universal legal order that applies to every people and to every State, no matter how their internal constitutional system of governance may be structured. The existence of international law, and its binding nature, is accepted in principle by almost all entities invested with public power. The universality of the normative system as such is no longer challenged except by extremist groups. The voices that in the past opposed, in particular, the continuity of the customary law that had arisen in the 19th century within the group of States with colonial possessions[7] have been overcome, or have simply turned silent.[8] It is particularly significant that all the superpowers of our time have joined the general consensus. Through their presence as permanent members in the Security Council, i.e. the most powerful institution of the United Nations, they have associated themselves so tightly with the World Organization that any withdrawal from the Charter appears more or less inconceivable, although in formal terms the Charter continues to exist only as an ordinary international treaty notwithstanding the precedence rule of Art. 103.[9] Thus a huge step has been accomplished from the second half of the 20th century up to the present time.

1.2. Transformation of the International Legal Order

In our contemporary epoch – where the democratic principle has found world-wide recognition and where agreement has been reached about non-recourse to armed force – international law obviously cannot maintain the same characteristics as in the period of European predominance in the world. Thus, the question as to the impact of time on international law may simply be answered by the general statement that the factual circumstances have two faces. Over the centuries they have

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[6] As a representative example see A.W. Heffter, *Das Europäische Völkerrecht der Gegenwart*, E.H. Schroeder, Berlin: 1844. Even the 8th edition from 1888, edited by F. Heinrich Geffcken, kept this title.

[7] *Cf.* M. Bedjaoui, *Towards a New International Economic Order*, Holmes and Meier, New York: 1979, at 134. By contrast, the classic viewpoint regarding the all-encompassing nature of international law was uncompromisingly defended by M. Virally, *The Sources of International Law*, in: M. Sørensen (ed.), *Manual of Public International Law*, Macmillan, London et al.: 1968, pp. 139-140.

[8] Even one of the fiercest critics of a European international law perverted by egoism, M. wa Mutua, *Why Redraw the Map of Africa?*, 16 Michigan Journal of International Law 1113 (1995), wrote that: "African states ... subscribe to international law" (p. 1122).

[9] The Charter contains no withdrawal clause, but at the founding Conference of San Francisco agreement was reached to the effect that denunciation would become inevitable should it emerge that the organization was unable to live up to its mandate to maintain international peace; *cf.* L.M. Goodrich, E. Hambro, *Charter of the United Nations. Commentary and Comments* (2nd ed.), World Peace Foundation, Boston: 1949, p. 143.

shaped the architecture of international law in accordance with the ever-changing variations in historical and political developments and societal value judgments, in all their manifold articulations.[10] But at the same time they remain subject to the disciplinary force of a body of rules. Facticity and normativity communicate with one another in a dialectic exchange process.

2. THE FOUNDATIONS OF THE CONTEMPORARY INTERNATIONAL LEGAL ORDER

So what is the current international legal order? At first glance this question may seem to be devoid of any meaningful sense. Today is today. Yet the international law which we know and as it is reflected in scholarly treatises and judicial pronouncements is, strictly speaking, the law of yesterday: its contents were formed in the past. Philosophical reasoning raises another difficulty: the precise point where "today" and "now" has come into existence is conceptually impossible to determine. What is being said and written today pertains to the past already at the moment of its formulation.[11] This observation is discomforting given the fact that, as already alluded to, international law does not stand set in stone before the eyes of the beholder, but remains involved in its underlying factual and evolutionary processes and cannot really be demarcated in a watertight manner. In this connection it should not go unnoticed that many great international jurists have more often than not opted for presenting their statements about the present connotation of a legal proposition as a kind of snapshot; valid for the actual moment only and quickly exposed again to the dynamic game of political forces.[12]

Another preliminary observation should be submitted before considering in greater detail the two most important sources of international law, i.e. treaties and customary law. In principle treaties, like international law in its entirety, pertain to the past even though they are concluded for the future, meaning that they are concluded at a given point in time, after which they are present in the world as a firm set of rules as set forth in the relevant text, subject to unreserved observation according to the principle: *pacta sunt servanda*. Customary law grows over time,

[10] *See* G. Winkler, *Zeit und Recht*, Springer, Wien / New York: 1995, p. 459: "Recht ist kein zeitloses Sollen ... kein Gefüge von zeitlosen Normen" ("Law is ... no system of timeles norms").

[11] Philosophy relies in this connection on the concept of "present awareness", which is estimated to last for about three seconds.

[12] *See e.g.* from the German literature U. Scheuner, *Solidarität unter den Nationen als Grundsatz in der gegenwärtigen internationalen Gemeinschaft*, in: Ch. Tomuschat (ed.), *Ulrich Scheuner. Schriften zum Völkerrecht*, Duncker & Humblot, Berlin: 1984, pp. 379-405. The general objective to evaluate international law within its societal framework was markedly pursued by J.H.W. Verzijl, *International Law in Historical Perspective*, Sijthoff, Leyden: 1968 (Vol. I); 1969 (Vol. II).

but at the point where it is supposed to be applied it presents itself as a finished set of norms, with the specificity that its origins lie in the past. Thus, where international law is applied the decision-maker resorts in large measure to decisions, experiences, and knowledge of the past that may not match the current political landscape. This disconnect would constitute a significant shortcoming of the law if the international community had not come up with the ways and means to break out from this 'backwardness' conundrum. In particular, the current climate change crisis can be expected to give a strong evolutive push to the normative status quo so that the general duty of cooperation (Art. 55 of the UN Charter; Principle 4 of the Friendly Relations Declaration[13]) may soon achieve some hitherto undefinable territorial gains vis-à-vis the principle of sovereign power and the jurisdiction of individual States.

2.1. International Treaties

With regard to the three main sources of international law the impact of time makes itself felt in different ways.[14] International treaties constitute a direct outflow (and output) of the principle of sovereign equality. Since they are intentional acts of volition, their origin can be identified by day, indeed almost by hour. In principle, as already mentioned, *pacta sunt servanda* is the determinative rule, currently also laid down in Art. 26 of the Vienna Convention on the Law of Treaties (VCLT).[15] Generally an expectation of durability accompanies the conclusion of international treaties. As a rule, formalized treaties are not provided with a clause limiting their temporal applicability, with the exception of routine business transactions. A famous exception to this practice was contained in the Treaty establishing the European Coal and Steel Community of 1951, whose applicability had been confined from the very outset to 50 years (Art. 97). In fact the States parties complied with this final date (23 July 2002), as in the meantime the all-encompassing entity of the European Community/European Union had emerged, which allowed for the remaining elements of the original partial integration to be fully integrated therein.

The VCLT does not contain any general rule about time limitations. It avoids any statement providing that a treaty – the objectives of which have not been reached or have become moot – could be affected.[16] No mention is made of *desuetudo* or obsolescence. Yet like any human action international treaties are subject to the vagaries of time, which may carry with it considerable challenges for the parties. It remains

[13] UNGA Resolution 2625 (XXV), 24 October 1970.

[14] In the present connection, only international treaties and customary law shall be dealt with.

[15] Vienna Convention on the Law of Treaties (signed 23 May 1969, entered into force 27 January 1980), 1155 UNTS 331.

[16] But see observations on the UN Charter in note 9.

true that the conclusion of a treaty is the primary temporal point of reference, but developments in the external circumstances cannot generally be ignored, and may even be foreseen by anticipation.

Art. 62 VCLT recognizes the *clausula rebus sic stantibus*, albeit under a number of restrictive conditions. As found by the ICJ in the dispute between Hungary and Slovakia about the water works along the river Danube, the *clausula* constitutes at the same time a rule of international customary law.[17] Essentially a change in the factual situation is considered legally irrelevant, unless

a. the existence of the controversial circumstances constituted an essential basis of the consent of the parties', and
b. the effect of the change is to radically transform the extent of obligations still to be performed under the treaty.[18]

This provision reflects paradigmatically the confidence in the stability of international treaties. Still, at the initial stages of the 20th century diplomatic language had used the pompous word of the "sanctity" of international treaties, and indeed the breach of the treaty establishing the neutrality of Belgium[19] in the First World War had been one of the leading accusations in the criminal indictment against the German Kaiser Wilhelm II.[20]

In accordance with general international law the VCLT attaches particular importance to the stability of international frontiers. The *clausula rebus sic stantibus* does not apply to treaties establishing an international boundary (Art. 62(2)(a)). Here the passage of time shall be entirely discarded in legal terms – a proposition which in view of the numerous territorial changes of the last two centuries was intended to contribute to good order in international relations, at least for the future. The International Court of Justice (ICJ) has fully endorsed this rule.[21] Only recently have tendencies emerged to conceive of the *clausula rebus sic stantibus* in an enlarged fashion, as a general emergency clause empowering a State to assert its interests in departure from the general rule requiring faithfulness to commitments entered into by treaty.[22] These tendencies have not yet been confirmed by authoritative judicial decisions.

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[17] ICJ, *Gabčikovo-Nagymaros Project (Hungary v. Slovakia)*, Judgment, 25 September 1997, ICJ Rep 1997, 7, 38, para. 46.

[18] See the interpretation of this clause in *Gabčikovo-Nagymaros Project*, 65, para. 104.

[19] London Protocol, 19 April 1839, reprinted in: W.G. Grewe (ed.), *Fontes Historiae Iuris Gentium*, Vol. 3(1): 1815-1945, de Gruyter, Berlin, New York: 1992, p. 162.

[20] Art. 227 of the Peace Treaty of Versailles, 28 June 1919, 104 LNTS 441.

[21] ICJ, *Territorial Dispute (Libyan Arab Jamahiriya/Chad),* Judgment, 3 February 1994, ICJ Rep 1994, 6, 37 para. 73.

[22] J. Kulaga, *A Renaissance of the Doctrine of Rebus Sic Stantibus?*, 69 International & Comparative Law Quarterly 477 (2020).

Obviously, the performance of international treaties may encounter particular obstacles after the emergence of armed conflict between the relevant States parties. A few years ago the UN General Assembly invited the International Law Commission (ILC) to consider this topic. The project was concluded in 2011 with a draft which states in principle that even in that eventuality treaties should not be negatively affected.[23] In an annex one finds an indicative list of treaties of which it may be generally assumed that they should remain in operation also in times of armed conflict, which is self-evident in respect of humanitarian treaties.[24] The General Assembly has commended the ILC for the work it has done but has only taken note of the project, refraining from issuing a final word of either approval or rejection.[25] It stands to reason that the continuity of a treaty notwithstanding a situation of armed conflict constitutes a highly political issue, in respect of which every State will look back to its own historical experiences.

Neither is a treaty insulated from the dynamics of international occurrences in its daily transactions. Its true test lies in its implementation. Every treaty is designed to shape reality and to serve as a mandatory guideline. On the other hand, more often than not it is the actual implementation of the clauses of a treaty which makes clear that the text requires interpretation and opens up margins of appreciation which both sides may use for their own benefit. A particularly complex chapter of conventional practice has been introduced by the international treaties on the protection of human rights, and in particular the European Convention on Human Rights (ECHR) and the two International Covenants of 1966. None of these treaties was drafted in a narrow-minded spirit. By distancing themselves from such narrow-mindedness the international instruments, with their high-sounding principles of simplicity and pathos, have been taken as beacons of orientation for the national guarantees of human rights. The interpretation of these treaties has eventually been entrusted to international bodies – in the case of the ECHR and the two parallel international instruments at the regional level – and even to international courts, which have been elevated to the rank of authentic interpreters. As an ineluctable consequence, in their practice a framework of substantive determinations has emerged which accompanies the official text, sometimes even overgrowing it. In this respect the development of these instruments has been largely taken away from their creators, i.e. the responsible political bodies.[26] The text cannot be liberated from the hands of its interpreters. A famous example is

[23] Annex to UNGA Res. 66/99, 9 December 2011.

[24] *Ibidem*.

[25] UNGA Res. 72/121, 7 December 2017.

[26] Analysis by F. Novak, *La conducta ulterior de las partes como regla principal de interpretación de los tratados*, 71 Revista Española de Derecho Internacional 101 (2019).

provided by the tensions between the United Kingdom and the European Court of Human Rights (ECtHR) with respect to the voting rights of prison inmates.[27] Many years were needed before a compromise could be found to the effect that the exclusion from voting should apply only to persons sentenced to long-term periods of deprivation of freedom on account of the most serious crimes.[28] Particular attention – and disapproval – was also paid to the jurisprudence of the ECtHR that the forceful returns to their country of origin of persons who had violently climbed over the boundary fortifications of the Spanish territories in North Africa were to be classified as mass expulsions in the sense of Art. 4 of Protocol No. 4 to the ECHR.[29] However, the judgment of one of the chambers of the Court was set aside a few years later by the Grand Chamber of the ECtHR.[30] Nonetheless, a constantly recurring phenomenon is that judicial practice and political expectations may diverge in the most surprising ways – which is the inevitable price of the rule of law derived from the principle of separation of powers.

Bowing to factual constraints, the VCLT has endorsed, in Art. 31(3)(b), the view that any subsequent practice in the application of a relevant treaty "shall be taken into account", provided that the practice evidences the agreement of the parties regarding its interpretation. In this connection the delimitation between practice, agreements between the parties, und tacit modification of the treaty is a very delicate and recurring issue. In many instances amendments of a treaty must follow a formal procedure that should not be bypassed. While in the case of bilateral treaties one can fairly easily gauge which factual elements may be relevant and should be taken into account, in the case of multilateral treaties the mass of relevant materials may achieve dimensions that can hardly be overseen if no central institution, like a conference of States parties and its secretariat, is able to indicate a specific direction in the attempts at interpretation.[31]

My colleague Georg Nolte, Special Rapporteur and present judge at the ICJ, has studied this problem for many years, and in 2018 succeeded in securing the approval by the ILC of a draft of conclusions on "Subsequent agreements and subsequent practice in relation to interpretation of treaties."[32] Thus we are now in possession of a text which in many detailed provisions specifies which impacts can be exerted

[27] The ECtHR disapproved in particular the automatic and undifferentiated exclusion from the right to vote in case of a sentence that orders deprivation of liberty: *Hirst v. the UK (2)* (App. No. 74025/01), 6 October 2005; *Greens and M.T. v. the UK* (App. Nos. 60041/08 and 60054/08), 23 November 2010.

[28] ECtHR, *Scoppola v. Italy* (App. No. 126/05), 22 May 2012.

[29] ECtHR, *ND und NT v. Spain* (App. Nos. 8675/15 and 8697/15), 3 October 2017.

[30] ECtHR (GC), *ND and NT v. Spain* (App. Nos. 8675/15 and 8697/15), 13 February 2020.

[31] *See e.g.*, statement by France (Alabrune) in the Sixth Committee of the UNGA, A/C.6/73/SR.20, 22 October 2018, 12, para. 74.

[32] Annex to UNGA Res. 73/202, 20 December 2018.

by the subsequent practice of the parties with respect to the substantive content of an international agreement. The text explicitly states that even a formally concluded conventional instrument may undergo variations of its substantive scope and meaning. The conclusions faithfully follow the determinations made by the VCLT in denying that consensual practice has any legally binding effect in a strict sense, although diplomatic practice – above all insofar as regards substantive details – may become a determinative factor. Only one linguistic inconsistency should be highlighted: In Conclusion 3 subsequent agreements and the subsequent practice of interpretation are characterized as 'authentic' means of interpretation. According to the general conceptual meaning, 'authentic' is tantamount to stating that the words concerned imply a final determination about the meaning. The ILC, however, wishes only to underline the particular evidentiary force of the factual elements produced by the parties, without excluding other sources of evidence.[33]

Since the consensual practice of the parties pertains to the factor of interaction between the numerous relevant stakeholders, the inquiry into the scope and meaning of a treaty provision cannot be satisfactorily determined by just one review at a specific point in time in the past, but must normally be constantly renewed with a clear focus on the relevant developments.

The extension of the conclusions of the ILC to the practice of international organizations (Conclusion 12), and hence also the practice of the United Nations – including the practice of expert bodies, in particular in the field of human rights (Conclusion 13) – falls outside the classic framework of the elements that are traditionally considered relevant and deserving of attention. Essentially, the practice of the States parties amounts to nothing else than an extension of the treaty-making power of the parties. On the other hand, the key question regarding the practice of the secondary institutions of a collective treaty is whether the organs of a treaty are free to emancipate themselves from the will of its creators. In this regard, numerous critical voices have emerged, many of which have expressed their concerns that the final product, for instance the original agreement of 1945 on the text of the UN Charter, could in the long run be taken away from its founders.[34] Again it is not the passage of time as such to which opposition is voiced, but the definition of the content of the existing agreement through factual practice without any judicial control.

In order to complete the picture that has been drawn up to now, reference should also be made to the well-known fact that most of the multilateral treaties being elaborated in our time attempt to improve their adaptability to the increasing challenges as a consequence of changing external circumstances by permitting secondary

[33] *See* ILC Report 2018, A/73/10, para. 52, commentary on Conclusion 3, paras. 2 and 4.

[34] *See e.g.,* Thailand, A/C.6/73/SR.22, 24 October 2018, para. 15; Israel, A/C.6/73/SR. 23 and 24 October 2018, para. 20.

law-making through established institutions. Late in the 20th century this strategy became fully recognized and made use of. Until that time the *traité-loi* stood at the centre of all considerations, based on the premise of a complete treaty that contains in its body the perfect range of all necessary regulations. One may note from the contemporary practice the two Vienna Conventions on Diplomatic and Consular Relations, in which institutions with the mandate of progressive development or adaptation to new challenges are not foreseen. The treaties on European integration comprised a contrary model, which as *traités cadre* were from the very outset designed to be refined and particularized during the course of their implementation. These European treaties organize dynamic processes in which new agreements need to be continually sought, in most fields through majority decisions, eliminating the potential of the veto power in international treaty law.

This part may be concluded with the general observation that a treaty is the tool par excellence of the international community. It cannot be denied that history is over and over again shaped by unrest, ruptures, and armed conflicts. Essentially, however, international treaties, under the auspices of the UN Charter, are generally employed as instruments for the creation of an environment where consensus is sought through peaceful means. Of course one cannot deny that the conclusion of multilateral treaties is normally characterized by inherent slowness. But it is also true that almost revolutionary changes can be brought about by means of treaty-making, as shown by the foundation of the United Nations or the European integration processes. A future global climate policy will doubtless be obligated, going much beyond the Paris Agreement of 2015, to lay down a comprehensive set of mandatory rules in the form of an international treaty.

2.2. International Customary Law

As a consequences of its conditions of existence, international customary law is oriented in a temporal direction: it emerges without a fixed date of origin. The definition given in Art. 38(1)(b) of the ICJ Statute continues to be considered as correct and well-suited, in particular in the jurisprudence of the ICJ, notwithstanding certain logical shortcomings. Yet it does not appear illogical, in contrast to the treaty as a legal device, to accept as binding legal rules certain patterns of conduct which have arisen from practice and are completed by *opinio juris*. Whereas treaties pertain in a certain sense to a meta-level, where the premises of the international legal order with its doctrine of sovereign equality require logical consistency in the law-making process; customary law constitutes rather an instrument of pragmatism and contains many fortuitous characteristics. The ILC has attempted here to establish more intellectual clarity and thereby to consolidate the reliability of the

international legal order.[35] Legal science, too, is untiring in its efforts to consolidate the woolly consistency of customary law, trying to define it by clearly perceptible criteria in order to provide it with greater predictability.[36]

The criterion of 'practice' refers to a process that can never be considered as definitively concluded. Customary laws evolves outside any formally regulated procedures, through the factual conduct of the legal entities deemed to be authorized to act at the level of international law. Long-lasting debates have been conducted about the question of what kind of "density" a practice must have before a corresponding *opinio juris* can emerge to support it. In the early epochs of international law the requirement of *diuturnitas* was many times asserted, i.e. of a long-lasting practice which in any event should comprise a couple of decades.[37] As a consequence of the claim of the oceans' coastal States to extend their jurisdiction to the mineral resources of the soil and the subsoil of the marine spaces off their coasts and the uses of extra-terrestrial space for commercial purposes, all of a sudden the concept of "instant customary law" appeared, i.e. of a new legal regime which emerged spontaneously in the face of unforeseen new factual developments, legitimated by a broad consensus supporting it.[38]

The ILC project on the identification of customary international law completely discards the criterion of length of time,[39] demanding instead that the practice must be sufficiently extensive and representative (Conclusion 8). This configuration of the rule stands in perfect harmony with the jurisprudence of the ICJ, which in the 2012 *Immunity of the State* case[40] confirmed its earlier holdings from the C*ontinental Shelf* cases of 1969 that the practice must be settled (French: "*pratique effective*"). A practice can only be deemed to be settled if it has stood the test of time, proving its suitability. The ILC project does not mention "instant custom", yet such short-

[35] See most recently the comprehensive presentation of international customary law by Sir Michael Wood, Special Rapporteur of the ILC, *First report on formation and evidence of customary international law*, UN Doc. A/CN.4/663, 17 May 2013, Yearbook of International Law Commission 2013 II/1, 109, 123-144; adopted as draft conclusions on identification of customary international during the 70th session of the ILC in 2018. Text: Annex to UNGA Res. 73/203, 20 December 2018.

[36] *See e.g.*, the collective volume edited by B. Krzan (ed.), *Essays in Memory of Professor Karol Wolfke*, 8(2) Wroclaw Review of Law, Administration and Economics (2018); B.S. Chimni, *Customary International Law: A Third World Perspective*, 112(1) American Journal of International Law 1 (2018).

[37] See the extensive discussion about this criterion by Michael Wood, *Second report on identification of customary law*, A/CN.4/672, 22 May 2014, 43, para. 58.

[38] Expression coined by B. Cheng, *United Nations Resolutions on Outer Space: "Instant" International Customary Law?*, 5 Indian Journal of International Law 23 (1965).

[39] In consonance with the jurisprudence of the ICJ in the first judgment on the continental shelf, *North Sea Continental Shelf (Federal Republic of Germany/Netherlands)*, Judgment, 20 February 1969, ICJ Rep 1969, 3, 43, para. 74.

[40] ICJ, *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening*), Judgment, 3 February 2012, ICJ Rep 2012, 99, 22, para. 55.

term practices can certainly become the basis of a rule of customary law if as a legal yardstick it corresponds to the wishes and needs of the international community and is buttressed by broad consent.

The doctrine of the persistent objector aims at halting the course of time. Its essence is to maintain that a State which, during the slow process of emergence of a customary rule has consistently and openly pronounced itself against the inherent normative substance of that rule in *statu nascendi*, will not be bound by it after it has consolidated itself as an element of the positive legal order.[41] Empirical evidence shows that the doctrine of the persistent objector cannot rely on genuine factual findings. All the rules of the law of the sea were deeply marked by the UN Convention on the Law of the Sea (UNCLOS), including with regard to non-signatory States. In particular its provisions on the territorial sea, being defined as extending up to a breadth of 12 nautical miles, and on the exclusive economic zone that may stretch out into the sea for a breadth of 200 nautical miles, have received overwhelming support. Nowadays challenging these maritime boundaries would be a vain attempt.[42] Unfortunately the Special Rapporteur of the ILC for the topic of "Identification of Customary International Law" has propagated the persistent objector doctrine,[43] obtaining in this regard a majority in the ILC for his views.[44] Yet in the jurisprudence of the ICJ the persistent objector doctrine has only a weak basis in a few *obiter dicta* from judgments issued many decades in the past.[45] In the discussion of the Wood project many voices clearly manifested their dissent.[46] This criticism has not lost its relevance by way of the consensus that welcomed the project, since UN General Assembly Resolution 73/203 explicitly refers in footnote 6 to the preceding deliberations in the Legal Committee. Customary international law *à la carte* encounters in particular the argument that freedom of objection, with its attendant result of halting the emergence of a rule widely shared by the international

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[41] Precisely defined in: The American Law Institute, *Restatement of the Law Third: The Foreign Relations Law of the United States*, American Law Institute Publishers St. Paul, Minn.: 1987 (Vol. I), p. 24, para. 102, Comment d.

[42] Even the USA has recognized, at least tacitly, this new regulatory system of the different maritime zones, notwithstanding its refusal to ratify the UNCLOS.

[43] *Third report on identification of customary international law*, A/CN.4/682, 27 March 2015, 59-67, paras. 85-95.

[44] *See supra* note 32.

[45] ICJ, *Asylum (Colombia v. Peru)*, Judgment, 20 November 1959, ICJ Rep 1950, 266, 277-8; *Fisheries (United Kingdom v. Norway)*, Judgment, 18 December 1951, ICJ Rep 1951, 116, 131.

[46] Nicaragua, A/C.5/73/SR.20, 22 October 2018, 14, para. 91; Sri Lanka, A/C.6/73/SR.22, 24 October 2018, 6, para. 30; Canada. *ibidem*, 12, para. 72; Cyprus, A/C.6/73/SR. 23, 24 October 2018, 6, para. 43. Advocating instead for the maintenance of the persistent objector principle: Turkey, A/C.6/73/SR.22, 6, para. 27; South Africa, A/C.6/73/SR.23, 3, para. 13; Israel, *ibidem*, 4, para. 27; Iran, A/C.6/73/SR.24, 25 October 2018, 5, para. 29; Indonesia, *ibidem*, 10, para. 63.

community, would lead to a division of the world into a law for the stronger States on the one hand and the weaker ones on the other.[47]

All in all, customary law constitutes the conservative element of international law. It ensures the continuity of the international legal order without being subject any more to the criticism that it cements the former predominance of the European powers. Since the transition into the world of sovereign equality through the UN Charter, all traditional norms are placed under the supervision of a critical world public and are compelled to continually justify themselves in the ongoing processes for the development of the law in light of the changing environment. Whoever believes that there exists a citadel of reactionary forces in this regard refuses to take note of the extant realities.

3. THE IMPACT OF THE PASSAGE OF TIME ON ENTITLEMENTS UNDER INTERNATIONAL LAW

Time plays an important role in those special situations wherein the question arises whether rights and duties may change without any active intervention on the of the rights' holder or the duties' bearer.

3.1. Protection of Status Quo

In principle, international law protects existing legal entitlements. It leaves it to the stakeholders themselves to shape their legal positions by virtue of their sovereign decision-making power. The intervention by institutions of international organizations is a phenomenon of the recent epoch and has nothing to do with the simple course of time. According to the now-established concept of *jus cogens*, however, it has become possible that a treaty loses its validity by virtue of a newly-emerged *jus cogens* rule and becomes invalid (Art. 64 VCLT). In its original sense this article has never become operative since the entry into force of the VCLT: to date no State has ever had recourse to Art. 64 VCLT with a view to obtaining from the ICJ a declaration about the invalidity of a conventional provision on account of its incompatibility with a rule of *jus cogens*.

[47] *See also* G.R.B. Galindo, C. Yip, *Customary International Law and the Third World: Do Not Step on the Grass*, 16 Chinese Journal of International Law 251 (2017), pp. 266-268; P. Dumberry, *Incoherent and Ineffective: The Concept of Persistent Objector Revisited*, 59 International & Comparative Law Quarterly 779 (2017); P. Sreenivasa Rao, *The identification of customary international law: a process that defies prescription*, 57 Indian Journal of International Law 221 (2017). The Asian-African Legal Consultative Committee had expressed its approval of the consistent objector rule upon the proposal of its Chinese member S. Yee, *AALCO Informal Expert Group's Comments on the ILC Project on "Identification of Customary International Law": A Brief Follow-up*, 17 Chinese Journal of International Law 187 (2018), p. 191.

3.2. Retroactive Effect?

However, the question remains open whether – through a rule of *jus cogens* – the validity of treaties from an earlier time can be challenged. In connection with the right of self-determination highly complex legal issues might arise. The new concept of *jus cogens* has likewise raised the question of whether consolidated transactions outside the treaty sector might require a new assessment from today's perspective, possibly with significant legal consequences. Such retroactive consequences are in principle unknown in international law.

It is widely recognized that well into the 20th century peace treaties took little account of the demands of specific ethnic groups for self-determination. The right of self-determination, originally a purely political claim, has established itself as a mandatory legal principle only in the second half of the 20th century. In its advisory opinion in the *Chagos* case the ICJ found, somewhat boldly but certainly correctly, that the definitive consolidation took place through the General Assembly's decolonization resolution 1514 (XV) of 14 December 1960.[48] The treaties that put an end to the First World War[49] had all been implemented well before that date, and they cannot be called into question and rescinded after more than a century. The questions of today are of a different nature. Is there any people which, under today's conditions, has been denied the invocation of its right of self-determination based on any international legal or factual obstacles?

It should be recalled in the first place that under the detailed provisions on the right of self-determination in the Friendly Relations Declaration,[50] this right is not recognized with respect to ethnic groups within an organized system of governance in the form of a right of secession, with the (possible) exception of instances where such a group is denied full and equal participation in the conduct of the public affairs of their country.[51] In this regard it matters little how the State organization was brought about. This negative conclusion applies also to the formation of new States from the heritage of former colonial territories. This may sound unjust, particularly in situations where specific ethnic groups were not able to assert their aspirations during the process of post-colonial nation-building. However, where the rule of law applies no group should suffer any grave damages or inconveniences by living within boundaries to which it has not given its full consent or approval.

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[48] ICJ, *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, Advisory Opinion, 25 February 2019, ICJ Rep 2019, 95, 132-133, paras. 150-153.

[49] Named after the specific locations in and around the capital where they had been signed (Treaty of St. Germain, Treaty of Neuilly, Treaty of Trianon and Treaty of Sèvres), partly reprinted in W.G. Grewe (ed.), *Fontes Historiae Iuris Gentium*, Vol. 3(2): 1815-1945, de Gruyter, Berlin, New York: 1992, pp. 683-729.

[50] *See supra* note. 3.

[51] *Ibidem*, last paragraph in the comments on self-determination.

3.2.1. Africa

It is common knowledge that in Africa the boundaries of the former British and French territories had been drawn rather arbitrarily, without particular regard for the ethnic specificities of the territories. Furthermore, there is no doubt that at the time of the granting of independence to these peoples and territories the existing former colonial boundaries were mostly upgraded to new international frontiers. Here the question could have been raised whether some of the new boundary lines had to be evaluated as a massive violation of the right of self-determination because of their faulty separation of coherent tribal areas. However, the heads of State and Government of the African States had agreed at their summit meeting in 1964 (Cairo) not to raise the territorial issue in order to avoid armed territorial conflict that might endanger the newly achieved independence.[52] No precise criteria were at that time available which would have made the new geographical division of Africa more just and convenient. Since that agreement of 1964 has essentially stood the test of time for over half a century it would make little sense to stir up unrest from a legal perspective by demanding territorial readjustments. The right of self-determination has not been conceived as a weapon of destabilization of *justice à outrance*. On its part the ICJ has seen no ground to doubt the boundaries drawn by the colonial powers or to rectify them retroactively. The two cases of *Burkina Faso v. Mali* and *Cameroon v. Nigeria* provide the most significant evidence of this viewpoint, i.e. intended to maintain the demarcations as they took shape half a century ago.[53]

It should be noted in this connection that the decolonization process has created a home for all ethnic groups of Africa in one of the States as they exist now. Not a single group has been excluded from the process of consolidation. Whoever should at the present time claim a new design of the African map under the auspices of association with a tribe or a people is impacted by a conception that has little to do with modern Africa and its new dynamics. On the basis of the current interpretation of the scope and the meaning of self-determination there are no peoples in Africa that could at least with a minimum of plausibility argue that the fulfilment of the right to self-determination has been denied to them.

3.2.2. The Americas

On the American continent the colonial history approached its end with the liberation of the overseas provinces from the Spanish monarchy in 1809. Some remnants

[52] Resolution 16(I): Border Disputes Among African State, 1964, available at: https://au.int/sites/default/files/decisions/9514-1964_ahg_res_1-24_i_e.pdf (accessed 30 June 2022).

[53] ICJ, *Frontier Dispute (Burkina Faso v. Republic of Mali)*, Judgment, 22 December 1986, ICJ Rep 1986, 554, 580-582, paras. 51-51; *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening)*, Judgment, 11 June 1998, ICJ Rep 2002, 303, 330 et seq.

of that time are discernible in the conflict between Guyana and Venezuela regarding the territories west of the Essequibo river, and the conflict between Guatemala and Belize where Guatemala, on the basis of transactions from the 19th century that are not easily transparent, has laid claim to half of the territory of Belize for itself. In both cases the dispute has recently arrived at the ICJ.[54] In the case of *Guyana v. Venezuela* time does play a role, but only a marginal one. Venezuela has refused since 1899 to comply with an arbitral award unfavourable to it without being able to adduce valid reasons for its refusal.[55] In the dispute between *Guatemala v. Belize* the determinative issue will be who has exerted effective territorial control and which population is living there. The lapse of time will buttress the claim of the litigant party able to show that it has manifested its governmental power in the contested territories for lengthy periods, excluding the jurisdiction of its opponent. New insights are not likely to be gained from that proceeding.

3.2.3. Europe

It does not need to be explained in detail that after the Second World War, under the authority of the Victorious Powers, dramatic territorial changes were effected. Within the framework of the Bonn Colloquium of 21 and 22 October 2021 the dispositions that were made to the detriment of Germany on the basis of the Potsdam Agreement of 1945[56] stood at the centre of the debates. In accordance with this agreement the German territories east of the Oder-Neisse line were placed under Polish or Soviet administration. Obviously the agreement, which had been brought about without any German participation, did not pursue the aim of bringing about immediately a transfer of territorial jurisdiction and, on legal grounds, could not even purport to do so. The general expectation was that a peace treaty would be concluded later. Until that time the boundary question was to remain open (Part IX, b). According to the established rules of international law such a cession could not take place without Germany's consent, and all attempts to construe a direct

[54] ICJ, *Arbitral Award of 3 October 1899 (Guyana v. Venezuela)*, Press Release No. 2018/17, 4 April 2018; *Guatemala's Territorial, Insular and Maritime Claim (Guatemala v. Belize)*, Press Release No. 2020/12, 24 April 2020.

[55] Detailed description of the facts in Guyana's Memorial, Vol. I, 19 November 2018, available at: https://www.icj-cij.org/files/case-related/171/171-20181119-WRI-01-00-EN.pdf (accessed 30 June 2022).

[56] Reprinted in: I. von Münch (ed.), *Dokumente des geteilten Deutschland*, Kroener, Stuttgart: 1968, at 32. The present writer believes that many times it was wrongly contested that the Potsdam resolutions issued by the Victorious Allied Powers – originally without France – constituted genuine international treaties. Clearly, the intention of the signatories was to enforce their stipulations as a mandatory commitment against Germany – a non-participating third State. Correct analysis by J.A. Frowein, *Potsdam Conference (1945)*, in: *Max Planck Encyclopedia of Public International Law*, Vol. VIII, Oxford University Press, Oxford: 2012, pp. 392, 394.

effect must be deemed to have failed.[57] The legal position up to the conclusion of the Warsaw Treaty of 1970[58] implies more intricacies. Modern international law does not recognize acquisitive prescription,[59] and the Polish Government knew exactly that a definitive territorial title would depend on the provisions of a future peace treaty. On the other hand, the Warsaw Treaty brought about a considerable reinforcement of the Polish legal position.[60] It formally stated that the "existing boundary line ... shall constitute the western State frontier of the People's Republic of Poland" (Art. 1(1)). Even if the Warsaw Treaty, as steadfastly contended by the Federal Government of Germany, were to be interpreted solely as an instrument for the renunciation of recourse to armed force – an interpretation that cannot be derived from its text – nonetheless a claim to acquisition had been established that could not be revoked unilaterally. A further consideration to be derived from general international law deserves also to be taken into account here. Inasmuch as Poland, acting in the exercise of its administration powers, was authorized by the Federal Republic of Germany itself to settle Polish nationals in the in the territories which until that time had belonged to Germany, an additional layer of individual entitlements was piled above the determinative inter-State relationship. To the extent that in the years after 1949 human beings grew up in those territories they have acquired, by virtue of the right to the "*Heimat*", a status under human rights law that could not be removed unilaterally.[61] Although the defeat of the German Reich was marked by egregious breaches of the applicable human rights and humanitarian law, including the expulsion of millions of Germans from their ancestral territories of settlement,[62] the course of time was not halted by those unlawful operations.

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[57] The view expressed by K. Skubiszewski, *La frontière polono-allemande en droit international*, 61 Revue générale de droit international public 242 (1957), according to which the transfer of sovereignty was effected by the Potsdam Agreement with immediate effect, is contradicted by the text of the Agreement.

[58] Federal Republic of Germany and Poland, Treaty Concerning the Basis for Normalizing Relations, 7 December 1970, ILM 10 (1971), 127.

[59] Little persuasive in this regard are M. Kohen, *L'influence du temps sur les règlements territoriaux*, in: *Société française pour le droit international*, Pedone, Paris: 2001, pp. 131, 138-143; and J. Wouters, S. Verhoeven, *Prescription*, in: *Max Planck Encyclopedia of Public International Law*, Vol. VIII, Oxford University Press, Oxford: 2012, pp. 420, 424.

[60] For more on this issue from a German viewpoint, *see* J.A. Frowein, *Die Grenzbestimmungen der Ostverträge und ihre völkerrechtliche Bedeutung*, in: *Ostverträge – Berlin-Status, Münchener Abkommen, Beziehungen zwischen der BRD und der DDR*, Hansischer Gildenverlag, Hamburg: 1971, pp. 27, 30 f.; H. Steiger, *Rechtsfragen der Ostverträge 1970*, *ibidem*, pp. 43, 46-48.

[61] In terms of classic legal argumentation such a right to the *Heimat* cannot easily be inferred since the right to the *Heimat* was originally only discussed as to the benefit of an expelled population, *cf.* Ch. Tomuschat, *Das Recht auf die Heimat. Neue rechtliche Aspekte*, in: *Des Menschen Recht zwischen Freiheit und Verantwortung. Festschrift für Karl Josef Partsch*, Duncker & Humblot, Berlin: 1989, pp. 183-212, for a recent confirmation of the "right of return" see UNGA Res. 66/283, 3 July 2012, para. 1.

[62] See comments by a neutral observer, R.M. Douglas, *Orderly and Humane. The Expulsion of the Germans after the Second World War*, Yale University Press, New Haven und London: 2012.

Human rights protection is enjoyed by every person, independently of whether they belong to a "people of perpetrators" or to "a people of victims". From a human rights perspective, those attributes are entirely irrelevant. Accordingly, the persons who with the consent of the international community and the Federal Republic of Germany itself established themselves in those territories that were administratively separated from Germany have accumulated a capital of confidence of which they may not be deprived arbitrarily. In addition, after many decades that stock of legitimate confidence could have been used against any possible right of return of the expelled population.

This inference should not be taken to mean that the route should be clear for any kind of annexationist measures. It must always be a temptation for dictators with imperialist aspirations to conquer by means of a war of aggression territorial space for its own people, eventually referring to the vital rights of the "settlers". The Polish case has a different physiognomy however. I will refrain here from pronouncing myself about the lawfulness of the Potsdam Agreement of the three (four) Allied Powers. Here the only relevant issue to be examined is what consequences the lapse of time has possibly produced. From the above considerations it appears that the classic method of analysis – according to which research for a rule of customary law should focus solely on precedents from the inter-State dimension – cannot be the appropriate yardstick in a field where the general configuration has been profoundly marked by new basic norms of international law. Here again, it is not time as such that has operated as "movens"; what matters instead is the emergence of a new legal architecture with new paradigmatic bases.

3.2.4. Retroactivity of Rules of *Jus Cogens* in Respect of Grave Crimes?

As already mentioned, according to a consolidated principle any factual occurrences need to be measured against the applicable legal yardsticks of their time.[63] Recently there has been a tendency to shove aside that principle by introducing a new line of thought. This in particular regards the colonial history of Africa with its shameful highpoint – the slave trade;[64] which is taken as point of departure for sophisticated deductions according to which the nations that were in the past involved in that trade should be deemed obligated to provide reparation payments to the descendants of the victims.[65]

[63] The ILC has explicitly noted in Art. 13 ARSIWA that reparation claims presuppose the breach of an international norm applicable at that time.

[64] On the current legal position together with the historical antecedents of the ban, *cf.* P. Viseur Sellers, J. Getgen Kestenbaum, *Missing in Action. The International Crime of the Slave Trade*, 18 Journal of International Criminal Justice 517 (2020).

[65] *See* D. Diop, *La réparation des crimes contre l'humanité en Afrique. Impératif catégorique ou devoir contingent?*, in: L. Boisson de Chazournes et al. (eds.), *Crimes de l'histoire et réparations: les réponses du droit et*

To the extent that such claims are based on ethical requirements the realm of law is left. Today we certainly regret most sincerely that imperialist thinking was not aware of the dubious nature of the legal norms that governed the process of colonization with its numerous human victims, abstaining from establishing any safeguards for the benefit of the indigenous populations. This later awareness, however, cannot rearrange the legal position as it was understood and practiced at that time, but must be transformed into an incitement for political strategies and actions today.[66]

Inasmuch as such constructive initiatives are based on the legal instruments adopted in the early years of the 19th century concerning the prohibition of the slave trade, they have at least a firm normative basis.[67] However, a consistent system of secondary rules governing the consequences of internationally unlawful acts has emerged only late in the 20th century and has not yet found its completion, notwithstanding the Draft articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA) project of the ILC concluded in 2001.[68] Moreover, whoever analyzes historical occurrences from the 19th century in light of the legal concepts of *jus cogens* and obligations *erga omnes* engages in a frivolous use of the time machine. Lawyers have to leave the judgment of the Thirty Year's War (1618-1648); the Napoleonic wars of conquest in Europe; and the German-French war of 1871 to historians. Lastly, the construction of a legal relationship between the nations responsible for the slave trade and the descendants of the victims of forced slavery has a fundamentally speculative nature. The descendants can neither be identified personally, nor can we recognize them conclusively as victims. The harm suffered by them cannot constitute damage of applicants living today.[69] By attempting to analyse epochs of the past based on the modern concepts of today one ends up with a multitude of logical contradictions that would require a comprehensive review of the legal order. Many proposals are carried out with good intentions, yet they pertain to legal policy and cannot be carried forward via the means of the law as it stands today. No one can be forbidden to characterize as unlawful events of

de la justice, Bruylant, Bruxelles: 2004, pp. 263-276; L. Sala-Molins, *Esclavage: Peut-on juridiquement envisager de ne pas réparer ?*, *ibidem*, pp. 179-185.

[66] In the Declaration of the Conference of Durban (2001) against Racism, Racial Discrimination, Xenophobia and Related Intolerance, available at: https://www.un.org/WCAR/durban.pdf (accessed 30 June 2022), the relevant time limits are intentionally kept rather vague.

[67] *Cf.* W.G. Grewe, *The Epochs of International Law*, de Gruyter, Berlin, New York: 2000, pp. 554-549.

[68] Annex to UNGA Res. 56/83, 12 December 2001: Responsibility of States for internationally wrongful acts.

[69] Therefore the attempt by clear-sighted observers to leave the rigid scheme of international responsibility, replacing it by forms of political and moral conciliation through negotiations, would be welcomed: L. Moffett, K. Schwarz, *Reparations for the transatlantic slave trade and historical enslavement: Linking past atrocities with contemporary victim populations*, 36 Netherlands Quarterly of Human Rights 247 (2018).

the past if, from our present viewpoint, they appear indeed to constitute unlawful phenomena; but such judgments convey no more than ethical reprobation and do not provide legal recipes suited to address the current issues of today.[70] This conclusion applies also to the partitions of Poland carried out in the 18th and 19th centuries. It serves as a guide for political orientation and may serve as reminder, but does not make things "unhappened".

3.3. Prescription

Lastly it is worthwhile to take a short glance at the concept of extinctive prescription. In this last section no territorial issues shall be discussed; the focus will be exclusively on claims resulting from internationally wrongful acts regarding other breaches of international law. The ILC has dealt with these issues in its ARSIWA project solely under the headings of waiver and acquiescence (Art. 45). A general rule on prescription is lacking. This cautious approach is understandable, particularly against the backdrop of the ambition of the ILC to create a system of rules of secondary law that should be identical for all claims resulting from the commission of an unlawful act. However, it seems hardly conceivable that in the present conditions the content and context of the violated rule should be totally left aside. The violation of a duty of consultation will never have the same weight as the commission of an international crime, and between the two extremes many intermediate steps on a hierarchical scale can be found. All of these variations would have to be reflected in a legal regime of extinctive prescription. Furthermore, the ILC was conscious of the fact that rules conceived for classic inter-State relations are not automatically suitable for relationships of a special type, in particular in the field of human rights (Art. 55 ARSIWA).[71]

Two different types of prescription must be distinguished: on the one hand prescription as an objection in a formal proceeding for the settlement of a dispute; and on the other hand prescription as a legal ground for the substantive extinction of a claim. Purely procedural issues shall not be raised here. The focus will be exclusively on the question whether a legal entitlement may lose its existence solely through passage of time, taking into account only traditional inter-State relationships.

A cursory preliminary reflection results in the conclusion that a comprehensive general rule can hardly be found. Conflicts between States are settled in the most diverse fora. More often than not States prefer negotiations, the results of which are not transmitted to the public. Even where during an armed conflict massive damages have occurred, reparation claims may not be raised where political considerations

[70] An erroneous path is therefore embarked upon by N. Boschiero, *La traite transatlantique et la responsabilité internationale des Etats*, in: L. Boisson de Chazournes et al. (eds.), *supra* note 65, pp. 203-262.

[71] *See* Section 4 of the commentary of the ILC regarding this provision.

may make it inadvisable to commence formal proceedings. In other instances, troublesome periods pass into oblivion. Judicial decisions are rare. The relevant precedents that are referred to in the legal literature relate mostly to instances of diplomatic protection, where a government has tried to secure the rights of one of its nationals.[72] In today's international legal order, which is largely based on ethical value judgments, uneasiness would be palpable if some (state) actor contended that claims deriving from violations of the ban on the use of force or from serious breaches of human rights guarantees have been extinguished by prescription.

The ICJ has provided only a few clues as to the place of the concept of prescription in the international legal order. In the *Nauru* case it confined itself to the sibyllinic observation that it was incumbent on the Court to "determine in the light of the circumstances of each case whether the passage of time renders an application inadmissible."[73]

No further authoritative statements can be found in the international jurisprudence. The practice of reparations is multiform and inconsistent. Regarding war damages in particular, States have many times preferred to conclude lump sum agreements; in other cases the passage of time renders moot any claims for reparation. A particular feature of such configurations is that no international judge endowed with jurisdiction to hear such claims is available. It is not by accident that the international humanitarian treaties have abstained from providing for judicial remedies in relation to any violations of their provisions.

CONCLUDING OBSERVATIONS

The multifaceted topic of time in international law provides little room for general conclusions. Time is the dimension in which, like all human artefacts, law exists, and international law is designed to fulfil a public order function in the world. It accompanies human societies according to their own codes of conduct on their path through history, conferring them a certain stability notwithstanding all the changes of the external circumstances. International law is much less subject to dictatorial usurpation than legal systems governing States' constitutional orders. Since it is the normative foundation of all States and, accordingly, of all human beings, no single State will ever succeed, under the conditions of a global world, to establish itself as the sole dominant nation. It cannot be denied that international law follows to a great extent the distribution of power in its various constellations, but usually

[72] *See e.g.,* G. Dahm, *Völkerrecht*, Kohlhammer, Stuttgart: 1961, p. 170.

[73] ICJ, *Certain Phosphate Lands in Nauru (Nauru v. Australia)*, Judgment (Preliminary Objections), 26 June 1992, ICJ Rep 1992, 240, 254, para. 32.

only in a measured way, not in Sturm-und-Drang, and usually only after a period of reflection and consolidation.