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Between Pragmatism and Predictability: Temporariness in International Law

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1. Introduction

One of the key functions or purposes of international law (and law in general for that matter)¹ is to provide long-term stability and legal certainty. Indeed, when adopting conventions, drafting treaties, making regulations generally the idea is not that those rules will elapse. Think, for instance, of human rights conventions the endurance of which is ensured by rather general formulations. Yet, international legal rules may also function as tools to deal with non-permanent or constantly changing issues, and rather than stable, international law may have to be flexible or adaptive. Hersch Lauterpacht discussed this question in terms of a struggle between change and stability and justice and security. And he pointed out that '[e]xperience teaches that in this struggle the element of change is not always victorious, for the simple reason that stability and security are in themselves a powerful constituent element of justice.'² In his view, '[a]t present international law is more static than any other law not only because of the absence of an international legislature, but principally because it regulates relations which are not in themselves liable to be affected in a decisive manner by economic and other changes.'³ Whether this observation still holds true today is one of the main questions that is addressed in an upcoming volume of the [Netherlands Yearbook of International Law](#),⁴ focusing on temporariness across various fields of international law, such as the law of treaties, the law of international organisations, climate change, migration, international criminal law, international human rights law and so on. According to Lauterpacht, one of the reasons for the insistence by international law on

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¹ Provided that 'law' is driven by the rule of law and not by undemocratic or authoritarian ideas.

² Hersch Lauterpacht, *The Function of Law in the International Community* (Oxford University Press 2011), at 256.

³ *Ibid.*, at 257-258.

⁴ (2015) 45 *Netherlands Yearbook of International Law*.

status quo is the absence of an international legislature which could deliberately change this situation. So far no such legislature has been created, which then raises the question how international law, if at all, could still react to or be influenced by changes, thus temporary issues. More concretely, what are the tools at the disposition of international law through which temporariness is dealt with?

Prima facie, one could think of two main types of temporary aspects relevant from the perspective of international law. First, the nature of the object addressed by international law or the 'problem' that international law aims to address may be inherently temporary (*temporary objects*). While the object of regulation itself does not cease to exist, its features are bound to change throughout time. These changes are generally unknown or difficult to predict. In these cases regulations aim to address moving targets. Examples of this type of temporariness are abundant: climate change, migration, development, belligerent occupations and so on. Oftentimes this type of temporariness is studied through concepts that aim to deal with changes and uncertainty, such as risk management and regulation, precaution or resilience. Second, a subject of international law may be created for a specific period of time, after the lapse of which this entity ceases to exist (*temporary subjects*). These subjects mainly concern the establishment of institutions or other entities. Examples of such temporary institutions are also ample in international law: territorial administrations, the International Criminal Tribunal for Rwanda and for the former Yugoslavia and so on. The mainstream discussion with regard to this type of temporariness seems to focus on questions of justice, fairness and accountability.

In addition to the above-mentioned approaches, these types of temporariness raise several questions from the perspective of international law, which are rarely addressed from a more conceptual perspective. Questions include the following: How does international law deal with matters that are non-permanent? What happens to international law when temporary creatures become permanent? What is the effect of temporary regulations on matters that are permanent? How does temporariness affect legal certainty? Put differently, where does international law stand on the continuum of predictability and pragmatism when it comes to temporary issues or institutions?

2. Forms of Temporariness

As indicated above, we feel that temporariness in international law may relate to both objects and subjects, and thought it might be of interest to devote an issue of the Netherlands Yearbook of International Law to temporariness as it relates to both objects and subjects. Inspired by the contributions to the *Yearbook*, some examples are mentioned below to illustrate these forms of temporariness.

2.1 Temporary Objects

An outstanding example of temporary objects is climate change. This object is temporary in the sense that, as the name already indicates, the climate is undergoing certain changes; i.e. its nature varies or might vary from time to time, which is influenced, among others, by technological advances, socio-economic conditions and demographic developments. In addition, due to developments and shifts in scientific

insights the manner in which climate change is seen is also prone to changes. Put differently, from time to time this problem needs to be tackled differently – i.e. a solution at a given moment in time might not work at another moment. Accordingly, a particular mechanism addressing the problem is almost by definition temporary.

Another widely known example of a temporary object in international law is the situation of refugee-seekers. While refugees are generally seen as subjects of international law, the problem surrounding them can rather be described as the object of regulation. The nature of refugee protection is inherently temporary, though in a somewhat different manner than that of climate change: the general purpose of this regime is to re-establish the relationship between the original state of nationality and provide a temporary solution until then – thus regarding the regime as an ‘exception’. I.e. the problem itself is generally seen as temporary, while in the case of climate change the problem has become temporary due to the changes involved. Nevertheless, the refugee protection regime is also subject to changes – making it temporary in a different manner. Namely, the refugees change, the number of refugees to be ‘tackled’ at a certain point in time is also subject to change, and obviously the domestic situation in the receiving state as well as in the state of origin also varies in many respects – which might also have impact on the way in which temporary protection can and will be provided to those who are escaping from their state of origin.

National crises or emergencies are also temporary ‘problems’ that in general justify the somewhat reduced protection of human rights, i.e. the adoption of human right derogations. Put differently, the temporary problem here is the lower level of protection of human rights, which depends on the particular circumstances of the emergency situation. Similarly to refugee protection, the problem here is inherently and strictly temporary. As soon as the crisis or emergency ends, derogations should be eliminated too.

As opposed to human rights derogations, affirmative action measures rather provide a higher level of protection. When affirmative actions or positive action measures are needed, the problem that needs to be addressed is inequality that stems from past discriminatory treatment. In other words, affirmative action measures aim to heal the consequences of a differential treatment adopted in the past, which has resulted in an unequal situation in the present. Nevertheless, they are similar to human rights derogations in that they will need to cease to exist after a period of time, namely when equal opportunities have been created.

Questions like these relate to an overarching objective of international law: a stable rule of law. If one perceives the international rule of law as the framework to provide stability and fairness (following domestic democratic notions based on that idea), the question is to what extent it can be combined with temporary issues. An answer to this can be that temporary institutions and rules can actually promote the international rule of law, providing more flexible solutions for the long-term achievement of a stable rule of law. In a way, this reveals that, international law itself (or at least parts of it) could also be regarded as object of temporariness. In fact, one could argue that some temporariness is inherent in the main sources of international law. Custom is inherently fluid and allows international law to change according to adapted practices and legal opinions. While the objective of written law is to overcome uncertainties and provide ‘fixed’ interpretations, treaties are often seen as ‘living instruments’, the interpretation of which may follow new

insights and developments. In fact, treaty law itself allows for amendment and modification. In the law of treaties 'subsequent practice', 'subsequent agreements', 'relevant rules' and 'supplementary means' play an essential role and discussions often relate to the tension between the intentions of the drafters and the ways these play out later.

Similarly, international law, as object of temporariness, may be challenged to remedy flaws in its system. When structural solutions are out of sight due to, for instance, political controversies, temporary solutions may be in order, and acceptable to the international community. The articles assembled in the new Netherlands Yearbook offer ample examples of such temporary 'repairs', including the establishment of *ad hoc* tribunals. An example that has received quite some attention of the past years concerns the immunity of international organisations. As an almost inherent element of the international system, structural changes are not to be foreseen in the immediate future. Yet, international organisations change and are increasingly active in rule-making that has effects on individuals. There may, however, be accountability gaps in this regard, in particular in relation to private claims. The question then is whether negative consequences of systemic choices can be remedied by allowing for temporary solutions.

2.2 Temporary Subjects

An outstanding example of temporary subjects is the so called commission of inquiry (CoI). These subjects are established as a reaction to an incident in an *ad hoc* manner. It seems that, in addition to the political difficulties involved in negotiating the establishment of a permanent (quasi-)judicial body, the nature of the incidents justifies the creation of such *ad hoc* mechanisms. These commissions are established for investigating (mainly) the facts of a specific international incident involving two or more states.

Temporariness of subjects of international law can also take a different form. Although there is a permanent court for punishing those responsible for the most serious crimes, international criminal justice still seems to favour temporary solutions. More specifically, the present criminal tribunals have been set up in an *ad hoc* manner, resulting in not-well-thought-through procedural rules and thus representing a mix of the two main systems, namely the adversarial and the judge-led models. This approach leaves quite some room for judicial trial and error – reflecting another temporary dimension of these institutions. In this case, temporariness relates to the functioning of specific institutions, or put differently, temporariness is visible in the main legal features of the operation of these institutions. The institutions themselves might be established on a permanent basis, but the manner in which they carry out their work is characterised by temporary elements.

At a more theoretical level, the impact of temporary institutions, or more broadly, temporary regimes on international law may serve as examples. These examples can be seen as addressing temporary objects (e.g. refugee law as well as climate change), while international criminal law, for instance, can be related to temporary subjects. These two aspects of temporariness can clearly be compared as to their general effect on permanent regimes.

Last but not least, the question of temporariness can be approached in a somewhat different manner. Rather than looking at the temporary subjects as defined above, one may look at the so-called 'permanent subjects'. Even though many of the subjects of international law are established as permanent 'institutions', this permanency does not mean that they are static, i.e. that they do not change. Put differently, even permanent institutions can be seen as temporary ones, given their dynamic existence that is steered by interaction among the various actors/subjects of international law. Such a dynamic is, however, difficult to be discovered given the constant present used in international law. This dynamic also implies that the permanence of institutions is relational.

3. Conclusion: All Relative?

A popular view on temporariness in international law may be that it potentially harms the already quite shaky international legal order. Indeed, as we noted, one of the key functions or purposes of international law is to provide long-term stability and legal certainty. In analysing the different views on temporariness, we may conclude that this element is certainly present, but that the opposite is also visible. More specifically, the examples illustrate that temporariness (or permanency) is relational. Nevertheless, this temporal element of either the objects or the subjects of international law has impact on international law. While it seems that concerning temporary objects there is an underlying aim to ensure both predictability and at the same time being pragmatic, as far as temporary subjects are concerned a pragmatic approach might turn out to have a negative impact on predictability. This difference might be explained by the difference between objects and subjects as such. Subjects of international law have 'independent' living and functioning, and they oftentimes want to set up their own approaches, mechanisms etc. Objects of international law, however, are subject to regulation, which most likely will ensure predictability when addressing a problem. All in all and depending on whether positive or negative meanings are associated with temporariness, a particular expectation is created, thus having an impact on the response provided, too. With regard to temporary objects where the issue or object is changing (and is thus temporary), this change is simply seen as a given that needs to be addressed in one way or another; i.e. the association with temporariness is definitely not negative. The general response to this change is the need to have 'flexibility' mechanisms built into the system. The system then can be criticised if it lacks or does not sufficiently embed such mechanisms. In addition, temporariness is also seen in this context as a phenomenon that can provide meaning, thus influencing the interpretation of otherwise permanent concepts.

Unlike temporary objects, the temporary subjects of international law are associated with both positive and negative features. As far as the positive features are concerned, it has been highlighted that temporary institutions can be seen as correcting, at least to a certain extent, the deficits of so-called permanent institutions. Moreover, temporariness is also contrasted with being static - temporariness is essentially seen as a form of flexibility or dynamism. However, we should remain aware of the dangers of

'*ad hocism*' as a form of temporariness as opposed to well-thought-through regimes. In this latter case, temporariness thus obtains a negative association.

It is the search for this balance between pragmatism and predictability that can be discovered with regard to temporary objects and subjects of international law. At the same time these two notions should not always be contrasted. Under certain circumstances, pragmatism may contribute to predictability as the latter is not only based on static international law, but may require dynamism and change to remain relevant. The upcoming *Yearbook* underlines that change is not something that we should see as an exception; in many cases it is a structural or systemic part of the international legal system.