PUBLIC INTERNATIONAL LAW AND ECONOMICS

CONCLUDING REMARKS TO THE BONN CONFERENCE

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In her words of introduction at the Bonn conference, Anne van Aaken spoke of an ideological and a methodological gap between U.S. and European lawyers. Whether this is true or not, it is certainly correct that economic analysis of law plays a less prominent role in Europe than in the United States. So was the conference about to bridge this gap? Yes, but the point of departure was somewhat more complicated:

- The Bonn conference was not about law and economics in general, but about public international law and economics. This is important because public international law has become an object of interest for law and economics approaches later than other legal fields. Here, certain contributions are still somewhat exploratory.

- The conference was not attended by U.S. and European lawyers, but by U.S. and German lawyers. While the stereotypical German may like to be considered a European, we should hesitate to assume that such a lawyer is indeed representative of a common European approach.

- The conference was not a forum in which U.S. and German lawyers discussed their latest research on public international law and economics, but rather an event in which U.S. lawyers presented papers on which the German lawyers commented. This suggests that the conference had an educational purpose.

In light of this setting, I would like to make a few remarks at the outset about the educational and professional background of members of my generation of German international lawyers (Part I), and then deal with some theoretical (Part II) and empirical (Part III) issue-specific (Part IV) aspects of the Bonn conference before I conclude (Part V).

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The following comments do not claim to be comprehensive, but remain selective.

I. EDUCATIONAL AND PROFESSIONAL BACKGROUND

Stereotypes are often unfair simplifications, but they can also contain kernels of truth. In our context, the stereotype is the narrow-minded doctrinal European lawyer who needs to be opened up for metalegal considerations, be they more theoretical or more empirical, so as to enable him/her to assess the realities in which s/he operates and to be clear about the ethical choices s/he makes. One of the important means offered in this respect could be economic analysis of (international) law.

The problem with this stereotype is that lawyers of my generation have been confronted with it since our student days. When I studied law at the *Freie Universität Berlin* in the late seventies, we were bombarded with sociological theories about the law in action and the mentality of the judiciary. In my third year of law school, I gave a seminar paper summarizing Calabresi's *The Costs of Accidents* with the help of a recently published book, *Introduction to Economic Analysis of Law* (in German) by Assmann, Kirchner, and Schanze.[1] Later, after I joined the Max Planck Institute for Public International Law in Heidelberg, we followed debates among U.S. international lawyers. While at the time economic approaches were not particularly influential in public international law, we took note of the metalegal approaches such as critical legal studies and emanations of the New Haven approach. Ultimately, most of us preferred the apparently more traditional and doctrinal "New York School," as represented by Louis Henkin, Oscar Schachter, and Thomas Franck.

We can, of course, speculate as to why most of my generation of German international lawyers preferred the more doctrinal approaches to international law in the United States. Perhaps it was because the mainstream of German legal education was still, on average, more doctrinally oriented than the average top U.S. law schools. However, my suspicion is that two other reasons were more important:

- The first was the visible example and the flourishing of European international law since the late seventies. This was the time when a stream of exciting judgments from the Luxembourg and the Strasbourg courts emerged. It was a time of judicial law making *and* exegesis. It was not the time for asking why international law binds at all, or how the *effet utile* could become even more efficient, or whether "the living tree" of the European Convention

1. HEINZ-DIETER ASSMANN, CHRISTIAN KIRCHNER & ERICH SCHANZE, ÖKONOMISCHE ANALYSE DES RECHTS (1978).

of Human Rights should be given more or less water—exceptions like Christoph Engel excluded.[2]

- The second reason was the sense among the German international lawyers of my generation that we were not just outside observers to a politically driven process, but that we were involved (or preparing to become involved) in a project. In this project we were supposed to be actors, responsible actors, who had to take all relevant considerations into account. Because these considerations were not all measurable, they also had to be intuitively assessed. A focus on the (economically and otherwise) measurable considerations would have appeared to us as being overly reductionist.

Whether this German/European approach to public international law is or was well founded does not matter so much. Perhaps this approach carries with it remnants of paternalism or exhibits a narrow-minded elitism. What is important, however, is, first, what appears to be a confirmation of a stereotypical difference may have changed its character and consciousness (and be more dependent on contemporary developments and comparative perspective than one would assume). Second, that it may have contributed to a mutual suspicion of narrow-mindedness: the adherents of "economic" approaches noticing that "doctrinal" lawyers do not pay sufficient attention to the economic aspects of their field, and the more "doctrinal" lawyers suspecting that those who advocate law-and-economics visions unduly reduce complexity by putting excessive emphasis on those aspects of the law which they can measure with their instruments.

II. THEORY

I am not an expert in economics and economic analysis of international law. It may therefore not be surprising that my initial bias at the Bonn conference, and perhaps that of some of the other German lawyers, consisted of the suspicion that economic analysis may be somewhat reductionist. I therefore found it helpful and encouraging to read Kenneth Abbott's paper on recent trends in political and social science theories. Although this paper does not specifically deal with economic approaches, its general perspective facilitates the access to economic analysis for more doctrinal lawyers. Abbott's suggestion to combine the different social science approaches (realism, liberalism, institutionalism, constructivism) resonates with the doctrinal lawyer's intuition that, ultimately, the emphasis on one of those particular approaches would lead to overlooking important aspects. The price of Abbott's approach is, of

2. CHRISTOPH ENGEL, PRIVATER RUNDFUNK VOR DER EUROPÄISCHEN MENSCHENRECHTSKONVENTION (1993).

course, the price any eclecticism must pay, i.e. the lack of coherence and determinacy, which a purer rational choice approach promises.

Game theory represents a different challenge for a doctrinal lawyer. If applied with care, game theory can only be helpful. Doctrinal lawyers are not oblivious to the interests, constraints, and calculations of players of various sorts, and such factors can be fed into the determination of the purpose and scope of a given norm or inspire a legislative proposal. Game theory can indeed make a difference for lawmaking and for legal interpretation, whether Bilateral International Treaties (BITs) are driven by host state competition or whether the commitment to international law depends on the need to lock in democracy. But everything depends on whether the "game" is properly defined. The game of attracting capital investment for light industries may not be the same as the one for extractive industries. The need to establish rules on the status of international law in domestic constitutions may not depend, even in the first place, on an interest in locking in democracy.

The most abstract question that is sometimes posed in game theoretical parlance can spark ideological differences between U.S. and German/European lawyers. This is the question of why states comply with international law. German/European lawyers sometimes take this question to imply a challenge to the binding nature of international law. While some lawyers in the United States who ask this question seek to relativize the binding nature of international law, this should not lead us to conclude that the question is illegitimate. Even if it is unusual that states (or international lawyers) openly consider whether it is in their interest to comply with the law, the phenomenon of more or less tacit defection from or half-conscious and half-negligent evasion of treaty obligations certainly exists.

International law, as any law, needs to be made plausible in the eyes of its addressees. This need is formulated in the question of why states should comply with international law. The answer given by German/European lawyers in response to this question tends to be different from at least a substantial minority of U.S. lawyers. While most German lawyers would tend to stress the disintegrative effects of noncompliance for the international legal system as a whole, the perspective of the U.S. lawyers concerned seems to be more particularized in the sense that the effects of noncompliance will likely remain within the confines of the treaty regime in question.

My sense is that the apparent theoretical difference is actually an abstraction from the contrasting practical international environment in which typical German/European and U.S. international lawyers operate. For the United States, as a state, the violation of certain specific norms of international law will not call into question international law as a "system." For German/European lawyers, however, a selective attitude appears to pose this danger.

The question of who is right may be the wrong question. Perhaps both are right in their respective environments. Perhaps the really important question is whether and, if so, in what circumstances developing countries are typically more in the situation of the United States or in that of European states. My sense is that the answer depends on the treaty regime in question. In any case, it would seem to require very subtle assessments to correctly pose this question in game theoretical terms.

III. EMPIRICAL APPROACHES

Economics should be particularly helpful when it comes to asking and answering empirical questions. I am not sure whether the pertinent contributions at the Bonn conference are representative in this respect. My sense is, however, that we have been given a more and a less plausible case of empirical analysis.

The paper by Elkins, Guzman, and Simmons is a fine example of what the combination of a good theoretical question and multifaceted empirical research can do to change conventional wisdom. After reading the paper, I find it very plausible that my Cold War inspired preconception, according to which the spread of BITs is driven by capital exporting countries, must be substantially modified to accommodate the competition for capital among host countries. It is also necessary to differentiate between different countries and industries, but not to the extent that cultural factors are overstressed. Having said this, it is no critique to say that the validated model can still be fine-tuned. Upon further reflection, the validity of this model is ultimately not so surprising as it may have appeared at first sight to a preconceived lawyer from a BIT-activist state such as Germany.

On the other hand, another paper at the conference confirmed my doubts about what can be done by way of an economic analysis that derives broad conclusions from a limited analysis. One hypothesis, stating that small states are less likely to cooperate, is certainly more counterintuitive than Elkins, Guzman, and Simmons's theory on the spread of BITs. That hypothesis therefore faces an uphill battle. But even if we consider this benevolently, we should expect that the authors deal with the obvious possible counter arguments. One is that it is necessary to differentiate between different types of (economic) treaties. A somewhat less obvious one is the role of "autonomous" implementation or compliance by small states with treaties to which they are not partners. As long as the paper does not address such questions, mainstream lawyers will hesitate to rely on it.

IV. ISSUE-SPECIFIC ANALYSES

For doctrinal lawyers the most useful economic analyses of international law are neither the primarily theoretical nor the primarily empiri-

cal contributions, but those which combine them with respect to a specific issue area and/or for a policy suggestion. At the same time, however, such contributions sometimes provoke defensive reflexes against supposedly simplistic assumptions of rational choice approaches. Beth Simmons made an important point when she said in Bonn that such reflexes themselves often rest on simplistic assumptions of how simple rational choice is. In any case, the decisive question is what goes into the utility function.

In some cases, the defensive reflexes against policy suggestions which claim to follow from an economic analysis appear justified. This is true, in my opinion, of Eugene Kontorovich's paper on universal jurisdiction. While he persuasively lists all the possible disadvantages of universal jurisdiction and formulates them in economic terminology, he does not effectively formulate and evaluate its possible advantages. He takes it for granted that prosecutors should have discretion whether to prosecute even the gravest crimes (a supposition that may be true for the United States but not for Germany, for example), and he does not really consider the main reason that is given for the enlargement of jurisdiction and the establishment of international criminal tribunals: the fight against impunity. He does not discuss whether the international community might value success in the fight against impunity so very highly because of the example that successful prosecutions anywhere would set against the commission of horrific crimes. For this reason, the international community might accept all the identified disadvantages too. If such considerations do not enter the utility function, it is not surprising if the policy recommendation from the supposedly economic analysis comes out the way Kontorovich suggests. This is not to say that his policy suggestion is wrong. It is just incomplete and therefore appears to be a reflection of what a lawyer who was brought up and still lives in the United States will intuitively put into the utility function. This in turn can lead "European" readers to identify the economic approach with particular forms of its implementation and feel confirmed in their defensive reflexes.

Most other contributions to the Bonn conference do not raise similar concerns. I do not share the distrust, which seems to underlie the comments of Andreas Zimmermann and Anne Peters, regarding the paper by Tom Ginsburg, Susan Chernykh, and Zachary Elkins on precommitment theory. It is legitimate to ask why states give a lesser or a greater role to international law in their respective constitutions. And it is informative for more doctrinally oriented lawyers to see that there may be a significant correlation between the age of a democracy and the place it accords to international law. Such questions and answers do not, in themselves, suggest that a mature democracy (like the United States or certain European Union states) should or could disregard international law, and they do not reopen the nineteenth century debates about

whether and why international law is binding. Such criticism may tell us more about the critic and his or her historical baggage than about the object of her criticism. On the other hand, it is equally clear that the precommitment function of national constitutions is neither an entirely novel insight nor is it, as Andreas Zimmermann rightly points out, the only factor to be taken into account.

Laurence Helfer's paper, meanwhile, functions as an important signpost guiding those who wish to apply an economic approach to another topic. He discusses the "benefits" and "costs" of direct international legislation, such as within the EU, on the one hand, and of the usual two-stage international legislation—treaty negotiations within the framework or with the help of international organizations and national treaty ratification—on the other. Although Helfer discusses these advantages and disadvantages in economic terminology, he formulates their substance in more traditional doctrinal terminology. It is therefore not easy to see what additional explanatory power economic analysis yields as far as the known powers of the International Labour Organization to "monitor unratified treaties" is concerned.

V. CONCLUSION

Has the Bonn conference fulfilled its purpose of identifying, or even of narrowing, a methodological gap between U.S. and European lawyers? The conference has certainly succeeded in sensitizing a more doctrinally oriented lawyer like myself to the economic perspective. Although most of us have economic intuitions, and apply them in the course of our work, the papers presented at the conference demonstrated what it takes to discipline such intuitions and to fortify them into valid arguments.

The conference did not, however, resolve my initial question of which approach is more broad-minded: an (enlightened) doctrinal approach or economic analysis. There is obviously no general answer to this question. The benefit of economic analysis for the resolution of any practical legal question depends on what goes into the utility function, just as the quality of every doctrinal answer depends on the faithful identification of the various relevant factors. Perhaps the main benefit of the conference was to dispel any simplistic preconceptions on the part of the nonspecialist "European" participants about how economic analysis is being carried out. Hopefully, the U.S. participants did not find occasion to cultivate stereotypes about European international lawyers as being fixated on doctrinal categorization. In fact, the papers and the comments should have made it clear that the contributions of many participants on both sides rested on policy considerations which required additional explanation.

Another conclusion which I take from the conference is that economic analysis seems to have more explanatory value in the areas of law making and compliance than for the interpretation of rules. I am now persuaded, for example, that the most important factor in the recent spreading of BITs is host country competition and that new democracies have a specific interest in making credible commitments to international law. I am less persuaded that, for economic reasons, the principle of universal jurisdiction should be interpreted restrictively.

I must confess that I sometimes thought in Bonn that economic analysis might be in danger of entangling itself in a jargon which can prevent its reception by mainstream (international) lawyers. Those colleagues with an international law background who have succeeded in familiarizing themselves with the basic tools of economic analysis and in applying them in certain fields have persuaded me that this vision of a world consisting of "costs" and "benefits," "utility functions," and different forms of "optimization" is useful. It is not only useful as a critical tool, but also as a means to assess the consequences of what we are doing. I do not have the impression, however, that economic analysis provides easy answers, despite its suggestive terminology.

Has the Bonn conference been a unidirectional learning experience? For me, this has certainly been the case. However, the comments by my colleagues from the "European" side should give some cause for reflection for those who continue to pursue the project of the economic analysis of international law. These comments either reflect different socioeconomic perspectives than what is mainstream in the United States (Marauhn, Petersmann, and Tietje, for example), or they reflect a doctrinal-political view of international law which takes this law seriously as a system (Peters and Zimmermann, for example), with all the economic implications this may have.