

Riccardo Pisillo Mazzeschi
Pasquale De Sena *Editors*

Global Justice, Human Rights and the Modernization of International Law

 Springer

Global Justice, Human Rights and the Modernization of International Law

Riccardo Pisillo Mazzeschi • Pasquale De Sena
Editors

Global Justice, Human Rights and the Modernization of International Law

 Springer

Editors

Riccardo Pisillo Mazzeschi
Department of Political and International
Sciences
University of Siena
Siena, Italy

Pasquale De Sena
Faculty of Law
Catholic University of Milan
Milan, Italy

ISBN 978-3-319-90226-5 ISBN 978-3-319-90227-2 (eBook)
<https://doi.org/10.1007/978-3-319-90227-2>

Library of Congress Control Number: 2018947585

© Springer Nature Switzerland AG 2018

This work is subject to copyright. All rights are reserved by the Publisher, whether the whole or part of the material is concerned, specifically the rights of translation, reprinting, reuse of illustrations, recitation, broadcasting, reproduction on microfilms or in any other physical way, and transmission or information storage and retrieval, electronic adaptation, computer software, or by similar or dissimilar methodology now known or hereafter developed.

The use of general descriptive names, registered names, trademarks, service marks, etc. in this publication does not imply, even in the absence of a specific statement, that such names are exempt from the relevant protective laws and regulations and therefore free for general use.

The publisher, the authors and the editors are safe to assume that the advice and information in this book are believed to be true and accurate at the date of publication. Neither the publisher nor the authors or the editors give a warranty, express or implied, with respect to the material contained herein or for any errors or omissions that may have been made. The publisher remains neutral with regard to jurisdictional claims in published maps and institutional affiliations.

This Springer imprint is published by the registered company Springer Nature Switzerland AG.
The registered company address is: Gewerbestrasse 11, 6330 Cham, Switzerland

Preface

This book builds on a research project started at the Inter-University Centre on Human Rights, Migration and Aliens' Law and then carried on together by the University of Siena and the Catholic University of Milan. During the research period, a conference was held at the Certosa di Pontignano, Siena, in May 2017, with the participation of the contributors of this volume.

The basic idea of the research, and of the book, is to explore on the possibilities and prospects of a process of structural modernization of the international legal order, mainly driven by the ever-increasing affirmation and rooting of the theory of human rights in contemporary international law. One could speak, in a nutshell, of a process that tends towards “global justice”, even if by using this concept, we do not intend to participate in the large debate on global justice that is taking place within the framework of ethical and political theory.¹

In our view, the above process can be analyzed under three main aspects: (a) a possible widening of the concept of international community and a change in the classical assumptions of statehood; (b) an increasing diversity and flexibility of the sources of general international law; (c) the capabilities of a “modernized” international law to face and resolve some of the main goals for humanity, which are set by the 2030 UN Agenda for Sustainable Development: in particular, equality and social inclusion, promotion of pacific societies and environmental protection. These three aspects are dealt with in the three parts of the volume.

The book does not intend to give definitive answers to these questions. Rather, it aims at developing a conceptual (but also pragmatic) analysis of the topic of modernization of international law. Moreover, we have chosen a pluralistic path, which is based on critical reflections developed by a diverse group of legal scholars, with different academic and cultural backgrounds.

Indeed, *three* basic approaches to the said topic can be found across the three parts of the book.

Pursuing the *first* approach, the modernization of international law entails that a “proactive” role should be played by international law scholars. Such an approach

¹ See, e.g., G. Brock, “Global Justice”, *Stanford Encyclopedia of Philosophy*, 6 March 2015.

is followed by Decaux, who submits the idea that some central issues of international law should be reconsidered by taking into account the increasing importance of the role played by non-State actors from different points of views (notably, sources and international responsibility). Similarly, Bourgeois and Wouters seek to redefine the role of *opinio juris* and reconsider its relationship with practice, building upon the recent work of the International Law Commission and starting from the premise that one comprehensive method is needed for the identification of rules of customary international law in all branches of international law. In an analogous vein, Francioni strongly appeals to go beyond “the individualist culture” of human rights, by developing arguments in favor of the “socio-cultural” dimension of these rights, as a possible basis for modernizing international law. For his part, Iovane argues that the priority of fundamental human values could be achieved in international law by “slowly incorporating changing practice [...] into existing legal regimes”, rather than by having recourse to the hierarchical method (*jus cogens*) or to other “interpretative devices” (balancing of interests). Lastly, Viñuales points out the need for reshaping “international law in its entirety in the light of environmental considerations”, also with a view to redefining it from a “sustainability perspective”.

According to the *second* approach, the modernization of international law calls for reconsidering some basic issues from a theoretical perspective. A similar way of thinking is shared by Dupuy, Tomuschat, Pisillo Mazzeschi and Viviani, and d’Aspremont, albeit with regard to different topics and with different results. An overall analysis of the conceptual features of the international community is carried out by Dupuy, who, however, does not fail to point out that the way in which international courts deal with *jus cogens* leads to the disappointing conclusion that such a community “is probably universal as a concept”, but is not “assured of having its own rights and interests effectively defended” in the near future. Tomuschat, by considering the concept of “general international law”, reaches the conclusion that this concept would be able to encompass peremptory norms as well as “legal propositions” treated as “principles”, both of which, however, should *not* be traced back to Article 38 of the ICJ Statute. The increasing importance of the general principles of international law, their different functions, and especially their capacity to strengthen the “values dimension” (as opposite, to a certain extent, to the “rules dimension”), are also stressed by Pisillo Mazzeschi and Viviani, according to whom such a tendency should be considered from the perspective of the structural modernization of contemporary international law. A different stance on general principles of law *in foro domestico* is taken by d’Aspremont, who points out that these principles are destined to keep playing a “modest role” in international law, as long as they are construed as a source of law, rather than as an “argumentative technique of content-determination (*i.e.* a mode of interpretation)”.

From a *third* perspective, reasoning on the modernization of international law means carefully considering some current developments that occurred within the practice of States and international tribunals, as well as bearing in mind the *raison d’être* of some basic features of the international legal order. In this vein, Judge Gaja emphasizes the findings reached by the ICJ as to *locus standi* and jurisdiction in a

couple of recent judgments concerning obligations *erga omnes* (*Belgium v. Senegal* and *Whaling in the Antarctic*), and their potential significance for subsequent developments. Tancredi carries out a detailed analysis of a certain amount of cases and judgments pertaining to the relationship between the principle of effectiveness and that of legality in the field of State sovereignty. His (somewhat skeptical) conclusion is that the two principles appear to be “neither necessarily irreconcilable nor mutually exclusive”, it being understood however that “the idea of reducing the importance of effectiveness, with justice always on the horizon, risks being self-defeating”. In a similar vein, De Sena submits that going beyond the distinction between citizens, aliens and human persons seems to be somewhat “unrealistic” under current international law, if one considers the persistent (positive) role played by nationality, but also “the increasing recourse to nationality as a means to adopt discriminatory policies against aliens and the resurgent recourse to a sort of legal nationalism”.

This book would not have been published without the financial support of some institutions. The editors wish to express their gratitude to the Inter-University Centre on Human Rights, Migration and Aliens’ Law as well as to the Universities of Siena and Catholic of Milan. The editors would also like to gratefully acknowledge the contribution, in the editorial work and the preparation of tables, of Professors Federico Lenzerini, Michele Nino, Paolo Venturi and Alessandra Viviani.

Siena, Italy
Milan, Italy
28 February 2018

Riccardo Pisillo Mazzeschi
Pasquale De Sena

Contents

Part I Global Justice and Changes in the International Community	
The Impact of Individuals and Other Non-State Actors on Contemporary International Law	3
Emmanuel Decaux	
State Sovereignty: Balancing Effectiveness and Legality/Legitimacy	17
Antonello Tancredi	
Claims Concerning Obligations <i>Erga Omnes</i> in the Jurisprudence of the International Court of Justice	39
Giorgio Gaja	
From a Community of States Towards a Universal Community?	47
Pierre-Marie Dupuy	
Part II Global Justice and Modernization of the Sources of General International Law	
Methods of Identification of International Custom: A New Role for <i>Opinio Juris</i>?	69
Hanna Bourgeois and Jan Wouters	
General Principles of International Law: From Rules to Values?	113
Riccardo Pisillo Mazzeschi and Alessandra Viviani	
What Was Not Meant to Be: General Principles of Law as a Source of International Law	163
Jean d'Aspremont	
General International Law: A New Source of International Law?	185
Christian Tomuschat	
Conflicts Between State-Centred and Human-Centred International Norms	205
Massimo Iovane	

**Part III New Goals for Humanity in the UN Sustainable Development
Agenda**

**Global Justice, Equality and Social Inclusion: What Kind of
“Modernization” of International Law? 225**
Francesco Francioni

Still Three Different Status for Aliens, Citizens and Human Persons? . . . 239
Pasquale De Sena

**The Influence of Environmental Protection on the Fabric of
International Law 255**
Jorge E. Viñuales

Index 269