Aspects of China's New Role in the Globalized World
Probems of international Politics

Ed. by Chan Sun and Hans-Christian Günther

East and West.
Philosophy, ethics, politics and human rights

Band 2

ed. by H.-C. Günther and Li Yong

Aspects of China's New Role in the Globalized World

Probems of international Politics

Ed. by Chan Sun and Hans-Christian Günther

Verlag Traugott Bautz GmbH

Bibliografische Information Der Deutschen Nationalbibliothek
Die Deutsche Nationalbibliothek verzeichnet diese Publikation in der Deutschen Nationalbibliografie; detaillierte bibliografische Daten sind im Internet über http://dnb.d-nb.de abrufbar.

Umschlagbilder:

Wikipedia
Bild 1:
Henry Kissinger, Zhou Enlai und Mao Zedong
https://upload.wikimedia.org/wikipedia/commons/0/09/Kissinger_Mao.jpg

Bild 2:
BRICS heads of state and government hold hands ahead of the 2014 G-20 summit in Brisbane, Australia.
https://commons.wikimedia.org/wiki/File:BRICS_heads_of_state_and_government_hold_hands_ahead_of_the_2014_G-20_summit_in_Brisbane,_Australia_(Agencia_Brasil).jpg
.

Verlag Traugott Bautz GmbH
99734Nordhausen 2016
ISBN 978-3-95948-197-7

Contents

Preface by the editors

This volume comprises papers given at an AvH conference at Zhongnan University of Changsha co-organized by Profs. Yang Kaixiang and Hans-Christian Günther with the support of Dr. des. Chan Sun (some papers of the same conference were published in vol. 1 of this series, others will be published in subsequent vols.). The papers of Prof. Justenhoven and Prof. von Senger were written for the conference but not delivered there, the paper of Chan Sun is a revision and English translation of a paper first published in Chinese.

Chan Sun/ H.-C. Günther November 2016

Heinz-Gerhard Justenhoven

Peace through Law

Peaceful dispute settlement through comprehensive and compulsory international arbitration as an obligation of international politics

In his famous treatise on "The Prince", the 16th century political analyst Niccolo Machiavelli sheds light on the moral dilemma of a political leader: a ruler sticking to moral principles in his foreign policy will unavoidably disadvantage himself if his counterpart ignores moral principles and strives ruthlessly for his own national interests.[1] Machiavelli observes that only those rulers become powerful, who ignore moral principles in foreign policy. Why is that the case? A prudent ruler needs to take into account the wickedness of humanity and of his counterparts, the rulers of other states. According to Machiavelli, even a ruler who is in principle willing to follow moral rules in international relations is forced to cheat and/or to a breach of promise as the circumstances do not allow him any other behavior. The ruler is caught in a dilemma:

---

1 Cf Niccolò Machiavelli, The Prince, Quentin Skinner and Russell Price (Ed.), Cambridge 2005.

As a ruler he has to protect the political community he heads. Under the circumstances of ruling within the international community, the responsible and prudent ruler cannot but – as last resort – act immorally against other states in order to protect his own state.

Machiavelli found many followers regarding his analysis. The most popular is the school of the "political realism" in the 20th century founded by Hans J. Morgenthau. Morgenthau saw international politics as an ongoing struggle for power due to conflicting national interests.[2] Any attempt to overcome this antagonism, according to Morgenthau, ignores this historical experience. Therefore Morgenthau, a German Jewish emigrant to the United States, was extremely critical of international institutions like the League of Nations and the United Nations founded to overcome war. Power struggle, as a result of conflicting national interests, is insurmountable according to the founder of "political realism". Given this, Morgenthau accepts that powerful states will always try to enforce their will on inferior states only due to the fact of their overwhelming power. States

2 Cf. Hans J. Morgenthau, Politics among Nations. The Struggle for Power and Peace, 5th Edition, New York 1978, 171ff.

need to deal with this fact and try to avoid becoming inferior, for example, by joining alliances. Good politics serving the purpose of peace need to balance conflicting interests but are in no way able to overcome them.

As an ethicist, I am interested in whether it is really an unchangeable situation for humanity that powerful states seem to be legitimized to enforce their will on inferior states only due to the fact of their overwhelming power. My thesis is that we need to change the parameters of the international relations. I will prove my thesis with regard to the international juridical system.

Resolving conflicts between states on the basis of international law by comprehensive and compulsory international arbitration or jurisdiction constitutes an ethical demand as well as a normative quest of international law. Ethics and international law grapple with the design of an international order to prevent conflicts between states from turning violent. In other words: how can international jurisdiction solve conflicts effectively between states and overcome the violent conflict resolution called “war”.

A brief review of the early international law literature, using the example of Hugo Grotius, demonstrates that classical international

law is open for this and that theoretical arguments against international arbitration and jurisdiction cannot be found.

International Arbitration and Jurisdiction in Modern International Law

Since Hugo Grotius (1583-1645), modern international law literature recognizes the significance of arbitration in settling disputes between states but describes it as a rarely used practice from the 16th to 19th century. The international law literature of the 16th to 18th century has thus proven fairly unproductive regarding questions of arbitration because early international law scholars since Grotius saw their main task in describing and systematising applicable law practices of states[3]: Sovereign states felt little inclination to submit themselves to the arbitrage of third parties. This is not to convey, of course, that international law scholars were not interested in the issue. Grotius establishes the demand for the institutionalisation of compulsory arbitration and thus states, “It would thus be ... useful – even to a certain degree necessary, that Christian powers hold congresses where neutral parties make decisions on the disputes of others und agreed to

3 Cf. Wilhelm Grewe, Epochen der Völkerrechtsgeschichte, Baden-Baden 1984, 424.

certain rules in order to coerce parties to submit to an equitable peace.“[4] Although he neither elaborates on this demand nor justifies it, the close links to utopian concepts from early modern age can hardly be dismissed, like the “Grand Dessin“ of Maximilien de Béthune from 1635, to William Penn's “Essay towards the present and future peace of Europe” (1693) or Abbé de Saint-Pierre's “Projet pour rendre la paix perpétuelle en Europe”(1713). Similarly, traditional international law indicates no principle objections as the works of Samuel Pufendorf[5], Emer de Vattel[6] or Friederich Georg von Martens[7], some of the leading international law scholars of the 17th and 18th century, demonstrate.

4 Hugo Grotius, De Iure Belli ac Pacis, Book II, Chapter 23, VIII,4, [R. Feenstra (Ed.) Aalen 1993].

5 Cf. Samuel Pufendorf, De iure naturae et gentium, Liber V, cap. XIII § 10; in: Samuel Pufendorf, Gesammelte Werke, Wilhelm Schmidt-Biggemann (Ed.), Vol. 4.2: Frank Böhling (Ed.), Berlin 1998, 551.

6 Cf. Emer de Vattel, Le droit des gens ou principes de la loi naturelle, Book II, Chapter XVIII § 329, Walter Schätzel (Ed.),Tübingen 1959, § 351.

7 Cf. Georg Friedrich von Martens, Précis du droit des gens moderne de l'Europe, fondé sur traités et l'usage, Göttingen 1789 § 172

The Jay Treaty of 1796 between England and the United States and the American peace movement of the 19th century instigated a phase of institutionalising international arbitration. The significance of the Jay Treaty consists less in its concrete results than in its effect. It represented the beginning of a growing number of arbitration treaties between states and thus marked the rebirth of the long-neglected arbitration practice.[8] The states involved were able to gain some experience with arbitration treaties and confidence in this kind of international dispute settlement mechanism. This facilitated a development that led to the foundation of the first international Court of Arbitration in The Hague in 1899.

The development towards institutionalisation continued in the 20th century: from the Permanent International Court of Justice (PICJ) of the League of Nations to the International Court of Justice (ICJ) of the United Nations. In this process, the following pattern emerged: To the extent in which states gain trust in the practice of solving conflicts by arbitration at first and later in the institution,

8 Cf. Georg Schwarzenberger, Present-Day Relevance of the Jay Treaty Arbitrations, in: Notre Dame Lawyer Vol. 53, Notre Dame University 1977/78, 715-733, 730f.

they are prepared to take further steps towards voluntary self-confinement. The density of regulations increases and international law develops further.[9] In addition, international arbitration continuously moves towards the centre of an international system of order whose primary objective consists of maintaining peace and settling disputes peacefully. The responsibility for this is transferred from the individual states to the institutionalised international community by voluntary self-confinement through the respective treaty.

Voluntary Self-Confinement of States for the Institutionalisation of Arbitration

The Treaty for the establishment of the The Hague Court (1899) constitutes the entry into a process that lead toward the institutionalisation of international arbitration, which in my view is

---

9 Cf. M.Schröder:„Concerning the significance for the development of international law, one needs to realize the not trivial influence that arbitral jurisdiction - as the older type of judicial dispute settlement - had on the evolution and the development of international courts after 1918, namely the PICJ and the ICJ. Materially, international law owes numerable landmark decisions to the practice of arbitration.“ Meinhard Schröder, Verantwortlichkeit, Völkerstrafrecht, Streitbeilegung und Sanktionen in: Wolfgang Vitzthum (ed.), Völkerrecht, Berlin et al. 2/2001, 545-602, 586.

open for further development.[10] When analysing processes of institutionalisation, it appears that a treaty's signatories are prepared to waive sovereignty. In this process the participating states, however, contend for the extent of submission under the institution. The central thread of the The Hague Agreement is the compromise between the intent to contribute to the establishment of the 'rule of law' on the one hand and the demand for state sovereignty on the other, i.e. their attempt to keep control over the process of arbitration as much as possible.[11] The The Hague Agreement only came about because of the states' preparedness for voluntary self-confinement. By signing the Agreement, states bound themselves at least insofar as they recognized the utility of the arbitration process in principle. From this stemmed a pressure for justification in the case that a state decided against a process of arbitration. At the same time, states reserved in each single case the right - also in consideration of a possible public pressure to justify their action – to submit to a process of arbitration or not.

10 Cf. Arthur Eyffinger, The 1899 Hague Peace Conference. The Parliament of Man, the Federation of the World, The Hague 1999.

11 Cf. the indepth study of Jost Dülffer, Regeln gegen den Krieg? Die Haager Friedenskonferenzen von 1899 und 1907 in der internationalen Politik, Berlin 1981.

Furthermore, they reserved the right to define the issue of dispute as well as the constitution of the court in the concrete case.

The Statute of the League of Nations expanded the The Hague Order in two ways: Firstly, the members of the League of Nations consent to settle all disputes that may jeopardize the League of Nations peacefully.[12] Second, two additional procedures are introduced: The disputing parties can call on the The Hague Permanent Court as before. In addition, a ‚Permanent International Court' of the League of Nations is established[13] that can decide "on all disputes that parties have put before it" (Art. 14). Finally, all those disputes can be brought before the Council of the League of Nations, which consists of members of the allied and associated major powers and of representatives of the four other federation members that have not been submitted to a process of arbitration. Judiciary disputes should be brought before one of the two courts

12 W. Penfield points out, that the majority of nations were excluded from the dispute settlement as only “civilized nations” were admitted to the League of Nations; the colonial world was excluded. Cf. William L. Penfield, International Arbitration, in: American Journal of International Law, Vol. 1, Washington DC 1907, 330- 341, 331.

13 Cf. Alexander P. Fachiri, The Permanent Court of International Justice. Its Constitution, Procedure and Work, London 2/1932, Reprint: Aalen 1980, 1-31.

of arbitration if the disputing parties agree. Political disputes as well as disputes in which there is still disagreement whether they can be put before a court of arbitration, should be brought before the League of Nations Council.

The newly established International Court of Justice (ICJ), which succeeded the Permanent International Court of Justice in 1945, is a principal organ of the United Nations and thus has a higher status in the international order than its predecessor. In this respect, one can speak of an “up-valuation” of international jurisdiction after 1945. Parties to the ICJ Treaty are members of the United Nations. The UN Member-States have obligated themselves „to settle their international disputes by peaceful means, so that world peace, international security and justice is not put in jeopardy“ (UN Charter, Art 2). At the same time, there is no requirement for entry: The UN Members can call on the ICJ to settle their disputes but they can also employ other methods of dispute settlement such as negotiation or mediation. Although the states have committed themselves to peaceful dispute settlement before the ICJ, they cannot be forced. To put it more directly: The signatory states have not made the decision to forego their sovereignty, which would lead to compulsory arbitration. States have, however, decided, at least in a facultative clause, to reserve the possibility of

compulsory arbitration for legal questions for those who wish.[14] As a result, the parties of the treaty can declare at any time that they recognize the competence of the Court for all legal disputes against every other state as compulsory on condition of reciprocity (cp. Statute Art. 36, 2). Given this declaration, only about 1/3 of UN Member-States (70 out of 193) agreed to such a commitment[15] – but partly with considerable reservations. The United Kingdom has declared reservations against „disputes with the government of any other country which is a Member of the Commonwealth with regard to situations or facts existing before 1 January 1969", the date of the British Declaration. At this point, the issue concerns disputes that could result from demands of former colonies against the British motherland. Germany only lodged its declaration in 2008. The United States, which have lodged their declaration in the 1940ies, renounced them later on. Optimistically, this process can be described as a continual path that moves towards the goal of effective international arbitration. Sceptically, one could counter that notwithstanding all progress, a qualitative step still needs to be

14 Cf. John G. Merrills, International Dispute Settlement, Cambridge 2/1991, 110.

15 http://www.icj-cij.org/jurisdiction/?p1=5&p2=1&p3=3 [9.1.2014].

taken: The voluntary submission under comprehensive and compulsory international arbitration.

The Sovereignty Provisio for Political Questions

In the The Hague Agreement of 1899, the states reserve the decision in each case to decide for which disputes they seek an arbitration process and for which they do not. In principle, the signatories of the The Hague Agreement only want to bring issues concerning legal regulations before a court of arbitration. Political disputes cannot, as is the unanimous opinion, be resolved before a court of arbitration.[16] This position has also not changed in the last one hundred years after the The Hague Agreement and in view of the International Court of Justice (ICJ), as far as I can tell. With this position, the states decline to let political conflicts between them be settled on the level of international law or general legal principles through an international arbitral court or another court. In my opinion, there are also no objections in principle against resolving political conflicts between states through a court. But states insist on the sovereignty not to submit politically defined

16 O.Nippold criticed this position already in 1907; cf. Otfried Nippold, Die Fortbildung des Verfahrens in völkerrechtlichen Streitigkeiten, Leipzig 1907, 184f.

conflicts to arbitration or jurisdiction by distinguishing between legal questions that are open to an arbitral dispute settlement and political questions that are considered 'not open' to such a submission. „Hence, international adjudication is unable to impose effective restraints upon the struggle for power on the international scene“, the political realist Hans J. Morgenthau correctly analyses.[17] But what follows from this analysis if one does not want to give in to the status quo?

Does one not have to allege that states' behavior implicitly confirms the necessity of first establishing an initial political consensus in order to transition a political conflict into an agreed upon rule of law? States apparently refuse to give up this process of regulating a political conflict, particularly with regard to vital interests and thus persist in protecting their respective sovereignty. An authoritative decision by judges could apparently not generate the political compromise and the consensus resulting from it.

A Lack of Impartial Law Enforcement

Concerning the question of implementing arbitral decisions respectively judgements, an - however modest - increase in self-

17 Hans J. Morgenthau, Politics among nations, 293.

confinement of states is discernible: The Hague Agreement does, therefore, not provide for the enforcement of power after an arbitral award: it remains up to the party losing before the court to comply with the decision. Only the public finding through an arbitral court that an award has been ignored should produce suitable pressure on states to yield to the award.

The League of Nation's order provided for its enforcement: If one of the two courts or the League's Council passed a judgement or respectively put forward a recommendation for the solution of a dispute, the members of the League of Nations were subject to an incomparably higher degree of commitment than provided by the The Hague order. The League's members were obligated to execute an arbitral award or a decision by the Council, acting in good faith[18]. In the case that the defeated party does not submit, the Council of the League of Nations threatens consequences. As a result, the League's Council claims enforcement power in principle for all of the states united by the League. Hence it remains up to the member states as to whether the arbitral award or

18 Cf. Statute o the Permanent International Court of Justice Article 13; http://www.icj-cij.org/documents/index.php?p1=4&p2=2&p3=0&#CHAPTER_I [13.1.2014].