# Chapter 1
# Between Pragmatism and Predictability: Temporariness in International Law

**Mónika Ambrus and Ramses A. Wessel**

**Abstract** One of the key functions or purposes of international law (and law in general for that matter) is to provide long-term stability and legal certainty. 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. *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*). Second, a subject of international law may be created for a specific period of time, after the elapse of which this entity ceases to exist (*temporary subjects*). These types of temporariness raise several questions from the perspective of international law, which are hardly addressed from a more conceptual perspective. This volume of the *Netherlands Yearbook of International Law* aims to do exactly that by asking the question of how international law reacts to various types of temporary issues. Put differently, where does international law stand on the continuum of predictability and pragmatism when it comes to temporary issues or institutions?

**Keywords** Temporariness · Temporary objects · Temporary subjects · Predictability · Pragmatism · Legal certainty · Change

---

Mónika Ambrus is lecturer in public international law, Department of International and Constitutional Law, University of Groningen, The Netherlands. Ramses A. Wessel is Professor of International and European Institutional Law at the University of Twente, Enschede, The Netherlands.

M. Ambrus
Department of International and Constitutional Law, University of Groningen, Groningen, The Netherlands
e-mail: m.ambrus@rug.nl

R.A. Wessel (✉)
Centre for European Studies, University of Twente, Enschede, The Netherlands
e-mail: r.a.wessel@utwente.nl



M. Ambrus and R.A. Wessel (eds.), *Netherlands Yearbook of International Law 2014*, Netherlands Yearbook of International Law 45, DOI 10.1007/978-94-6265-060-2_1

## Contents



## 1.1 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 this volume of the *Netherlands Yearbook of International Law*. According to Lauterpacht, one of the reasons for the insistence by international law on *status quo* is the absence of an international legislature which could deliberately change this situation. So far no such legislature has been created[4], which then raises the question how could international law, if at all, 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

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

[2] Lauterpacht 2011, at 256.

[3] Ibid., at 257–258.

[4] Apart perhaps from the fact that international organizations are increasingly seen as contributing to 'international legislation'. See Wessel 2015.

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, developing countries, belligerent occupations and so on. Oftentimes this type of temporariness is studied through concepts that are aimed 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 certain entities. Examples of such temporary institutions are also ample in international law: territorial administrations, states in transition, 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 hardly addressed from a more conceptual perspective. This volume of the *Netherlands Yearbook of International Law* aims to do exactly that, including the following questions. How does international law deal with matters that are non-permanent? What happens to international law when the originally temporary creatures become permanent? What is the effect of temporary regulations on matters that are permanent? How does temporariness affect legal certainty? These and related questions are addressed in the contributions of this volume of the *Yearbook* from various perspectives in order to explore the impact of temporariness on international law, namely how international law reacts to various types of temporary issues. Put differently, where does international law stand on the continuum of predictability and pragmatism when it comes to temporary issues or institutions?

Rather than providing a summary of each contribution, this introduction places the chapters within the above indicated framework of the two main forms of temporariness. After introducing these forms of temporariness as addressed in this volume, this chapter will discuss how these forms relate to and what effect they have or can have on international law. In order to gain further insights into the nature of temporariness, the chapter also highlights the main concepts associated or contrasted with the notion of temporariness in the concluding chapter.

## 1.2 Forms of Temporariness

This section introduces these two main forms of temporariness as addressed in the chapters without exploring their impact on international law, which is the subject of the next section.

### *1.2.1 Temporary Objects*

An outstanding example of temporary objects is climate change, which is explored in van Asselt's chapter. 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 quasi *per definitionem* temporary.

Another widely known example of a temporary object in international law is the situation of refuge-seekers. While refugees are generally seen as subjects of international law, the problem surrounding them can rather be described as the object of regulation. As Durieux's chapter describes, 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 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.

As explained in Criddle's chapter, 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, as discussed in Addis' chapter. 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. Ranchordás answer to this is 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 fact, as she argues, 'temporary certainty can contribute to thicker definitions of the rule of law including long-standing justice and protection of human rights.'[5]

In a way, this reveals that, international law itself (or at least parts of it) could also be regarded as an object of temporariness. In fact, one could argue that some temporariness is inherent in the sources of international law. Considering the main ones: 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, as the contribution of Merkouris indicates, treaty law itself allows for change over time. 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 in which these play out later.

As legal scholars, we are not merely observers of changes in international law. Scholarly insights are equally temporary and obviously contribute to changes in the international rules. The 'shift from eternity (natural law) to temporality (changeable law)' is man-made. In his contribution, Djeffal points to the influence of paradigm changes over time. The question raised in his contribution is whether in the dialectal process from atemporality to temporality, we can see a new paradigm termed 'fluxus': asserting that the law is necessarily moving and changing and hardly ascertainable. 'Under such an assumption, predicting the law generally means to predict the next decision. The temporal focus is, therefore, on the next moment.'[6]

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 present collection offers 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. Taylor's contribution points to

[5] Ranchordás 2015.

[6] Djeffal 2015.

accountability gaps in this regard, in particular in relation to private claims. The question then is whether unpreferred consequences of systemic choices can be remedied by allowing for temporary solutions (in this concrete case: dealing with 5000 private law claims which emerged in response to the allegedly negligent importation of cholera into Haiti by UN peacekeepers).

### *1.2.2 Temporary Subjects*

An outstanding example of temporary subjects is the so called commissions of inquiry (CoIs). As explored in Henderson's chapter, these subjects are being 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. As Henderson explains,

> [t]hese contemporary CoIs, while not producing legally binding outcomes, nonetheless carry out various adjudicative functions, from determining applicable legal frameworks and the scope of the legal rules and norms in question to determining whether particular acts amount to violations of these rules and norms.[7]

He even indicates that CoIs

> offer what may be the only, or at least most formal, treatment of the legal issues raised in the context of a particular conflict or crisis, and perhaps represent an important shift in the *modus operandi* of the international community in seeking at least some accountability for violations of international law.[8]

Temporariness of subjects of international law can also take a different form, as illustrated in Bohlander's chapter. Although there is a permanent court for punishing those responsible for the most serious crimes, international criminal justice still seems to favour temporary solutions, as Bohlander points out. More specifically, he argues that 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.

---

[7] Henderson 2015.

[8] Ibid.

Galbraith, at a more theoretical level, examines the impact of temporary institutions, or more broadly, temporary regimes on international law. Two of her examples can be seen as addressing temporary objects (refugee law as well as climate change), while the example of international criminal law can be related to temporary subjects. In this regard, her contribution shows that these two aspects of temporariness can clearly be compared as to their general effect on permanent regimes. She examines through different theories (rational design approach, historical institutionalism, constructivism and behavioural international law) the reasons behind these temporary 'regimes' as well as the manner in which they shape permanent ones.

Last but not least, Uruena's chapter approaches the question of temporariness in a somewhat different manner. Rather than looking at the temporary subjects as defined above, he analyses the so-called 'permanent subjects'. In his view, 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: 'international norms and institutions are "permanent" or "provisional" in comparison to *other* international norms and institutions.'[9]

## 1.3 International Law and Change

Both temporary objects and subjects have an interesting relationship with international law. This section looks at this relationship through the lenses of the chapters in this volume.

### *1.3.1 Temporary Objects and International Law*

The chapters addressing temporary objects of international law essentially focus on the relationship between these objects and international law: how does international law enable the regulation of these objects, what is the role of permanent institutions in this regard, and how does a temporary measure impact upon a general norm?

Concerning climate change as a temporary object of international law, van Asselt's chapter argues that the 'changing circumstances make it challenging to govern the problem of climate change through a single set of rules fixed in time,

[9] Uruena 2015 (emphasis in original).

and therefore point to the need for a flexible, dynamic and adaptive legal system.' He, however, also admits that '[a]t the same time, the flexibility necessary to address the temporary nature of the subject matter may well challenge one of the core rationales of legal norms: to provide legal certainty and predictability and, more broadly, to uphold the rule of law.'[10] In other words, a changing problem needs legal answers that can adjust to the extent the problems require. To put it bluntly, temporary problems require temporary solutions. Such temporary solutions, so the argument goes, can be 'produced' if certain flexibility mechanisms are built into the legal regime. His chapter examines to what extent the regime of climate change can be regarded as flexible. Analysing its various aspects, he finds that 'flexibility has been the rule rather than the exception in the *design* of the United Nations climate change regime.'[11] Nevertheless, he admits that in practice the regime still faces certain challenges. In his view, 'the adaptability of the climate regime is limited in at least two important respects: the evolution of commitments in accordance with changing national circumstances and changing the overall ambition in light of new scientific evidence.'[12] All in all, the chapter suggests that international law has tried to cope with the fact that climate change is an object that requires temporary solutions, i.e. flexibility. Accordingly, the temporary object did have a significant impact on the design and functioning of the international legal regime that regulates this object, and thus this regime can be characterised as pragmatic, which nevertheless ensures predictability.

As far as migration or refuge, another temporary object in international law, is concerned, Durieux's chapter explores how international law reacted to the temporary problem of 'refuge time'. The international legal regime on refugee protection includes several 'temporal' aspects as a reaction to the special nature of the refuge situation. First, over time the position of the refugee should be brought closer to that of citizens. Second, a deadline is set as to until when the refugee can be regarded as refugee, in order to avoid that this status last longer than desirable. As Durieux explains

> [t]he management of "refuge time" is the source of an obvious tension within the 1951 Convention regime. Premature return to a continuing situation of persecution or violence is clearly prohibited by the *non-refoulement* principle. … Meanwhile, attachment leads to integration, which becomes the default solution.[13]

In the 1980s the focus was on the free will of the refugee to return. However, in the 1990s the question of what the host state can do in order to 'convince' the refugee to return home ('promote voluntary repatriation') has become rather urgent, given the crisis in Yugoslavia. This has led to the emergence of the concept of 'temporary protection' in Europe. This concept has tried to solve the tension between the focus on return and integration by placing a strong focus on the return aspect.

---

[10] van Asselt 2015.

[11] Ibid. (emphasis in original).

[12] Ibid.

[13] Durieux 2015.

Indeed, it was defined as 'a return-oriented protection mechanism'. While in Europe temporary protection has been regulated, within the UN it was only loosely referred to. So one can see an interesting parallel development here: while at the UN level the emerging crisis did not lead to any formal or practical changes in the approach towards refugees, at the EU level a new approach was adopted and applied. In the latter case the temporary problem has had a huge impact on the manner in which the refuge problem was treated and actually shifted the focus from finding a balance towards promoting return, while in the former case the problem did not lead to much visible change thus creating some tensions concerning large-scale influx of refugees. Put in more abstract terms, at the European level a concrete crisis has induced the adoption of a specific approach towards all refuge situations, while at the international level it was not possible to create an exception even for such a crisis. One might say that Europe has adopted a more pragmatic approach as opposed to the international level's seeming focus on predictability.

Emergency or crisis situations can also be addressed by adopting temporary measures that allow for certain derogations from human rights. The leading human rights agreements formulate such derogation possibilities in a rather broad manner, though generally enshrining that certain steps need to be followed. The question can then be raised how these broad standards can be translated into rules. An increasingly frequently emerging response to this question is '[t]he idea that international law needs to develop more concrete rules for human rights derogation'.[14] However, this has so far not happened, and most probably will not happen soon. How can then these standards be seen? 'Should derogation standards be understood primarily as delegations of rule-making authority to international courts and commissions? Or should they be construed as delegations to states to develop "rules adapted to their special needs"?'[15] In simple and more general terms, the question that is raised with regard to human rights derogations in Criddle's chapter is the following: who is authorised under international law to decide on the concrete temporary measures? The underlying idea behind this allocation of authority can be related to the point made in van Asselt's chapter, namely flexibility or pragmatism. Emergency situations vary per situation and per country. Accordingly, they also require a response that can be fit to the particular case, thus the possibility to derogate from human rights needs to be adaptable to this case, hence requiring flexibility. Based on the case-law of the most relevant human rights international adjudicative bodies, Criddle's chapter identifies that international human rights law (HRL) essentially 'entrusts states with [the] primary responsibility to determine what measures are necessary to protect and fulfil human rights for their people during national crises.'[16] I.e. international law considers states as the most appropriate actors to adopt measures that are suitable for addressing an emergency.

[14] Criddle 2015.

[15] Ibid.

[16] Ibid.

'Broad derogation standards are the mechanisms HRL employs to structure its jurisprudence of altruism, empowering states to design temporary human rights regimes that are tailored to the specific exigencies of particular national crises.'[17] Nevertheless, human rights courts provide the final guarantee 'that states do not abuse their discretionary power'.[18] While in general, given this role of states, a deferential approach is adopted by international courts, the judicial deference should be 'conditioned upon the state serving as a faithful trustee for its people',[19] so the argument goes. Essentially one could then conclude that international law through laying down a broad standard as well as judicial deference ensures that there is ample flexibility when the adoption of emergency measures is needed, whereby it can be qualified as an example of a pragmatic approach, which at the same time aims to ensure predictability.

One might conceive affirmative actions as comparable to human rights derogations, given that on the face of it, they also seem to deviate from the general rules, in this specific case from the idea of equality, in the sense that they entitle a group to special protection. However, as Addis' chapter argues, 'the analogy with emergency exceptions is misplaced and the worry that these measures will undercut the very coherence of the norm of equality is unwarranted.'[20] In other words, affirmative actions do not 'undermine the coherence and predictability of the norm itself.'[21] 'They suspend non-discrimination in its narrow and formal sense while preparing the ground for a broader and more robust notion of equality.'[22] I.e. they actually 'do not leave the general norm of equality in suspension for a temporary period.'[23] In a more general sense, Addis' chapter clearly illustrates that a temporary measure can have a long-term effect on a general concept under international law, namely it can change and complement its meaning, thus contributing to its predictability even though the measure itself might be regarded as a pragmatic one.

As noted above, predictability may also be assured by structurally including 'temporality' in an international legal regime. As we have seen, international treaty law—as analysed by Merkouris—forms a good example of a legal regime allowing for change. Treaties, as key objects of international law, are meant to stabilise the system and provide legal certainty. Yet, treaty law allows for temporary solutions and dynamic interpretations over time. The reason for this is obvious: by not allowing 'time' to affect the interpretation of international agreements, they would run the risk of becoming dead letters rather than accepted bases for international cooperation. A similar notion lies behind the flexible solutions described by Ranchordás, where she points to the fact that, in the end, these contribute to a

[17] Ibid.

[18] Ibid.

[19] Ibid.

[20] Addis 2015.

[21] Ibid.

[22] Ibid.

[23] Ibid.

stable rule of law, as well as a further promotion and consolidation of the rule of law. Taylor's chapter, while highlighting their caveats, also suggests that temporary solutions could contribute to closing, at least to a certain extent the accountability gap regarding international organisations.

### *1.3.2 Temporary Subjects and International Law*

The chapters looking at temporary subjects essentially focus on the relationship between these subjects and international law: how does international law facilitate or enable the creation of such subjects; how do they affect international law in a more general sense; and how does international law actually accommodate these subjects or their temporary features?

Henderson's chapter argues that international law, and more specifically certain features of international adjudication, makes it possible or facilitates the creation of and reliance on these institutions. Put differently, this chapter looks into the question how permanent subjects of international law actually enable or even promote the emergence of such commissions. In his view, there are at least three features of international law that can be 'blamed' for such a promotion: the formality of international adjudication, the principle of non-intervention, and procedural fairness. CoIs are such temporary institutions that can avoid falling in the trap of these features. Temporariness can thus be seen as providing correction to some negative impacts of permanent institutions, thus their existence might be best explained by a pragmatic approach.

In a somewhat different manner, Bohlander's chapter explores the impact of temporary criminal justice solutions on international (criminal) law. He argues that the so called 'draft-as-you-go' approach, thus the application of temporary solutions, rather than well-thought-through models as well as the room provided through this approach for judicial trial and error,

> open[…] the building of the administration of justice up to intruders with separate agendas and to political negotiations that would appear to fit and fix the temporary emergency and to fill the temporary gaps in the law needed for the fixing.[24]

Such an approach, in other words, can have serious consequences as far as the legitimacy of these permanent institutions and legal certainty are concerned—so the argument goes. I.e. embedding in the main features of international criminal law systems such temporary solutions clearly has a negative impact on international criminal justice. Accordingly, the pragmatic approach adopted in this case clearly has a negative impact on the predictability of international law.

As indicated above, Uruena's chapter argues that even the so-called 'permanent' institutions and rules are constantly in the process of change, even though the language of international law suggests a constant present: 'international law approaches

[24] Bohlander 2015.

norms and institutions as though they had always been there. Once change occurs, it approaches new (or changed) norms and institutions as if *those* norms had always been there.'[25] He suggests then to think about change, thus temporariness, in a somewhat different manner. As indicated above, he argues that the permanency of these institutions and norms is relational, which enables us 'to think of norms, not as discrete utterances, but rather as part of a wider landscape in which the temporal and the permanent help define each other.'[26] Accordingly, he suggests that we use the notion of 'global regulatory space' in which various forces exert different pulls. So permanence is impossible, 'which is triggered by the constant movement of all the objects in the global regulatory space.'[27] And the result of this interaction between the various actors is a particular state of art in international law. Put differently, he aims to discover the underlying ideas behind, or, as he calls it, the 'deep grammar' of change in international law, even though this theory would not change the perception of seeing norms and institutions as 'static' or as 'discrete events'. The theory of incremental change based on the proposed 'gravitational pull', however, has its own caveats or challenges, namely tunnel vision and regulatory capture. The former implies that '[t]alking in terms of a "gravitational force" creates the risk of losing sight of an overarching narrative of a "good" society.' The latter danger is that the global regulatory space makes it possible for private actors to exert influence on the decision-making relying on gravitational pull. Such influence could have desired as well as negative impact. In order to avoid these caveats, Uruena's suggestion is to set up a normative framework based on which one could devise a 'vocabulary to perform a critique of the reasons behind such a powerful pull'.[28] Whether or not it is necessary to assess the 'appropriateness' of the extent of 'pull' of certain norms and institutions is up for debate. Nevertheless, such a pull can be seen as incorporating pragmatism in the permanent institutions in a manner that might negatively impact predictability, given the fact that they are difficult to identify and foresee. In any event it is of utmost importance to have a vocabulary for exploring the nature of changes even in permanent institutions that are inherently also temporary given the workings of the various pulling forces. In light of the other chapters, the question could be raised how are then so-called temporary institutions and rules different from the so-defined 'permanent ones' other than the basic rules establishing them?

Similarly to Bohlander's chapter, Galbraith's contribution also examined the impact of concrete temporary subjects on permanent ones (or on international law in a broader sense) but from a more theoretical perspective. She examined how four different theories of state behaviour would and could explain the impact these temporary regimes might have on future permanent regimes. All theories she studied indicate that the impact of temporary regimes on permanent ones is not

[25] Uruena 2015 (emphasis in original).

[26] Ibid. (emphasis in original).

[27] Ibid. (emphasis in original).

[28] Ibid.

negligible. First, 'a rational design approach suggests that states can iron out mistakes or adjust to new conditions in ways that are not overly influenced by the structure of the temporary regime.'[29] Second, '[u]nder a historical institutionalist perspective, one would expect the design choices made for temporary regimes to have outsized influence in some but not all contexts.' Probably this theory provides the best explanation as to the creation of commissions of inquiry, as described in Henderson's chapter. Third, the constructivist approach suggests that 'the power of the temporary regimes is largely in strengthening the norms of governmental and other actors in favour of the objective of the regime.' The 'pull' discussed in Uruena's chapter concerning the changes in permanent institutions could be best explained based on this theory. Last, 'a behavioural international law approach would suggest that temporary regimes are always sticky, with the magnitude varying based on the extent to which these regimes serve as defaults or reference points.'[30] This last one is actually the point made by Bohlander. Interestingly, all these theories seem to try to find a balance between pragmatism and predictability—change is necessary, but certain elements need to be added in order to ensure predictability. They suggest that actually no choice should be made between pragmatism and predictability, as they can be both facilitated and maintained at the same time.

All in all, we can conclude 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.

## 1.4 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 argued in our introduction to this chapter, 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

[29] Galbraith 2015.

[30] Ibid.

present, but that the opposite is also visible. 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 for having '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 influence the interpretation of otherwise permanent concepts—as, for instance, illustrated in Addis' chapter.

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, through which temporariness is essentially seen as a form of flexibility or dynamism. However, Bohlander's chapter, for instance, also highlights 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 seems to form the thread through our analysis of the different perspectives. At the same time these two notions should not always be contrasted, as, for instance, illustrated by Criddle's chapter. 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 chapters in the present volume underline 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.

## References

Addis A (2015) Special temporary measures and the norm of equality. Netherlands Yearbook of International Law 45:311–331

Bohlander M (2015) Paradise postponed? For a judge-led generic model of international criminal procedure and an end to 'draft-as-you-go'. Netherlands Yearbook of International Law 45:333–357

Criddle EJ (2015) Protecting human rights during emergencies: delegation, derogation and deference. Netherlands Yearbook of International Law 45:197–220

Djeffal C (2015) International law and time: a reflection of the temporal attitudes of international lawyers through three paradigms. Netherlands Yearbook of International Law 45:93–119

Durieux J (2015) Temporary protection: hovering at the edges of refugee law. Netherlands Yearbook of International Law 45:221–253

Galbraith J (2015) Temporary international legal regimes as frames for permanent ones. Netherlands Yearbook of International Law 45:41–65

Henderson C (2015) Commissions of inquiry: flexible temporariness or permanent predictability. Netherlands Yearbook of International Law 45:287–310

Lauterpacht H (2011) The function of law in the international community. Oxford University Press, Oxford

Merkouris P (2015) (Inter)temporal considerations in the interpretative process of the VCLT: do treaties endure, perdure or exdure? Netherlands Yearbook of International Law 45:121–156

Ranchordás S (2015) The international rule of law time after time: temporary institutions between change and continuity. Netherlands Yearbook of International Law 45:67–91

Taylor K (2015) Shifting demands in international institutional law: securing the United Nation's accountability for the Haitian cholera outbreak. Netherlands Yearbook of International Law 45:157–195

Uruena R (2015) Temporariness and change in global governance. Netherlands Yearbook of International Law 45:19–40

van Asselt (2015) Between the devil and the deep blue sea: enhancing flexibility in international climate change law. Netherlands Yearbook of International Law 45:255–286

Wessel RA (2015) Revealing the publicness of international law. In: Molenaar EJ, Nollkaemper PA, Nouwen S, Rijngaert C (eds) What's *wrong* with international law? What's wrong with *international* law? Martinus Nijhoff Publishers, Leiden, Boston (forthcoming)