



INTERNATIONAL LAW-MAKING: PROBLEMS OF COHERENCE AND FRAGMENTATION

A summary of the Chatham House International Law discussion group meeting held on 23 March 2007.

The meeting was chaired by **Richard Tarasofsky**, Head of Energy, Environment and Development Programme at Chatham House. Participants included legal practitioners, academics, NGOs and government representatives.

Main Speakers:

- **Professor Alan Boyle**, Professor of Public International Law, University of Edinburgh
- **Professor Christina Chinkin**, Professor of International Law, London School of Economics
- **Dr Howard Mann**, International Law Advisor, International Institute for Sustainable Development

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International organisations and other law-making bodies in areas such as human rights, crime and trade have tended to develop their own rules in isolation from related fields. Thus, what the International Law Commission has termed “splitting up the law into highly specialised boxes that claim relative autonomy from each other” has been one of the major themes of the past few years. The resulting incoherence and fragmentation is thought to be particularly apparent in the field of environmental law, an example used frequently by Professor Boyle and Professor Chinkin in their book titled *The Making of International Law* (Oxford University Press, 2007).

FRAGMENTATION

Focusing on fragmentation, Professor Chinkin pointed out that the International Law Commission believes fragmentation to be a natural consequence of the expansion of international law within the current globalised world. The proliferation of the international courts and tribunals has been the catalyst for such discussions with considerable debate surrounding such issues as the impact of jurisdictional or substantive conflict and forum shopping.

In the ILC's major study on fragmentation,¹ the approach was to examine the various techniques within existing international law for avoiding or resolving conflict; for instance, interpretive techniques, institutional hierarchy, and doctrines. Professor Chinkin and Professor Boyle however take a different perspective in their book. Rather than starting with sources, they examine the main processes, techniques and strategies that are used by different law making bodies in the making of international law. Their study revealed the huge variety of institutional grounds for law making and the separate legal regimes making international law within their own particular area of expertise. Professor Chinkin provided two examples:

- Primarily fragmentation is illustrated by the horizontal groupings of states operating alongside and within the international legal order. The issues that are being created by the concurrent existence of regional systems is illustrated by the recent case of *Ireland v United Kingdom (Mox Plant Case), Order No.3, Suspension of Proceedings on Jurisdiction and Merits and Request for Further Provisional Measures (2003) 42 ILM 1187*, described by Martin Koskenniemi as a "stunning case that shows the ECJ imagining the EU as a sovereign whose laws override any other legal structure".
- Fragmentation is also seen in the numerous specialist sectoral areas of international law and the contextualised legal regimes that now abound using different law making strategies and favouring different law making outcomes. According to Professor Chinkin, there can be no assumption that the techniques engaged, for example, in human rights matters are appropriate with respect to security matters, or that the ways in which law creation is approached in world health are appropriate in trade issues or the law of the sea issues.

Fragmentation is unsurprising given the variety of interests at play: the participants in the process, the potential beneficiaries, the likely decision-makers, the likely forum in which the decision making is to take place, the impact on national legal systems, the necessary input of technical or specialist expertise, whether the objective is flexibility or certainty, whether the impact required is cardinal in the form of a treaty or more of a soft type law (resolution, code of conduct, etc).

Process Legitimacy

Professor Chinkin highlighted the importance of legitimacy in the law making process and in response to the question of what determines legitimacy, she cited Tom Frank's suggested 4 indicators of legitimacy: determinancy, symbolic validation, coherence, and adherence to a normative hierarchy.² The current standards of good governance as promoted by the World Bank may offer other objective criteria as guidance to process legitimacy, for example the requirements of procedural transparency, democratic decision-making, reasoned decisions and review mechanisms.

Quoting Martin Koskenniemi, Professor Chinkin explained the significance of process legitimacy: "formalism constitutes a horizon of universality, embedded in a culture of restraint, a commitment to listening to others' claims and seeking to take them into

¹ *Fragmentation of international law: difficulties arising from the diversification and expansion of international law*, Chapter IX, ILC Report, Fifty-fourth session (29 April – 7 June and 22 July – 16 August 2002)

² Franck, *Legitimacy in the International System*, 82 AJIL (1988) 705, at 712

account”.³ In a decentralised system no process can claim priority and different processes may be engaged simultaneously or in competition with each other. But in a fragmented system there are no easy pointers to determining which is the most appropriate way of approaching law-making in a specific instance, or as to which process will more likely be regarded as legitimate and by whom. Although for some critics of international law, legitimacy is little more than a tool with which to reassert the sovereignty of states in an increasingly globalised world, for most governments the consensual basis of general international law through international agreements legitimises consequential restraints on sovereignty. In that sense legitimacy both derives from state consent, and is an essential pre-condition if governments are to be persuaded to give their consent to regulatory regimes. Accordingly where law is made through a long-established process that gives effect to state consent there is less likelihood of its being deemed illegitimate, while the legitimacy of new or adapted law-making processes may be challenged, especially where in one way or another they bypass expressly, or undermine, or in other ways erode state consent.

The UN Security Council is an example of this: where before it was simply a peace enforcing body, since 9/11 it has been increasingly taking on a deliberative legislative role. For example, Resolution 1373, 28 September 2001 laid down state obligations with respect to terrorist activities which is addressed to all states with respect to issues of terrorism in general and not a response to a specific occasion although the context is 9/11.

Advantages of the Security Council taking on a legislative role are numerous. It can create quick, universal and immediate binding obligations on all states (not just to those who choose to become parties) in a way that no treaty negotiation or general assembly resolution could do. However, there are major problems: it is not a representative body (consists of only 15 states at a time and 5 of the permanent members with a veto can ensure that no legislation is adopted that is against their particular interests); and although there are procedures whereby non-members and even non-member organisations can have some input to their deliberations, the Security Council essentially negotiates in private; there are no accepted rules for interpretation of Security Council Resolutions; and it need give no reason for its decisions. Further, it may override existing law that was agreed by states through consent and by which states had believed themselves to be bound to act. The possibility of challenging Security Council resolutions either specifically or more generally, and the scope of judicial review is uncertain in national courts, regional courts or international courts.

Such issues have caused many to question the Security Council’s usurpation of the General Assembly’s role and the limits to its law-making capacity.

NGO Participation

Professor Chinkin also commented on the increased participation of non-state actors in international law making. Referring to Kofi Anan’s comment that “more effective engagement with NGOs also increases the likelihood that UN decisions would be better

³ Koskenniemi, *‘The Lady Doth Protest Too Much’: Kosovo and the Turn to Ethics in International Law*, 65 MLR (2002) 159

understood and supported by a broad and diverse public”,⁴ it was submitted that participation of non-state actors has democratised international law making and thus enhanced legitimacy.

However, caution is required against assuming the democratisation of international law-making through NGO participation. According to Chinkin, Judge Higgins presents well the alternative views: “To some, these radical phenomena [of NGOs] represent the democratisation of international law. To others it is both a degradation of the technical work of international lawyers in the face of pressure groups and a side-stepping of existing international law requirements and procedures [including, for example, consent].”⁵ Many concerns can be put forward about NGOs themselves: they are often undemocratic, they are self appointed, they frequently consist of few people, they determine their own agendas, there is no guarantee that the views expressed even by high profile NGOs are representative or even in fact representative of the views of their constituencies, their internal decision-making processes may not be transparent, there is often a deluge of information which conceals various processes underneath them, they are pressure groups and therefore do not need to address the full range of issues that state elites have to address, and the need for many NGOs to be accountable for their donors for various expenditures also gives rise to questions about who is actually setting the agenda and whose interests are really being given greater account. Further, given the imbalance respecting international NGOs between the North and the South another effect of enhancing the role of NGOs in international law making may be in fact to replicate state power structures by furthering the bias in favour of agendas of the North. The global disparity in computer access may also disadvantage membership participation in NGOs from the South. The ‘paradigmatic shift’ in international society towards geo-governance may in fact amount to little more than another means of validating essentially Northern liberal interests in a post-colonial, post-cold war world. It may further promote Western/Northern domination through the culture of law as an instrument of NGO activism.

COHERENCE

Professor Boyle addressed the issue of coherence by way of an overview of the major processes which have become the main models for the making of international law. He also discussed the extent to which the institutional mechanisms currently in place have been successful in achieving coherence.

Major Law-making processes

Majoritarian law-making is the typical method for the adoption of International Law Commission treaties, for human rights and humanitarian treaties and for General Assembly resolutions. However, there are a number of disadvantages of making law by majority voting:

- There is no necessity to negotiate a text which is capable of accommodating all participants (that is the essence of majority voting as the minority is in effect ignored if necessary).

⁴ Report of the Secretary General in Response to the Report of the Panel of Eminent Persons on United Nations-Civil Society Relations, UN Doc A/59/354, para 4.

⁵ Higgins, *The Reform of International Law*, in Rawlings (ed), *Law, Society and Economy: Centenary Essays for the London School of Economics and Political Science 1895-1995* (Oxford, 1997) 208, at 215.

- The result may well mean that a significant ‘minority’ of states, which have voted against specific parts or the whole of the text, may then go on to refuse to ratify or endorse the text and so this is not the best method to secure a global consensus or agreement.
- The fact that states can make reservations may to some degree help to alleviate the opposition in allowing states to agree to some parts and to exclude others, but this produces a fragmented treaty as it means the treaty reads differently between different groups of states

As an exercise of global law making, a procedure of this kind is thought to be inefficient as it will neither ensure enough support for the treaty to function effectively, nor more importantly, will it provide a potential basis for state practice and therefore for new customary law to emerge.

The second model of law making which has become a significant model for modern treaty negotiations is consensus. This model was employed in the negotiations for the Convention of the Law of the Sea, the International Criminal Court statute, the Climate Change Convention, most multi-lateral environmental agreements, new WTO agreements and most intergovernmental organisations decisions (e.g. General Assembly, WHO, WTO). Law making by consensus does not necessarily mean that states have no objections as states may indeed indicate that they have reservations and may even indicate that they oppose the proposal but that they will not obstruct the consensus. This feature has made this method the most dominant of the processes mainly because it involves engaging in diplomacy, listening and bargaining. Securing widespread support for such texts not only legitimises and promotes consistent state practice but also makes it less likely that other states will object to the immediate implementation to what has been agreed. It follows from this that new customary international law may come into being very quickly and in this broader sense, a consensus negotiating process becomes not simply a way of negotiating universally effective treaties, but also a specific form of customary law making process. This process has been referred to by J Brunné and Toope in their writing on interactional processes on the law making role of intergovernmental organisations.⁶ It is this broader consensus and not the formal act that infuses the legal norms generated within that process with the ability to influence state conduct.

Institutional Mechanisms

There is a clear need for what one of the WTO agreements refers to as “a mutually supportive relationship” between law making institutions, as there needs to be some way of coherence between international bodies. Professor Boyle suggests three ways to do this.

Firstly, greater coordination; however sometimes it is not clear which international organisation should be legislating. For example, with regards to legislation on forests, it is unclear whether it should be the Convention on Biological Diversity, the International Tropical Timber Organisation, or even the Food and Agriculture Organisation. This demonstrates the difficulty of coherence when such an array of relevant organisations

⁶ Brunné J. and Toope S., *International Law and Constructivism: Elements of an Interactional Theory of International Law*, 39 Col JTL (2000) 19

exist, but it was submitted that the best approach would be to construct a coalition of different institutions when law-making which could be co-ordinated by the UN General Assembly (e.g. as it did by laying down common principles in the case of the Millennium Development Goals).

A second mechanism to improve coherence is codification. This was previously limited to the ILC but now in the area of terrorism, for example, an ad hoc committee is genuinely engaged in codifying this area of international law. Professor Crawford, a former rapporteur, observed in a letter to Boyle: "What the ILC can do is to consolidate developments in a particular area of law, making them part of the *droit acquis*...it is progressive when seen against a background of slow development in the international community and its institutional need for a coherent body of law." Thus the ILC and other bodies engaged in codification have an important role in giving overall coherence. There was discussion about whether the ILC continues to have a role in the modern world given that it has covered most of the major topics and its agenda and future agenda do not seem to be entirely obvious but according to Boyle there does seem to be a continuing role in ensuring that law made by other bodies or the law previously made by the ILC remains coherent in the modern world.

Nevertheless, while diversity of expertise, a measure of independence from direct government control and its representative character continue to give the Commission its principal claim to speak as a global body on international law, none of these points should be exaggerated. The election of ILC members by the General Assembly has as much to do with politics as with professional expertise. Ensuring more equitable geographical representation has resulted in increased participation by developing countries and in that sense gives the Commission's work greater legitimacy, but the consequential addition of more serving diplomats or governmental lawyers does not necessarily broaden or deepen its expertise and adds nothing to its independence. The breadth and increasing specialisation of contemporary international law also means that real expertise on any individual topic may be thinly spread within the Commission.

The ILC is only effective when its work commends itself to states. It is not really an independent law making process in itself; Boyle described it as "a technically specialised part of the broader political process of law making through the UN". Moreover, he referred to Koskinniemi, a former member of the ILC, who drew attention to the doubts shared by other UN specialised agencies and programmes about "the very idea of international legislation being prepared by a body of international lawyers, somewhat like experts in a domestic justice department..."⁷ As he observes, from the perspective of these institutions "international legislation through the traditional method by UN lawyers and diplomats was not a key to solving the world's problems but part of these problems itself."⁸

The third mechanism cited by Professor Boyle is the contribution of the international courts. There is no doubt that the ICJ in particular prefers a harmonized conception of international law and intimated this in its report on fragmentation. The ICJ has gone some way to improve coherence which is most demonstrated by its willingness to take

⁷ Koskinniemi, *International legislation today: limits and possibilities*, 23 Wis ILJ 2002 60 at 64

⁸ *Ibid*, 64

account of other treaties and other rules of law, e.g. *Gabčíkovo-Nagymaros Case (Hungary/Slovakia)*.⁹

There has also been a willingness to take account of functional necessity in interpreting treaties in deciding customary international law, e.g. the *Arrest Warrant Case (Democratic Republic of the Congo v Belgium)*.¹⁰ However, many writers have disagreed on the desirability of law making on the basis of functional necessity and many were astonished by the ICJ in the *Arrest Warrant case* as there is no apparent legal foundation for the rules on which the case was decided.

Another criticism made of the international courts' approach is their obvious reluctance to decide cases in terms of the priority of particular rules. Therefore, rules of *jus cogens*, rules on the law of treaties, or priority in time rules and others are not a prominent feature of the case law. Rather, what is apparent is a strong preference for treating different rules as capable of integrated harmonious application and interpretation, and a reluctance to choose. The only technique that does appear with any frequency is the differentiation between *lex specialis* and *lex generalis*. For example, the *Legality of the Threat or Use of Nuclear Weapons Advisory Opinion*¹¹ and the *Legal Consequences of the Construction of a Wall in Occupied Palestinian Territory Advisory Opinion*¹² are both examples where the court treats one body of the law as a *lex specialis* and to that extent it becomes the 'dominant law'. However, even with this, the ICJ has declined to treat a *lex specialis* as a self-contained insular regime separated from the rest of international law, preferring it to be applied in the broader context in the law as a whole.

Despite all of these techniques there is obviously still a risk that different courts will take different views of the same law. International law changes and develops as can be seen in the *North Sea Continental Shelf Cases (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands)*¹³. In the past different courts have even taken a different view of essentially the same question. This was illustrated recently by ICJ in *Bosnia and Herzegovina v. Serbia and Montenegro* (26 February 2007). For a long time after the *Nicaragua case*, the ICJ has taken one view of non-state actors engaging in civil war while the ICTY took a different view in *Prosecutor v Tadic* (ICTY)¹⁴. However in the recent Bosnia genocide case the ICJ has reverted to its view in *Nicaragua*, which raises the question of where *Tadic* now stands in international law.

Conclusion

There has been an expansion in international law-making with new areas falling within the ambit of legislation and new bodies being involved, but the question remains as to what the starting point should be: from domestic law, from the work of political scientists, from the advocacy of civil society? This may cause incoherence but Dr Mann's view is that absolute incoherence may not always be desirable. Professor Chinkin also suggested that the crafting of new legal principles from such a variety of sources may lack coherence but may provide a broad legitimacy for what is often a complex enterprise.

⁹ (1997) ICJ Reports 7

¹⁰ (2002) ICJ Reports 3; (2002) 41 ILM 536

¹¹ (1996) ICJ Reports 226

¹² (2004) 43 ILM 1009

¹³ (1969) ICJ Reports 3

¹⁴ (ICTY) IT-94-1 15 July 1999

Secondly, the question was posed whether more international law is even required given the quantity that has been generated over the last few decades. Professor Boyle and Professor Chinkin were of the opinion that more international law is not required; rather, greater efforts are needed to ensure greater integration, coherence, and effectiveness of the existing international law.

As a final point, there was some discussion over the division of the problem with international law-making into fragmentation and coherence. It was discussed that perhaps the problems with law-making could not be so simplistically divided and Dr Howard Mann argued that such a division is unrealistic. He termed the problem as being one of a circular or continuous nature: fragmentation in the creation of international law, coherence in its application followed by attempts at recreation or redefinition of international law to generate more coherence, which leads to more fragmentation. According to Dr Mann, if we are to break this cycle, and in order to attain a coherent legal system, what is needed is a 'governing paradigm' or direction and it seems that sustainable development has emerged as such.

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