Improving International law: between the Dynamism of Stakeholders and the Limitations of the Law-making System

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Abstract:

The absence of an international legislator raises questions with regards to alternative law-making processes. Public International Law relies basically on consensualism and thus leaves to States a wide range of appreciation and discretion. Nevertheless, it develops and evolves at a fast pace and through various multilateral processes. The latter do not have the same relevance nor the same power, and corresponding mechanisms are put in place by different bodies.

The International Law Commission (ILC) has actively participated in the codification and improvement of international law. Its impact is reflected in customary law but also in treaty-law through the adoption of conventions based on the ILC reports. This is for example the case of the Vienna Convention on the Law of Treaties that has also become customary international law.

Other bodies participated to the development of international law such as the International Court of Justice and other United Nations organs and specialized agencies. Pressure groups like Non-Governmental

Organizations contribute as well to the emergence of new rules of international law and the development or amendment of the existing ones. The roles of all these actors is not the same; it ranges mainly from legislating to observing and implementing international norms.

This paper analyzes the relevance of certain bodies in terms of international law-making and the difficulties that hinder the improvement of the international legal system. Current procedures are often long, complicated and not systematized. The thematic codification of international law led to the development of scattered sources that cannot be integrated into one system of laws. Hence the latter can hardly be described as an international legal order.

The paper discusses the aforementioned challenges while tracking the ongoing path that is usually followed by international rules before becoming part of the corpus of international law. As a result, such rules amount to the level of binding sources as others remain soft laws. In any event, they have to be incorporated in domestic law in order to be enforced. This is another level of difficulty where the complementarities between national law and international law become an additional challenge to the improvement of international law.

INTRODUCTION:

Hominum causa (omne) ius constitutum est hō´mēnūm kô´sa (ōm´nā) yūs kōnstētū´tūm āst . ha´minum ka˘´zu (am´nē) jus kanstitū´tum est

Law is never made for the sake of the legal order per se. It is there to regulate all aspects of life and is provided for the sake of human beings. Starting from this statement, International Law governs relations between states, but most importantly, it governs all arising matters and areas of concern that affect our existence, our survival and our development. The trans-boundary character is the common denominator between all these issues and what makes them under the umbrella of International Law.

Making International Law should follow this approach. It must consider the human foundations of legal norms and reflect human needs and social matters. Consequently, International Law should be flexible, adaptable to new contexts and closely linked to social, economic, historic and political circumstances. International Law-making processes do not always fit these descriptions. Even though law-making bodies dynamically endeavor to improve International Law, they are often slowed down by many obstacles. Most of them arise from the limitations of the system. This raises questions with regards to the relationship between dynamism of relevant stakeholders and the complexities of law-making methods.

The first level of difficulty is embodied in the explosion of sources that do not always meet the requirements of effectiveness. The second level is expressed in the existing law-making system that does not constantly

respond to the aspirations of stakeholders. These difficulties will be elucidated to clarify the ambiguities of the relations between the improvement of International Law and the limitations of law-formation.

The selected approach is far from being exhaustive. It is not possible in the limited scope of this study to cover all relevant theories. Several concepts are used to answer related questions without being examined in greater depth. Moreover, the suggested examples are purely selective and do not cover all areas of International Law. The limitations of the law-making system are chosen for their relevance but are not comprehensive. This paper discusses only some substantive deficiencies and does not review the multiple procedural deficiencies of the system.

The term "stakeholder" is to be interpreted as the bodies that are directly or indirectly involved in the process of making International Law, including inter alia states, international organizations, courts and NGOs. And the term "dynamism" refers to the enthusiastic efforts of stakeholders to contribute to the improvement of International Law. Such improvement involves the addition of new sources as well as the enhancement of the existing ones.

The structure of the current paper reflects the two facets of the suggested topic. Dynamism of law-making bodies (I) facing the limitations of the law-making system (II). Both issues are discussed in relation with the phenomenon of law-improvement.

I. Dynamism of International Law-making bodies

The active dynamism of International Law-making bodies increased the number of sources of International Law leading to their proliferation (A). This raises questions with regards to the efficient implementation of international norms (B). Does dynamism of multiple stakeholders affect the efficiency of International Law?

A. Proliferation of sources

The international legal order does not include any legislative body nor a consistent mechanism to apply and interpret International Law. Enforcement procedures and institutions depend basically on the will of states. Voluntarism determines how International Law is made, implemented and enforced. There is no unified procedure to create new rules and no system that decides how such rules come into existence.

International Law-making processes are usually defined depending on each type of sources. Different mechanisms involve different kinds of stakeholders that would lead to different kinds of sources. For instance, the contribution of the International Law Commission (ILC) to the sources of International Law is remarkable. Based on its mandate to ensure progressive development and codification of International Law(1), it has led to the adoption of several international treaties(2) and developed many rules that havebecome customary(3), or that reflect state practice

(1) Charter of the United Nations, article 13 (1); United Nations General Assembly resolution 174 (II), 21 November 1947, ILC Statute, article 15.

(2) such as the Convention on the law of treaties, the Convention on Diplomatic Relations, the Convention on Consular Relations and the United Nations Law of the Sea Convention.

(3) The International Court of Justice considered customary the criteria of necessity set out by the International Law Commission (see concerning the Gabcikovo-Nagymaros Project, judgment of 25 September 1997, ICJ, para 52).

which could amount to international customs.

Following the order of article 38 paragraph 1 of the ICJ Statute, in terms of treaties, the role of the ILC is considerable as well as the role of international organizations including the judiciary organ of the United Nations, the International Court of Justice (ICJ). Starting with the ILC, as mentioned before, several treaties were concluded based on the ILC reports that were often adopted by the UN General Assembly. Many draft articles developed by the ILC became international treaties, hence forming the foundation of modern International Law."(4)

The role of international organizations is also notable in terms of the sources of International Law. Generally, it is the relevant organization that promotes treaty-making within its area of competence. Specialized United Nations' agencies play a major role in this regard such as the UNESCO, ILO, UNEP, etc. Non-governmental organizations (NGOs) submit as well shadow reports in international conferences and form pressure groups that would directly or indirectly contribute to the sources of International Law. They participate as well to the supervision of state actions pursuant to their legal obligations.

NGO's have nowadays access to negotiation processes. They attend general meetings of treaty-based bodies such as the CEDAW and the CAT Committees where states' representatives present their periodic reports and discuss them with the participating attendees. Despite this active participation of NGO's to the making, advocacy and

(4) See Pemmaraju Sreenivasa Rao, International Law Commission, Max Planck Encyclopedia of Public International Law [MPEPIL], April 2013. See also Making better International Law, the International Law Commission at 50, Proceedings of **the United Nations Colloquium** on Progressive Development and Codification of International Law, United Nations, 1998.

monitoring of international norms, their exact role is yet to be determined. On the national level, states choose when to follow their recommendations. The weight of civil society depends on the margin of freedoms in each state which would undermine its role depending on the will of states. On the international level, practice shows that their impact is still minimal even in the instances where civil society is given a consultative power.(5)

The second source listed by article 38 of the ICJ Statute is custom as evidence of a general practice accepted as law. Since the formation of customs is based on its two constitutive elements, practice and opinion juris, other stakeholders are added to the previously mentioned ones. The latter do not create international customs but recognize them by proving the existence of both required elements. Such action is more declaratory than constitutive. The burden of proof falls surely on the party invoking customs, but courts may point out at customary norms of International Law.

The ICJ participates to the process of making International Law. However, its relevance is limited by article 59 of its Statute that provides for the implementation of its decisions inter partes. In practice, the ICJ often refers to its previous judgments but the principle of stare decisis still does not apply. The impact of the ICJ is nevertheless important when it comes to recognizing customs, such as the rules contained in the Vienna Convention on the law of treaties or the first draft of ARSIWA(6). In addition to its persuasive power that could influence the conduct of states, the ICJ refers to the

(5) See Boyle Alan and Chinkin Christine, The Making of International Law, 2007, p.5457- and 6281-.

(6) Case concerning the Gabcikovo-Nagymaros Project, op.cit., note 3, para 46,47.

existing norms of International Law as evidenced customs or as general principles of International Law.(7) The latter is listed as the third source of International Law in article 38. They can be recognized by courts as well based on domestic laws and are usually linked to considerations of equity.

The list of sources of International Law shows that they are state-centered. Stakeholders rely on State consent to adopt binding sources of International Law or track the practice of states to identify such sources. Non-binding sources or subsidiary sources, such as courts' decisions and teachings of highly qualified publicists have persuasive authority and a significant impact on the international legal system.(8)

The diversity of International Law-making bodies led to the proliferation of sources despite the absence of a consistent unit from which they emerge. The contribution of various actors involved numerous processes depending on the scope of work of each. Furthermore, the dynamism of these actors improved International Law-making processes in many ways:

First, International Law-making and more precisely treaty law-making does not rely any longer on the sole efforts of states. Treaties were usually signed in international conferences convened by states whenever they found it convenient or necessary to enter into agreements in specific areas. Nowadays, international organizations, each within

(7) Marija Dordeska, The process of International Law-making: the relationship between the International Court of Justice and the International Law Commission, International and Comparative Law Review, forthcoming, 2015 (41 pages).

(8) See Martin Dixon, Robert McCorquodale, Sarah Williams, Case and materials on International Law, 2016, pp.4248-.

its competency, draft treaties and invite states to negotiation and eventually to signature in international conferences held for this purpose. This generally applies to multilateral law-making treaties knowing that bilateral treaties and contract-treaties are adopted through narrower procedures involving the concerned parties.

Second, the dynamism of multiple stakeholders led to an enhanced specialization of the sources of International Law. Further efforts are made by UN agencies to promote the adoption of treaties within their scope of action.

Third, and considering the preceding notes, proliferation of sources is not only quantitative but also qualitative. Improvement of International Law-making processes cannot occur without further involvement of relevant bodies.

Fourth, the list of sources provided by article 38 of the ICJ Statute is not exhaustive. Additional sources were clearly and expressly recognized by the ICJ such as the UN General Assembly resolutions.(9) Indeed the dynamism of the General Assembly improved International Law by shedding light on specific areas that are not sufficiently regulated such as aquifers, trans-boundary harm, unilateral acts, state liability etc.

Fifth, International Law-making bodies have acquired with time more powers to promote the adoption of international legal instruments. This is reflected for example in terms of human rights where efforts are made to strengthen and enhance their effective functioning even though these efforts(10) are more related to the effective implementation of existing sources than to the creation of new ones.

(9) Advisory opinion on the legality of the threat or use of nuclear weapons, ICJ, 8 July 1996, para 70.

(10) Strengthening and enhancing the effective functioning of the human rights treaty body system, United Nations General Assembly resolution A/68/L.37, 12 February 2014.

B- Effectiveness of sources

The abundance of International Law norms is not always accompanied with efficient enforcement mechanisms. This caused concerns regarding States' compliance with their multiple obligations under International Law[1] and other concerns related to the termination and denunciation of treaties[2], which would affect the effectiveness of International Law sources and be an obstacle to the dynamism of International Law-making bodies.

1. Questions of compliance

There is no doubt that states must comply with their obligations arising from the binding sources of International Law. Pursuant to the principle of pacta sunt servanda, states have the obligation to respect the treaties to which they are parties in good faith.(11) They cannot invoke their internal laws to justify the breaches of their international obligations.[12] Violations are still frequent despite these provisions. One would refer to the inefficiency or the inadequacy of the existing enforcement mechanisms. The proliferation of sources and the lack of a common system of formation and application of laws increases the deficiencies of such mechanisms. The limited scope of this study does not allow a thorough evaluation of the efficiency of current enforcement mechanisms. However, a brief track of the improvement of International Law shows that the adoption of new sources often results in adding relevant procedures to ensure their proper implementation. Two examples can be given in this context: International Environmental Law and International Human Rights Law.

(11) Vienna Convention on the law of treaties, 1969, article 26.
(12) Ibid., article 27.

Environmental agreements are concluded at an "exponential rate"[13]. Most environmental issues are covered by specific treaties and many of their rules have gained a customary value like the precautionary principle and the principles of no harm and environmental impact assessment. International environmental law has developed to include more specific and realistic measures to respond to current and future challenges, and to improve the existing compliance systems. Kyoto Protocol was added to the Framework Convention on Climate Change to provide concrete measures negotiated by the Conference of Parties.

The Framework Convention and the Convention on Biological Diversity have the same monitoring system based on reporting and financial support. However, Paris agreement of 2015 did not include any binding enforcement mechanism. This does not mean that the agreement did not advance in terms of compliance procedures to ensure the application of states parties' obligations. It has indeed established "a mechanism to facilitate implementation of and promote compliance with its provisions".[14] Moreover mandatory measures were added in 2001 to the International Convention for the Protection Committee.[15]

The same tendency is seen in terms of human rights. Evolving sources constantly improved relevant compliance and monitoring systems. They also increased the relevance and the legal value of human rights norms. Evolution occurred in favor of more powers given to treaty-bodies and various

(13) Ademola Abass, International Law, text, cases, and materials, second edition, 2014, p.633.

(14) Paris agreement under the United Nations Framework Convention on Climate Change, United Nations, 2015, article 15.

(15) For an overview on environmental treaties, see Martin Dixon, Robert McCorquodale, Sarah Williams, Case and materials on International Law, op.cit., pp.469481-.

stakeholders and of an expansion of legal instruments. All the human rights complaints procedure was revised gradually with the establishment of the Human Rights Council and the extension of the powers of treaty-based bodies. Moreover, the adoption of the additional protocols to the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights set out individual complaints procedures.

The preceding statements show that proliferation of International Law sources does not have a negative impact on the compliance with these sources. To the contrary, it can improve the existing system. However, this does not prevent violations. In any event, these violations cannot be attributed to the multiplicity of the sources of International Law. Therefore, dynamism of International Law-making bodies does not affect the compliance with international obligations.

2. Questions of termination and denunciation

One would ask in this context if the proliferation of sources facilitates and provokes termination of treaties. Does the dynamism of stakeholders reflect a certain "rush" in the process to attract as many state parties as possible?

The accruing number of sources increases the chances of withdrawal from international engagements. The risk does not relate only to numbers, but also to a potential attitude of the law-making bodies which might accelerate the processes of International Law-making. It is certainly a risky attitude that would affect the stability of relevant mechanisms and resulting sources. The lack of uniform and centralized legislative authority can destabilize states' commitments.

On one hand, states are under a constant pressure to accede to treaties. The international community and various bodies encourage states to join treaties and some would accept accession knowing that most international agreements leave space for termination or denunciation. This perception of the law reflects the vision of some private law stakeholders. Accordingly, law is seen as a product like any other product which can be generated by multinational corporations, leading to the development of efficient systems of private law making. Such companies use their contractual relationships with the many entities they deal with, to legislate behavior concerning the product quality, "working conditions for the suppliers' employees, ethical conduct, and similar matters."(16)

It was said that the "production of legal regulation, like that any other product, is subject to market forces. Regulation is both a thing, and, as a system of constraints on human behavior, an institution, one with a life of its own."(17) These statements enlarge the sphere of law-making bodies, and undermine the states' monopoly. They detach legal processes from the scope of states' sovereign rights. However, this is certainly a factor to further proliferation of laws and to the acceleration of their adoption.

On the other hand, treaty-termination and denunciation are not always linked to the deficiencies of the system or the proliferation of the sources. Current situations show that this is mostly due to the rising challenges as well as to the political, historical, social and economic changes on the international scene.

(16) Larry Catá Backer, Economic globalization and the rise of efficient systems of global private lawmaking: Wal-Mart as global legislator, University of Connecticut Law Review – 39(4) (forthcoming 2007), p.1.

(17) Ibid., p.3.

Treaty termination follows strict rules provided by part X section 3 of the Vienna Convention on the Law of Treaties that reflect customary International Law(18). Generally, a treaty can be terminated or denunciated by treaty provision or consent. Most treaties require a definite period where they continue to apply before denunciation takes effect. The WTO (World Trade Organization) and NAFTA (The North American Free Trade Agreement) allow withdrawal with six months' notice.

This reminds us of the concerns raised by Trump foreign policy with regards to the international commitments made by the US. President Trump promised not to withdraw from NAFTA. But he withdrew America from the Trans-Pacific Partnership trade deal. He is also considering whether the US should withdraw from Paris agreement on Climate Change. Such approach is close to the private law approach mentioned above. Accordingly, treaties can be seen like any other products subject to market forces. At least, this is what the American presidency seems to show. However, this cannot be true even for the US, since treaty-making and law-making in general are much more complex than this apparent comparison.

In the American system, treaties are usually codified in national law and cannot be easily revoked. President Trump could withdraw from NAFTA because the agreement has not already received agreement from the Congress. This ascertains the fact that denunciation of treaties is not as simple as shown by politicians or media. It is merely a legal act and follows binding rules provided for by the Vienna Convention on the Law of treaties and by the relevant treaty provisions.

(18) Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa), ICJ, 1971, para 94.

Article 50 of the TEU (Treaty on European Union) allows a member state to withdraw from the EU according to its constitutional requirements. The withdrawal procedure is very specific. It involves negotiating an agreement that specifies the exact terms of withdrawal including the financial engagements of the concerned state. Withdrawal takes effect as of the date of entry into force of the agreement or two years after notification of withdrawal unless the European Council agrees with the withdrawing state to extend this period.

Following Brexit referendum, the UK started negotiations with the European Union based on article 50 to agree on post Brexit arrangements. The transitional period of two years (if not more) is considered as a transitional period. The latter is now common in most international treaties.

Transitional measures reduce the effect of treaty denunciation rather than preventing such denunciation. States do not wish to conclude a treaty knowing that they can never withdraw from it. Therefore, transitional measures could form a certain compromise to safeguard the interests of the concerned parties at least momentarily. The acquired rights of parties are protected pursuant to article 70 of Vienna Convention on the Law of Treaties, even though there is a controversy whether those parties include individuals' acquired rights. Transitional measures also preclude states that wish to breach their obligations under a treaty to withdraw from this treaty for that purpose at least for a certain period.

Improvement of International Law-making follows this trend and transitional measures are nowadays introduced in most international agreements. The transitional period is

longer depending on the area and the gravity of potential breaches to the relevant treaty. In the investment and financial sector for example, such period is often very long. The recent Canada-EU trade agreement (CETA) provides a transitional period of twenty years for the provisions concerning investment.(19)

In International Criminal Law, the scope of denunciation is limited to avoid states' withdrawal for escaping from punishment. Denunciation does not affect criminal investigations and proceedings that commenced prior to withdrawal where the withdrawing state had a duty to cooperate. Withdraw cannot prejudice in any way the continued consideration of any matter which was already under consideration by the Court.(20)

The ICCPR (International Covenant on Civil and Political Rights) does not provide any rules for denunciation. Yet this was not interpreted as allowing termination. Article 56 of the Vienna Convention on the Law of Treaties provides that when the treaty does not include any provision regarding termination, the latter is only allowed where the parties intended to admit it or it is understood from the nature of the treaty. Accordingly, the United Nations Human Rights Committee considered that the parties did not intend to admit the possibility of withdrawal concerning the ICCPR.(21) This ascertains the fact that the current approach towards denunciation is restrictive by adding a transitional period or other limitative measures.

(19) Comprehensive Economic and Trade Agreement (CETA) between Canada, of the one part, and the European Union [and its member states…] of the other part, 30 October 2016, still not in force, article 30.9.

(20) Rome Statute of the International Criminal Court, 1998, article 127 (2).

(21) United Nations Human Rights Committee, General Comment No. 26 of 1997. Malcolm N. Shaw, International Law, seventh edition, Cambridge, 2014, p.685.

Dynamism of treaty-making bodies does not limit the improvement of International Law, by focusing more on concluding treaties than making those treaties "interminable". A middle solution was found to convince sates to further sign treaties without preventing them from the possibility of withdrawal: transitional measures. Hence dynamism is still an important factor towards the improvement of International Law. However, the latter faces different obstacles pertaining to the limitations of the law-making system.

II. Limitations of the law-making system

Improvement of International Law faces several obstacles directly and indirectly linked to the limitations of the law-making system. Such limitations can be grouped in three categories: inherent formalism versus rising de-codification (A), inaptitude to respond to all new developments and challenges (B), and extensive specialization leading to the fragmentation of International Law (C).

A. Formalism versus de-codification

International Law-making relies heavily on formalism especially when it comes to formation of treaties. Vienna Convention on the Law of treaties include specific provisions regulating all stages of treaty formation till eventual termination including inter alia interpretation, validity and reservations to treaties. Such a formalism linked to the process of codification of International Law slows down its improvement. Extensive formalism adds procedural requirements to the adoption of new sources. Since such requirements are mostly binding, any breach would alter the validity of the relevant legal instrument. Overcoming

extensive formalism can be done through many ways:

First, having recourse to sources other than treaties can reduce codification and attenuate formalism. This certainly accelerates the process of law-making and increases the number of resulting sources. It is conceivable due to the complementarily between the sources and the lack of hierarchy in International Law (except between jus cogens norms and other International Law norms).

On one hand, customs can develop outside the scope of any treaty, notwithstanding the situation where a treaty codifies a pre-existing custom(22) or where treaty provisions are recognized as customary rules(23). The autonomy between treaties and customs(24) allows the latter to develop in an innovative manner following state practice and opinion juris. On the other hand, general principles of International Law can supplement treaties, substitute customs and incorporate new changes in "sectoral regimes".(25) The space left for sources other than treaties reconciles formalism with dynamism of stakeholders and simplifies the process of law-making.

Second, treaty-law itself is not as codified as before. De-codification is possible with the interplay of other sources.(26) As previously stated, customs can develop independently from treaties. Vienna Convention allows extensive

(22) It is the case of the most provisions of the 1949 Geneva Conventions on International Humanitarian Law. Cf. Jean-Marie Henckaerts and Louise Doswald-Beck, "Droit international humanitaire coutumier, volume I: Règles" (International Humanitarian Law, volume I: Rules), Bruylant, Bruxelles 2006, 878 pages.

(23) See supra I(A).

(24) Enzo Cannizzaro, the Law of treaties through the interplay of its different sources in Research Handbook on the Law of Treaties edited by Christian J.Tams, AntoniosTzanakopoulos and Andreas Zimmermann with Athene E.Richford, 2014 (p.21).

(25) Ibid., p.2730-.

(26) Ibid., p.16.

interpretation of treaties if textual interpretation does not provide sufficient clarity.(27) Accordingly, the principle of states' consent was interpreted in an evolutionary manner by the ICJ. Article 7 of the Vienna Convention regulates full powers required to represent a state for adopting the text of a treaty. It expressly lists out specific persons to be able to express states' consent. However, it leaves space for other persons to represent states in certain situations.(28)

The ICJ applied article 7 lato sensu to people representing a state in specific fields.(29) This could be interpreted as an extensive interpretation of codified treaty-law. Nevertheless, the Court has gone farther by allowing the Attorney General of a state to bind that state.(30) Such statement is a step

(27) Vienna Convention on the Law of Treaties, 1969, articles 3132-.

(28) Article 7 of the Vienna convention states that: "1. A person is considered as representing a State for the purpose of adopting or authenticating the text of a treaty or for the purpose of expressing the consent of the State to be bound by a treaty if:

(a) He produces appropriate full powers; or

(b)It appears from the practice of the States concerned or from other circumstances that their intention was to consider that person as representing the State for such purposes and to dispense with full powers.

2. In virtue of their functions and without having to produce full powers, the following are considered as representing their State:

(a) Heads of State, Heads of Government and Ministers for Foreign Affairs, for the purpose of performing all acts relating to the conclusion of a treaty;

(b) Heads of diplomatic missions, for the purpose of adopting the text of a treaty between the accrediting State and the State to which they are accredited;

(c) Representatives accredited by States to an international conference or to an international organization or one of its organs, for the purpose of adopting the text of a treaty in that conference, organization or organ."

(29) Case concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Rwanda), ICJ, 3 February 2006, para 47.

(30) Questions Relating to the Seizure and Detention of Certain Documents case, ICJ, 3 March 2014, paras. 3147-.

beyond the codification of the law of treaties. Even though judicial decisions are not binding per se, the interplay of case-law can de-codify International Law. This can be done by referring to treaty-law, which is paradoxical in terms of consistency of the sources of International Law.

Third, International Law-making is formal but it is also "inherently flexible"(31). Vienna Convention regulates in-depth all rules regarding treaty formation, implementation and termination but also leaves a margin of appreciation for states and relevant bodies. This applies for example to the expression of the consent to be bound, to ratification since it relies entirely on national law, as well as to the variability of treaty-interpretation, the definition of pull powers to represent states as mentioned earlier and to treaty identification.(32)

Reducing formalism can surely encourage dynamism of states and law-making bodies regardless of the type of corresponding sources. Yet, stakeholders must be careful with extensive de-formalization and de-codification that could lead to further de-standardization and thus to the de-stabilization of the whole process. Formalism and codification provide some safety in the making and application of International Law. They can fill the gap of the absence of a common and uniform system to generate laws on the international level.

B. (In)aptitude to respond to all new developments and challenges

Global challenges and current developments expanded

(31) Jean d'Aspremont, Formalism versus flexibility in the law of treaties in Research Handbook on the Law of Treaties edited by Christian J.Tams, AntoniosTzanakopoulos and Andreas Zimmermann with Athene E.Richford, 2014 (p.261).

(32) Ibid., pp. pp.257284-.

the sphere of public International Law. The post WWII system could regulate most modern situations and respond to most crisis without the need to radical changes. Re-structuration was never highly solicited because of the adaptability and flexibility of the procedures concerning the formation of norms and their implementation. But what International Law really lacked was predictability (1) and enforceability (2).

1. Lack of predictability

The foundations of International Law as a normative system are built upon the historical circumstances. Like other branches of law, it evolved upon the needs of succeeding societies holistically. It is perceived to regulate common challenges or trans-boundary concerns. Indeed, the use of force is authorized when the international peace is breached or threatened to be breached or in cases of aggression between states.(33) Since its conception, International Law was meant to apply to situations that go beyond the boundaries of one state. By definition, it is the equivalent of interstate law more than international law as such. Recent developments on the international scene forced International Law to move from its traditional orientations. It is no longer as state-centric as before and does not regulate only trans-boundary issues.

Individuals were not seen before as subjects of International Law. This is not true anymore knowing that jus gentium is following the current tendency towards the humanization of International Law.(34) Individuals are

(33) United Nations Charter, San Francisco 1945, Chapter VII.

(34) On the humanization of International Law, cf. Theodore Meron, The humanization of humanitarian law, American journal of International Law, volume 94, n°1, January 2000, (pp.239- 278, especially pp.239240-); Jeand'Aspremont, Jérôme de Hemptinne, "Droit international humanitaire" (International Humanitarian Law), editions Pedone, Paris 2012, pp.8990-. Ludovic Hennebel, « L'«humanisation» du droit international des droits de

therefore at the center of International Law with the growing impact of human rights and the principles of humanity in general.

International Law had to cope with the contemporary changes in the field of humanitarian law for example. The new forms of conflicts, the use of modern technology as well the use of force by non-state actors required the development of new rules. The latter do not govern only traditional conflicts opposing two states, but also non-international conflicts opposing a state to non-state armed groups. This explains the adoption of the Second Protocol Additional to the Geneva Conventions of 12 August 1949, relating to the Protection of Victims of Non-International Armed Conflicts.

International Law could not predict all the current changes and challenges. And it is unlikely to do so for the future. Therefore, flexibility and adaptability in addition to the dynamism of all relevant stakeholders are the key to its proper improvement. So far, its structure could provide adequate response to emerging crisis and problematic situations. Yet, this response was mostly on a normative level because in terms of enforceability, a lot is still to be accomplished.

2. Lack of enforceability

Lack of compliance with International Law often arises from the insufficiency of enforcement mechanisms and

l'homme, commentaire sur l'avis consultatif n°18 de la Cour interaméricaine relatif aux droits des travailleurs migrants » (The humanization of International Law, commentary on the advisory opinion No.18 of the Interamerican Court of Human Rights relating to the rights of migrant workers), "Revue trimestrielle des droits de l'homme" (Trimestral Revue of Human Rights), N°59, 2004, pp.747- 756. A.A. Cancado Trindade, Humanization of International Law » in « International Law for human kind: towards a new jus gentium », Collected Courses of The Hague Academy of International Law, volume 316, 2005, pp.19282-.

mostly from the absence of enforcement bodies. There is no international police that can arrest states' representatives if they fail to respect their international obligations. INTERPOL cannot undertake cross-boundary activities because, as an organization, it is not a subject of International Law and has much more limited scope of activities. The United Nations Organization does not have an international army and relies on states to form multi-national forces under its mandate.(35) The International Criminal Court cannot always arrest suspects due to the lack of states' cooperation and the absence of relevant enforcement bodies. Nevertheless, one must point out that the ICJ recently required Senegal to extradite the former president of Chad to Belgium for his breaches to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.(36)

C. Extensive specialization leading to rising fragmentation

Proliferation of the sources of International Law was certainly the best way to cover evolving and emerging areas of concern. However, such "diversification and expansion"(37) led to a legal phenomenon that started to be emphasized in the very beginning of the current century, the fragmentation of International Law. As mentioned above, contemporary changes and challenges stretched out the borders of International Law by relying on its elastic structure and flexible mechanisms. Its adaptability to rising matters motivated its advanced specialization that increased the gaps between its various components.

(35) United Nations Charter, San Francisco 1945, articles 4147-.

(36) Questions Concerning the Obligation to Prosecute or Extradite (Belgium v. Senegal), ICJ, 20 July 2012.

(37) Fragmentation of International Law: difficulties arising from the diversification and expansion of International Law, Report of the Study Group of the International Law Commission, Finalized by Martti Koskenniemi, August 2006.

The main aspect of fragmentation is the rigid separation between the legal framework concerning different areas of public International Law. As Malcolm Shaw said "the tremendous expansion of both the rules and the institutions of International Law, with the rise of more and more specialist areas such as trade law, environmental law and human rights law, has led to arguments that International Law as a holistic system is in the process of fragmentation."(38) The main problem arises from the fact that such specialized law-making and institution-building tends to take place with relative ignorance of legislative and institutional activities in the adjoining fields and of the general principles and practices of International Law."(39)

The negative impacts of fragmentation are numerous: enhancement of special regimes on the detriment of the center that is consequently destabilized, conflict between International Law norms and discordance in their interpretation.(40) Furthermore, fragmentation can reach the judiciary system and cause a conflict of jurisdiction, due to the emergence of decentralized courts and tribunals.(41) Many solutions were suggested(42) to bridge up the gapbetween

(38) Malcolm N. Shaw, International Law, seventh edition, Cambridge, 2014, p.46.

(39) Fragmentation of International Law: difficulties arising from the diversification and expansion of International Law, op.cit., note 35, para.8.

(40) Ibid., paras.46323-.

(41) Mathias Forteau, « L'influence du choix de la juridiction sur le droit applicable aux relations internationales. Forum shopping et fragmentation du droit international in La fragmentation du droit applicable aux relations internationales, regards croisés d'internationalistes privatistes et publicistes » (The influence of the choice of jurisdiction on international relations. Forum shopping and fragmentation of International Law inThe fragmentation of the law applicable to international relations, crossed insights of private and public internationalists), under the supervision of Jean-Sylvestre Berge, Mathias Forteau, Marie-Laure Niboyet et Jean-Marc Thouvenin, scientific supervision Mathias Forteau, Pedone, Paris 2011, pp.143163-.

(42) Clémentine Bories, Philippe Guez, thomas Habu Groud and Anne-Laure Vaurs-Chaumette, « Table ronde. Expériences partagées » (Round Table. Shared experiences) in La fragmentation du droit applicable aux relations internationales, regards croisés d'internationalistes privatistes et publicistes (The fragmentation of the law applicable to international relations, crossed insights of private and public internationalists), op.cit, previous note, pp.180192-.

various regimes under International Law, solve conflicts and seek relationships.(43) Notwithstanding the relevance of such solutions, fragmentation of International Law still exists and it was not entirely resolved. One would wonder if it is still possible to attain a certain unification of the law of international relations.(44) However, fragmentation and improvement of International Law can co-exist.

Despite all the disadvantages of fragmentation, International Law is still perceived as an autonomous system of laws. The interplay between its different components is guaranteed by the implementation of many principles such as lex specialis derogare leg egenerali, lex posterior, jus cogens and the priority of the United Nations Charter pursuant to article 103.(45) And the pivotal role of the ILC contributes to connect all the branches of International Law.

As previously stated, dynamism of stakeholders often leads to the proliferation of sources of International Law. Such sources are developed separately by different law-making bodies such as the UNESCO concerning cultural norms, the International Labor Organization concerning workers' rights, and the ICRC concerning International Humanitarian Law. Even if these bodies are distinct, they often communicate especially when it comes to the agencies that are affiliated to the same organization, the United Nations. The ICRC also communicates with the

(43) Fragmentation of International Law: difficulties arising from the diversification and expansion of International Law, op.cit., note 35, para.27.

(44) Clémentine Bories, Philippe Guez, thomas Habu Groud and Anne-Laure Vaurs-Chaumette, « Table ronde. Expériences partagées » (Round Table. Shared experiences), op.cit., note 40, p.192.

(45) Article 103 of the United Nations Charter states that: "In the event of a conflict **between the** obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail."

United Nations and contributes through reports to the ILC.(46)

Moreover, the ILC endeavors to achieve its aim of progressive codification of International Law by adopting an integrative approach. The latter is developed by its study on the fragmentation of International Law. This study refers to the principle of systemic integration that is mentioned in article 31 (3) (c) of the Vienna Convention on the Law of treaties.(47)

Therefore, to overcome the obstacle of fragmentation, improvement of International Law cannot be achieved without a minimum of systematization. Dynamism of stakeholders is always an impetus for the proper evolution of norms if the enhancement of legal regimes does not affect the stability of the center.

(46) See for example the recent Report of the International Law Commission: ICRC statement to the United Nations, 2016, United Nations General Assembly, 71st session, Sixth Committee, Report of the International Law Commission on the Work of Its sixty-eighth session (A/71100/), October – November 2016. Statements by the ICRC.

(47) Fragmentation of International Law: difficulties arising from the diversification and expansion of International Law, op.cit., note 35, paras. 410480-. Article 31 of the Vienna Convention on the Law of Treaties states that:" 1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:

(a) Any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty;

(b) Any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

3. There shall be taken into account, together with the context:

(a) Any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;

(b) Any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;

(c) Any relevant rules of International Law applicable in the relations between the parties.

4. A special meaning shall be given to a term if it is established that the parties so intended."

CONCLUSION

Increasing the sources of International Law is a factor of its constant improvement. Dynamism of stakeholders does not have an adverse impact on the enhancement of relevant norms. Nevertheless, it should not affect the coherence of the system. Nowadays, it is frequently asked whether an actual international legal order really exists. Decentralized formation of norms adds to these concerns by fragmentizing different regimes. The solution is not by slowing down the mechanism but by reshaping it, for the purposes of unification, proper classification and adequate specialization. All these practices should not disregard the center of norms that must strengthened. This can be done by the same stakeholders which contribute to the development of International Law.

The main concern is related to the relevant bodies that can re-module the existing system without alienating it. International Law still has the aptitude to face all the current challenges as shown throughout this study. The system is not flawless and can still be improved. However, it is pre-disposed to cope with the changes based on the common elements that gather all the areas of International Law.

"The international system is composed increasingly of co-operative and competing elements participating in cross-boundary activities, but the essential normative and structural nature of International Law remains."(48)

48 Malcolm N. Shaw, International Law, op.cit., note 36, p.48.

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