

■ BOOK REVIEW

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**Alan Boyle and Christine Chinkin,
The Making of International Law,
Oxford University Press, 2007, xxx + 338 pp.**

In domestic legal systems, a distinction between legal and other kinds of rules is usually determined by constitutional provisions. The international legal system in contrast is characterized by decentralization and the determination of legal rules is thus much more difficult and often an issue of controversy. The book of Alan Boyle and Christine Chinkin deals with the complex issue of international law-making. Its aim is not to give a comprehensive account of how international law is made; but rather, it wants to provide a "*flavour of the diversity of international law-making processes, the system's capacity for innovation, and its responsiveness to need.*" (p. 2)

In Chapter 1 ("*International Law-Making*", pp. 1-40), the authors introduce the reader to various issues and themes which play a role in international law-making. An account of international law-making in response to terrorism gives a first taste of the diverse mandates and processes of law-making institutions, participants within them, and the instruments adopted. The authors briefly consider the impact of various theories of international law on the making of international law such as natural law, legal positivism or the New Haven approach. Moreover, they outline particular issues of law-making in today's globalised world such as fragmentation; and, they provide some thoughts on legitimacy as criterion for assessing law-making processes. Finally, they address the question of reform of law-making. In that respect they suggest, for example, that what the international legal system currently needs is not more international law-making, "*but greater efforts at ensuring the integration, coherence, effectiveness and universal reach of the existing international law.*" (p. 39)

Chapter 2 ("*Participants in International Law-Making*", pp. 41-97) is particularly concerned with the role of non-state actors in the making of international law. In enumerating the sources of international law, Article 38, paragraph 1 of the Statute of the International Court of Justice (ICJ) assumes that states are the primary actors in international law-making. "*But focus solely on state actions*" – as the authors rightly note on p. 41 – "*gives a misleading picture of international law-making*". Therefore, the authors point out ways and means by which non-state actors take part in international law-making processes and thereby influence – though to an empirically uncertain extent – the development of international law.

The discussion in this Chapter centres on non-governmental organisations (NGOs) since only NGOs are given international legal status by the UN Charter (Article 71). The authors, *inter alia*, consider the extent to which NGOs have access to intergovernmental organisations (IGOs), whether they have a right to participate in IGO processes, and whether their participation increases the

legitimacy of international law-making. The authors describe the relationship between NGOs and IGOs as "*symbiotic*" (p. 45): IGOs derive some additional legitimacy from NGO participation and NGOs acquire legitimacy from their IGO-granted mandate. As regards the claim of democratisation and thus legitimisation of the law-making processes through NGO participation, the authors stress, however, that various factors may challenge such a claim. NGOs are for example often non-democratic and there is no guarantee that their views are representative.

The authors also look at how NGOs actually participate in treaty-making and provide case studies concerning, *inter alia*, the UN Torture Convention, the Landmines Convention and the Rome Statute of the International Criminal Court (ICC). Furthermore, they discuss NGO participation in law-making through the UN General Assembly (UNGA), the UN Security Council (UNSC) and global summits. The authors also demonstrate how NGOs impact the creation of new rules in the course of, e.g., treaty monitoring and NGO advocacy within national, regional and international judicial bodies.

Chapter 3 ("*Multilateral Law-Making: Diplomatic Processes*", pp. 98-162) subsequently deals with the main multilateral diplomatic processes through which modern international law-making usually takes place. The authors discuss IGOs such as the United Nations (UN), the Food and Agriculture Organisation (FAO), the World Health Organisation (WHO) and the World Trade Organisation (WTO). They also consider *ad hoc* negotiating conferences such as the 3rd UN Conference on the Law of the Sea and the Rome Conference concerning the Statute of the ICC. Moreover, they observe to what extent bodies such as conferences of the parties to a multilateral treaty or independent expert bodies established by a treaty engage in law-making.

The processes considered in this Chapter are similar in that they are primarily political and that voting is in general reserved to states. Nevertheless, NGOs (as discussed in Chapter 2) and legal or technical expert bodies (as discussed in Chapter 4) are also involved and influence the result. The discussion of the various processes reveals a tendency towards taking decisions by consensus. Therefore, the authors also briefly consider benefits and drawbacks of consensus law-making. The sheer number and specialisation of law-making processes discussed makes apparent the fragmented fashion in which international law is made.

Only some of the bodies reviewed are endowed by their constituent treaties with the power to prescribe generally applicable rules. The primary example is the UNSC, which may adopt resolutions binding for all states. Due to the UNSC's unrepresentative membership, however, the authors regard its increasing law-making activities as problematic. These activities might not be perceived as legitimate and thus, might be resisted by states regardless of their binding character.

Chapter 4 is specifically concerned with the distinctive process of "*Codification and Progressive Development of International Law*" (pp. 163-209). Codification influences treaty law, but as the authors demonstrate, its impact on customary law is even more important. This Chapter provides the reader with an overview of the working methods of various bodies engaged in codification and progressive development of international law as well as with a critical assessment of some of their products. The authors, *inter alia*, briefly discuss the *ad hoc* Committees on Terrorism and on the Safety of UN Personnel established by the UNGA; the

International Committee of the Red Cross (ICRC), which recently produced a report on customary international law related to armed conflicts; and the International Institute for the Unification of Private Law (UNIDROIT).

The authors' main focus, however, is on the International Law Commission (ILC). They consider how the ILC selects its topics, whether and to what extent it cooperates with other bodies as well as whether and when it is advisable that codification efforts result in a soft law instrument rather than a treaty. The authors also assess why the topic of environmental law proved to be so troublesome for the ILC while, in relation to other topics such as state responsibility, state immunity, law of treaties and the establishment of the ICC, the ILC made significant accomplishments. As regards the future of the ILC, the authors argue that even though international law-making will increasingly be about negotiating new law rather than codifying existing law, the ILC may still play a role, provided it keeps closer contact with states and thus, the political process. Moreover, they note that by dealing with issues such as fragmentation or treaty reservations, the ILC arguably shifted its focus from clarifying pre-existing law towards enhancing coherence within the system of international law as a whole – a development, which the authors seem to welcome.

The multilateral processes outlined in Chapter 3 result in a variety of "*Law-Making Instruments*", which are dealt with in Chapter 5 (pp. 210-262). Instruments discussed in this Chapter are various forms of soft law, resolutions of the UNSC and multilateral treaties. The purpose of this Chapter is thereby twofold. First, it explains how these instruments evolve into international law. Second, it outlines how these instruments interrelate and whether they do so in a coherent or fragmentary fashion.

The authors, *inter alia*, demonstrate the effects soft law may have on customary international law and that states sometimes are not free to disregard soft law because of its interaction with a treaty. They point out that UNSC resolutions may override inconsistent international law and are thus a means to effectuate quick changes in the law. They stress, however, that there are certain limits to the UNSC's law-making capacity. The authors eventually point out that even treaties short of universal membership may have effects for non-party states because they may, for example, through practice become accepted by all states as the basis of new customary law.

The authors clearly illustrate that it is not necessarily crucial in law-making terms whether or not an adopted instrument is formally binding on states. They show that the most important sense in which many multilateral processes outlined in Chapter 3 may be referred to as law-making is that their products contribute to law-making through custom or general principles. Furthermore, they highlight that – with the exception of the UNSC resolutions – rules may not be imposed on dissenting states. This characteristic of international law-making still distinguishes it from a genuine legislative system.

Finally, Chapter 6 is concerned with "*Law-Making by International Courts and Tribunals*" (pp. 263-312). The authors provide here an interesting outline of some of the law-making attributes of international adjudicative bodies. Though their discussion focuses on the ICJ as the only international court of general jurisdiction, they also make references to other international bodies such as the WTO Dispute Settlement Panels and Appellate Body.

Article 38, paragraph 1 of the ICJ-Statute recognises judicial decisions only as subsidiary sources of international law. Nevertheless, judicial decisions do have an impact on the development of international law. International courts contribute to law-making by affirming the law-making effect of instruments, such as multilateral treaties or UN resolutions, or by articulating new legal rules and principles. The authors also note – and rightly so – that the actual law-making effect of a judicial decision eventually depends on whether states accept that decision and take it as basis for their practice. Moreover, they discuss various factors which enhance or decrease the legitimacy of international court decisions and observe that international decisions in general enjoy a high degree of legitimacy.

The proliferation of international courts and tribunals – the authors note that in 2004 there were some 125 (!) international judicial bodies and mechanisms – is just another aspect of the fragmentation of the international legal system. They find support for the argument that this proliferation has not led to inconsistencies in the development of international law. Since courts have to deal with the relationship between different norms, they have an important role to play in furthering coherence. In that regard, the authors also point out that international courts tend towards an integrated approach to international law rather than a fragmented one. The authors, however, concede that limited compulsory jurisdiction or applicable law may of course impede this approach.

"The Making of International Law" by Alan Boyle and Christine Chinkin is an outstanding study on how international law is made. It provides remarkable insight into mechanisms and procedures by which international rules are created and identifies the participants and instruments involved. It thereby enhances the reader's understanding of the complexities of contemporary international law-making and does not fail to point out the challenges ahead, such as the furtherance of coherence.

Even though the book does not deal in detail with the formation of customary international law, the reader learns about which participants in the international law-making process contribute to its evolution as well as how and where its existence and content are established. The authors argue that contemporary law-making on the basis of multilateral processes "*represents a marked advance over classical customary international law*" (p. 261). Since it rests more on multilaterally negotiated texts than on uncertain practice of only a handful of states, an agreement of states to rules has become easier to spot.

In view of the complexity of the issue discussed, it is all the more laudable that the book is so easy to read. The large number of recent and illustrative examples and case studies proved very helpful in this regard. Another asset of the book is that each Chapter ends with a short list of book recommendations. In sum, this book is essential reading for anyone interested in contemporary international law-making.

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