The doctrinal illusion of heterogeneity of international law-making processes

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THE DOCTRINAL ILLUSION OF THE HETEROGENEITY OF INTERNATIONAL LAWMAKING PROCESSES

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I have argued elsewhere that the development of heterogeneous international legal instruments (especially through the idea of soft legal instruments) reflects an attempt by international legal scholars to redefine the ‘rules of recognition’ of the international legal system with a view to poaching new materials of study in areas which are intrinsically outside the realm of international law and which would have originally fallen within the expertise of scholars of other disciplines.1 It is the aim of this paper to develop this argument further and to apply it to the idea of the heterogeneity of international lawmaking as a whole. More precisely, this paper will try to demonstrate that the contemporary assertion that international lawmaking has become more heterogeneous is less the result of an actual practice than the outcome of an inclination of scholars to expand their material of study.2

While the aspiration for the import of new legal materials into the ambit of international legal scholarship can provide a rational explanation of the proneness of international scholars to depict international lawmaking processes as diverse and heterogeneous, it is not sufficient to explain all the underlying motives of such a leaning. It is submitted here that, in a few circumstances, the tendency to play down the State-centrism of international lawmaking processes and the

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magnification of their heterogeneity can also be traced back to a more general and
fundamental endeavour of international legal scholars to convey a cosmopolitan vision of international law with a view to fostering the legitimacy of their object of study. This paper also explains the attraction of scholars to these heterogeneous representations of international lawmaking as an attempt by international legal scholars to preserve the importance of their expertise and that of their discipline in areas where they have been subject to the competition of other social sciences.

For the sake of this paper, the heterogeneity of lawmaking processes refers to the idea of a diversification and a multiplication of the actors formally taking part in the making of international law. In that sense, this paper only deals with the ratione personae dimension of heterogeneity: heterogeneity is associated here with the alleged rise of non-State actors as lawmakers besides States and international organizations with legal personality and, to some extent, with the somewhat similar idea of transnational law.3 The heterogeneity of lawmaking processes is thus not construed here as including the diversification of legal instruments to which States resort to make international law.4

Before expounding on the three abovementioned motives encouraging scholars to create (or be tempted by) the illusion of the heterogeneity of international lawmaking processes, it is necessary to briefly recall the extent to which international law actually remains State-centric despite the diversification of the actors involved in international lawmaking processes.

A BRIEF SKETCH: THE ABIDING STATE-CENTRISM OF INTERNATIONAL LAWMAKING PROCESSES

The alleged ratione personae heterogeneity of international lawmaking processes is commonly attributed to the growing involvement of non-State actors in international lawmaking besides the classical role already played by States and international organizations. It is beyond doubt that over the two last decades non-

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4 This is precisely the object of the abovementioned article, J d’Aspremont, ‘Softness in International Law’ (n 1).
State actors have been expending their say in international lawmaking processes. They also potentially wield some influence in the review\(^5\) and amendments\(^6\) procedures of conventional instruments.

While the extent of their influence is probably new, the role of non-State actors can not in any way be considered as unprecedented. Steve Charnovitz has shrewdly demonstrated that NGOs have been involved in international lawmaking for more than 200 years.\(^7\) In fact, NGOs have aroused the initiative or have been granted a formal participatory role in various international lawmaking conferences as early as the 19th century. To name but a few, this is well illustrated by the role of the American Peace Society in the first plan for the Permanent Court of Arbitration;\(^8\) the role of the Geneva Public Welfare Society in the adoption of the 1864 Geneva Convention for the Amelioration of the Condition of the Wounded in Armies in the Field;\(^9\) the role of all the peace societies which sent representatives to the First and Second Hague Peace Conferences;\(^10\) the role of the Inter-Parliamentary Union and the World Court League in the establishment of the Permanent Court of International Justice\(^11\) and the occasional role of NGOs in the committees and conferences of the League of Nations.\(^12\) In the same period, a similar role was played by the private sector on several occasions, as is illustrated


\(^6\) See Convention on the Prohibition of the Use, Stockpiling, Production and Transfer or Anti-Personnel Mines and on Their Destruction (n 5), Article 13.

\(^7\) S Charnovitz, ‘Two Centuries of Participation: NGOs and International Governance’ (1997) 18 Michigan Journal of International Law 183. See also the brief outline of Boyle and Chinkin, The Making of International Law (n 1) 42-43.

\(^8\) Charnovitz, ‘Two Centuries of Participation’ (n 7) 193.


\(^10\) S Rosenne (ed), The Hague Peace Conferences of 1899 and 1907 and international arbitration: reports and documents (The Hague, TMC Asser, 2001) and especially the reproduction of the account of J Brown Scott, 1-20.


by the meetings of the International Telegraph Union,\textsuperscript{13} the annual conferences of the International Labour Organization\textsuperscript{14} or the Pan American Conferences.\textsuperscript{15}

Although the role of non-State actors in international lawmaking processes is not entirely new, it must be acknowledged that the extent of their contribution has undergone a noteworthy increase.\textsuperscript{16} For instance, their formal presence and participation in international lawmaking processes has swollen, as is demonstrated by their (potential) involvement within the framework of the UN Economic and Social Council (ECOSOC),\textsuperscript{17} the UN Global Compact,\textsuperscript{18} the UN Human Rights Council,\textsuperscript{19} the UN Security Council\textsuperscript{20} (to a very limited extent), the WTO\textsuperscript{21} and within the cooperation policies of the European Community with the Group of African, Caribbean and Pacific Countries (ACP countries).\textsuperscript{22} Some notorious recent


\textsuperscript{18} A Judge, ‘The Global Compact with Multilateral Corporations as UN Final Solution’ (2000) 6 Transnational Association.

\textsuperscript{19} UN General Assembly (UNGA) Res 60/251 (3 April 2006) UN Doc A/RES/60/251.

\textsuperscript{20} This is the so-called Arria formula devised in 1993 whereby Security Council members are allowed to invite other members to an informal meeting which they chair with a view to receiving information from the NGO concerned on a specific issue. For an example, see UN Security Council (UNSC) Resolution 1325 on Women and Peace and Security (31 October 2000) UN Doc S/RES/1325. See the comments of Boyle and Chinkin (n 1) 78-79.

\textsuperscript{21} See Article V (2) of the Agreement Establishing the World Trade Organization (adopted 15 April 1994) 33 ILM 1125; see also the Guidelines for Arrangements on Relations with Non-Governmental Organizations (23 July 1996) WTO Doc WT/L/162. See the critical comments of Boyle and Chinkin (n 1) 93.

\textsuperscript{22} See Article 4 of the Partnership Agreement between the members of the African, Caribbean and Pacific Group of States of the one part, and the European Community and its member States, of the other part (signed in Cotonou 23 June 2000) [2000] OJ L 317. The ACP States shall determine the development principles, strategies and models of their economies and
convention-making conferences have also weathered a renewed NGO involvement as is illustrated by the conferences leading to the adoption of the 1997 Convention on the Prohibition of the Use, Stockpiling, Production and Transfer or Anti-Personnel Mines and on Their Destruction, the 2008 Convention on Cluster Munitions or the well-known examples of the processes leading to the adoption of 1984 Torture Convention, the 1990 Convention on the Rights of the Child, and the 1999 Rome Statute of the International Criminal Court. In these situations, it can hardly be denied that non-State actors, through their formal role, have left their imprint in the substance of the rules finally adopted.

societies in all sovereignty. They shall establish, with the Community, the cooperation programmes provided for under this Agreement. However, the parties recognise the complementary role of and potential for contributions by non-State actors to the development process. To this end, under the conditions laid down in this Agreement, non-State actors shall, where appropriate:
- be informed and involved in consultation on cooperation policies and strategies, on priorities for cooperation especially in areas that concern or directly affect them, and on the political dialogue;
- be provided with financial resources, under the conditions laid down in this Agreement in order to support local development processes;
- be involved in the implementation of cooperation project and programmes in areas that concern them or where these actors have a comparative advantage;
- be provided with capacity-building support in critical areas in order to reinforce the capabilities of these actors, particularly as regards organisation and representation, and the establishment of consultation mechanisms including channels of communication and dialogue, and to promote strategic alliances.

23 See Convention on the Prohibition of the Use, Stockpiling, Production and Transfer or Anti-Personnel Mines and on Their Destruction (n 5) Preamble: ‘Stressing the role of public conscience in furthering the principles of humanity as evidenced by the call for a total ban of anti-personnel mines and recognizing the efforts to that end undertaken by the International Red Cross and Red Crescent Movement, the International Campaign to Ban Landmines and numerous other nongovernmental organizations around the world’. On this convention and the role of non-State actors, see K Anderson, ‘The Ottawa Convention Banning Landmines, the Role of International Non-Governmental Organizations and the Idea of International Civil Society’ (2000) 11 European Journal of International Law 91. See also M Cameron, R Lawson and B Tomlin (eds), To Walk Without Fear: The Global Movement to Ban Landmines (Toronto, Oxford University Press, 1998).

24 See Convention on Cluster Munitions (n 5) preamble: ‘Stressing the role of public conscience in furthering the principles of humanity as evidenced by the global call for an end to civilian suffering caused by cluster munitions and recognizing the efforts to that end undertaken by the United Nations, the International Committee of the Red Cross, the Cluster Munitions Coalition and numerous other non-governmental organisations around the world’.

25 See Boyle and Chinkin (n 1) 67.


27 See for instance the role of the Coalition for the International Criminal Court, www.iccnow.org/?mod=ichistory (last accessed 22 June 2009). For some general remarks, see Boyle and Chinkin (n 1) 71-74.
The major role of non-State actors in international lawmaking is not limited to treaty-making procedures. They can also be instrumental to the tentative codification of new rules of customary international law as is exemplified by the International Committee of the Red Cross’ (ICRC) study on Customary International Humanitarian Law\textsuperscript{28} and the report of the International Commission on Intervention and State Sovereignty.\textsuperscript{29} While the potential impact of the latter still remains unclear and subject to deep questioning,\textsuperscript{30} the role of the former has been particularly remarkable, however controversial its methodology may have been.\textsuperscript{31}

The abovementioned developments, while they are undeniable, do not however suffice to suggest a major upheaval of the entire international lawmaking system. There is no doubt that, whatever the influence of these non-State actors may be, States remain the exclusive international lawmakers. The upstream influence wielded by some non-State actors can help ignite new lawmaking initiative or orientate ongoing lawmaking undertakings but this is insufficient to elevate these actors to the status of lawmakers. Indeed, no formal international lawmaking powers have been bestowed upon these actors\textsuperscript{32} and States always retain the final word.\textsuperscript{33}

It is true that, besides internationally personified international organizations, some of these non-State actors may have been endowed with international legal personality. However, it is essential to highlight at this stage that the likelihood that some of them have acquired international legal personality\textsuperscript{34} – although to an extent that may be more limited than some have

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\textsuperscript{31} For a criticism of the methodology of the International Committee of the Red Cross (ICRC), see infra II.

\textsuperscript{32} Even within the UN Economic and Social Council (ECOSOC), the status and the role of NGOs remain entirely determined by States. See Merle, ‘Article 71’ (n 20) 1732.


\textsuperscript{34} \textit{Reparations for Injuries Suffered in the Service of the United Nations} (Advisory Opinion) [1949] ICJ Rep 174. See also \textit{La Grand} (Germany v United States) [2001] ICJ Rep
claimed\textsuperscript{35} – is less the result of a direct conferral of international legal personality upon non-State actors. Rather it is an indirect consequence stemming from their rights and duties.\textsuperscript{36} That means that these actors may well now have a formal international legal personality derived from their rights and duties but that has not endowed them with any formal and actual lawmaking powers.\textsuperscript{37} Moreover, it must

paras 77 and 89. According to the Special Rapporteur of the International Law Commission (ILC) on the Responsibility of International Organizations Giorgio Gaja, this approach could lead the Court to even assert some day the legal personality of non-governmental organizations (UN ILC, ‘First Report on Responsibility of International Organizations’ UN Doc A/ CN.4/532, para 17). For a forceful opinion argument about extending legal personality, see F Green, ‘Fragmentation in Two Dimensions: The ICJ’s Flawed Approach to Non-State Actors and International Legal Personality’ (2008) 9 Melbourne Journal of International Law 47.


\textsuperscript{37} G Abi-Saab, ‘Cours général de droit international public’ (1987) 207 Collected Courses of the Academy of International Law 9, 444. See also P Weil, ‘Le droit international en
be understood that the rights and duties that non-State actors may now hold remain the result of a State-centric lawmaking process. The question of the international legal personality of these actors should accordingly be seen as separate to the question of their lawmaking status.

Likewise, individuals and non-governmental organizations\(^{38}\) are sometimes entitled to institute proceedings against a State before regional Courts. The standing that individuals and non-governmental organizations may have before these judicial bodies does not confer upon them any lawmaking power. At most, their initiative can encourage some judges to engage in some form of lawmaking.\(^{39}\) But their influence in the institution of the proceedings stands apart from the question of whether they can actually make law. The inaccuracy of the claim that international lawmaking processes have proven more diverse and heterogeneous \textit{ratione personae} because of a growing role of non-State actors is also underpinned by the exact opposite phenomenon. Indeed, while the role of non-State actors has swollen, we simultaneously witness that States have reinforced their grip over global lawmaking processes.\(^{40}\) This reinforced State dominance may take various forms. First, it is the result of a more intensive lawmaking activity through the classical State-centric convention-making system\(^{41}\). This is also manifest in the light of the unprecedented resort to existing institutional lawmaking mechanisms within international organizations where


\(^{40}\) A similar feeling is shared by Clapham, \textit{Human Rights Obligations} (n 36) pp 5-6 (‘Whether globalization is really leading to the demise of nation State is still open to question. It may be argued that, in at least some contexts, the globalization of certain decision-making processes is actually leading to a greater role for the State, and for international law, and international decision-making processes’).

States still wield a sweeping clout and, in particular, a more frequent use by States of the UN Security Council to create wide-ranging and binding rules.\textsuperscript{42}

The renewed dominance of States over international lawmaking processes is not only the upshot of a greater use of the classical channels of lawmaking. The emergence of new forms of lawmaking outside the normal abovementioned blueprints also contribute to reinforcing the dominance of States. For instance, the development of the so-called ‘governmental networks’\textsuperscript{43} illustrates how the power of States has been thriving outside traditional lawmaking frameworks. It is true that the State itself may be undergoing an internal diversification of its organization and of the allocation of powers within its machinery.\textsuperscript{44} In that sense, the State is in the midst of a process of disintegration.\textsuperscript{45} However, this segregation of the State can essentially be seen as a reinforcement of its powers, for it allows the State to be even more present and influential, even in areas traditionally adverse to it. These developments do not accordingly lead to a multiplication of lawmakers. They only show that, if a diversification \textit{ratione personae} is truly taking place, it is \textit{within} the State machinery.

In sum, the assertion that international lawmaking is turning more heterogeneous \textit{ratione personae} because of the multiplication of non-State actors is not entirely convincing from an empirical perspective – and, hence, the concerns for the excessive role of non-States actors which have occasionally been expressed seem undue.\textsuperscript{46}


\footnote{\textsuperscript{44} See for instance in the area of trade, D Patterson and A Afilalo, \textit{The New Global Trading Order. The Evolving State and the Future of Trade} (Cambridge, Cambridge University Press, 2008).}

\footnote{\textsuperscript{45} See Slaughter, ‘Global Government Networks, Global Information Agencies, and Disaggregated Democracy’ (n 43).}

\footnote{\textsuperscript{46} See the opinion of Gilbert Guillaume, \textit{Legality of the Threat or Use of Nuclear Weapons} (Advisory Opinion) [1996] ICJ Rep 266; J Bolton, ‘Should We take Global Governance Seriously’ (2000) 1 \textit{Chicago Journal of International Law} 205.}
Legal scholars have been very prompt to see in some of the aforementioned developments the emergence of a new international lawmaking framework, within which non-State actors enjoy a fledgling status of lawmaker.\textsuperscript{47} Some others, while acknowledging that contemporary lawmaking processes are still fundamentally State-centric, have come to the conclusion that granting a lawmaking status to non-State actors should be at least advocated and promoted.\textsuperscript{48} To a lesser extent, it has also been defended that the behaviour of non-State actors should be taken into account for the sake of customary international law,\textsuperscript{49} as is underpinned by the methodology used in the abovementioned study of the ICRC on the customary rules of international humanitarian law.\textsuperscript{50} And even when legal scholars back away from this idea and stand by the daily reality of State-centrism, they remain somehow attracted by this image. Many international legal scholars thus prove, in one way or another, amenable to the idea of a lawmaking role of non-State actors.\textsuperscript{51}


It is therefore of great interest to embark on an examination of the reasons explaining why the heterogeneity *ratione personae* of international lawmaking constitutes such a powerful temptation.

There are probably many reasons underlying the abovementioned inclination of scholars. It would be too ambitious to strive to describe them all. Although such a choice condemns the argument developed here to offering only a partial explanation, this paper will expound on what I see as the three main reasons explaining why legal scholars are so enticed to embrace the image of a heterogeneous and diverse international lawmaking. Firstly, mention will be made of the need of scholars to find new legal materials and new objects of study for the sake of their own scholarship. Secondly, it will be explained that the representation of international lawmaking as heterogeneous conveys a cosmopolitan image of lawmaking processes, thereby reinforcing the legitimacy and the acceptance of the rules that are adopted therein. Lastly, it will be argued that these portrayals of international lawmaking as heterogeneous boil down to a means to preserve the relevance of the expertise of international legal scholars in fields where other disciplines have been overshadowing international legal scholarship.

**The quest for an expansion of the objects of international law**

The introduction of non-State actors in the scheme of international lawmaking through their elevation to the status of lawmaker provides a great advantage in that it allows scholars to extend the limits of international law. Firstly, the lawmaking status granted to non-State actors enable scholars to create a new object of study as such. In that sense, the role of non-State actors itself becomes the object of scholarly examination. By including non-State actors in their representations of international lawmaking procedures, international scholars also increase the number of processes that can be deemed to yield international legal rules. In other words, by including non-State actors in the making of international law, they

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(Manchester, Manchester University Press, 1998) 161, 163; this is also well illustrated by the fact that we have witnessed the creation of a special law journal devoted to the question (*Non-State Actors and International Law* – published by Brill until 2005) or that of a book series (*Non-State Actors in International Law, Politics and Governance* published by Algate). AM Slaughter is not far from recognizing such a law-making role to individuals Slaughter, ‘The Real New World Order’ (n 43). See also E Beigzadeh, ‘L’évolution du droit international public’ in E Jouannet, H Ruiz-Fabri and JM Sorel (eds), *Regards d’une génération sur le droit international public* (Paris, Pédone, 2008) 78.
simply multiply the number of international lawmaking processes. This possibility ultimately allows them to stretch the limit of international law and to include non-legal materials into the scope of their study.

*The role of non-State actors as a new object of study*

Leaving temporarily aside the question of whether this constitutes a *relevant* topic for a legal analysis, there is little doubt that the question of the role of non-State actors is a wide-ranging one, simply because there is a broad, rich, diverse and complicated practice. The inclusion of this complex practice in the fields that allegedly fall within the expertise of international legal scholars provides them with a spacious ‘new’ area of study. For those scholars that are interested in how law is made, the role of non-State actors thus becomes a new issue in the same vein as questions pertaining to treaty-making or the formation of customary international law. But the benefit of granting non-State actors a lawmaking role for scholars interested in the procedural aspects of lawmaking is even greater than that. It not only makes the role of non-State actors a new object of study in itself, it also brings into the scope of legal scholarship new *processes* that would have classically been deemed alien to the making of international law. Indeed, once endowed with an international lawmaking role, non-State actors interacting with one another can be considered as involved in an international lawmaking process. This means that granting a formal lawmaking role to non-State actors can help transform non-legal processes into international lawmaking processes, which, in turn, can become new objects of study.

*The introduction of new legal materials*

Awarding a lawmaking role to non-State actors is not solely tempting for legal scholars interested in the study of lawmaking. It can also benefit legal scholars interested in the substance of the law. Indeed, granting a lawmaking role to non-State actors not only leads to a transformation of non-legal processes into international lawmaking processes but also makes the *product* of these new lawmaking processes legally relevant. In that sense, it provides legal scholars with new ‘legal’ material that allegedly falls within the ambit of their expertise and the scope of their study. The argument of the heterogeneity of lawmaking processes is thus also a means to capture non-legal material and shroud them with the trappings of a legal object.
The quest for a cosmopolitan representation of international law

It is contended here that the portrayal of international lawmaking as more heterogeneous than it actually is, also originates in the attempt of many legal scholars to convey a more cosmopolitan image of international law. This is especially true with respect to those authors that have tried to magnify the participation of individuals and NGOs in international lawmaking processes. This move rests on the assumption that those international lawmaking processes where States and international organizations have yielded to a greater role of individuals and NGOs would be more cosmopolitan and more democratic – to the extent that this latter concept is applicable to the global forms of governance.52 This attitude also draws upon the belief that regulations produced by such participatory processes would be seen as more legitimate.53 Even though it is far from certain that this assumption is empirically true,54 it certainly constitutes one of the reasons why international legal scholars are so enticed by the idea of the heterogeneity ratione personae of international lawmaking processes.

The quest for the continuous relevance of international legal scholarship

While widening the field of international legal research and giving some cosmopolitan clothing to international law, a representation of contemporary international lawmaking as being diverse and heterogeneous can eventually help international legal scholars preserve their authority in an area where it has been jeopardized. Indeed, globalization has created normative spaces that are detached from all forms of State’s grip55 for which legal categories have proven insufficient.

54 For some general and critical remarks about the legitimacy of international lawmaking, see Boyle and Chinkin (n 1) 24-35.
55 P Alston, ‘The Myopia of Handmaidens, International Lawyers and Globalization’ (1997) 8 European Journal of International Law 435; see also the remarks of E Jouannet,
This is especially true with respect to the substantive and factual influence of non-State actors, which legal scholars can hardly grasp and identify with formal legal concepts. This means that the expertise of international legal scholars does not extend beyond the formal and procedural role of non-State actors. In that sense, it is not certain that international legal scholars are well-equipped to engage in the analysis of the factual and substantive role of non-State actors in international lawmaking. From the perspective of international law, non-State actors can only be mere ‘participants’, endowed with a few participatory rights. This means that, even though international legal scholars can probably contribute to clarify the formal and procedural roles of these non-State actors, their technical expertise is of no avail as to the determination of the substantive influence of non-State actors.

Against that backdrop, the idea of the heterogeneity of lawmaking processes can be seen as a means to alleviate the unease of international legal scholars towards their inability to gauge the substantive influence of non-State actors beyond their formal and procedural role. The idea of heterogeneous international lawmaking proves very useful in sustaining the belief that international legal scholars could engage in an analysis of this phenomenon despite the uncertainties pertaining to the relevance of their expertise in that area. In that sense, the idea of the heterogeneity of international lawmaking and the correlative lawmaking ‘status’ granted to non-State actors may seem to guarantee the relevance of the legal expertise and, hence, the authority of legal scholars for subject-matter where the usefulness of their role is anything but certain.


Contemporary practice shows that the image of international lawmaking as a diverse and heterogeneous process – understood in terms of the multiplicity of the actors involved – is mostly an illusion. Despite strong empirical evidence, many scholars have been lured by this idea or have tried to promote it. This paper addressed three reasons explaining why international legal scholars are so inclined (or tempted) to defend the heterogeneity *ratione personae* of international lawmaking processes. There are surely other explanations, which are left for further research and discussion. The three factors examined here should, however, suffice to make us realize how amenable we are towards the idea of the heterogeneity of international lawmaking and help us rein in that powerful temptation.