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The Hybridity of International Lawmaking: Impressions and Afterthoughts from the ESIL 2021 Stockholm Conference

Sotirios-Ioannis Lekkas* 

1 Introduction

On 9–11 September 2021, Stockholm University hosted the Annual Conference of the European Society of International Law titled ‘Changes in International Lawmaking: Actors, Processes, Impact’. The hybrid format of the Conference both in person and online due to the ongoing pandemic worked as an apt metaphor for its overarching theme. As international lawmaking takes place within a broader context of cultural fusion and transboundary and global exigencies, hybridity can certainly be construed as one of its features. Hybridity is not a legal term of art.¹ In postcolonial studies, hybridity denotes a ‘global state of mixedness’ or ‘the synthesis that takes place in any encounter between distinct cultures, with the implication that combination, rather than sorting into pure categories, is the norm’.² According to one of its major proponents, the recognition of an ‘*inbetween* space ... may open the way to conceptualizing an *international* culture based ... on the inscription and articulation of culture’s *hybridity*’.³ Such cultural hybridity ‘entertains difference without an assumed or imposed

* Postdoctoral Researcher, Department of Transboundary Legal Studies, University of Groningen, Groningen, The Netherlands. Email: s.i.lekkas@rug.nl. This paper is based on research conducted in the context of the project ‘The Rules of Interpretation of Customary International Law’ (‘TRICI-Law’). This project received funding from the European Research Council (ERC) under the European Union’s Horizon 2020 Research and Innovation Programme (Grant Agreement No. 759728). All weblinks were accessed on 21 September 2021. The programme of the 2021 Annual Conference of the European Society of International Law, ‘Changes in International Lawmaking: Actors, Processes, Impact’, is available at <https://esil2021.se/conference-programme/>.

¹ For a rare use of the term ‘hybridity’ in the context of international legal doctrine, see A. Becker Lorca, *Mestizo International Law* (2014) 76 (in passing).

² I. Buchanan, ‘Hybridity’, in *A Dictionary of Critical Theory*, online edn, (2010), available at <https://www.oxfordreference.com/view/10.1093/acref/9780199532919.001.0001/acref-9780199532919-e-333>; C. Calhoun (ed.), ‘Hybridity’, in *Dictionary of the Social Sciences*, online edn, (2002), available at <https://www.oxfordreference.com/view/10.1093/acref/9780195123715.001.0001/acref-9780195123715-e-782>.

³ H. K. Bhaba, *The Location of Culture* (1994) 56 (emphasis in the original).

hierarchy'.⁴ From this perspective, current international lawmaking resembles a hybrid culture that occurs through the synthesis of multifaceted, even contradictory, rationalities in a space cohabited by diverse actors.⁵ The crucial question is whether the concept of hybridity or, better, its permutations in international legal scholarship provides an adequate framework to reflect and theorize about international lawmaking and, in the final analysis, whether it should be celebrated as an end in itself.

As I will try to show, the concept of hybridity captures the essence of current discussions about the state of international lawmaking as they transpired in the conference. After briefly outlining these debates, I will focus on the emanations of such hybridity within the theory of sources of international law drawing from, and expanding upon, themes raised in the conference.

2 Perspectives on the Hybridity of International Lawmaking

At a perfunctory level, discourses about the state of international lawmaking tend to oscillate between two ideal courses of argument.⁶ On the one hand, the 'old' international law is laid down exclusively by states through formal processes and is based on sovereignty and state consent.⁷ On the other hand, the 'new' international law emanates from the international community as a whole and emphasizes global values such as democracy and humanity over formal requirements and state consent.⁸ Refreshingly, presentations and discussions at the conference overwhelmingly focused on the vast space between these ideal conceptions of international-law making.⁹ It is in this respect that the idea of hybridity reflects the spirit of the proceedings both as a descriptive shorthand and as an area of contestation.

From a descriptive perspective, international lawmaking encompasses practices beyond formalized exchanges between states acting by and through siloed ministries of foreign affairs and diplomatic bureaucracies. Notably, synergies and antagonisms occurring between national and international actors can have a formative or transformative effect for international legal rules and standards. Examples elaborated during the conference included the development of counterterrorism regulation through the exchanges of lower-level agencies of the United Nations (UN) and national authorities; the dissonance between domestic courts in African states and the African Union on the issue of immunities of state officials; and the enunciation of international

⁴ *Ibid.*, at 5.

⁵ Similarly, presentation by Anne Leander (Forum 1: The Deformalisation of International Law).

⁶ M. Koskeniemi, *From Apology to Utopia: The Structure of International Legal Argument* (1989, reissue 2006), at 67–69.

⁷ E.g. Alvik, Emberland and Eriksen, 'Polycentric Decision-making Structures and Fragmented Spheres of Law: What Implications for the New Generation of International Legal Discourses?', in C. E. Eriksen and M. Emberland (eds), *The New International Law: An Anthology* (2010) 3, at 4–5.

⁸ *Ibid.*

⁹ Koskeniemi and Nouwen, 'The Politics of Global Lawmaking: A Conversation', 32 *European Journal of International Law (Eur. J. Int'l L.)* (2021) 1341.

standards regarding legislative processes by the European Court of Human Rights.¹⁰ What is more, lawmaking may also involve the participation of non-governmental actors in international decision-making processes like, for instance, the participation of organizations of indigenous peoples in environmental protection fora or the consultation of mining contractors in the development of regulations for the exploitation of the mineral resources of the deep sea-bed.¹¹ Such processes may also comprise networks between subnational entities which aim to influence the content of international standards, such as the participation of different branches and levels of government and civil society in the local implementation of international human rights standards or the emergence of groupings of cities aspiring to contribute meaningfully to international regulation.¹² Besides, international regulation can also be the result of the interfaces between policy and science or technology, regulatory responses to global pandemics or climate change being cases in point.¹³ The practices elaborated in these presentations attest to the hybridity of international lawmaking. In this sense, international law is often an emergent of the interactions between diverse public and private actors occurring organically at the interstices between the supranational, international and subnational level.¹⁴

The main points of disagreement related to the evaluation of these developments from a practical, normative and epistemological perspective. In practical terms, to the extent that these developments are limited to specific regimes and involve the inputs of specialized bureaucracies, experts and advocacy groups, there is the risk of fostering fragmentation and managerialism. This is particularly important in fields like counterterrorism and pandemic management where there is a tendency for the normalization of emergency measures at the expense of other considerations, especially human rights.¹⁵ The diffusion of regulatory authority also raises the issue of allocation of regulatory risk and political accountability in cases of regulatory failure. For instance, as one presenter suggested, it is hard to comprehend the shortcomings of the World Health Organization's response to the recent pandemic without taking into account the serious curtailing of its powers under the influence of developing states.¹⁶ It is equally difficult to make sense of the 'Kafkaesque' structure of the UN

¹⁰ Presentations by Isobel Roele (Forum 5: Legitimacy and Rationality in International Lawmaking), Patryk Labuda (Agora 6: Trans-/International Crimes and Changes in Lawmaking) and Matthew Saul (Agora 9: National Parliaments and Changes in Lawmaking Domestic Implementation).

¹¹ Presentations by Natalie Jones (Agora 10: Subnational International Lawmaking) and Maria Esther Salamanca (Agora 1: The Order of the Oceans and Changes in Lawmaking).

¹² Presentations by Veronika Fikfak (Forum 3: The Changing Local Implementation of International Law) and Maša Kovič Dine (Agora 10: Subnational International Lawmaking).

¹³ Presentation by Gian Luca Burci (Forum 8: Current Events: Lawmaking in a Post-pandemic World — Is Covid a Gamechanger?).

¹⁴ See, *inter alia*, Koh, 'The 1994 Roscoe Pound Lecture: Transnational Legal Process', 75 *Nebraska Law Review* (1996) 181, at 183–184; Kingsbury, Krisch and Stewart, 'The Emergence of Global Administrative Law', 68 *Law and Contemporary Problems* (2005) 17, 18–20.

¹⁵ Presentation by Isobel Roele, *supra* note 10, Diane Desierto (Forum 8: Current Events: Lawmaking in a Post-pandemic World — Is Covid a Gamechanger?), Eyal Benvenisti (Forum 5: Legitimacy and Rationality in International Lawmaking).

¹⁶ Presentation by Eyal Benvenisti, *supra* note 15.

counterterrorism system of the early 2000s without considering the role and policies of certain powerful states at the time.¹⁷ More generally, the idea that international law emerges from the interactions of various actors has little normative import in itself.¹⁸ Insofar as such interaction takes place in a broader context of historical and existing inequalities, the key issue is who has a seat at the table, sets the agenda and impacts the outcome.¹⁹ In other words, who wins and who loses by the configuration of each legal institution.²⁰ In this respect, the intellectual origins of the term ‘hybridity’, which are rooted in a postcolonial context, captures, in my view, the crux of contestation within and beyond the conference.

The key division of the conference centred around how to make sense of such hybridity from an epistemological perspective. In this regard, the conference interrogated the binaries of ‘old’-ness and ‘new’-ness, international and global law, leading to some important insights. In particular, the juxtaposition of ‘old’-ness and ‘new’-ness masks the fact that international lawmaking has hardly ever been a monolith.²¹ For instance, the capacity of private actors to shape international law is nothing ‘new’, nor innately progressive or democratic; companies administering colonies had the capacity to enter into treaties even of a political nature on behalf of the colonial power since the late 16th century.²² For the same reason, the antithesis between international and global law seems somewhat tenuous insofar as global law is meant to encompass the emergence of new subjectivities, processes or forms.²³ Indeed, the resilience of the theory of sources stems partly from its capacity to create new subjectivities, such as ‘the international community of States as a whole’, or to encompass conflicting rationalities, like ‘sovereignty’ and the ‘elementary considerations of humanity’.²⁴ Conversely, to the extent that global law is interpreted to signify the decline of state sovereignty and consent, it fails to provide an alternative justification for public and private regulatory power and its democratic legitimacy.²⁵ Similarly, a tendency towards less formal processes and forms does not signify a radical shift towards global law. It is a truism that ‘informal instruments (such as oral agreements or custom) can bind; non-binding instruments (such as ISO standards) can be very formal’.²⁶ Indeed,

¹⁷ E.g., O’Donnell, ‘Naming and Shaming: The Sorry Tale of Security Council Resolution 1530 (2004)’, 17 *Eur. J. Int’l L.* (2006) 945, at 945 ff.

¹⁸ Similarly, Koskeniemi, ‘International Law and Hegemony: A Reconfiguration’ 17 *Cambridge Review of International Affairs* (2004) 197, at 202.

¹⁹ Presentation by Diane Desierto, *supra* note 15, and Dire Tladi (Concluding Panel: Global Law as the End of International Law?).

²⁰ Koskeniemi and Nouwen, *supra* note 9.

²¹ *Ibid.*

²² E.g., *Island of Palmas (Netherlands/US)* [1928] II RIAA 829, 858.

²³ Presentation by Andrea Leiter (Concluding Panel: Global Law as the End of International Law?).

²⁴ Presentation by Moïse Makane Mbenge (Concluding Panel: Global Law as the End of International Law?); Koskeniemi and Nouwen, *supra* note 9; Art. 53, Vienna Convention on the Law of Treaties (signed 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331 (‘VCLT’); *Corfu Channel (UK v Albania)*, Judgment, 9 April 1949 ICJ Reports 4, at 22.

²⁵ Presentations by Sergio Dellavalle (Forum 5: Legitimacy and Rationality in International Lawmaking) and Anne Orford (Concluding Panel: Global Law as the End of International Law?).

²⁶ Pauwelyn, Wessel and Wouters, ‘When Structures Become Shackles: Stagnation and Dynamics in International Lawmaking’, 25 *Eur. J. Int’l L.* (2014) 733, at 755–756.

there are several footholds in the theory of sources of international law that allow for the consideration of informal instruments in the process of identification and interpretation of rules of international law.²⁷

In sum, whereas hybridity appears to be a feature of international lawmaking in diverse fields, this does not translate into a radical reconfiguration of international legal doctrine. The hybridity of international lawmaking appears thus as a condition, a state of being, rather than a goal in itself. As such, it can be examined through the use of the existing vocabulary of international law. I will turn briefly to this point.

3 Hybridity and the Determination of International Law

For the most part, the conference paid close attention to the question of who makes international law and how. Despite the wealth of interesting examples presented, the answer to this question remained, in the final analysis, states and, within their remit, international organizations. Yet, the theory of sources of international law deals with a somewhat different question: how to determine international law. This is a formal process in the sense that it is governed by rules of international law.²⁸ Yet, such formality should not be confounded with state-centrism or immutability, but it is, in fact, what enables hybridity in international lawmaking in very important respects.

First, a notable feature of the theory of sources is that it is agnostic as to who determines the rules of international law. The most prominent example in this respect is the formulation of the rule of treaty interpretation that lays down *how* treaties will be interpreted without prescribing *who* will interpret them.²⁹ Similarly, the recent works of the International Law Commission on customary international law, general principles of law and *jus cogens* envisage a process of law ascertainment without specifying who performs this operation.³⁰ As a corollary, '[i]nternational and domestic courts, international institutions, non-governmental organizations as well as legal scholars [can] raise ... claims about what the law says and contribute to its development'.³¹ Many practices explored in the conference constitute instantiations of this enabling function of international law on sources. These include the inputs of independent international law experts to governments and legislatures, the antagonisms

²⁷ Presentation by Concepción Escobar Hernández (Forum 1: The Deformalisation of International Law).

²⁸ E.g. J. d'Aspremont, *Formalism and the Sources of International Law: A Theory of the Ascertainment of Legal Rules* (2011) 12–13.

²⁹ Arts 31–33 VCLT.

³⁰ Conclusion 1, International Law Commission (ILC), 'Conclusions on the Identification of Customary International Law', in International Law Commission, 'Report of the International Law Commission – Seventieth session (30 April–1 June and 2 July–10 August 2018)', General Assembly Official Records Seventy-third Session Supplement No. 10 (A/73/10), para. 66; Draft Conclusion 1, ILC, 'General Principles of Law – Texts and Titles of Draft Conclusions 1, 2 and 4 provisionally adopted by the Drafting Committee' (28 July 2021) A/CN.4/L.955; Draft Conclusion 1, 'Peremptory Norms of General International Law (*jus cogens*) – Text of the draft conclusions and draft annex provisionally adopted by the Drafting Committee on first reading' (29 May 2019) A/CN.4/L.936.

³¹ I. Venzke, *How Interpretation Makes International Law: On Semantic Change and Normative Twists* (2012), at 16.

between domestic judiciaries and executives in the area of international criminal law and the participation of non-governmental organizations in international criminal proceedings.³²

Second, the rules on international law ascertainment and interpretation can be used to determine change in a rule or its content. For instance, in the context of treaty interpretation, interpreters can infer change from textual elements or broader changes in relevant rules of international law binding between the parties. The parties often retain only ultimate control over this process, notwithstanding the fact that the expected outcome is the determination of their own collective intention. In this way, interpretation can effectively induce change in the content of a treaty provision. By contrast, the issue of change remains relatively underexplored with respect to customary international law, still more in the area of general principles of law and *jus cogens*.³³ The dominant account is that all such rules can only be changed either by a subsequent rule of the same pedigree or that they constantly evolve (leading to the paradoxical implication that they never fully form). This might have important practical implications for the determination of the rules applicable in new fields, such as the cyber-space.³⁴ In this respect, there is certainly room for the further study of practices, if not rules, that allow the principled determination of the content of rules of unwritten international law by ways akin to interpretation.³⁵

The openness and flexibility of the rules associated with the theory of sources might give the impression that anything goes. There is certainly the risk of this process being taken over entirely by powerful states, activist courts and influential private actors.³⁶ These rules, however, provide a structure. For instance, the rule of treaty interpretation suggests that isolated practice by one state, however powerful, has less impact on the content of a rule than, say, the existence of a relevant rule of general international law. Indeterminate as they are, they do imply that certain arguments are unacceptable no matter who articulates them.³⁷

4 Conclusion

The organizers should be commended for assembling such a rich and diverse collection of illuminating contributions to which my imperfect account cannot possibly

³² E.g. Presentations by Larissa van den Herik (Agora 9: National Parliaments and Changes in Lawmaking Domestic Implementation), Patryk Labuda, *supra* note 10 and Florian Jeßberger and Leonie Steinl (Agora 6: Trans-/International Crimes and Changes in Lawmaking).

³³ Presentation by Enzo Cannizzaro (Forum 1: The Deformalisation of International Law).

³⁴ Presentation by François Delerue (Conversation with the ESIL book prize winners 2020 and 2021); see, e.g., Akande, Coco and de Souza Dias, 'Old Habits Die Hard: Applying Existing International Law in Cyberspace and Beyond', *EJIL:Talk!*, 5 January 2021, available at <https://www.ejiltalk.org/old-habits-die-hard-applying-existing-international-law-in-cyberspace-and-beyond>.

³⁵ Presentation by Enzo Cannizzaro, *supra* note 33; see, e.g., Merkouris, 'Interpreting the Customary Rules on Interpretation', 19 *International Community Law Review* (2017) 126, at 134–136.

³⁶ Presentation by Anne Orford, *supra* note 25, with reference to Koh, *supra* note 14, at 205.

³⁷ Koskeniemi, *supra* note 6, at 69.

do justice. Its ambitious agenda successfully encapsulated the process of creation of international law as a hybrid culture. Within this culture, international law emanates through policy and science, conflict and cooperation. International lawyers and their craft are only a part of this culture. Their crafting tools might be a bit rusty and they might not come in handy all the time. Still, they need to keep them honed.