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BOOK REVIEW OF

ALAN BOYLE AND CHRISTINE CHINKIN,

THE MAKING OF INTERNATIONAL LAW (OXFORD UNIVERSITY PRESS, 2007)

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One of the abiding mysteries about the teaching of public international law is the peculiar disconnect between the extensive focus on four classic "sources" of international law, as typically taught in law schools or recounted in treatises, and the way in which contemporary international law is actually made. The prime example of that disconnect is probably customary international law. While most textbooks and treatises spend considerable time explicating the requirements for uniform, consistent, and long-standing State practice, combined with *opinio juris*, as illustrated through key decisions of the World Court from years past (such as the *S.S. Lotus* case or *North Sea Continental Shelf* cases), and perhaps with some attention to the great controversies about the source (such as whether "words" can suffice instead of "action"), it is actually rather difficult to identify a new norm of international law that has emerged purely as a matter of widespread State practice. Indeed, although theory would call for a detailed search of the practice and beliefs of States spanning decades, if not centuries, rarely do international or national courts today engage in any such inquiry, and rarer still do States as a predicate to their diplomatic exchanges.

Conversely, an extraordinary range of international "rules" or "norms" are created today through mechanisms that do not fit easily into the traditional sources of international law. Non-binding "recommendations" of the World Health Organization, developed by respected experts in the field, have a treaty-like effect in prompting national health administrations to adopt laws and regulations that implement the recommendations. Resolutions of the UN Security Council impose "legislative-like" obligations upon States in an effort to prevent the financing of terrorist organizations or to limit the proliferation of weapons of mass-destruction. Trade obligations arising under the Uruguay Round agreements may be avoided if national laws seek to uphold "standards" established by entities such as the Codex Alimentarius Commission or the Commission on Phytosanitary Measures. Committees or commissions formed under multilateral human rights treaties assert a power to interpret and at times expand the meaning of such conventions, as well as to judge the permissibility of reservations made by State parties. Transnational corporations, eager to avoid adverse publicity, boycotts, and even litigation, adopt and implement non-binding "codes of conduct" (generated by States, international organizations, or non-governmental organizations), which in some instances non-governmental organizations provide mechanisms for independent certification of compliance. One or a few non-binding resolutions universally agreed to by States that purport to recognize a legal norm are used as evidence of customary international law.

The nature of such "norms" as "law" is, of course, debated, and some adhere to a notion that ultimately many of these norms can be traced back to some form of consent by a State to a treaty obligation. Yet, in light of such developments, the standard account of the four "sources" of

international law seems woefully incomplete, and must give way to a much richer explanation of how international legal norms can and do emerge.

Thankfully, many notable efforts have been undertaken over the past decade to study such law-making, such as Robin Churchill and Geir Ulfstein's path-breaking article in the pages of this *Journal* on law-making by autonomous institutional arrangements in multilateral agreements,[1] Dinah Shelton's edited collection analyzing the effects of non-binding international norms,[2] Anne-Marie Slaughter's account of law-making by networks of governmental experts operating across borders,[3] Anthony Anghie's exploration of the enduring influence of colonial and Euro-centric attitudes in shaping international law,[4] José Alvarez's thorough treatise on law-making by international organizations,[5] or the on-going research project at New York University School of Law on "global administrative law",[6] to name just a few.

In *The Making of International Law*, Professors Alan Boyle of the University of Edinburgh

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[1] Robin R. Churchill & Geir Ulfstein, Autonomous Institutional Arrangements in Multilateral Environmental Agreements: A Little-Noticed Phenomenon in International Law, 94 A.J.I.L. 623 (2000).

[2] Commitment and Compliance: The Role of Non-binding Norms in the International Legal System (Dinah Shelton, ed. 2000).

[3] Anne-Marie Slaughter, A New World Order: Government Networks and the Disaggregated State (2004).

[4] Antony Anghie, Imperialism, Sovereignty and the Making of International Law (2005).

[5] José E. Alvarez, International Organizations as Law-Makers (2005).

[6] For a symposium treatment, see 17 Eur. J. Int'l L. 1 (2006).

and Christine Chinkin of the London School of Economics add to this literature, but set their sights on providing a broad account of contemporary law-making, looking across different areas of organizational behavior, both governmental and non-governmental. They eschew a doctrinal discussion of the four classic sources of international law, providing instead "a study of the principal multilateral processes and law-making tools through which contemporary international law is made" (p. vii). To that end, Chapter 1 addresses certain general aspects of international law-making, including a survey of theories of international law, problems of legitimacy in new law-making techniques, and calls for general reform. Chapter 2 addresses the "who" of international law-making (i.e., the participants), Chapters 3 and 4 discuss the "how" of such law-making (i.e., multilateral law-making through diplomatic processes or codificiation/development through expert bodies), and Chapter 5 recounts "what" is produced by such law-making (i.e., the types of law-making instruments). Finally, Chapter 6 discusses the role of international courts and tribunals as law-makers, making the case that international judges do not only apply law as they find it, but fill in gaps and in some instances extend or create new norms.

Two particular short-comings of this volume should first be noted before moving onto its attractive elements. First, although the title might suggest otherwise, the book does not provide a systematic account of the "making" of international law. There is no discussion of the making of international law through bilateral treaties or other instruments, little discussion of the making of international law by multilateral treaties in the sense of creating binding obligations directly upon the parties to the treaty, and virtually no discussion of law-making in the form of classic customary international law. At the beginning of the volume, the authors suggest that such traditional sources

of international law have been recounted elsewhere and hence need not be addressed again (p. 2), but as one moves through the volume it becomes clearer that the authors conception of the "making" of international law entails law that is "made" through mechanisms other than the classic sources of international law. Thus, the authors assert that "[w]e can only begin to talk seriously about international law-making processes, ... if we identify some other sense in which the instruments [States] adopt become 'law' beyond the specific context of participation in a treaty or the affirmation of a soft law instrument" (p. 161). In other words, when States conclude a multilateral treaty that directly binds them, they have not engaged in a process that "makes" law or at least not law that needs to be seriously discussed.

Yet such an account of the "making" of international law is just as incomplete and unhelpful as an account that sees international law-making as arising solely from the classic sources of international law. Both classic and more contemporary forms of international law-making exist and deserve serious study. A volume focusing solely on more contemporary forms of international law-making is certainly appropriate, but it need not characterize traditional means as something other than "law-making". At a minimum, the authors might have explained and defended their concept of "law-making", so as to clarify their choice of processes and to avoid confusion for those not already versed in the traditional sources of international law.

Second, even with respect to more contemporary forms of law-making, the book does not seek "to provide a comprehensive account of the myriad ways in which contemporary international law is made" (p. 2). One cannot fault the authors for avoiding the difficulty of trying to provide a

definitive account, in a single volume, of the whole range of contemporary forms of law-making, and instead reaching for selected "examples" and "case studies" so as "to provide a flavour of the diversity of international law-making processes" (p. 2). Yet even within this more scaled-back, sampler approach, several parts of the volume seem oddly skewed in their content.

For example, Chapter 2 of the book is on "Participants in International Law-Making". The chapter begins by noting that a "focus solely on state actions gives a misleading picture of international law-making" (p. 41). After that sensible observation, virtually the entire rest of the chapter—about one fifth of the book—is about non-governmental organizations, covering topics such as "NGOs and the UN", "NGOs and Treaty-Making", "NGOs and International Law-Making," NGOs Monitoring and Norm Generation," and so on. Among other things, the authors note that the number of NGOs represented at the Rome Conference on the International Criminal Court "was larger than the number of participating states (160) and larger than any single state delegation" (p. 73). Given this extensive emphasis on NGOs in a chapter addressing "participants", one might naturally emerge a belief that the most important "participant" in contemporary international law-making are NGOs, yet that belief would be just as misleading as one that regards States alone as the relevant actor. States continue to play a dominant role in the formation of contemporary international law, as do international organizations, with NGO's as an important but secondary participant. Another example of a distorted focus might be the lack of sufficient attention to national law as a means for international law-making (a brief discussion appears at pp. 85-87). National law plays an extraordinary role in international law-making, both in terms of reducing inchoate international norms to detailed and binding national laws and regulations, and in terms of generating new

international norms and principles through national legislation or case law that emerges across the globe.

Despite its flaws, the book is well worth reading. Boyle and Chinkin are extraordinarily gifted international lawyers, highly conversant in the mechanisms by which international law operates, especially in fields where their expertise is sharpest, such as the law of the sea and human rights. In a very well-written, coherently organized, and relatively brief text (300 pages), they cover a wide array of important issues, including how the international law-making agenda gets set, the importance of "legitimacy" for law-making processes, the vexing role of "soft law" in conditioning inter-State behavior, and the role of international courts in not just stating the law, but creating it as well. Perhaps curiously, given their emphasis on contemporary law-making, Boyle and Chinkin spend a considerable amount of time discussing two "old school" entities, the International Law Commission (ILC) and the International Court of Justice (ICJ), but both discussions are informative and rich in insights. Further, throughout the volume, the authors provide copious citations to contemporary cases and scholarship, along with a helpful list of further readings at the end of each chapter.

One of the strengths of the volume is that the authors are careful to avoid facile opinions. For example, though they clearly recognize the significance of NGO participation in international law-making, they cautiously conclude that "it seems premature to assert that there is a right to access and participation" for NGOs in that law-making (p. 57). Moreover, they worry about the disconnect between contemporary law-making and the traditional reliance on State-based consent, noting that

"[p]articularly in areas such as human rights or environmental law there is a tendency to assert new norms of customary law at will in order to advance political and social agendas—an activity pursued especially by NGOs." When that happens, "[s]cant regard is given to the niceties of state consent or the likelihood of compliance with such easily pronounced norms" (p. 285). Another strength of the book are Boyle and Chinkin's identification of strengths and weaknesses in contemporary international law-making, and their suggestions for improvement. For example, while some have decried the relatively small number of international lawyers who repeatedly appear before the ICJ and other global tribunals, Boyle and Chinkin applaud this development, since this "epistemic community of the comparatively small body of lawyers ... ensures a common set of perspectives about the appropriate way to present an international case and has a tangible impact upon the way international courts function, and thus on their law-making potential" (p. 291). Looking to the future, they suggest that the ILC could play a larger role in international law-making processes by actively proposing cooperation with UN organs and international organizations so as to find useful proposals for future ILC work, rather than relying just on ILC-initiated ideas (p. 177).

Both authors are U.K. nationals and they occasionally express views about the role of the United States in the making of international law. Particularly for the many U.S. nationals who are readers of this *Journal*, the following proposition will be of interest: "The perception that the US can and should operate more effectively outside many of the constraints of international law poses the greatest contemporary challenge to the post-1945 system of multilateral law-making exercised principally through the United Nations" (p. 104). Presumably the entity doing the "perceiving" is the U.S. Government, or perhaps the people of the United States, and it is interesting that the authors

are not asserting that the challenge arises from an actual *ability* of the United States to operate outside the constraints of international law but, rather, the United States' *perception* that such an ability exists. More discussion as to why this factor is the "greatest" contemporary challenge was probably warranted, given the existence of other contenders, such as the inability or unwillingness of many States actually to implement the treaties that they ratify, the enduring difficulty for international courts and tribunals in securing wide-ranging jurisdiction to which States adhere (the difficulty of the Tribunal for the Law of the Sea in developing a significant caseload or the paucity of prosecutions at the International Criminal Court come to mind), or the intractable economic disparities between blocs of States that often polarize and politicize the law-making processes. Indeed, as the authors themselves note, sometimes it is the "unilateral" action by the United States that results in international law-making, such as the adoption of IMO regulations phasing out single hull oil tankers (p. 133) or the successful conclusion of the Uruguay Round (p. 136).

All-in-all, for those interested in an engaging and informed survey of various ways in which international law is currently made, this book makes an excellent starting point, and points the direction for those who wish to embark on even deeper inquiries.

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