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Deriving Peremptory Norms from Sovereignty

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NEW VOICES: RETHINKING THE SOURCES OF INTERNATIONAL LAW

This panel was convened at 9:00 a.m., Thursday, March 26, by its moderator, Anthony D'Amato of Northwestern University, who introduced the panelists: Evan Criddle of Syracuse University College of Law; Evan Fox-Decent of McGill University Faculty of Law; Annecoos Wiersema of the Ohio State University Moritz College of Law; Martins Paparinskis of the University of Oxford; and Anastasios Gourgourinis of the UCL Faculty of Laws.

DERIVING PEREMPTORY NORMS FROM SOVEREIGNTY

By Evan J. Criddle[*] & Evan Fox-Decent[†]

In international law, the term "jus cogens" refers to norms that are considered peremptory in the sense that they are mandatory and do not admit derogation. Although the jus cogens concept has achieved widespread acceptance, international legal theory has yet to furnish a satisfying account of jus cogens's legal basis. We argue that peremptory norms are inextricably linked to the sovereign powers assumed by all states. The key to understanding international jus cogens lies in Immanuel Kant's discussion of the innate right of children to their parents' care. Drawing on Kant's account, our theory of jus cogens posits that states exercise sovereign authority as fiduciaries of the people subject to their power. An immanent feature of this state-subject fiduciary relationship is that the state must comply with jus cogens. The fiduciary theory clarifies jus cogens's content by generating discrete criteria for identifying peremptory norms.

I. KANT'S MODEL OF FIDUCIARY RELATIONS

To apprehend the fiduciary character of state legal authority, consider the structure of familiar fiduciary relations such as trustee-beneficiary, agent-principal and parent-child. Fiduciary relationships arise from circumstances in which one party (the fiduciary) holds discretionary power of an administrative nature over the legal or practical interests of another party (the beneficiary), and the beneficiary is vulnerable to the fiduciary's power in that she is unable, either as a matter of fact or law, to exercise the entrusted power. This administrative power is other-regarding, purposive, and institutional; it is held so as to be used on behalf of others, for limited purposes, and within the framework of a legal institution such as a family or a corporation. Beneficiaries generally are unable to protect themselves against an abuse of fiduciary power and depend on the fiduciary to promote their entrusted interests. If multiple classes of beneficiaries are subject to the same fiduciary power, the fiduciary's basic duties are *fairness* or even-handedness as between beneficiaries and *reasonableness* in the sense of having due regard for the beneficiaries' separate interests.

Kant sets out the moral basis for fiduciary obligations in an argument concerning the duties that parents owe their children. For Kant, legal rights embody the realization of a person's moral capacity to put others under legal obligations. Fiduciary obligations to children stem from the parents' unilateral creation of a person who did not consent to be a party to the parent-child relationship and who cannot survive without support. These circumstances trigger

[*] Assistant Professor, Syracuse University College of Law.

[†] Assistant Professor, McGill University Faculty of Law. This essay is adapted from Evan J. Criddle & Evan Fox-Decent, *A Fiduciary Theory of Jus Cogens*, 34 YALE J. INT'L L. 331 (2009).

the child's moral capacity to place the parents under a fiduciary duty to provide for her security.

Extending Kant's reasoning, the dignity intrinsic to legal personality supplies the moral basis for fiduciary obligation in other contexts as well. A relationship in which the fiduciary has unilateral administrative power over the beneficiary's interests can be understood as a relationship mediated by law only if the fiduciary (like the parent) is precluded from exploiting her position to set unilaterally the terms of her relationship with the beneficiary. The fiduciary principle therefore authorizes the fiduciary to exercise power on the beneficiary's behalf, but subject to strict limitations arising from the beneficiary's vulnerability to the fiduciary's power and her intrinsic worth as a person. In the case of the state-subject fiduciary relationship, we argue now that these limitations include jus cogens norms.

II. Fiduciary States

The argument for the state as a fiduciary draws on the fiduciary concept's general constitutive features. Legislative, executive, and judicial powers exhibit the institutional, purpose-laden, and other-regarding characteristics that constitute administration. Legal subjects, as private parties, are not entitled to exercise public powers and thus are peculiarly dependent upon, and vulnerable to, public authority. It follows that the state's sovereign powers give rise to a fiduciary obligation.

To see by way of illustration that the minimal content of this obligation includes jus cogens, consider the peremptory prohibition against slavery. The fiduciary principle authorizes the state to secure legal order on behalf of every agent subject to state power. Because each person is an equally valid subject of the fiduciary authorization of state authority, each must be accorded an equal opportunity to acquire rights which can enshrine and protect their respective interests. It follows that a state cannot support slavery without contravening its most basic fiduciary obligation to ensure that each agent subject to its powers is regarded equally as a person capable of possessing legal rights. Indeed, since the fiduciary principle regards every individual as an equal co-beneficiary of legal order, the fiduciary state must protect every individual against all forms of arbitrary discrimination (such as apartheid).

Furthermore, under the fiduciary theory, jus cogens norms arise from the very concept that tends to be pitted against it—sovereignty—precisely because all states exercise sovereign powers which trigger application of the fiduciary principle. By positing the state as a fiduciary of its people, the fiduciary theory co-opts sovereignty by deriving peremptory norms from the very powers that are constitutive of it.

III. Criteria for Identifying Peremptory Norms

Unlike previous theories of jus cogens, the fiduciary theory points to discrete formal and substantive criteria that establish necessary and sufficient conditions for identifying peremptory norms.

The fiduciary theory borrows its formal criteria from Lon Fuller's internal morality of law, a set of desiderata that legal norms should aspire to satisfy irrespective of their substantive aims. Peremptory norms must embody general and universalizable principles. They must also be public, clear, feasible, consistent with other like norms, relatively stable over time, and prospective rather than retroactive. Norms that flagrantly violate any of these principles would either frustrate the state's fiduciary mission or simply subvert the state's ability to establish legal order, and therefore they would lack any justification from the point of view of the fiduciary model.

Three further necessary and substantive conditions flow from the structure and content of the fiduciary theory. First is a principle of *integrity*: peremptory norms must have as their object the good of the people rather than the good of the state's officials. Second is a principle of *formal moral equality*: the fiduciary state owes a duty of fairness or even-handedness to the people subject to its power. Third is a principle of *solicitude*: peremptory norms must be solicitous of the legal subject's legitimate interests.

The fiduciary theory's three substantive criteria, like the formal criteria, establish necessary rather than sufficient conditions of jus cogens. Most, if not all, human rights conform to them. Even when considered collectively, the formal and substantive criteria enumerated thus far do not provide a basis for distinguishing peremptory norms from nonperemptory norms.

Happily, the fiduciary theory points to other substantive criteria capable of specifying peremptory norms. The fourth substantive criterion of jus cogens is a principle of *fundamental equal security*: norms that are indispensable to the fundamental and equal security of individuals qualify as peremptory norms. For example, some international prohibitions such as the norms against genocide, arbitrary killing, and wars of aggression target state actions that literally annihilate a state's subjects. Others such as the prohibitions against slavery and apartheid protect subjects from systemic domination. Because respect for such norms is indispensable to the state's specific fiduciary obligation to secure legal order, the state cannot derogate from these norms under any circumstances. The principle of fundamental equal security thus enables us to distinguish nonderogable from derogable norms, and thereby supplies a sufficient condition to the necessary formal and substantive conditions that precede it.

Significantly, the principle of fundamental equal security is not a necessary condition because another independently sufficient condition is implicit within the state's obligation to secure legal order: adherence to the rule of law. The fifth substantive criterion of jus cogens is a procedural principle regarding *the rule of law*: a norm will count as jus cogens if respect for it is indispensable to securing legality for the benefit of all.

IV. Rethinking the Canon of Peremptory Norms

The fiduciary theory's formal and substantive criteria provide a practical framework for identifying peremptory norms. Seven categories of norms appear in the influential *Restatement on Foreign Relations of the United States* as illustrations of international jus cogens: the prohibitions against genocide; slavery or slave trade; murder or disappearance of individuals; torture or other cruel, inhuman, or degrading treatment or punishment; prolonged arbitrary detention; systematic racial discrimination; and "the principles of the United Nations Charter prohibiting the use of force." Tellingly, each of these norms merits peremptory treatment under the fiduciary theory because they deny a state's subjects secure and equal freedom.

The fiduciary theory also clarifies jus cogens's applicability to other international norms. Consider, for example, the norm against public corruption. The prohibition against public corruption satisfies the fiduciary theory's substantive criteria by advancing the best interests of the people rather than state officials, and by requiring the state to treat its national patrimony as a public good to which every national has an equal claim under the rule of law.

The fiduciary theory also distinguishes norms that do not qualify as jus cogens. For instance, the fiduciary theory excludes the prohibition against piracy from the ranks of jus cogens. Article 15 of the Convention on the High Seas defines piracy as "illegal acts of violence, detention or any act of depredation, committed for *private* ends by the crew or passengers

of a *private* ship or *private* aircraft." To merit recognition as a peremptory norm under the fiduciary theory, the prohibition against piracy would have to be repackaged as a constraint on state authority. Absent a clear nexus to the state-subject fiduciary relationship, however, the prohibition against piracy is best classified as a common crime.

V. Conclusion

We have argued that the fiduciary nature of state legal authority furnishes a persuasive explanation for peremptory norms and their relationship to state sovereignty under international law. Peremptory norms such as the prohibitions against slavery and torture are not exceptions to state sovereignty, but rather constitutive constraints flowing from the state-subject fiduciary relationship itself.

Conferences of the Parties to Multilateral Environmental Agreements: The New International Law-Makers?

By Annecoos Wiersema[*]

What do Conferences of the Parties (COPs) to multilateral environmental agreements contribute to international legal obligations? What does the answer mean for how we think about fragmentation in the international legal system?

Multilateral environmental agreements (MEAs) have proliferated over the past decades and are central to international environmental law. To operate on an ongoing basis, these MEAs generally establish an institution known as a Conference of the Parties—a COP—made up of representatives of the states parties to the MEA. These COPs meet regularly and are the supreme body of the treaty.

COPs regularly engage in a number of activities, some of which follow the traditional model of international law as based on the consent of states, such as formally amending the treaty text, amending appendices or annexes, and concluding protocols—new treaties—under a framework convention. In all of these examples, the COP activity requires the consent of a state before that state is bound or allows for a form of opt-out. However, another set of COP activity forms the subject of this discussion. More specifically, COPs also pass resolutions and decisions that do not require the formal consent of states parties to the treaty to come into effect and do not provide for any kind of opt-out by an objecting state. This activity requires only consensus or even a simple majority vote to bind all states parties to the treaty, whether or not they voted in favor of the resolution or decision.

This activity—which I term consensus-based COP activity—is a significant force in international environmental law.[1] Some of it has direct effect on the parties' substantive obligations, i.e., their external obligations. For example, under the Montreal Protocol on Substances that Deplete the Ozone Layer, the COP is authorized to adopt adjustments and reductions to the allowances states have for production or consumption of ozone-depleting substances through

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[1] For alternative, but important, perspectives on how we should treat COP activity under international law, see Robin R. Churchill and Geir Ulfstein, *Autonomous Institutional Arrangements in Multilateral Environmental Agreements: A Little-Noticed Phenomenon in International Law*, 94 AJIL 623 (2000); Jutta Brunnée, *Reweaving the Fabric of International Law? Patterns of Consent in Environmental Framework Agreements*, *in* Developments of International Law in Treaty Making 101 (Rüdiger Wolfrum and Volker Röben eds., 2005); Jutta Brunnée, *COPing with Consent: Lawmaking under Multilateral Environmental Agreements*, 15 Leiden J. Int'l L. 1 (2002).

either consensus or a two-thirds majority vote.[2] COP activity can also indirectly affect the external obligations of the parties, for example, by elaborating and interpreting language of the treaty that defines the parties' obligations.[3]

Other consensus-based COP activity is directed only at the internal obligations of the parties. For example, criteria for listing of species on the appendices of the Convention on International Trade in Endangered Species are intended to influence how the parties vote at the COP.[4] Although these criteria do not directly alter the parties' external obligations, by altering what states should consider in determining whether to restrict trade in certain species, they inevitably influence the course of the treaty. In the same manner, compliance and dispute resolution procedures developed by COPs can also have an effect on the overall treaty, even when they are internally directed.[5]

This consensus-based COP activity has a significant effect on states' legal obligations under MEAs. Yet, the activity does not result in resolutions or decisions that can be divorced from the underlying treaty. COP decisions and resolutions are almost invariably tightly connected with the original treaty and enrich it by deepening and thickening the parties' obligations. They deepen the obligations by contributing to implementation and effectiveness. They thicken the obligations by adding to the text of the original treaty through interpretation and guidance.

This tight connection to the treaty and the deepening and thickening effect makes COP activity hard to evaluate according to our traditional classifications of the sources of international legal obligation: treaties and customary international law. If consensus-based COP activity is viewed as independent from the underlying treaty and is evaluated according to the standard tests for hard international law obligations—whether as treaty law or customary international law—it is unlikely to meet these tests and will not be considered hard law.

If consensus-based COP activity is not hard law—or rarely hard law—can we simply refer to it as soft law and move on? This is the approach most commentators take. However, the term soft law is also unhelpful for a full understanding of the relationship of consensus-based COP activity to the parties' substantive legal obligations under the underlying treaty.

Adding soft law to the binary framework of hard law and non-law simply adds another layer to a hierarchical framework. It does not challenge the hierarchy itself. Soft law is still not law. This tripartite classification does not adequately capture the particular relationship that COP activity has with the underlying legal obligation of the treaty. For, to the extent that COP resolutions and decisions deepen and thicken the treaty obligations, it is no longer possible to argue that the treaty obligation stands at a hierarchically superior position than the COP obligation. They are inextricably intertwined.

[2] Montreal Protocol on Ozone-Depleting Substances art. 2(9), Sept. 16, 1987, 26 ILM 1541, amended text *available at* <http://www.unep.org/ozone/pdfs/Montreal-Protocol2000.pdf>.

[3] For example, the COPs of the Ramsar Convention on Wetlands have passed numerous resolutions adopted by simple majority of the parties interpreting key terms of the treaty, arguably changing the emphasis of the treaty. *See* Convention on Wetlands of International Importance Especially as Waterfowl Habitat, Feb. 2 1971, T.I.A.S. No. 11, 084, 996 U.N.T.S. 245 [hereinafter Ramsar Convention]; Annecoos Wiersema, *A Train Without Tracks: Re-Thinking the Place of Law and Goals in Environmental and Natural Resources Law*, 38 ENVTL. L. 1239, 1291 (2008).

[4] *See* Convention on International Trade in Endangered Species of Wild Flora and Fauna, Mar. 3, 1973, 27 U.S.T. 1087; *Criteria for Amendment of Appendices I and II*, Conf. 9.24 (Rev. CoP 14), 9th Meeting of the Conference of the Parties to CITES (Nov. 7-18, 1994), amended at the 14th Conference of the Parties to CITES (Jun. 3-15, 2007).

[5] Brunnée, *Reweaving the Fabric, supra* note 1, at 111.

I argue that, instead of trying to fit consensus-based COP activity into these frameworks by asking whether it is law, we should be asking a different question. The question we need to ask if we want to accurately understand the significance of consensus-based COP activity for states' international legal obligations is: what is the relationship of consensus-based COP activity to the underlying treaty obligations of the parties to that treaty?

Why does it matter how we frame the question, or even what legal status we accord this kind of consensus-based COP activity? The way in which we address this activity can have a number of consequences, a few of which I outline briefly here.

First, the way in which a tribunal frames the question about the status of consensus-based COP activity can have a real effect on whether that tribunal will view COP resolutions and decisions as affecting parties' international legal obligations.[6]

Further, when we see the legal significance of COP activity, we begin to see a picture of an increasingly sectorally fragmented international legal system.[7] At the same time, reframing the question about the role of COP activity offers opportunities to better manage this sectoral fragmentation. For example, within dispute resolution settings, recognizing the relationship between consensus-based COP activity and the underlying treaty might allow for use of the interpretive provisions of Article 31 of the Vienna Convention on the Law of Treaties by tribunals reaching beyond their own regimes for understandings of principles addressed by multiple treaties, such as the precautionary principle.[8] Even beyond dispute resolution settings, recognizing the legal significance of COP activity might allow states to form linkages across treaty regimes as a way to manage sectoral fragmentation.

Finally, understanding the significance of consensus-based COP activity and its close relationship to the legal obligations of the parties to the underlying treaty may have implications for how we understand activity in other areas of international law beyond MEAs. For example, what does our understanding of COP activity tell us about the work of international organizations? Does it have implications for work carried out under the auspices of treaty regimes in other areas of international law, such as human rights law, even if that work is carried out by bodies other than COPs? These questions can only be fully explored if we ask the right question: what is the relationship between consensus-based COP activity and underlying treaty obligations of the states parties to that treaty?

INVESTMENT PROTECTION LAW AND SOURCES OF LAW: A CRITICAL LOOK

By Martins Paparinskis[*]

INTRODUCTION

During the last decade, investment arbitration has made a considerable contribution to the development of investment protection law. This essay will address some sources of law implications arising from the extensive reliance that investment arbitration tribunals place

[6] *See* Natural Resources Defense Council v. Environmental Protection Agency, 464 F.3d 1 (D.C. Cir. 2006); Jonathan Verschuuren, *Ramsar Soft Law is Not Soft At All, available at* <http://www.ssrn.com/abstract=1306982> (copy on file with author).

[7] On sectoral fragmentation, *see* Andreas Fischer-Lescano and Gunther Teubner, *Regime-Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law*, 25 MICH. J. INT'L L. 999 (2004).

[8] Vienna Convention on the Law of Treaties art. 31, May 23, 1969, 1155 U.N.T.S. 331.

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on the case law interpreting *pari materia* treaty rules. The essay suggests that Jessup's 1927 call for caution in the development of the law on the treatment of aliens is still relevant:

> [T]here is an overwhelming necessity for definite criteria ... but I deny the implication that merely because there is a necessity for this definite position that you have the right to inject into international law a criterion merely because it is definite without ascertaining whether that criterion is actually accepted. We cannot dismiss something as a generality in favour of something which is definite merely because one is definite and one is general, unless the definite criterion is actually accepted.[1]

Identifying the Role of Arbitral Case Law

Tribunals may reference case law in a number of ways. The earlier decisions may have explained the relevance of general concepts in the particular context.[2] The earlier decisions may have interpreted a similar rule in an inspirational way. The earlier decisions may have employed certain arguments that can be applied by analogy. While there are shades of difference between different legal arguments, there is a point when reliance on earlier awards goes further than that. The case law regarding open-textured substantive rules (e.g., most-favoured-nation ('MFN') treatment, indirect expropriation, and fair and equitable treatment) shows a case-by-case fleshing out and refinement of presumptions, criteria, and sub-criteria on the basis of particular factual circumstances. Such a fact-based law-elucidation would be hard to justify otherwise than if undertaken regarding the same applicable rule of law. Since, due to historical developments, investment protection law is largely set out in legally unconnected bilateral treaties, it is necessary to address the mutual relevance of these interpretations.[3] The next sections will consider some arguments for treating *pari materia* interpretations as legally relevant for the interpretation of other treaties.

Old Explanations of Arbitral Case Law

Arbitral Case Law and Ordinary Meaning

The ordinary meaning that parties had in contemplation at the time when they concluded a treaty may refer to the established meaning of like terms in earlier instruments, and this meaning may also be established through means of judicial interpretation.[4] However, the natural inter-temporal qualification is that the meaning is established before the treaty is concluded. The argument therefore has limited application to investment protection rules, where most contentious issues were either not arbitrated at all (up to the late 1990s), or resolved in radically divergent ways (after that).

[1] *Discussion*, 21 ASIL Proc. 29, 35-36 (1927).

[2] *E.g.*, the explanation of the role of cause, object, forum selection, and attribution in treaty claims regarding contractual issues, Compañiá de Aguas del Aconquija S.A. and Vivendi Universal v. Argentina, ICSID Case No. ARB/97/3, Decision on Annulment, July 3, 2002, 17 ICSID Rev. 168 (2002).

[3] Martins Paparinskis, Barcelona Traction: *A Friend of Investment Protection Law*, 8 Baltic Ybk of Intl L. 105 (2008).

[4] Elihu Lauterpacht, *The Development of the Law of International Organization by the Decisions of International Tribunals*, 152 Recueil des Cours 377, 396 (1976 IV); Case Concerning Maritime Delimitation in the Black Sea (Romania v. Ukraine), Judgment, 2009 ICJ Rep. (February 3), *obtainable from* <www.icj-cij.org>, ¶¶ 133-134.

Arbitral Case Law and Generic Terms

Generic treaty terms follow the development of international law,[5] and there is no reason of principle why this development could not draw upon arbitral interpretations of bilateral treaties. However, it is not clear whether the investment protection rules are of a generic nature, particularly in light of other evolutionary tools like MFN clauses and reference to customary law available to states. It is also not clear whether the divergent views expressed by tribunals authoritatively reflect the contemporary meaning. Most importantly, this approach would misstate the traditional generic term argument distinguishing between the source and destination of the inter-temporal *renvoi*, and turn it into a circular argument where each rule simultaneously occupies both positions.

Arbitral Case Law and Supplementary Materials

Arbitral awards are material sources of law, and Article 32 of the Vienna Convention on the Law of Treaties ('VCLT') permits the application of non-exhaustive supplementary materials in treaty interpretation.[6] However, to identify both concepts seems problematic. Awards as material sources would not become part of the primary rules even if they authoritatively explained their content. This argument would also go against the grain of the VCLT, which does not direct the interpreter to developments completely extrinsic to the treaty-making and parties. Finally, the supplementary materials could not be anyway used beyond the limits of each particular treaty.

Arbitral Case Law and Customary Law

Article 31(3)(c) of VCLT directs the interpreter to 'any relevant rules of international law applicable in the relations between the parties.' If the interpreter finds customary law, the development of law through investment arbitrations would be on safe normative grounds, since the same applicable law would apply in all cases. However, this argument cannot explain the development of those rules that have no customary law background (e.g., MFN treatment). It also raises questions about the possibility of referring to customary law when the treaty wording is slightly different (like expropriation) and when the treaty and customary law are alleged to prescribe different content (like fair and equitable treatment and international minimum standard).

New Explanations of Arbitral Case Law

Whatever approach one takes, it is complicated to defend a general incorporation of legal reasoning regarding the development of all kinds of rules. In light of this, two new approaches have been suggested that may be described as the 'weak' and 'strong' arguments for consistency.

The 'weak' consistency argument considers 'the applicable law ... by definition ... different for each BIT,' and therefore argues for a *jurisprudence constante*.[7] It is true that in a treaty

[5] Aegean Sea Continental Shelf Case (Greece v. Turkey), Judgment, 1978 ICJ Rep. 3, 33, ¶¶ 77-78 (Dec. 19).

[6] The Canadian Cattlemen for Free Trade v. Canada, UNCITRAL Arbitration, Award on Jurisdiction, Jan.28, 2008, *available at* <http://ita.law.uvic.ca/documents/CCFT-USAAward_000.pdf>, ¶¶ 164-169.

[7] SGS Société Générale de Surveillance S.A. v. Republic of the Philippines, ICSID Case Nos. ARB/02/6 and ARB/04/08, Decision of the Tribunal on Objections to Jurisdiction, Jan. 29, 2004, *available at* <http://ita.law.uvic.ca/documents/SGSvPhil-final_001.pdf>, ¶ 97.

dispute, applicable law *in the first instance* will be different for each treaty, but *in the second instance*, Article 31(3)(c) of VCLT may lead the interpreter to the applicable law of custom that would be (*pace* special custom) identical for all treaties. The concept of *jurisprudence constante* does not seem to add much to the analytical tools that the interpreter already possesses regarding the application of general concepts (cause, object, attribution, etc.) to particular rules.

The 'strong' consistency argument argues for harmonious development of the law in light of well-established case law.[8] When the applicable law is customary law, to rely on established case law explaining the content of the rule is a normal technique for identifying custom. However, when the applicable law is different treaty law, the consistency of the arbitral case law (interpreting e.g. 10 treaties) is hard to justify as directly legally relevant for the interpretation of 2,600 other treaties.

While an argument for 'new' rules of interpretation permitting greater flexibility is not impossible, it is unlikely that such rules have emerged. States argue, and tribunals accept, the rules of VCLT. When tribunals are conceived as engaging in law-making, the state practice is disapproving. The responses by NAFTA states to perceived activist tribunals through Article 1128 submissions, the NAFTA Free Trade Commission, and changes in treaty practice support the traditional sources of law. Whatever *a priori* jurisprudential reasons for consistency states may be presumed to have, practice shows them as satisfied with the existing framework encapsulating the procedurally and substantively fragmented system.

Conclusion

In 1930, the Hague Conference on Codification failed in codifying the law on the responsibility for treatment of aliens, leading to serious criticisms and reappraisals of apparently established rules. One reason for the failure was that developing states suspected developed states of abusing law-making methods (leading to debates about sources of law for five out of the available twelve days).[9] In 2009, Jessup's words of caution cited above sound just as persuasive. Considering the scepticism already expressed in state practice, it may be advisable to reconsider the benefits of a more formalistic approach to sources with a clearer identification of applicable law, so as to avoid another '1930' backlash.

Equity in International Law Revisited (with Special Reference to the Fragmentation of International Law)

By Anastasios Gourgourinis[*]

Introduction

This contribution suggests that when discussing "international law as law" in the circumstances of today, it is worth revisiting the current and prospective normative role for the

[8] *Saipem S.p.A. v Bangladesh*, ICSID Case No. ARB/05/07, Decision on Jurisdiction and Recommendation on Provisional Measures, Mar. 21, 2007, 22 ICSID Rev. 100, ¶ 67 (2007).

[9] IV League of Nations Conference for the Codification of International Law [1930] 1442-76, 1583 (Shabtai Rosenne, ed., 1975).

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principle of equity in the sphere of international legal relations. Hence, by undertaking a normative assessment of the principle of equity and equitable principles as normative 'tools' in international legal reasoning, the discourse *infra* will focus on their potential relevance in the ambit of the still on-going debate on the normative fragmentation of international law resulting as a consequence of the diversification of international regulation via treaty-established, subject-matter specific regimes.

THE NORMATIVITY OF EQUITY AND EQUITABLE PRINCIPLES IN INTERNATIONAL LAW

While commentators are rather hesitant in categorizing equity *per se* as a formal source of international law,[1] the fact that international courts and tribunals can apply equity and equitable principles as part of general international law is fully reaffirmed by international case law.[2] For, according to the ICJ, "equity as a legal concept is a direct emanation of the idea of justice...the legal concept of equity is a general principle directly applicable as law."[3]

Judge Weeramantry has provided an elaborate account of the "routes of entry" of equity, i.e., how equity fits with the framework of sources of international law (mainly treaty, custom, and general principles).[4] Probably equity's most prominent route of entry, early identified ever since Judge Hudson's much cited dictum in the *Meuse Case*,[5] is via general principles of law. In a fashion that reflects a certain duality, while equity has permeated international law as a general principle *eo nomine* (what is generally referred to as equity *infra*, *praeter* and *contra legem*), it also has found expression in equitable principles (such as good faith, unjust enrichment, abuse of rights, estoppel, acquiescence and so on) themselves endowed with international legal validity as general principles of law of Art. 38 (1)(c) ICJ Statute;[6] in this sense, they form part of general international law, that is the set of international norms that are binding *erga omnes* (as contrasted to *erga omnes partes*, as in the case of treaties).

Based on the drafting deliberations of what is now the ICJ Statute,[7] it appears that equitable and general principles of law both constitute the "general principles of justice" referred to in *Norwegian Shipowners' Claims*.[8] For, it is here suggested that equity (as part of international law) and equitable (general) principles of law should be viewed as essentially different facets of the same concept, the former denoting the normative process and the latter denoting the normative means. The lack of reference to equity in what is now Article 38(1)(c) of the ICJ Statute was eventually counterbalanced by the inclusion of general principles of law applicable *in foro domestico*. Ergo, being treated separately by some authors,[9] on the one hand equity

[1] *E.g.*, Michael Akehurst, *Equity and General Principles of Law*, 25 Int'l & Comp. L.Q. 801, 807 (1976).

[2] *E.g.*, CHRISTOPHER R. ROSSI, EQUITY AND INTERNATIONAL LAW: A LEGAL REALIST APPROACH TO INTERNATIONAL DECISIONMAKING 59-86 (1993).

[3] Case Concerning the Continental Shelf (Tunisia/Libyan Arab Jamahiriya), Judgment, 1982 ICJ REP. 18, ¶ 71 (Feb. 24).

[4] 1993 ICJ REP., ¶¶ 74-102 (Weeramantry, J., sep. op.). For further analysis, see Anastasios Gourgourinis, *Delineating the Normativity of Equity in International Law*, 11 INT'L COMM. L.REV. 327 (2009).

[5] Diversion of Water from the River Meuse (Netherlands v. Belgium), 1937 PCIJ, ser. A/B, No. 70, at 76 (Hudson, J., ind. op.).

[6] *See* Oscar Schachter, *International Law in Theory and Practice*, 178 RECUEIL DES COURS 13, 83 (1982 V).

[7] Permanent Court of International Justice, Advisory Committee of Jurists, Procès-verbaux of the Proceedings of the Committee, June 16-24, 1920, with Annexes, at 296, 307, 310-315, 318, 324, 332, 336, 338.

[8] Norwegian Shipowners Claims (Nor. v. U.S.), 1 R. Int'l Arb. Awards 307, 331 (Perm. Ct. Arb. 1922).

[9] *See* the discussion in Romualdo Bermejo, *Place et rôle de l'équité dans le droit international nouveaux*, 36 *ÖzöRV* 219, 229-232 (1986).

has been faced with skepticism for vagueness and lack of predictability,[10] while 'stand-alone' general principles of law have lapsed into a considerable degree of obscurity regarding their origin, practical utility and *modus operandi*, overtly disadvantaged to treaty and custom.[11] As a result, equity and equitable principles should be assessed as a 'whole.'

Moreover, and at a parallel analytical level, it can be additionally suggested that it is further feasible to normatively assess equity and equitable principles through the lens of the primary norm/secondary norm process-type differentiation, long-known from the work of the International Law Commission (ILC) on State Responsibility.[12] For, it appears that while equity and equitable principles can be themselves subject to breach,[13] they can also deal with the consequences of breaches of other primary norms.[14]

Equity and Equitable Principles as Interstitial Norms

Interstitial norms, according to Vaughan Lowe, are those which are necessary in the process of legal reasoning, operating in the interstices of primary norms, dealing with issues of overlaps and conflict between the latter.[15] Underlying Lowe's argument is the idea that application of norms is a "process of juristic evaluation" aimed at harnessing the negative consequences stemming from the fragmentation of international law. The utilization of interstitial norms as modifying norms falls in the hands of judges, not as *law* but as *reason* adjusted to the function of law, so as to regulate the normative interaction of other, primary norms.

Indeed, Lowe treats interstitiality from a *quasi-normative* perspective: interstitial norms cannot generate normative consequences in their own name. Their lack of normativity is eventually balanced by their usage by judges; it is not the interstitial norm that matters, but rather the use judges make of it. Nevertheless, the proposition made here follows a different, *normative* route. While interstitial norms can be taken to include conflict-resolution techniques such as *lex posterior* and *lex specialis*, they can arguably include equity and equitable principles as primary or secondary norms. For, indeed, Lowe's reference to *abus de droit* and unjust enrichment as examples of interstitial norms provides further support to this line of argument.

In this sense, it can be further argued that equity and equitable principles as interstitial norms can operate as positive catalysts vis-à-vis the fragmentation of international law, i.e.,

[10] *E.g.*, Joseph Hendel, *Equity in the American Courts and in the World Court: Does the End Justify the Means?*, 6 Ind.Int'l & Comp.L.Rev. 637, 665-677 (1996).

[11] *See* Bin Cheng, General Principles of Law as Applied by International Courts and Tribunals [reprinted] 3-6 (2006); Martti Koskenniemi, *General Principles: Reflexions on Constructivist Thinking in International Law*, Oikeustiede-Jurisprudentia 117 (1985).

[12] Roberto Ago, Second Report on State Responsibility, [1970] Y.B. Int'l L. Comm'n 177, 179, UN Doc. A/CN.4/SER.A/197O/Add.l.

[13] *E.g.*, Maritime Delimitation and Territorial Questions Between Qatar and Bahrain (Qatar v. Bahrain), Judgment, 2001 ICJ Rep. 94, ¶ 248 (Jul. 1); Draft Articles on Diplomatic Protection, Commentary to Art. 5, ¶ 13, *in* Report of the ILC on the Work of Its Fifty-eighth Session, UN GAOR, 61st Sess., Supp. No. 10, at 16, UN Doc. A/61/10 (2006).

[14] *E.g.*, Draft Articles on Responsibility of States for Internationally Wrongful Acts, Commentary to Art. 45, ¶ 1, and Art. 56, *in* Report of the ILC on the Work of Its Fifty-third Session, UN GAOR, 56th Sess., Supp. No. 10, at 43, UN Doc. A/56/10 (2001), *reprinted in* [2001] Y.B. Int'l L. Comm'n 74, UN Doc. A/CN.4/SER.A/2001/Add.1 (Part 2).

[15] Vaughan Lowe, *Sustainable Development and Unsustainable Arguments*, in International Law and Sustainable Development: Past Achievements and Future Challenges, 19 (Alan Boyle & David Freestone eds., 1999); Vaughan Lowe, *The Politics of Law-making: Are the Method and Character of Norm Creation Changing?*, in The Role of Law in International Politics: Essays in International Relations and International Law 207 (Michael Byers ed., 2000).

increasing the 'rate' of normative harmonization of norms derived from distinct subject-matter specific regimes (*infra legem* interpretative function); also, as negative normative catalyst, i.e., resolving the conflict between competing norms derived from distinct treaty-established regimes (*praeter* and *contra legem* function).

A *Prima Facie* View of Equity's Relevance in the Fragmentation Debate: The *Georges Pinson* case

A *prima facie* indication of equity's relevance in the fragmentation debate can be traced back to the 2006 Final Report on the topic of fragmentation issued by the ILC appointed Study Group.[16] *Inter alia*, the Report largely draws from the much-cited *dictum* from the 1928 *Georges Pinson* case[17] in order to introduce the so-called concept of "principles of international law proper" into the fragmentation analysis—distinct from Art. 38(1)(c) of the ICJ Statute—as a possible proper normative response to the problems posed by the normative fragmentation of international law.[18]

Nevertheless, the introduction of this allegedly novel concept appears to be based upon a misreading of the actual *dictum*'s term "*droit international commun,*" as it features in the original French version of the *Georges Pinson* award.[19] In actuality, Professor Verjiil, acting as the Presiding Commissioner *in casu*, was using the term as simply referring to general international law, that is, the set of international norms binding *erga omnes*. But aside from the circularity of the Study Group's above position, a closer look at the *Pinson* award actually reveals a further element of general international law: in the earlier pages of the *Georges Pinson* award, Umpire Verzijl stated that equity in international law operates as a "subsidiary source" or as a "superior principle."[20]

Consequently, it would be feasible to argue that for purposes of fragmentation discourse, equity has a potential normative role to play. Equity and equitable principles can be *prima facie* viewed as operating as a "subsidiary source" vis-à-vis under-regulation in the international sphere, i.e., vis-à-vis the existence of *lacunae* regarding legal responses to normative conflicts in 'hard' cases (*praeter legem* function). Alternatively, they can be viewed as a corrective "superior principle" *vis-à-vis* over-regulation, i.e., vis-à-vis 'hard' cases where the application or non-applicability of *existing* norms for the resolution of normative conflicts (e.g. *lex posterior, lex specialis*) may lead to manifestly unjust results (*contra legem* function).

Concluding Remarks

To conclude, this contribution has submitted that the equity and equitable principles, as part of general international law, indeed appear to have a potential normative role in situations of normative complexity resulting from the fragmentation of the international legal system; and furthermore, that this normative role for equity merits future doctrinal attention.

[16] ILC, Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, Report of the Study Group of the ILC, Finalized by Martti Koskenniemi, UN Doc. A/CN.4/L.682 (Apr. 13, 2006) [hereinafter Fragmentation Report].

[17] Georges Pinson (France) v. United Mexican States [hereinafter Georges Pinson], 5 R. Int'l Arb. Awards 327 (Perm. Ct. Arb. 1928).

[18] *See* Fragmentation Report, *supra* note 16, at 94 (fn 237), 96, 233, 234, 254.

[19] Georges Pinson, *supra* note 17, at 422.

[20] *Id.* at 355 (Author's translation).