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From Custom to Certainty – an Effective International Law for the 21st Century

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Squaring the Circle: Some Thoughts on 21st-Century International Law

In *The Square*, which has recently been awarded the Best Film prize at the 2017 European Film Awards, a flashy curator of a contemporary art museum establishes an enclosure in which people are told to behave responsibly, or as the installation describes, it is "*…a sanctuary of trust and caring. Within it we all share equal rights and obligations*"[1]. Whatever the real intention and meaning of the installation, the plot precipitates when the curator's phone is stolen inthe enclosure and a hunt to retrieve it begins. In the multi-layer metaphorical *œuvre*, one of the ideas proposed is that responsibility may have physical as well as abstract borders. What is outside of the delineated space, bears no guarantee.

International law as a 21st-century phenomenon may be said to resemble *The Square* in a number of ways. It represents a discrete space in which sovereign States conduct their international legal affairs to settle disputes between themselves in a peaceful manner, and to promote the advancement of common goals. Within this arena, States have thus far adopted a perspective based on the motto 'go with what you know.' Historically, international law has primarily been conceived of as customary in nature, amounting to "*a general, uniformly applicable law between States…abstract or rudimentary [in nature], by virtue of which States have the power to create specific obligations*"[2]. This represented a simple, understandable *modus operandi* with clear limitations, namely that customary norms, while adaptable, often lack specificity. In an arena without a single norm interpreter, the contestable nature of norms became problematic as inter-State intercourse increased.

To cure this defect, over the 20th century, custom and *courtoisie internationale*[3], were partly substituted by a framework largely based on the precision of treaties. This codification of the

[1] BOUCHER B., The Art World Is Hard to Satirize: Ruben Östlund on Sending Up Curators in His Award-Winning Film 'The Square', *Artnet News* 9 November 2017 https://news.artnet.com/art-world/ruben-ostlund-the-square-1135943. Accessed on 10 December 2017.

[2] KOSKENNIEMI, MARTTI, *From Apology to Utopia – The Structure of International Legal Argument*, Cambridge, CUP (2005), 390.

[3] Generally understood as non-normatively binding customary conduct, but also styled as behaviourally induced law. See ARAJÄRVI N., Changing Customary International Law and the Fluid Nature of Opinio Juris, https://law.duke.edu/cicl/pdf/opiniojuris/panel_6-arajarvi-changing_customary_international_law_and_the_fluid_nature_of_opinio_juris.pdf. Accessed on 10 December 2017.

obligations of *magni homines* was to be accomplished through a series of *Internationale Verträge*, with the personification of States themselves substituted for the transposition of inter-personal contractual relations to the international arena. This move was intended to bring increased specificity to law, in order to cope with the advance of technology and the increasingly integrated nature of international society, and was further intended to prevent normative contestation and guarantee compliance within the framework of inter-State responsibility. Again, the model was based on familiar ground, largely implementing bilateral and multilateral tools developed in States' domestic law to the international legal arena.

However, this framework, while neatly conceived, has delivered much less than it promised. While norms have solidified, interpretation thereof has become ever more subjective, framed to fit the purpose of the interpreter and rule-maker at the same time, adopted for a particular forum or particular audience. The square of responsibility lacks an effective enforcement and judicial apparatus, with the lack of an authoritative single norm interpreter again proving a thorn in the system's side. Modern international law, much like a contemporary art exhibition, is a space where constitutive, declarative and interpretative forms overlap[4]. The hunger for argumentative freedom of actors inside the square of responsibility seems insatiable, and the failing art of legal argument has not been remedied by codification (description). Instead of rectifying fallacies in the space left for normative contestation, the interpreter (and the rule-maker) exploit these fallacies to their own benefit. Moreover, the interpreted norm receives its meaning not only from the actors entering the square but also from third-parties and observers - the *Kunsthistoriker* of legal academia and international organisations, often possessing more credibility than self-interested State actors, the traditional makers of international law.

This expert cadre introduces a different dimension to international law – in contrast to State actors, they have a defined purpose and aim (*per definitionem* in the case of international organisations)[5] or provide a special knowledge in their respective field as "the most qualified publicists"[6]. However, States, as members of international organisations, remain the principal actors, and international law thus remains a State-generated discipline[7].

Through this emerging diversification, international law has experienced creeping specialisation. Independent from the corpus of general international law, specific areas are increasingly governed by "self-contained regimes". Such regimes, often based on treaties, not

[4] D'ASPREMONT J. (2017), Non-State Actors and the Formation of International Customary Law: Unlearning Some Common Tropes, Forthcoming *in:* SUFYAN DROUBI (ed), *Non-State Actors and the Formation of Customary International Law, Mell and Schill Perspectives on International Law* (Manchester University Press, 2018). https://poseidon01.ssrn.com/delivery.php?ID=638096082013127022069000030029088091053039023004022060096115024072000095091016094005100007032007024026014124111072029021002076045005010079051073025088083066016105006008015070001118112083093102124117110066116065004107031114022124115070086091072096065&EXT=pdf. Accessed on 10 December 2017.

[5] 'The term "international organisation" refers to an organisation established by a treaty or other instrument governed by international law and possessing its own international legal personality. International organisations may include as members, in addition to States, other entities', Art. 2 lit. a DARIO, *Yearbook of the International Law Commission* [2011] vol. II, Part 2.

[6] *Cf.* Art. 38(1)(d) ICJ-Statute.

[7] *Ibid*. Fn. 4.

only regulate a specific legal field, but also provide rules to enforce and interpret the regime[8]. These rules might clash with the norms of interpretation as set forth in the 1969 Vienna Convention on the Law of Treaties, generating *sui generis* norms and a legal hotchpotch. A solution for this widening gap between general and *sui generis* international law is yet to be found. Occasionally, international organs attempt to harmonise different systems. An example might be the "judicial dialogue" between the European Court of Justice and the European Court of Human Rights, with EU law and the European Convention on Human Rights representing two interacting, yet independent self-contained regimes, in which the ECtHR has crafted a presumption of *prima facie* mutual compliance[9]. However, such collaborations for problem-solving remain rare exceptions. Especially in areas in which international norms exist without an accompanying judicial mechanism or States must positively agree to any form of judicial proceedings, effective problem-solving remains problematic, opening space for interminable contestation.

Treaties, as contracts uprooted from private law, were meant to formalise agreements regarding a certain area of interest. However, while in the national sphere, the judicial branch provides mechanisms for dispute settlement, international law lacks such authoritarian bodies. While the International Court of Justice is the main judicial organ of the United Nations and has jurisdiction over "all cases which the parties refer to it and all matters specially provided for in the Charter of the United Nations or in treaties and conventions in force"[10], it still requires State consent to proceedings. Where no consent is given, the Court is barred from intervening. Especially in self-contained regimes, the regime itself may contain an independent judicial body, as seen in the cases of the European Court of Justice and the European Court of Human Rights. This leads to a fragmentation of interpretation and application of international law. Where no judicial body is authorised to adjudge or no judicial mechanism has been established, the international community and non-judicial organs, accompanied by scholars and experts, decide on the interpretation and legality of actions, without any final, authoritarian decision on the law. While in an art exhibition, such a variety of opinions and interpretations might be desirable, it leads to uncertainty in international law.

As a separate, but related problem the increasing number of treaties dealing with special areas of interest and the creation of a variety of specialised bodies by those treaties is worthy of mention. While using the same terminologies, definitions in one treaty might differ from the same terms in a different treaty. When each treaty has its own bodies to interpret (and apply) the specific treaty-law, the goal of a common set of rules between States is undermined. Common, uniform rules require a common, uniform understanding of the rules, set out by one interpreter. Where a variety of rules are prescribed, common rules have to give way to a

[8] KLEIN: *Self-contained regimes*, Max Planck Encyclopaedia of Public International Law, para. 1.
[9] *Cf. Bosphorus Hava Yollari Turizmve Ticaret Anonim Sirketi v. Ireland* (2005), 45036/98, ECLI:CE:ECHR:2005:0630JUD004503698; reaffirmed in *Avotiņš v. Latvia* (2016), 17502/07, ECLI:CE:ECHR:2016:0523JUD001750207.
[10] Article 36(1) ICJ-Statute.

fragmentation of the international legal sphere into *leges speciales*, ultimately creating a variety of squares of responsibility, contradicting the original purpose of international law.

To decipher and categorise the fragmentary phenomena and the new relations between different actors, novel sub-disciplines of international law were created, such as global administrative law, global public administration, global experimentalist governance, or transnational governance[11], featuring new transnational global actors. These disciplines, merging conventional legal theories with political theory and other disciplines within the humanities and social sciences, take account of nascent synergies between international law and domestic law, and between States and non-State actors, notably in hybrid private-public international bodies and private self-regulatory transnational institutions. Such disciplines have been only partially successful in reconciling theory with practice, or indeed, in mapping the international legal arena in anything approaching a systemic manner. Some have, however, contributed to the understanding of the reliance on non-hierarchical decision-making, the importance of periodical monitoring and judicialisation and shortcomings in international institutional planning[12].

Overall, however, these new initiatives have fallen short of understanding and compensating for the destabilising tendencies in international law generally, and fragmentation in particular, failing to provide a reliable typology of international rules and their interpretation and application[13]. New legal methodologies need to be developed, promoting legal convergence. Keeping such theories *au courant* requires taking stock of the particularities of individual international regimes such as international trade law, international environmental law and EU law, which are becoming ever-more self-contained *à maintes reprises*. The fragmentation (or particularisation) of law raises epistemological issues that beset international law conceived of as a single discipline. Questions may even be raised as to whether conceiving of it in such terms is still appropriate. It would be a chimeric proposition to argue that the particularisation of international law, driven by cadres of specialists in narrow disciplines, is likely to better determine the limits of a particular norm (whether customary or treaty-based) when it clashes with another norm from a separate self-contained regime. In such circumstances, subjective interpretation is often cloaked in objective language in order to give priority to certain sources, usually those that are more technical in character and those that are closely connected with the regime to which the specialist belongs. Absent a neutral authority in the international legal arena, indeterminacy remains a significant problem for the discipline as a whole.

This problem should not, however, make way for political science to be the key solution. While, especially in international law, politics is a key factor in the creation of legal rules, the

[11] See for example SCHLEIFER P. / FIORINI M. / AULD G., *Transparency in transnational sustainability governance: a multivariate analysis of regulatory standard-setting programs*, EUI RSCAS; 2017/16; Global Governance Programme-258; Global Economics. http://hdl.handle.net/1814/45708. Accessed on 10 December 2017.
[12] DE BÚRCA G. / KEOHANE R. O., / SABEL C. (2013), New Modes of Pluralist Global Governance, 45 *N.Y.U. J. INT'L L. & POL*.
[13] WALKER N. (2017), The Jurist in the Global Age, *in:* VAN GESTEL R. / MICKLITZ H.-W. / RUBIN E. L. (eds), *Rethinking Legal Scholarship*, New York, NY: Cambridge University Press, 2017, p. 100.

interpretation and application should solely originate from a legal approach. Stepping outside the legal realm undermines faith in the system still further, and perhaps terminally. Political motivations may be different from case to case, encouraging legal uncertainty and thus, ultimately, weakening the international legal system *per se*.

Importantly, the development of international law should not be seen as a step back. Many recent developments have made room for actors other than States to be part as subjects of international law. Notably, the emergence of human rights law and international bodies and organisations in the 21st century[14] allowed individuals and organisations to be subjects of law, that is, to be able to have their own rights and obligations, independently from States. International organisations may enter the world stage as parties to treaties, may take proceedings before courts[15] and represent key players in the codification of international law[16]. Individuals gained the right of instituting proceedings before international courts[17] and may be indicted before international courts[18]. Where individuals are prevented from taking actions directly, their State of origin might claim their rights[19]. The ever-broadening domain of international law, with its multiple specialist offshoots, may be seen as an ever-more complex puzzle for international lawyers, but this increased complexity has allowed it to meaningfully protect and engage with an ever-broadening array of actors, something which, as the 21st century progresses, we are likely to witness progressing still further.

[14] *Cf.* BUERGENTHAL, *Human Rights*, Max Planck Encyclopedia of Public International Law, para. 3.
[15] *Cf.* in Advisory Opinions before the ICJ, Arts. 65-68 ICJ-Statute.
[16] The International Law Commission was established to develop and codify public international law, as prescribed in Art. 13(1) lit. a UN-Charter.
[17] *E.g.* the ECtHR.
[18] *E.g.* the International Criminal Court.
[19] *Cf. Ahmadou Sadio Diallo* (*Republic of Guinea v. Democratic Republic of the Congo*), available at http://www.icj-cij.org/en/case/103.