Book Reviews

Alan Boyle/ Christine Chinkin: The Making of International Law

Oxford University Press, 2007, XXX + 338 pages, ISBN 978-0-19-924819-3

International law is of fundamental importance for a globalised world. Climate change, transnational organised terrorism, the despoliation of the environment, gross human rights violations, and the spread of deadly diseases, arms and drugs across national borders, among other problems, require solutions in the form of rules, standards and procedures and, thus, law-making on an international level.

The book of Alan Boyle, Professor at the University of Edinburgh, and Christine Chinkin, Professor at the London School of Economics and Political Science, explains vividly how international law is made. It does not give a formalistic account on the traditional – and untraditional – sources and theories of international law but identifies the actors, instruments, and processes by whom and through which international law is generated. This new approach unites norm creation with the interpretation, application, and development of international law.

In a succinct Introduction, which already forms the first Chapter, Boyle and Chinkin point to the fight against terrorism as an illustrative example of current international law-making. Moreover, they clarify the concept of legitimacy, which they define as "the normative belief that a rule or institution ought to be obeyed" (p. 24). The authors distinguish between process legitimacy and system legitimacy. They rightly argue that process legitimacy could not be used as a substitute for legality where the designated and accepted procedures had not been followed, or where substantive laws had been breached.

The notion of system legitimacy is used with regard to the role and actions of the most powerful states. Traditionally, these states had a hegemonic position in the formation of international law. But recently there has been some change in both customary international law and

A. von Bogdandy and R. Wolfrum, (eds.),
Max Planck Yearbook of United Nations Law, Volume 12, 2008, p. 551-560.

treaty-making processes. The practice of a large number of states may outweigh that of a smaller number of more powerful states, as has happened in the case concerning the extent of the territorial sea and the determination of the preferential fishing zones, or more generally economic zones. Furthermore, the multilateral law-making processes leading to the adoption of the Rome Statute of the International Criminal Court, the Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction (Landmines Convention), the Convention on Climate Change and the Kyoto Protocol show that even the dissenting United States, the world's only remaining superpower, cannot assume that it will be able to dictate the outcome against the will of the majority.

The second Chapter of the book deals with the participants in the process of international law-making. Boyle and Chinkin acknowledge that states continue to dominate the international law-making agenda and the allocation of resources, but they also hold that it would be short-sighted to insist on the classical view of states as the sole makers of international law. Hence, the authors examine in detail the involvement of non-state actors in international law-making , in particular those that are variously termed civil society, transnational advocacy networks, social movements, and, above all, in an institutionalised form, non-governmental organisations (NGOs).

The participation of NGOs is regarded as not being unproblematic. Boyle and Chinkin urge that caution is required in assuming that it democratises international law-making, since NGOs were "often non-democratic, self-appointed, may consist of only a handful of people and determine their own agendas with an evangelical or elitist zeal. There is no guarantee that the views expressed by even high-profile NGOs are representative, either generally, or with respect to their claimed constituencies" (p. 58). The authors first analyse the NGOs strategies both for participation in treaty-making and for influencing institutional law-making. They refer, on the one hand, to the Convention against Torture, the Landmines Convention, the Rome Statute, the UNIDROIT Convention on Mobile Equipment, and the Multilateral Agreement on Investment as examples, and on the other hand, to the UN General Assembly and the UN Security Council, which have allowed only very limited access to NGOs through the so-called Arria Formula (see for further information on this procedure, the article of C. Breen in this Volume), and global summit meetings. Then they turn to NGO monitoring, norm generation and advocacy. They explain that the interactive processes between international institutions, states, regional and local

authorities, which function as "interpretative communities", since they "give meaning to and incorporate international instruments into their own local regimes through a mix of their own narratives, experiences, values, visions and dreams", and NGOs are "potentially law-making insofar as they generate state practice as a basis for customary law, help establish general principles of law, or constitute evidence for the interpretation and application of existing norms and principles" (pp. 82-83).

The third Chapter outlines the variety of international processes which exist for the negotiation and adoption of treaties, decisions, and soft law instruments. The authors in this context return to the concept of legitimacy. Instead of the notion of democratisation as a suggested perspective on legitimacy, they argue in favour of a "more cosmopolitan notion of participation in international law-making [… as] a possible solution, exemplified by the election of parliamentary organs in international institutions such as the Council of Europe, the Nordic Council or the Organisation for Security and Co-operation in Europe" (p. 101). Moreover, they state that the equal participation of all sovereign states in the process of law-making could be viewed as inherently democratic, particularly when the negotiating power of individual states, however small, was strengthened by consensus negotiating procedures. Regarding the future, they suggest that "the present international law-making 'system' – in reality more a bric-a-brac than system – should evolve into something closer to the European Union, the only functioning model of a multilateral legislative system currently available. On that model the UN General Assembly might become the Parliament, the Security Council would be the equivalent of the Council of Ministers, and the Secretariat would perform the functions of the European Commission" (p. 102).

Then the authors shed some light on law-making by the United Nations, namely by the Security Council, which has the power, albeit of dubious legitimacy, to make legally binding obligations on questions of law of a kind that are typically made by courts and to override both customary law and applicable treaties. Thereafter, they examine the law-making by the Food and Agriculture Organization, the World Health Organization, the International Maritime Organization, and the World Trade Organization, as well as by international conferences such as the Third UN Conference on the Law of the Sea and the Rome Diplomatic Conference for an International Criminal Court, and by intergovernmental and human rights treaty bodies. Boyle and Chinkin make an assessment concerning law-making by consensus, which cannot always be interpreted as approval. Consensus negotiating procedures in-

evitably generate a greater need to engage in diplomacy, to listen and to bargain than decisions being taken by majority. As the negotiations of the 1982 UNCLOS and the Climate Change Convention have demonstrated, these procedures tend to democratise decision-making by diminishing disparities in power among states; no participating state can be ignored, every state has to consent. Furthermore, the adoption of a consensus package-deal can have a powerful law-making effect; securing widespread support, not only legitimising and promoting consistent state practice, but makes it less likely that other states will object to immediate implementation. Consequently, new customary law may come into being very quickly.

In the fourth Chapter, the authors turn to the codification and progressive development of international law. They portray in detail the work of the ILC, which could, according to their view, with better guidance from the 6th Committee of the General Assembly and a much closer relationship with states, assist but not lead the process of shifting the focus of international law-making away from the codification of existing law towards the negotiation of new law. Boyle and Chinkin find it is slightly surprising that the multilateral treaty has been the ILC's preferred instrument for the codification of international law since a treaty runs the risk of securing only a relatively small number of parties and referring the draft articles to a diplomatic conference might re-open debates on a text which already rests on a delicate compromise between differing views. They propose that the ILC should evolve and make greater use of soft law instruments in future.

This proposal leads to, and also predetermines the structure of, the fifth Chapter dealing with the instruments employed by international law-making processes. The authors do not start their explanations by focussing on treaties but on soft law, a term which they hold to be a convenient description for a variety of non-binding instruments used in contemporary international relations. They point out that substance and intent are categories for the distinction between hard law and soft law; "the label attached to the instrument is not decisive" (p. 213). Soft law instruments can represent an alternative to law-making by treaty for four reasons: firstly, it may be easier to reach agreement when the form is not binding; secondly, it may be easier for some states to adhere to non-binding instruments since they can avoid the domestic treaty ratification process; thirdly, soft law instruments are more flexible since they are normally easier to supplement, amend or to replace than treaties; fourth and finally, they may provide more immediate evidence of international support and consensus than a treaty whose impact is heav-

ily qualified by reservations and the need of ratification and entry into force. Furthermore, soft law instruments are often used as mechanisms for authoritative interpretation or amplification of the terms of a treaty. They may contain general principles and have effects on customary international law, providing evidence for existing law, or of the *opinio juris* or state practice that generates new law. Thereafter, the authors turn to UN Security Council resolutions, which can over-ride treaty-law and general international law, and to treaties themselves, which do not, as the authors stress, *per se* make general international law but can, not unlike soft law, contribute to the process by which new customary law is created and developed. They briefly explain how treaties can have legal effects for non-parties, how they can be maintained as evolving regimes, and how different law-making treaties interact.

The last Chapter gives an overview of the role international courts and tribunals play with regard to the making of international law. The authors argue that "[i]n a decentralized system without a legislative body or authoritative law-making process and where unwritten law is developed through the amorphous processes of state practice and *opinio juris*" (p. 268) international courts and tribunals, in particular the ICJ, do more than simply apply the law; they are part of the process of making it. In some cases this involves affirming the law-making effect of multilateral agreements, UN resolutions, ILC codifications or other outputs of the international law-making processes. In other cases, judges have drawn upon a much broader legal basis for their decisions, and articulated, not least in the case of gaps in written international law, rules and principles of law that can only be described as novel and are not necessarily supported by evidence of general state practice or *opinio juris*. Moreover, international courts take over the task to address the problems of coherence and fragmentation and try to find solutions pointing to an integrated concept of international law.

In sum, the book of Boyle and Chinkin is an excellent insight in, and analysis of, the genesis and development of contemporary international law. The authors often deviate from the established paths of the foundations of the international legal order and give hints to a modern understanding, thereby taking a critical stand towards American foreign policy and mainstream scholarship. The authors use a mixture of inductive and deductive methods, refer to countless examples, and present their results in clear language. The book should have a firm place in international law discussions.

Dr. Diana Zacharias, Senior Research Fellow at the Max Planck Institute for Comparative Public Law and International Law, Heidelberg

Holger Hestermeyer: Human Rights and the WTO – The Case of Patents and Access to Medicines

Oxford University Press, 2007, XXXVI + 369 pages, ISBN 978-0-19-921520-1

Conflicts between the liberal economic principles of the global trading regime established by the Agreements entered into under the umbrella of the World Trade Organization (WTO) and non-economic concerns such as human rights, protection of the environment or development policies have been at the forefront of the debates about "harnessing globalisation" for quite some time. In recent times, the case of patents and access to medicines has probably received the greatest attention in both political circles and also in academia. Publications on the question to what extent the compulsory licensing of patents for pharmaceuticals desperately needed to fight pandemic diseases such as HIV/AIDS infringe or do not infringe the WTO Agreement on Trade-related Aspects of Intellectual Property Rights (TRIPs) have multiplied over the last few years (see for example, the monographs by Gamharter, Access to Affordable Medicines: Developing Responses under the TRIPS Agreement and EC Law, 2004; von Kraack, TRIPs oder Patentschutz weltweit – Zwangslizenzen, Erschöpfung, Parallelimporte, 2006 and Rott, Patentrecht und Sozialpolitik unter dem TRIPS-Abkommen, 2002).

The present work of Holger Hestermeyer, Senior Research Fellow at the Max-Planck-Institute for Comparative Public Law and International Law in Heidelberg, will nevertheless find a wide and interested readership, not least because of being written in English and being published by one of the best-known and most prestigious publishing houses world-wide Oxford University Press. The book is based on Hestermeyer's doctoral thesis, which was written under the supervision of Rüdiger Wolfrum and accepted by the University of Hamburg in 2006.

According to its own description in the Introduction (xxxiii – xxxvi), the study treats "the conflict between patent law obligations under the [...] TRIPS-Agreement and access to medicine, a conflict that is, at its core, a conflict between the law of the [...] WTO and human rights law." Against this backdrop, one may question the wisdom of choosing

"Human Rights and the WTO" as main title for the work (presumably for reasons of better marketability) and putting the reference to "Access to Medicines" only in the subtitle. Readers who expect a wider treatment of the conflict between WTO law and human rights, which raises many more questions than the one related to TRIPs (see e.g. Cottier/ Pauwelyn/ Bürgi (eds), Human Rights and International Trade, 2005), might – quite understandably – be disappointed. From the point of view of scientific and scholarly culture, it begs once more the question whether the "German way" of publishing genuine academic work – the author has to pay for the production costs of the book, but will enjoy more leeway as regards the substance and title of the publication – is not preferable to the anglo-american way that obviously is to some extent driven by market considerations.

After the already mentioned short introduction, Hestermeyer lays the foundation of the treatment of the specific conflict by introducing the background of the debate (Chapter 1, pages 1 -17), namely the legal disputes that arose in connection with the pricing policy for the AIDS medicine AZT and with the South African Medicines Act. Chapter 2 (pages 18 – 75) describes and analyses the international rules on patents, their underlying concepts and rationales and their rather new application to pharmaceuticals as a consequence of the TRIPs. Chapter 3 (pages 76 – 136) delineates access to medicine as a human right protected under different instruments of public international law. According to Hestermeyer, this includes a right of individuals *vis-à-vis* their governments to receive financial support for the purchase of medicines needed or alternatively a right to receive the medication from the government directly (which would have to buy the pharmaceuticals then), or, again alternatively, a right to a legally guaranteed "adequate level of the price of the medicine." (p. 136)

This is a crucial point. Hestermeyer bases his argument regarding the first two alternatives on the states' obligation to "fulfil", regarding the latter on the obligation to "protect" the right to life and access to medicines. However, it clearly makes a difference if a state fulfils its obligations by spending public money for the purchase of pharmaceuticals on the market or if it restricts the enjoyment of (intellectual) property rights of (typically foreign) individuals in order to fulfil its obligations. Given the importance of the argument for the overall aim of the study, one would have appreciated a more comprehensive elaboration of this structural difference (but see later pages 153 – 158). Moreover, it seems a somewhat short-sighted interpretation of a right to access to medicine to include only the pharmaceuticals already developed and not a right

to the development of essential medicines in the future. A state would then not only be under an obligation to create a legal order in which access to life-saving medicine is guaranteed, but also research and development (Hestermeyer discusses this matter at pages 158 – 166).

However, Hestermeyer comes to the conclusion that patents for pharmaceuticals in developing countries generally interfere with the access to medicine without a justification (page 166). In Chapter 4 (pages 137 – 206), Hestermeyer's bottom-line argument is the following: human rights law is fundamentally based on morality and thereby deserves normative superiority to the utilitarian and instrumental WTO legal order. It is worth recalling at this point, that Hestermeyer rejects practically any human rights foundation of intellectual property (which he considers to be only functional). From that perspective, private traders' market access rights are indeed a mere reflex. Not only Ernst-Ulrich Petersmann presumably disagrees with this approach (as Hestermeyer realises himself, see page 197 et seq.). I do also. Human rights conventions do create rights of individuals directly and not "as a mere reflex" of horizontal state-to-state obligations since they predominantly affect the relationship between states and their own citizens. Hence, there will be no nation state that could exercise diplomatic protection and the individuals must thus be empowered themselves. In contrast, trade treaties typically deal with obligations of states *vis-à-vis* nationals of other states, which are usually construed as obligations towards the foreign state. This logical *constructional* difference does not suffice to justify a *fundamental normative hierarchical claim*, nor does the lack of a globally protected individual right to property, which is largely due to the political division of the world until 1989. Using Fukuyama's picture of that time, it seems that in Hestermeyer's reasoning "history strikes back."

In Chapter 5 (pages 207 – 292), Hestermeyer addresses the ultimate question of how access to medicine affects the interpretation of the relevant obligations under the TRIPs. He correctly points out that it may not as such be relied upon in WTO dispute settlement in order to justify an infringement of the obligations deriving therefrom. Notwithstanding that it serves as an argument for a broad interpretation of the flexibilities inherent in the TRIPs (page 229 – 250). Not surprisingly, Hestermeyer finds access to medicines to constitute an argument mitigating in all cases in favour of freedom of choice for WTO members (regime of exhaustion, compulsory licences etc.). However, all interpretative efforts cannot overcome the clear wording of article 31 (f) TRIPs that makes compulsory licences for exports impossible, a possibility in-

dispensable for countries without sufficient manufacturing capabilities to produce the generics themselves (pages 250 – 253).

The last part of the analysis is devoted to the three different legal instruments that were adopted by the WTO in response to the disputes about the legal limits to WTO members' compulsory licensing policies. Hestermeyer describes the negotiating history and content of all of them in great detail (page 256 – 276) and analyses their respective legal status (page 276 – 287). The latter is far from clear and undisputed and the WTO membership has made extremely creative use of its limited power to create "secondary" WTO law. Despite these efforts, access to medicines remains impaired by the TRIPs, Hestermeyer argues. Even the solution for compulsory export licensing will not be able to remedy the situation, since the necessary investment for manufacturing capacities in countries like India will no longer pay off, if it can only be used for exports to very small LDCs (and not also for the huge domestic Indian market). The practice following the August 2003 export licensing waiver indicates its own practical insufficiency or irrelevance: only one export licence has been granted on this basis so far.

In the final pages of his study, Hestermeyer discusses possible solutions for the underlying systemic conflict between WTO law and human rights. Given the political unlikelihood of any amendments to the WTO agreements that provide for a greater role of human rights obligations inside the WTO legal system, Hestermeyer demands a more active role of WTO dispute settlement organs in the "importation of human rights into the WTO legal order" and points to the example of the European Court of Justice in the 1970s (page 288 et seq.). However, the differences between the two systems, partly admitted by Hestermeyer himself, are too large to make the European Union an example. The key difference between the two legal systems is the fact that the European Community exerts genuine sovereign rights in a way very similar to that of a Nation State. The same is by no means true for the WTO. The European Court of Justice initially imported fundamental rights considerations into the EC legal order to restrict this law-making power of the EU's institutions, not to relativise the obligations of the Member States in any way. The latter has taken place only very recently, when the European Court of Justice accepted fundamental rights to qualify as important public concerns justifying *prima facie* infringements of the fundamental freedoms.

Notwithstanding the criticism expressed above, which is to some extent admittedly a question of normative paradigm, the book is an extremely thoughtful, knowledgeable, comprehensive and well-written

contribution to a discussion of fundamental importance for the future development of the global trading system. Whether it is also a suitable "comprehensive introduction to the debate for non-specialists", as it claims to be (page xxxiii), is a different question.

Dr. Christoph Herrmann, Munich/Vienna