

Globalisation or Fragmentation of International Law: Challenges for Harmonisation

1 Introduction

“It is a well-known paradox of globalization that while it has led to increasing uniformization of social life around the world, it has also led to its increasing fragmentation”. (“Fragmentation of International Law: Difficulties arising from the diversification and expansion of International Law” *Report of the International Law Commission Fifty-eighth Session 1 May to 9 June and 3 July to 11 Aug 2006, General Assembly Official Records Sixty-first Session Supplement No. 10 (A/61/10) 403 par 242, hereafter ILC Report*).

The concepts mentioned in the above quotation from the Report of the International Law Commission on the fragmentation of International Law (ILC Report), namely globalisation and fragmentation, appear to be mutually exclusive. At face value, globalisation is linked to universal application of rules which seek the lowest possible common denominator and thus favour a wide and general content. Fragmentation, which is a consequence of specialisation, on the other hand, denotes an exclusivity and limited but specific scope. Is it possible that International Law is becoming

more specialised and at the same time increasing its global relevance and applicability?

The topics dealt with under the theme of International Law at the Society of Law Teachers of Southern Africa (SLTSA) Conference of January 2008, ranged from Trade Law, International Economic Law and Disability Law to Regional Law questions. All illustrated the increasing functional specialisation of International Law as an overarching discipline. It is against this background that current International Law thinking on universality and fragmentation will be considered and their possible consequences for the international legal system as we know it will be assessed. Finally, the consequences of globalisation and fragmentation for harmonisation, which was the theme of the conference, will be considered.

2 Fragmentation

The phenomenon of fragmentation has been with us for some time and recently received considerable attention from scholars of International Law. (See in this regard Werner "Constitutionalisation, fragmentation, politicization, the constitutionalisation of international law as Janus-faced phenomenon" 2007 June *Griffen's View* 17–30; Fischer-Lescano and Teubner "Regime collisions: The vain search for legal unity in the fragmentation of global law" 2004 *Michigan Journal of International Law* 999–1046; Lapaš "Some remarks on fragmentation of international laws: 2007 *CILSA* 1–29 and Koskenniemi and Leino "Fragmentation of International Law? Postmodern anxieties" 2002 *Leiden Journal of International Law* 553–579.) Fragmentation is an inevitable consequence of the vastly increased scope of International Law over the past half-century. In fact, International Law is becoming as diverse as national legal systems. Many of the traditionally demarcated areas of national law such as Water Law, the Law of Contract, Insolvency and Mergers and Acquisitions are now developing an international counterpart. As more actors are entering the international arena, the global society is becoming more pluralistic. (See Olivier "International and regional requirements for good governance and the rule of law" 2007 *SAYIL* 39.) Their interactions require a legal system that could accommodate their differing pursuits and preferences. A rigid and traditionalist approach clinging to established rules would not articulate the needs of modern society.

The ILC Report addressed the topic under the heading: Fragmentation of international law: Difficulties arising from the diversification and expansion of international law (ILC Report 400–423). When the ILC established a working group to deal with the matter in 2002, fragmentation was conceived as a problem, thus the project was initially titled "Risks ensuing from fragmentation of international Law" (*idem* 405).

The underlying reason for the Commission's study was the emergence of new and specialised types of law, so-called "self-contained regimes" also referred to as "*lex specialis* and geographically or functionally limited treaty-systems" which create problems of coherence in International Law (405. See also Lapaš 2007 *CILSA* 3). Modern International Law is full of recent but fast developing fragmented areas of specialisation such as

International Human Rights Law, International Environmental Law, International Trade Law, International Insolvency, Space Law and Nuclear Law to name but a few.

Self-contained regimes are usually described by their unified object and purpose, which is particularly relevant in interpreting those rules. The ILC concludes that International Law rules all stand in relationship to the system as a whole and may slot in at different levels of the hierarchy. The interpretation clauses of the Vienna Convention on the Law of Treaties (arts 31–33) should determine their relationship to one another. Priority should be given to the specific norm over the general (ILC Report 410 & 413).

2 1 Impact of Fragmentation of the International Legal System

Fragmentation of law has the potential to disrupt the coherence and legal certainty of established rules (Werner 2007 *Griffen's View* 23). The development of new rules often rebel against existing formal requirements for law creation and may challenge the traditional requirements for the creation of Customary International Law and treaties (the primary sources of International Law). These new areas of specialisation are often regulated by either principles which do not qualify as custom, or by instruments such as model legislation or UN resolutions, which are neither treaty nor custom. One of the reasons for the development of new branches of law may, in fact, be that traditional structures and rules do not accommodate novel and fast developing fields of law. (The International Law Association's Committee on the Formation of Customary International Law took a fresh look at the formation of Customary International Law in its Final Report on the Statement of Principles Applicable to the Formation of General Customary International Law (London Conference 2000. See [http://www.ila.hq.org/pdf/Customary Law.pdf](http://www.ila.hq.org/pdf/Customary%20Law.pdf) accessed 2008-06-18. See also Simma and Alston "The source of Human Rights Law; custom, *ius cogens* and general principles" 1992 *American Yearbook of International Law* 102 and Van Hoof *Rethinking the Sources of International Law* (1983) 181–183.) Think for instance of how the development of Human Rights Law and Environmental Law have challenged traditional thinking on sovereignty, the requirements for the development of a customary rule and the validity of reservations (Olivier 2007 *SAYIL* 40). New development of legal regimes providing for specialisation exerts tension on existing International Law, which may cause the system to develop or to collapse. When deviations of general law become general and frequent, the unity of law suffers. As stated by the ILC Report (par 246):

"On the one hand, fragmentation does create the danger of conflicting and incompatible rules, principles, rule systems and institutional practices. On the other hand, it reflects the expansion of international legal activity into new fields and the attendant diversification of its objects and techniques."

The proliferation of sub-regimes can be directly linked to an increase in the occurrence of transnational problems and underlines the need for international co-operation. Harmonisation provides a tool for such

co-operation, be it by means of model laws, framework conventions, or interpretative tools in national legislation (Olivier and Boraine "Some aspects of international law in South African cross-border insolvency law" 2005 *CILSA* 388–391). Harmonisation in the enforcement of the provisions of various sub-regimes goes hand in hand with the idea of an emerging global rule of International Law.

3 Globalisation

Globalisation compels states to face the challenge of common problems by means of international co-operation. Increased co-operation inevitably puts sovereignty and national constitutions as supreme national authority under pressure. States now have international standards to answer to. The development of global and regional standards on human rights, the environment, trade, the rule of law and good governance, which by their very nature encroach on state sovereignty, now appear in numerous instruments of the United Nations (UN), the European Union (EU) and the Africa Union (AU) (the Charter of the United Nations, the AU Constitutive Act and constitutive instruments of the European Union provide enabling frameworks in this regard). New legal rules born from fragmentation of previous vague and general rules have now entered the domain of universal norms. There appears to be an inevitable link between globalisation and a universalist approach to law. This challenges traditional thinking on sovereignty and the role of state consent. According to Werner this construction views International Law to be broader than a core of consent based rules, to also include universal values and the interests of the international community as a whole where the role-players are not only states and international organisations (Werner 2007 *Griffen's View* 20). There is currently a detectable trend in international legal debate towards the constitutionalisation of International Law (Cottier and Hertig "The prospects of 21st century constitutionalism" 2003 *Max Planck Yearbook of United Nations Law* 269). The vocabulary of constitutionalism moots the idea that "international law should be regarded as a more encompassing constitutional structure that governs the relationship between a wide variety of subjects" (Werner 2007 *Griffen's View* 20).

The process of constitutionalisation of International Law is illustrated by world-wide processes of increased regional integration. It involves an incremental shift of economic and political power from the exclusive constitutional powers of states to a supra-national body. Regional organisations such as the EU and the AU necessarily undergo a process of constitutionalisation of their own. The process in the EU is marked by the debate surrounding the Treaty Establishing a Constitution for Europe (reprinted in 2004 *Official Journal of the European Union* 2004/C 310/01). Regional organisations adopt instruments prescribing standards of conduct for member states, which aim to harmonise individual legal systems and facilitate close co-operation and economic integration.

Globalisation within the context of the development of universal values, structures and closer regional co-operation has underlined the limitations of the national state, empowering non-state actors, such as individuals and multinational corporations to enter the domain of traditional state

functions (Cottier and Hertig 2003 *Max Planck Yearbook of United Nations Law* 269 on challenging states as exclusive subjects of International Law).

4 Specialised Versus General International Law

In a legal order which is simultaneously becoming more specialised and universally applicable, the need for legal certainty remains important. Bringing different legal systems, both private and international under the same umbrella has the potential to open a Pandora's box. Different systems of law need to be carefully harmonised in order to cater for the needs of a global world, without neglecting the interests of individual states. In the case of the development of specialised branches of law at a trans-national level, the application of general International Law may provide guidance and a solid and consistent foundation for structured fragmentation. As such, treaties, regardless of their subject matter, are governed by the Vienna Convention on the Law of Treaties, state practice by principles of Customary Law and differences of interpretation by the general international rules of interpretation. The ILC identifies the Vienna Convention on the Law of Treaties as providing the unifying framework within which harmonised and orderly fragmentation should take place.

5 Recommendations for Harmonisation

Globalisation and fragmentation of International Law are concepts that cannot be divorced; the one is a consequence of the other. According to Lapaš (2007 *CILSA* 28) fragmentation of International Law should be regarded "as a natural and predictable stage in the evolution of a legal system". It is suggested that the same holds true with regard to the global application of International Law. Because the scope of International Law is widening, areas of specialisation are increasing. This leads to the question: How can International Law contribute to the harmonisation of national law in Africa? The following options, using both tools of international and national law, are suggested:

(a) International tools:

- (i) Model international legislation, such as the Model Law on Cross-Border Insolvency United Nations Commission on International Trade (UNCITRAL) (accepted 1997-05-30), provide a consistent framework for the adoption of national legislation, which may foster co-operation between different jurisdictions;
- (ii) Decisions taken by regional organisations such as the Southern African Development Community (SADC) and the AU on areas of common interest should, if consistently enforced, provide a yardstick for various domestic legal disciplines; and
- (iii) Standard setting regional treaties could likewise act as standard setting documents for various national jurisdictions especially where compliance is monitored at an international level.

(b) National tools:

- (i) In respect of SA, the interpretation clauses of the Constitution of the Republic of South Africa (1996, ss 39 and 233) play a valuable role. They respectively provide for the consideration of

International Human Rights Law in the interpretation of the Bill of Rights and for preference for an interpretation of any legislation consistent with International Law; and

- (ii) The incorporation of international model laws and standard setting treaties into domestic law sets the scene for the alignment of various national legal systems with a fixed international standard.

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Gedagtes oor die Verwysing Van 'n Afleggingsdispuut deur 'n Individuele Werknemer

1 Inleiding

Die onderhawige nota handel oor die vraagstuk waarheen 'n werknemer 'n afleggingsdispuut waarby slegs hy as individu betrokke is, kan verwys – die Arbeidshof of na die Kommissie vir Versoening, Bemiddeling en Arbitrasie (KVBA). Voor 2002 was die posisie dat sodanige dispute slegs na die Arbeidshof verwys kon word.

Gedurende 2002 is die Wet op Arbeidsverhoudinge (66 van 1995 (WAV)) egter gewysig deur die Labour Relations Amendment Act (12 of 2002) om die verwysingsmoontlikhede vir 'n enkele werknemer te vergroot deur 'n verwysing na die KVBA ook onder sekere omstandighede in te sluit. As gevolg van die verwarrende formulering van die betrokke verwysingsbepaling in die WAV, het onsekerheid ingetree. Gedurende 2007 is drie uitsprake gepubliseer waarin die betekenis van die wysiging bespreek word, maar ongelukkig is die verwarring en onsekerheid vergroot en gekompakteer deur dié uitsprake wat andersins ook grootliks onversoenbaar is. Die aandag sal vervolgens kortliks op die uitsprake gevestig word.

2 *Sharief v Alpha Pharm Distributors (Pty) Ltd*

In hierdie uitspraak van die KVBA (sien 2007 28 ILJ 2108 (CCMA)), wat gedurende Mei 2007 gelewer is, is Sharief (S) afgelê nadat slegs hy by 'n konsultasieproses met die werkgewer (A) betrokke was. Die afleggingsdispuut is gedurende Oktober 2006 na die KVBA vir versoening verwys en na die uitreiking van 'n sertifikaat van nie-oplossing van die dispuut, is dit uiteindelik vir arbitrasie gedurende Mei 2007 ter rolle geplaas. Die KVBA se jurisdiksie om die dispuut te arbitreer, is egter bevraagteken en die voorsittende kommissaris is versoek om 'n beslissing oor die aangeleentheid te verskaf. 'n Feitlike probleem in verband met die betrokke aflegging wat uiteindelik 'n belangrike rol in die beslissing van die kommissaris gespeel het, was die feit dat die konsultasieproses met S plaasgevind het slegs nadat die struktuur ingevolge waarvan S afgelê sou word, goedgekeur is.