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# WHY INTERNATIONAL LAW IS LESS EFFICIENT THAN DOMESTIC LEGAL SYSTEMS?

**Abstract:** This essay argues that international public law is less efficient and less culturally adequate than domestic legal systems. There are many reasons for operational deficiencies of international law, such as the impossibility of full cultural adequacy of international law because there are too many and too different cultures on the Globe, and the strategic power game of superpowers that leads to frequent acts of strong states, which disregard the international law without being punished for this. I have focused on a purely legal premise of lower efficiency of international law, however. The very loose structure of sources of international law and the lack of strong enforcement of legal norms are presented as the main reason for the functional weakness of international law and some recommendations are proposed to make this variety of law as strong as necessary in the next stages of globalisation. The more global the scope of problems that humankind is confronted with, the stronger the authority and systemic efficiency of international law should be. At present, unfortunately, it is not culturally adequate and needs comprehensive reform. Without smart and comprehensive reform, international law may become obsolete in times that need its authority much more than any other era in human history.

**Keywords:** sources of law, systemic efficiency of law, cultural adequacy of law. authority of law.

## 1. LEGAL SYSTEM: ITS CULTURAL ADEQUACY AND SYSTEMIC EFFICIENCY

The legal concept that we need to be able to compare efficiency of regulative capacities of international and domestic legal systems should be universal enough to describe what are common and what are specific characteristics of legal systems under study. Common features of legal systems are the following:

- Any law is a system created or recognised by humans for the humans who are present on the relevant territory. Legal systems are the streamlined

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configurations of social facts, such as human interactions which generate the process of emergence of valid norms of conduct[1].

- The groups in power at a given moment may enact the laws by legislative authority within specific states or just recognise some longstanding customs as binding, valid and worthy of being enforced. International law is made by contracts or agreements between at least of two actors.
- The law is a system of rules and principles of conduct. Its fundamental and primary purpose is to regulate modes of conduct of any person or organisation in such a way that facilitates cooperation, or at least reduces the conflict of interests. No single and singular legal rule or principle can regulate the conduct of individuals or organisations.

Only dynamic interactions of valid norms and cooperation of many relevant legal norms in conjunction with facts may have the power and authority to regulate the conduct of any subject under a specific legal system. The system regulates because it is a system and a singular norm that belongs to this system is inefficient without necessary cooperation with many other norms that belong to this system.

Systemic efficiency of international law is less feasible than systemic efficiency of domestic law because of many reasons but the fundamental reason is well known – systemic emergence of social power in the international community is much harder to produce than in conditions of a specific state and its legal system. Normative legal systems are binding on all subjects on equal terms and nobody should be identified as homo sacer, the outlawed person orone that shall not be protected by the law and shall have no rights and duties under this law.

This means that the efficiency of law is a complex matter referring to the cultural adequacy of legal systems and different styles of *executio iuris* in the broad sense. The more adequate is an operating legal system and the higher are its capabilities to adapt to dynamic conditions, the higher could be its capability to regulate behaviours and social processes. Adaptations of legal systems must be flexible and smooth enough to be able to:

- address the pressing social needs of nations and civil societies;
- foster the civilisational development of contemporary societies and cultures;
- serve the interests of the dominant groups without ignoring the interests of non-dominant groups;
- be consistent with the level of development of a society or societies;
- express the values shared by majorities and to protect the values of many minorities living under a legal system;
- reproduce the systemic legitimacy of impersonal norms and principles;

[1] Legal systems as emergent phenomena were presented in my most recent three books – Status prawny i dynamika porządku prawnego, Łódź 2017; Teoria i filozofia prawa: wykłady, Gdynia 2019; Interpretacja prawnicza: omnia sunt interpretanda, Warszawa 2020.

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- not violate cultural identities and traditions that are alive in the social memory of large groups of the people and expressed in morality or the rules practical prudence and common sense;
- be conducive to social and economic development and to expectations about the quality of living in a specific time.

I assume that there can be at least two sets of criteria that could allow us to make a reasonable valuation of regulative efficiency of legal systems defined by the following questions:

- how many subjects under the given legal system obey the rules and principles of this system of regulation? How many of them do what they should do?
- and if they do not obey the law, are they duly punished by any established public authority?

My purpose in this essay is to claim that international law at present is less efficient than many of the domestic legal systems due to the following reasons: a. the very nature of sources of international law, b. impossibility of full cultural adequacy of international law because there are too many and too different cultures on the Globe, and c. the strategic power game of superpowers that leads to frequent acts of strong states which disregard international law without being punished for this. The present essay will focus only on the first reason for the weakness of international law in providing solutions. Let us look at a realist critique of the sources of international public law.

## 2. SOURCES OF INTERNATIONAL PUBLIC LAW AS AN OBSTACLE TO ITS EFFICIENCY

There is a great variety of sources where one can find rules regulating actions of participants in the international system or world order, such as multilateral and bilateral treaties, international customs, general widely recognised principles of law, decisions of national and lower courts and scholarly writings of legal experts of high professional reputation. Article 38(1) of the Statute of the International Court of Justice is generally recognized as a definitive statement of the sources of international law. It requires the Court to apply, among other things, (a) international conventions, whether general or particular, establishing rules expressly recognized by the contesting states; (b) international custom, as evidence of a general practice accepted as law; (c) the general principles of law recognised by civilized nations; (d) subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified of the legal experts of various nations, as subsidiary means for the determination of rules of law.

The sources of international public law are to a lesser degree a system than the sources of domestic law because their hierarchy is less consistent and is

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a subject of ongoing debate in the expert's community[2]. The hierarchy of norms and their sources increases the regulative efficiency of legal systems and contributes to a deeper and clearer interpretation of legal norms and facts of the case under scrutiny. The missing link in this chain of interpretative decisions is a shaky and disputable hierarchy of norms in international law. The second missing component is the lack of interconnections between different types of sources of international law.

### 2.1. TREATIES AND THE *IUS COGENS*

The hardest pieces of international law are multilateral conventions and bilateral treaties which are sometimes regarded as a positive law or at least as an equivalent of positive law enacted in municipal systems nowadays. The preference between sources of international law is given to treaties so the rules established by treaty should take preference if such a valid and relevant treaty exists. But in many cases it does not exist or there are obvious inconsistencies between the multilateral convention and a bilateral treaty that could apply to the facts of the case. If there are two treaties valid and binding, i.e. multilateral and bilateral, it is not clear which one shall take preference. Such a gridlock is extremely rare under domestic law. This kind of missing hierarchy is exacerbated by the fact that international law has no equivalent to a constitutional act of the supreme authority. There is, however, one convention that can be perceived as superior to any other treaty – the obligations under the United Nations Charter override the terms of other treaties (Article 103 of the United Nations Charter).

Above the UN Charter there is something incurably unclear but highly regarded as a supreme set of rules. A peremptory norm, or *ius cogens,* is a principle of international law considered so fundamental that it overrides all other sources of international law, including even the Charter of the United Nations. The principle of *ius cogens* is enshrined in Article 53 of the Vienna Convention on the Law of Treaties: "For the present Convention, a peremptory norm of general international law is a norm accepted and recognised by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character". The trouble is that this regulation presupposes that there exists such a community of States as a whole" or at least that this variety of community is feasible in a foreseeable future. It is doubtful and this presupposition seems to be an effect of the wishful thinking very remote from the real world in which we must live.

The list of *juris cogentis*' rules is not very long, as it includes prohibitions of such crimes and wrongful acts as waging aggressive war, war crimes, crimes

[2] M. Prost, *Hierarchy and the sources of international law: a critique*, (in:) The Oxford handbook on the sources of international law, Jean d'Aspremont Samantha Besson eds., 2017.

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against humanity, piracy, genocide, apartheid, slavery and torture. Respect for fundamental human rights and first of all human dignity and freedom is regarded as *ius cogens* but there is no overall agreement about this matter among legal experts[3].

Another trouble with *ius cogens* is that it remains unclear who may decide about the extension of the catalogue of norms that belong to this supreme category. What we know is that the emergence of a rule of *ius cogens* should be essentially similar to that required to establish the creation of a new rule of customary international law. Therefore, *ius cogens* could be perceived as a special principle of custom with superadded opinions strongly influenced by particular interest of policymakers among the ruling groups in more than 200 states.

The structural shortcoming of the treaties is their limited binding force in comparison to enacted bills or other acts of domestic law. Domestic laws are equally binding for all physical and legal persons who are present on the territory of a given state. Treaties are binding sources of obligations for the parties to them. Contractual obligation cannot be imposed on a state by international treaty without the consent of the subject to it expressed in an act of ratification. Domestic laws impose legal obligations upon its subjects without their consent; this unpleasant truth is taken seriously as a trivial necessity even in liberal democratic states with long and decent traditions of responsive governance. It is more true in totalitarian and authoritarian regimes, that are unfortunately more widespread than democracies. In international law, only the rules of the *ius cogens* have a universal character and apply to all states, irrespective of their wishes and interests.

## 2.2. CUSTOMARY LAW

International customs are binding for all members of the global system but there are only very few multilateral conventions of universal, general applicability all over the Globe. For example, laws on global commons or laws regulating the *ius ad bellum* are universally approved and applicable. Most of the conventions are limited in the scope of their possible application and their effectiveness depends upon the number of states that ratified or acceded to the particular convention. Only a few such conventions have a sufficient number of parties to be regarded as international law in their own right. A universal or near-universal degree of formal acceptance is a rare situation. The Geneva Conventions for the Protection of War Victims of 1949 and the Vienna Convention on the Law of Treaties 1969 are rather exceptions to the rule than a rule itself in this regard.

Many treaties are interpreted as if they were customary law, because some actors have a vested interest in extending their binding power upon non-parties.

[3] V. D. Degan, Sources of international law, Netherlands: Martinus Nijhoff Publishers, 1997.

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Legal security and certainty of law are at risk in such situations and the general efficiency of treaties decreases.

Another practical trouble with a treaty is that as a part of its formal parties there may be some states that accepted the obligations of a treaty to which they are not party (never signed it duly, or signed, but never ratified). Limits to the validity of the treaty are more complex than the above-mentioned uncertainty. The treaty can be regarded as a source of law only when it is capable of affecting non-parties or has consequences for parties more extensive than those specifically required by the treaty itself. Thus, it is never certain if the specific treaty is a *ius cogens* (peremptory law) or not. Therefore, legal rule based on the treaty is to a greater extent created by the interpretation and application than it is in the case in an application of domestic law. It may have an impact on a lower efficiency of international law.

It is far from certain whether international treaties and international customs are sources of international law of equal validity. If we regard them as equally valid, it should mean that new customs may supersede older treaties and new treaties may override older customs. Also, *ius cogens* (peremptory norm) is rather a custom, not a treaty. Customary laws are replaced by enacted laws in domestic legal systems, but in international law many old customs survive for a longer time and make a clear hierarchy of sources almost impossible. Many customs cause a lot of confusion due to the lack of precise wording.

Article 38(1)(b) of the ICJ Statute refers to "international custom" as a source of international law emphasizing the two requirements of state practice plus acceptance of the practice as obligatory or *opinio juris sive necessitatis*. Both requirements are quite confusing and increase the risk of misinterpretation. Shall we regard as the state practice only real deeds of governments, or some words of its diplomats or leaders at the United Nations General Assembly as well? Are words only an expression of *opinio iuris* or are they a specific form of practice? And, if some speeches we can perceive as actions in practice, who should decide what speeches and how performed or by whom are of such weight that we can evaluate them as if they were practical deeds? How common, long-lasting, and consistent some practices must be to be rightly understood as *usus longaevus* that makes a customary law?

For more than 70 years it remains unclear whether official practices of the UN Security Council or The General Assembly may be regarded as an agreeable premise for the emergence of customary law. Debate on consistent practice and opinio iuris have led to one quite reasonable conclusion that both premises are equally important in the emergence of customary law. But this nice certainty is unfortunately not very good news. *Opinio iuris* is of course referring to individual psychology and a reasonable person can ask: what would be less certain than acts of an individual psyche about the validity of some institutional practices?

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## 2.3.GENERAL PRINCIPLES OF LAW

Even more confusion is made by „the general principles of law recognized by civilized nations" recommended as a source of international law by Article 38, paragraph 1(c) of the Statute of the International Court of Justice. Such standards are justified as rational derivations from many domestic legal systems: the standard of restitution for harm committed, the standard of rule understanding, modes of reasoning used for rule struggles, such as "*lex posterior derogat legi priori*", "*lex superior derogat legi inferiori*", and many other, such as: "*audiatur et altera part*", "*actori incumbit onus probandi*", "*pacta sunt servanda*", the principle of good faith, the principle of equity or estoppel. It is notoriously unclear whether general principles of law (sometimes simply principles of jurisprudence) should be recognised as principal or auxiliary sources of international law.

The scope of general principles of law is unclear and controversial. Despite this ongoing controversy, there is a widespread perception of general principles as an interpretative directive to the International Court of Justice to fill any gap in the law by reference to the general principles. There is a certain paradoxical logic in it – the more principles are unclear, the better they will serve the judges in their efforts to fill all gaps in treaties and customs. Even many hard-line legal positivists supported the application of general principles of law, provided that they had in some way been accepted by states as part of the legal system.

## 2.4. JUDICIAL DECISIONS AND SCHOLARLY WRITINGS

What is certain and agreed upon by modern jurisprudence, is that judicial decisions can be regarded as auxiliary sources of international law. Judicial decisions are nothing more than an auxiliary source of international law because there is no rule of *stare decisis* in international public law. The decision of the International Court of Justice in the Hague has no binding force except between the parties and in respect of a particular case. Nobody has a duty of following the pattern of a decision in a specific ruling of the court.

The scholarly works of prominent jurists are not regarded as sources of international law. However, the wisdom of the best legal scholars helps develop the rules that are rooted in treaties, customs, and the general principles of law. This is accepted practice in the interpretation of international law.

## 2.5. SOFT LAW

Another trouble-making source of international law is the soft law, which is based on the agreement between the states. It seems to be a variety of a strong recommendations, similar to *ius dispositivum* in municipal law; it is not binding but is valid, it is not a compelling reason for obedience and does not impose obligations, but rather a mutual promise that agreed action will be undertaken in

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a good faith. It is normativity, but less than commitment. Its legal force is undefined but real, this force is more than a mere possibility. Soft law is legally significant and relevant, but is unable to impose binding obligations on participants to the process of its emergence.

Soft law is not created as treaties, but rather is an emanation or emergence than the final product of the political will. Soft law „emerges", confirming the theory of emergent legal systems and legal orders. The subjects of international law in the third decade of the XXI century are not just states as it was in 1945, as many new highly motivated and powerful actors have emerged, such as international organisations, worldwide NGO's and multinationals. What is an even more relevant argument against the formalistic tradition of sources of international law, is a well-known fact that the practice of hundreds of new subjects is constantly changing realities and thus makes fertile ground for the spontaneous surfacing of the soft law.

## 3. CONCLUSIONS AND RECOMMENDATIONS

A semi-chaotic and non-systemic picture of the set of sources of international law may seem to be pessimist and perhaps somewhat exaggerated. It is made, however, with an intention that we, the lawyers, should do much more for better ordering these sources and therefore increase the systemic efficiency of international law. Global problems of humankind are serious enough and they cannot be solved just by the power games of politicians, competition among big corporations, and innovative ideas of technology designers.

International law must adapt faster to challenges and genuine global threats to preserve its regulative efficiency and innovation capacity in the future. The dignity of international law depends on broadening the traditional list of its sources. There is urgent need to prepare multilateral conventions on global epidemic diseases, natural disasters and the military use of drones. Better organised and more efficient international law may become a tool in humanistic social engineering on a global scale. I do not accept the approval of the present disorder in the sources of international law advocated by Jean d'Aspremont, despite the fact that I have learnt a lot from his works.

More efforts should be devoted to the ideas and projects of the constitution for the human community on the Globe which should clearly define what is *ius cogens* (human rights of all generations, many segments of space law for example), and what is soft law and how to apply it to the spontaneous or even chaotic dynamism of facts[4]. Real facts must compete with fake facts. Legal norms may help to make a proper distinction between the real, the virtual, and the

[4] T. Widłak, From international society to the international community. The constitutional evolution of international law, Gdansk 2015.

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fake. Global law may help our efforts in improving the quality of human knowledge.

The new concepts of the sovereign state, such as shared sovereignty or limited sovereignty, should be regarded seriously while interpreting and implementing all sources of international law and all relevant facts of the cases. Rules and institutions are instrumental to the practical application of fundamental values, such as peace, security, justice, and freedom. Rule of law in the global system exists only in rudimentary forms. International law must get stronger to make the rule of law a public global good.

The dignity of human beings demands stronger, more efficient and better legitimised international law. Scholars and politicians must build together a new tradition of the discourse on global problems. The theory of formalism in legal science should be re-evaluated against the backdrop of the growing acceptance by international legal theorists of the blurring of the lines between law and non-law, by opening the law to the rules of morality, practical prudence and common sense.

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