Fragmentation in International Law and Governance: Understanding the Sum of the Parts

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Introduction: International Law in a Global World

Professor A.H.A. Soons, this volume’s honoree, has asked us to examine the broad question of “What is wrong with international law?” This essay will examine the possibility that there is less wrong with international law, than there is a gap in understanding how international law is made and functions. This has normative implications as existing structures of governance – public authorities, international institutions, corporations – struggle to respond to new issues and to increased demands for accountability and performance. A further struggle exists to maintain some kind of system-wide coherence as activity in specialized areas like human rights or environmental protection intensifies. This has emerged from a governing environment that moved to solve immediate problems through “strategic interactions among entities that are not arranged in formal hierarchies” and “wield power and make rules [but] are often not authorized to do so by general agreement.”

On the eve of the millennium in 2000, UN Secretary-General Kofi Annan wrote that

[W]hile the post-war multilateral system made it possible for the new globalization to emerge and flourish, globalization, in turn, has progressively rendered its designs antiquated. Simply put, our post-war institutions were built for an inter-national world, but we now live in a global world.

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1 Portions of this essay are adapted from C. Ku, *International Law, International Relations, and Global Governance* (Routledge, Abingdon, UK: 2012).
The same might be said of international law as a legal system. The present institutions and structures of global order, including law, developed in response to specific international needs. They have generated new capacities and demands that in turn have changed the political and legal landscape within which law now operates by producing new global governing institutions, norms, structures, partnerships, and relationships.

**Thickening Globalization and State Authority**

The globalized governing environment is an open and participatory one. It is also one where authority is diffused and challenged from many directions. Hierarchies are becoming flatter not only in government, but throughout the private sector in corporate and other non-state entities. Law and regulated behavior now develop through networks and social movements rather than exclusively through institutions or governments. These interactions create denser and denser political and normative connections between the local and the global, the individual and the institutional, and the national and the transnational, but not necessarily in a linear or hierarchical way. As diverse forces add capacity and depth to international norms, global politics enriches international law. But these forces have also created confusion as to the authority or content of a norm, with potentially negative consequences for legal order and governance in the near term.

International law is now called upon to address multi-dimensional, multi-sector, and multi-level issues like sustainable development, environmental protection, and the economic and general well-being of individuals. This requires a specialization and focus that have raised questions in the international law community about the ongoing coherence of international law as a legal system. See, for example, the International Law Commission's report on the fragmentation of international law.\(^4\) This fragmentation is further exacerbated by the emergence of an increasingly complex global political environment where authoritative international action may come from sub-national or private entities. The relationship between international, national, and sub-national legal systems is also becoming less of a hierarchical relationship and more of a partnership among systems that connect with each other to give life

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