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INTERNATIONAL LEGAL THEORY

Standardization: A Dynamic and Procedural Conceptualization of International Law-Making

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Abstract

The paper analyses the dynamic procedures that work during the formation of international law in international organizations and conventional frameworks. These procedures organize and structure the interactive exercise of the normative function by law-creating bodies and law-applying bodies. The paper conceives of this 'way' of making international law as a law-making method that the concept of standardization helps to understand. Grounded in Aristotelian dialectic logic, standardization indeed conceptualizes the dialogic and procedural law-making that works for normative coherence in contexts characterized by co-operation and the heterogeneity of interests. Introducing this concept, the paper insists on the fact that it is the procedural nature of the dialogue that is crucial to reach normative coherence. Drawing on the consequences of standardization, and regarding dynamic procedures, it reappraises the status and the importance of both the different sources of international law and the different participants to international law-making. Also, the paper points out the predominance of normative coherence, as well as that of its 'guarantor', namely procedure that its author considers the cornerstone of legal certainty in the co-operative context of the international society.

Key words

coherence; dynamism; formalism; law-making; non-state actors; procedure; sources; standardization

Introduction

Since the middle of the twentieth century, international law-making has been characterized by the diversification of its authorship, the multiplication of its instruments, and, more generally, the increasing complexity and lengthening of its processes. Faced with this reality, international lawyers are equipped with and torn by two main conceptual frameworks to think of these phenomena.

The first relates to a positivist tradition that understands the making of international law in terms of formal sources. In a nutshell, all the proponents

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of this school of thought, beyond their differences, focus on instruments enshrining international norms.[1] This approach constitutes the basis of the traditional theory of the sources of international law. As for the second conceptual framework, it refers to schools of thought that, taking stock of the 'processual' dimension of the making of international law, emphasize its dynamism and set aside formalism – nowadays, the 'New Haven'[2] and the 'International Legal Process'[3] schools illustrate such a 'processual' understanding of international law-making. These positivists and 'processual' schools of thought embody two irreconcilable extremes inasmuch as the source-based approach of the former is formal and static while the process-based approach of the latter is informal and dynamic.[4]

The aim of this paper is not to reconcile these schools, but rather to reconcile their underlying paradigms, namely formalism and dynamism. It argues that international lawyers do not necessarily have to choose between formalism and dynamism to conceptualize the contemporary making of international law.[5] Three lines of argumentation support this statement.

First, from a conceptual point of view, one has to realize that formal sources are not the only embodiments of formalism. Indeed, one can also have a procedural approach to formalism – a proceduralism that is in no way incompatible with dynamism. Procedures are not immobilizing strangleholds, but synchronic and

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1 As explained by Roberto Ago in reference to Bergbohm: 'For legal positivists, positive law must be defined as created law. Positive quality is conferred on a legal rule by the fact that it derives its existence from an act of creation which took place in history and may be perceived objectively'; R. Ago, 'Positivism', in R. Bernhardt (ed.), *Encyclopedia of Public International Law*, Vol. 7 (1984), 385, at 385; see C. Bergbohm, *Staatsverträge und Gesetze als Quellen des Völkerrechts* (1832). R. Ago's article provides a complete overview of legal positivism. Among an abundant literature, see, in particular, D. Anzilotti, *Cours de droit international* (1929); G. Jellinek, *Allgemeine Staatslehre* (1922); H. Triepel, *Völkerrecht und Landesrecht* (1899); A. Verdross, *Die Verfassung der Völkerrechtsgemeinschaft* (1899). Regarding customary law and its informal nature, legal positivists have to use legal fictions to justify its categorization as a formal source; see P.-M. Dupuy, *Droit international public* (2008), 345.

2 The proponents of the 'New Haven' school conceive of international law as an informal process of authoritative decisions regarding the choice and the realization of policy goals. While doing so, they neglect the instruments providing international rules. For an analysis of this school of thought, see, in particular, M. MacDougal, 'International Law, Power, Policy: A Contemporary Perspective', (1953/I) 82 RCADI 137; M. McDougal and H. Lasswell, 'The Identification and Appraisal of Diverse Systems of Public Order', in R. Falk and S. Mendlovitz (eds.), *The Strategy of World Order: International Law* (1966), 45; M. McDougal and W. M. Reisman, *International Law in Contemporary Perspective* (1980); W. M. Reisman, 'International Lawmaking: A Process of Communication', (1981) 86 PASIL 101.

3 As explained by Mary E. O'Connell: 'International legal process emphasizes understanding how international law works. It concentrates not so much on the exposition of rules and their content as on how international legal rules are actually used by the makers of foreign policy.' In relation to the promoter of the 'New International Legal Process' school, Harold H. Koh, she explains that 'Koh's own work has both described the "dynamic", "non-traditional", and "non-statist" processes of international law and mentioned the normativity of these processes'; M. E. O'Connell, 'New International Legal Process', (1999) 93 AJIL 334, at 334, 338; see H. H. Koh, 'Transnational Legal Process', (1996) 75 *Nebraska Law Review* 181.

4 Even though the distinction between international law-making and international law is sometimes difficult to make, this paper focuses, as mentioned in the introduction, on the former. Therefore, here, the conceptual frameworks that help to understand the making of international law and not those that are dedicated to the thinking of international law as such are targeted. Regarding international law, there exist also conceptual tensions, e.g., between 'instrumentalism' and 'formalism'; see M. Koskenniemi, 'What Is International Law For?', in M. Evans (ed.), *International Law* (2010), 32.

5 For a similar argument regarding the theory of subjects, see J. d'Aspremont, 'Non-State Actors in International Law: Oscillating between Concepts and Dynamics', in J. d'Aspremont (ed.), *Participants in the International Legal System: Multiple Perspectives on Non-State Actors in International Law* (2011), 1.

diachronic vectors of dynamism. This brings one to the second series of arguments. From a descriptive point of view, it appears that, in international organizations (IOs) and conventional frameworks, an increasing number of procedures organize the interactive exercise of the normative function by law-creating and law-applying bodies. This interactivity embodies the dynamic nature of international law-making while the procedure that structures this interactivity guarantees its formalism. This leads to the third reason why dynamism and formalism are not antagonistic in the understanding of current international law-making. In the context of an international society characterized by increasing co-operation, this paper argues, from a normative point of view, that the dynamic and dialogic dimension of law-making calls for an improvement in existing dynamic procedures and, more generally, for a proceduralization of existing law-making processes. It is so precisely because, in this co-operative context on the international plane, procedure is the cornerstone of legal certainty more than norms characterized by relativity. In that sense, contrary to the above-mentioned schools of thought, which think the making of international law under the aegis of process, the author of this paper promotes the procedural paradigm.

Arguing and promoting this, it is important to make two epistemological remarks at this early stage, the first relating to academic deontology and the second to the train of academic thought. As for the former, the author of this paper believes that any attempt in legal theory necessarily involves (and requires) a normative bias. Legal theory is indeed, in essence, reflexive. In light of the legal reality that it can only simplify, legal theory realizes a self-analysis of law on its foundations and basis, so as to redefine them. As explained by Chaïm Perelman, this normativity can be criticized as being more ideological than scientific.[6] As a matter of fact, as scientifically rigorous and honest as legal theorists endeavour to be, they cannot completely dispose of 'ideology'. This should not be criticized as deontological misconduct, but rather accepted as a component of scholarly thought so that this subjective element in scientific research can be better taken into account and controlled. For that reason, one can only concur with Niklas Luhmann that legal theory has to be viewed as a *praxis*.[7] Legal theorists have to explain law as such and also explain themselves in contact with their object of research. Embracing this conception of legal theory, the author of this paper explains at the outset that the analysis of its object of research, namely dynamic and procedural international law-making, is viewed through the lens of proceduralism that is believed to be best suited to the thinking of international law-making in contemporary international society. This stems from the conviction that procedure is the cornerstone of legal certainty in societies characterized by the equality between their members and the heterogeneity of their interests, which decide, however, to live in a co-operative environment rather than in a conflictual one.

This practical understanding of legal theory brings one to the second epistemological remark: the train of academic thought. Thinking can be described as a

6 See C. Perelman, *Ethique et droit* (1990), 742.
7 See N. Luhmann, *La légitimation par la procédure* (2001), XXIV.

'hermeneutic circle' made of three stages that are repeated. In the first stage, the subject envisages an object of research through her/his conceptual lens and this is precisely the lens that shapes the object at this stage. At the second stage of the circle, he/she tries to know and understand better this object of research. During the third stage, this effort results in a modification of the object and thereby of the subject.[8] Thought is a continuum whose train can only be progressive. With that understanding, it is impossible to anticipate the output of coming hermeneutic circles and any conceptualization has to follow the pace of thought. In that temporal context, there is no claim here to provide a definitive theory answering all the questions that it raises in particular regarding the concept of (international) law. These questions were raised only after hermeneutic circles had been completed regarding the object of research, which is (international) law-making. While our current research investigates the issues regarding (international) law as such, the present paper focuses on the dynamic and procedural feature of international law-making that the concept of standardization allows one to understand.

In order to introduce and analyse this concept of standardization in relation to international law-making, the paper answers three questions: Where? What? So?

As for the question 'Where?', the paper first provides an institutional contextualization of the dynamic procedures in the international legal order. Based on the analysis of an archetypal co-operative society whose law-making is characterized by dialogism, it reveals the existence of the dynamic procedures that flourish in co-operative arenas, be they IOs or conventional frameworks (section 1). Then, the paper answers the question 'What?' by focusing on the concept of standardization as such. Thereby it provides a conceptual framework, based on Aristotelian dialectic logic, to understand the above-mentioned dynamic procedures (section 2). In relation to this, the paper finally turns to the question 'So?'. It draws out the consequences of the dynamic and procedural conceptualization embodied by standardization regarding international law-making. For that purpose, it revisits both the theory of the sources of international law and the issue of the participants to international law-making. Furthermore, the paper draws attention to the predominance of normative coherence in the thinking of international law-making (section 3).

1. The context of standardization: international co-operative society

A society and its legal order are coexistent. The legal order provides the organization without which a society would not exist.[9] Under this societal understanding of the nature of the legal order, its structure, namely the secondary rules[10] that organize

[8] See J. Ladrière, *L'articulation du sens: Discours scientifique et parole de la foi*, Vol. 1 (1970), 96.

[9] 'Le droit avant d'être norme, avant d'avoir trait à un ou plusieurs rapports sociaux, est organisation, structure, attitude de la société même dans laquelle il est en vigueur et qui par lui s'érige en unité, en un être existant par soi-même'; see S. Romano, *L'ordre juridique* (1975), 19.

[10] For an analysis of secondary rules, see H. L. A. Hart, *The Concept of Law* (1997), 94.

its functioning, are marked by the features of society.[11] As for international society, one is faced with its contemporary 'schizophrenia' and thereby with the ambivalent plurality of its law-making methods.[12] This synchronic schizophrenia is the product of a diachronic evolution, of a progressive balancing[13] throughout the twentieth century between 'coexistence' and 'co-operation'.[14] Even if it goes without saying that, from a synchronic point of view, the international legal order presents, at any given time and in variable proportions, coexistent and co-operative features,[15] it remains that the coexistent paradigm was predominant until 1945 while the co-operative paradigm has gained increasing importance since then. This postwar international legal order being therefore typical of the co-operative context in which the dynamic procedures here under scrutiny are at work, this section uses it to set up an archetype of the co-operative international society (hereafter, 'the co-operative international society') and thereby to contextualize these dynamic procedures.

To do so, it first studies the features of the co-operative international society that impact on its legal order (subsection 1.1). This section then highlights the dialogic nature of international law-making in this society (subsection 1.2). Finally, it analyses the dynamic procedures that contribute to the making of international law in co-operative arenas and thereby reveal a dialogic law-making that is not 'processual', but procedural (subsection 1.3).

1.1. An intersubjective collaborative society

The international co-operative society can be depicted, in a Pascalian way, as a society in which states are 'embarked'. Admittedly, they are not embarked on the same boat, but they are on the same sea, whose same resources they share while facing the same storms. Their independence depends on their interdependence. In other words, it is because they realize that they are linked by a community of interests that is also individually in their best interests that states take to the sea of the

[11] For a similar conceptualization of the legal order, see G. Abi-Saab, 'General Course of Public International Law', (1987/VII) 207 RCADI 15, at 19, 31.

[12] In that sense, R.-J. Dupuy argues that there exist two categories of rules in the international legal order, different in nature and belonging to the '*droit relationnel*' and the '*droit institutionnel*'; see R.-J. Dupuy, *Communauté internationale et disparités de développement*, 'General Course of Public International Law', (1979/III) 165 RCADI 9, at 46.

[13] In opposition, P. Weil argues that 'Despite the profound transformations that international society has undergone, especially since the end of the Second World War, the functions of international law have remained what they have always been since the outset, and there could be no greater error than to contrast "modern" or "present-day" international law with "classic" international law in this respect'; P. Weil, 'Towards Relative Normativity in International Law', (1983) 77 AJIL 413, at 419.

[14] It is the Permanent Court of International Justice (PCIJ) which referred to the duality of objectives pursued by states that intend 'to regulate the relations between these co-existing independent communities or with a view to the achievement of common aims', *Lotus Case (France v. Turkey)*, Judgment, PCIJ Rep., (7 November 2007) Series A No. 10, at 18. As argued by W. Friedmann, who uses the two paradigms of 'coexistence' and 'co-operation' to characterize not only the subject matters regulated by international law, but also the modalities of the formation of international law; see W. Friedmann, 'General Course of Public International Law', (1969/II) 127 RCADI 39, at 47–224.

[15] In that sense, see the geological (rather than temporal) approach promoted by J. H. H. Weiler to describe and analyse the international legal system; J. H. H. Weiler, 'The Genealogy of International Law: Governance, Democracy and Legitimacy', (2004) 64 *Zeitschrift für ausländliches öffenliches Recht und Völkerrecht* 547.

international community, so often referred to in international documents.[16] These common interests are particularly related to the increasing protection of human rights,[17] of cultural and natural[18] heritage, and of the environment, be it natural or economic.[19] It does not mean that this community of interests replaces the self-oriented interests of states, nor that it does not meet the reluctance of states. But this reluctance, even though it may be challenging, does not threaten the existence of the community and of the co-operative 'behaviour' of states.[20]

In the international co-operative society, co-operation does not involve any integration. International society is horizontal. But, if one may say so, while states individually constitute the pillars of this society, they collectively form a collaborative pediment. Admittedly, this pediment remains horizontal, but it is higher than its pillars. Even though multilateral diplomacy is a general phenomenon, this inter-state collaboration mainly takes place in IOs.[21] These organizations, which involve private entities in their activities,[22] are the cornerstones of this intersubjective collaboration and they play an important role in meeting the needs of international life.[23]

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16 Beyond the United Nations General Assembly (UNGA) resolutions, particularly the Declaration on the Principles of International Law Concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations, one can mention, for instance, Art. 53 of the Vienna Convention on the Law of Treaties referring to 'the international community as a whole' or the *Barcelona Traction* case in which the ICJ refers to the obligations of a state towards the international community as a whole; see, respectively, Declaration on the Principles of International Law Concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations, Res. 2625(XXV) (1970); 1969 Vienna Convention on the Law of Treaties, 1155 UNTS 331; *Barcelona Traction Light and Power Company, Limited (Belgium v. Spain)*, Judgment of 5 February 1979, [1979] ICJ Rep. 3, at 32, para. 33.

17 See, in particular, on the international plane, UNGA, the Universal Declaration of Human Rights, Res. 217A(III) (1948); 1966 International Covenant on Civil and Political Rights, (1967) 6 ILM 368; 1966 International Covenant on Economic, Social and Cultural Rights, (1967) 6 ILM 360.

18 See, e.g., 1972 Convention Concerning the Protection of the World Cultural and Natural Heritage, 1037 UNTS 151; 1972 Agreement Governing the Activities of States on the Moon and Other Celestial Bodies, 1363 UNTS 3; 1982 Convention on the Law of the Sea, 1833 UNTS 396.

19 In support of this 'common-interest' approach to these issues, see, in particular, J. d'Aspremont, 'The Foundations of the International Legal Order', (2007) 18 *Finnish Yearbook of International Law* 219; Y. Onuma, 'In Quest of Intercivilizational Human Rights: "Universal" vs. "Relative"', (2000) 1 *Asia-Pacific Journal on Human Rights and Law* 53. Some of these issues, particularly human rights, are considered by a number of scholars as universal values; among an abundant literature, see, in particular, B. Simma, 'From Bilateralism to Community Interest', (1994-VI) 250 RCADI 217; C. Tomuschat, *International Law: Ensuring the Survival of Mankind on the Eve of a New Century*, 'General Course of Public International Law', (1999) 281 RCADI 9; E. de Wet, 'The Emergence of International and Regional Value Systems as a Manifestation of the Emerging International Constitutional Order', (2006) 19 LJIL 611. For an attempt to reconcile these two opposite views, see J. G. van Mullingen, 'Global Constitutionalism and the Objective Purport of the International Legal Order', (2011) 24 LJIL 277.

20 For reference to the behaviour of societies, see Romano, *supra* note 9.

21 Beyond the issue of the inter-state collaboration *within* IOs that this section analyses, the questions raised by the relations between IOs are addressed below; see subsection 3.3, *infra*.

22 For a discussion of the role of private entities in international law-making, see subsection 3.2, *infra*.

23 'The subjects of law in any legal system are not necessarily identical in their nature or in the extent of their rights, and their nature depends upon the needs of the community. Throughout its history, the development of international law has been influenced by the requirements of international life, and the progressive increase in the collective activities of States has already given rise to instances of action upon the international plane by certain entities which are not State'; *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion of 11 April 1949, [1949] ICJ Rep. 174, at 178.

The multiplication of these needs explains that, in terms of *negotium*,[24] the scope of international law extends. As noted by Pierre-Marie Dupuy referring to an 'international normative cover':

> States almost constantly define, plan or regulate their terms of cooperation in the most varied domains . . .. The time is gone when international law was just the instrument of a diplomacy limited to the negotiation of war alliances or peace conferences.[25]

Given this variety, co-operative international law is characterized by the diversification of international normativity, from imperativeness[26] to softness.[27] It is not a symptom of weakness.[28] International law only provides the international co-operative society with the normative techniques necessary to its blossoming and durability. So does an international law-making characterized by dialogue.

1.2. A dialogic international law-making

As a principle, states are sovereign and autonomous in the international co-operative society. This implies that their consent is predominant in particular with respect to their commitment to co-operate. In the same vein, this voluntary co-operation does not result in a transfer of sovereignty except for integrated IOs. It remains that states are not totally autonomous in the co-operative society inasmuch as the expression of their interests is 'channelled' and rationalized by the co-operative arenas in the activities in which they participate voluntarily. Of course, states involved in co-operation can synchronically resist the realization of the collective interest pursued in a given arena for the sake of their own interests. But the essence and the secondary rules of the legal order leave them no choice but to keep on discussing to overcome their disagreements. Indeed, as highlighted by Georges Abi-Saab:

> Within an international community encompassing the whole humanity – the latter being considered neither as a philosophical proposition nor a distant horizon . . . but as a near, more tangible reality . . . the world being closed in an 'earthly city' does not admit any escape. It leaves us on a planetary stage facing each other in camera, where hell and the enemy is not other people, but the other inside myself who rises against ourselves.[29]

In that context, dialogue constitutes the 'driving principle' of the co-operative international society. States' decision-making power is not an absolute authority that would end disputes. Admittedly, it can freeze co-operation, slow it down, but it is unable to annihilate it. Co-ordination is a diachronic continuum wherein all the wills, the best and the most reluctant, work together. It is made of a succession of dialogues leading or not to more or less satisfactory agreements, but constituting the basis of upcoming discussions. This co-operation takes place mainly within

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[24] The term *negotium* refers to the normative substance of legal rules. From this *negotium*, one distinguishes the *instrumentum*, which relates to the instrument that contains legal rules, e.g., a treaty.

[25] Dupuy, *supra* note 1, at 387 (translation provided).

[26] See, in particular, the Vienna Convention on the Law of Treaties, *supra* note 16, Art. 53.

[27] For an analysis of 'soft law', see sub-subsection 1.3.2, *infra*.

[28] See Weil, *supra* note 13, at 414–15.

[29] G. Abi-Saab, '"Humanité" et "communauté internationale" dans la dialectique du droit international', in R.-J. Dupuy (ed.), *Humanité et droit international – Mélanges René-Jean Dupuy* (1991), at 11 (translation provided).

co-operative arenas, be they formal or informal, in which it constitutes, to paraphrase Churchill's take on democracy, the worst form of governance with the exception of all others.[30]

As illustrated by the development of multilateral normative diplomacy, this dialogic and dynamic ethos animates the formation of international law in the co-operative international society. This formation is not driven by the conflict between the foreign policies of states, but by what has been termed a *politique juridique* ('legal policy').[31] This *politique juridique*, which aims at channelling the interests of states without annihilating them, operates in IOs and other co-operative arenas.[32] In relation to the latter, one witnesses their institutionalization and the subsequent proceduralization of their law-making processes. In that context, one can notice that, in a number of IOs and conventional frameworks, the making of international law does not consist of ordinary processes or single procedures leading to the adoption of treaties or resolutions, but of interactive procedures forming part of a law-making procedure. This brings the paper to the technical analysis of the dynamic procedures that standardization helps to conceptualize.

1.3. A dynamic and procedural international law-making

In IOs and conventional frameworks, procedures of law creation and procedures of law application play an interactive role in the formation of international law. This interactivity relies upon two 'nexus'. The first is procedural in the sense that IO charters or conventional frameworks' regulations organize the procedural interactive relations between these procedures (sub-subsection 1.3.1).[33] The second is substantive inasmuch as international-law rules formed in co-operative international frameworks are characterized by a 'vagueness' that requires a collaboration between procedures of law creation and procedures of law application (sub-subsection 1.3.2).

1.3.1. The 'procedural nexus' between law creation and law application

In international co-operative frameworks, law creation is characterized by its procedural nature. This is certainly true in IOs, but also in conventional frameworks that develop procedures similar to those at work in the former. These procedures aim at rationalizing as much as possible[34] the expression of individual interests

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30 W. Churchill, Speech at the House of Commons, 11 November 1947, (1947) 444 *The Official Report, House of Commons* 206.

31 See R. Kolb, *Interprétation et création du droit international: Esquisses d'herméneutique juridique moderne pour le droit international* (2006), 91.

32 For the analysis of the normativity of IO output, see subsection 1.3, *infra*.

33 To illustrate the interactive procedure that standardization conceptualizes, one can usefully refer to procedures in force in the United Nations Educational, Scientific and Cultural Organization (UNESCO). See, in particular, 1945 Constitution of the United Nations Educational, Scientific and Cultural Organization (hereafter, 'UNESCO Charter'), UNESCO, *Basic Texts* (2010), 5; Rules of Procedure concerning recommendations to member states and international conventions covered by the terms of Art. IV, para. 4 of the Constitution (hereafter, 'UNESCO Rules of Procedure'), 5 C/Res. 133–134, 7 C/Res. 109, 17 C/Res. 114, 25 C/Res. 194, 32 C/Res. 95, UNESCO, *Basic Texts* (2010), 111.

34 As illustrated by the tendency of states to group together in light of their interests and by the technique of 'package deal', the rationalization does not equal the annihilation of states' interest's expression. See, in particular, R. Y. Jennings, 'Law Making and Package Deal', in *Mélanges offerts à Paul Reuter: Le droit international: Unité et diversité* (1981), 347; S. Lee, 'Multilateral Treaty-Making and Negotiation Techniques: An Appraisal',

of member states so as to promote the collective interest (or interests) pursued by the framework.[35] In this respect, one should emphasize the fact that, beyond the question of the normativity of treaties and resolutions, as discussed subsequently,[36] the procedures of creation of treaties are analogous to the procedures of creation of non-binding resolutions.[37] The United Nations Educational, Scientific and Cultural Organization (UNESCO) provides an example of this. As for the preparation of conventions and recommendations,[38] it has four almost identical stages: the inclusion in the agenda of the General Conference of proposals, the procedure for the first discussion by the General Conference, the preparation of drafts to be submitted to the General Conference for consideration and adoption, and the procedure of consideration of drafts by the General Conference.[39] Concerning the voting, even though conventions are adopted by a vote of two-thirds and recommendations by simple majority,[40] the authentication of both is made by the president of the General Assembly[41] and, for both, he/she has to remind member states, when communicating the certified copy, that they must submit conventions and recommendations to the competent national authorities.[42]

Beyond this similarity, procedures of law creation are in many of these frameworks articulated with *compulsory and/or systematic* monitoring procedures.[43] It is important to highlight that it is this compulsory and systematic dimension that forms the procedural nexus. The notion of monitoring is here understood in a broad sense, covering dispute-settlement procedures (judicial procedures) and follow-up mechanisms (quasi-judicial procedures). One does not mean that these procedures are equal in nature, even though one witnesses 'jurisdictionalization of the latter',[44]

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in B. Cheng and E. D. Brown (eds.), *Contemporary Problems of International Law: Essays in Honour of Georg Schwarzenberger on His Eightieth Birthday* (1988), 157.

35 E.g., Art. 1 of the UNESCO Charter ('Purposes and Functions') provides that, to contribute to peace and security, the organization will: '(a) Collaborate in the work of advancing the mutual knowledge and understanding of peoples through all means of mass communication . . . (b) [g]ive fresh impulse to popular education and to the spread of culture . . . (c) [m]aintain, increase and diffuse knowledge'; see UNESCO Charter, *supra* note 33.

36 See sub-subsection 1.3.2, *infra*.

37 In that sense, see, in particular, P. Daillier, M. Forteau, and A. Pellet, *Droit international public* (2009), 190.

38 Art. 1 ('Scope of the Present Rules of Procedure') of the UNESCO Rules of Procedure defined the recommendations as the instruments 'in which the General Conference formulates principles and norms for the international regulation of any particular question'; see UNESCO Rules of Procedure, *supra* note 33. The preparation of non-normative resolutions obeys a procedure that is analogous but simplified. For a description of this procedure, see the multi-stage procedure for the elaboration, examination, adoption, and follow-up of declarations, charters, and similar-setting instruments adopted by the General Conference and not covered by the rules of procedure concerning recommendations to member states and international conventions covered by the terms of Art. IV of the Constitution, 33/C Res. 141, UNESCO, *Basic Texts*, *supra* note 33, at 117.

39 For an analysis of this procedure of elaboration, see A. A. Yusuf, 'Pratiques et procédures en vigueur à l'UNESCO pour l'élaboration des instruments normatifs', in A. A. Yusuf (ed.), *Standard-Setting in UNESCO, Vol. 1: Normative Action in Education, Science and Culture* (2007), 31.

40 In case a convention is adopted only by a vote of a simple majority, the General Conference can decide to transform the project into a recommendation; see UNESCO Rules of Procedure, *supra* note 33, Art. 13.

41 Ibid., Art. 14.

42 UNESCO Charter, *supra* note 33, Art. IV(4); ibid., Art. 16.

43 In UNESCO, the monitoring is organized every four years. One can mention that, apart from the fact that reports concerning conventions are prepared by states and those concerning recommendations by the Secretariat, the procedure of conventions and recommendations monitoring is identical; see UNESCO Charter, *supra* note 33, Art. IV(6); UNESCO Rules of Procedure, *supra* note 33, Arts. 17, 18.

44 In that sense, see, in particular, Dupuy, *supra* note 1, at 560.

or that they are equally efficient in terms of monitoring. But it appears that, while controlling the application of conventions or resolutions by states, they all contribute to the formation of international law. In a nutshell, by analysing states' conduct in a contentious or non-contentious way,[45] they make clear which practices are normatively coherent and compatible with the generally vague rules[46] at stake and, further, with the collective interest (or interests) of the co-operative framework. Thereby, they realize a concretization of rules, the product of which can become a form of *jurisprudences constantes*.[47] Thus, this interactivity is not linear, but retroactive. Another dimension of this retroactivity, procedurally organized, lies in the fact that the charters of IOs and the regulations of conventional frameworks organize the control of law-application bodies by the law-creation bodies. This is illustrated by the WTO Marrakech Agreements, which give the final interpretative 'word' to the Ministerial Conference and the General Council.[48] This assessment may lead to the validation of the normative developments realized by the law-applying body[49] or, on the contrary, to its setting aside. It is this procedural dialogue between the bodies of IOs and conventional frameworks that carries out the formation of international law in these co-operative frameworks. This procedural dialogue is here reinforced and required by the normativity that characterizes these frameworks.

1.3.2. The 'substantive nexus' between law creation and law application

The rules used in the co-operative frameworks here analysed are characterized by a vagueness[50] that seals the procedural nexus between law-creation and law-

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45 As noted by G. J. H. van Hoof: 'As a result of the configuration of the international society the functions of international supervisory bodies are often not limited to supervision *stricto sensu*, i.e. review and correction. Not seldom measures of the international "legislator" are very vague and/or abstract. In many cases they contain only broad directives with regard to the subject-matter to be regulated. Such directives need to be clarified or elaborated into more specific norms before they can be applied in practice. With respect to review, too, this clarification or elaboration is necessary, because review – and consequently correction – cannot be effective if the norm which must be used as a standard is too abstract or vague'; G. J. H. van Hoof, *Rethinking the Sources of International Law* (1983), 261; see also A. von Bogdandy and I. Venzke, 'Beyond Dispute: International Judicial Institutions as Lawmakers', (2011) 12 *German Law Journal* 979.

46 See sub-subsection 1.3.2, *infra*.

47 In relation to this phenomenon, see, in particular, G. Guillaume, 'The Use of Precedents by International Judges and Arbitrators', (2011) 2 *Journal of International Dispute Settlement* 5; M. Jacob, 'Precedents: Lawmaking through International Adjudication', (2011) 12 *German Law Journal* 1005.

48 Art. IX(2) provides that: 'The Ministerial Conference and the General Council shall have the exclusive authority to adopt interpretations of this Agreement and of the Multilateral Trade Agreement', 1994 Marrakesh Agreement Establishing the World Trade Organization.

49 In that sense, the Organization for Economic Cooperation and Development notes that the peer-review system creates a 'dialogue [qui] peut à son tour servir de base à un renforcement de la coopération, à travers par exemple l'adoption de nouveaux principes directeurs et recommandations, voire la négociation d'instruments juridiques'; 'L'examen par les pairs: un instrument de coopération et de changement'; *L'Observateur de l'OCDE* (2007), 6.

50 These vague rules are generally referred to as 'standards'; for analysis of this concept, see, in particular, L. Kaplow, 'Rules versus Standards: An Economic Analysis', (2007) 42 *Duke Law Journal* 557; R. B. Korobkin, 'Behavorial Analysis and Legal Form: Rules vs. Standards Revisited', (2000) 79 *Oregon Law Review* 23; P. Schlag, 'Rules and Standards', (1985) 33 *UCLA Law Review* 379; E. Riedels, 'Standards and Sources: Farewell to the Exclusivity of the Sources Triad in International Law?', (1991) 2 EJIL 78; S. Rials, *Le juge administratif français et la technique du standard (Essai sur le traitement juridictionnel de l'idée de normalité)* (1980). For a challenge to the concept of 'standard' itself, see Y. Radi, 'La standardisation comme procédure systémique de formation du droit: Contribution à la théorie générale du standard et à la théorie des modes de formation du droit international public', PhD thesis (2010), 29.

application procedures. To better understand this vagueness and the normative collaboration it requires, one can refer to the distinction made by Roberto Ago between 'norms of conduct' and 'norms of result'.[51] Under the Ago dichotomy, the former provide a given conduct to be complied with,[52] while the latter provide for a result to be achieved, its addressee being free to choose the relevant conduct.[53] But, as noted by Jean Combacau, this distinction is too radical:

> [T]he distinction between obligations whether they consist of a conduct or a result matters less than the extent to which a state's conduct is conditioned by rule. Sometimes the latter determines the former unequivocally . . .. Sometimes it remains equivocal . . . either because the norm offers several paths . . . or because it only defines the objective for which the state must display its domestic techniques.[54]

As it appears, the dichotomy (norms of conduct/norms of result) is better conceived of in terms of a sliding scale. To reach the objective, the addressee enjoys a freedom that varies from one extreme of the spectrum to the other.

The norms produced by law-creation bodies in co-operative frameworks are characterized by the vagueness of the conduct expected from states to reach a co-operative objective. In that context, this vagueness of the *negotium* requires from law-application bodies, be they judicial or quasi-judicial, that they give 'substance' to norms so that they can monitor whether the states' conduct is in breach of them. These norms and the need to develop them further result in a de facto normative delegation realized by law-creation bodies to law-application bodies.[55] This delegation coupled with the recourse to precedents erects the latter as law-makers. In light of the above,[56] this delegation appears to be retroactively controlled by law-creation bodies.

'In the course' of the interactive procedure, the notion of relative normativity[57] has to be procedurally approached inasmuch as the normativity of IO resolutions

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51 This dichotomy has to be distinguished from that made in civil law between 'norms of result' and 'norms of means'. Norms of result provide a result to be achieved, while norms of means call for its addressees to make all the effort to reach the objective provided in the norm. Beyond the differences between these two dichotomies, one can notice that norms of means are also tools used in co-operative frameworks to confer on co-operative international law some flexibility.

52 'Article 20 – Breach of an international obligation requiring the adoption of a particular course of conduct: There is a breach by a State of an international obligation requiring it to adopt a particular course of conduct when the conduct of that State is not in conformity with that required of it by that obligation'; Report of the International Law Commission, Doc. A/32/10, (1977) II(2) YILC 19.

53 'Article 21 – Breach of an international obligation requiring the achievement of a specified result: 1. There is a breach by a State of an international obligation requiring it to achieve, by means of its own choice, a specified result if, by the conduct adopted, the State does not achieve the result required of it by that obligation', ibid. Among norms of result, Roberto Ago made a distinction between four categories of norms – a distinction based on the degree of permissiveness of norms for the means of execution available to states; see ibid., Arts. 21.2–21.5.

54 J. Combacau, 'Obligations de résultat et obligations de comportement: Quelques questions et pas de réponse', in *Mélanges offerts à Paul Reuter*, *supra* note 34, at 193 (translation provided).

55 In that sense, see, e.g., G. Bastid Burdeau, 'Le pouvoir créateur de la jurisprudence internationale à l'épreuve de la dispersion des juridictions', (2006) 50 *Archives de philosophie du droit* 289, at 297.

56 See sub-subsection 1.3.1, *supra*.

57 On this concept, see, in particular, J. A. Beckett, 'Behind Normative Relativity: Rules and Process as Prerequisite of Law', (2001) 12 EJIL 627; U. Fastenrath, 'Normative Relativity in International Law', (1993) 4 EJIL 305; J. Tasioulas, 'In Defence of Relative Normativity: Communitarian Values and the Nicaragua Case', (1996) 16 *Oxford Journal of Legal Studies* 84; Weil, *supra* note 13.

and of treaties is not as different as it is when assessed out of this procedure. This is mainly due not to the fact that the *negotium* of norms is generally vague – be they provided in a binding treaty[58] or in a non-binding resolution – but to the fact that both are developed by law-application bodies.[59] In that procedural context, normative 'compulsiveness' (*obligatoriété*) is not the cornerstone of international legal normativity as it used to be and still is in some international-law areas. International legal normativity is here rather based on procedure that replaces normative 'compulsiveness' as the guarantor of legal certainty and therefore as the pillar of legality.[60]

Besides requiring a reappraisal of the 'parameters' of international legal normativity, the current phenomena in the making of international law here analysed call for a dynamic and procedural conceptualization that the schools of thought focusing on processes cannot provide[61] and which is the aim of standardization.

2. The concept of standardization: understanding dynamic procedures

Dynamic procedures are characteristic of the international frameworks that embody the 'co-operative behaviour'[62] of the international society. This dynamic and procedural law-making method is peculiar to all the societies, domestic and international, characterized, first, by a certain degree of co-operation between their members and, second, by a heterogeneity of interests and values. In such a context, this method aims at rationalizing the expression of interests and striking a balance between them so as to make legal rules coherent with the normative body made of them. Such an objective is pursued, both synchronically and diachronically, by dynamic procedures better understood through the prism of Aristotelian dialectic logic. This dialectic constitutes the core of standardization that conceptualizes the dynamic and procedural law-making method. In order to highlight the analysis of this dialectical ethos of standardization (subsection 2.2), one first needs to introduce Aristotelian dialectic logic (subsection 2.1).

2.1. An introduction to Aristotelian dialectic

Even though the concept of dialectic has been used and abused over the centuries and even though Aristotle is better known for his conceptualization of analytic

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58 As reminded by G. Abi-Saab: 'A l'origine le terme *soft law* a été formulé par Lord McNair pour désigner le droit en forme de propositions ou principes abstraits, en opposition à la *hard law* qui est le droit concret, vécu ou opératoire, issu de l'épreuve judiciaire'; G. Abi-Saab, 'Eloge du "droit assourdi": Quelques réflexions sur le rôle de la *soft law* en droit international contemporain', in *Nouveaux itinéraires en droit: Hommage à François Rigaux* (1993), 60.

59 See sub-subsection 1.3.1, *supra*.

60 As indicated in the introduction, this paper focuses on the analysis of the conceptual relations between standardization and (international) law-making; it does not aim at elaborating on the relation between standardization and (international) law. Regarding the latter, see Y. Radi, 'Legal Normativity in International Law: A Reappraisal', Amsterdam Center for International Law Working Paper, Working Paper on Postnational Rulemaking (2012).

61 See 'Introduction', *supra*.

62 This reference to the 'behaviour of society' is borrowed from Romano, *supra* note 9.

logic, dialectic logic is an important contribution made by Aristotle in *Topics*[63] to the understanding of society. His contribution is all the more significant as Aristotle did not invent this logic *in abstracto*, but on the basis of the intellectual life he observed. While doing so, he came to the realization that, in the 'practical sphere' where certainties are lacking, human beings reason and interact in a certain way to reach plausible and coherent conclusions. It is this 'way' that dialectic theorizes and that this section aims at introducing so as to highlight the dialectic foundation of standardization.

To introduce Aristotelian dialectic, it is necessary first to delineate its scope of relevance in order to contextualize its objective (sub-subsection 2.1.1). In light of this, it will then be possible to analyse how dialectic works and allows one to reach plausible and coherent conclusions (sub-subsection 2.1.2).

2.1.1. The finding of coherent and plausible conclusions in the 'practical sphere'

Among lawyers, Aristotle is usually viewed as the 'founding father' of *jus* naturalism. If this opinion is the product of a mistaken understanding[64] of the Aristotelian philosophy of law,[65] then it is more fundamentally the result of the misunderstanding of Aristotelian metaphysics. This misunderstanding is due to the oversight of the implacable distinction Aristotle makes between the 'sublunar world' and the 'supralunar world'. Contrary to Plato, Aristotle considers that the 'supralunar world' is unattainable for human beings and that human discourse is condemned to 'procéder *comme si*[66] le monde était un tout bien ordonné'.[67] The 'supralunar world' is admittedly a model for Aristotle, but in no way is it accessible to humanity.

In light of this scission, Aristotle considers that human beings are deprived of any certainties in the 'sublunar world' and that they are forced to live in contingency. In such an understanding of human condition, truth and unity are replaced by plausibility and coherence. In that context, as for 'practical issues', analytic logic, namely the logic that is used for demonstrations in physics and mathematics, is inoperative. Indeed, human beings cannot base their reasoning on unchangeable

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63 Aristotle, *Topics* (2004). For commentaries of *Topics*, see, in particular, G. E. L. Owen (ed.), *Aristotle on Dialectic: The Topics, Proceedings of the Third Symposium Aritotelicum* (1968); W. A. De Pater, *Les Topiques d'Aristote et la dialectique platonicienne, méthodologie de la définition* (1965); Y. Pelletier, *La dialectique aristotélicienne: Les principes clés des Topiques* (2007).

64 As noted by J. Lenoble and F. Ost, 'la philosophie du droit d'Aristote … constitue un modèle de la pensée juridique occidentale, à tout le moins dans son versant iusnaturaliste. Non seulement nombre de théologiens s'y réfèrent explicitement, quoique à des degrés divers; mais surtout de multiples représentations véhiculées par les juristes ne peuvent se comprendre que comme des reprises, souvent inconscientes et caricaturales, des positions du Stagirite, ne retenant de ces dernières qu'une version naturaliste simplifiée et dogmatique aux dépens des tensions qui animent de part en part la pensée aristotélicienne'; J. Lenoble and F. Ost, *Droit, mythe et raison: Essai sur la dérive mytho-logique de la rationalité juridique* (1980), 356.

65 Aristotelian philosophy of law is not compiled in specific books but is rather the product of a cross-reading of Aristotle's works, whose *The Nicomachean Ethics* constitutes the cornerstone; Aristotle, *The Nicomachean Ethics* (1998). For an analysis of his philosophy of law, see, in particular, Lenoble and Ost, *supra* note 64, at 354–438; M. Villey, *Philosophie du droit: Définitions du droit: Les moyens du droit* (2001), 43.

66 Emphasis added.

67 It is mainly because commentators forget this '*as if*' that they misunderstand Aristotle. And yet, as argued by P. Aubenque: '[C]e *comme si* que les commentateurs ont négligé, introduit la distinction capitale entre la réalité d'un rapport intelligible et l'impossible idéal d'un monde qui aurait retrouvé son unité'; P. Aubenque, *Le problème de l'être chez Aristote* (2009), 401.

certainties and therefore pretend to reach sure conclusions. On the contrary, Aristotle argues that, to tackle practical issues, they can only rely on opinions to try to reach plausible conclusions,[68] the plausibility of which is assessed in light of its coherence with the body of existing opinions. This conclusion does not have such features because of weak foundations or prejudices. What Aristotle calls opinions are indeed based on reason and thereby have to be taken seriously. In this sense, 'l'usage des opinions offre un moyen, indirect mais réel, de se rapprocher du vrai, de tenir le vraisemblable'.[69] The conclusion is plausible and coherent because, from a synchronic point of view, numerous opinions are relevant to discuss a particular issue and because, from a diachronic point of view, opinions keep changing all the time. In that context, it is one of the virtues of dialectic to select the most relevant opinions, which brings this paper to the analysis of dialectic logic.

2.1.2. The dialectical activity of reason and dialogue

Dialectic logic animates the activity of both reason and dialogue. Their dialectic activities are made up of repeated dialectic operations based on dialectic acts. The dialectic act allows an opinion to be transformed into an argument. Before analysing this transformation, one needs to introduce the tools that are used to realize this transformation: the Aristotelian topoi.

In a nutshell, these topoi take stock of and conceptualize the way human beings get a representation of things. Despite the fact that we are not always aware of this, we use relations of inference to represent those things, such as these: 'the universal attributes of the type apply to the species' or 'the contrary of the attribute applies to the contrary of the subject'. These universal relations, which are the foundation of inference and which provide formal certainty to dialectic syllogism in the absence of a substantive certainty,[70] are called 'common topoi'.[71] From them, Aristotle distinguishes 'special topoi'. They are not different in nature but they are a concretization of the former in a particular field. For example, in relation to law, the above-mentioned common topos – 'the contrary of the attribute applies to the contrary of the subject' – gives the 'special topos' – 'the opposite of what is illegal is legal'.

Keeping in mind these topoi, one can return to the transformation realized by the dialectic act and illustrate its functioning with a very basic example. Thus, let

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[68] 'Our discussion will be adequate if it has as much clearness as the subject-matter admits of, for precision is not to be sought for alike in all discussions . . .. Now fine and just actions, which political science investigates, admit of much variety and fluctuation opinion, so that they may be thought to exist only by convention, and not by nature . . .. We must be content, then, in speaking of such objects and with such premises to indicate the truth roughly and in outline, and in speaking about things which are only for most part true and with premises of the same kind to reach conclusions that are no better'; Aristotle, *supra* note 65, at 1.

[69] J.-M. Le Blond, *Logique et méthode chez Aristote: Etude sur la recherche des principes dans la physique aristotélicienne* (1939), 15.

[70] In that context, contrary to a common opinion shared by C. Perelman, for instance, the specificity of dialectic syllogism with respect to analytic syllogism is not only (and mainly) the uncertainty that characterizes its premises, but the fact that the formalism of the relation between the terms of the syllogism relies on the certainty of the relation of inference; see C. Perelman, *Logique juridique: Nouvelle rhétorique* (1999), 6.

[71] As defined by Y. Pelletier: 'le lieu est une affinité d'attribution attachée aux corrélatifs d'une relation logique'; Y. Pelletier, *supra* note 63, at 312.

us take the issue of the legality of smoking in the open air when we know that it is illegal to smoke inside buildings. The *opinion* one might hold that 'it is legal to smoke in the open air' is transformed through application of the following special topos – 'the opposite of what is illegal is legal' – into the *argument* that 'the opposite (smoking in open air) of what (smoking inside buildings) is illegal is legal'. In other words, it can be argued that, since it is illegal to smoke inside buildings, *a contrario*, it is legal to smoke in the open air.[72] This dialectic act, which reminds lawyers of argumentative techniques,[73] constitutes the core of dialectic operations realized by reason and dialogue.

As mentioned above, Aristotle opines that human beings reason in such a way even though they are not conscious of it.[74] However, he considers that the command of this reasoning is unequal between them inasmuch as it is a human faculty that requires training. Besides this necessity to exercise reason, Aristotle thinks that human reason is faced with three main obstacles: first, the endlessness and complexity of practical issues; second, the endlessness of opinions that can be used to solve these issues; and, *last but not least*, the difficulty for a single person to reason on her/his own.

For all these reasons, Aristotle argues that dialogue is the most suitable 'space' for the development of dialectic activity. This dialogue between two or more persons aims, through the exchange of arguments, at reaching a conclusion that is plausible, namely coherent with the body of existing opinions. On the basis of this dialectic ethos, Aristotle distinguishes dialectic from sophistic and niggling, which pursue, respectively, the appearance of wisdom and victory. Beyond these teleological differences, Aristotle is aware of the fact that pure dialectic dialogues are rare and that the intention of the participants to the dialogic activity may not be the plausibility and the coherence of the conclusion, but rather the appearance of wisdom and victory.

So as to 'domesticate' behaviours incompatible with the dialectic ethos and also to favour the accomplishment of the dialectic telos of dialogue, Aristotle developed a set of rules[75] that regulate and structure the dialogue. In the same vein, Thomas Aquinas made dialectic more procedural during the thirteenth century, his theory

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72 This topos does not give any truth to this argument. For the same issue, a different topos can provide an argument that contests the legality of smoking in the open air. This is the discussion of numerous arguments based on numerous topoi that leads to reaching a plausible and coherent conclusion for the issue at stake.

73 E.g., G. Tarello identified in legal practice 13 arguments that allow the establishment of premises on the basis of texts, among which are the argument *a contrario*, the argument *a simili*, the argument *a fortiori*, the argument *a completudine*, and the argument *a coherentia*; G. Tarello, 'Die juridische Argumentation', *Archiv für Rechts- und Sozialphilosophie*, complementary volume (1972), 103, quoted in Perelman, *supra* note 70, at 55.

74 As argued by Y. Pelletier: '[L]a raison possède . . ., à peu de frais, simplement grâce à l'expérience interne de sa propre activité de connaître, de former concepts et propositions, et, grâce à son attention à ceux de ces concepts et propositions les plus en circulation pour chaque chose, un moyen de connaître plus accessible que la science, un autre style de puissance qui lui permet de sortir un peu de l'ignorance et de s'approcher tout de même assez des choses pour en préparer une connaissance plus véritablement scientifique'; Pelletier, *supra* note 63, at 74.

75 'Dialectic' refers both to a science and to the object of this science – a distinction that corresponds to the scholastic division between the *dialectica docens* and the *dialectica utens*; according to T. Aquinas: 'La dialectique peut être considérée selon qu'elle enseigne ("*secundum quod est docens*") et selon qu'elle fait usage ("*secundum quod est utens*"). Selon qu'elle enseigne, elle fait considération de ces relations logiques et institue un mode grâce auquel on puisse en venir, dans chaque science, à des conclusions établies de manière probable. Cela, la dialectique le fait démonstrativement, et, en cela, elle est science. Selon qu'elle fait usage, cependant, elle

being used to organize the *quaestio disputata*. In relation to this, one can notice that, given the difficulty in concluding the dialogue, he entrusted a third party with the function of concluding it – a conclusion remaining, by definition, temporary.[76] As it appears here, the regulation of the dialogue, namely the procedure, constitutes both the embodiment of dialectic and the guarantor that a coherent conclusion can be reached. In light of the above, one realizes that, as for the making of law in societies characterized by co-operation, the procedure is the embodiment of dialectic and the guarantor of normative coherence. In that sense, standardization that conceptualizes dynamic procedure is animated by a dialectic ethos.

2.2. The dialectic ethos of standardization

In societies characterized by co-operation where interests and values are heterogeneous, law faces uncertainties, not only societal, but also normative. Indeed, law is confronted with the uncertainty arising from the divergent interests existing in society. In that context, its telos and ethos require that it brings certainty through balances struck between these interests. Even though legal rules crystallize such normative composition of interests, crystallizations appear to be more or less instable and the law itself more or less uncertain. This is so because cases may reveal the 'vagueness' of legal rules, but also of the 'normative body' whose different rules may be potentially applicable. Besides, this uncertainty has also an evolutive dimension inasmuch as legal rules and the normative body they form have to be adjusted to societal evolutions.

In that context, the making of law is animated by dialectic logic in these societies, particularly in the co-operative frameworks of international society. This law-making method conceptualized here as standardization is first of all characterized by its dynamism, in the sense that it is made of dialogues between normative authorities whose aim is the formation of normative composition of interests (sub-subsection 2.2.1). This formation that standardization conceptualizes is not informal and processual, but it is procedural. The procedure regulates and rationalizes the dialogue, its aim being to guarantee the coherent formation of law (sub-subsection 2.2.2).

2.2.1. A dynamic conceptualization of law formation

In order to think about the relations between the organs of legal systems or subsystems, the Kelsenian pyramid constitutes the main conceptual framework that lawyers make use of. Kelsen recognized the 'coexistence' between law application and law creation.[77] In the frame of the superior rule and of the normative context, it is indeed incumbent upon all the levels of the pyramid to make a choice that is

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se sert de ce mode constitué et conclut quelque chose de manière probable dans chaque science. En cela, elle décline du mode de la science'; T. Aquinas, *Metaphysic*, at 4 #576, quoted in Y. Pelletier, *supra* note 63, at 87.

[76] See Villey, *supra* note 65, at 197–201.

[77] 'A norm that determines the creation of another norm is applied by the creation of that other norm. Application of law is at the same time creation of law. These two concepts are not in absolute opposition to each other as assumed by traditional theory. It is not quite correct to distinguish between law-creating and law-applying acts. Because apart from the borderline cases – the presupposition of the basic norm and the execution of the coercive act – between which the legal process takes place, every legal act is at the same

in fact a normative creation. But, besides this coexistence, one should realize that, when law-applying bodies apply legal rules, they do not only 'concretize' them at their level of the pyramid, but they also participate, through a retroactive effect, in the development of those superior rules.[78] As analysed above in international co-operative frameworks,[79] their individual concretizations can constitute the basis of *jurisprudences constantes* applied in all similar cases and, beyond that, they can trigger a reaction of the law-creating bodies confirming and enshrining these *jurisprudences* or, conversely, setting them aside. In that context, the relations between the levels of the pyramid are of course hierarchical, but not linear as theorized by Kelsen. In other words, the hierarchy between the bodies of legal systems or subsystems is tangled.[80]

All of them take part in the exercise of a normative function that is better referred to in terms of a (dynamic) formation than a (static) creation. The exercise of the normative function in co-operative societies in general and in international co-operative frameworks in particular cannot be thought statically through the organic paradigm, but it has to be conceived of dynamically through the systemic paradigm. As pointed out by Michel van de Kerchove and François Ost with the concept of the 'strange loop',[81] the collaboration and the opposition between the normative authorities constitute the matrix of their dialogue.[82] But, beyond this, the author of the paper argues that procedure more than dialogue is the main characteristic of the formation of law. Indeed, procedure organizes and rationalizes the normative dialogue for the sake of the coherence of the law. As it appears here, procedure is the conceptual cornerstone of standardization.

2.3. A procedural conceptualization of law formation

Law formation in international co-operative frameworks and more generally in societies characterized by co-operation is not abandoned to a 'processual' dialogue that would let the expression of interests unconstrained or would not allow one to select among normative arguments. In the same vein as the Aristotelian dialogue

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time the application of a higher norm and the creation of a lower norm'; H. Kelsen, *Pure Theory of Law* (2009), 234.

78 In that sense, M. Virally opines that: 'On ne saurait affirmer *a priori* qu'une norme ne peut en aucun cas modifier celle dont elle tire sa validité . . . la jurisprudence peut compléter la loi – ce qui en définitive est la modifier'; M. Virally, *La pensée juridique* (1998), 172.

79 See sub-subsection 1.3.1, *supra*.

80 See P. Amselek, 'Réflexions critiques autour de la conception kelsénienne de l'ordre juridique', (1978) 1 *Revue de droit public et de la science politique en France et à l'étranger* 5, at 13–14.

81 Michel van de Kerchove and François Ost recourse here to the concept of the 'strange loop' developed by D. Hofstadter; see, in particular, D. Hofstadter, *Gödel, Escher, Bach: An Eternal Golden Braid* (1979).

82 'La présence d'une gradation, d'une relation de supériorité, d'une position de commandement est, en droit, indubitable, même si elle est le plus souvent déjouée. En cela consiste l'étrangeté des boucles observées: elles sont étranges car elles déçoivent une attente naturelle, celle précisément d'une hiérarchie respectée, d'une supériorité en acte. . . . A l'idée d'un sens et d'une obligatoriété *a priori* imposés par l'organe supérieur se substitue dès lors l'idée d'une collaboration entre organes de création et d'application du droit, voire, dans certains cas, d'une prééminence de l'organe inférieur qui décide, en dernier ressort, de la portée réelle du texte juridique. Si jurisprudence et administration continuent donc de souscrire aux postulats de "souveraineté" et de "rationalité" du législateur, cette discipline apparente n'empêche cependant pas ces autorités de prendre une part active et parfois non prévue au processus de création juridique, faisant ainsi apparaître la systématicité réelle du droit sous la forme d'un enchaînement de boucles étranges'; M. van de Kerchove and F. Ost, *Le système juridique entre ordre et désordre* (1988), 107.

is structured by rules,[83] dialogic law-making is structured and rationalized by an interactive procedure that is, depending on societies, at work in the legal system as a whole or in subsystems. This 'systemic' and dynamic procedure is made of a network of 'organic procedures' (at work within organs), procedurally linked and articulated. This 'spatial' aspect of the concept of standardization overlaps with its temporal dimension. Indeed, through each of the above-mentioned 'organic procedures', this systemic procedure works diachronically for the formation of law.

Whichever way one approaches standardization, it is important to understand that the dialectic rationality that animates it aims both 'organically/synchronically' and 'systemically/diachronically' at composing and recomposing rules that are as much as possible coherent with each other[84] and, in any case, alien to truth and unity.[85] Even though the charters of IOs or domestic constitutions are without any doubt the benchmark of these coherent (re)compositions, they do not provide any truth. Their various rules or objectives are normative compositions of interests leaving room and calling for normative choices in their interactive application. The normative body in force in the legal (sub)system is also a point of reference. But it suffers from the same symptom, as it is both a 'complex body' that provides (more or less) open-normative compositions and a 'living body' that changes along with the evolutions of society.

In this normative landscape, the systemic procedure is at work in an 'impressionist' manner in the sense that 'by slight strokes' it makes and adjusts legal rules one into the other. Moreover, it corrects the normative compositions that appear to be incompatible with the body made of these rules. Procedural rationality lies at the core of this law formation. In a context of uncertainty within law itself, the systemic procedure works so as to reach normative compositions that suit both the situations they aim at regulating and the normative body. By doing so, it does not pursue any normative truth, but a normative coherence that is the unattainable horizon of societies characterized by co-operation and the cornerstone of their durability. Standardization allows one to understand this procedural rationality that is at the core of the dynamic procedures at work in IOs and conventional frameworks. By doing so, it leads to a reappraisal of the making of international law.

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[83] See sub-subsection 2.1.2, *supra*.

[84] As argued by N. MacCormick: '[T]he coherence of norms consists in the fact that, by recounting them rationally, as a whole, they "make sense" intrinsically or instrumentally, or in the realization of one or several common values, or in the achievement of one or several common principles . . . this coherence is always a matter of rationality, but not always a matter of truth'; N. MacCormick, 'Coherence in Legal Justification', in O. Weinberger and W. Krawietk (eds.), *Theorie der Normen, Festgabe für Ota Weinberger* (1984), 41, at 53, quoted in J. Lenoble and A. Berten, *Dire la norme: Droit, politique et énonciation* (1990), 99.

[85] In that sense, standardization could be linked by the reader to the Dworkinian 'chain of law'. But, beyond the fact that, under the concept of standardization, this chain does not link only judges, but all the normative authorities and also has a procedural dimension; it does not pursue the objective of unity that underlies Dworkinian theory; see R. Dworkin, *Law's Empire* (1986). As for the ambiguity of R. Dworkin concerning unity, see Lenoble and Berten, *supra* note 84, at 104.

3. The consequences of standardization: reappraising international law-making

Standardization has consequences regarding the way international law-making is thought about in relation to dynamic procedures. First, it leads one to revisit the status and importance of, on the one hand, the different sources of international law (subsection 3.1) and, on the other hand, the different participants in international law-making (subsection 3.2). Second, it draws attention to the prominence of normative coherence that requires further making international law-making procedural (subsection 3.3).

3.1. A reappraisal of the sources of international law

The law-making method that standardization conceptualizes calls for a procedural approach to the sources of international law. This is true in relation both to the sources that interact in the course of dynamic procedures (subsection 3.1) and to customary law. As for the latter, standardization implies a proceduralization of the formation of general rules of international law, which leaves hardly any room for describing it as customary law (subsection 3.2).

3.1.1. A dynamic and procedural conceptualization of the formal sources of international law

The understanding of international law-making in the literature has traditionally been thought of statically/organically in terms of sources. One cannot deny here the existence and the relevance of sources in the understanding of this law-making. But it is argued that they should be thought of in light of their dynamism and, more specifically, through the concept of standardization of their procedural dynamism.

When taking stock of the dynamic and procedural interactions between the formal sources of international law in co-operative frameworks, it appears that standardization conceptualizes a multi-source procedure. This multi-source procedure implies the recognition, as formal sources, of instruments so far deprived of this status by the traditional theory of the sources of international law.[86] As a matter of fact, even though treaties constitute the cornerstone of this procedure, this source does not have a normative monopolistic status 'in the course' of dynamic procedures and it does not evolve on its own in a 'legal vacuum'. First of all, as explained above,[87] resolutions of IOs, irrespective of their non-binding nature, play a creative

[86] This theory does not consider IO resolutions as a source, though it considers decisions by international tribunals as supplementary sources. This traditional theory is well illustrated by Art. 38 of the ICJ Statute: '1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply: 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 recognized by civilized nations; d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law. 2. This provision shall not prejudice the power of the Court to decide a case *ex aequo et bono*, if the parties agree thereto'; 1945 Statute of the International Court of Justice.

[87] See sub-subsection 1.3.2, *supra*.

role similar to that of treaties.[88] Furthermore, the charters of IOs provide procedural links between them, the elaboration of a treaty leading at times to the adoption of a resolution.[89] Conversely, the adoption of a resolution can lead to the elaboration and the adoption of a treaty, particularly on the basis of the output of monitoring procedures.[90] Given their above-mentioned normative task,[91] decisions of tribunals, awards of arbitration tribunals, and decisions of follow-up bodies are sources that interact with treaties. Besides calling for such a dynamic and procedural understanding of formal sources, standardization requires one to rethink the formation of general rules of international law.

3.1.2. A dynamic and procedural conceptualization of the formation of general rules of international law

The literature has so far identified two kinds of customary process.[92] The first one leading to the formation of 'ancient custom' is characterized by its informality and its spontaneity.[93] As for issues regarding which co-operative frameworks are competent, one cannot help but notice that such informal and spontaneous processes cannot exist. Indeed, in a context in which a dynamic law-making procedure is at work, there is no room for it. This is true in relation to customary norms originating both from a multilateral treaty and from IO resolutions, in the sense that the dynamic procedure shapes, 'stage by stage', state practice and *opinio juris*.[94] But this statement applies also to the customary norms that would emerge as a reaction to the norms adopted in co-operative frameworks. In such circumstances, the dynamic procedure would constitute a 'focus point' leading to the identification of the resisting states and a planification of their reaction, far away from any spontaneity and informality. In light of the above, it appears that, for issues regarding which dynamic procedures are at work, one witnesses the proceduralization of the formation of general rules of international law. As for this phenomenon, one may deny that one is still faced with a custom. Admittedly, the normative product is a general norm, but its formation does not present the customary features. In that context, one has to be aware of the

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88 The creative role of IO resolutions is contemplated in the specific context of the dynamic procedures analysed here. It is only in this procedural 'context', and not regarding IO resolutions in general, that one puts forth this role. In that sense, this paper does not address the issue of IO resolutions in relation to the general soft-law debate.

89 See the example of UNESCO, *supra* note 40.

90 See the statement of OECD, *supra* note 49.

91 See sub-subsections 1.3.1 and 1.3.2, *supra*.

92 See G. Abi-Saab, 'La coutume dans tous ses Etats ou le dilemme du développement du droit international général dans un monde éclaté', in *Le droit international à l'heure de sa codification: Etudes en l'honneur de Roberto Ago* (1987), at 53–65.

93 G. Abi-Saab defines 'ancient custom' in this way: 'Il s'agit . . . d'un processus exogène, autonome, d'une dynamique émanant directement du corps social, en dehors de tout cadre spécifique, qui n'est ni règlementé, centralisé ou canalisé. Il ne s'agit donc pas d'un procédé, d'une procédure prescrite et règlementée par le système juridique lui-même en vue de produire certains effets . . .. C'est aussi un mode spontané ou inconscient de création du droit . . .. Enfin, il s'agit d'un processus hétérogène, il n'y a ni identité, ni continuité, ni prévisibilité quant à ceux qui y participent, ni quant aux modalités de son déroulement, y compris dans l'espace et dans le temps'; ibid., at 60.

94 It is important to emphasize that dynamic procedures work 'stage by stage' for the generalization of norms (*negotia*) provided in treaties or resolutions (*instrumena*). These *instrumena* constitute only the starting point of this procedural generalization.

fundamental difference between the dynamic procedure leading to the formation of general norms and the customary process leading to the formation of customary norms.

The same reticence applies regarding 'new customs'. Admittedly, the production of general norms through dynamic procedures may be linked at first glance to the formation of these 'new customs', namely those that are deemed to arise instantaneously in international deliberative bodies, most notably the United Nations General Assembly.[95] As a matter of fact, both are characterized by clear procedures aiming at the elaboration of general norms. But, when the former can succeed, the latter can only fail. Indeed, as noted by Georges Abi-Saab in relation to 'new customs', despite the apparently legislative procedures set up in certain bodies, the legislative effect, although hoped for, cannot in fact be reached for lack of an actual legislative power. This is the reason why one resorts to custom as a way to bring the procedure to completion.[96] But, when a dynamic procedure exists, there is no need for custom for that purpose; the dynamic procedure at the different stages brings this generalization to fruition. In that sense, dynamic procedure finishes the procedural formation of the 'new custom'. But, as with 'ancient custom', one has to realize that this law-formation procedure has nothing in common with customary law. To avoid any confusion and to take stock of the procedural formation of the general norms, as for issues regarding which interactive procedures are at work, it is necessary to drop out any reference to custom and it is better to refer to the concept of standardization. Besides calling for a reappraisal of the theory of the sources of international law, standardization requires one to rethink the status and importance of international lawmakers.

3.2. A reappraisal of the participants in international law-making

Many participants,[97] such as IOs, non-governmental organizations (NGOs), and experts, nowadays take part, at one level or another, in the making of international law. These 'new' participants are often not considered 'equal' to states, mainly for the reason that they are thought to be deprived of any legitimacy.[98] Of course, given the

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95 See, in particular, B. Cheng, 'United Nations Resolutions on Outer Space: "Instant" International Customary Law', (1965) 5 *Indian Journal of International Law* 35.

96 'En internationalisant et en institutionnalisant le processus de création du droit international général, [the international community] s'est en fait forgé un procédé ou mécanisme législatif réunissant tous les caractères de celui-ci: une procédure claire et préétablie, utilisée consciemment en vue d'élaborer des normes de caractère et à effet général. Mais – et c'est un grand mais – cet effet reste au-delà de sa portée. En d'autres termes, vu le faible degré d'intégration de la communauté internationale, celle-ci n'a pas pu développer, parallèlement à ce procédé, un "pouvoir législatif" correspondant, de sorte que ce procédé législatif ne débouche pas sur un "effet législatif". Et c'est là qu'intervient la coutume. On fait appel à cette boîte noire, à cette force mystérieuse, pour parfaire ce procédé, remplacer le chaînon manquant et combler le 'hiatus' entre le "procédé" et le "pouvoir", en attribuant un "effet législatif" à ce qui a été conçu comme un "acte législatif", sans pouvoir atteindre son but par ses propres moyens'; Abi-Saab, *supra* note 92, at 63.

97 See, in particular, J. d'Aspremont (ed.), *Participants in the International Legal System: Multiple Perspectives on Non-State Actors in International Law* (2011).

98 Among an abundant literature on the issue of legitimacy in international law, see, in particular, J. d'Aspremont and E. De Brabandere, 'The Complementary Faces of Legitimacy in International Law: The Legitimacy of Origin and the Legitimacy of Exercise', (2010) 34 Fordham ILJ 101; A. Buchanan, 'The Legitimacy of International Law', in S. Besson and J. Tasioulas (eds.), *The Philosophy of International Law* (2009), at 80; T. Franck, 'Legitimacy in the International Legal System', (1988) 82 AJIL 105; M. Kumm, 'The Legitimacy

features of international society, these entities cannot be endorsed with any democratic legitimacy. But such a requirement appears to be mistaken in this society. The assessment of their legitimacy should not be ontologically based, but rather practically based. In other words, this paper argues that the legitimacy of these participants does not depend on their 'self', but on the way in which they exercise their role in normative function.[99] They are expected to work dialectically towards the making of rules, promoting the collective interest, and not to pursue dogmatically their own interest. In relation to this, one can argue that dynamic procedures at work in IOs and conventional frameworks realize on their own a legitimization of these new participants.[100] Whatever their intentions, the procedure channels their interests in the same way as it does regarding the interests of states. In that procedural context, they appear to be as legitimate as states and thereby to be equal to them. Being equal, the interests the new participants promote are no less, yet no more, valuable than those of states.

In relation to this question of the status of the non-states entities *inside* IOs and conventional frameworks, standardization leads one, more prospectively, to raise the issue of the status of those entities that play an autonomous normative role *outside* public arenas. This is so because it is believed that this concept helps us to understand the increasing interaction between, on the one hand, public normative bodies and, on the other hand, private and hybrid bodies, such as the Basel Committee on banking supervision.[101] Indeed, from a descriptive point of view, the 'normative path' followed by the rules made by the interactions between these bodies can be conceived of as a normative dialogue. In light of this, one could argue that the autonomous private/hybrid bodies play a (normative) role inside the international legal order and are participants in international law-making when they take part, together with public bodies, in the making of rules relevant on the international plane. This is precisely the reason why, from a normative point of view, standardization highlights the need to make these normative processes procedural in particular through a formalization of the nexus between the above-mentioned bodies. This appears to be the *conditio sine qua non* of the coherence of a body of rules that increasingly regulates international society. This leads me to point out the prominence of normative coherence and thereby to call for the proceduralization of international law-making.

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of International Law: A Constitutionalist Framework of Analysis', (2004) 15 EJIL 907; J. Tasioulas, 'The Legitimacy of International Law', in Besson and Tasioulas (eds.), *supra* note 98, at 97; R. Wölfrum and V. Röben (eds.), *Legitimacy in International Law* (2008).

99 For an analysis of what the authors called the 'legitimacy of origin' and the 'legitimacy of exercise', see d'Aspremont and De Brabandere, *supra* note 98.

100 Although not in the context of dynamic procedures under scrutiny here, Global Administrative Law (GAL) emphasizes the legitimating effect of procedural principles; see, in particular, B. Kingsbury, 'The Concept of "Law" in Global Administrative Law', (2009) 20 EJIL 23, at 41–50; from a different conceptual perspective, see A. van Bogdandy et al. (eds.), *The Exercise of Public Authority by International Institutions* (2008).

101 See M. S. Barr and G. P. Miller, 'Global Administrative Law: The View from Basel', (2006) 17 EJIL 15; K. Alexander, 'International Banking Law and the Basel Committee on Banking Supervision: An Alternative Form of International Law-Making', in T. Komori and K. Wellens (eds.), *Public Interest Rules of International Law: Towards Effective Implementation* (2009), 377.

3.3. A plea for the proceduralization of international law-making

As mentioned above,[102] coherence is the only horizon of societies characterized by contingency. This contingency is a challenge for a discipline such as law, which is also faced with an internal contingency, but whose very ethos and telos consist of bringing certainty in societies. In that context, legal certainty is based not on a static truth, but on a dynamic coherence. Given this, procedure that works for coherence is a more reliable guarantor of legal certainty than legal rules themselves.

As for the international legal order, this importance of coherence calls, from a normative point of view, for the proceduralization of international law-making. This is not a plea for a vertical integration of this order, which is impossible in light of the features of contemporary international society, but a call for an improvement and generalization of existing procedural mechanisms. These evolutions appear to be needed in particular regarding the relations between the co-operative frameworks analysed in this paper, what is at stake being the normative coherence of international law as a whole.

Even though this issue is generally addressed through the lens of fragmentation,[103] the concept of coherence seems in fact better suited when thinking of international law-making. Indeed, fragmentation is a static concept that does not reflect how the international legal order actually works and does not point to the real issue. It may well be fragmented from an institutional point of view, but, for the making of international law, it is characterized by dialogue – be it efficient or not – between the different arenas and the interaction between their normative corpora.

For the sake of the normative coherence of international law and its subsequent certainty, the author of this paper argues that this dialogue should be improved[104] and made procedural. It could be done by building procedural bridges at two stages: 'upstream' and 'downstream', if one may say so. 'Upstream', as illustrated by the example of the collaboration between UNESCO and the International Labour Organization (ILO),[105] procedures could organize the participation of all the co-operative frameworks that have an interest in a given subject matter. 'Downstream', as illustrated here as well by the co-operation between UNESCO and the ILO,[106] procedures

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[102] See subsection 2.1, *supra*.

[103] See International Law Commission, 'Fragmentation of International Law: Difficulties Arising from the Diversification of International Law', Doc. A/CN.4/L.682. Among an abundant literature, see, in particular, M. Craven, 'Unity, Diversity and the Fragmentation of International Law', (2003) 14 *Finnish Yearbook of International Law* 3; P.-M. Dupuy, *L'unité de l'ordre juridique international*, 'General Course of Public International Law', (2002) 297 RCADI 1, at 429–78; M. Koskenniemi and P. Leino, 'Fragmentation of International Law? Postmodern Anxieties', (2002) 15 LJIL 553; M. Prost, 'Discours sur le fondement, l'unité et la fragmentation du droit international: A propos d'une utopie paresseuse', (2006) 39 RBDI 621. M. Prost and P. K. Clark, 'Unity, Diversity and the Fragmentation of International Law: How Much Does the Multiplication of International Organizations Really Matter?', (2006) 5 *Chinese Journal of International Law* 341; B. Simma and D. Pulkowski, 'Of Planets and the Universe: Self-Contained Regimes in International Law', (2006) 17 EJIL 483; S. Singh, 'The Potential of International Law: Fragmentation and Ethics', (2011) 24 LJIL 23.

[104] In that sense, see J. P. Trachtman, 'Fragmentation and Coherence in International Law', (2011) available at www.ssrn.com.

[105] E.g., both the 1996 Recommendation concerning the Status of Teachers and the 1997 Recommendation concerning the Status of Higher-Education Teaching Personnel were prepared and adopted by UNESCO and the International Labour Organization (ILO).

[106] The application of the above-mentioned 1996 Recommendation concerning the Status of Teachers is monitored both by UNESCO and the ILO.

could co-ordinate the participation of co-operative frameworks at the stage of law application. The Economic and Social Council could play a key role in the organization of this procedural co-ordination, by making use of its prerogatives, which should be strengthened[107] and could be extended to a non-specialized agency.[108] This is the meshing of such a 'procedural network' that would work and favour the coherence of international law as a whole.[109]

4. Conclusion

As demonstrated in this paper, the concept of standardization allows for a better understanding of the dynamic procedures that work at the formation of international law. Given their increasing number, the law-making method conceptualized by standardization is a phenomenon to be taken seriously by international scholars.

First of all, it should lead them to have a more dynamic and procedural understanding of international law-making. In relation to the sources approach to this law-making, it should first invite international lawyers to understand the procedural interaction of the formal sources of international law. Second of all, it should lead international lawyers to question the very existence of customary law for issues regarding which dynamic procedures are at work. There appears to be no reason to refer to customary law and one should avoid covering this phenomenon with the veil of custom that is too often used strategically both by the participants to law-making and by scholars. Finally, in the context of an academic discourse dominated by the paradigms of unity and fragmentation, it draws their attention to the importance of coherence and of its cornerstone, namely procedure.

Beyond the procedural evolutions suggested in this paper, one cannot help but notice that, in a context in which no Supreme Court can emerge,[110] international judges nowadays play a key role in the coherence of international law. Admittedly,

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107 The Economic and Social Council can address only recommendations. For an analysis of this structural weakness, see D. Williams, *The Specialized Agencies and the United Nations* (1987), 17.

108 Under Art. 63.2 of the UN Charter: 'It [the Economic and Social Council] may co-ordinate the activities of the specialized agencies through consultation with and recommendations to such agencies [specialized agencies], and through recommendations to the General Assembly and to the Members of the United Nations'; 1945 Charter of the United Nations. In that sense, Art. IV(3) of the Agreement concluded by the United Nations and UNESCO provides that: 'The United Nations Educational, Scientific and Cultural Organization affirms its intention of cooperating in whatever further measures may be necessary to make coordination of the activities of specialized agencies and those of the United Nations fully effective. In particular, it agrees to participate in, and to cooperate with, any body or bodies which the Council may establish for the purpose of facilitating such coordination and to furnish such information as may be required for the carrying out of this purpose'; 1946 Agreement between the United Nations and the United Nations Educational, Scientific and Cultural Organization, UNESCO, *Basic Texts*, *supra* note 33, at 175.

109 Even though these propositions to set bridges between IOs can be compared to those made in the literature, particularly by GAL, constitutionalist, and pluralist theories, it is important to emphasize the formal procedural dimension of these propositions and their original conceptual underpinning, i.e., Aristotelian dialectic logic. Regarding the above-mentioned literature, see, in particular, B. Kingsbury et al., 'The Emergence of Global Administrative Law', (2005) 68 *Law and Contemporary Problems* 15; J. Klabbers et al., *The Constitutionalization of International Law* (2009); N. Krisch, *Beyond Constitutionalism: The Pluralist Structure of Postnational Law* (2011).

110 For propositions in that sense regarding the International Court of Justice, see, in particular, G. Guillaume, 'Quelques propositions à l'occasion du cinquantenaire de la CIJ', (1996) RGDIP 323; O. Vicuna and C. Pinto,

they are constrained by their jurisdiction, which may appear to threaten the normative coherence of international law. But, by making use of the tools they are equipped with, particularly applicable law and methods of balancing and interpretation, it is believed that they have room to compose norms that strike a balance between all the interests promoted by international law.[111]

In that context, international judges and arbitrators should be guided by the ethos of their profession: *jurisprudentia*. Indeed, the 'prudence' of 'law' consists first and foremost in its coherence. Beyond this, in the spirit of Aristotle, it is the reasonableness of the 'prudent' that is the prime guarantor of coherence.

'The Peaceful Settlement of Disputes: Prospects for the Twenty-First Century', *Preliminary Report Prepared for the 1999 Centennial Commemoration of the First Peace* (1999).

[111] For an example regarding the 'place' of human rights in investment treaty arbitration, see Y. Radi, 'Realizing Human Rights in Investment Treaty Arbitration: A Perspective from within the International Investment Law "Toolbox"', (2012) 37 *North Carolina Journal of International Law and Commercial Regulation*, forthcoming.