

INTRODUCTION TO INTERNATIONAL LAW

Wallace, Rebecca M. International Law: A Student Introduction. (2nd ed.) (London: Sweet & Maxwell, 1992).

1. INTRODUCTION

The subject-matter of this text is international law, that is, public international law as distinct from private international law (conflict of laws).¹

DEFINITION

Today, international law² refers to those rules and norms which regulate the conduct of states and other entities which at any time are recognised as being endowed with international personality,³ for example international organisations and individuals, in their relations with each other. Such a definition takes account of international law's "youthfulness" and recognises that new actors may be required to participate on the international stage. States, although they remain the primary subjects of international law, are no longer its exclusive subjects as they once were. International law was initially concerned exclusively with regulating inter-state relations and then only in respect of diplomatic relations and the conduct of war. This is no longer true.

International law has expanded both in terms of its subjects and its content. Major problems of international concern have been tackled collectively by states. This has proved, for example, more resource effective than attempting individual state action. The consequence has been a proliferation in the number of international organisations in the years since 1945. Modern technology has brought states and their populations into closer and more frequent contact with each other, and rules have evolved to regulate such contact. The subject-matter of international law has correspondingly expanded, and international law now has within its ambit issues which were traditionally regarded as being exclusively within a state's domestic jurisdiction, for example treatment of one's own nationals. This has had repercussions for individuals. They are now recognised as possessing some, albeit limited, international

¹Private international law (conflict of laws) is a system of law which is part of states' domestic law and which is utilised to determine how conflicts of jurisdiction are to be resolved.

²The term international law is something of a misnomer as statehood and nationhood are not necessarily synonymous.

³International personality is dealt with in Chap. 4.

personality. The traditional definition of international law, namely a body of rules governing the relations of independent states in times of peace and war, is too rigid and outmoded. A definition of international law must accommodate the developments which the international legal system has witnessed in the twentieth century, and must reflect international law as it is today.

NATURE AND CHARACTERISTICS OF INTERNATIONAL LAW

Is international law law?

The question is not one which the author intends to explore. Any analysis of the question presupposes a definition of law, and is therefore one more suited for a jurisprudence class than an international law class. It is sufficient to say here that international law is law. States acknowledge it as such. Some states refer to international law in their constitutions. States like to be seen acting in accordance with it, and legal advisers are employed to formulate, present and defend their state's position in international law.

Others, while recognising international law, purport to deny its effectiveness. What those who are derogatory of international law fail to appreciate is that their expectations of international law may be unrealistic. Law cannot coerce states in matters which are primarily political. International law cannot of itself and by itself dictate the policies of states.

If hostilities break out international law is criticised for not maintaining international peace, yet international law cannot prevent its own violation any more than the municipal criminal law can prevent crimes being committed or contract law can prevent contracts being broken. In other words, the fact that law is violated does not in itself negate a legal system's effectiveness. Law is not a solution in itself, but is rather a means of handling a particular situation. International law is concerned with promoting international cooperation, and achieving co-existence amongst states. When international law breaks down the fault lies not with international law itself, but with those who operate within the international legal system.

International law receives a bad press, especially when it breaks down. The issues involved are internationally politically sensitive, and so are newsworthy. International law, however, functions very effectively on a day to day level. Today we can switch on the television, and see events "live" from anywhere in the world. Mail is sent and delivered throughout the world. International travel is an everyday occurrence. Such happenings are taken for granted, but they are only made possible through the efficient functioning of international law, whose "low-key operation is generally overlooked, especially as the media do not regard it as newsworthy.

What are the characteristics of international law?

International law is not imposed on states—there is no international legislature. The international legal system is decentralised and founded essentially on consensus. International law is made primarily in one of two ways: through the practice of states (customary international law) and through agreements entered into by states (treaties).⁴ Once international rules are established they have an imperative character and cannot be unilaterally modified at will by states. The absence of a strong enforcement machinery is highlighted by sceptics as a weakness of international law. There is no international police force, nor is there an international court with compulsory jurisdiction to which states are required to submit. That is not to say, however, that international law is not effective. Sanctions are available which may be employed and which may affect a state's conduct. If international law is violated there are a number of self-help measures which the victim state may adopt, for example, a treaty may be suspended or terminated, or the assets of an offending state may be frozen. The United Nations Security Council may authorise economic sanctions. Force may be used in defined circumstances.

Public opinion can also be an effective sanction. States want to be seen to be adhering to international law: why otherwise do they go to considerable efforts to justify their particular position in international law?

There is an international court to which states can refer their disputes for settlement. States, however, must agree to submit to the court; there is no legal compulsion on them to do so.

The role of reciprocity in international law observance should not be minimised. It is in a state's own interest to respect, for example, the territorial sovereignty of other states as they in turn will respect its territorial sovereignty.

The international legal system is intrinsically different from municipal law. The principal participants of the international legal system states are all treated as equally sovereign.⁵ The international community is composed not of a homogeneous grouping of states, but rather a heterogeneous group of some 180 states, which differ politically, economically, culturally and ideologically.

States need to co-exist. International law was conceived and born out of such a need, and thus is designed to promote international peace and harmonisation. A system which sought

⁴ See Chap. 2, "Sources."

⁵This is a legal fiction as obviously some states carry more weight than others in the international community.

to characterise one state as “guilty” and one as “innocent” would not facilitate the realisation of international peace. International law must be conciliatory rather than adversary.

The international legal system is a young, immature system which is constantly evolving and developing. It is not simply lawyers’ law. Politics play an influential role. Consequently, the study of international law facilitates a greater comprehension of, and gives an insight into, the functioning of the international community.

THE DEVELOPMENT OF INTERNATIONAL LAW

Some observations

International law as a system is of recent origin.⁶ Modern international law stems from the rise of the secular sovereign state in Western Europe. As in any community, law was required to regulate the relations of states with each other. The rules of war and those on diplomatic immunity were the earliest expression of international law. The Age of Discovery in the sixteenth and seventeenth centuries necessitated the evolution of rules governing the acquisition of territory. At the same time, the principle of the freedom of the seas was articulated. International law grew out of necessity, namely as already said, in response to the need of states to co-exist.

International law set the perimeters of state action; within these perimeters establishing national competence, states enjoyed freedom of action. International law continued to expand as international intercourse increased and by the nineteenth century had become, geographically at least, a universal system. It remained, however, rooted in Western European traditions and values and in its concept and content it maintained this European bias. The twentieth century has witnessed major changes which have had repercussions for the international legal system. The sovereign independent state has been challenged; universal war has brought devastation twice; previous colonial territories have attained independence. The twentieth century has seen a greater emphasis on international co-operation, whereby states work together rather than individually. Matters once considered exclusively within domestic jurisdiction are now susceptible to international regulation. The use of force has been prohibited except in defined circumstances.

International law is no longer the preserve of some 50 states, but rather embraces some 180 states: it is no longer an exclusive western club. The “new” states have ideas contrary to those held by the “old” states. They do not challenge the existence of international law *per*

⁶Although the embryo of international concepts was apparent within Greek city states, *e.g.* it was recognised that citizens of states in other territories had rights. There was, however, no concept of an international community as such.

se, but they do challenge the substantive content of some of these rules, for example, the measure of compensation to be awarded in respect of the expropriation of an alien's property and within the field of human rights the articulation of "third generation" rights. The European bias of international law has been destroyed. Political ideologies other than that of the capitalist are now heard within international fora, for example the communist and socialist. Modern technology has not only brought states into more frequent contact with each other, but has created new areas for international regulation, for example outer space and the deep sea-bed. In addition, international law has had to meet new challenges - challenges which demand an international response as individual state action proves inadequate and deficient. The most obvious is that presented by the environment.

The twentieth century for international law has been one of unparalleled expansion. It is on the international legal system as it exists today that this text focuses.

SUPPLEMENTARY READING

Cases and Materials

D.J. Harris, *Cases and Materials on International Law* (1991), Chapter 1.

INTERNATIONAL LAW – SOME DEFINITIONS

Public International Law - The legal system governing the relationships between nations.

Treaty - An international agreement concluded between two or more states in written form and governed by International law. Obligations are created when each nation signs, ratifies or adheres to the treaty. Synonyms include: accord, convention, covenant, declaration or pact.

Instrument of Ratification - A country's formal confirmation, in writing, of its intention to be bound by a treaty. Where the provisions of a treaty require the filing of such an instrument, a country that has signed the treaty must deposit an instrument of ratification with the Depository or Registrar for the treaty.

Depository or Registrar - A treaty will specify where instruments of ratification should be deposited. The registrar is usually the United Nations, however, the treaty can specify any country.

In Force - Usually a treaty will include a provision about when the treaty will come into force. For example, it may require that a certain number of countries file instruments of ratification in order for the treaty to come into force. A treaty is only in force for those countries who have ratified it.

Status - Students need to know whether a treaty is in force, by what authority, the date of signature, the place of signing, what countries are party to the treaty. In particular, you need to know and whether your country became party as a result of signature or accession, and whether your country has ratified the treaty, and on what date.

Status information may also include reservations or objections filed.

Accession - A country who was not a party to the treaty at the date and place of original signing, may later accede to the treaty. The treaty itself will usually indicate by what means accession can be demonstrated.

Reservations - A unilateral statement, made by a State when signing, ratifying, or acceding to a treaty, whereby it purports to exclude or modify the legal effect of certain provisions of the treaty with respect to its own obligations. In the course of their dealing under the treaty, other states may choose, by way of objection, whether or not to recognize the reservations made by another nation.

Multilateral - A treaty between three or more countries.

Bilateral - A treaty between two countries.

For more details see *Vienna Convention on the Law of Treaties*. Done at Vienna on 23 May 1969. Entered into force on 27 January 1980. United Nations, *Treaty Series*, vol. 1155, p. 331.

IS INTERNATIONAL LAW REALLY LAW?

The Debate Continues

Excerpt from:

Currie, John H., Craig Forcese and Valerie Qosterveld. International Law: Doctrine, Practice and Theory. (Toronto: Irwin Law, 2007), Chapter 1, page 3.

In its crudest, most positivistic form, international law is what states do. In their crudest, most simplistic form, international relations are governed by the whim of hegemonic states. Put these two approaches together and international law is what powerful states want it to be.

. . . Depressingly, there is some truth to this view. International law often is the product of - rather than a restraint on - *realpolitik*. "The hell with international law," former U.S. Secretary of State Dean Acheson reportedly said during the Cuban missile crisis, "It's just a series of precedents and decisions that have been made in the past." "I don't care what international lawyers say," President George W. Bush reportedly stated to his assembled advisors when questions about the use of force in Afghanistan arose in 2001, "we are going to kick some ass."¹

Nevertheless, it remains the case that powerful - even dominant - nations do not always dictate outcomes in international relations. Witness the failure of the United States and the United Kingdom to secure a United Nations Security Council resolution authorizing or (depending on your perspective) confirming prior authorization of their invasion of Iraq in 2003. Nor is international law controlled by such states. If it were, the International Criminal Court and the Land Mines Convention² would have foundered in the face of opposition by the United States and China.

From this, we can conclude that international law and relations are more nuanced than crude, simplistic vision outlined above.

¹Richard A. Clarke. Against All Enemies: Inside America's War on Terror. (New York: Free Press, 2004) at 24.

²Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and their Destruction, 3 December 1997, 2056 U.N.T.S. 211.