Laws1023: Public International Law

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Week 0: Nature, Scope and History of PIL

Lecture

Nature and Scope of Public International Law?

What is international law?

- A state under IL is if they have sovereignty, sovereignty is the guiding principle of modern IL, Article 2 paragraph 1 and 7 of UN Charter – UN based on principle of sovereign equality of all of its members, UN can't intervene in matters that are within the domestic jurisdiction of a state. A small state like Nauru has 1 vote same as China.
- Sovereignty is the state has the freedom to implement national polices domestically that cannot be lawfully encroached by the Un or by the states, subject to limitations.
- "International law comprises a system of rules and principles that govern the international relations between sovereign states and other institutional subjects of international law" (Dixon, 2007)

United Nations

- 1945 United Nations – devastating war to get politicians/diplomats to come together to try and set up a system to prevent conflict. 50 states signed the UN charter.
- Article 2(3) - (4): "All members shall settle their international disputes by peaceful means that international peace and security, and justice, are not endangered. All members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations"
- International Court of Justice and other international courts and tribunals
- Many more multilateral treaties
- Expansion of IL to cover individuals, IOs

Is IL really 'law'?

- "[T]heroies of law… are one of the principal causes of law morale among students of international law" – Brownie 1955. In Austin's view:
    - "The law obtaining between nations is not positive law: for every positive law is set by a given sovereign to a person or persons in a state of subjection to … [the law's] author … [T]he law obtaining between nations is law (improperly so

called) … The duties which it imposes are enforced by moral sanctions: by fear on the part of nations, or by fear on the part of sovereigns, of provoking general hostility, and incurring its probable evils, in case they shall violate maxims generally received and respected" (John Austin, Jurisprudence, 1832).

- Consent theory
    - International law are those rules which states have accepted or consented to be binding against them through custom or treaty – rules of law emanate from their own free will
    - Doesn't explain foundations of International law in all instances – e.g. treaties that establish boundaries between 2 sovereign states, doesn't require the consent of every other state in the world for it to be valid. Dispositive treaties
    - Doesn't taken into account why new states are still bound by customary international law – not written down but an understanding of the rules based on the behaviour of states. Doesn't adequately take into account customary international law
- Code of international ethics?
    - States ignore when their national interests override the agreement to follow, only follow when it suits. Is international law just moral obligations?
    - Some breaches of ethical behaviours are regarded as more than ethical and moral
- Enforceable
    - International law that may be unethical or unmoral but still followed e.g. diplomatic and head of state immunity. International law is only a code of international ethics, IL does not constrain state behaviour when important national interest is at stake. IL isn't law because there's no centralised enforcement mechanism.
    - States do largely obey IL in their everyday activities
- Reciprocal entitlement theory
    - The conclusive argument is the reciprocal entitlement theory – dismisses the idea of enforcement/consent, Il is really law because it is enforceable in the same way as domestic law, this depends on your definition of enforcement. It

need not be physical enforcement i.e. deprive entitlements through jail, freezing bank accounts.

    - All legal systems feature legal recognition of the rights of people, known as entitlements, typically enforce their rules by removing one or more entitlements so that international law is essentially the same. All states have same entitlements, IL is enforced by reciprocal entitlement violation, its effective so therefore it is law. All other states are entitled to remove things from states that don't follow IL such as ambassadors, denying visas, refusing to engage in trade negotiations with them.

- No single, satisfactory general theory
- "International law is sanctioned by habit, interest, conscience and force"

Critiques of International Law

- Eurocentrism/Post-colonial critiques/ "Third World" critiques
    - Only promotes a particular view of the world. Third world critiques emphasis that IL was created during colonial era and was used to justify the processes of marginalisation and domination of the colonised people by western powers.
    - Dispute neutrality and purported universality of IL and highlight that it emerged solely from a European, Christian tradition of law.
    - Reject idea that at the end of WWII IL moved away from its origins and they say that although the system appears to be legitimised by the human rights and the rights of a nation, those who support this idea, believe it is still a tool of oppression.
- Human Rights as favouring the individual
    - IHRL is very Eurocentric, places the state and the individual as the primary agent of human rights, more treaties reflect an individualistic conception of rights and right holders, and this marginalises a collective arrangement to rights, e.g. indigenous people view their identity as an individual being inseparable from their community.
- Claims to Universality

Week 1: Problems, Sources & Techniques of PIL

Sources of International Law

Article 38(1) Statute of the International Court of Justice

- Accepted as stating the main sources of international law
    - The Court… shall apply:
        a) International conventions, whether general or particular, establishing rules expressly recognised by the contesting states; [i.e. treaties]
        b) International custom, as evidence of a general practice accepted as law; [i.e. customary international law]
        c) The general principles of law recognised by civilised nations;
        d) … judicial decisions and the teachings of the most highly qualified publicists… as subsidiary means for the determination of rules of law
- Is there a hierarchy of sources?
    - No, if you are trying to make a case, don't necessarily go for treaty first, first 3, a b and c should apply any and all at the same time, not in order of importance. D are not actually a source of law in and of themselves, ICJ is entitled to look at secondary recourses on how to interpret a specific of laws.
    - Difference between formal source of law (passage of bill etc) and material source of law are those sources of law identifiers, help subjects of international law (states) know what the law. A B and C are formal sources of law and D is a material source of law.

Treaties

What is a treaty? Definition based on the Vienna Convention of the Law of Treaties 1969 (VCLT), art 2:

- An international agreement
- Between states (or between a state/international organisation (IO), or between IOs)
- In writing
- Governed by IL (agreements between states on commercial matters etc.)
- Whatever its particular designation e.g. "Treaty", "agreement", "Covenant", "Convention", "Protocol", "Pact", "Charter"

Once in force for the parties, a treaty is legally binding on the parties and any breach will be a violation of international law

Treaties v Customary International law

- A treaty binds only those states or International Organisations that are parties to the treaty – don't create obligations for third parties, state can opt out of a treaty It hasn't signed.
- Customary International Law, which binds all states (subject to exceptions).

Multilateral Treaties as Evidence of CIL (exhaustive list on page 35 of textbook)

- If reliance is to be placed on a multilateral treaty as evidence of CIL, it is first necessary to establish whether the treaty was intended to be declaratory of existence IL or constitutive of new law. Silence of the treaty can make this difficult to ascertain. Be accepted as valid evidence of the state of CIL.
    - Weight it carries varies depending on number of parties, amount of consistent or inconsistent evidence.
- If the treaty on its face purports to be declaratory of CIL or it can be intended that this was its intent, the treaty may be evidence of CIL.

Customary International Law

- "International custom, as **evidence of a general practice accepted as law**" – art. 38 ICJ Statue
- State practice may give rise to customary international law when that practice is uniform, consistent and general, and if it coupled with the belief that the practice is obligatory rather than habitual (opinio juris).
- Explained by Oppenheim 1905 (1st ed.)
    - Customary rules grew up by common, tacit consent of states
    - States dealing with each other needed some rules of international conduct
    - Single usages became habitual, then these single uses become obligatory
    - Gradually turned into custom over time as a feeling of legal requirement grew up
- As to when a usage turns into a custom, Oppenheim says:

- "All that theory can point out is this: Wherever and as soon as a certain frequently adopted international conduct of States is considered legally necessary or legally right, the rule, which may be abstracted from such conduct, is a rule of customary international law."

Examples of CIL

Wide Range of Subject matters, e.g.:

- The duty not to intervene in the internal affairs of another state – fundamental principle of sovereignty – what they're going to do within their own orders subject to treaties and customary laws that prevent this.
- Immunity of heads of state and senior ministers from the jurisdiction of foreign courts
- The prohibition of torture
- Various rules re interpretation of treaties e.g.
  - Art 28 VCLT 1969: a treaty does not bind a state re any act or fact before the treaty came into force for that state
  - Art 27 VCLT: A state cannot rely on its domestic law to justify breach of a treaty
    - Questions relating to the Obligation to prosecute or extrude (Belgium v Senegal) ICJ 20 July 2012

Two Requirements for customary international law:

- In order to prove that there is CIL – that certain behaviour or refraining from certain behaviour has been done by states and that conduct and refraining to act is being done because **they believe they are under a legal obligation to do so**. E.g. standard for every nation to have a national anthem,
- State practice
  - Material, objective element – repeated acts by states
  - State practice means any act or statement by a State from which views about CIL can be inferred; it includes physical acts, claims, declarations in abstract (e.g. General Assembly Resolutions), national laws, national judgements and omissions.
- Opinio juris sive necessitates

- Subjective, psychological element – a state's belief that it is obliged by law to act in a particular way

Customary International Law

- "Constant and uniform usage, accepted as law"
  - Asylum case (Colombia v Peru 1950) – attempt to argue for the existence of CIL, failed in this case, Colombia failed in their attempt to prove that there was a rule. 1948 failed rebel in Peru, warrant for rebellion's arrest, fleas to Colombia's embassy and is grant asylum, Colombia asks Peru if they can grant safe passage for him (to get him out of the country) – Peru refused and said he was guilty of crimes and not a war prisoner. Colombia took this to the ICJ, could Colombia have the right to say that he was a political prisoner and therefore the Peru people didn't have the right to say he wasn't. Colombia had to prove that all other countries were acting this way.
  - Argument was whether there was a CIL rule permitting state granting asylum (Colombia) the sole right to characterise asylum seeker's offence as political or not

State Practice

- *To prove practice must show:*
  - How frequently rule is accepted (consistency/acquiescence/absence of protest)
  - How many states respect it (repetition)
  - Which States respect it (number of States)
  - Over what length of time it has been followed (duration)

Lack of Protest and/or Acquiescence

- Dispute regarding Navigational & Related Rights (Costa Rica v Nicaragua) 13 July 2009 – Does not have to be rigorous conformity, fairly high degree of regularity, doesn't have to be no variation. If a particular rule that you are trying to prove there are examples of people braking this, does this weaken your case?

- Costa Rica subsistence fishing rights: time + lack of protest by Nicaragua = customary right
    - You need to have a lack of protest or acquiescence in the behaviour Nicaragua had to say that Costa Rica had no right to his, for the courts, Nicaragua failed to deny the existence of a right arising from the practice.
- A state is not bound by a customary rule if it has consistently opposed that rule from its inception. However, a new State is bound by rules which were well established before it became independent.

Customary International Law – Can Treaties be Custom?

- North Sea Continental cases (FRG v Denmark; FRG v Netherlands) 1969
    - Court considered it necessary that in order to prove the principle of CIL was that the rule had to be unequivocal and form a general law of IL. The principle would only be applied if fail to reach an agreement (therefore not a general law as it is not always the go to) – states can make a reservation (conditional acceptance of a treaty) to not have the principle apply to them
- For a treaty provision to be also regarded as CIL:
    - Provision must be of a fundamentally norm-creating character
    - Must be widespread and representative participation in the treaty
    - Passage of short period of time not necessarily a bar
    - But state practice should have been extensive and virtually uniform
    - Must be general recognition of a rule/legal obligation

Customary International Law – what constitutes state practice?

- From ILC's non-exhaustive list (1950)
    - Treaties
    - Decisions of international and national courts
    - National legislation
    - Diplomatic correspondence
    - Opinions of national legal advisers
    - The practice of international organisations

- Brownlie adds policy statements, press releases, official manuals on legal questions (e.g. of military law), executive decisions and practices, orders to naval forces, and comments by governments on ILC drafts

Customary International Law – Opinio Juris

- Opinio juris sive necessitates – need to distinguish custom from something that is just done for policy reasons or because states are nice. The very idea of the state it can carry a psychological element poses some significant problems – almost unheard of that states will say they are doing something because they have to.
- Opinio juris is necessary for the creation of customary rules; State practice, in order to create a customary rule, must be accompanied by (or consist of) statements that certain conduct is permitted, required or forbidden by international law (a claim that conduct is permitted can be inferred from the mere existence of such conduct, but claims that conduct is required or forbidden need to be stated expressly). It is not necessary that the State making such statements believes them to be true; what is necessary is that the statements are not challenged by other states.
    - Subjective psychological element – a state's belief that it is obliged by law to act in a particular way
- How is opinio juris determined?
- Who bears the onus of proof?
    - Onus lies on state arguing for the existence of a custom
        - Asylum case (Colombia v Peru) (1950)
        - Nuclear Weapons advisory opinion (1996)

Customary International Law

- Custom can be universal, or local or regional
    - Asylum case (Colombia v Peru) (1950)
        - Is there evidence of a regional custom?
        - Is the custom invoked binding on the other party?
    - Right of Passage Case (Portugal v India) 1960
        - "Constant and uniform practice… accepted as law by the parties" as to free passage between Portuguese enclaves
    - Costa Rica v Nicaragua 2009 (fishing rights)

- R (on the application of Al-Saadoon) v Secretary of State for Defence

The Persistent Objector

- Persistent objector to new customary rule/theory will not be bound by it (unless jus cogens) - effect is that given a state persistently objects to the creation of a law can pre-empt the application of that law to them – the state has to object prior to the creation of the law – puts on an onus on the state to start rejecting the developing law. You need to have a lack of protest or acquiescence in the behaviour
- Anglo-Norwegian Fisheries case (UK v Norway) 1951
  - UK failed to protest at Norwegian use of straight baselines
  - Norway consistently objected to any limit on the length of such baselines
  - International Court of Justice made an alternative finding that a coastline delimitation rule put forward by the UK 'would appear to be inapplicable as against Norway, in as much as she has always opposed any attempt to apply it to the Norwegian coast'
- The rule is hard to reconcile with the current theories of international law, the evidence which might be produced to support the rule is weak indeed.
  - The theory of the persistent objector clearly has a role within the international legal system; the difficulty is to identify its true effect.
- Nambia Opinion ICJ Rep 1971, 16, indicates that it would be impossible to be a persistent objector to a rule of jus cogens.

Jus Cogens

- "Pre-emptory norms of international law from which no derogation is permitted".
- A rule that prescribes conduct that is immoral or anti-social – e.g. a treaty that permits genocide, set of constitutional principles for IL, because this is still new, there is still some dispute over the content of jus cogens or what rules have jus cogens status.
  - A body of supreme or "constitutional" principles – Cassese
- Originated in treaty law: a treaty provision that violates a jus cogens norm is void
- No definition but includes e.g. prohibitions of aggression (use of threat of force), slavery, genocide, apartheid, torture, piracy and the right to self-determination

General Principles of Law

What are general principles?

- International law recruits certain principles from municipal law
- E.g. rules of procedure, good faith, res judicata [an issue decided by a court may not be reopened], ex injuria jus non oritur [no benefit can be received from an illegal act], unjust enrichment, estoppel
- Chorzow Factory case 1927 [the right to receive compensation]
- Equity as part of the international system
    - Diversion of Water from the Meuse Case (Netherlands v Belgium) (1937), opinion of Judge Hudson
    - Frontier Dispute Case
- Two major opinions: one holds that the phrase embraces such general principles as pervade domestic jurisprudence and can be applied to international legal questions. The over view asserts that the phrase refers to general principles of law linked to natural law as interpreted during recent centuries in the Western world, that is, the transformation of broad universal principles of a law applicable to all mankind into specific rules of IL.

"Subsidiary means of determination of rules of law"

Not sources of law but "subsidiary means of determination of rules of law – art 38(1)(d):

- Judicial decisions:
    - Decisions of ICJ (only binding on states involved, no concept of precedent other international courts and tribunals, domestic courts, arbitral tribunals.
- Note ICJ statue art. 59, but many examples of ICJ developing new rules of IL:
    - Reparation case 1949: UN has international legal personality
    - Reservations case 1950: rules on reservations to multilateral treaties
    - Nuclear Tests case 1974: effect of a unilateral act
    - Anglo-Norwegian Fisheries case 1951: drawing of straight baselines
    - Notteböhm case 1955: principle of real and effective nationality
- Teachings of the most highly qualified publicists

Other "Sources" of International law: The role of UNGA resolutions

- Can have binding effect e.g. Namibia advisory opinion (1971)

    - *But generally, not legally binding*
- Accepted as evidence of state practice and opinio uris either of existing CIL or contributing to its formation e.g. in Nicaragua case 1986, Nuclear Weapons opinion 1996. Some argue they can create “instant customary law”
- Considerations apply to UNGA and any other IO of universal membership
- See also ILA Report 2000, pp 54-66