LAWS2270 NOTES

INTRODUCTION

CLASS ONE

Roberts, *The Divisible College of International Lawyers*

Public international law is not truly international because different nations construe public international law differently, creating a non-uniform application of public international law. Lawyers' understanding of the law is relevant in all fields but particularly in public international law, because public international law lacks a central legislator or judiciary. This is the concept of 'comparative international law', examining cross-national differences in the interpretation and application of public international law. Comparative international law also considers how certain national approaches have come to dominate understandings of the 'international' such that they are presented as neutral and universal.

Roberts' entire point can be summarised into three arguments:

1. International academics in different jurisdictions are often subject to different influences that affect their understanding of public international law – evidenced by, eg, the differing responses by Western and Russian academics to the 2014 annexation of Crimea, or Western and Chinese academics to the 2016 South China Sea arbitration;
2. Certain national approaches have come to dominate interpretations of the 'international' such that they are presented as neutral and universal – in such a way powerful states are 'international law exporters' and weaker states are 'international law importers'. For this reason, academics in importing states are more likely to view public international law as a foreign, illegitimate concept, while academics in exporting states are more likely to view public international law as a (marginally) important aspect of the law.
3. Existing interpretations of public international law are likely to be disrupted by factors such as changes in geopolitical power. This increases the importance of international academics understanding the perspectives of other jurisdictions, which allows them to more fully comprehend the development of public international law as a transnational field. Transnational flows may be asymmetrical – eg Chinese academics and lawyers studying in the US leads to (a) diffusion of US approaches into China, but also (b) stronger understanding of US public international law in China than vice versa.

McKeown, *Periodising Globalisation*

The era of globalisation is that in which social thought is dominated by the sense of living in a time of unprecedented change – since at least the early 19th century. Various contenders for a beginning to the 'age of globalisation' include:

- 1800s and/or 1950: the World Bank's claim to the period of economic globalisation, with an intervening period of deglobalisation from 1914 to 1950 (the Great Depression and the two World Wars). Outside of Europe, this is only accurate if (at best) the 1920s are ignored. It is worth noting that this period is also marked by global violence from the 1850s to 1870s, which is another aspect of globalisation.
- 1820 ('modern globalisation'), being the emergence of global price convergence, industrial growth patterns in Western Europe, improved transportation and

communication technology, and a new cycle of mass migration. Modern globalisation also marks the emergence of the international order of modern states.
- 1571, being when the founding of Manila established a steady trans-Pacific connection, or twice in the 17th and 18th centuries when global silver prices converged.

The **point** (which is kind of obvious) is that there is no one true era of globalisation.

Megret, *International Law as 'Law'*

Dimensions of public international law:

- Subjective dimension: a law of states rather than individuals, including the emergence of non-state actors and the non-recognition of certain states internationally.
- Ethical dimension: a law of pluralism that respects the differences between legal systems in different states, but with minimum global standards.
- Social dimension: a law of equals without hierarchy, meaning that public international law cannot be properly imposed upon states without their consent.
- Epistemological dimension: a positivist law that is observable from the behaviour of states, albeit not entirely abstracted from minimum ethical norms.
- Normative dimension: contractual rather than legislative, leading to the popularity of 'dualist' systems – although also characterised by unequal treaties and public international law obligations.
- Functional dimension: decentralisation of legislature, judiciary and executive, although trends towards centralisation of the judiciary have occurred with the establishment of permanent international courts. Absent a reliable executive sanction, few concrete legal consequences flow from violating norms of public international law.

Is public international law 'law'?

- Deniers: Public international law is not law because it does not impose enforceable obligations.
- Idealists: Public international law is law because it is the law of morality – ie international law is valid but aspirational.
- Apologists: Practically, it does not matter whether public international law is law or not – the important question is the effect that it has upon the behaviour of states, even if that is a result of interests rather than obligations.
- Reformists: Public international law is not currently law, but it should be reformed to be made into a more effective law.
- Critics: The entire debate about whether public international law is 'law' among a society of nations ignore the larger problem that some nations are effectively excluded from that society of nations, meaning public international law is not equally applied at all.

Changes in public international law:

- Centralisation: public international law represents the centralisation of disparate legal systems towards a global norm, eg through the emergence of strong regional organisations such as the EU and the establishment of international judicial institutions.

- Absorption: public international law becomes instrumentalised by empires to justify imperialism, creating vertical hierarchies within the international legal system – see, eg, colonialism or arguments of 'collapsed states' or 'criminal states'.
- Dissolution: public international law becomes brittle through excessive decentralisation, such that it is merely a multilateral aspect of municipal law – public international law transcends the state by imposing its regulatory arm upon non-state actors. Governance replaces diplomacy, networks replace formal international organisations, and vertical relationships replace horizontal relationships (the privatisation of international obligations).
- Renewal of public international law: ongoing support is provided by weaker states that rely upon a strong public international law framework to protect themselves from a sole hierarchy of power. Public international law may reform to lead to greater participation, more equitable distribution, and more systematic enforcement. However, it is not clear how this would occur without the consent of (disadvantaged) superpowers.

CLASS TWO

***Statute of the International Court of Justice* art 38**

1. The Court, whose function is to decide in accordance with public international law such disputes as are submitted to it, shall apply:
    a. international conventions, whether general or particular, establishing rules expressly recognised by the states parties;
    b. international custom, as evidence of a general practice accepted as law;
    c. the general principles of law recognised by civilised nations;
    d. subject to the provisions of art 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* [from equity and conscience], if the parties agree thereto.

Dixon, *The Sources of International Law*

The traditional starting point for discussing the sources of public international law is s art 38 of the *Statute of the International Court of Justice* (see above). However, art 38 is not a list of such sources, nor is it even a complete list of the matters which the ICJ considers in its cases (it omits, eg, UNGA resolutions and diplomatic correspondence). Article 38 also does not indicate the priority in which sources of public international law are to be applied.

Sources of public international law can (artificially and uselessly) be divided into three types:

- Formal sources are procedures or methods by which rules become legally binding (eg the passage of a Bill through Parliament).
- Material sources are sources which provide the substance and content of legal obligations, but do not themselves create these obligations (eg judicial decisions in a common law system).
- Evidentiary sources are sources which provide evidence of the substance and content of legal obligations (eg state activity or diplomatic memoranda).

Realistically, the distinction between the three (and between material and evidentiary sources in particular) is highly artificial and difficult to maintain. A more useful approach is to use art 38 as an incomplete list of the sources of public international law.

INTERNATIONAL TREATIES

International treaties are the only way states can consciously create public international law. Because treaties are the result of a conscious and deliberate act by states, they are the most important source of public international law and are likely to remain so. Treaties as a source of law are governed by a number of principles:

- Treaties are voluntary (they are essentially state-state contracts) and only treaty parties are privy to the treaty (enjoy rights and obligations with respect to the treaty).
- However, where treaties codify or develop customary law, non-parties may be later bound by customary law with identical contents to the treaty.
- Similarly, where a treaty codifies existing customary law, the substance of the obligations specified in the treaty may be binding on all states, because even states not bound under the treaty are bound by existing customary law with identical contents to the treaty.
- In a more complicated case, treaties may codify existing customary law and also add further obligations. In this case the treaty parties are bound by all treaty obligations, but non-parties are bound only by the existing customary law. However, if state practice develops in accordance with the treaty, this will create new customary law which will bind non-parties. This last concept can only occur if the treaty provision is 'of a fundamentally norm creating character such as could be regarded as forming the basis of a general rule of law' (*North Sea Continental Shelf Cases* (1969) ICJ Rep 3).

A debate exists about whether treaties are essentially contracts that impose obligations upon states (see *Maclaine Watson v Department of Trade and Industry* [1989] 3 All ER 523), or whether they create public international law. The only issue with this is that there is no external law which causes treaty obligations to be binding (as the common law causes contractual obligations to be binding). Rather, treaties create their own public international law under which the treaty obligations are binding. The distinction between treaties that create public international law and those that merely impose obligations is one of purpose, not legal effect.

CUSTOMARY INTERNATIONAL LAW

Customary international law is the law evolving from the customary practices of states. Creation of new customary law requires the following, derived inter alia from the *North Sea Continental Shelf Cases*, *Lotus Case* (1927) PCIJ Ser A No 10, *Anglo-Norwegian Fisheries Case* (1951) ICJ Rep 116, and *Nicaragua v USA* (1986) ICJ Rep 14:

- Particular state practice, including acts and omissions, statements regarding specific situations, abstract statements of legal principle, national legislation, and the practice of international organisations;
- The state practice must be 'constant and uniform' (*Lotus Case*) or 'settled practice' (*Jurisdictional Immunities of the State Case*), which is a higher bar to change more fundamental customary laws;