

Public International Law – A Liberalist View

Written by Arshad Salmaan Ali

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ARSHAD SALMAAN ALI, JAN 13 2014

Introduction

While the concepts of international law can be traced back thousands of years,[1] the modern structure of international law developed in the seventeenth century through the work of scholars such as Hugo Grotius,[2] culminating in the Peace of Westphalia in 1648. At its foundation was the notion of international law regulating sovereign, equal states free to govern without external interference.[3] This classical notion of international law has increasingly been challenged by liberalism,[4] critical of the dichotomist view of the law separating the international and domestic spheres and in the process perpetuating the state-centric approach to the law.[5] The tension between the two dominant theories of realism and liberalism in describing and directing the evolution of the law is explored; and we posit, consistent with the liberal view, that the state-centric *realist* paradigm of international law is inconsistent with the increasing emphasis placed on the rights of individuals.

The Classic Model – Diplomatic Immunity

As mentioned above, the focus of international law has been inter-state relations.[6] Despite the rights of individuals being considered by classical scholars,[7] the lack of standing of individuals in relation to violations of treaties,[8] unless the treaty provided for individual rights and obligations,[9] perpetuated the state-centric nature of international law. This position was illustrated by twentieth century assertions of scholars that states exclusively are the subjects of international law.[10]

Diplomatic protection allows a state to bring an action on behalf of its citizen based on the *Vattelian Fiction*,[11] that a wrong committed against a national is a wrong committed against the national's state.[12] This was reiterated in the Draft Articles on diplomatic Protection which was adopted by the International Law Commission in 2006,[13] and which the General Assembly took note of.[14]

This somewhat ameliorates the difficulty that standing non-state entities face. However, it is clear from the *Barcelona Traction* case that the decision to exercise diplomatic protection is at the discretion of the state,[15] and the state may choose not to exercise this protection due to political or indeed any other reasons unrelated to the case.[16]

Commentators have suggested that the absence of a legal duty compelling a state to exercise diplomatic protection on behalf of an injured national is illuminatory of the distinction between what the law is ('*lex lata*') as opposed to what it should be ('*lex ferenda*').[17] An early version of the *Draft Articles on Diplomatic Protection*[18] proposed just such an obligation for a state wherein there is a grave breach of a *jus cogens* norm in the absence of extenuating circumstances.[19] While not ultimately included in the final version, it is indicative of the trajectory of international law in the attempt to accommodate the rights of sub-state entities.

Contemporary Challenges

It is clear that the state-centric paradigm is evolving to one that is more inclusive of the role of non-state entities such as NGOs, interest groups and global corporations possessed of rights and responsibilities.[20] This is reflective of the greater power of non-state entities in influencing the world order. However, in most instances the claim of an

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individual must still be subsumed within that of the national state,[21] which continues to constrain the ability of non-state entities from participating fully in the international legal arena.

Intersection of International Relations and Law

The nature of international law, created as it is by states through treaties or a preponderance of state practice, is influenced by politics.[22] International law and politics together comprise the international system which is studied and manipulated by political scientists, lawyers and policy makers.[23] Given this characteristic of international law, theories used to describe it become instrumental in dictating the direction in which the law evolves.[24]

The two dominant international relations theories that explain state behaviour are *Realism* and *Liberalism*.^[25] The realist approach is characterised by self-interested states, interacting in an anarchical system like billiard balls, opaque and unitary entities colliding with each other.^[26]

Liberalism, by contrast, has three main assumptions:^[27]

1. Actors in politics are individual members and groups of domestic society promoting their self-interest;^[28]
2. Governments represent a sub-section of society, whose interests are reflected in foreign policy;^[29]
3. Behaviour of States, especially pertaining to conflict and co-operation, reflect the nature and configuration of state preferences.^[30]

The genesis of the liberalist movement in international law can be traced back to the seminal work of Kant's perpetual peace.^[31] His thesis that liberal states would coalesce into a confederation of peace conserving states (*'foedus pacificum'*),^[32] has been tremendously influential. For example, when speaking before the British Parliament, the President of the United States of America, Ronald Regan, claimed that governments founded on liberal principles of individual liberty exercise restraint in foreign policy before proceeding to declare a crusade for freedom and democratic development.^[33] This was coupled with the use of force – despite its illegality^[34] – against the illiberal state of Nicaragua.^[35] The potency of Liberal theory in both describing but also influencing international relations, and to a lesser degree the international legal system, is apparent.

Relationship Between International and Municipal Law

The relationship between international and domestic law is not settled,^[36] with the two dominant theories being monism and dualism.^[37] Monism asserts that there is a single body of law that regulates human interaction, with international law residing at the apex of this system.^[38] In diametric contrast, dualism claims international and domestic law are separate,^[39] with international law requiring incorporation by a state before it operates in the national sphere.^[40] A third explanation – the *harmonisation theory* – has emerged to address deficiencies in the dominant paradigms. This assumes that international law forms part of domestic law, but that in the case of conflict domestic law prevails.^[41]

States are required to conform to international law in good faith,^[42] and are responsible for any breaches that will not be excused through an invocation of its constitution or any other domestic law.^[43] The increased ambit of international law in the domestic sphere can be discerned by treaties and *jus cogens* norms that require domestic implementation by states – such as the Geneva Conventions of 1949 in relation to war victims,^[44] Statutes of the International Criminal Tribunal for Rwanda,^[45] and of the former Yugoslavia,^[46] in addition to the ICC.^[47] In relation to *jus cogens* norms against torture for example, states are compelled to implement legislation to criminalise torture.^[48] However, this argument is tempered by the reality that international law does not generally prescribe or regulate implementation of international obligations.^[49]

With latitude in terms of implementation of international law, two distinct trends can be observed from a comparative analysis of state practice.^[50] In the first case, *automatic standing incorporation*, international law is automatically incorporated into domestic legislation without requirement of domestic legislation.^[51] The second method is *legislative ad hoc incorporation*,^[52] also known as *transformation*,^[53] which allows international law domestic

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application only where it has been implemented by an act of parliament.[54]

In Australian jurisprudence, a definite adoption of either theory has not occurred,[55] but there has been a preference for the transformation theory,[56] with a rejection of automatic incorporation doctrine.[57] This has been elucidated by statements asserting that international law, while not a part of the body of domestic common law, is nonetheless one of the sources of English law.[58] More recent judicial pronouncement has confirmed this, with the proviso that in the case of a clash between domestic common law and customary international law, the court may choose to adopt international law.[59] Such a view can constrain international law from applying domestically even in cases where a fundamental breach of the laws of nations, such as genocide for example, [60] is alleged to have occurred, because the crime might not part be part of the domestic law.

State Immunity

This doctrine, also known simply as *sovereign immunity*, allows foreign states to enjoy jurisdictional immunity as it proscribes litigation which might result in a state appearing as a defendant.[61] The historical basis for the immunity derives from the fact that a head of state was not subject to the authority of the courts, and by extension through the principle of sovereign equality, from the courts of other states.[62] State immunity, as part of customary international law, is underpinned by the principle of sovereign equality,[63] respect and dignity of other states,[64] and encompasses criminal and civil proceedings.[65] This aspect of customary international law has been incorporated in Australia through federal legislation,[66] and the immunity extends to the conduct of foreign nationals acting in the official capacity of a state.[67]

The scope of the immunity has narrowed over the years, from an absolute immunity to one requiring a state to be acting in a sovereign capacity (*'jure imperii'*) as distinguished from private activities (*'jure gestionis'*) usually entailing commercial activities.[68] State immunity is not generally afforded for commercial, employment contracts, personal injury or infringement of intellectual property.[69]

The application of this rule can be a cause of consternation. For example, the House of Lord in *Jones v Saudi Arabia*,[70] decided when applying *The Arrest Warrant* case[71] that immunity was not to be denied to Saudi Arabia or its agents for torture.[72] This was followed in *Fang v Jiang Zemin*. [73] By shielding a state and her agents through state immunity, gross violations of international law breaching *jus cogens* norms such as torture can be carried out without effective judicial censure. This perpetuates the state-centric paradigm at the cost of the rights of individuals.

Act of State Doctrine

Articulated as the *act of state doctrine*,[74] state practice particularly in common law nations requires respect for the independence of other sovereign states without an examination of the acts of such states in domestic courts.[75] While it has been argued by some academics that this doctrine is of common law import rather than a product of customary international law,[76] in *A-G (UK) v Heinemann Publishers Australia Pty Ltd*[77] (*'Spycatcher'*) the Australian High Court, relying on *Oetjen v Central Leather*[78] (*'Oetjen'*), held that the doctrine is founded on *international law* principles of comity and expediency.[79]

In *Oetjen* the court utilised such a reasoning to refuse enforcement of intellectual property rights in the form of a patent issued by a foreign state.[80] This was a somewhat puzzling decision given that the philosophical basis of the doctrine is respect and courtesy of other states, which one might expect to lead to enforcement of a patent granted by a foreign state. This reluctance was demonstrated again in *Spycatcher* where the High Court refused to enforce penal laws of a foreign state.

It has been suggested that this doctrine is unjust due its denial of private rights,[81] as occurred in *Dagi v Broken Hill Proprietary Company Limited (No 2)*. [82] In this case, the action of the plaintiffs in Papua New Guinea against a mining company was barred, as it would involve examination of whether a foreign state had committed a breach of trust by not pursuing compensation claims of residents as permitted under the contract.[83] This prevented what was

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ostensibly the private right of a non-state entity from succeeding, and which arguably would fall within the *jure gestionis* exception to state immunity if the state had been sued directly .

Liberalism – Limitations?

Liberalism, in seeking the expansion of the role of non-state entities and which by consequence would dilute state sovereignty, may lead to unexpected consequences. As explained by Kingsbury:[84]

State sovereignty as a normative concept is increasingly challenged...but discarding sovereignty...will intensify inequality, weakening restraints on coercive intervention...and redivide the world into zones.

Conclusion

The view espoused by certain international law scholars[85] is that the classic conception of international law fails to adequately deal with contemporary circumstances. This appears to be a justified claim, especially given the heightened emphasis on the protection of individual rights. The multifaceted reasons for this view have been touched upon briefly, which encompass issues of standing, state sovereignty and immunity, in addition to the complex interplay between municipal and international law. A brief reference has also been made to the critique of liberalism – that the dilution of state sovereignty might impose costs of its own.

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