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The growing clout of international law

Published 23 August 2006

Original in **English**

First published in **The New Presence 2/2006**

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In a globalized world, global cooperation and international law are becoming increasingly important, writes William A. Cohn of the University of New York in Prague. But many argue that the "war on terror" and the current Israel-Lebanon conflict are international humanitarian law's newest tests of resolve.

There is currently much discussion about international law (IL), but scant analysis of what it actually is. Conventional wisdom suggests that international law is illusory, because the lack of a world government makes it unenforceable. Others contend that this reflects a misconception of the true complexity of international law, which exists *de facto* at all times in different guises.

Evolving international law (a conceptual framework)

Invariably, IL raises questions regarding the nature of law and the relationship between law and morality. Is law aspirational as well as compulsory? Does law establish standards beyond simply compelling compliance by threat of punishment? *Black's Law Dictionary* defines international law as "Those laws governing the legal relations between nations." Yet IL also serves to regulate affairs between individuals and businesses across nations. Indeed, there are three different kinds of IL – public, private, and hybrid IL. However, public IL, or the law of nations, is what most commentators consider as international law.

IL is founded on consent and derived from voluntary state practices. Thus, the perspective is state-centric, in that the legitimacy of IL is derivative and

conferred by nation states. More recent developments in IL, such as the advent of the International Criminal Court and the prosecutions of former heads of state for crimes against humanity, have established stronger universal obligations.

The main sources of international law are treaties and conventions. There is neither an international legislature to create nor an international executive branch to enforce international law. Thus, it is left to the voluntary cooperation amongst states to act in their perceived mutual interest, which they do by signing agreements to bind sovereign states to those obligations agreed upon. States follow IL because they want other states to do the same. When voluntary compliance is not forthcoming, then various degrees of coercion can be used (e.g. resolutions, sanctions, penalties, imprisonment, and threat of force).

Significant touchstones in the history of IL – a timeline

ca. 340 B.C. – Aristotle's *Politics*, followed by the writings of Saints Augustine and Thomas Aquinas, addresses just cause and conduct of war (*jus ad bellum* and *jus in bello*). Aristotle also makes the distinction between positive law and natural law.

1215 – England's *Magna Carta*, establishing rights of citizens and legal constraints on monarchy/rulers, begins the historical process of creating the rule of constitutional law.

1625 – Hugo Grotius' *Three Books on the Law of War and Peace* sets forth the sources of international law and its role in regulating relations among states.

1795 – Immanuel Kant's *Perpetual Peace* envisions an ethical international law reached by a federation of nations. *The Metaphysical Elements of Justice* (1797) states freedom exists only if universal moral laws govern, thus free will depends on universal laws.

1868 – Saint Petersburg Declaration, first formal agreement prohibiting use of certain weapons (those which cause unnecessary suffering) in war.

1883 – Paris Convention provides international patent and trademark protection, Berne Convention of 1886 provides international copyright protection.

1899 & 1907 – Hague Conventions, formal treaties on laws of war and war crimes, viewed as founding modern international humanitarian law.

1919 – League of Nations built on principle of collective security through diplomatic negotiation (replaced by UN following WWII).

1920 – League of Nations Permanent Court of International Justice (PCIJ).

1928 – 62 states sign Kellogg-Briand Pact, defining “just wars” and “wars of aggression”.

1944 – Bretton Woods Conference founds World Bank and IMF.

1948 – Universal Declaration of Human Rights (UDHR) adopted by UN General Assembly; Convention on the Prevention and the Punishment of the Crime of Genocide.

1949 – Nuremberg & Tokyo trials of WWII war criminals; Geneva Conventions prohibit cruel, inhumane, or degrading treatment of civilians or combatants during armed conflict; Convention on Genocide.

1950 – UN International Law Commission adopts the Nuremberg Principles as law, establishing personal responsibility and liability for war crimes.

1951 – Convention on Refugees.

1959 – The Antarctic Treaty turns southernmost continent into international scientific preserve, today shared by 43 nations.

1967 – Outer Space Treaty states that “The exploration and use of outer space […] shall be carried out for the benefit and in the interests of all countries.”

1968 – Nuclear Nonproliferation Treaty (NPT) creates IAEA and a framework for controlling the spread of nuclear material and technology.

1972 – UN Conference on the Human Environment begins era of global environmentalism; Strategic Arms Limitation Treaty (SALT I) signed.

1976 – International Covenant on Civil and Political Rights.

1982 – Law of the Sea Treaty (UNCLOS) governs use of the oceans.

1984 – Convention against Torture.

1987 – Montreal Protocol protecting the ozone layer by limiting CFCs.

1996 – Nuclear Comprehensive Test Ban Treaty; World Intellectual Property Organization (WIPO) Phonogram Treaty on digital technologies.

2002 – International Criminal Court (ICC).

2005 – Kyoto Protocol on greenhouse gas emissions comes into force.

Public international law

Public international law is law which applies to more than one nation state. Formerly known as the law of nations, public IL regulates relations among nations in matters such as trade and war and has been expanded in the past century to include rights of individuals under the aegis of human rights.

The sources of public IL are (in order of importance): treaties (signed and ratified by 2 or more states) and conventions/protocols (treaties sponsored by international organizations); custom (practices between states over time which come to be seen as binding, e.g. the law of the seas); general principles of law (those recognized by civilized nations and which are common to the national law of the parties to a dispute); and legal scholarship (judicial decisions and writings of legal scholars provide persuasive but non-binding authority).

As with the ICC and Kyoto Protocols, the delay between the negotiation of and the coming into force of multilateral treaties and conventions may be lengthy. The treaty-making process involves adoption of an agreement/text by the negotiating states, followed by their consent to be bound by the agreement (requiring ratification/formal adoption by their heads of government), and then their entry into force, generally upon the formal

consent of all signatory states (unless agreed that it shall come into force provisionally). It is common, however, for multilateral agreements to allow for a fixed number of states to express their consent, bringing a given agreement into force. For example, the Kyoto Protocol came into force in 2005 after it was ratified by nations accounting for at least 55 per cent of greenhouse gas emissions.

As states have the capacity to attach reservations, the negotiations involved in treaty making are considerable (e.g. the negotiations on UNCLOS, creating a world treaty governing uses of the oceans, lasted from 1973 to 1982, and these built on earlier negotiations from 1958 to 1960). The Montreal Protocol (limiting CFC emissions in order to protect the ozone layer) has been seen as a model of conference diplomacy in that difficult negotiations were largely completed prior to the treaty coming into the public spotlight. Unlike the ICC and Kyoto Protocols, this allowed shared interests rather than public and political positions to be prioritized.

Private international law

Commercial business contracts are the largest source of international law. Private IL addresses relations and disputes among individuals and businesses from different nation states. Private contracts afford parties a good deal of freedom and flexibility to utilize foreign law. Thus, a British exporter doing business with an Indonesian manufacturer may, given appropriate conditions, opt for the contract to be governed by Malaysian law and for the British courts to have jurisdiction in the matter.

Arbitration is the chosen means of dispute resolution in the vast majority of commercial agreements. The importance of arbitration in international business transactions is reflected in the UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards, which binds signatory states to recognize the enforceability of arbitral awards decided in any signatory state in the courts of the other.

In addition to states, private sector actors may also be bound by evolving public IL. For instance, businesses may face liability for human rights violations which occur in countries where they operate joint ventures. In a 1997 case, the US-based Unocal Corporation was sued by Burmese workers on the basis of human rights abuses carried out by its joint venture partner entity in Myanmar and a US court allowed the case to proceed. Also, free-

trade agreements such as NAFTA have brought legal challenges and debate on the application (or lack thereof) of labor and environmental standards. Overseas sub-contracting by foreign-owned business entities has also led to litigation against leading companies in the garment, apparel, and sportswear industries for allegedly violating applicable labor and environmental regulatory standards.

Hybrid international law

Hybrid IL encompasses trade agreements and taxation treaties whereby the signatory is the state. Trade has become a lightening rod of IL controversy. The debates raging over the proposed free trade pact for the Americas, EU agricultural subsidies, or the World Trade Organization (WTO) are but a few examples. The WTO has become a powerful international organization (IO), one able to influence the economic fortunes of nation states. It serves as the ultimate arbiter of the rules of global trade and has developed a judicial mechanism to render decisions which are binding upon its more than 130 member states. If a party does not comply with a WTO decision, member states are permitted to impose retaliatory trade sanctions. The result is a judicial mechanism with sufficient bite to ensure enforcement.

The US has brought and won WTO decisions against Japan, Brazil, and the EU on subsidies and other protectionist barriers to free trade. In 2001, the EU successfully challenged US tax code provisions concerning the running of exported goods to Europe through US tax haven countries. By ordering the US to dismantle this tax subsidy, the WTO gave its most significant ruling to date repealing hundreds of millions of dollars in tax breaks given to Microsoft, Boeing, and other large US exporters. This case is illustrative of the interdependent nature of domestic state law and IL, and also demonstrates the growing potency of IL, even upon the world’s most powerful industrialized nations.

The negotiations concerning LDC (lesser developed countries) debt reduction and debt forgiveness provide another example of hybrid IL. Most of the bad loans were made by private commercial banks, yet governments and IOs were intimately involved in the negotiations over the treatment of these loans.

The war in Iraq has seen private defense contractors play an unprecedented role in traditional state military operations, and thus may be seen as *de*

facto hybrid IL. To some, this is a sensible way to utilize market forces in order to supply needed services. To others, subcontracting sovereign duties violates IL by allowing human rights abuses to occur with impunity as private sector actors are not held accountable under the military chain of command and applicable treaties.

The UN and international organizations

Over the past 60 years, the rise of international organizations (IOs) has been remarkable. Confronted with two world wars within 30 years, powerful nations established IOs under the ideal of collective security – from the League of Nations to the UN system and beyond. The number of IOs has grown some six-fold since 1945, totaling more than 500 IGOs (International Governmental Organizations, such as the EU, ASEAN, and OPEC) and tens of thousands of NGOs (Non-Governmental Organizations, such as Greenpeace, Planned Parenthood, and Amnesty International).

The UN is the closest to a global government that the world has yet witnessed. Its Charter affirms the principle that states are equal under IL, and that states have full sovereignty over their own affairs and territories. The proliferation of UN “peacekeeping forces” around the world has been contentious on many levels (peacekeeping forces are not mentioned in the UN Charter, but have been used frequently since 1991). Might they one day be used to enforce World Court rulings? In the 1950s and 1960s, UN membership more than doubled as African and Asian colonies became independent states. Until the mid-1960s, the USSR was the main power to use its veto in the Security Council as the Assembly regularly sided with the US. But by the 1970s and 1980s, the growth of newly independent third-world states led to the US becoming the main user of the veto. Since then, there has been tension between the main financial contributors to the UN and the majority of its states. Developing countries assert that the UN Security Council (comprised of the US, Britain, France, Russia, and China) has been usurping powers from the General Assembly (in which all members are represented) and are demanding either a reversal or an expansion of Council membership. Wealthy countries say that those who pay should have a greater say.

Emerging perspectives

When the British House of Lords delivered its verdict against former Chilean president Augusto Pinochet in late 1998, the rejection of Pinochet's claim to immunity was a watershed moment in international justice. Heads-of-state are usually viewed as immune from prosecution for acts undertaken in their official capacity. Yet Britain's highest court affirmed the principles of the Magna Carta and from Nuremberg, in which no individual is above the rule of law, not even a former president. The following year, former Yugoslav president Slobodan Milosevic became the first serving head-of-state to be indicted and tried by an international tribunal.

The International Criminal Court (ICC) was established in 2002 as a permanent international tribunal to prosecute perpetrators of genocide, war crimes, and other crimes against humanity as defined by international agreements. Several recent ad hoc war crimes tribunals (1993 in the former Yugoslavia, 1997 in Rwanda, and 1999 in Sierra Leone) mark the first time since WWII that the UN Security Council set up international war crimes tribunals. The calls for a permanent court of this nature grew following the Nuremberg trials of 1945-46. To some, the ICC is an important and much needed step forward in establishing international rule of law. Others contend that the ICC lacks accountability other than to its member states, and as such is too political and an unacceptable imposition on state sovereignty. US concerns about ICC prosecutions of its forces have led it not only to refuse to join, but also to actively lobby against other states joining. Israel and China have also voiced strong objections to the ICC.

The objections raised with respect to the ICC are also raised with respect to so-called state universal jurisdiction statutes (e.g. in Belgium and Germany). Universal jurisdiction means that any state may arrest and try any individuals who commit specified crimes under IL However, the concept of universal jurisdiction itself is controversial as traditionalists see it as an illegitimate exercise of judicial power.

Conceptual debates

The age-old debate between realism and utopianism pervades debates on IL. US President George Bush's appointment of John Bolton, known for his harsh condemnation of the UN and international treaties, as US ambassador to the UN has polarized the debate concerning the role of IL. Bolton has said, "If I were re-doing the Security Council today, I'd have one permanent member because that's the real reflection of power in the world." He and

other “realists” view participation in many international agreements as misguided. Such views underline ideological tensions between those who see the national (economic) interest as prime and those “idealists” who support the ascendancy of global governance.

International law can be viewed as the sum of state actors pursuing their individual self-interests. From this perspective, states view IL as mere tools of convenience. In this climate, numerous violations of IL continue to occur, essentially without sanction. The Soviet invasions of Hungary, Afghanistan, and Czechoslovakia; and US interventions in Guatemala, Chile, Grenada, and Panama are just two examples. Likewise with China’s role in Tibet, Turkey’s role in Cyprus, and Israel’s occupation of the West Bank and Golan Heights, as well as the ongoing atrocities in Darfur, Sudan, the question of IL enforcement remains murky.

Many see international law as a powerful and sorely needed external constraint on states’ pursuit of their own short-term interests. They contend that unrestrained state action is lawlessness, and as such is self-destructive and irresponsible. After all, the argument goes, national borders stop neither acid rain nor nuclear fallout. In the words of former US Supreme Court Justice Arthur Goldberg, “Power not ruled by law is a menace.”

Twenty-first-century issues

IL continues to dominate the international agenda. From intellectual property agreements on the use of the worldwide web to issues of organized crime and money laundering; from human trafficking to protecting fish stocks – all of these issues underline the fact that in a globalized world, global cooperation and international law are becoming increasingly important. AIDS and other public health epidemics have also placed global cooperation at the top of the agenda. The need for affordable drugs vs. the licensing rights of pharmaceutical companies holding patents also raises contentious issues regarding IL.

The US-led “war on terror” has undoubtedly challenged the relatively new and evolving standards of international humanitarian law. Critics point out that numerous states violate human rights, civil liberties, and democratic principles, while using the war on terror as a pretext. Issues of hypocrisy and double standards with regards to IL also continue to dominate the headlines. Proponents of the methods used in the current war on terror assert that new

challenges demand new responses and that the failure of the UN system to effectively respond to threats posed by aggressors and those who pursue weapons of mass destruction (nuclear, biological, and chemical weapons) shows the failure and impotency of IL.

It is fairly easy to discount international law by pointing to numerous seemingly flagrant violations thereof. However, if IL is seen as an evolving historical process, there are certainly developments suggesting its increasing potency. Following WWII, domestic rights violations were simply internal affairs. Neither states nor IOs had any right to criticize how a government mistreated its own people. That is certainly no longer the case today.