

The Legal Aspects of International Conflict Resolution

By

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International law, like all law, aspires to regulate the affairs of nations in such wise as to be rational and humane. The statement that *law* is distinct from *morality* is puerile, not only because it is a well-worn theme by now, but also because it is an introduction to “legal myopia” - the inability to see beyond statute and precedent into the motive forces that shape law. That the effort to achieve goals of “humanity”, “considerateness”, etc., in short, ethical acceptability, is at work in international law should be evident immediately to one who sees the development of such a doctrine as the right of peoples to self-determination into a “peremptory norm of international law” (*jus cogens*) and the classification of the promotion and manufacture for sale of nuclear weaponry as an international delict.

It has been said that one of the purposes of international organizations and their instrumentalities (such as the United Nations and the International Court of Justice) is the avoidance of international conflict. I do not share this view, for there is something salutary about conflict and neither the U.N. Charter nor the Statute of the World Court (nor any other significant international document I am aware of) suggests that conflict is to be avoided at all costs. It is conflict that clarifies values; it is conflict that leads to the emergence of a new international order; it is conflict that

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allows nations to arrive at more powerful realizations that lead to shifting demarcations between "legality" and "international irresponsibility." It is my position that what international law endeavours to achieve is framing the conflict between nations within law and established norms of civilized encounter. To put it in other way, international law seeks to provide the stage where conflicts may be played out in view of arriving at more humanizing resolutions for world order.

International Law and Domestic Law

The debate between legal monism and dualism is standard fare for students of legal philosophy and introductory jurisprudence. I do not feel like indulging in the luxury of participating in a debate that is confounded by so many views and variations of views. Brownlie (*Principles of Public International Law*) does make a very useful suggestion: it is best to maintain that there is a sphere of international law (the relations between elites, be they states, trans-national corporations or international organizations) and there is a sphere of municipal law (the exercise of a state's governmental powers). Once one sees that this position is to be preferred, it also becomes obvious that international conflicts can be spawned by this situation.

All students of international law are introduced to the case of *The Paquete Habana* and *The Lola*, United States Supreme Court, 1900; 175 U.S. 677, 20 S.Ct. 290, a "turn-of-the-century" case. Already in that case it is readily observed that the U.S. Supreme Court did a good job at a "balancing act." The Court admitted that it felt obliged to administer international law, acknowledging that the United States must go by the established norms of conduct among nations (customary international law); on the other hand, it premises its administration of international law on the pronouncement that "international law is part of our law." The question then follows whether the Supreme Court administers international law as a consequence of the "binding" character of international law on domestic courts, *per se*, or rather because international law is declared part of U.S. law. The question is common, but the answer is by no means simple. If one argues, as I am inclined to do, for the obligatory character of international law on municipal courts, then is one willing to go the full length of the argument in holding that judgements by international tribunals can effectively bar litigation in municipal courts on the doctrine of *res judicata*? In tackling this problem with my students, I have argued for the following approach: the law of nations (whether customary or treaty) will not intrude into the municipal law system. Should domestic law, however, proceeding as autonomous, reach executory conclusions that would put a State or its instrumentalities in breach of an international obligation, an international "cause of action" arises. Two moves can obviate this undesirable end-result: the adoption of a constitutional policy of adherence to international law, and the development of a rule of construction that makes courts (and administrative agencies) interpret municipal law

in such wise as to avoid conflict with international law. This was a doctrine enunciated in the case of *The Attorney General of Israel v. Eichmann* before the District Court of Jerusalem. The *Paquete Habana* and the *Lola* cases, however, are significant in that the Supreme Court of the United States acknowledges that international law can give rise to certain rights that may be adjudicated before municipal courts. In such cases, municipal courts must take judicial notice of international law. Here lies a tremendous difference between the treatment of international law and foreign law. In the domain of what is traditionally called "private international law" (conflict of laws), tribunals do not take judicial notice of foreign law; that is to say that anyone adducing foreign law as basis for *cause of action or defense* must prove foreign law in consonance with relevant provisions of the *law on evidence*. It is generally accepted, however, that municipal courts will take *judicial notice* of international law. Naturally, what is supposed (but cannot be readily granted) is familiarity of domestic judges with developments in international law. Obviously, competent *amici curiae* can, in some measure, make up for this lack.

Is there a hierarchy of observances? This appears to be the case when one reads the *Paquete Habana* and *Lola* opinion. Recourse is had to customary law absent treaty and controlling executive or legislative act, or judicial precedent. At first blush, this hierarchization seems to subordinate customary international law to municipal law. That it does so is to be expected, however, because what we deal with here is the decision of a court that is bound by a state's own municipal law. But when a State deals with the community of nations it must, itself, submit to a regime of law. This policy of a "global community of law" and not of whim (more exactly, politicians' tantrums) is what supports that holding, by now well-entrenched in international law, that a State may not interpose its municipal law, not even its Constitution, as an excuse for ignoring its international obligations. Implied then is the obligation of States to fashion and, where necessary, re-work municipal law so as to preclude State violation of international law. The body-politic through the interaction of its different branches and agencies must reconcile the demands of international law with those of municipal law.

We have cited United States jurisprudence. The recognition, however, of the need to strengthen international law partly through administration by municipal courts is not an American insight alone. Lord Denning, in *Trendtex Trading Corporation v. Central Bank of Nigeria*, England, Queen's Bench, 1977, 1 Q.B. 529, 553-554, a relatively recent decision, held that the so-called doctrine of "incorporation" seemed to be the more desirable theory to go by so as to enable the English judiciary to recognize changes in international law. In fact, he calls attention to the fact that English courts have applied changes in international law without aid of Acts of Parliament. In this case, the bounds of the doctrine of *sovereign immunity* have changed, and these changes have been recognized in the courts of England as well as in the courts of other countries without any specific

legislation. What a more global perspective and the political will to promote the growth of international law will do to public law cannot be anticipated, but its directions can be detected. Such concepts as "domestic jurisdiction", "national sovereignty" and "legislative supremacy" will be used in a manner that will reflect changes in political and legal attitude.

For the moment, it seems that while domestic courts display sensitivity to international law, the "balancing act" previously referred to will still be part of the show. In the *Immunity Cases* decided by the Supreme Court of the People's Republic of Croatia, No. Gz 766-56 in 1956, the Court found that a foreign state could claim immunity from suit by a rule of customary international law; the Court, however, eagerly pointed out that there was a rule of domestic law which did provide for such immunity.

In the light of all this, the holding of District Judge Thomas, approvingly cited on appeal, in the *Schroeder v. Bissel* case, United States District Court, D. Conn., 1925, 5 F. 2nd 838, as well as the "ratio decidendi" of the Court of Jerusalem in the *Eichmann* case will not find much support.

The Concept of "Domestic Jurisdiction"

It has been said quite pointedly by one local author that international law stumbles over the rock of "sovereignty." I maintain that "sovereignty" is a "scandal" (in the Greek sense of "stumbling block") to international law not because it is a powerful concept but because it is nebulous. Legal ambivalence, for one, covers a multitude of political and juridical uncertainties!

If by "sovereignty" and "domestic jurisdiction" one means that national legislation can be oblivious of international law, then very embarrassing situations that would readily serve as juicy materials for analysis in a course on political law could so easily arise. Should the Legislature enact statute violative of treaty obligations or international law, the Executive could find itself impeded in its efforts at establishing diplomatic relations or at bringing about a warmer climate with one other State, with an association of States, even with the rest of the world community. The same thing may be said of Judicial decisions that render it more difficult - if not impossible - for the Executive to do what constitutional law obliges it to do: preside over and take responsibility for the foreign affairs of the country. This was exactly what was at bar in the *Sabbattino v. Banco Nacional de Cuba* case, a U.S. Supreme Court decision mastered by practically every beginner in an international law course.

The United Nations Charter in Article 2 (7) is careful to exclude from the competence of the world body matters within the domestic jurisdiction of states. Obviously, this hardly does anything to clarify the concept, but it should also be clear that the determination of what is within domestic jurisdiction or beyond it cannot be left to the unilateral

determination of the individual State. It is easy to see that when this is the case, any State can, with ease, slither its way out of a tight spot by asserting "domestic jurisdiction". In the *Tunis-Morocco Nationality Decrees* case, Permanent Court of International Justice, 1923 (PCIJ, Ser. B., No. 4) the predecessor of the present-day World Court ruled that the very status of the entity involved, a protectorate, called for an examination of the whole situation, effectively denying exclusive jurisdiction of domestic courts over the matter. The question of nationality seems unyieldingly a domestic issue, but the court ruled that where there are obligations which a State may have undertaken towards other states, there are issues of international law is at bar. There claims of domestic jurisdiction will not preclude litigation before an international tribunal.

"Sovereignty" and consequent "domestic jurisdiction" are hallmarks of statehood. Concepts like these, however, when deliberately left ambiguous, can be dangerous. International law in fact has floundered on the rocks of such claims. Because our perspective is one of resolving international conflicts, I propose that we think of "sovereignty" as the mark of an elite that the world community deals with in a manner that supports its governmental independence, territorial integrity and international juridical personality. Seen this way, "sovereignty" becomes in turn a concept supportive of international law. A climate for the sound resolution of international conflicts can thus come about.

I submit that a concept of "sovereignty" and "domestic jurisdiction" that develops along these lines will be a synthesis of the components of domestic control and self-determination as well as of international responsibility. To the extent that a State-elite ignores the sentiments of the world community, in the same measure does it do injury to its own sovereignty. It will be observed that assertions of sovereignty and rhetoric on "domestic jurisdiction" tend to arise when international organizations or bodies inquire into such matters as human rights violations, the protection of foreign investments and protests in the face of political or diplomatic irresponsibility. In fact, I have the suspicion that words like "sovereignty" and "domestic jurisdiction" are solemnly intoned on such occasions precisely because they tend to elicit visceral rather than intellectual reactions! It is said by some jurists that the choice between the primacy of international law or that of municipal law is really the disjunction between prevailing sentiments: when nationalism runs high, then there will be assertions of the "sovereign independence" of states; when pacifism or internationalism, however, are one's rallying points, then international law wins the day. My own view of sovereignty, as outlined above, makes it stand to reason that an assertion of sovereignty is irreconcilable with disregard for international law. The state-elite then that disregards international concerns about international law threatens its own sovereignty insofar as other state-elites refuse to lend support to its claims at control when used in transgression of the precepts on human rights. There is legal support for this. It is recognized by writers of repute that there is such a thing as "the

obligation to withhold recognition." I concede that the doctrine has problematic ramifications, but in its simplest form, it is the statement that when a force establishes itself in violation of *jus cogens*, the illegality at inception will never be cured by effective control. Pursuing the logic of this juridical persuasion, State-elites are under obligation to support the self-governance of an entity purporting to be a state only when these do not violate well-established international standards on the treatment of individuals, ethnic minority groups or aliens. The hesitation of international law to speak about individuals is a thing of the past. The fact is that in many respects areas of customary and conventional law have to do with the treatment of individuals and the promotion of human dignity. To hold otherwise would be to allow entities to thrive that threaten the very world order envisioned in treaties and customs accepted with the force of law.

In this light, positions such as those expressed in the Connally Reservation should now be considered for consignment to the dusty archives of history. If a State-elite submits itself to the compulsory jurisdiction of the World Court but leaves to itself the right to determine when it should submit or not is to offer a new - and incomprehensible - meaning to the term "compulsory jurisdiction." It matters not, really, whether it is a "super-power" like the United States that makes the reservation or not. As in domestic affairs, however, what is many times lacking in the world arena is the *political will* to insist that international law should prevail. The United States, after all, is not the world; perhaps, even this rhetoric is not necessary for the fact that the United States itself invoked international law to lend legitimacy to its actions in the Middle East has shown it that the support of the global community is something not even a "super-power" can do without!

It is for the reasons discussed above that I have a difficult time grasping the logic of the United States Court of Appeals in the *Diggs v. Schultz* case, United States Court of Appeals, District of Columbia, 1972, 470 F. 2nd 461, certiorari denied 411 U.S. 931, 93 S.Ct. 1897. There, the trial lower court found a confrontation between an international obligation of the United States arising out of Resolution 232 of the Security Council imposing a trade embargo with Southern Rhodesia and the Byrd Amendment of 1971, that forbade the President from prohibiting the importation of materials determined to be strategically important. As the appellant's correctly, to my mind, argued, the Byrd Amendment, of itself, did not necessarily put the United States on collision course with the position of the Security Council. In its option however, the Executive was in fact choosing to violate the country's treaty obligations, using a Congressional act as support. The appellate court declined to enjoin the President, declaring that the choice of options was part of Executive discretion and was a *political*, consequently *non-justiciable* issue. I earlier argued for the adoption of a rule of construction that would strengthen the position of international law in regard to the resolution of international conflicts. A

question of law was actually in issue: Could the President, invoking a congressional act, opt to violate a treaty obligation? The court refused to make a pronouncement; in effect, it refused to pass judgement on the legality of Presidential acts - a power well within the scope of its constitutional jurisdiction. I think that the Court missed an opportunity to bring governmental acts to conform with the prescriptions of international law.

Diplomatic Protection

A national of one State who goes to another submits himself to the civil and criminal jurisdiction of the courts of the receiving State. On the other hand, because of nationality, a bond continues to span the geographical distance between the national and his homeland. The exercise of diplomatic protection is therefore one fertile ground for international conflict. Consistently with the position I advanced earlier, I must also add then that it is this area of international law that holds the promise of growth and development.

Jurists maintain that three factors compete for attention when the law of diplomatic protection is involved: *first*, the right of the injured state; *second*, the interests of the injured alien; *third*, the interests of the defendant state, competing national states and other entities.

In the *Barcelona Traction Case*, a 1970 case tried and disposed of by the International Court of Justice (1950 I.C.J. 3, 32 ff.), the Court contended with the issue of Belgium exercising diplomatic protection in favor of its nationals, stockholders of a Canadian corporation. The International Court of Justice found the Application of Belgium to involve the logical fallacy of "*petitio principii*" in that Belgium was asserting the right to exercise diplomatic protection over its nationals, even if Canada would also have the same right to espouse the claims of its corporation. I respectfully maintain that the Court ignored the issue rather of whether, in the absence of affirmative action on the part of the State of incorporation (or even more, refusal on the part of the latter state to prosecute claims), the State of the aggrieved stockholders may exercise diplomatic protection and the right of espousal. The *Barcelona Traction* case has become a classic among international law students because it serves as an example of advertence to municipal law by an international tribunal. In fact, the Court referred to municipal law principles of corporate law. I think that the possibility of a *derivative suit*, admittedly an action in equity, common to the corporation laws of states that deal with this kind of legal entity, could have been profitably used by the International Court of Justice to recognize *jus standi* on the part of the Belgian government.

It is my belief that the more capacious our standards of juridical personality are, the greater the opportunities exist for rational discourse, exchange and the legitimation of resolutions and emergent structures. □