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lnternational Law as Law

Sompong Sucharitkul
Golden Gate University School of Law, ssucharitkul@ggu.edu

INTERNATIONAL LAW AS LAW[1]

PROF. DR. SOMPONG SUCHARITKUL

I. INTRODUCTION

The title of this address: "International Law as Law," appears at first sight to beg several fundamental questions. To discuss "international law" *qua* "law" initially requires a common understanding of the term "law," or to be more precise what is meant by "law" for the purpose of the current study. Without embarking on the perennial quest for a universal definition of "law," it may suffice for practical purposes to refer even superficially to the variety of schools of thought on the definition of "law." The term "law" cannot be taken for granted, as there are so many known definitions of "law" in the study of jurisprudence, or the philosophy of law, legal science or general principles of law. Once it is agreed as to which definition of "law" or which school of jurisprudence is adopted or to be followed, for the present purpose, the answer to the question whether international law is, or can at all be regarded as "law" may be attempted more meaningfully. This may well depend, as it surely does depend, on the actual definition of "law," employed in the exercise.

By way of illustration, some of the more notable schools of jurisprudence offering concrete definitions of "law" may be considered, as they may

1. Keynote address presented by Professor Dr. Sompong Sucharitkul, D.C.L. (Oxon), Dean of the Faculty of Law, Rangsit University, Bangkok, Thailand at the 19th Fulbright Symposium at Golden Gate University School of Law on April 3, 2009.

provide different answers to the question of the "lawness" of international law as law.

One of the most prominent analytical schools of jurisprudence that attracted the attention of jurists in the past one hundred years or so was the Austinian theory of law, defining 'law" as a "command" issued by one political superior to a political inferior or subordinate, with a sanction attached in the event of failure to obey or abide by the "command."[2] This command theory of Austin's definition of law was prevalent for some time, until discredited by a number of convincing objections and reasons given by subsequent commentators. While the Austinian definition of "law" was in vogue, it was relatively certain that "international law" did not and could not qualify as "law."

For one thing, "international law" could scarcely be regarded as a command, nor could there be a political hierarchy, neither a political superior nor subordinate, as States are equal in the eyes of international law. Besides, there seemed to be a marked absence of sanction in international law to the extent that "international law" appeared outwardly to lack lawness without any effective sanction.

In this particular context, circumstances may have considerably, if not fundamentally, changed over the past one hundred years. A "command" that used to be the source of authority from a political superior, issued to a subordinate from an Austinian perspective, may find more comparable concrete examples in a variety of resolutions of the Security Council of the United Nations which could create binding legal obligations on member states of the United Nations. While states remain equal in the eyes of international law, international bodies or agencies have been established which appear to have been vested with superior, if not supra-national, authority. It is no longer absolutely certain that if Austin were alive today, he could not have defended his definition of law as not precluding the "lawness" of international law, as a source of international obligations flowing from a supra-national world body, entrusted with the exercise of some semblance of a kind of legislative, executive and even judicial power with some tangible forms of sanction attached in the eventuality of non-compliance. Even enforcement measures are no longer inconceivable within the framework of the United Nations.

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2. *See, e.g.*, John Austin and W. Jethro Brown, The Austinian Theory of Law: Being an Edition of Lectures I, V, and VI of Austin's "Jurisprudence" and of Austin's "Essay on the Uses of the Study of Jurisprudence"with Critical Notes and Excursus, John Murray, Albemarle Street, London, 1906, p 331.

"International law" appears more likely to be considered as "law" in the eyes of other schools of jurisprudence such as the historical or sociological school. Examples of relevant schools of jurisprudence include Sir Henry Maine's "Ancient Law,' Sir Paul Vinogradorff's "Historical Jurisprudence," or the Realist School of Jurisprudence. Additional schools of jurisprudence include the Pure Science Theory of Law as proposed by Professor Hans Kelsen, or the Natural Law school of jurisprudence prevalent in ancient Rome as reported by Classical Roman Jurists like Ulpian and subsequently advocated by European jurists such as Duguit. Other than the analytical school of Austin, "international law" has incurred no negative reception in any definition of "law."

Even in other analytical schools of jurisprudence, the lawness of international law seems apparent. Take for example, an analytical definition of "law," suggested by Dr. Arthur Goodhart, Master of University College, Oxford University, Professor of Jurisprudence, an American graduate of Yale University School of Law, and for longer than three decades, Editor in Chief of the English Law Quarterly Review. In one of his memorable classes on jurisprudence almost six decades ago, Dr. Goodhart once offered a more pragmatic definition of "law" from his own school of thought, which could well be classified as "analytical". According to Professor Goodhart, "law" can be defined as "a body of rules recognized as binding within an organized society."[3] His description of law as a collection or body of rules is readily and clearly visible. His reference to the subjective element of "recognition as binding" signifies acceptance by members of the organized society as an obligation incumbent upon its members, as well as upon the society itself. The substance of the law or any rule of law may be altered by the will of the society and its members, as the law itself as well as its rules must necessarily grow and progressively develop to keep up with the march of time. Similar to the mundane Buddhist philosophy which manifestly admits the existence of the four fundamental truths, or the four Ariya Sajja, namely birth, growth, illness or decay, and death or disappearance, as the cycle of Samsara, any rule of law in any organized society is bound to follow this inevitable cycle. A rule of law is born, created or established; it is accepted in a society and grows or prospers in its application. One day it will lose its attraction and binding character by ailing, becoming sick, or falling into a state of decay, and will eventually fade away or fall into desuetude, thereby following the cycle of Samsara. Such rules of law which are no longer recognized by the community as

3. *See, e.g.*, A.L. Goodhart, English Law and the Moral Law, Fred B. Rothman & Co. Littleton, Colorado, 1988, p 19.

binding will become obsolete or extinct, abrogated, superseded or abandoned or otherwise replaced by different, more current, or even contrary rules. A set of pre-existing rules may become obsolescent for lack of sustained recognition or continuing practice and observance. It may then remain on the decline and finally fall into disuse or oblivion, or otherwise is substituted by another more updated and contemporary version of the derelict set of rules. Such is the cycle of life and death for any living breathing being, including any rule of law.

If international law is law as it appears to have been firmly established, then international law qua law too must follow the same path of Samsara as law. This accounts for the natural growth and progressive development of international law. Accordingly, a rule of international law, just like any rule of law, comes into being or becomes established in the practice of states, further develops and grows in its acceptance by the international community, and may one day lose its attraction or binding force and fall out of practice and become no longer observed by states. It may thus die a natural death or fall into disuse or become replaced by a different rule of international law.

II. RELATIONSHIP BETWEEN INTERNATIONAL LAW AND NATIONAL LAWS

Once the lawness of international law is ascertained and proven beyond dispute, the next series of burning questions to address and examine in-depth concern the relationship between international law, the international legal system and national laws, or any given national, internal or domestic legal system. One question that deserves to be clarified in the first place is whether international law is part of national law or vice versa. To put it differently, it is questionable whether the international legal system finds its place in any given national legal system, or conversely whether a domestic legal system can be distinctly recognized by or within the world legal order. The answers to these questions may all be in the affirmative. Still, further questions need to be raised and examined regarding the reciprocal relations between the two legal systems.

It may be appropriate at this point to refer to two different approaches to the relationship between the law of nations on the one hand and any given national or federal legal system on the other. In this connection, it would seem practical to start from a given national legal system, such as the United Kingdom or the United States, to discover the proper place of international law within a domestic or municipal legal system. Students of international law in a common law system are likely to be familiar

with the dictum of Lord Mansfield in *Triquet v. Bath*, (1764) 3 Burr. 1478, recalling observations by Lord Talbot, the Lord Chancellor in an earlier case of *Buvot v. Barbuit*, (1735-37) Cas. Temp. Talbot 281-283, declining jurisdiction against Barbuit, who was commissioned by the King of Prussia in 1717 to do and execute what his Prussian Majesty should think fit with regard to his subjects trading in England. Thus, the theory of incorporation was introduced into English case law by English courts incorporating customary rules of international law into the common law, and supplemented in the field of diplomatic immunities by the Statute of Anne (1708), Act for Preserving the Privileges of Ambassadors, and other Public Ministers of Foreign Princes and States, c.12, ss.1, 2 and 3. As the United States inherited the English common law system upon attaining independence, the English doctrine of incorporation was part and parcel of the heritage of the English common law, complete with an incorporated body of customary rules of international law.

In another closely related field of state immunity which in the English practice was but a sequence of personal immunity of the sovereign, in *De Haber v. The Queen of Portugal*, (1851) 17 Q.B. 171, Lord Campbell C.J. said, at page 206-207, " . . . To cite a foreign potentate in a municipal court, for any complaint against him in his public capacity, is contrary to the law of nations, and an insult which he is entitled to resent." In US practice, influenced in no small measure by the common law doctrine of the immunity of the domestic sovereign and the impact of the United States Constitution, American courts were the first, in point of time, to formulate the doctrine of state immunity which has subsequently been accepted in the general practice of states. The principle was earlier lucidly enunciated by Marshall C.J. in *The Schooner Exchange v. M'Faddon*, 11 U.S. 116 (1812) 7 Cranch 116, at pages 136-137, "… This perfect equality and absolute independence of sovereigns, and this common interest impelling them to mutual intercourse, and an exchange of good offices with each other have given rise to a class of cases in which every sovereign is understood to waive the exercise of a part of that complete exclusive territorial jurisdiction, which has been stated to be the attribute of every nation." Like in the practice of the United Kingdom, customary rules of international law have been accepted by American courts as being part of the law of "our land."

Other national jurisdictions which have not adopted the Anglo-American doctrine of incorporation of customary rules of international law as part of the corpus juris of their own national law may nevertheless recognize the existence of a body of customary rules of international law, and consider them, as in the case of Dutch courts, to be binding on their

national judiciary. Other jurisdictions, such as the French and the Italian, may have more or less explicitly provided for the application of customary rules and principles of international law by national judicial authorities.

To explore all the jurisdictions in the world is to enter another field of international legal studies, namely comparative law. An in-depth examination of comparative legal systems or the comparison of national laws may lead inevitably to the question of choice of law in a given situation. This will in turn lead to concurrent or partly overlapping areas of legal studies, known as conflict of laws or more popularly in the civil-law jurisdictions, "Private International Law."

From the perspective of international law or the world legal order, an exploration of national legal systems is not only recommended but is also beneficial and useful. To say the least, an examination of the laws of each nation or several major nations of the world, will contribute to the understanding of the process of the making of international law. The sources of international law, as contained in Article 38 (1), (b), (c) and (d) of the 1946 Statute of the International Court of Justice, invariably and expressly include references to national legal systems, such as "(b) international custom, as evidence of a general practice accepted as law," "(c) the general principles of law recognized by civilized nations," or "(d) . . . judicial decisions . . . of the various nations, as subsidiary means for the determination of rules of law." Each of these items is found in the study of national legal systems.

Whatever the ultimate conclusion that may be reached regarding the degree of usefulness of the studies of various municipal legal systems in the search for the substance of rules of international law, there is a clear need to learn about national laws to assist in the comprehension and application of rules of international law. The intimate relationship between international law and national or domestic laws are therefore boundless and infinite. Their inter-connection is complex and intense to such an extent that there seems to be very little difference in practice between "monism" and "dualism," nor indeed between the different theories of "monism" or "dualism." Whether international law and any given national law can be seen as one or can co-exist peacefully as distinct legal systems, appears to entail no significant or any material difference in effect. Their intellectual discussion is nonetheless helpful for a better and wider appreciation of their mutual needs and reciprocal interchanges.

III. IMPACT OF NATIONAL LAWS ON THE LAW OF NATIONS

As a natural consequence of an intensive mutual relationship, international law has been inspired by national laws and has continued progressively to develop from the practice of states. Hence from the experience of national courts and national legal systems, including the legislative and administrative authorities. International law cannot exist without the international community or the family of nations. Within each State there is a national legal system to provide the source of inspiration for the livelihood of the law of nations, which continues to grow from strength to strength, borrowing freely from national legal systems whatever rule of law or general principle of law that may be considered expedient and conducive to its growing status in dimension as well as in volume and efficacy, including more effective implementation of the evolving rules of international law.

Today the world has seen in active operation many international and regional bodies at work singly and collectively in close collaboration to enhance and strengthen the rules of international law. To mention a few, apart from the International Court of Justice and the Permanent Court of Arbitration in Hague which have been operative for many decades, there are also in operation the United Nations Compensation Commission (UNCC), the International Law Commission (ILC), the International Criminal Court (ICC), the various International and Regional Criminal Tribunals, and the GATT and the World Trade Organization (WTO). There are a great many fascinating world bodies and regional agencies to study in order to acquire a better understanding of international law in full progressive development.

For all these and more, there is ample proof of the presence of international law as law. International law has indeed become more effective to such an extent that it is now clearly possible to speak of effective remedies and the application of enforcement measures in the form of sanctions in international relations. International law has been reinforced by the collective will of the states as manifested in various domains. For instance, in the field of recognition and enforcement of foreign arbitral awards, adherence to the New York Convention of 1958 has done much to lend more meaningful strength to alternative dispute resolution (ADR) in general and international arbitration in particular. If international law itself is short of effective sanctions for want of an international police force, this gap is more than fully compensated by the willingness of enlightened national judicial authorities to give effect to international awards and adjudications.

Finally, international law has persisted, and will continue to prosper with the continued and increasing support of member nations of the international community who are currently enlightened by the realization that a lawless world would imply an early termination of the world legal order. Only international law and order will ensure the survival of mankind against the background of scientific and nuclear research and experiments that continue to threaten the stability and well-being of the people of the world. What is urgently needed today is the awareness that international law is law and must be regarded as such by the international community and by each and every member of the world populace without exception. If this address has led to that conclusion, the aims and purposes of the present exercise may be said to have been fulfilled.

IV. CONCLUDING OBSERVATIONS

In the ultimate analysis, it is emphatically vital to reconfirm with absolute conviction the original proposition that international law is law, and that international law should be treated as law with all the attributes of that notion. It is incumbent upon nations and people of the world to add further strength and vitality to the rules of international law without detracting from its lawfulness or legality. International law should be devoid of the slightest trace of unlawfulness or illegality of any kind whatsoever.