

A Perspective on International Law

SYED HAMID ALBAR

ABSTRACT

This article explores the evolution and role of contemporary international law vis-a-vis international politics. It considers how these rules and norms regulate the conduct of states and other entities in their relations, internally and externally. The article discusses the polemics between different scholars on the nature of international law and its aspects to achieving peace, justice, prosperity, and freedom for all. There are those who consider international law as ineffective due to its failure in maintaining international peace or compelling states to comply. Nonetheless, it is well-accepted and important in order to attain balance and order in the management of society and international relations. Hence, it binds state and non-state actors to take efforts to avoid conflicts which can be devastating for peace, justice, and prosperity. However, the nature of the international system is such that it has not been able to dictate politics and behaviour of states. The dilemma of the international community is how to create a more level playing field for freedom and democracy to prevail. In reality, international law today is a reflection of the development of the international society in their competition for power. The current debate is on whether it is possible to create a more just and balanced international order. Thus, international law is confronted with many challenges and impediments that need to be overcome and dealt with. In conclusion, even with the prevalence of flaws and weaknesses, international law is still a necessary means in the promotion of rule of law and governance. Any breach or breakdown of international law should not be blamed on the law itself, but rather the fault of the actors that operate the system.

Keywords: international law; justice; international politics; international order; international relations.

INTRODUCTION

It is a truism to say that law is of fundamental importance to any society as it acts as a guideline to what is acceptable in human conduct and behaviour. Dulić (2021), in her article on law, said: “Generally speaking, law is a set of rules created by State institutions that makes laws through the authority of the State. The laws have sanctions that are recognized by the State and enforced by State authorized bodies”. It is these rules that bind all people in society and State and without which there would be conflicts between individuals, groups, communities, and the State (Kishan Tiwari 2017).

The system of rules and guidelines provide general safety and ensure rights of citizens are upheld against abuses by States and others. John Salmond defined law as “the body of principles recognized and applied by the State in the administration of justice”. In general sense, law can be defined as “a set of rules (religious, customary and/or promulgated by the duly authorised body) which is applicable to all members in a society and enforceable before a court of law” (Muhamad Hassan et al 2020). It is also a tool used in the administration of affairs of State and society in its internal and external relations. The *raison d'être* of law universally accepted is in securing order

and balance in the management of society. This means law can be categorised as any rule of action including any standard set or pattern to which actions are or ought to conform in the political, economic, and societal domains.¹

In a connected world of the past and today, we need rules governing relations among sovereign States and other entities that are referred to as international actors. This is where the term international law came into being. It has many definitions and theories. According to one of those definitions, international law is “a system of treaties and agreements between nations that govern the way nations interact with each other, or with citizens of other nations and businesses of other nations” (Dulić 2021). However, the classic definition of international law was given by Bentham who said: “[I]t is a collection of rules governing relations between State (law of nations)”. Furthermore, JG Starke defines international law as “body of law which is composed for its greater part of the principles and rules of conduct which States feel themselves bound to observe, and therefore, do commonly observe in their relations with each other” (Muhamad Hassan et al 2020). Watts (2001) appropriately pointed out that: “[I]nternational law is an important part of the structure of our international society”. Therefore, it is also known as ‘law of nations’, ‘law among nations’, and ‘inter-state law.’

Of course, these definitions omit individuals and international organizations. In the broader context, international law consists of a body of rules, regulations, treaties, and agreements done at the bilateral or multilateral levels agreed among independent sovereign nations to govern their interactions with one another, that are binding and enforceable. Today, it has evolved from its original classical definition to include non-governmental organisations, transnational corporations and even individuals that

provide dynamic and vital inputs to modern international law (Shaw 2021). Accordingly, some scholars redefine international law as: “[T]he body of rules that governs the relations between States and such entities as have been granted international personality” (Schwarzenberger 1965). In the same vein, others (Williams and de Mestral 1987) define international law as: “[T]he system of law containing principles, customs, standards and rules by which relations between States and other international persons are governed,” These definitions are more inclusive of subjects of international law and also reflective of the modern reality (Mohammad Naqib 2011).

Furthermore, many countries have considered fitting to incorporate international law as an integral part of their municipal or national laws. This has enabled States to establish relations with one another and deals with issues that may arise from time to time among them through the international legal framework. Hence, it is right to say that there is an effort and mechanism to provide order in the international community and assist in overcoming physical or military conflicts (Brahm 2003).

Eric Brahm (2003), in his essay of international law, noted that it has evolved in a number of ways. He mentioned four sources of international law which are very significant by referring to Article 38(1) of the Statute of International Court of Justice (ICJ) such as, firstly, international agreements and treaties entered and ratified among States; secondly, international customary practices which are rules developed from general practice which are accepted as law and exists independent of treaties (e.g. in the case of armed conflicts, it strengthens the protection given to civilians and non-combatants or victims of conflicts or civil war); thirdly, general legal principles commonly applied by a significant number of States; and finally, judicial decisions of international courts, tribunals, arbitrations

as well as, to some extent, domestic courts, and also writings or works of legal scholars whose expertise are acknowledged and accepted by political leaders.²

According to Schwabach and Cockfield (2009), what we are witnessing in international law is very much influenced by John Locke's notion of liberalism which says: "The values underlying international law today are the values of liberalism - the rule of law, capitalism, democracy and emphasis on human rights". Changing attitudes in the age of enlightenment have profound effects on the development of international law (Boyle 1985). Therefore, international law grew to augment the values enumerated by Locke and subsequent political philosophers. The purpose of the law is to achieve peace, justice, common interests promoting trade among nations.

Nonetheless, it does not mean that the presence of international law provides all the answers to resolve disputes or conflicts among nation States, organizations, individuals, and others. It is just a platform or mechanism available for dealing with issues arising in international relations. The world has become more complex even though the law attempts to provide better clarity through elaborate drafting and language aimed at avoidance of conflict or a methodology for conflict resolution. The smaller and weaker nation States often perceive that the administration and implementation of international law has the elements of double standards and selectivity in favour of the powerful States. They contended that the current international order is imbalanced, unjust, undemocratic and in favour of the powerful. The powerful takes advantage of the law by interpreting and dictating their own interest and dominion in legitimizing their actions. For example, in defining what amounts to a threat or what is considered as immediate or imminent danger to international peace and security are interpreted to suit their

interests or those of their allies. The prohibition of use of force under Article 2(4) of the Charter of the United Nations (UN) is often liberally interpreted and used as a pretext for self-defence or to take pre-emptive action. It camouflages the true agenda of regime change as some of the examples can be seen in the case of invasion of Afghanistan, Iraq, and bombings of Libya, etc. The morality and values of what is right or wrong in the execution of international obligations seem to be missing in international politics. The powerful even find justification to ignore the UN and the multilateral system by taking unilateral action to suit their interest.

Salmond (1893) placed the concept of justice as one of the primary purposes in his definition of law when he said: "Laws are the bodies of principle that tribunals recognise and apply while administering justice." The ultimate purpose of law is to achieve justice for all citizens of the world. What is justice? Rawls (1999) said: "Justice is the first virtue of social institutions, as truth is of systems of thought". Justice can be defined as a concept of moral rightness based on ethics, equity and fairness, rights of all human beings without discrimination. To put it in another way, justice can also be perceived as equality of rights and fairness. Morality and ethics should be the prerequisite for international order and stability.

EVOLUTION OF CONTEMPORARY INTERNATIONAL LAW

According to Schwabach and Cockfield (2009), modern international legal structure was a product of European sovereign nations as this can be traced back to the Treaty of Westphalia in 1648. After the end of the Thirty Years War (1618-1648) among warring European nations, the world saw the birth of new nation States such as Russia, France, Great Britain, Sweden, and Spain. Generally, the Treaty of Westphalia was concluded to achieve collective security and prosperity.

In fact, it was during this period that the concept of State sovereignty began to surface and propagated as an absolute dogma. It was from this notion that the principle of non-interference in the domestic affairs of another State gained recognition and accepted as an absolute norm, including on human rights' abuses within the boundaries of the State.

International law, as it evolves, reflects a world system based almost exclusively on the principle of State sovereignty and that the States are the only relevant actors in it. Political philosophers like Grotius, Pufendorf, Hobbes and Rousseau asserted that State was an independent political entity responsible for the protection of its citizens and international political institutions cannot get involved in the domestic affairs of a State except with the consent of that State. Be that as it may, the structure of international law today has its roots in the experience of the European Renaissance era, though its origins lay deep in historical antiquity from different cultures and civilizations dated back to the time immemorial (Schwabach and Cockfield 2009).

Grotius, in his book entitled '*De jure belli ac pacis*' (law of war and peace) published in Paris in 1625, expounded on the concept of just war. Due to numerous works, he was considered as the founding father of modern international law. The definition of international law centres on the word 'inter' which means 'between/among'. Literally, international law is defined as 'law among nations', embodied in treaties, or customs that is recognized by all nations. It is established that international law regulates international relations as well as conflicts; and States follow such law to preserve self-interest as well as common interests within the international community and also to maintain peace and security. Bentham, an English philosopher, provided the first classic definition of international law, (which is also referred to

as public international law or law of nations), as "the body of legal rules, norms and standards that govern relations between States for peaceful coexistence."

Thus, States hold the primary and sole role in politics and adhere to customary and contractual rules in relations among them. In theory, even the UN is not above them. On this basis, the positivist school of thought argues that international law is not really law since its validity is dependent absolutely on the will of the States. This is explicit in the notion of sovereignty and equal status of States. This dictum was affirmed in the *Lotus* case³ decided by the Permanent Court of International Justice (PCIJ) in 1927. The court, in this case, decided the legal validity of international law depended on the will of States. Hence, in general, State entities are bound only by decisions they have consented to and no central authority is capable of enforcing any law or the judgment of a court without their consent.

Funk (2011), in his thesis submitted to Utah State University, opines that: "[W]hen one considers the abundant number of nations, and forms of governments that have emerged throughout the history of civilisation, it becomes apparent that although mankind shares common traits and attributes, societies often implement different principles as they strive to protect their interests and achieve their goals". The debates among scholars are between the sceptics who believe international law should not be considered as law and those who consider international law is law in the similar position as domestic law. The distractors argue though that it acts only as a stabilizing factor in the international system in relation among States or States' actions. According to them, "[T]hese principles and decisions require enforcement mechanisms that go beyond State's consent to be considered as 'law'... Law must also create a true obligation ..." (Petallides 2012).

However, the supporter of international law would accept its imperfections of enforcement and obligation, but counter it by saying neither is domestic law perfect in its contents or its method of enforcement. Anyhow, international law is definitely well designed, crafted and generally accepted norms of the structure of the international system. It does serve as a benchmark for compliance in the interactions among States and endorsed by the international community to prevent violation. Overall, it is viewed as 'just and fair', in the main accepted as such and effective in maintaining peace and security.⁵

O'Connell (2008) seems to take a similar position that international law is law because it supports order in the world and through it, nations achieve, to a large extent, humanity's fundamental goals of advancing peace, prosperity, human rights, and environmental protection. According to his argument, those who oppose international law is in reality bent on promoting dominance or hegemony of a single nation. The supporters of international law reject the stance that international law is powerless and unworthy of respect, though they accept that international law has not reached its optimal stage as domestic law in its development. O'Connell (2008) also argued that international law has authority because it is widely accepted norms by the international community. He provided evidence to support his contention by proving that international law has power of enforcement through military intervention, numerous kinds of sanctions, countermeasures, and courts, and thus it supports the common interests of the whole humanity.

INTERNATIONAL LAW VS INTERNATIONAL POLITICS

The most apparent difference between national and international law is that the latter lacks any central authority to enforce

them. National laws or domestic laws are laws that enacted 'within' a particular State and mainly enforced in its territory. There are no right and wrong answers to this contestable proposition of validity and effectiveness. Scholars like Edward Hallett Carr and Hans Morgenthau, viewed international law from the angle of international relations as well as States' behaviours, and opined that it is too idealistic to think that international law could determine the understanding of behaviour of nation States. After all, it has failed to prevent the occurrence of two world wars. They concluded that it would be more realistic to view international relations from the perspective of power and interest as global politics is generally premised on power struggle and self-interest. It is their contention that international law has no decisive role in understanding behaviour of States or determining international peace and security. Scholars like Eric Brahm reinforced this position when he said there is no government to enforce the law because international law itself can be a source of conflict as well as a solution in international relations.

Thus, as we are living under an anarchic global order, it is not surprising that many people think the debate should be centred upon the issue of international politics and security rather than the perfection of achieving international justice. The reality indicates that the discourse on international law is about political power struggle and self-interests. Furthermore, even the most ardent supporters of international law could not contend that international justice prevails.⁴

The debates on the subject are always contentious taking into account the realities on the ground on incidents, events, and actions, be it under the UN or independent of it. Hence, to obtain consensus or universal acceptance on the observance of international law and norms for international justice is next to impossible unless it is driven by the major

power struggle and self-interest. In this way, the situation in West Asia as a theatre of power struggle and violent conflict can be better understood in the context of competing geopolitical and economic power struggle and self-interest for hegemony and dominance.

Nonetheless, matters could be worse without having international law to govern relationships among States. Carmen Pavel of King's College, in his essay among other things, argues that developing international law is necessary because it can promote rule of law. It can be further asserted that international law is no longer confined to simply a collection of rules; as it is developing rapidly into a complex set of rules and influential principles, practices, and assertions supported by sophisticated structures and processes. In light of this development, no doubt international law has generally become the foundation for the smooth conduct of international relations (Hathaway 2007).

However, this should not be taken to mean that international law is a universal panacea of justice, humanity, and prosperity yet. It should be taken only as aspirational in the vision of seeing a better future of the world without war and physical conflict in the anarchic world order. The most adverse and glaring example of the imperfection revolves around politics of power struggle and self-interest of nation States in its trajectory of international relations. The question can be raised at this juncture as to why we cannot do more under the banner of international law?

There is a need to change its decision-making process and enforcement tools, and institutions driven by a sense of fairness and justice based on today's realities and not that of post-World War II agenda of the victors.⁶ It is within this paradigm that we currently view and accept the realities of international law that determines interstate relations. The truth is we do not have another system or structure

to replace it unless we agree with the dream of the idealists for a world government and a world enforcement body.

Many people would agree that the international system is anarchic but, at the same time pragmatic because there is no central authority over or to control States. Their actions can be better managed by enhanced cooperation among nation States and supra international organisations to oversee their activities for greater cooperation. This is the reality of global politics and a way to prevent future open armed conflicts. The international community, particularly the smaller developing nations can aspire for an optimistic future that will deliver peace, security, and justice.

Noam Chomsky, an American philosopher and political activist, has perfectly described why we need to be optimistic for a better future when he said: "Optimism is a strategy for making a better future. Because unless you believe that the future can be better, you are unlikely to step up and take responsibility for making it so" (Audsley 2019). For this reason, the presence of international law and understanding it is inevitable since countries will continue to interact with each other through international laws, encompassing the rules, regulations, treaties, agreements and so on.

With this optimism, the global community must find ways to respect rule of law and governance. In an interdependent and globalised world working together to protect human rights and cooperate in overcoming transborder crimes is a necessity in the aspiration to see there is international law and international justice. Most importantly the globalised international society can hope for a peaceful and orderly world. In view of the current numerous challenges that we are going through in the international politics, it is necessary to reflect on the efficacy and effectiveness of the international system and order. In this

regard, many developing countries hold the position that the implementation and enforcement of international laws are still clouded by double standards and selectivity hence lacks fairness and justice. It tends to be discriminatory, and the international order is tilted in favour of 'might is right', a left over from the historical past of colonialism.

CONCLUSION

International law and the institutions created under it, provide guidelines and standards for the conduct and behaviour of States in their international relations. In this way, it can promote global peace and prosperity as well as maintain the check and balance over opposing or competing interests that nations would have. Therefore, it will positively contribute towards stability and order under the international system. In the absence of international law, no matter how inadequate and imperfect they may be, the anarchic international order would result in greater injustice and oppression by the powerful against the weak.

States as the primary international actors, the UN and international institutions have the overriding power to fulfil the agenda of humanity to establish justice. It is the responsibility of the international community to act collectively on the ideal of promoting global peace and order. Hence, we can say that international law and the accompanying institutions established under it, should manage the competing or opposing interests among nations to coexist and cooperate. The objective is the realization of a stable, consistent, and structured international relations among States based on sovereignty and equality.

In an interdependent world, international justice should be achieved by the simplest, most effective, and least expensive platform to resolve big or small problems incorporating commerce, transport, communication, and other

matters of global concerns. Nonetheless, if a stable international order is to be achieved, there must be recognition of the need for proper balance within the framework of the international system that encourage and practice rule of law. Equally fundamental to this equilibrium is to believe and practice the true values of peace, justice, freedom, and prosperity for all of humanity, in its contextual place of its history and identity. The repeated call has been for the effective international system and its institution to promote peace, practice justice and bring prosperity to all corners of the world. Justice in the world could not be achieved without the effective implementation of the principles of law (Dulić 2021). Finally, it is worthwhile to consider the issue of international law and international justice from the perspective of the glass half full or half empty by taking what Benjamin Butler said: "When one adds the practical consequences of the inability to respond to claims of justice --- the instability and violence that can result --- then the costs are clearly higher" (Butler and Brown 1987). Albeit globalization and interconnectedness would not automatically bring an end to a history of anarchist world order; the globalised international community can hope for a peaceful and orderly world in the future with the spirit of optimism.

NOTES

¹ Shubhi Pandey, Nature, Purpose and Function of Law, 2018, <https://www.legalbites.in/nature-purpose-function-law/> (22 July 2021).

² See also Muhamad Hassan Ahmad, & Ashgar Ali Mohamed, Legal theory and concept of law, in Ashgar Ali Mohamed (ed.), *Malaysian Legal System*, CLJ Publication, Ampang, Selangor, 2020, p 54.

³ S.S. Lotus (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 10 (Sept. 7).

⁴ See also B. F. Bulter, & R. L. Brown (eds.), *The Law School Papers of Benjamin F. Butler: New York University School of Law in the*

1830s, Greenwood Press, New York 1987, pp 1-257.

⁵ Ibid.

⁶ See also Ghulam Mohammad Qanet, Mohammad Naqib Ishan Jan, Muhamad Hassan Ahmad, Ahmad Masum, & SMM. Nafees, 'Curbing the security council's powers: thinking the unthinkable?' (2021) 7 (1) *Journal of Asian and African Social Science and Humanities*, pp 1-15.

REFERENCE

Audsley, S.M. 2019. Why study International law?.

<https://www.lawstudies.com/article/why-study-international-law/> [15 July 2021].

Boyle, J. 1985. The politics of reason: critical legal theory and local social thought. *University of Pennsylvania Law Review* 133 (4): 685-780.

Brahm, E. 2003. International Law. https://www.beyondintractability.org/essay/international_law [15 July 2021].

Butler, B.J. & Brown, R.L. (pnyt.). 1987. *The Law School Papers of Benjamin F. Butler: New York University School of Law in the 1830s*. New York: Greenwood Press.

Dulić, A. 2021. What is the importance and role of international law in terms of protecting your human rights in society?.

https://www.linkedin.com/pulse/hat-importance-role-international-law-protecting-your-azra-%C4%91uli%C4%87/?trk=public_profile_article_view [22 July 2021].

Funk, D.R. 2011. The role of law: how law shapes and alters the foundations of societies. Tesis Sarjanamuda, Department of Political Science, Utah State University.

Hathaway, O.A. 2007. Why we need International law. <https://www.thenation.com/article/archive/why-we-need-international-law/> [15 July 2021].

Kishan Tiwari. 2017. Importance of law in society. <https://legaldesire.com/article/importance-of-law-in-society/> [14 July 2021].

Mohammad Naqib Ishan Jan. 2011. *Principles of Public International Law: A Modern Approach*. Gombak: IIUM Press.

Muhammad Hassan Ahmad & Ashgar Ali Ali Mohamed. 2020. Legal theory and concept of law. Dlm. Ashgar Ali Mohamed (pnyt.). *Malaysian Legal System*, hlm. 37-39, 53. Ampang: CLJ Publications.

O'Connell, M.E. 2008. *The Power and Purpose of International Law: Insights from the Theory and Practice of Enforcement*. Oxford: Oxford University Press.

Petallides, C.J. 2012. International law reconsidered: is international law actually law?.

Inquires Journal/Student Pulse 4(12): 1-2

<http://www.inquiriesjournal.com/articles/715/international-law-reconsidered-is-international-law-actually-law> [15 July 2021].

Rawls, J. 1999. *A Theory of Justice*. Massachusetts: Harvard University Press.

Salmond, J.W. 1893. *The First Principles of Jurisprudence*. London: Stevens & Haynes.

Schwabach, A. & Cockfield, A.J. The role of international law and institutions. Dlm. Schwabach, A. & Cockfield A.J. (pnyt.). *International Law and Institutions*. Oxford: Eolss Publishers Co. Ltd. <https://www.eolss.net/Sample>

Chapters/C14/E1-36.pdf [15 July 2021].

Schwarzenberger, G. 1965. *The Inductive Approach to International Law*. London: Stevens and Sons.

Shaw, M. 2019. International law. <https://www.britannica.com/topic/international-law> [15 July 2021].

Watts, A. 2001. The importance of international law. Dlm. Michael Byers (pnyt.). *The Role of Law in International Politics: Essays in International Relations and International Law*, hlm. 10. Oxford: Oxford University Press.

Williams, S.A. & de Mestral, A.L.C. 1987. *An Introduction to International Law: Chiefly as Interpreted and Applied in Canada*. Toronto: Butterworth.

Syed Hamid Albar
Faculty of Law
Universiti Kebangsaan Malaysia (UKM)
E-mel: syedhamid.albar@yahoo.com