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THE REALITY AND EFFICACY OF INTERNATIONAL LAW*

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THE writer's contact with international law dates back to 1954 when he began work on a doctoral thesis under the supervision of Judge Sir Humphrey Waldock, as he later became. Since then he has been engaged with the subject more or less continuously and this in both academic and practical contexts. It follows that the approach must be somewhat *ex parte*. As Justice Powell is reported to have said, on taking the oath of office, when asked if he supported the American constitution: 'certainly I support the constitution; after all, it has always supported me.'

Of course, even the best-formed and well-tested body of principles, whether in the social or natural sciences, may acquire a penumbra of doubt. Doubting is fashionable, and in the context of international relations doubting often takes some unhealthy forms. Doubts based upon ignorance and strong suppositions about the conduct of States lead not to healthy inquiry but to a neurotic nihilism. A much-paraded desire for order and justice is transformed into glib assertions of anarchy and into luddite attacks on international institutions, and this on the excuse that the international order is imperfect. In any case, it must be accepted that the quality and performance of international law has been given a low rating by some very reputable thinkers. The object of the present paper must therefore be this penumbra of respectable doubt.

First of all, the reality of international law, that is to say, the actual use of rules described as rules of international law by governments, is not to be questioned. All normal governments employ experts to provide routine and other advice on matters of international law and constantly define their relations with other States in terms of international law. Governments and their officials routinely use rules which they have for a very long time called the 'law of nations' or 'international law'. It is not the case that the resort to law is propagandist—though it sometimes is. The evidence is that reference to international law has been a part of the normal process of decision-making. Some of the evidence is to be seen in the volumes of the *British Digest of International Law* which relate to the period 1860–1914. There are to be seen the confidential opinions of the Law Officers of the Crown.

The law delimits the competence of States. No journey by air could take place in reasonable conditions if it were not for a network of legal

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structures involving the jurisdiction of States, the agreements of States and various I.C.A.O. procedures and standards. The law also provides the tools for constructing institutions. Typically, what is, in effect, the *loi-cadre* of the E.E.C. is a multilateral treaty.

At any time international society contains a certain number of dangerous eccentrics. In the recent past one head of State has been probably a cannibal, another a murderous psychopath and in a third example the prime minister and foreign minister are former members of well-known terrorist organizations. Moreover, the regime in Tehran has gone in for the taking of hostages as an instrument of policy and has produced a system of self-righteous anarchy which is isolated from other Muslim States. The existence of these depressing memorials of the abnormal proves no more about the general role of law and the habit of legality than the existence within *national* communities of criminal individuals and groups, alienated and violent minorities and forms of racialism, the last often reinforced by the internal law and administrative practices.

Given the reality of international law, its actual role in the business of States, the more interesting and necessary inquiry is into the performance or efficacy of the law.

As a first line of approach it may be said that international law confronts certain objective and inescapable features of the political landscape. In the first place, the addressees of the rules are normally and primarily the governments themselves. It is too often forgotten that this feature is shared by public law within States. Like the law of the constitution, international law addresses the very agents who should apply the rules: the rules are essentially principles of self-limitation and, for governments, they are immanent and not external.

A connected proposition would be this: on empirical grounds, given the number of civil wars, wars of secession and *coups d'état* since—let us say—1945, a good case can be made out for saying that public international law is *more* efficacious than *public* law within States. At any rate, whether or not such a judgment is sustainable, those who would judge international law would do well, on grounds of logical consistency, to start out by taking a hard look at the performance of *national* legal systems. It is a striking fact that in discussion of the efficacy of sanctions directed at the Smith regime in Rhodesia after U.D.I. it was common for reference to be made to the 'ineffectiveness' of United Nations resolutions. In this context it was unusual to hear reference to the efficacy of the Southern Rhodesia Act of 1965 and the law of treason as applicable in Rhodesia. Logically the Westminster *grundnorm* was as much in issue as the New York *grundnorm*.

Indeed, within States a fair degree of common sense prevails in assessing the performance of law. It does not seem sensible to say, for example, that because the rule of law is weak in Northern Ireland, and murders occur continuously, we can conclude that the law of the United Kingdom is not

a reality. That kind of logic involves saying that if an ideal score of one hundred is not achieved any other lesser score is not to be counted.

There is a second inescapable feature of the political landscape. International law is essentially a law *between* States and this remains true in spite of the appearance of various international organizations and the significance of human rights standards. There is no world State. Thus even if the assumption be made that a world federal State or whatever is a desirable goal, since State law will be more effective, then the whole question of the efficacy of international law would become moot if such a global State were formed. In other words, the Austinian 'command theorist' can only be satisfied on the terms that the experiment is set aside. In passing it may be asked whether public order in a world federal State would be necessarily enhanced. At least it would as a matter of terminology: a 'war' between India and Pakistan would be described as 'provincial civil strife' in the region of South Asia, which is as good as describing 'the poor' as 'the less well off'.

The general problem has other facets. Perhaps the key to the whole discussion is the proposition that legality is indivisible. The bizarre goings-on which we usually describe as 'serious breaches of international law'—genocide, hostage-taking, various other breaches of human rights—are the product of government policies as such. The Watergate affair involved a decision to use methods, previously employed against foreign political targets, against political groups at home. At the less dramatic level the dumping of oil at sea in breach of treaty standards is the consequence of the relative inefficacy of domestic law in enforcing those treaty standards. The protection of the environment and much of the protection of human rights depend upon the application of standards *within the national legal and administrative systems*. Probably the biggest single obstacle to treaty enforcement is the inability of national administrations in many countries to cope with even a minimal burden. Once again it is perhaps the case that international legality is more readily primed than internal legality simply because international relations are for the most part conditioned by reciprocity. Thus it appears that the growth of legality in China, such as it is, has been quicker in respect of those matters relating to commercial law, foreign trade and treatment of foreigners generally.

Both legal systems, international and domestic, exhibit cases of what may be called the discretion not to prosecute. Within the United Kingdom the more striking examples include the non-prosecution of the Ulster conspiracy in 1912–13, the readiness to negotiate with Ian Smith and his fellow conspirators and the aftermath of the revelations of breaches of Rhodesian sanctions contained in the Bingham Report. It is a delicate matter to provide parallel cases in international relations. The failure to condemn the Indian intervention at the independence of Bangladesh or the Tanzanian intervention to overthrow Idi Amin may be appropriate

as examples, and some would instance the attitude of most governments to the Entebbe operation by Israeli forces.

The fact is that legal and political systems from time to time face situations in which the positive way forward involves amnesty and a healing of social wounds rather than the inflexible application of the law. The example of the policy of the Nigerian Government after the defeat of the Biafrans deserves notice as a model of peaceful reconciliation and the avoidance of revenge.

In national life the law is not expected to cover all events; by a paradox in international relations almost every event, including large areas of administrative activity, is considered to be classifiable as lawful or unlawful. Much of what is considered to be a 'part of international law'—the constitutions of international organizations, the standards and recommendations of such organizations—is in reality to an extent the functional counterpart of administration in national systems. Many treaties are concerned with the statement of agreed policies and programmes or constitute promises of particular performances: they are part of a process of dealing and not much more. A major source of confusion in international law lies in the overlap between the concept of State responsibility (or the concept of delict) and the notion of the *ultra vires* act. In other words, many cases of illegal behaviour on the part of States are really the equivalent of the *ultra vires* act by a public body or minister which is not also a tort. The constant outcome is an inflation of the concept and incidence of illegality in international life.

This apparent inflation of illegality on the plane of international relations has a further dimension. Reference to international law, not only by laymen but also by lawyers, has become a sloppy and shorthand way of stating the need for effective regulation of major problems such as the control and reduction of armaments, the protection of the environment, the conservation and allocation of resources and so forth. The crude truth is that the law is not a substitute for the political will of States in facing problems on a basis of co-operation. The constant reference to the alleged inadequacies of the law, as though it were an unsuccessful and isolated totem, is unhelpful and ensures that the fire of criticism is directed to the wrong quarter.

Against this background, what may be called the question of the effectiveness of international law can be addressed. At some risk of stating the obvious it is worth creating a realistic perspective. A government seeks the advice of a lawyer outside its own legal staff. Governments may be assumed to know their own business and they frequently decide that they need advice on international law matters. The issue of effectiveness *tout court* of the law simply does not come up. A high proportion of officials have not heard of Austin, Salmond, Kelsen, Hart or Dworkin. Whilst this may be an intellectual loss to those officials, the conduct of State business goes forward in the absence of conceptual or jurisprudential doubt. There

is no reason to think that even those who have heard of the legal philosophers allow their knowledge to impede the progress of business.

There is another aspect of the subject which lies completely outside the framework of thinking within the category of effectiveness. In certain important areas of international affairs the terms and categories of international law provide the syntax, the very fabric, of the subjects concerned. This is true particularly of the law of the sea. In practical terms a marine biologist acting as general watchdog for his firm's interests must understand the law of the sea. The law has similarly become stitched into the subject of human rights, the question of sovereignty (or title) in respect of territory and international monetary transactions. Moreover, certain important aspects of planning by naval staffs are informed by legal considerations, more especially in the context of low-level coercion and the drafting of the rules of engagement for naval commanders. In all these contexts the law, so to speak, sets the scene and provides the contours of the landscape of decision-making. The law is thus not external, coercive and alien but internal, logically necessary and familiar.

So far, apart from an apparently philistine reference to the fact that many officials do not know much about jurisprudence, at least as it is known in Anglo-American law schools, the question of how we define 'law' has been avoided. In a sense this question is supernumerary. If States use international law, and they do, then it seems impertinent to question the classification of the rules, since even if governments have made some error (according to *academic* categories) the rules still exist and have to be examined. However, by way of concession, an excursion into jurisprudence, a tactical strike, will be carried out.

The usual approach to law as a phenomenon is to seek a definition of law or something called 'positive law'. Thus Holland[1] proposes the following: 'A law, in the proper sense of the term, is therefore a general rule of human action, taking cognisance only of external acts, enforced by a determinate authority, which authority is human, and, among human authorities, is that which is paramount in a political society.' This resembles the Austinian view of law as a coercive order.

Fashions and the methods of legal science change. Today, against the background of a literature offering a variety of definitions, writers are more cautious and do not try to offer a 'definition of *a* law' or of 'law'.

Thus Hart in *The Concept of Law*, published in 1961, is concerned to isolate a *concept* and not to offer a *definition*. Hart gives two specific qualities of the concept:

(i) the existence of both primary and secondary rules; the former type are laws concerning human actions and accidents of the usual kind, the latter are concerned with conferring powers and helping to identify those competent to make, and change, the primary rules;

[1] *The Elements of Jurisprudence* (1st edn., 1880), p. 41.

(ii) The existence of an ultimate *rule of recognition* which provides the particular system of rules with its criteria of validity, in other words, a rule which specifies the sources of valid rules.

This approach is more empirical and more fruitful than the search for a 'definition' and yet the methodology is not dramatically different. The basic assumption is that *the* concept of law awaits identification if only the incorrect views of the Austinians are discarded. Law is presented as a concept which has some special qualities and its own integrity.

This assumption seems to me to be in its own way as restrictive as the prescribing of some neat definition. It tends to inhibit examination of the enormous number of social roles which quantities called 'law' have in fact played. The study of law as a phenomenon is presented as a search for a species of butterfly which, it is believed, has certain characteristics, though it has not yet been found. Butterflies noticed during the search are ignored as not corresponding to the model searched for. When a butterfly is found which for a while is thought to correspond to the model then others noticed are *ex hypothesi* of no account.

In other words, the Hart approach is an example of *a priorism* and over-simplification, all the more influential because it refers to a *concept* of law and proceeds from a writer of authority and sophistication. So in his opening chapter Hart is already referring to the 'clear standard cases' constituted by the legal systems of 'modern states',[1] which are contrasted with the 'doubtful cases' exemplified by 'primitive law' and international law. In this way he partitions his material at the outset of his study and, it would seem, decides to rely on a certain type of political framework as offering the evidence for conclusions on law in general.

Like Austin, Hart offers views related primarily to the way things are ordered in the more developed modern States. In adopting this type of presentation, and in coming to the conclusions about law referred to earlier, Hart relies on conceptions which do not derive from an empirical study of the evidence. In a university setting the highly generalized study of law within a jurisprudence syllabus leads easily to the assumption that one is dealing with a concept, a logical whole, a system of norms and so on. Moreover, the analyst and philosopher, eager to make law respectable in terms of other disciplines, and to make it fit into his particular intellectual system, is inevitably drawn to the abstract presentation. But, socially and politically, it is difficult to believe that those in charge of even the more organized societies of recent times have been very conscious of law as a unitary concept or system, and as a system consisting of primary and secondary rules.

The elements of the abstract model of law offered by Hart are inextricably bound up with political and social quantities which have to be caricatured by him and others in order to be accommodated to the abstract model. Thus in a system in which rules by convention stand with other

[1] *The Concept of Law* (1961), p. 3.

kinds of rules, both common law and statute, as in the British Constitution, there is no neat 'ultimate rule of recognition' which provides an intellectual basis for a system of rules, but a complex state of political fact referred to compendiously as the law and custom of the constitution. Moreover, in many societies there is nothing which approximates to a single rule of recognition as a guide to the law-determining agencies. The rules of recognition may vary. Thus in Turkey and Iran modern city-based code law has at times marched with adherence to local custom and Koranic law by the peasant peoples of the provinces and the nomadic groups. Lack of social cohesion cuts across any notion of a unity of legal rules based on a system both known and accepted throughout the country concerned.

The highly political provenance of the secondary rules in the Hart model, i.e. the basic principles of the constitution detailing the competent law makers, means that to describe them as 'secondary rules' is to adopt a level of abstraction which is unhelpful. Thus some secondary rules, for example, the principle of parliamentary sovereignty in the United Kingdom, may be much more significant than others similarly classified.

Of especial importance is the fact that the operation of the secondary rules may break down without affecting the operation of the primary rules to any great extent, or at all. Civil strife may place the secondary rules in jeopardy and possibly change them, yet during the time when the political foundations are being remade there is generally no legal vacuum—acts in the law of the ordinary sort are valid; there is no moratorium for crime and even after a change of sovereignty there is no moratorium on ordinary crime as opposed to political crime committed in the territory prior to the change.

The work of Hart and others avoids the cruder aspects of the notion that legal rules operate as coercive orders from particular human beings received and obeyed by the population at large. However, the intellectual conception of law with its emphasis on rules of recognition shares some of the mechanical oddities of the notion of coercive orders, since it assumes that law operates in a community of well-tutored individuals receptive to a particular system of norms. Yet it is obvious that populations do not see law in this way and it is a fact that a large section of a population may take note of secondary rules, and thus primary rules as well, laid down by rival authorities, for example, a separatist movement, a militant church at odds with the civil authority or tribal custom which runs contrary to the code of law of the central administration. Law is relative to the social order of things, and the reasons for its effectiveness are not to be referred to a single notion of obedience or of appreciation of the validity of norms according to a central principle.

The general emphasis on secondary rules and reference to compulsory jurisdiction of courts and a legislature as the normal marks of a legal system lead Hart to give a low, or at any rate abnormal, status to public

international law among other systems.[1] The lack of a compulsory jurisdiction and a legislature is regarded by Hart not as the special feature of a system which operates in conditions of a certain kind, but as the marks of an outcast, of a butterfly which is not wanted for the pre-determined collection. Yet as we have already said, the stability of international relations compares quite well with internal law, given the grand total of municipal systems ruptured by civil strife since 1945. And whilst it may be said that international law lacks secondary rules, this matters less if one accepts the view that secondary rules do not play such a decisive role in maintaining the more basic forms of legality in municipal systems.

With all its faults, international law is the best tool available for dealing with the affairs of States. On the evidence the law provides a more practical basis for approaching international problems and the settlement of disputes than, for example, natural law in its various forms, Islamic jurisprudence, the principles of socialist internationalism, or so-called 'equity'.

A persistent feature of the debate about the effectiveness of international law is the tendency to pursue the argument in terms of jurisprudence, or otherwise in more or less abstract terms. The legal theorists have to an extent dictated the terms of the debate and this is unfortunate for a number of reasons. The legal philosophers, with few exceptions, are unacquainted with international law. Certainly they lack knowledge of its practical applications. Thus there is much theorizing, usually on the basis of testing the law of nations against criteria which are thought to be characteristic of domestic legal systems, and not enough examination of the vast array of evidence of the actual role of international law, both in the routine stewardship of State affairs and also in more strenuous political circumstances. As it has been suggested above, if a government official considers that the legal aspects must be carefully taken into account in the process of decision-making, then to an important extent, the law has a significant role and is thus 'effective'. Whether in a given situation the law is ultimately 'effective' is a question of taste, in other words it is a matter of political and moral evaluation. When the law is seen to be 'ineffective', the cause is not 'the law' but the absence of organization, political will, sufficient personnel or funding, and so forth. Law, whether national or international, is not a source of alibis for politicians and administrators.

[1] See *The Concept of Law*, chapter X.

TORTS IN ENGLISH PRIVATE INTERNATIONAL LAW*

By P. B. CARTER[1]

GENERALLY speaking, the circumstance that an alleged tort was committed abroad, that is to say outside England and Wales, does not present any special bar to the jurisdiction of an English court. The defendant must, of course, have been served with process within the jurisdiction in the normal way, or leave must have been obtained to serve the writ or notice of the writ out of the jurisdiction. The only marked exception to the generality of the English court's jurisdiction, notwithstanding the fact that the alleged tort was committed abroad, is constituted by the rule in the *Moçambique*[2] case, as recently approved and extended by the House of Lords in *Hesperides Hotels Ltd.* v. *Aegean Turkish Holidays Ltd.*[3] The primary aspect of this rule inhibits an English court from adjudicating upon title, in the very broad and loose sense of any proprietary or possessory interest, to foreign land. The rule has a secondary spin-off in the law of tort and prevents an English court from entertaining actions for trespass to foreign land, actions for conspiracy to trespass to such land and possibly certain other actions such as those for nuisance or negligent damage to foreign land.[4] It should perhaps also be mentioned that there is a negative sense in which it may, in a conflict of laws situation, be more difficult to assert jurisdiction by obtaining leave to serve an absent defendant to a tort action. This is because Order 11, r. 1 (1) (h), of the Rules of the Supreme Court provides that one of the cases in which the obtaining of such leave is permissible is the case in which 'the action begun by the writ is founded on a tort committed within the jurisdiction'. If the alleged tort was committed abroad, therefore, leave can only be obtained on one of the other bases set out in Order 11.

Subject to the rule in the *Moçambique* case, which after all is only concerned with a relatively narrow segment of tort liability, and subject to the above-mentioned negative restriction upon the availability of leave to serve an absent defendant, the jurisdiction of the English court is very

 Adapted from a paper read to the British Branch of the International Law Association at Oxford in May 1981.

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[2] *British South Africa Co.* v. *Companhia de Moçambique*, [1893] A.C. 602.

[3] [1979] A.C. 508. It is now proposed in Clause 27 of the Civil Jurisdiction and Judgments Bill that the general jurisdiction of English courts 'to hear and determine proceedings for the recovery of damages for trespass to, and other torts in respect of, immovable property shall extend to cases in which the property in question is situated outside that part of the United Kingdom'. The tortious, but not the proprietory, aspect of the *Moçambique* rule would thus be abrogated.

[4] For Canadian authority for the extension of the rule to torts involving foreign land other than trespass see *Brereton* v. *Canadian Pacific Railway*, (1897) 29 O.R. 57, and *Albert* v. *Fraser Companies*, [1937] 1 D.L.R. 39. The extension of the rule to cases of negligent damage to land seems also to be implicit in the reasoning in the English case of *The Tolten*, [1946] P. 135: see Dicey and Morris, *The Conflict of Laws* (10th edn., 1980), pp. 539–40.