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International Law and State Practice in Geopolitics; Part I

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Abstract

Throughout global affairs, a state distinguishes itself in adopting its unique 'state practice.' State practice projects national values that endure over time and advances vital national interests that evolve over time. Diagnostic analysis of a state's models of interpretation of international law is one of several means by which to delineate its state practice. Reverse engineering these models can expose and then either confirm or refute perceptions of underlying values and interests. This enables follow-on predictive and prescriptive analyses to increases confidence levels in other states' cycles of planning and executing responsive policies and programs, and favourably shape future negotiations in multilateral diplomacy. This multipart study presents such a diagnostic analysis and affirms that the security of a coherent international legal system directly informs debate on security and defence.

1. Introduction

This multipart study assesses states' modalities of interpretation of international law as general indicators and predictors of state practice in geopolitics. Descriptive analysis of geopolitical issues introduces context for debate on state practice by distinguishing fact from speculation. Thereafter, deeper diagnostic analysis should follow to determine why issues arise, hence enabling more effective follow-on prescriptive and predictive analyses and planning in policy and programs.

Any formal discipline can be the foundation of such diagnostic analysis, be it history, international relations, economics, political science, sociology, etc. This paper employs the discipline of international law.

The study begins by overviewing the essence of international law in **§2** in order to first understand what is being interpreted before assessing states' models of interpretation. **§3** presents three cases illustrating critical issues in international law's impact on state practice. **§4** offers observations on the problematic rule of international law in geopolitics. **§5** offers conclusions.

The US legal philosopher, John Dewey, made the penetrating observation, "there is fact, as distinct from perception of fact."[i] In likewise sharp distinction, 'there is law as distinct from interpretations of law.' This multipart study analyzes how and why three states with distinctive national agendas - The People's Republic of China, the Russian Federation, and the United States - interpret international law as they do - or are perceived to do. Within the culturally and socially diverse international community whose members champion the full spectrum of competing national values and vital national interests,[ii] no one model of interpretation of law can be expected to prevail over others. Hence, states 'many models of interpretation of international law form a global framework of models of interpretation of law that is arguably more fragmented[iii] and asymmetric than symmetric. Nevertheless, the modalities of interpretation of law employed by these three selected states are at least representative of their many variations and form a start point for debate.

2. Interpretating international law as being a set of international obligations

2.1 International law as obligations or rules

2.1.1 Law as obligations

The essence of international law is the sum of international legal obligations. The term, 'obligation,' is better suited to debates in global affairs than the term 'law.' Any obligation necessarily invokes the actions of two or more parties to negotiations, one party assuming an obligation to perform or to not perform, and another party to whom that obligation is owed. International obligations bind parties that possess international legal personality and hence capacity to assume these obligations, be they sovereign states with equal legal status (regardless of their different politico-economic and military strength) or international organizations (but not nongovernment organizations).

Prior to sitting at the Permanent Court of Arbitration (1964) and International Court of Justice (ICJ) (1967), Judge Gerald Fitzmaurice noted (1958) that treaties are not in the strictest sense a formal source of law as provided for in the Statue of the International Court of Justice[iv] (ICJ Statute) art 38(1) (a). Rather, treaties are a *source of obligations as evidence of law*, as expressed in the general principle, '*pacta sunt servanda*.'[v] Fitzmaurice.

> "...deduced from defining law as '...rules of general validity and for application to the subjects of the legal system,' not arising from particular obligations or undertakings on their part' that '*treaties are a formal source of obligation, but* (even in the case of so-called 'law making treaties') *are not a source of international law* [emphasis added].'"[vi]

In contrast, the term, 'law,' may be considered more an abstract concept including equity, fairness and various kinds of justice such as restorative or retributive. These goals are difficult to attain in the international community wherein no one supreme power can arbitrate disputes among its subject members.

2.1.2 An alternative: law as rules

Legal philosophers. e.g., legal positivists, Professors John Austin (1790-1859) and H. L.A. Hart (1907-1992) might have challenged Fitzmaurice in suggesting law is a series of social commands[vii] or rules.[viii] Commands and rules may appear quite relevant in informing debate on rule of *domestic* law where the state is necessarily and hierarchically superior to its many subjects.[ix] However:

1. internationally sourced commands and rules are ineffective in a horizontally structured international legal order of states whose sovereign equality precludes rules imposed by others;

2. commands and rules do not comport with the commonly employed dispute settlement tool of multilateral negotiations that are employed in the contemporary international community;

3. the former state-centric international community is fragmenting to recognize non-state entities; not all its subjects, objects, or conflicts comport with any rule of international law,[x] nor possess international legal personality that is the prerequisite to assume international legal obligations; and

4. if international law were a static, unitary and comprehensive body synthesizing all primary and secondary rules, as Hart suggests, then it would have to provide for all possible legal outcomes;

yet the opposite occurred in 1996, when the International Court of Justice (ICJ) could not decide on the lawfulness of use of nuclear weapons,[xi] resulting in a very rare *non-liquet.*

2.1.3 Conclusion

Judges Rosalynn Higgins, newly elected president of the ICJ when the Nuclear Arms Advisory opinion was issued, has argued law is a *dynamic* international legal and social process,[xii] which appears a more coherent interpretation of international comity.

2.2 Sources of obligations

Obligations circumscribe states practice throughout the full spectrum of geopolitics. Obligations derive from the two primary and related sources of international law,[xiii] **(1)** treaty[xiv] or convention; **(2)** custom.[xv]

1. Treaties abound. Illustratively, the UN Charter (1945) inter alia delimits the initial threat or use of force in settling disputes, [xvi] the *jus ad bellum*. The more recent succession of Geneva Conventions and Protocols Additional (1949 and 1977) and elements of the two Hague Conferences (1899 and 1907) provide for how force is to be used once armed conflict begins, the law of international and non-international armed conflict,[xvii] the *jus in bello*. Other obligations derive from the several instruments concerning the ban and nonproliferation of nuclear, chemical and biological weapons.[xviii] Other conventions set out provisions for rules-based regimes of international trade.[xix]

   Treaties that set out new obligations are cited as 'law-making treaties.'

2. Customary international law is the synthesis of two necessary and symbiotic elements;

   a. the objective and factual element of established state practice concerning a particular international context, such as the threat or use of force in international dispute settlement, or access to fish stocks, cited as *usis*,

   b. the subjective element, being the collective belief by the international community that such an established practice constitutes law, cited as *opinio juris.*

3. Obligations also derive from a secondary source, general principles of law; [xx] illustratively, the general principles of the paramountcy of self-preservation and sovereignty. [xxi] Principles are considered to be gap fillers that augment primary sources if required.

4. Of lesser weighted subsidiary sources of law, judicial decisions [xxii] bear explanation. Unlike a national common law system which considered former jurisprudence as a primary source of law, decisions of the International Court of Justice are only binding on the parties to a case and only in respect of that case.[xxiii] However, fact patterns of previous cases may be considered in arriving at decisions. In this respect, it is similar to a civil law system.

2.3 Secondary rules that enable interpretation and administration of primary rules as obligations

Fitzmaurice's note cited above predates the Vienna Convention on the Law of Treaties (1968)[xxiv] (VCLT) by only 10 years. Yet, his note converges with post-1968 research of Mark Villager. Villager cites the VCLT's operative art 31, "General rule of interpretation," and art 32, "Supplementary means of interpretation," as the 'crucible of treaty interpretations.'[xxv] This general rule matches the general principle of law, namely, *pacta sunt servanda*, which superseded the former *rebus sic stantibus. Pacta sunt servanda* permits flexibility of interpretation of obligations, inasmuch as it comports with both of two approaches to interpreting treaty law, namely,

- the 'will of the parties to the obligation;' and
- a 'teleological interpretation' that focuses on achieving intended end-states.

In contrast, the former and less flexible rebus sic stantibius, denied adaptation of interpretation of obligations to changes in circumstances.

Hence, as one of several sets of 'secondary rules' that are intended to enable the interpretation and application of 'primary rules' as found in treaty ad custom. the VCLT codifies the flexibility necessary to interpret international legal obligations effectively.

Determination of a breach of international obligation as an 'internationally wrongful act' invokes the Articles of Responsibility for Internationally Wrongful (ARSIWA),xxvi another set of secondary rules. State responsibility arises upon at least two determinative articles being satisfied:

- "Every internationally wrongful act of a State entails the international responsibility of that State;" and
- "There is an internationally wrongful act of the State when conduct consisting of an action or omission; (a) is attributable to the State; (b) constitutes a breach of an international obligation of the State."xxvii

2.4 Summary

Little debate surrounds the identification per se of sources of law. They are well established, cited in the Statute of the International Court of Justice and replicate the sources identified in the Statute of the ICJ's predecessor, the Permanent Court of International Justice (1920-1946). Greater debate surrounds the interpretation of sources and secondary rules, their legal effectiveness, the relationship between treaty and custom, and the jurisdiction of judicial fora when using them in international dispute settlement, as assessed in Part 2 of this study.

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[i] John Dewey, *The Public and its Problems* 3 (Henry Holt 1927).

[ii] See generally Michael Ignatieff, *Peace, Order and Good Government: A Foreign Policy Agenda for Canada* (O.D. Skelton Lecture Ottawa 12 March 2004), http://www.international.gc.ca/depArtment/skelton/lecture-2004-en.asp.

[iii] See generally Marti Koskenniemi, *Fragmentation of International Law? Postmodern Anxieties*, 15 Leiden JIL 551 (2002) http://www.repositoriocdpd.net:8080/bitstream/handle/123456789/588/Art_KoskenniemM_FragmentationInternationalLaw_2002.pdf?sequence=1.

[iv] Statute of the International Court of Justice (1946) (18 April 1946) annexed to the Charter of the United Nations (892 UNTS 119) (concluded 26 June 1945 entered into force 24 October 1945) http://legal.un.org/avl/pdf/ha/sicj/icj_statute_e.pdf.

[v] Gerald Fitzmaurice, *Some Problems Regarding the Formal Sources of International Law*, Jan Hendrik Willem Verzijl and Frederik Mari van Asbeck, eds, *Symbolae Verzijl présentées au professeur J.H.W. Verzijl à l'occasion de son LXXX-ième anniversaire* 153, 157-160 (Nijhoff 1958).

[vi] Id, 153, cited in Christian Eckart, *Promises of States under International Law* nn 13-14 (Bloomsbury Publishing 2012) https://books.google.ca/books?id=HY56BAAAQBAJ&pg=PT143&lpg=PT143&dq=fitzmaurice+criticise+treaty+law&source=bl&ots=dJEWHfQAab&sig=tsflfdWA6fd1tO_84Hr1NJ7KJ_Q&hl=en&sa=X&ved=0ahUKEwj03r2O3ubSAhVB5WMKHQmMA64Q6AEIITAC#v=onepage&q=fitzmaurice%20criticise%20treaty%20law&f=false; See also Roslyn Higgins, *Problems and Process* 33-34 (Oxford 1994); D. J. Harris, *Cases and Materials on International Law* 42-44 (Thomson 6th ed 2004).

[vii] Scott J. Shapiro, *Legality* 53 (Harvard 2011).

[viii] Ian P. Farrell, *On the Value of Jurisprudence*, Book Review, Scott J. Shapiro, *Legality* (Harvard 2011) 90 Texas Law Rev 187, 201 (2011) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2670172 .

[ix] Id 187, 187 n1, 194-201.

[x] See generally Robert McCorquodale, Defining the rule of international law; defying gravity, 65(2) *The Int'l and Comp L Q*, 277 (2016); see also Robert McCorquodale, Symposium: Defining the Rule of Law, *Opinio Juris* (16 May 2016) http://opiniojuris.org/2016/05/16/defining-the-rule-of-law-symposium/.

[xi] Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1. C.J. Reports 1996, p. 226 https://www.icj-cij.org/public/files/case-related/95/095-19960708-ADV-01-00-EN.pdf

[xii] Infra n 6 Higgins.

[xiii] See generally Bing Bing Jia, *The Relations between Treaties and Custom*, Chinese JIL 81-109 (2010) https://academic.oup.com/chinesejil/article/9/1/81/342025?login=true.

[xiv] ICJ Statute art 38 (1)(a).

[xv] ICJ Statute art 38 (1)(b).

[xvi] Charter of the United Nations (1945) (892 UNTS [UN Treaty Service] 119 concluded 26 June 1945 in force 24 October 1945) arts 2(4) and 51 https://treaties.un.org/doc/publication/ctc/uncharter.pdf

[xvii] Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (75 UNTS 31concluded 12 August 1949 entered into force 21 October 1950) (Geneva I (1949)); Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (75 UNTS 85 concluded 12 August 1949 entered into force 21 October 1950) (Geneva II (1949)); Geneva Convention relative to the Treatment of Prisoners of War (75 UNTS 135 concluded 12 August 1949 entered into force 21 October 1950) (Geneva III (1949)); Geneva Convention relative to the Protection of Civilian Persons in Time of War (75 UNTS 287 concluded 12 August 1949 entered into force 21 October 1950) (Geneva IV (1949)); Protocol Additional to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of International Armed Conflicts of 08 June 1977 (1125 UNTS 3 concluded 08 June 1977 entered into force 07 December 1978) (AP I (1977)), all four preceding instruments at https://www.icrc.org/en/doc/assets/files/publications/icrc-002-0173.pdf; Protocol Additional to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of Non-International Armed Conflicts of 08 June 1977 (1125 UNTS 609 concluded 10 June 1977 entered into force 07 December 1978) (AP II (1977), all two preceding instruments at https://www.icrc.org/en/doc/resources/documents/misc/additional-protocols-1977.htm; The Hague Conference of 1907 (concluded 18 October1907 entered into force 26 January 1910); Hague Peace Conference 1899 (concluded 29 July 1899 entered into force 04 September 1900) (Hague (1899)), all two preceding instruments at https://www.icrc.org/en/doc/resources/documents/misc/additional-protocols-1977.htm.

[xviii] See generally Convention on the Prohibition of the Production Development, Stockpiling, and Use of Chemical Weapons and on their Destruction (1974 UNTS 317 concluded 13 January 1993 in force 29 April 1997) https://www.un.org/en/genocideprevention/documents/atrocity-crimes/Doc.42_Conv%20Chemical%20weapons.pdf; Geneva Convention on the Prohibition of the Development, Production, and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction (1972), (1015 UNTS 163concluded 10 April 1972 in force 26 March 1975) https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Treaty.xsp?documentId=BACF97285A9CB2A2C12563CD002D6C88&action=openDocument; Treaty on the Non-Proliferation of Nuclear Weapons (1968), (729 UNTS 161 concluded 01 July 1968 in force 05 March 1970, extended indefinitely 11 May 1995) https://www.un.org/disarmament/wmd/nuclear/npt/text; Comprehensive Nuclear-Test-Ban Treaty (729 UNTS 161 concluded 10 September 1996 not yet in force) https://treaties.unoda.org/t/ctbt; Treaty on the Prohibition of Nuclear Weapons (634 UNTS 326 concluded 07 July 2017 not yet in force) https://undocs.org/A/CONF.229/2017/8 ; Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to be Excessively Injurious or To Have Indiscriminate Effects (1342 UNTS 147 concluded 10 October 1980 in force 02 December 1983) https://www.icrc.org/en/doc/assets/files/other/icrc_002_0811.pdf .

[xix] Multilateral Marrakesh Agreement establishing the World Trade Organization (with final act, annexes and protocol). Concluded at Marrakesh on 15 April 1994 (UNTS 31874) (33LLM 1125) https://www.wto.org/english/docs_e/legal_e/04-wto_e.htm .

[xx] ICJ Statute art 38 (1)(c).

[xxi] Bin Cheng, *General Principles of Law as Applied by International Courts and Tribunals* Ch.1, The Principle of Self-preservation 29- 105 (Cambridge 1953, 2006).

[xxii] ICJ Statute art 38 (1)(d).

[xxiii] ICJ Statute art 59.

[xxiv] Vienna Convention on the Law of Treaties (1155 UNTS 331 concluded 23 May 1969 in force 27 January 1980) https://legal.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf.

[xxv] Mark E. Villager, *The Rules on Interpretation: Misgivings, Misinterpretations, Miscarriage? The 'Crucible' Intended by the International Law Commission*, in Enzo Cannizzaro, ed, *The Law of Treaties; Beyond the Vienna Convention* 105 (Oxford 2011).

[xxvi] UN Doc A/56/10 Report of the International Law Commission on the work of its fifty-third session, 23 April - 1 June and 2 July - 10 August 2001, Official Records of the General Assembly, Fifty-sixth session, Supplement No.10, State Responsibility ¶¶ 30-77, 29-365 (November 2001) appended to UN Doc A/Res 56/83 (12 December 2001); see also ILC YB 2001 Vol II (2), http://legal.un.org/ilc/documentation/english/reports/a_56_10.pdf.

[xxvii] ARSIWA arts 1 and 2, respectively.