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International Law and State Practice in Geopolitics; Part II

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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. Effectiveness of international law; attribution of state responsibility

Synthesizing the international legal obligation and subsequent determination of a breach of that obligation raises the question as to whether international law may satisfy the legal principle of effectiveness, and how. The question exists at both the conceptual and operational levels.

1.1 Conceptual interpretations

This paper proposes effectiveness of international law cannot be measured in terms of outputs of equity or justice, as to do so would suggest an arbiter holds a determinative power greater than that of sovereign states and with which to render decisions restoring equity and justice. However, this is a negative proposition and as such only partly addresses the question.

Affirmation of what legal effectiveness is lies in no less than ten different interpretations.[1] Illustratively, some political scientists argue legal effectiveness is voluntary obedience to law deriving from a sense of fairness and legitimacy,[2] whereas a former legal advisor to the US Department of State (2009-2012) with academic pedigree argues legal effectiveness is innate obedience to law and presumed compliance with rules.[3] Another former legal advisor to State suggest law can be considered more a policy management tool, and legal effectiveness more the impact that law has on shaping the future course of state practice.[4]

A comparison of concepts of effectiveness with a selective sample of judicial practice further informs the debate.

1.2 *The Corfu Channel case*; a model of attributing state responsibility

In more practical terms, attribution of an internationally wrongful act to a state serves as one indicator of legal effectiveness. Attribution depends on not only factual circumstance and sufficiently probative evidence but also on the particular modality of interpretation of the obligation in question, e.g. instrumentalism,[5] statism [6] or legal pragmatism.[7] Modalities of interpretation aside, attribution may be more easily determined to the degree that the plaintiff more fully satisfies **(1)** the burden of proof; **(2)** a standard of proof.

The *Corfu Channel case* (1949)[8] was the first contentious heard by the ICJ following its standup in 1945. Both the plaintiff, the United Kingdom, and the respondent, Albania, had consented to the

ICJ's jurisdiction under a Special Agreement (a *compromis*),[9] although Albania had, arguably, consented unwittingly and unintentionally. The UK had little difficulty in satisfying the burden and standard of proof. The UK established that Albania was responsible for mining the Strait of Corfu in Albanian territorial waters adjacent to the Greek island of Corfu. Among other Royal Navy ships patrolling the unusually narrow and shallow straits (Figs 2 and 3), the destroyers *HMS Suarez* and *HMS Volage* were mined on 22 October 1946. The *Suarez* was damaged beyond repair (Fig 1). Forty-four personnel were killed, and many others injured.[10] Forensic evidence was compellingly probative in the ICJ's attributing responsibility for an internationally wrongful act to a state, Albania.

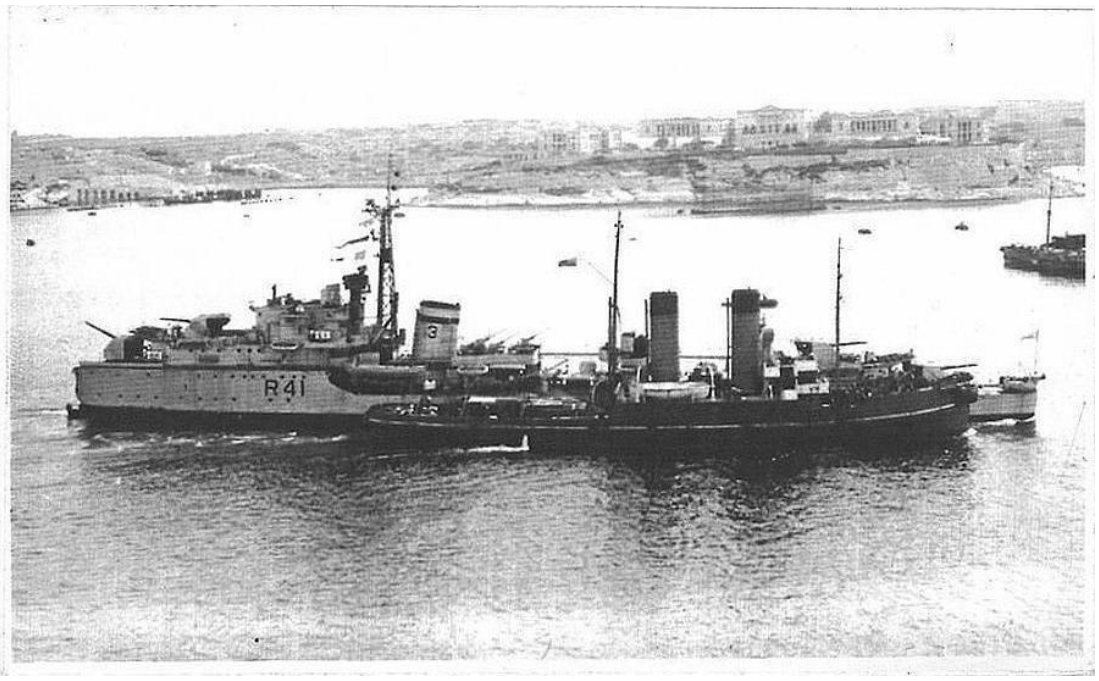

Fig. 1: HMS Volage enters harbour at Malta following the incident; note loss of bow on portside.[11] (Photo credit: Naval History.net)[12]

Fig. 2: Map showing the Corfu Channel, between Albania (Alb) and the Greek island of Corfu.[13] (Photo credit: Naval History.net)[14]

Fig. 3: Map showing the narrow breadth of the Corfu Channel in Albanian territorial waters.[15] (Photo credit: Naval History.net)[16]

1.3 The *Nicaragua* case; political manipulation of law to avoid state responsibility

1.3.1 Introduction

Distinct from 'law-making treaties,' treaties may also be 'declaratory of custom,' wherein customary state practice is codified in treaty. The law in question may retain the status of both treaty and custom at the same time. However, this duality raised problematic issues in politics and law, namely, how vital national interests are protected by international law and its interpretations.

Illustratively, UN Charter art 51 permits threat or use of force in self-defense of the sovereign against imminent threat. The ICI has found that art 51 as treaty law, is declaratory of customary international law. This does not mean that treaty law declaratory replaces custom, but that use of threat or use of force in self-defence is *both* treaty law and customary law rather than just one or the other. This seemingly small point of distinction – treaty law can also be customary law – played a determinative role in the International Court of Justice's decision in attributing state responsibility for an internationally wrongful act to the United States in the *Nicaragua* case (1986).

1.3.2 The case

In 1982, the US began to assist the right wing 'Contras' movement in its armed opposition to the Sandinista National Liberation Front (SNLF). The SNLF, in turn, was attempting to overthrow the US-friendly regime of Nicaragua's president, Antonio Somoza. US support comprised **(i)** provision of small arms and supplies to the Contras (a breach of US domestic law, facilitated by USMC Colonel Oliver North); **(ii)** mining of three Nicaraguan harbours, Corinto, El Bluff, and Puerto Sandino [the latter due west of Managua]. [17]

Fig. 4: Map showing Nicaragua's three ports mined by the CIA (Photo credit: CIA World Factbook)[1]

Nicaragua brought an action against the US in the ICJ. The Charter's Annex established the ICJ as the UN's principal judicial organ and the Court's jurisdiction. In this action, the US invoked the 'Vandenberg Reservation.'[18] This reservation was named after US Senator Arthur Vandenberg (1884-1951), who chaired the US Senate Foreign Relations Committee 1946-1948 and was a champion US internationalist while mindful of protecting US vital national interests from foreign jurisdiction. The US had made this reservation to its 1945 ratification of the UN Charter.

The reservation entitled the US to have *all parties to the treaty invoked in any case before the ICJ become parties to that case if the US decided to invoke its reservation*. The burdensome character of this reservation is intended presumably to enable the US to determine if and when the Court's jurisdiction will apply to US interests. Having the then other 157 Member States of the UN be party to the case would be a condition precedent difficult to satisfy. Hence, the ICJ would have no jurisdiction over US interests.

In the *Nicaragua* case, the Vandenberg reservation

> …withheld from the Court's jurisdiction 'disputes arising under a multilateral treaty [in this case the UN Charter] unless (1) all the parties to the treaty affected by the decision [of the Court] are also parties to the case before the Court, or (2) the United States specifically agrees to jurisdiction'
>
> In the US view, the reservation barred the Court from looking into Nicaragua's claims concerning the alleged use of armed force on the grounds that it prohibited the Court from applying any rule of customary international law the content of which was also the subject of provision in the relevant multilateral treaties. Contrary to Nicaragua's positions, the US claimed that the Charter provisions and the customary rules were identical, leaving no room for 'other customary and general international law' on which Nicaragua could rest its claims. [19]

The ICJ disagreed with the US argumentation, and the US subsequently withdrew from the proceedings as was its legal right under the ICJ Statute's system of consent-based jurisdiction under ICJ Statute art 36, citing the ICJ's lack of jurisdiction.[20]

Nevertheless, the Court found the pertinent customary law derived from two resolutions of the United Nations General Assembly,[21] such resolutions being accepted as expression of state practice.

> The status of General Assembly resolutions has been a subject of academic and political controversy for many years, although few have argued for a direct law-creating effect for them. [Nicaragua] goes much farther than its predecessors in transforming them from exhortations or "soft law" principles into "hard law" prescriptions, at least in the eyes of the Court.[22]

Subsequently, the US vetoed a DRAFT UN Security Council resolution proposed by Nicaragua.[23] The resolution's operative paragraph cites "The Security Council … makes an urgent and solemn call for full compliance with the Judgment of the International Court of Justice of 27 June 1986 in the case of "Military and Paramilitary Activities in and against Nicaragua S/18221…". The US veto effectively blocked enforcement of the judgment that favoured Nicaragua and prevented Nicaragua from receiving financial and other reparations from the US awarded by the Court.[24]

The US Ambassador to the UN, Vernon Walters transubstantiated the Court's legal decision into political terms. He stated Nicaragua's resolution was a "disservice to international law and a cover for Sandinista actions violating U.N. principles … and could not and would not contribute to a 'peaceful and just settlement of the situation in Central America …', adding Nicaragua would 'exploit such a resolution as a blanket endorsement of its military and domestic policies."[25] He called Nicaragua's characterization of the regional situation "wholly disingenuous and self-serving."[26]

The Vandenberg Reservation may be an extraordinary and unreasonable provision that is impossible to satisfy. Notwithstanding, it provides the US with a deft and politically motivated but legally grounded means to escape the jurisdictional reach of a source of international legal obligations over which it has little control, i.e. customary international law, unlike a source of obligations which it can shape through negotiations with other states, i.e. treaty law.

Fig. 5: On 05 October 1986, Eugene Hasenfus, a US citizen, and CIA employee, was aboard a Fairchild C-123 carrying supplies to the Contras. The aircraft was owned by Southern Air Transport, a Miami Fl. air charter firm allegedly linked to the CIA. Nicaraguan armed forces shot the plane down in Nicaraguan airspace with a Soviet SA-7. He was the sole survivor, captured [see photo], sentenced to 30 years in Nicaraguan prison, pardoned and returned to the US. These events led to a US joint Congressional investigation in November 1987 and the US Administration's Tower Commission, both contributing to the windup of this operation of the CIA in Nicaragua, OP ENTERPRISE. (Photo credit: Leo Dematteis)[27]

1.3.3 Summary

The US' legal posture in *Nicaragua* and throughout the Iran-Contra matter reflect one model of interpretation of international law, legal pragmatism, first cited by Oliver Wendall Holmes Jr, Associate Justice of the US Supreme Court [1902-1932]. It is not inconsistent with US state practice intended to limit jurisdiction over US interests. Illustratively,

1. In 2000, US President Clinton signed the Rome Treaty (1998)[28] (Rome) standing up the International Criminal Court yet later withdrew his signature vice forwarding the instrument to the US Senate for ratification. This posture was subsequently restated by John Bolton, US Ambassador to the UN (2005-2006) and National Security Advisor (2018-2019).

Notwithstanding, the US had previously ratified the Geneva Conventions (1949), the backbone of international humanitarian law proscribing crimes against humanity and war crimes per Rome arts 7 and 8 respectively but had not ratified the first two Protocols Additional to the Geneva Conventions (1977).

2. Custom is *ex post facto* creation of law whereas treaty is *ex ante facto*. Further, without codification, custom affords wider latitude than treaty in determining what constitutes lawful state practice. Given the ensuing lack of a state's control over what constitutes customary law and the problematic outputs of *Nicaragua*, the US has expressly refuted consideration of provisions of the, e.g., UN Convention on the Law of the Sea [29] (UNCLOS) as being declaratory of customary law.[30]

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[1] The Effectiveness of International Law, ILA 76th Biennial Conference / ASIL 108th Annual Meeting (07-12 April 2014 Washington) https://www.asil.org/sites/default/files/annualmeeting/pdfs/2014_Program.pdf.

[2] Thomas Franck, *Fairness in International Law and Institutions* 481 (Oxford 1995).

[3] Harold Hongju Koh, *Why Do Nations Obey International Law?* 106 Yale Law J 2599 (1997) http://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=2897&context=fss_papers.

[4] Abram Chayes and Antonia Handler Chayes, *Compliance without Enforcement: State Behavior under Regulatory Treaties*, 7 Negotiation J 311(1991); Antonia Handler Chayes & Abram Chayes, *From Law Enforcement to Dispute Settlement: A New Approach to Arms Control Verification and Compliance*, 4 Int'l Security 147 (Spring 1990); Abram Chayes & Antonia Handler Chayes, *Living Under a Treaty Regime: Compliance, Interpretation, and Adaptation*, in Antonia Handler Chayes & Paul Doty eds. *Defending Deterrence; Managing The ABM Treaty Regime into the 21st Century* 197 (Pergamon-Brassey's International Defense Publishers 1989); Abram Chayes & Antonia Handler Chayes. *On Compliance*. 47 lnt'l Org 175 (1993), cited in Koh, *Why Do Nations Obey International Law?* 2599, 2635 n 183.

[5] See generally Brian Tamahana, *The Tensions Between Legal Instrumentalism and the Rule of Law*, Center for the Study of Law and Society, Jurisprudence and Social Policy Program UC Berkley1, 2 (2006) http://escholarship.org/uc/item/5321r1r0.

[6] See generally Lauri Mälksoo, *Russian Approaches to International Law* 158 (Oxford 2015), cited in Angelika Nußberger, Book Review, 26 Euro JIL 790, 792(2015) http://www.ejil.org/pdfs/26/3/2610.pdf.

[7] See generally Michael J. Glennon, *The Fog of Law, Pragmatism, Security and International Law* (Stanford 2010).
[8] *Corfu Channel Case (United Kingdom v Albania)* Merits Judgment 09 April 1949 ICJ Rep 4 https://www.icj-cij.org/public/files/case-related/1/001-19490409-JUD-01-00-EN.pdf.
[9] SPECIAL AGREEMENT CONCLUDED ON MARCH 25th, 1948 [documenting a *compromis* between the UK and Albania citing the UK as plaintiff and Albania as Respondent, further to ICJ Statute art 36(1)] https://www.icj-cij.org/public/files/case-related/1/1495.pdf; see also *The International Court of Justice Handbook* 35 (updated to 31 December 2018) https://www.icj-cij.org/public/files/publications/handbook-of-the-court-en.pdf.
[10] Post World War 2 - Contemporary Accounts, CORFU CHANNEL INCIDENT, MINING OF HM DESTROYERS SAUMAREZ and VOLAGE, 22nd October 1946 https://www.naval-history.net/WXLG-Corfu1946.htm; see also Anisa Bahiti, *Albania-Greece Maritime Border - A Short 75 year History* Albanian Daily News (Sunday 30 August 2020) https://albaniandailynews.com/news/albania-greece-maritime-border-a-short-75-year-history.
[11]Naval history.net https://www.naval-history.net/Photo10ddVolage3PS.jpg.
[12] Ibid.
[13] Naval History.net, https://www.naval-history.net/WXLG-Corfu3.jpg.
[14] Ibid.
[15] Naval History.net https://www.naval-history.net/WXLG-Corfu1.jpg.
[16] Ibid.
[17] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)* Merits Judgment 27 June 1986 ICJ Rep 14, 100-101 §190 http://www.icj-cij.org/docket/files/70/6503.pdf.
[18] Named after US Senator Arthur Vandenberg (1884-1951), who chaired the US Senate Foreign Relations Committee 1946-1948 and was a champion US internationalist while still mindful of protecting US vital national interests including protection of US interests from foreign jurisdiction.
[19] Tom Ruys, *'Armed Attack' and Article 51 of the UN Charter; Evolutions in Customary Law and Practice* 7 (Cambridge 2010).
[20] See generally Louis B. Sohn, *American Acceptance of the Jurisdiction of the International Court of Justice: Experiences and Prospects*, 19 (3) Georgia J International and Comparative Law 489 (1989) https://digitalcommons.law.uga.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=1702&context=gjicl.
[21] **(1)** UN doc A/Res 2625 (XXV), Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations (24 October 1970) https://unispal.un.org/DPA/DPR/unispal.nsf/0/25A1C8E35B23161C852570C4006E50AB.
(2) Un doc A/Res 3314 (XXIX) Definition of Aggression (14 December 1974) https://undocs.org/en/A/RES/3314(XXIX).
[22] Fred L Morrison, *Legal Issues in The Nicaragua Opinion*, 81 American JIL 160-166 (January 1987) https://web.archive.org/web/20120205163909/http://bailey83221.livejournal.com/55750.html.
[23] Michael J Berlin, *U.S. Vetoes Nicaraguan Resolution On Compliance With Court Decision*, Washington Post (01 August 1986) https://www.washingtonpost.com/archive/politics/1986/08/01/us-vetoes-nicaraguan-resolution-on-compliance-with-court-decision/ecdf20d6-cf3a-4761-ba23-5c49a9fa379a/.
[24] UN doc S/18250 (31 July 1986) https://undocs.org/en/S/18250.
[25] Infra n 4 berlin.
[26] Elaine Sciolino, *U.S. VETOES REBUKE ON AID TO CONTRAS*, New York Times (01 August 1986) https://www.nytimes.com/1986/08/01/world/us-vetoes-rebuke-on-aid-to-contras.html.
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[28] Rome Statute of the International Court (2187 UNTS 90 concluded 17 July 1998 in force 01 July 2002) https://www.icc-cpi.int/resource-library/documents/rs-eng.pdf.
[29] United Nations Convention on the Law of the Sea (1833 UNTS 397 concluded 10 December 1982 in force 01 November 1994) https://www.un.org/depts/los/convention_agreements/texts/unclos/unclos_e.pdf.
[30] See Craig Allen, The International Law of the Sea: A Treaty for Thee; Customary Law for Me? Opinio Juris 14 June 2012, http://opiniojuris.org/2012/06/14/the-international-law-of-the-sea-a-treaty-for-thee-customary-law-for-me/.