INTERNATIONAL LAW & POLITICS: THE SAME UNDER ANOTHER NAME?

Ana M Nacvalovaite
International Law & Politics: The Same Under Another Name?

Ana M Nacvalovaite
The perceived dichotomy between international law and international politics has been a highly important point of reference for academics in their discourses and debates surrounding the exact nature of international law. Many academics have treated them as two distinct frameworks and have argued that international law does not in fact exist (if *de jure* it does) as political considerations over-ride them. Other academics have argued that international law is merely another political tool used by statesmen and that international law is not in itself a legal system.

This apparent distinction, that international law can only be legal or political, is entirely misleading and does not give a correct interpretation as to the nature of international law. The ideas of a legal system and a political one that have been used by academics thus far in the debate over the nature of international law, are merely ideal types that should not be strictly interpreted because ideal types are unlikely to be replicated in the real world. Rather, the use of the ideal definitions of legal and political is that, in looking at the relationship between those definitions and the facts will one come to a more nuanced understanding of the nature of international law, and indeed of the meanings of the legal and political. And from this, one will be able to establish that such a distinction between a legal system and a political one is clumsy and arbitrary when applied to the facts, and rather when applied to the facts, such a distinction and dichotomy collapses.

Doubtless international law is made up of statements of politics, but they are also legal in the sense of promoting a sense of obligations and duties. This essay will first prevent a brief overview of the sources of international law and show how and why the perceived legal/political dichotomy has been prevalent in the academic discourse surrounding the sources and nature of international law. Examples of where international law has been used for political ends will then be considered and the view that a purely political or a purely legal approach to understanding international law is not an accurate way of looking at international law will be put forward, and that a more fruitful way to approach the issue would be to collapse the distinction between the two and that international law is both political and legal. And in conclusion the essay will look at the consequences of its arguments to the question of whether there is legal truth in international law and whether treaty bodies are analogous with political bodies.
There are traditionally two types of sources of international law. One from international treaties and another is what academics have termed to be customary international law. For many intellectuals like Henry Steiner, treaties form a significant part of international law. This has been enshrined in Article 38(1) of the Statute of the International Court of Justice where courts are instructed in clause A to enforce “international conventions, whether general or particular, establish rules expressly recognised by the contracting state”. In effect this means that treaties head the list as the first instance expression of international law, especially where those treaties include many parties. This can be seen in the development of the laws of human rights with a plethora of multi-lateral agreements including the Vienna Declaration of the World Conference on Human Rights in 1993 or the earlier adoption by the member states of the Council of Europe of the Convention for the Protection of Human Rights and Fundamental Freedoms in 1950. Treaties can create and define the remit, power and jurisdiction of the international institutions (the most famous example would be the United Nations Charter which created the United Nations) in which states party to the treaty take part and might owe duties and obligations to. Treaties serve different purposes, from basic political motives such alliances, peace settlements, control of atomic weapons, settling border disputes to those which are less politically motivated such as foreign aid or free trade agreements. Another characteristic feature of treaties are that they normally prescribe direct and specific impact upon the state parties such as tariff accords, income tax conventions and perhaps the most important example human rights.

The other source of international law is custom which is increasingly becoming more important in areas like human right obligations. The importance of customary law has also been enshrined in the Statute of the International Court of Justice where clause B of Article 38(1) states that the Court shall apply “international custom, as evidence of a general practice accepted as law”. Codification, academic comments and case law of the International Court of Justice all may contribute to customary law. Customary law can be sub-divided into two types; state practice and *opinio juris*.Traditionally custom has been a general and consistent practice followed by states and is then accompanied by some form of articulation of its legality. However with regards to current international law, customary law emphasizes the *opinio juris* rather than general and consistent state practice because it relies from on statement. In other words, customary
international law is derived from abstract statements of *opinio juris* and is substantially normative in nature. This can be seen in the Universal Declaration of Human Rights in 1948 for example.

The difference between the two sources of international law underlie much of the academic commentary on the nature of international law as can be seen in the development of the idea of hard and soft law within the academic discourse. Hart and Hare both distinguished two types of law: One which is descriptive – discovered by observation and reasoning because they are statements about what is already being practiced. The other is prescriptive in that it states what that practice ought to be rather than has been. Hart and Hare went on to argue that legal rules are always prescriptive supported by a descriptive factor or a normative element, i.e. what should be. These customs are not descriptively accurate, in that they are not statements that are already being practiced and therefore some theorists have characterized this form of customary international law as “soft law” with sub-legal that is not law. Deemed as legally non-binding, this form of “law” has posed an academic problem about the state of international law and how it is derived from it. Indeed some theorists have looked at the distinction between hard and soft law and suggested that the difference is in their consequences. With hard law the consequences are legal whereas soft law is political, and therefore soft customary international law becomes a political statement and therefore exists within the political framework rather than a legal one.

This form of opinion has been expressed by many academic commentators such as Martti Koskenniemi who have brought the discourse as outlined in the previous paragraph to its logical conclusion by arguing that it is impossible to have international law for a society of sovereign states that are motivated by political power and self-interest. Their skepticism about the international law stems from four main issues that law is subordinate to political power, to the will of the states, to cultural, moral and legal diversity in the world and finally due to the paucity of central judicial bodies. The first two reasons will be dealt with as they are the most pertinent to this question. Power means the ability of the state to impose its will on other states and those ingredients of power number the political, the psychological and is distributed unevenly. The fundamental importance of power and the pursuit of self-interest of the state will mean that law, in particular customary international law would yield to those determinants and indeed become a
mere political of states to impose their will on others. This view is supported by the often put forward argument that international law is inherently non-legal because customary international law is based ultimately on the sovereignty of states, the implication of which is that there is no formal authority and in the final analysis states are not subordinated to any superior authority. Therefore any real limits on the states actions, i.e. only becomes in practice binding, from the state’s perception of their own national interest, and thus in the words of Raymond Aron’s infamous phrase “might makes right”.

Running corollary to this has been the argument that international law is a mere framework for sovereign states to further their political aims. A view propounded by such academics like Francis Anthony Boyle. And indeed there are many instances where international law has been driven by politics rather than the rule of law. This can be seen in how impotent international law can be. For example in the fact of numerous UN directives transgressions, Israel has not faced any legal fallout due to the political considerations of certain states particularly USA in blocking any moves by the UN to punish Israel. Justified by international law, there was undoubtedly a political dimension to the invasion of Iraq. Whereas in instances where there was undoubtedly international law justification on the grounds of human rights in places such as Rwanda and Darfur, the UN was unable to enforce laws because states were unwilling to do so because of humanitarian reasons.

As with the above instances, politics has been a deciding factor in explaining the circumstances which determine whether or not international law is being enforced or not. In many of those situations, the laws of human rights are the ones in question, but the issue should not be restricted there alone. After all the political use of international law has been demonstrated in states’ attempts to claim the Antarctic and Artic for political rivalry in space as well as in the independence of Kosovo. However to argue that because international law operates in a political setting, it can not operate in a legal setting is wrong. As academics like Stanley Hoffman argues, the use of international law whether it be for political purpose or not, the political costs of actions done within a purported legal framework are greater. And indeed if one looks at what a legal system essentially is, is the allocation of power, whether it be in a domestic legal system or within an international framework. And thus those who use the legal system to further their
political aim are accountable in some form to it too (with intra- and non- governmental bodies being important here). Thus the USA’s invasion of Iraq is being judged on terms of legality because they used international law to justify it. Collapsing the perceived academic difference between the legal and the political, and understand that laws always act in political contexts and vice versa provides a far more suitable framework for understanding the nature of international law.
Bibliography


