THE CAMBRIDGE-TILBURG LAW LECTURES

THIRD SERIES 1980

# What is International Law and how do we tell it when we see it?

by SIR ROBERT Y. JENNINGS

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# Nulla Poena sine Lege in English Criminal Law

by J.R. SPENCER

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Editors: Dr B.S. Markesinis and Mr J.H.M. Willems

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# FOREWORD

The year 1978 marked the thirtieth anniversary of Professor C.J. Hamson's 'Summer course for foreign lawyers' and of his untiring efforts not only to introduce the civil lawyer to the mysteries of the Common law but also to bring closer together lawyers form bots sides of The Cannel. The same year saw the beginning of the 'Cambridge-Tilburg Law Lectures' which developed indirectly form the 'Summer cours' and which seek to achieve similar aims by different methods.

The idea of inviting two Cambridge scholars to assist their Dutch colleagues in the teaching of the Common law as a regular option for undergraduate studies in novel and, to judge from first reactions, has so far been successful. The immediate objects are to achieve closer links between Common lawyer and Civil lawyer; to encourage the further systematic teaching of the Common law; and to produce a series of lectures, two of which will be published annually in the hope that they may be interest to a wider public.

The realisation of this idea became possible thanks to be generosity of the Tilburg Law Faculty and the impressive energy, euthusiasm and hospitality of its members. To name all who in divers ways contributed to the realisation of this scheme is, unfortunately, impossible but the names of Professors Jeukens, Schoordijk and Deelen demand special attention. On the Cambridge side the project was extremely fortunate to gain the early support of Professor Gareth Jones, Professor Tony Jolowicz, Mr. David Williams and Mr. Tony Weir.

The third series of the Cambridge-Tilburg Law Lectures were delivered in Tilburg in March 1980 by Professor R.Y. Jennings, Dr P. O' Higgins and Mr J.R. Spencer and once again are published by the Tilburg Law Faculty in association with Kluwer Law and Taxation Publishers.

B.S. Markesinis J.H.M. Willems

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# *What is International Law and how do we tell it when we see it?*

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Sir Robert Y. Jennings

Article 49 of the Rules of the International Court of Justice requires parties before the Court, in their pleadings, to include a "statement of the law" in the case. How does one today set about the task of identifying principles and rules of international law, and of distinguishing it from that which, whatever else it may be, is not law?

This is not a problem simply of international law. It arises in every system; and tends to arise in an acute form at times of political or social unsettlement. Thus in English law, when the issue of the freedom of the individual in the person of John Wilkes was the challenge to the independence of the Courts and the Judiciary.

In the leading case of Entick v. Carrington (1765), about the seizure of John Wilkes's papers with a view to prosecution for criminal libel, "Mr. Wilkes's private pocket book filling the mouth of the sack", Lord Camden said this concerning the alleged powers of the authorities:

> "If it is law, it will be found in our books. It it is not to be found there, it is not law."

What, then, is the state of our 'books' in international law? It is a pertinent question, because although lawyers know that the quality of certainty of law is one on which there must be much compromise, not least in the interests of justice, it is a desideratum of any strong law that there is reasonable certainty about where one should look to find it. Nor is this less important for the well-being of the International Court of Justice in particular or the process of international litigation in general. It has sometimes been complained that the decisions of the World Court have been unpredictable. But the outcome of any case worth litigating must be to a serious degree unpredictable. The problem lies deeper and is more serious than that: it is that the choice of legal principles to be applied and upon which the decision will be made is itself often unpredictable; a circumstance which must be a discouragement if not even a deterrent to governments contemplating international litigation.

I doubt whether anybody is going to dissent from the proposition that there has been never a time when there has been so much confusion and doubt about the tests of the validity - or sources - of international law, than the present. This is natural enough at a time when the tide of

development, change and elaboration in international law is flowing stronger than ever before. So the present confusion is far from being of itself a reason for pessimism. All the same, there is no denying that it is a major problem calling for, if not necessarily a speedy solution, at least a sound one.

It should be remembered at the outset that in considering the sources of international law, we are looking not only at the tests of validity of the law - the touchstone of what is law and what is not - but also at the ways in which law is made and changed. This is a complication not found, at least not to the same degree, in domestic systems of law. For instance, in a system of domestic law the interpretation and application of a statute is quite distinct form the actual process of legislation: so much so that, in English law for example, debates in parliament during the legislative process are not permitted even to be cited in order to assist in the process of interpretation.

But in international law the questions of whether a rule of customary law exists, and how customary law is made, tend in practice to coalesce.

Inescapably the inquiry begins with Article 38 of the Statute of the International Court of Justice, which sets out what the Court, "whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply". The list that follows is probably the first thing that any international lawyer learns:

> "(a) international conventions, whether general or particular, establishing rules expressly recognized by the contesting States;
> (b) international custom, as evidence of a general practice accepted as law;
> (c) the general principles of law recognized by civilized nations;
> (d) subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law."

The subsidiary means, cases and writings, particularly cases, I shall come back to. The so-called "general principles" have no very clear meaning but the fact that the ambiguity has never had to be resolved is perhaps indicative of this provision's relative lack of importance in practical matters. But again I shall return to that question. Certainly it is treaties and custom that are, and always have been, of major importance; and it is these

that I want mainly but not wholly to talk about; as far as maybe in that order; but, of course, in reality they are not always clearly separable, and new developments have made them more inter-connected rahter than less so.

But first, a word of caution about Article 38 itself. We have to use it because it is part of the Statute of the Court and because the problems, therefore, in practice tend to present themselves in the context of that provision. But we must also remember that it is a 1920 draft and not always well-suited to international law in the 1980s. So we must use it, but interpreting where need be; as in a written constitution; and remembering that it is an open question whether it is now of itself a sufficient guide to the content of modern international law.

*Treaties*

Treaties used to be the most readily indentifiable element of international law. A treaty had identifiable parties and, with rare and easily recognized exceptions, it created rights and objections only upon those States parties, which had voluntarily subscribed to it by whatever mode, or modes, were provided. Indeed it was this contractual nature of the treaty that persuaded Sir Gerald Fitzmaurice to say that it was, therefore, not a source of law but a source of obligation (see Symbolae Verzijl, (1958), pp. 156 ff).

That simple position was, I suppose, first changed by the Genocide Convention Advisory Opinion, and the subsequent emergence of new rules about reservations, which had the result that the task of finding out which States are parties to a particular treaty, and in relation to which other States parties, is now often a matter of quite esoteric research in the case of multilateral treaties. Moreover, the answer may be dubious and even disputed. One need go no further than the Anglo-French case in 1976-7 over the English Channel. It was only after full pleadings from both sides, and oral argument, that the Court was able to decide, though with, on this point, a different opinion from one Judge, that Article 6 of the 1958 Geneva Continental Shelf provision dit not apply between the Parties to the Channel Islands area, but did apply to the Western Approaches area.

Another complicating factor about treaties as a source of law has been the enormous success and importance of the efforts made, through the work of the International

Law Commission, to codify large parts of international law by multilateral treaty: a complicating factor not least because the whole experience of the International Law Commission has shown that there can be no hard-and-fast distinction between codification strictly-so-called and progressive development. And indeed, even if items of strict codification could be identified, the very fact of changing the law from an unwritten source to a written source is itself inevitably a major change. For the techniques of dealing with, interpreting, and applying a written law - by which I mean one with a single authoritative text - are quite different from the techniques of dealing with an unwritten rule.

Indeed, a codifying and progressively developing text can have a life and authority quite apart from its obligatory force as a treaty - witness, for example, the influence and even authority of the Vienna Convention on the Law of Treaties, long before it recently came into force as a treaty for certain ratifying States. Furthermore, it is a little unrealistic simply to say that the codified rule is binding on States not Parties to the Treaty, simply as a customary rule, whilst ratifying States are bound both by the custom and the treaty text. For the fact is that the customary rule has in large if not entire measure com to be the rule as it is expressed in the text, partly because the text was the result of both the preparatory work of the International Law Commission, and of strenuous negotiation at the Vienna Conference; and partly also just because of its availability as a single text.

So one begins to wonder how far the ratification of such codifying and developing conventions really matters very much. Certainly a State which wishes not to be bound by such a rule will usually need not only not to ratify but positively to reject. Even then, it could be unsuccessful, if the rule is regarded as a statement, or should one say, restatement, of custom. Of course the situation is different where the treaty is not simply law-making, or law-stating, but sets out for example to create an organization. States do not become members of an organization by the development of custom. For this sort of change, the treaty is essential as such.

Yet there is another, and not easily reconcilable, way of looking at the matter. If a Court takes the view that a treaty provision is not codificatory in the broad sense of the term - that is to say, including a necessary ingredient of progressive development - then it would appear

that a strict and orthodox view of the ambit of treaty obligation may be taken. I need hardly remind you of the International Court of Justice's attitude towards Article 6 of the 1958 Continental Shelf Convention, in the North Sea cases Judgment.

> "In principle, when a number of States, including the one whose conduct is invoked, and those invoking it, have drawn upon a convention specifically providing for a particular method by which the intention to become bound by the regime of the convention is to be manifested - namely by the carrying out of certain prescribed formalities (ratification, accession), it is not lightly to be presumed that a State which has not carried out these formalities, though at all times fully able and entitled to do so, has nevertheless somehow become bound in another way."

So, according to this view of the matter, the gateway leading from mere treaty provision to the creation of new custom is straight and narrow. The same strict view was evidenced also, of course, in the Asylum case. Thus, the influence of the treaty provision will greatly differ in its ambit of obligation according as whether it is to be regarded as codificatory or not. It is hardly necessary to add that this distinction itself, important as it may be, is often a very nice one on which more than one opinion is possible.

Accordingly, it is relevant here to consider a somewhat puzzling passage of the North Sea Judgment, about the requirements of a treaty provision before it can even be considered whether it has become a customary rule of law, whether by force of example, by the spread of practice, and the like. Concerning the possibility of a treaty provision becoming, through practice, part of customary law, and thus "to have become binding even for countries which have never, and do not, become parties to the Convention": "There is no doubt", added the Court, "that this process is a perfectly possible one and does from time to time occur: it constitutes indeed one of the recognized methods by which new rules of customary law may be formed. At the same time this result is not lightly to be regarded as having been attained" (para. 71). Nevertheless, it could come about, went on the Court, "even without the passage of any considerable time"; and "a very widespread and representative participation in the convention might suffice of itself, provided it included that of States whose interests were specially affected" (para. 73).

All this is commonsense. But there is another passage in

the same Judgment where it is laid down that, for custom to arise from treaty provision: "It would in the first place be necessary that the provision concerned should, at all events potentially, be of a fundamentally norm-creating character such as could be regarded as forming the basis of a general rule of law" (para. 72).

The Court did not regard the rule in Article 6 of the Geneva Continental Shelf convention, as having this character; although it is interesting to note in passing that all the difficulties the Court raises in regard to Article 6 would seem to apply with equal force to Articles 74 and 83 of the Draft Convention on the Law of the Sea, which do purport to be drafts suitable for a universal rule.

Now what did Article 6 lack to make it potentially of a fundamentally "norm-creating character"? What sort of distinction can we trace between a rule that is merely of a norm-creating character and one that is "fundamentally" of a norm-creating character? And if the convention had been generally ratified, would Article 6 not then be a "general rule of law", whether or not it was of a norm-creating character? Anyway, if it is binding between Parties to the treaty, how can it fall to be of a norm-creating character?

Perhaps all the Court means by this obscure passage is that they did not like the idea of Article 6 becoming a general rule, so were minded to persuade themselves that it actually could not do so. Or perhaps it is a way of wrapping up, what is probably the fact, that the Court takes to itself some discretion to decide whether it is minded to elevate a treaty norm into a general norm.

One can, of course, appreciate that a provision which cannot, so to speak, stand on its own feet, but is partly dependent for its object and content or proper functioning on other provisions of a treaty, which provisions happen to be essentially contractual in nature, cannot logically and reasonably become a rule of general custom, for thus would it be divorced from the qualifying effect of its context in the convention. This would be to make a rule of custom different in its effect from the treaty rule from which it was derived.

But it is difficult to see how this could possibly be true of Article 6 of the 1958 Treaty. And the statement of the Court begins to look even odder, when it is remembered that the Court declared Article 1 to represent existing general customary law; even though that Article was obviously, one would have supposed, a temporary, holding article;

that "exploitability" could never have represented a definitive rule of a potentially norm-creating character; and though the Article begins with the words, "For the purpose of these Articles, the term 'continental shelf', is used ...".

This question of when a treaty provision turns into custom arises also in another dimension. I mean the classical argument found in the older text books: if you have a more or less large number of bilateral treaties saying the same thing, should one regard this as evidence of a developing custom; or as evidence that governments felt it necessary to make the treaties in order precisely to contract out of the customary rule? There can be no general answer to that question. It is necessary in each case to go through the pain of deciding which way it should go; and if it happens to be a Court that incurs that pain of decision, the answer will probably stick. A topical example is the tension between the NIEO and the many scores of bilateral investment treaties providing for full compensation in the event of nationalisation.

But before we can take this matter any further, we must turn to look more particularly at custom.

## *Custom*

The identification of custom used to be a comfortable and reasonably secure process. Like most of my generation, I was brought up on the periods of Mr. Justice Gray's measured prose in the Supreme Court of the U.S. in the cases of the "Paquete Habana" and the "Lola" in 1899. The question was whether small fishing boats were exempt from capture as prize. For evidence of "the customs and usages of civilized nations", he referred to the works of jurists and commentators; and he found an established rule of international law, "founded on considerations both of humanity to a poor and industrious class of men, and of the natural convenience of belligerent States", that such vessels "honestly pursuing their peaceful calling were exempt from capture".

For evidence of custom, Pitt Cobbett, in a good, popular case book of the period, lists "records of State action", and "Text-writers of Authority". As to what is now called the element of the opinio juris sive necessitatis, but was then frankly called consent, or assent, of States, there was no need to attempt to show that "the State in question" had assented to the rule; in the words of Professor West-

lake's great text book of 1904, "it is enough to show that the general consensus of opinion within the limits of European civilization is in favour of the rule".

But if customary law was then relatively easy to identify, it was also correspondingly difficult to change or develop. It had, if you like, a strong element of inertia. So much so that, in the inter-war period, it supposed that one of the ways of preventing war must be to find procedures of what was called "peaceful change". The League of Nations was hamstrung by the unanimity rule, and there were feelings of guilt about the Peace Treaty of Versailles, and the desire to change it without it being changed by another European war. So the central problem of international law then seemed to be its rigidity. In lectures delivered in 1931, Sir John Fischer Williams said: "Perhaps the most difficult and certainly the most important of the problems which have to be solved if the world is to be freed from war between civilized nations is the problem how men are able to combine the avoidance of war with the necessity of giving effect to changes in international relationships". It is a curious irony that whilst codification was under suspicion of introducing even more rigidity, the Hague Conference of 1930, which attempted to codify some parts of the law declared to be so well established as to be "ripe for codification", ended in almost unmitigated failure.

Whether or not that diagnosis was correct for its time, the scene today could hardly be more different. The efforts of the International Commission in promoting the codification and progressive development of central areas of international law, have met with important success. One need think only of the great law of the sea codifications of Geneva in 1958; the Vienna conventions on diplomatic and consular law, the Vienna convention on the Law of Treaties, the recent convention on State Succession to Treaties, and the present difficult and controversial yet highly promising work of the Commission on State Succession in matters other than treaties, on State Responsibility, and so forth. Large and important areas of international customary law have thus become written law. Nor has this been done without change, and very considerable elaboration and development of the law.

And as to actual changes in the law: one need only think of the reversal in the attitude of the Commission itself, in the course of its labours over the question of reservations to treaties; and the eventual adoption by the Vienna Conference of an even more radical form of the new

rule; and its subsequent acceptance in may quarters as being a general rule.

There is also a disquieting side to this ferment in the law. There are now so many vehicles for the expression of opinio juris - digests of State practice and opinion, resolutions of innumerable inter-governmental and non-governmental organizations or ad hoc conferences, and of the General Assembly itself - that it is increasingly difficult to say with any conviction what is lege lata and what is lege ferenda. In some fields, indeed, that vital distinction has become so blurred as to defy definition with any certainty. In the area of economic law there are almost contending systems. And then there are sometimes 'standards' rather than law. Where do we place those in our scheme of sources? In fact the whole exercise of identifying general customary law has become immensely complex, and correspondingly uncertain; and in so many areas it is not just a question of inquiry but also of a policy-choice.

For the line between laws and contending proposals for laws to become so difficult to establish, however, is a serious matter, and bodes no good at all for the authority of the law. It is the element of conviction that lends customary law its authority; and if the conviction be missing, so pro tanto is the authority.

Perhaps it is time to face squarely the fact that the orthodox tests of custom - practice and opinio juris - are often not only inadequate but even irrelevant for the identification of much new law today. And the reason is not far to seek: much of this new law is not custom at all, and does not even resemble custom. It is recent, it is innovatory, it involves topical policy decisions, and it is often the focus of contention. Anything less like custom in the ordinary meaning of that term it would be difficult to imagine.

Take for instance a question on which it is now generally accepted that there is both a treaty rule and a customary law rule and that they are different, and therefore the distinction is significant: I mean the law governing continental shelf boundaries between opposite or adjacent States. The State practice here is voluminous, it is all recent; and it is constantly being augmented, so that much depends upon the moments of time at which it is sampled. But what is this so-called practice? It is a series of boundary settlements by agreement. Very few of them give any clue as to the general principles if any that underlie the agreement. The different factors influencing the choice of the agreed boundary are obviously of great variety, in-