1987

International Courts and the Efficacy of International Law

Mark Weston Janis
University of Connecticut School of Law

CONFERENCE

INTERNATIONAL COURTS AND THE PROTECTION OF HUMAN RIGHTS

FOREWORD: INTERNATIONAL COURTS AND THE EFFICACY OF INTERNATIONAL LAW

*by Mark W. Janis**

Quand je vais dans un pays, je n'examine pas s'il y a des bonnes lois, mais si on exécute celles qui y sont, car il y a des bonnes lois partout.[1]

Any difficulty in making good international law pales beside the problem of making good international law effective. The history of the international legal discipline is replete with examples of carefully crafted norms disregarded in practice. One need only mention the Kellogg-Briand Pact of 1928[2] and the Charter of the United Nations of 1945 and their vain attempts to prohibit war to evoke the commonplace that international law does not "work."

Yet, international law plainly does "work" in its most frequent usage, when international law is applied by a national legal system. When a treaty provision or a customary international law is used as a rule of decision by a municipal court or administrative agency, international law has all the efficacy that a municipal legal system can provide.[3] For most international lawyers, this efficacy is enough because

---

* Professor of Law, University of Connecticut School of Law. A.B., Princeton University; B.A., M.A., Oxford University; J.D., Harvard University.

1. Montesquieu, *Notes sur l'Angleterre*, OUEVRES COMPLÈTES 331, 332 (Éditions du Seuil 1964).

2. Treaty Providing For the Renunciation of War as an Instrument of National Policy, August 27, 1928, 46 Stat. 2343, T.S. No. 796, 94 L.N.T.S. 57.

3. In the United States, for example, article VI(2) of the Constitution makes "all Treaties made, or which shall be made, under the Authority of the United States . . . the Supreme Law of

most international lawyers, especially those practicing international economic law, rely upon national legal systems, not upon any international legal system to get their job done. "Piggy-backing" on national law-applying and law-enforcing institutions is quite an ordinary way in which international law is made effective. Indeed, one of the most helpful contributions which international law makes to international relations is to provide common rules which are simultaneously applicable and effective in two or more municipal legal systems.

When we think of international law being ineffective, then, we are not contemplating international law as it comes to be incorporated into municipal law. Rather, the particular ineffectiveness of international law arises in its application within whatever we have for an international legal system. It is not the body of rules of international law, so much as the process of international law, which is really in issue. The question might be formulated: How is international law effective in international legal process?

A focus on the efficacy of international law in international legal process is reflected in the usual critiques of international law as really "law." In the nineteenth century, the leading Anglo-American legal positivist philosopher, John Austin, especially concerned about the link between rules and rule-enforcement, argued that real "law" required a sovereign to enforce it and that, therefore, international law was not by definition "law" but a form of morality.[4] In the twentieth century, H.L.A. Hart, in his construction of positivism, while accepting that linguistically and because of usage it was right to call international law "law," wrote that international law resembled not a municipal legal system but a primitive legal system where there are primary rules of obligation but no secondary rules to efficiently make, recognize or enforce the primary rules.[5]

However, whatever their differences, neither Austin's nor Hart's nor most other general jurisprudential characterizations of international law pay particular attention to the diversity of international legal process. That is, most discussions of the problem of the efficacy of international law assume that there is *a* system, ineffective though it may be, of international law and suppose that there is something like a sin-

---

the Land." U.S. CONST. art. VI, cl. 2. The Supreme Court has held that customary international law is part of the common law of the United States. *See* The Paquete Habana, 175 U.S. 677, 700 (1900).

4. J. AUSTIN, THE PROVINCE OF JURISPRUDENCE DETERMINED 208 (n.p. 1832).

5. H.L.A. HART, THE CONCEPT OF LAW 209, 226 (1961).

gle general integrated, if not hierarchical, international legal process. Reality is otherwise. Although there is some international law and process which may purport to be universal, such as the United Nations and its law, most international law and process is pertinent only to a number of consenting states. This is true even for widely popular treaty frameworks, such as the General Agreement on Tariffs and Trade[6] and the International Monetary Fund.[7] It is no more accurate to say that there is *a* system of international law than to say that there is *a* system of municipal law. As there are many systems of municipal law, so there are many systems of international law.

Given the diversity of international legal process, the efficacy question might be reformulated, and its answer tell us more, if we ask: What forms of international legal process are effective? The reformulated question properly assumes that there are different systems of international law and hints that some systems will be more effective than others. In analyzing the relationships between law and society, Max Weber, at the turn of the twentieth century, defined "law" as "an order system endowed with certain specific guarantees of the probability of its empirical validity."[8] Weber's necessary "guarantees" for law were more sophisticated than Austin's necessary "sovereigns" for law. Weber wrote of a "coercive apparatus, i.e., that there are one or more persons whose special task it is to hold themselves ready to apply specially provided means of coercion (legal coercion) for the purpose of norm enforcement." The "coercive apparatus" may use psychological as well as physical means of coercion and may operate directly or indirectly against the participants in the system.[9] This conceptual framework for understanding the efficacy of law is a more useful way to understand the effectiveness of international legal process than the theories provided by Austin and Hart.

Somewhat surprisingly, given the problem of efficacy in international law, there is relatively little academic attention paid to it. Most international legal studies are concerned with rules rather than process.[10] Some scholarly reluctance is probably due to the division between international lawyers and political scientists; the lawyers may

---

6. General Agreement on Tariffs and Trade, October 30, 1947, 61 Stat. (5),(6), T.I.A.S. No. 1700, 55 U.N.T.S. 194 (1948), as amended by numerous protocols.

7. Articles of Agreement of the International Monetary Fund, July 1-22, 1944, 60 Stat. 1401, T.I.A.S. No. 1501, 2 U.N.T.S. 39.

8. M. WEBER, LAW IN ECONOMY AND SOCIETY 13 (Rheinstein & Shils trans. 1954).

9. *Id.* at 13.

10. 1 A. CHAYES, T. EHRLICH & A. LOWENFELD, INTERNATIONAL LEGAL PROCESS xi (1968).

feel comfortable with the rules and uncomfortable with international relations and the political scientists vice versa. There may be a difficulty in cumulation too, for it is easier to make interesting general analyses and conclusions when there is a considerable amount of evidence available and presently there is not.

The evidentiary problem of the efficacy of international law is addressed, to some extent at least, by the papers and proceedings that follow. The idea stimulating the Conference on International Courts and the Protection of Human Rights was to view the efficacy question in a relatively narrow focus, particularly the effectiveness of the European and Inter-American Courts of Human Rights. It has long been a dream of Western idealists to fashion international courts to enforce international law.[11] How well do such courts work?

International courts are not, of course, "sovereigns" or part of the apparatus of any sort of supranational sovereign authority system which would satisfy an Austinian definition of "law." There is simply no such supranational authority in the world today nor is there likely to be any soon emerging. Arguably, international courts play a part in some secondary rule-making, -recognizing and -enforcing scheme à la Hart which might make international law seem less a Hart-like primitive legal system and more like a regular municipal legal system. The best analogy of all, however, comes from Weber, for international courts do seem very much like parts of a structure for legal coercion, using psychological as well as physical means and operating indirectly as well as directly on the participants, specifically states, in the system.

The Conference did not focus on the most notorious international court, the International Court of Justice at the Hague, because the ICJ is all too obviously part of a relatively ineffective international legal system, that of the United Nations. This does not make the United Nations system unimportant; politically it is very important indeed. It is only to say that the ICJ and United Nations law is presently theoretically uninteresting because it is so far removed from being an effective international legal system. Much more interesting in theory (and perhaps as a harbinger) is the international legal system fashioned by the European Convention on Human Rights where formal legal structures, i.e., the European Court and Commission of Human Rights, have appeared to exercise actual authority. Their demonstrated effectiveness has been, on the international plane, unrivaled, save perhaps by that

11. *See* M. JANIS, AN INTRODUCTION TO INTERNATIONAL LAW, ch. 5 (forthcoming 1988).

other Western European regional international legal system, European Economic Law.[12] The inclusion of the Inter-American Court of Human Rights within the focus of the Conference was not meant to imply that Inter-American Human Rights Law had progressed so far along the road to efficacy as had European Human Rights Law (plainly that is not so). Rather, because the Inter-American Court has been modeled on the European Court, it seemed appropriate and easy to make contrasts and comparisons between the two.

The Conference made no presumption that international courts protecting human rights, especially the European Court of Human Rights, were representative of international law as a whole. Indeed, the point was that such courts were particularly successful and, to a degree, unusually formal international legal structures. The hope was, though, that lessons might be learned and that the Conference could through its measured contribution suggest ways in which international law, in and out of the human rights field, could be made more efficacious.

12. *See* D. LASOK & J.W. BRIDGE, INTRODUCTION TO THE LAW AND INSTITUTIONS OF THE EUROPEAN COMMUNITIES (3d ed. 1982).