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NOVA SCHOOL OF LAW

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4.

The rule of law allows the common citizen to defend itself in the value of an unlawful, imminent ~~threat~~ threat, allowing individuals a last resort to try and guarantee their survival when state powers are not in time to help. This concept is based on the idea of the dignity of human beings.

This can be also applied on state level, though analogically and with some distances, serving the same purpose. On a small mental exercise, how could South Korea (for example) defend itself against China if not by self-defence, seeing ~~as~~ that the aid of the collective security system created by the UN Charter, in the form of the UN Security Council, would be nowhere near in time to help? ok

On the other hand, if the criteria for self-defence were too loose, the world would permanently be at war. good

So, article 51 of the UN Charter looks to balance both of these extremes and find an equilibrium between collective security and individual, or sometimes collective, self-defence.

To that end, it is ~~essential~~ to establish when and to what extent states can use force in self-defence, with two criteria being generally accepted: necessity and proportionality. The idea serving as base is that self-defence ~~serves~~ be used to repel an attack, not to pursue and further punish the attacker. Based on this, it is clear that the threat should be present, or at least imminent in the cases of putative self-defence. Furthermore, the defensive acts should target military sites, as per the World Court's 2003 Oil Platforms verdict, deeming the ~~U.S.~~ U.S.'s bombing of two Iranian oil platforms to be unlawful due to these not serving the purposes of the alleged military activities the U.S was trying to defend itself from. yes

anticipatory

Controversy arises however, when the attacks stem not from states, but from other entities such as terrorist groups or paramilitary groups, though these can be (and sometimes are) controlled or backed by other states.

This was the example in Nicaragua. After overthrowing the Somoza regime, the left-wing Sandinistas took power and alligned themselves with the USSR and Cuba. Logically, in typical Cold War fashion, the U.S. started backing a paramilitary right-wing group, the so-called Contras, who seeked to overthrow the Sandinistas.

3. → Good analysis. Some more examples would have been welcomed (distinction between civilized & uncivilized, denial of sovereignty etc.) + 20th century before WWII.

During the Middle Ages, it is safe to say that there were not many relations between states other than trade relations and war, so Public International Law was not all that effective as there were no actual international relations for it to govern and oversee.

So it is only fitting to say that PIL came into action as states began to explore and subsequently colonize the world. The first famous treaty in these times was the Treaty of Tordesillas, concluded by Spain and Portugal. By way of this treaty, the two world powers at that time effectively divided the world in half and agreed that ~~each~~ world explore and colonize its half. This was based on the idea of ~~terra nullius~~ terra nullius, which roughly translates to no-man's land. So, seeing as they considered both sea and land no-man's land, ~~they~~ everything they discovered was theirs to settle, which, if we come to think about it, is a paradox, bearing in mind that the European powers considered the natives to be something other than people on one hand, but on the other recognized their capacity to consent and enter international relations. ok good

The idea of terra nullius came to change by way of Hugo Grotius, who the author wrote on behalf of the Verenigde Oost-Indische Compagnie (United East Indian Company, an enterprise of dutch traders effectively controlled by the Dutch Kingdom) declaring the high seas to be terra communis, common property. Though for completely different purposes, namely those of introducing the Dutch Kingdom to colonialism, one could say this was effectively a precursor of the concept of international waters.

After colonizing nearly the entire world, the European powers began enslaving local people and trading them for profit.

International law was at the helm of this movement by first allowing it and then gradually banning it right until the point we have reached nowadays with slavery being completely banned. The gradual movement of abolition also came as a paradox, seeing as the main international law makers, the European powers, banned slavery on one hand, but soon conquered the whole of Africa in what became known as the Scramble for Africa and several other parts of the world on the other hand. It is safe to say that although everything changed, nothing really changed. Despite that, it is important to note that this movement was one of the first instances where international law saw individuals as its subject, which at the time was an exception due to international law being monopolised by European states. Although the individual citizen is nowadays widely regarded as a subject of PIL, at that time, that idea was one of exception.

All in all, international law approached colonialism with the underlying idea of providing the European powers with legal and economic stability among them giving the circumstances, which seems logical from the perspective of the aim of the rule of law according to German sociologist Max Weber, that aim being exactly that of providing stability on legal and economic level to its makers and subjects.

2.

As stated above, the main subjects of PIL are states and these are generally considered to be sovereign, which means they don't need to accept authority from any other country or organization unless they choose for it to be that particular way. This is one of the underlying ideas of PIL.

The concept of state as we know it is relatively new, in the Middle Ages there were mainly city states and independent leagues such as the Hansa award the Baltic Sea and trader guilds in the Flanders. However, the state became the main form of political organization as people came to realise that it was more stable and its authority less prone to outside attacks. It was with this idea in mind that the Montevideo Convention (1930) provided the four first requirements of statehood, namely population, territory, effective government and capacity to enter international relations.

To the end of this last requirement, it is important to note that the Montevideo Convention also referred to recognition of the state, although not as a requirement, which makes sense bearing in mind that if one state does not recognise the other, it won't enter international relations with it.

Logically, if that unrecognised state is also unrecognised by many other states, it won't be entering international relations with anyone any time soon, which ends up being the same as having no capacity to enter international relations from a practical standpoint.

So, although recognition by other states is not a legal requirement, it is a political requirement and that means that it will more often than not reflect on individuals. For example, a state is sovereign enough to patrol its borders and control those who enter or not (through a visa for example) and does not recognise another state, it can deny entry to nationals of that unrecognized by not recognising their passport. The same could happen with marriages or other administrative acts carried out under the law of the unrecognized state.

This goes to show that, although the Montevideo Convention deemed the requirement of recognition to be of no legal relevance by adopting the declarative theory of recognition, we have to keep in mind that the international community is, first and foremost, a political community where new members depend on the acceptance of older members. This acceptance comes in the form of recognition.

Furthermore, recognition is not always based on whether one state thinks the other meets the criteria of statehood, but more so on whether one state thinks the other state's purposes are alligned with its own.

One example came in the Cold War, where the Communist bloc was reluctant on recognising the Federal Republic of Germany (commonly known as West Germany) and Western states were in turn reluctant towards recognising the German Democratic Republic (East Germany). A more recent example being Palestine, recognised by nearly all of the Muslim countries in the Middle East, with Iran at the helm.

Recognition is also an important aspect for new states that arise from secession from another country. Comparing the examples of South Sudan and Kosovo, we see that South Sudan being recognised by its former "parent" state Sudan helped it gain wide international recognition. The same can not be said about Kosovo, seceding from Yugoslavia, then Serbia and not being recognised by Serbia, which seriously dents Kosovo's quest for de facto independence and international recognition. In cases of secession, we can conclude that recognition has an underlying aspect of consent.

Good analysis & examples

More on constitutive theory

recognition

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Naturally, both countries came before the ICJ with Nicaragua arguing that the activity of those armed groups could be directly attributed to the USA and the USA arguing that it acted in self-defence of El Salvador. → collective

As for the USA's argument of an ad hoc self-defence, the ICJ liminarly rejected it on the grounds that it is necessary for the state under attacks to directly ask for another state's help. This was not the case however, so the ICJ had no choice but to dismiss the argument. Had it gone the other way, the ICJ could have opened a dangerous precedent, loosening up the requirements for lawful self-defence too much. As for the argument presented by Nicaragua, the ICJ deemed that it it could be proved that the USA exercised "effective control" over the Contras' activities, it ~~would~~ would be held liable and Nicaragua's self-defence would be justified. In the end, this was, however, not proved before the ICJ.

Another line of thought in case law was provided by the International Criminal Trial of former Yugoslavia (ICTY) in the case of Prosecutor v. Dusko Tadic. In this case, the ICTY argued that the test of "effective control" was too strict and failed to hold states liable, suggesting a looser test, that of "overall control", be used. Although this opinion is more in line with international responsibility law, it also blurs the line which connects a state's conduct to its international responsibility.

As per usual in PIL, this is another matter that must be carefully balanced: one step too far in one direction and states won't be able to lawfully and timely defend themselves; one step too far in the other and the world will be at war.

Good analysis & examples.

More on collective self-defense and preemptive self-defense (especially last one)