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1 author:

Niruka Sanjeewani
General Sir John Kotelawala Defence University
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Introduction to Transnational Legal System in International Law

D.G. Niruka Sanjeewani

1. Introduction

In 1648 The Treaty of Westphalia ended the thirty years War in Europe by acknowledging the sovereign authority of independent states. This event marked a new step in international law (IL). It means the treaty gave the birth for nation-states identifying national security as a primary interest. After the Cold War transnational actors were gradually emerged in the international system and with the emergence of these actors IL was transformed in to a Transnational Legal System. (TLP). For an instance before the fall of the Berlin wall and the end of the Cold War, Tom Franck who a Professor of Law at New York University observed that no one seemed to be asking fundamental questions about the legitimacy of IL.[1] The legitimacy takes serious commitments underlying the practices of IL. But the legitimacy of IL was replaced in to richer idea due to the emergence of transnational actors such as international and non-governmental organizations. According to Philip Jessup TLP includes all law which regulates actions in transcended national frontiers. Therefore the term "transnational" involves a larger universe of activates than the term international which refers something involving more than a single country.

2. Transnational Legal System

Professor Harold Koh defines TLP as "process whereby public and private actors, including nation states, corporations, international organizations, non-governmental organizations, and individuals interact in a variety of fora to interpret, enforce, and ultimately internalize rules of international law."[2] It is noteworthy that the process entails transnational actors including nation states, corporations, international organizations, non-governmental organizations. Commonly IL recognized as the law of nations or "jus gentium" which interprets the state-

[1] Mattias Kumm, "*The Legitimacy of International Law: A Constitutionalist Framework of Analysis*", http://ejil.org/pdfs/15/5/397.pdf , (Accessed on 20 June 2016).
[2] Harold Hongju Koh , *"Review Essay: Why Do Nations Obey International Law?",* http://legal.un.org/avl/pdf/ls/Koh_IL_Article2.pdf, (Accessed Date 20 June 2016).

centred view of international norm-making. TLP is also identifies IL as a 'product of a constructivist, dynamic, and highly participatory process of states". Most significantly constructivists believe that states may comply with **norms** and it demonstrate that they have adapted particular norm in to their own social environment. Therefore, it is very clear that norm based state practices promotes normative consensus of state behaviour.

Normative system in IL is a framework of international system which operates state actors effectively. In that sense Human rights law is a best suited example for the normative system. It administers state behaviour in violation of human rights and it may convey for individuals to claim for human rights violations. This normative system provides direction to identify goals of states to be pursued. It generally interconnects with an operating system as well. Within the operating system states have **obligations** to embed and assert international law in to their domestic legal system. Obligation means that states or other actors are bound by a rule or commitment"[3]. As an example states are legally binding to United Nations (UN) principles and no states can overpass those principles. So it shows an obvious fact that Koh's theory of TLP entirely depends on the incorporation of international norms and obligations. Other than that interaction, interpretation and internalization of states are main key factors in TLP process.

Within the TLP system interactions are mostly rely on common interests of states. Common inserts are a state's self-interests which may align with the self-interests of other states and it will build up certain discussions over legal issues as well. After the World War II states agreed to preserve legal interaction to have fair trials on war crimes and prevent another world war. As an outcome of these efforts Nuremburg, Tokyo Trials and the Universal Declaration of Human Rights were adopted by states and those were symbolized interactions of states on

[3] United Nations, *"Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries 2001"*, http://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf,(Accessed on 20 June 2016).

common interests. Moreover, interconnection between National and IL is very much important in this process. It has proved through the successful adoption of Rome Statute at the Rome Statute Conference in 1998. It has come to force in 2002 when the 60th State ratified the Rome Statute.[4] Above inculcation of norms may lead to interpret state interests, identity and behaviour.

International community has placed interpretation of laws in a higher place. As an instructive example the treaty norms of IL has interpreted in Vienna Convention under the term "fair and equitable treatment" and Article 31 also states that interpretation of a treaty address "[a]ny relevant rules of international law applicable in the relations between the parties,". Interpretation is the process of assigning meaning to texts and statements for the purposes of establishing rights, norms and obligations. Article 31 of the Vienna convention has mentioned four elements of interpretation. Namely, interpretation has to be done in a good faith, in accordance with the actual meaning to be given to the terms of the treaty, in their context and, in the light of its object and purpose. Likewise, Vienna convention all the international agreements interpret certain legal bindings. In addition to that European Constitutional Treaty which signed in 2004 guides the interpretation of the European Union's laws. Most significantly European Court of Justice (ECJ) deals with complains comes under European integration. It behaves like an international court to enforce ECJ judgments in national courts. It indicates that the interpretation of international law is also a matter of National laws as well. Within this context legal scholars and judges such as Stein, Weiler and Mancini offered detailed and powerful interpretations of how the ECJ had gradually secured compliance with its judgments. Furthermore, the scope of the interpretation has changed in the modern world. As an example WTO is no longer involving in economic issues and there are links to

[4] Zhu Wenqi, "*On co-operation by states not party to the International Criminal Court*", https://www.icrc.org/eng/assets/files/other/irrc_861_wenqi.pdf,(Accessed on 20 June 2016).

environmental concerns and human rights. UN Charter (Chapter VII) now concerns international peace and security including money laundering issues. Therefore, it is very clear that the applicability of legal obligations has changed in the modern world.

Transnational actors like individuals and their practices generate impacts on interpretation of IL. George H. W. Bush has interpreted international relations are "governed by the rule of law". But that rule of law was challenged by him when American tanks rolled toward Baghdad in 2003. International lawyers have criticized this action as a violation of the United Nations Charter. In 1990 – 91 when Iraq invaded and occupied Kuwait the international community used armed force to enforce international law (resolutions of the Security Council).[5] It concludes that the legitimacy of the use of armed forces are changed due to the powerful states such as USA. This kind of situations arise a question about authenticity of legal norms and obligations. Moreover, some global incidents lead to interpret new laws as well. In the Nicaragua Case the ICJ referred number of resolutions in international bodies to support prohibit the use of force in interventions.[6] Above moves of judicial institutions has paved a way to resolve legal issues in a more neutral manner. As an example after ninety years Permanent Court of International Justice (PCIJ) and its successor (the International Court of Justice) demonstrated that the existence of a standing court has replaced in to neither the use of force nor judicial methods to resolve international disputes. Jonathan Charney explores this procedure as a transformation of legal practices from ad hoc to permanent tribunals.

[5] Mary Ellen O'Connell, "*Enforcing the Prohibition on the Use of Force: The U.N.'s Response to Iraq 's Invasion of Kuwait*", http://scholarship.law.nd.edu/cgi/viewcontent.cgi?article=1308&context=law_faculty_scholarship,(Accessed on 20 June 2016).

[6] Karen J. Alter, "*The Multiple Roles of International Courts and Tribunals: Enforcement, Dispute Settlement, Constitutional and Administrative Review*", http://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=1211&context=facultyworkingpapers,(Accessed on 20 June 2016).

States comply with these international norms and obligations through their domestic legal systems. Generally, it known as the internalization process. TLP conceives three forms of internalization, Social internalization, Political internalization and Legal internalization. Social internalization take place when a norm acquires public legitimacy through an adherence. Secondly Political internalization occurs when the political elites accept and advocates international norm as a matter of government policy. Thirdly Legal internalization take place when an international norm is incorporated into the domestic legal system through executive action, legislative action, and judicial interpretation. More specifically, an international norm can be internalized through executive actions of government policies such as the passage of new laws; and judicial incorporation through domestic judgments. As an instance the national constitutions of Ireland, the Netherlands, and Italy refer the recognition of international legal principles as a broad policy goal.

In internalization process there is a problem about the commitments of states. In 2007, Australia was one of four States that voted against the United Nations' Declaration on the Rights of Indigenous Peoples which was supported by 143 member States of the UN General Assembly. But after a change of Federal Government, the declaration was accepted by the Minister for Indigenous Affairs, the Hon. Jenny Macklin MP. It is a sound example for ad hoc behaviour of internalization process. The internalised commitments of developed countries to Kyoto Protocol also show the lapses of internalization process. Kyoto protocol is a climate accord which was established to reduce greenhouse gas level. It was adopted in December 1997. United States which is the number one emitter has not joined to the convention. USA produces approximately 25 per cent of the world's carbon dioxide emissions affecting the wellbeing of people. These factors lead to make a generalization that internalization is changed within diversified world scenarios.

In general, international law is enforced through national implementation and the obedience of states to IL. In theoretical perspective there is a close interconnection between the concept of obedience and IL. According to Koh (1997, 1998: 628) obedience is rule-induced behaviour caused when a state party has internalized norms. Once international community finds particular state in a violation, international legal norms become strongly embedded in domestic legal processes. Even though obedience is about compliance it also motivates participation of states in enforcing international rules and norms into domestic legal systems. According to Koh, most compliance comes from obedience; most obedience comes from norm-internalization; and most norm-internalization comes from participation in legal process, particularly TLP.[7] This kind of state behaviour generally comes under Regime theory which assumes that compliance with international commitments was possible and states would establish regimes when it was in their long- term interest to cooperate. In some cases, internalization involves slow acquiescence to International norms as was the case with US adoption of elements of the Law of the Sea Convention. (UNCLOS). It means President Ronal Regan announced in July 1982 that he would not sign the convention because of several major problems in the convention's deep seabed mining provisions. During the Clinton Administration revisions of the convention transmitted to the UN Senate and it didn't give its consent to the convention. Therefore, USA remains as a non- party to the convention.

Even though the internalisation is well defined under TRP there are controversies of the engagement of state practices. When Reagan administration was mining the harbours in Nicaragua, Sandinista Government filed a suit against the U.S. Government in the International Court of Justice in 1984. Many people assumed that it was just a publicity stunt. By suing this in intergovernmental forum, Nicaragua pursued the goal of obtaining a judicial interpretation

[7] Andrew T. Guzman, "*A Compliance-Based Theory of International Law*", http://scholarship.law.berkeley.edu/cgi/viewcontent.cgi?article=1391&context=californialawreview,(Accessed on 20 June 2016).

that the United States was violating IL. Then they hoped internalize it in to U.S. domestic law. Therefore, Nicaraguans went to the U.S. Congress, where then-Senator Daniel Patrick Moynihan introduced a resolution that terminated future aid to the Contra forces for any actions that violated the ICJ ruling. In response, the Reagan administration stopped mining the harbours almost immediately[8]. It shows that TRP, in which the Nicaraguans triggered an interaction, which led to interpretation of IL which was ultimately internalized into U.S. funding statutes, or domestic law.

3. Conclusion

In an interconnected world, norms and obligations in IL determines TLP process. It addresses the impact of extraterritorial commitments over transboundary activities. It expands the legal horizon of IL beyond a classical state-centred view. This allows states to enjoy long-term relationships with other cooperative states on the basis of binding promises of interaction, Interpretation and Internalization which were discussed earlier. These situations indirectly interpret that state sovereignty has challenged due to this transitional legal process. Because IL is no longer limited to governing purely state relations, it encompasses the relationship of non-state actors vis-à-vis states. This consent based approach may change time to time and it will make issues to international peace.

[8] Eric A. Posner, "*Transnational Legal Process and the Supreme Court's 2003-2004 Term: Some Skeptical Observations*", http://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=2729&context=journal_articles, (Accessed on 20 June 2016).

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