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THE ROLE OF CUSTOMARY INTERNATIONAL LAW IN DOMESTIC LAW

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International law plays a significant role in domestic legal systems. Sometimes that role is a visible and impressive one, with courts limiting the authority of legislatures and executives to make laws or national decisions, as has sometimes been the case in the implementation of European treaties. Sometimes it is so ordinary that it is almost unnoticed for example when national courts apply international law by providing sovereign immunity or diplomatic immunity to foreign states or diplomats.

This presentation will examine aspects of that question. It is divided into three parts. The first part examines the structure of international law. The second discusses the application of customary international law in domestic legal systems, both in Europe and in the United States. The third part, as has been requested, will specifically address the application of international law in the United States courts.

1. The Structure of International Law

The sources of international law are spelled out most simply in article 38 of the Statute of the International Court of Justice. They are:

> (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;

I will be discussing items (b) and (c), which reflect customary international law, the law that is not reduced to the text of specific conventions.

Let me say something about that customary law. It contains several elements. It once consisted largely of the custom and practice of nations, established by very long usage and articulated by scholars such as Grotius. Some of that historical customary international law still exists and is applied. Increasingly, in modern days, that customary law has been codified. The law of the sea, the law of treaties, of state succession, of diplomatic and consular immunity, and even of state responsibility has now been written down in a series of treaties under the leadership of the United Nations, based upon preparatory work conducted by the International Law Commission. Yet there are circumstances in which those treaties technically do not apply. The Vienna Convention on the Law of Treaties, for example, only applies to treaties concluded after the 1960's, but many disputes will involve earlier treaties. The Convention on Diplomatic Relations only regulates the diplomatic immunities of diplomats from signatory states, yet some diplomatic immunity cases involve other diplomats. The texts of these treaties are now frequently seen as a codification of the preexisting international law. So the rules set forth in the treaties are sometimes applied, even when the treaties themselves are not technically in force. Third, some new multilateral conventions (and also resolutions of the General Assembly) are legislative in character. After they have been accepted by a broad stratum of the international community, they may become customary international law, even without specific and formal ratification by all governments. Some aspects of humanitarian law, of human rights law, and of environmental law may fall into this category. Courts can and do apply the standards that they contain and may call this emerging customary law. The Genocide Convention provides a ready example. Genocide is internationally illegal, whether or not a particular country has ratified the treaty itself.

I should also say something about heading (d) of article 38(1) and its importance for today's discussion. Subsection (d) directs the international court of justice also to consider

> (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.

That provision recognizes that "judicial decisions" of nation states are one of the authorized means for determining the rules of international law are. That statements contains a major assumption--the domestic courts of nations will make decisions about questions of international law. While the international legal order does not expressly direct local courts to make decisions about international law questions, it assumes that they will do so in appropriate cases.

2. Customary International Law in National Courts

The international system demands that states comply with international law. States are bound to respect and apply its rules. If they fail to do so, they incur state responsibility for reparations. International law leaves the means of securing that compliance to the individual nation states. The real question is whether that compliance comes automatically or only through some formal act of transformation that makes the international rules applicable in the domestic system.

2.1 General principles

The relationship of international law to domestic legal decisions is sometimes cast in the language of the dichotomy between "monism" and "dualism." Briefly stated, "monism" is the notion that international law and domestic law are part of the same system, and that thus domestic courts must apply international law as part of that unitary legal system. "Dualism," in contrast, is the view that international law and domestic law are two separate systems, with two separate decision-making structures. Under the dualist view, international rules become part of national legal systems only through some overt act of transformation that adopts the international rule for the domestic system.

The "monism vs. dualism" debate has engaged professors and scholars for over a century. In fact, no country is fully monist or fully dualist. One must look, as judges regularly do, to functional problems and issues, rather than to mere theoretical labels, in dealing with these issues.

2.2 Constitutional and legal principles

So let me turn to the application of international law by domestic courts in real cases. In the case of treaties, the answer is frequently simple. The United States Constitution makes both laws and treaties, the "supreme law of the land." (U.S. Constitution, art. VI, paragraph 2.) Article 15 of the Ukrainian Constitution gives treaties internal applicability.

For customary law, the issues are more complex. In the *Pacquete Habana*, a United States Supreme Court decision from 1900, the opinion of the Court states,

> "International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction as often as questions of rights depending upon it are duly presented for their determination." (175 U.S. 677 (1900).)

The case involved boats from Spanish Cuba that had been seized during the Spanish-American war of 1898. The United States government claimed that it had the right to seize and sell them as maritime war prizes. The Supreme Court rejected the government's claim and ordered the return of the ships to their Cuban owners.

Other national legal systems have also expressly incorporated international law in their legal systems by constitutional principles or implicitly incorporated it through judicial decisions and practice. For example, article 25 of the German *Grundgesetz* (Basic Law) provides:

> "The general rules of public international law shall be an integral part of federal law. They shall take precedence over the laws and shall directly create rights and duties for the inhabitants of the federal territory."

In article 10(1), the Italian Constitution provides, "Italy's legal system conforms with the generally recognized principles of international law."

As Wildhaber and Breitenmoser show in their important article in volume 48 of the Zeitschrift für ausländisches öffentliches Recht und Völkerrecht, similar rules can be found in the constitutions of many other European countries. Even countries that have no constitutional provisions on the status of international law in the domestic legal system frequently incorporate customary international law as a self-evident proposition. Belgium, the Netherlands, and Switzerland can be cited in this regard. Even countries, such as the United Kingdom, that are commonly regarded as "dualist" incorporate much of international law into their domestic legal standards. The old Soviet system, in contrast, tended to incorporate treaties into the legal system, but to exclude the application of customary international law.

The real questions are not *whether* international law is incorporated into the national legal system, but rather *how* international norms are applied within that system and what effects it has. Several questions arise.

2.3 The relative rank of international law and statutes

What is the rank of international law in relation to other rules of law? to the rules of the Constitution? to the rules of ordinary laws? to the rules established in administrative regulations? The practice in the world is divided on this question.

Some of the Western European countries candidly give some international legal rules a rank even higher than national statutes. For example, article 94 of the Constitution of the Netherlands gives treaties precedence even over national laws. Whether this rule would extend to the commands of customary international law is an open question.

Other countries place customary international law on an equal level with statutes in the legal hierarchy. In the United States, for example, the famous quotation from *The Pacquete Habana*, cited above, continues to explain this balance. It says:

> "For this purpose, where there is no treaty and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations, and as evidence of these, to the works of jurists and commentators who by years of labor, research, and experience have made themselves peculiarly well acquainted with the subjects of which they treat."

Under this approach, while international law can provide a rule for decision, a subsequent law will displace that rule for the domestic courts.

So the result in these countries is that a new treaty overrides an existing law, even if it does so only implicitly. And, of course, a treaty always overrides any inferior form of legislation, even if it is enacted after the treaty. Thus the treaty always outranks administrative rules or local municipal ordinances. In the United States, this also means that treaties, which are federal law, override all state laws. The only possible problem occurs when a later statute is inconsistent with an earlier treaty. National courts have developed techniques to deal with this problem.

2.4 The interpretation of other laws to avoid international questions

The most serious problems occur when a new national law is inconsistent with an existing treaty obligation. In countries in which international law has a rank equivalent to that of domestic law, this may create a practical problem. If the court applies the international rule, it will be ignoring the command of its own constitutional bodies. If it applies the domestic rule, it will be violating international law and creating international liabilities for its state.

In the United States and other countries in which international rules are on a par with domestic rules, courts do make a serious effort to avoid interpretations of domestic rules that will create violations of international law. Since 1804, it has been a principle of United States law that "an act of Congress ought never to b e construed to violate the law of nations, if any other possible construction remains." (*The Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804))

One example is *Cook v. United States*. (228 U.S. 102, 120 (1933)) In the *Cook* case, international rules, established by treaty with Canada, dictated that United States Coast Guard boats would not pursue smugglers more than 12 miles from the U.S. shore, but a subsequent federal statute permitted them to act up to 24 miles from the U.S. shore. The Supreme Court found that, unless Congress very clearly expressed the intention of violating international standards, the statute not be construed to violate those standards.

A more recent case, applying those principles, involved the Palestinian mission to the United Nations. The Headquarters Agreement, an international agreement between the United Nations and the United States, requires the United States to permit recognized delegations to establish missions in the New York City area. The UN had given the PLO observer status, which appeared to give it the right to maintain an office for that purpose in New York. The United States Congress, however, passed a statute, the Anti-Terrorism Act, that prohibited PLO offices in United States territory. The case came before the United States District Court in New York City. The federal judge ruled that Congress could not be presumed to have intended to create a breach of the international obligation. The Court thus held that the federal law, although it appeared to prohibit all PLO offices, only prohibited those which were not authorized by treaty. To actually prohibit the PLO office at the UN, the court said, would have required the political branches of government, the President and Congress, to enact a law that would clearly express the intention of creating this breach of international obligation.

The courts thus give treaties (and other international law rules) a special standing. While a subsequent statute can override a treaty, it will not do so unless the law expresses the intention to do so clearly and unequivocally, perhaps by express language. Thus the law-makers must assume the political responsibility for the breach of international law.

2.5 Questions of interpretation

One must also ask about the nature of the international rules created. Where they intended to give rights directly to individuals, or only represent promises that something will happen at some time in the future. In the case of treaties, this is known as the question about whether the treaty is "self-executing." Consider the following two treaty provisions:

> Treaty 1: "Each State will enact a law providing a free automobile to every law professor."
>
> Treaty 2: "Each State provides a free automobile to every law professor."

If the Parliament takes no action, am I entitled to a car? A strict reading of Provision 1 seems to require the enactment of a law before I can get my car; a strict reading of Provision 2 seems to give me a right to a car now.

European courts and scholars appear to assume that most treaties are self-executing, and to impose obligations upon the countries that sign and ratify them. In contrast, the United States seems to have a more cautious approach to self-executing treaties, frequently requiring implementing legislation before the treaty is carried into force.

Similar issues exist in the case of customary international law. Indeed, they are made more difficult by the nature of customary law. Since it is not reduced to a single text, there may be slightly different formulations. There may be disputes about whether a claimed international right extends to include a remedy for affected individuals or only gives their state a right to make diplomatic representations. This is less problematic in the case of international rules that are derived from agreed texts (like the extension of treaties) than it is in the case of "pure" international law.

3. International law in U.S. courts

I have also been asked to address the question of the application of international law standards in United States courts. I have already discussed some of the cases above, but let me review the principles developed above:

Treaties are part of the "supreme law of the land," (U.S. Constitution, art. VI, paragraph 2) and customary law is "part of our law." (*The Pacquete Habana)* Where there is an apparent conflict between a domestic law and a rule of international law, courts will attempt to interpret the domestic law narrowly, to avoid actual conflict; this frequently means that the international law rule will continue to apply within its scope.(*Cook v. United States; United States v. PLO*). So the general answer is that United States courts can and do apply international law in ordinary cases.

There have been some exceptions (or apparent exceptions) to this doctrine. Under the so-called "Act of State Doctrine," American courts once deferred to the decisions and actions of foreign countries regarding the legality (or not) under international law of expropriations of private property located in those countries. While that doctrine still applies in a limited range of cases, Congress has effectively repealed that doctrine. Indeed, it has called upon the courts to decide a broader range of cases involving expropriation, terrorism and other claimed violations of international law.

Some other recent United States cases have in part turned on the question of interpretation of international law rules, and in particular on the extent to which they give rights to individual persons, as opposed to giving only claims to the foreign government in question. Two cases come to mind immediately. In *United States v. Alvarez-Machain,* (504 U.S. --- (1992)) United States drug enforcement agents had seized an individual in the northern parts of Mexico and brought him before United States courts for trial on charges involving the murder of another drug enforcement agent. Alvarez-Machain claimed that his arrest by U.S. officials in Mexico violated provisions of the U.S.-Mexico extradition treaty. He did not claim violation of customary international law. The United States Supreme Court rejected his claim based on the extradition treaty. It found that while the treaty provided for extradition, it did not expressly prohibit the possibility of other means of securing the presence of an individual in court.

The second case that deserves note is the *Breared v. Green* (118 S.Ct. 1352 (1998)), which concluded this year. Breared, a citizen of Paraguay, had lived in the United States for many years. He had been tried and convicted of the crime of murder. He had admitted killing the victim, but claimed that a "spirit" had made him commit the act. He had been given the assistance of a lawyer, provided by the state, and had the benefit of several appeals. Unfortunately, the local police had failed to notify the Paraguayan consul of his arrest. Breared never raised this issue during his trial or appeals. After his conviction and death sentence, the Paraguayan government sought to have the conviction set aside for this technical violation of his (and its) rights under the treaty. The courts in Virginia rejected this claim, finding the failure to notify the consul to be a mere technical violation that did not affect the outcome of the case. Although the International Court of Justice indicated that a stay of execution would be appropriate, pending its consideration of the matter, the United States Supreme Court declined to intervene in the case.

Some commentators have suggested that these cases demonstrate a rejection of the rules of international law in the domestic legal system. Yet the courts were careful to reaffirm the role of international law in the American legal system, stressing other points that led to their decisions. While some commentators may dispute the outcomes, both cases recognize the continuing role of international law in the United States legal system.

Conclusion

Most legal systems in Western Europe and North America apply international law within the domestic legal system. The precise mechanisms of doing so vary from country to country. It some cases, it application is required by the national constitution. In others, it is a matter of judicial practice. Judicial application of international standards is part of the expectation of the international community as we progress into the next century.