Supra-State Order: Obligation under International Law

The nature of obligation under international law and its sources mark out the international legal order from many, and quite possibly any, of the world's domestic legal systems. The lack of a legislator at the international level has led some, most memorably Jeremy Bentham with his wonderful flare for invective, to declare that international law is not 'law' properly-so-called. There can be little doubt, though, that States generally act as if under obligations (whether truly 'legal' or not) on the international plane. The primary principle in determining whether a State is under an obligation is that of consent. A State, in general, is bound by those obligations which it accepts, and in accepting the rule it obliges itself to follow it. The principle underlying this process is that described by Georg Jellinek as Selbstverpflichtung, or self-limitation; more commonly referred to in modern international law by the Latin phrase pacta sunt servanda ('agreements must be kept'). This was most famously proclaimed in the judgment of the Permeant Court of International Justice, the predecessor to the ICJ, in the Case of the S.S. Lotus. In that case the Court held that only those obligations which a State has accepted can limit its action. Any act on the part of a State which is not prohibited by a rule of international law is therefore permitted: a permissive rule of law is not required.

It has long been accepted that treaties and customary rules are the major sources of those rules; now enumerated under Article 38(1) of the Statute of the International Court of Justice. The sources are listed (although not hierarchically) as treaty law (Article 38(1)(a)), customary law (Article 38(1)(b)), general principles of law (Article 38(1)(c)), and subsidiary sources, including the decisions of international courts and tribunals and the writings of the 'most highly qualified publicists' (Article 38(1)(d)).

The requirement of State consent can most clearly be seen in the law of treaties – now governed by the Vienna Convention on the Law of Treaties, the product of an International Law Commission examination of the topic – but also underpins the formation of customary international law. Customary rules are those which have been tacitly accepted by States through their practice. The North Sea Continental Shelf cases held that the requirements for the formation of a rule of customary law are State practice (or that the actions of States accord with the nascent rule) and opinio juris (or that States act in accordance with the rule because they believe themselves to be under a legal obligation so to act). It must also be show that that practice is 'extensive and virtually uniform', or that there is a general understanding among States that such a rule exists. Such an understanding does not have to be universal, however. Indeed, as was confirmed in the Anglo-Norwegian Fisheries case, where a State does not accept the application of the rule, and thereby demonstrates that it does not consent to the rule, it will not be bound. It is also possible for a customary rule to emerge only in a discrete region, or for its creation to be driven by a limited number of States if they are specially affected by the subject matter of the custom. Such a regional custom was the subject of the Court's examination in the Asylum case, while the Court's advisory opinion on the Legality of the Threat or Use of Nuclear Weapons considered specially affected States.

The same principle of consent to be bound, albeit in a different form, can be seen in the Nuclear Tests cases. Here the Court held that New Zealand and Australia were entitled to rely on France's unilateral declaration that it would cease nuclear testing in the south Pacific, despite that the declarations were not addressed to them. The declaration created an obligation on France, upon which any affected State could apply. That decision has been supplemented by the lesser-known case of Temple of Preah Vihear. Although the Court's

statements on the matter were ancillary to its judgment, the ICJ suggested that a unilateral declaration, where it purports to affect the rights of another State and thus calls for a response indicating acceptance or rejection of the new legal situation, can create rights and obligations for both States even where no response is given, provided that no negative response is given. The ICJ cast such an obligation as a rule created by the proposal of the first State and the tacit consent of the second.

It is not necessary for an obligation to be owed to a single State or to a group of States, however, but may be owed to the entirety of the international community. Such obligations are known as obligations erga omnes. The ICJ confirmed the existence of such obligations in the Barcelona Traction case, but has appeared reluctant to declare which obligations fall into this category other than those, such as the prohibitions of genocide, slavery, aggression and apartheid, which it gave as examples in Barcelona Traction itself. The notable exception is the right to self-determination, which the Court confirmed to be of 'an erga omnes character' in its East Timor decision. A distinct, although arguably connected, category of norms are obligations jus cogens. The international community accepted the existence of such non-derogable norms of law in Article 53 of the Vienna Convention on the Law of Treaties, but what the content of these peremptory norms may be is even more mysterious than that of erga omnes norms. Indeed, although the prohibitions of genocide, torture, apartheid, slavery and aggression are routinely cited as examples of jus cogens norms (and although the ILC declared the prohibition on the use of force to be a jus cogens norm in its commentary on the VCLT), the ICJ has never acknowledged the existence of such norms, let alone confirmed what their content may be.

Although the absence of a legislator in international law complicates the process of assessing what rules apply to States, certain secondary rules have emerged on the formation of international obligation. These rules not only aid in discerning what the obligations on States are, they reveal much about the foundations of the international legal order.

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- Case of the S.S. Lotus (France v Turkey) (1927) PCIJ Series A, no. 10.
- Fisheries Case (United Kingdom v Norway), Judgment, (1951) ICJ Rep 116.
- North Sea Continental Shelf (Germany/Netherlands; Germany/Denmark), Judgment, (1969) ICJ Rep 3.
- Nuclear Tests in the South Pacific (Australia v France; New Zealand v France), Judgment, (1974) ICJ Rep 253.
- Case concerning the Temple of Preah Vihear (Cambodia v Thailand), Merits, (1962) ICJ Rep 6.
- East Timor (Portugal v Australia), Judgment, (1955) ICJ Rep 90.
- Barcelona Traction, Light and Power Company, Limited (Belgium v Spain), Judgment, (1970) ICJ Rep 3.

- Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, (1996) ICJ Rep 226.
- Colombian-Peruvian asylum Case, (Colombia/Peru), Judgment, (1950) ICJ Rep 266.
- Vienna Convention on the Law of Treaties (1969), 1155 UNTS 331.
- Statute of the International Court of Justice (1945).