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Library webinar: Does international law still matter?

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Introduction

My topic today is: Does international law still matter?

As a middle power, Australia has been a beneficiary of the post-1945 international order. It is an order we commonly call 'rules-based' and international law is significant part of that system.

International law, like all law, works best when we don't notice it. It underpins trade and freedom of navigation – vital to a country that exports by sea. It also underpins the systems of international communication by submarine cable and satellite and air travel on which we also rely for connection with the rest of the world. International markets and the movement of goods, people, information and services, require a lot of law and – like it or not – a lot of lawyers.

It is much easier to notice law, including international law, when it is being violated. And it is common to say we live in an age of revisionist powers and challenges to international law. We can ask, after Russia's egregious and continuing aggression against Ukraine whether the UN Charter's cornerstone commitment to the prohibition on the use of force in international relations has been dealt a terminal blow. We can ask whether China's refusal to comply with an international arbitral ruling that its claims in the South China Sea violate the UN Convention on the Law of the Sea means we should prepare for a return of spheres of influence or the rise of 'international law with Chinese characteristics'.[1]

We can certainly ask tough questions about the health of multilateralism. Major institutions appear afflicted with paralysis or inefficiency. The World Trade Organization (WTO) continues to have no functioning body to hear appeals in trade disputes, as the US continues to block appointments to the appellate body; and after 20 years and great expense the International Criminal Court (ICC) has sentenced only 5 people for serious international crimes, one of those on a guilty plea.[2]

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[1] See for example: Anne Orford, 'Regional Orders, Geopolitics, and the Future of International Law', *Current Legal Problems* 74 (2021): 149-194; and Tom Ginsburg, 'Authoritarian International Law?', *American Journal of International Law* 114(2) (2020): 221 – 260.

[2] For a longer examination of ICC effectiveness, see: Douglas Guilfoyle, 'Lacking conviction: Is the International Criminal court broken?', *Melbourne Journal of International Law*, 20(2) (2019): 401-452.

I would like to address each of these briefly, before making a case for qualified optimism for the future of international law. Indeed – in a world that lacks a common morality, language or system of government – there is no real alternative to international law as a system for States to make formal promises to or claims against each other, or to engage in coordinated action to solve collective problems such as climate change. But more than that, I will suggest that international law provides a vital tool of statecraft, one that allows small and middle powers to make to their voices heard and place collective pressure on great powers.

But first, let us consider the challenges.

Aggression

Russia's egregious violation of the territorial integrity of Ukraine has led many to ask if the UN Charter or international law remains relevant. What has become of the absolute prohibition in Article 2(4) of the Charter on the use of force in international relations?[3] It is an understandable emotional reaction to shocking events.

It would be easy to see in Russia's actions a blow that has irretrievably 'shattered the mutual confidence' necessary to sustain Article 2(4). Except that precisely the same point was made – and precisely the same language used – in 1970 by Professor Tom Franck of NYU in his article 'Who Killed Article 2(4)?'[4]

At the time he was examining the proxy conflicts or the Cold War or the habit of dubiously legitimate governments calling on military support from the US or Russia to retain or consolidate power. We have been here before.

Russia's actions in Ukraine are certainly grave and, indeed, criminal. President Putin's speech on the eve of the invasion of Ukraine was, essentially, a taped confession to the crime of waging a war of aggression – the supreme crime prosecuted at Nuremberg in 1945.

However, in national law, a single crime of violence does not usually lead to us claiming the rule of law is dead. We should be similarly skeptical of claims international law is now irrelevant.

We might say in answer, 'ah, but in national law there is enforcement and violent offenders are punished.' Many survivors of intimate partner violence in this country would, I imagine, beg to disagree. Even in a well-functioning rule of law country, serious violations of the legal order occur.

When we criticize international law for lacking enforcement, we are usually comparing it with an exaggerated vision of national law's effectiveness.[5]

International law lacks arms of its own. It is the law of a community of states, and it is for that community to enforce its own laws. And consequences are being visited upon Russia. Trade and economic sanctions are degrading its military behind the lines, just as weapons and equipment supplied to Ukraine by the international community are degrading Russian forces at the front line. Russia is rapidly running out of – for example – the computer chips needed to maintain modern war-fighting equipment.

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[3] Juliette McIntyre, Douglas Guilfoyle, and Tamsin Phillipa Paige, 'Is international law powerless against Russian aggression in Ukraine? No, but it's complicated', *The Conversation*, 28 February 2022.

[4] Thomas M. Franck, 'Who Killed Article 2(4)? or: Changing Norms Governing the Use of Force by States', *American Journal of International Law,* 64(5) (1970): 809–837.

[5] A point developed in James Crawford, *Chance, Order, Change: The Course of International Law* (Brill, 2014).

Further, Ukraine does not believe international law to be irrelevant to this conflict – a point I shall return to.

Maritime order

In our own region we are faced with the fact that China refuses to abide by a binding international arbitral tribunal ruling. That ruling held that China's claims in the South China Sea are without foundation to the extent they contradict the UN Convention on the Law of the Sea, the so-called constitution for the oceans.[6] Doesn't this show UNCLOS is a failure? Well, no it doesn't. The UNCLOS arbitration upheld an important national interest of a number of claimant states: their right to control a 200 nautical mile exclusive economic zone off their coasts. Let's be clear: the EEZ is a legal construct. It exists only because of international law. And it is considered a vital national interest.

This is why in 2014 China had to use the PLAN to evacuate Chinese citizens from Vietnam when anti-Chinese riots followed Chinese oil exploration in the Vietnamese EEZ. It is also why President Duterte ran into internal political and legal trouble trying to operationalize a joint development MOU with China over areas of the Philippines EEZ. The award appears to have similarly stiffened spines in other capitals such as Hanoi.

If the nine-dash line is a nullity there is no basis for negotiation with China – and no basis for commercial actors to assume the risk of exploiting oil and gas reserves in blocks China. Also, the EEZ has increasingly become part of maritime nationalism in a number of countries. And governments, democratic or not, have constituencies they cannot offend.

We can also see something important in China's intemperate campaign to discredit the arbitral tribunal and its award. This has ranged from attacking the integrity and impartiality of individual arbitrators, to claiming the Philippines acted only as a US proxy, to bizarrely hiring a billboard in Times Square in 2016 to run a video falsely suggesting a British MP supported China's claims.

All of this suggests that the ruling rattled China. That at some level it cares whether its actions are branded 'legal' or 'illegal' not only in a court of law but in the court of international opinion.

Interestingly, China has also shifted its legal ground. It has stopped talking of 'historic rights' in the South China Sea and started to make a complex argument that an international law rule outside UNCLOS allows it to draw straight baselines around its so-called 'offshore archipelagoes' and project EEZs from them.

I won't attempt to go into the detail of that position now. It is enough to say the argument is spurious both because no such rule exists, and because the islands it claims to apply this rule to are for the large part a collection of scattered rocks many of which are not even above water at low tide.

Nonetheless, China's behavior is important because it shows the role of international law as a yardstick of legitimacy. A ruling that its behavior is contrary to international law is a blow to China's soft power and legitimacy. And the CCP regards any attack on its legitimacy on the international stage as also being a challenge to its internal legitimacy to govern.

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[6] The discussion in this section draws on: Douglas Guilfoyle, 'The Rule of Law and Maritime Security: Understanding Lawfare in the South China Sea', *International Affairs* 95(5) (2019): 999–1017.

That is, disagreeing with China in the language of international law is potentially seen as an act of lawfare designed to contribute to a wider campaign against CCP rule.

Multilateralism

On multilateralism, it certainly appears that for the moment the heady days of creating major new multilateral institutions and treaties are behind us. We may not see again, or at least not soon, the high watermark in the 1990s with the founding of the World Trade Organization and the International Criminal Court.

The present epoch seems to be one of, at best, minilateralism. An age of bespoke international agreements among the likeminded, such as the 11 member Comprehensive and Progressive Agreement for Trans-Pacific Partnership.

I've noted the paralysis of the WTO Appellate body and the lackluster performance of the International Criminal Court. To this we could add the return of Security Council paralysis, and its failure to do anything of significance regarding the conflict in Ukraine due to the Russian veto power.

Nonetheless, the picture is not all gloom. Crisis has provoked creativity and workarounds:

- Some 47 WTO parties (including Australia) have clubbed together to form the Multi-Party Interim Appeal Arbitration Arrangement, essentially establishing an alternative to the WTO AB for the time being.
- Kharim Khan, the new ICC prosecutor, has sidestepped usual debates about the ICC budget and is resourcing major investigations by appealing – successfully – for ICC member states to make additional contributions to support his office's activities in Ukraine. Importantly such support is not limited to financial contributions but in a major innovation has included seconded personnel.
- States have been able to support Ukraine without Security Council authorisation through perfectly straightforward application of Charter provisions on collective self defence. Albeit that this has raised some questions about at what point do supporting states become direct parties to the conflict between Ukraine and Russia.
- There is presently work being done in the UN General Assembly to find a way forward on an international tribunal capable of prosecuting Russian leaders for the crime of aggression, to complement the war crimes investigations of the international criminal court.

Also, closer to home the member states of the Pacific Island Forum and the Alliance of Small Island States have put forward new ways of interpreting the UNCLOS which will preserve their maritime entitlements in the face of the existential challenge of sea level rise.[7]

To give credit where it is due, Chinese frustration with the US Congress stalling efforts to expand international financial institutions, coupled with Chinese overcapacity, led to the formation of the Asian Infrastructure Investment Bank in 2013. Australia is now the sixth largest shareholder in the bank and recognizes it meets a regional need that existing international financial institutions did not.

None of these solutions is perfect, but the best use of law is often in facilitating least-worst outcomes or solutions that everyone can live with even if no one is left entirely happy.

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[7] 'Declaration on Preserving Maritime Zones in the Face of Climate Change-related Sea-Level Rise', 6 August 2021.

The position of small states

Let me now say something about the case for qualified optimism for international law. At the national or international level, law will not magically solve your problems for you. Very often it frames the terms of negotiations rather than determines the outcomes. This is true at the level of geopolitical conflict or neighborhood dispute – as anyone who has ever had to negotiate with a neighbor over a fence or tree branches knows.

This may sound platitudinous. If law does not constrain bad actors in hard cases, what use is it? In this vein we tend to ask, why would a revisionist power like China, or an aggressor like Russia comply with a court or tribunal ruling against it. And if they won't comply, what is the point of such institutions.

This question misses, to my mind, a more important and fundamental one. Why, if power politics always prevents compliance, do small states bother going to international tribunals at all? We could – patronisingly – suggest that small states are just naïve or ignorant. This is plainly not true. Recent developments have taught us some hard lessons and reminded us that our smaller neighbors in the Indian and Pacific Oceans are able to make their own strategic choices and pursue their own national interest. They are no-one's fool.

And small States have turned to international tribunals with increasing frequency. I have mentioned Philippines/China. Mauritius has also pursued a series of international legal challenges to the UK's administration of the Chagos Archipelago which it severed from Mauritian territory in the 1960s as the price of Mauritian independence. Those islands were then used to lease the strategically significant Diego Garcia airbase to the US.

Mauritius' campaign ran for a decade.[8] It secured rulings against the UK's position in an UNCLOS arbitration, before the International Tribunal for the Law of the Sea, and most significantly in an Advisory Opinion of the International Court of Justice. The ICJ, in particular, found the UK's continued occupation of the archipelago an internationally wrongful act that violated the law of decolonisation.

And in November this year the UK announced it would negotiate over the return of those islands.[9] Why? Because it was becoming increasingly untenable for a country that wished to assume a leadership role in the Indian Ocean to be seen to be in violation of multiple court rulings in a dispute with an Indian Ocean State. Mauritius used legal statecraft to undermine UK soft power, and bring the UK back to the negotiating table.

Similarly, Timor Leste successfully brought Australia to the table to negotiate a maritime boundary, using compulsory conciliation clauses in UNCLOS. Not only did this resolve a long running dispute, it did much to restore Australia's reputation as a rule-of-law player in the region.

Finally, Ukraine is pursuing cases against Russia in both the International Court of Justice and the International Tribunal for the Law of the Sea. It is actively negotiating with the international community as to the form a special tribunal for the crime of aggression could take, which would run in parallel to ICC and Ukrainian prosecution of international crimes committed in Ukrainian territory.

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[8] Discussed in: Douglas Guilfoyle, 'The Chagos Archipelago before International Tribunals: Strategic Litigation and the Production of Historical Knowledge', *Melbourne Journal of International Law* 21(3) (2021): 749-771.

[9] Patrick Wintour, 'UK agrees to negotiate with Mauritius over handover of Chagos Islands', *The Guardian*, 4 November 2022.

Why pursue a 'legal front' to the war? One Ukranian ambassador at large has said the point of Ukranian lawfare is that one day Russia will wish to rejoin the family of nations, and when it does so the price will be compliance with everyone one of the judgements against it.[10]

This neatly encapsulates the two ways small states can make use of international law in their diplomacy and statecraft. In a world that lacks a universal morality, language or system of government, international law is the best language we have for contesting the legitimacy of another states' actions.

And in that struggle over legitimacy, international law also provides a tool for mobilising supportive constituencies.[11] Law allows small states to highlight how bigger states actions threaten not just their own interests but the order upon which we all depend. The aim, then, is not instant compliance – but long-term pressure for change.

Conclusion

Let me conclude with a plea. It has become very common in Australian policy circles to talk about the importance not of international law but of the 'rules based international order' (RBIO). This carries risks and may not be in the national interest.[12]

By stepping back from international law to international order we risk sending some dangerous signals. After all, China wants a rules-based order. Just one where it gets to set special rules in its own back yard. So too does Russia.

The risk is that 'rules based international order' sounds to some of our interlocutors – indeed, to some of our friends and neighbors – a lot like: 'the game of international law, but played in a way where the west sets the rules and always wins'. The international order we have benefited from has always been open to change, but change from within the existing rules.

By setting up the RBIO as a monolith to be preserved from change at all costs we risk painting ourselves into a defensive corner and sending signals that are easily mis-interpreted, or worse which may actually invite rather than forestall a general re-writing or fragmentation of the rules.

This paper has been provided by a presenter in the Parliamentary Library's Seminar and Lecture Series. The views expressed do not reflect an official position of the Parliamentary Library.

[10] See comments of Anton Korynevych, Ukrainian Ambassador at Large in: 'The Globalist', *Monocle 24 News Radio*, 22 June 2022, at 16:00-17:30; and 'The Foreign Desk in Bratislava', *Monocle 24 News Radio*, 4 June 2022, at 3:33-8:08.

[11] Karen J Alter, *The New Terrain of International Law: Courts, Politics, Rights* (Princeton University Press 2014), 5.

[12] See: Shirley V Scott, 'The Decline of International Law as a Normative Ideal', *Victoria University of Wellington Law Review* 49(4) (2018): 627; and Malcolm Jorgensen, 'International law cannot save the rules-based order', *Lowy Interpreter*, 18 December 2018.