Customary international law

The concept of “ international law” has fuelled academic debate regarding its interpretation, parameters and whether it in fact hinders measures to maintain international order, by virtue of the fact that there is a dichotomy between theory and the reality of the formation of customary international law as suggested by the above statement. Indeed it has been commented that the “ demise of custom as a source of international law has been widely forecasted because both the nature and the relative importance of customs’ constituent elements are contentious”.

Conversely, it has been propounded that customary international law is nevertheless significant as a source of law particularly in the international human rights arena. For example, the codification of conventions, and case law of the International Court of Justice (IJC) have been cited as contributing to the “ resurrection” of customary international law. However, notwithstanding the theoretical importance of international law making in areas such as human rights and as a check on autocratic power, these measures are only as effective as their practical enforceability, which some commentators have challenged in light of competing political interests at international level, which will be the focus of this analysis.

Hedley Bull described international law as a “ body of rules which binds states and other agents in world politics in their relations with one another and is considered to have the status of law”. However, many commentators have questioned whether this theoretical ideal of “ international law making” is actually reflected in fact by “ the existence of any set of rules governing interstate relations, secondly, its entitlement to be called “ law” and, thirdly, its effectiveness in controlling states in “ real life” situations”.

Notwithstanding the contention as to whether the term “ law” is applicable to the social contract in the international arena, it is argued that there are in force some general principles of law “ which states regard as binding on one another”. For example, the fundamental principles governing international relations include the right to self-determination of peoples, prohibition of the threat or use of force, peaceful settlement of disputes and respect for human rights, international cooperation and good faith. As such, Antonio Cassesse observes that: “ The principles at issue possess tremendous importance, for they represent the only set standards on which States are not fundamentally divided. They constitute the core “ rules of the game” on which all States basically agree and which allow a modicum of relatively smooth international relations”.

However, Cassesse’ statements, whilst undoubtedly justified on the basis of member state commitment as signatories to international treaties and conventions, ignore the conflicts creates by the law making process which arguably make “ little more than a manifestation of divisions in power between states of different political and economic importance,” which is further compounded by the conflict between the sources of international law under customary law and various treaties and charters.

Indeed Anthony Carty observes that there is in no complete system of international law to provide resolutions to disputes in contemporary international relations. Carty’s assertions are rooted in the premise that states continue to operate as “ states of nature”, with no unequivocal demarcation of rights under international law, further compounded by ad hoc, unilateral interpretation by member states. Moreover, the lack of a

cohesive international legal system evidenced by inconsistencies in concepts of customary law results in a “ clash between international law and measures deemed necessary to maintain a balance of power”.

This is particularly evidenced by the law relating to legitimate use of force in the international arena. The 1945 United Nations Charter (the Charter), which is considered to be a source of international law, was implemented to address the post Second World War concerns of preventing repeat atrocities. The preamble to the Charter asserted its primary objective as “ saving succeeding generations from the scourge of war” and implementing a framework to facilitate peaceful dispute resolution in international relations. Furthermore, the Charter imposed a prohibition on the use of unilateral force by member states, which was viewed as a radical measure in international law making.

However, the theoretical milestone in international law has been cited by some as a false dawn, compounded by the continued uncertainty as to the boundaries of Article 2(4) in practice, leading to Dixon to question its efficacy as a protectionist measure. Moreover, Reisman has argued that in any event, “ Article 2(4) was never an independent ethical imperative of pacifism”. This is further supported by the proviso that “ unilateral force must not be inconsistent with the Purposes of the United Nations”, which is further compounded by conflicting right of member states to self defence under Article 51 of the Charter.

The intrinsic uncertainty facilitated by the drafting of Article 2(4) creates scope for discretion by the reference to “ purpose of the United Nations”. As

such, the Charter effectively grants scope for member state unilateral interpretation, whilst simultaneously justifying any use of force as complying with the “ purpose” of the United Nations.

Furthermore, the continuation of post holocaust conflicts question the efficacy of Article 2(4) as a protection mechanism on illegitimate force in international conflict, thereby facilitating scope for potential abuse of political and economic objectives without effective sanction, further bolstered by the Article 51 right to self defence. Moreover, notwithstanding the objectives of the ICJ, in practice its decisions have been criticised for lacking consistency, highlighting the problem of after the event decisions to determine whether force used was legal.

The role of the SC in having the power to “ determine the existence of any threat to the peace, breach of peace, or act of aggression” and implement measures that may include force, has been further utilised as highlighting the dichotomy between theory and practice in international law making. The machinations of the SC are intricate, with many arguing that powerful member states within the SC create an imbalance of power in using the SC to further their political desires. This is further compounded by the fact that states which are not signatories to the UN fall outside the jurisdiction of SC decisions and are subject to convoluted principles of international customary law.

As such, this creates scope for selective enforcement of international law, compounded by the conflict between applicability of Charter principles and established principles of customary law, which is inherently problematic in

practice. Whilst Dixon and McCorquodale argue that some principles of customary law apply irrespective of the Charter provisions, other commentators assert that the Charter “ heralded a new beginning”, thereby limiting the scope of customary law in this context. This conflict between Charter and customary law in the context of legitimate force is a breeding ground for abuse, enabling furtherance of political goals by exploiting the uncertainty.

For example, in the case of Nicaragua v USA, the ICJ stated that the Charter right to self defence was derived from customary law and that the SC had final veto over what constituted legitimate self defence. MacClean suggests that this decision suggests that the Charter supersedes customary law, which in the absence of any binding definition of “ armed attack” or what constitutes justifiable self defence, enables international law to effectively be used to legitimise potential abuses of power with extreme uses of force as self defence, shrouded in the veil of accountability by ad hoc decisions of the ICJ after the event.

A prime example of this is the ICJ opinion as to “ whether the threat or use of nuclear weapons in any circumstances is permitted under international law”. The ICJ skated around the issue, repeating the prohibition on use of force contrary to Article 2(4) of the Charter and customary law, yet failed to expressly determine whether a preemptive nuclear attack would be unlawful.

This clearly creates potential for abuse in the absence of any coherent guidelines, which is further evidenced by the crime of aggression, which has remained controversial as a legal concept in international law, often

criticised for being “ intertwined with political elements”. The implementation of the Rome Statute, UN Charter and International Criminal Court was hailed as a historical milestone for protection of human rights against aggression in the international arena.

However, in order for any crime of aggression to be effective, it is vital to define what constitutes an act of aggression. However, member states have consistently bypassed implementing a binding definition of what constitutes an act of aggression since the UN Charter was introduced, thereby indicating a distinct gap between theory and the reality of formation of customary law. Furthermore, the lack of binding definition is perpetuated by the lack of delineation between state and individual liability and what is meant by the term “ individual” for the purpose of establishing state liability. Article 39 of the Charter addresses crimes of aggression by the state and not individuals and therefore failure to define “ act of the individual” clearly undermines the theoretical purpose of the crime of aggression as a check on autocratic power.

The mechanics of war are inherently complex and the notion of excessive force will clearly vary from one state to another. This in itself highlights the gap between theory and formation of customary law on the international plane, as the problem of having any absolute legal framework will intrinsically be unable to account for the complexities of war at international level. Furthermore, the limited nature of a binding definitive framework also lends itself to exploitation by member states intended to serve their political and economic motivations.

This is further limited by the fact that in aggression, the leadership requirement for establishing liability is inherently restricted by the practical difficulty faced by member states in bringing leaders of their state to account, again highlighting the gap between theory and practice. This was evidenced in the case of R v Jones where the House of Lords rejected the appellant's claim that the Iraq war constituted an illegal act of aggression under the Charter. In rejecting the appeal, Lord Bingham asserted that " the crime of aggression is not a crime in the domestic law of England and Wales". The judicial rationale in the Jones case was rooted in the notion that floodgate claims facilitating anarchy would result from enabling such a claim.

Moreover, Lord Bingham stated that the international law crime of aggression was not a crime under national law and that it was " not for judges to decide what conduct should be treated as lying so far outside the bounds of what is acceptable in our society so as to attract criminal penalties." This dictum again highlights the dichotomy between theory and law, which in itself lends itself to the use of international law as a tool in furthering political and social power. The Jones decision further begs the question as to the usefulness of the Charter in practice if the crime of aggression under international law is claimed to be unenforceable at national level due to national courts asserting lack of jurisdiction.

Moreover, the Charter expressly grants a power of veto to the Security Council (SC) to determine what constitutes an act of aggression. Article 39 of the Charter enables the SC to make recommendations and decide what punitive measures shall be imposed to maintain or restore peace. Notwithstanding the attempts of UN Resolution 3314 to move towards a

binding definition of aggression, the debates preceding the Resolution led to compromise in order to appease political disagreements and facilitate amity amongst member states. As such, ambiguous wording remained, compounding the continued uncertainty as to what actually constitutes an act of aggression.

Additionally, it has been observed that certain UN member states are clearly more influential, which creates the contradictory situation whereby decisions left to be determined by the SC could potentially result in selective enforcement of international law with some states being subject to harsh measures to restore peace, whilst turning a blind eye to others. This undermines the purpose of the Charter and equality of the rule of law, with the ironic result that those in power can evade accountability. For example, Megret argues that the deficiency in the international law concepts of aggression have enabled the Bush administration to evolve ad hoc concepts of self defence justified as being necessary in the war on terror, thereby compromising the rule of law.

In conclusion, the historical importance of the development of international law making through customary principles and various treaties cannot be ignored. However, the theoretical ideal is significantly undermined by gaps between theory and enforcement in practice, which is particularly evidenced in the law of aggression and use of force by the lack of consistent rules and purposeful ambiguity in Charter provisions intended to assuage political conflict and promote member state agreement. However, this has resulted in ad hoc decision making in the international arena often after the event, which undermines the purpose of international law as an effective

mechanism to resolve international conflict and protect human rights abuses.

Moreover, the inherent ambiguity and lack of precedent has arguably enabled powerful states to use international law to legitimise excessive force, further compounded by the conflict between customary law and the Charter in this context. As such, measures need to be taken to clarify a coherent legal framework with effective sanction if international law makers are to render member states subject to the rule of law in practice. Only then can international law making be “ more than a manifestation of divisions in power between states of different political and economic importance”.