Fundamentals of Politics and Governance

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Concept Publications

ISBN 978-978-954-444-8

FUNDAMENTALS OF POLITICS AND GOVERNANCE
Published by
Concept Publications Limited
77, Shipeolu Street, Bakare Bus Stop,
Palmgrove, Lagos, Nigeria.
E-mail: conceptpublications@gmail.com
deleconcept@yahoo.co.uk
Website: www.conceptpublications.com
Phone: +234 802 309 4010 & +234 703 057 2604

Designed, printed and bound in Nigeria by
Concept Publications (Press Division), Lagos.
Phone: +234 805 259 4490 & +234 703 057 2604

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International Law and Diplomacy

Idowu A. Johnson

Introduction

LAW regulates the behaviour of the citizenry. Without law, society would be disorganised and ungovernable. So, like in the domestic environment, the international system requires law to guarantee order. But unlike the domestic or national system that has a means of enforcement, the efficacy of international law as a regulatory mechanism on the behaviour of states, is predicated on voluntarism (Kolawole, 1997: 278). Thus, international law operates on the willingness of members of the international community to make it binding since there is no power of sanction.

International law is one of the traditional devices by which states promote their interests in the global arena. It deals primarily with relations among sovereign states. It also deals with important concepts such as sovereignty, agreements and disputes between international actors; the use of force and self-defence; the regulation of the high seas, air, and space; international trade and human rights. In the same vein, states carry on regularised relations with one

another through diplomacy. However, traditional practices of diplomacy must be augmented by other mechanisms to maintain and increase regular, smooth interactions of states. International law is such a mechanism.

Understanding International Law and Diplomacy

Before elaborating on the concepts of international law and diplomacy, it is essential to understand their meanings. International law may be defined as the rules and principles that govern states and their relations *inter se* (Umozurike, 2006: 1). Jessup (1968: 17), on the one hand, presents it as the body of laws which is "applicable to states in their mutual relations and to individuals in their relations with states." On the other hand, the Soviet Academy of Sciences defines international law as "the aggregate of rules governing relations between states in the process of their conflict and co-operation, designed to safeguard their peaceful co-existence, expressing the will of the ruling classes of these states and defended in case of need by coercion applied by states individually or collectively." (Kozhevnikov, cited in Umozurike, 2006)

Basically, international law influences large parts of everyday life. It makes it possible for us to send a letter to someone on the other side of the world, to travel internationally by just using passports, and know what time it is anywhere on the planet (American Society of International Law, 2006).

For Morgenthau (1973: 280), "international law is a system of binding legal rules laying down the rights and duties of state in relation to each other." Also, Adeniran (1983: 45) identifies the functions of international law which include minimising friction between and among states, stabilising the behaviour of states, facilitating co-operation between

and among states, protecting individuals, settling disputes and serving as a tool of public relations and propaganda. In the same vein, the necessity of international law as a branch of international relations arises from the need to ensure a process that regulates competing demands as well as establish the framework for predictable and agreed community behaviour.

Diplomacy is one of the techniques of foreign policy. It is a conduct and management of relations between sovereign states in accordance with established rules and usages, with a view to obtaining maximum advantage for the diplomat's own state, and with minimum friction or with resentment. Stutz (1995:30) defines diplomacy "as the process by which states and other international actors pursue official international relations, reconciling competing and conflicting interests through negotiations." In the viewpoint of Berridge (2005:1), diplomacy "consists of communication between officials designed to promote foreign policy either by formal agreement or tacit adjustment." Diplomacy is also defined as "the application of intelligence and tact to the conduct of official relations between the governments of independent states, extending sometimes also to their relations with vassal states, or more by the conduct of business between states by peaceful means" (Mazi-Mbah, 2007:481).

History and Sources of International Law

Modern international law has its roots in the Peace Treaty of Westphalia (1648). The Treaty of Westphalia brought an end to European religious wars and coincided with the rise of nation states. The rulers decided that each entity should be sovereign, which meant that each sovereign enjoyed supreme authority over his or her territory. This became the key concept of the international system. States are

independent and autonomous and, because of sovereignty, equal in their ability to enter international relations (Reuter, 2011:431). Thus, international law has its origin in the conventions and rules developed to guide relations among emergent dynastic states in Britain, France, Spain and Portugal concerning the conduct of war, use of open seas in periods of peace and war, establishment of boundaries, protection of diplomatic representation, and so on.

The earliest attempt to formally articulate and systematise the norms and practices out of which international law developed is attributed to Hugo Grotius, who in 1625 published a book, *On the Laws of War and Peace*. Grotius elucidates a number of fundamental principles that serve as the foundation for modern international law and international organisation. For Grotius, all international relations are subject to the rule of law; that is, the law of nations and the law of nature, the latter serving as the ethical basis for the former. Grotian thinking rejects the idea that states can do whatever they wish and that war is the supreme right of state and the hallmark of their sovereignty. Grotius, a classic idealist, believes that states, like people, are basically rational and law-abiding, capable of achieving co-operative goals (Evans, 2006; Grewe, 2000; Mingst, 1999).

Furthermore, the Grotian tradition argues that there is an order in international relations based on the rule of law. Although Grotius himself was not concerned with an organisation for administering this rule of law, many subsequent theorists have seen an organisational structure as a vital component in realising the principles of international order. Thus, the Grotian tradition was challenged by the Westphalian tradition, which established the notion of state sovereignty that international law is expected to serve today.

The sources of international law are laid down in Article 38 of the Statute of the International Court of Justice (ICJ, 1945). These sources are international conventions (treaties), international customs, general principles, and judicial decisions and teachings of respected scholars in the field. The latter (decisions and teachings) are secondary sources of international law while treaties, customs, and general principles are considered primary sources.

International conventions or treaties: These are written agreements between states. The signatories' consent is bound by its content, which makes a treaty legally binding. Treaties have many different names, including convention, agreement, pact, accord, protocol, charter, and covenant. Depending on the number of signatories, international law distinguishes between bilateral (two states) and multilateral (three or more states) treaties.

Customary law: The ICJ (1945) statute refers to custom "as evidence of general practice accepted by law." To prove that a rule is customary, courts have to consider the actual practice of states and the acceptance by states of the practice as law. Customary law is derived from the consistent practice of states accompanied by *opinion juris*, that is, the conviction of states that, the consistent practice is required by a legal obligation.

General principles: General principles provide a mechanism to address issues that are not already regulated by treaties or customary international law. Many general principles arise from comparable practices in domestic law and concern aspects of the judicial process. The most important principle is that of good faith; namely, the fact that states have to execute their treaty obligations honestly and to the best of their ability.

It is noteworthy that international law does not compare with domestic legislation. The process by which international laws are made is weakened by extreme decentralisation. There is neither legislative body capable of keeping up with changing conditions and mounting needs nor international organ with authority to set rules of conduct for all. In contrast to the subject of domestic law, the most important subject of international law in its application to sovereign states cannot be bound by treaty made by rules unless their authorised leaders have accepted the treaties' provisions (Ayeni Akeke, 2008:395). Besides, there are no international law-enforcement agents, no international police to enforce compliance or punish states that violate the law. That is why a school of thought does not consider international law as law in the proper sense of the word.

Enforcement of International Law

In the absence of authority structures at the international level, why do most states obey international law most of the time? The liberal response is that states obey international law because it is right to do so. States want to do what is right and moral, and international law reflects what is right. To liberals, states themselves benefit from living in an ordered world where there are general expectations about other states' behaviour. States want to be regarded positively, according to liberal thinking.

Specifically, international law is an internationally-accepted law. Should states choose not to obey international law, other members of the international community do have recourse. A number of the possibilities are self-help mechanisms that realists rely on:

(1) Issue diplomatic protests, particularly if the offence is relatively minor.

(2) Initiate reprisals or actions that are relatively short in duration and intended to *right* a previous wrong.

(3) Threaten to enforce economic boycotts or actually impose more substantial embargoes on both economic and military goods, if trading partners are involved.

(4) Use military force, the ultimate self-help weapon (Mingst, 1999: 236).

More importantly, international law is generally observed and is effective. The violation of an international law by one state amounts to an infringement on the rights of another state, and this may be followed by a reprisal, retaliation, or a demand for compensation. Thus, states take all these into consideration and know that it is in their best interest to observe the international law, at least to avoid trouble and live in peace. In addition, states can submit disputes for arbitration by the International Court of Justice (ICJ) located in The Hague, The Netherlands upon mutual consent. The judgments given by the court in these cases are binding, although it possesses no means to enforce its rulings. The court may give an advisory opinion on any legal question at the request of whatever body may be authorised by, or in accordance with, the Charter of the United Nations to make such a request.

Diplomacy

Diplomacy is a conduct and management of relations between sovereign states in accordance with established rules and usages, with a view to obtaining maximum advantage for the diplomat's own state, and with minimum friction or with resentment. However, it is not synonymous with *foreign policy*; rather it is the official expression of foreign policy in practical terms. Foreign policy is the attitude of one state towards other states while diplomacy is the concrete expression of this attitude officially.

Diplomacy has been used since the end of the Roman Empire. In fact, its use can be put in focus through periodisation. The end of the Roman Empire to the Renaissance constitutes an era, which can be called the age of *unorganised diplomacy*. The second period of *unorganised diplomacy occurred* from the Renaissance to the end of World War I, the period of the *old diplomacy*. The third period began at the end of World War I which is known as the period of *open diplomacy* (Kolawole, 1997: 216).

As a sub-field of international relations, international diplomatic relations deal with rule conventions and customs guiding the establishment of formal relations and exchange of missions between states and non-state actors, the mode of terminating such relations and the practices surrounding the treatment of various categories of accredited representations. It also deals with rules guiding entry into the premises of diplomatic missions. Thus, diplomacy is a technique used in international relations to open, cement or dent a relationship between two states or among many states. It depends on the goal a state sets for itself. Many issues of international relations are influenced, re-shaped, moderated or determined through diplomacy. One way of achieving peace, through diplomacy, is for the contending sides in a dispute to reach a mutually-acceptable agreement when such agreement or understanding is obtained among states, through the effort of trained governmental representatives, often employing stylised communication (Charles, 2002: 268).

The Conduct and Rules of Diplomacy

Diplomacy is a complex game of manoeuvring in which the goal is to get other players to do what you want them to do. The players can number from two, in bilateral diplomacy, to many, in multilateral diplomacy. The rules of

diplomacy are, at best, loose, and there is not just one mode of play. Instead, like all fascinating games, diplomacy is intricate and involves considerable strategy that can be employed in several ways. Thus, while diplomacy is often portrayed by an image of sombre negotiations over highly-polished wooden tables in ornate rooms, it is actually more than that.

Modern diplomacy is a far-ranging communication process (Rourke, 2007; Berridge, 2005). In essence, diplomacy involves communicating goals, demands, requests and other objectives to one or more countries or other actors. It also includes persuading other actors to support or comply with your objectives by communicating either the logic or morality of the point of view or by communicating the power to achieve goals despite opposition.

There are usually diplomatic protocols observed in the conduct of diplomacy. Some basic rules of effective diplomacy are:

(1) *Be realistic:* It is important to have goals that match your ability to achieve them. Being realistic also means remembering that the other side has domestic political problems, meaning having to engage in two-level diplomacy.

(2) *Be careful about what you say:* The experienced diplomat plans and weighs words carefully. It is not necessary to flaunt personal greatness and state the negative aspects of other societies.

(3) *Seek common ground:* Finding a common ground is a key to ending disputes peacefully. A first step to seeking common ground is to avoid seeing self as totally virtuous and the opponent as epitome of evil.

(4) *Be flexible:* While adhering to core principles may be

important, being flexible on everything other than the most vital point is often wise.

(5) *Understand the other side:* Try to understand what the opponent really wants and appreciate an opponent's perspective, even if you do not agree with it.

(6) *Be patient:* It is also important to bide your time. Being overly anxious can lead to concessions that are unwise and may convey weakness to an opponent. As a corollary, it is poor practice to set deadlines, for yourself or others, unless you are in a very strong position or you do not really want an agreement.

(7) *Leave avenues of retreat open:* It is axiomatic that even a rat will fight if trapped in a corner. The same is often true of countries. Denoted as honour, saving face, or prestige, it is important to leave a way out for self and opponent. Ultimatums, especially public ones, often lead to war (Rourke, 2007: 260).

It is notable that while the above rules are solid guidelines to effective diplomacy, the practice is still more art than science. Therefore, effective diplomacy must tailor its approach to the situation and the opponent. To do this, diplomats must make choices about the channel, level, visibility, type of inducement, degree of precision, method of communication, and extent of linkage they will use. To this end, the functions of diplomats include bargaining, negotiation, protection of their citizens abroad, symbolic representation of their countries in such countries of accreditation, obtaining useful information by overt and covert means to enhance the interest of their countries, providing needed advice to their home governments and making sound judgments in policy options on behalf of their countries (Holsti, 1983: 168-171).

One of the important features of diplomacy today is *summit*. Summits bring heads of states together to discuss common issues in roundtable conferences. This provides heads of state with the opportunity of meeting one another face to face to discuss their common problems. Summits encourage friendly relationships among states. Summits take place at roundtable conferences, which could be ad hoc or permanent. An ad hoc conference is called up when the need for it arises while permanent conferences take place regularly at fixed times (Omoregbe, 2007). In essence, diplomacy within the context of conference can facilitate communication and smooth relations between and among states.

More importantly, diplomacy begins with bargaining, through direct or indirect communication, in an attempt to reach agreement on an issue. Such bargaining may be conducted tacitly among the parties, each of which recognises that a move in one direction leads to a response by the other. In addition, the bargaining may be conducted openly in formal negotiations, where one side offers a formal proposal and the other responds in kind; this is repeated many times over until compromise has been reached. In either case, reciprocity occurs, wherein each side responds in kind to the other's moves. States seldom enter diplomatic bargaining or negotiations as power equals. Each has knowledge of its own and its opponent's power potential, as well as information about its own goals. Although the outcome of the bargaining is almost always mutually-beneficial, the outcome is not likely to please each of the parties equally.

Apparently, bargaining and negotiations are complex processes, complicated by at least two critical factors. First, most states carry out two levels of bargaining

simultaneously: international bargaining between and among states, and the bargaining that must occur between the state's negotiators and its various domestic constituencies, both to arrive at a negotiating position and ratify the agreement reached by the two states. Second, bargaining and negotiating are in part, a culture-bound activity (Mingst, 1999: 122), a view accepted among liberals, who place importance on state difference. In addition, diplomatic agreements, generically considered, vary in form to an almost bewildering degree. They vary most obviously in title or style: *treaties*, *final acts*, *protocols*, *exchange of notes* even *agreements*. They also vary significantly in textual structure – language, whether they are written or oral – and whether or not they are accompanied by side letters (Berridge, 2005: 72).

The parties to a negotiation may agree that the subject of their agreement is not appropriate to regulation by international law. This may be because it is obvious that it is more appropriately governed by municipal law, as are a great many commercial accords. Alternatively, it may be because the agreement merely amounts to a statement of commonly-held principles or objectives. If, however, the parties to a negotiation concur that their agreement should create obligation enforceable in *international law*, then they must put it in the form of a treaty (Berridge, 2005). In view of the widespread cynicism about the effectiveness of international law, why might the parties to a negotiation want to create an agreement entailing international legal obligations? They do this because they know that such obligations are honoured far more often than not, even by states with unsavoury reputation (Henkin, 1979:47). In the same vein, whether a state legally exists rests the disposition of other states; that is, pre-existing states must extend diplomatic recognition to another entity.

Conclusion

International law, in the form of treaties and conventions, applies to the gamut of state behaviour in international politics. No principle of international law is more important than state sovereignty. Sovereignty, in this sense, means that no authority is legally above the state, except that which the state voluntarily confers on the international organisations it joins. International treaties are usually negotiated by diplomats prior to endorsement by national politicians. Thus, the bedrock of international law is respect for the rights of diplomats. The standards of behaviour in this area are stated in detail, applied universally, and taken very seriously. The ability to conduct diplomacy is necessary for all other kinds of relations among states, except perhaps all-out war. Negotiation and bargaining are the typical tactics of diplomacy. States create many diplomatic channels and employ many top-level diplomats who are skilled in negotiations to resolve differences and enhance co-operation among them.

References

Adeniran, T. (1983). *Introduction to International Relations*. Ibadan: Macmillan Nigeria Ltd.

American Society of International Law (ed.) (2006). *International Law*. Oxford: Oxford University Press.

Ayeni-Akeke, O. A. (2008). *Foundations of Political Science*. Ibadan: Ababa Press Ltd.

Berridge, G. R. (2005). *Diplomacy: Theory and Practice*. New York: Palgrave Macmillan.

Charles, P. W. (2002). *Peace and Conflict Studies*. California: Sage Publication.

Grewe, W. G. (2000). *The Epochs of International Law*. New York: De Gruyter.

Henkin, L. (1979). *How Nations Behave: Law and Foreign Policy*. New York: Columbia University Press.

Holsti, K. J. (1983). *International Politics: Framework for Analysis*. Toronto: Prentice Hall Inc.

International Court of Justice (1984) Statutes of the International Court of Justice. Retrieved from www.icj.cij.org/documents.

Jessup, P. C. (1968). "International Moot Court Competition Compendium." Http:heinonline.org/HeinDocs/Philipscjessup.

Kolawole, D. (ed.) (1997). *Readings in Political Science*. Ibadan: Johnmof Printers Ltd.

Mazi-Mbah, C. C. (2007). *Foundations of Political Science*. Nimo, Anambra: Rex Charles and Patrick Limited.

Mingst, K. (1999). *Essentials of International Relations*. New York: W. W. Norton & Company.

Morgenthau, H. J. (1973). *Politics Among Nations*. New York: Alfred Knopf.

Omoregbe, J. (2007). *Socio-Political Philosophy and International Relations*. Lagos: Joja Education Research and Publishers.

Reuter, T. K. (2011). "International Law," in Ishiyama, J. T. and Breuning, M. (eds). *21st Century Political Science: A Reference Handbook*. California: Sage Publications.

Rourke, J. T. (2007). *International Politics on the World Stage*. New York: McGraw-Hill.

Stutz, J. (1995) Cited in Osimen, G. U. (2012). *Principles of Conflict Management*. Ibadan: Memphis Publication.

Umozurike, U. O. (2006). *Introduction to International Law*. Ibadan: Spectrum Books Ltd.