

INTERNATIONAL LAW & JUSTICE: SOME PRELIMINARY THOUGHTS ON A STRAINED RELATIONSHIP

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International law is often considered to be a discipline meant to promote justice. The story of international law's historical evolution tends to be generally associated with events which are celebrated as having advanced the cause of justice, and modern international law's key instruments embody the strong desire for promoting and preserving justice and peace. But this is only one part of the story. A more dispassionate reading of international law's historical evolution shows that its origins and development had little to do with the notions of justice and fairness. How could this be so? And how may we think about international law's role and relevance in a troubled world, if we realize that the relationship between international law and justice has always been, and will always be, a strained one?

Transcribed plenary speech of Dr Kalana Senaratne

The theme today raises a number of questions for international law students. It raises the critical question of the relationship between international law and justice. Questioning the relationship between international law and justice has always engaged great minds. International law and justice follow each other very closely. If you read some of the books and articles on international law, you might see that the two concepts go together. It's almost as if, at times, you cannot talk about one without referring to the other. It is an issue which is affecting a lot of people around the world, including the people of Sri Lanka. Many stories can be told about this relationship. One is somewhat mainstream and very optimistic. This is about the positive relation between international law and justice. According to this story, the roots of international law go back centuries to the religious teachings. There is reference to teachings in Hindu, for example. This story also refers to the idea that the development of international law principles is slow. There is the reference to something called where European states and entities got together to end the 30yrs war, which was a big problem in international law in form of treaties made to prevent the recurrence of war. I will also talk about the great thinkers of IL such as Hugo Grotius, people who were first talking about international law in the scientific manner. Then you get to the birth of international law and institutions. There is a reference to the development of principles such as international humanitarian law (IHL). The late 18th, late 19th and early 20th centuries give reference to the roots of these humanitarian principles, in institutions such as the ICRC and also the various peace conferences, and in all these there is some attachment to the idea of justice. Especially in the form of IHL, which is largely about insuring justice to the people affected by war and conflict? You then get to what is sometimes known as the heroic period of international law, from the 1920s up to about the 1960s. There is firstly a new hope promoted by a president of the US, Woodrow Wilson. He was talking about a new world order based on states which

were made up of consent to be governed, a great promoter of international law and justice, and in particular the principle of self-determination. Steps were taken to establish something like the world government, not a government really but small steps were taken in that direction. The League of Nations was established. We find international judicial bodies being established, the Court of International Justice. We find the great ideas of the international criminal law which had to do about justice ultimately being discussed by the great idealists and great international law scholars. Then you get the US system, which is the foundation of the current international legal and political court. Its main purposes are to maintain international peace and security and to end disputes in conformity to the principles of justice and international law. There again international law and justice seem to be going together. Look at the Nuremberg charter, again about justice. Promoting justice to people affected by World War II. We also talk about decolonization. International law helps a large no of people in the third world to attain freedom from colonial rule. The principle used here was the right to self-determination in international law. After a period of about 30-40 years in which nothing much happened, in the 1990s we find rejuvenation in international legal literature. The cold war was over, leaving a lot of literature about internal self-determination, promoting a democracy and people's justice. New tribunals were established the Ruwandan tribunal, again to promote justice to the people. The ICC comes about. More recently we have the nuclear banning treaty. Another wonderful moment said to have promoted the course of justice and peace around the world. In this way the story suggests that things are easy, which it certainly is not. But we are slowly getting there as by the words of justice Weeramantry; "we are perhaps moving towards the sunlit plateau of peace and justice". But is this the only story to be narrated about international law? There is another darker story we should be mindful about. This darker story is not the complete opposite, it tells that international law may be about promoting justice as well as injustice and at times it may be difficult for some of us to differentiate between the two. This is always the case. We can refer to the moment when the idea of the international community was promoted; 1648. This was about stopping the recurrence of war. Ask the question from the perspective of justice, what of the people who were subjected to a brutal war? This was a moment where no one judged the people who fought; it was largely about preventing and not really about justice. Take the early principles of international law, and international law can be seen as not something that prevented, but as something that promoted colonialism. Take the work of some leading scholars such as proof. Todi Yungi, who laid out the principle of sovereignty, which is central to international law, as a way of ensuring the distinction between the sovereign and the less sovereign and non-sovereign. Between the civilised and the uncivilised. The question we don't ask about these principles is who decided one part of the world is considered sovereign and the other not sovereign? What did international law say about the justice to people of the world at that time? International law law principles helped the promotion of colonism. There were concepts developed, Terenalius is one concept that comes to mind, the idea being that territory doesn't belong to anyone. You enter these territories, take hold of them and there's another international law principle which tells that you cannot prevent or resist colonization,

there could be a war justly waged against. That was international law those days. Self-determination. Popular story was that international law helped decolonization. That international law granted self-determination to peoples. But was that really the case? Who decided in the 1st place that certain parts of the world were not qualified enough to self-determine? These questions are not really asked by a lot of people. Take the moment the UN was established, and there's a wonderful irony here that does not appear without a bit of probing. This was one of those great see-saw moments in the development of international law and international legal order. The UN charter was signed on the 26th June 1945. And why was that? There were a lot of things about international law said in the UN charter to prevent recurrence of conflict. On the 6th August Hiroshima was hit, after the UN charter was adopted. Two days later we get the Nuremberg charter which considered many activities illegal. On the 9th August we get the bombings of Nagasaki. What of justice in this particular context? How do we understand the concept of international law and justice in this way? When we talk about the Nuremberg structure but Nuremberg was also one of those moments where, if you observe critically, you doubt whether there should be a constitution in the 1st place. The critical history of Nuremberg tells you that when this issue came up in 1945 that Britain and Churchill in particular were against the idea of prosecuting, and they had wanted some of the main Nazi leaders executed. Because he knew the irony of establishing tribunals and getting the accused to speak. They knew it might be a short trial, at the end. Why was the Nuremberg plan executed? Well it was mainly because President Roosevelt thought the people would like it. Stalin thought it has great propaganda effect. So this is also the story of international law and justice. We talked about nuclear weapons. It's nice to have a treaty but it seems that almost all countries of the world will accept it somewhere in the future except for a few states which have nuclear weapons. If you ask international law the critical question; does international law make nuclear weapons illegal? Even when the very existence of the state is under threat? I don't know what international law will say. I will conclude by referring two or three factors which suggest why this relationship is a difficult one. One is because the nature of international law is such that it makes it difficult for people to achieve justice because international law on the one hand has respect for state interest since the subject of international law is still the state and states operate on very different principles of sovereignty, territorial integrity, security etc. But international law also has to respond to the concerns of the individual human rights and individuals operate on a very different set of assumptions, freedom, and liberty and so on. So there will always be the clash between international law and justice. What about justice? What does justice mean? Justice could be many things to many people. Even since the ancient Egyptian kings justice was something that is defined in the way that a person wanted to define it and the ancient kings considered that what was just was what the Pharaoh considered to be good. Even today if you ask anyone about justice they would say something very different to what we think of justice. Finally justice is unpredictable because you may think you want certain things but once that is realised you might think there is something more to be attained. I think it somewhat unfair to demand international law to promote justice all the time because international law is

ultimately a modest tool we make by ourselves and therefore we cannot expect to prove anything with international law. I think the question that will always have to be asked is what international law are we talking about? And whose justice are we talking about? The moment we start looking for answers to these questions, we know the relation between international law and justice is not going to be a very happy one.