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The Indeterminacy in International Law and Its Causes

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Abstract

This paper discusses an issue that is often avoided in the field of international law studies, namely, the indeterminacy of international law. The so-called indeterminacy of international law, i.e., international law often fails to give a clear answer to specific questions, the paper firstly describes the specific manifestations of this indeterminacy, and then explores the reasons for its emergence from both internal and external levels. The paper argues that the non-jurisprudential and non-binding nature of international law, as well as its profound influence by international politics, determines its indeterminacy. In addition, the ambiguity of the language of international law itself exacerbates the tendency of indeterminacy in international law.

Keywords: international law, legal indeterminacy, international treaty law, international politics

1. Introduction

Determinacy of the law means that the law can provide a single definitive answer to a specific question; conversely, a rule is indeterminate if the law can give several different answers to a specific situation, i.e., if a definitive answer cannot be obtained by the law itself[1] indeterminacy in international law is everywhere in international law, but in previous studies, many scholars have tended to shy away from this indeterminacy. For a long time, indeterminacy in international law has been privately disseminated as a hidden disciplinary knowledge, and the ability to master indeterminacy in international law is even a measure of the maturity of an international law scholar's professional skills. This article will discuss this issue in terms of international law indeterminacy and its manifestations and causes.

2. Manifestations of Indeterminacy in International Law

One of its most obvious manifestations is that the sources of international law are not even clearly defined. According to the Statute of the International Court of Justice, the sources of international law can be summarized as follows: international conventions, international custom, the general principles of law recognized by civilized nations, judicial decisions and the teachings of the most highly qualified publicists (the latter two being secondary means of determining the rules of international law)[2]. There has been very extensive debate as to when international custom and principles of international law were formed and exist, and whether the sources of legal principles need to be limited to the domestic legal practice of States in order to fit the context of "recognized by civilized nations".[3] And there is no definitive answer as to the extent to which international law cases should play a guiding role in specific cases.

This indeterminacy also manifests itself in the establishment of international customary law, state practice and opinio juris, as two elements of the formation of international customary law, have been controversial in terms of their content and even their necessity. In the case of state practice, the main debate has centered on the extent to which practice should be universal, whether it should exist for a certain period of time, and whether the state practice of different states should be treated equally (regardless of the economic, financial, military, technological and demographic characteristics of those states). For example, some scholars acknowledge the existence of 'instant custom', while others argue that custom should be formed through dialogue over time, and

'like good coffee, international law has to be brewed'.[4] As for opinio juris, some scholars have argued that its concept is mysterious, and it is not even clear what kind of conduct can be considered opinio juris, and that it does not explain how a wide range of conduct has become law.[5]

The question of jurisdiction also reflects the high degree of indeterminacy in international law — that is, the inability of international law to provide a clear answer as to which State has jurisdiction in a given situation. There is always a "free space" for States to determine jurisdiction. As the PCIJ stated in the 'Lotus' case, it was necessary for the Court to ascertain whether there was a principle of international law prohibiting Turkey from prosecuting Lieutenant Demons[6] — in other words, if no treaty or principle of international law could be found, Turkey's jurisdiction should not be denied — and in fact, it is also true that the PCIJ did not deduce such a principle from the three substantive arguments put forward by France. In turn, Turkey's jurisdiction over the case was recognized.

The indeterminacy of international law makes it impossible to give a definitive answer to the question of reservations to treaties and the establishment of States either. Article 19 of the Vienna Convention on the Law of Treaties provides that a reservation to a treaty shall not be incompatible with the object and purpose of the treaty, an ambiguous formulation which has given rise to a long-standing controversy concerning "object and purpose". A different understanding of the object and purpose of a specific treaty may determine the permissibility of a specific reservation. In the case of reservations to human rights treaties, for example, Pellet and Müller consider that a reservation is not entirely evil if the object and purpose of the treaty is seen as contributing to the widest possible accession by States.[7] On the question of statehood, the debate between the Constitutive and Declaratory theories makes it controversial whether "recognition" is a necessary condition for a state to acquire legal status,[8] which, together with other controversies under the question of statehood, makes the question of when a new state is formed difficult to answer.

3. The Causes of Indeterminacy in International Law

The causes of indeterminacy in international law are numerous, but first and foremost the sources of international law should still be examined — the sources are both a manifestation and a cause of indeterminacy in international law. It is useful to compare the sources of international law with the sources of law in civil law countries and the sources of law in common law countries. One of the characteristics of the sources of law in civil law countries is the authoritative, codified culture of the code. The legislator has to go through a rigorous process of codification, which also ensures that the legal texts are precise.[9] In addition, in some civil law countries, such as China, a complex system of legal interpretation has been established — the Supreme People's Assembly, as the legislature, has the power to interpret the Constitution and fundamental laws. The Supreme Court and the Supreme Prosecutor's Office can also interpret specific issues in the application of the law.[10] These interpretations are extremely binding on the lower courts, and the great advantage of this system is that it enables "similar cases to be decided in the same way" as far as possible, in other words, it enables specific questions to be answered clearly. As opposed to this the lack of compulsory statutory codes to guide international law in "providing clear answers to specific questions" and the lack of a sufficiently authoritative body to provide convincing interpretations of fundamental questions in the sources (such as whether the element of opinio juris in customary international law is necessary) have naturally led to indeterminacy in international law, with treaties and customary international law as the main sources.

In contrast to common law, one of the most significant features of international law is the absence of the principle of precedent — according to Article 59 of the ICJ Statute, decisions of the ICJ are not binding. While it should be acknowledged that ICJ decisions interpret international law to some extent (unlike binding legal interpretations in civil law systems) and play a considerable role in the development of international law, and may also be used as 'evidence' in the search for international customary law,[11] the lack of binding precedent allows the ICJ to make completely different decisions in similar cases, or at least the scope to decide differently. And this flexibility also contributes to the indeterminacy of international law.

The second cause of indeterminacy in international law is the ambiguity and imprecision inherent in the language of the law. The ambiguity of language makes it difficult to understand and apply the law. This is not a phenomenon unique to the field of international law. Hart has suggested that the law itself has an open texture, with a core of settled meaning in legal terms and a penumbra of indeterminacy. The indeterminacy of the law will be resolved as the courts or other officials exercise their discretion.[12] In the field of international law, in 1939, Kelsen criticised the language of the Covenant of the League of Nations as being too vague.[13] Though some scholars have also been optimistic that the vagueness of the language of international law is only 'relative' and can be resolved through legal techniques,[14] as mentioned above, the 'non-precedential' nature of international law will undoubtedly make this process difficult.

If viewed from a broader perspective, the interaction between international law and international politics likewise contributes to the indeterminacy of international law. Martti Koskenniemi argues that our ideals based

on world order can easily obscure the fact that social conflicts must still be resolved through political means. It further states that legal rules whose content or application depends on the will of the legal subject for whom they are valid are not proper legal rules at all.[15] Morgenthau even argues that the real relationship between states is international politics and not international law.[16] This nihilistic perspective of international law may be outdated-cause International law today plays a unique role in promoting the development of civilization and the peaceful settlement of international disputes, including the protection of human rights, the prohibition of the use of force, but it needs to be acknowledged that the shifting interests of states and the unequal power of states make it difficult for international law, which is heavily influenced by international politics, to maintain its certainty — negotiation, and compromise are everywhere in international law, particularly, in matters of the establishment of treaties, reservations to treaties and the establishment of customary international law.

A typical example of this is the repeated negotiations of the Convention on the Law of the Sea. It is a profound example of the influence of international politics on treaty-making. The exploitation regime of the international seabed area in UNCLOS is a new issue in the law of the sea, and this issue, which concerns the development interests of all countries on the planet, is highly controversial, especially since the "parallel exploitation regime" provided for in Part 11 of UNCLOS emphasizes the interests of developing countries to the detriment of the interests of developed countries. This has caused dissatisfaction among a number of developed countries such as the United States of America, which is reluctant to accede to the Convention, after many rounds of negotiations, UNCLOS was finally concluded on the premise that small and medium-sized countries would give up their vital interests. [17]It can be said that the combined power of States themselves is an extremely important context for the establishment of the various world orders. It clearly reflects the influence of international politics on the legislative process of multilateral treaties[18] Some scholars have even argued that international law is nothing more than a "pure form" that provides a platform for consultation and dialogue among states. [19]With regard to the conclusion of the treaty, "the consent of States to be bound by the treaty" and "the sovereign equality of States" should be the basic conditions, in other words, it should be a "clear answer", but the influence of international politics has made it vague at times.

The question of the relationship between international law (mainly treaty law) and domestic law, which may also lead to indeterminacy in international law, should likewise be mentioned. There are two main problems here, one of which is the question of the ranking of international law about domestic law. Article 27 of the Vienna Convention on the Law of Treaties declares that a party may not invoke the provisions of its internal law as justification for its failure to perform a treaty. [20]This seems to declare the primacy of international law over domestic law — which is justified because the establishment of an international treaty is based on consensus, i.e., the common commitment of the parties to be bound by the treaty. The parties to the treaty are similarly entering into a contractual relationship.[21] International law can only have a relatively stable space of implementation if States are prohibited from imposing undue benefits for themselves based on domestic law. Otherwise, the very meaning of the existence of international law may be dissolved and become a purely flexible instrument in the service of international political struggle, hardly providing answers to any specific questions in its own right. However, the validity of such superficial "contractual relations" is sometimes questionable. For example, in the LaGrand case[22], despite the ICJ's order to stay in the US domestic law process, the US court declared that the ICJ ruling did not constitute enforceable US federal law and that the President had no constitutional authority to alter this position. There is a contradiction — international law needs to take absolute precedence over domestic law to resolve specific international issues, but this may conflict with sovereignty as an 'absolute and permanent power within a state'[23] (the latter is also a fundamental principle of international law), or even, if a State's declaration of "consent to be bound" was not entirely voluntary at the time of the conclusion of the treaty, because of international political or other factors (discussed above), then its interference with the treaty's operation by domestic law is not incomprehensible.

In practice, treaties generally need to be incorporated into the domestic law of States before they can be applied, [24]and this raises a second problem: the procedure by which international law needs to be "incorporated" is determined solely by the relationship between the executive, judicial and legislative organs of States. Here, a distinction can be made between monism and dualism. In the case of dualist countries, such as the United Kingdom, the substantive conclusion of a treaty is completed by the King's ratification, but domestic parliamentary approval is still required for incorporation into the British legal system[25]. In contrast, in monist countries, such as China, the ratification of a treaty and the 'declaration' of its incorporation into the Chinese legal system are both done by the National People's Congress.[26] This difference in procedure adds an additional layer of indeterminacy as to whether a treaty will actually be effective in a particular country — particularly in dualist countries — if the transformation of a treaty after its conclusion is not timely, treaty obligations may not be properly implemented because of a lack of domestic law necessary for the implementation of international law or because domestic law contrary to international law is being applied. This means that, although the Vienna Convention on the Law of Treaties sets out in detail the conditions for the conclusion and entry into force of

treaties, these are ideal situations and international law cannot in fact give a clear answer as to whether and when treaties can be applied, since this depends on the "transformation" procedures of States. At the same time, the lack of timely application of treaties, which are an important source of international law, may itself lead to a lack of a suitable legal framework for the resolution of many international problems, which further increases the indeterminacy of international law.

4. Conclusion

As previously discussed, the indeterminacy of international law is manifested in its inability to give clear conclusions on specific issues in international law, including but not limited to what exactly the sources of international law are, which state may acquire jurisdiction in a specific case, when international customary law is established, the conditions under which treaty reservations are permissible, and when states are formed. Both internal and external factors contribute to the development of indeterminacy in international law. Internally, the non-precedential nature of international law and the lack of binding bodies of legal interpretation and enforcement make it inclined to be weak and uncertain in resolving international issues, a tendency that is reinforced by the indeterminacy of the legal language itself. For external reasons, the nature of international law is such that it is naturally closely linked to international politics, and the tendency to be overly influenced by international politics or even to be "instrumentalist" or "nihilistic" in international law makes international law even more constrained in dealing with international disputes. Moreover, the implementation of international law, especially treaty law, usually relies on national legislative procedures for its transposition into domestic law, and this process adds to the indeterminacy of international law. Dialectically, indeterminacy prevents international law from playing a greater role in specific issues, but it also provides a platform for States to freely negotiate based on the principle of sovereign equality, which encourages more States to actively participate in international affairs and contributes to the peaceful and development of our world.

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