

The communication by States of International Law to their direct stakeholders

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Resumen: El derecho internacional fue concebido como un derecho interestatal. Sin embargo, como consecuencia del desarrollo progresivo del derecho, nuevos actores y nuevos sujetos han ido surgiendo. El individuo es uno de ellos bajo diferentes perspectivas, bajo la perspectiva penal al asumir la responsabilidad de sus actos frente a los diferentes tribunales ad hoc y, ahora ante la Corte Penal Internacional. También se ha desarrollado la figura bajo la perspectiva de los derechos humanos. Este artículo analiza las formas como las políticas estatales relativas al derecho internacional se presentan a los individuos, a las personas jurídicas y a los demás actores.

Palabras clave: Sujetos, actores, accionistas, arbitraje, organizaciones intergubernamentales

Abstract: From the beginning International law has been conceived as being between states. However, as a result of the progressive development of the law, new actors and new subjects have taken root. The individual is one of these and this has occurred in respect of different perspectives; under the criminal concept the individual may be held responsible before different ad hoc tribunals and the International Criminal Court. Also from the perspective of human rights. This article analyzes the means by which the state's positions on matters of international law are conveyed to individuals, corporate entities and other actors.

Keywords: Non State actors, stakeholders, arbitral awards, intergovernmental organizations.

Introduction

We tend to take it for granted that the processes and institutions of international law are somehow understood or uniformly received by all people, simply because States interact with one another through the medium of international law, which is after all in the public spotlight. Alternatively, it may be felt that natural persons need not be informed about the position of their government on general or particular matters of international law, or that of other governments, as having no direct impact on their daily lives. Natural persons are the forgotten stakeholders of international law, namely the people of each country that possess a direct interest in its international relations. The recognition of stakeholders and the advancement of relevant theories is connected to the examination of corporate governance models, with the main question underlying these being whether the corporation's board owes duties solely to its shareholders (with a view to maximizing their profits), or whether it is also obliged to look out for all those affected by the operation of the corporation; that is, its stakeholders.¹ There is no reason why this stakeholder paradigm cannot find fruitful application in the case of international law, in which the law may be viewed as a productive process, States as executive boards endowed with decision-making powers and each individual as a stakeholder thereof. Unlike corporate stakeholders that are more or less aware of the actions that affect them, the actions of States in the international sphere are far removed from the day-to-day exigencies of the average individual. This means that even in the extreme scenario that people were generally aware of the international activities of their governments they would have no idea of the ways in which these affect them, or have the potential to affect them in the future. Although States need not communicate their distinct position on international law to their stakeholders, other than

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1 See Friedman, A. L. & Miles, S. *Stakeholders: theory and practice* (Oxford UP, 2006); Phillips, R. *Stakeholder theory and organisational ethics* (Berrett-Koehler, 2003). For stakeholder participation in the sphere of the environment, see particularly Stoll-Kleemann, S. & Welp, M. (eds.). *Stakeholder dialogues in natural resources management: theory and practice* (Springer, 2006).

by the minimum formal means that are dictated by transparent public governance, they have discovered that failure to do so not only alienates them from their popular base and allows distorting powers (whether benevolent or otherwise) to discredit them.

This article focuses only on developed democratic States (without ignoring some poignant examples set by developing countries or emerging super-powers) and does not examine the communicative practice of international organisations. It sets off by examining how difficult international law is in terms of being comprehended in terms of its basic and more detailed tenets. If it is found to be difficult to be conveyed, then governments are obliged to find a new language to converse and interact about international law with their stakeholders. Communication about international law can take many forms; it may encompass substantive law or relate solely to institutions and international organisations. The language is as important as the communication itself, although the two are distinct. Communication assists in identifying the object of concern and the politics behind it, whereas the function of language is to convince and convey a message. Ultimately, it is not the message that is important but the meaning established through the interactive process. It is apparent that the subject matter of the article is ultimately not about law as a communicative process.² Equally, the premise of this discussion is much broader than the internal processes of international law organised as an autopoietic system.³

1. Who understands International Law?

The persons most likely to read this article will no doubt be international lawyers, or at the very least will possess some understanding of international

2 This issue befalls the realm of other jurisprudential discussions. See Van Hoecke, M. *Law as communication* (Hart, 2002), in which the author's central thesis is that all legal relations are to be understood in terms of dialogue, conversation and communicative processes, rather than as traditional command-obedience structures. This is so, argues Van Hoecke, because legal systems are open systems, thus allowing for this type of interaction between their various participants.

3 Communication is in fact central to autopoietic systems, in the sense of internal constructions of information based on their respective code. In the case of international law the code is predicated on the distinction between lawful and unlawful and it serves as the basis for producing international rules. Therein, the three elements of communication (i.e. information, utterance and understanding) are present, albeit the mode of addressing is reversed, in that it is the addressee controlling the sender through anticipation of utterance. See Luhmann, N. *Social systems* (trans. J. Bednarz, Stanford UP, 1995), p. 143.

law and its institutions. This audience is fully capable of grasping the complexity of international norms, as well as ascertain that which is normative from that which is not. This body of people consists of international law academics, relevant practitioners, lawyers employed in international organisations, the personnel of international judicial institutions, legal advisors in government departments and students of international law. It is not obvious that lawyers not specifically trained in international law will be able to fully grasp most concepts, and certainly the finer intricacies, of this subject matter, although admittedly they are better suited to this task than the average non-lawyer. What this means is that international law is only really understood as a technical discipline by those engaged in it professionally. To the rest of the world that lacks an understanding of its underlying principles, its deconstruction and decoding is impossible. This gap in the comprehension of international law by its very stakeholders is steadily increasing on account of the following reasons: a) the professionalization of international law by a distinct corpus of individuals; b) lack of interest because of the absence of a direct impact on the daily life of ordinary people, and; c) as a result of enforcement difficulties; d) legal language barriers.

It is evident, therefore, that when individuals or groups thereof desire to find out why an international affair is regulated in a particular manner, they will turn to mass media for the answer. The media, in turn, will in its majority lack the expertise to provide an accurate legal response, especially where the matter is open to several interpretations, and will instead focus on alternative elements, such as political, strategic and others, which are easier to explain and are far more sensational than any “dull” legal analysis. There is something wrong with this. In domestic laws one of the fundamental principles underlying the organisation of society is that ignorance of the law is not an excuse for violating it (*ignoratio juris nemet excusat*).⁴ The idea of this principle is not that individuals must know every law, but that as active members of their community they must have a basic understanding of fundamental laws and generally distinguish that which is legal from that which is not.⁵ This accumulation of understanding is a natural process that comes about from the very organisation of society, including its information component, from

4 See Segev, R. Justification, rationality and mistake: mistake of law is no excuse? It might be a justification, 25 *Law and Philosophy* 31 (2006).

5 See *Lambert v California*, 355 U.S. 225 (1957) and *Ratlaf v USA*, 510 U.S. 135 (1994), in which the US Supreme Court makes this subtle distinctions and in the case of *Ratlaf* also requires proof as to the accused's knowledge.

which people about is mores from social discourse. Where is the place of the ignorance of law claim in the sphere of international law? Or to put it another way, is ignorance of international law an excuse when it is violated by an individual that is not an agent of a State, particularly given the absence in some countries of any equivalent to an international social discourse?

Individuals will at best comprehend the function of international agreements, but will have little, or no, idea of specific treaties. Moreover, they will be ignorant as to the formation and function of customary law, or its relevance to international justice. This is further exacerbated by the fact that the judges in most countries refuse or fail to acknowledge the validity of customary norms, even though this is possible under relevant constitutional terms. There exist practical ramifications to these observations. Individuals derive rights and duties from treaties and customary law, where applicable, and as a result enjoy a degree of international legal personality. This is true in many fields, particularly human rights, international criminal and humanitarian law, foreign investment, EC law and others. Even if one dismisses knowledge over the international body of rights as immaterial to the actual possession of the entitlement itself, how may we justify the imposition of individual personal responsibility on offences established by treaty or custom when these did not exist in the substantive law of the individual's home State? Much of this discussion in the international criminal law literature has focused on the principle of legality, as transposed, however, from its domestic law context.⁶ Starting from the Nuremberg Tribunal, the various judicial institutions have argued since then that simply because domestic law fails to specifically incorporate custom or treaty crimes therein, or because the criminal liability of perpetrators, as opposed to State liability, is not specifically mentioned in prior treaty or customary law, does not mean that the perpetrator should not incur liability as a matter of international law. It is argued, in order to counter these contentions, that the principle of legality need not resemble exactly its domestic law counterpart, as long as the prohibited behaviour in question was one of universal repugnance. While this solution is perhaps satisfactory in respect of certain acts, it is not for all. The very fact of universal repugnance presupposes that every person on the planet possesses sufficient and uniform information about the matter under consideration, which is not the case. Moreover, what if a

6 See Gallant, K. S. *The Principle of Legality and International and Comparative Law* (Cambridge UP, 2008).

certain State nurtured generations of illiterate tribal people to believe that otherwise repugnant crimes are in fact wholly permitted? Why should their unintentional ignorance of international law not constitute an excuse?

Whatever the merits of international judicial pronouncements dealing with impunity and legality these can only be understood as such by a discrete group of lawyers. To the non-lawyer this issue will appeal to his common sense of justice and the communication of all other legal matters will generally be of no significance. What is of importance is that the culprit displayed as bad has been convicted or acquitted as the case may be!

2. How do States understand International Law?

In analysing this query in the title of the present section one should not think of the State as a single entity wherein all the elements that compose it share the same assumptions, interests, data or knowledge of facts. Moreover, the elements that comprise it do not all necessarily have the same understanding and knowledge of international law. Certain government agencies will enjoy great latitude in binding the State through international agreements, whereas others will not engage with international actors in the course of their ordinary functions. Ministries of foreign affairs will be so accustomed to the vagaries of international affairs that they will keep to a minimum what they say and what they do, other than entering into treaties, in order to avoid giving rise to unfavourable unilateral acts. Many governmental officials, however, untrained in the practical formation of State practice will make unnecessary statements to the press, unaware of the potential consequences.⁷ Many weak States during the 1960s and 1970s entered into multilateral treaties, particularly in the human rights field, without ever intending to honour the commitments contained therein. This is certainly true of the regime of Idi Amin in Uganda and it is no less true of the majority of States on the world scene at the same in varying degrees. During that time, the ratification of politically sensitive treaties, such as those pertaining to human rights, was perceived by weak governments as beneficial to their external image, having

7 In *FYROM v Greece*, application to the ICJ Concerning the Implementation of Article 11(1) of the Interim Accord of 13 September 1995, available at: <<http://www.icj-cij.org/docket/files/142/14879.pdf>>, the lawyers for FYROM appended to their application a list of media interviews given by the Greek Foreign Minister in which the latter allegedly admitted blocking FYROM's applications to join particular intergovernmental organisations. This use of veto power is in fact the basis of FYROM's contention.

little concern for the domestic sphere since their rule was dictatorial. They, therefore, understood human rights treaty obligations not in any way as reciprocal or enforceable, but merely as window dressing. This perception was exacerbated by the absence of strong international institutions that would otherwise force weak States to honour their obligations. In fact, there is a strong correlation between strong institutions (as broadly understood to include both organisations as well as enforcement mechanisms), both internal and international, and the perceptions of States about international legal obligations. Thus, States comprehend international law on the basis of institutions and less through the substantive content of their obligations. For example, a non-compliant State will most probably decline to become a party to a treaty regime that provides for a compulsory individual and inter-State complaint system the awards of which are final and binding.

In some cases, the legal accuracy of what certain government agencies, even ministries of foreign affairs, perceive on a particular matter may be challenged in practice by other government departments. It is not infrequent, thus, for national military contingents in multilateral peacekeeping operations to operate on the basis of Rules of Engagement (ROE) that are not sanctioned by the international law rhetoric of their country of origin. For example, it has been narrated to me by professional military legal advisors in service in post-Saddam Iraq that because of the high incidence of children dropping rocks from rooftops and balconies onto open military vehicles the ROE expressly permitted the use of lethal force against such children. Little, or no, discretion was available. I must have seemed far removed from their reality when I pointed out that the shooting of civilians under such circumstances, especially children, was widely considered in international law a grey zone and that targeting civilians even in that context be a measure of last resort.⁸ This type of discrepancy in the understanding of the law between purely administrative and on-the-ground government agents is also evident in other fields of public administration.

8 This corresponds to the two types of recognised approaches in classifying otherwise civilians that are presumed to be taking part in hostilities; the “membership” and the “specific acts” approaches, discussed in detail by Kleffner, J. K. From belligerents to fighters and civilians directly participating in hostilities: on the Principle of Distinction in non-international armed conflicts one-hundred years after the Second Hague Peace Conference, 54 *NILR* 315 (2007). The matter is currently still hotly contested and is the subject of a prolonged series of conferences. See ICRC, *Third expert meeting on the notion of direct participation in hostilities: summary report* (October 2005), available at: <[http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/participation-hostilities-ihl-311205/\\$File/Direct_participation_in_hostilities_2005_eng.pdf](http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/participation-hostilities-ihl-311205/$File/Direct_participation_in_hostilities_2005_eng.pdf)>.

Without wishing to enter into a discussion regarding the intentional violation of international law by government agents in the knowledge that they will not be prosecuted (e.g. illegal abductions, torture), it is instructive to keep in mind the role of senior diplomats and envoys. They will generally be empowered with significant powers, both in terms of negotiation as well as in terms of actual bargaining. They will enter into discussions with criminal elements (e.g. kidnappers), as well as representatives from States, albeit sometimes with a hidden agenda.⁹ The understanding of these envoys, as indeed expressed in their very mandate, is to secure their objective even if by so doing they must necessarily disregard fundamental principles of international law or State practice. For example, it is common knowledge that States, or persons authorised by them, negotiate with kidnappers and pirates and are prepared to pay the requested ransom if plausible military action cannot be otherwise undertaken.¹⁰ Equally, States are not averse to making secret impunity deals in return for peace, although with the indictment of the Sudanese President, Al-Bashir,¹¹ such practice may be gradually diminishing.

As part of their treaty-making function, one should differentiate between States that have the resources to effectively assess each international instrument and those that do not. In the context of the European Communities, for example, the plethora and variation of Directives is such that not every member State is able to draft independent implementing legislation.¹² Thus, in many cases, the Directive is transposed into domestic law verbatim. This practice is also true in respect of important multilateral treaties the substantive law of which seems distant to some participants and in no need of protracted arguments. This is the case with the International

9 It has been intimated by some academic scholars that the negotiations leading to the 1995 Dayton Agreement by which the war in Bosnia was ended was premised on the offering of an impunity package to the main participants. See D'Amato, A. Peace vs. accountability in Bosnia, *88 AJIL* 500 (1994).

10 For example, the Italian government negotiated with Afghan kidnappers in 2005 regarding the release of an Italian aid worker in Afghanistan. See <<http://www.breaking-newsenglish.com/0506/050610-hostage-e.html>>. See also Fisher, I. When governments give in to kidnappers, *International Herald Tribune* (25 March 2007), available at: <<http://www.iht.com/articles/2007/03/25/news/italy.php>>.

11 *ICC Prosecutor v Al-Bashir*, Warrant of arrest re situation in Darfur, ICC Doc ICC-02/05-01/09 (4 March 2009).

12 Directives are only binding as to the result to be achieved upon each member State to which it is addressed, but each State is free as to the choice of form and methods. Art. 249(2), EC Treaty.

Criminal Court Statute, at least as regards those smaller nations that are not likely to have any of their nationals indicted of the relevant crimes. Many among such countries may even be ignorant about the jurisprudence of international criminal tribunals or the state of international law in respect of a particular multilateral instrument and will assume that the drafting committees and their years of hard work suffices for its veracity. Moreover, it is common knowledge that the officials of many nations enter multilateral negotiations without a clear international agenda, well-worked out national arguments, or even sufficient preparation. The major concern in such cases will be the scale of assessed contribution that party is obliged to pay. On the other hand, the proximity of a State to the practical application of a norm augments its interest in the shaping of that norm. Hence, even financially weak States will place all their efforts in understanding the legal intricacies of border disputes with neighbouring States, bilateral trade agreements, as well as seemingly remote issues that may have a future direct impact on their national interests. By way of illustration, a good number of nations have expressed a vital interest to submit interventions in the ICJ's examination of Kosovo's plight to self-determination.¹³ Other States that decided not to intervene have also made their positions known, for the obvious reason of avoiding future self-determination claims from other ethnic groups [essentially minorities if the Kosovo example is anything to go about] on their territories. Less powerful States, thus, perceive the processes of international law as a struggle to make their vital national interests known and respected and are prepared to devote only minimal attention to other affairs that affect them only tangentially, even if they acutely affect the global community.

As far as more powerful countries are concerned, every aspect of international relations is of direct interest. The USA, Russia and China, for example, have political, military, commercial and other interests throughout the world. Everything affects them directly or indirectly. This eventuality necessarily also informs their conception of international law. A good starting point is the work of the UN Security Council. Whereas international lawyers will attempt to extrapolate law from the deliberations and decisions of the Council, the members of the Council itself are interested solely in policy

13 The Serbian Foreign Minister even addressed 80 potentially interested countries to intervene in the proceedings. See <http://www.mfa.gov.yu/Policy/CI/KIM/280109_e.html>. It is instructive that Slovakia, Greece, Cyprus, Spain and Romania, which have direct interests from the outcome of this case, favoured in favour of the UN resolution requesting an advisory opinion from the ICJ, whereas other EU States were not so keen.

objectives, despite the consistency of the language used in the resolutions.¹⁴ The Council's sole preoccupation with legal considerations lies perhaps in its effort to avoid giving rise to an undesired precedent. Since powerful States are fully aware that they can shape international norms, they are naturally inclined to shape some of those norms in a way that no other countries can derive any entitlement therefrom, while at the same time giving rise to an exclusive valid entitlement for themselves. This is certainly the case with humanitarian intervention, for which much ink has been shed. None of the big powers that has acted under the guise of humanitarian intervention has ever invoked it as a universally normative entitlement.¹⁵ In quite the same manner, the Security Council's practice when authorising the use of armed force has not given rise to a precedent; every decision is based on its own unique and exceptional circumstances. In their treaty relationships, moreover, powerful States do not only strive to preserve or follow existing normative expectations; rather, their intention is to formulate international law in a way that serves their particular interests. This is not always possible at the multilateral level, as the ICC outcome demonstrated in respect of the USA, but at the bilateral level this is generally the case. One need only consider the proliferation of bilateral investment treaties on the basis of model agreements framed by powerful nations, to which few manoeuvres are possible. As a result of the above considerations it is fair to argue that powerful States perceive international law as a process of circumscribing their national interests, in distinction to the general practice of non-powerful countries for which the norm is to follow normative patterns designed elsewhere, even though they may not always be in full agreement, unless particularly pressing national interests deem otherwise. Whereas non-great powers may reluctantly join a treaty regime in which they find little, or no, interest in order to enjoy other benefits elsewhere, powerful nations will refuse to join even those treaties that one would think only natural that they join. This has been the position of the USA in respect of global human rights treaties, particularly the 1966 International Covenant on Civil and Political Rights and indeed the International Criminal Court. The reluctance of the USA has stemmed

14 Papastavridis, E. Interpretation of Security Council Resolutions under Chapter VII in the Aftermath of the Iraqi Crisis, 56 *ICLQ* (2007), 83.

15 See generally, Simpson, G. J. *Great powers and outlaw States: unequal sovereigns in the international legal order* (2004).

from particular provisions in these treaties, which sat uncomfortably with its overall policy objectives.¹⁶

Having examined briefly how States perceive their place within the international norm-making process, let us now examine the main premise of this article that concerns the mechanisms by which States convey the content of international law to their direct stakeholders.

3. The communication of International Law by States

3.1. Perceptions of International Law

Even in the era of the Internet and advanced technology, law is communicated to a country's stakeholders not by the channels of foreign governments, but by that country's own communication channels. We have already determined that the concepts of international law are generally difficult to grasp and by implication this also applies to the language employed. It has equally been demonstrated that the treaty-making objective of treaties belies particular political aims, irrespective of how these are defined as per their subject matter. As a result, the language and the messages used to convey international law to a country's stakeholders must reflect both the inherent complexities of international law, as well as the political objectives of the incumbent government. The question of the language of international law will be dealt in a following section. Here we shall concentrate on the methods of communication and the context within which this is performed.

The starting point for this discussion is the perception of international law by individuals as correlating to average notions of fairness, justice and legitimacy.¹⁷ They will not know the precise content of international rules and they may even get them conceptually and fundamentally wrong, but their perception of international law will be coloured by one or all of these three qualities. Certainly, a wide empirical study stretching across most

16 See *infra* notes 51-56.

17 See generally, Franck, T. M. *Fairness in International Law and institutions* (Oxford UP, 1998), pp. 25-46, where he focuses on the procedural legitimacy of international rules by reference to four distinct properties of the rule. These are its coherence, determinacy, symbolic validation through ritual and pedigree and its adherence to a normative hierarchy. Franck's idea of procedural legitimacy, through the interaction of these properties, concerns the degree to which the rule will be obeyed by States and not if it is necessarily perceived as fair by individual stakeholders.

jurisdictions would help reach more secure answers to this question, but alas one is not provided in this article. Instead, I shall premise my assumptions on the validity of popular sentiment or the spontaneous expressions of local approval or disapproval in respect of the actions of particular leaderships in recent political history. It is fair to argue that the attitude of the majority of people in the developed world towards international law is that it is grossly unfair and that it serves only the interests of powerful nations. Although this view is principally informed by the information available to these stakeholders, it is also predicated on one's value judgment as to right and wrong. For example, in the category of wrongs one would certainly classify global poverty, man-made pollution and climate change, violation of human rights, the perpetration of genocide and the waging of opportunistic wars. On the other hand, among the positive qualities of international law one would allow room for bringing perpetrators to justice, taking measures to limit environmental pollution, inter-State cooperation in the fields of trade, transportation and telecommunications, as well as general cooperation that allows people to travel freely across countries and continents. Between these two extremes lies a grey zone endowed with two particular qualities. On the one hand, there are some acts clad with legitimacy, but which are in fact repugnant to the majority of people, while on the other hand, there do exist acts that are coloured one way or another depending on the affiliations of their commentators.

By way of illustration, the vast majority of Europeans would argue that the modalities regarding the detention of persons at Guantanamo Bay, Cuba, as well as the lack of fair trial guarantees were abhorrent. To many Americans, however, that had witnessed on television the events of 9/11 and were subjected thereafter to a continuous bombardment of national security alarms and messages about the danger of those incarcerated at Guantanamo Bay, their detention under any circumstances was no doubt a welcome event. Equally, although the vast majority of the world would have no problem determining that the use of force against Iraq in the first Gulf War in 1990-91 was fair and just, even stakeholders from the governments of the allied forces of the 2003 assault against Iraq would find it hard to uphold the legitimacy of that operation. Even if one concedes the guised legality of the 2003 Iraq campaign,¹⁸ the views on its legitimacy are certainly dispersed. On the one

18 In the debates before the UN Security Council, the US delegate, Ambassador Negreonte, was adamant about Iraq's possession of weapons of mass destruction and this was subsequently the legitimating ground for invoking the relevant resolutions. UN Doc S/PV.4644

hand, a majority of Americans, influenced by the post-9/11 rhetoric and grossly misinformed about Saddam Hussein's links with Al-Qaeda, defended the justifications offered by the Bush administration. On the other extreme, the majority of Arabs around the world, although cognisant of the brutality of Hussein and his cronies, objected to his overthrow on grounds of ethnic and religious pride alone. In the middle one finds the sentiments of Europeans who were largely opposed to the invasion and generally rejected the justifications offered by their politicians, but were also keen to see Saddam Hussein deposed; these sentiments later turned to outright resentment. For the purposes of this discussion, the extensive employment of international law to give legitimacy to the aforementioned events is central to the perception of international law by its stakeholders. In the psyche of the latter, all acts attributed to States are tantamount to simultaneous legal propositions. Thus, the average person will not distinguish between a particular instance of armed force from its international legal context, attempting thereafter to assess the legality of that action. Rather, he will far more simply conclude that the attack is unjust and unfair, if that is indeed the case. Within these two categorisations of the attack we find two types of value assessment: one on the attack itself and another on its legality. Thus, individuals do in fact make value judgments about international law, but this is not a distinct process from the particular act which informs their legal judgment.

This is unlike the processes of value judgment in domestic law. A person desirous of terminating a contractual relationship will ponder whether this is possible under contract law and will consult a lawyer as to the proper answer and remedy. Equally, a knife-thrower at a circus will probably be unsure if the consent of his assistant will suffice in order for him to become a human target and will equally solicit the services of a legal professional. In both of these cases the individual in question distinguished between the act and its legality, on account of the uncertainty about the legality of the particular action. I am unsure what the precise outcome of this observation is, but it seems to me that whereas the average individual possesses no concrete knowledge of international law, in the domestic setting people are at least aware of relevant normative boundaries. As a result, they are more prone to first identify the act and then seek an answer as to its legality, rather than simply make a value judgment as to its legitimacy, which is the case when

(8 Nov 2002). See *Iraq war violated the rule of Law*, available at: <http://news.bbc.co.uk/1/hi/uk_politics/7734712.stm>.

evaluating actions in the international sphere. Thus, individual stakeholders when making value judgments about international events they do so in respect of their legitimacy and not their legality.

In the same manner, the average individual stakeholder does not generally distinguish between international politics and international rules. The two are in most cases perceived as identical and indistinguishable, and at best they are found to coincide by choice and not by accident. Some examples are illustrative of this trend. Most people in the developed world believe that foreign diplomats and other foreign dignitaries are unjustly given wide privileges, such as parking in otherwise prohibited areas without being fined,¹⁹ or committing crimes without being punished by the local authorities. Thus, the very granting of privileges and immunities afforded to particular persons, especially foreign diplomats are viewed as lacking justice and legitimacy.²⁰ The same is true in respect of serious international offences, such as war crimes and crimes against humanity, for which Heads of State and those enjoying immunity *ratione personae* are generally immune from prosecution before national courts.²¹ As a result, and subject to minor exceptions, the perception by ordinary people living in the developed world is that immunity is a political tool that has been created to serve inter-State relations, despite the obvious fact that it breeds injustice in the process. In this sense, given that immunity is viewed as being juxtaposed to justice and justice itself represents international law, immunity cannot be entertained as a rule of international law but as something outside the realm of law. Alternatively, if the principle of immunity is indeed part of international law, then justice, as understood by individual stakeholders, is beyond the purview of international law. Although the juxtaposition between immunity versus

19 See, Diplomats Rack Up £1.5 million in Parking Fines (3 Dec 2008), available at: <<http://www.westminster.gov.uk/councilgovernmentanddemocracy/councils/pressoffice/news/pr-4558.cfm>>; see also the very interesting study of Fisman, R. & Miguel, E. *Cultures of corruption: evidence from diplomatic parking tickets*, available at: <<http://sticerd.lse.ac.uk/seminarpapers/dg10052006.pdf>>.

20 Higgins, R. The abuse of diplomatic privileges and immunities: recent United Kingdom practice, 79 *AJIL* 641 (1985).

21 For the vast majority of individual stakeholders the conclusion of the *Congo v Belgium* (Belgian Arrest Warrant case), Judgment of 14 February 2002, paras 47-55, must seem offending. In that case the ICJ ruled that despite the evidence of crimes against humanity alleged to have been committed by the Congolese Foreign Minister and his indictment on the basis of universal jurisdiction by the Belgian courts, he continued to enjoy immunity *ratione personae* and could not be prosecuted before national courts.

access to justice (the right to a fair trial) has troubled international law in the recent past,²² an international lawyer would have no problem distinguishing the two concepts and classifying them as legal rules, apart from their political dimensions.

In much the same way, most Muslims consider that the majority of the rules encompassed within the corpus of international law are no more than disguised political agendas. Unlike their western counterparts their perception of international law is coloured, among others, by an absence of consistency. Most poignantly, they see a great degree of support in favour of Israeli actions over the Palestinian question and the treatment of these people on its territory –such that would have under other circumstances sent State leaders before international criminal tribunals– and yet Palestinian groups that oppose the Israeli government are branded terrorists. The US backing of Israel, aided by the all-powerful pro-Israel lobby in the USA, even when it is in breach of the most fundamental considerations of humanity,²³ confirms the politicisation of international law in the Arab psyche. This perception is further exacerbated by the fact that the USA, and sometimes the EU, accuse the Arab world of human rights violations when in fact the USA operated during the Bush administration secret prisons for torture around the world and only occasionally, but not convincingly, pulls the ear of Saudi

22 See *Al-Adsani v UK*, Judgment of 21 November 2001, 34 EHRR (2002), 11, paras 55-66, in which the European Court of Human Rights ruled, by a majority of one vote only, that the rule of immunity trumps the right of access to justice through the right to a fair trial; see Voyakis, E. Access to Court v State immunity, 52 *ICLQ* 279 (2003). It is not totally certain that this position will persist much longer in the near future and there is a lot of public interest litigation before international tribunals, including the UN Human Rights Committee, to reverse the policy implications of this ruling.

23 Israel has been responsible for a number of atrocities in occupied territories, whether perpetrated by its own forces or by forces under its control. On the top of the list is the massacre of Palestinian refugees at the Sabra and Shatila refugee camps by Phalangist forces at a time when the camps were under Israeli control. See Final report of the Kahan Commission [Kahan Report], 22 *ILM* 473 (1983). Equally, the building of a wall by Israel to keep out terrorists from its territory was viewed by the ICJ as violating fundamental human rights of non-Israeli populations. Legal consequences of the construction of a wall in the occupied Palestinian territory, *ICJ Rep* 136 (2004), paras 115ff. Moreover, in the Palestinian uprising in late 2008, Israel was accused of using excessive and indiscriminate force against Palestinian civilians, including the shelling of a UN compound filled with women and children. See Sengupta, K. Outrage as Israel Bombs UN, *The Independent* (16 Jan 2009), available at: <<http://www.independent.co.uk/news/world/middle-east/outrage-as-israel-bombs-un-1380407.html>>.

Arabia and that of the Gulf States for their atrocious human rights record. Thus, the absence of consistency in the application of so-called international rules is understood by most Muslims as evidence that international law is just another name for international politics and that in any event it is grossly unfair and lacks legitimacy. This perception corresponds to “lawfare” by States, a concept which will be analysed more fully in a following section.

3.2. The communication of Substantive Law

States need to communicate their position on international legal issues to their direct stakeholders. They do not, however, need to communicate with, or for that matter convince, other foreign nationals, even if at times they are seen to be doing just that. Communication is meant to stir support for a State’s actions in the international sphere by removing intense opposition in the domestic sphere and in this sense a State’s direct stakeholders are its citizens, because only they can exert pressure on the government. Modern governments generally listen and adhere to popularity and opinion polls and most policy decisions are influenced by their results.²⁴ Even a bold government will not lightly defy public disapproval of its policies in a particular field. Public approval is not only about winning elections, but also about being able to enforce one’s policies with the least possible amount of dissent and negative publicity. As a result, one need only communicate to those stakeholders whose opinion directly influences public policy. By way of illustration, although the policy decisions of US President George W Bush on the environment, terrorism, human rights and use of force were viewed as abhorrent by the vast majority of people in both the developed and developing world, he nonetheless stuck to them religiously until the end of his administration. Negative foreign press and popular resentment outside the USA had little or no impact on his ability to make foreign policy decisions, the communication of which was only intended for American ears. It was only internal support that was required to persist with such decisions. It is a fallacy to think that governments are intent in any way to win the hearts and minds of foreign nations or their people. Thus, the communication of a government’s position on international law will be communicated only to that country’s nationals, irrespective of whether the message is simulta-

24 McDonald, M. D. & Budge, I. *Elections, parties, democracy: conferring the median mandate* (Oxford UP, 2005), pp. 39ff.

neously interesting to foreign stakeholders. At the same time, of course, one should not be oblivious to the fact that communication of international law is also directed to other governments.

Governments generally communicate with their stakeholders in a variety of ways. First and foremost they do so through the adoption of implementing legislation transposing internationally assumed obligations. Secondly, the way they vote in international conferences and organisations, as well as their financial pledges to particular international causes is informative of their position. Thirdly, their communication is evidenced by policy decisions, whether formal or informal. A formal policy decision may be to impose sanctions on a third nation or to agree to send a military contingent to a peace-keeping mission. State practice conforms to this model of formal policy decision-making. Informal policy decisions, on the other hand, may be constituted by the initiation of negotiations with third nations on particular matters without the requirement therein to reach any sort of agreement, or even to conclude the negotiations themselves. Thus, actions that lack any binding character altogether may be classified under this typology. Finally, governments may wish to communicate their specific position on international law by means of a direct proclamation to their direct stakeholders. This may be achieved by ad hoc or periodic “addresses to the nation”,²⁵ or indirectly through communications addressed to other governments. Historically, the waging of war was proclaimed through a declaration of war, which served to warn both the enemy but also one’s own nationals. Nowadays declarations of war are defunct,²⁶ but governments still issue ultimatums or otherwise

25 This is a common way of addressing the US public by the incumbent US President. These addresses may be classified twofold; on the one hand, the message conveys an official act that has only just taken place and is now being announced for the first time. For example, President Reagan’s 14 April 1986 Address on Air Strikes against Libya was meant to serve that very purpose. Available at: <<http://www.reagan.utexas.edu/archives/speeches/1986/41486g.htm>>. On the other hand, an address is simply the prelude, or sets out the justification, for State acts that will follow, as was the case with President Bush’s Address to the Nation on the day of the 9/11 terrorist attacks, and particularly his crusade against the War on Terror, available at: <<http://archives.cnn.com/2001/US/09/11/bush.speech.text/index.html>>.

26 Nonetheless, common article 2 to the 1949 Geneva Conventions still maintains the relevance of such declarations as incidents that trigger the initiation of an international armed conflict and the subsequent application of international humanitarian law. Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (N° I) 75 UNTS 31; Convention for the Amelioration of the Condition of the Wounded, Sick, and Ship-wrecked Members of Armed Forces at Sea (N° II) 75 UNTS 85; Convention Relative to the Treatment of Prisoners of War (N° III) 75 UNTS 135; Convention Relative

address the authorities of other nations either indirectly, on the occasion of public speeches, or directly through particularly addressed messages that usually take the form of warnings. Again, while the primary addressees of these forms of communication are foreign governments, the secondary addressees are also one's direct stakeholders. This is no accident and in many cases these communications to foreign governments are intended primarily for internal consumption.

There does exist one critical problem, however. How do all these forms of communication filter down to where direct stakeholders can access the information contained therein and moreover understand and decode it? The language of communication will be explained in a following section, as here we are interested in the transmission of the communication itself. It should not be presumed that States always act in a transparent manner. It is often claimed by some governments in the developing world that contracts between State entities and private investors must necessarily be cloaked under private law.²⁷ A natural consequence following from absolute contract confidentiality relates to the lack of information about those State finances pertinent to the contract. If the government decides by law that revenues are not to be made public, then the next logical step is to avoid incorporating such revenues into the annual State budget. Such revenues would either simply not exist, or because they would not have been officially declared as oil monies (or other types of revenues as the case may be) they could not be channelled into the regular budget, but into an extraordinary budget! Given that there generally exist four types of constitutional budgets, i.e. on the basis of appropriation, vote-on-account, vote-of-credit and supplementary, an extraordinary budget of this kind that would not be adopted publicly by parliament would be clearly unconstitutional. It is equally unconstitutional – or a defiance of fundamental constitutional principles – for parliament to adopt a secret, non-public, budget, yet it happens.²⁸ This practice is not

to the Protection of Civilian Persons in Time of War (N° IV) 75 UNTS 287. Threats of armed force are also prohibited under art. 2(4) of the UN Charter. See Roscini, M. Threats of Armed Force and contemporary International Law, 54 *NILR* 229 (2007).

27 This is the position in Kazakhstan the National Fund of which, for example, established by Presidential Decree N° 402 (23 August 2000), keeps out of the country's official gazette and the public eye production sharing agreements (PSAs) entered into between the government and foreign investors.

28 Reiss, H. (ed.). *Kant: political writings* (Cambridge UP, 1991), pp. 93-130, where Kant's advocacy of the principle of publicity is cited, in accordance with which all laws must be

the sole prerogative of developing countries. The USA, Russia, China and many of their allies consistently make incursions into foreign territories to apprehend alleged terrorists or criminals,²⁹ or otherwise engage in illegal renditions,³⁰ as well as sabotage private ventures through covert operations.³¹ We have already alluded to the fact that States secretly and unofficially negotiate with terrorists on some occasions. Thus, States will naturally attempt to communicate only those positions of international law that they wish their direct stakeholders to hear.

Given that very few people have access to the body of legislation that implements international agreements, let alone State practice, voting patterns and informal public decision-making within international organisations, the mode of communication must be kept simple, universally comprehensible and accessible. Much of this work is achieved through the mass media and the Internet, although these channels do not necessarily always transmit the intended message and can be antagonistic to the communicating government. It is obvious, therefore, that the best form of message transmission is that which is direct, lacks vagueness and cannot be subjected to multiple interpretations and distortions. These messages are also constructed in such a manner as to appeal to particular sentiments pertinent to the circumstances at hand. By way of example, following decolonisation in the 1950s, the newly emergent African States argued vehemently that although international law demanded the payment of adequate compensation for nationalised foreign

public so that they can be defensible and serve as a measure of justice; Bentham, J. *On the promulgation of the laws*. Chap. I. In: Bowring, J. *Bentham: the complete works* (William Tait, 1843), who stated that in order for a law to be obeyed it must be known.

29 In *USA v Alvarez-Machain*, 112 S Ct 2188 (1992); *Sosa v Alvarez-Machain et al.* (Judgment of 29 June 2004), the US Supreme Court upheld the principle *male captus bene detentus*.

30 See *Redress, time to end the smoke and mirrors: positive obligations to respond to extraordinary renditions*, memorandum to the UK Government (July 2007), available at: <<http://www.redress.org/documents/MemoExtraordinaryRendition17July07.pdf>>; *Redress, the alleged use of UK airports in extraordinary renditions and the implications for this for UK compliance with the UN Convention against Torture and other Cruel, Inhuman or Degrading Treatment* (22 Dec 2005), available at: <<http://www.redress.org/casework/JCHRrenditions22Dec05.pdf>>, in which redress discusses both reported and unreported incidents of extraordinary renditions by government bodies.

31 The Rainbow Warrior incident concerned the sinking of an environmental NGO vessel by French agents in the territory of New Zealand and while the vessel was harboured there. The NGO was monitoring French nuclear detonations in the region and gave the French bad press. See *Case concerning the difference between New Zealand and France concerning the interpretation or application of two agreements, concluded on 9 July 1986 between the two States and which related to the problems arising from the Rainbow Warrior Affair*, Decision of 30 April 1990, XX RIAA 215.

property, this was generally inapplicable in the decolonisation context because the colonisers had for too long exploited the resources of their colonies to the detriment of their people (Nyerere doctrine).³² A settlement was finally reached in the matter, but as a result of that dispute new countries generally joined the community of nations under the express understanding that they accept the rules of international law as they find them on the day of independence. The formulation and iteration of the Nyerere doctrine involved the communication of a message to multiple addressees; for the purposes of the present article this included clan members and one's own nationals. This was a powerful message that evoked the sub-national and national sentiment of the colonised addressees, among others. Its public character, as opposed to a bilateral announcement, rendered it far more potent vis-a-vis western governments because it could no longer be reneged or revoked.

Practice suggests that employing the language of international law itself in order to convey a message pertinent to international law is not necessarily a wise communication strategy. When in 2003 the Blair administration in the UK fought to convince the British public of the legality of its invasion it sought the advice of the Attorney-General.³³ Although it was widely believed by the British public at the time that the Iraqi regime did not possess weapons of mass destruction, nor links with Al-Qaeda, it reluctantly hurried behind its incumbent government for solidarity purposes.³⁴ Under the circumstances there was perhaps no better alternative, but the Blair government violated the cardinal rule enunciated earlier, according to which individual stakeholders when making value judgments about international events do so in respect of their legitimacy and not their legality. The Attorney-General's Legal Advice was clearly intended to assure the British people of the operation's legality. If it turned out, as it did, that critical facts had been exaggerated or fabricated the cloak of legality would have been not only counter-productive but also damning. Framing communications about international law through notions of legitimacy avoids all of the aforementioned pitfalls. This rule (i.e. that governments should communicate international law to their stakeholders by refraining from using the very

32 Bello, E. G. Reflections on succession of States in the Light of the Vienna Convention on Succession of States in Respect of Treaties 1978, 23 *German YIL* 296 (1980), pp. 298-99.

33 Legal advice by Lord Goldsmith, Attorney-General (March 17, 2003).

34 Norton-Taylor, R. & White, M. Intelligence chiefs tell Blair: no more spin, no more stunts, *The Guardian* 5 (June 2003), p. 1.

language of law) is subject to a single exception; the concept of “lawfare”, which is examined in the following subsection.

3.2.1. *The exceptional communicative potential of lawfare*

The concept of lawfare is typically employed in the legal and political literature to denote the communication of international law by non-State actors to the international community about the abusive behaviour of particular States. The contemporary use of the term³⁵ is linked to former US Air Force Colonel Charles Dunlap who argued that international law was actually impeding US military operations because his country’s opponents were using international law through statements or lawsuits to demonstrate that the US was waging wars that were in violation of the letter or spirit of international law.³⁶ Lawfare is essentially a continuation of war through legal means and usages, along the lines, albeit reversed, of Carl von Clausewitz’s famous pronouncement that war is a continuation of politics by other means.³⁷ It is obvious that for Clausewitz lawfare is an impediment to powerful nations, but a tool for weak nations and entities. The vilification of this type of lawfare has now become an entrenched political position of the two main target States, i.e. the USA and Israel. The 2005 US National Defence Strategy claimed that “the USA will continue to be challenged by those who employ a strategy of the weak using international fora, judicial processes and terrorism”, albeit the term lawfare was not used.³⁸ Israel’s frustration is directed at the employment of international humanitarian law by human rights NGOs and pro-Palestinian groups and their sympathisers in order to allegedly discredit Israel’s defence of its homeland. Thus many of its

35 Its origins, in fact, seem to lie in Carlson, J. & Yeomans, N. Whither goeth the Law: humanity or barbarity. In: Smith, M. & Crossley, D. (eds.). *The way out: radical alternatives in Australia* (Landsdowne Press, 1975).

36 Dunlap, C. J. *Law and military interventions; preserving humanitarian values in 21st Century Conflicts*, available at: <<http://www.duke.edu/~pfeaver/dunlap.pdf>>.

37 See Von Clausewitz, C. *On war* (1832), trans. A Rapoport (Penguin, 1968). Von Clausewitz defines war “as an act of violence intended to compel our opposition to fulfil our will”. He then famously goes on to say that “self-imposed restrictions, almost imperceptible and hardly worth mentioning, termed usages of international law, accompany it without essentially impairing its character”, p. 101.

38 Department of the Defence. *The National Defence Strategy of the USA* (2005), available at: <<http://www.defenselink.mil/news/Mar2005/d20050318nds1.pdf>>, p. 5.

senior political and military figures have been accused as war criminals and applications have been lodged before domestic and international tribunals in respect of both criminal and civil cases.³⁹ Moreover, NGOs petition governments to abide by their international obligations to promote compliance of international law by other States, thus bringing international law to the forefront of confrontation.⁴⁰

Governments, in addition to non-State actors, actively engage in lawfare themselves and when they do so they refrain from employing political or other language; rather, their communication to their stakeholders is in the language of international law because that is exactly the object of contention. The USA, for example, during the Bush Administration, routinely argued that the detained Al-Qaeda captives were specifically trained to manipulate the US legal system and that the assignment of independent counsel for the accused exacerbated this situation.⁴¹ In fact, it is officially asserted that national security forces confiscated an Al-Qaeda Training Manual in Manchester, UK, which provides instructions upon capture.⁴² As a result of this evidence it is certainly easier for the USA to justify to the American people the impeding of the work of the accused's counsel.⁴³ In this manner it is claimed that international law is a tool used by the enemy, which must be restricted; or to put it crudely, the argument is that the be-

39 See Herzberg, A. *NGO lawfare: exploitation of courts in the Arab-Israeli Conflict* (NGO Monitor Monograph Series, 2008). The author argues, inter alia, that this type of lawfare against Israel is evident in attempts to indict former Prime Minister Ariel Sharon in Belgium and Doron Almog for war crimes and crimes against humanity. Equally, this is also true in respect of civil actions in *Matar v Dichter*, 500 F Supp 2d 284 (SDNY 2007) and *Belbas v Ya'alon*, 466 F Supp 2d 127 (DDC 2006), both of which were dismissed by the courts on account of the defendants' immunities, as well as with a string of cases seeking to block trade with Israel, particularly *Corrie v Caterpillar*, 403 F Supp 2d 1019 (W D Wash 2005) and *Saleh Hasan v Secretary of State and Industry*, [2007] EWHC 2630. The application for an advisory opinion to the ICJ on the Legality of the Construction of a Wall is also cited as a form of lawfare.

40 *Al-Haq v Secretary of State for Foreign Affairs et al.*, which is currently ongoing and concerns the failure of the UK government to act to promote compliance with humanitarian law under arts. 1 and 146 of Geneva Convention IV (1949) in respect of Operation Cast Lead in December 2008 that left 1300 civilians dead in the Israeli offensive against Gaza.

41 Yin, T. Boumediene and lawfare, 43 *Univ Richmond LR* 865 (2009), pp. 879ff.

42 *Al-Qaeda training manual*, UK/BM-176 to UK/BM-180, Lesson eighteen: Prisons and detention centres, available at: <http://www.usdoj.gov/ag/manualpart1_4.pdf>. It is somewhat far-fetched to claim that Lesson Eighteen of the Manual exhorts Al-Qaeda members to lawfare; this is hardly its purpose.

43 See Luban, D. Lawfare and legal ethics in Guantanamo, 60 *Stan L Rev* 1981 (2008).

nefits of international law must only accrue to self-professed democratic peoples and nations, given that everybody else only wants to manipulate it! Israel has taken its lawfare campaign a step further from the USA, by not simply defending its policies and discrediting the “enemy”, but by actively employing international law to promote and legitimise its practices. Daniel Reisner, a former international law advisor to the Israeli Army, stated that his job consisted of finding “*untapped potential in international law* that would allow military actions in the grey zone: International law develops through its violation... an act that is forbidden today becomes permissible if executed by enough countries [...] If the same process occurred in private law, the legal speed limit would be 115 kilometres an hour and we would pay income tax of 4 percent”.⁴⁴ Reisner offered as example the tactic of targeted killings introduced by Israel and which allegedly had subsequently been accepted by the majority of States.⁴⁵ To a large degree, these attempts aim to demonstrate that the existing rules of international law on a particular matter cannot meet the exigencies of contemporary security situations, or that an exception to an otherwise sufficient rule is warranted for humanitarian purposes, as was the case with the NATO Kosovo campaign in 1999.

3.3. Communication about institutions and organisations by States

By far the most frequent international law subject of communication by States to their stakeholders relates to institutions and intergovernmental organisations. By institutions we mean all types of processes through which international norms are assessed, as is also State behaviour; in their majority these processes involve either a judicial or a quasi-judicial function. Given that individuals only at best understand international law in the abstract and as being indivisible from its political dimensions, institutions and international organisations are much more approachable and are subject to objectification. This is not, of course, to say that international organisations are perceived as a-political by individual stakeholders.

44 See Weizman, E. *Lawfare in Gaza: legislative attack* (1 March 2009), available at: <<http://www.opendemocracy.net/article/legislative-attack>>.

45 See Melzer, N. *Targeted killings in International Law* (Oxford UP, 2008), who argues that the lawfulness of targeted killings can under extreme circumstances be justified in respect of suicide bombers and some hostage-taking operations and that no new rule is required because the existing legal framework is more than sufficient.

Let us begin with an examination of State critiques on institutions. The institution of arbitration, whether of the investment or the commercial type, is generally employed by States and merchants as a means of settling their disputes outside the regular court systems. Indeed, one of the seminal reasons for choosing arbitration over litigation is that it removes potential bias from local courts in favour of the local party. This is even more poignant where the local party is a governmental entity. Although Saudi Arabia was once an ardent supporter of arbitration in its dealings with foreign investors, particularly in the field of hydrocarbon contracts, from the dawn of the decolonisation era it reversed its position dramatically. This development occurred because in some key arbitrations to which it was a party the arbitrators allegedly undermined Islamic law as the applicable law of the relevant contracts on the ground that it was either insufficiently elaborate and therefore unsuitable for settling business disputes,⁴⁶ or that it simply could not secure the interests of private parties.⁴⁷ The rejection of Islamic law (as a necessary extension of local laws premised exclusively on the *Shari'a*) is even more remarkable if one considers that the parties had agreed that Islamic (or Saudi law, where relevant) law was in part or in whole the applicable law of the contract.⁴⁸ As a result of the *ARAMCO* award the Saudi government adopted Resolution 58, which effectively closed the door to all government agencies to arbitrate with third entities.⁴⁹ Saudi Arabia's position on the institution of arbitration is not unique. Indeed, developing States in Africa had until very recently vociferously opposed arbitration as a dispute settlement method, arguing that it was geared towards vindicating neo-imperialist commercial agendas and that it was totally controlled by Western States and their corporations.⁵⁰ Although many of these criticisms are true, States generally decide to communicate about institutions when they have failed to achieve their objectives through them; States seldom, if ever,

46 *Petroleum Development (Trucial Coasts) Ltd v Sheikh of Abu Dhabi*, 18 ILR 144 (1951), per Lord Asquith, at p. 149; *Ruler of Qatar v Intl Marine Oil Co Ltd*, 20 ILR 534 (1953), per Bucknill, J. at p. 545.

47 *Kingdom of Saudi Arabia v ARAMCO*, 27 ILR 117 (1963), at p. 169.

48 As a result, the arbitrators viewed the contracts as having been internationalised. See Anghie, A. *Imperialism, sovereignty and the making of International Law* (Cambridge UP, 2005), pp. 225-28.

49 Council of Ministers Resolution N° 58 of 03/02/1383 H (25/06/1963).

50 This is also true in other parts of the developing world. See Sornarajah, M. The Uncitral model law: a third world viewpoint, 6 *Journal of International Arbitration* 7 (1989), pp. 15-16.

thank institutions following a victory. What in fact the Saudi government and African States were relaying about the process of arbitration is that it was institutionally unfair and biased in favour of Western interests. In the case of Saudi Arabia there was no hint in its communication that Islam was also under attack, which may have had dire consequences in the country's broader trading relations. The obvious implication and perhaps the initial aim of these communications (i.e. also of African nations) was to limit Western power and influence over trade vis-a-vis the weaker commercial bargaining powers of Africans and Saudis. However, at the time these policy decisions were made, i.e. in the aftermath of decolonisation, they rather expressly convey the message of these nations' new-found sovereignty and the death of neo-imperialism. The message to all stakeholders, including foreign States, is that the rules of the game are no longer dictated by a single authority. Thus, one of the functions of communications about institutions, especially when these are derived not from powerful countries is to assert sovereignty and disengagement from foreign forces.

Powerful nations, on the other hand, need not display their prowess and sovereignty to other countries, nor to their direct stakeholders. Indeed, such a display would be perceived as a sign of weakness, rather than power. Powerful nations tend to communicate about institutions to their direct stakeholders when they lack numerically superior alliances to sway policies in their favour, or where they fail to secure desired degrees of exceptionalism. The communication becomes crucial in those cases where the institution in question is of a globally benevolent character that one would expect a powerful nation not only to partake but also support. The mood of the communication therefore, without exception, assumes a very particular form; it attacks the institution as being weak, criticises it for supporting standards that are much lower than the existing standards of the critiquing State and finally contends that the institution is dominated by like-minded States intent on attacking that particular powerful nation from the very outset. In order to alleviate the concerns of those sceptical stakeholders that may once have sided with the incumbent government, the communication will culminate in a strategy where the government under consideration will claim to support and encourage the overall aims of the institution in its international relations, but not the institution itself. It should be noted that these observations are true of democracies and not authoritarian or generally undemocratic regimes in which governments do not feel the need to communicate their policy decisions to their stakeholders.

The USA is a perfect case study for testing these hypotheses, which are in fact based on an examination of its pertinent foreign policy practices. In times recent the USA has declined to join five major treaty regimes of global importance; the International Criminal Court, the 1966 International Covenant on Civil and Political Rights (ICCPR)⁵¹ –although it subsequently acceded in 1992– Protocol II of 1977 Relating to the Protection of Victims in Non-International Armed Conflicts, the 1997 Kyoto Protocol⁵² and the Ottawa Land Mines Convention.⁵³ In respect of all of these treaty regimes the USA demanded the recognition of exceptionalism, whether directly as per its demand to retain landmines in the border separating North from South Korea,⁵⁴ or indirectly by demanding that the Security Council, rather than the Court, should determine breaches of the peace and acts of aggression.⁵⁵ In equal manner the USA criticised these treaty regimes as either being sub-standard in comparison with its own legislation (i.e. the ICCPR),⁵⁶ or as being unrealistic (Kyoto), or as exacting too much from itself and its allies and relatively little from every other nation (ICC, Protocol II and the Land Mines Convention, as well as the Kyoto Protocol). In relation to the latter argument the claim is that the allocation of responsibilities by far burdens the USA, or that its particular interests and existing commitments are far greater than those of any other nation. The underlying and overarching claim is that accession to these institutions necessarily renders the USA the direct target of institutional measures, as well as an object of targeted attacks by its enemies. As a result, the message to its direct stakeholders is that while

51 999 U.N.T.S. 171.

52 1997 Kyoto Protocol to the UN Framework Convention on Climate Change, 37 *ILM* 22 (1997).

53 1997 Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction, 36 *ILM* 1507 (1997).

54 Wurst, J. *Closing in on a landmine ban: the Ottawa Process and US Interests*, *Arms Control Association* (June/July 1997), available at: <http://www.armscontrol.org/act/1997_06-07/wurst>. See s 896 of the US Landmines Elimination Act of 1998, introduced by Senators Leahy and Hagel which imposes a moratorium on the use of landmines, even in the Korean Peninsula, unless they are deemed indispensable.

55 Testimony of David Scheffer before the Senate Foreign Relations Committee, 23 July 1998, available at: <http://www.state.gov/www/policy_remarks/1998/980723_scheffer_icc.html>.

56 Of course, when the USA acceded it appended a large number of reservations, understandings and declarations. See US Reservations, Declarations and Understandings, ICCPR, 138 Cong. Rec. S4781 (2 April 1992).

the relevant law itself will be applied unilaterally by the US government, exceptionalism is of paramount importance on account of national security interests, whereas the rejection of the institution protects the State from unprovoked and personalised suits and accusations. The aim of the communication essentially seeks to demonstrate that the State itself is far superior in terms of its prevailing substantive law and implementation as compared to the “disgraced” institution and that refusal to accede is beneficial rather than disadvantageous. It is evident that negative communications about institutions are necessarily complex and multifaceted because in most cases it is hard to convince one’s direct stakeholders that otherwise benevolent institutions (against landmines, global climate change, in favour of human rights, etc) are unfair and bad.

As far as communications about intergovernmental organisations are concerned, two general observations should be made from the outset. Firstly, that States do not as a rule criticise international organisations in which they are not members, unless they are ex members or ex signatories thereto.⁵⁷ Secondly, and by logical implication, unlike the case of negative criticisms against institutions in respect of which the criticising State is usually not a party, negative communications about international organisations are generally made solely by parties to these organisations. Thus, the criticism is intended to also generate intra-institutional effect in order to challenge particular power balances within the organisation, apart from its specific communicative effect to that country’s stakeholders. But why would States want to communicate negative things about an organisation in which they are willing and active members?

The answer to this question lies in the pursuit of intra-institutional objectives and/or in order to rally domestic support for possible violation of the internal law of the organisation by the criticising State. Consider, for example, the various challenges against the United Nations by its member States. Emerging regional powers such as India, Egypt, Japan, Brazil and Germany are desirous of permanent seats in the Security Council and are critical of the Organisation for refusing to enter into structural reforms.⁵⁸ On

57 Exceptionally, the USA has criticised the European Communities in respect of its anti-competition policy. See Sandage, J. B. *The Wood Pulp Decision and its implications for the Scope of EC Competition Law*, 26 *CML Rev* 137 (1989).

58 See, e.g., Japanese Ministry of Foreign Affairs, *Reform of the UN Security Council: Why Japan should become a permanent member* (March 2005), available at: <<http://www.mofa.go.jp/policy/UN/reform/pamph0503.pdf>>. See also UK-France Joint Summit Declaration of 27 March

the other hand, persistent violators of human rights, notably Saudi Arabia, Central Asian republics, China and others mount constant attacks against the UN's human rights organs and institutions, accusing them of bias and First World arrogance. They constantly promote the mantra of cultural relativity,⁵⁹ which they believe that the UN ignores to their detriment. Moreover, the USA accuses the UN of institutional weaknesses and failures and of burdening it with excessive arrears, which it fails to honour until desired reforms take place.⁶⁰ It is no wonder therefore that in seven consecutive years 65 percent of Americans consider that the United Nations is doing a poor job.⁶¹

Global international organisations, particularly the United Nations, are not merely exclusive clubs that promote the interests of their members; rather, to a large degree they represent and promote independent currents of thinking and policy in certain fields that will ultimately conflict with the relevant political ideologies of many of their members. This is particularly true in respect of those organs and personnel that are endowed with independence from their countries of nationality. This is critical to understanding why intra-institutional alliances are sometimes impossible to achieve. We have already alluded to the fact that States mostly communicate negative messages about international organisations to their direct stakeholders where they are about to, or have indeed violated obligations arising therefrom. This process involves demonising the organisation in order to explain the

2008, which supported the granting of permanent member status in the Security Council to Germany, Brazil, India and Japan, as well as permanent representation from Africa. Available at: <<http://www.number10.gov.uk/Page15144>>.

59 See Donnelly, J. Cultural relativism and universal human rights, *6 HRQ* 400 (1984).

60 It is instructive that as far back as 1967 President Nixon had included the UN in a list of "old institutions that are obsolete and inadequate ... set up to deal with a world of twenty years ago". Keefer, E. C. *The Nixon Administration and the United Nations: It's a damned debating society*, available at: <http://www.diplomatie.gouv.fr/fr/IMG/pdf/ONU_edward_keefer.pdf>, p. 1. Moreover, President George Bush's envoy to the UN, John Bolton, was a long-standing UN foe, who publicly stated that "there is no such thing as the United Nations. There is only the international community, which can only be led by the only remaining superpower, which is the United States". Watson, R. Bush deploys hawk as new UN envoy, *The Times* (8 March 2005), available at: <http://www.timesonline.co.uk/tol/news/world/us_and_americas/article421888.ece>.

61 Saad, L. Americans remain critical of the United Nations, *Gallup* (13 March 2009), available at: <<http://www.gallup.com/poll/116812/Americans-Remain-Critical-United-Nations.aspx>>. Nonetheless, the same empirical data shows that the majority of the American public does want the UN to have a meaningful function.

rationale of the infraction. Yet, the fact that nations very rarely willingly terminate their membership to international organisations is evidence of their knowledge that their citizens are generally happy with the result of membership thereto. As a result, communications about organisations are not generally focused on individual stakeholders but are instead directed towards intra-institutional rivalries. This in turn gives rise to so-called organised hypocrisy (OH) within international organisations.⁶² It is perhaps only when a State receives a severe blow to its sovereignty from an international organisation that it may wish to communicate its vehement dissent to its direct stakeholders in order to justify subsequent drastic measures. However, this assumption has not been verified by the practice of medium-sized States, as was the case of Yugoslavia that did not seek to disrupt its relations with the UN following recognition by member States of Kosovo's unilateral declaration of independence.

4. The language of communication

The language and particular symbols of international law are distinct from the general phraseology within which it is uttered. When combined, the resulting discourse may have a meaning of its own. This meaning is transmitted by a different code than that of the language itself.⁶³ In this section we are interested in understanding the intended meaning of the language conveyed by State agents and this in turn may help us understand what type of decoding they expect their stakeholders to undertake.⁶⁴ It may also explain whether communicating governments expect some degree of interaction or dialogue (e.g. intensified lobbying, protests, withdrawal of public support, etc) from their interlocutors. Given that this article is not meant to critically expose and analyse the various schools of semiotics and linguistics, I will be assuming from the outset that communication is a means by which a system interacts with its external environment and by so doing lends itself

62 See Krasner, S. *Sovereignty: organised hypocrisy* (Princeton UP, 1999). This may be defined as the existence of contradictions between decisions, declarations and action that arises from inconsistent material and normative-ideational pressures on organisations. It is endemic to all organisations.

63 Jackson, B. S. *Semiotics and legal theory* (Routledge, 1987), p. 12.

64 See generally the standard work of Habermas, J. *The theory of communicative action: reason and rationalisation of society* (trans. T. McCarthy, MIT Press, 1984).

to the characterisation of an open rather than a closed system.⁶⁵ Within information theory a tripartite model of communication was developed. According to this, a *message* is derived from a source, which is then conveyed along a *channel* and from there to a *receiver* that interprets and decodes the message.⁶⁶ It is obvious that the effectiveness of communication in this model depends on the reliability and quality of the channel. If the channel conveys the message without distortion (the so-called background noise), assuming it has that capacity, it will reach its receivers in much the same way as it was intended. The meaning, according to this theory, is precisely in the message, but the theory itself may be criticised for failing to take into consideration the variety of contexts and environments inherent in the communicative process.⁶⁷ Yet, it helps overcome the theoretical distinction between communication and signification, most prominently enunciated by Mounin. He argued that whereas communication involves the intention to convey a message through a sign (e.g. words or actions), the unintended conveyance of a message cannot by implication constitute communication, but something of an inferior character, which he termed “signification”.⁶⁸

In previous sections we have elaborated on the sources of the message, as well as the reasons and context of it being conveyed, as well as the process whereby it reaches its intended receivers. What is missing from this equation is the language of the message and the potency of the channels through which it is communicated. When the content of the message is generally ambiguous, difficult to understand although overall very positive, or antithetical to the prevailing views of the majority it is usually intentionally distorted when conveyed through the channel. Distortion in this sense is not necessarily tantamount to lying;⁶⁹ over-simplification or

65 Wiener, N. *Cybernetics: control and communication in the animal and the machine* (Wiley & Sons, 1948).

66 Shannon, C. E. & Weaver, W. *A mathematical model of communication* (Illinois UP, 1949).

67 This is even more relevant in the case of law, which is characterised by a culture of its own and is actually said to be culturally embedded. Cotterrel, R. *Law, culture and society: legal ideas in the mirror of social theory* (Ashgate, 2006), p. 81.

68 See Jackson, *supra* note 63, pp. 21-23.

69 This is not to say that even democratic governments do not lie to their people. Consider, for example, the Spanish government’s announcement on the day of the Madrid train bombing of 11 March 2004 that ETA was behind the carnage. Richburg, K. B. Spain campaigned to pin blame on ETA: despite evidence to Contrary Basque Group was Focus in Blasts, *The Washington Post* (16 March 2004), p. A1. The reason for blaming ETA was because general

emphasis on positive features as opposed to negatives will do just as well. The medium of the channel is also responsible for dispersing the meaning of an otherwise straightforward message. This technique is as old as time and the Old Testament, for example, is abundant with prophecies, whereas the New Testament contains many parables.⁷⁰ In both cases, the sources of the message presumed that the receivers would be unable to understand its meaning and hence they employed parables and prophecies to both simplify and mystify the message.

In contemporary politics, governments do not always think that their position on international law is complex enough to resist conveying it as it is; most serious issues are generally straightforward if one removes all the details and elaborations that legal professionals [by necessity] cloak them with –i.e. professional legal language accessible only to a closed number of individuals. Rather, governments fear further distortion or exposure by opposition groups, of whatever nature these may be. The language thus of international law, as far as the interaction between the governing and the governed is concerned, is not legal at all. There are numerous communicative reasons for this choice. Firstly, the asymmetric knowledge of this language necessarily means that the source will not be able to convey the desired message to the recipients. Secondly, and as a result, an appropriate semantic system of communication must be employed in such a way that facilitates meaningful interaction. This language is usually somewhere in the middle between metaphors (or parables), which are indirect, and the medium of

elections were due in three days and the incumbent Zapatero government was well aware that the Spanish public had been opposed to Spain's leading role in the Iraq war fearing retaliatory terrorist attacks on Spanish territory.

⁷⁰ Origen, one of the early Church fathers of the 3rd century, believed that the Bible (both the Old and New Testaments) yields three forms of understanding. These themselves he allegorised in accordance with the physical and mental composition of man; i.e. as consisting of body, soul and spirit. These are for Origen the three levels of understanding of the Bible. The body represents the literal meaning, the soul the moral meaning, while the spirit represents the highest theological meaning. This is well illustrated in his work *First principles*, Book IV, chapter II:2. Without rejecting historical truths in the Scriptures he does nonetheless strongly advocate that each word has a deeper allegorical meaning that is not apparent to everyone, but not only to those who earnestly seek the truth. He was not the first to consider the existence of allegory and typology in the scriptures, as Philo, a Jew, before him had done in relation to the Old Testament and a number of commentators have pointed out his influence on Origen, at least in part. See generally Hanson, R. P. C. *Allegory and event: a study of the sources and significance of origen's interpretation of scripture* (Westminster/John Knox Press, 2003), pp. 253ff.

international law, which although direct is perceived as incomprehensible. This intermediate language assumes three general types: that of political rhetoric, funnelling of particular emotions and the language of money and finances. These roughly correspond to the three faculties of the soul, that is the rational, the concupiscible (appetitive) and the irascible (θυμικόν).

Thus, political rhetoric is a language that everyone understands and is directed at the rational faculty of its recipient. For example, when the UK Prime Minister declared that although he was unhappy with having to invade Iraq in 2003 this was nonetheless held to be necessary for regional and world peace, he was in fact setting out a rational argument that correlated to its recipients' notions of security. Conversely, our concupiscible faculty is tantalised by matters that affect us personally and in our daily life; unlike the war in Iraq. Most typically, this involves spending power, job security and the free flow of consumable goods. People, understandably, want to feel secure in respect of these three. In the aftermath of the 2008 credit crisis the governments of the developed world refused to discuss with their stakeholders the inability of bilateral or multilateral cooperation through existing institutions. Equally, no mention was made about the poor of the world; rather, the exclusive focus was on convincing one's citizens that every effort would be made not to lose jobs and that measures would be put in place to provide financial incentives and stimuli.⁷¹ No doubt, the language of money talks to everybody's heart. Finally, many governments frequently address their stakeholders' irascible faculty in order to divert attention from other matters. Successive UK governments have, for example, branded the European Communities, and particularly the Commission, as the "Brussels bureaucrats" with the aim of appeasing public unrest over certain EC policies, while refusing to reveal preferential treatment in other areas.⁷² Equally, the lambasting of Iceland by British Prime Minister Gordon Brown in 2008 and the imposition of anti-terrorist legislation against the country was meant to side with the anger of British nationals that had lost money through Icelandic banks.⁷³ Finally, the horrific treatment of suspected terrorist elements

71 See Cohen, J. E. The polls: can presidential rhetoric affect the public's economic perceptions? *33 Presidential Studies Quarterly* 408 (2005).

72 The usual accusation is that the EC Commission goes to great lengths to adopt new legislation on the most trivial issues. See Cowgill, A. Letter: Major against the Brussels Bureaucrats, *The Independent* (26 March 1994), available at: <<http://www.independent.co.uk/opinion/letter-major-against-the-brussels-bureaucrats-1431678.html>>.

73 The UK Treasury froze the assets of the Icelandic bank Landsbanki Islands under the

by the USA in the aftermath of 9/11 was explained by reference to their inhumanity and the ensuing justification of torture was meant to funnel and sustain public anger.

The simplicity of the non-legal language employed to convey meanings about international law is consistent with the findings regarding so-called dialogic models in the field of conversation studies. Therein, it is postulated that meaning is conditioned by the interlocutors through the course of their dialogue; thus, we cannot talk of *meaning* outside the parameters of a particular conversation and its distinct interlocutors. When a conversation commences it is governed by so-called conversational rules, which are co-operative in nature. For the purposes of this article, the philosopher Paul Grice identified numerous conversational maxims, such as avoidance of information overflow, relevance, brevity, avoidance of ambiguity and obscurity of expression.⁷⁴ These findings correspond with our earlier observations about the communication of international law, whose language is difficult and is thus conveyed to its stakeholders through other communicational avenues. The dialogue between a government and its stakeholders is not obviously conversational in the strict interactive sense, but the level of response and understanding by stakeholders is quantifiable through opinion polls, media coverage, reactions of public interest groups and NGOs and finally through the results of elections.⁷⁵

5. Conclusions

This article did not concern itself with the usual, but generally, true accusations against States about the existence of deceit mechanisms and the fabrication of stories by the media. This is not something an international

2001 Anti-Terrorism, Crime and Security Act. See Landsbanki Freezing Order 2008, SI 2668 (8 Oct 2008), in the preamble of which the Treasury made explicit use of powers emanating from ss 4 and 14 of the 2001 Anti-Terrorism Act.

74 See Taylor, T. J. & Cameron, D. *Analysing conversation: rules and units in the structure* (Pergamon Press, 1987), p. 83.

75 In large part, the Greek elections of 2004 were lost by the then government because in 2001 it had caused outrage and massive demonstrations by deleting the entry on religious conviction from personal ID cards. The government justified its stance by reference to a binding requirement under EC law. This is a typical case of failing to interact and of simply message-throwing. See also Chrysolaras, N. Why orthodoxy? Religion and nationalism in Greek political culture, 4 *Studies in Ethnicity and Nationalism* 40 (2008).

lawyer could easily verify in each particular case, but it is not excluded from the underlying assumptions of the present study where proof is amply provided. Rather, focus was placed on ascertaining how and at what level ordinary people understand international law and the means by which governments convey international law to their people. As to the first, individual stakeholders find international law difficult to understand generally and thus view it through other lenses and do not distinguish between a political action and its applicable law. Moreover, stakeholders evaluate acts of the State on the basis of broadly-understood legitimacy, rather than on notions of legality, primarily because of the law's obscurity and indeterminacy. As a result, governments refuse to talk in the language of international law, even by watering it down, and employ other means of communication and languages, particularly that of politics. This intermediate language assumes three general types: that of political rhetoric, funnelling of particular emotions and the language of money and finances, all of which correspond to the three faculties of the soul, that is the rational, the concupiscible (appetitive) and the irascible. Exceptionally, governments are willing to communicate in the very language of international law where they attempt to defend themselves from instances of lawfare waged by civil society, or where they actively engage in lawfare against such non-State actors. Lawfare presupposes that the relevant actors have some understanding of the underlying issues or that they broadly comprehend the general subject area. In most cases, the underlying issues are not hard to grasp; international crimes and the use of force.

Communication to one's stakeholders is only mandatory by transparent government rules, but even if every law, treaty or other agreement of a State was freely available on paper and on the Internet, this does not mean that either transparency or communication is effectively practiced. One way of making something untraceable and obscure is by "hiding" it in a sea of information. Openness requires knowledge about those international issues that have a direct impact on the lives of a country's stakeholders, such that may encompass relations with neighbouring States, the global environment and others that although do not concern daily life they are nonetheless of true concern. It is hoped that the keen reader will be more able to identify the deeper meaning of communications about the law from States.

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