Customary International Law and the Law of the Sea in U.S. Courts

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Michael Socarras
McDermott Will & Emery LLP
Washington, D.C.
202-361-9231

What is customary international law?

- Federal statutes must be construed in accord with CIL:
- *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64 (1804) (Marshall, C.J.) (an act of Congress will "never" be construed to violate "the common principles and usages of nations").
- CIL is positive law, not natural law:
- *The Antelope*, 23 U.S. (10 Wheat.) 120-21 (1825) (Marshall, C.J.) ("That the [slave trade] is contrary to the law of nature will scarcely be denied. . . . But . . . the usage of all, could not be pronounced repugnant to the law of nations, which is certainly to be tried by the test of general usage").

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- CIL supersedes the constitutional grant of war powers:
- *The Paquete Habana*, 175 U.S. 677, 700 (1900) (customary international law makes U.S. liable for seizure of fishing vessel in the exercise of constitutionally unchallenged war powers).
- CIL protects property rights and grants corporate status:
- *Municipality of Ponce v. Roman Catholic Apostolic Church in Porto Rico*, 210 U.S. 296 (1908) (Catholic Church has corporate status and property rights binding as international law in US courts, as evidenced by a US treaty that confirms custom, Spain-Papacy concordats, Spanish laws since Columbus, and “all systems of European law [since] the fourth century”).

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- CIL supersedes constitutional grant of commerce power:
- *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 47 (1996) (Congress clearly intended to regulate commerce by abrogating Florida's sovereign immunity, but the federal statute doing so is void as contrary to the "jurisprudence of all civilized nations").
- CIL is not derived from nor limited by the Constitution:
- *Alden v. Maine*, 527 U.S. 706, 713 (1999) ("the sovereignty of the States neither derives from, nor is limited by, the terms of the Eleventh Amendment" but rather is "a fundamental aspect of the sovereignty which the States enjoyed before the ratification of the Constitution, and which they retain today . . .").

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- CIL remains evolving U.S. law:
- *Sosa v. Álvarez-Machaín*, 542 U.S. 692 (2004) (claims under law of nations "must be gauged against the current state of international law").
- A ratified U.S. treaty contrary to state practice is a political commitment, not law:
- *Medellín v. Texas*, 128 S.Ct. 1346 (2008) (neither ICJ Statute nor Optional Protocol, nor a Presidential determination, suffice to make ICJ judgments automatically binding in domestic courts where no state follows such a practice).

What is the law of the sea?

- ". . . [UNCLOS] also contains provisions with respect to traditional uses of the oceans which generally confirm existing maritime law and practice and fairly balance the interests of all states." United States Oceans Policy, Statement by the President (Mar. 10, 1983).
- "The argument that except for Part XI, the Convention codifies customary law or reflects existing international practice is factually incorrect and legally insupportable." Tommy Koh (adapted from statements by the President of the Third Conference on Dec. 6 & 11, 1982).

What is the law of the sea?

- An act of Congress should be construed contrary to LOS:
- *U.S. v. Alaska*, 503 U.S. 569, 588 n.10 (1992) ("Under international law, artificial alterations to the coastline will extend a country's boundaries" (citing Art. 8 of Territorial Sea Convention and Brief for U.S. on UNCLOS as CIL) but Submerged Lands Act requires opposite conclusion).
- A state may pick and choose aspects of EEZ jurisdiction:
- *Mayagüezanos por la Salud y el Ambiente v. U.S.*, 198 F.3d 297, 305 (1st Cir. 1999) ("Whatever the scope of the United States' potential powers, either multilaterally or unilaterally, over the EEZ, it is clear that the United States has not exercised any such powers with respect to the transport of nuclear waste").

What is the law of the sea?

- Court decisions evidence whether UNCLOS is CIL:
- *Odyssey Marine Exploration, Inc. v. Unidentified, Shipwrecked Vessel*, 675 F.Supp.2d 1126, 1147 (M.D.Fla. 2009) (whether there is a CIL norm to resolve "disputes between competing sovereigns over underwater cultural heritage discovered in international waters" should be resolved in light of whether any state's court has ever applied Art. 149 of UNCLOS).
- UNCLOS CIL is not *jus cogens* and thus not binding:
- *Perforaciones Exploración y Producción v. Marítimas Mexicanas, S.A*., 356 Fed.Appx. 675, (5th Cir. 2009) (UNCLOS environmental claims involve aspirational, non-binding norms, unlike *jus cogens* norms against genocide, torture or crimes against humanity).

Errors in the Restatement (Third) of Foreign Relations Law Part V

- Four 1958 conventions "codified the law as it had grown up over two centuries, including also the law of the continental shelf (515), which had developed since 1945."
- ". . . the Convention as such is not law of the United States."
- Except for deep sea mining provisions, the "substantive provisions of the Convention" are accepted by "express or tacit agreement" and "consistent practice" "as statements of customary law binding upon them apart from the Convention."

Example of where Rest. errors lead

- Sec. 521 Freedom of the High Seas

  Comment b. *Reservation of the high seas for peaceful purposes*. Article 88 of the LOS Convention specifies that the "high seas shall be reserved for peaceful purposes." That provision does not preclude the use of the high seas by naval forces. Their use for aggressive purposes, which would be in violation of Article 2(4) of the Charter of the United Nations . . . , is forbidden as well by Article 88.

Implications for LOS

- CIL is the only form of international law that the S.Ct. has consistently upheld for two centuries.
- The S.Ct. is increasingly reluctant to enforce treaties as law.
- The S.Ct. is likely to look to what the international community of states actually does, not what they commit to do.

Implications for UNCLOS

- Whether a particular provision in UNCLOS is CIL (i.e. U.S. law) requires extensive and detailed legal analysis of evolving state practice worldwide.
- UNCLOS is likely to be enforced as CIL under S.Ct. authority if it reflects custom.
- UNCLOS is either law or a vision of the future; it can’t be both, at least in the U.S.

UNCLOS Ratification

- Customary LOS is more clearly U.S. law than the treaty.
- UNCLOS ratification would not help make it law; treaties are presumed not to create private rights and may not be self-executing.
- A debate over self-execution and private rights under UNCLOS would be deeply confusing; would certain norms be ‘self-executing’ as CIL while others are not?
- Senate ratification of UNCLOS may be necessary as a matter of U.S. policy, but it would only make a lawyer’s job harder.
- What U.S. lawyers need is a comprehensive, evolving analysis that identifies UNCLOS provisions that the international community states follows, in actual practice, from a sense of legal obligation.