

Making international law work

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Pirates operating off the Horn of Africa (Credit: africacenter.org)

Knowing or establishing the law in a particular situation is only the beginning of a lawyer's work. The real effort and skill lies in translating abstract legal principles into practical realities, UK arbitrator Vaughan Lowe QC has argued.

Lowe's speech – which considered international lawyers' approach to piracy off the Horn of Africa and chlorofluorocarbon gases among other problems – marked this week's launch of a new senior research fellowship in public international law at the British Institute of International Comparative Law, commemorating the late arbitrator and international lawyer **Sir Arthur Watts QC**.

The purpose of the fellowship is to put the practical application of public international law at the heart of BIICL's work. The institute is appealing for money to endow it, with an appeal target of £500,000.

Making law effective

The speech was delivered at Freshfield Bruckhaus Deringer's London office by public international lawyer **Colin Warbrick**, after Lowe was taken suddenly ill.

While it considered the role of practitioners, scholars and institutions such as BIICL in rectifying deficiencies in international law, its focus was on how to make the law effective.

For a law to be effective we do not need to see "obsessive and literal conformity" with its letter, Lowe argued. "One characteristic of a civilised society is surely that its citizens have the confidence to break a rule when the literal application of that rule

is both senseless and harmful (I have in mind the bus driver who refused to allow a motorist whose car was on fire to use the fire extinguisher on the bus because he needed permission from head office).”

“The effectiveness of the law does not even consist in 100 per cent success in imposing the law as reasonably interpreted,” he continued. “In allocating resources to policing and to other social purposes such as health, education and the infrastructure of modern life, we implicitly accept that a certain level of law-breaking will go unpunished and undetected.”

Effectiveness is rather “a level of conformity with the law that makes the decades that each of us spends on this planet not only tolerable but also in a broad sense ‘just’,” he explained. We have to weigh up the desired level on a case-by-case basis, bearing in mind tensions such as those that exist between terrorism laws and civil liberties.

Only thus can a state become “an essentially law-abiding” place rather than “a nation of spivs and chancers playing the law up to its literal limits and then wriggling, grub-like, through the nearest convenient wormhole”.

Moulding international law

When tailoring international law to the conditions of a domestic legal system there is no “one size fits all” approach, Lowe insisted. In every state, international law “needs to be moulded, modulated to fit in with the national legal system and institutions”.

A good example of this is the manner in which states have addressed piracy off the Horn of Africa, he said. The recent rise in the problem has led some to argue that new treaties, or a dedicated international court to deal with the problem, are needed. In 2009, states adopted the Djibouti Code of Conduct, which restates some existing international law principles.

But Lowe said none of these are needed as much as ships to police the area and arrest procedures that would support successful prosecutions in domestic courts. The trial of alleged pirates in states near the place of arrest is “far more satisfactory than requiring the arrested vessel to sail home with prisoners camped out in the restricted accommodation on board ship, for trial in the flag state”, he said.

In particular, comprehensive protocols are needed on how boardings, arrests and seizures should take place and be recorded to satisfy “the evidential and procedural requirements of the laws of the state where any eventual trial takes place”.

He noted the Kenyan law requirement that, in criminal trials concerning the unlawful use of a weapon, the weapon be produced in evidence. This clashes with the common practice whereby arresting naval officers throw pirates’ weapons overboard to put them out of use, he said.

Turning his attention to international environmental law, Lowe observed that the ban on CFCs in the Montreal Protocol of 1987 worked because there was “a ready alternative in the market”.

“The proposed ban on greenhouse gases is failing because it is cutting across not only entrenched interests but, more potently, across the aspirations of the industrialising world,” he argued. Lawmakers have to be prepared to take different approaches in response to different problems and work “with the grain”.

He cited some recent examples of innovative thinking – including the UK’s method of stopping a Russian ship sailing under the flag of Curacao, the MV *Alaed*, which was delivering helicopters to Syria.

“The captain knew enough international law to chart a course avoiding the territorial seas of the UK, Denmark and the Netherlands; but the voyage was thwarted by the cancellation of its insurance cover,” he said. “Enlisting market mechanisms as an alternative to the possibility – said to have been contemplated by the British government – of stopping it in British waters was an elegant and effective way of securing compliance with the law”.

Other countries have used domestic law, such as the US’s Alien Tort statute, to enforce their international obligations.

What mechanisms are needed?

A state’s “internalisation of the rules of the international law” is an important step towards effective implementation of the law, Lowe suggested. Organising bureaucracies – whether corporate or governmental – can make the check for consistency with international law “as much a part of the routine as [...] the check for compliance with national law”.

But Lowe emphasised that “it is not just a matter of box-ticking”.

“Laws should be applied deliberately and thoughtfully, not mindlessly and regardless of the consequences” and with a “modicum of discretion”, he advised.

To work out what methods of enforcement work best, Lowe proposed “the collection and compilation of information on domestic responses to international legal mechanisms [...] exactly the kind of exercise at which BIICL excels”.

Such a comparison could have far-reaching effects, he claimed - just as European navies’ implementation of piracy laws that are compliant with the European Convention on Human Rights has led to improvements in the criminal justice systems of East African states. “Prisoners, and their lawyers, see persons accused of piracy benefitting from prison conditions and court procedures that are convention-compliant (and financed in part by the arresting states) and ask why land-based robbers and brigands do not have the same advantages,” he explained.

The need for a dualistic, empirical approach

Concluding his speech, Lowe argued that “dualism – the transformation and adaptation of international law to the particular circumstances of each national legal system – is the only rational approach (and, indeed, the only tenable theoretical position). The idea that rules of international law can be directly applied as such in domestic legal orders, without any mediation to integrate them into the domestic legal system, seems to me to be unsustainable”.

“It follows that uniformity of implementation of international obligations among states is unlikely to be an achievable – or even a desirable – goal. The need is for each state to comply with the international obligation in the way that suits it best”.

The best approach to implementation can be determined from empiricism rather than theory, he argued. “If [...] the aim is to prevent [wartime] attacks upon schools and hospitals, one ought to ask whether the result of outlawing attacks upon them increases or decreases the installation of gun and missile emplacement around schools and hospitals. Reports from the Middle East [...] suggest that the supposed immunity of such sites from attack makes them very attractive as military sites”.

The aim should be to secure “immunity from attack – or, more precisely, the protection of the personnel, facilities and services in the hospital complex” rather than “the complete immunity of the hospital site as such”, he argued.

In other situations, one might ask “are the current arrangements for the right of individual petition to the European Court of Human Rights the best way for securing compliance with the convention?” or “is it better for a state to exercise its maritime jurisdiction by enacting specific laws for its maritime zones, or [...] to say that all of its law applies in its territorial sea?”

Such questions require careful analysis. “The need is not for a single grand theory on the relationship between international law and domestic law, but a careful consideration of the contours of each particular domestic legal order in which the implementation of the rules of international law is required”.

Watts’s contribution

Sir Arthur Watts, after whom the BIICL fellowship is named, began his career as a lawyer in the UK Foreign & Commonwealth Office, posted to Cairo and Bonn. Later, he was closely involved in preparations for Britain’s entry to the European Community, and became the first legal adviser to the UK’s representation in Brussels.

He served as the FCO Legal Adviser from 1987 to 1991 and, after his retirement, became an in-demand international arbitrator and International Court of Justice advocate. He was on BIICL’s management council for nearly 20 years and then on its advisory council. On receiving news of his death in 2007, the ICJ bench rose in his memory.

Lowe, who appeared alongside Watts in the Palestinian Wall case at the ICJ, said that his pleading in that case was “a masterclass”.

“Without ever appearing patronising, he made it seem that he was not so much arguing a case before the court as taking the court to the evidence, where it could see for itself the obvious and ineluctable correctness of the position of his client”.

Lowe also said that Watts epitomised “the British tradition in international law: a focus on the practical, on the law as it is, rather than the law as it ideally would be, and a concern with the details of specific cases rather than Procrustean attempts to force every situation within the confines of some legal paradigm”.

Further addresses were given by Watts’s successor as legal adviser to the FCO, **Sir Franklin Berman KMCG QC**, who now chairs BIICL’s board of trustees, and the inaugural Watts fellow **Jill Barrett** (also a former FCO lawyer). Among other anecdotes, she told how Watts organised the first cricket match at the South Pole, where he was representing the UK at a meeting under the 1960 Antarctic Treaty.

Barrett’s work at BIICL includes research on treaty law and practice in collaboration with the Centre for International Law in Singapore, research; on the adequacy of the international legal framework governing the Antarctic; and on the way in which national courts around the world interpret and apply customary international law.

Building on a 2009 project supported by Watts, she is also researching the approach to evidence at the International Court of Justice.

*For further information on the appeal please contact BIICL’s development director, **Alice Reynolds**.*