Israel on Trial Leadership Course 2022

Session 1 - The UN, international law and issues of legitimacy

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Mr. Andrew Tucker: The EU's approach to international law

International law and legitimacy

The way law is "used" is politically relevant and influential. Expressing opinions in legal language lends legitimacy to political arguments.

Europe regards itself as the custodian of international law; this is not surprising, because international law as we know it developed in Europe over the 17th, 18th, 19th and even 20th centuries. The Eurocentric character of the international legal system is reflected in the fact that the two primary international law institutions (the ICJ and the ICC) are in the Hague.

But the influence of Europe is waning. Since states are both the main subjects of international law and the actors who shape international law, they determine the future of international law. The last few decades have seen a new era, in which the majority of UN members are not Western, and they do not identify anymore with the Euro-centric system which they associate with the colonial powers. Many UN member states are non-democratic countries which do not share Western ideals or values. They vote in the UN and other multilateral institutions to promote their own political and ideological preferences, using the language of law to strengthen their case.

The EU's approach to the Israeli-Palestinian conflict

After the creation of the European community in the 1950s, there were few attempts to act collectively as "Europe" on the world stage. But this changed in the 1970's - it is no coincidence that this occurred at the same time as the revolutionary growth of human rights law.

A European common foreign policy began to develop after the Six Day war (June 1967), when the European member states realized that they needed a common position about what was progressively regarded as the Israeli-Palestinian conflict, to define their relationship to the Middle East. The Venice Declaration of 1980 (iin which Europe for the first time acknowledged Palestinians' right to self-government and the PLO's right to be connected to peace initiatives, called settlements illegal, and required Israel to end the occupation) laid the foundations of the modern European approach to the conflict.

It is no secret that all of this was politically-driven. Amongst other things, Europe was concerned to build a positive relationship with the Arab world, and thus ensure secure

supplies of oil and gas and bring Palestinian terror on European soil (think of the Munich massacre in 1972) to an end.

Since 1980, the EU has adopted **three key positions** in relation to the conflict:

- No part of the territories outside the "Green line"[1] belongs to the State of Israel – unless the PLO agrees otherwise;
- All Israeli settlements outside the "Green line" are illegal; and
- "Palestine" has to become a State on the territories that (according to the EU) don't belong to Israel (outside the "Green line"), with East Jerusalem as its capital.

The **EU Council**, composed of the foreign ministers of the member states, expresses these views in its policy statements year by year. According to the Council, these are "parameters", which it expects Israel and the PLO to comply with in their negotiations. In a way, the Council is imposing its view about law on the parties.

The other EU institutions also use instruments and processes available to them to affirm the positions adopted by the Council. For example, in 2015, the **EU Commission** adopted an interpretative notice in relation to the labeling of products from the "occupied Palestinian territories". Furthermore, the Commission is responsible for channeling the millions of Euros that the EU and its member states donate every year to the Palestinian refugees organization (UNRWA) and the Palestinian state-building project.

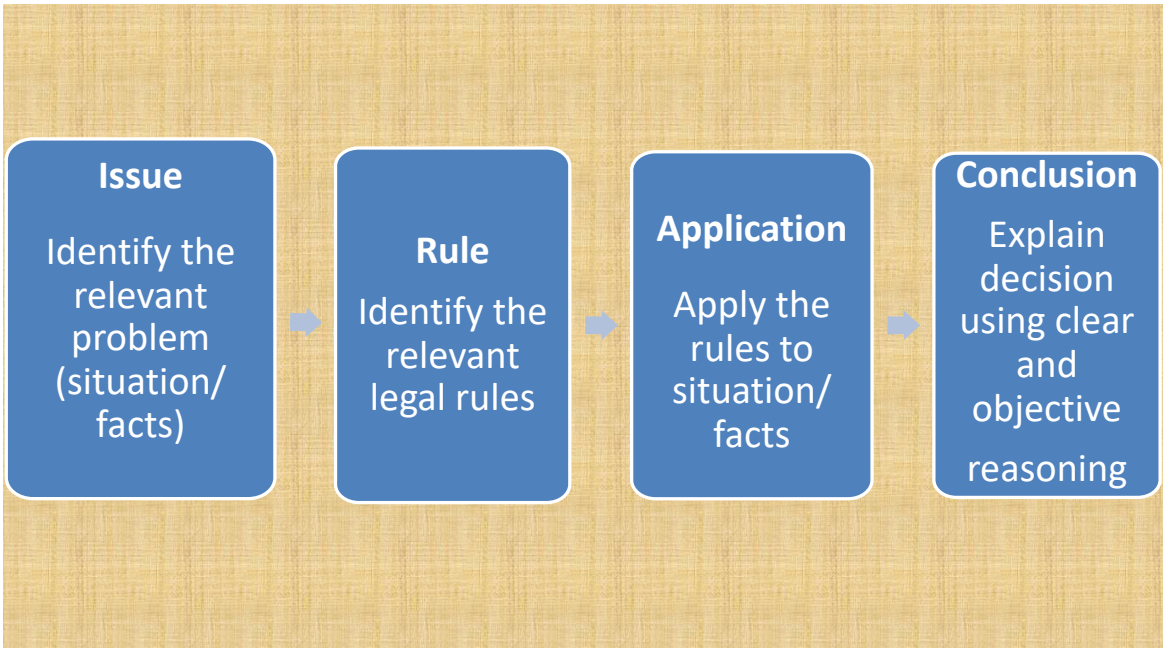
The **European Court of Justice**, the highest EU judicial institution, also expresses its views of international law, as it did in the *Psagot* case in 2019. The *Psagot* winery produces wine in the Benyamin region (north of Jerusalem) – outside the Green Line. This wine is sold in Europe but the ECJ stated that it should be labeled as a product from "occupied territories" and originating from an "illegal settlement". The Court thus reflected the political views adopted by the Council and implemented by the Commission.

Legal reasoning

Legal reasoning is intended to ensure that the legal system is not abused, and law is applied transparently, consistently and coherently. There are 4 steps in applying law in any given situation:

- Characterize the issue or problem that we want law to give an answer to;
- Identify the relevant legal rules and principles;
- Apply the rules/principles to the facts of the situation;
- Explain the conclusion with clear and objective reasoning.

[1] The Green line is the 1949 armistices line



When it comes to the Israel/Palestine conflict, we see that legal reasoning is abandoned, and a case-specific approach is taken that is not adopted in relation to any other occupied territory or self-determination dispute.

In relation to defining the problem: Europe ignores many aspects of the conflict, such as the fact that the Mandate for Palestine envisaged the creation of a national home for the Jewish people in Palestine and allowed Jews to "closely settle" the land; the regional dimension (eg. interference by Turkey and Iran, or the war in Syria). It has adopted a simplistic narrative, seeing this as a conflict between an oppressive "occupier" and an oppressed (and innocent) population. This aligns more or less with the paradigm adopted in the International Criminal Court by the previous Prosecutor.

So what legal principles apply to the conflict? First, there are a number of "meta" (or high level) principles of international law:

- **non-discrimination**: rules have to be applied to all states equally and not selectively applied to specific cases without justification.
- **inter-temporality**: when one looks at the legality of a case, one should look at the law at the time. For example, the question whether Israel was entitled in 1967 to claim sovereignty over the territories it conquered needs to be determined according to the law as it stood in 1967.
- **consent**: states cannot be bound to a determination of their legal rights or obligations without their consent. Israel did not consent to the legal proceedings before the ICJ in

2004, and it has not consented to join the ICC Rome Statute. So it arguably cannot be bound by the decisions of those tribunals.

Next, there are general rules of international law which are applied to the issues of territorial conflicts in general but which are usually ignored regarding the Israel-Palestinian conflict. Taking the three "parameters" adopted by the EU:

- ***Territorial sovereignty:*** the main legal principle that determines the borders of states emerging from Mandates or colonies is called "Uti possidetis juris". This principle applies to determine the territorial boundaries of the State of Israel in 1948, just as it has been applied to determine the borders of many states (former mandates or colonies) around the world. However, it is ignored by the courts, just as they ignore the relevance of the Mandate for Palestine generally;
- ***"Settlements":*** There is no general law prohibiting "settlements". Thus, the statement saying that "Israeli settlements are illegal" is not accurate under international law. The relevant rule is contained in article 49(6) of the Fourth Geneva Convention: "The Occupying Power shall not deport or transfer parts of its own civilian population into the territory it occupies." Israel is only prohibited from enabling Jews to live and work in East Jerusalem, Judea or Samaria if Israel can be qualified as an "Occupying Power" and it can be proven that it has "deported" or "transferred" its population into the occupied territory.
- ***Statehood:*** There are clear legal rules determining what states are, and how they come into existence. There is no general right to statehood the right of self-determination, which is more a political principle than a legal one, can be satisfied in other ways than statehood. Palestine is clearly not a state under general principles of international law, so why does the ICC treat it as if it were a state?

Some conclusions

There are three points to take away:

1. We must distinguish between legal principles; on the one hand, and non-legal norms like morality and politics on the other. Statements of law by political bodies (the European ones or any other institutions) are not binding, and should be treated with some skepticism.
2. Secondly, applying legal principles to complex situations like the Israeli-Palestinian conflict requires the entire context of the situation to be taken into account: historical, political and even religious aspects are all relevant when applying the law. The complexity on the ground, coupled with the generality of law principles means it is very rare that law will prescribe a specific answer to any problem, let alone a solution for resolving a multi-faceted conflict.
3. Thirdly, none of the EU's "parameters" in relation to the Israeli-Palestinian conflict are mandated or required by international law. By imposing them, Europe is arguably infringing Israel's right to sovereign equality. This bias doesn't just affect Israel; it harms everybody in this conflict. The fair application of international law is not just a question of defending Israel but defending the rights of everybody involved in this conflict.

Recommended Reading materials

Carlill, B. *The Challenges of Resolving the Israeli-Palestinian Dispute – An Impossible Peace?.* London: Palgrave Macmillan 2021

De Blois, M. and Tucker, A. *Israel on Trial*, 2017 chapter 3

Persson, A., *The EU and the Israeli-Palestinian conflict 1971-2013: In Pursuit of a Just Peace.* Lanham: Lexington Books 2015.

Persson, A., *EU Diplomacy and the Israeli-Arab Conflict, 1967-2019.* Edinburgh: Edinburgh University Press 2020

Stone, J., *Israel and Palestine - Assault on the Law of Nations.* London, Baltimore: The Johns Hopkins University Press 1981.

Weiler, Joseph, "Israel, the Territories and International Law: When Doves are Hawks" in Kellerman, A., Siehr, K. and Einhorn, (ed.) T. *Israel Among the Nations*, Kluwer, 1998.

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