Podcast 13 – International Law – Why it Matters to Canadian Law Students

PROFESSOR FORCESE: Welcome back to the virtual Orientation for incoming JD students at the University of Ottawa Faculty of Law. In this podcast, I interview Professor John Currie about International Law: where it comes from, how it works, and how it’s relevant to Canadian law. I began by asking Professor Currie about his career and teaching areas.

PROFESSOR CURRIE: My name is John Currie. I teach a number of courses here at the law school, including International Law, Torts in first year, and a course in the law of armed conflict.

PROFESSOR FORCESE: And so, periodically, you teach international law in the first year as part of the thematics?

PROFESSOR CURRIE: That’s right, sometimes in first year, but sometimes also in upper years. Those courses are equivalent to one another, so it’s the same subject matter, it’s just in first year, it gives students an opportunity to get a head start if they have an interest in pursuing more specialized courses in upper years.

PROFESSOR FORCESE: So a lot of people come to law school with an interest in International Law – at least this law school. Can you tell us what International Law is?

PROFESSOR CURRIE: As a gross oversimplification, international law is the law governing relations between States and other international legal persons. That probably sounds like a mouthful, but it essentially means that it’s not the law that applies within States normally, in the normal sense that we think of that, but it’s the law that governs the way States relate to one another. In the 20th Century, not only States are regulated by International Law. There have been some innovations, and so there are international organizations, for instance, and there are some specialized areas of International Law that apply directly to individuals – think of International Criminal Law, for example – but by and large, and as a simplification, International Law is the law as between States.

PROFESSOR FORCESE: So, is it a rarefied area that really has little impact on the day-to-day lives of Canadians or of those practicing law in Canada?

PROFESSOR CURRIE: I think there’s a misconception that sometimes it is, or that it is. States are somehow distant entities, and in their relations may seem distant. We might have an image of them meeting at the UN, and who knows what happens there. But, in fact, not at all. International Law has been broadly incorporated into Canadian law in various ways, and there are a number of ways in which it does, in fact, impact day-to-day transactions within Canada itself, in ways that don’t directly involve other States at all, but nevertheless are directly relevant to Canadians.

PROFESSOR FORCESE: So, what are the sources of International Law?

PROFESSOR CURRIE: There are a number of them, but the two major ones are treaties, first of all, which set out, much like a Statute does, broadly applicable rules, sometimes between as few as two States, but sometimes multilateral treaties that are subscribed to by almost all the States, or all the States in the world. So, that one source of law is actually quite straightforward in the sense that the rules are written down and there’s a fair amount of transparency as to what the obligations of States may be.

Customary International Law is the second broad source of International Law, and it is essentially patterned or based on a pattern of conduct that has been engaged in by States, sometimes over centuries, but sometimes over a shorter span of time. But, these patterns of conduct come over time to create expectations that they must be complied with, and so, you have these two sources. Obviously, customary law is much less certain in its content because it’s based on an understanding of patterns of conduct rather than written words, but it is nevertheless a fundamental source of international law.

PROFESSOR FORCESE: And how did these sources of international law become Canadian law?

PROFESSOR CURRIE: Well, in fact, our system of law in Canada is largely based on a British approach, given the British nature of our Constitutional heritage, and, in British law, customary international law is generally assumed to be part and parcel of the common law that forms part of the law of the realm. The same basic rule applies in Canada: Customary International Law is presumed to form part and parcel of Canadian common law, and common law rules are therefore expected to be interpreted in a manner that is consistent, wherever possible, with customary international law.

PROFESSOR FORCESE: Just so our listeners understand, what is common law?

PROFESSOR CURRIE: Common law is that body of rules that has been created essentially by decisions of courts. Again, sometimes over centuries, but sometimes over a shorter period of time. But they are basically the binding rules that emerge from decisions of courts. Common law is distinct from statutory law, which is enacted expressly by a legislative body such as Parliament, or a provincial legislature.

PROFESSOR FORCESE: So there’s a link between international customary law and the common law of Canada. And what about with treaties?

PROFESSOR CURRIE: With treaties, the rule in English law, and also, until relatively recently, in Canadian law, was that treaties do not automatically form part of Canadian law, as does customary international law. The reason for that is a simple rule of British and Canadian constitutional law, which is that the Executive branch can’t make domestic law. When you think, or are aware, that treaties are concluded by the Executive branch of government, that explains why it is that they don’t automatically form part of Canadian law. Traditionally, what had to happen, is that a legislative body, such as Parliament, would have to enact a piece of legislation that recognized or incorporated or translated in some sense the treaty terms into Canadian statutory law.

PROFESSOR FORCESE: So, what does that mean in practice? You would have a piece of legislation that emphatically recognized that some treaty was part of Canadian law?

PROFESSOR CURRIE: Sometimes that will happen, but it takes a number of different forms. We have pieces of legislation, for instance, that implement Canada’s treaty obligations with respect to, say, diplomatic relations. We have domestic legislation which gives effect to Canada’s various human rights obligations. We have domestic statutory law that implements Canada’s obligations under the Rome Statute of the International Criminal Court, which is, in spite of its title, a treaty, not a Statute, but a treaty between States. And so on.

Sometimes though, statutory law in Canada takes a different approach to the incorporation of treaty law: it will simply, in one or two sections, give effect within Canadian law to the content of the treaty, and then append the treaty as a Schedule. So, rather than trying to repeat the terms of the treaty, or translate them into domestic statutory law, there’s simply an incorporation by reference entirely.

PROFESSOR FORCESE: And is there any reason for a Canadian court to look to international law above and beyond circumstances where it may be customary, and therefore part of the common law, or incorporated, or rather received into a Statute?

PROFESSOR CURRIE: Yes, certainly, and that’s what I meant by saying that, until recently, treaty law had to be transformed or implemented by statutory law to have effect within Canada. In fact, in the last 10 to 20 years, the Supreme Court of Canada, in a series of decisions, has made it clear that even Canada’s unimplemented treaty obligations, for instance, must be looked to by courts when they are interpreting domestic law, whether common law or statute law. And, a similar rule has always applied with respect to customary international law, as well, that, in general, one tries to interpret the common law of Canada in a manner that is consistent with customary international law.

So, the net result of those developments is that both customary law and treaty law – remember, those are the two primary sources of international law – even if they don’t sometimes have direct effect in and of themselves within Canadian law, are nevertheless a relevant source for interpreting Canadian law and understanding, therefore, Canadian law.

PROFESSOR FORCESE: It’s quite complex. How would you describe the level of understanding of these complexities amongst Canadian judges and Canadian lawyers? Is this an area where there is a large degree of expertise?

PROFESSOR CURRIE: I wouldn’t say that; I would say there is a broad misunderstanding, sometimes even in the courts, if I can say so. Sometimes, the courts don’t fully appreciate at least the indirect effect of international law on Canadian law. It’s fairly well understood that customary law is part and parcel of Canadian common law, there’s not much debate there, and it’s also fairly widely understood that if Parliament, for instance, implements one of Canada’s treaty obligations, that it has to be given effect to, because it is part of statutory law. But the indirect effect, the interpretive effect of international law on Canadian law, is less well understood. And that’s by students, as well.

In my own practice, when I was in practice, there were several instances where I was able to use international law in the courtroom in support of an argument trying to interpret a piece of legislation, or a common law rule, and where counsel opposite was obviously completely unaware of the potential relevance of international law in this area. And I always felt that gave me a bit of a leg up. It was unfortunate, because, in the end, the courts will always be best assisted by lawyers who are well educated in these rules, on both sides of the issue. But this is why I tell many of my students that they are wise to have taken a course in international law, because they will have a leg up on those students who may not have done so. They will be aware, in other words, of the relevance, direct and indirect, of international law, even if they never practice international law itself, even if they only ever become domestic law practitioners in Canada.

PROFESSOR FORCESE: What’s the single biggest difficulty or view for a student who has been schooled, say, through their first year in domestic law and now making the leap into understanding international law?

PROFESSOR CURRIE: I think, I tell this to my students at the outset of my international law course, is that they have to be deprogrammed, in some sense, because they’ve learned to think of law in a very specific way. They’ve learned to think of it in a top-down way, in a hierarchical way, as something that is enacted or imposed, for instance, by a binding court decision. And international law really isn’t of that nature at all, it’s not made in that way at all. It is mostly made by consensual agreement amongst States, either through treaties – express consensual agreement – or through their conduct, through their mutual interactions, and therefore through their implicit acceptance and recognition of the law. So, in that sense, international law is, we describe in the field, of a horizontal nature. It’s self-imposed by States and other subjects of international law, by and large, as opposed to being imposed by a law-maker – Parliament for example – and imposed on a subject. So, it’s very different from what students come to expect law to look like, and how they expect it to be made.

PROFESSOR FORCESE: If you were to have advice for students who are interested in pursuing career opportunities in international law, what advice would you have in terms of their legal studies and what they do around their legal studies?

PROFESSOR CURRIE: I would advise them, actually, to get a well-rounded legal education either way. It’s not always easy to pursue a career directly out of law school in international law, unless you happen to be one of those lucky persons who gets a position, for instance, with Foreign Affairs, or in one of the Department of Justice’s sections that deals with international law, or with an international NGO, or an international organization. All of those opportunities do exist, but they’re relatively rare compared to the vast majority of other opportunities.

In my own case, I litigated for a number of years in insurance and commercial litigation before I managed to pursue my own interest in international law. And I was able to do that because I didn’t focus solely on one area of law in my studies; I took a well-rounded course of studies, in domestic and international law, so that I was able to land on my feet no matter what the job market happened to look like. If you have an interest in international law, you’ll eventually find something, but it’s important to think about what will happen to you in the meantime, and to be prepared to practice domestic law, perhaps, for a while as well.

PROFESSOR FORCESE: Thanks, John.