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INTERNATIONAL LAW AND INTERNATIONAL RELATIONS: A PROBLEMATIC AND/OR A HARMONIOUS RELATIONSHIP?

Abstract

The paper focuses on the relationship between International Law and International Relations, i.e. on their interconnectedness as a substantial issue both from theoretical and practical point of view. The starting premise is that although they constitute distinct academic disciplines, the objects of their interest can hardly be analysed in isolation from each other. Even those who disagree with the thesis of their academic synergy, acknowledge that with no international law there could be no international relations; also, the practice of international politics is a ground that breeds international legal norms. In the analysis of this rather complex relationship, a special emphasis is placed on the need for deconstruction of the wide-spread myth that international law is by default 'good' (i.e. positive in a normative sense of the word), while the international politics is to be blamed for all the bad things that happen in the international arena. Instead, we make an attempt to shed some light on the most important strategic and moral limits of the international law, in order to induce a more critical viewpoint on the relations between power, politics and law in the international arena. The paper ends with some suggestions about the need for development of an innovative research agenda in elaboration of this relationship.

Key words: *INTERNATIONAL LAW, INTERNATIONAL RELATIONS, INTERNATIONAL POLITICS, ETHICS, CRITICAL STUDIES*

1. Understanding International Law

Law regulates the relationships among the subjects in every state, with no exception. The citizens, in democratic systems in particular, behave in accordance with the rules that they (i.e. their legitimate representatives) have enacted through a specific procedure of law-making. The most general definition of law reads that law represents a set of rules and norms of behaviour adopted by the competent institutions in a determined procedure, and the implementation of which is guaranteed by the state instruments of coercion. Legal norms and relationships are power relations so the issue of their justification/righteousness is of essential significance for any society that wants to be just. However, the relationship between law and justice is not straightforward: it has been an object of change throughout history, even within the same political entity, in accordance with the changeable societal and other circumstances, such as power balance, cultural and moral development, etc. Law and politics are in a consequential re-

lationship: the political will precedes the legal norm, both in logical and chronological terms. In democracy, law is usually a resultant of the interests and demands of various stake-holders with regard to the regulation of certain issues. It is achieved through the political process. Law is the most powerful and the most efficient means for creation and implementation of public policies favoured by the dominant political and/or societal elites. Efficiency of law is due to its compulsory nature guaranteed by the state. Unlike law, which assumes predictability and stability, politics is a dynamic process that often goes even behind the scene and uses various creative means and channels, hence their inherent tension and dialectical tie. Law is the most efficient instrument for realization of the political goals, but at the same time it is the most reliable means for guarantying that politics will not supersede the agreed legal order and rules of the game. The most essential way to understand their mutual relationship is through the concept of politics within law (constitutionalism).

International society also relies on an order set and regulated by rules and norms. Increasing number of issues - both in national and international realm - are regulated in accordance with or under the influence of the international legal standards and norms. There is a wide consensus over the significance of the modern international law, although there are disagreements over its nature and the degree of its implementation and respect. For a very long period of time, one of the most frequently posed questions has read: *is international law truly law*? The dilemma arises from the international anarchy that governs the international society (Lechner, 2017). Second, there is no international legislative power invested in one institution with exceptional competence for law making, neither is there a judiciary that would decide in case of disrespect of the international legal norms. Some scholars argue that it is of utmost importance that international law does not have a command function that would enforce the subjects to abide by it (Bull, 1995), and instead it represents a positive morality. International law encompasses the international customary rules, which is not the case with the national law. Fourth, states are (still) the most important subjects of international law, and as sovereign actors they join international arrangements and respect international legal norms voluntarily (i.e. on the ground of a previously built consensus within the internal political process). The only exception are the legal rules with general mandatory force (*ius cogens*), such as a ban on the use of force, genocide, crimes against humanity, racism, etc. The most frequently used counter-arguments in favour of the opposite thesis are the following: despite its weaknesses, international law is real, it is a positive law because it causes certain behaviours in the international actors: also, they refer to the international law in order to justify their actions or their claims. Second, international relations do not exist in chaos but in an organized/mature anarchy; thus, despite the absence of a central/supreme authority, the international actors have strong need to function within an organized community based on a defined and respected set of rules and norms. Despite its lack of power to coerce/enforce, international law successfully induces voluntarily consent in the relevant actors, which is also an important element of national law that is not respected only because of fear from sanc-

tions, but most often because of acceptance and persuasion. Third, the modern international society enables various forms of debate and the reaching of an agreement between states and another subject (including international NGOs). Fourth, the international legal arrangements usually involve numerous forms of resolution of disputes through judiciary or quasi-judiciary means. Fifth, the state undertakes guarantees for implementation of the international agreements, but in some cases there are also other forms of political pressure and sanctions that make international subjects abide by the law in their international arrangements.

International law represents a set of rules and norms that states and other international actors feel obliged to respect in their mutual relations, and they usually do respect them (Henderson, 2010). In this paper, however, we advocate a rather wider understanding, based on the constructivist ground supported by some additional arguments of other schools of thought (Brunnee and Toope, 2010). We understand international law as: a series of *rules* that govern the behaviour of state and non-state actors; an international legal *process* of rulemaking, its interpretation and implementation by the elites; a way of *thinking* that predominantly focuses on the governments, rules and legal risks; an adequate language of deliberation, justification and allegation (Bower, 2015); *an elite* of legal practitioners that are recognized as 'competent' in the international legal 'practice' (Adler and Pouliot, 2011), who incorporate legal 'virtues' such as legal responsibility, integrity and humanity, thus developing the sense of legal obligation through their interactions (Gaskarth, 2012). Consequently, international law involves a sense for moral goal and teleology (Koskenniemi, 2011), which by default interlinks all aspects of international law with legitimacy and which makes the respect of the international law very important (i.e., "we care for our actions to be perceived as legal because international law is considered to be good/positive").

2. On the Relationship between International Law and International Relations

Politics and law within the international system are in as close relationship as they are within the national frameworks. But, in theory, there are different standpoints on the exact nature of this link. Some authors (Irish, Ku and Diehl, 2013) argue that the issue of the ties between international relations/politics and international law has always been a rather neglected subject of debate. Others, however, claim that during most of their period of development as academic disciplines, they have been ignoring each other, although the focus of their interest was always quite similar (international cooperation, peace and war, regulation of environmental issues, trade, health, etc.). However, during the last couple of decades there have been frequent calls for bridging the differences and for a closer interdisciplinary cooperation (Yasuaki, 2003; Ku, 2013); but even a cursory glance shows that they have been a rather declaratory endeavours with no practical effects in the field.

Usually (neo)realists have insisted on portraying international law as a fiction, as an issue of convention and agreement, or at most on presenting it as a special cate-

gory that is not very relevant for international politics. The reality offers a different picture: there is hardly any issue or event in the international arena in which international politics and law are not intertwined, hence the counter-thesis that international anarchy is compatible with the international legal order. With no intention to turn one's blind eye to the real politik, in which states possess different power in pursuing their national interests, it is important to emphasize that international law secures minimum conditions for international exchange and cooperation under predictable and equal conditions. International law is a product of the international society of states, which strives to secure its common need for order, because of which the actors are ready to accept certain limits to their freedom of action for the sake of the community as such. In return, international law becomes an integral part of the context in which the society of states exists, imposing certain limit through a system of rules and regulations. International relations have always had a strong impact on the scope and the nature of international law, and vice versa. This has especially become the case since the aftermath of the WWII and the adoption of the UN Charter. Yet, dominance of realists under such circumstances undermined the meaning of the international law.

As already noted, international rules are a factor in modelling the international system. The different schools of IR give their own explanations for this relationship, and especially with the regard of the significance of the international law. As mentioned, (neo)realists argue that international law has limited and non-crucial impact on the international relations; also it is a creation of the states, which uphold it as long as it does not impede the realization of their national interests. According to them, international law is but a reflection of the current distribution of power and capabilities among the international actors, which in other words means that international law is a reflection of the politics of power. (Neo)Liberals however grant it exceptional significance, insisting on the principle of rule of law in the international arena, especially in the context of export of democracy and/or human rights around the globe; paradoxically, with this argumentation they often justify concrete breach of international law for the sake of the aforementioned values.

Henderson (2010) believes that international law is incorporated within the international order. Under the term 'order' he assumes a stable pattern of values and behaviours, which structure the relations between the actors for a longer period of time (decades or even centuries). For instance, today's order encompasses the values of democracy, human rights and free market (capitalism) that have been embraced by the leading powers for a long period of time. These democracies try to persuade other states and non-state actors to accept them wholeheartedly as the only alternative. The rules of international law help establish and sustain the world order. Furthermore, a precondition for an international recognition of a state is its readiness and ability to respect the international law; or in other words, state subjectivity is in direct correlation with the international law. On the other hand, many rightly argue that the configuration of international relations also has a strong impact on the nature and effects of international law. The change of the structural models of IR induces a change of the essence

and the scope of the international law. Thus, during the bipolar era, international law was divided both in its material content and in terms of its territorial effects - on Soviet and Western international law. What followed the Cold War was a period of redefining (according to some, even deleting) of the differences and barriers, for the sake of promotion of a neo-Kantian idea of a global moral and legal order (Bowring, 2008). However, much time did not pass before the international law entered a new deep crisis and went through a degradation on a global scale - as a result of the liberal interventionism and promotion of the Responsibility to Protect Doctrine, starting with FR Yugoslavia, Afghanistan, Iraq, Libya, Syria, etc. The crucial question remains open: what was/is the reason, and what was/is the consequence? Whether the power balance in the international arena has had a decisive influence on the weakening of the international law, or it was the other way around - the impotence of the international law is to be blamed for the unequal position of international subjects in the context of peace and war issues?

3. The Narrative of "Good" Character of International Law Revisited

The focus of the academic community - both in the field of international law and IR - has becoming more and more critical lately, especially with regard to the idealized image of international law. Kyl, Feith and Fonte (2013) challenge the legitimacy of the process of international law making through the prism of disrespect for the basic democratic standards. They argue that it is created by unelected foreigners who do not possess moral authority to bind the sovereign will of free people. The representatives of the critical school elaborate from a different point of view, arguing that some states (such as USA) possess too much power to craft and/or interpret international law (Okafor, 2008). They also claim that international law hides injustice and serves powerful interests under a patina of universality and justice (Sinclair, 2010; Simpson, 2004). Schick (2006) directs his critique towards the nature of legal thought and practice itself, noting that codifying morals and talking in terms of universal legal 'rights' encourage us to think too abstractly and risks blinding individuals to the alternative possibilities or wider considerations. In a similar manner, Anderson (2009, 337) argues that international criminal law 'reduces atrocities of global scale to the bland and deliberately affectless scope of a courtroom'. Modirzadeh claims that the ongoing debate about the technical legal aspects of US drone targeting is a distraction from the enormous implications of the wisdom of conducting the campaign against terrorism. Shany (2009) charges that international law permits one to feel better about injustice as lawyers and the legal process can serve as 'conscience-clearing outlets in the face of atrocity'. Quite a number of critical analysts refer to the role of international lawyers due to their ability to justify almost anything they do in the name of strengthening the international law (which is seen as an inherent good that someday will bring about peace and justice). Kennedy (2005) criticizes sharply the lawyers' formalistic tendency to indulge in an excessive debate over forms and forums even (or especially) in matters of life and death while ignoring consequentialist analysis. Very similar is the thesis that claims that per-

verse institutional outcomes may not arise simply because of the weaknesses of an institution, but because of its strengths. Thus, Finnemore and Barnett (1999) argue that both the power and pathologies of international organisations stem from the same sources, such as the rationalist-legalist authority of bureaucracy which privileges rule-following over flexibility (and thus rules over goals), while allowing bureaucrats a significant level of unchecked authority to exploit their reputation of impartiality to pursue their own policy goals.

The overview of the critical evaluations of the role of the international law in the modern world shows that the majority of them are focused on the lack of legitimacy and democratic deficit in the process of law-making, the structural inequalities on a global scope that reflect on the crafting and implementation of this law, the problematic role of the international lawyers as well as the impact of the international law on the selection of humanitarian and/or security needs. According to some scholars, international law may even have a negative effect on the state politics of use of force for the sake of protection of its own citizens (McKeown, 2017).

Conclusion

The disciplines of international law and international relations/politics have for a long time been treated as completely separated, and even very different. The modern state of affairs, however, discloses the 'little dirty secret' shared by the scholars from both disciplines: everybody knows that the existence of international law plays a key role in the creation and modelling of international relations, as well as that the practice of international politics is a sine qua non for crafting and functioning of the international law (Joyner, 2006). As it is the case in a national setting, there is a tight dialectical linkage between the international law and international politics, but one should not disregard the tendencies to prescribe the international law powers and abilities that it does not really possess. Namely, it is still a typical position to look at the international politics as something dirty and unworthy, something that does not abide to certain principles and moral considerations - and vice versa, to look at the international law as something higher and more valuable than politics, picturing it as good, pure and ethical. In this context, some scholars even speak of international law as superior, with a hegemonic position, as if it is a factor that has 'legalized' world politics to such a degree that it replaces the other legitimate discourses, such as morality. Hence, the harshest critique that could be given at the expense of one's political behaviour is to say that it represents a breach of an international legal norm.

The review of the latest theoretical thought as well as the practice of crafting and implementing international law, however, displays a different picture. The international law has always been and still is a reflection and a product of power relations that govern the international arena for quite some time now. Even as such, it is implemented and respected selectively and unevenly. On the other hand, its 'dark side' shows that it helps perpetuating the status quo in power relations and inequalities, es-

pecially in socio-economic and military terms. In that context, the legal theoreticians manifest certain degree of blindness when it comes to its involvement in the structures and discourses of the prevailing hierarchy on a global scale (Anghie, 2006, 109; Hobson, 2012).

With the exception of the critical school of thought, the others still portray the history of international law as a straightforward and linear process in the form of a narrative of progress towards a rational and humane global order in which international law plays a role of 'gentle civilizer of nations', to use Koskenniemi's famous phrase. In addition, the international law is usually presented as a unique achievement of the European civilization (only) (Pitts, 2015). Truly, today, a picture of the international arena as a formally and legally egalitarian world of nation states that function along a number of hierarchical power structures, which are invisible and hard to hold accountable dominates. Only the critical school has so far managed to warn about the fact that both today's international relations and international law coexist in a framework of imperial and quasi-imperial structures, and not only in the context of asymmetrical relations when it comes to wealth and military power. The history of international law is at the same time a history of universalism and hierarchy, which can hardly be untangled. The international law has played a significant role in the structuring and legitimizing of such a hierarchical order; paradoxically, this was possible precisely because of its power to speak on behalf of justice and equality, even when the opposite is the case. On the other hand, as Pitts (2017) rightly concludes, the theory of international relations has always been reserved with regard to its normative dimension (that is essential for law), so at the end of the day the alleged gap between politics and law in the international arena still persists.

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