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Cop21 agreement and public international law

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Abstract
The making of the first global climate change agreement – COP21 – calls for some reflection over the status of public international law. Is this a binding treaty and it is law? There has been a huge debate about the differences and similarities between national law and public international law. Recently, legal scholars like Goldsmith and Posner have claimed that public international law is not binding and that governments can do what pleases them in terms of respect or non-respect for such law. In addition, professor Posner has argued that public international law is largely irrelevant in its humanitarian sectors, especially conventions about human rights. Yet, these claims are hardly tenable.

Keywords: Public international law (PIL), COP21-agreement, normativity, enforcement, Goldsmith, Posner, Kelsen, Schmitt, realism against idealism or liberalism, cosmopolitanism.

Introduction

The great commitment to a global climate policy by the governments of the world – the COP21 treaty, stretching over decades, will require continuous monitoring and country evaluations. A global climate change agreement would preferably take the form of a treaty, entering Public International Law (PIL). Respect for it as well as its enforcement in turn presupposes that the geopolitical tensions between states are contained, or at least not allowed to escalate into war. In war like situations, governments simple do what is necessary.

Sadly enough, there are a few hot spots in the geopolitical map of the world: South China Sea, North Korea, Taiwan, the Middle East, and Fertile Crescent, the Ukraine, Kashmir and the instability in much of Central Africa. These constant conflicts take much effort from ecological concerns and results in little for peace and reconciliation. A major war between some of the super powers over some contested territory would derail a common global climate policy. Can PIL help?

We have to go back to the well-known dilemma in international relations: realism emphasizing state reasons and their mutual obligations against idealism/liberalism underlining the needs of the international community, including the rights of humanity. Climate agreements between states, like the COP21 agreements, would enter the PIL, meaning that the question of the validity of this type of treaties is unavoidable. Realists claim generally that PIL is not binding upon states, but only growing normativity in a globalised interdependent world can avoid a return to brutal realism and its danger of violent conflicts and war.

Is pil really law?

Let me shortly examine the arguments against PIL, put forward in an extensive contemporary debate As a matter of fact, the nature of and future for PIL are widely debated among legal scholars and political scientists on both sides of the Atlantic. In The Limits of International Law by legal scholars Goldsmith and Poser (2006), it is argued to the effect that public international law is radically different from domestic/national law, especially in lacking the property of being binding. Goldsmith and Poser state:

"The book rejects the traditional explanations of international law based on legality, morality, opinio juris, and related non-instrumental concepts. Using simple rational choice tools, the book seeks instead to provide an instrumental account of when and why nations use international law, when and why they comply with it, and when and why international law changes." (Goldsmith and Poser, 2006: 463)
(https://www.law.uchicago.edu/files/files/126.pdf)

The concept of validity – *opinio juris* - is a prominent element in the concept of law. Is it really true that domestic law or national law could be binding at the same time as public international law is not? When speaking about the nature of law, one often encounters the idea that law is a set of rules that are binding as well as enforced? What then about the nature of PIL?

Normativity

It is an undeniable fact that foreign affairs have become more regulated than ever before, speaking generally about the global market and the interactions among states, international as well as regional organisations like the EU and ASEAN. One may speak of growing normativity in international relations after the Second World War. Not only have numerous new norms been introduced, but the call for implementation has grown much stronger with the rise of an international civil society. But it is all a matter of beliefs. It sometimes occurs that norms become obsolete, meaning that they are no longer believed to be valid and the respect for them is missing. Changes in the world order since the end of the Second World make it imperative not to model international relations and state interactions as an international system according to Waltz model or as a society in anarchy albeit with possibilities of cooperation. A number of central features have been transformed, resulting in a slow and hopefully unstoppable growth in normativity.

Rebuttal of normativity?

The rebuttal of normativity with PIL from Goldsmith and Posner is entirely different from naive geopolitics. They present a most elaborate theory of PIL, combining jurisprudence with international relations, interpreted with a few basic game theory models. Moreover, they are highly sceptical about Volkerrecht, its foundations and its claim to normativity, meaning that its key principles bind sovereign states. However, Goldsmith and Posner do not reiterate Schmidt's position towards PIL. They confirm that PIL is LAW, and not merely the morals of victorious governments. Yet, they completely deny normativity. How could a system of norms that constitute LAW lack entirely normativity?

According to this theory of PIL, PIL is often complied with but not because of any binding force of its norms. Compliance can be best explained by the operation of state interests and their coordination in the games that are played out underneath PIL. Moreover, governments have no obligation whatsoever to comply with PIL. Thus, the enforcement is entirely up to the states in the international system that may or may not comply alternative may or may not retaliate against reneging by other governments, all based upon consideration of self-interests.

Goldsmith's and Posner's rejection of any obligation with PIL may appear somewhat drastic, but it may be related to the perennial debate about what is law. Law, all agree, is a huge ordered set of couples of norms and their enforcement:

Law = <norms, enforcements>.

What is contested is whether the binding nature (validity) of the first element – norms – is the same or different from the efficacious nature of the second element – compliance or punishment. How about PIL: binding and/or enforceable?

The nature of the validity of norms is a central topic in all kinds of legal theory. One may separate between 3 positions:

a. Legal norms are objectively valid (natural law);
b. Legal norms are valid, but only in relation certain country criteria (legal positivism);
c. Legal norms are valid if and only if they are properly enforced (legal realism).

According to the first position, legal norms are valid in an absolute sense. If they are valid, then they are universally valid. Such norms are "true". The second position relates all forms of legal validity to the national legal system in a specific country. Norms are valid in a country, only if they follow from some basic criterion, like the basic norm (constitution) or are introduced according to the so-called secondary rules operating in the country.

The natural law approach to legal norms has become popular with the emergence of liberal egalitarianism, but it is all a theory about objective validity, to be examined below. Legal positivism tries to retain a form of validity that is situation bound, each nation-state having its own valid set of norms. However, legal validity is a matter of beliefs, while legal realism underlines the probability of respect for norms by means of enforcement activities by the bureaucracy and the judiciary.

Legal norms like due process of law and equal protection do not speak by themselves, as they have to be interpreted in the light of available notions and legal theory, which is often contested. When people have different beliefs about the law, various procedures for settling legal issues may be employed, like judge made decisions in case law or the introduction of new legislation. When beliefs change, legal norms are often reinterpreted. In reality, the system of legal norms in a country is hardly a logically coherent one, but is often based upon various pragmatic reasons, resulting in ambiguity, if not contradictions (Posner, 2002).

The basis of national or domestic law in beliefs about subjective validity recurs in the structure of international law. Public international law has expanded considerably after the Second World War into several bulks of norms, regulating purportedly interactions between states and protecting mankind. Yet, its claim to universal validity has been a serious issue of contention (Goldsmith and Posner, 2003: Posner, 2009) [23]. It is the probability of respect and enforcement that is the weakness of the system of international norms. Correspondingly, there is not total agreement about the validity of the many norms of the international society: treaties, conventions, recommendations, customs, decisions by international courts, opinions by legal scholars, etc. Some argue that governments may or may not respect international laws, depending upon their national interests or state reason. Others argue that these norms constitute the bedrock of all forms of legal systems, entering domestic law as valid rules. Thus, validity is not a matter of convenience or utility. Whereas legal scholars tend to underline the validity of international law as well as its unity with domestic law, political scientists often remain sceptical, arguing that states have no prima facie duty to observe these norms. Thus, validity is again subjective, i.e. it is a matter of beliefs.

The international system of states

It has been argued often that there exists no public international law, because what is distinctive of a legal order is missing, namely enforcement. This entails that the rules of the international community is a mere set of recommendations, only to be employed for strategic purposes when it is not just a question of simply talking. The basic actors remain the governments of states, pursing what interests they regard to the reasons of state. The organisations active on the global scene above the states constitute coordination mechanisms whose activities have to be legitimized by the states, if and when they are taken seriously. The NGOs may raise their voices, but it is the states that determine whether they are to be heard or not, let alone be allowed to influence global policy-making or implementation.

According to realism, the mundane interests of a country - economically, geopolitically, culturally - offer sufficient guidelines for state action. The nation-state knows what it has to do to protect its so-called vital interests that may include universal or cosmopolitan principles. When a government accepts global or regional coordination with other governments, resulting in so-called regimes, then it is still a matter of promoting national interests or state reasons. Thus, entering the economic coordination mechanisms of the world - WB, IMF and the WTO - is based upon voluntary decisions that aim at capturing a part of the wealth that a global market economy can deliver for its participating players.

However much coordination among states is accomplished in IGOs and regional bodies, the states watch any threat to their existence and survival as eliciting an indisputable right to self-defence. Thus, governments may decide unilaterally upon

military activities, has the right to do so, and will not refrain from going to war when attacked or seriously threatened.

It is true, realists would admit, that in the period of globalisation - starting one could say around 1980 - interdependencies have increased substantially just as coordination efforts. But the logic of the international system remains the same, despite all IGOs, NGOs and the making of many new treaties. We are still living in a state of anarchy where at the end of the day the principle of self-help applies fully.

One could perhaps surmise that the path towards more of regulation of global and regional affairs and interactions has been accompanied by a reduction in the relevance of the realist framework of analysis. Noticeable are the attempts to revise naked realism of Morgenthau type into regime theory or rational choice institutionalism that partly acknowledges normativity (Krasner, 1983, Young, 1989, Keohane, 2005) [19, 29, 18]. Yet, hard core realism is still alive, as several scholars maintain that states are the key players and that they are driven by self-interested incentives.

Geopolitics

One may contrast the perspective outlined here of growing normative in the international community with a much debated geopolitical analysis of future scenarios. The following predictions/possibilities/opportunities (whichever one may choose) are portrayed (Friedman, 2011) [11]:

- The break-up of Russia through invasion from both the West and East;
- The expansion of Turkey in various directions;
- The collision between the US and Mexico concerning the former Mexican territories, lost in 1845-1848.

All these projected changes would come up against PIL. Does it entail that they are little likely to take place? I would be inclined to argue thus. The PIL framework makes such huge scale geopolitical changes improbable, because they would involve – massively - the breaking of the basic principle: "*Pacta Sunt Servanda*".

Interestingly, Freedman's geopolitics targets the largest state in the world, territorially speaking. He evidently sees no hinder for its neighbours to cut it up: Finland regaining Karelia, the EU capturing huge parts of areas controlled once in historical times, Turkey moving into the Caucasus and in the East both China and Japan taking a bulk of Siberia. This is complete nonsense. All EU member states are bound by the "normative power Europe", which entails a firm commitment to peace and respect for territorial integrity. Turkey will face internal challenges to deal with, like the Kurdish question and the shaky balance of power in the Middle East. Finally, the price for China or Japan taking on nuclear Russia could be extremely high, especially if other powers in the Pacific decide to support Russia.

One may of course question whether it would be a state interest for the EU member countries to try once again the impossible task of defeating the Russian bear – an enterprise attempted trice the last three centuries (Charles XII, Napoleon and Hitler) with always the same outcome, i.e. crushing defeat. The notion of real or rational state interests in realism turns highly problematic, when a state engages in aggressive warfare, which could equally well be explained by misconceived leader preferences. But Goldsmith and Posner (2005) do not hesitate to build a whole theory about PIL on the assumption that these state motives or reasons can be specified objectively. Yet, tet us return to Posner, but this time it is not about his idea with Goldsmith that international law is merely imperatives, and do not constitute binding law. Instead, we examine his rejection of the relevance of PIL.

Irrelevance of PIL

It is undecided or debatable how the seemingly inexorable march towards normativity is to be theorized in relation to the classical paradigms: realism versus idealism or liberalism. On the one hand, a new realist interpretation has been launched by Eric Posner (2009) [23], rejecting the ambitions behind creating a body of laws of the international community. We need to examine his warning against international law efforts in Posner's Perils of Global Legalism (2009) [23] and The Twilight of Human Rights (2014).

"Legalism"

Legalism or PIL' humanitarianism is rejected by Posner, especially when human rights discourses are clothed in the cloths of law. Let us quote a colleague of E. Posner, stating in The European Journal of International Law:

"Posner defines 'legalism' as 'the view that law and legal institutions can keep order and solve policy disputes' (at 21), while 'global legalism' is 'an excessive faith in the efficacy of international law' (at xii). Posner describes American-style global legalists as overestimating the social value of international law, and therefore overestimating the reciprocal, retaliatory, or systemic costs of violation, with the effect that they overestimate the effectiveness of international law." J. P. Trachtman, Review of Eric A. Posner Vol. 20 no. 41263–1331

This argument is not the same as the theory of PIL, suggested by Goldsmith and Poser above. They argued that PIL is not "binding", but the 2009 and 2014 books by Posner claim that PIL is not effective, not resulting in outcomes that may it worth as an endeavour of mankind or the governments of the world.

The irrelevance argument is really independent of the non-binding thesis. PIL could be binding for various reasons, but irrelevant due to implementation failure. Or PIL may be relevant, because it is partially enforced and could be implemented better I the future. Another colleague of Posner states in Democracy Journal:

"In the last few years, we have been subjected to a relentless drumbeat of human rights violations. In Saudi Arabia, there has been a "systematic and ruthless campaign of persecution against peaceful activists" (to quote Amnesty International) to silence criticism of the state following the 2011 Arab Spring protests. In Brazil, the country's criminal justice system has been so overwhelmed that it semi-regularly resorts to extrajudicial justice. Here at home, we have all heard of the unlawful rendition of terrorist suspects to foreign jurisdictions where torture is likely. Such horrors are recounted throughout Eric Posner's The Twilight of Human Rights Law, the latest salvo from one of the legal profession's most relentless—and prolific—opponents of international law. How can we tolerate an international legal system that has failed to expunge these practices, the book asks? Posner claims that the international legal system has burgeoned, and yet "rights are not respected more today" than 20 years ago." (Simmons, 2015: 99)

Yet, the failure to implement PIL has always been a major topic in the debate about the nature of PIL. In so far as Posner

target the new cosmopolitanism and its lofty ideals, one is prepared to accept his critique of too weak enforcement, or even impossibility of implementation. But when his criticism also includes all kinds of human rights treaties and conventions, then one must object. There have been some advances in the protection of human rights, which is a clear sign of the relevance of this international jurisdiction.

Posner has basically a very limited view on PIL, as he regards it as the legal framework that states have erected and support for self-interests and reciprocity (Posner, 2012). This entails that he neglects the other side of PIL, namely the protection of the international community, or humanity. He states:

"In this paper, I argue that this difference is connected with the structure of international law. At the heart of international law lies the phenomenon of reciprocity. States take international law norms most seriously when the penalty for violating them is direct and immediate retaliation from other states in the form of reciprocal violation of the same norms. When international law has this structure, it is relatively robust. When it lacks this structure, it is weak. I argue that the United States takes the law of war more seriously than human rights law because the laws of war are reciprocally enforced, while human rights laws are not." "Human Rights, the Laws of War, and Reciprocity" Posner in Law and Ethics of Human Rights 6 (2):147-171 (2012)

This is in fact a too limited view upon PIL. It aims at the protection of not only states but also individuals, or mankind. Posner argues that PIL is not binding, because it is often not enforced. This is true also of national law, although definitely considered binding or obligatory. Posner claims that only the section on states and sovereignty are relevant within PIL, because they are based upon games of reciprocity between governments. However, also the COP21 treaty follows from the logic of reciprocity, meaning that all must sign the agreement in order to exclude free riders and make it obligatory. It is true that enforcement will be problematic in relation to the COP21 Agreement, as the procedures to implement the Agreement are vague, to say the least.

The international community

The call for normativity in relation to the international system, modelled as anarchy and self-help, has a more solid foundation than idealist blue-prints for an international community in eternal peace, as with Kantianism for instance. It starts from the body of principles laid down in public international law (PIL), comprising not only treatises but also custom and self-evident reasons. PIL has existed for centuries, constituting the set of norms guiding diplomacy. After the Second World War, PIL has been codified in numerous standard textbooks of ever increasing size.

According to the foremost legal scholar in the 20th century adhering to the idea of normativity, PIL is based upon natural law conceptions with a pacifist orientation. Hans Kelsen (1912) could draw upon a legacy from Christian Wolff and his idea of civitas maxima when proposing his legal monism, meaning that PIL comes before national or municipal law. However, such a Christian pacifist foundation for global normativity is easy to reject.

Carl Schmitt (1928, 2002) [27] disposed of this type of Christian pacifist project by denying that PIL was anything than mere recommendations, lacking the typical force of law and constituting mere wishful thinking. Thus, the Versailles Treaty had no binding force upon Germany, argued Schmitt, against the fundamental – Grundnorm – idea of the idealists from Grotius and onwards that "*pacta sunt servanda*". Schmitt took the positivist standpoint of Hobbes, namely that there is only national law, emanating from the will of the state, i.e. legal dualism.

The Kelsen-Schmitt controversy has much dominated the theorizing on PIL, linking up this debate on the nature of PIL with the opposition between idealists and realists. PIL would be:

a. Morality and not law;
b. Recommendations that is not self-enforceable;
c. Norms without enforcement;
d. Pacifist notions that are unrealistic;
e. Global regulation that would be biased or dangerous.

One finds reminiscences of this classical antimony in the now surging debate on PIL, as it has evolved after the Great War (Besson and Tasioaulas, 2009; Dunoff and Trachtman, 2009; Klabbers, 2009; Crawford, 2012; Posner, 2009) [2, 23]. Yet, this antimony of domestic law against morality or realism against idealism has less relevance today due to a number of recent developments.

One major factor in promoting normativity is the speed with which new information flows around the globe today. This is reflected in the constant updating of information in the many news channels: CNN, BBC, Al Jazeera, Fox, France 24, etc. These media constitute only one expression of the global communication village, as also governments have poured lots of resources into various ways to achieve constant updating.

More information, better accuracy and quick updating have the following consequences for the monitoring of PIL:

- Presumed violations of basic rules are when known communicated worldwide;
- Perpetrators offending the rules of PIL cannot expect to go undetected for a long time;
- Clear violations of PIL will be recorded almost at once and transmitted worldwide, meaning that there is memory of what has taken place;
- Offences against the rules of PIL can be monitored for weeks and stored in detail in order to allow for future examination and possible court procedures.

As information as well as the continuous updating of data is crucial for monitoring of evens, normativity is much enhanced by the immense technological advances in communication recently. What the protagonists of normativity have at their disposal is nothing less than a set of tools for constant and detailed surveillance of the observance or violation of PIL.

Kelsen's legal positivism took the view that law's validity is conditioned by its effective enforcement, whereas Swedish philosopher Axel Hagerstrom developed the legal realist approach that legitimacy of norms is nothing but the same as their probability of compliance. Legal pragmatists like for instance Richard Posner (1993) shares the Hägerströmview: "law is a prediction about what the judges will do". Since states sometimes comply with and sometimes renege with PIL on the basis of self-interests, Posner draws the conclusion that PIL has no normativity or binding validity, neither Treaty Law ("*pacta sunt servanda*") nor Customary Law, i.e. there is no "*opinio juris*".

It is true that PIL differs from domestic law as far as the probability of compliance or enforcement is concerned, at least in well-ordered countries. But this was always the standard objection towards PIL. And how can it lead so far that it is claimed that it has no binding force whatsoever, at the same time as the probability of enforcement is increasing? PIL may be deficient as LAW, but how can it be LAW and have no normativity?

PIL is grounded only upon state interests, guiding them to various forms of coordination at best, as well as to renege at worst. States would have behaved in the same way without treaties or customary international law, in accordance with various equilibria in non-cooperative game theory. This position bypasses entirely the transaction cost saving nature of LAW. States could not handle all the transaction costs from solving a myriad of alternative interaction games, day in and day out. Better to rely upon the binding nature of valid norms with a general scope, guiding action in similar circumstances.

One may wish to contrast the new realist argument by Posner with the new cosmopolitanism, which dreams of a development of PIL towards morals and natural law, i.e. more of legitimacy but little or none of efficacy.

Cosmopolitanism

When theorizing globalization, cosmopolitanism and law, one cannot bypass the insights from the philosophy of law, distinguishing between norms on the one hand (validity) and their implementation on the other hand (efficacy). Just because the new cosmopolitanism speaks much about universal rights, it does not turn these moral rights into substantive law. The new theory of cosmopolitanism, launched by so-called liberal egalitarians, purports to be a global political theory for the globalisation age. It is based upon various theories of justice in political philosophy and results in some stunning or utopian conclusions.

The new cosmopolitanism (Caney, 2006) [6] envisages foreign affairs on the model of domestic affairs in so-called well-ordered countries, and thus aims at a new international constitutionalism to protect humanity. I argue that both positions fail to render a credible account of increasing relevance of public international law for politics and economics in foreign affairs. Yet, it does not match that of rule of law in domestic affairs. One may argue that the key principle in public international law, viz state sovereignty, now has to co-exist with other most important principles, such as e.g. humanitarian intervention and national self-determination. Besides, several of the rules of the international community that were recognized earlier but often neglected by governments have recently received a new emphasis

New cosmopolitanism is much broader than old cosmopolitanism according to the Kantian framework. Whereas the latter concentrated upon peace and the regulation of violent conflicts, new cosmopolitanism underlines global distributive justice besides launching civil and political rights. It goes far beyond public international law. Are we then to say that it gives directions for the future improvements of the law of the international community - "*Voelkerrecht*"? I much doubt that, as the new cosmopolitanism is utopian, whereas the PIL framework is practical. For instance, R.G. Teitel suggests that PIL has evolved so much recently that it can be considered as a global rule of law regime, comparable to the Rechtsstaat within a country. Her argument: PIL = Global Rule of Law, consists of three parts theorizing what she calls humanity's law (Teitel, 2011) [28]:

a. Humanity's law comprises essentially the following parts of the PIL: the Geneva and Hague conventions about the conduct of inter-state war: just war as well as justice in war, the Treaty of ICC (International Criminal Court) and the Security Council decisions concerning the ad hoc courts for Former Yugoslavia and Rwanda: personal security in intra-state civil war and anarchy;
b. Humanity's law offers person protection in several ways similar to rule of law regimes within a country;
c. Humanity's law has a structure similar to that of domestic rule of law.

I would not hesitate to suggest that the suggested strong linking of the PIL with cosmopolitan moralism would weaken the emerging normativity in international relations. What Teitel calls "humanity's law" is hardly comparable to rule of law in so-called well-ordered societies.

Firstly, the Geneva Conventions are hardly new, as they began to be laid down around 1900. Second, together with the Hague Conventions they offer a number of norms about the conduct of war and use of violence in conflicts, but these norms have had almost nil impact upon reality. Whereas the so-called efficiency of rule of law tends to be high in the capitalist democracies or well-ordered countries, the opposite is true of humanity's law. In addition, the ICC has not met with universal acceptance and the capacity of the ad hoc tribunals to punish perpetrators has been rather meagre. Thus, also with regard to legitimacy the framework of humanity's law is hardly to be compared with the rule of law regime when solidly implemented as within the OECD countries. Thirdly, whereas Humanity's law targets the protection of civilians against physical violence from either interstate or intrastate conflicts, the rule of law regime has a much broader scope than merely the Habeas Corpus rights. Thus, rule of law today entails constitutionalism, which is lacking in Humanity's law.

Rule of law only exists when there is a high probability that its norms are complied with, either directly or indirectly through enforcement against deviations from observing these rules. Teitel speaks of humanity's law "providing protection", "offering protection" etc. But the respect for these norms is often so low that this is only a manner of talking about LAW.

The call for global democracy is a cornerstone in the new cosmopolitanism (Held, 1995) [13]. Scholars calling for more of democracy envisage either small reforms of global institutions in an egalitarian direction or they suggest that pressure should be exercised upon countries that are illiberal. PIL endorses state sovereignty together with non-interference on the one hand as well as human rights as well as humanitarian intervention on the other hand. Thus, PIL as a whole is hardly a consistent normative framework. But it holds true that in any case PIL does not entail global democracy, which call today would amount to a culture blind “exigency” (Rawls, 2001) [25].

A spontaneous order

The augmentation of normativity along with the process of globalisation has led to a debate about the pros and cons of global constitutionalism (Krisch, 2011; Dobner and Loughlin, 2012) [16, 8]. One should separate between the expansion of PIL on the hand and various efforts at regional or global constitutionalism. As the failure of EU constitutionalism

shows, constitutions make much sense at the level of nation-states. Globally, the PIL framework advances slowly but inexorably by means of the principle of "muddling through". The PIL is not planned or designed as a whole set of rules. Instead it has expanded in scope and range in an incremental fashion. It builds upon the accumulated wisdom of a variety of efforts over a few centuries to codify a set of reasonable rules for the interaction of states as well as the protection of persons.

To make this approach to PIL as a spontaneous order in Hayek's terminology more concrete, one may take the invasion of Iraq in 2003 as an example. The US and UK led invasion of the sovereign state of Iraq violated PIL, as clearly expressed by French foreign minister Villepin in the debate in the Security Council ahead of the start of the war. The reason for the attack proved erroneous, but the wider consequences of the invasion has been disastrous to such an extent that it forms one of the catastrophes of human history: millions of Muslims dead or wounded, thousands of American and British killed or molested, the disintegration of whole states, the rise of insurgency from radical Islamic fundamentalism, millions of refugees and terrorism in Arabia and the West.

PIL states the rules of war, how to start a conflict and how to conduct it. It is based on the collective wisdom of mankind from violent conflicts over centuries. These rules must be respected, as they are not merely moral recommendations that can be reneged upon when convenient to a state. A climate change regime would enter PIL in the manner, meaning a set of binding rules that restrain governments to respect the interests of humanity.

The military intervention in Libya was hardly more successful, resulting in a so-called failed state, from which people try to exit in huge numbers. Although this intervention could be motivated by rules in the PIL about foreign support to groups in internal conflict and principles of humanitarian intervention, the outcome was dismal, to say the least. It is true that dictatorship was abolished, but only to be replaced by anarchy, clanism and political violence. Perhaps the calm reality of political stability trumps the turbulent zest for democracy in the Muslim civilisation?

The situation in Syria was rather similar to that of Libya, but the Russian support for the regime ruled out the possibility of an intervention from Western powers. Also China would have vetoed that in the Security Council, whose approval is necessary for collective defence or humanitarian intervention. However, the civil war in Syria quickly got completely out of hand with multiple groups fighting and the regime bombing its own population indiscriminately. With the entrance of ISIS from Iraq, Syria has fallen into the Hobbesian predicament of *Omnium bellum contra omnes*, worsened by the air raids of no less than four super powers.

With hindsight, one can definitely assert that the Iraqi invasion was not only legally wrong, but also disastrous in actual consequences. The Libyan case is debatable, as the regime was a despicable dictatorship, but without any plans for the aftermath, Libya has suffered enormously. The same is true of Syria, where millions have been very badly affected by the civil war among Moslems, between the Shia regime and the Sunni communities, along with much outside intervention from Arab countries, Iran and Russia as well as Western powers now. For Syria holds that humanitarian intervention, if at all feasible, would have resulted in better outcomes, which is not true of Libya.

However, the flat break of PIL with regard to the state of Iraq has thrown the entire Middle East in turmoil. One should not go against a spontaneous order, as the enormous costs of all kinds for the Operation Cobra: Iraqi Invasion testify about.

Conclusion

In the philosophy of right and legal theory, it is emphasized that ethics and justice have to do with rules, whether the approach is a deontological or one of consequentiality. Legal norms fulfil this requirement of generalizability of universalizability, inherent in morality (Hare, 1972) [12]. In various domains of activity – economics, environment, state interactions, humanitarian efforts, there has occurred a seminal trend towards normativity since 1945 and especially 1990. It blurs the traditional separation between realism and idealism that has dominated IR. The inexorable drive towards more of normativity has accompanied the major changes in the international system or foreign relations:

- The strengthening of the IGOs;
- The creation of regional organizations;
- The evolution of a global civil society: NGOs and CSOs;
- The creation of new global courts, ad hoc or permanent besides the ICJ;
- The expansion of domestic courts into international affairs.

However, growing normativity does not entail global constitutionalism or even that the basic problem of public international law – implementation or enforcement – has been resolved adequately. Idealism, especially in the form of utopian cosmopolitanism remains unrealistic, but realism has been tempered by normativity. Constitutionalism works best at the state level. And one may be sceptical about the pros of attempting to create constitutions for regional or international organizations.

To sum up

The new interpretation of PIL by Goldsmith and Posner (2006) replaces normativity with mutual advantage or utility:

"The primary intellectual target of Limits is the claim—widespread in earlier generations of international law scholarship and still dominant today—that nations comply with international law for non-instrumental reasons. Non-instrumental explanations for compliance can include a sense of obligation to comply (opinio juris), or international law's normative pull, more the absorption of international law into a nation's internal value set." (Goldsmith and Posner, 2006: 464)

I cannot agree. To the extent that PIL is really law, it is binding. To the extent that it somehow protects mankind, personal integrity and peace among nations, it is relevant.

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