Can the "Peace through Law" Approach Work?

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The "peace through law" approach is a prescriptive[1] idea building on the premise that a state of peace, i.e. the absence of uncontrolled use of force,[2] can be achieved in an organized society if the performance of coercive acts is, by virtue of a legal order, reserved only for certain subjects of that society who perform those coercive acts against others as *organs* or "*as an agent of the community constituted by that order*"[3]. In other words, the approach assumes that by creating a monopoly on the legitimate use of force based on a legal order, the relations between members of a community are inevitably pacified. Applied to the conditions of the international sphere, the promise of the approach is that the interactions between the different subjects of global politics, primarily states, can be pacified by putting into place a system of legal rules that effectively regulate the relations between those subjects, in particular in cases of conflict. The difficulties linked to this approach are based on these prominent criticisms of international law: (1) can the international order be likened to a community of subjects in the sense that both the administration and the enactment of legislation is centralized and thus withdrawn from the individual members; and (2) is international law really *law*, that is rules which govern the behaviour of the members of a global society? Whether or not the approach *works*, i.e. whether it is possible to pacify international relations by implementing an international legal order, depends on whether satisfactory answers can be given to these two questions. The following will provide a modest attempt in this regard.

1. Brief Genesis of the "Peace through Law" Concept

The inclination to resolve interpersonal and international conflicts by force runs like a red thread through human history, as if it was rooted in human nature itself.[4] But almost as an antithesis to this phenomenon, the longing for peace between peoples and civilizations has equally been a desire firmly rooted in the minds of both average citizens and philosophers and thinkers. Early examples of ideas that connect the longing for global peace with the notion of a transnational concept of law are Jeremy Bentham's "Plan for an Universal and Perpetual Peace"[5] and Immanuel Kant's theory of a perpetual peace. It deserves particular mentioning that Immanuel Kant early understood that a war could easily evolve into "*a war of extermination, where the process of annihilation would strike both parties at once and all right as well, would bring about perpetual peace only in the great graveyard of the human race.* "[6] He thus deduced that "*according to reason*" there can be no other path for States to advance *"from the lawless condition which unceasing war implies, than by giving up their savage lawless freedom, just as individual men have done, and yielding to the coercion of public laws.* "[7] Other theories on the pacifying effect of international law were put forward in light of the cataclysmic events in the early to mid-20th century, with the prominent example of Hans Kelsen coining the idea of "peace through law" by means of the slow but steady development of an international judiciary, followed by administrative agencies (in the sense of an executive, or enforcing entity), and eventually the creation of an international legislature.[8] And indeed, if one takes a careful view at human history as a species and as a maturing international community, it becomes evident that humans are already on their way to "world peace through law" through the step-by-step, law-by-law, accumulation of a body of international law.

2. The Domestic Analogy – Can the World Community Learn from Nation States?

One of the central assumptions of the "peace through law" approach is an analogy between the nation state and an emerging world community, both structurally and in terms of the influence of the respective law[9].[10] Yet as tempting as this analogy may be, since it promises to provide a structural blueprint, it is doubtful whether either the

evolution or the end product of the modern European state can in any way be generalized, that is, a legal and political centralization on a global scale based on western concepts such as democracy, the rule of law and the separation of powers.[11] Whereas the projection of the concept of law onto the global sphere will be addressed separately below, some of the structural differences of such an analogy will now be scrutinized.

It is an undeniable fact that the international community displays a rather low level of organization, in the sense of an underdeveloped constitutional structure of checks and balances and accountability.[12] This observation figures very prominently in the writings of realists beginning in the 1930s and 1940s, who tirelessly point out that international law "*lacks three institutions which are essential parts of any developed system of municipal law: a judicature, an executive and a legislative.*"[13] Such a matured organizational structure could, according to the promise from the constitutional system of western design, ensure that certain functions considered vital for the survival of the community are performed by pre-defined organs and administrators. The international community, however, is still largely dominated by states, with international governmental/non-governmental organizations as well as individuals only slowly beginning to have a direct impact on international affairs and as immediate bearers of rights and duties.[14] In addition, the international community lacks a uniform level of organization for sanctions; it has no effective court structure or single executive organ that can implement the law. But in light of these observations, it ought to be asked if the precise reproduction of nation state institutions and structures on a universal level is at all a necessary precondition for the pacification of the world community.

First, it must be remembered that even the above-mentioned national structures are the result of a development, a gradual process which the global community has not undergone. Thus it should not be expected – also in light of differences between states and even regions of the world in terms of political and societal organization – that the same structure can be made to apply at the stroke of a pen. Furthermore, international law scholars tend to believe that the separation of powers of the municipal model (of western complexion) is more complex than is necessary for the international level. Instead, since the nature of international law is undetermined,[15] emphasis should be put on the judicative and executive function of a closer world community.[16] Hans Kelsen, e.g., called it a "*fatal fault of its construction*" that the Covenant of the League of Nations placed the Council and not the Permanent Court of Justice at the centre of the organization.[17] Indeed, it is the function of courts to determine a breach(er) of applicable law on both the international and municipal level and only in a secondary step does the question of enforcement of the law arise.[18] It thus not only appears acceptable to push for a gradual development of the international institutional system but indeed necessary in order to pave the way for a more coherent executive institutional design and sanctions mechanism. The relative importance and proliferation of international courts and tribunals since 1945, despite the lack of a far-reaching compulsory jurisdiction of international courts and the continued absence of any organization close to an international government appears to support this interpretation. Finally, it should not be overlooked that the adoption of a global structure of separation of powers would even more force states to adapt to this structure – with the loss of national sovereignty as a necessary result. This concern is indeed one of the greatest obstacles that international law has faced in the past century and continues to face despite the slow progression of international institutional design.

3. International Law as "Law"

Closely linked to the institutional aspects addressed so far, the "peace through law" approach essentially builds on the pacifying effect of law in the international sphere. This idea has been supported on numerous occasions in scholarship and throughout the centuries, perhaps most prominently in recent time by Hans Kelsen with a merger of his pure theory of law and the world federalist interpretation of the global order. It is not the appropriate place here to expound on the various premises suggested by Hans Kelsen – such as that the international legal system encompasses all normative systems, including state legal systems, and that international law, strictly speaking, is super-ordinate to them.[19] The precise relationship between international law and municipal law is a separate issue which can be (and has been) solved in various ways.[20] But what must be raised as a central problem in the present context is the impossibility of international law to, so far, overcome important concepts such as the sovereignty of nation-states and the supreme role accorded to national legal systems (by states themselves and subjects functioning under their aegis). This concern must be linked to the rather persistent criticism in both scholarship and practice that international law is not really law and thus cannot assume the role of a set of rules prescribing behaviour

and which are enforced through institutions.

International law is not law; it is a series of political and moral arrangements that stand or fall on their own merits, and anything else is simply theology and superstition masquerading as law.[21]

The central argument of those questioning the "legality" of international law is that the lawmakers in international law are also at the same time the subjects of that law.[22] Coupled with the lack of a coercive authority, compliance with any norm in the international sphere appears to depend only on the will of states[23] and thus international law, in so far as it can be said to exist at all, is merely "*a mirror of the reality of politics in international relations*".[24] This reductionist view, which emphasizes the role of power and of national interest in international relations, is particular prevailing in the realist school of international relations.[25] This view is also of major importance to the assessment of whether law can indeed have a pacifying effect on those relations.

In answer to this criticism, the basic function of international law as it appears today ought to be considered. As stated by Shirley Scott, international law today can be seen as an ideology, a set of rules and basic principles which play a key role within the socio-political structure of international relations.[26] The fact that international norms do provide for stability in international relations can hardly be denied, be it in the broad sense of a preservation of international peace and security and protection of human rights, in a regional context to level existing social and economic differences between states, or in more specific fields such as the law of the sea, world trade, or space exploitation.[27] Be it to provide for a predictable normative framework to facilitate the cooperation between states in those areas or to ensure the necessary institutional underpinning for such cooperation, international law does fulfil an important function upon which actors, which are considered the prime movers of international relations, rely. As an example, and on a still very fundamental level, it suffices to refer to principles of law,[28] such as the concept o*pacta sunt servanda*,[29] without which cooperation in international affairs would fall back to anarchy. It is also relevant to outline that international law norms are clearly distinguishable from other factors in international affairs in that they reach a degree of specificity unattained by e.g. mere morality and power.[30]

A further point of criticism is that international law does not qualify as "law" since states (and other actors) do violate international law on occasion and because the international legal system does not, for those instances, provide for sanctions with the same level of efficiency as can be observed in municipal law. For the present analysis, this criticism is relevant insofar as sanctions are often linked to the question of peace in a legal system. As pointed out by Baron David Davies:

The prevention of war […] involves the creation of machinery for securing international justice, justice, in turn, is dependent upon disarmament; disarmament cannot be obtained without security; and security cannot be purchased without the establishment of sanctions.[31]

Yet this observation must be strongly rebutted – the occasional violation of international law, irrespective of how dramatic it is presented (e.g. in the media) does not override the ordinary course of interactions between states.[32] Furthermore, sanctions are, also in municipal law, merely a means of last resort and neither their existence nor their degree of effectiveness should lend as a basis for a final verdict on the legal character of a particular legal system. What can be stated with some degree of certainty is that international law is embedded in a political context, wholly different than national law. It is of a horizontal character, operating among the subjects that both create and are expected to follow it. Mechanisms such as reciprocity, dialogue and consensus have far greater relevance in such a context than command, obedience and enforcement. Or expressed differently, the nature of international law reveals it as a "*legal system based on co-ordination and co-operation among equals.*"[33]

4. The Pacifying Role of Law in International Relations

Having clarified that the domestic analogy is of some use and that international law does qualify as a set of rules that govern behaviour in international affairs, despite relevant issues of effectiveness and enforcement, attention can be focused on the question what obstacles must be overcome for international law to have a pacifying effect on international relations.

One such obstacle is the already mentioned horizontal character of international law, i.e. the fact that its rules aim to regulate the affairs among equals and that they are not developed by central institutions empowered with this task. The sovereign equality of states, the *Grundnorm* and "*fundamental axiomatic premise of the international legal order*"[34] from which flow the ban on the use of force and the prohibition of intervention in the current system of international law, is an obstacle to the development of a system of world peace based on international law. It is indeed all too apparent that the primacy of international law, which would be the vantage point for establishing international law as a basis for world peace, has never gone beyond being a theoretical concept, be it in the shape of an *imperium romanum* or *civitas maxima*, despite the appeal to a moral unity of human beings. And even these earlier attempts at establishing a peace beyond the nation state borders were hardly based on a pacifist ethos.

Indeed it appears that the analogy with national legal systems pushes the "peace through law" approach into a fundamental dilemma, namely that legal centralization also suggests resulting in social and political standardization. Indeed international law is often perceived as threatening when it purports to regulate issues that hitherto have been dealt with by states alone and in different ways. With the gradual development of international law, often circumscribed with the notions of fragmentation and constitutionalization,[35] it is inevitable that a social process sets which leads to functional differentiation and the gaining of autonomy of certain parts of society. This process has been implemented in domestic societies for long, but has commenced with force in the international realm only through the emergence of specialized organizations and treaty-regimes.[36] It must also be taken seriously when certain states fear the spread of international law due to the risk of a concealed spread of hegemonic tendencies of the Western world. This has some truth to it when it is argued that certain concepts on which international law is occasionally claimed to rest reflect the technological, financial and military supremacy only developed in the West.[37]

As an equally necessary consequence of the partial analogy with national law, international law (when seeking to displace state-waged war as a way to resolve conflicts that cannot be mediated) needs to resolve the question of legitimate usage of force and in its final consequence – of the use of war. The system of collective security first established by the League of Nations and later revived in Chapter VII of the UN Charter is an attempt to provide a legal framework for the use of force but it has not only in the example of the Covenant of the League of Nations found a rather unsatisfactory arrangement; with building blocks based on the premises that (a) states have an equally strong interest in preventing the use of force against each other, and (b) that states share the same willingness to assume risks in order to prevent this. Thus although the League of Nations[38] and subsequently the UN, taught "that the world cannot and must not depend on the anarchic rivalry among sovereign States to preserve the peace and security of the world"[39] – the only thing that international law seems to be able to rely upon in this respect is the concept of a common morality or ethics, not (yet) a truly actionable legal foundation. Indeed as Hans Kelsen also found, what international ethics is likely to consider as just, is also likely to transform into international law.[40] However, this suggestion raises the deeper question of defining what "international ethics" might consist of.

Finally, despite the problem-orientated approach taken in the present thesis, this should by no means be interpreted as an indication that the "peace through law" approach does not already "work". To the contrary, but without going into details, the author is convinced that much of the peaceful interaction in international affairs today is to a large extent owed to the one-step-at-a-time, brick-by-brick, law-by-law, norm-by-norm accretion of a body of "international law", which is gradually becoming a body of genuine "world law" right before our unsuspecting eyes,[41] influencing decisions of war and peace almost on a daily basis.

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[1] With this is meant that the approach mainly describes how international affairs ought to function. See Suganami, Hidemi, *The 'peace through law' approach: a critical examination of its ideas*, in: Trevor Taylor (ed.), *Approaches and Theory in International Relations* (New York, Longman, 2nd edn., 1978), pp. 100-121, at p. 105.

[2] As will be clarified by the following, the lack of force is not to be understood as the *absolute* absence of force.

[3] Kelsen, Hans, *Peace through Law* (New Jersey, Lawbook Exchange, 2000), at p. 8.

[4] This observation can be brought in connection with Thomas Hobbes' view (which mirrored that of e.g. Plautus), that humans are inherently selfish. "*To speak impartially, both sayings are very true; That Man to Man is a kind of God; and that Man to Man is an arrant Wolfe. The first is true, if we compare Citizens amongst themselves; and the second, if we compare Cities.*" Hobbes, Thomas, *De Cive* (London, Kessinger Publishing, 2004), at p. 2.

[5] Bentham, Jeremy, *Plan for an Universal and Perpetual Peace* (London, Sweet & Maxwell, The Grotius Society Publications, 1927).

[6] Kant, Immanuel, *Perpetual Peace: A Philosophical Essay* (New York, Cosimo Inc., 2010), at p. 7.

[7] *Op. cit.*, at p. 17.

[8] Hans Kelsen's propositions for the attainment of peace through law will be taken up again in a later segment of this paper.

[9] On the role of the quality of the law, see *infra*, Chapter 4.

[10] According to Hidemi Suganami, the "'*peace through law' approach of the post-First World War* [...] *was based on the assumption that the more closely analogous the international legal system would become in a number of aspects to a domestic legal system, the more peaceful and orderly would be the society of nations.* " See

Suganami, *op cit.*, at p. 106. See also, e.g., Hans Kelsen, who even speaks of the establishment of a "*World* [Federal] *State*"; Kelsen, *op cit.*, at p. 5. See also Butterfield, Herbert and Wight, Martin (eds.), *Diplomatic Investigations: Essays in the Theory of International Politics* (Michigan, Allen & Unwin, 1966), at p. 35.

[11] On a "Europe centeredness" of these concepts and, occasionally, of the outlook on international law in general, see, e.g., Wolfrum, Rüdiger, *International Law*, in: Wolfrum, Rüdiger (ed.), *Max Planck Encyclopedia of Public International Law – Vol. V* (Oxford, Oxford University Press, 2012), pp. 820-836, at paras. 22-38.

[12] Young, Ernest A., *The Trouble with Global Constitutionalism* (2003) 38 Texas International Law Journal, pp. 527-546, at p. 529.

[13] Carr, Edward Hallett, *The Twenty Years' Crisis, 1919-1939: An Introduction to the Study of International Relations* (London, Macmillan, 1946), at p. 170.

[14] Walter, Christian, *Subjects of International Law*, in: Wolfrum, Rüdiger (ed.), *Max Planck Encyclopedia of Public International Law – Vol. IX* (Oxford, Oxford University Press, 2012), pp. 634-643, at paras. 2-3.

[15] See further *infra* at Chapter 4.

[16] According to Hidemi Suganami, there is "*nothing unnatural in* […] *resorting to domestic analogy selectively.*" Suganami, *op cit.*, at p. 108.

[17] Kelsen, *op cit.*, at p. 49.

[18] Cf. Lauterpacht, Elihu, *International Law, Being the Collected Papers of Hersch Lauterpacht, Vol. 1* (Cambridge, Cambridge University Press, 1970), at pp. 16-20.

[19] See on this, Zolo, Danilo, *Hans Kelsen: International Peace through International Law* (1998) 9 European Journal of International Law, pp. 306-324, at p. 309.

[20] For perhaps the most prominent example, see the relationship between EU law and the national law of the EU Member States, building on principles of direct effect and supremacy of European law. See, e.g. Gaja, Giorgio, *European Community and Union Law and Domestic (Municipal) Law*, in: Wolfrum, Rüdiger (ed.), *Max Planck Encyclopedia of Public International Law – Vol. III* (Oxford, Oxford University Press, 2012), pp. 822-827.

[21] Bolton, John R., *Is There Really "Law" in International Affairs?* (2000) 10 Transnational Law & Contemporary Problems 1, pp. 1-48, at p. 48.

[22] Mainly States and international organizations. Cf. Wolfrum, *op cit.*, at para. 13.

[23] Slaughter, Anne Marie, *Building Global Democracy* (2000) 1 Chicago Journal of International Law, pp. 223-229.

[24] Wolfrum, *op cit.*, at para. 13.

[25] See, for a prominent example, e.g. Morgenthau, Hans J., *Politics among Nations. The Struggle for Power and Peace* (New York, Alfred A. Knopf, 1948).

[26] Scott, Shirley, *Identifying the source and nature of a State's political obligation towards international law* (2004-2005) 1 Journal of International Law and International Relations, pp. 49-60, at p. 49.

[27] See generally on the fragmentation of international law, Pauwelyn, Joost, *Fragmentation of International Law*, in: Wolfrum, Rüdiger (ed.), *Max Planck Encyclopedia of Public International Law – Vol. IV* (Oxford, Oxford University Press, 2012), pp. 211-220.

[28] Principles of law are themselves considered one of the three categories of sources in international law upon which the legal order is based. See Wolfrum, Rüdiger, *Sources of International Law*, in: Wolfrum, Rüdiger (ed.), *Max Planck Encyclopedia of Public International Law – Vol. IX* (Oxford, Oxford University Press, 2012), pp. 299-313, at paras. 33-39.

[29] I.e. the notion that a treaty in force is binding upon the parties to it and must be performed by them in good faith. Cf. Art. 26 Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331.

[30] Byers, Michael, *International Law*, in: Reus-Smit, Christian and Snidal, Duncan (eds.), *The Oxford Handbook of International Relations* (Oxford, Oxford University Press, 2010), pp. 612-631, at p. 625.

[31] Baron David Davies, *The problem of the twentieth century: a study in international relationships* (London, E. Benn, 3rd ed., 1938), at p. 3. It is interesting to note that Baron Davies, when speaking of sanctions, does not imply the creation of a judicial system but of an international police force.

[32] Malanczuk, Peter, *Akehurst's Modern Introduction to International Law* (London, Routledge, 7th edn., 2003), at p. 6.

[33] Wolfrum, *op cit.*, at para. 21.

[34] Kokott, Juliane, *States, Sovereign Equality*, in: Wolfrum, Rüdiger (ed.), *Max Planck Encyclopedia of Public International Law – Vol. IX* (Oxford, Oxford University Press, 2012), pp. 571-586, at para. 1.

[35] Koskenniemi, Martti, *International Legal Theory and Doctrine*, in: Wolfrum, Rüdiger (ed.), *Max Planck Encyclopedia of Public International Law – Vol. V* (Oxford, Oxford University Press, 2012), pp. 976-986, at paras. 28-33.

[36] See on the collision between national and international law, Fischer-Lescano, Andreas and Teubner, Gunther, *Regime-Kollisionen: Zur Fragmentierung des globalen Rechts* (Frankfurt am Main, Suhrkamp, 2006).

[37] See Latouche, Serge, *L'occidentalisation du monde, Essai sur la signification, la portée et les limites de l'uniformisation planétaire* (Paris, La Découverte, 1989).

[38] For a broader analysis of the failure of the League of Nations, see, e.g., Keylor, William R., *The Twentieth Century World and Beyond – An International History Since 1900* (Oxford, Oxford University Press, 5th edn. 2010), at pp. 97-116.

[39] Keylor, *op cit.*, at p. 98.

[40] Kelsen, Hans, *Law and Peace in International Relations: The Oliver Wendell Holmes Lectures 1940-41* (Cambridge, Harvard University Press, 1952), at pp. 36-37.

[41] Ranney, James T., *World Peace Through Law: Rethinking an Old Theory* (2012) Vol. 1, Issue 5, Cadmus, pp. 125-134, at p. 126.

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