THE STRUCTURE OF INTERNATIONAL LAW AND THE NEED FOR HIGHER LEVELS OF DEMOCRATIC CONSCIENCE AS NECESSARY FOR COMPLIANCE

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Abstract

This paper examines the structure of international law from the realist perspective, arguing that international law cannot be perceived from the positivist angle, since there is no uniformed body of sanctions, and that unlike the domestic law structure in its hierarchical fashion of vertically placed compliance mechanisms, international law assumes a horizontal fashion as stemming from the inherent principles unique to international law. The paper suggests that just as democratic conscience is the mental component of democracy, necessary to its peculiarity as a political system, it is necessary for nation-states, especially the hegemonic states that constitute the United Nations Security Council to imbibe as it aids responsibility towards legal obligations. The paper further analyzes compliance in the light of the consideration of two international relations models of compliance, reputational model and the direct sanctions model, stating that compliance could be a function of reciprocity. The paper concludes on the success of international law in establishing order among states and regulating other non-state actors, suggesting that the ambition that international law has for a peaceful world could be achieved if states would inculcate higher levels of democratic conscience.

Keywords: Compliance, Democratic Conscience, International law, States

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Introduction

The structure of International law is of a peculiar form; such that it's functioning, as different from municipal law is based on some conditions that are majorly reliant on international cooperation. To talk of the extent to which international law should be seen as law is to firstly follow on the nature of the subject and to examine some technicalities that make distinctions between international law and international relations. The nature of international law is such as could be perceived from the definition that:

International law consists of the rules and principles of general application dealing with the conduct of states and of international organizations in their international relations with one another and with private individuals, minority groups and transnational companies[1]

The perception of law as a body of rules stemming from a vertical legal structure as would be seen in the municipal law system would be misleading if same were to be applied in an attempt to understand the international legal order since the core principles of international law, sovereignty, equality and non-interference supports a horizontal structure, in fact the mechanism of compliance might be lost in such an attempt. The structure of the international legal system as determined by its subjects, is such that, it assumes a horizontal position in its functioning since the seeming equality of states, as presented by their sovereign status, does not allow for a global governing system, and consequently, there is no such thing as a world court with a limitless jurisdiction spanning across nations. The International Court of Justice decides cases on the consent of the parties involved and has no mechanism to make sure for the compliance of its decisions[2] The International Criminal Court decides cases on parties who are citizens of contracting states, that is, countries that have signed and ratified the ICC Rome Statute or upon a United Nations Security Council referral.[3] International law rules should be distinguished from international practices such as saluting foreign flags at sea as they are not binding, but are only polite gestures.[4] Just as one might want to distinguish between morality and law, so is international law different from international morality.[5] To a large extent, the difference between municipal law where the subjects are individuals governed by a system of laws derived from a legislative process and a constitution that are binding on their conduct and an international law system

[1] Beckman and Butte, 'Introduction to International law' (2016) International Law Student Association, accessed on Dec. 30 http://www.ilsa.org/jessup/intlawintro

[2] Statute of the International Court of Justice 1998, article 36.

[3] International Criminal Court, Rome Statute 1998, arts. 12 and 13.

[4] North Sea Continental Shelf cases, ICJ Reports, (1969) p. 44; 41 ILR, p. 29.

[5] Malcom N. Shaw, *International Law*, (6th edn, Cambridge University Press 2008) 2.

where states have their interests to protect and have their internal affairs covered by their sovereign status, is that the international law system is mostly consent based.

THE VIEW OF JURISTS ON THE STRUCTURE OF INTERNATIONAL LAW

Hans Kelsen, a well-respected jurist, has viewed international law from the perspective of the legal positivist, considering with as much idealism in the function of international law that political interests have little or nothing to do with normative events or the content of treaties.[6] The context in which he sees the structure of international law as analogous to that of domestic law is the context of a compliance theory that is constituted on the premises of formal agreements and custom. He strips international law of any realism that should be predicated on politics, recommending scientific objectivity as would be expressed in the role of the expert legal adviser as being the articulator of objective interpretation. The positivist view of Kelsen is well expressed where his point is highlighted in the conception that international law is constituted by international agreements that result in rules binding on contracting states and customary practice well known among states that outlines conduct that needs be complied with.[7] Myres McDougal had a dissension that views international law from the realist perspective that cuts on the traditional space between international politics and international law, suggesting that interest had much to do with the formation of international law. What is more interesting is his awareness that international law for the most part is non-hierarchical.[8] This translates into the thought that international law professes a complex, horizontally structured relationship between states and other international actors. International law could also be seen along this line as a regulatory system that is factored and determined by the needs and characteristics of the international political system.[9] International law in its horizontal expansion has retained an inclusivity where new states created after the Second World War, individuals, groups and international organizations, both private and public are concerned.[10] With the definition of law based on the argument of the Austinian command theory of law, viewing law from the perspective of a sovereign issuing a command enforced by punishment or sanction, one might be tempted to judge international law less than what it is, or to

[6] H. Kelsen, *Principles of International Law* (2nd ed. R.W Tucker, 1966)

[7] Malcom N. Shaw, *International Law*, (6th edn, Cambridge University Press 2008) 6.

[8] M.S McDougal, 'International Law, Power and Policy: A Contemporary Conception' (1953) Vol. 82 RdC 133-259

[9] Malcom N. Shaw, *International Law*, (6th edn, Cambridge University Press 2008) 44.

[10] Ibid 44.

follow the trend of relegating it to the category of 'positive morality'[11] The criticisms to this perspective have been that it has distorted the nature of law and its role in a society and has reduced it to an end, compliance.[12]

This is not to say that globalization and the emergence of complex political systems like the supranational union is not defining the interaction between states and the international system, and re-inventing the concept of sovereignty, the argument sustaining the horizontal structure of international law is based on the fact that there is no unified body of sanctions through which international law may be operated as command. To fully understand the horizontally-structured nature of international law, it should be seen and appreciated from its sources. The sources of International law are authoritatively specified as that, the court in deciding cases shall apply:[13]

International conventions, whether general or particular establishing rules expressly recognised by the contesting states;

International customs, as evidence of a general evidence of a general practice accepted as law;

The general principles of law recognised by civilized nations; subjects to the provisions of Article 59, judicial decisions and teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law. The United Nations Security Council could have been deemed to top the structure of the International law system as the guardians, ensuring compliance, but for the veto power of the five permanent members (America; USSR, now the Russian Federation; France; China; and the United Kingdom)[14] The issue of the rule of law for an international legal order, just as is required of any well-functioning legal system has arisen in many instances, the current being the role of Russia in the Syrian war, and the pertinent question whether political forces will affect any legal inquisition into the matter. For instance, there had been allegations of the use of chemical weapons and indiscriminate attacks of civilian populated areas by the Assad controlled Syrian Army and some of the rebels.

The question of whether there would be a Security Council referral for the prosecution of the use of chemical weapons and other war crimes, is seemingly unsure as shown by the recent crisis on agreement over the armed conflict in Syria. However, one of the

[11] See J. Austin, *The Province of Jurisprudence Determined* (ed. H. L. A. Hart, London, 1954) 134–42.
[12] HLA Hart, *The Concept of Law* (2nd edn, Clarendon Press 1994) 10.
[13] Statute of the International Court 1945, article 38.
[14] See e.g. P. Sands and P. Klein (eds), *Bowett's Law of International Institutions* (5th edn, London, 2001) Chapter 23.

balances needed for the emphasis of a rule of law in the international law system are two elements of compliance, to wit; reciprocity and alliance.[15] For instance, the fair treatment of prisoners of war according to the rules of international humanitarian law by two nations engaged in an international armed conflict might be predicated on the need to have their military personnel caught behind enemy lines to be treated fairly.[16] And for the sake of alliance that is, political support generated from other nations in say, a dispute with another nation, a nation mostly might want to take the politically correct course of action in alignment with international law.

DEMOCRATIC CONSCIENCE AND INTERNATIONAL LAW

Democratic conscience is a concept of cooperation and a progressive notion of order that is expressed within a political system. It has its many manifestations, and one is the willingness to respond positively to issues affecting corporate interests. In international politics, the democratic conscience is the positive response to cosmopolitan concerns. If seen in its ideal state, the democratic conscience is the foundation of order as opposed to the conceptions of self-absolutism where power is deconstructed in the context of interests that are not shared. The democratic conscience is the mental component of democracy; democracy is its practice. The United Nation's Charter espouses this concept of democratic conscience in the letters of its purpose:[17]

To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace;

To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace;

To achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without

[15] Malcom N. Shaw, *International Law*, (6th edn, Cambridge University Press 2008) 7- 8.

[16] See the provisions of the Third Geneva Convention of 1949 as relating to the protection of the prisoners of war.

[17] The Charter of the United Nations 1945, Article 2(1), (2), (3), (4).

distinction as to race, sex, language, or religion; and

To be a centre for harmonizing the actions of nations in the attainment of these common ends.

The traditional stance of the United Nations has always been on the advancement of democracy. In addition, much as there could be a positive relationship between peace and democracy, there remains a largely debated absoluteness to the possibility of that positive relationship; hence, there is no blatant parallel nor a flawless congruity. An Oxford scholar defined the relationship in his attempt to identify political violence as a consequence of the absence of proper democracy thus:

The world is not as peaceful as during late colonialism, but we are down to five ongoing wars and twenty-seven minor conflicts. So this break in trend looks to be consistent with the triumph of democracy: where people have recourse to the ballot they do not resort to the gun.[18]

Respect for the rule of law in a democracy is deemed sacrosanct, since the rule of law is a function of common interest where the principles of fairness and justice are concerned. Therefore, the hope for a rule of law in the international law system is based on a democratic conscience. History has proven that despotic regimes assist each other, as in the case of Adolf Hitler and Benito Mussolini, and as in the case of former autocracies in Africa, and this reflecting a psychology of association, is not humanly out of place. However, as much as the international law structure favors a horizontal one in the face of the principles of sovereignty, equality and non-interference, international politics would be the vehicle through which international law would get to its destination. It is believed by liberals, that the type of regime in place in a state is crucial to understanding the role of law international relations.[19] They also believe that compliance is also reliant on whether the state can be seen as a state practicing liberal democracy with a representative government that supports civil and political rights, and a legal system that respects the rule of law.[20] This view has been supported by John Morrow's study that found in terms of international humanitarian law, ratification by democracies correlated with greater compliance.[21] Again, democracies are most likely to comply with

[18] See Paul Collier, *Guns, Wars and Votes: Democracy in Dangerous Places* (HarperCollins Perennial Reprint ed., 2009) 6.

[19] Slaughter, Anne-Marie, 'International Law in a World of Liberal States' (1995) Vol 6. European Journal of International Law 503-538

[20] Heath Pickering, 'Why Do States Mostly Obey International Law' 2014 E-International Relations Students <www.e-ir.info/2014/02/04/why-do-states-mostly-obey-international-law/> accessed on 15 July, 2017

[21] Morrow, James, 'When Do States Follow the Laws of War?' (2007) Vol 101, No. 3 American political Science Review 559.

international law compared with autocratic regimes.[22] The dynamic expression of the mechanisms of international law and international politics present certain exceptions that are pertinent. These exceptions are in the form of multilateral interventions in the nature of an act by the United Nation Security Council (UNSC), and sometimes unilateral interventions that might go unquestioned as resulting from the hegemonic status of the state concerned. One instance of the unilateral intervention was the United States role in the 1991 Gulf War, when it moved against Iraq without the support of the UNSC. The super power syndrome, in as much as it could be effective in compliance situations could also be a threat to international order. This was reflected in the case of the Soviets role in the Cuban missile crisis of 1962, when the super powers, America and the Soviet Union almost went to war with each other over what seemed to have started out as an ideologically-motivated assistance by the Americans in appropriating overseas interests. Democratic conscience as positively as it could be, when it is reflected in the polity of a state could have more significant impact when it is reflected in its highest levels in the polity of a hegemonic state, and even much more when it becomes the interface of interaction between hegemonic states. The democratic conscience in the sphere of contemporary international relations has always been at polar extremes, and to identify this would be to examine the veracity of the statement in the light of the international politics that characterize the Syrian crisis. The Assad regime as supported by the Russian state presents some challenges for the democratic conscience of the United Nations as a multilateral framework for international peace. The United Nation's Charter provides that:

In order to ensure prompt and effective action by the United Nations, its Members confer on the Security Council primary responsibility for the maintenance of international peace and security, and agree that in carrying out its duties under this responsibility the Security Council acts on their behalf.[23]

The question remains thus: has the UNSC performed on the responsibility that has been conferred on them by the provision of article 24 (1) putting aside interests that do not align with the representations of world peace and security, and have they really acted on behalf of the members of the United Nations? The answer comes in negative form, that the UNSC has actually fallen short of its purpose in the multilateral frame work of the United

[22] Owen, John, 'How Liberalism Produces Democratic Peace' (1994) Vol 19, No. 2 International Security 87-125, 87.

[23] The Charter of the United Nations, Article 24(1).

Nations in the Syrian case and many more instances before it.[24] In the actual sense of it, the UNSC can be said to have virtually failed, if in the light of their responsibilities as provided by the United Nations charter, success should be measured. The question remains for the manifestation of compliance and the place for a rule of law in the international law system. That the erstwhile former states of the eastern bloc, China and Russia with their low levels of democratic conscience would align their interest in the support of the Assad Regime to the disapproval of the Western states, the United Kingdom and the United States, shows some evidence to the importance of democratic conscience, and what the possibilities could be if hegemonic states share a high level of democratic conscience. China's position on the Syrian crisis, as much as it has lacked any demonstrated will in its action to provide a solution, was resolute in its support of Russia.[25] Perhaps the low level of democratic conscience amongst communist and socialist states is tied to the classic Marxist theory that viewed the interaction of politics and law as the scenario of the dominance of one class of people by the other,[26] this being antithetical to democratic conscience. Even though there has been a review to this approach as stemming from the proliferation of capitalist states and the unviability of this perspective to law in international relations,[27] yet, the historical antecedence of a people would always reflect in their politics, whether internally or externally. Historical evidence shows that the perception of law in China differed greatly from the perception of the law in the West. There was no preeminence to law in the Chinese society as it did in the European civilization.[28] This could explain the contemporary trend of China's foreign relations response within the framework of the UNSC. Away from the Syrian conflict, it could be argued that the lack of uniformity in the perception of the permanent members within their function as UNSC members has brought some checks to hegemonic excesses that could be incurred by unilateral interventions by any of the permanent members of the UNSC. It could also be argued that the perceived role of the UNSC as a compliance mechanism in international law is questionable if one were to perceive international law from the positivist angle, knowing that compliance to the positivist is a

[24] Richard Spencer, 'How Syria and the bloody conflict has torn the UN Security Council apart' (2015) The Telegraph, October, www.telegraph.co.uk/news/worldnews/middleeast/Syria/11915649/How Syria and the bloody conflict has torn the UN Security Council apart

[25] Ibid.

[26] Malcom N. Shaw, *International Law*, (6th edn, Cambridge University Press 2008) 31.

[27] Ibid 32.

[28] See Malcom Shaw, *International Law*, (6th edn, Cambridge University Press 2008) 37. Lloyd, *Introduction to Jurisprudence*, 760–3; S. Van der Sprenkel, *Legal Institutions in Northern China*, New York, 1962, and R. Unger, *Law in Modern Society*, New York, 1976, 86–109

question of a monopoly of force which should be wielded by a sovereign with a single-mindedness towards sanction. It could also be argued that the UN charter didn't anticipate that the permanent members of the UNSC with their different levels of democratic conscience, owing to their internal experiences now being externalized in their foreign relations would as a consequence impede single-minded interventions necessary for order in the international community. One of the greatest threats to democratic conscience in the international law system, is the new wave of populism that seems to be sweeping across the West. It appears to have the capacity of creating an insularity in the polity of powerful states, and this could leave vacant spots in the balances of the compliance mechanisms of international law. Ultimately, democratic conscience determines how positively a state would respond to state responsibility as it may arise.

THE PLACE OF COMPLIANCE WITHIN INTERNATIONAL LAW

As well expressed in the Latin maxim 'Quis custodiet ipsos custodes,' who will guard the guardians themselves? Expressing that there ought to be guardians of the law who will ensure compliance through, if possible, the use of sanctions, but the question remains: who issues the command of law, and who issues sanctions or ensures punishment upon violation of the law in an international system? To start with, the system of sanctions for international law are very much differently formed from what is known in the municipal law system. The system of sanctions for international law follow up on the configuration of the horizontal system founded on the notion of the equality of states. Hence, there is no unified system of sanctions for the international law system.[29] The issue of sanctions as belonging to a positivist perception of the law questions the legal status of the structure of international law, as it has been noted earlier in this article. The place of compliance in international law, is not the place of what a means is to an end, but an end in itself. The means to compliance lies in the composition of two component parts, to wit; sanctions through the consideration of reciprocity. That is, a state might comply on the grounds of avoidance of state responsibility that emanates from a breach or non-performance or on the grounds of not wanting its interests jeopardised in the state affected by its breach or non-performance. One argument that maintains reciprocity as a component or as a means to the end of compliance is the

[29] See e.g. W. M. Reisman, *Sanctions and Enforcement in The Future of the International Legal Order* (C. Black ed 2nd ed, R. A. Falk, New York, 1971) 273; J. Brierly, *Sanctions (*17 *Transactions of the Grotius Society*, 1932) 68; Hart, *Concept of Law*, 211–21; A. D'Amato, 'The Neo-Positivist Concept of International Law' (1965) 59 AJIL, 321; G. Fitzmaurice, 'The Foundations of the Authority of International Law and the Problem of Enforcement' (1956) 19 MLR, 1, and S. Schwebel, *The Effectiveness of International Decisions* (Leiden, 1971)

argument that self-help, which states can take under certain conditions in international law, is a check to acts that could have arisen in the course of furthering state interests, as the principle, *sic utere tuo ut alaenum non laedas*[30] in international law delimits the consequences of the political act of the state to itself. Albeit that self-help is a concept that does not conform to the nature of law as seen from the positivist perspective as necessarily having an element of force, which must be issued by a sovereign, and this implies that the system of sanctions must be unified, it should be noted that it is a function of the principle of reciprocity. There are two models to the compliance from an international relations perspective; the reputational model and the direct sanctions model.[31] The reputational model analyzes compliance from the position that a state that breaches an obligation under international law is seen by other states as ready to breach its other obligations.[32] While direct sanction analyzes compliance from the position of force.[33] Even if reputational sanction outweigh direct sanction in the international law system, and in the positivist conception of the nature of law, direct sanction should outweigh reputational sanction in the establishment of order, it doesn't make international law, less as law or deprive it of its nature as law, it only suggests a peculiar dimension of law and reinforces the idea that the true nature of law cannot be captured in a single definition. There are costs and implications to whatever decisions a country and its decision makers come up with on the breach or the honouring of a promise under international law. As earlier noted, a nation considers very much its interests in its interaction with other nations and as such this will spur it in complying if the odds are much in the favour of complying, but if not, such a nation might consider the breach if its benefits outweigh its costs.[34] There is usually observance of international law in the situation whereby a nation finds that the benefits are affected in such a way as to ensure compliance, when in the non-existence of that law, a state would have acted differently this is termed reputational sanction.[35] One sure instance would be the fear of the placement of economic embargo as a response to a breach seen as grave.

FINDINGS

The structure of international law and its success in its ambition to establish a peaceful world, while it governs the conduct of states

[30] The principle that 'a property should not be used in a way that would lead to the destruction of other's,' is a principle that as much as outlines the purpose of state responsibility, also points out the sacrosanct quality of the principle of sovereignty.

[31] Andrew T Guzman, *A Compliance Based Theory of International Law,* (John M. Olin Foundation, 2015) 2.

[32] ibid

[33] ibid 47

[34] Andrew T Guzman, *A Compliance Based Theory of International Law,* (John M. Olin Foundation, 2015) 42.

[35] ibid 42.

in their interactions, is very much dependent on the levels of democratic conscience among states. The ambition of a peaceful world could be possible if states would imbibe high levels of democratic conscience in their bid to comply, but understanding that states would always want to secure their interests sometimes to the detriment of other states is a reflection that states and their respective governments are comprised of people with differing political needs from the people of other states they interact with at the governmental level. From this structure of international law and the attendant challenges with identifying a system of compliance that would inspire utmost gravity to the rules of international law, one could say that international law would best be defined along the lines of realism. However, the case, there have been certain achievements to the existence and practice of international law in its current state. Firstly, putting a human face to armed conflicts thereby creating obligations for belligerent parties in their engagement in conflict, and in the protection of parties and non-parties to the conflict, regulating the conduct of nations in line with a fast expanding democratic consciousness in the global community, granting recognition of the independence of states in light of certain requirements to the access of the right of self-determination to states like Kosovo are some of the many achievements of international law.

CONCLUSION

It can be argued that when there is friction in the diplomatic interactions between states, the knowledge of international law creates a level ground for negotiations in the resolution of disputes. These achievements of international law having stemmed from many years of global civilization going through phases of perfection, occurring first in the way people perceived political systems, and especially with the practice of modern democracy. Then, in the expansion of the governmental interests across the state frontiers, it could be hoped that the democratic conscience of the democratic state is a phenomenon that develops with time. Hence, from the argument, one can safely say that the structure of international law will not dim the prospects of compliance over time, if states expand their consciousness in the magnanimity of democratic conscience, the prospects of compliance can only get better.