REFLECTION ON THE PHILOSOPHICAL-HISTORICAL ROOTS OF THE CRISIS IN WESTERN INTERNATIONAL LAW THINKING

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Abstract

International Law appears to have lost both its possible civilizational foundations — the Greco-Roman/Christian doctrine of natural law and the contract theory, based on the "Humanist" confidence in the creative potential of individual will. In practice International Law — as it continues to exist — consists of either contractual arrangements among two or more States, or unilateral assertions of will by individual States, usually contested by other States. In this sense, International Law has become privatised, a matter of duelling individual perspectives, with no ontologically objective environment within which "warring" individuals can be embedded. This is the context in which the so-called Lauterpacht approach to International Law arises. It claims that the application of private law analogies should be suitable for international legal decision-making. Legal analysis and judgement then becomes a matter of weighing up the force of two or more competing wills. Another problem is that the social contract theory prioritises the striving for security as the central human characteristic. The legal discourse closes itself off from alternatives capable of questioning this idea. For one possibility, the idea that world society is a natural family of Nations is excluded. The new goal of the social contract, after the Great Depression and World War II, was to establish a liberal order wherein human opportunities would be significantly expanded and universal prosperity would be guaranteed. The basic tenet of liberalism is the dismantlement of the State, which is supposed to be the form through which individuals participate in their own governance. As this State retreats, private economic interests, regulated only by private law, if at all, take precedence. So, the long pathway from the 17th century confidence in the humanist construction of the State through the social contract of free and equal individuals ends up at present in a critical breakdown of order, where an antinomian spirit prevails at all levels of society, domestic, transnational and international. This diagnostic exercise offers no solution, although it does indicate obstacles which could, conceivably, be overcome.

Key words

International Law, philosophy of law, social contract, liberalism, doctrine, international courts

Citation: Carty J. A., Tolstykh V. *Reflection on the Philosophical-Historical Roots of the Crisis in Western International Law Thinking* // Zhurnal VSHÉ po mezhdunarodnomu pravu (HSE University Journal of International Law). 2024. Vol. 2. No. 3. P. 4–13.

https://doi.org/10.17323/jil.2024.23983

The West — of which its International Law is a part — being in a state of Nihilist Collapse. The construction of the Western philosophy of governance — including International Law — is around two consecutive stages of civilization: the Greco-Roman/Christian and the Renaissance Humanist, which gradually replaced the former.

The former grounded a doctrine of natural law, that the nations and peoples of the world formed part of a common humanity, created by a rational God and having a duty to reflect God's nature by observing his law of reason which he designed for their existence. This permeates the thinking of the late scholastic "international lawyers" F. Vitoria and F. Suarez and indeed even H. Grotius, despite his disclaimer that the law of nature and nations could exist without God. This natural law doctrine was never an empirical exercise. It was a metaphysical insight into the rationality of "man", corresponding to the rationality of God, which created and governed the universe. Obeying Law meant corresponding one's own conduct to this cosmic order. It is now forgotten why the idea of observing Law (with a capital L) has meant so much in the Western civilization.[1] Despite the expanding place of "humanism" from the 17th century, some form of ontological natural law continued into the 19th century, in the form of the natural, individual rights of nations, which made up their so-called fundamental rights of States.[2] With the disappearance of an ontological dimension to International Law, its writers have no foundation for a construction of "the public" dimension of international order — in the sense of the place of the nations as a whole in relation to one another — because they have

1 Carty A. *Philosophy of International Law*. 2nd ed. Edinburgh University Press, 2017. P. 3–6, 25–29.

2 Idem. *International Law as a Science, The Place of Doctrine in the History of its Sources* // Indian Yearbook of World Affairs. Part II. 1980. P. 128–160.

no idea of a “world” in which States or Nations find themselves. The way is being prepared for the subjectivisation and privatisation of the whole idea of Law that comes with the second, Humanist phase of the Western civilization, a decayed form of which now predominates among the intellectual “tools” of international lawyers.

The “Humanist” message here means the confidence of individual men to construct out of nothing (i.e. without any vision of a “world, either historical or metaphysical”) a contractual foundation for governance, the entire content of which has been supplied by the contracting parties.[3] With Th. Hobbes, J. Locke, J.-J. Rousseau, and I. Kant, at a minimum, it is felt possible to construct sovereign States. However, there is a fateful development here. E. Vattel’s “Law of Nations” (1758) adopts the contract theory of the State and follows, above all, the philosophy of J. Locke. The language used to construct the State is to leave behind a state of nature and to enter civil society. However, Vattel is adamant (rejecting C. Wolff) that there is no international social contract and that nations still exist in a state of nature, but, in his view, nevertheless supported by a much weakened ontology of Nations, which gives primacy to subjectivity, so that even treaties concluded are always subject to unilateral interpretation. Yet, at the same time, Vattel believes in an ontology whereby Nations are “naturally” inclined to look to their own inner development and to leave other Nations undisturbed.[4]

This confidence in Law as a product of the Will of the State is itself now deconstructed sociologically by the Scandinavian Realists (above all, A. Haegerstroem) who recognise that the “Will of the State” is a fiction, that political society is infinitely more amorphous and unstable. Adherence to Law rests upon many factors accidentally present in large societies. Indeed, a sociological approach will reveal that large numbers of so-called Nation States at present are anything but coherent collective bodies and that large areas of international society have become unstable, leaving the world landscape more and more to resemble the chaotic transition from mediaeval to modern Europe. Despite a formal acceptance — actually fictional — that there is a general customary law of States (though the methods of locating it remain elusive), in practice International Law — as it continues to exist — consists of either contractual arrangements among two or more States, or unilateral assertions of will by individual States, usually contested by other States if the content of the former has implications for them. In this sense, International Law has become privatised, a matter of duelling individual perspectives, with no ontologically objective environment within which “warring” individuals can be embedded.[5]

Legal analysis and judgement then becomes a matter of weighing up the force of two or more competing wills. That is to say one engages in a search for the real or true intentions of the parties, ending up in a speculative judgement of what was really intended — by means of logical and grammatical analysis. Such vagueness — reflecting the disappearance of a strongly defined will — has provoked the whole field of so-called critical legal theory (D. Kennedy and M. Koskenniemi) to decry the competitiveness of endless disputes where arguments collide with one another in a mesmerising dance. These written and oral arguments are separated from any historical, cultural and political context. The “crits” have an easy time disclosing the contextual conditionality of legal concepts, while expanding argumentative possibilities endlessly. The reason is simple enough. Completely free subjects, unrestrained by any authority or objective world environment, may say and do say as suits their subjective view of their interests.

Even more seriously, the dominating legal institutions, judicial, do not rely upon a sovereign will when declaring law, but introduce general principles, soft law and other judicial decisions, following a quest for effectiveness, short term, but lacking an ontological basis and a rigorous methodology. That brings judgements into disapproval. The most extreme case is the *Nuclear Weapons Case* (1996), which gave priority to the right of States to use these weapons in self-defence (read: subjectively assessed security) over the continued existence of the human race.

This is how International Law has come to acquire a formalised, procedural, dualised system of law, where arguments can only be resolved when a final adjudicative authority is present, itself resting upon authority and not reason. There is, of course, no such general adjudicative authority. Its existence would contradict the fact that States have not set up an international civil society, i.e. a world State. However, they work on the basis that real or supposed combined wills of States do in fact constitute a complete international legal order. The fundamental problem inherent in liberal philosophy is that it has no ontological concept of reality, no objective world into which individuals can be integrated. It is A. McIntyre who demonstrates that

[3] Carty A. *Philosophy*... P. 71–72, 162–168.
[4] Ibid. P. 149–151.
[5] d’Aspremont J. *International Law as a Belief System*. Cambridge University Press, 2017.

this is why liberalism is condemned to focus exclusively on procedures of argumentation — arguments condemned to be foundationless and inconclusive.[6]

This is the context in which the so-called Lauterpacht approach to International Law arises. It claims that the application of private law analogies should be suitable for international legal decision-making. Treaties are equated with contracts and territory is equated with private property. State responsibility is a replica of the law of torts or obligations. This is the message of "Private Law Sources and Analogies of International Law" (1927) by H. Lauterpacht. Hereafter analysis of international relations has become the task for social philosophers and the jurist has merely a linguistic task of identifying "intentions of a legal character". Yet Lauterpacht believed that this task was adequate to justify placing hope in the judiciary to "fill the gaps" in International Law and ensure a world ruled by law.[7]

Apart from the issue of the absence of widespread acceptance of judicial settlement, the judge's perspective would be to qualify the acts of individual States, identify who was liable to pay compensation, and not to identify the general problems which create these situations, nor generate measures to eliminate these problems. This is a point usually made by "Great Powers" in resisting the UN General Assembly requesting advisory opinions of the International Court of Justice (hereinafter — ICJ, the Court), such as in the *Nuclear Weapons Case.* While the argument is always rejected by the Court, nonetheless it proceeds to ignore the wider context anyway.

Underlying the sterility of international arbitrations is precisely the absence of any intellectual substance (of ethical, cultural, or whatever) and character among academics — reduced to writing analytically critical commentaries upon judicial decisions or producing commentaries on "law-making treaties" as if they were codified municipal laws. It is not surprising that lawyers with State service background are most often appointed to the International Law Commission (hereinafter — ILC) or to the ICJ. The academics have no separate body of knowledge apart from analysis of "legal" materials produced by what is called the frame provided by the State.[8] That is to say, "legal knowledge" is what is produced by the "Will of the State", which includes the Executive, the Legislature, and especially the Judiciary and any international body created by inter-State will. All an academic can boast is a more general and systematic knowledge of what "spouts out of" this frame provided by the State. Ontologically, nothing else can have "Being".

When it comes to attempts by the ILC to define the fundamental rights of States, this was a topic which the ILC, not surprisingly, abandoned since it was a leftover of a defunct natural law metaphysics.[9] Equally it could make nothing of the inherently ontological nature of the concept of *jus cogens* — that there must be conduct of such essential importance that its disregard has to be beyond the so-called Will of States. So, the ILC merely repeated the terms of the Vienna Convention on the Law of Treaties (1969), that *jus cogens* is itself a creation of the Will of States. In this context the ILC makes vacuous remarks about the self-determination rights of peoples, not treating its relation to the territorial integrity of States, an "essentially" ontological question. Finally, it fails to elucidate the meaning of general customary law, inevitably, since the latter is a product of a romantic notion of nationalism hanging over from the early 19th century. An ostensibly unconscious community way to make law is no longer possible in a post-metaphysical age.[10]

In any case, it would be difficult to imagine today an international lawyer giving advice that would be listened to by senior officials as in the second half of the 19th century was done by R. Phillimore in the UK or by F. Martens in Russia. Indeed, it was Lord A. McNair, who commented on how the 19th century textbook was merely descriptive rather than analytical work, a history of international relations.[11] What McNair missed completely was the moral sense which Phillimore as a Christian, educated in the classics, was undertaking. For Phillimore there was the spirit of a God-given moral law governing the universe. Moral truth demonstrates that independent communities are free moral agents. So, writing in the 1870s, he noted that the failure of European States to object to the violent seizure of Danish territory in 1864 and the equal failure to resist further violent territorial changes led to the prevailing notion that "a state must seek territorial aggrandisement as a condition of her welfare and security."[12]

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6 Carty A. *Recent Trends in the Theory of International Law* // European Journal of International Law. 1991. № 2. P. 16.
7 Lauterpacht H. *The Function of Law in the International Community*. Oxford University Press, 1936.
8 Carty A. *The Decay of International Law*. Manchester University Press, 2019. P. 38.
9 Idem. *The Need for Interdisciplinarity in the Work of the International Law Commission* // ed. by A. Qureshi. *Law Reforms around the World*. Routledge, 2023.
10 Ibid.
11 Carty A. *The Philosophy*… P. 13. He was also the person who directed Lauterpacht to write his work on private law analogies.
12 Ibid. P. 12.

A mark of how deeply set in stone are the conditions created by McNair and Lauterpacht is that when Carty first raised these arguments in 1990, they provoked no debate. However, in 2004, J. Crawford, the leading academic international lawyer in the UK, thought that a reply was overdue. He published a chapter in a book denouncing A. Carty, specifically pointing to the Admiralty Court practice of Phillimore and describing Carty's argument about the narrowing of the profession's activities as absurd, given Phillimore's Admiralty Court practice.[13] The comments by McNair and Crawford show that they do not just disagree with the argument presented here. They simply do not understand it.

One may ask how serious it is that International Law appears to have lost both its possible civilizational foundations. If the international situation is relatively stable, then one might remain, as mainstream international lawyers prefer, agnostic about foundations. However, many institutions of International Law that have depended upon the so-called principle of effectiveness, such as recognition, succession, the right to self-determination, *uti possidetis juris,* have become redundant, leaving huge gaps in the international order. In his work "The Paralysis of International Institutions and the Remedies", the Hungarian intellectual I. Bibo points out that the so-called principle has no normative character, and the international society is increasingly marked by actors not willing to accept as an accomplished fact what appears to be backed by overwhelming force.[14] Palestine is one example where Israel is recognised, but so is the "idea" of a Palestinian State. The difficulty is also that the reduction of the concept of the State to the idea of sovereignty (ignoring historical, social, economic and other factors) means that so-called international lawyers have no intellectual tools to grasp the internal and external forces which work for or against the cohesion or the disintegration of States. At present, that is to ignore the power of the national, while also neglecting the intercontinental flow of migration. All conflicts in the former USSR and Yugoslavia, following the principle of *uti possidetis juris,* were due to the attempt to accept previous administrative boundaries. There was never any "Will of the International Community" to apply, but it was assumed by the so-called European Commission on the former Yugoslavia, set up to oversee the dissolution of Yugoslavia. The rule resulted in a significant part of populations becoming minorities. Once in power, the new States pursued a policy of national unification, depriving minorities of rights. This is now a significant issue in Ukraine. Other States, having no clearly agreed principle to follow, have taken different sides, as happens now with Ukraine. The situation is even more exacerbated by the fact that the West is especially overrun at present by intercontinental migration, which the social contract theory of the State cannot resolve, given its purely formal character.

There is an even more serious defect of the social contract theory of law as one attempts to apply it to international relations. It is not simply that the absence of any real global consensus leads to the drafting of international conventions which leave gaping cracks in normativity (such as Articles 74 and 83 of the 1982 Law of the Sea Convention, and Article 6 of the 1997 Convention on the Law of Non-navigational Uses of International Watercourses). The social contract theory prioritises the striving for security as the central human characteristic. The legal discourse closes itself off from alternatives capable of questioning this idea. For one possibility, the idea that world society is a natural family of Nations is excluded. Here one is at the transition stage between the two civilizational blocks of the West and that transition is a rupture rather than a bridge. D. Campbell's "Writing Security: United States Foreign Policy and the Politics of Identity" argues for a vacuum at the heart of the "modernist" State:

> This has to be filled through a negative construction of 'the other', which returns to give it material content. This process is a deeper level of the process of secularization represented by Westphalia. Modern secularization, the core of which is self-assertion or self-determination, in rejecting medieval or universal Christendom, presented the problem of securing identity 'in terms of how to handle contingency and difference in a world without God' Absent the metaphysical guarantee of the world by God, man is faced with danger, ambiguity and uncertainty… (T)he transfer of sovereignty from God to the State meant also the transfer of the category of unconditional friend/enemy relation onto conflicts between the national States that were in the process of integrating themselves.[15]

At present this "philosophy of the Will" has led to epidemics of violence. Violation of the prohibition on the use of force cannot be considered on par with other violations. Unlike the latter, it makes the very existence of International Law impossible.

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[13] Crawford J. *Public International Law in Twentieth Century England* // ed. by J. Beaton, R. Zimmerman. Jurists Uprooted, German-speaking Émigré Lawyers in Twentieth Century Britain. 2004. P. 681.

[14] Discussed in Carty A. *The Decay…* Chapter 4 on the law of territory.

[15] Carty A. *Philosophy...* P. 159–160.

First, it destroys other assumptions on which International Law is premised: social contract, basic norm, peaceful coexistence, and so on. Moreover, the prohibition on the use of force is the central point of the liberal conception of law; its violation makes it impossible to implement all the other points: protection of property, free trade, human rights, representative democracy, and others.

Second, it terminates existing treaties (except those regulating hostilities) and makes it impossible to conclude new ones (except for peace treaties). In other words, war means the end of International Law between belligerents. Modern doctrine takes a more differentiated position, which, however, cannot always be implemented.[16]

Third, the specific feature of modern warfare is its discriminatory character: the adversary is defined not as an equal opponent (*justus hostis*), but as an enemy of the human race (*hostis humani generis*); the purpose of the war is its destruction (rather than the defence of right); the confrontation is total. The main stake in such a war is the very existence of a legal entity; a victorious war destroys the international community as it narrows the circle of States.

Fourth, a war within the community of civilised nations is something more than a dual confrontation; unlike colonial wars, it forms a matrix projected onto the universal order.[17] This can be explained both by the fact that the European order is a convincing example for countries external to it, and by the fact that it is the guarantor of the universal order (its core).[18]

> At the beginning of the 21st century, it has become obvious: the prohibition on the use of force is not provided with the necessary guarantees: to ensure it requires a radical reorganisation of the existing order and working out of new political theories.[19]

The particular pseudo-formal legal arguments used now to disregard the provisions of Article 2(4) and Article 51 of the UN Charter are the following:

First, some States and part of the International Law doctrine defend the right to preventive self-defence, referring to the danger of terrorist attacks and use of weapons of mass destruction, inadequacy of reaction *post factum,* and duty of the State towards its people.[20] The concept of preventive self-defence is used in public rhetoric by the US, the UK, Israel and, after 2022, Russia.

Second, in the late 1990s, the right to unilateral humanitarian intervention was transferred from the realm of morality to the realm of positive law. Proponents of this right invoke moral considerations, the concept of *jus cogens* and humanistic trends in law.[21] This novelty was not supported by most specialists, but may well be rehabilitated as the consensus of the permanent members of the UN Security Council erodes, and new conflicts break out.

Third, after the attacks of September 11, the right to self-defence has come to encompass actions taken to combat terrorists. The concept of terrorism, however, is not clear: some States apply this label to rebels fighting for secession; others — to unfriendly autocratic States (rogue States) such as Iran and North Korea.

The Exhaustion of the Philosophy of the Will and the Possibility of a Return to the Classical Greek-Roman/Christian Foundations. This diagnostic exercise does not aim to reconstitute foundations for international order, but merely to emphasise the depth of the problem, i.e. to analyse the forms of the present collapse of both pillars of a Western-based world normative system. Obviously no claim is made that this order either does or should have global validity in the absence of interchange with other “non-Western” perspectives. The first step will be to argue that the grounds in political sociology and economy that are needed to give legitimacy to the humanist confidence of a social contract/private law analogy approach to

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16 “To introduce the principle of moderation into the theory of war itself would always lead to logical absurdity” (Clausewitz C. von. *On War.* First published 1832. Tr. by P. Paret. Princeton University Press, 1989. P. 76).

17 “From the 16th to the 20th century, European international law considered Christian nations to be the creators and representatives of an order applicable to the whole earth. The term "European" meant the normal status that set the standard for the non-European part of the earth. Civilization was synonymous with European civilization. In this sense, Europe was still the center of the earth” (Schmitt C. *The Nomos of the Earth*. Tr. by G. L. Ulmen. Telos Press Publishing, 2006. P. 86).

18 See Tolstykh V. L. *Krizis mezhdunarodnogo prava: diagnoz* [A Crisis of International Law: A Diagnosis] // Zakon. 2022. № 12. P. 123–124. (In Russian).

19 Ibid. P. 124.

20 Higgins R. *Problems and Process. International law and How We Use It.* Clarendon Press, 2006. P. 242; Sofaer A. D. *On the Necessity of Pre-emption* // European Journal of International Law. 2003. Vol. 14. № 2. P. 209–226; Gazzini T. *The Changing Rules on the Use of Force in International Law.* Manchester University Press, 2005. P. 199.

21 Tesón F. R. *The Liberal Case for Humanitarian Intervention* // ed. by J. L. Holzgrefe, R. O. Keohane R. O. *Humanitarian Intervention: Ethical, Legal and Political Dilemmas*. Cambridge University Press, 2003. P. 93, 128–129; Abiew F. K. *The Evolution of the Doctrine and Practice of Humanitarian Intervention.* Martinus Nijhoff Publishers, 1999.

International Law are no longer present in the West. In summary, the governance of Western States is in the hands of a minority of "rich globalists" leading to a profound withdrawal of moderate and dialogic opinion from politics and opening the way to largely so-called right-wing movements, which will be discussed in the second section of this part — around the possibilities of a return to classical ideas of governance.

The collapse of the legitimacy of social contract-based governance

International Law borrows the basic ideas of national law, using them as a criterion of recognition and as a basis for the international order (the so-called domestic analogy). The modern international order has emerged relatively recently. Its symbolic beginning is considered to be the Peace of Westphalia, concluded at the end of the Thirty Years' War, in 1648. Its core political idea is the concept of social contract formulated by Hobbes. The purpose of the social contract was the security of its participants and overcoming the threat of private warfare emanating from feudal institutions.[22]

However, the individualism of the social contract supposes a relative equality of opportunity among the individuals making up the separate democratically organised communities. The new goal of the social contract, after the Great Depression and World War II, was to establish a liberal order wherein human opportunities would be significantly expanded and universal prosperity would be guaranteed. This promise was unfulfilled: only narrow segments of society profiteered from the market economy; for everyone else, this has meant progressive economic, political and cultural alienation. The concept of the Welfare State, with its resources, allowed the West to defeat the USSR in the Cold War, but today it is squandered: even developed countries face shortages of funds, unemployment, unfair distribution and corruption.[23]

Even more seriously, as already noted above, the conflict proneness of the Western States has brought into question their basic capacity to guarantee the security of their own citizens. Article 2(4) of the UN Charter has not ensured "perpetual peace": States are unwilling to renounce the use of force and use human rights and the fight against totalitarianism as a new and unconditional *justa causa.*[24] The Western model of democracy is difficult to inculcate in the non-Western world; its forcible introduction can lead to disorganisation and a decline in living standards. Th. Franck's hypothesis of the emergence of a right to democratic rule overcoming the principle of non-interference has turned out to be an utopia.[25] In recent years, Western countries have themselves faced a crisis of democratic procedures. There is a change in the methods of governance: under the pretext of a common threat, the State intervenes in the sphere of private life (surveillance, checks, restrictions); the *modus vivendi* of citizens implies constant fear, readiness to endure violence and rejection of unauthorised activity.

At the same time the global order was characterised by a high degree of inequality, and the recipes of international institutions only exacerbated it.[26] The rhetoric of common welfare has almost completely disappeared from international legal discourse; the fight against COVID-19 has almost completely ignored socio-economic aspects. Furthermore, *the turn to expertise* as a new basis of legitimacy, accentuated by COVID-19, implies the rejection of democratic procedures, anonymisation of political power, and redistribution of powers in favour of the private international economy (banks and corporations), removing governance from public control. In other words, neoliberalism is incompatible with the social contract theory of governance, also as it is applied to international relations. Its basic tenet is the dismantlement of the State, which is supposed to be the form through which individuals participate in their own governance. As this State retreats, private economic interests, regulated only by private law, if at all, take precedence. Hence, it is not surprising the hold which the Lauterpacht method of International Law enjoys.

A bridge between this and the next section may be provided by some socio-psychological aspects of the critique of late or postindustrial capitalist society, where the very idea of independent will has become illusory. In his study "A Cultural History of International Relations" R. N. Lebow offers a cultural representation of

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22 Tolstykh V. L. *Op. cit*. P. 125.

23 Ibid. P. 126.

24 As A. Ispolinov writes, "modern state practice, as well as newly appeared international treaties, directly authorising armed intervention without the consent of the state, do not confirm the thesis about the peremptory nature of the prohibition of the use of force"; and "doctrine has found itself in a situation of deep disagreement on key legal issues" (Ispolinov A. *Normy mezhdunarodnogo prava o primenenii sily i spetsial'naya voennaya operatsiya Rossii* [International Law on the Use of Force and Russia's Special Military Operation] // Zakon. 2022. № 8. P. 40. (In Russian).

25 Franck Th. M. *The Emerging Right to Democratic Governance* // American Journal of International Law. 1992. № 86. P. 46.

26 "International law is playing a crucial role in helping legitimize and sustain the unequal structures and processes that manifest themselves in the growing north-south divide. Indeed, international law is the principal language in which domination is coming to be expressed in the era of globalization" (Chimni B. S. *Third World Approaches to International Law: A Manifesto* // International Community Law Review. 2006. № 8. P. 3).

liberal democracy as the political theory for appetite.[27] Liberalism views the human drive of appetite positively, imagining peaceful, productive worlds in which material well-being is a dominant value, with proponents of globalisation predicting a worldwide triumph of liberal-democratic trading nations. It leaves out another main human motivation, the striving for esteem, both self-esteem and esteem that one has won from others, according to agreed rules. Yet Lebow remarks how liberalism offers no ballast to resist the tendency to fear that the precariousness of an international society without any overriding authority repeatedly engenders through the competition which is the main form of contact among States. This is because liberalism does not acknowledge that appetite, like spirit (esteem-driven) societies, have their roots in human motivation, ultimately individual even if inherently socially contagious. Of human motivation, Lebow says:

> Spirit and appetite-based worlds are inherently unstable. They are intensely competitive, which encourages actors to violate the rules by which honor and wealth is attained. When enough actors do this, those who continue to obey the rules are likely to be seriously handicapped… The difficulty of appeasing the spirit or appetite, or of effectively discriminating among competing appetites, sooner or later propels both kinds of people and regimes down the road to tyranny. Tyranny is initially attractive because the tyrant is unconstrained by laws. In reality, the tyrant is a true slave because he is ruled by his passions and is not in any way his own master.

So, the long pathway from the 17th century confidence in the humanist construction of the State through the social contract of free and equal individuals — with the mirage sometimes believed to be realised, of a global social contract among Nation/States — ends up at present in a critical breakdown of order, wherein an antinomian spirit prevails at all levels of society, domestic, transnational and international.

A diagnostic exercise offers no solution, although it does indicate obstacles which could, conceivably, be overcome. The primary pillar of a normative order in the West has been the Christian/Greek-Roman. In his work “The Defeat of the West” (in French, 2024) E. Todd[28] offers a contemporary history of the West, focused centrally on the United States and Great Britain, as a leading centre of the NATO alliance. It is in terms of the significance of the complete loss of Protestant Christian belief in the two countries. Of course, the relative importance of the US means a primary focus on the significance of norms for the decision-making of the Washington DC Foreign Affairs community, centred around the White House.

The argument follows M. Weber that the reason for the original preeminence of the Anglo-American (also “white” Commonwealth) predominance has been the Protestant belief in predestination as God’s Chosen People, driven by a passion for education and betterment, starting with the Bible, nurtured by a strict and authoritarian family culture, which ensured both national achievement and a profoundly competitive conviction that they had to excel over other nations. The one other deeply Protestant nation, Germany, ran foul of the Anglo-Americans and was knocked into a subordinate place. This Anglo-American political culture accepted restraints on its goals and gave the world the League Covenant, the Kellogg-Briand Pact, the UN Charter and, above all the Atlantic Charter of 1941 (the agreement of Churchill and Roosevelt).[29]

However, more of a demographer than a political theorist or historian of ideas, Todd uses certain statistical indicators to trace the disappearance of this Christian heritage, which had of course absorbed the Greek heritage of Plato and Aristotle through Aquinas and Augustine. Between 1870 and 1930, full Protestantism gave way to a “zombie” secularised Protestantism, demonstrable primarily through church registration and attendance. That became reduced to attendance at births, marriages and death. During this time adherence to basic tenets of Christian conduct continued, especially the family structure, education of children and service to the community (including patriotism). Of course, the fading out was gradual, and the shock of World War II provided an “Indian summer” for Christian belief. However, from the 1950s to the 2000s the final transition to Zero culture was reached. Again, statistical and other physical indicators of the death of Christianity, are the prevalence of cremation, the collapse of Western family structures — contrasting with a hugely increased role for children of Asian families — the introduction of same-sex marriage and the exclusion of Christian symbolism from public life. At this stage the ethics or morality of Christianity will have vanished completely. Crucial importance attaches to the disintegration of the family and

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[27] Lebow R. N. *A Cultural Theory of International Relations.* Cambridge, UK and New York : Cambridge University Press, 2008. P. 61–93.

[28] Todd E. *La Défaite de l’Occident*. Paris : Seuil, 2024.

[29] Ibid. P. 140–144.

the loss of any attachment to community ideals, or ideals of public order. The Western societies have become completely atomised.[30]

From the 1980s, throughout the West, the loss of even secularised Christian ethics expressed itself in the economic world with the abandonment of the Welfare State and the adherence to a philosophy of the withdrawal of the State from ensuring public well-being. Drawing on a radical reading of J. Rawls, "Theory of Justice", Todd explains how the philosophy that inequality favoured productive competition quickly led to permanent large disparities of wealth. An elitist higher education system created a dominant university educated political class of the 10 % who opposed wealth redistribution or balancing and, especially, favoured the opening of boundaries and resistance to majority demands for immigration control. They ostensibly opposed supposedly right-wing racist policies of the majority, who felt no longer represented by the elites. These themselves had a purely predatory attitude toward capitalism and the primary focus of companies became asset-stripping mergers and acquisitions — which have left the West significantly reduced in industrial capacity in relation to Russia, China and India. The "left behinds", the majority of Western populations, with no hope of economic redistribution or social mobility, are reduced to consumers in an increasingly competitive, atomised, and because increasingly unproductive, also debt-ridden society. Beyond the top 10 % professional class are the 400 families in the US, who own the capital, administered by the 10 %, who, together with their counterparts in other Western countries, control international trade and finance, so far as still under Western influence — including the Middle East, Australasia, and Northeast Asia (excluding only North Korea).[31]

This picture certainly explains why the so-called profession of international lawyers, whether academic or practitioner, is happy with the "Lauterpacht Paradigm" of International Law. They are part of the 10 % professional class. The interests the legal order has to satisfy are primarily private and economic. Any "violence" can be treated as a threat to the private order and therefore criminal. There is no call to distinguish "terrorism" from national liberation movements. Human rights, the one consolation prize, can be regarded as a concession to the insecurities of the individual. Indeed, non-discrimination "law" can be a very useful tool in demonising any resistance to uncontrolled immigration, as racist populism.

The worst is to come. Enormous military power in the world is concentrated in what Todd called "The Washington Band". This is more part of the 10 % elite than the top 400 families. However, very much as Lebow has described the individual in the appetite society, they have no Freudian superego to discipline and civilise them. There is nothing beyond the individual desire to acquire wealth and esteem, which translates to maximising the importance of their role as shapers of the US foreign policy. There are no transcendent ideals beyond the ego, whether Christian or humanist. Liberal democratic rhetoric, even of the importance of the US, does not count, as much as the internal dynamics of what Todd calls the mimetic interdependence of this Washington village. There are of course the Central Intelligence Agency and the Pentagon, and behind them, the Military-Industrial Complex. However, Todd is arguing here not for the deep State, but instead for what he calls "the shallow State". These feckless people are directing a policy which, given the nihilist absence of values, is predominantly militaristic.[32]

Todd explains the genocide in Gaza and the absence of any Western reaction, outside some marginal States, as proof of the death of any human values in the leading Western countries.[33] All over Western Europe and North America, freedom of speech and assembly are being openly and brutally suppressed where protests are made against this genocide. Moral confusion reigns supreme, and International Law is not all that has to suffer and be reborn again.

Conclusion

Therefore, International Law and its doctrine are in crisis. This is not a political problem, a defect of a certain institution, a temporary ineffectiveness, gaps that can be filled, etc., but a real crisis, i.e. the situation when International Law has reached a critical (final) stage of its development, which, in turn, makes its total transformation inevitable. In fact, the norms of International Law created at the previous stage cannot be used to respond to new challenges, while the basic ideas that were the starting point for the development of new norms have completely exhausted their creative potential.[34] This crisis is comprehensive, i.e. it affects all

30 Todd E. *Op. cit.* P. 151–156.
31 Ibid. P. 248–268.
32 Ibid. P. 287–303.
33 Ibid. P. 367–368.
34 Tolstykh V. L. *Op. cit*. P. 126.

levels of International Law: ideological, theoretical, discursive, legislative, implementational and institutional. It is not accidental and spontaneous, but represents a natural outcome of the historical process — the next, but perhaps the last stage in the development of Western International Law.

The professional community of scholars, diplomats, counsels and judges of international courts is not inclined to recognise the crisis: its symptoms are defined as temporary difficulties, the result of hostile factors or misinterpretations; they are, of course, surmountable, and their overcoming will open the way to a new, happier future. At the same time, the corporation itself is interested in a modicum of criticism that attests to its health — hence, the simulation of criticism and the abandonment of a real resistance. This position results from being embedded in the existing order: most people are either unable to see beyond the familiar picture, or are disposed to use existing structures in order to survive. The end of the existing order in this respect may be the end of the professional community. Just as theologians were expelled from international politics at the end of the 16th century, so international lawyers may be expelled from it at the beginning of the 21st century — «*Silete Advocati in munere alieno*!».[35]

РАЗМЫШЛЕНИЯ О ФИЛОСОФСКИХ И ИСТОРИЧЕСКИХ ПРИЧИНАХ КРИЗИСА ЗАПАДНОЙ ДОКТРИНЫ МЕЖДУНАРОДНОГО ПРАВА

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Аннотация

Международное право, похоже, утратило обе свои возможные цивилизационные основы — греко-римско-христианскую доктрину естественного права и договорную теорию, основанную на «гуманистической» уверенности в творческом потенциале индивидуальной воли. На практике международное право — в том виде, в котором оно продолжает существовать, — состоит либо из договорных соглашений между двумя или более государствами, либо из односторонних волеизъявлений отдельных государств, обычно оспариваемых другими государствами. В этом смысле международное право было приватизировано, превратилось в дуэль индивидуальных перспектив без онтологически объективной среды, в которую могут быть встроены «враждующие» индивиды. Именно в таком контексте возникает так называемый лаутерпахтовский подход к международному праву. Лаутерпахт утверждает, что аналогии частного права подходят для принятия международно-правовых решений. Таким образом, юридический анализ и суждение концентрируются на взвешивании двух или более конкурирующих воль. Другая проблема заключается в том, что теория общественного договора отдает приоритет стремлению к безопасности как центральной характеристике человека. Правовой дискурс закрывает себя от альтернатив, способных поставить под сомнение эту идею. Например, исключается идея о том, что мировое общество — это естественная семья наций. Новой целью общественного договора после Великой депрессии и Второй мировой войны стало установление либерального порядка, при котором были бы значительно расширены возможности человека и гарантировано всеобщее процветание. Либерализм, однако, предполагает демонтаж государства, то есть формы, с помощью которой индивиды организуют собственное управление. По мере того как государство отступает, на первый план выходят частные экономические интересы, регулируемые только частным правом. Таким образом, долгая дорога от веры XVII века в гуманистическое построение государства через общественный договор свободных и равных индивидов заканчивается в настоящее время критическим разрушением порядка, где антиномичный дух преобладает на всех уровнях общества, внутреннем, транснациональном и международном. Данный диагноз не предлагает решения, хотя и указывает на препятствия, которые, по-видимому, могут быть преодолены.

Keywords

международное право, философия права, общественный договор, либерализм, доктрина, международные суды

Для цитирования: Карти Д. Э., Толстых В. Л. *Размышления о философских и исторических причинах кризиса западной доктрины международного права* // Журнал ВШЭ по международному праву (HSE University Journal of International Law). 2024. Т. 2. № 3. С. 4–13.

https://doi.org/10.17323/jil.2024.23983

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[35] Ibid. P. 123.

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