

THE PHILOSOPHY OF INTERNATIONAL LAW: FOUNDATIONS,
AUTHORITY, AND CRITICAL PERSPECTIVES**Gulomov Abdulakhadkhon**

2nd year student of the Faculty of Law of NamSU

Email: abduhadgulomov5050@icloud.com<https://orcid.org/0009-0004-6668-692X><https://doi.org/10.5281/zenodo.21773640>

Abstract: This article examines the philosophical and jurisprudential foundations of international law, exploring its normative authority, legitimacy, and structural limits beyond the state. The study systematically analyzes the sources of international legal obligation through the lenses of classical natural law (Grotius, Vattel), legal positivism and voluntarism, and modern constitutionalism and cosmopolitanism (Kelsen, Habermas). Furthermore, it addresses core legal paradoxes, including the tension between absolute state sovereignty and peremptory human rights norms (*jus cogens*), monist versus dualist reception models, and contemporary critical perspectives such as Third World Approaches to International Law (TWAIL) and realist critiques.

Keywords: Philosophy of international law, natural law, legal positivism, voluntarism, *jus cogens*, state sovereignty, monism and dualism, cosmopolitanism, TWAIL.

Annotatsiya: Ushbu maqolada xalqaro huquqning falsafiy va jurisprudensial poydevori, uning normative vakolati hamda davlatlarustlik tabiatidan kelib chiquvchi konseptual muammolar tahlil qilinadi. Tadqiqotda tabiiy huquq (Grotius, Vattel), pozitivizm va voluntarizm hamda zamonaviy kosmopolitanizm (Kelsen, Habermas) nazariyalari prizmasi orqali xalqaro huquqiy majburiyatlarning kelib chiqish manbalari o'rganilgan. Shuningdek, davlat suvereniteti va inson huquqlarining umume'tirof etilgan imperativ normalari (*jus cogens*) o'rtasidagi zidoyatlar, xalqaro huquqiy institutlarning legitimligi hamda Uchinchi dunyo yondashuvlari (TWAIL) va tanqidiy huquqiy tadqiqotlar (CRITS) doirasidagi zamonaviy ilmiy qarashlar yoritilgan.

Kalit so'zlar: Xalqaro huquq filosofiyasi, tabiiy huquq, huquqiy pozitivizm, voluntarizm, *jus cogens*, davlat suvereniteti, monizm va dualizm, kosmopolitanizm, TWAIL.

Аннотация: В данной статье исследуются философско-правовые основы международного права, его нормативная природа, легитимность и институциональные пределы в условиях отсутствия централизованного суверена. На основе анализа естественного права (Гроций, Ваттель), юридического позитивизма, волюнтаризма и современного

космополитизма (Кальзен, Хабермас) раскрывается природа обязательности международных норм. Особое внимание уделено фундаментальным противоречиям между государственным суверенитетом и императивными нормами защищающими права человека (*jus cogens*), соотношению монизма и дуализма, а также критическим концепциям, включая подходы стран Третьего мира (TWAIL).

Ключевые слова: Философия международного права, естественное право, юридический позитивизм, волюнтаризм, *jus cogens*, государственный суверенитет, монизм и дуализм, космополитизм, TWAIL.

The English phrase “international law” was first coined by the utilitarian philosopher, Jeremy Bentham (Janis 1984). But philosophical engagement with international legal themes stretches back to writings on natural law in ancient Greece and Rome. Philosophers in this tradition—such as Plato, Aristotle, Cicero, and the Stoics—advanced the idea of a universal normative order over and above the laws and customs found in particular societies that is discoverable through the exercise of ordinary human, or “natural”, reason (Nussbaum 2019: 18–96). In the Middle Ages, Christian beliefs framed the idea of normative universalism which, at times, was cynically deployed to justify the wrongs of Christian rulers but, at its best, provided the basis for subjecting their conduct to moral censure, as the criticisms of the *Conquistadores* in some of the Spanish Scholastics illustrate (Pagden 2003; Pagden & Lawrence 1991).

In the modern era, the Dutch natural lawyer Hugo Grotius is credited with laying the foundations for the rise of international law as a genuine system of positive law, rather than simply a source of universal moral or “natural law” principles. By insisting that his system of law would be justifiable even if it were assumed that God does not exist, i.e., the “*etiamsi daremus*” argument in the Prolegomena to his *De Jure Belli ac Pacis* (1625: para. XI), Grotius paved the way for a more genuinely universalist conception of international law, independent of Christian beliefs and thus more ideologically inclusive (Nussbaum 2019: 97–140). Subsequently, important contributions were made by other major philosophers, including Pufendorf, Kant, Hegel, Bentham. Although the two leading legal philosophers of the twentieth century—Hans Kelsen and H.L.A. Hart—devoted attention to international law, and extensively so in the case of the former (Bernstorff 2010), international law was neglected by the Anglophone legal and political philosophers who followed them, and important works by international law scholars with potential significance to philosophical debate—e.g., Brierly (1928) or Lauterpacht (1933)—seldom resonated outside the field of

international law. By the end of the last century, however, there was a surge in philosophical engagement with international law. This change is reflected in the publication of *The Law of Peoples*, the last book written by John Rawls (1999), and also in the more philosophically inclined works of prominent international lawyers, such as Thomas Franck (1995).

The focus of this entry is on developments that have occurred since World War II. In the aftermath of World War II, an unprecedentedly sophisticated international architecture of legal norms and institutions, to a large extent associated with the United Nations system, was established. With the end of the Cold War, and the spread of globalization, this architecture reached new heights of ambition, claiming authority over a diverse range of governmental matters that were formerly treated as falling within the exclusive province of state authority. The scope of international law expanded to cover new subject-matter, such as the relationship between the individual and the State, migration, or the environment. Many now perceive the “international rule-based order” to be imperilled by the rise of authoritarian powers, on the one hand, and of populist forces in the Western world, on the other; both are said to be hostile to international law, especially to certain aspects of it like human rights (Alston 2017; Ginsburg 2020; Neuman 2020; Wuerth 2017). For others, the expansion of international law poses a challenge to the liberal foundations of domestic sovereignty. This entry is inevitably selective, focusing on some general conceptual and normative questions, but discussions of the discrete domains of international law can be found elsewhere in the Stanford Encyclopedia

1. Conceptual and Normative Argument on International Law: Recent philosophy of international law has pursued a great variety of questions. For present purposes, they can be broadly grouped into two categories, although the boundaries between them are not sharp. First, there are conceptual questions, such as whether international law is genuinely an instance of “law” and, if it is, how it is related to the municipal legal orders associated with individual states; there are also conceptual questions relating to key ideas employed in international legal discourse, whether these be general ideas such as “sovereignty”, “the state”, or “legitimacy”, or ideas associated with specific international legal sources or doctrines, such as “customary international law”, “*jus cogens*”, and “human rights”. Such questions are discussed mainly in sections 2 and 3 of this entry.

Second, there are normative questions about the proper goals that international law—or its domains, such as international human rights law,

international environmental law, and international criminal law—should advance and the means by which it may properly do so and, relatedly, how the legitimacy of international law is to be assessed. A recurring issue is the extent to which ethical-political standards fashioned to assess domestic law—such as democracy, the rule of law, and even legitimacy itself—apply to international law (an important theme in the work of Buchanan, e.g., Buchanan 2013). Due to the long period of philosophical neglect of international law, we are still at an early stage in forming an adequate picture of the political morality appropriate to its distinctive nature and role. These questions are mostly discussed in sections 4, 5, and 6 of this entry.

2. International Law as Law: The two features of international law most commonly invoked by those who call into question its legal character are the absence of a centralized system of enforcement and the role of state consent in the formation of rules of international law. Some legal philosophers, while recognizing that international law possesses some features characteristic of law, dispute its status as a genuine and fully-fledged legal order (e.g., Hart 1961 [2012]). We consider these different strands of arguments on the legal nature of international law in turn.

2.1 Lack of Centralized Enforcement Mechanisms: At the domestic level, law is enforced through both executive power (police, tax authorities, regulatory bodies, etc) and judicial power. International law does not benefit from a comprehensive system of executive and judicial enforcement that is comparable to what developed domestic legal systems can offer. The UN, as the principal international organization, does perform a unique role particularly in the area of collective peace and security; and its most powerful organ, the Security Council, is empowered to adopt decisions under Chapter VII of the UN Charter that are binding on all member states of the UN and can involve the use of military force. The Security Council has used its enforcement powers since the end of the Cold War, most notably during the First Gulf War in 1990–1991 when it authorized its member States to use force to liberate Kuwait following Iraq’s aggression and invasion. But there are many examples of grave breaches of international law that are not met with any enforcement action by the Security Council. As for judicial enforcement, international law lacks a centralized dispute settlement mechanism that operates independently of the consent of states. It is true, however, that the role of the International Court of Justice and the proliferation of other international courts and tribunals—with jurisdiction over areas such as human rights, trade, investment, international crimes—mean that, in practice,

international law does benefit today from a far greater measure of enforcement through courts and tribunals than ever in the past.

Some legal philosophers have responded to the problem of limited enforcement by fashioning a theory of international law on the basis of the hypothesis—admitted to be a “fantasy”—that an international court with compulsory jurisdiction exists and that there are reliable international institutional mechanisms for giving effect to its decisions. Some have also given a normative interpretation of the relation between law and enforceability that makes in principle, rather than actual, enforceability a touchstone of legality. Thus, according to Liam Murphy, when it comes to law

we would regard it as obviously appropriate for provision to be made within the normative order itself for effective enforcement. Properly regulated third-party enforcement is always in principle appropriate. (Murphy 2017: 221).

Another solution draws attention to the existence of decentralized modes of enforcement, e.g., “outcasting”, which operate not through centralized institutions, but by denying law-breakers the benefits of membership and cooperation (Hathaway & Shapiro 2011; Kelsen 1952 [2012: 20–25]; Goodman & Jinks, 2013). Finally, and more radically, some reject the thesis that enforcement mechanisms, centralized or not, are necessary for full-fledged legal status. It is a mainstream view in contemporary legal philosophy, shared by philosophers as diverse as H.L.A. Hart, John Finnis, and Joseph Raz, that the concept of law does not involve the idea of coercion as a necessary element (Hart 1961 [2012: 199–200]; Finnis 2011; Raz 1999: 159; and in relation to international law, O’Connell 2008: 62–8. For a different view, see Schauer 2015).

This mainstream view rejects the command theory of law (e.g., John Austin), which construes law as orders of a sovereign backed by the threat of sanctions; the view that the function of law is to identify delicts (conduct characterized as illegal) which are the condition of a sanction (a coercive act against the law-breaker) (e.g., Kelsen); as well as predictive theories of law (e.g., Oliver Wendell Holmes) which reduce law to predictions about the application of sanctions (Hart 1961 [2012]). Instead, the primary function of law is to provide a structure for generating norms that guide human behaviour, with or without the existence of effective sanctions, as in Joseph Raz’s hypothetical “society of angels” (Raz 1999: 159). On this view, enforcement mechanisms operate as a mere contingent back-up plan for cases where law fails in its primary function.

As a matter of historical fact, municipal legal systems have extensively relied on centralized enforcement mechanisms to encourage compliance, but this does

not amount to a conceptual constraint on the existence of law. It is also worth noting Hart's observation that in the international domain—where it is difficult for violence and wrong-doing to remain hidden from public view—there may be less of a practical need for sanctions to secure compliance (Hart 1961 [2012: 218]).

On this view, what matters for the existence of international law is a sufficient level of compliance to underwrite its operation as a practically effective system of normative ordering. Though some query whether international legal norms genuinely exert compliance pull of their own accord, as opposed to on the basis of independent (e.g., self-interested) reasons that favour adopting the pattern of behaviour prescribed by law (Goldsmith & Posner 2005), in the famous words of Louis Henkin, it is arguably still the case that

almost all nations observe almost all principles of international law and almost all of their obligations almost all the time. (Henkin 1979: 47)

2.2 The Role of Consent in the Formation of Rules of International Law: The most authoritative statement of the sources of international law is found in Article 38 of the Statute of the International Court of Justice (ICJ 1945). Neither of the two main sources of international law there identified—customary international law and treaties—has an obvious counterpart in domestic law. Arguments about the legal character of international law turn, to a significant degree, on how we understand these two methods of law creation to function.

Legal philosophers writing about international law have often proceeded on the basis that both treaty and custom ultimately depend on state consent. Ronald Dworkin, for example, believed that the idea that a state is subject to international law only insofar as it has consented to be bound by it reflects what “seems to be now generally accepted by practitioners and scholars of international law” (Dworkin 2013: 5). The consent-based account of international law does indeed enjoy wide support among international lawyers too. In one 1996 case, the International Court of Justice described consent, alongside sovereignty, as “*the very basis of international law*” (ICJ 1996: para. 21).

But is the consent-based account correct in a descriptive sense? Does it, in other words, accurately reflect the way in which rules of international law are generated? When one considers how international law “works”, in theory as well as in practice, this account begins to unravel. This was noted by H.L.A. Hart in 1961 when he wrote of

the suspicion that the general theory that all international obligation is self-imposed has been inspired by too much abstract dogma and too little respect for the facts. (Hart 1961 [2012: 226])

State consent does evidently play an important role in the formation of treaties. Treaties do not bind states that are not parties to them and have not consented to be so bound (Vienna Convention on the Law of Treaties, Article 34 [VCLT 1969]). But among treaties too, there are important caveats. The right to withdraw unilaterally from a treaty, which would grant states the full force of consent, does not, for example, apply to all treaties. The UN Charter is generally understood not to be open to unilateral withdrawal: member states of the UN can be expelled from the organization, but they cannot leave it voluntarily. Consent to it is thus irrevocable. States may be said to have consented to all of the rules that descend from UN membership when they first joined the UN, but the UN Charter is not a static body of legal obligations; it also governs processes through which rules of international law come into existence, and are interpreted and developed—processes which will take their course after the State's initial consent to be bound by the Charter.

The consent-based account runs into even greater difficulties when it comes to custom. There is, first, the notion of *jus cogens*, i.e., rules of customary international law (such as the prohibition on torture, genocide and apartheid) which have acquired peremptory status and from which no state is permitted to derogate. Dworkin maintained that *jus cogens* too comes “under the umbrella of consent” in contemporary international legal doctrine (Dworkin 2013: 6), but there is nothing in the definition of *jus cogens* in the Vienna Convention that suggests this.^[1]

Nor, contrary to many accounts, is customary international law, or custom, based on consent. Custom is defined in the Statute of the International Court of Justice as “general practice accepted as law” (Statute of the International Court of Justice, Article 38(1)). This definition is normally understood to comprise two elements: an objective one, i.e., the practice of States; and a subjective one, i.e., *opinio juris*, the acceptance of rules as custom. Many of the conceptual errors that afflict discussions of custom, with inevitable repercussions for theoretical arguments about international law, concern its subjective dimension. Two errors are common. The first one is to think of *opinio juris* as requiring state consent to a rule of customary international law. Acceptance and consent are, however, different concepts. The International Court of Justice regularly establishes the existence of rules of customary international law without specific evidence of

consent from the states concerned (Talmon 2015). The second one is to describe the subjective element as necessarily involving a belief that a particular practice is already law.

There are at least two good descriptive reasons to be sceptical about both the belief- and the consent-based theories of customary international law. First, they cannot explain why newly independent states are bound by rules of custom in respect of which they never had an opportunity to give consent or time to form beliefs (Hart 1961 [2012: 226]). Secondly, neither the consent-based nor the belief-based account of customary international law can adequately explain change in customary rules. Under the consent-based theory, the replacement of a rule of custom with a contrary one would be explained as a consequence of states withdrawing their consent from, and acting in breach of, the prior rule. Under the belief-based approach, a change in custom would be explained by error or insincerity on the part of states, either acting on the erroneous belief that a particular rule was one of customary international law or lying about their belief.

These descriptive questions have a bearing on conceptual argument about the legal character of international law. If the main engines of rule-creation function only on the basis of consent, or depend on the belief and subjective mindset of those that those rules are meant to constrain, the legal character of international law would be, at best, severely diminished; or, at worst, lost entirely because international law would be robbed of the claim to legitimate authority inherent to law, a claim that its norms are binding simply as legal rather than as voluntarily or otherwise subjectively assumed.

These questions also have an impact on argument about the legitimacy of international law, which is discussed below, because as observed by John Tasioulas, such accounts “tarnish[es] the legitimacy of customary international law” (Tasioulas 2014: 331; Tasioulas 2016), and undermine both the moral and systemic credentials of international law.

References:

1. Besson, S., & Tasioulas, J. (Eds.). (2010). *The Philosophy of International Law*. Oxford University Press.
2. Charlesworth, H., Chinkin, C., & Wright, S. (1991). Feminist approaches to international law. *American Journal of International Law*, 85(4), 613–645.
3. Goldsmith, J. L., & Posner, E. A. (2005). *The Limits of International Law*. Oxford University Press.
4. Grotius, H. (1625/2012). *On the Law of War and Peace* (S. C. Neff, Ed.). Cambridge University Press.
5. Habermas, J. (2006). *The Divided West*. Polity Press.

- 6.Hart, H. L. A. (2012). The Concept of Law (3rd ed., Chapter X: International Law). Oxford University Press.
- 7.Kelsen, H. (1952). Principles of International Law. Rinehart & Company.
- 8.Koskenniemi, M. (2005). From Apology to Utopia: The Structure of International Legal Argument. Cambridge University Press.
- 9.Lauterpacht, H. (1970). International Law: Being the Collected Papers of Hersch Lauterpacht (Vol. 1). Cambridge University Press.
10. Mutua, M. (2000). What is TWAIL? Proceedings of the ASIL Annual Meeting, 94, 31–38.
- 11.Nardin, T. (1983). Law, Morality, and the Relations of States. Princeton University Press.
- 12.Rawls, J. (1999). The Law of Peoples. Harvard University Press.
- 13.Raz, J. (2010). Human rights without foundations. In S. Besson & J. Tasioulas (Eds.), The Philosophy of International Law (pp. 321–338). Oxford University Press.
- 14.Tasioulas, J. (2007). The legitimacy of international law. In C. Samantha (Ed.), The Philosophy of International Law (pp. 97–116). Westview Press.
- 15.Капустин, А. Я. (2014). Международное право и глобализация. Москва: Норма.

