



# ON THE APOLITICAL CHARACTER OF INTERNATIONAL LAW (OR LACK THEREOF)

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## ABSTRACT

*International law has an innate and seemingly unquestionable claim on its allegedly apolitical character. However, international law is far from being an apolitical domain. On the contrary, due to systemic influences or by way of politically-informed or other personal interpretations of law, international law proves to be a very political construct. Under the light of this revelation, one feels compelled to probe deeper into the political features of international law by way of theory and to debunk its mythological self-portrait of an apolitical benefactor of humanity. Doing this will enable the opening up of new perspectives for the much needed improvement of international law.*

**Keywords:** *International Law, Critical Legal Studies, Feminist International Law, Theories of International Law*

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## INTRODUCTION

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If you are willing to work as a professor of Public International Law in Turkey, it is imperative that you write a so-called Habilitationsschrift as well as some other additional academic papers, which are then going to be reviewed and evaluated by a jury of PIL Professors designated by a centralized governmental institution. During this process, one may be found lacking, which in turn will disqualify her and force her to write new book or papers. There are many cases where these refusals on behalf of juries to promote certain individuals are utterly and totally justifiable. However, there have been other cases, this author has heard of, in which some very successful and promising academics have been rejected solely due to the fact that the subjects of their submitted dissertations are just too theoretical for the liking of the jury.

This means all the Koskenniemis, Slaughters or Miévilles of the world, who are working diligently to produce high quality academic pieces, may be facing a big danger, if they happen to be working towards a full professorship at a Turkish university. Theoretical international law students are definitely running the risk of an elimination by a jury of five established professors, who would obviously tend to deem it more prudent and wise to write rather about “concrete” problems of international law.

This approach cannot be said to be existent only in the Turkish school of international law.<sup>[1]</sup> This flaw is a characteristic of the international law circles all around the world as has been highlighted by the rather-theory-oriented students of the field. In this paper I shall try to probe into this problem and to highlight a major deficiency in the philosophical inquiries by students and experts of international law as to what international law should be like. Given this aim, this paper can by no means claim to be an original work, for this deficiency easily observable on the ontological and epistemological departments of international law has been succinctly elaborated by great legal thinkers like Koskenniemi or Kennedy, to name a few. I, in addition to the referred writers and their works, will try to justify my claim that this theoretical stagnation may be attributable to the peculiarities of a certain international system, i.e. the UN System.

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[1] I am not sure whether there is a Turkish school of international law. Berdal Aral probes into this “school” in his important article; Berdal Aral, “An Inquiry into the Turkish ‘School’ of International Law”, *The European Journal of International Law*, Vol. 16, No. 4, Oct. 2005, pp. 769-785.

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## THE INTERNATIONAL SYSTEM

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I am of the opinion that international law thought of today has been substantially shaped by the UN System. This system, which is essentially nothing but a series of refraining acts even from discussing the real and pressing problems of humanity and the earth, so that superpowers shall be appeased or (God forbid) not pushed into an unwanted friction against each other, must be the main culprit for our ideological timidity, each time we are called upon to discuss international law and its deontology.

I feel it would be totally justified to claim that today's international law had been determined, shaped and partially frozen in the formative years of the 20th Century, namely the short period of time following 1944.

The universal system called into existence by the victor states of the 2nd World War was reflective of the state of affairs on the field. There were winners and losers; there were powerful states and others who were far from being a challenger to these mentioned powerhouses. What we know today as international system or UN System is a *mélange* of a face-saving idealism and a so-called realism. The latter should be read as meaning in actuality the prolongation of the national power and security concerns of "the victor states" right into the heart of the emerging universal structures.

"When the American proposals were first made in 1943 and 1944 for a prospective world organization, there was obvious tension between the desires of the major powers to retain ultimate control over the organization's biggest decisions and the need to gain widespread support among the small and medium states that were to be its rank and file."<sup>[2]</sup>

Blended with the above mentioned idealism and the sheer gladness to have an end to the terrorizing universal war, this nepotistic structuralization may have been neglected or simply ignored, for the lack of aggressive and deadly battles is in itself an end, especially for a world or states killing each other's citizens in millions. In addition what followed the 2nd World War was a stagnative period of all the world states shaking under the fear of a nuclear exchange between the competing super-powers. This potentially ultra-dangerous war had to be avoided at all costs and this urge led to the freezing of many regional or local disputes, for these only too easily could have been promoted to a dispute with extinction at the end.

Another symptomatic regularity was the need on behalf of the unimportant states to get along well with their sphere's super power or other powerful and influential states like France or England. Security Council had five standing members, who had the veto power as well as military capabilities to back up

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[2] Ian Hurd, *After Anarchy: Legitimacy and Power in the United Nations Security Council*, Princeton University Press, Princeton and Oxford, 3rd Printing, 2008, p. 20.

their legally created privileged positions. Though the Security Council was not directly in the business of lawmaking on a universal level, every member of the international community knew only too well who was who. Therefore it would be a misleading remark if we were to delimit the influence of the Security Council only to the fields of peace and security. Superpowers and other standing members of the Security Council were the deities of this secular cathedral, whose approval should have been secured at all times and costs by the lesser beings, i.e. other states. Then, a state who is willing to take part in the *travaux préparatoires* of a multilateral convention has to be very careful to avoid the situation of falling from grace in the eyes of the “boss”. This political and timid approach has had to inform the contributions of a major part of the states. The notes and remarks prepared by the foreign affairs ministries had to be evaluated again, solely in terms of their compatibility with the declared designs of the superpowers. There had to be necessary additions and also some rogue-looking policy designs were to be chopped at a very early stage. If looking like a renegade in the eyes of the superpower was already eliminated, then the client state could have started the process of making its master glad. This hypocritical stance was ubiquitous and helped the formation of law, we are today operating under. Against this background, I argue that international law cannot be thought about in total separation from the political processes. Logically then, it would be wrong to believe that international law is an apolitical construct.

Law, generally speaking, has to address the emerging problems of the society, in which it prevails. That said, we are still walking and talking in the dark, for, when the time comes to the lawmaking on an international level or better for the needs of an international society, we have to think within the parameters and act in accordance with the procedures, created with the rigid and hypocritical thinking of the post 2nd World War Era. Then, it is crystal clear that we have to increase the variety of the inputs into these lawmaking mechanisms, including some very welcome inputs to amend for the better these mechanisms and constructs. Theoretical contributions prove to be very important, so that all the possible scenarios as to what the world can look like tomorrow, can be heard of.

With all these said, there is a vast collection of written rules and regulations in international law and these international rules have been forged during an era, which, by its very nature, restricted the options for what law should prescribe. An international law expert working for her country’s foreign affairs ministry has now to dwell upon this non-visionary and usually politically-informed body of rules. This *modus operandi* has to be seen as the most prudent form a methodological standpoint, since the rampant lawmaking has consolidated itself as the international law, recognizing no chance for the hitherto-suppressed or innovative modes of legal thinking.

However, in the light of the mentioned need for theory, one has to challenge this consolidated international law approach, which finds its embodiment, among others, in the 38th Article of the ICJ Statute.<sup>[3][4]</sup> This challenger, though, runs the very probable risk of being an outcast or even worse a “rebel”, who shall have a very hard time earning recognition as a professor of international law. In addition, this rebel and her works may be classified as fanciful imaginations that display no coherence with the “paradigmatic values” of the discipline and eventually scientific value, even the slightest of it, may be rejected to them.<sup>[5]</sup>

In the light of this dogmatic intellectual environment, it is only logical to assume that there is a serious time-gap between what law is and what it really ought to have been, in order to be able to tackle the problems the international community is facing today. Human rights and international environmental law are two very cogent proofs of this belated nature of public international law.

It is no coincidence that only after the structures of the cold war began to loosen up a little bit that the international community gained the momentum and raised the requisite awareness needed to create legal rules specifically to address matters of extreme importance, like the very survival of the planet, hence the birth of the international environmental law. Sadly enough, this relatively recent codification of international rules, too, has been a product of a completely political stage, which has its “alpha states” and other lesser entities. Against this background, one can only speculate on what international law could have looked like today if international decision and law-making mechanisms were not diluted by political calculations and endless efforts to appease the powerful states.

[3] The Statute of the International Court of Justice, available at <[http://legal.un.org/avl/pdf/ha/sicj/icj\\_statute\\_e.pdf](http://legal.un.org/avl/pdf/ha/sicj/icj_statute_e.pdf)>

[4] Erdem Denk tackles the racially biased structure of international law and also this very article in his thought-provoking work; Erdem Denk, “Güle güle uluslararası hukuk, cehenneme kadar yolun var”, *Birikim*, Vol. 190, February 2005, pp. 71-96.

[5] Thus, international law students are strongly called upon to produce and reproduce “normal science” in the Kuhnian sense, i.e. in strict compatibility with the pre-set paradigmatic values and boundaries. According to Kuhn; “Normal science, the activity in which most scientists inevitably spend almost all their time, is predicated on the assumption that the scientific community knows what the world is like. Much of the success of the enterprise derives from the community’s willingness to defend that assumption, if necessary at considerable cost. Normal science, for example, often suppresses fundamental novelties because they are necessarily subversive of its basic commitments.” Thomas S. Kuhn, *The Structure of Scientific Revolutions*, The University of Chicago Press, Chicago and London, 3rd. Edition, 1996, p.5.

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 THEORY AND ITS BENEFITS
 

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Where does the theory fit in against this background? As can be seen, theory is needed to inform the speculation to guess those *parallel international laws* with a view to converging today's law to the ideal one, at least to that extent as this could be possible. With a blooming academic subfield in international law and with the ever increasing number of theoretical works, international law is opening itself up to the probability that "a different world is possible". From the feminists it learns how intrinsically value-laden and gendered it is; and how these laden masculine values are intrinsically working as root causes of the reification and justification of "social, political and economic inequalities".<sup>[6]</sup> Feminist international lawyers, "seek to expose and question the limited bases of international law's claim to objectivity and impartiality and insist on the importance of gender relations as category of analysis".<sup>[7]</sup>

Another significant opportunity of soul-searching for the international lawyers would be provided by the Critical Legal Scholars and their studies regarding international law.<sup>[8]</sup> According to CLS scholars that are preoccupied with the problems of international law, this domain of law is in a constant pendulum movement, acting at times as solid expressions of a consolidated legal structure.<sup>[9]</sup> While this is the hard side of this Janus-faced construct, at other times this body of rules can deteriorate into mere idealistic-looking rhetoric. This arbitrary bifurcation renders it possible for the states to act as they politically deem fit; sometimes as the benefactors of universal idealistic values and humanistic calls and sometimes as stone-hearted actors jockeying for more power, who would solely be willing to be bound by those rules, to which they expressly consented. This debunking of international law by the critical lawyers is a convincing illustration of how shaky its solid-looking foundations actually are.

In addition to these, international law has the chance to find out (owing to the theory) how racially or culturally biased it can be, or failing thereof, it at times runs this risk of carrying these biases without ever knowing it.<sup>[10]</sup>

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[6] Hilary Charlesworth, "Subversive Trends in the Jurisprudence of International Law", American Society of International Law Proceedings, Vol. 86, 1992, p. 128.

[7] Hilary Charlesworth, "Feminist Methods in International Law", American Journal of International Law, Vol. 93, April 1999, p. 379, cited in Noellë Quevinët, "Feminist Scholars and international (humanitarian) law: Are their claims justified?", Humanitäres Völkerrecht, 4/2002, p. 228.

[8] David Kennedy, "A New Stream of International Scholarship", Wisconsin International Law Journal, Vol. 7, Number 1, Fall 1988, pp. 1-49; Nigel Purvis, "Critical Legal Studies in Public International Law", Harvard International Law Journal, Vol. 32, Number 1, 1991, pp. 81-128.

[9] Necati Polat, Ahlak Siyaset, Şiddet: Bir Kuram Olarak Uluslararası Hukuk, Kızılirma Yayıncılık, İstanbul, 1999, pp. 83-94.

[10] For a succinct elaboration of Eurocentric tenets of international law, Martti Koskenniemi, "Histories of International Law: Dealing with Eurocentrism" Rechtsgeschichte, Zeitschrift



International law inherently has a claim stemming from liberal thought that forms its basis. According to this, law has the capacity to bring about objective rules that foresee legal solutions to international disputes. International judge has to determine the rule applicable to the dispute at hand and justice will be served in this allegedly objective manner. According to ICJ, “the Court is not a legislative body. Its duty is to apply the law as it finds it, not to make it”.<sup>[11]</sup> However, even the most obviously drafted legal rule requires some level of interpretation inevitably during its application. Therefore, interpretation emerges as a necessity not only in relation to those rules that are simply ill-prepared or not-so-meticulously drafted or those that carry an innate ambivalence. This kind of rules are deemed by the international law and its academia to be the only rules in international law that require an interpretation. That said, in reality every legal rule necessitates an interpretation. At the final analysis, it all comes down to the judge invited to apply these rules. If there is a serious probability of prejudice on behalf of judges then the liberal understanding of international law faces a huge challenge in its claim of absolute objectivity. As a matter of fact, it is reported that the Court has gone beyond “the law as it found” and rendered decisions on issues where ambivalence reigned rampant.<sup>[12]</sup> If, by way of interpretation, law can be re-created according to personal designs and/or perceptions of judges, then it would be very difficult to accept this claim of purported legal objectivity dominant on international fora, which brings us to the conclusion that it is wrong or at least objectionable to define international law as a sphere of ontological objectivity with no political strings attached to it.

As observed, political considerations may be at play either on systemic level (i.e. states’ politically-informed contributions to international law’s making) or on personal level (i.e. perceptions and political inclinations of the international Judge). These studies and contributions along with many insights they provide, may eventually enable the international legal system to make it up for the long period of stagnation and to turn itself into a fitter system so as to meet the needs of the international community.

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des Max-Planck-Instituts für europäische Rechtsgeschichte, 19/2011, pp. 152-176.

[11] South West Africa (Second Phase), Judgment of 18 July 1966, ICJ Reports, s. 48.

[12] Necati Polat, “Uluslararası Hukukta İçerik Sorunu: Ege Uyuşmazlığı Örneği”, in İhsan Dağı (Ed.), Türk Dış Politikasında Gelenek ve Değişim, Siyasal Kitabevi, Ankara, 1998, p. 223.

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## INSTANCES OF INTERNATIONAL INJUSTICE

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That the system has failed many times in duly meeting the needs of the international community as a whole may be highlighted by a series of cases or advisory opinions of the International Court of Justice. Among these, Nuclear Weapons Advisory Opinion<sup>[13]</sup> merit a special attention, for in it the misery of the Court is definitely most visible. As known by the community of legal scholars, the Court juxtaposed some humanitarian rules, which it defined as “cardinal rules” of great significance. The Court then went on to add that employment of nuclear weapons shall definitely violate some of the most important general rules of this “humanitarian” law. All of a sudden however, the Court changed its course and direction and left the humanitarian concerns definitely unattended by claiming that if the survival of the state is threatened, that state may use nuclear weapons without heeding the general rules of humanitarian conventions, some of which may even make the final list of the so-called *jus cogens rules* one day.<sup>[14]</sup> To put it bluntly, the Court refrained from calling spade a spade. Two things may be aimed by this; the reiteration of the prestigious and privileged position of the states and their security concerns in the international platforms and secondly the unmistakable effort of the court to give “alpha states” some leverage in their decisions as to their nuclear weapons, for the possession of nuclear capabilities is a persuasive sign of your membership in the most coveted fraternity of states, at least from a security-related viewpoint.

Another instance of blatant injustice is the ICJ’s decision in Nicaragua.<sup>[15]</sup> According to the Court, if one state is supplying arms to terrorist groups or other groups using lethal force against other states, this state cannot be held responsible for the severe violations of international humanitarian committed by these non-state actors, for the ICJ sought for that responsibility that the sponsoring state has to have *effective control* over the actions of that armed non-state actor. This is too high a threshold for the effective employment of international legal mechanisms to combat illegal military action. However, if the arming state is “the state” in the international system, the impunity is only too easily attached to that superpower. Afghanistan makes the case more understandable. There, the issue was the un-condonable activities of the Al Qaida terrorist organization. As we all know this armed and ideologically motivated Islamist group attacked USA and killed thousands of civilians and caused

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[13] The Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion of 8 July 1996, ICJ Reports, pp. 223-267.

[14] Distinction in military targeting could be one these cardinal rules. However, in the employment of WMD’s like nuclear weapons the line between combatants and civilians will be irreparably trespassed.

[15] Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America) Merits, Judgment of 27 June 1986, I.C.J. Report, p. 14.

extremely high material loss. Justifiably, the international community reacted to this bloodshed with fast declarations of solidarity with USA and creative usage of international rules. The best example for this creativity should be the invoking of the 5th Article by the NATO members, which foresee the case of an attack on a member state. In the case of an attack against a NATO member, this attack will be accepted as one against the whole body of the members. As far as this author is concerned, this was the right legal solution at the face of a ruthless attack, which definitely satisfied the requirements of an armed aggression with the massive damage it inflicted on US soil. In turn, the regime in power back then in Afghanistan “acknowledged and adopted”<sup>[16]</sup> the attacks of this bloody terror organization, which eventually caused the basis of its own guilt. The international community reacted swiftly and decisively. As to legality of the war in Afghanistan there is little doubt in the academic literature, and this author finds no reason to place the legality of this war under further elaboration. That said, the vigor with which states have acted against this state is appalling, since the Taliban regime might have had no *effective control* over the activities of Al Qaida cells all over the world. The *effective control* that the ICJ sought in the Nicaragua case was definitely not available. The regime’s overt willingness to support and encourage Al Qaida in rhetoric and to provide them with safe haven and training facilities in deed bound Taliban to the activities of Al Qaida, and thus caused the international responsibility of Afghanistan. These actions were identical with or at the very least reminiscent of what the USA operators had provided for the non-state armed groups back then in Nicaragua case. The international judges or the decision-makers seem to be enjoying the latitude to pick from different legal standards, which may substantially vary and change the legal outcome at the end of the process, according to the identity of the accused parties in different cases.

I am of the opinion that the legal reasoning as regards the Al Qaida and Afghanistan relation was the right solution to the paramount use of force by non-state actors and “the globalization of the informal violence”.<sup>[17]</sup> As conscious actors in the field, international legal personalities (i.e. states) are capable of knowing what the real motives of their non-state partners are and they should be in a position to foresee or at least guess what these groups are going to do with the military training or equipment they are receiving from their sponsoring states. Right at this point, it has to be accepted that the sponsoring state

[16] I am referring to the exact wording of the Article 11 of ILC Draft Articles on Responsibility of States for Internationally Wrongful Acts. According to mentioned Article “Conduct which is not attributable to a State under the preceding articles shall nevertheless be considered an act of that State under international law if and to the extent that the State acknowledges and adopts the conduct in question as its own”.

[17] Robert O. Keohane, “The Globalization of Informal Violence, Theories of World Politics, and the “Liberalism of Fear”, Dialogue IO, Vol.1, Issue 1, 2002, pp 29-43.

*acknowledges and desires* the continuation and committal of the aggressive operations of that non-state group. That is why the war in Afghanistan was a justified military intervention according to international rules, whereas the ruling in Nicaragua case was far from tackling the realities of the international relations. This was probably the least of the intentions, to tell the truth, since the accused party was the USA, i.e. the superpower, which one simply cannot afford to alienate.

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## CONCLUSION

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In an ideal judicial setting, the standards used by the judges should not be altered by arbitrary or selective readings of law. However, the praxis is far from being even close to the ideal state of affairs. This fluctuation may be stemming from a systemic property of the international affairs such as the power relations that define the game as well as form the political/personal perceptions of the judge, who chime in to the system as a law-maker under the disguise of a legal interpreter.

This leads to the conclusion that international law, not only in its making (informed by the interest-maximizing states' behavior) but also in its application, is an extremely politicized domain. This conclusion is a striking negation of the image the community of international lawyers is conveying. International law is anything but apolitical. Therefore, it needs proper and miscellaneous (even iconoclastic if necessary) input from theoretical inquiries to find guidance and improvement in the light of the pressing needs of the humanity.

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