THE NEED FOR A NEW THEORY ON INTERNATIONAL LAW

(Uluslararası Hukuk Hakkında Yeni Bir Teoriye İhtiyaç)

Emre YAVAŞ[1]

ABSTRACT

Theories on international law have been formed in compliance with international landscape. In this regard, the former predominant naturalist theory on international law which excludes the consent of a state in defining international law was replaced by the positivist theory which defines international law as the reflection of state consent in the nineteenth century. This positivist theory served international law in the time of rapid progress of international law well until the mid-twentieth century. On the other hand, this current predominant positivist theory on international law has been challenged by many problems because of the dramatic and unprecedented developments in international law since Second World War.

Keywords: International Law, Natural Law, Positivist Theory, State Consent.

ÖZ

Uluslararası hukuk teorileri, uluslararası manzaraya uygun olarak oluşturulmuştur. Bu bağlamda, uluslararası hukuku devlet rızasının yansıması şeklinde tanımlayan pozitivist teori, uluslararası hukuku tanımlarken devletin rızasını hariç tutan uluslararası hukuk hakkındaki eski baskın doğal hukuk teorisinin yerini 19. yüzyılda almıştır. Bu pozitivist teori, uluslararası hukukun hızlı ilerleme zamanında uluslararası hukuka yirminci yüzyılın ortasına kadar iyi bir şekilde hizmet etmiştir. Öte yandan, uluslararası hukuk hakkındaki bu mevcut baskın pozitivist teori, İkinci Dünya Savaşı'ndan bu yana uluslararası hukuktaki dramatik ve görülmemiş gelişmeler nedeniyle ortaya çıkan sorunlarla başa çıkmak zorunda kalmıştır.

Anahtar Sözcükler: Uluslararası Hukuk, Doğal Hukuk, Pozitivist Teori, Devlet Rızası.

1 Danıştay İdari Dava Daireleri Kurulu Tetkik Hakimi, emreyavas20@hotmail.com

INTRODUCTION

International law most scholars and theorists have sought to identify over at least last three centuries is a controversial subject. Particularly before the nineteenth century, international law associated with natural law thought which excludes the consent of state in defining international law because of the immature of international positive law including treaties, customs and the general principles of law[2]. In the nineteenth century, this predominant naturalist theory on international law was replaced by the positivist theory due to European Enlightment, the increase in treaty making and the establishment of a variety of international institutions[3]. The international legal positivism which defines international law as the reflection of state consent and so binding international law can arise only by the consent of states. Under this predominant theory, international conventions, refers to both multilateral and bilateral treaties and international custom, as evidence of general practice accepted as law, refers to customary international law are generally accepted as the two main sources of international law.

On the other hand, this predominant theory on international law has been challenged by many problems because of the dramatic and unprecedented developments in international law since Second World War. As a result, new alternative theories have come out to seek answers to these challenges. This article, after addressing the historical developments of traditional theories on international law, will discuss whether international law is a positivist system based on state consent and international law needs a new theory.

I. THE TRADITIONAL VIEWS ON INTERNATIONAL LAW

Earlier international law theorists, namely naturalists primarily focused on unwritten rules consisting of custom to explain how the relations of states to be governed. Natural reason was the prominent early explanation for this situation[4]. According to this theory, "the law of nations was the necessary outgrowth of the laws of nature and could be discerned through the application of reason"[5]. In this context, customary international law primary source of international law was

2 NEFF Stephen C., "A Short History of International Law", in Malcom D. Evans (ed.), **International Law (**Oxford: Oxford University Press, 1th edition, 2003), p. 31, 41.

3 SHAW N. Malcolm, **International Law** (Cambridge: Cambridge University Press, 6th edition, 2014) p. 28.

4 HALL Stephen, "The Persistent Spectre: Natural Law, International Order and the Limits of Legal Positivism", 12 **Eur. J. Int'l L.** 269, p.274 (2001).

5 COHEN G. Harlan, "Finding International Law: Rethinking the Doctrine of Sources", 93 **Iowa L. Rev.** 65, p.79 (2007).

derived from natural reason, whereas treaties had to be interpreted in conformity with natural reason and thus, custom became quite powerful, both theoretically and normatively within the natural law framework[6]. "The often-mysterious process by which practices become accepted as law, or opinio juris, was explained and imbued with divine, or natural, rationality"[7]. The naturalist theory defines international law as divined from moral dictates existing independent of the consent of state[8].

On the other hand, particularly in the nineteenth century, this predominant view on international law began to change since international lawyers increasingly "sought to present their discipline as scientific in character"[9] to define a methodology and definitions to interpret international law. In particular, "this meant the exclusion of questions of an essentially 'conjectural' character; i.e. those falling principally within the domains of morality, ethics and metaphysics"[10]. In addition, there was a sharp increase in treaty making over the period and many international conferences such as the 1863 Postal Conference, the 1863 Geneva Red Cross Conference, the 1884 Berlin Conference on the Future of the Congo, and the 1899 and 1907 Hague Peace Conferences were held to negotiate international law issues[11]. Vast amount of international institutions were also established to handle matters as varied as telegraph administration, the abolition of slavery, and public health. The international legal positivism which defines international law as the reflection of state consent emerged from this change in international legal view because international law needed to become more scientific, and state consent seemed to provide an answer[12]. As Oppenheim, one of the prominent positivist theorists, explained that international law is law between sovereign states, not individuals[13] and the common consent[14] of

6 HALL, p.275.
7 COHEN, p. 81.
8 HOLLIS B. Duncan, "Why State Consent Still Matters - Non-State Actors, Treaties, and the Changing Sources of International Law", 23 **Berkeley J. Int'l Law.**, 137, p.140 (2005).
9 ANGHIE Antony, "Finding the Peripheries: Sovereignty and Colonialism in Nineteenth-Century International Law", 40 **Harv. Int'l L.J.** 1, p.10 (1999).
10 HALL, p.277.
11 COHEN, p. 80.
12 SHAW, p.29.
13 "The law of Nations is a law for the intercourse of states with one another, not a law for individuals. As, however, there cannot be a sovereign authority above the single sovereign states, the Law of Nations is a law between, not above, the single states, and is, therefore, since Bentham, also called International Law". OPPENHEIM Lassa, **International Law**, p.20 (2nd ed. 1912).
14 "The consent takes two forms: express consent, which is given when states conclude a treaty stipulating certain rules for the future international conduct of the parties; tacit consent, which is given through states having adopted the custom of submitting to certain rules of international conduct. Treaties and custom are, therefore, exclusively the sources of the Law of Nations". OPPENHEIM, p.22

states is the basis of international law. According to consent-based theory, state consent creates a legal obligation which leads to compliance. This consent-based argument has taken a handful of criticisms. As Guzman points out that "consent, by itself, does not provide states with an incentive to obey the law"[15]. In addition, other theories as the New Haven School, International Law and Economics, International Law and International Relations, and the New Stream movement have arisen to argue about international law from different perspective on account of big changes in international legal system in the twentieth century.

II. THE SOURCES OF INTERNATIONAL LAW

The doctrine of sources of international law provides suppositions for the understanding and discussion of international law. In this context, the doctrine of sources is "a general understanding of how and where international law rules can be found, a methodology for identifying valid rules of international law, and a theory of international law's bases"[16]. The sources of international law has been a controversial issue over the nature of international law for long times. It is important to note that the articulation of sources in Article 38 of the Statute of the International Court of Justice[17] (ICJ Statute, conventions, custom, and recognized general principles is accepted as elements to identify what legal rules to apply in a particular case[18]. Moreover, the notion that the general consent of states creates rules of general application is referred to account for how these rules make up international law[19]. International conventions, refers to both multilateral and bilateral treaties and international custom, as evidence of general practice accepted as law, refers to customary international law are generally accepted as the two main sources of international law. Customary international law is composed of the general practice of states and the belief of legal obligation, called opinio juris.

Although the ICJ statute does not explicitly express that there is a

15 GUZMAN T. Andrew, "A Compliance-Based Theory of International Law", 90 **Cal. L. Rev.** 1823, p.1834 (2002).

16 COHEN, p.74.

17 Article 38(1) of the ICJ Statute provides that "[t]he Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply: a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states; b. international custom, as evidence of a general practice accepted as law; c. the general principles of law recognized by civilized nations; d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.", Statute of the International Court of Justice, 59 Stat. 1031 (1945).

18 HALL, p.284.

19 THIRLWAY Hugh, "The Sources of International Law", in Malcom D. Evans (ed.), **International Law** (Oxford: Oxford University Press, 1th edition, 2003), 117, p.121.

hierarchy between the sources, treaties are often considered first and treated as most authoritative on the grounds of the order in which the sources are listed. This consideration reflects the predominant positivist theory of international law[20]. The process of treaties including negotiation, drafting, signing and ratification constitutes the strongest evidence of state consent. By contrast, it is significant to point out evolving international landscape has been straining this phenomenon in a number of ways. In this context, many questions on the meaning, nature, and content of treaties whether all states parties to treaty agree on the basic principles, all of these states intend to be bound and all of these states interpret the meaning of the treaty in the same way[21] have challenged the positivist theory. Moreover, states, in practice, often do not comply with human right treaties and environmental treaties to which they are parties[22]. "If international law is identified with treaties, as the traditional doctrine of sources suggests, and treaties bear, at best, no relationship to state action, can international law really be law?"[23]

In addition, the evidence of consent to custom is a little problematic, but this problem can be solved on the basis of the concept of implied consent. In this sense, "the international law must be consistently practiced by nations whose interests it clearly affects, with the tacit consent or acquiescence by those nations whose interests it does not"[24]. But, "even when generalized state consent to a particular custom might be clearer, the scope of what has been consented to will remain difficult to pin down"[25]. Moreover, it is generally accepted that the acknowledgement of the composition of customary international law faces several well-known problems. Customary international law suffers from problems such as "there is no agreement on how widespread a custom must be in order to

20 FICHTELBERG Aaron, "Legal Rules and International Society, 15 **Emory Int'l L. Rev.** 157, p.161 (2001).

21 COHEN, p. 86.

22 Hathaway explains why states, in practice, do not obey the provisions of treaties: "Yet in fact these countries often have stronger incentives (and weaker disincentives) to join human rights treaties than states with better records-first, because such countries usually have weak rule of law and thus create limited opportunities for domestic legal enforcement; second, because human rights treaties usually lack transnational legal enforcement mechanisms, such as supranational enforcement or credible threats of state-to-state retaliation; and finally, because such countries, by displaying their (sometimes insincere) commitment to human rights, increase their standing among other nations, international bodies, private investors, domestic actors, and others and thereby obtain significant collateral benefits". HATHAWAY A. Oona, "Between Power and Principle: An Integrated Theory of International Law", 72 **U. Chi. L. Rev.** 469, p. 474 (2005).

23 COHEN, p. 96.

24 THOMAS Chantal, "Customary International Law and State Taxation of Corporate Income: The Case for the Separate Accounting Method", **14 Berkeley J. Int'l L.** 99, p.114 (1996).

25 COHEN, p. 79.

satisfy the state practice requirement, the opinio juris requirement fares no better as a theoretical matter than does the state practice requirement, violations of customary international law are difficult to identify because the rules themselves are often vague"[26] and these problems have arisen suspicion whether customary international law exists at all as a relevant force in international law.

The exhaustive list of the sources of international law enshrined in Article 38 of the ICJ Statute and the notion that state consent serves as the exclusive source of obligation in international law have faced many challenges due to the changes in the international system such as the rapid inclusion of new states into the system, the rise of human rights, the creation of international and transnational organisations, and the variation of the nature and subject matter of treaties especially in the second half of the twentieth century[27]. In this regard, the challenging issues including the difficulty of accepting treaties as a source of law since they only bind the parties to the treaty[28], the insignificance of proof of state consent[29], the insufficiency of Article 38 of the ICJ Statute for the content of modem international law, the proposal of new sources for international law[30] have been argued by scholars. Furthermore, many questions on the concept that state consent serves as the exclusive source of obligation in international law whether what the constituent element is for legal force to the consent of states proclaimed through conventions, treaties bind states just because they consent to the treaty's binding effect, a non-consensual basis such as natural law can be a treaty's legal force have arisen[31]. It should be stressed that another big challenge to the positivist doctrine of sources of international law stems from the coming out of new kind of sources such as United Nations Resolutions, various declarations of the international community and guidelines, called as soft law. In this sense, non-binding instruments have an essential and growing role in international relations and in the development of international law[32].

III. CHANGES IN THE INTERNATIONAL LEGAL SYSTEM

The international legal system is founded as a state-based system and the predominant positivist theory of international law accepts that

26 GUZMAN, p.1874.
27 NEFF , p. 54.
28 FITZMAURICE G.Gerald, "Some Problems Regarding the Formal Sources of International Law" in **Symbolae Verzul** 153, p.157 (1958).
29 COHEN, p. 86.
30 JENNINGS Y. Robert, What is International Law and How Do We Tell It When We See It?, Schweitzerisches Jahrbuch For Internationales Recht 37, 59, 61 (1981), reprinted in **Sources Of International Law** 28, 38, 39 (Martti Koskenniemi ed., 2000).
31 HOLLIS, p. 142.
32 GUZMAN, p.1874.

foundation. It can thus be presumed that under the predominant view, any role of the individual in the international legal system is merely as an object of that system and not as a subject[33]. That is to say, states entirely identified individuals' role and this was completely subject to states consent[34]. A 'subject' of the international legal system can be identified as a legal person who has direct rights and responsibilities under that system, can bring international claims and, "is able to participate in the creation, development, and enforcement of international law"[35]. In this context, the notion of international personality and the condition of being a 'subject' of the international legal system were explained by the ICJ in its Reparations for Injuries Opinion[36]. According to the ICJ, there can be subjects of the international legal system aside from states, these entities can have international legal personality, and they can act independently in the international legal system. Thus, "recognizing that individuals have certain rights and duties under international law does not imply that those attributes are identical to those of states"[37].

It is important to note that the predominant positivist theory of international law which excluded the individual as the subject of rights could not prevent the gross violations of human rights and atrocities throughout twentieth century around the world[38]. "The horrors of World War II triggered a revolutionary expansion of internationally protected

33 STEPHENS Beth, "Individuals Enforcing International Law: the Comparative and Historical Context", 52 **DePaul L. Rev.** 433, p. 445 (2002-2003).

34 TRINDADE Antonio Augusto Cancado, "The Consolidation of the Procedural Capacity of Individuals in the Evolution of the International Protection of Human Rights: Present State and Perspectives at the Turn of the Century", 30 **Colum. Hum. Rts. L. Rev.** 1, p. 7(1998-1999).

35 MCCORQUODALE Robert, "The Individual and the International Legal System", in Malcom D. Evans (ed.), **International Law (Oxford: Oxford University Press,** 1th edition, 2003), 299, p. 301.

36 "The subjects of law in any legal system are not necessarily identical in their nature or in the extent of their rights, and their nature depends on the needs of the community. Throughout its history, the development of international law has been influenced by the requirements of international life, and **the progressive increase in the collective activities of states has already given rise to instances of action upon the international plane by certain entities which are not states** ... In the opinion of the Court, the [UN] Organisation was intended to exercise and enjoy, and is in fact exercising and enjoying, functions and rights which can only be explained on the basis of the possession of a large measure of international personality and the capacity to operate upon an international plane ... That is not the same thing as saying that it is a state, which it certainly is not, or that its legal personality and rights and duties are the same as those of a state ... It does not even imply that all its rights and duties must be upon the international plane, any more than all the rights and duties of a state must be upon that plane. **What it does mean is that it is a subject of international law and capable of possessing international rights and duties, and that it has capacity to maintain its rights by bringing international claims**." Reparation for Injuries, Advisory Opinion, ICJ Reports 1949, p 174 at pp 178-179.

37 STEPHENS, p. 445.

38 TRINDADE, p. 10.

individual rights"[39]. Thus, such "atrocities awakened the universal juridical conscience to the necessity of reconceptualising the very foundations of the international legal order, restoring the human being to the central position from which he had been displaced"[40]. The participation of individuals in the creation, development, and enforcement of international law has been gradually increasing particularly in the second half of twentieth century. Furthermore, both international organisations such as the United Nations Organization, the International Labour Organisation, the International Monetary Fund, the World Trade Organisation and the World Intellectual Property Organisation and non-governmental organizations (NGOs) such as the International Committee of the Red Cross, the Global Human Rights Defence, the Human Rights Watch and the Greenpeace, which are part of international community, have had an increasingly considerable impact on the creation, development, and enforcement of many parts of the international legal system.

It should be stressed that "the evolution of the individual as a separate independent juristic entity and the acceptance of the international community's legitimate interest in the observance of international law are particularly well established in the context of human rights"[41]. The acknowledgement that some international human rights are binding on states irrespective of whether or not they are parties to any specific convention in which the rights are enshrined arises from the Universal Declaration of Human Rights[42] and further development of human rights in numerous conventions[43]. Similarly, under international environmental law, "declarations which enjoy the general support of the international community assert the obligations of states in terms which reserve to no state a right to exempt itself from the fundamental responsibilities declared"[44]. Moreover, it is worth noting that the concept of jus cogens (peremptory norms) from which no derogation is allowed is established on the basis of the acceptance and recognition of international

39 STEPHENS, p.449.

40 TRINDADE, p.8.

41 CASSIDY Julie, "Emergence of the Individual as an International Juristic Entity: Enforcement of International Human Rights", 9 **Deakin L. Rev.** 533, p.544 (2004).

42 Universal Declaration of Human Rights (UDHR) 10 December 1948 UNGA Res. 217 (III).

43 The International Court of Justice has specifically recognized this acknowledgement. The ICJ pointed out: "such obligations derive, for example, in contemporary international law, from the outlawing of acts of aggression, and of genocide, as also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination. Some of the corresponding rights of protection have entered into the body of general international law...; others are conferred by international instruments of a universal or quasi-universal character". Barcelona Traction, Light and Power Company, Limited (Belg. v. Spain), I.C.J. 4, 32 (5 February 1970).

44 PERKINS A. John, "The Changing Foundations of International Law: from State Consent to State Responsibility", 15 **B.U. Int'l L. J.** 433, p.451 (1997).

community of states[45] rather than the assumptions of positivist theory. States have to comply with jus cogens irrespective of whether or not they consent to these norms. It is widely accepted that individual responsibility for certain offences in the international legal system has developed under both international criminal law and international humanitarian law[46]. In this respect, individuals can be responsible for their some acts even when performing on behalf of the state within the international legal system. Under the doctrine of universal jurisdiction which is not derived from state consent, any state has jurisdiction over certain offences recognized as of global concern, such as piracy, slave trade, genocide, war crimes.

It is noteworthy to point out that although the traditional doctrine of sources has served international law to provide framework and structure in the time of rapid progress of international law well over the twentieth century, this doctrine has been increasingly challenged by the big change in the content of modern international law. As a result, new theories on international law has been argued to define the concept of international law and seek to explain which rules are treated as law in the international system, when and why states obey the international rules that they do and which new sources can fit the content of modern international law. In this context, compliance theories "have focused on how compliance is generated through the formalized interaction between states in international institutions, rational-choice concerns with state reputation, socialization of states within international communities, the internalization of international norms within domestic legal systems, and the compliance pull generated by rules perceived as legitimate"[47].

CONCLUSION

The evolvement of international law depends on the present day conditions of international community. In this regard, the naturalist theory on international law was replaced by the positivist theory due to different international landscape particularly in the nineteenth century. It would be fair to say that the positivist theory on international law which defines international law as a reflection of state consent and accepts treaties and customs are two main sources of international law and states are the real actor in the international system has served well until the mid 1950s. As theoretical debate on the rationale of the positivist theory has been continuing, the following dramatic changes in the international system: the

45 Article 53 of the Convention on the Law of Treaties (Vienna) 23 May 1969, in force 27 January 1980; 8 ILM 679.

46 VICUNA Francisco Orrego, **"Individuals and Non-State Entities before International Courts and Tribunals", 5 Max Planck Yearbook of United Nations Law 53,p. 56 (2001).**

47 COHEN, p. 97.

atrocities of two world wars, the ending of a Cold War, the rapid inclusion of new states into the international system, the rise of human rights, being individuals as a subject of international law, the acknowledgement of the notion of jus cogens, the development of international criminal law and the recognition of universal jurisdiction, the influence of non-state actors, the creation of international and transnational organisations, and the variation of the nature and subject matter of treaties have put pressure on the positivist theory to revise its general framework. These developments have given rise to the agreement of international community on the significance role of other actors except states within the international system and the principles of international law that can become binding on states without their consent. Moreover, non-binding instruments have had an increasingly crucial effect on the governance of international relations between states. It is not surprising to argue that a new theory which takes into consideration the current international landscape is needed to identify international law properly.

BIBLIOGRAPHY

Books

OPPENHEIM Lassa, **International Law,** (2nd ed. 1912).

SHAW N. Malcolm, **International Law** (Cambridge: Cambridge University Press, 6th edition, 2014).

Articles

ANGHIE Antony, "Finding the Peripheries: Sovereignty and Colonialism in Nineteenth-Century International Law", 40 **Harv. Int'l L. J.** 1 (1999).

CASSIDY Julie, "Emergence of the Individual as an International Juristic Entity: Enforcement of International Human Rights", 9 **Deakin L. Rev.** 533 (2004).

COHEN G. Harlan, "Finding International Law: Rethinking the Doctrine of Sources", 93 **Iowa L. Rev.** 65 (2007).

FICHTELBERG Aaron, "Legal Rules and International Society", 15 **Emory Int'l L. Rev.** 157 (2001).

FITZMAURICE G. Gerald, "Some Problems Regarding the Formal Sources of International Law" in **Symbolae Verzul** 153 (1958).

GUZMAN T. Andrew, "A Compliance-Based Theory of International Law", 90 **Cal. L. Rev.** 1823 (2002).

HALL Stephen, "The Persistent Spectre: Natural Law, International Order and the Limits of Legal Positivism", 12 **Eur. J. Int'l L.** 269 (2001).

HATHAWAY A. Oona, "Between Power and Principle: An Integrated Theory of International Law", 72 **U. Chi. L. Rev.** 469 (2005).

HOLLIS B. Duncan, "Why State Consent Still Matters - Non-State Actors, Treaties, and the Changing Sources of International Law", 23 **Berkeley J. Int'l Law.** 137 (2005).

JENNINGS Y. Robert, What is International Law and How Do We Tell It When We See It?, Schweitzerisches Jahrbuch For Internationales Recht 37 (1981), reprinted **in Sources Of International Law** 28 (Martti Koskenniemi ed., 2000).

MCCORQUODALE Robert, "The Individual and the International Legal System", in Malcom D. Evans (ed.), **International Law** (Oxford: Ox-

ford University Press, 1th edition, 2003), 299.

NEFF C. Stephen, "A Short History of International Law", in Malcom D. Evans (ed.), **International Law** (Oxford: Oxford University Press, 1th edition, 2003), 31.

PERKINS A. John, "The Changing Foundations of International Law: from State Consent to State Responsibility", 15 **B.U. Int'l L. J.** 433 (1997).

STEPHENS Beth, "Individuals Enforcing International Law: the Comparative and Historical Context", 52 **DePaul L. Rev.** 433 (2002-2003).

THIRLWAY Hugh, "The Sources of International Law", in Malcom D. Evans (ed.), **International Law** (Oxford: Oxford University Press, 1th edition, 2003), 117.

THOMAS Chantal, "Customary International Law and State Taxation of Corporate Income: The Case for the Separate Accounting Method", 14 **Berkeley J. Int'l L.** 99 (1996).

TRINDADE Augusto Cancado Antonio, "The Consolidation of the Procedural Capacity of Individuals in the Evolution of the International Protection of Human Rights: Present State and Perspectives at the Turn of the Century", 30 **Colum. Hum. Rts. L. Rev.** 1 (1998-1999).

VICUNA Orrego Francisco, **"Individuals and Non-State Entities before International Courts and Tribunals**", 5 Max Planck Yearbook of United Nations Law 53 (2001).