



A Liberal Theory of International Justice

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BOOK REVIEW:
A LIBERAL THEORY OF INTERNATIONAL JUSTICE¹

Parvathi Menon*

The ‘Statist order’, which is at the centre of international law’s defining characteristic and source, used as the legal premise upon which States base their arguments, is an artificial order, at best. Who creates norms in international law and thereafter, who is required to respect it once it has acquired the status of a customary norm, reflects on the world of ‘equal and autonomous sovereigns’ imagined by those who engage in the sources argument.² Thus, it is said to create a normative order where the States make the laws (or exist as an external normative order beyond the States, binding them). It is well accepted that the notion of ‘sovereignty’ as the power that comes with one’s factual existence as a State, does not lie with the State alone anymore. The decision-makers in the various nooks and crannies of our socio-economic fabric exert their control, thus reconfiguring and disintegrating state sovereignty at different levels: below the State and above the State.³ The book turns a blind eye to this important development in international law and covers a number of issues that turn the focus back to the

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1 ANDREW ALTMAN & CHRISTOPHER HEATH WELLMAN, *A LIBERAL THEORY OF INTERNATIONAL JUSTICE* (2009).

2 See MARTTI KOSKENNIEMI, *FROM APOLOGY TO UTOPIA* (2d ed. 2006) for the legal and the pure fact approaches to sovereignty. Here I restrict the argument to the beneficiaries of the order, if it is considered to exist external to the State, or the creators of the order, if it is gleaned from the States. See also DAVID KENNEDY, *INTERNATIONAL LEGAL STRUCTURES* 256 (1987).

3 Though there has been much debate surrounding the diminishing importance of sovereignty in the international law discourse, I contend that the obfuscation of its content and the changing nature of its implication are perhaps very telling of its omnipresence. As long as it is being countered or debated, it continues to be important-even if through its fragmented existence, just as the Westphalian State is. Cf. Martti Koskenniemi, *What Use for Sovereignty Today?* 1 *ASIAN. J. INT’L. L.* 61 (2011). See STEPHEN KRASNER, *SOVEREIGNTY: ORGANIZED HYPOCRISY* (1999).

mainstream statist approach to the discipline. Altman and Wellman bring about a very expansive analysis of not merely what the liberal theory of international justice is, but make a very concerted effort to debunk the myths that surround the viewpoints espoused by various other theorists.

The idea of the State as the perceived state of normality⁴ seems to be the central theme the book pursues, in order to deem the relevance and successes of doctrines like the right to self-determination. In that particular example, first, the authors miss the irony the doctrine evinces- in order to exercise the right, they claim, the State must possess a moral right, or the non-State group must possess the right and the desideratum to become a State. This ignores the very nature of the people exercising the right- are they subjects of international law, or do they become subjects only after they exercise this collective right? The status of these people is in a state of transition.⁵ Second, the authors stress on the legitimacy of the State to hinge on their ‘proposed’ respect for their citizens. It reinforces the fallacy surrounding law’s expectations that rarely match the reality of adjudging the State’s (lack of) respect for human rights.⁶ It also vitiates the correlation between violence and liberation/self-determination movements that must be taken into account and are often found to misguide the international community or whoever might be the ‘external rationality agent’, to the extent of justification for the disorder created. Violence stemming from these movements often results in a plethora of human rights violations, but in the name of their ‘statist’ pursuit, they continue to enjoy the legitimacy not available to other human rights violators. I shall look into these claims in the following paragraphs in order to extend my scepticism towards the liberal theory of international justice, for its inability to convincingly elucidate the realistic tensions faced within the international spectrum.

4 MICHEL FOUCAULT, *ABNORMAL: LECTURES AT THE COLLEGE DE FRANCE* (Arnold I. Davidson ed., Graham Burchell trans., 2003); *see also* MICHEL FOUCAULT, *DISCIPLINE AND PUNISH* (Alan Sheridan trans., 2d ed. 1995) (1977).

5 Nathaniel Berman, *Sovereignty in Abeyance*, 17 EUR. J. INT’L L. 203 (2000). If law normally draws from sovereignty, then self-determination, he says, arises when that “sovereignty is in abeyance”.

6 Antony Anghie, *IMPERIALISM, SOVEREIGNTY AND THE MAKING OF INTERNATIONAL LAW* 246 (2007).

In a fairly straightforward case put forth in the book, the authors draw an interesting parallel between a State's ability to self-govern in the light of liberation movements and the case of parents who, no matter how poor their parenting skills, continue to assert the 'right' to bring up their children. Espoused as a case against the conceived harm of intervention by foreign states into the territory of the human rights violating state, the authors deem the existence of the 'right to self-determination' as paramount, overriding any image of being a violator of human rights standards. This view is fairly conflicting and hard to reconcile with the legitimacy factor of the State. Whether it is the *de facto* existence as a State or the *de jure* exercise of sovereignty, the mainstream idea of the State as the one factual state of existence for 'entities' in international law, seems to be reified through this book. Democratic governance within the State is not a pre-requisite for its legitimacy- the book uses the Vaclav Havel example to drive home this point; albeit in the same vein, the argument made is of the desideratum of the political group of people, which, even if sounds democratic, is said to end at the point of making that choice. Thereafter, the type of governance could be monarchic, if that were the choice. I find agreeable the proposition that western democratic ideals need not necessarily be the aspiration for all States- it is common practice to invest in propagating mainstream notions, like that of democratic governance models, as is often done with the statist one. What is bothersome in the arguments advanced in the book is that the authors turn to the people in whom the ultimate sovereignty vests- their choice of governance is considered to be an exercise of their right to political self-determination and it is towards the fulfilment of the doctrine that the authors find a non-democratic set up equally legitimate. This leads me to the next fallacy as put forth in the language of law.

The issue of recognition of States is primary in discussions around creation of States. Correlating the problem of recognition to democracy requirements and the corollary *problématique* of human rights violations, a plausible connection made by Altman and Wellman is this: even if it might not be blatantly clear that democratic societies have fewer human rights violations, the leverage possessed by the states through this process of recognition puts a bar on liberations movements that do not 'desire to' meet the standard prescribed by the 'civilized' 'western'

ideas (of what makes a ‘peace-loving State’).⁷ This most definitely overlooks the Fanon-like concern regarding the demarcation made between what are perceived as civilized and uncivilized nations. International scholars often treat the politics prevalent in the decision-making process like it is invisible.⁸ To turn the creation of States or the process of recognition into a legal requirement in international law is to continue to wage that age-old futile battle of separating law from politics. Basing this recognition on the levels of human rights violation is a far cry from reality. The question, “who decides?”, whether a legal or a moral question, is intertwined with the concept of ‘legal’ recognition. It must be noted that the ‘decision-makers’ construct these ideas in order to shape an abnormality that allows for innovative actions that can be projected as a means to revert to the ‘normal’ state of order. It is also of relevance the usage in the provision on the ‘sources and evidence of international law generally’, as found in Article 38 of the Statute of the International Court of Justice, provision 1 (b) which reads, “general principles of law recognized by *civilized nations*”. It was understood to differentiate the barbaric practices of the uncivilized nations from the peace-loving, defined legal systems of the civilized nations.

The third issue that I wish to discuss is that of secession. The right to secession too hinges on the statist order. Relying on a very modernist approach, the authors support nationalism, albeit urging that it occurs around the centrality of the State. Without supporting state-breaking,⁹ the deviance from the ‘norm’ is advised only in the light of an examination of their political capacities. This is extended to both, State and non-State entities.¹⁰ The question of secession

7 Charles Tilly, *Western State-Making and Theories of Political Transformation*, in *THE FORMATION OF NATIONAL STATES IN WESTERN EUROPE* (Charles Tilly ed., 1975). See GLIANFRANCO POGGI, *THE DEVELOPMENT OF THE MODERN STATE* (1978); ANTHONY GIDDENS, *THE NATION STATE AND VIOLENCE* (1985); FRANTZ FANON, *THE WRETCHED OF THE EARTH* (1961); Charles Taylor, *Nationalism and Modernity*, in *THEORIZING NATIONALISM* (Ronald Beiner ed., 1999).

8 See generally DAVID KENNEDY, *THE DARK SIDES OF VIRTUE* 349-350 (2005).

9 See ROBERT REDSLOB, *THE PROBLEM OF NATIONALITIES* (1931).

10 See Richard T. Ford, *Law's Territory: A History of Jurisdiction* 97(4) *MICH. L. REV.* 843-930 (1999) on the creation of sub-national identities and territories; BENEDICT ANDERSON, *IMAGINED COMMUNITIES* (3d ed. 2006). The same walls that define the subject of the liberation struggles create *freedoms* and also facilitate *conformity*. In this way, the territorial art of separation simultaneously creates “the liberties [and] . . . the disciplines.” FOUCAULT, *DISCIPLINE AND PUNISH*, *supra* note 5, at 195-228.

needs to be studied as a conflict between *freedom* and *conformity*,¹¹ the right of the seceding groups to exercise their political freedoms *versus* the existing State's right to protect its territory by preventing secession, towards conforming to the Statist desideratum.

Moving onto Chapter 4, on International Criminal Law, what is found as the leitmotif of this book is the determination of legitimacy and illegitimacy of States. Without really revealing a yardstick for measurement of this legitimacy, but merely basing it on the absence of human rights violations, as found in previous chapters, the authors are reducing the credibility of this so-called legitimacy factor and its adjudication, alike. Altman and Wellman, through this chapter, repose faith in the International Criminal Court, but more importantly distinguish it from ideas of democracy and secession owing to the lacking institutional framework within which the latter can be carried out. It might be worth noting in this context, the existence of the institutionalization of concepts like democracy and secession through their linkages with human rights and its related charters and treaties. Arguably, on the other hand, international criminal law marks a paradigm-shifting moment in the dialectical production and negotiation of the political. Further, in institutionalizing a universal discourse of humanity and 'peace', it refuses to allow political confrontation to take place within the international legal system in a way that would maintain at least the *risk* of violence. In Schmittian¹² terms, international criminal law rules out the possibility of the exception. Although the concept of international criminality deployed in 1945 was not new, its institutionalization was. From the perspective of the facilitation or foreclosure of political capacities, I ask whether this institutionalization is positive or negative. Here, I am writing against secular liberal institutionalists, who concentrate on progressively 'ending impunity' to the neglect of this question.

The fifth chapter on political assassinations and armed interventions is almost disturbing to the extent that it espouses an endorsement of the violence in the larger interests of preservation of societies and justice. Killing a few to save the

11 See SIGMUND FREUD, *CIVILIZATION AND ITS DISCONTENTS* (1929). I borrow Freud's typology to showcase the conflicting ethos that occurs in conflicts like Kashmir, Bosnia and Ethiopia- of the freedom of the peoples vis-à-vis conformity to a category for membership to the international community.

12 CARL SCHMITT, *THE NOMOS OF THE EARTH* (2003).

rest is the failing utilitarian theory of scholars like Bentham and Jhering¹³ that have been fought against by many scholars, especially those that hail from the critical schools.¹⁴ Yet, principles of armed intervention and assassination continue to have a strong foothold in discussions that surround ‘law and justice’.¹⁵ The irony is compelling. If intervention could deem a state illegitimate, as the authors suggest mildly, using the Iraqi invasion of Kuwait as an example, it could perhaps help curb violence through a naming-shaming process. Holding that thought, one must reconsider the possibilities keeping in mind the politics involved in the de-legitimation techniques used by the international community. It is here that the focus shifts to the States in question- are they the power wielders, or do they merely yield to the demands of the power-wielders?¹⁶ The authors deal with the power factor in Chapter 6, as emanating from the wealth quotient, but do not imagine that the poorer State will always be the oppressed, or rather, that being poor is not equivalent to being the oppressed. What has not been discussed is whether the converse is true; are the oppressed usually the poorer States, the Others in international law?¹⁷ With the emerging European-centric universalism, the non-European people, through colonialism, were in effect subsumed within the European order making the ‘maintenance of the order’ the pretext on which massacres were carried out.¹⁸ Neither the laws of war, nor the law of nations applied to non-Europeans.¹⁹ This non-inclusion must be examined through the rise

13 RUDOLF VON JHERING, *LAW AS A MEANS TO AN END* (1914) (Isaac Husik trans., 2006). How far should social interest trump the individual will? Jhering says there is no overarching principle that binds every situation; it, in fact, depends upon circumstances and therefore, there is no general guide. See also Neil Duxbury, *Jhering's Philosophy of Authority*, 27(1) OXFORD J. L. STUD. 23-47 (2007).

14 See KENNEDY, *supra* note 9, at 349-350.

15 Martti Koskeniemi, *The Lady Doth Protest Too Much: Kosovo, and the Turn to Ethics in International Law*, 65 MOD. L. REV. 159-175 (2002).

16 See MICHEL FOUCAULT, *POWER/KNOWLEDGE* (Colin Gordon ed., 1980) and *SOCIETY MUST BE DEFENDED* (David Macey trans., 2003).

17 INTERNATIONAL LAW AND ITS OTHERS (Anne Orford ed., 2006).

18 Quincy Wright, *The Bombardment of Damascus*, 20 AM. J. INT'L L. 263 (1926); See J. B. Atlay, *Legitimate and Illegitimate Modes of Warfare*, J. OF THE SOC. OF COMP. LEGISLATION 10 (1905).

19 See John Stuart Mill, *A Few Words on Non Intervention*, in COLLECTED WORKS (John Robson ed., 1984). He stated that “to suppose that the same international customs, and the same rules of international morality, can obtain between one civilized nation and another, and between civilized nations and barbarians, is a grave error, and one which no statesman can fall into.”

of the State as the sole source of law around which the ‘international community’²⁰ came to be created. The laws of war, as treaties that were binding only among sovereign nations, therefore excluded the ‘uncivilized’ entities to begin with. The institutionalization of this international community and thereby, of the exclusion through the Mandate system and the United Nations, portray the continuance of the depiction of the ‘humanitarian’ claims made by the ‘civilized’ unto the ‘others’. In the circumstances, it is often difficult to separate the poor from the perceived ‘uncivilized’ States and disconnect their relationship to the oppressed, the Others.

The juxtapositions of what is viewed as traditional international law and modern international law should be interpreted as a means to participating in, and indeed, partly creating deep shifts in the history. This can be seen as a method of reconfiguring the power, where strength is equated with knowledge, so that the State is neither institutionalized nor fetishized. This leads to a reflection on the genealogy of liberalism (and the theory of the limitation of the power of the state) and the role played by Hobbes at the heart of this genealogy. Here, law is *normally* based on sovereignty and in *extraordinary cases*, “sovereignty is in abeyance”.²¹ The desire to conform to statist standards²² makes the idea of freedom a process of proving, like in postcolonial theory, that *we too can look civilized*. Equality as a *process* versus equality as a *result* is crucial to be differentiated between here. The resulting equality, of becoming a nation state and being subsumed into the statist

20 See ANDERSON, *supra* note 11; PARTHA CHATTERJEE, NATIONALIST THOUGHT AND THE COLONIAL WORLD (1986); ERIC HOBBSBAWM, NATIONS AND NATIONALISM SINCE 1788 (1990).

21 See Berman, *supra* note 6.

22 SUSAN MARKS, THE RIDDLE OF ALL CONSTITUTIONS: INTERNATIONAL LAW, DEMOCRACY, AND THE CRITIQUE OF IDEOLOGY (2003). She critiques the concept of the ‘dominant ideology’, which underestimates the independent agency of the subaltern group that exists beyond the ruling classes. I borrow her thesis to advance my argument that ‘normality’ as a pre-existent state of being of the international order presupposes and imposes certain dominant ideas which tend to be internalised as the default state; it ignores/abnormalises any resistance to such ideas. The resistance which leads to ‘disorder’, is thus argued to be antithetical to the normality. See generally ABRAM CHAYES & ANTONIA HANDLER CHAYES, THE NEW SOVEREIGNTY (1995). If self-determination struggles bring with them the right to revolt against the repression/suppression by the State, it might be interesting to note that some scholars believe the formalist turn to the right might obfuscate the political background against which it must operate. See OFUATEY-KODJOE, THE PRINCIPLE OF SELF-DETERMINATION IN INTERNATIONAL LAW 128-156 (1977).

order is merely *accommodative*; the *transformation* can occur only if the process is based on equality principles,²³ where different kinds of entities can co-exist within the international order, without one always aspiring to exist as the other simply because it is the only acceptable form of existence, the State. Whether it is groups, populations or individuals who can assert their right to self-determination, it needs to reflect on the process and the resulting ‘state of normality’ it encourages within the international spectrum. And that is where one must strive for change.

23 See Roberto M. Unger, *The Critical Legal Studies Movement*, 96 HARV. L. REV. 561 (1983). See also ROBERTO M. UNGER, *FALSE NECESSITY* (2004); Lewis D. Sargentich, *Complex Enforcement* (1978). See generally Kimberle Williams Crenshaw, *Race, Reform and Retrenchment: Transformation and Legitimation in Anti-Discrimination Law*, 101 HARV. L. REV. 1331 (1988).