

Prof. Dr. Miodrag Jovanovic (Belgrade)

International Law as a Subject of Legal Philosophy

Thursday 17 September 2015

Following on from his initial talk on the subject of collective rights two evenings previously, Prof. Dr. Miodrag Jovanovic, Professor of Legal Theory at the University of Belgrade, delivered, on Thursday 17 September, a second *laboratorium lucernaiuris* lecture on the legal-philosophical premises of international law. The issue is a particularly timely one, with much talk being currently made of a widespread assault on the international legal order that has eroded its foundations and authority. Rather than signalling a wholesale lurch away from international law, recent global developments have, as Prof. Jovanovic clearly and insightfully mapped for the audience, in fact had the effect of bringing forth a marked revival of interest in international law philosophy and theory.



The starting point for the discussion was the long-standing question of whether international law really does constitute law, and the speaker began by indexing certain commonly posited objections. These included the arguments that international law lacks an enforcement mechanism, that its provisions are precatory but not binding, that it does not have the necessary institutional apparatus to function as a hierarchically-ordered normative order (such as domestic law), and that it is too closely imbricated with international politics. Such claims were spotlighted as a set of leading concerns for the subsequent discussion, and a first move was to trace their presence through the history of international law philosophy from the Stoics to the twentieth century. Two phases can, Jovanovic suggested, be broadly identified in this context – the first, founded on the idea of the law of nations, is dominated by the principles of natural law and finds perhaps classic



expression in Grotius's *De iure Belli ac Pacis*; the second, meanwhile, marks the rise of a positivist perception of international law, commonly held to have emerged from the utilitarian theories developed by Bentham and Austin in the late eighteenth century, and which extends into the work of twentieth-century positivists such as Kelsen and Hart. The writings of the latter two thinkers represent, Jovanovic asserted, vital staging posts on the onward march of positive law approaches in the last century; reflecting upon this, he thus spent some time offering an in-depth critical analysis of their respective theories. While not possible here to offer any kind of detailed summary, key points flagged up included Kelsen's views that the principle features of the general concept of law are equally applicable to international law and that the presence of socially-organised sanctions, as the primary defining criterion of

law as a normative order, suffices to determine whether international law is law “in the true sense of the term”, and Hart’s conclusions that international law lacks both secondary rules of adjudication and a unifying rule of recognition, and that while analogies do thus exist between international and domestic law in terms of function and content, these do not, crucially, extend to form. At the close of this main section of the argument, a number of the criticisms levelled against such theories were also noted and commented upon – e.g. that, in the case of Kelsen, the insistence on grounding the legal character of international law on recourse to physical force and the pattern of violent retribution is fundamentally misleading or, in that of Hart, that there is no compelling reason to demand that the international legal order necessarily replicate the form of domestic legal systems.

In the final segment of the talk, brief reference was first made to the apparent recent revitalization of interest in international law philosophy, both on the part of international law scholars and legal philosophers – including those who have previously shown little sustained interest in the subject (Dworkin’s last published piece was, for instance, a treatise on a “new philosophy for international law”). To conclude, Jovanovic set out a number of what he termed “modest claims” for a new appraisal of the philosophical foundations of international law. A first, vital step is, he argued, to establish whether the primary aim is to proceed from the object of study itself (i.e. the provisions and treaties of international law and their implementation), or rather to offer a methodological reflection. Subsequently, he then outlined three key issues that, to his mind, are indispensable to any



analysis of the philosophical nature of international law, namely (i) the normative force *qua* bindingness of international law provisions; (ii) the specific character of international law as an institutional normative order (particularly in relation to the perceived fragmentation of the international law regime and its interactions with states and private or semi-private actors); and (iii) the question of coercion in the enforcement of international law principles. At the close, Jovanovic turned back to Kelsen’s famous view of international morality as the seedbed of international law, and reiterated how this demands, for any attempt to (re-)conceptualise international law, a thoroughgoing, theoretical elucidation of the relationship between law and morality. Such arguments provided the audience with much food for thought, as was evidenced by the stimulating discussion section that rounded off the evening.

{Steven Howe}