A JURISPRUDENTIAL ATTEMPT AT RULE OF LAW CREATION: AN ANALYSIS OF THEORETICAL ASSUMPTIONS FOR COMPULSORY INTERNATIONAL ADJUDICATION AND REALISTIC CHALLENGES

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The concept of the rule of law, at least as understood in the discourse on national law, includes the element of compulsory adjudication. At the same time the formulated norm on universal compulsory adjudication is missing in general international law, as well as in the particular regional order regulating relations of European states. Although this gap between the concept and practice could be perceived as an intriguing theoretical and practical problem which attracts thoughtful analysis, this is not the case in contemporary debates. In the practical discourse on the development of general international law there has been no progress regarding the implementation of the concept for centuries. The progress of the European order, even if it manifests signs of an emerging norm on compulsory international adjudication, still has to be confirmed by formulated norms. The reluctance to resolve this gap between the concept and practice causes practical problems e.g., tensions between states. In the theoretical discourse the problem already exists by the very fact of insufficient scientific attention given to this problem. The central issue for a consistent legal theory is the explanation of international law without compulsory adjudication. The purpose of this contribution is to analyse the arguments in favour of compulsory adjudication in international law. The arguments are presented by following the insights on this issue provided by Kelsen and Lauterpacht. Theoretical questions to be answered

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are the following: a) what are the theoretical assumptions on which the concept of compulsory international adjudication is grounded; and b) what are the objections to these assumptions from the realistic approach to law.

Key words: compulsory adjudication, models of law, legal disputes, coherence, evolution

1 INTRODUCTION

The linguistic practices of legal practitioners include the use of the concept of compulsory adjudication – i.e. adjudication involving the initiation of this process on the request of an authorised agency or person – when considering the meaning of the rule of law.[1] Also, many legal theorists looking for theoretical assumptions of the rule of law have confirmed this connection.[2] These empirical claims on the ordinary and philosophical use of concepts seem to be true at least for the discourse on national law (hereinafter: NL).[3] At the same time, international law (hereinafter: IL) lacks a formulated norm[4] on compulsory international adjudication (hereinafter: CIA) for all the states of the world in their mutual disputes. Even more unexpectedly, this norm is still not explicitly formulated in the-post war European order for regulating those relations between the European states usually considered as political disputes. Obviously, there is a gap between the concept of the rule of law including compulsory adjudication and specific systems considered 'legal', but without norms necessary for the realisation of this concept. The gap becomes more dramatic for those who consider the concept of the rule of law, first and foremost in its narrow version as governance by rules (and even more in any broader version

[1] For an overview of the case law of the Court of Justice of the European Union see for instance Mańko, R., *European Court of Justice case law on judicial independence*, European Parliamentary Research Service, 2021, https://www.europarl.europa.eu/RegData/etudes/BRIE/2021/696173/EPRS_BRI(2021)696173_EN.pdf (20 November 2021).

[2] For instance, Raz's concept of the rule of law as presented in 1979 includes adjudication among other elements (Raz, J., *The authority of law: Essays on Law and Morality*, Oxford University Press, Oxford, 1979, p. 212). Other authors developing formalistic models of this concept also include adjudication, for instance: Albert Venn Dicey, Friedrich Hayek, Lon L. Fuller and Roberto Unger (see Tamanaha, B. Z., *On the Rule of Law*, Cambridge University Press, Cambridge, 2004, pp. 63 and 94).

[3] Both sources mentioned in the footnotes above refer primarily to state law.

[4] The term 'formulated norm' refers to the norm formulated in sentences and 'implicit norm' refers to the norm not formulated in sentences.

than this), to correspond to the very nature of law.[5] Although this intriguing problem could be expected to attract large numbers of thoughtful contemporary studies in both theoretical and practical fields, surprisingly, this is not the case. This lack of interest for the gap, coupled with the belief that it causes practical and theoretical problems, makes up the reason for writing this contribution.[6]

The contribution is inspired by the following practical considerations. First and foremost, one could expect the international political actors to continue the development of IL after the ban on the threat or use of force. However, the discussion about the establishment of universal compulsory adjudication in IL has not progressed significantly since the debates which were being held before and during two Hague peace conferences in 1899 and 1907 when the Convention(s) for the Pacific Settlement of International Disputes were signed.[7]

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[5] The rule of law including adjudication can be formulated not only as a political ideal, but also as part of the explication of the very concept of law. To be more specific, since law regulates its own creation and application (Kelsen, H., *Pure Theory of Law*, The Lawbook Exchange, Clark, New Jersey, 2005, p. 71) the societies governed by law should have some kind of adjudication as application of general norms. If the rule of law is understood at least as governance by general rules (thin version), which requires the application of general rules, then the concept corresponds to the concept of law requiring application of rules, i.e., adjudication. Although it is debated whether a legal system, i.e., rule of law requires for adjudication to be centralized, we will see arguments below in favour of this position.

[6] In this contribution we deal only with the analysis of theoretical assumptions of the concept of CIA. The topic of CIA is connected with the whole set of separate jurisprudential questions such as judicial law-making, judicial discretion and legitimacy of judiciary. These questions deserve separate elaborations and are in the focus of many scholars researching national and international adjudication. A contemporary collection of the broad set of topics connected to CIA and elaborated from the aspect of positive-legal sciences, sociology, economy, philosophy and political science, which are of interest for legal theorists, can be found in Romano, C. P. R.; Alter, K. J.; Shany, Y., *The Oxford Handbook of International Adjudication*, Oxford University Press, Oxford, 2013; and an analysis of more specific topics in Von Bogdandy, A.; Venzke, I., *In Whose Name? A Public Law Theory of International Adjudication*, Oxford University Press, Oxford, 2014.

[7] On the considerations about international adjudication during the two Hague peace conferences and the role of the two persons leading the 'American project' on the establishment of international adjudication see Koskenniemi, M., *The ideology of international adjudication and the 1907 Hague Conference*, in: Daudet, Y. (ed.), *Topicality of the 1907 Hague Conference, the Second Peace Conference*, Martinus Nijhoff, Leiden, 2008, p. 127. For a historical overview of the development of compulsory adjudication including both conferences see: O'Connell, M. E.; VanderZee, L., *The History of International Adjudication*, in: Romano, C. P. R.; Alter, K. J.; Shany, Y. (eds.),

Furthermore, even if the European order shows signs of an emerging norm on CIA – which can be claimed by indicating, for instance, a positive attitude of European states towards the acceptance of a facultative clause on the Statute of International Court of Justice – crucial affirmative decisions on the formulation of this norm are still missing.[8] Secondly, practical problems occur following this lack of political and legal interest in the matter. For instance, certain disputes between states are left to be resolved depending on political power and not based on legal standards through compulsory adjudication. Furthermore, the reluctance of states to submit all kinds of disputes in advance to the rule of law causes serious political tensions.[9] Finally, inconsistence between an officially proclaimed value of the rule of law in some orders, such as the post-war European order, and the lack of a formulated norm on compulsory adjudication casts doubts as to the integrity of such communities.

The practical problems are sometimes connected with the unresolved theoretical puzzles or with the prevailing theoretical conceptions determining these puzzles. The jurisprudence which aims at the systematization of legal knowledge apparently has a lot to say on the place of compulsory adjudication in any legal system. Nevertheless, this topic concerning IL is neglected in the legal theory discourse.[10] The general perception of IL as a marginal issue in legal theory results in unresolved theoretical problems and this research aims at putting on the table one of the important pieces of the puzzle for understanding IL. It deals with the conceptual problem referring to the kind of order considered to be ruled by law while at the same time missing compulsory adjudication. This

The Oxford Handbook of International Adjudication, Oxford University Press, Oxford, 2013, p. 40.

8 The analysis of the emerging norm on CIA in the European order will be elaborated in separate research.

9 Unresolved disputes such as the Croatia-Slovenia border disputes or territorial disputes in the South China Sea can be said to cause tension, without opening the discussion on the substance of dispute and the possibilities for a legal solution. The acceptance in advance of the jurisdiction of a neutral body for making decisions in any future disputes might be perceived as unnecessary judicialization of politics but it is still, under additional fulfilled conditions, an efficient method of decreasing the tensions exactly by depoliticizing international relations where this is possible.

10 On some explanation for the negligence of the topic see Besson, S., *Legal Philosophical Issues of International Adjudication*, in: Romano, C. P. R.; Alter, K. J.; Shany, Y. (eds.), *The Oxford Handbook of International Adjudication*, Oxford University Press, Oxford, 2013, p. 413.

problem could be addressed in two main ways: either by reconstructing the concept of the rule of law or by ascertaining a tremendous fault in such an order.

The purpose of the contribution is to assess the second approach by determining the assumptions of CIA traced in the contemplation of Hans Kelsen and Hersch Lauterpacht on this issue and to expose these assumptions to realistic criticism following primarily Alf Ross' methodological standpoint. The main theses of the analysis are the following. Firstly, starting from the specific concept of the legal system (rational legal system i.e., consistent, complete, coherent and progressive) the justification of CIA can be grounded on the four assumptions (subordination, overarching justiciability, supreme legal values, and evolution of law). The importance of these assumptions is not only theoretical, as they can be used practically for both *de lege lata* and *de lege ferenda* argumentation. Secondly, such a theoretical attempt can be challenged by the realistic approach (focused on socio-psychological realities). The challenges are grounded on differentiating the specific concept of the legal system from reality.

After this introduction, in the second section the fundamental assumptions of CIA based on the insights of Kelsen and Lauterpacht will be presented. The third section will be dedicated to the structuring of the argumentation in favour of CIA in a way to mirror the realistic counter-argumentation. For this purpose, different aspects of a scientific approach will be explicated and used to serve as the axis for grounding the argumentation in favour of CIA theory and its realistic criticisms. In the fourth section the sustainability of the CIA assumptions will be analysed by confronting them with the realistic approach to IL. Finally, in the fifth section findings will be summarized having in mind the main thesis of this contribution.

2 THEORETICAL ASSUMPTIONS FOR COMPULSORY INTERNATIONAL ADJUDICATION

Although Kelsen and Lauterpacht dealt with international adjudication in separate theoretical projects, we have found their considerations compatible enough to be put together in the form of a unique legal theory of CIA. The theory consisting of elements shared by both authors, can be summarized as an attempt to scientifically justify *the request* for the establishment of CIA based on the idea of the universal nature of law. This requirement would be fulfilled if all states committed in advance to settle all their disputes, future and existing ones, through a third body which would provide a final decision based on the law, whereby the process of making such a decision could be initiated on the request of any state or organ having a legal interest in requesting the decision,

or specifically authorized to do so. The matrix of reasoning in favour of such a request can be presented as encompassing the following four assumptions about the nature of law which we recognize in the writings of both scholars.

1. The subordination thesis: IL and NL form a united system in which the IL is subordinated[11] to NL.
2. The overarching justiciability thesis: international disputes are legal disputes.
3. The supreme legal values thesis: the rule against the CIA is contrary to the principles on the supreme legal values of peace, legal certainty and equality.
4. The evolution of law thesis: IL is a primitive system evolving towards the advanced form of law through the constitution of compulsory adjudication.

2.1 The subordination thesis

Kelsen and Lauterpacht have analysed different conceptions of IL that have appeared in the history of legal thought and they created their own systematic overview of these ideas.[12] The combination of both classifications can be

[11] The terms 'subordination' and 'coordination' do not have the same meanings as when used by Kelsen. They are used here to name two main theoretical models on international law that reflect common characteristics of different scholars. The difference between two main models is explained below.

[12] In 1920 Kelsen has critically presented the theories of authors dealing with the nature of IL and grouped their conceptions in the following way: (i) dualistic conception; (ii) conception with the primacy of municipal law (first monistic) and (iii) conception with the primacy of IL (second monistic) which includes the idea of IL as civitas maxima (Kelsen., H., *Das Problem der Souveränität und die Theorie des Völkerrechts*, J. C. B. Mohr (P. Siebeck), Tübingen, 1920). A similar analysis can be found in Kelsen, H., *Sovereignty and International Law*, Georgetown Law Journal, *vol*. 48, no. 4, 1960, p. 627. Lauterpacht has also provided a critical review of authors elaborating about the nature of IL and made the following structure of historical overview. (i) In first group are placed conceptions of authors: a) who deny the existence of IL; b) who deny the legal nature of IL; c) who consider IL as weak law; d) who claim that IL has specific characteristics. (ii) In the second group we can find: a) doctrine on coordination in combination with the theories of self-restraint; b) doctrine of coordination with the idea of power-supremacy; c) conception of IL of coordination grounded in law-creation treaties; d) conception of law of coordination including the rule *pacta sunt servanda*. The third group includes: a) conception based on rule *pacta sunt servanda* with justiciability of international disputes; b) conception based on initial hypothesis with the idea on the rule of law (Lauterpacht, H., *The Functions*

reconstructed in the way to group all conceptions in two main IL models: the subordination and the coordination model.

According to the coordination model, there is a natural difference between NL and IL. In contrast to the former in which norms are imposed to subjects, the latter is a different kind of normative system in which the norms are voluntarily accepted.[13] In other words, the nature of IL is such that the existence and the content of its norms depend on the will of each individual state. This idea suggests two kinds of such dependency: a) dependency during the creation of law; and b) dependency during the application of law.[14] Based on this distinction we can construct two versions of coordination models referred to as the exclusive and the modest version.

In the exclusive version of the coordination model, states accept both the creation and application of international norms only on the basis of the state's voluntary self-restriction. Since the acceptance of both general and individual norms is only the question of self-restriction, the state can always decide on its own to cease being restricted by international norms. Since international norms are not perceived by states as *binding* in the same way as is understood when talking about NL, it could be said that legal duty does not exist in interstate relations. To be precise, according to this view there is no legal duty constituted by norms outside each NL system. Consequently, the obligations of states towards each other are at best moral obligations based on the promise that the state will follow the standards on international relations. What states do in international relations is to voluntarily coordinate their behaviour when they decide to cooperate. It is plausible that the idea of CIA cannot find its place in this version of the coordination model. This is the case because following this model an 'international organ' cannot command certain behaviour from states but only recommend standards which states have to autonomously recognize as their own norms. Moreover, it is not only about the requirement for the internalization of an external standard, but about the perception that a standard before the act of internalization does not exist for the state in the same way as a legal norm created by the state itself.

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of Law in the International Community, The Lawbook Exchange, Clark, New Jersey, 2000, pp. 385-423).

13 Lauterpacht, *op. cit.* (fn. 12), p. 214.

14 These two kinds of dependencies are a reformulation of the Lauterpacht's note on two aspects of the disputable theory of a state's sovereignty. The first aspect is the right of the state to determine the content of IL by which it will be bound in the future, and the second aspect is the right of the state to determine the content of existing IL in a given case (Lauterpacht, *op. cit.* (fn. 12), p. 3).

In the modest version of the coordination model, for the creation of international norms there should be a will of states, but once the states set out a norm, an international legal duty exists despite a state's own will not to recognize its existence. However, this does not necessarily mean that CIA should exist. According to the modest version, determination of the content of law itself is dependent on the agreement between states since 'the state is in principle the sole judge of the existence of any individual rules of law, applicable to itself'.[15] That is to say, even if it happens that actors in international relations following this version of law accept the establishment of CIA, national courts will still not be subordinated to the international courts and could make their own decisions applicable in the national system which contradict IL norms.

In the model of subordination, IL is not dependent on the will of individual states as in the coordination model. Firstly, only parts of its norms are directly produced by the will of states while many others are not and even the former could be seen as grounded in the norms which are not dependent on the will of each state. Secondly, the existing norms once created in whatever way are binding on states irrespective of their will. More importantly, this model posits IL as a higher norm above NL, regardless of what states may want. For instance, the principle that international treaties must be respected or the principle of equality of states constitute higher norms and consequently, other hierarchically lower norms have to be in line with them even if individual states do not accept this hierarchy.[16] Two versions of the subordination model can be distinguished: the exclusive version, which requires a centralisation of all functions of creation, application and coercive enforcement of the law, and the modest version, according to which it is sufficient that there is a centralization of compulsory adjudication in the international legal system.

As mentioned above, the perception of IL through the coordination model can be in accordance with the absence of CIA, and this view opposes the argument that any legal order necessarily requires CIA. That is why the theory on

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[15] *Ibid.*

[16] The question of how these legal obligations appear in national legal systems is a separate question and can be answered in different ways, depending on the understanding of the sources of law. Different doctrines on sources of law give different importance to treaty law, customary law and the general principles of law. Besides, the idea of the subordination model is closely connected to the idea of the *civitas maxima*. Whatever the explanation of IL sources is provided, it has to, *a priori,* incorporate (explicitly or implicitly in the expression of sovereign will) the premise that norms from IL sources exist in national legal systems and that they are higher than national norms.

CIA has to explain why IL cannot exist in a way described by the coordination model. Lauterpacht considers the exclusive version of the coordination model – which he understands as the combination of the theory of self-limitation and the doctrine of coordination – as a negation of the binding force of IL.[17] This gives a conclusion, that proponents of the coordination model negate the IL as a legal system. For Kelsen the exclusive version of the coordination model is logically consistent because in this model IL exists as part of NLs.[18] However, even this explanation of IL is problematic. In line with additional insights from Kelsen's view on CIA, it appears that the thesis on the existence of ILs as parts of NLs relies only on the institution of national courts and this reliance suffers from the disadvantage of different interpretations of the same dispute. Kelsen is aware that this will be a strange concept of law. 'Since the other State has the same competence to decide for itself the question of law, the fundamental legal problem remains without authoritative solution. The objective examination and unbiased decision of the question of whether or not the law has been violated is the most important, the essential state in any legal procedure'.[19]

The modest version of the coordination model, which considers that there is objectively existing IL once it has been agreed upon by states, but that the states themselves determine the content of objective law, is perceived by both scholars as logically inconsistent. As Lauterpacht says: 'It is […] impossible to follow those writers who, from the fact that individual obligations of international law owe their origin to the will of states, deduce the existence of an essential difference between law of coordination and a law of subordination'.[20] The serious deficit of this theory is the conflict between the acceptance of IL legally obligating states, and non-acceptance of international adjudication which would enable the determination of that law. 'There is therefore an obvious *non sequitur* in the reasoning that as specific obligations of international law are – unlike laws within the State – grounded in agreement and not in a command, there is in international law no compulsory realisation of the law through the instrumentality of international tribunals'.[21] Kelsen also rejects the modest model of IL, which he understands as presuming the existence of IL and NL as independent systems in any case with or without the constitution of CIA. The reasons are epistemological. 'This dualistic construction – or rather "pluralistic"

[17] Lauterpacht, *op. cit.* (fn. 12), p. 418.

[18] Kelsen, *op. cit.* (fn. 5), p. 336.

[19] Kelsen, H., *Peace Through Law*, The Lawbook Exchange, Clark, New Jersey, 2008., p. 13.

[20] Lauterpacht, *op. cit.* (fn. 12), p. 421.

[21] *Ibid*., p. 420.

construction, in view of the multitude of national legal orders – is untenable if both the norms of international law and those of the national legal orders are to be considered as simultaneously valid legal norms. This view already implies the epistemological postulate: to understand all law in one system – that is, from one and the same standpoint – as one closed whole'.[22]

2.2 The overarching justiciability thesis

In the previous section, we presented how the rule 'everyone is a judge in its own matter' (*omnis judex in rea sua*) can be deduced from the thesis that the nature of IL corresponds to the coordination model of both versions. Apart from this one, there is one more thesis against the establishment of CIA. This is the thesis about the nature of international disputes as political questions which provides ground for the principle that courts should not decide about them. If international relations are always or predominately under the risk of being declared as political questions[23], and we will see below how this thesis could be defended, then states, according to the aforementioned rule, should not commit in advance to submitting such questions for decision to a third body. They should not be submitted to the court because they are not the kind of disputes to be decided by adjudication (type 1) or because this submission would involve the court in the law-creating instead of the law-applying function (types 2-4).

As a reaction to the thesis on political disputes which serves as the ground for the rule against CIA, a contrary thesis can be posited. It is the claim that all disputes in the community governed by IL are legal disputes, which means that there is no question which should not or cannot be answered by adjudication. Kelsen and Lauterpacht do not contest that disputes can be differentiated according to requests and the matter of dispute. They reject the thesis that such differences imply a natural and logically necessary limitation of adjudication which could scientifically justify that, due to the nature of the matter, some disputes should be left out of the scope of the judiciary.[24]

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22 Kelsen, *op. cit.* (fn. 5), p. 328.

23 Lauterpacht, *op. cit.* (fn. 12), p. 153.

24 For instance, Kelsen recognizes that conflict can be understood as a political or economic conflict concerning the interests involved. However, he also contends that disputes are legal or non-legal with regard to the normative system which regulates these interests (Kelsen, *op. cit.* (fn. 19), p. 24). A similar consideration on the difference between legal and political disputes is visible from Lauterpacht's elaboration of the concept of political disputes found later in this section.

Based on Lauterpacht's understanding of the doctrine on political disputes, which he criticizes, a political dispute can be defined as one which has some of the following characteristics making it non-justiciable: a) the matter of the dispute is of vital interest to legal subjects; b) it is not regulated by formulated norms; c) at least one side in the dispute is requesting rights on the basis of equity and moral considerations; d) at least one side is requesting a change in the current law. We will present briefly the arguments as to why each of these characteristics cannot present a reason against the CIA.

The thesis of the inability to adjudicate a political dispute concerning vital interests of states is rejected for two reasons. Kelsen used the arguments that IL is superior to state law and that it delegates regulation to states by determining the temporal, territorial and material sphere of validity of NL.[25] If that is the case than any interest considered vital can be in the jurisdiction of IL in the same way as it can be delegated by IL to be in the jurisdiction of states. In the same vein, what is at one moment within the jurisdiction of states, can later be exempt from their exclusive jurisdiction. As an example of delegation, which could illustrate Kelsen's account of delegation, we can consider determination of sea borders which had once been left to the subjective will of each state, until the jurisdiction was removed and the objective standard transferred to the sphere of IL. Lauterpacht also mentions several empirical cases where the states agreed on international arbitration in areas which had previously been considered as vital and as such in the sphere of states' autonomy.[26] In addition, Lauterpacht emphasized another argument which is the exact opposite of the fear that international adjudication endangers vital interests. 'It is not sufficiently realized that fundamental rights of States are safe under international judicial settlement, for the reason that they are fundamental legal rights; that inalienable rights are safe under international judicial settlement, because nothing – except force – can alienate them; that matters which according to international law are within exclusive domestic jurisdiction are safe under the aegis of obligatory arbitration, because a tribunal acting judicially will necessarily adjudge them to be so'.[27]

Kelsen and Lauterpacht ground the justiciability of a 'political dispute' which is not regulated by formulated norms in the doctrine of non-existence of gaps in a legal system since the answer to any dispute can be reached by legal reasoning. Kelsen puts forward the thesis of formal completeness of a legal system,

[25] Kelsen, *op. cit.* (fn. 5), pp. 336-339.

[26] Lauterpacht, *op. cit.* (fn. 12), pp. 145-153.

[27] *Ibid.*, p. 182.

according to which behaviour that is not forbidden is permitted.[28] Along with the thesis of completeness of law, Lauterpacht adds the thesis on filling of the material gaps. The material gap refers to a situation when a certain relationship is not regulated by formulated rules but should be regulated according to the law.[29] In any case, he finds that when the NL is in question, there is no logical reason why this sort of political dispute could not be adjudicated by using the criteria concerning 'formal or material gaps' and, consequently, the same should apply to IL.

The problem of political disputes in which a party questions the fairness of solutions with regard to the current legislation is more complex. According to Lauterpacht, international adjudication has to stay within the domain of current law, but like in a national system, an international court can acknowledge equity either *infra legem* within the framework of the existing law, or *praeter legem,* when there are no formulated rules.[30] Lauterpacht considers that equity *contra legem* (decisions *ex aequo et bono*), in principle would not be allowed and the court could apply non-legal standards only if the parties have authorised such an adjudication and even then with regard to the entirety of the existing law.[31]

The fourth mentioned political dispute in which one of the parties requires a change of law is addressed by Kelsen in the following way: it is the subjective view of one state. Even if such claim could be justified on objective grounds, a defect of the law missing the required norm cannot be a reason for non-application of IL as it is recognized by states of the international community, including the states in dispute. Kelsen concludes that non-application of the law leads to anarchy and not to a change of the law, which is wanted by a party in the dispute claiming the existence of a political dispute.[32] Lauterpacht similarly considers that the requirement for a change of law cannot be an excuse for the avoidance of adjudication. Nevertheless, Lauterpacht emphasises the role of adjudication in progressive development of law when the law can be changed if not in line with the needs of the international community.[33]

In addition to what was said about the last three versions of political dispute, both scholars have more to say about the fear of a transformation of adjudication

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28 Kelsen, *op. cit.* (fn. 19), p. 27.

29 Lauterpacht, *op. cit.* (fn. 12), p. 86.

30 *Ibid.,* p. 314 and his note 1 at 314; connected with his view on the gaps that are the result of the imperfections of the law-making process at p. 75).

31 *Ibid.*, pp. 32, 314, 325 and 327.

32 Kelsen, *op. cit.* (fn. 19), p. 31.

33 Lauterpacht, *op. cit.* (fn. 12), p. 80.

into the law-creation function without the influence of states. When Lauterpacht responds to critics on the transformation by emphasising that a court never creates new obligations, but only ascertains existing law[34], such argument must be observed from his point of view on IL as *civitas maxima*.[35] According to this view, the law, international as well as national, cannot be reduced to mere agreements and wilful acts. In practice, international courts base their decisions on customs, general principles of law and 'reason of the thing'.[36] This idea of the *civitas maxima* understood as the international legal order existing objectively and independently from each individual state[37] is also present in Kelsen's theory in a way that it enables a wider spectrum of sources of international law than the doctrine which reduces them to a mere agreement between states. In that context we can mention Kelsen's example of a legal system in which court practice develops the law even with no centralized legislator.[38]

2.3 The supreme legal values thesis

Kelsen and Lauterpacht have made an argument against the existing rule in IL according to which everyone is a judge in its own matter as it is in conflict with the principles on the protection of the values of peace, legal certainty

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[34] *Ibid.*, p. 420.

[35] *Ibid.*, p. 422.

[36] *Ibid.*, pp. 421-422. This way of understanding of IL makes it possible for judges "to create law by way of interpreting the existing law and its general principles." According to Lauterpacht, adjudicative law-making is a general legal phenomenon and "like courts within the State, so also international tribunals, by the very nature of the judicial function, are not confined to a purely mechanical application of the law" (*Ibid.*, p. 257).

[37] For Kelsen's view on the *civitas maxima* and change of his attitude towards this concept see: Langford, P.; Bryan, I., *From Wolff to Kelsen: The Transformation of the Notion of Civitas Maxima*, in: Langford, P.; Bryan, I.; McGarry, J. (eds.), *Hans Kelsen and the Natural Law Tradition*, Brill, Leiden, Boston, 2019, p. 161 and Leben, C., *Hans Kelsen and the Advancement of International Law*, European Journal of International Law, *vol.* 9, 1998, p. 287. Even though Kelsen does not mention this concept in his later works on IL after the interest in it expressed in the 1920s, the idea that a legal order exists objectively above the subjective wills of individual subjects remains. In this sense, it is a similar concept to Lauterpacht's use of the term *civitas maxima* "meaning that super-State of law which States, through the recognition of the binding force of international law *qua* law, have already recognized as existing over and above the national sovereignties" (Lauterpacht, *op. cit.* (fn. 12), p. 420).

[38] Kelsen, *op. cit.* (fn. 19), p. 23.

and formal equality. The thesis on a norm protecting the value of CIA as an implicit norm of each of three principles can be grounded in their explications of these principles.

Peace cannot be sustained without CIA. Kelsen noted that 'nothing is more dangerous to peace than the existence of conflict which is not settled and for the peaceful settlement of which no obligatory procedure is provided'.[39] Similarly, Lauterpacht claims that 'the reign of law, represented by the incorporation of obligatory arbitration as a rule of positive international law, is not the only means for securing and preserving peace among nations. Nevertheless, it is an essential condition of peace'.[40]

Legal certainty can only be achieved through establishing rights and obligations by institutions separated from the parties in dispute. According to Lauterpacht: 'The object of law to secure order must be defeated if a controversial rule of conduct may remain permanently a matter of dispute. It must so remain as long as no agencies exist capable of determining existing legal rights with finality and without appeal'.[41] Kelsen also considers that 'establishment of compulsory adjudication of international disputes is a means, perhaps the most effective means, of maintaining the positive international law'[42] and defines the problem of IL as the situation in which 'the fundamental legal problem remains without authoritative solution' since each state in dispute is 'authorized to decide for itself the question of whether the other State has violated, or is about to violate its rights'.[43]

The principle of sovereign equality is understood by both scholars as the equality of states before IL. The state is not subject to the legal authorities of any other state, but only to the norms of IL. In that context Kelsen claims that 'the State's sovereignty under international law is the State's legal independence from other States'.[44] Legal independence requires that 'the courts of one State are not competent to question the validity of the acts of another State insofar as those acts purport to take effect within the sphere of validity of the later State's national legal order'.[45] With Kelsen's previous comment in mind on the autonomy of states to decide for themselves about a violation of rights of

39 *Ibid.*, p. 32.

40 Lauterpacht, *op. cit.* (fn. 12), p. 437.

41 *Ibid.*, p. 425.

42 Kelsen, *op. cit.* (fn. 19), p. 45.

43 *Ibid.*, p. 13.

44 *Ibid.*, p. 35.

45 Kelsen, *op. cit.* (fn. 19), p. 37.

another state, we can conclude that, without CIA, a situation contrary to the principle of equality will occur. Lauterpacht explicitly made such a conclusion. 'There is indeed a glaring contradiction in the idea that in a society of States which are *ex hypothesi* independent of one another, and in a relation of equality to each other, one State may legally claim the right to remain judge in a dispute in which rights of another State are involved'.[46] For Lauterpacht the rule of voluntary acceptance of international courts is, in fact, interference into the jurisdiction of another state. He noticed that 'any doctrine which, in relations between States, postulates the individual interest of the single State as the ultimate standard of values and of legal obligation, amounts to a negation of international law'.[47] The position in which a state's interests are not the only and exclusive value 'does not mean that international law disregards its important interests. It means only that these highest interests are recognized, measured, and adjusted by international law by reference to the equal interests of other States and to those of the international community as a whole'.[48]

Under the condition that the values mentioned by Kelsen and Lauterpacht are indeed protected by existing IL principles, another condition is needed for the sustainability of the argument on CIA. It is the existence of a hierarchy of norms according to which the principles protecting these values are supreme principles, higher than the principles protecting values which can be used to ground the rules problematic for CIA.

2.4 The evolution thesis

The CIA evolution thesis on IL can be described as consisting of three elements: (1) IL is a primitive/rudimentary type of law; (2) the crucial step for IL development is the introduction of CIA; (3) there is a reason why IL is progressing into more sophisticated forms.

Kelsen and Lauterpacht consider IL an imperfect legal system. According to Kelsen, the present state of IL (in 1934) 'is characterised by the fact that international common law – considered from a technical standpoint – is still in the stage of a primitive system of law, that is to say, it is at the stage from which the legal system of the individual States originally developed'.[49] Lauter-

[46] Lauterpacht, *op. cit.* (fn. 12), p. 429.

[47] *Ibid.*, p. 430.

[48] *Ibid.*

[49] Kelsen, H., *The Legal Process and International Order*, The New Commonwealth Research Bureau Publications, London, 1934, p. 11.

pacht, in the same vein, considers the degree of IL's development, whereby he finds the cumulation of its shortcomings unknown even to primitive society.[50] When considering which institution is necessary for the development of IL, both authors provide arguments in favour of CIA rather than legislation: historically there have existed legal systems without legislators but not without tribunals.[51] For both scholars, not even the centralisation of coercive enforcement is a necessary prerequisite for IL legal development, provided that the centralisation of adjudication is ensured.

Finally, the question arises why IL would evolve at all. Kelsen quotes biologist Ernst Heckel according to whom the individual human being, as an embryo, passes through all the stages of evolution that the whole human race has up to now passed through. Kelsen considers that in the sphere of law it is the other way around: 'here, as is appropriate to the species, the entire community bound by international law has to pass through all stages of the evolution which the individual State-community has passed through, to reach the embryonic condition in which it still is today'.[52] Furthermore, the evolution of legal technique with regard to the IL may be much more rapid than the process needed for the evolution of the NL; 'similarly the human embryo covers in a few months a distance which mankind has needed several thousands of years to cover. Along this road, however – so it appears – no essential stage can be missed'.[53] Lauterpacht believes that the future development of IL will be conditioned by looking at IL through the lens of more advanced forms of law manifested in municipal laws. With this hope in development, he prefers to regard IL 'as incomplete, and in a state of transition to the finite and attainable ideal of a society of States under the binding rule of law, as generally recognized and practised by civilized communities within their borders [...]'.[54] He refuses attempts of lawyers who prefer the description of IL as permanently primitive law as an unscientific and non-progressive approach. He finds contradiction in the claim that humans would adhere to 'fundamentally differing standards of order and justice in different spheres of action'[55] such are NL and IL.

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50 Lauterpacht, *op. cit.* (fn. 12), p. 442.

51 Kelsen, *op. cit.* (fn. 49), p. 12; Kelsen, *op. cit.* (fn. 19), p. 23; Lauterpacht, *op. cit.* (fn. 12), p. 425.

52 Kelsen, *op. cit.* (fn. 49), p. 12.

53 *Ibid.*, p. 13.

54 Lauterpacht, *op. cit.* (fn. 12), p. 432.

55 *Ibid.*, p. 434.

3 STRUCTURE OF THE ARGUMENTATION ON THE COMPULSORY INTERNATIONAL ADJUDICATION

From the description of the four theses of CIA theory, arguments in favour of compulsory adjudication can be summarized in the following way.

1. Compulsory adjudication is a necessary element of law as subordination. Legal order is a united system of IL as a subordinating and NLs as coordinated legal systems. If IL is a subordinating normative system than CIA necessarily must exist in IL (if IL = subordinating system ⇒ CIA ∈ IL).
2. Compulsory adjudication is the function for the resolution of disputes by the application of law. Legal order is a gap-free system. If IL is a gap-free normative system than all disputes in international community (ID) necessarily have a solution by the application of law, i.e. by CIA (if IL = complete system ⇒ x → CIA(x), x ∈ ID).
3. Compulsory adjudication is a value protected by the norm which is implied by the principles protecting values of peace (P), legal certainty (LC) and equality (E). Legal order is a value-coherent system with the supreme values of P, LC and E (all other norms {n1…} have to be in line with the principles protecting these values). If IL is a value-coherent system with the supreme values of peace, legal certainty and equality, then the value of CIA is protected by the implicit norm of IL (if IL = value-coherent system {P, LC, E > n1…} ⇒ CIA).
4. Compulsory adjudication is an institution whose establishment is a benchmark for distinguishing primitive from advanced orders of social regulation. Legal order is developing from a primitive order of social regulation. If IL is developing from a primitive to a developed order, then CIA *tends* to appear (if IL is progressing ⇒ CIA).

The CIA theory reconstructed in this way reveals that it is based on the idea of rationality of the legal system. We can systematize elements of rationality behind the theory as consisting of two aspects. The first refers to the model of the legal system characterized by: a) consistency (enabled by subordination); b) completeness; and c) coherence of legal values. The second aspect is the idea of progress. If rationality is a feature of science, then these two aspects of rationality can be seen as part of the scientific approach to law. It is adhered to by those legal scholars whose aim is to explain the relevant practices and the system of norms through the scientific model of reality which is rationally structured and progressive. However, besides rationality described in this way, there is also the third aspect of rationality specific to science which requires description of the objects of the science – which objects for legal science are existing norms

and relevant practices – as they are, not prescribing how they should be. The description of the factual subject-matters (third aspect of rationality) does not have to be in line with the rational model which progressively develops (first and second aspect of rationality).

Figure 1: Rationality, CIA and realistic criticism

Rationality properties	CIA theory thesis	Realistic counter-arguments
Consistency	Subordination	Multi-legal reality
Completeness	Overarching justiciability	Separation of politics from law
Coherence	Supreme legal values	Lack of axiological hierarchies
Progressiveness	Evolution of law	Non-linear developments

4 REALISTIC CHALLENGES TO COMPULSORY INTERNATIONAL ADJUDICATION

As can be seen from Figure 1, acceptance of the properties of the scientific model of reality – consistency, completeness, coherence and progressiveness – leads to the four theses on CIA. If IL is a subordinating, gap-free, value-coherent system with specific supreme values and a progressively developing system, then instantiations of this system should contain a constitutive norm on general compulsory adjudication. In the second section, we have presented the argumentation as to why IL is to be perceived as fulfilling these rational criteria. The realistic challenges come from the third aspect of rationality: a requirement for the description of the existing system and relevant practices. This aspect is manifested in Alf Ross' claim that the existence of a law in the last instance is to be a question of certain socio-psychological realities which are not found behind the logically possible assumptions.[56] This realistic point of view on law distinguishes the law as seen by some legal scholars and law actually practiced by relevant legal actors. With focus on the legal actors, four counterarguments are posited in this section as challenges to CIA theory (see figure 1). The realistic challenges are: a) international law and national law are two separate legal orders (argument on multi-legal realities); b) international political issues cannot be submitted to legal decisions (argument on separation of politics from law); c) there are no supreme legal values in IL (argument on lack of axiological hierarchies); d) IL can follow regressive trends (argument on non-linear developments).

[56] Ross, A., *A Textbook of International Law*, The Lawbook Exchange, Clark, New Jersey, 2006, p. 62.

4.1. Argument of multi-legal realities (fall of consistency)

As we could see from the four models of law, the model of subordination in both versions is in accordance with the concept of law as a rational legal system. In contrast, both versions of the coordinative model are not in line with that concept. The modest version of the coordination model of the interstate system does not fulfil the rational requirements because of the conflict between the thesis on the binding nature of IL norms and the thesis that every state can judge for itself what the content of international law is. A discussion on the models discovers that the thesis on the uniqueness of law itself can be manifested in two possible views on IL: a) IL as an objectively existing system which is above national law and b) IL as part of NL as 'the external law of state'. The former view, which corresponds to the subordination model, was explained as more rational than the latter view, which corresponds to the exclusive coordination model.

The proposition of CIA theory that IL is a subordinating normative system can be criticised by a realist arguing that this proposition is a rational theoretical construction which does not correspond to reality. That is, in the reality according to Ross, humans do not feel national legal systems as derived from IL. The attempt to 'legitimize' the existence of a national legal system through the idea of an international general constitution requiring obedience of international agents is 'an empty superfluous construction very far from reality'.[57] Ross argues exactly the opposite, claiming that validity of IL is deduced from national laws if this connection is regarded from a realistic point of view. That is to say, the validity of state law is a fact, 'which has its socio-psychological foundation in internal functions of intercourse' and not in the validity of international law.[58] Consequently, the realistic criticism of the subordination thesis ends with the following conclusions. Firstly, the thesis is not something that can be tested by reference to reality. The theories positing the thesis like this (e.g., will theories, idealistic theories on objective ideas or the first postulate theories) are not scientific. Secondly, the only matter that is relevant in relation to the question of validity of IL is that the legal duty to comply with the law need be observed as a socio-psychological phenomenon.[59]

The legal experience is a specific kind of feeling of obligation. As opposed to some other experiences, such as the moral experience, the legal experience occurs and develops under the pressure of an efficient mechanism of application

[57] *Ibid.*, p. 63.

[58] *Ibid.*, p. 63.

[59] *Ibid.*, p. 50.

of force in the implementation of previously determined, authoritatively and externally established rules.[60] According to Ross, IL is felt as obligatory and as produced conventionally, i.e. outside the individual (authoritatively) but it lacks the institutional factor of coercive enforcement. Nevertheless, he does not conceive IL as mere conventional morality.[61] After all, IL is "felt to be valid as law". It is not experienced as law because of the idea of war that serves as a possible instrument for the enforcement of law since war lacks regularity of implementation and certainty of results.[62] What is then the source of the legal experience if not coercive enforcement? The cause of IL's legal experience are the fundamental maxima of IL which are the same in NL. Such maxima are psychologically acceptable to agents in the IL arena. According to Ross, IL is: a) a conventional (in the meaning of: external, authoritative, objectively determined, as opposed to personal morality which is an individual phenomenon); and b) not a coercible order, (i.e., it is not a mechanism that would regularly and with certainty enforce the norms); with c) derived characteristics of law.[63]

Now, this kind of a realistic response also seems vulnerable to criticism. It relies on the beliefs of the norm-users regarding normative practices (the folk concept of law), at the same time trying to keep a connection with at least some essential features of law which can be identified based on the discourse of those practicing what is considered to be properly called law. Ross is trying to conceal the tension between the factual status in which states as norm-users give priority to the principle of autonomy in their relations and the conceptual request for IL to be binding. His attempt faces the following problems. The theory of IL adapted to factual circumstances still cannot explain the situation in which a state can have a subjective right for which it has never had the possibility of realisation on demand.[64] Furthermore, it is questionable whether a moral-like feeling of binding force of international norms by norm-users is sufficient for claiming the legal nature of IL or compulsory adjudication as a necessary condition for the existence of the legal experience of binding norms.

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60 *Ibid.*, p. 53.

61 Ross uses the term "conventional morality" (conventional in the sense of authoritatively established) to make a reference to practices such as "custom and usage, fashion, deportment, politeness, rules of the game". *Ibid.,* p. 53.

62 *Ibid.*, p. 53.

63 *Ibid.*, p. 54.

64 Of course, existence of such subjective right without the right to demand its realisation is also possible in NL. For instance, in NL it is related to the legal institute of statute of limitations. But there is a key difference between a subjective right which could be actionable in court at least for some time before it is time-barred and a subjective right which has never been actionable.

4.2. Argument on the separation of domains (fall of completeness)

If law is a rationally structured system, there is no individual case of law-application which should not or cannot be resolved by international adjudication. On the one hand, the realists would easily agree with the argument of Kelsen and Lauterpacht that 'no limit has been set to the nature of the disputes which can be referred to the settlement of the court. Purely political disputes too can be submitted'.[65] On the other hand, from the socio-psychological point of view the question of completeness is a matter of the fact of existing legal practices. If we follow Ross's reasoning, it is a matter of directives on the sources and interpretation of each positive legal system as to how the judge will resolve the case[66] and in the case when the sources formally established do not provide an answer, legal and cultural tradition can play a role.[67] However, the possible influence of legal and cultural tradition does not imply an objectively right answer provided by law to any dispute. Ross is sceptical of the claims on a universal system of values which can be *apriori* posited as the best one.[68] It depends on the normative ideology of judges of each legal system what system of values will lead the resolution in the event of material gaps. The normative ideology will also determine whether the practice of resolving legal gaps will appear for political questions. This indeterminacy of legal solutions makes a good reason for states being suspicious of the role of international courts. The dependency of the resolution of disputes involving legal gaps on the constructive practice of judges is obvious in municipal legal orders where constitutional judges can but do not have to necessarily apply the interpretative technique of filling the constitutional gaps by expressing implicit norms.[69] Furthermore, a more elementary precondition for the exclusion of *non liquet* possibility is needed. This refers to the existence of the norm of closure of the particular legal system.[70] Ross confirms that the practice of judges in general confirms the existence of such a norm in international law since 'no instance has ever yet been registered in which the judge has dismissed a case on the ground that it was impossible for him to settle it on the basis of the current law'.[71] However, this empirical

65 Ross, *op. cit.* (fn. 56), p. 295.

66 Ross, A., *On Law and Justice*, The Lawbook Exchange, Clark, New Jersey, 2004, pp. 75-158.

67 *Ibid.*, p. 100.

68 *Ibid.*, p. 258.

69 Guastini, R., *La sintassi del diritto*, Giappichelli, Torino, 2011, pp. 201-206.

70 *Ibid.*, pp. 419-426.

71 Ross, *op. cit.* (fn. 56), p. 279.

statement was expressed before the *non-liquet* decision was in fact made by the International Court of Justice.[72]

4.3. Argument on a lack of axiological hierarchies (fall of coherence)

From the axiological point of view, CIA is a value necessary to be protected by norm in order for the legal values of peace, legal certainty and equality to be preserved. In other words, if these three values are protected by norms of IL, then they imply the norm on CIA. Three challenges to this argument can be formulated from the realistic point of view. The first test for the sustainability of the argument is to assess whether the three values are indeed protected by the existing norms of IL. The second step is to challenge the thesis that principles protecting these values, if such exist in IL, are above the principle protecting the autonomy of states which is the ground for the *omnis judex* rule. The third realistic scepticism towards the argument in favour of CIA concerns the idea behind this argument. From the realistic point of view, legal systems are not value-coherent by themselves, but those who formulate and interpret the norms might have been trying to make them coherent.[73] Thus, the challenge for the CIA thesis about legal values could be formulated in the way to question the existence of relevant practice which contributes to the coherence of IL based on supreme legal values and, more substantially, to suspect the existence of an appropriate legal consciousness which would enable any such practice. One of the manifestations of such a practice and consciousness behind it, is the use of the technique of determination of some kinds of axiological hierarchies when formulating or applying norms.[74] The use of such a technique is contingent.

Before any empirical inquiry into international reality, the following thesis can be intuitively posited. The principles protecting the three values are formulated or implied by normative documents on IL; however, practice determines their *de facto* existence and their specific meanings. International practice does not confirm the supremacy of the principles protecting these values (or at least of some of their possible meanings) over the principle of autonomy.

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[72] International Court of Justice, *Legality of the Threat or Use of Nuclear Weapons,* Advisory Opinion, 8 July 1996, ICJ Reports, 1996.

[73] Guastini, *op. cit.* (fn. 69), p. 232.

[74] If the axiological hierarchy is recognized and expressed during the process of the formulation of norms it becomes material hierarchy in the system. The term axiological hierarchy is usually connected with interpretation of norms by judges and not with formulation of norms by legislator.

Despite the rule banning the threat or use of force, the protection of the value of peace often fails due to the protection of the value of autonomy of (at least some) states expressed in the rules of non-intervention and veto-power. The principle of legal certainty also does not have absolute priority over a state's autonomy. The claims on rights and obligations among states are mostly left in the zone of vague meanings for disputed states without the possibility to be authoritatively determined. This uncertainty is the result of states' practices to avoid legal regulation of 'political issues' (the separation of politics from law thesis) and to stick with the *omnis judex* rule whenever political power allows it. Finally, the principle of equality does not always prevail. The states which fit adequately in the momentary matrix of power, which reflects the grounds of the constituted international community, can avoid the regime which would rationally be expected to be followed in accordance with the equality principle. This situation with values is not the result of legal reasoning on the hierarchy of values, but of the perception of what IL is, provided through coordination lenses worn by legal actors.

4.4. Argument on non-linear developments (fall of progressiveness)

The evolution thesis claims that the introduction of CIA transforms the primitive form into the advanced form of law (first and second element) and that there is a reason why law should be considered as developing from the former to the latter form (third element). If the third element of the evolution thesis is understood as expressing the *trends* and not historical laws, it can be accepted as in line with the realistic aspect of the scientific approach to law. Nevertheless, when questioning the reasons for belief in such trends, the following assumptions could be recognized behind the writings of Kelsen and Lauterpacht. Firstly, societies in a pre-legal, primitive stage are worse than societies in the adjudicative stage. Secondly, there is an attitude among humans to develop better societies which is stronger than the attitudes preferring *status quo* or regression. These anthropological claims[75] could be formulated in a more scientific manner in terms of recalling 'the humans like us in the world like ours', who want to survive or to achieve other goals which can be scientifically determined by socio-psychological insights about humans. But even such insights on current human nature can be challenged by realistic scientific requirements

[75] These two assumptions are anthropological claims about the nature of humans who are inclined to compare and objectively evaluate different ways of living and who are free to choose among them.

as insufficient for explaining "non-progressive" human behaviour known from our history and as neglecting the possibility of the change of human nature followed by reverse historical processes.

This challenge can be recognized in two kinds of realistic legal theories. Both are focused on the socio-psychological investigation of the reality looking for law in action. The difference between them relevant for our discussion is in where they find law in action. The first version of the realistic theories finds it in the practice of courts, and the second in the practice of norm-users i.e., ordinary citizens or, for the purpose of our research, states in their international relations.

The court-oriented version of the realistic legal theory could obviously share with the CIA theory insights about the importance of courts for law (second element). This is visible when realistic scholars examine the role of courts in NL. For instance, they recognize the importance of the judiciary in NL as it generally enables the law in books to become law in action and thus the law efficient.[76] More specifically, this role of courts in the incorporation of norms into real life is crucial for some areas of NL, e.g., constitutional law and for the occurrence of specific structural changes in society. It is not difficult to see how these empirical insights on the importance of courts for NL can be used in an elaboration on IL. Ross himself talks about the current imperfection of IL as 'an order of a much weaker character with respect to its ability to direct human conduct towards social purpose'[77], and refers to the importance of compulsory adjudication in order to remove any deficiencies of international law such as its anarchical character and legal uncertainty.[78] However, in light of realistic insisting on a descriptive aspect of the scientific approach, this realistic comment on CIA could be understood in the following way. Although the scientific model of reality according to which the development of law depends on the establishment of CIA (first and second element of the evolution thesis), we do not know whether this will happen in the future (third element) and especially whether the current international courts will take responsibility for such development. In some periods of human history there might have been a tendency for development in that direction. However, the reversible processes are possible, as well as a change of the nature of man that we know today.

The realistic scholars preferring the second version focused on the behaviour of states are not necessarily against social development (first and third element) but could be sceptical or ignorant regarding the role of courts in such

[76] Ross, *op. cit.* (fn. 66), p. 35.

[77] Ross, *op. cit.* (fn. 56), p. 54.

[78] *Ibid.*, pp. 54-59.

process (second element). Only those proponents of the norm-users approach that claim the primitive state of IL to be natural and a change of this state of affairs undesirable (first element), reject the whole idea of IL evolution. Their argument is grounded on the propositions of a static structure of society and possibly on the political division into friends and enemies.[79] These theories rely on the anthropological idea of necessary features of human nature and as such are vulnerable to the same kind of realistic criticism as the one applicable to the CIA theory. In both we can recognize an expression of attitudes towards a particular model of society and not just a description of reality. However, there could be an important difference among evolutionists and the proponents of preservation of interstate relations in the natural state of affairs. The latter seem to have a problem with expressing publicly to the audience making a majority today, what could be beneficial for all and each single nation in the state-of-nature with friends and enemies. The CIA theory can justify positive attitudes towards the model of IL with compulsory adjudication by arguing publicly that a community organized in such a way is more rational than communities organized in line with some other models. However, it is clear that this argument depends on the liberal belief in progressiveness based on rationality that includes the belief in scientific progress.

5 CONCLUSION

The theory of CIA based on Kelsen's and Lauterpacht's insights can be described as a scientific (jurisprudential) attempt at the creation of compulsory adjudication in international relations. This attempt can be perceived as based on *de lege ferenda* analysis, which is the most obvious when considering the evolution thesis. If the international actors accept the idea of the progress of IL, they could reconsider a reform of the international order by introducing universal CIA.

At the same time, it could be seen as a request based on the understanding of what the law is from the point of view of a scientist who sees IL as a consistent, complete and coherent system with specific supreme values. If IL is such a system in accordance with the thesis on subordination, overarching justiciability and supreme legal values, then international courts could be required not to apply the *omnis judex* rule. We can add that even the argument on the evolution of IL can be used as the reason for the appropriate interpretation of the goals of existing

[79] Schmitt, C., *The Concept of Political*, The University of Chicago Press, Chicago, London, 2007.

law. Moreover, Lauterpacht[80] explicitly formulated a *de lege lata* request while Kelsen[81] at least indicated the possibility of such argumentation when discussing the relation between general international and UN law.[82] We can predict that the success of the *de lege lata* request before the contemporary international legal actors is very unlikely. The reason can be found in the current international practices from which we can learn what is most probably considered as 'valid' law in the international community.

The realistic challenges to CIA theory can be summarized in the following way: we are living in multi-legal realities, where political international issues are excluded from legal reasoning and the establishment of axiological hierarchies is not accepted by the key legal actors. In addition, the evolution thesis can be dismissed by claiming the static perspective of IL or even the possibility of regressive trends. We have detected the differences between the positions of realistic criticism itself whereby Ross advanced his own approach. Although his approach is questionable in some elements, Ross' account of law is valuable as it correctly emphasises the separation of rational models of law from the description of the reality by rational methods.[83] If the actual international practice is different from what the rational model requires, can we still claim that the theory on CIA has scientific relevance?

When different aspects of rationality – rational structure, progressiveness and rational description of reality – are differentiated, the CIA theory finds its place in legal science: to offer a rational model of law. As a matter of fact, it seems irrational or at least scientifically not credible for a legal scholar who dedicates his or her life to rules of law to publicly refuse the rule of law provided by the constitution of CIA. It is true that in reality different models can

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80 Lauterpacht, *op. cit.* (fn. 12), p. 435.

81 Kelsen, H., *Principles of International Law*, Rinehart and Company, New York, 1952, pp. 57-58.

82 For a more detailed analysis on the similarity between Kelsen and Lauterpacht in regards to methodological approach with a *de lege ferenda* and a *de lege lata* analysis see Krešić, M., *The role of peace in Kelsen and Lauterpacht's theories of international law*, Collected papers of the Law Faculty of the University of Split, *vol.* 56, no. 2, 2019, p. 485.

83 For more detailed analysis of Ross's scientific approach of law see Krešić, M., *Ross's concept of the legal consciousness and deliberate normative change*, Pravni vjesnik: Journal of Law of the Law Faculty of the J. S. S. University of Osijek, *vol.* 35, no. 3-4, 2020, p. 177. The interpretation of Ross' approach is exposed exactly in a way to distinguish "a) description of the existing activities of the participants in different practices connected to the law and b) an explanation of these practices through the model of science".

be followed, but it is also true that practices can be determined by the models followed. In that context, Kelsen[84] and Lauterpacht[85] believed that a legal theory could influence international relations. According to them, one of the causes of today's absence of compulsory adjudication are exactly those doctrines of IL which actually support the political reluctance of states to accept the rule of law in their relations.[86]

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[84] Kelsen, *Sovereignty and International Law, op. cit.* (fn. 12), p. 640.

[85] Lauterpacht, *op. cit.* (fn. 12), p. 337.

[86] Kelsen, *op. cit.* (fn. 19), p. 18 and 48; Lauterpacht, *op. cit.* (fn. 12), p. 438.

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Sažetak

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PRAVNOTEORIJSKI POKUŠAJ STVARANJA VLADAVINE PRAVA: ANALIZA TEORIJSKIH PRETPOSTAVKI I REALISTIČKIH IZAZOVA OBVEZATNOM MEĐUNARODNOM PRAVOSUĐENJU

Pojam vladavine prava, barem prema shvaćanju pojma kada se upotrebljava u diskursu o nacionalnom pravu, uključuje element obvezatnog pravosuđenja. Istodobno, u općem međunarodnom pravu nedostaje izražena norma o univerzalnom obvezatnom pravosuđenju kao što nedostaje i u partikularnom regionalnom poretku koji uređuje odnose među europskim državama. Iako se ta neusklađenost pojma i prakse može doživjeti kao intrigantan teorijski i praktičan problem koji privlači promišljenu analizu, to se ipak ne događa u suvremenim raspravama.

U praktičnom diskursu o razvoju općeg međunarodnog prava već desetljećima nema napretka u odnosu na primjenu pojma. Napredak europskog poretka, čak i ako pokazuje znakove nastajanja norme o obvezatnom međunarodnom pravosuđenju, još se mora potvrditi donošenjem izražene norme. Otpor prema rješavanju neusklađenosti pojma i prakse uzrokuje praktične probleme kao što su, primjerice, napetosti među državama.

U teorijskom diskursu problem postoji već zbog nedovoljne znanstvene usmjerenosti na to pitanje. Glavni problem za konzistentnu pravnu teoriju je objašnjenje međunarodnog prava kao prava bez obvezatnog pravosuđenja.

Cilj je ovog članka analizirati argumente prema kojima međunarodno pravo zahtijeva obvezatno pravosuđenje. Argumenti su prikazani slijedeći Kelsenove i Lauterpachtove uvide o ovom problemu. Teorijska pitanja na koja se nastoji odgovoriti ovim radom jesu: a) koje su teorijske pretpostavke na kojima se temelji pojam obvezatnog međunarodnog pravosuđenja i b) koje prigovore ovim pretpostavkama može oblikovati realistički pristup pravu.

Ključne riječi: obvezatno pravosuđenje, modeli prava, pravni sporovi, koherentnost, evolucija

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