

Mario Krešić*

Original scientific paper

UDK 341.645:34.03

DOI: <https://doi.org/10.25234/pv/19705>

Paper received on 7 December 2021

Paper accepted on 10 June 2022

THE REALISTIC TEST FOR THE THESIS ON COMPULSORY INTERNATIONAL ADJUDICATION: LEGAL VALUES IN PRACTICE OF INTERNATIONAL ACTORS

Summary: The paper deals with assessment of the practices of international relations regarding the protection of peace, legal certainty and equality. These values are important for the argument in favour of the compulsory international adjudication. In view of the realistic challenges to this argument, the paper aims at answering the questions if these three values are protected by applicable norms of international law, whether the principles protecting these values, if they exist in the international law, are above the principle of protecting the autonomy of states as the basis for the omnis iudex rule, and finally, if these values are involved in axiological hierarchies formed by the actors formulating and interpreting the international norms. The answers to the first two questions will be given by the means of an empirical assessment of international practices, whereas the answer to the third question will be provided by identifying attitudes towards international relations based on interpretation of existing practices through models of coordination and subordination.

Keywords: peace, legal certainty, equality, compulsory adjudication

1. INTRODUCTION

The concept of compulsory international adjudication (in the following text: CIA) can be defined by following Hans Kelsen's recommendation to the fathers of the contemporary international order. The concept refers to the obligation of all states to submit all their disputes to the decision of the court without exception,¹ and it implies that adjudication should be

* Mario Krešić, PhD, Assistant Professor, Faculty of Law, University of Zagreb, Trg Republike Hrvatske 3, 10000 Zagreb, Republic of Croatia. E-mail address: mario.kresic@pravo.hr. ORCID: <https://orcid.org/0000-0002-1461-7680>.

1 Hans Kelsen (1943) 'Compulsory Adjudication of International Disputes' (1943) *The American Journal of International Law* (37)3 397, 397.

initiated at the request of an authorised body or person.² The values of peace, legal certainty and equality are important for CIA.³ Kelsen and Lauterpacht believe that there is a close connection between them: CIA is a value that must be protected by a norm in order to preserve the legal values of peace, legal certainty and equality.⁴ The argument is that norms on protection of three values imply the norm on protection of CIA. However, for the sustainability of the argument, it is necessary to prove that these norms on protection of the three values exist in the system and that they exist as the supreme norms of international law (IL). If the principles protecting these three values were indeed accepted in international practice as those protecting the supreme values of international community which are higher than the principle of autonomy, at least when discussion on CIA is involved, than the argument in favour of the norm on CIA would be inevitable in legal discourse.

As explained in the assessment of the sustainability of the CIA assumption about axiological hierarchies “[t]hree 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 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 existing *omnis iudex* 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. Thus, the challenge for CIA thesis about legal values could be formulated in a way to question the existence of relevant practice which contribute 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 a practice. One of manifestations of such a practice and consciousness behind, is the use of technique of determination of some kinds of axiological hierarchies when formulating or applying norms. The use of such a technique is contingent.”⁵

In the present article we will assess practices of international relations regarding the protection of these three values. The explanation of selected practices is not claimed to be necessarily the only correct interpretation of contemporary IL but as the one which present the challenge for the thesis on supreme values. The explanation will be framed in a way to manifest the connection between different perceptions of IL when looked through coordination and subordination model with the different attitudes towards the reasoning about international

2 See: Mario Krešić ‘A Jurisprudential Attempt at Rule of Law Creation: An Analysis of Theoretical Assumptions for Compulsory International Adjudication and Realistic Challenges’ (2021) 71(6) *Collected Papers of Zagreb Law Faculty* 819, 820 and 823; and Mario Krešić ‘Compulsory adjudication: an emerging principle of European Law and the Western Balkans’ accession to the European Union?’ in Mario Krešić, Damir Banović, Alberto Carrio Sampedro and Jānis Pleps (eds), *Ethnic Diversity, Plural Democracy and Human Dignity. Challenges to the European Union and Western Balkans* (Springer 2022), 2.

3 Consequently, these values are also important for the creation of an international rule of law, at least according to those legal practitioners and legal theorists who combine the concepts of the rule of law and compulsory adjudication. See: Krešić ‘A Jurisprudential Attempt at Rule of Law Creation’ (n 2), 820–821.

4 *Ibid* 833.

5 Krešić ‘A Jurisprudential Attempt at Rule of Law Creation’ (n 2), 841. “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.” *Ibid*. On the realist view of axiological hierarchy, see: Riccardo Guastini, *La sintassi del diritto* (2nd edn, Giappichelli 2014) 232. The legal consciousness of officials in international bodies and statesmen is crucial to international practice regarding axiological hierarchies.

relations. According to coordination model, there is a natural difference between national law (in the following text: NL) and international law (in the following text: 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.⁶ 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. In the model of subordination, IL is not dependent on the will of the individual states as in the coordination model. More important, this model posits the IL as higher norms above the NL no matter what states want.

2. THE PRINCIPLE OF PEACE

The principle of peace can be found in UN Charter (1945) which prohibits the threat and use of force.⁷ According to article 1 “the Purposes of the United Nations is to maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace.” Article 2 requires that “all Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.” However, it has to be seen what does it mean in practice.

2.1. DATA ON THE USE OF FORCE

Data on armed interstate and internal conflicts with at least 25 battle related deaths per year (in the following text: armed conflicts) are provided by Uppsala University and Peace Institute Oslo.⁸ Based on this data, we have calculated for the purpose of our research the following figures: for the period 1946–2018 there were a total of 286 armed conflicts among of which 48 between states (in the following text: interstate conflicts) and 238 between state and non-state or rebel groups in state territory or outside the state territory (in the following text: internal conflicts).⁹ Based on the same data, the following figures can be provided regarding the armed

6 Hersch Lauterpacht *The Functions of Law in the International Community* (first published 1933, The Lawbook Exchange 2000) 214.

7 Charter of the United Nations (signed 26 June 1945, entered into force 24 October 1945) UNCIO XV, 335; amendments by General Assembly Resolution in UNTS 557, 143/638, 308/892, 119 (UN Charter 1945).

8 Uppsala Conflict Data Program at the department of Peace and Conflict Research, Uppsala University and the Centre for the Study of Civil War at the Peace Research Institute Oslo (UCDP/PRIO), *Armed Conflict Dataset* (Version 19. 1., 2018) <<https://ucdp.uu.se/downloads/>> accessed 1 May 2020 (UCDP/PRIO 2020).

9 For details on the UCDP/PRIO methodology see: Nils Petter Gleditsch and others, ‘Armed Conflict 1946–2001: A New Dataset’ (2002) 39 (5) *Journal of Peace Research* 615. According to the used methodology the types of conflicts are defined as: interstate (both sides are states in the Gleditsch and Ward membership system), extrasystemic (between a state and a non-state group outside its own territory, where the government side is fighting to retain control of a territory outside the state system), internal (between government and one or more rebel groups) and internationalized internal (internal with involvement of foreign

conflicts during and after Cold-War period (i.e., up to the end of 1988 and from the beginning of 1989). In the period 1946–1988 there were 38 interstate conflicts and 36 of them ended before the end of 1988. In the period 1989–2018, 2 interstate armed conflicts which started before 1989 have been continued or reactivated in this period and 10 new interstate conflicts have appeared, i.e., in total 12 interstate conflicts were active at least some time in post-Cold-War period. Concerning the internal conflicts, in the period 1945–1989 total of 132 such conflicts can be recorded whereby 72 of them ended before the end of 1988. In the period 1989–2018, 60 internal conflicts which started before 1989 have been continued or reactivated in this period and 106 new internal conflicts occurred i.e., in total 166 internal conflicts were active at least some time in post-Cold-War period. Therese Pettersson and colleagues informed on 52 active armed conflicts in 2018 and only two of them were between states.¹⁰ In addition to the information on interstate and internal conflicts important information refers to other cases of state's failure to properly control violence in its own territory. The UCDP/PRIO provides data for two types of conflicts in such failed states: communal and organized armed conflicts where none of the parties is the government (in the following text: non-state conflicts) and violence exercised against civilians by governments and formally organized armed groups (in the following text: one-sided violence). In the period 1989–2018 UCDP/PRIO has recorded 721 non-state conflicts and a total of 274 actors engaged in one-sided violence.¹¹

2.2. PEACE IN NEGATIVE MEANING

The protection of legal value of peace can be understood in its negative meaning as the absence of violence. The value of peace with this meaning is accepted in the practice of the international community in regard to the interstate conflicts. This claim can primarily be based on attitudes of states to avoid such conflicts which claim is supported by abovementioned figures. Especially today the argument seems sustainable since in 2020, according to data we have collected by the end of October, there was only one interstate armed conflicts as defined above.¹² Since then, two interstate armed conflicts have occurred: Kyrgyzstan-Tajikistan conflict (2021) and Russia-Ukraine conflict (2022). In addition, it can be argued that even when involved in interstate conflicts, states have the attitude to justify armed activities in line with requirements of UN Charter (1945) and that the UN Security Council (in the following text UNSC) reacts on interstate conflicts.¹³ Nevertheless, the same acceptance cannot be claimed

governments with troops). In this contribution we have grouped extrasystemic, internal and internalized internal conflicts under the label 'internal conflict' as opposed to 'interstate conflict'.

10 Therése Pettersson and others, 'Organized violence 1989–2018 and peace agreements' (2019) 56(4) *Journal of Peace Research* 589, 590.

11 Ibid 591 and 593.

12 The Armenia-Azerbaijan conflict caused 16 or more deaths in July, and the large-scale war which erupted on November 27 and ended on December 10 caused 4.529 deaths. Another conflict with armed clashes caused the number of deaths close to the criteria set by definition of armed conflict (25 deaths): China-India (20 or more). The military actions in Iran-USA conflict (although it is not clear whether this conflict belongs more to internal conflict) has also resulted with deaths of soldiers. The breaches of ceasefire in India-Pakistan conflict resulted with deaths of civilians. See: *The Washington Post* (2020: 13 March, 26 June, 14 July, 18 July, 13 October and 4 December).

13 The Russia-Ukraine conflict (2022) could be the major exception.

for other kinds of violence. According to the calculations we have provided above, it seems that interstate conflicts have partially been replaced, especially after the Cold War ended, by the internal conflicts often followed by the armed intervention of foreign states and sometimes without the unambiguous legal approval of the international community for such interventions. Besides, as mentioned above, other kinds of violence in failed states largely occur.

2.3. PEACE IN ITS POSITIVE MEANING

Even if we can talk about existence of the legal value of peace in its negative meaning as the absence of violence, and this only for the interstate conflicts, more problematic seems to speak about this value in its positive meaning as the peace through law, i.e. peace established by the enforcement of IL. The legal scientists are keen to interpret the UN Charter in a way that violations of peace should be looked through the framework of the law, but in practice the solution to disputes is most often sought through diplomatic, political and economic systems rather than legal. It does not have to be a problem for the legal system to normatively permit the usage of other systems (i.e. moral, political, aesthetic) for solving legal issues. Nonetheless, the option offered by the UN Charter to settle disputes by non-legal means is in practice a regular rule, and the use of IL is an exception. From data in the literature relevant for this issue, we have calculated that in the period 1946–2018 33 conflict-related issues have been addressed by the UNSC resolutions which we consider legal acts since they include either legal determinations or warnings for states to protect population from mass atrocities, i.e. obeying the norms on legally prohibited behaviour.¹⁴ The claim on avoidance of protecting the value of peace through law is supported by this data regarding UNSC resolutions with legal character. The data serves as an argument when it is considered in light of: a) the whole activity of UNSC (for this period there were total 2300 resolutions of different kinds including those addressed to individualized parties in conflicts); b) above-mentioned numbers of 286 armed conflicts in this period; as well as c) aforementioned numbers of 721 non-state conflicts and 274 actors engaged in one-sided violence in post-Cold-War period (1989–2018).

¹⁴ In 2001, when describing the practice of UNSC in performing adjudicative-like (quasi-judicial) function, David Schweigman, following the authors previously writing on this topic – Oscar Schachter (1962) and Vera Gowlland-Debbas (1990) – has mentioned 12 UNSC resolutions containing a legal determination which can be grouped as follows: 1) illegal presence of South Africa in Namibia (1970); invalidity of policy and practices of Israel in establishing settlements in Palestinian and other Arab territories occupied since 1967 (1979); illegality of the proclamation of independence of Southern Rhodesia (1965); illegality of annexation of Kuwait by Iraq in 1990 (1990); 2) condemnation of human rights in Iraq (1990), Bosnia and Herzegovina (1992), Somalia (1992), Rwanda (1994) and Liberia (1994); 3) liability of Iraq for direct losses and damages related to invasion and occupation of Kuwait (1991), invalidity of the Iraq statements repudiating its foreign debts (1991) and obligation of Iraq to respect diplomatic immunities (1990). See: David Schweigman, *The Authority of the Security Council Under Chapter VII of the UN Charter: Legal Limits and the Role of the International Court of Justice* (Kluwer Law International 2001) 155–156. Regarding the second group we can add the information provided by Alex Bellamy in 2015 on UNSC emphasising the responsibility of states on preventing mass atrocities (R2P). From his text we can list 14 crisis including mass-murdering for which UNSC has reacted by its' resolution in period 1990–2005 whereby 6 of them were already included in above-mentioned Scheinman's list (Iraq, Bosnia and Herzegovina, Somalia, Rwanda, Iraq and Liberia) and 11 UNSC resolutions referring to R2P in the period 2011–2015. See: Alex J Bellamy, 'The Responsibility to Protect Turns Ten' (2015) 29(2) *Ethics & International Affairs* 161, 161. From the list of Global Centre for the Responsibility to protect we can detect 1 new conflict (Lake Chad Basin) for which UNSC issued resolution recalling R2P in the period 2016–2018 (and 1 more in 2011 – Yemen – not listed in the above-mentioned R2P list. See: Global Centre for Responsibility to Protect (GCR2P), (2020) *R2P references in United Nations Security Council Resolutions and Presidential Statements, 2006–2020* (last updated 11 April 2020, 2020). <<https://www.globalr2p.org/resources/un-security-council-resolutions-and-presidential-statements-referencing-r2p/>> accessed 1 May 2020 (GCR2P 2020).

2.4. PEACE AND DISCRETION

The problem with the protection of the value of peace is connected with the unpredictability i.e. legal uncertainty which will be addressed in separate subsection. The discretionary assessment of the UNSC on the violation of the peace – in negative or positive meaning of this value – is not conducted through legal procedure typical for adjudication.¹⁵ Although norms with vague content are commonplace in law, they can be clarified through the practice of law-applying organs. The lack of legal reasoning on the issues that arise before the UNSC causes that the meaning of legal norms remains vague. For this reason, it is almost impossible to apply legal norms including the concepts important for IL, for instance of aggression or other breaches of the peace. There are no legal criteria established by UNSC for the intervention of the international community in internal affairs of the state. While the norm on prohibition of atrocities can be perceived by legal scholars as *ius cogens* relevant for the decision on peace-keeping intervention, in practice it is evident that no actual atrocity will necessarily be followed by the legal decision of the international community on disobeying a positively determined value of peace (see for instance Syria conflict).

2.5. PEACE IN THE MODEL OF COORDINATION

The value of peace in its positive meaning is inseparable from the respect of the rule of law value as the consequence of the subordination model. In contrast, the coordination model of IL enables for the value of peace to have any meaning that the states accept in reaching a compromise. The contemporary international community understands the value of peace in its negative meaning as the prohibition of interstate conflicts and for the protection of such a value it is sufficient that the UNSC makes political decisions (at least until the status-quo on the question of peace is kept among UNSC permanent members). The further development of its quasi-adjudication capacity is not necessary at this stage of peace-protection and only if some additional interests would be recognized under the requirement for the protection of peace, e.g. the interest not to be affected by behaviour counted as atrocity, could require more legal reasoning.

3. THE PRINCIPLE OF LEGAL CERTAINTY

The principle of legal certainty is not explicitly mentioned in the UN Charter (1945) but it could be interpreted as implied by the text of the Charter.¹⁶ Even though, it is still question

¹⁵ The accountability of the UNSC for making decisions is impossible without improvement of procedural rules with clear criteria. In this context some of the challenges for R2P (controversies on military interventions and veto-right in SC) mentioned in the literature as well as connected initiatives (code of conduct to limit veto) can be read. On R2P challenges see for instance Bellamy (n 10) 179–190.

¹⁶ This value can possibly be recognized in the vague provision that the UN's goal is to "achieve, by peaceful means and in accordance with the principles of justice and international law, the settlement or resolution of international disputes or situations that

whether this value in practice has the priority over the value of autonomy of states when they decide regarding the rights and obligations.

3.1. THE LAW ON TREATIES

The certainty of rights and obligations established by treaties has not been fully affirmed in the practice of international community. The Vienna Convention on the Law of Treaties¹⁷ is ratified by 114 of the 193 UN member states, i.e. by 59 percent of UN member-states. Although largely considered being international customary law, the fact remains that many states have not ratified the Convention. Among them are for instance the United States, France, Norway, Turkey, Romania, Iceland, Israel, Jordan, Iraq, Iran, Afghanistan, India, Pakistan, Indonesia, South Africa, Yemen, Somalia and North Korea.¹⁸ Even if we disregard this inconvenience, the compulsory adjudication regarding the breach of treaties has been limited by the Convention only to the cases of violation of *jus cogens*,¹⁹ which, as a concept, has not completely crystallized in the theory and practice.²⁰

3.2. THE PRACTICE OF ENSURING THE CERTAINTY OF TREATIES

In favour of the optimism that paradigm of CIA is expanding in IL, Marcel Brus has mentioned among other things the establishment of the World Trade Organization (1994) and the UN Convention on the Law of the Sea.²¹ In particular, he emphasized the success of the latter as this convention was ‘the first occasion in which all states involved in the drafting of a comprehensive multilateral treaty have accepted a dispute settlement regime that provides for compulsory and binding dispute settlement in most cases and for compulsory non-binding third party procedures in a large number of the remaining categories of disputes’.²² However, today’s international community accepts the state of affairs in which exists no mechanism for

could lead to a distortion of peace.” (Article 1 of the UN Charter 1945). It is doubtful whether disputes must be resolved only in accordance with international law or the principles of justice go beyond the scope of law. Furthermore, this provision applies only to the resolution of disputes and situations that could lead to distortion of peace.

17 Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS I-18232 (VCLT 1969).

18 United Nations, *Multilateral Treaties Deposited with the Secretary-General* <<https://treaties.un.org/Pages/ParticipationStatus.aspx>> accessed 1 May 2020. UN Multilateral Treaties (2020).

19 Article 66 prescribes that if parties could not reach solution in case of one party claiming for defect in contracting or a ground for the invalidity of the treaty, and the dispute refers to *ius cogens* (article 54) or the prescribed procedure regarding the claiming such a situation (article 65), then 12 months after notification the dispute can be submitted to International Court of Justice for a decision. In all other disputes regarding the treaty the compulsory adjudication is not prescribed. VCLT (1969)

20 *Ius cogens*, i.e., peremptory norm of general IL is defined in article 53 of VCLT (1969) as a “norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.” According to the same article a treaty is void if it conflicts with *ius cogens* at the time of its conclusion.

21 United Nations Convention on the Law of the Sea (adopted 10 December, entered into force 14 November 1994) 1833 UNTS I-31363 (UNCLOS 1982).

22 Marcel TA Brus, *Third Party Dispute Settlement in an Interdependent World* (Martin Nijhoff Publishers 1995) 23.

determining violations of some particular rights and obligations of states. The imperative of following internal interests of states which are sometimes understood in a very limited way (and often misunderstood), results in selectiveness of regimes which will be provided by certainty.²³ In the international trade regime²⁴ compulsory adjudication has indeed been accepted as an instrument for resolving disputes, while the IL on border disputes is not guaranteed by generally accepted CIA. Moreover, in some areas where tendency towards the development of compulsory adjudication was strong, semi-solving solutions on CIA prevailed. For instance, despite the optimism for developments in maritime regime, United Nations Convention on the Law of the Sea²⁵ permits the states for some important sea disputes such as territorial issues on the sea, to declare exclusion from compulsory adjudication. Bruss's optimism at the time the Convention came into force (1994) did not, for example, reflect on the sea dispute between Croatia and Slovenia. None of the mandatory ways of solving the dispute envisioned by the Convention – binding through adjudication or non-binding through conciliation – was implemented in this case.

3.3. UNCERTAINTY OF TREATIES IN THE MODEL OF COORDINATION

Thus, it is still hard to say that the value of legal certainty is accepted as the supreme legal value of international law in all its regimes as the value which should be protected in all cases of international relations. Following abovementioned insights on legal uncertainty caused by the absence of judicial protection in the case of a breach of treaty the question may be raised whether the principle of *pacta sunt servanda*, which protects the value of the legal certainty, is indisputably accepted principle? The absence of the adjudication and consequent coercive enforcement of the treaties does not jeopardize the *pacta sunt servanda* principle under the following assumption. For the treaties entered by states without accepting compulsory adjudication in case of dispute over the application of the treaty, it has to be assumed that states follow the coordination model of IL. In that case the contracting parties did not even want their contractual obligations to become legally binding or they want these to be implemented by agreement of all contracting parties.

However, even this weak argumentation in favour of the acceptance of *pacta sunt servanda* by the current international community is problematic. Even when states accept compulsory adjudication for treaties in accordance with requirements of subordination model, it is possible that the treaty for states remain uncertain in the same way as when considered through coordination lenses. For instance, the treaty between Greece and Macedonia, which among other mutual duties, obliged Greece not to obstruct Macedonia's entry into Euro-Atlantic integration, had no application in real life because the international community allowed its

23 The commercial realm is an area most acceptable for states to self-restrict because of the "impact of global economy on the economic health of virtually every state" and refusal to accept legal arrangements means exclusion of the state from the full participation in global commerce. Brian Z Tamanaha, *On the Rule of Law* (Cambridge University Press 2004) 130.

24 Marrakesh Agreement Establishing the World Trade Organization and Annex 2: Dispute Settlement Rules: Understanding on Rules and Procedures Governing the Settlement of Disputes (adopted 15 April 1994, entered into force 1 January 1995) 1867 UNTS I-31874 and 1869 UNTS I-31874 (WTO Agreement and DSU (1994).

25 UNCLOS 1982.

implementation to be ineffective. The assumption that the international community, especially NATO and EU, did not consider this treaty to be *de facto* legally binding becomes more convincing when it is taken into account that the International Court of Justice has given a binding decision that Greece had violated its obligations under the treaty.²⁶ With this problem in mind, which shows that the principle of certainty depends on power-relations, it is yet to be seen whether the states will accept the principle of legal certainty at least for those norms that could be considered as *ius cogens* and whether it is possible to determine the content of this concept acceptable to everyone.

4. THE VALUE OF EQUALITY

The value of equality is stated in the UN Charter (1945).²⁷ Lauterpacht and Kelsen understand the value as the equality of states before the general legal standards being aware of the fact on real inequalities of states in the same way as the actual inequalities of individuals exist in national communities.²⁸ Even when defined in this way as a thin concept, it is still questionable whether the equality in the international community is a legal value from psychosociological standpoint of its actors.

4.1. INEQUALITY IN SUBMISSION TO THE ADJUDICATION

The acceptance of the equality as the value to be legally protected would require that the international court for states must be established by IL, which would mean, *inter alia*, that all agents of international relations are equally subjected to the adjudication. In contrast, the present international community legitimize the set-up of international criminal tribunals only for some states, while other states may exempt themselves from such particular arrangements. The jurisdiction of the International Criminal Court is accepted by 123 states, i.e., the 64 percent of the UN state-members. The jurisdiction is not recognized by three non-European permanent members of the UNSC as well as by the most of states in conflict-affected regions of Asia and Northern and Eastern Africa.²⁹ The partial explanation of this situation can be searched in some states' preference of the model for international criminal law which 'envisages the application of criminal standards to illiberal regimes and their personnel. The

²⁶ *Application of the Interim Accord of 13 September 1995 (the Former Yugoslav Republic of Macedonia v Greece)* (Judgement) (2011) ICJ Rep 644.

²⁷ Article 1(2) states that the UN's goal is to "develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples." Article 2(1) states that "the Organization is based on the principle of the sovereign equality of all its Members". UN Charter (1945).

²⁸ Hans Kelsen, *Peace Through Law* (The Lawbook Exchange 2008), 35–36. Lauterpacht n (3) 430.

²⁹ The main exceptions from this practice of refusing the ICC in Asia are: Afghanistan, Bangladesh, Cambodia, East Timor and Jordan and in North-East Africa: Kenya, Uganda, Tanzania and Tunisia. UN Multilateral Treaties (2020).

ICTY and ICTR are more typical of this vision'.³⁰ The more substantial reason for this strange situation is to be found in an understanding of IL.

4.2. EQUALITY IN MODELS OF SUBORDINATION AND COORDINATION

In the subordination model of IL, the value of legal equality would require that a particular case must be decided in a manner that solution would be applicable in all the same or similar cases. The search for such a solution includes the reasoning on different legal values of the community in the case, their weighing depending on the political goals and the state of the affairs in the community. On the other hand, the coordination model of IL does not require the integrity of reasoning secured by the application of equality principle and constructing the value-coherence of the normative system. This is unnecessary contemplation as long as states-members of international community accept whatever set of rules. Consequently, the states which perceive the IL through coordinative model might be satisfied with particular *ad hoc* adjudications for the parties in dispute if necessary but would be reluctant to accept public courts which are the feature of subordination model.

4.3. JUSTIFICATION FOR INEQUALITIES?

However, the legal inequalities could still deem to be justified in international realm even if perceived through the model of subordination, by searching for the appropriate principle. Thomas M. Franck presents a situation as the example of IL value-coherence problem and then points out how it could be justified. The example refers to the contradiction between the principle of equal sovereignty of states guaranteed by the article 2 of the Charter and the rule on veto power provided to five permanent members of the UNSC by the article 27 of the same document. 'If states did not regard the United Nations as an aspect of a global community, this seeming contradiction would not matter. Life is full of contradiction. It only matters when a contradiction rises to the level of an incoherence that invalidates and illegitimizes an aspect of the system of rules of a community to which the state belongs and by reference to which the state defines its own legitimacy'.³¹ According to Franck, in order to prevent the Charter from falling into a problem of incoherence, states seek a neutral principle which would rationally revive the consistency. He has discovered the following content of this principle: although states are in principle equal, some states may be empowered with more weight of their voice regarding international affairs, since they have greater responsibilities based on their special wealth and power. Franck then admits that some states in the UNSC today do not have such wealth and power as compared to other states. However, this new incoherence is practically resolved in a way that those states do not veto decisions unilaterally but rely on the stronger

30 Gerry Simpson, *Great Powers and Outlaw States. Unequal Sovereigns in the International Legal Order* (Cambridge University Press 2004) 8.

31 Thomas M Franck, 'Legitimacy in International System' (1988) 82(4) *The American Journal of International Law* 705, 749.

members of the UNSC.³² Thus, Franck's thesis can be interpreted as if states are seeking for a neutral principle for justification of inequality and if the principle does not exist anymore as it was initially designed behind rules, the states begin to behave in a way to reconfirm it through new practices corresponding to the new world reality.

Nonetheless, this *de facto* adaptation of the principle through practice to accommodate new circumstances can be in contrast to the initial meaning of the neutral principle. It is not disputable that states may indeed try to act consistently, but this consistency in fact can be such to reduce the neutral principle to sheer conformation of the states to the power relations with no other justification concerning the burdens of responsibility for maintaining or improving the IL. When the court in the subordination model of law decides on situation of deviation from the principle of equality, then it keeps on using general neutral principles by justifying the exemptions and requiring that measure, which leads to derogation of equality principle, is designed in the best way to achieve the legitimate objective. It is hard to find the effort of the members of international community to justify derogation of equality principle sufficiently similar to such a legal reasoning on legal issues in line with community goals. At the same time, the legal inequality among states manifested in a way that some general norms apply only to some states and for other states in the same or similar situations they do not apply is not a structural problem for the coordinative model of IL which relies on the conventional acceptance of any existing relations.

5. CONCLUSION

The previous sections on the values of peace, legal certainty and equality in the international law leads us to the following conclusions. The principles protecting three values are formulated or implied by normative documents on IL. However, the practice determines their *de facto* existence and their specific meanings. The 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. Despite the rule on banning the threat or use of force, standard on the protection of the value of peace is often derogated by standard on 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 the state's autonomy. The claims on rights and obligations among the states are mostly left in the zone of vague meanings for disputed states without possibility to be authoritatively determined. This uncertainty is the result of states' practices to avoid legal regulation of 'political issues' (separation of politics from law thesis) and to stick with the *omnis iudex* rule whenever political power enables to behave in that way. Finally, the principle of equality does not always prevail. The states which fit adequately in the momentarily 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 to equality principle. This situation with values is not the result of legal reasoning on hierarchy of values, but of the perception of what is IL provided by coordination lenses worn by legal actors.

³² Ibid.

BIBLIOGRAPHY

1. Bellamy AJ, 'The Responsibility to Protect Turns Ten' (2015) 29(2) *Ethics & International Affairs* 161
2. Brus MTA, *Third Party Dispute Settlement in an Interdependent World* (Martin Nijhoff Publishers 1995)
3. Franck TM, 'Legitimacy in International System' (1988) 82(4) *The American Journal of International Law* 705
4. Gleditsch NP and others, 'Armed Conflict 1946–2001: A New Dataset' (2002) 39 (5) *Journal of Peace Research* 615.
5. Guastini R, *La sintassi del diritto* (2nd edn, Giappichelli 2014)
6. Kelsen H, *Peace Through Law* (The Lawbook Exchange 2008)
7. Kelsen H, 'Compulsory Adjudication of International Disputes' (1943) (37)3 *The American Journal of International Law* 397
8. Krešić M, 'A Jurisprudential Attempt at Rule of Law Creation: An Analysis of Theoretical Assumptions for Compulsory International Adjudication and Realistic Challenges' (2021) 71(6) *Collected Papers of Zagreb Law Faculty* 819
9. Krešić M, 'Compulsory adjudication: an emerging principle of European Law and the Western Balkans' accession to the European Union?' in Mario Krešić, Damir Banović, Alberto Carrio Sampedro and Jānis Pleps (eds), *Ethnic Diversity, Plural Democracy and Human Dignity. Challenges to the European Union and Western Balkans* (Springer 2022)
10. Lauterpacht H, *The Functions of Law in the International Community* (first published 1933, The Lawbook Exchange 2000)
11. Pettersson T and others, 'Organized violence 1989–2018 and peace agreements' (2019) 56(4) *Journal of Peace Research* 589
12. Schweigman D, *The Authority of the Security Council Under Chapter VII of the UN Charter: Legal Limits and the Role of the International Court of Justice* (Kluwer Law International 2001)
13. Simpson G, *Great Powers and Outlaw States. Unequal Sovereigns in the International Legal Order* (Cambridge University Press 2004)
14. Tamanaha BZ, *On the Rule of Law* (Cambridge University Press 2004)

REGULATIONS, DOCUMENTS AND JUDGEMENTS

1. *Application of the Interim Accord of 13 September 1995 (the Former Yugoslav Republic of Macedonia v Greece)* (Judgement) [2011] ICJ Rep 644
2. Charter of the United Nations (signed 26 June 1945, entered into force 24 October 1945) UNCIO XV, 335; amendments by General Assembly Resolution in UNTS 557, 143/638, 308/892, 119 (UN Charter 1945)
3. Global Centre for Responsibility to Protect (GCR2P), *R2P references in United Nations Security Council Resolutions and Presidential Statements, 2006–2020* (last updated 11 April 2020, 2020). <<https://www.globalr2p.org/resources/un-security-council-resolutions-and-presidential-statements-referencing-r2p/>> accessed 1 May 2020 (GCR2P 2020)

4. Marrakesh Agreement Establishing the World Trade Organization and Annex 2: Dispute Settlement Rules: Understanding on Rules and Procedures Governing the Settlement of Disputes (adopted 15 April 1994, entered into force 1 January 1995) 1867 UNTS I-31874 and 1869 UNTS I-31874 (WTO Agreement and DSU 1994)
5. Uppsala Conflict Data Program at the department of Peace and Conflict Research, Uppsala University and the Centre for the Study of Civil War at the Peace Research Institute Oslo (UCDP/PRIO), *Armed Conflict Dataset* (Version 19. January 2018) <<https://ucdp.uu.se/downloads/>> accessed 1 May 2020 (UDCP/PRIO 2020)
6. United Nations, *Multilateral Treaties Deposited with the Secretary-General* <<https://treaties.un.org/Pages/ParticipationStatus.aspx>> accessed 1 May 2020 (UN Multilateral Treaties 2020)
7. United Nations Convention on the Law of the Sea (adopted 10 December, entered into force 14 November 1994) 1833 UNTS I-31363 (UNCLOS 1982)
8. Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS I-18232 (VCLT 1969)

Mario Krešić*

REALISTIČNI TEST ZA ARGUMENT U KORIST OBVEZUJUĆEG MEĐUNARODNOG PRAVOSUĐENJA: PRAVNE VRIJEDNOSTI U PRAKSI MEĐUNARODNIH AKTERA

Sažetak

U članku će se ispitati kakve su prakse u međunarodnim odnosima s obzirom na zaštitu mira, pravne sigurnosti i jednakosti. Ove su tri vrijednosti važne za argument u korist obvezujućeg međunarodnog pravosuđenja. Slijedeći izazove koje realizam postavlja pred takav argument, članak će nastojati odgovoriti na sljedeća pitanja: jesu li tri vrijednosti zaista zaštićene postojećim normama međunarodnog prava; jesu li načela kojima se štite ove vrijednosti, ako ova načela postoje u međunarodnom pravu, iznad načela zaštite autonomije država koje utemeljuje postojeće pravilo *omnis iudex*; i naposljetku, jesu li ove vrijednosti uključene u vrijednosne hijerarhije koje uspostavljaju oni koju formuliraju i tumače međunarodne norme. Odgovori na prva dva pitanja pružit će se na temelju empirijske procjene međunarodne prakse, a odgovor na treće pitanje utvrđivanjem stavova prema međunarodnim odnosima na temelju interpretacije postojećih praksi kroz modele koordinacije i subordinacije.

Ključne riječi: mir, pravna sigurnost, jednakost, obvezujuće pravosuđenje



This work is licensed under a Creative Commons
Attribution-NonCommercial 4.0 International License.

* Dr. sc. Mario Krešić, docent Pravnog fakulteta Sveučilišta u Zagrebu, Trg Republike Hrvatske 3, 10000 Zagreb. E-adresa: mario.kresic@pravo.hr. ORCID: <https://orcid.org/0000-0002-1461-7680>.