Kostiantyn V. Gorobets,
PhD,
Visiting research scholar,
University of Groningen
(Groningen, Netherlands)

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INTERNATIONAL RULE OF LAW IN A DISCOURSE OF DOUBTS

The international rule of law – one of the most influential theoretical ideas of contemporary international legal scholarship. At the same time, it exists in a ceaseless discourse of doubts and defenses. Political realism and postmodern skepticism constitute two major reasons for doubts about it. Article deals with the arguments provided by them, and with possible counterarguments based on the ideology of formalism.

Keywords: international rule of law, political realism, legal instrumentalism, formalism.

Горобець К.В. Міжнародне верховенство права у дискурсі сумнівів. – Стаття.

Міжнародне верховенство права – одна з найвпливовіших теоретичних ідей сучасної міжнародно-правової науки. У той же час, воно існує в безперервному дискурсі сумнівів і заперечень. Політичний реалізм і постмодерністський скепсис є двома основними причинами для сумнівів з цього приводу. Стаття присвячена аргументам, що ними представлені, а також можливим контраргументам, заснованим на ідеології формалізму.

Ключові слова: міжнародне верховенство права, політичний реалізм, юридичний інструменталізм, формалізм.

Горобец К.В. Международное верховенство права в дискурсе сомнений. – Статья.

Международное верховенство права – одна из самых влиятельных теоретических идей современной международно-правовой науки. В то же время, оно существует в непрерывном дискурсе сомнений и возражений. Политический реализм и постмодернистский скепсис являются двумя основными причинами для сомнений по этому поводу. Статья посвящена аргументам, которые ими представлены, а также возможным контраргументам, основанным на идеологии формализма.

Ключевые слова: международное верховенство права, политический реализм, юридический инструментализм, формализм.

Introduction. The idea of the international rule of law is one of the most discussed theoretical issues, but at the same time one of the most controversial. This is partly because of the vagueness of the international rule of law itself, which often leads to the instinctive denial of its existence. However, the primary problem is that legal philosophy, which remains the central domain of the rule of law theories, cannot offer a relevant explanation scheme or even an approach that would make the rule of law ideas applicable in international legal theory. It stipulates the elaboration of plentiful particular theories of the international rule of law, that usually suit only one of its particular aspects. Alternatively, it calls forth the use of analogy with the domestic theory of the rule of law, which is not always (if ever) relevant.

Such a dissent from the international rule of law issues does not make a strong case for it. At the same time the increasing extent of references to the international rule of law (or to the rule of law at the international level) in normative acts, as well as in soft law, creates demands for its conceptual understanding. It does not seem, though, that conceptualizing the international rule of law should go beyond or outside the key patterns of the general theory of the rule of law, or, on the contrary, deduct the international rule of law directly from the domestic legal theory. This article represents an attempt of methodological analysis of how the international rule of law can be explained both from the side of legal philosophy and from the side of international law theory simultaneously.

Why does the Rule of Law Matter for International Law? The aim of this section is to examine the rising rule of law discourse at the international level. There is no doubt that modern international law tends to incorporate rule of law considerations into international legal reasoning and rule-making. Many international organizations of universal and regional character declare their adherence to the rule of law ideology and aspire to promote it both at the domestic and international level. However, the perpetual question of international legal theory is still there: does the rule of law at the international level mean something more than only a legitimative slogan, which rather

has a political meaning? Taken broadly, the rule of law at the international level brings up the classical and incessant problem of the connection between international law and international politics. Nevertheless, two tendencies of the rule of law at the international level may be seen. First is the dissemination of the rule of law ideology among international organizations as a goal of their activities. Second is the continuing discrepancy among international legal scholars about the applicability of the rule of law to international realms. These two tendencies reflect two sides of the rising rule of law discourse and hence need to be considered attentively.

Rule of Law as a Part of International Legal Discourse. The relevance of the rule of law issues for the international legal system is widely seen in the conviction of the necessity of its promotion. Promotion of the rule of law at the domestic and international level is often seen as one of the core goals of the United Nations. The Secretary-General emphasized that "the 'rule of law' is a concept at the very heart of the Organization's mission" [1]. This underlines that during the XX century and at the beginning of the XXI century the rule of law has gone a long way from being a theoretical concept of British constitutional law through the stage of philosophical considerations to gaining recognition as a basic idea of the functioning of today's legal systems. Such a transformation determines its significance for the international legal system. It appears, among other things, in the idea that the rule of law at the international level should become the primary vector of humanity's development [2, p. 356; 3, p. 2].

From the viewpoint of legal philosophy, there can be no doubt that the idea of the rule of law is one of the most valuable achievements of the European civilization, as it has become one of the fundamental principles of modern law and an important concept of political and legal philosophy. Philosophical and theoretical justifications of the rule of law have been accompanying the Western tradition of legal thinking throughout the last two centuries, and in this aspect, the rule of law reflects the image of law that is common for contemporary jurisprudence.

Apparently, the rule of law finds its most institutionalized form in domestic law, because it is the fundamental criterion of domestic legal systems' effectiveness and legitimacy, especially in the Western legal tradition. Its ability to serve as a factor of legitimation of legal systems and evaluation of their effectiveness is widely reflected in international legal acts, especially adopted within the UN system. Indeed, the current references to the rule of law, which can be found in UN General Assembly resolutions and declarations *(GA Res. 55/2 (8 September 2000); GA Res. 61/39 (4 December 2006); GA Res. 62/70 (6 December 2007); GA Res. 63/128 (11 December 2008), etc.)* or in resolutions of the UN Security Council (SC Res. 1528, 27 February 2004; SC Res. 2260, 20 January 2016; SC Res. 1542, 30 April 2004; SC Res. 1756, 15 May 2007; SC Res. 2268, 26 February 2016, etc.), as well as in statements of UN officials, reflect the importance of the promotion, restoration and strengthening of the rule of law as one of the UN's main goals.

A well-known and widely spread definition of the rule of law is given by the UN Secretary-General, who said that the rule of law constitutes "a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency" [1, para. 6].

However, it is unclear whether the elements of the rule of law named by the Secretary-General are equally applicable to the domestic and international legal systems. Thus, R. McCorquodale supposes that "it is a statement about how the rule of law should operate in national systems and it is not a definition of the rule of law at the global level. It refers to the 'State itself' being accountable within its own system." [4, p. 287] That seems to be one of the

reasons why the international rule of law specifically is being referred to much more carefully. For instance, the Declaration of the High-Level Meeting of the General Assembly on the Rule of Law at the National and International Levels is less certain about the list of requirements of the rule of law at the international level, saying that "We recognize that the rule of law applies to all States equally, and to international organizations, including the United Nations and its principal organs, and that respect for and promotion of the rule of law and justice should guide all of their activities and accord predictability and legitimacy to their actions" [20].

Predictability and legitimacy are crucially important for the rule of law, but it is not confined to them. It is hard to see how the other principles of the rule of law mentioned by the Secretary-General (such as accountability to the law, separation of powers, avoidance of arbitrariness, etc.) can be directly built into the international legal system. It indicates that the rule of law is primarily important for states and domestic legal systems, as the rule of law principles cannot indisputably and without any simplifications be extrapolated onto the international legal system.

Thus, the main angle of the rule of law consideration at the international level is elaborating the standards of the rule of law and promoting them among states; practically, the rule of law is usually seen as a sphere of international cooperation, not as a part of the international legal system. Not only the context in which the rule of law is being mentioned in international legal acts, but also the non-governmental organizations' activities in indexing the rule of law (International Network to Promote the Rule of Law, World Justice Project, Millennium Challenge Corporation, Heritage Foundation, etc.) speak well of that the rule of law at the international level is being considered in the 'top-down' angle: from international rule of law standards — to their implementation in domestic law.

However, there are several problems with understanding the entire concept of the 'rule of law at the national and international levels'. Does this concept reflect two different phenomena or one? If the rule of law at the international level is an independent concept,

what its content is? How can the domestic idea of the rule of law be extrapolated onto the international legal system? And finally, is it possible to speak about the *international rule of law* as the set of principles and requirements to the international legal system instead of the *rule of law at the international level* that seems to be an external descriptive concept? Answering these questions constitutes a major part of international legal theory. However, it still needs to be seen whether the rule of law at the international level is even possible.

Two Reasons for Doubts about the International Rule of Law. The idea of the international rule of law is often criticised from the standpoint of two approaches. The first one is legal instrumentalism (or instrumental approach to the law), which is presented in international theory, among others, by political realism. The second one is postmodern skepticism, which deconstructs the deep-seated structures of legal reasoning, discovering its vagueness and untenability [5, p. 391]. Both of these approaches either reject the idea of the international rule of law or substantiate the deep doubts about the possibility of such an international system which would confront even the simplest theories of legality (so called 'rule *by* law' theories). Rule by law' theories reflect the idea that even the worst political regimes can confront to the requirements of the rule of law simply by endowing the governance into the legal form. It usually means the obliteration of the core principles that determine the quality of laws [6]. Besides, the rule-of-law considerations are supposedly untenable in international law because of the use of analogy, which will be separately analyzed.

Instrumentalism and the International Rule of Law. A reason for the skepticism about the international rule of law has a strong connection with the instrumental approach to the law as a whole and to international law specifically. The basic idea of such an approach is that law is treated only as a tool for reaching the goals set by political system. At the same time law is seen as having none of its own independent content, i.e., the content which is unaffected by political expediency. Indeed, the instrumental view of international law renders

the definition of the international rule of law content and place in the international legal system impossible.

The application of the instrumental approach leads to two important conclusions. Firstly, the international rule of law as a goal is considered to be impossible to reach, because the institutions that create and enforce international law are too subordinated to political expediency. Without centralized rule-making international law is too uncertain and thus ineffective to a degree which is not permissible for a rule-of-law-governed legal system. That means, first of all, that rule of law, either at the domestic level or at the international level, is an 'all or nothing' concept: if a legal system fails to conform to some of its requirements, it dismisses the entire possibility of the rule of law in such a legal system. International law, compared to domestic law, may be considered as institutionally insufficient in terms of law-enforcement and even law-making, and that increases international law's dependence on international politics. Practically, it leads to the legal and political impunity of powerful states, as they treat international law not as a normative delimiter of their behavior, but as the instrument for justifying policies and taking international law as a refugee in pursuing their interests [7, p. 7-10].

Secondly, the international rule of law is considered to be impossible even as a doctrine, as it is no more than an ideological stamp, which serves a cover for justification of international actors' decisions and actions [5, p. 391]. An interesting point here is that this second aspect of the instrumental view of international law can paradoxically be used 'for benefits' of the rule of law reasoning. For instance, I. Hurd supposes that "international law [is] as a set of resources. This [...] recognizes that law contains the capacity to legitimate state policy. International law provides the resources with which states talk about and understand their behavior" [8, p. 46]. It leads him to the conclusion that "[g]overnments use the categories and concepts provided by international law to explain their needs and their actions — these include ideas and rules around sovereignty, intervention, self-defense, humanitarian rescue, self-determination, and much more" [8, p. 45]. Hurd supposes that this particular function

of international law serves to harbor the rule of law logic in its application to the international legal system (he calls it an integral model of legal and political legitimation).

It looks like Hurd does more bad than good for the international rule of law, linking it to the matter of justification. He actually substitutes the idea of legality (which is at the heart of the rule of law ideology) with the new version of *raison d'État*, saying, among other things, that "[t]he meaning of international legal rules arises from how it is invoked in the diplomacy of states."[8, p. 46] It is no wonder that here international law turns out to be only a continuation of international politics, and what Hurd calls the 'international rule of law' is simply an external expression of political reasoning, which actually has very little in common with the rule of law ideology.

Postmodern Skepticism about the International Rule of Law. Similar doubts, although differently grounded, can also be seen in postmodern interpretations of international law within their emphasis on its fundamental indeterminacy and constant reproducing of the internal discourses [9, p. 590-591]. Normative uncertainty provokes the reconsideration of the meaning of even the basic categories of the international order (such as human rights, development, peace, etc.). As Pauline Westerman argues, we can imagine the law as a matryoshka, where the biggest doll is one which constitutes the most abstract and equivocal idea. It helps to reach a compromise over the rules, although parties can interpret this idea in very different ways, thus no one can say what this idea is about [10, p. 181]. It leads to complete relativism, which gives no chances for the rule of law to be reached in the international legal system. Therefore, international law is too discursive for being certain enough to make the international rule of law possible.

In such conditions the concept and the content of the international rule of law is getting very blurred, uncertain and vague. On the one hand, it becomes commonly recognized that the international rule of law must be reached and strengthened, but on the other hand it is almost impossible to discover its requirements, as they dissipate in ceaseless contestations. That is why M. Koskenniemi considers the

idea of the international rule of law in the context of political grounds of international law, emphasizing the impossibility of reduction of the rule of law to the 'pure legal discourse' because the international system does not and actually cannot elaborate one [9, p. 1].

From this perspective, the international rule of law is being torn between legal and political reasoning. This creates two different versions of its content, and those become even more split in the conditions of the implementation of the international rule of law principles into the practice of international law. As a result, fragmented and disintegrated, international rule of law loses its affinity as a significant theoretical idea and gets more and more shifted to the sphere of political argumentation.

These two positions — instrumentalism and postmodernism — despite being differently grounded, have a lot in common. They dismiss the idea of the international rule of law because it does not meet those solid intagliated arguments that domestic constitutionalism uses to justify the concept of legality. Hence, it is merely impossible to bring the international rule of law to the same methodological point, and this supposedly undermines its relevance for the theory and practice of international law. Its fate is to be a rather political myth that exists to justify international politics.

Formal Shelter for the International Rule of Law. Meanwhile, the applicability of the rule of law logic in the international legal system can be justified by bringing it to the point of formalism methodology. To constitute the formal vision of the rule of law and determine its place in international legal theory it is necessary to distinguish the instrumental and non-instrumental rules and discover how the latter restrict international politics (1). Such a task also requires answering the question of whether the uncertainty of international law is such that it disables any rule-of-law considerations at the international level (2). Finally, if the international rule of law needs to be taken formally, its connection to the idea of legality should be established (3).

Non-Instrumentalism and the Limits of Politics. Notwithstanding the political character of international law, it is crucial to underline

that not every rule either in domestic or international law can be considered as instrumental, and that undermines the idea of international law's total submission to political reasoning. In its essence, the concept of the rule of law implies that the law is primary a system of non-instrumental rules. Legal philosophy considers the non-instrumental rules as the rules that were established to express the general principles of the organization of a certain social system, and do not rely upon individually pursued goals. The rule of law defines the idea that a legal system consists of clear and certain non-instrumental rules that regulate the procedure of creation and application of the law. In essence, non-instrumental rules can be called the secondary rules in Hart's terminology. Thus, non-instrumental (secondary) rules allow international law to resist political expediency by restricting rule-making to procedural limits. As T. Reinold grounds, secondary rules "legitimize, but at the same time constrain, the exercise of political power. [...] In secondary rule-making the stakes are even higher than in primary rule-making, because the former determine in the first place who has a say in shaping the latter." [11, p. 275] So, if primary rules in international law can be seen as an outcome of political compromise, it would be a mistake to use the same logic for secondary rules, which regulate the process of rule-making, law-enforcement, outline the jurisdictions, etc. The mere existence of the secondary rules means that international politics is restricted mainly by the necessity to confront these rules.

The argument of political expediency also fails because it does not explain the possibility of the rule of law at the domestic level. Indeed, even the deliberative democracies cannot always guarantee absolute transparency in the interactions of political and legal systems during decision-making. As R. Puntam has shown in his two-level analysis theory, at the national level, domestic groups pursue their interests by pressuring the government to adopt favorable policies, and politicians seek power by constructing coalitions among those groups. At the international level, national governments seek to maximize their own ability to satisfy domestic pressures, while minimizing the adverse consequences of foreign developments [12, p.

434]. However, it does not mean that domestic politics tramples down the requirements of the rule of law, as political decision-making only partly depends on legal means. The same applies for international law and international politics: however deep their interosculation is, they can still exist as two discourses that limit and define each other. In other words, if political expediency were an argument that is powerful enough to dismiss the idea of the international rule of law, it should have done the same at the domestic level. However, it is not. It all depends on the qualities of the particular legal system, whether it is stable and authoritative enough to hold out against politics. That means, as R. McCorquodale says, that rule of law is not an 'all-or-nothing' concept, as it is always a question of extent [4, p. 296].

The other noticeable argument is given by I. Hurd when he shows the implication of the idea of the international rule of law in its opposition to political realism. Considering the legal grounds for the USA's external policy, he argues that despite the fact that the USA often violated international law, it did not mean that they ignored it. Every action in international affairs requires justification, because "the international legality of an act depends on which state undertakes it, and what that state says about the act, and what it has previously said about its relationships to the pieces international law that may apply" [13, p. 42]. I. Hurd also emphasizes that the constraining effect of international law means that, "if legal sources can be found to legitimate the policy, its passage is smoothed; where they cannot be, the policy is at minimum more controversial and perhaps off the table entirely" [13, p. 48].

Although, it seems that I. Hurd tends to substitute the concept of the international rule of law with the idea of international law itself. Limiting politics and establishing the very basic rules of behavior is what law does, that is what it had been set up for. Here, one uses the descriptive approach ('law *guides* actions and *limits* the behavior'). Whereas the rule of law requires the prescriptive approach ('law *must* confront to the specific requirements'). Even though the rule of law does not mean the rule of a good law [14, p. 211], it is still important to distinguish these two types of legal propositions. The fact that states

somehow adjust their behavior with international law proves only that international law exists. Contrary to this, the rule of law does not prescribe the obligatory character of specific actions, but it prescribes what international law should act like. In other words, "the international rule of law should not be confused with the existence of, and compliance with, substantive international law obligations" [4, p.292].

Despite this, the core idea that I. Hurd stands for is quite simple: in its limitation of international politics the international rule of law reveals itself as a specific paradigm of international relations, which opposes the rule of force. In its gist, the international rule of law underlines such an international order that is generally more foreseeable and reliable than such is based on the rule of force.

The Issue of Uncertainty. Besides the problem of political expediency, another frequently noted issue that supposedly make the rule of law idea hardly found at the international level is that of uncertainty. One of the common claims against the international rule of law is that international law does not consist of rules that provide a certain and defined model of behavior. The problem of international law`s uncertainty, of course, can be put otherwise, for instance, as Jörg Kammerhofer does. From his point of view, one should distinguish carefully epistemological and ontological uncertainty. The first one is connected to the inherent limits as to how well we can perceive law, which can hinder us from knowing whether a proposed norm *is* a norm of international law. The second one comes to the direct question of what happens when international law itself is, or when its rules themselves are, problematic, for instance, when there are normative conflicts [15, p. 3-4].

Uncertainty of international law naturally leads to difficulties in its enforcement and impacts its efficiency. In the rule-of-law discourse the issue of uncertainty arises, among others, in the relative character of compliance. Individual states have the capacity to change the legal status of their behavior — from illegal to legal, from violation to compliance — by the exercise of their legal and political agency [16, p. 378], which means that potentially every state can have a unique set

of obligations under the same treaty. It undermines one of the basic requirements of the rule of law: that laws should be public, stable and equally applied.

Although law's uncertainty is a problem only if the legal system does not have the instruments for overcoming such uncertainty, those are mainly the legal interpretation and the application of law. One can evaluate these instruments as efficient or inefficient, depending on the features of a specific legal order, but they still constitute part of the legal reasoning, otherwise the law would have been inapplicable. Uncertainty of the law cannot be defined as the main obstacle for the rule of law, as it may be overcome. It works both at the domestic and international levels, as far as the application of law always requires discovering its meaning and relevance for a concrete case. So, by 'using' the law (e.g., by exploiting it as a rule, obeying or enforcing it), actors determine its content and overcome its uncertainty at the same time. Sometimes the clarification of rules requires their interpretation, sometimes even their breaching. Robert Goodin notices that in the case of customary international law, "[i]n the absence of any formal amendment procedure, the only way [...] for states to 'propose an amendment' to customary law is by *breaking* that customary law," [17, p. 231] which is also a moment of clarification of the content of the customary rule.

In such a way, although the uncertainty can even be called an inherent feature of international law, it does not affect the applicability of the rule of law logic to it. Every legal system has some level of uncertainty that ensues from the fact that the rules must be applicate in a deductive manner that requires its clarification. This clarification can be made with or without the use of rule of law considerations, but uncertainty *per se* is not an insurmountable barrier for the rule of law.

The International Rule of Law and Legality. Apparently, the international dimension of the rule of law comes to life when international law is seen as a system of formalized rules that opposes lawlessness, and here one may meet the purely Hobbesian reasoning used by states in limiting their prerogatives in exchange for the prerogatives of others being limited likewise. In this particular sense,

the international rule of law arises as a formal structure, which is firmly connected with the principles of international law. Here, discussions about the international rule of law should not be reduced only to questions of how international law and international politics correlate, or how legal uncertainty must be dealt with; they rather should be focused around the virtues that international law should possess to be effective. Jeremy Waldron reasonably emphasizes that,

"asking about the rule of law in the international arena is not just asking whether there is such a thing as international law, or what it is, or what we think of particular treaties (such as human rights covenants), or of the value of customary international law, or of the enforceability of international law in our own courts. The phrase 'the rule of law' brings to mind a particular set of values and principles associated with the idea of legality" [18, p. 25].

Indeed, regarding the international rule of law theoretically, it should be admitted that the efficiency of law is determined by two basic factors. Firstly, a law must be recognized by the ruled as binding; and secondly, it must have the minimum degree of conformity to the rule of law principles, i.e., to the principles that constitute the very content of legality. It is also possible to describe normative thinking about the international rule of law, using the distinctive features of the international legal system. That is what Patrick Robinson does, when he says: "[n]otwithstanding the disorganization of the international legal order and the lack of universal acceptance of many international legal standards, there are three norms of international law which are generally agreed to have universal application. The first are consensual agreements between states — that is, treaties — which are governed by the principle of *pacta sunt servanda*. The other two are customary international law and *jus cogens*" [19, p. 34].

Such a formal, or even legalistic shelter for the international rule of law, however reasonable it seems, may bring this concept to the utopian edge of international legal theory. The international rule of law being derived from international law itself, takes the risk of becoming merely a part of 'high' legal philosophy. Nevertheless, it

does not mean that the international rule of law must be perceived from a moral perspective. This concept is rather an outcome of the attempts of theorizing the normative structure of international law, and from this side the formalism can serve as the starting point for the international rule of law justifications.

Conclusion. The importance of the concept of the rule of law is difficult to overestimate. It is not only a significant achievement of contemporary legal philosophy, or an acquisition of the theory of constitutionalism. Generally speaking, the rule of law is a concept that integrates and embodies the inherent principles and axioms of legal thinking. The development of domestic legal systems and the international legal system led to the rise of two different versions of the rule of law, that have distinct manifestations but share a mutual core. This core is an idea of authority of law, which means its consistency and reliability as a system of regulation.

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