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Rat u Ukrajini – patologija međunarodnopravnog sistema?

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Ključne reči
• rat u Ukrajini
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• legalnost
• patologija pravnog sistem
• autoritativnost prava

Polazeći od uobičajene tvrdnje da rat u Ukrajini dokazuje da međunarodno pravo (MP) „više ne funkcioniše“, članak pokušava da napravi razliku između tri moguća tumačenja ove tvrdnje. Prvo, izjava može značiti da je centralnom delu IL, odnosno režimu upotrebe sile, oduzeta „legalnost“. Drugo, može biti reči o tome da imamo posla sa situacijom koju je Hart okarakterisao kao „patologiju pravnog sistema“. Treće moguće tumačenje bi bilo da MP o upotrebi sile nije autoritativan, što znači da nema kapacitet da stvori osećaj obaveznosti kod adresata normi. Članak se zalaže za drugo tumačenje.

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Keywords
• war in Ukraine
• international law
• legality
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• authoritativeness of law

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Proceeding from the common assertion that the war in Ukraine proves that international law "doesn't work" anymore, the article tries to differentiate among the three possible readings of this claim. First, the statement may mean that a central part of international law, namely the regime on the use of force, has been stripped of its 'legality'. Second, the allegation may be that we are dealing with a situation which Hart characterized as "the pathology of a legal system". The third possible reading would be that international law on the use of force is not authoritative, meaning it does not have the capacity to generate the sense of bindingness among its addressees. The article argues in favor of the second reading.

1. INTRODUCTION*

A Ukrainian international legal scholar recounted a bitter joke that law students started to circulate on social media at the beginning of the war in Ukraine. Namely, a response to the otherwise frequent student question – "Will we have a public international law class tomorrow?" – was all of a sudden a depressing one: "It doesn't work, stop studying it." (Vishchyk 2022) Ukrainian law students were by no means the only ones to express this utterly pessimistic sentiment regarding the current state of affairs of international law (IL).

In this brief contribution, I want to differentiate between the three distinctive readings of the claim that IL "does not work".[1] *First*, this phrase may mean that the protracted armed conflict in Ukraine has stripped a central part of IL, namely the regime on the use of force, of its 'legality'. Put differently, the war in Ukraine would be an indication that Article 2(4) is no longer valid, i.e. existent rule of international law. *Second*, and somewhat less detrimental interpretation would be that we are dealing with a situation which Hart characterized as "the pathology of a legal system". The *third* reading would indicate IL's lack of authority in the given domain. That is, it would amount to the claim that IL does not have the capacity to generate a sense of bindingness among its addressees. In the remainder of the paper I want to demonstrate why the second reading is the most plausible one.

2. THE WAR IN UKRAINE AS A VINDICATION THAT IL ON THE USE OF FORCE NO LONGER EXISTS

Grotius's 1625 treatise *De Iure Belli ac Pacis* is widely considered one of the cornerstones of the field of international legal studies. It problematized the subject-

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1 To be sure, there are some other plausible interpretations of this claim. For instance, it is possible to argue that this statement means that IL serves primarily as a tool of power, instead of being a means of tempering it. Or, it is possible to say that IL's not working amounts to its failure to advance substantive justice. The problem with both of these readings is that they tend to broaden the concept of international law, equating it with international rule of law and just international law, respectively.

matter of the right to wage war, which is always "undertaken for the Sake of Peace" (Grotius 2005, Book I, 133), at least a peace on favorable terms for the winning side. Hence, one might say that the legal regulation on the use of force in international relations is at the very core of what we commonly conceive under the label 'international law' (for a more elaborate argument that this is the fundamental international legal principle of the modern era, *see*, Hathaway, Shapiro 2017).[2] Such a view is confirmed by Art. 2(4) of the UN Charter, which prohibits "the threat or use of force against the territorial integrity or political independence of any State". Thus, if the war in Ukraine, *inter alia*, testifies to the fact that this founding rule of international relations is no longer valid rule of international law, then it would not be an exaggeration to claim that international law on the use of force, that is, the very core of international law, has simply ceased to exist.[3]

In fact, some international scholars have been fostering this claim for quite some time. For instance, as early as 1970, in the face of more than one hundred separate outbreaks of hostilities between states, Franck asked what and who killed Article 2(4). His answer was: "What killed Article 2(4) was the wide disparity between the norms it sought to establish and the practical goals that nations are pursuing in defense of their national interest." (Franck 1970, 837) He repeatedly referred to this stance, only to provide a final 2003 verdict in reaction to the U.S. invasion of Iraq. At that point, he vehemently concluded that Article 2(4) "has died again, and, this time, perhaps for good." (Franck 2003, 610)

A seemingly more theoretically elaborate claim of this sort was developed by Michael Glennon. He argues that, generally speaking, "[i]f a rule is breached by a significant number of states a significant number of times over a significant period of time, I would not call it international law." He says that such rule "may still exert 'compliance pull' as a social norm ... But it is not international *law*." (Glennon 2005, 960) Put differently, "social norms that fall short of the minimum-compliance tipping point ... do not qualify as law." (Glennon 2005, 961)

In pursuing this radical conclusion, Glennon appears to equate the concepts of norm "validity", "existence" and "bindingness". At first, he notes: "If a given norm is a rule of international law, it is by definition obligatory." (Glennon 2005, 952)

2 In highlighting the significance of Kellogg-Briand's 1928 Pact, they say: "The Pact outlawed war. But it did more than that. By prohibiting states from using war to resolve disputes, it began a cascade of events that would give birth to the modern global order. As its effects reverberated across the globe, it reshaped the world map, catalyzed the human rights revolution, enabled the use of economic sanctions as a tool of law enforcement, and ignited the explosion in the number of international organizations that regulate so many aspects of our daily lives." *(*Hathaway, Shapiro 2017, xv)

3 I take "validity" to be a specific form of "existence" of a (legal) rule/norm. Hence, there is no difference between saying that a (legal) rule/norm "is no longer valid" or that it is "non-existent". (Cf. Kelsen 1991, 2. Bulygin 2015, 175)

In the next step, he says: "If the community of nations behaves as though rules do not exist, then they do not exist; and if they do not exist, they are not binding." (Glennon 2005, 960) The ultimate ground of validity/existence/bindingness of an international legal rule is its primary efficacy – whether it is sufficiently followed by its addressees. He admits that this may raise serious dilemmas regarding identification of "the precise moment at which the balance tips." Nevertheless, "at some point state practice that is inconsistent with a norm is simply too thick to justify the conclusion that states really accept the norm as obligatory." (Glennon 2005, 960) Such is, in Glennon's opinion, exactly the state practice with respect to Article 2(4).

Putting aside Glennon's confusion with respect to different conceptions of "validity",[4] the main problem with his reasoning is that it implies that the 'legality' of a rule cannot be established before it reaches an undefinable tipping point of minimum-compliance by norm-subjects. For, under this view, it is logically conceivable that something which has been agreed upon as a treaty rule was from the very inception largely violated by the norm-addresses. In such a situation, in order for that something to count as a valid international 'legal' norm one would need to wait for the reaction of norm-subjects and their subsequent adherence through the requisite complying practice. However, this then raises the question of the status of the agreed upon "something", enshrined in the treaty text, whose validity is dependent on the sufficient level of efficacy.[5]

Glennon's employment of the concept of *desuetudo* is also theoretically problematic, because it focuses solely on non-compliance by the norm addressees. He argues that "[n]ot all violation results in desuetude", because "if it did, virtually no rule would be binding." Therefore, "[d]esuetude occurs only when a sufficient number of states join in breaching a rule, causing a new custom to emerge." (Glennon 2005, 942) How-

4 Bulygin speaks of the three conceptions of "validity". Two of them are descriptive – "membership" and "applicability" – while the third is normative – "bindingness". According to the "membership" conception, "[a] norm can be said to be valid in the sense that it belongs to (or is a member of) a legal system." (Bulygin 2015, 171) According to the "applicability" conception, "to say that a norm is valid ... is not to issue a prescription but to state the existence of a prescription according to which the norm in question must be applied to a case." Finally, according to the "bindingness" conception, "to say that a norm is valid is to prescribe that it ought to be obeyed and applied." (Bulygin 2015, 172)

5 Glennon may want to explore the route taken by Stephen Munzer, who argues that a norm may be valid, yet non-existent, and *vice versa*. This argument rests on Munzer's conception of norm "existence", which is tied, but not identical to norm "efficacy". What he implies under the first claim is the situation in which a norm is "enacted by a legally competent authority", and yet there is "a complete failure by officials to apply sanctions or to criticize." In a reverse situation, "a rule might in fact be supported by sanctions and/or criticism without having been created by a proper authority." (Munzer 1972, 42–43) For one, this claim can hardly be vindicated by any known legal practice, which normally treats norms that are applied by the courts and implemented by law enforcing institutions as "valid legal norms", even if they were not as such enshrined in some other source of law (e.g. statute). There are other problems with Munzer's proposal. (*see*, Jovanović 2019, 80–82)

ever, according to Hans Kelsen, this would not suffice. He says that a general legal norm loses its validity "if [it] cease[s] to be observed by and large, and when not observed, to be applied." (Kelsen 1991, 139) There are, thus, two cumulative requirements of a norm's inefficacy in order for it to cease to be valid. Therefore, "[a] norm would not be considered to have lost its efficacy if only the individuals whose behaviour is the condition for the coercive act decreed in the general sanction-decreeing norm were by and large not observing the implicit norm of behaviour, while the competent organs were at the same time by and large applying the general sanction-decreeing norm." (Burazin 2021, 100) Glennon disregards the second condition altogether. But even if he had wanted to employ it, he would have been forced to acknowledge that it is not met in the case of Article 2(4). Namely, the International Court of Justice (ICJ) has played a pivotal role in the development of the law on the use of force, either by giving judgments on the merits, or indirectly involving the use of force. (Christine 2013, 237)

If Article 2(4) is not stripped of its validity through *desuetudo*, has it been annulled in some other way?[6] When IL's rules specifying the conditions of validity for both treaty and customary rules are taken into account, one is again unable to conclude that Article 2(4) has ceased to exist. Namely, if the prohibition on the use of force is treated as a treaty rule, its demise may come as a result of either explicit or tacit agreement from all the contracting parties as to that effect. No evidence of some such agreement exists. Neither do all UN member states agree that this prohibition was at some "tipping point" supplanted by what Glennon calls "the freedom principle," which is functionally equivalent to no rule, nor can it be said that they all agreed to amend the Charter by way of their subsequent practice. However, even if it could somehow be shown that the treaty rule on the prohibition of the threat or use of force was modified or ceased to be valid, "[i]t would ... also have to be shown that the parallel customary prohibition on the use of force no longer operated." Bearing in mind that this is presumably a *jus cogens* norm, it could have been modified only by a norm of the same quality of peremptoriness. And yet, "[t]here is not the slightest evidence of this." (Crawford, Nicholson 2015, 113)

3. THE WAR IN UKRAINE AS AN INSTANCE OF PATHOLOGY OF IL

If the international legal regime on the prohibition of the use of force is a valid, yet often breached segment of IL, how can we account for such a fact? In her recent speech before The Hague Academy of International Law, German Federal Foreign

6 As noted by Kelsen, a norm is "a valid legal norm if a) it has been created in a way provided for by the legal order to which it belongs, and b) it has not been annulled . . . in a way provided for by that legal order." (Kelsen 1949, 120)

Minister, Annalena Baerbock, proceeded exactly from Franck's charge only to argue that this war was not a declaration of bankruptcy for international law. Namely, law violations cannot be eradicated. In her words, "[j]ust as we as states, as national governments, will not be able to prevent people from committing offences in our countries ... [so] we have to be honest and say quite clearly that we as the international community will not be able to prevent countries from violating the principles of international law." What matters, then, equally in municipal and international law, is "how we respond to a violation of rules and principles and how resolutely and united we do so together." (Baerbock 2023)

Hart might have suggested a plausible analytical framework for treating this problem of discrepancy between law's existence and its efficacy. When elucidating the foundations of a legal system, he says that "the assertion that a legal system exists is ... a Janus-faced statement looking both towards obedience by ordinary citizens and to the acceptance by officials of secondary rules as critical common standards of official behaviour." (Hart 2012, 117) Therefore, the "normal" case of a legal system's existence is "one where it is clear that the two sectors are congruent in their respective typical concerns with the law." At times, however, "the official sector may be detached from the private sector, in the sense that there is no longer general obedience to the rules which are valid according to the criteria of validity in use in the courts." Such a situation can be characterized as "the pathology of legal system". Hart mentions three sources of this pathology: revolution, enemy occupation, and "the simple breakdown of ordered legal control in the face of anarchy or banditry." (Hart 2012, 118)

When speaking about the pathology of legal system, Hart had in mind only the case of municipal law. So, the question is whether this analytical framework is really of any use at the international level. I will claim that it does, on account that Hart was unjustified in holding that international law did not possess the element of "systematicity", understood "as the union of primary and secondary rules" (Hart 2012, 110). Namely, Hart argued that "international law not only lacks the secondary rules of change and adjudication which provide for legislature and courts, but also a unifying rule of recognition specifying 'sources' of law and providing general criteria for the identification of its rules" (Hart 2012, 214) Waldron rightly qualifies this Hart's stance as "simply preposterous." (Waldron 2013, 222) If law's obtaining the "systemic" feature serves the goal of remedying the ills of uncertainty, static character of the rules, and inefficiency (Hart 2012, 92–93), then IL shall not be judged by merits of *form* present at the domestic level, but by whether it can perform those specific *functions*. (Payandeh 2010, 981) It transpires that it would be very difficult to claim that, even back in 1961, when *The Concept of Law* was published, international law did not know of the secondary rules of adjudication and change.[7] Similarly, if we take as the main role of

7 Waldron shows that both the constitution of the International Court of Justice (ICJ) as a court, as well as its operation, which, regardless of the absence of compulsory jurisdiction, is marked

"the rule of recognition" to specify criteria for the validity of primary rules, then it is possible to argue that Art. 38 of the ICJ Statute, which provides for a nonexhaustive list of sources of international law, serves that particular function. In addition, the practice of international adjudicative institutions contributes to the crystallization of the status of other potential sources, such as decisions of international organizations. (see Jovanović 2019, 88) Consequently, Hart is not justified in "making greater demands on international law than he makes on municipal law." (Waldron 2013, 220)

Despite possessing functional elements of a legal system, IL has obvious institutional specificities. There are at least three of them that are important for the present discussion: 1. States are not merely norm-subjects of international law, but in the absence of specialized international executive bodies, they regularly assume the role of officials, i.e., agents of the international legal order; 2. As noticed by Kelsen, the monopoly on force by the international community is highly decentralized, insofar as the principle of self-help, in the form of self-defense, still plays an important role; (Kelsen 1952, 13–16) and, 3. There is a lack of courts with compulsory jurisdiction. According to Kelsen, an obvious deficiency stemming from these three institutional features of IL is that in certain cases "there is no authority, different from and independent of the parties concerned, competent to ascertain in a concrete case that a delict has been committed." (Kelsen 1952, 15)

All those institutional complexities are revealed in the case of the war in Ukraine. In the absence of ICJ's compulsory jurisdiction, it is impossible to authoritatively establish that the use of force in Ukraine by the Russian Federation is a breach of Article 2(4). In one of the most comprehensive treatises on the subject-matter, Gray raises a further problem, that of interpretation. She says:

> A central question is whether it is possible to use state practice to arrive at an authoritative interpretation of the Charter or to supplement its brief provisions. ... Given that state practice includes the actual use of force, the justification offered by states for it, the response of other states inside and outside the UN and other organizations, and their public positions in debates on general resolutions of the General Assembly on the use of force, as well as an extensive treaty practice including friendship treaties, non-aggression pacts, border treaties, mutual defence agreements and regional arrangements, how are universal rules to be extracted? ... [Finally], [s]hould the Charter be seen as open to

by the general acceptance of its decisions, cannot be understood differently but in terms of secondary rules. (Waldron 2013, 216) Similarly, it is hardly deniable that the international order has gradually evolved secondary rules specifying the ways of changing the international law, which were subsequently codified in the 1969 VCLT. True, this change is different than the one in a modern municipal system – "it is plenary rather than representative and it works through a principle of voluntary accession rather than majority-decision" – but the crucial point is that it performs the same function. (Waldron 2013, 218)

> dynamic and changing interpretation on the basis of subsequent state practice or should the prohibition of the use of force in Article 2(4) rather be seen as having a fixed meaning, established in 1945 on the basis of the meaning of the words at that date in the light of the preparatory works and the aims of the founders? (Gray 2008, 10–11)

In its written objection to the ICJ's competence to entertain the Ukrainian claim regarding provisional measures, Russia, *inter alia*, argued that its "special military operation conducted ... in the territory of Ukraine is based on the United Nations Charter, its Article 51 and customary international law."[8] This is by no means a novel argument, knowing that, immediately after Bush's 2002 announcement of the US new doctrine of "preventive war", some scholars rushed into the conclusion that "[a] new legal norm of anticipatory offensive intervention has emerged as a valid doctrine."[9] Those more cautious pointed out from the outset that, in the context of Article 51, "[t]he very term 'prevention' is politically loaded and morally contradictory", insofar as "[i]t casts into question an old opposition, the difference and the symmetry between offensive and defensive war" (Colonomos 2013, 9), which is in itself questionable as well. (for a classical philosophical treatment of the subject-matter, *see*, Walzer 2006)

Hence, in relying on a hardly unknown interpretative route, Russia raised a legal claim that it is acting in compliance with the Chapter VII of the UN Charter, which exceptionally authorizes acts of "individual or collective self-defence". Despite the apparent legal dubiousness of the Russian claim,[10] in the absence of the ICJ's compulsory jurisdiction to decide on its (il)legality, one should be aware of Kelsen's warning that "it remains doubtful whether the coercive act performed as a reaction against an alleged delict is a sanction or a delict." (Kelsen 1952, 15) Apparently, Russia claims that its self– defensive military intervention ought to be construed as a sanctioning measure. Lurking behind this case is a more general theoretical problem of the legal nature of self-help. It is commonly defined as "legally permissible conduct that individuals undertake absent the compulsion of law and without the assistance of a government official in efforts to prevent or remedy

8 https://www.icj-cij.org/public/files/case-related/182/182–20220307-OTH-01-00-EN.pdf

9 "This type of intervention justifies action to literally attack and replace tyrannical regimes that foster international terrorism, endeavour to, or actually develop and maintain biological, chemical, or nuclear weapons." (Cohan 2003, 288)

10 To begin with, there is "substantial ambiguity about whether Russia is relying on preventive individual self-defence of Russia itself against Ukraine or on the collective self-defence of the two new supposedly independent states." (Milanovic 2022) The other interpretative and argumentative strategies were employed as well, so that it is possible to argue that "Russian legal justifications were couched ... in a confused blend of self-defence and humanitarian necessity." (Cavandoli, Wilson 2022, 387)

a legal wrong." Put differently, it is "a legally recognized alternative or substitute for a judicial remedy." (Brandon et. al. 1984, 850) Thus, in claiming to assume the role of both adjudicative and administering organ of the international legal order,[11] the self-defending state is, colloquially speaking, taking the law into its own hands. (Kelsen 1952, 23)[12]

Now, Article 51 requires that "[m]easures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council". And implicit in this formulation "is the notion that the reporting of measures would normally be a prelude to action of some sort by the Security Council that would bring to an end the need for the State, which has been the victim of an armed attack, to continue to exercise its right of self-defence." (Greig 1991, 366–367) In other words, self-defense is an exception to the default rule that in cases of threats to and breaches of peace, as well as acts of aggression, the Security Council has the primary authority of a quasi-adjudicative body.[13]

The obvious problem in the case of the war in Ukraine stems from the fact that the alleged self-defending military operation is taken by a permanent member of the UN Security Council, which from the beginning diminished the prospects of any decision by this body. Namely, Russia did inform the Security Council on

11 It is here important to emphasize that the term "sanction" is often used to denote both the rule addressed at some adjudicative body, and the material act of punishment. *Stricto sensu*, "sanction" should be used only for the former, and not for the letter, which is only an act of execution of the sanctioning rule. Thus, an international legal "sanction" is a rule prescribing a certain remedial "measure" as a consequence for the violation of the established duty, whereas the action by the authorized actor is merely a material act of administration of the stipulated sanctioning measure. (Jovanović 2019, 93)

12 Interestingly enough, while speaking about defensive war, Kelsen mentions "the right to self-defense" and states that it "appears to be neither a delict not a sanction." (Kelsen 1952, 30) In dismissing the idea that self-help amounts to taking the law into one's own hands, Siner seems to go along the lines of Kelsen's reasoning when arguing that self-help is "a privilege to act vis-à-vis another in a certain way when certain circumstances exist, and its exercise is always defeasible to a final determination by a court." (Siner 2017, 31) The problem with this reasoning is the following. Although the Charter also speaks of the "right to self-defense", one should keep in mind that, just as any form of self-help, this measure is a substitute for a judicial remedy. In its typical function, an adjudicative body is not there to grant rights, but to determine whether the delict has been committed and, if so, to decide to apply the requisite remedy, i.e. sanctioning rule. Therefore, for analytical purposes, self-defense can be broken down into three separate acts: first, the state determines that the other party has committed a wrongful act ("an armed attack"); second, it applies the sanctioning rule of a self-defense; third, it administers this sanctioning measure, by undertaking material, military actions. In the first two steps, the state assumes the role of adjudicative, whereas in the third step that of administering organ of the international legal order.

13 Speaking of "the quasi-judicial role of the Security Council", Schachter noticed that this body "was required to deal with disputes and, in the circumstances of Chapter VII, was granted the authority to make binding decisions." (Schachter 1964, 960)

invoking the right of self-defense,[14] but this move was met with the draft resolution submitted by Albania and the United States, and supported by eleven members, which qualified the military operation as a violation of Art. 2(4). Expectedly, Russia blocked its adoption by using veto.[15] Therefore, although not unparalleled,[16] the situation in which a state with the veto power assumes the role of the "official sector" (Hart) of the international order only to effectively annul the quasi-adjudicative competence of the Security Council brings the international legal regime on the use of force to the brink of anarchy, thereby seemingly vindicating Hart's diagnosis – that we are faced with pathology of the core regime of international law.

4. THE WAR IN UKRAINE AS AN INDICATION OF IL'S LACK OF AUTHORITY

Does the pathological state of affairs amount to IL's lack of authority in the given domain? Instead of providing a straightforward answer, let me make a couple of preliminary conceptual clarifications. As previously noted, validity is a special form of existence of all the norms, including legal ones. No norm can qualify for the status of 'legality' unless it satisfies established criteria of its validity specified in some recognized sources of law. As put by Samantha Besson and Jean d'Aspremont:

> The question of the sources of international law pertains to how international law is made or identified ... Not only is it important for practitioners to be able to identify valid international legal norms and hence the specific duties and standards of behaviour prescribed by international law, but the topic also has great theoretical significance. The sources help understand the nature of international law itself, i.e. the legality of international law. (Besson, d'Aspremont 2017, 2)

Although intricately related to validity, bindingness is nonetheless a different norm-quality. For any norm, including a legal one, to be binding, it has to generate a "sense of obligation," i.e., authoritativeness among norm-subjects. That is, rules are "binding if they are accepted and function as such." (Hart 2012, 25) In that respect, while all legal norms purport to be authoritative, not all of them succeed

14 S/2022/154

15 China, India and the United Arab Emirates abstained from voting.

16 A central part of Putin's speech preceding Russia's military intervention consists of 'tu quoque' type of justification, reminding of similar, legally questionable use of force by major Western powers, most notably the United States. English version is available at https://www.spectator.co.uk/article/full-text-putin-s-declaration-of-war-on-ukraine/

in being so. Suffice here to say (see in more detail in, Jovanović 2019, 131ff) that Raz's influential theory is fatally flawed in claiming that authoritativeness of a legal norm consists in its capacity to provide exclusionary reasons for action. That is, according to this claim, the preemptiveness of a legal norm implies that we are "not allowed to question its force," even though we are allowed to deliberate upon it, i.e. "to question its wisdom and advocate its reform." (Raz 2009, 141) As rightly noticed by Kenneth Ehrenberg, this is hardly "an accurate characterization of the demands law places upon us, although it may be an accurate characterization of our response to its demands when we accede to its authority." (Ehrenberg 2013, 52)

Due to the institutional complexity of IL, the authoritativeness of international legal rules has its further specificities. As put by Cąli, international legal authority "makes a different claim in degree of influence over the conduct of state officials. The binding/non-binding understanding does not encompass this variety adequately." (Cąli 2015, 63) In another words, bindingness can be *gradated*, because normativity can be *gradated*. When primarily understood as the capacity to give rise to obligations, legal normativity can clearly be endowed with relative weight.[17] If all norms, including legal ones, are taken as reasons for action, then norm-subjects are the ones who ultimately bestow upon different norms different normative weight. At times – actually, in most legal orders, most of the time – norm-subjects "internalize"[18] legal norms and treat them as if they are preemptive reasons for action,[19] just as sometimes they disregard them altogether or give preference to the rules of other normative orders (see in more detail in, Jovanović 2019, 150ff). Inquiries into the sources of authoritativeness, that is, into reasons why norm-subjects, including states, abide by the rules, belong more to the province of sociology or international relations than to legal philosophy.[20]

17 This understanding of relative normativity is different than the two suggested by Goldmann. He associates the first type, "intellectual relativity", with the fact that "[s]ome rules of international law might be considered as more fundamental to the ability of international law to achieve justice, and therefore as hierarchically superior." The second type, "phenomenological relativity" is related to "the question of the validity criteria of international law which distinguish it from other normative orders, and in particular whether all rules of international law need to meet the identical validity criteria, or whether there are different types of international law – binding and nonbinding ones – that exist in parallel." (Goldmann 2019, 740–741)

18 "Patterns of internalization across numerous decision-makers may of course develop, or be inculcated by education, or be enforced by sanctions. But the way in which and the extent to which, if at all, rules become a part of a decisional process is ultimately determined by the decision-maker alone." (Schauer 1991, 128)

19 In Ehrenberg's words, while "the law does not *claim* to preempt our reasons ... we allow it do so when we accept its authority." (Ehrenberg 2013, 52)

20 For example, working at the intersection of international relations theory and international law, Guzman has offered a "reputational" theory of states' compliance. (Guzman 2008) Yet, all the analytical, clarificatory work is to be done by legal philosophy.

Authoritativeness is intricately connected to the overall efficacy of a legal system. For, by and large, an ineffective legal system cannot be meaningfully said to be authoritative. However, at this point one should be aware of the two levels of legal efficacy that I only briefly touched upon. 'Primary efficacy' refers to the rule-observance by norm-subjects (citizens, states), while 'secondary efficacy' refers to the application of sanctioning rules by law-applying bodies (courts, tribunals).[21] If a single rule is, in terms of primary efficacy, largely ineffective, this is an indicator of its inability to generate a sense of obligation among norm-subjects. There are further signs that a legal rule lacks authority. Let us not forget Hart's important insight about legal rules, that their "internal aspect ... manifest[s] in their use as guiding and critical standards of conduct" for norm-subjects (Hart 2012, 155). Thus, if hardly anyone refers to a certain rule as a critical standard of conduct, then it becomes gradually meaningless to speculate about its authoritativeness.

When the current war in Ukraine is filtered through the aforementioned analysis, one cannot, in a straightforward manner, conclude that the international legal regime on the use of force, emanated in Article 2(4), is fatally devoid of its authority. *First*, this regime still seems to be used as a critical standard of conduct. That is, one can hardly point to "a complete absence of justificatory rhetoric" of the relevant kind.[22] As observed by Susan Marks:

> Behind Putin's specific arguments is the evident and rather striking fact that he did not brush aside international law. He *used* it. Even if the argument he puts forward won't persuade many people, it is an argument framed in recognisable international legal terms. He invokes established international legal concepts, categories and norms, and stakes out a position on familiar international legal issues. (Marks 2002)

Second, Russia's refusal to abide by the ICJ's provisional measures on ceasing all military operations in Ukraine is also based on legal grounds that the Court had no jurisdiction in the first place. However, unlike with the offered legal justification

21 "Since the occasions for legal coercion are mainly cases where the primary function of the law in guiding the conduct of its subjects has broken down, legal coercion, though of course an important matter, is a secondary function." (Hart 2012, 249) When a legal system is mainly only secondary effective, then this might be a sign that the respective society is on the verge of revolution.

22 For Glennon, besides the "overwhelming inconsistent conduct", the absence of this rhetoric is an important indicator that the tipping point has been reached and that the rule ceased to exist. (Glennon 2005, 971, n. 156) In that respect, he refers to a number of statements by the US officials on the eve of 2003 military intervention in Iraq, which contained no such justificatory rhetoric. In addition, "[t]he United States Congress authorized the use of force against Iraq by enacting legislation that contained no condition that that use first be approved by the U.N. Security Council." (Glennon 2005, 979)

of its military intervention, which is almost universally rejected as meritless, Russia's arguments regarding ICJ's lack of jurisdiction are taken with far more respect among international scholars. Take Alexander Orakhelashvili's bold criticism of the ICJ's stance:

> The Court has simply created a bad precedent of manipulative reasoning through which it has allowed itself to be implicated in the political process, and did so for no obvious or rational purpose. The Court may have been motivated by the fact that its provisional measures are binding on litigating States, and is thus likely to have acted out of the motive to enhance the pressure of the international legal system on Russia to induce it to do what it has to do anyway. However, there is no such thing as binding force in the air. No decision is binding on anyone unless the decision-maker has acted in compliance with statutory limits on its own authority and has applied the law properly. (Orakhelashvili 2022)

Finally, in the absence of a compulsory, state-like mechanism of secondary efficacy at the international level, one should not disregard altogether the reaction of other institutional actors, most notably the UN General Assembly, which adopted a resolution deploring the Russian' "aggression" against Ukraine, with 141 votes in favor, 5 against and 35 abstentions (A/RES/ES-11/2).[23] Furthermore, the Pre-Trial Chamber of the International Criminal Court decided to issue the warrant for Putin's arrest for the alleged responsibility for war crimes.[24] Finally, Russia has been excluded from a number of international organizations, including the Council of Europe, and it was subjected to a system of unprecedented economic sanctions.[25] In words of Oona Hathaway and Scott Shapiro, "[t]he continued response to the continued violation makes clear that the legal principles involved are ones that the world stands behind. A forceful response, therefore, would have the effect of *reaf-*

23 The General Assembly met under what is known as the Uniting for Peace resolution, which allows special meetings of the entire membership to be called when the U.N. Security Council is deadlocked on an issue. It has been invoked fewer than a dozen times since it was adopted in 1950, and the last time in 1982.

24 On 17 March 2023, Pre-Trial Chamber II of the International Criminal Court issued warrants of arrest for two individuals: Vladimir Putin and Maria Lvova-Belova. Putin is allegedly responsible for the war crime of unlawful deportation of population (children) and that of unlawful transfer of population (children) from occupied areas of Ukraine to the Russian Federation (under articles 8(2)(a)(vii) and 8(2)(b)(viii) of the Rome Statute). (see, https://www.icc-cpi.int/news/situation-ukraine-icc-judges-issue-arrest-warrants-against-vladimir-vladimirovich-putin-and) https://www.icc-cpi.int/news/situation-ukraine-icc-judges-issue-arrest-warrants-against-vladimir-vladimirovich-putin-and

25 This has all led Hathaway to conclude "that the response to an illegal war launched by a nuclear-armed state with a veto on the Security Council has been far more effective than anyone had reason to hope at the outset." (Hathaway 2023)

firming the legal prohibition" (Hathaway, Shapiro 2022), thereby also vindicating at least partial authority of the given international legal regime.

5. A CONCLUDING WORD

In the face of immense human loss, suffering and continuous massive destruction, any attempt at a sophisticated legal analysis may look like a cunning sophistry. However, it is exactly in exceptional circumstances that a sober analysis is mostly needed to help us grasp the legal aspects of these horrible events. The preceding pages were an attempt of that sort. The undertaken analysis has demonstrated that the claim that the war in Ukraine proves that IL on the use of force no longer exists is unwarranted. It also revealed that it is possible to argue that, despite its indisputable devastating effects, the war in Ukraine is most adequately perceived as an instance of "the pathology of legal system", and one that partially but not totally undermines the authority of IL in the given domain.

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