The Context of International Legal Arguments. ‘Positivist’ International Law Scholar August von Bulmerincq (1822-1890) and His Concept of Politics

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1. Introduction

This article is part of a larger research project with the working title “The Sociology of International Legal Arguments” that I have carried out as Hauser Research Scholar at New York University School of Law. The main idea of the research project is to situate the international legal arguments of the representatives of an international law chair, that of my own university in Tartu (historically also Dorpat and Iur’ev), in their socio-political context. The timeframe of the activity of Tartu’s five international law professors – August von Bulmerincq, Carl Bergbohm, Vladimir Hrabar, Ants Piip and Abner Uustal – covers the period since the inception of modern international law by the “men of 1873” (of whom Bulmerincq was one) roughly until the end of the Cold War (1855-1985).

The hope and ambition underlying the project is that turning one’s attention to the sociological question “what is it that academic international lawyers are doing?” instead of restricting oneself to the study of the archetypical juridical question “what is the law?” bears the potential of providing new insights about the practice of international law. The central idea is that context is crucial for understanding the practice of international law, i.e. international legal arguments of the representatives of professionals in the ‘field’ of international law.  

We are accustomed to the fact that in legal disputes lawyers present partisan arguments in favour of their clients. In fact, this is the bread of the practicing lawyers and jurisconsults. From legal scholars, however, we expect objectivity, neutrality, being scientific. The question is to what extent this is possible and realistic. What are the criteria for ‘objective’ international law scholarship? Take for instance the famous debate between Hugo Grotius (1583-1645) and John Selden (1584-1654) about the

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freedom of navigation on the high seas in which the Dutchman Grotius defended the interests of Dutch East India Company and the Englishman Selden the position of the British Crown. Was their work scholarship or advocacy or both? Or here is another example the first original work on international law in Russia was written in 1717 by Petr P. Shafirov (1669-1739), “A Discourse Concerning the Just Causes of the War between Russia and Sweden”. Already the title indicated the presumption that Tsar Peter had just causes to go to the Great Nordic War (1700-1721) against Sweden; the mere task was to present them. Peter the Great in person took part in laying out the arguments of the book.³

International law has emerged from the practical necessity, not or not only from needs for philosophical speculation. Therefore, it is insufficient to explore claims, positions and arguments presented within the framework of international law merely as part of ‘pure’ doctrinal history. I have to emphasize here that in legal scholarship, this insight is not as self-evident as it may seem. Legal scholarship and international lawyers typically claim their authority from the principles of neutrality, universality and objectivity. The central strategy of the positivist legal tradition has been to claim the separation of law from politics. In playing down the political, socioeconomic, historical context of legal arguments and doctrines, the mainstream legal tradition relies on the absolutist programme. It is also quick to point out dangers of relativization: it responds to those who question law’s objectivity that what is perhaps meant well as programme of demystification and search for truth, may end up damaging law as a central achievement of civilization, destroying what has been built earlier, “throwing the baby out with the bathing water”. But the reality is that nowadays international law is anyway attacked as irrelevant (or harmless) by powerful international actors and criticized as co-responsible for injustices by marginalized international actors. International legal scholarship cannot ignore those critiques; it has no alternative but facing the mirror with good faith. Perhaps there is some encouragement in the words of the French sociologist Pierre Bourdieu: “The analysis of mental structures is an instrument of liberation: thanks to the instruments of sociology, we can realize one of the eternal ambitions of philosophy – discovering cognitive structures (…) and at the same time uncovering some of the best-concealed limits of thought. (…) I think historicism must be pushed to its limit, by a sort of radical doubt, to see what can really be saved.”⁴

³ William E. Butler, “On the Origins of International Legal Science in Russia: The Role of P. P. Shafirov”, 4 Journal of the History of International Law 2002, pp. 1-41 at 31. The book is also interesting in the context of the present study since it laid out Russian claims over the Baltic provinces. Shafirov claimed that historically, “the greater part of the Provinces of Livonia and Estonia were under the jurisdiction and protection of the Russian crown”. This was in his view, inter alia, evidenced by the fact that the “city of Dorpat” was, “according to the testimony of credible Russian chronicles,” built in the year 1030 by a Russian grand prince Iuri and named after him. The city of Reval (Tallinn) likewise was built by a Russian grand prince “who lived in ancient times”. Cited from Butler, p. 7.