“All the World’s a Stage”

The Scripts of International Law

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It is not easy to respond to this article. The argument is very rich, moving from Hobbes to formalism, realism, constructivism, critical studies and the new-New-Haven school. It is theoretically informed, but at the end of the day down-to-earth. Instead of approaching law with a set of a-priories, Hakimi argues, it is necessary to do justice to the social practices in which law is formed and shaped. When I started thinking about my response, I was tempted to do justice to the richness of the arguments. However, I resisted this temptation for a very practical reason. In a short post like this one, my argument would become a bit like the law in Hakimi’s metaphor: a bramble bush reaching out in all directions without a clear authorial voice to keep the story together. A nice metaphor for the life of law, but a bad model for a blog post. Therefore, I decided to do something that Hakimi hopefully pardons: I made a sovereigntist move, singled out one core point from her article and wove my arguments around it.

The core point of my post appears in one of the three conditions held by what Hakimi calls the “sovereigntist theory”: the condition for law’s existence. I think this is the most important condition discussed by Hakimi, as the other two (efficacy and justifiability) logically follow from it. If one understands law’s existence differently, one holds different opinions on what it means for law to be efficacious and justifiable. According to Hakimi, sovereigntists argue that “Law can exist […]only insofar as a source with authority settles what is to be done in formally binding commands for its subjects.” (49)

Law as a Script

While Hakimi treats this condition as if it contains one single criterion for the existence of law, I argue that there are actually two criteria here. The first is that law has to follow from “a source with authority”. This criterion goes back to the ambition to separate law from non-law: whatever follows from the sources counts as law, what does not follow from these sources does not count as law. This part of the sovereigntist theory is discussed most extensively in the article, and has spurred debates about the pros and cons of giving up a clear demarcation line between law and non-law. I will not revisit these debates here. Instead, I will focus on the second criterion mentioned above: that law consists of formally binding commands. This point, I argue, is analytically distinct from the question whether law flows from formal sources or is rooted in a more fluid social reality. Even if one sticks to a formal doctrine of sources, one could argue that it contains more than only binding norms of conduct. In other words: the question regarding the legal validity of linguistic utterances should be separated from the question what these utterances do. They could formally ‘bind’, but also do other things, such as express identities, emotions, make assertions etc.[1] My argument is that this richness of legal texts should not be overlooked as it makes it possible for law to function at all. Even if it were possible to have a system that springs from one or a few sources, it would not and could not be a system that only consists of binding norms.

So the point is not only that rules are open and their content cannot be settled once and for all. The

[1] One of the first to categorically separate the questions of validity and bindingness is Dick Ruiter, Institutional Legal Facts: Legal Powers and their Effects, Springer (1993).

point is more radical: the law is not and cannot be only about "binding" norms and rules that make it possible to create and change these binding norms (Hart's secondary rules). Rather, it is a script, or rather: a series of nested scripts, that turns people into actors, into *personae*, with many of the elements that one would normally find in a script. Of course, it is not a script in the traditional sense, which spells out the lines that people should speak on stage. It is a script that allows and requires a lot of improvisation, the addition of new elements, etc. And yet, it does present us with a reality that would not exist without the script. It steers the kind of stories we tell in order to make sense of the script. Moreover, it is a script that is reinforced by all kinds of non-verbal elements, such as rituals ("all rise…"), paratextual elements, such as the title and make-up of legal documents (often reproduced in films and theatre performances, as a signal of how powerful these symbols are).

Some Examples

Let me give a concrete example. Elsewhere, Sarah Nouwen and I have discussed what we call the "deep script" of international criminal law.[2] This deep script does not spell out what actors do, but still offers them roles, stock characters, rituals, stock story-lines, typical places to perform. This is obvious in the role that people assume as defence lawyer, prosecution etc. However, it goes deeper than that. The script also affects, for example, the stories that are told about the defendant. International crimes require a combination of collective violence and individual responsibility. As Liana Minkova argues, this pre-structures the stories told by defence counsel about their clients.[3] In the Ongwen case, for example, the Defence emphasized how the defendant was a typical LRA member, just as vulnerable to manipulation and duress as anyone else in that organization. Yet, it also told stories that emphasised his individuality, how he was different from other LRA commanders, more intelligent and caring. Elsewhere, Sofia Stolk has shown how prosecutors in opening statements typically present defendants as "sophisticated beasts": more controlled and manipulative than others and yet less able to control their animalistic drives. In this way, they appeal to the in- or a-human nature of the crimes, while still maintaining that it is a human individual that should be held accountable.[4]

In other words: law pre-structures: who acts, who talks, about whom and how.

Now the script metaphor may be obvious in a court setting with robes, a theatrical space, performances and ritualistic moves. However, I think it is also helpful outside such settings. Take for example Security Council Resolutions. Discussions on such resolutions tend to focus on the question whether they are taken under Chapter VII and whether they are binding or not. However, such readings completely ignore the actual text as it appears before one's eyes. The text does not consist of a series of commands, randomly thrown into the world by a sovereign author. Rather, they contain stories about the Security Council itself.[5] The Council narrates its own past, by recalling earlier Resolutions, expresses all kinds of emotions, recommends and decides and makes a promise to remain seized of the matter. The Council, in other words, acts as a character that secures its own identity through recollections of its past and future, and presents a story that is much richer than formalists or realists want us to believe. The text is filled with paratextual elements, such as the title, the date, the logo, the preamble. Without such elements, it would virtually be impossible to make sense of the Resolution. As the literary critic Gerard Genette said in relation to literary works: "To indicate what is at stake, we can ask one simple question as an example: limited to the text

[2] S.M.H. Nouwen and W.G. Werner, `Scripted Stories about Dominic Ongwen', in: S.M.H. Nouwen and W.G. Werner, *The Deep Script of International Criminal Law: Stories about Dominic Ongwen* (Oxford University Press, 2027).

[3] Liana Minkova, Who Is Dominic Ongwen? The Deep Script of International Criminal Law's Defence Narrative, in Nouwen & Werner (eds, 2027).

[4] Sofia Stolk, The Opening Statement of the Prosecution in International Criminal Trials; A Solemn Tale of Horror, Routledge (2021).

[5] For an elaborate argument see: Wouter Werner, Security Council Resolutions as autobiographical texts , *London Review of International Law*, 13 (1), 77–92.

alone and without a guiding set of directions, how would we read Joyce's Ulysses if it were not entitled Ulysses?"[6] To paraphrase Genette: How would we read Security Council Resolutions without a guiding set of directions, if they were not entitled "Security Council Resolutions" and not formatted and narrated in the traditional sense?

A third example is the legal personality of States. The fact that the term "personality" is derived from theatre already suggests that it signifies more than a set of rights, duties and competences. The state is a "person" who not only seeks physical security, but also a relatively stable identity.[7] Principles such as sovereignty present the person of the State as one among other, equal States. Principles such as *pacta sunt servanda* help States to secure their identities: by making and keeping a promise, the State signifies that it remains the same person across time.[8] International law, in other words, is more than a set of rules that are "binding" upon already existing agents. It offers a script that creates characters, assigns roles and instructions on how to act.

Back to Hakimi

This brings me to what I consider to be the main argument of Hakimi in her article, in the part where she diagnoses what the problem is with what she calls the "global crisis in authority" :

> *"The problem is more serious than the mere paucity of legal controls, because the essential function of law, the thing that it must do before it does anything else, is constitutive. It must draw people into using it" (94).*

This use can take many forms, and goes way beyond "control", the thing that formalists and realists cherish so much. In this context, the current crisis of authority is not only that law fails to exercise authority over people, it is that powerful agents refuse to be authors of their lives in terms of law. Especially the way in which the Trump administration operates is a challenge that runs deeper than illegality. It refuses to act as the *persona* in the script of law and starts to ridicule, debunk or ignore that very script. Sure, sometimes challenges to international law should be welcomed, as TWAIL and critical scholars have shown. Too often, the script of international law has favored those in positions of power and marginalized others. Sometimes other scripts work more emancipatory, as they allow marginalized voices and forgotten stories to be heard. However, the scripts offered by the Trump administration do away exactly with respect for a plurality of scripts. "I don't need international law", Trump said. What limits my power is "My own morality. My own mind. It's the only thing that can stop me."[9] This is a script too, which creates *persona*, and which is held up through all kinds of rituals, props and performances. It is a script that denies the *persona* of the State as a character that inhabits a world to be equally shared with other communities. Hakimi rightly warns against the consequences of such attitudes, as they move towards coercive control instead of empowerment. What I take home from her article most of all, is to resist the temptation to counter the turn to coercive control with calls for more legal control. The lesson for me is that to search for solutions may not be the solution. Instead, I feel encouraged to use my imagination, and to perform scripts that encourage others to do the same. The authority of law is not something settled, but exists as long as it fosters creative authorship.

[6] Genette G 1997 Paratext. Thresholds of Interpretation Cambridge University Press Cambridge (originally published as Seuils 1987 Trans Lewin J E), 2.

[7] See for example: Jennifer Mitzen, (2006). Ontological security in world politics: State identity and the security dilemma. *European Journal of International Relations, 12*(3), 341-370.

[8] On the importance of keeping promises as a way to secure one's identity see Paul Ricoeur (1992), *Oneself as Another*, The University of Chicago Press.

[9] Trump insists he doesn't need international law and his power is only limited by his own morality | The Independent

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