E.H. Carr, Hans J. Morgenthau, and International Law

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CARMEN CHAS, FEB 27 2024

Though the thought of E.H. Carr and Hans J. Morgenthau concerning international law may seem to be of little worth, this is not the case. Neither relegates international law to a secondary, merely epiphenomenal position, nor do they dismiss it out of hand. On the contrary, their thought and works transcend the traditional caricature of realism. Though they highlight the problems of international law, both address it as a multifaceted, real aspect of the international community. Carr's international thought exceeds easy classification (Howe 1994, 277). He had an immense range and appetite for research and was amongst the first to write an advanced critical attack on modernity's pretension to political understanding (Cox 1999, 645; Molloy 2003a, 280). Morgenthau's works are also more sophisticated than the "crude power politics privileged by standard interpretations of his thought" (Jütersonke 2010, viii-ix). Moreover, Carr's and Morgenthau's international thought transcends mere antiquarian interest: they actively question the structure of the international community and the problems it faces. Both thinkers offer complex interrogations of the relationship between power and politics, and of the pathologies of existing international law (Scheuerman 2009, 11-12; Williams 2004, 633-634). Like other classical realists, both Carr and Morgenthau engaged extensively with ideas of global reform. Their works, which highlight many of the problems present in contemporary international law, allow us to think about social and political change beyond the nation-state (Scheuerman 2010, 247).

This article will examine the oft-overlooked place of international law in the thought of Carr and Morgenthau, contrasting both of their explorations of the nature and problems of international law vis-à-vis each other. In the following, I will first examine their respective analyses of the social context of international law and how this social context affects it. Following this, I will delve into their different critiques of the problems international treaties face. Finally, this article will explore the influence of nationalism and national interests on international law and highlight the significance and importance of Carr's and Morgenthau's thought on international law today.

The social context of international law

The question of the limitations of international law takes a central role in Carr's thought. Carr confronts the idea of law and international law as something independent and superior to politics. He critiques the assumption that by establishing the rule of law and maintaining international law and order we "transfer our differences from the turbulent political atmosphere of self-interest to the purer, serener air of impartial justice" (Carr 2016, 159). This assumption is fundamentally flawed: it assumes international law and domestic law are at the same state of development. International law lacks three key institutions which are essential parts of developed systems of domestic law: an executive, legislature, and judicature. In the international realm, there are neither agents to enforce law nor courts that can give decisions that are recognised as binding by all members of the international community; custom is the only source of law, rather than direct legislation. This results in international law being a primitive type of law—the law of an undeveloped rather than a fully integrated community (Carr 2016, 159-160).

Morgenthau also deeply engages with the question of the nature of international law. All legal systems must be able to answer the following four questions to be effective: First, who holds legal power over a given object? Second, in what way can this legal power be changed? Third, how will a dispute concerning this object be resolved? Finally, in what way will the person holding this legal power be protected in the exercise of it? (Morgenthau 1933, 7). It is only by answering these four questions that a legal system can achieve the task which falls to any legal system: ensuring

justice and peace (Morgenthau 1933, 7-8). However, international law, unlike domestic law, can only answer the first of these questions. Its laws are developed in accordance with the objective requirements of the international social reality rather than by conscious and rational legislative processes (Morgenthau 1934, 139-140). This profoundly affects how it operates, subjecting it to its social context.

The differences between domestic law and international law are rooted in the social context in which they both operate. Though in domestic law legal rules—whether economic, social, or political—are at least temporarily exempt from conflicts of interest, this is not the case in international law (Morgenthau 1953, 143). Areas of convergence between legal rules and social function in international law are always precarious because they exist by virtue of a permanently unstable consensus among interested states (Morgenthau 1953, 143-144). What few rules of international law do not owe their existence to the consent of the members of the international law are either the logical precondition for the existence of any legal system or the existence of a state system—such as the rules of treaty interpretation or those delimiting the jurisdiction of individual states (Morgenthau 1948, 343-344). The fact that international law is a decentralised legal order therefore impacts it immensely. Though domestic legal systems operate within a social context which gives them vitality, without it legal rules remain a dead letter (Morgenthau 1956, 6). International legal rules, however, are either the result of attempts to gloss over existing dissension through agreements on meaningless verbal formulae that either preserve the status quo or create procedural devices which may be used to resolve conflicts through compromise (Morgenthau 1953, 143-144). They only bind states which have consented to them, and, even then, only due to how they "are so vague and ambiguous and so qualified by conditions and reservations" so as to allow states a great degree of freedom of action (Morgenthau 1948, 343).

Carr and Morgenthau, then, both view international law as a system of law which is more primitive than domestic law by virtue of the social context in which it exists. They both emphasise the differences between these two types of legal systems. Politics and law, for Carr, are indissolubly intertwined due to how they govern the relations of people in society. This makes law, like politics, "a meeting place for ethics and power" (Carr 2016, 165). The same is true of international law, which can have no existence except in so far as there is an international community which recognises it as binding. It is, as such, a "function of the political community of nations", and its defects are born from its primitive character and nature rather than technical defects (Carr 2016, 165). Morgenthau also highlights these concerns. Though domestic law and international law are manifestations of the struggle for power they differ due to the different moral, political, and social conditions prevailing in each (Morgenthau 1978, 42). The decentralised structure of the international community inevitably results in the decentralised structure of international law. It is because of this that international law owes its existence to the interests of states and the distribution of power between them, which, in turn, means that "[w]here there is neither community of interests nor balance of power, there is no international law" (Morgenthau 1978, 281-282).

International treaties: Key questions and problems

The question of international law does not end here for Morgenthau and Carr: They also explore the different problems related to international treaties in differing, yet similar ways which highlight their realist analysis and critique of international law. Morgenthau critiques the idea that the normative provision of *pacta sunt servanda* can serve as the fundamental law of international law, as it would require the head of the international community to be the guarantor of the international legal order and the bearer of its validity. The international legal system, however, is decentralised by nature: its validity rests on the fundamental norm of state law (Morgenthau 1934, 217-218). This makes it impossible "to 'find' or 'invent' some nice international order, acceptable to all states", as it would presuppose "a harmonizing of all interests influencing international relations" (Amstrup 1978, 165-166).

The fact that the international legal system is decentralised also plays a major role in the working of international treaties. Only two forces can create international law: necessity and mutual consent. The bulk of the rules of international law owe their existence to the mutual consent of the individual subjects of international law, states, which are bound only by those rules to which they have consented (Morgenthau 1978, 283). International law operates in the same conditions that would exist within states if legislative functions "were to be performed by the individual citizens themselves in the form of private contracts, instead of by legislatures and courts" (Morgenthau 1978, 283). The inevitable result of this system of legislation is a lack of legal regulation whenever there is no

unanimous consent and uncertainty about what the law is in a particular case (Morgenthau 1978, 283-284).

Carr's analysis of international treaties leads him to identify key problems which, though related, differ from those identified by Morgenthau. First amongst these is the political background in which international treaties originate. Every system of law presupposes a political decision, whether explicit or implied, and behind all law there lies a necessary political background (Carr 2016, 166). This affects international treaties, as they cannot be automatically or unconditionally applied and are affected by the fallacy of presupposing that the interests of all states are the same (Carr 2016, 56). This is not the case—particularly when concerning international law. The supremacy of privileged groups within a community can be so overwhelming so as to give rise to a sense that their interests are those of the community (Carr 2016, 75). Satisfied states "generally assume that to maintain the status quo is the best way to maintain peace" (Carr 1939, 99). This affects how international treaties are interpreted and applied, making the question of their validity a "weapon used by the ruling nations to maintain their supremacy" (Carr 2016, 174). Treaty compliance—which Carr explores through his critique of *pacta sunt servanda* in interwar diplomacy—also presents a key issue. It is difficult to discover from the words used to justify the nonfulfillment of treaty obligations whether said alleged justification is based on legal or moral grounds. This makes the dilemma of international law that of ecclesiastical dogma: Elastic interpretation increases the number of faithful, whilst rigid interpretations, though theoretically desirable, provoke secessions from the church (Carr 2016, 171).

Carr also addresses the static nature of treaties. It is this static nature that makes applying them consistently after they have come into effect considerably difficult. "Words", he writes, "are often misleading in politics because their meanings change" (Carr 1939, 3). Much like any social order, treaties require a large measure of standardisation and abstraction: there cannot be a different rule for every member of the community. This presents a problem when attempting to apply treaties to states whose size, power, and political, economic, and cultural development vary considerably (Carr 1939, 29-30). Carr explores this idea throughout his analysis of the League of Nation's attempts to outlaw and regulate war, which provided a "discreet 'formulae' to plaster over the real cracks, thereby concealing both the seriousness and the character of the issues at stake" (Carr 1986, 22). Laws and political forms grow out of the conditions they are required to meet and changes in their political context can render them obsolete (Carr 1942, 153). This makes the consistent application of treaties through time challenging, particularly in areas close to national interests. Peace and security, therefore, cannot be properly made the object of policy. Quests for security inevitably become instruments of reaction (Carr 1942, xxii). International peace, meanwhile, cannot be achieved by "the signing of covenants 'outlawing' war any more than revolutions are prevented by making them illegal", as the only "stability attainable in human affairs is the stability of the spinning-top or the bicycle" (Carr 1942, xxiii).

Carr's theory of history and his work on historiography also allow further insight into these ideas. Carr highlights the "underlying logic and progression in the cooperation and conflict of the past" (Howe 1994, 297) and shows a keen awareness of the "inherently limited and historically relative nature of human knowledge" (Babik 2013, 499). History is a constantly moving process, with historians moving within it (Carr 1990, 133). This same fact also applies to international law. International legal treaties and international law have their starting point in history, and need to be understood as products of the historical context in which they were created (Carr 1951, 1). Like all systems, they reflect the values of those who create them (Carr 1951, 11-12). They have a historical bias which affects the shape they take and reflects the interests of dominant states. This impacts their ability to establish rules based on abstract principles.

Though the problems Morgenthau and Carr both allude to in their analyses of international treaties are different, they converge on the question of nationalism, national interests, and their effect on international law. It is to this point that we will now turn.

The question of nationalism

The decentralised nature of the international community and reliance on national interests, as we have seen in Carr's and Morgenthau's analyses, significantly impacts the role and functions of international law. It makes international law a primitive system of law where the enforcement of the law is left "to the vicissitudes of the distribution of power between the violator of the law and the victim of the violation" (Morgenthau 1978, 298). Strong states find it easy to

both violate the law and enforce it, whilst small states must rely on powerful friends for the protection of their rights (Morgenthau 1978, 298). Legalistic, positivist approaches to the problems of international law inevitably lead to an optimistic approach to the problems of international politics. These approaches take the stipulations of rights and duties in international legal documents at face value and delimit the subject of their research to legal matters, minimising the importance of political factors (Morgenthau 1940, 261; Morgenthau 1946, 6).

This problem finds its root in the role nationalism plays in the international community. For Carr, sovereign states are "legal conventions between which no kind of equality exists or can reasonably be assumed" (Carr 1948, 72). Not only are they quantitatively unequal: they are also qualitatively incomparable (Carr 1948, 72-73). States are unable to be great powers unless they have strength—whether economic or military—and have a foreign policy of their own (Carr 1946, 585). The deterioration of international relations in the interwar period despite the machinery of the League of Nations was therefore not caused by an unhappy accident or the malevolence of a particular people or nation, but due to nationalism (Carr 2021, 26-27). The observance of international legal obligations depends "on the will of the nation, under whatever form of government, to honour it" (Carr 2021, 27). States, however, will not observe international treaties or international law when they become burdensome or dangerous to the welfare or security of their nation. Any international order built on the obligations assumed by national governments is therefore "an affair of lath and plaster and will crumble into dust as soon as pressure is placed upon it" (Carr 2021, 29). International law is, in other words, incompatible with modern states.

Carr's critique of nationalism warns us that we must beware of the siren calls of nationalism or think that we can answer the challenges facing the international community through the nation-state (Cox 2021, liv). It is the very lack of equality between states and the absence of a higher authority that makes it impossible for international law to achieve international morality and turns it, instead, into a second-order instrument of power (Molloy 2013, 264). International law is affected by this, and becomes subjected to the clash between conservative states satisfied with the status quo and revolutionary states seeking to overthrow it (Carr 1942, xv). This impacts how international law is interpreted and applied. Great Britain's interpretation of the Covenant of the League of Nations, for example, differed markedly from France's due to their different national interests and security needs (Carr 1990, 42-50; Carr 1939, 105). Morgenthau mirrors Carr's analysis on this point. International law can serve as an ideology for the policy of the status quo, since it defines a certain distribution of power, and cannot easily allow for changes in the general distribution of power (Morgenthau 1978, 96-97).

The significance of Carr's and Morgenthau's analyses of nationalism and national interests and their effect on international law cannot be overestimated. No durable peace can be made unless those who have the power also have "the will in the last resort, after having tried all methods of persuasion, to take and enforce with vigour and impartiality the decisions which they think right" (Carr 1942, 275). We cannot focus wholly and completely on the rules of international law or the text of international treaties alone. Power cannot be ignored, as all political regimes justify themselves in philosophic and moral terms. They cannot govern by brute force alone (Morgenthau 1969, 32-33). All actors on the political scene play an act by concealing the true nature of their political actions, and legal principles can be both the ultimate goals of political action or the pretexts and false fronts behind which power is concealed (Morgenthau 1978, 93-94).

Conclusion

What do Morgenthau's and Carr's similar, yet differing analyses show and have to say about international law? More importantly, how is their thought relevant to questions of international law? Both point at and warn about the different problems international law faces. All legal orders, not just international law, possess static tendencies that arise from the nature of law and the principle of legal certainty. These static tendencies require, above all, the delimitation and preservation of spheres of power (Morgenthau 1933, 66). Legal orders, however, cannot maintain themselves if they push these principles to their ultimate consequences. They also need to account for the sociological background of the law (Morgenthau 1933, 67-69). Laws cannot be divorced from politics, power, and morality. Any institution which purports to make authoritative moral pronouncements exists in time and space—they cannot free themselves from them. Their pronouncements are inevitably coloured by the conditions in which they exist, by their ambitions, and by their interests (Carr 1948, 66). The morality of the dominant group is always "distorted by the perspective of its own

interest, and it identifies the morality which protects that interest with absolute and universal good" (Carr 1948, 67).

The problems Carr and Morgenthau point to affect international law profoundly, in all its facets, and cannot be easily avoided. The problem lies in the reliance on the text of international law alone. It is a naïve arrogance, Carr argues, to assume that the problems of the government of mankind "can be solved out of hand by some neat paper construction of a few simple-minded enthusiasts" (Carr 1942, 164). Morgenthau supports this idea and highlights the impossibility of finding a universally accepted measure of values with which to decide in a universally binding manner the conflicting state claims (Morgenthau 1933, 76). Adherence to strict legal formalism, however, could lead to irresponsible foreign policy decisions (Schuett 2012, 134).

The situation, however, is "much less dismal than the foregoing analysis might suggest" (Morgenthau 1978, 299). Morgenthau and Carr clearly articulate this idea in their works, which are fundamentally constructive. Morgenthau (1978, 299) argues that the great majority of the rules of international law are generally observed by all states without compulsion, since it is in their interest to honour their obligations under international law. Problems of enforcement only become acute when international legal rules of international treaties have a direct effect on the relative power of the states concerned (Morgenthau 1978, 299). Peaceful change and global reform are, however, possible (Molloy 2003b, 81; Scheuerman 2011, 15-18). Carr articulates this optimism particularly strongly. Though we may be "utopian if we expect to attain our goal", we will "indubitably fail if we have no goal ahead by which to set our course, or if we shrink from the difficulties and hardships that are encountered along the way" (Carr 1951, 111-112). Carr and Morgenthau do not just bring the problems of international law to light. Rather than give in, their theories remain optimistic about the prospects of humanity (Rösch 2023, 217) and allow us to discover how much they still have to say about our world today (Cox 2010, 533).

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