

Machiavelli at 500: From Cynic to Vigilant Supporter of International Law

Approximately as appears in *Ratio Juris* Volume 28 no. 2, 2015: 242-51

ANDREAS FOLLESDAL

Abstract

Machiavelli's 500 year old treatise *The Prince* laid out central features of the realist tradition in international relations. His premises led him to question the likelihood of efficacious and stable international law and international courts, a scepticism that has present day proponents. Machiavelli's reluctance was due to a combination of features of *human nature* and a focus on anarchic features of the *relations among states*. The article challenges these assumptions and implications: other interpretations of human nature are closer to Machiavelli's text, and the current relations among states are significantly different. The revised assumptions should render Machiavelli's followers more optimistic about international law and international courts.

Machiavelli's 500 year old *The Prince* is a classical source of the realist tradition of international relations, a tradition which has been sceptical to the impact and value of international law.¹ Indeed, Machiavelli himself explicitly denied *pacta sunt servanda*: Promises should be broken when the interests of state so dictate: "a wise lord cannot, nor ought he to, keep faith when such observance may be turned against him." (Machiavelli 1977, ch 18). This article defends and explores a different interpretation of Machiavelli which allows and indeed welcomes a greater role for international law and international courts under current relations among states.

Machiavelli had profound influence on the 'classical realists' such as Morgenthau (Morgenthau 1945, Morgenthau 1964, 323; Russell 1990) and 'neorealists' such as Kenneth Waltz (Waltz 1979, 117). *The Prince* lays out several of the central claims of the realist tradition which explain why Machiavelli and many realist scholars in his wake express severe doubts about the likelihood of efficacious and stable international law and international courts. Sovereign states will have little

¹ This article was written under the auspices of ERC Advanced Grant 269841 www.MultiRights.net — on the Legitimacy of Multi-Level Human Rights Judiciary; and partly supported by the Research Council of Norway through its Centres of Excellence Funding Scheme, project number 223274 – www.PluriCourts.net - The Legitimacy of the International Judiciary. Thanks for comments at a Machiavelli Workshop organized by the International Association for Constitutional Law, Florence; and at a workshop at the University of Tromsø.

reason to create and comply with 'costly' international courts and tribunals which require the states to act differently than they would otherwise be inclined. According to this tradition, the reluctance is due to a combination of features of *human nature* – a central concern to the classical realists - and the neo-realists' focus on anarchic features of the *relations among states*. Versions of both assumptions are present in *The Prince*. I shall argue that better and updated assumptions should lead Machiavelli's followers to be more optimistic about international law and international courts.

Machiavelli's views of international relations and international law merits interest for several reasons beyond the historical. He shaped the theory and practice of governance and international relations until this day. Furthermore several of his insights about human nature and our institutional circumstances still hold true, and shed light on some of the fundamental challenges to law and international law. For instance, his insistence that statesmen must act in response to how the world is rather than simply to how it should be still merits reflection. Debates in the philosophy of law revolve around some such issues even among 'republicans' all of whom count Machiavelli among their ancestors. Thus we find 'neorepublicans' who disagree on the legitimacy of judicial review, even by domestic courts not to mention international courts. Richard Bellamy objects to domestic review whilst Philip Pettit argues in favour. (Bellamy 2007, Pettit 1997, ch 7)

I shall argue that Machiavelli, properly understood, can support international law and courts even though they restrain states and the Princes whose liberty he wrote to defend. Machiavelli's argument, charitably reconstructed, rebuts some but not all criticism against the legitimacy of ICs, even criticism based on the concern to maintain state sovereignty. Even Machiavelli might grant that under our present circumstances state governments may have good reasons to create and submit to independent ICs - if not the ones we have today, then suitably reformed. If *his* premises can support ICs, the arguments may be relevant when we struggle with the tensions between sovereignty and ICs. The article starts with 1) an account of Machiavelli's premises concerning human interests and the circumstances of anarchy among sovereign Princes. Properly understood, Machiavelli was in crucial respects not a 'Machiavellian' as this term has come to be used. He did not reject the possibility of moral judgment in international politics, but was critical of moralism in the sense of abstract moral discourse that ignores political realities, especially our non-ideal circumstances of partial compliance with flawed international rules. Section 2 draws out some implications for international law and international courts. Section 3 defends a charitable interpretation of Machiavelli's assumptions about human nature and our inclination toward competitive conflicts. Section 4 explores the changed circumstances of our world order, no longer correctly characterized as anarchy or autocracy. Section 5 draws implications for international law and international courts.

Setting: Then and now

In Machiavelli's terminology, the State – or *status* – is the territory which is the personal possession of the Prince. (Mansfield 1996) The main question for Machiavelli was how the Prince could maintain a monopoly of coercive authority over this territory, rather than be subjected to domination in the form of the arbitrary will of others. This is *the* Interest of State. How should the Prince act to best secure his *state*, surrounded by similar powerful states, not subject to any common authority. What has given Machiavelli a bad reputation for half a millennium is the substantive contents of his advice. He appears to deny any constraints on the Prince's choice of means in pursuit of the 'interest of the state: Lie, break promises, and deceive when necessary. (Chapter 15) Agreements in the form of treaties are only so much hot air, to be broken when necessary. This account stands in sharp contrast with other guides to princes, harking back to St. Augustine and St. Thomas Aquinas. They typically held that politics – and even warfare - should be pursued consistent with universal ethical standards. However, some present day scholars have supported Machiavelli's focus, to not ask what princes *should* do, but rather what they *actually* do. Thus Posner and Yoo argue that states agree treaties and keep them only when in the prior interests of states. (Posner and Yoo 2005) Indeed, treaties and their bodies may be criticised as a 'Machiavellian' ruse under the guise of 'managerialism' which

has its concealed normativity that privileges values and actors occupying dominant positions in international institutions and who therefore have no reason to take a critical attitude to those institutions. It solidifies the sense that questions of distribution and preference have already been decided elsewhere, so all that remain are technical questions, questions about how to smooth the prince's path. (Koskenniemi 2009, 16)

Still, I shall suggest that Machiavelli's assumptions about human nature are compatible with effective international agreements and even international courts.

1. Central Realist Assumptions of *The Prince*:

Several assumptions Machiavelli makes in *the Prince* overlap with what we now regard as characteristic of the realist tradition in international relations. Realism assumes that the basic actors are states, who are rational, unitary political units in anarchy. The states have fixed and conflictual goals, especially concerning their own preservation. The states assume that generally such preferences dominate all others, so that they must act accordingly. This problem structure makes interstate relations a permanently conflictual and competitive bargaining arena over scarce resources, where relative material capabilities determine the outcome. (e.g. Moravcsik 1999)

Central interests of the Prince: survival of the estate, nondomination and independence

In *The Prince*, Machiavelli underscores three interrelated interests of a Prince: The Prince's 'Interest of state' is his overriding concern to secure *the survival of the state*. The Prince must minimize risks to maintain his estate. This is a particular instance of the Prince's general interest to avoid *domination*. No other person or group should have "the capacity to interfere in their affairs on an arbitrary basis." (Pettit 1999, 165; cf. Skinner 1984) This has since become known as a *Republican* conception of Liberty.

Another interest Machiavelli ascribes to princes is *independence* – which may also be based on the concern for nondomination. Machiavelli holds that the Prince should be able to "support himself with his own resources" rather than always require assistance from others." (Chapter 10)

Some critics may have taken him to counsel pure egoism, but Machiavelli does not rule out that individuals are motivated by any concern for others, for instance in the form of considerations of morality or justice. However, he infamously insisted on the need to disentangle politics from religion or other forms of moralism, especially that which ignores the consequences of apparently moral actions when other actors cannot be trusted. The pursuit of the survival of the state and avoiding domination may require other virtues, especially under anarchic relations.

Circumstances of anarchy among unitary sovereigns foster short term strategies for survival, low trust

The anarchic circumstances that princes find themselves are important for the consequences Machiavelli draws. The princes are in a state of nature where their own survival is at stake. To maintain their state each Prince is led into a spiral of short-term strategies of preemptive attacks. they find themselves in what Hobbes described 140 years later as a *state of war*, where "Each live under continuall fear of attack." They are not *at war*, but believe that others have 'a known disposition thereto." (Hobbes 1968 (1651), ch 13) The smartness of the Prince, and the relative strength of states thus becomes decisive – as realists since have insisted.

These premises lead Machiavelli to draw his infamous conclusions, that considerations of justice must often be overruled to secure the interest in survival of the state. Princes must develop a 'flexible disposition:' knowing when to act effectively. He must be

prepared to vary his conduct as the winds of fortune and changing circumstances constrain him and ... not deviate from right conduct if possible, but be capable of entering upon the path of wrongdoing when this becomes necessary. (ch 18)

In particular, a prudent ruler cannot, and must not, honour his word when it places him at a disadvantage:

a wise lord cannot, nor ought he to, keep faith when such observance may be turned against him, and when the reasons that caused him to pledge it exist no longer. If men were entirely good this precept would not hold, but because they are bad, and will not keep faith with you, you too are not bound to observe it with them. (ch 18)

Princes must also avoid getting a bad reputation, because this will put their position at risk. The virtuous Prince – by Machiavelli's lights - must therefore appear not to be wicked – even when he cannot avoid behaving wickedly. So he must be “a great simulator and dissimulator.” In short, for Machiavelli, the virtuous Prince is a good hypocrite. This will not be so difficult, claims Machiavelli, since the observers are so far removed from the Prince that they can only judge by appearances. “Every one sees what you appear to be” but “few really know what you are.” (ch 18)

2 International law: feeble instruments for states' short term interests

This account seems to grant little importance to international law and international courts: Machiavelli would question the need, possibility and their effects. Given his assumption that princes seek independence, they would presumably not seek benefits that required cooperation at all. Furthermore, treaties can barely be established given Machiavelli's support for deception and promise breaking when short term self interest so requires. Finally, any such agreements would presumably not have much impact even when complied with. Judges on this view are *delegates* of their Prince, unlikely to enjoy measures of independence, and bound to pursue the interests of their state. Machiavelli would presumably agree with Goldsmith's and Posner's recent statements to this effect:

International law,.. is simply a product of states pursuing their interests on the international stage. It does not pull states towards compliance contrary to their interests, and the possibilities for what it can achieve are limited.
(Goldsmith and Posner 2005)

3 The Princes' 'disposition toward war'

Machiavelli's scepticism toward international law thus emerges as a combination of the princes' interests and the circumstances of anarchy among them. Their 'disposition toward war' – as Hobbes would describe it – becomes especially nasty when there is low trust among them. Their short term strategies for survival overrule all other concerns, including standard morality.

A useful application of Machiavelli's arguments to our circumstances requires more clarity about Machiavelli's assumptions about human nature; in particular the security risks princes face among each other. Some have interpreted Machiavelli to hold that each prince will always prefer to pursue their immediate interest in

survival and indeed world domination, and attack each other preemptively. This accords well with one version of realism, dubbed 'offensive realism': that the statesmen have a insatiable human urge to dominate others – an 'animus dominandi.' (Morgenthau 1948, ch. 1; cf Mearsheimer 2001) On this account, Machiavelli analyses the conflict among princes as what game theorists later have labeled a 'prisoners' dilemma': Each will prefer to attack the other, either to achieve domination or as a second best to avoid succumbing to the other's preemptive attack. Many princes will therefore often end up in a suboptimal situation expending much resources on defense and attack against others.

Some might observe that if there is a likelihood of interacting again and again in the future, some cooperation among such self interested offense-oriented princes might still emerge. But the circumstances Machiavelli addresses do not allow such longer term perspectives. In Machiavelli's – and Hobbes' - world, life is 'solitary, poore, nasty, brutish, and short.' (Hobbes 1968 (1651), ch 13, 15) So such long term planning is irrational: for Machiavelli, unless the Prince takes precautionary measures, he will be dead in the short run.

I submit that this interpretation of Machiavelli is mistaken. An account of the princes' motivation that fits better with the texts ascribes to them a less 'offensive' attitude. His ideal Prince is not the shrewd egoist said by some to inform the realist tradition of international relations. He does not share the 'Machiavellian' doctrine "that anything is justified by reason of state." (Bull 1995, 189)

I submit that Machiavelli had a more complex conception of human interests. Firstly, the princes are assumed to have a preference for survival and non-domination, *not* world domination. The version of realism that fits better is thus not the 'offensive' but the 'defensive' associated with Kenneth Waltz and others. (Waltz 1979) Secondly, the princes would *prefer* to not attack each other, keep promises and otherwise cooperate. But as long as the risks of other' defecting are high and disastrous, each is safer by not cooperating. (for similar arguments about Hobbes, cf Hampton 1986, Skyrms 2004)

This contingent acceptance of violations of common morality is not compatible with the 'offensive' prisoners' dilemma interpretation. Consider his comments in Chapter 18 on why such violations are permitted: Princes should

... not deviate from right conduct *if possible*, but be capable of entering upon the path of wrongdoing *when this becomes necessary*"

... a man who wants to act virtuously in every way necessarily comes to grief among so many who are not virtuous. *Therefore* if a prince wants to maintain his rule he must learn how not to be virtuous. (My emphasis)

The ruler must chose *the least bad* option when others do not act as they ought.

The Prince would thus prefer to keep promises – and international law – when survival of the state is not at risk. The relationship among the princes is therefore not best modeled as a prisoners' dilemma, but instead as what is known as an *assurance game*: Each prince will prefer to comply with shared rules *if* these secure his interest

in non-domination, and *if* he can be assured that others will likewise comply. his interpretation transforms the problem of collective action among princes. The challenge is thus not fundamentally to *change* the princes' preference for killing each other off, or to provide sufficient credible punishments to deter each of them. That might best be solved by establishing a common master who would punish free riders. Thus Hobbes would much later argue for a powerful Leviathan, without whose sword, "covenants, without the sword, are but words and of no strength to secure a man at all" (Hobbes 1968 (1651), ch 17). For Machiavelli, this is neither necessary nor satisfactory – especially because the Leviathan could in turn dominate each prince.

On this assurance game account the challenge is how to assure princes that they sincerely would prefer not to attack each other. – and that none of them are likely to attack by accident or weakness of will. I shall suggest that today there are more sources for assurance today.

4 Changing circumstances

Several of the circumstances have changed since Machiavelli's time. At least three changes in the global order are significant when eliciting his lessons for today's world.

He faced an anarchy among unitary, sovereign, more independent states; while we live in a system of states that are *interdependent* in our globalized world. Authority within these states is more *internally fragmented* - many of these states are democratic so power is strongly dispersed. Finally, the states are embedded in multi-level legal regimes that *create and maintain long term expectations*.

Princes' desire for independence has been replaced by globalisation - the global interdependence for issues ranging from trade and investment to work mobility and security. Such interdependence generally reduces the likelihood of downright attacks. Each state recognizes that they benefit from established relations ranging from markets to mutual protection arrangements – benefits that will be lost by aggressive attacks. This interdependence thus reduces the risk that a state will be attacked, and this knowledge reduces the risk even more .

The second important change contributes further to reduce the risk of preemptive attacks. Many states have implemented institutions that secure political equality in the form of *democratic rule*. The legislator and the executive are scrutinized to a greater degree, not least by the opposition and by independent media, and are ultimately accountable to the citizenry by means of majority rule. The assurance problems are alleviated both within and among democracies.

- More transparency wrought by independent scrutiny and closer ties to the population reduces assurance problems about the states' plans, since hypocrisy is more difficult to carry out. The risks to security are also greatly reduced among democracies: a consistent finding in international relations is that of 'the Democratic Peace', that democracies do not fight against each other (Doyle 1983a, b).

At the same time, note that democratic rule creates new risks of domination for the citizenry. Why should those who find themselves in the minority trust majority rule? The equal citizens of a state will have good reason to ensure that authorities will not abuse their power. This is one reason to favour *constitutional* democratic rule: majority rule on the basis of deliberation, within constraints that monitor and safeguard the vital interests of all against risks of being outvoted. The need to prevent domestic domination counsels checks and balances with an independent judiciary, and arguably for international judicial review to protect human rights.

The third important change from Machiavelli's days is the growth of global institutions, partly due to the lowered security risks. Such institutions allow states to pursue more and longer term interests, so allow states to create and maintain expectations. At the same time the institutions may increase states' need for a reputation for trustworthiness – and allow them means to establish such reputations. International courts and tribunals provide independent monitoring to ascertain whether states do keep their promises and can be trusted. (Helfer 2006)

5 Machiavelli's Lessons at 500

This article has laid out a 'Machiavellian' defense of the growth of international law, on the basis of a revised account of his assumptions about human nature. On this account Machiavelli should welcome a greater role for international law and international courts under current relations among states, characterized by increased globalization, democratization and international institutions. I have explored an interpretation of his claims about the interests of states, denying that his account is an aggressive realist but rather a defensive concern of the prince to keep ultimate control over one's territory –rather than be subjected to domination: the arbitrary will of others. His notorious advise on how to pursue this 'interest of the state' – to lie, break promises, and deceive when necessary – stem from the anarchic premises of his day, or so I have argued. I have suggested that several salient features are different in today's globalized world, with several democracies and international institutions. Under these circumstances, I argue that Machiavelli's scepticism against international law is greatly reduced.

Once security concerns are handled, international cooperation for longer term shared interests including self binding to human rights become more feasible and beneficial. International law does turn out to have an impact in the longer turn: states do not only agree to do what they would do otherwise, because their expectations can best be pursued by binding themselves and thereby others to shared agreements. (Helfer 2006, *pace* {Posner, 2005 #49655})

One important conclusion is that international law and courts can help *prevent* domination in a variety of ways among states that are interested in non-domination rather than world domination. Treaties and international courts and tribunals undoubtedly increase interdependence, - which Machiavelli would lament as a

threat. But such interdependence may also reduce the risk of domination. States that agree to treaties and international courts and tribunals give expression to a belief that stable peaceful interaction will be to their interest. This helps decrease suspicion among other states that they will be subject to pre-emptive attacks, and this common knowledge in turn reduces the suspicion even further. Treaties and somewhat independent courts and tribunals may also help reduce the risk that the more powerful states always get their way. Human rights treaties and international courts and tribunals provide at least two further important contributions to reduce domination. Human rights treaties and their courts can help reduce the risks faced by individuals within democracies by providing scrutiny and judicial review of majoritarian decisions. A further external effect is related to this: Other states can be more assured that they will not be attacked, the more democratic states there are, since these are less prone to aggression and domination.

On this revised reading of Machiavelli, he would welcome much of the development of international law. However, we should also heed his warning, which remains with us. There are at least two clear risk that proponents of such an interdependent global legal order overlook.

One risk concern the challenges wrought by less democratic, and less peaceful states. The changed circumstances are not universal: there are still autocratic states, and some states still hesitate to comply with international courts that rule against them. It remains an important task to craft international law and institutions so that they can handle situations where some parties do not comply – in ways that do not subject loyal compliant states to undue risks.

Another challenge stems from international law and their courts and tribunals themselves. Such courts must wield power, and exercise discretion. Thus they can easily become new sources of domination over states. This is no doubt why some ‘republicans’ are sceptical of constitutional courts with the power of judicial review in general, including international courts. (Bellamy 2007) This risk may be of at least two kinds. An international court may not be independent enough, and thus become the instrument of one or a few states, who may seek to stack the bench or affect the judgments unduly. Alternatively, the court may be too independent, so that it abuses its discretion in ways that favours either particular judges or the court itself unduly. These problems are difficult to address. On the one hand, international courts must exercise discretion, whilst at the same time, the judges must be checked and held to account in various ways. In the absence of international parliaments and executives, modes of division of power known from domestic constitutions are difficult to envision. One alternative may be to explore ‘diagonal’ checks and balances in the multi-level legal order (Benvenisti and Downs 2009): how domestic courts, executives and legislatures may hold international courts sufficiently accountable – without preventing the sort of independence worth preserving.

I submit that these two challenges of “constitutional” design of international law remain important warnings from Machiavelli, regardless of how we otherwise judge his lessons in *The Prince*. The task remains: How to craft and maintain

international law and international courts so that they can handle states with varying degrees of rule of law and democracy, whilst ensuring that they remain sufficiently independent yet accountable.

References

- Bellamy, Richard. 2007. *Political Constitutionalism: A republican defense of the constitutionality of democracy*. Cambridge: Cambridge University Press.
- Benvenisti, Eyal, and George W. Downs. 2009. "Court cooperation, Executive accountability and global governance." *New York University School of Law Journal of International Law and Politics*.
- Doyle, Michael W. 1983a. "Kant, liberal legacies, and foreign affairs, part 1." *Philosophy and Public Affairs* no. 12 (3):205-235.
- Doyle, Michael W. 1983b. "Kant, liberal legacies, and foreign affairs, part 2." *Philosophy and Public Affairs* no. 12 (4):323-353.
- Goldsmith, Jack L., and Eric A. Posner. 2005. *The limits of international Law*. Oxford: Oxford University Press.
- Hampton, Jean. 1986. *Hobbes and the social contract tradition*. Cambridge: Cambridge University Press.
- Helfer, Laurence. 2006. "Why states create international tribunals: A theory of constrained independence." In *International Conflict Resolution*, edited by Stefan Voigt, et al. Tübingen: Mohr Siebeck.
- Hobbes, Thomas. 1968 (1651). *Leviathan*. Baltimore, Maryland: Penguin.
- Koskenniemi, Martti. 2009. "The politics of international law - 20 years later." *European Journal of International Law* no. 20 (1):7-19.
- Machiavelli, Niccolò. 1977. *The Prince*. New York: W. W. Norton & Co. Original edition, 1513.
- Mansfield, Harvey C. 1996. *Machiavelli's virtue*. Chicago: University of Chicago Press.
- Mearsheimer, John J. 2001. *The tragedy of great power politics*. New York: Norton.
- Moravcsik, Andrew. 1999. "Is anybody still a realist?" *International Security* no. 24 (2):5-55
- Morgenthau, Hans J. 1945. "The Machiavellian Utopia." *Ethics*:145-147.
- Morgenthau, Hans J. 1948. *Politics among nations: the struggle for power and peace*. New York: Knopf.
- Morgenthau, Hans J. 1964. *The purpose of American politics*. New York: Vintage
- Pettit, Philip. 1997. *Republicanism: A theory of freedom and government*. Oxford: Clarendon Press.
- Pettit, Philip. 1999. "Republican Freedom and Contestatory Democratization." In *Democracy's value*, edited by Ian Shapiro and Casiano Hacker-Cordon. Cambridge: Cambridge University Press.
- Posner, Eric, and John Yoo. 2005. "Judicial independence in international tribunals." *California Law Review* no. 93 (1).
- Russell, Gregory. 1990. *Hans J. Morgenthau and the ethics of American statecraft*. Baton Rouge: Louisiana State University Press.
- Skinner, Quintin. 1984. "The idea of negative liberty: philosophical and historical perspectives." In *Philosophy in History: Essays on the Historiography of Philosophy*, edited by Richard Rorty, Quintin Skinner and Jerome B.

Schneewind, 204-19. Cambridge: Cambridge University Press.
Skyrms, Brian. 2004. *The stag hunt and social evolution*. Cambridge: Cambridge University Press.
Waltz, Kenneth N. 1979. *Theory of international Politics*. Reading, Mass.: Addison-Wesley.

University Address:
PluriCourts
University of Oslo
P.O box 6706
St. Olavs plass 5
N- 0130 OSLO
Norway