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FROM THE IUS PUBLICUM EUROPAEUM TO A LAW FOR THE GLOBAL SOCIETY

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School of Law

CRIO Centre of Research on International Organizations

Villa Cerami

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Editorial Staff

Adriana Di Stefano

Federica Gentile

Giuseppe Matarazzo

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THE NEVER-ENDING TRANSITION

FROM THE IUS PUBLICUM EUROPÆUM TO A LAW FOR THE GLOBAL SOCIETY

Rosario Sapienza*

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* Professor of International Law, University of Catania Law School, CRIO Faculty Advisor.

I. The two models of conceptual organization and description of relations between States

There are many reasons why today's efforts towards a universally accepted theory of international law as a regulatory system are confronted with several difficulties.

I think that one of these reasons lies in a fact that does not always receive due attention. I intend to refer to the current situation of a comprehensive image of international law, consisting of the coexistence of two alternative models.

The first one is the traditional model of international law, which dates back to the *Ius Publicum Europaeum*, where international law is seen as a way of ensuring any sort of coexistence between sovereign states, while the second one is the model of the organized international community, tending to the constitutional dimension of a *Civitas Maxima*, where international law is seen as a way of realizing some paramount values.

These two models differ in many elements, the most important of which, from a legal point of view, is the legislative technique, namely the deep structure of the legal rules and their *modus operandi*.

In this short essay I intend to briefly illustrate this particular difference.

II. The first and most dating model: the one that builds a “conventional” order based on the principle of non-intervention

The first of the models alluded to above, dating back to pre-Westphalia ages, is based on acceptance by States of the idea of their sovereign equality, from which follows the need for a mutual respect attitude between themselves thought as equally sovereign legal entities.

Even before the Peace of Westphalia, a traditional starting point for discussions

of international law, States abided by the so-called principle of non-intervention in internal affairs.

The content of this duty of abstention was quite clearly defined. International practice of the time shows a “catalogue” of situations in which States were expected to refrain from what was thought to be a forbidden intervention in internal affairs of another State.

A first set of cases referred to situations where a Sovereign required another Sovereign to adopt, or refrain from adopting, a certain behaviour while exercising his power of government. Even a simple request for clemency for an individual subject to the sovereign power of the territorial Sovereign, was held to violate the principle and rejected on the grounds that the matter was purely internal and therefore within the sole responsibility of the territorial Sovereign.

A second set of hypotheses of forbidden intervention concerned cases where a foreign Sovereign troubled the sovereign right to exclusive exercise of powers of government of another Sovereign by encouraging or fomenting plots that disturbed order and peace in that State.

All these behaviours were included in the ban of “*se mêler des affaires domestiques*” (literally “interfere in domestic affairs”) and is easy to see that the element they shared was just the fact of causing trouble on the power of government by the territorial Sovereign.

III. Conventional basis of the legal order based on the principle of non-intervention

But why even just make a request for clemency was to be considered invasive of sovereignty? To understand this, it should be noted that the administration of justice since the Middle Ages was considered to be the ultimate manifestation of a sovereign power and, therefore, venturing to ask that an individual subject to the sovereignty of another Sovereign should be treated in this or that way, amounted to acting as judge between the Sovereign and his *subditus*, thus exercising the sovereign power of adjudicating on the territorial Sov-

ereign, replacing him in the exercise of this power that was considered essential to sovereignty, instead of leaving the whole matter to his exclusive power of appreciation.

Now, as we know, the true breaking point between the medieval and the modern cultural and institutional horizon is represented, with reference to this issue, by the acceptance of the reality of a plurality of *iurisdictiones*. Middle Ages society, the *Respublica sub Deo*, deemed the *iurisdictio* to be one and unique, and several struggles opposed the Emperor and the Pope concerning the exercise and even the ultimate foundation of that *iurisdictio*.

The modern international society is international (and, maybe, is modern) because it is a society in which different States, all equally hold their own spheres of *iurisdictio* to be separate and distinct from that of other States.

But this is a point which requires some further conceptual development. First, we should bear in mind that what we have been saying so far has its philosophical and cultural presuppositions in the idea according to which the Modern Age is no longer the era of a unique *Veritas*, but of the coexistence of different *auctoritates*, each with its own self-made and self-legitimizing *veritas*. Here is how you build the legitimacy of the political power of the sovereign State, which is sovereign precisely because of its self-made and self-legitimizing *veritas*.

It is no coincidence that our investigation has got the moves from the breakup of monolithic or otherwise rigidly hierarchical constitution of the medieval world and its legal rationalization. We are speaking of the same period of the humanistic crisis of classical Aristotelian-Thomistic construction that provided the paradigm of universal knowledge and therefore of universal justice.

The very idea of truth as a sole and unique *Veritas* enters an epochal crisis to give way to scepticism and a libertine culture in the name of an absolute freedom of the individual from any constraint. It's the end of an hard idea of law based on a certain idea of natural order and of divine command.

IV. Systematic and theoretical implications of this model of international law

Now, if every sovereign State carries its own self-made *veritas*, the only way in which these different and independent *veritates* can coexist is to build an order that, far by the emergence of its own *veritas*, has the sole purpose to promote coexistence between these autonomous individualities. An order which is based not on a particular *veritas*, nor on the sole and unique *Veritas* but on a convention, an agreement on the idea that what States need is simply to coexist, respecting the right of everyone to build his own self-made *veritas*.

Thus, the individual *pleno jure* subject of this “conventional” international order, i.e. the sovereign State, is the only owner of rights and then proceeds to set a “law without a State” that on first hypothesis is based on a purely conventional idea, i.e. the necessity of living together, on the promotion of peace because war is too destructive and therefore unthinkable from the standpoint of preserving the system.

In addition, this individual/sovereign State, and precisely because it is sovereign, must reject the construction of a genuine institutional neutralization of opposing claims such as we could realise (in a Schmittian sense) by a “State of States” in the world.

We have therefore a situation of peace (or rather, not war) based on rules which are mere “formal” rules of the game of a conventional order. The principle of non-intervention in internal affairs in fact tells us only that we must respect the sovereignty of other Sovereign States, but says neither what it consists of, nor to what extent we need to respect it. And the way of creating norms is the agreement by States, i.e. the international treaty or an international custom seen as a tacit agreement.

And then we have a parallel situation where opposing claims clash one another, a situation that in classical international law was represented by the “state of war” and in current international law is represented by unilateral self-help.

V. The model of the “State of States” and its constitutional values

Yet another model of international relations coexists with this traditional one we tried to describe above, a non contractual viz. constitutional model, which sometimes overrides the logic of the model so far described, creating a somewhat parallel international law.

This is due, I believe, to several factors, but mainly to the creation and operating of the United Nations.

Several years ago Richard Falk wrote about the overlapping between the Westphalian model and the model of United Nations, indicating the difficulty of this interaction in collective security matters.

But this idea stretches to provide the basis for a new model of normative order in international relations. It is, in my opinion, the mere existence of the UN which implies the need to move toward a new conception of international law.

The mere fact that an international universal organization exists has caused the abandonment of the conventionalist paradigm replacing it by an attempt to build common values on which to base the international relations, an international community, which is no more to be seen as a mere community of coexistence, but as a community based on shared values.

So we are confronted here with a vision that aims to replace a community of States governed by a conventional logic by a community of states that recognize and share common values.

Values which are difficult to identify in a comprehensive manner and one feels that the list he would draw would always be rounded down.

Values too often established as mere working program, taking the attitude that once was of the late nineteenth century militant legal positivists.

Values that largely tend to coincide with the purposes of the United Nations at large. But if we wanted to focus on one evolutionary line among others, we might just draw on the adoption of the Universal Declaration of Human Rights which has given rise to a

vast Human Rights Movement which overwhelmed several classical international law approaches.

VI. Normative implications of this non contractual viz. constitutional model

And again, the mere fact that an international universal organization exists has important normative implications in that it modifies the way international law is made and works.

First of all, an emphasis is put on non contractual ways of norm creation, such as custom or general principles, international organizations resolutions, soft law mechanisms and so on.

Secondly, the international order seems to move toward a hierarchical asset, through ideas such as those of *ius cogens*.

Thirdly, a set of norms on State responsibility is steadily developing as a major form of international guarantee for international rights and norms.

Fourthly, individuals are coming to the fore as subjects of international law, being attained by international norms endowing them with rights, but also imposing upon them an internationally based criminal responsibility.

Fifthly, the normative technique for the making of international law shifts from the paramount role of the non-intervention principle, to a *modus operandi* which identifies States' behaviours forbidding them as such. A good example is provided by the norms forbidding the threat or use of force, not because it would amount to a forbidden intervention in internal affairs, but because the threat or use of force is deemed to be illicit in themselves.

VII. The never-ending transition between these two models as a feature of present international relations

This second non contractual viz. constitutional model, however, as I briefly sketched it in its “purity”, is far from being established in international law today. This is deemed to be commonplace, but it is held to be merely attributable to the faults of the system, to its imperfect implementation.

In my opinion, States simply cannot accommodate themselves to this new model and while paying lip service to the non contractual viz. constitutional model, they tend to behave as if they were living in the past, in the traditional conventionalist model.

For the moment being, the coexistence of the old law truly “international” (based on the principle of non-intervention in internal affairs) and “new” legal rights based on the “new” model have created some more problems to theorists of international law.

Those stem primarily from failure to keep in mind that the law “international” as we find in the practice of States and the law “universal” are based on two different and conflicting images of the world community that cannot overlap or assimilate.

I believe that not only the unresolved coexistence between these two models can successfully explain the difficulty of reconciling two legal discourses inspired precisely to different models, but that, being the stage we have reached the phase of an infinite transition from one model to another, a transition which seems destined never to be achieved, we are therefore called to a difficult, acrobatic task, that of devising a law order for this never-ending transition.

And now here we would like to point out some of the paths of this reflection.

The most obvious one is the need to focus on the profiles of the compatibility of unilateral coercive means with the dynamics of collective security and peacekeeping, an issue on which the debate is as a matter of fact lively and varied.

Secondly, a field in which research is worth committing is the necessary rethink-

ing of the theory of sources. The custom practice is deconstructed into a collection of composite materials generally ascribed to the category of non-written international law, in relation to which the only clear point is that theory cannot content herself with the mechanical repetition of old schematics.

And even in terms of theory of the multilateral treaty, a powerful legal instrument that we have inherited from previous developments, what we need to find is a way of composing between the unilateral dimensions which manifest itself not only in the ever-increasing use of reservations, but also and perhaps more in the full-bodied kit of unilateral interpretative declarations which States join to their contractual statements.

Third, what still needs a strong research contribution, is the theory about the systematic impact of international human rights legislation on international law at large, an endeavour which may not capture significant results except in the light of a reworking of sovereignty as a legal concept, no more construed as the ultimate guardian of the de facto freedom of the State, but deeply in need of a truly international theorizing.

Fourth, we should go into the problems of a true international theory of international organizations.

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