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LA "RIVINCITA DEI TERRITORI" TRA GEO-DIRITTO E DIRITTO INTERNAZIONALE.
A GEO-LEGAL APPROACH TO PUBLIC INTERNATIONAL LAW THEORY AND PRACTICE

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I. The "La Rivincita dei territori" 2009 Conference

In May 8-9, 2009, with a two days conference held in Ragusa and Catania a new research project was started.

The project, named "La Rivincita dei territori. Coesione territoriale e politiche dell'Unione europea" out of the title of a paper presented by myself, was aimed at a multidisciplinary study of the problems related to the then new territorial dimension of European cohesion strategies.

Ten years after, this paper aims at refreshing that approach, trying to provide a stronger theoretical basis in terms of a thoroughly new scheme, stemming from the hybridization of the original framework with the more general perspective called "geo-diritto".

II. The geo-diritto and Public International Law

The geo-diritto is a term used for the first time by the Italian scholar Natalino Irti in a beautiful book whose title is precisely *Norma e luoghi. Problemi di geo-diritto* (2001).

In this book, Irti argues the thesis that legal norms have an intimate relation with geography, i.e. that a norm exists in a space and has a special relation with that space.

After a thorough perusal of general theories having studied the specific relations of norms and space, Irti comes to the point. According to the famous Italian scholar, nowadays the main problem of the geo-diritto is the fact that global legal relations live in a dimension which he calls a-topia, i.e. nowhere.

But a nowhere different from the u-topia, because in global legal relations as well as in the internet, not only it is difficult to determine where this space is, but even if this space is conceivable as such.

Therefore, taking into account that the global economy is not capable of building a legal order of its own, nor are the States able to create effective norms through their treaties, Irti envisages a permanent role for the political decision, the only way to choose between the a-topian or territorial dimensions of the geo-diritto.

These ideas may well be applied to the construction of Public International Law.

Public International Law, as we study it today, has inherited from the Westphalian order the idea of an order based on the territorial dimension, i.e. on the assumption that the sovereign State exercises his sovereign powers on a territory of its exclusive belonging.

Nevertheless, the political and legal processes through which Law, and particularly International Law loses its unique territorial dimension is much more ancient and complicated that Irti seems to think.

III. The emergence of new *non-territorial* subjects of international law: International Organizations and Liberation Movements

Public International Order begins to lose its exclusively territorial structure when new subjects appear on the international stage, subjects claiming a status though not being territorial subjects.

International Organizations, e.g. are fictitious creature set up by States through a process of creation stemming out of international treaties, and described as new actors on the international stage, and therefore as new subjects of the international legal order.

New subjects which were not established on the basis of a territorial sovereignty which they do not possess, but simply because they can be described as autonomous, independent centers of relations, of rights and obligations. A suitable quote in this connection is the well-known passage from the International Court Advisory Opinion in the case "Reparation for injuries suffered in the service of the Nations".

This will prove to be a crucial step. Beside the traditional subjects i.e. sovereign territorial States, Public International Law accepts the subjectivity of an entity not exercising territorial sovereignty at all, precisely the international organization.

The same holds true, mutatis mutandis, for the legitimacy of the self-determination movements deriving not from the "fact" of the control a territory, such as in the classical theory of civil wars used to happen for the insurgents but on a legitimacy, assumed a priori, of the cause for which he fights.

In the evolution of the legal regime of non-international conflicts, emerging alternative forms of legitimacy other than the control of the territory thus show the end of the centrality of the territorial dimension.

International Organizations and Liberation Movements, if compared to States and Insurgents show therefore that other forms of legitimation have emerged, other than territorial control. All this seems to authorize the

conclusion that territorial control is no more crucial to the establishment of international subjects and of the legal order enforceable among them.

A new order is heading its way, leaving classical international law aside.

This is in no way a novel consideration. To put it into the words of Carl Schmitt, the Ius Publicum Europaeum was definitely a territorial order, delving its roots deep into the earth and intended to solve disputes mainly of a territorial character.

According to Schmitt, in fact, this territorial dimension that had characterized the Ius Publicum Europaeum began to decline, when England, as a result of its territorial conquests in the New World, established itself as a maritime power, and, as such, imperial, acting as a novel Leviathan in perennial struggle against terrestrial powers (Behemoth) represented by continental States, still basing their power on the collective identity of the nation and the defense of the motherland and territorial integrity.

As soon as this global maritime empire was established, the crisis of Public International Law as Ius Publicum Europaeum started and a new global order appeared, in which international law only served as a legislation applicable to States relations, but having lost its features of a pervasive universal morality based on the mutual recognition of the equality of … equally sovereign territorial States.

In Schmitt's view this marks the end of a system based on exclusive State subjectivity and the distinctions between public and private law and between State law and interstate law begun to fade away.

As soon as the terrestrial roots of the legal order were lost, new ways of warmongering took place and war became a partisan war, having its origins and legitimation in ideologies.

The partisan, in fact, does not wage war to defend land from occupation, but conducts a struggle on behalf of its own ideology and, in doing so, he replaces the public interstate war by a new war against a private enemy thus regressing, therefore, to barbarity.

The political nature of this crisis is related, according to Schmitt, to the dominance of the economy and technology in contemporary world, where States exist simply to perform a purely bureaucratic and organizational function.

IV. The Universalistic Claims of the Human Rights International Protection

On the other hand, the spatial dimension of State law, whether national or international, is sharply criticized by the movement in favor of an international protection of human rights, no more content with the distinction between national and aliens, but straightforwardly pointing to a universalistic global regime, based on the *ius naturae* approach of the same dignity of every human being.

It is evident, in this approach, the strive towards a uniform legal order, in which all human rights should be enjoyed by all human beings, without any distinction or discrimination.

Again, the spatial dimension is not confined to the State territory, but is dissolved in a global dimension, sort of a World Federal State, whose legal order is aimed at the protection of "all human rights for all".

But it is easily understandable how a *territorium* coinciding with entire planet is the same as no *territorium* at all. Because the idea of a partition is naturally inherent to the idea of territory.

V. Non-State approaches to the idea of a Transnational Law

The traditional scenario of international law is then going to change considerably as a result of the phenomenon of globalization, which overturns the so-called "social basis" of the international community, traditionally resting on a defined body of rules and actors, and today much more complicated, with new actors, rules and procedures.

It is usual today to identify this change as the transition from an order marked by international law to a global order of transnational law, which is sometimes marked in Anglo-Saxon literature as *an international regime* or, more frequently, as global *governance.*

For the time being, however, and for the limited purposes of this document, it is enough to note that both of these terms, or other equivalents, are used to point to the failure of international law in controlling such a transnational order.

Thus, even if public international law still exists it is no longer exclusively *the* sole law of international relations: it is a law among *others,* contributing, with its rules to a volatile transnational legal regime.

The constructive approach of the new *transnational law* thus outlines new balances that arise not necessarily and not only from the nomopoietic force of the State or States but from the complex interaction of the various protagonists on the international stage (interaction often identified with the market or with international civil society) creating a new legal, non-territorial, dimension for global society and at the same time a new field of reflection and study for lawyers, especially for those interested in international things.

VI. The Rivincita dei Territori Approach as part of the European Public International Law

In recent years a new movement emerged, based on the rediscovery of the peculiarities of a period we can call the Golden Age of Public International Law.

This period was characterized by the predominance of European Powers and can be properly called as the period of European Public International Law.

The movement is both an academic project as well as a political endeavour.

The territorial dimension is being advocated both at a national, at a supranational as well as at a local and regional level, through the concept of a European Space.

A European Space both at a supranational, continental level, but also at a local, regional and national level. All of them related with a different level of governance of a different extension of territory.

What is central to our argument is the fact that the territory is a constitutive element of all these levels of government and governance.

And this is why we speak of a Rivincita dei Territori, because this movement can be seen as an antagonist of the deterritorialization feature typical of the project of a Global Law.

Notes and References

The idea of a geo-diritto is borrowed from Natalino Irti, *Norma e Luoghi. Problemi di geo-diritto*, Laterza, Roma-Bari 2006.

The quote for the "Reparation for injuries suffered in the service of the Nations, Advisory Opinion", [1949] is ICJ Rep 174, ICGJ 232 (ICJ 1949), 11th April 1949.

A Review Paper for the 2011 STIPIL Background course is provided by Federica Antonietta Gentile in *International Law as a Non-Territorial Order? A Review Paper for the 2011 STIPIL Course*, CRIO Papers 14 (2012). A quote for Schmitt is quite obviously Carl Schmitt, *Der Nomos der Erde im Völkerrecht des Jus Publicum Europaeum*. Duncker & Humblot, Berlin 1950

It is almost impossible to offer suitable quotes to describe the impact of the Human Rights Movement on Public International Law. Pietro Barcellona has written a lot on the idea of the relation of global legal projects and the de-structuration of the traditional idea of a territorial space governed by the State. See, among others possible quotes, Pietro Barcellona, *Il declino dello Stato. Riflessioni di fine secolo sulla crisi del progetto moderno*, Dedalo, Bari 1998 and *Le passioni negate. Globalismo e diritti umani*, Città Aperta Edizioni, Troina 2001

As far as the so-called Transnational Law Approach is concerned, see Gunther Handl, Joachim Zekoll, Peer Zumbansen (edds.), *Beyond Territoriality. Transnational legal Authority in an Age of Globalization*, Brill/Nijhoff, Leiden-Boston 2012. Useful suggestions also in Maria Manuela Pappalardo, *What is Transnational Law? A Trip through a Still Unknown Land,* CRIO Papers 50 (2020) and Rosario Sapienza, *The Return of the European Public International Law. A Manifesto,* CRIO Papers 52 (2020).

Major contributions on all the issues discussed in this paper may be found in the proceedings of the XVI National Assembly of the Italian Society for International Law held in Catania in June 2011. See Adriana Di Stefano,

Rosario Sapienza (edds.) *La tutela dei diritti umani e il diritto internazionale*, Editoriale Scientifica, Napoli 2012.

Other worthy research materials were presented at the X International Meeting of Young International Lawyers held in Catania in January 2013. See Adriana Di Stefano (ed.*), Un diritto senza terra? Funzioni e limiti del principio di territorialità nel diritto internazionale e dell'Unione europea*, Giappichelli, Torino 2015 (2 voll.)