diritto internazionale
giurisprudenza catania

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INTERNATIONAL LAW AS A NON-TERRITORIAL ORDER?

2011 – 4.3

Fogli di lavoro
per il Diritto Internazionale

Volume chiuso nel mese di marzo 2012

FOGLI DI LAVORO *per il Diritto Internazionale* è *on line*
http://www.lex.unict.it/it/crio/fogli-di-lavoro

ISSN 1973-3585
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Pubblichiamo qui di seguito il review paper del corso STIPIL 2011 scritto dalla nostra redattrice Federica Antonietta Gentile.

La redazione

I The Territorial Roots of the International Legal Order as the starting point of our argument

The Fourth Season of the Selected Topics in Public International Law Series took place in 2011 Spring Term and was devoted to "Conflicting Approaches to International Law. An Historical and Theoretical Perspective"

This Review Paper shall elaborate on one of the main issues highlighted during the course i.e. the fact that the International Order is progressive losing its "territorial dimension", not only because it is no more a legal order exclusively enforceable in the relations between territorial sovereign States, but also because international legal concepts are increasingly being construed in a way which does not take into account the territorial dimension.

Public International Law as we study it, is indeed, a discipline and a legal order already in its post-Westphalian age and aspirations, even if it has inherited from the Westphalian order the idea of an order based on the assumption that the sovereign State exercises his sovereign powers on a territory of its exclusive belonging.

Territorial sovereignty is thus the basis of political legitimacy and of a legal order enforceable between States. And territorial States shall be the sole and unique subjects of this newly established legal order.

II The emergence of new non-territorial subjects of international law

But Public International Order shall begin to lose its exclusively territorial structure when new subjects will stand on the international stage. International Organizations, fictitious creature set up by States through a process of creation stemming out of international treaties, will be 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, though a long one, is the well-known passage from the International Court Advisory Opinion in the case "Reparation for injuries suffered in the service of the Nations":

"The subjects of law in any legal system are not necessarily identical in their nature or in the extent of their rights, and their nature depends upon the needs of the community. Throughout its history, the development of interna-

tional law has been influenced by the requirements of international life, and the progressive increase in the collective activities of States has already given rise to instances of action upon the international plane by certain entities which are not States. This development culminated in the establishment in June 1945 of an international organization whose purposes and principles are specified in the Charter of the United Nations. But to achieve these ends the attribution of international personality is indispensable.

The Charter has not been content to make the Organization created by it merely a center "for harmonizing the actions of nations in the attainment of these common ends" (Article 1, para. 3). It has equipped that center with organs, and has given it special tasks. It has defined the position of the Members in relation to the Organization by requiring them to give it every assistance in any action undertaken by it (Article 2, para. 5), and to accept and carry out the decisions of the Security Council; by authorizing the General Assembly to make recommendations to the Members ;[p179] by giving the Organization legal capacity and privileges and immunities in the territory of each of its Members; and by providing for the conclusion of agreements between the Organization and its Members. Practice—in particular the conclusion of conventions to which the Organization is a party—has confirmed this character of the Organization, which occupies a position in certain respects in detachment from its Members, and which is under a duty to remind them, if need be, of certain obligations. It must be added that the Organization is a political body, charged with political tasks of an important character, and covering a wide field namely, the maintenance of international peace and security, the development of friendly relations among nations, and the achievement of international co-operation in the solution of problems of an economic, social, cultural or humanitarian character (Article 1) ; and in dealing with its Members it employs political means. The "Convention on the Privileges and Immunities of the United Nations" of 1946 creates rights and duties between each of the signatories and the Organization (see, in particular, Section 35). It is difficult to see how such a convention could operate except upon the international plane and as between parties possessing international personality.

In the opinion of the Court, the Organization was intended to exercise and enjoy, and is in fact exercising and enjoying, functions and rights which can only be explained on the basis of the possession of a large measure of international personality and the capacity to operate upon an international plane. It is at present the supreme type of international organization, and it could not carry out the intentions of its founders if it was devoid of international personality. It must be acknowledged that its Members, by entrusting certain functions to it, with the attendant duties and responsibilities, have clothed it with the competence required to enable those functions to be effectively discharged.

Accordingly, the Court has come to the conclusion that the Organization is an international person. That is not the same thing as saying that it is a State, which it certainly is not, or that its legal personality and rights and duties are the same as those of a State. Still less is it the same thing as saying that it is "a super-State", whatever that expression may mean. It does not even imply that all its rights and duties must be upon the international plane, any more than all the rights and duties of a State must be upon that plane. What it does mean is that it is a subject of international law and capable of possessing international rights and duties, and that it has capacity to maintain its rights by bringing international claims".

This will prove to be a crucial step. Next to 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.

This development was prepared by those scholars who started to theorize the formalization of the sovereignty. The sole arbitrator Huber, in the famous judgment on the Island of Palmas (1928), stated that sovereignty in international law was expressed in the independence of the sovereign state, so arguing that the territory was a substrate which founded a legally relevant situation, situation which, however, he did not identify with it:

"Sovereignty in the relation between States signifies independence. Independence in regard to a portion of the globe is the right to exercise therein, to the exclusion of any other State, the functions of a State. The development of the national organization of States during the last few centuries and, as a corollary, the development of international law, have established this principle of the exclusive competence of the State in regard to its own territory in such a way as to make it the point of departure in settling most questions that concern international relations. . . . Territorial sovereignty, as has already been said, involves the exclusive right to display the activities of a state. 'has right bas as corollary a duty: the obligation to protect within the territory the rights of other states, in particular their night to integrity and inviolability in peace and in war, together with the rights which each state may claim for its nationals in foreign territory. Without manifesting its territorial sovereignty in a manner corresponding to circumstances, the state cannot fulfill this duty. Territorial sovereignty cannot limit itself to its negative side, i.e., to excluding the activities of other states; for it serves to divide between nations the space upon which human activities are employed, in order to assure them at all points the minimum of protection of which international law is the guardian. . . .

The principle that continuous and peaceful display of the functions of state within a given region is a constituent element of territorial sovereignty is

not only based on the conditions of the formation of independent states and their boundaries (as shown by the experience of political history) as well as on an international jurisprudence and doctrine widely accepted; this principle has further been recognized in more than one federal state, where a jurisdiction is established in order to apply, as need arises, rules of international law to the interstate relations of the States members . . . . "

III The territorial legacy of civil wars

Modern States, seen as a specific form of organization of political relations, emerge from civil wars around the fourteenth and fifteenth centuries.

Indeed, it may fairly be said that the State of the Ius Publicum Europaeum emerges just from an era of civil wars such as the wars of religion, after having victoriously resisted what is probably the last feudal struggle and the first truly modern conflict.

And it is therefore correct, though unusual, to say that international law, as a framework of coexistence of modern states, is tightly connected to the civil war phenomenon.

So civil war cannot be described as merely one of the sectors that international law may regulate, but rather, on one hand it can be seen as the breeding ground from which international law stems.

For these reasons, the legal regime of Civil Wars is one of the most problematic and tormented areas of international law. At the same time one must admit that its analysis offers a special point of view to grasp the dynamics involved in the evolution of the entire international legal system.

Now let us fix some points. In the general scheme offered at the time by the so-called Ius Publicum Europaeum, an armed insurrection of a part of the population against the established government must be considered an "internal affair" as it is precisely in the maintenance of an internal order that the State offers the measure of its being a State for the historical reasons above remembered.

In this view, which, as we shall see, is generally accepted by anyone writing about civil wars in the period we are analyzing, a civil war is in no way an autonomous problem, different from all other "internal affairs". Rather you can say that international law exists when the civil war "dies", since you become a sovereign (and therefore a subject of international law) just denying and pacifying a civil struggle in a particular territorial area, which shall be the measure of your territorial sovereignty and subjectivity.

The insurgents, and the same insurrection as a fact, do not exist under international law as they are …. covered by the territorial sovereignty of the State.

The civil war, then ... does not exist for international law and the legitimate territorial sovereign may well claim to treat the rebels as mere criminals, because they have no other status than that of rebels.

This means that in no way a conflict between the territorial sovereign and his people or a part of them can be considered as a war in the sense of international law, since the international concept of war, the Krieg in Form, to use Schmitt's words, is closely linked to that of international subjectivity and rebels are no international subjects at all.

Military operations taking place between the sovereign and rebels in revolt will therefore not be considered strictly speaking military operations and the international law of war (ius in bello) will not be enforced.

There will not therefore need to distinguish in terms of intensity or extent of military operations, because according to this reconstruction, which is the only one that maintains its rigid internal consistency, the military operations of the insurgents are mere raids, acts of banditry and nothing more, and then there can be no question of distinguishing between more or less extensive operations, between more or less organized activities.

It is also well known, on the contrary, that in this traditional scheme which we are referring to, where insurgents are able to consolidate their autonomous power over a portion of territory of the existing State, they can aspire to the status of international subjects in the form of the government of a new State (in the case of secession) or as a new government of the old State.

Once again, therefore, international law does not need to consider the civil war, and the balance between the political forces is resolved in favor of territorial sovereignty since when, but only when, the insurgents have imposed their sovereignty on the disputed territory, they may, for this sole reason, be regarded as subjects of international law.

IV Wars of national self-determination and their effect on the territorial dimension of civil wars

But with the emergence of self-determination, the principle of separation of internal strife from international war, based on the acquired control of territory, will be permanently undermined.

I am referring here to the widespread recognition of the "legitimacy" of the wars of national liberation, albeit in a radically changed context, as will be

that of the illegality of the threat or use of armed force. A war of national liberation should be rather seen as a *bellum iustum* by definition, so to say.

It is the end of an international order based on the idea of a Krieg in Form, because self-determination of peoples in itself shall be seen as a value to protect.

The insurgents, in the classical theory of civil war, appeared worthy of protection because in fact able to control a territory, and therefore in competition with the territorial sovereign, capable to overthrow him or to secede from the State he governs.

The legitimacy of the self-determination movement does not derive from the "fact" of the control a territory, 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.

V A Tentative Conclusion in a Schmittian Mode

International Organizations and Liberation Movements, if compared to States and Insurgents show therefore that other forms of legitimation have emerged, other than territorial control. And so seem 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.

Classical international law was in fact largely based on territorial considerations. In the words of Carl Schmitt, an author deeply examined in this STIPIL Fourth Season, 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 or-

der 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.

Bibliographical Notes and References

Here is the quote for the "Reparation for injuries suffered in the service of the Nations, Advisory Opinion", [1949] ICJ Rep 174, ICGJ 232 (ICJ 1949), 11th April 1949, International Court of Justice [ICJ] and here that for the "Island of Palmas Case (or Miangas), United States v Netherlands, Award", (1928) II RIAA 829, ICGJ 392 (PCA 1928), 4th April 1928, Permanent Court of Arbitration [PCA] both referred to in para II.

A General Bibliography for the IV STIPIL Background course was also offered and it was as follows: Schmitt, *Der Nomos der Erde im Völkerrecht des Jus Publicum Europaeum,* Berlin, 1950 ; Guggenheim, *Jus Gentium, Jus Naturae, Jus Civile et la communauté internationale issue de la divisio regnorum intervenue au cours des 12e et 13e siècles*, in *Comunicazioni e Studi*, 1956, p. 1 ss.; Ziccardi, *Les caractères de l'ordre juridique international*, in *Recueil des Cours de l'Académie de Droit International de La Haye*, 1958-III, p. 267 ss.; Reibstein, *Völkerrecht*, Freiburg, 1958-1963, 2 voll.; Nussbaum, *A Concise History of the Law of Nations*, New York, 1962; Schmitt, *Theorie des Partisanen. Zwischenbemerkung zum Begriff des Politischen,* Berlin 1963 ; Friedmann, *The Changing Structure of International Law*, London, 1964; Verzijl, *International Law in Historical Perspective,* Leyden, 1968-1974; Carrillo Salcedo, *Soberania del Estado y derecho internacional*, Madrid, 1969; De Visscher (Ch.), *Théories et réalités en droit international public*, Paris, 1970; Paradisi, *Civitas Maxima. Studi di storia del diritto internazionale*, Firenze, 1974; Mosler, *The International Society as a Legal Community*, Alphen aan den Rijn, 1980; Cassese (A.), *Il diritto internazionale nel mondo contemporaneo,* Bologna, 1984; Grewe, *Epochen der Völkerrechtsgeschichte*, Baden Baden, 1984; Macdonald e Johnston (a cura di), *The Structure and Process of International Law: Essays in Legal Philosophy Doctrine and Theory*, Dordrecht, 1986; Ferrari Bravo, *Prospettive del diritto internazionale alla fine del secolo XX*, in *Rivista di diritto internazionale*, 1991, p. 525 ss.; Higgins, *Problems and Process. International Law and How We Use It*, Oxford, 1994; Simma*, From Bilateralism to Community Interests in International Law,* in *Recueil des Cours de l'Académie de Droit International de La Haye*, 1994-VI, p. 217 ss.; Henkin, *International Law. Politics and Values,* Dordrecht, 1995; Miele, *La comunità internazionale*, Torino, 1995; Truyol y Serra, *Histoire du droit international public*, Paris, 1995; Schachter, *The Decline of the Nation-State and its Implications for International Law,* in *Columbia Journal of Transnational Law*, 1997, p. 7 ss.; Focarelli, *Lezioni di storia del diritto internazionale*, Perugia, 2002; Koskenniemi, *International Law in Europe: Between Tradition and Renewal*, in *European Journal of International Law,* 2005, p. 113 ss.; Carty, *The Philosophy of International Law,* Edimburgh, 2007; Besson, Tasioulas (eds.), *The Philosophy of International Law*, Oxford, 2010; Sapienza, *La guerra civile nell'evoluzione del diritto internazionale*, Firenze-Catania, 2010.