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Rosario Sapienza

# The Return of European Public International Law and Transnational Law

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**Cattedra di Diritto Internazionale**
Via Crociferi, 81 - 95124 Catania
E-mail: risorseinternazionali@lex.unict.it
Redazione: foglidilavoro@lex.unict.it

## Public International Law was born in Europe

We started our research moving from the idea that there is no such thing as Public International Law *in rerum natura*. On the contrary, if you accept the basic tenets of legal positivism, the mere idea of a set of rules beyond or over the States is difficult to accept.

We have therefore investigated the historical, political and economic reasons for postulating such a system of rules and also both the ways in which the sovereignty of the State influences the construction of the international legal system, as well as, speculatively, the ways in which international law affects relations between people within States.

In particular, in our research we have intended to describe the system of public international law as the highest fruit of European genius for law, tracing its evolution from the middle of the 19th century (when the first professorships of international law were established in Europe) until the middle of the 20th century. At this stage, international law is still developing under the decisive influence of European schools of thought and aims both to ensure a continental order and to support the planetary expansion of the European Powers.

## US hegemony and the global stage of international law

The end of the Second World War, on the other hand, marks the beginning of a global stage of international law, characterized by the creation of the UN and the establishment of a US political hegemony, which is also felt in terms of doctrinal elaboration.

This global stage is also characterized by the coexistence of two models of a legal order beyond the State: that of European international law based on the coexistence of sovereign States and that the American model based on the activity of common institutions. These two models coexist, in a situation of continuous, never-ending transition from one to the other, though none of them prevailing over the other.

## The European scenario becomes more complicated

The overall decline in the hegemony of European States on international relations produces nevertheless, once again, a great legal and institutional endeavor, through the development and strengthening of an integration at the continental level, which takes the form of European international organisations such as the Communities and then the European Union and the Council of Europe and the European Convention on Human Rights.

Thus, it is once again the path of laws called to offer a way of thinking and planning institutions reflecting a political situation of forced cooperation. If in the mid-19th century the idea of an international legal order served the project of an expansion of the European civilisation model, from the mid-20th century onwards the path of law will also be followed in Europe for the creation of a model and structure to manage the now downgraded role of the European Powers in a setting of international relations deeply modified by the new power relationships at the planetary level.

## International law: in search of a founding basis

All these planned legal orders, however, cannot assert themselves and operate on the basis of the changing will of the States, the sole depositors, even in the current structure, of the political force or the support of those citizens within the States who want to support such projects with the force of their political consent.

For these reasons, wishing to provide these international rules with a more solid foundation than the tricky basis of changing political balance, we chose to investigate international law as a particular type of legal discourse, with logically coherent and accomplished arguments, capable of a "self-foundation" based on its own logical coherence. A system available to interpreters, living through their arguments and debates.

This is an approach, based on the idea of the "non-naturalness" of a system of rules enforce beyond the State, and on the very need of its "self-foundation", which we would not hesitate to ascribe to those defined today *as*

*transnational* and which have been the subject of specific study in our researches in recent years.

Our method

The methodology followed has therefore favoured, integrating them into the theory of public international law, the ways through which international law has a concrete impact on the legal relations of individuals through the internal procedures of international obligations, conflicts of laws, the international protection of human rights, and, finally, the law of the European Union.

However, we would like to emphasize that the emergence of *transnational* models is rather due to a particular circumstance, namely the lack not only of a consensus on the methods of coordination between State systems, but also the lack of consensus on the desirability and the very possibility of this coordination.

A way of coordinating systems

In truth, the problem of coordination between legal systems has been the fundamental problem of public and private international law over the past decades. Although each sovereign State asserts the absolute autonomy of its legal system from those of other States, the contacts that unavoidably exist between these systems, either because individuals form legal relations related to multiple legal systems (e.g.the marriage between two persons of different citizenship) or because two or more States otherwise enter into legally significant contacts (acts of one State intended to produce effects in the order of another), legal rules must be identified to regulate these situations, i.e. to build schemes through which different legal systems can be coordinated.

No State and no legal system exist and operate in a vacuum, but in an environment in which other States and other legal systems exist and operate. International law [using the terms *lato sensu* us to encompass all international legal disciplines] can thus be described as the set of principles and norms that provide, in different ways, the toolkit for this coordination, so that the rule intended to regulate the case can be easily identified. In short, whatever the

techniques developed to identify the most suitable standard to regulate a case, the fundamental problem will still be that of the identification of this rule.

## An archaeology of the strategies of coordination between systems

For several centuries the techniques used were those aimed at developing principles for the coexistence of regulatory systems that were described as conflicting with each other. In this sense, it is true that what we now call private international law was the first scheme of regulatory coordination. And probably are correct those who traced the origins of this method far back in time until the famous glossa accursiana *si Bononiensis conveniatur Mutinae*... The term "private international law" (which, modelled on that "public international law", prevails in its use over those, more proper, such as "conflicts of laws" or "international private law") includes all those rules that affect private persons – individuals and collective entities – taking part in situations and relations that are not *completely* located within a single State, rather affecting two or more State systems.

But these systems of conflict of laws did not operate in a vacuum and certainly a system of rules existed, ruling the direct relations between sovereign entities, and based on the pattern of the *iurisdictio divisa* and the related principle of mutual non-interference in the internal affairs of each sovereign. Since the 18th century, and even better since the 19th century, it has been working on increasingly sophisticated regulatory techniques to ensure the legally ordered interaction between these sovereign entities and has thus developed as an autonomous legal system, a real international law that has been called public, because it regulates relations between States.

### The *Ius Publicum Europaeum*

The first of these models of international legal order between the States, the *Ius Publicum Europaeum*, is based on the mutual acceptance by States of the idea of their sovereign equality and therefore of the logical-legal need to respect each other as equally sovereign bodies.

Even before the peace in Westphalia, the traditional starting point of international law, States held their relations abiding by the so-called principle of non-intervention in internal affairs.

Now, as we know, the real breaking point between the medieval and the modern horizon is therefore represented, with reference to this question, by the acceptance of the idea of a plurality of *iurisdictiones*. International society is a society in which several States coexist, all equally holders of their own sphere of *iurisdictio,* autonomous and distinct from that of other States. And even today international relations and international law retain some comparable characteristics.

Thus creating an order of coexistence which is not based on consent on certain values, a particular *Veritas,* but on the idea that it is still necessary to coexist, respecting the right of each to build his own self-made *Veritas*. This is why this order is called conventional, from the latin word *conventio* which means agreement. An agreement to coexist, even if we do not share any common values, simply because it is necessary to coexist.

Public international law

Public international law, the immediately following model from the nineteenth century onwards, is thought of as a system of civil law enforced between *Magnae Personae* (the States themselves) and entrusts its regulatory coordination function to the treaty-responsibility system, overlapping, without eliminating it, the scheme of non-intervention and giving life to what we call classical international law.

The globalist frames developed by U.S. schools of thought

Public international law at the stage of US hegemony, on the other hand, stands as a legal system in competition with the internal legal systems, and by claiming to build a world federal system, it can only create a situation of constant transition, a *never-ending transition* we have defined it, between the two models: the classical we've been describing till now and the quasi-constitutional.

This non-contractual representation of international law is therefore essentially due to the political and cultural hegemony of the United States and its internationalist legal schools. It is rampant to the point of sometimes overlapping the logic that we have described so far, creating a parallel international law, or perhaps it would be better to say a non-homogeneous weaving that leads us to talk about a never-ending transition between the conventional order described *supra* - which represents the starting point in a chronological but also logical sense of an evolution - and the outcomes, often only anticipated, of this evolution in a broad "constitutional" sense.

The United Nations, an organization for globalism

This is due, I believe, to a number of factors, including the creation and operation of the United Nations Organization which brings about the abandonment of the conventionalist paradigm and the attempt to build, instead, common values on which to base the international community, thus no longer seen as a mere community of coexistence, but as a community founded on shared values. A vision that aims to replace a community of States governed by a conventionalist logic, with a community of States sharing common values.

These values are difficult to fully identify and the list that you wanted to trace would always be approximated by default. They are values that are affirmed as a programme of work, taking up the militant attitude that was already the positivist jurists of the late nineteenth century.

And to a large extent they tend to coincide with the purposes of the United Nations. If, however, we wanted to favour an evolutionary line among others, we could draw on the massive human rights regulatory programme which is based on the adoption of the Universal Declaration of Human Rights and which has overturned classical international law.

A Law for the Global Society

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.

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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. In short, at a time when international law celebrates its success in becoming an autonomous legal system, it loses its function as a general system of coordination.

The result is a "non-public" coordination strategy for regulatory materials and coordination methods themselves. 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 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.

Towards a new European Public International Law?

However, we are convinced that this situation should be reacted to through a decisive return to the approaches of European schools, and to the centrality that is recognised in them by the State apparatus and/or in any case to bodies and apparatuses that respond democratically to their behavior.

Indeed, it seems to us that this phenomenon is already taking place, even if camouflaged, and at times unknowingly experienced, and that therefore it is only necessary to sharpen the gaze (and also the intelligence) to trace and detect at least its profile, if not its clear physiognomy.

European international law presents itself as a particular evolution of classical international law, of 19th century European international law, based on the protection of State sovereignty and the use of the contractual instrument in the typical form of the international treaty.

Today, the protection of State sovereignty is entrusted to the case law on "counter-limits" developed by national courts, while the treaty is still in vogue, both because the fabric of international relations is still based on certain fundamental treaties, such as those on the European Union or the European Convention on Human Rights, but also because the instruments of government of the European Union and the shaping of its policies are nothing more than peculiar international agreements among Member States, peculiar as far as the drafting procedures and the effects of the rules created are concerned.

This is why we want to continue to investigate this European international law, in order to outline the overall frame within which the individual regulatory developments taking place at the continental level are to be placed.