

# The Philosophy of International Public Law and the Changes on the Reality of the International Society

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## Abstract

The evolution of the concept of International society has considerably broadened throughout history along with the evolution of International rules. At first, it was defining the group of sovereign States existing at that time, while subsequently to the creation of the UN organization, International society would rather imply any individual designated by International legal corpus. At the end of the Cold War, the multiplication of nation-States, that would stay politically and economically fragile and unstable, compelled the UN to act over those States' sovereignty, though, to help them to outlive. Over the last decades, the phenomenon of globalization has contributed to support the idea of human rights and has considerably led to a global opinion that would be able to put pressure on States. Moreover, the UN would engage itself in emphasizing the concept of peace in all its decisions and actions. As such, International Penal institutions as the International Court of Justice had been established. But the fear of States for their sovereignty has still remained a problem in the equation.

**Keywords:** international public law, philosophy of law, United Nations, *domaine réservé*, human rights

## 1. Questions

- What are the principles on which International Law was founded?
- What is the most important Philosophy school on International Law?
- What are the effects of globalization on human rights?
- Is it possible that the concept of humanism will overthrow the principle of sovereignty?
- In which direction are Institutional organizations developing?
- Is it possible to redefine State's sovereignty?

## 2. Introduction

When International Law's founding fathers started to consider the concept of *the law of nations*, they would use terminology as *natural law* and *Roman law*, while they were promoting a legal way to organize relationships between nations. Yet, those authors were already aware that not all nations could be managed under only one rule at that time. It was then necessary to find a suitable law that would deal with different States. This law would be able to rule on political problems between nations. In the 17<sup>th</sup> century, the Duke of Sully imagined a European Confederation between independent nations but still described it as a dream. Other authors, like the two Spanish Francisco Vitoria and Francisco Suarez had used terms like *jus naturae* and *jus gentium* to express the necessary legal rules that would organize relations between *civitates vel regna* (States and kingdoms). They would emphasize on the existence of two systems: internal laws (civil or municipal laws) that regulated individuals within the State, and a set of rules that would organize relationships between different nations (law of nations). This distinction had been there consolidated for three centuries afterwards, while most research was undertaken to define the contents of the law of nations, as well as its legal sources. By then, the terminology *civitates* has become *suprema potestas*, meaning that the State could not be submitted to any other authority of the same nature, that is to say submitted to another State. In other words, we were relating to sovereign State. To sum up, the notion of State-nation is referred to in both the Pact of Nations and in the United Nations Pact. Between the two World Wars, authors started to criticize the unlimited States' sovereignty because States' sovereignty would only lead to wars. After WWII, there was a relentless use of *humanism* and *sovereignty*. Both notions are referred to in a great numbers of International treatises. Humanism exerted pressure on two extents: from now on, we would rather refer to *International Society* than *society of nations*; and the mechanisms of humanism would be based on international solidarity, that happened to be so necessary to promote and institute in the age of globalization. Therefore, all these phenomena have pushed

the International rules to adapt to the actual state of the International society, and then there was a need to redefine the traditional principles of International Law above all by relying on the idea that law must be born out of social needs.

### 3. The Distinction between *Natural* and *Positive* Law

There is the theory of natural law that claims that humans are created with an inner sense that helps them to differentiate between right and wrong. This theory, first dating back from the times of Plato and Aristotle, is based on *human nature*, and is, therefore, opposed to *positive law*, a corpus of laws that are socially constructed by people. Alongside, a wide range of knowledge, from philosophy (the study of ethics) to economics relate to natural law. The main theorists are notoriously Aristotle and Thomas Aquinas. Aristotle believed that there is a natural justice valid everywhere. While Thomas Aquinas intrinsically connected natural law and religion. He explained that there is a divine eternal law, which natural law is a part of, which fundamentally is based on doing good and avoiding evil. In a legal perspective, natural law manifests itself in the punishment of crimes that are universally acknowledged as penal crimes, such as murder and rape. On the contrary, positive law related to the laws made up by men. The most known example is *common law*. It opposed to natural law since such laws are applied at a specific time and at a specific place finally to serve specific goals. In his masterpiece, Vattel<sup>1</sup> compromised by codifying natural law to become positive law. Tensions between natural law and positive law may have positively contributed to the development of International Law. Grotius, the father of International Law, found natural law relevant to define *jus cogens* norms<sup>2</sup> and to lay down the foundations of International Law. More modern legal researches discussed the tight implication<sup>3</sup> of natural law within International law<sup>4</sup>.

### 4. From a Group of Sovereign Nations to an International Society

"Alphonse Rivier, à qui l'on demandait un jour de définir le domaine du droit des gens, répondit qu'il s'étendait du boudoir de l'ambassadrice jusqu'au champ de bataille..."<sup>5</sup>. Alphonse Rivier was a very famous Swiss scholar at the end of the 19th century who wrote: "Les Principes du Droit des Gens" (in 1896) in which he tried to come up with a definition of International Law. To paraphrase his idea, he postulated that the law of nations (the former name for International Law) encompassed the affairs from the Ambassador's wife in her *boudoir* to the activities maneuvered on the battlefield. Nowadays, International Law fairly extends from such affairs as the right of a baby born in the Amazonian forest to the preservation of the sand on the Moon's surface. It means that the scope of International Law has dramatically enlarged from the 21st century than it had in the 19th. The International Society has shifted from its materialization as a group of sovereign nations to the idea of its actual competence for regulating internal and external States' relationship with each other. The reality of International society has completely transformed through two historical phases. The first phase is the separatist movement led by nations eager to extirpate themselves from colonialist States and which lasted over 30 years since 1945, and subsequently, permitted their integration into the United Nations. The second phase is the dismantling of the U.S.S.R.<sup>6</sup>, which resulted in the creation of 30 new emerging States. The outcome of these two phases raised new challenges for the UN as an organization responsible for International Law and its application. Indeed, the birth of these new States was followed up by their fragile stability.

### 5. Short-Term Solutions for the Crisis of State-Nation

The International society developed in such a way<sup>7</sup> that not only did it not have enough time to act effectively at the time of the dissolution of the Soviet Union, that it had to face globalization as a new phenomenon and the new challenges ensuing therefrom. Emile Giraud asserts: "*A notre avis le droit dépend des conceptions philosophiques, morales, politiques régnantes, beaucoup plus que ces dites conceptions dépendent du droit*"<sup>8</sup>. He described that

<sup>1</sup> Vattel, *Le Droit des Gens ou Principes de la Loi Naturelle*, 1758.

<sup>2</sup> A latin expression that means compelling law and that entails any binding norms from which no derogations are admitted by the way of agreements. In short, it is natural law within International law.

<sup>3</sup> Fernando R. Tesón, *Natural Law as Part of International Law: The Case of the Armenian Genocide*, 50 *San Diego Legal Review* 813 (2013). Available at: <https://ir.law.fsu.edu/articles/39>

<sup>4</sup> D'Amato, Anthony, "Is International Law Part of Natural Law?" (2010). *Faculty Working Papers*. 68. <https://scholarlycommons.law.northwestern.edu/facultyworkingpapers/68>.

<sup>5</sup> Cité par Maurice Bourquin, dans son article "L'humanisation des gens" (1950). "La technique et les principes du droit public". Paris: L.G.D.P., p. 21.

<sup>6</sup> "Depuis la fin de la guerre froide, la façon dont les peuples définissent leur identité et la symbolisent a profondément changé. La politique globale dépend désormais de plus en plus de facteurs culturels". In Samuel P. Huntington (2000) *Le Choc des Civilisations*. Paris: Ed. Odile Jacob, p. 15.

<sup>7</sup> As Rebecca Wallace claims justly: "International Law is no longer the preserve of some 50 states, but rather embraces some 185 states: it is no longer an exclusive western club." *International Law*. p. 5.

<sup>8</sup> Emile Giraud (1950) "Le rejet de l'idée de souveraineté L'aspect juridique et l'aspect politique de la question." in "La technique et les principes du droit public. Etudes en l'honneur de Georges Scelle, Paris: L.G.D.J. p. 253.

the political situation at this time was more related to philosophical than legal principles<sup>9</sup>. In such a case, he added that: " (...) *les nouvelles théories juridiques ne seront pas consacrées par le droit positif, (...)*".<sup>10</sup> After the 1990s, no space has been allotted to written legal principles. The action of the UN has substantiated the weakness of implementing legal principles. Firstly, the UN would use a *soft* method to redefine already existing legal terms. Secondly, the key idea of this method was the broadening of the concept of peace. In doing so, the UN wanted to grant its Security Council more powers to act on States that may go through an internal crisis and a lack of stability, as was the case in Cambodia, Haiti, Bosnia, Kosovo, and East Timor. In 1992, Boutros Boutros Ghali's *An Agenda for Peace* mentioned the concept of peace thrice under three formulae: peacebuilding, peacemaking, and peacekeeping. All of this was to justify the competence of the UN to organize parliamentary elections, or to take part in the reconstruction of State institutions (parliaments, executive power, and so on), and to contribute very actively in the drafting of some States' Constitutions, as it occurred in Iraq, and it is currently the cases in Libya and Syria. All of these missions permitted the broadening of the concept of peace and the UN Security Council's prerogatives along. Back at that time, this method was far more bound to achieve since only one world power existed, and, therefore, there was lesser use of the veto. However, from the last 5 years on, both Russia and China repeatedly used the veto. In that case, State sovereignty was ruled by International Law, though was subjected to discussion.

## 6. The Institutionalization of International Justice and Its Influential Prerogatives

International penal jurisdiction and International Justice Institutions were created. They encompass the philosophy of International Law that claims that no one could escape from International Justice if one offended it. This idea was promptly developed with the Security Council's resolutions for the creation of Rwanda and Former-Yugoslavia International Courts as well as the Special International Court for Sierra Leone. This philosophy wanted to go further by the creation of a mandatory International penal jurisdiction that would comply with international rules. International justice would be then pronounced by an International independent tribunal established by treaties, and no longer by UN Security Council's resolutions. This original International legal institution materialized after the signature of the 1998 Rome Treaty. However, States emphasized on Article 15 to attempt to restrain the Prosecutor general's prerogatives assuming that his competence may be limiting their sovereignty. International crimes such as aggression, genocide, crimes against humanity might be committed during internal and international conflicts. In that case, International Tribunals may prosecute, then, either in the case of internal or international conflicts, and States cannot defend themselves in such cases by merely invoking the concepts of sovereignty or internal affairs. Then, there is a huge gap within the philosophy between the creation of the Society of Nations, which advocated no threat to the principle of sovereignty (Article 5 of the Pact of Nations), and the reliance on Article 15 of the Rome Treaty to try to limit the Prosecutor general's prerogatives.

## 7. The Philosophy of International Law besides the Evolution of Human Rights

For the last 30 years, human rights have undergone significant progress in terms of legal texts consecrating them or by the control of their application assured via the creation of the Human Rights Council<sup>11</sup>. In 2006, it replaced the Commission on Human Rights, and promptly lot of States, representatives of human rights defenders as well NGOs would join in. This institution works as a control organ<sup>12</sup> on a world scale. This institution gathered several controlling systems competent for applying legal decisions against States that may violate human rights. The concept of human rights is itself contradictory to the concept of sovereignty since human rights would grant legal status for individuals conventionally recognized as subjects of International Law. In all cases, governments have agreed upon the limitation of their sovereignty for the benefit of human rights, even though some States would aggress them, but generally, the States have found political and economic benefits for themselves out of the respect of human rights.

## 8. The Extent of Globalization on New Currents of Thinking

The most two effective impacts of globalization have been embodied in the World Wide Web and above all in social media, creating a global public opinion that would speak up against problems ( political, economic, and so on). States cannot ignore the political weight of this opinion that may even be able to exert pressure on governments. The last few years have provided us with relevant examples, such as the case of Georges Floyd murdered by the police in the USA that spurred huge rallies in the US and far beyond under the *Black Lives Matter* slogan. Many people in France, the *Gilets Jaunes* movement, demonstrated for months to contest the economic recession and

<sup>9</sup> La notion de système figure parmi les thèmes fondamentaux de la théorie du droit moderne, (...) la 'Science' juridique, concernant la définition, l'unité, l'autonomie, les propriétés structurelles du droit, prennent appui sur une compréhension primordiale du caractère systématique de celui-ci. (...) in Frederic Rouvillois (ed) (1999) *Le droit*. Paris: GF Flammarion, p. 166.

<sup>10</sup> *Ibid*, pp. 253-254.

<sup>11</sup> Created by the General Assembly Resolution 60/151 (2006).

<sup>12</sup> H J Steiner, Ph Alston, R Goodman, (2007). *International Human rights in context*. Oxford: Oxford University Press. pp. 737-799.

the repercussions on the population's living standards. Social media were very useful for them to organize demonstrations on the territory, and to popularize their action abroad. Another example is the case of the Russian political dissident, Alexei Navalny whose arrest spurred people to come down in the streets to show their disagreement. Each of these cases among others has managed to arouse a new global common thinking founded on the principle of humanity<sup>13</sup>. This social and mediatic construction would directly influence legal rules and above all sovereignty without any State able to ignore this phenomenon. In the case of France's cartoons, for instance, while the government was arguing its constitutional right, global opinion was mostly against the cartoons (far beyond Islamic countries) and the principle of free speech the way France was depicting it. The global opinion may play a role in the protection of the environment too. "*Dans l'opinion publique, il se trouvera beaucoup de gens qui se piquent d'internationalisme et qui acclameront la solidarité internationale quand elle leur sera présentée sous la forme d'un principe général, (...)*"<sup>14</sup>. In other words, his global opinion is a rational example of what we may call *internationalism* or *international solidarity*<sup>15</sup>.

## 9. Humanity and International Law

Humanity does not own a legal meaning. Humanity comprehends any human being on Earth. This term was even used in the preamble of several conventional texts to focus on the universality of those texts. The concept of humanity surfaced as a legal term in the 1899 Clause Martens but as an indefinite appellation *laws for humankind*. More precisely, when the Court of Justice in the *Case of Corfoe* (9<sup>th</sup> April 1949) granted special dignity to those laws and the same value as custom law. When the same Court sued its judgment on 8<sup>th</sup> July 1996, on the lawfulness of the use of nuclear weapons, it mentioned the use of nuclear weapons as a crime against humanity. Most have been completed with the creation of the ICJ that identified every crime that might constitute a crime against humanity as well as the sanction procedures, which ascertained substantial legal value to the notion itself. It is International Environment Law that focuses a lot on the term *humanity*. Indeed, it defines any space or goods belonging to the whole of humankind<sup>16</sup>. The concept of heritage<sup>17</sup> has developed with the resolution of the Assembly General A.G. Res. 2749 XXV that included the laws applicable to the seabed. Similarly, article 136 of the 1982 Convention of the Sea. The Treaty of the Moon was thereby signed in NYC 17<sup>th</sup> December 1979 and claimed that: "[t]he Moon and its resources are part of the common heritage of humankind." The two regimes (the sea and the Moon) imposed new fundamental legal principles: firstly, peaceful utilization, secondly, the protection of human interests, and thirdly, non-appropriation. Thus, those principles would be used further in other application fields in IL like corruption, environmental responsibility. More important, those principles have shifted from material things to the ruling of individuals' activities (crimes against humanity, corruption). The notions of humanity and world heritage has shifted towards the human. This is translated into the birth of human responsibility and its legal implications. Moreover, expressions as *States' interdependence* and *human solidarity* would be exemplified in such cases as the relief in natural catastrophes and the protection of civilians fleeing wars or trapped in internal armed conflicts, or in a sanitary crisis like Co-vid 19 which is the most contemporary example. This helped to construct the necessity of a human consciousness that unfortunately has not been designed yet as a legal principle.

## 10. Conclusion

According to the changes and challenges facing the international society, structural changes have taken place along with the emergence of new fields of application of International Law. As a result, new legal theories in IL were initiated. These theories are still incomplete in the legal sense, namely that no dogma or procedures concerning them have been clearly outlined. However, it shows that IL can adapt to reality. Moreover, it happened that objectivism has clearly outweighed natural law through the process of globalization of legal rules. Globalization has intensified international relations and consequently the acknowledgement of International society's interdependence. This phenomenon aroused the development of International Law rules in both *quantitative* and *qualitative* paradigms. Nowadays, there is a fundamental crisis that necessitates urgent action from International organizations and States' governance to develop already existing legal rules to preserve the International society.

<sup>13</sup> "Qu'il soit nourri d'une haute Esperance humaine, de l'amour de la justice (...), chaque jour lui apportera de nouvelles raisons de s'interroger sur l'avenir d'un homme qui continue à refuser si fermement de sortir enfin de la préhistoire. (...) ces hommes si fiers de leurs exploits techniques, mais qui pratiquent la torture, acceptent la violence, ne haïssent pas sérieusement la guerre, qu'ils préparent sans remords, (...) Emerger de la barbarie ancestrale est un lent processus (...); laissez-lui le temps de grandir et de découvrir son destin véritable", in Theodore Monod (2002). *Et si l'aventure humaine devait échouer*. Paris : Grasset, pp. 257-258.

<sup>14</sup> Emile Giraud, *Ibid*.

<sup>15</sup> "La théorie de la justice politique de Rawls (...), en réconciliant les exigences de liberté individuelle et de solidarité sous la houlette d'un État non pas providentiel mais libéral, qui assure conjointement la jouissance des droits fondamentaux et la juste répartition des avantages de la coopération sociale", in Atila Ozer (1998). *L'Etat*. Paris : GF Flammarion, p. 167.

<sup>16</sup> R. J. Dupuy (1991). *L'humanité dans l'imaginaire des nations*, p. 224.

<sup>17</sup> A. Kiss (1982). "La notion de Patrimoine commun de l'humanité", The Hague : R.C.A.D.I, t. 175, pp. 103-106.

The prevailing difficulty that the philosophy of International law has to cope with is not to reject States' sovereignty but rather to carve sovereignty so that it fits International Law's new rules.

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