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THE RELATION BETWEEN THE CONCEPT OF INTERNATIONAL LAW AND THE MECHANISMS OF ITS APPLICATION

Dr Abdelsalam Hammash

ABSTRACT: *There are a strong relationship between the philosophy of International Law and the mechanisms of its application. This evolution has spanned for centuries and showed the evolution of the International Community which requires to be studied. The changes in the ways of application of International Law created a new system of control. At the same time, it overcomes the core of International Law, which is mainly sovereignty.*

KEYWORDS: international law, international community, methods of control, rules, international organizations.

INTRODUCTION

A study of public International Law[1] cannot be complete without the study international facts along with theoretical texts[2]. In his Article 36[3], the International Tribunal cited formal sources of International Law such as treaties, customs, judgments, and so on. All of this may help to shape a theory but it is not enough[4]. A law disconnected from reality would become eventually null and void, and would become a utopia. That is the reason why the real significance of law cannot be fully grasped without the study of procedures. In reality, those procedures are not only mere application of rules but also are ways to construct new legal rules and even to improve those rules. This aspect will be analyzed further in this analysis. Legal notions encompass law sources, subjects, competences and judgments that appeared in the application of the laws. Without procedures and mechanisms of application of such rules, a valid legal theory cannot be achieved. When Grotius[5] published his masterpiece *De jure belli ac pacis* (On the Law of War and Peace) in 1625, he came up with the comprehensive idea of reorganizing the European society and its structure with the recognition for each State to reach its

[1] Daillier, P. (2010). *Droit International Public*, Paris: L.G.D.J., p.70.
[2] Hamed Sultan, (1976). International Public Law, Dar Al Nahda, Cairo, p 9-10
See also, Ahmad Abo Alwafa,(2010), Al Waseet in International public law, Darr Al Nahda, le caire, Egept t, pp18-24
Ali Sadik Abo Haif, (1995),Al International law, Darr Al Nahda, le caire, Egept, 24-52
[3] Charles de Visscher,(1933). "Contributions a l'etude des sources de du droit international", RDILC, pp. 395-400.
[4] Dupuy, P.-M. (2004). *Droit international public*, Paris: Dalloz, p. 5. See more in Detter, I. (1994) *The International Legal Order*. Aldershot: Darmouth
[5] Al-Qaissi (2002). History of International Law. Bagdad: Bait al-Hekma. pp. 162-168.

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own sovereignty[6]. By this way, it would allow ending up the legal links between the German Emperor and the nations under the German rule. It created a natural legal link based rather on human reason and established a new legal principle to abolish the link between laws and Christianity. However, the analysis of mechanisms efficient to rearrange the links between nations within the scope of human law shows that there is not a consistent method for its application, since each State would apply using his discretionary powers. Therefore, this paper aims to address these questions:

-How was created the International Community?
-Why was States' sovereignty the core of International Law?
-How did International organizations change the concept of sovereignty?
-How have the mechanisms of control developed through years?

Towards a definition of legal procedures

The lack of consistency in the methods of application of laws by States showed the necessity for a set of procedures[7] clearly defined that would be efficiently applied to a precise case. It includes legal texts as well as the procedures emanating from the text. Following this idea, Machiavelli showed in *The Prince* (1532)[8] that the Prince must be sovereign, and administers his foreign affairs with absolute liberty. This concept of *sovereignty* or *absolute liberty* means that there are no definite procedures that the Prince would be forced to abide by. The term of *sovereignty* consequently encompasses any action taken either in peace or in war without distinction. At the beginning of World War I, there was a lack of two elements: firstly, a global vision of the concept of *nation*, which was limited to Western countries at the time; secondly, there was not a clear definition of the procedures. As such, we can define International Law as a set of principles applied discretionarily to regulate the relationships between nations. Sovereign princes would not hesitate to rely on force to overthrow rules that they may consider to represent a threat to their sovereignty. Moreover, those rules did not have a legal binding value and would be applied only in the case of arbitration and only under the Prince's acceptance. None of this prevented the theoretical principle from developing this principle, for example, referring to principles such as *fair war* or *unfair war* in time of war to justify any use of force. In time of peace, though, legal methods came out to regulate relationships between States such as treaties, International arbitration. Nonetheless, the use of force remained the only way to arbitrate in the facts, and eventually, appeared to be the only tool linked to Princes' will and did not have any legal value.

[6] Detter, I. (1994) *The International Legal Order*. Aldershot: Darmouth.
[7] Mohammad Al-Dakkak, (1978). International Organizations. Cairo: Dar Al-Thaqafa, pp. 25-35.
[8] Niccolo Machiavelli, (1532) *The Prince*. Damascus: Daer Al-Waled.

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The emergence of diplomatic missions

At the end of the Thirty Years' War, belligerents tried to reach mutual peace embodied in the 1648 Westphalia Treaty. This Treaty contained three fundamental principles: nation's sovereignty, stability in diplomatic representation, and non-intervention in States' affairs (the latter being rather a political principle). The two main reasons explaining the will to stabilize diplomatic relationships was mostly to ensure safe maritime routes for trade, and to strengthen the relationships between sovereign nations. Consequently, the set of legal rules that manage relationships between nations was not consistent and rather fragmented, as we may label currently as *soft law*. In reality, if we stick to its modern meaning nowadays, we could not label it as a law. Therefore, we cannot hint at procedures defined to regulate situations between nations[9]. This situation prompted jurists to come up with a system or a concept to unify directory principles respectfully to the Westphalia Treaty principles. However, this system could not arise without the creation of *State*. The transition from a nation to a State necessitated a central power that would dominate and exercise powers and State functions on a definite territory inhabited by a group of people linked to each other by either race, and/or political, sociological factors. In *The Six Books of the Republic* (1576), Jean Bodin[10] described the concept of *State* as :"Le droit gouvernement de plusieurs ménages et de ce qui leur est commun avec puissance souveraine. (…). Pas d'Etat sans souveraineté." Sovereignty must be one and indivisible, perpetual, and supreme. In this context, it is clear that State law in Europe was only for the creation of sovereign States and was not a tool used to regulate the relationships between States. Therefore, sovereign States were free to implement any method to achieve their mutual legal relationships with other sovereign States. The only advantage of the Treaty is the reference to a theoretical principle that would organize the relationships between sovereign States and lay down the keystone of customary law for these relationships. However, this principle was not applied because the absence of procedures. In fact, those principles were just applied in case of maritime incidents or commercial conflicts, but eventually could not prevent wars. At that time, legal literature would only refer to *jus ad bellum* or *jus in bellum*. Pufendorf (1632-1694) claimed in *On the Law of Nature and of Nations* (1672) that sovereignty must be limited to natural legal principles. The mere existence of principles is not sufficient, and as such, procedures must be postulated. The same idea was in Vattel's (1714-1768) *The Law of Nations or Principles of the Law of Nature Applied to the Conduct and Affairs of Nations and Sovereigns*. (1758). Most emphasis is on the participle *Applied*, which Vattel used to point out the necessity of clear procedures to apply natural law on nations. He went further by referring to an *International society*. It is worthy to remind that Vattel was acknowledged as a *positivist*. Accordingly, the principles resulting are such: there must be equality between each sovereign States. The International society is an interstate[11]

[9] Mohammad H. Al-Qadah, (2010*). International Public Law*. Amman: Al-Waraq, pp. 52-56.
[10] Ryad Al-Qaissi (2002). History of International Law. Bagdad: Bait al-Hekma. pp. 265-277.
[11] Jessup, Ph.C. (1949). *A Modern Law of Nations*. London: McMillan, p. 120.

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society. International Law is exclusively interstate, which means that it cannot be applied to individuals. International sources are issued under the States' will and consent. Respectively, treaties are signed through an explicit consent, while custom is defined tacitly. Sovereign States would appreciate by their own what they are allowed to do or not in terms of International relationships. War was permitted in the framework of relationships between sovereign nations. In 1780, Betham even referred to *International Law*. At the end of this era, all procedures finally comes to the States' discretionary powers. The only new idea is that principles were explicitly declared. The existence of underlying principles without any procedures resulted in two schools of thought: the voluntary school and dualism. The voluntary school claimed that the founding of International Law exists in States' law, while dualism recognized the distinction between internal and international laws. The only effective procedure was the creation of International Conferences between States related to different affairs.

The establishment of International institutions

International Conferences were the first embodiment of the institutionalization of International Law[12]. Mainly in the 18th and 19th centuries, States attempted to establish an equilibrium between them. In this context, authors as Jellinek and Trierel started to express the theory of *voluntary positivism*, which means that States would face to legal principles that are defined and written. It compels States to comply to them strictly. However, because of the absence of a supreme organization that will rule over States, international custom would stay limited to States' actions, as they would act as freely as they would in the past. Therefore, along with a political balance between States, International Law started to seek for a legal founding principle away from States' will. As Kelsen said : " La société international résulte non pas de la coexistence et de la juxtaposition des États, mais au contraire de l'interpénétration des peuples par le commerce international (au sens large) Il serait bien curieux que le phénomène de sociabilité qui est à la base de la société étatique s'arrêtât aux frontières de l'État." .

There were two kinds of International Conferences: on the one hand, there were International Conferences during which States parties would comply with the principles de *bonne foi*, and on the second hand, more technical Conferences pointed to a specific domain of specialization: business, disarmament, and so on. The latter would result to the creation of institutions charged of the application of the resolution issued by the Conference. Small institutions (most of them being local authorities) would apply the application of the resolutions. Following to this, the situation changed with the birth of more developed institutions and treaties that would contain a procedural dimension, as well as a consolidated International custom. Adding to that, by the end of the 19th century, there was a clear-cut distinction between the right to war and the right to peace. *Jus ad bellum* (1899 Geneva, 1906 The Hague Conferences) reminded of the right to protection of victims of armed conflicts and the control of military operations (such as

[12] Ryad Al-Qaissi (2002). History of International Law. Bagdad: Bait al-Hekma. pp. 265-277.

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the control of the types of weapons used). While *jus in bellum* encouraged the creation of International organizations, the one of those is The Post, and most of those were European maritime organizations. However all these progresses, the techniques for the application of the International Law would remain in a primary stage and stayed totally linked to States' will. From the 19th century up to the end of WWI, many legalists requested the creation of an International organization competent to regulate relationships between States. Wilson and his 14 points Declaration emphasized on the necessity to regulate relationships by applying law. This is what will give birth to International law. The Pact of Nations came up with the necessity of an International organization. The Wilson's Declaration, signed after WWI, would give birth to the Society of Nations and to an International Tribunal. Two techniques stood out: a political one and a purely legal one. As the latter is concerned, institutions already existed at that time. The efficiency of institutions, though, would remain to States' will. This was the main reason for the failure of the Society of Nations. On the contrary, the International Tribunal issued a number of judgments fundamental for the emancipation of International Law. The only one noticeable improvement of the Society of Nations was that it managed to elaborate peaceful methods to solve International conflicts, such as mediation, arbitration, and committees of inquiry. Afterward, those methods appeared to be very useful to develop further International methods for the resolution of conflicts (UN Pact Chapter VI)[13]. In parallel, International Law has witnessed the creation of the WTO as a specialized organization in a specific domain (basically, labor and protection of labor force) organized around the different components of labor: managers, workers, and trade unions, which introduced a new step for the procedures in a specific domain. The most important thing to understand is that International Law may be a tool not only to cope with issues *between* States but also to solve issues *inside* a State. Another important proposal is the prohibition of war by Briant and Collin. This was a significant step in the prohibition of the use of force in a legal way. Nevertheless, even this pact stayed in its primary form since it was deprived from any procedures that would prevent the use of force. And as before, its application depended on States' will. The other standpoint to achieve the actual prohibition of war was eventually the limitation of weapons to be used. This move has spurred some legalists, as Georges Scelle, to concentrate on the problem of elaborating procedures in International Law that would rely mostly on sovereignty. Thus, the most appropriate approach to overcome this problem is to limit States' sovereignty[14]. The incapacity of sovereign States to ensure peace would necessitate the development of other institutions and of the idea of international solidarity. More certainly, limits should be put on States' will. This entire context has finally lead to the creation of the United Nations. The UN founders have aimed at keeping up the balance between traditional legal fundamentals

[13] Murphy, S.D. (2006). *Principles of International Law*, XXIII, Saint Paul: Thomson/West. And in Reuter, P. (1983). *Droit International Public*. Paris: PUF.
[14] Fatlaoui, Sohaib, (2010). International Public Law in time of Peace. Amman: Dar al-Thaqafa, pp 247-256.

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and more modern mechanisms of control. It is then easier to understand that Articles I and II of the UN Pact enshrined the guiding principles of the International Law, most of them prominent when linked to the limitation of war. Furthermore, the Security Council was established as an organ to guarantee the control of International Law principles. The paragraph 7 of Article II is the most outstanding since it pointed out that the UN would respect the States' *domaine reservé* under two conditions. Firstly, as long as there is no threat to International peace and stability. Secondly, that the respect of *domaine reservé* would be accordingly to its definition in International Law, which gives supremacy to International Law on internal laws and requires the modernization of organs of control

The new role of the UN General Assembly

The first role for the UN General Assembly is to develop modern rules[15] of International Law and to guarantee friendly and peaceful relationships between States. In other words, the Assembly works to set up the concept of *humanism*. Most of the legal corpus issued by the UN refers explicitly to this important concept (on such many issues as space, sea, and so on). Therefore, the modern doctrine of International Law has become more and more into sociological positivism and inside it the *pragmatism* current. Among the authors defending this view are Thomas Franck, Louis Henkin, and Charles Rousseau[16]. Nowadays, there is a multiplication of UN specialized organizations and others organizations not belonging to the UN but cooperating with it. All those organizations have developed their own mechanisms of application and of control, which are founded on their respect by States[17]. Then, a control committee was created to control States' compliance on the ground. The creation of a central committee within these organizations charged in classifying States according to their level of compliance. These organizations, moreover, are responsible for the application of resolutions issued by it. This form of functioning is the most adequate to guarantee peace and to ensure a better fate for humankind. From the 1950s on, there were so many mechanisms along with the creation of International organizations and to put out NGOs. The diversity of such organizations eventually may be a backward because they are only linked to a very specific domain of competence, then, their action would very limited. This situation has spurred the International community to study the International responsibility, which is contrary to sovereignty. Indeed, States remain responsible to unlawful acts and lawful acts on environment that may endanger the future. To establish International responsibility, an important step for International jurisdiction. There is a development in mentality of States' competence to comply with legal procedures. Eventually, the diversity of mechanisms is only the result of diversity of the fragmentation of the International community and the hesitation to become a more organized community.

[15] Ghassan Al-Jundi. (1987). *International Organizations Law*. Amman: Al-Maktaba al-Wataniya, pp. 35-39.
[16] P. Daillier, *op. cit.* pp. 115-117.
[17] Sayyid Abo Attiah, (2000). *International penalties*. Cairo: Al-Thaqafa, pp. 138-150.

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CONCLUSION

There is a close relationship between the theory of International Law and its philosophy. Many Internationalist schools of thinking have studied the several mechanisms of application of International rules, and the application may take place at different levels. There are two main currents of thinking, however, that deserve to be highlighted. The first one emphasizes on the sovereignty, and claims that States' cooperation should be performed according to the respect of States' sovereignty and States's *bonne foi.* After the World War II, the second current advocated on humanity that is the main component of International community, and the social reality of such a community requested the creation of an international institution that is granted freedom of action, and the creation of more specialized organizations with special missions. The passionate conflict between dominant principles and the evolution of the International community is so obvious that it explains the incapacity of reforming the United Nations even though many analyses on the topic tried to come up with a solution. Some States are merely not ready for the reform of International Law principles because they would feel threatened by the shift from States' sovereignty to interdependence. Indeed, if such may happen, legal mechanisms would become more mandatory and it would result in the creation of a supranational society.

Recommendations

-Owing the nature of this study, it is recommended to law specialists to concentrate their efforts further on this topic, and at the same time avoiding studying it in a mere philosophical contemplation, but rather trying to come up with practical elements to bring up a solution to the lack of procedures.

-States or governments have to take awareness of the change of the nature of the International Community and the incapacity to protect States from global phenomena like wars, or more recently pandemic, or disasters due to climate change.

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