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Is sovereignty still the foundation of international law?

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From the seventeenth to the nineteenth centuries, the idea of sovereignty formed the basis for the theoretical development of international law, that is, the formation of a theoretical framework within which to explain and rationalise the practice that arose from new relations among modern states. That theory gave rise in turn to the birth of a discourse *of* international law or *on* international law which has progressively become the common parlance of international law practitioners today. Between the onset of the twentieth and the onset of the twenty-first centuries, international law underwent a change of dimension, purposes and actors. But the language invented in the seventeenth century is still in use. This is not just a matter of the classical 'law's delay' relative to social changes; it is both the language and the metalanguage of law[3] – the way the law speaks of itself and the concepts used to describe it – that no longer correspond to what international law has become. Sovereignty, which belongs to the language of both legal theory and positive law,[4] attests to this mismatch more than any other concept.

To attempt to describe today's international law with the language of sovereignty is like trying to describe the Internet with the concepts used in the days of the printing press or to explain particle physics without quantum mechanics, by applying the principles of traditional physics.

This can be felt, of course, for those whose job it is to teach international law and who can no longer manage to properly describe what is there before their eyes for want of suitable concepts. This confusion is passed on to those who, educated in our universities, take part in international negotiations to defend certain social ends, whether the interests of some state or other, some organisation, business undertaking or federating 'cause' such as the defence of the environment. Happily, more often than not, the conceptual fog is torn apart by pragmatic action. Diplomats are not trained to set out problems but to come up with solutions. Ad hoc arrangements, institutional, procedural or normative innovations are multiplied for ends determined by the world of politics. However, such a development of law without appropriate concepts merely complicates the understanding of it a little more. Action itself is impeded at some point because without its compass it is unable to set a heading. For example, the theory of international law based on sovereignty is unable to understand what it means for *non state actors* to participate in the works of international organisations and more broadly in the development and implementation of international law.[5] And for the simple reason that, within the 'Westphalian' or 'Vatellian')[6] framework

3. The distinction is made by Michel Troper in 'Les concepts juridiques et l'histoire', in M. Troper, *Le droit et la nécessité* (Paris, PUF, coll. 'Leviathan', 2011), pp. 255-268.

4. Here again, see Michel Troper, 'La souveraineté, inaliénable et imprescriptible', in Troper, *Le droit et la nécessité*, pp. 77-98 and especially p. 98: 'Sovereignty is not therefore an objective property of the state, that could be observed and described. It is a legal concept, which is not only part of the language of legal theory but also belongs to the language of positive law'. Conversely – and for reasons set out in this paper – I cannot follow Michel Troper when he concludes, 'We cannot evaluate such theories [including the theory of sovereignty], but merely describe and explain them. They are not amenable to being true or false. We can probably find them more or less consistent, but their consistency or inconsistency has no impact on their existence or effectiveness. In this sense, the concept of sovereignty is intact.' It seems necessary on the contrary to evaluate a theory to determine whether it can satisfactorily account for reality. A theory that is unrelated to reality is frenzied. It may exist and it may be 'effective' in that it acts as a support for developing law or, in Michel Troper's example, for courts to make judgments. But it is 'ineffective' from another point of view, namely its capacity to account for the real world – which is the only thing to be expected of a theory, outside of purely aesthetic considerations. From this point of view, the concept of sovereignty is not 'intact', it has aged.

5. See O. de Frouville, 'La place de la société civile dans les organisations internationales : quelle stratégie pour la France au XXIème siècle ?', in G. Cahin, S. Szurek and F. Poirat, *La France et les organisations internationales au XXIème siècle* (Paris Pedone, 2014) pp. 295-325; 'La Cour pénale internationale : une humanité souveraine ?', *Les Temps modernes*, n°610, *La souveraineté*, automne 2000, pp. 257-288.

6. These expressions are often used to refer to what is also called 'classical' international law. 'Westphalian' because classical international law is often described in the historiography of international law as beginning historically with the treaties of the Peace of Westphalia that ended the Thirty Years War in 1648. A historical judgement of the kind is probably rough and ready, which does not mean we should not keep the term, provided that the event, in this instance, crystallises a concept. For a critical perspective, see especially Dominique Gaurier, *Histoire du droit international. Auteurs, doctrines et développement de l'Anti-*

of international law, states alone are the 'originating' subjects of international law, while international organisations, individuals and firms are invariably 'derived' subjects. That is, they are only subjects by virtue of the will of states which confer rights and duties on them, usually by means of an international treaty, that is, a sort of 'contract' between states (states being thought of as natural 'persons' in the state of nature). Such exclusiveness, such a privilege of states is part and parcel of the mind-set of diplomats who fail to understand quite how it can be that they should find themselves working on a daily basis with non state actors to whom, all the same, they have not granted any right. They confine themselves to of this fact, but are unable to think of it or articulate it other than as the outcome of social necessity with which one must come to terms if all touch with reality is not to be lost. This inability to conceive of the place of non state actors leads to it being either overestimated or, as is more often the case, underestimated, and consequently to applying a form of regulation to them that corresponds neither to actual practice nor to the utility that one might want to derive from the contribution of such actors.

The reason for this difficulty is that 'Vatellian' theory and discourse have said everything they had to say about international law such as it was between the mid-sixteenth and late nineteenth centuries. Contrariwise, such a theory and such a discourse have nothing more to say about the recent changes in international law.

It might be wondered why there is this inability to speak of international law today?

First, the purpose ascribed to international law has changed. Because international law today relates not *only* to coexistence among states but also and above all to the construction of peace. This new purpose of international law has arisen from the observation that classical international law failed to maintain lasting peace and to enforce observance of individuals' rights. Admittedly, international law facilitated the ending of the wars of religion by imposing pluralism and toleration: *cuius regio, eius religio*. Each state could in future choose not just the religion of its subjects but also its political system, its economic regime and so on without any interference from other states. But for one thing, such a regime was only set up for the benefit of European states – international law was 'European public law' – justifying by the same token both colonisation and the enslavement of one part of humankind by the other; for another thing, the principle of 'non intervention' meant that the state's population was at the mercy of its leaders proclaimed to be 'representatives of the state' and so invested with complete immunity for their crimes. 'Sovereignty is the mutual guarantee of torturers.'[7] The proclamation of human rights in the United Nations Charter after the atrocities of the Second World War is a response to the 'A man is master in his own home' that Goebbels proffered to the League of Nations when he was challenged about the treatment of Jews in Germany.[8] Henceforth, international law is tasked with safeguarding the independence of each community, but in compliance with a number of higher norms, that are required of states. When expressed in the language of sovereignty, this dual purpose appears contradictory at some point: how can one maintain states' 'sovereignty' – that is the principle of non intervention – and the practical necessity for those same states to comply with the requirements of international law which, from now on, intervenes in all areas of state activity? The answer from the proponents of sovereignty is that the

state may 'consent', by virtue of its sovereignty, to limitations of competence and even transfer some of its competences to international or supranational entities. But in truth such consent is rather meaningless nowadays, as can be seen with 'new' states such as Kosovo or Timor, which must immediately include and submit unconditionally to a 'package' of rules that are required of them. Similarly, the institutionalisation and build-up of oligarchic power, in the form of the Security Council, that affects states and individuals or legal entities, shows to what extent the argument of consent has lost all explanatory force.

Second, this change in the purpose of international law – which rests in some sense on a moral imperative taken into account by states – has encountered another form of factual imperative, namely the far-reaching transformation of the world through the process of globalisation. Today no state can claim to act wholly independently, disregarding the impact of its decisions outside its boundaries or claiming to be fully autonomous with respect to that outside world. The distinction between *internal* (domestic) and *external* (foreign), on which sovereignty was founded (itself divided between 'internal' and 'external' sovereignty, reflecting the division between 'private' and 'public' in human societies) is now meaningless in a world of flows, be they financial, cultural or human, that disregard national borders. In truth, far from 'Westphalian' non intervention, today's world has become a world of non-stop intervention. Economic, political, cultural, social intervention and so on has become the rule rather than the exception. Multiple interventions seeking to articulate, coordinate and form a global project for the planet in the area of the prevention of global warming, the fight against pandemics, actions against extreme poverty, the prevention of mass crimes, and so forth. As Habermas remarked, what is developed within international organisations now is a world domestic policy without a world government.[9] The state can no longer think of itself *in itself* and *for itself*, as an ethical whole, formulating a universal law, the external aspect of which would be international law applicable to that state. There is nothing more destabilising today in international arenas than to hear these tiny solipsistic subjects constantly saying 'me, me, me' before finally realising that they have no other choice than to de-centre themselves and take into consideration the other 'me' in its otherness so as to manage at last to say 'we'.

Sovereignty was not thought up in order to solve common problems in common, but so that everyone could solve their own problems at home and for themselves separately. To carry on using the language of sovereignty for a system of law the main purpose of which is nowadays to solve common problems does not make the task impossible, admittedly, but it does over-complicate it.

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The only way to think of current international law with sovereignty would be to imagine it possible to move from *equal sovereignty* to *equality before the Sovereign*.

But *there cannot be any Sovereign* on a world scale. Kant saw this clearly when after contemplating the idea of a world state he dismissed it in the end. Such a state would necessarily be despotic and in any event wholly unmanageable. Continuing to speak the language of sovereignty to try to solve the aporias of sovereignty therefore leads to another dead end: to come up with a global system of law implies building a world state; but since the world state is impossible, there can be no global legal system. Things go round in circles because one cannot move beyond a problematic concept by placing it at the centre of the solution. There is a global legal system today but the language of international law hides its outline from

9. See Jürgen Habermas, *The Postnational Constellation*, transl. M. Pensky, (Cambridge, Polity Press, 2001), *Après l'Etat-nation. Une nouvelle constellation politique,* trad. Rainer Rochlitz (Paris, Fayard, 1999), pp. 111 ff.

us most of the time. We must therefore both get rid of the conceptual trappings of sovereignty and invent a new language to describe and further develop this global system of law such as it can be observed.

This is the project of *a democratic theory of international law*.[10] Such a theory finds its starting point in the aporia described by Kant: to achieve perpetual peace, states must move out of the state of nature; and yet they cannot, as individuals can, form a world state as it would necessarily be despotic and unmanageable. To escape from this aporia, Kant proposes a concept that on the face of it seems antinomic: the *Federation of Free States*, governed by what is characterised as 'cosmopolitan' law. Beginning with this concept – which refers to a *process of transition* much more than any particular form of political organisation – the theory calls on instruments specific to both the theory of the Federation and the theory of democracy. The idea is that by combining such instruments in light of the Federation of Free States concept, a theory can be built enabling positivistic jurists to properly apprehend today's positive law, but also to think in terms of tomorrow's international law.

10. See the presentation of the Institut Universitaire de France research project: http://www.frouville.org/Projet_IUF/Entrees/2012/7/24_PRESENTATION_DU_PROJET_DE_RECHERCHE.html