ILO*100*

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The ILO and the Structural Transformation of International Law

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I

The current international legal system, while still bearing the main features it acquired as it emerged from the Peace of Westphalia in 1648, has undergone a long process of transformation, particularly since the late nineteenth century, from a purely State-centric system towards a community-centred one. The establishment of the ILO, with its specific features, in the wake of the First World War, constituted an important milestone in this transformation.[1]

The system ensuing from the Peace of Westphalia was the result of the disintegration of a community of values and allegiance, which prevailed in Europe throughout the Middle Ages, at least in theory, if not in practice: an *imperium mundi* based on the fiction of a universal Christian empire, successor to Rome, that Vinogradoff, the famous historian of international law, called 'the world state of medieval Christendom'.[2] A feudal, hierarchical community which, though progressively showing signs of loosening up, remained from an ideological point of view an integrated community with both its legitimacy as a community and the legitimacy of its law rooted in a double allegiance to the Pope and the Emperor.

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[1] For more, see Georges Abi-Saab, 'Cours général de droit international public' (1987) 207 Recueil des cours 9 passim; cf. Georges Abi-Saab, 'The Changing World Order and the International Legal Order : The Structural Evolution of International Law Beyond the State-Centric Model' in Yoshikazu Sakamoto (ed), *Global Transformation : Challenges to the State System* (UNU Press 1994) 439.

[2] Paul Vinogradoff, 'Historical Types of International Law' (1923) I Biblioteca Viseriana 53.

This stable, static and hierarchical European universe went through a series of traumatic shocks straddling the fifteenth and the sixteenth centuries, including the discovery of the New World, Galileo's writings on heliocentrism, the Renaissance, the rediscovery of pre-Christian heritage, the expansion of trade with the Far East, India and China, with the opening of the southern maritime routes, the *conquista*, and the establishment of trading posts. These shocks resulted in a material and intellectual opening up to an infinite world. Retrospectively, this could be deemed as the first wave of globalization.

It was in this context that strong States emerged together with the contestation of the prevailing ideological structure of the double allegiance. It led to the Reformation, which in turn led to the Wars of Religion which were ideological wars, the only object of which was to annihilate the other ideological camp. When neither of the two camps managed to prevail and impose its 'truth' upon the other, they sought a way out of these long drawn-out wars, through a legal structure, in the manner of an armistice agreement that would allow the coexistence of potentially antagonistic units.[3]

An agreement was thus reached by the parties to the Peace of Westphalia to recognize as governing principle the famous dictum *cuius regio, eius religio* (whose realm, his religion) which in effect meant that each prince would have the right to determine the religion of his own territory. In the ideological terms of the time, a transformation was operated from a hierarchical, ideological and legal system to a completely horizontal system under which each State would be free to follow its own ideology within its territory.

In order to coexist, States which had been at war with each other, had to skirt around their differences through the new twin parameters of allocation of power: the principles of sovereignty and equality. According to the first principle, each prince had the final word, or, he was the final instance within his territorial and functional domain and did not depend on any

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[3] Georges Abi-Saab, 'The Security Council as Legislator and as Executive in its Fight Against Terrorism and Against Proliferation of Weapons of Mass Destruction: The Question of Legitimacy' in Rüdiger Wolfrum and Völker Röben (eds), *Legitimacy in International Law* (Springer 2008) 112-113.

higher authority. For the system to be sustainable in the presence of a plurality of princes, they had to recognize the same attributes to each other, regardless of their differences of size, power, wealth, ideology or religion. Thus, to suit the system's needs, the princes had to turn a blind eye on their differences or feign not seeing them (the principle of equality), whence the model of the hermetic State – or to use Arnold Wolfers' expression, 'billiard ball' States – completely opaque, that one cannot see through and which touch only from the outside.[4]

The basic assumption of the system was that it was a system of ceasefire. To use the words of David Mitrany, the task of this system was to keep its subjects 'peacefully apart'.[5] It was not a system based on common interests or common values. There was only one common procedural or mechanical interest: to have minimum rules of the game that permit each to play against the others in order to gain at their expense. The task of the system was very minimal in that it permitted the continued coexistence of potentially antagonistic units with a *modicum* of intervention from the system itself. As to the scope and nature of the obligations which emerged from that system, these could be reduced to a mega obligation in the form of an injunction not to trespass on the territorial or functional ambit of other sovereigns; an obligation of result, as there is no graduation in abstention.[6]

How did the system work? It was characterized by the prefix 'self': self-limitation, self-interpretation, self-help. It was a purely State-centric system. States were the subjects, creators and the organs of the system. Even, as regards arbitration, the German historian of international law Wilhelm Grewe, in his book *The Epochs of International Law*, wrote that the period starting with the Peace of Westphalia constituted the 'nadir' of international arbitration, precisely because of this new legal structure of the international society.[7] The princes did not want to give by the left hand what they have just got by the right hand, by submitting their differences to a third party, be it an arbitrator or a judge. The dynamo and driving force of the system

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[4] ibid 113.

[5] David Mitrany, *A working peace system: An argument for the functional development of international organization* (Oxford 1943).

[6] Abi-Saab (n 3) 113.

[7] Georges Abi-Saab, 'The Normalization of International Adjudication: Convergence and Divergencies' (2010) 43 New York University Journal International Law and Politics 2-3.

was reciprocity, either positive or negative – negative in the form of reprisals or war, in response to self-interpreted violations of one's rights. The law of coexistence is merely the 'modelization' or 'ideal type' of the classical international law resulting from the Peace of Westphalia.[8]

II

The advent of the Industrial Revolution – together with the social upheavals it induced – at the end of the eighteenth century and beginning of the nineteenth brought about new and important transformations. The revolution in science and technology and in ideas (all ensuing directly or indirectly from the Enlightenment) was yet again the driving force for change, heralding a new wave of globalization. The technical and economic overtaking of the State became more and more apparent, in the sense that not only the small European States, but also the Great Powers such as Great Britain, no longer provided an adequate territorial base to encompass the economic activities made possible by the new means of production and exchange.

This explains the emergence of an international economy based on a growing division of labour and a growing awareness of a need for a new type of international regulation permitting and facilitating the development of these activities, which swept through and beyond States, thus creating bonds of material interdependence and giving rise to partial solidarities. This, in turn, explains the occasional emergence, from the second half of the nineteenth century, of pockets of the law of cooperation, especially in the field of communications, in order to respond to problems of global nature caused by the Industrial Revolution. These pockets were small islands within the ocean of the law of coexistence or classical international law but they were significant islands because they were based on a different logic. Their privileged legal instrument, the multilateral treaty, was not only a 'law-making treaty' *(traité-loi)* bearing a new type of legal regulation, but also an 'organic' treaty, providing an institutional structure which underlay this regulation and attended to its implementation. This led to the first

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[8] Georges Abi-Saab, 'Wither the International Community' (1998) 9 European Journal of International Law 250-251.

generation of international organizations, such as the River Commissions (for the Danube and the Rhine) and the administrative unions such as the Universal Postal Union.[9]

The basic assumption was that there was a common interest, hence a community around that interest. It was almost the opposite of the assumption of classical international law. In this context, the task of the legal system was more ambitious; to make collaboration possible in order to satisfy this common interest which could not be satisfied at all or adequately on an individual basis and which required combined efforts. The purpose was no longer 'to maintain States peacefully apart' – as Mitrany wrote. The purpose of the legal system was 'to bring States actively together'. As regards the nature of the obligations, the transformation was from a passive obligation of abstention to an obligation to play an active role in order for the whole enterprise to work.

How did the system work? It needed proper institutions. It was, by nature, an institutional type of regulation as the collective activity required a division of labour which depended on the capacity and on the specific situation of each of the participants. Therefore, a regulator was needed.

III

The establishment of the ILO in 1919, in the wake of the First World War, marked a new and significant stage in the structural evolution of international law. Until then, there were few islands of law of cooperation in a vast ocean of law of coexistence. They were based on (and driven by) a perceived material common interest, palpable to each participant. The great novelty of the ILO was that it ushered a new kind or species of law of cooperation, and a new generation of international organizations, its institutional component, based on common values. The ILO was avowedly created to promote social justice, though on the dark side of the moon there may have been some ulterior motives, such as not leaving to the Bolsheviks the monopoly of speaking for the workers of the world.

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[9] ibid 255.

The ILO also innovated in developing new techniques in pursuit of its objective, such as the system of reporting and scrutiny of the reports through the Committee of Experts on the Application of Conventions and Recommendations, and in assisting member States in integrating protective norms in their municipal legal systems.

The fact that the ILO managed to continue to function and to develop and sharpen its instruments during the inter-war period, in spite of the assaults of totalitarian regimes from the left and the right, verges on the miracle. Hibernating during the Second World War, while preserving its *acquis*, the ILO resuscitated even before the formal end of the War, to resume with renewed vigour its mission. One of its particularly valuable contributions during the post-war period was the transmission of its experiences and techniques to the new regimes of law of cooperation that pullulated since the end of the war, particularly with the opening of the floodgates in the field of human rights.

The current legal system as a whole is still guided by the Westphalian paradigm of the 'international law of coexistence'. But it is clear that this paradigm does not tally with large and growing expenses of legal regulation. Yet, as shown by Thomas Kuhn,[10] if the specific applications do no longer conform to the central paradigm, then the paradigm must change. We are living in a period of search for a new paradigm for international law, a new paradigm which is yet to be captured.

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[10]   Thomas Khun, *The Structure of Scientific Revolutions* (University of Chicago Press 1962).