

# Eternalizing Westphalia?

## International Law in a Period of Turbulence\*

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## INTRODUCTION

In 1983, Sir Robert Y. Jennings published an important article called “What is international law and how do we tell it when we see it?” (Jennings, 1983). This question has been repeated for centuries now, and it is upon this fact that I would like to reflect briefly in this article. Why this question, and why is it so incessantly repeated? In my view, it is a question that contains within it the very paradox of International Law: on the one hand, it is a body of law that is as modern as any other, based as it is upon the pretense of being normatively autonomous in relation to the mere factuality of international relations; but on the other hand it is a specific normative body of law, with the absence of a monopoly of legitimate force by any single public power, and thus with a more naked tension between norms and society, between reality and law. That is why one feels tempted to ask what kind of law is this, given that it is so unusual when compared to “the other law”...

This specificity of international law, this special intensity and visibility of the contrast between reality and normative discipline, makes it into an excellent laboratory for the study of the sedimentation and consolidation of law as an expression of the paradigm of modernity. This is the standpoint that shall serve as the background for my analysis of the relation between international law and the so-called “Westphalia system”. What I would like to emphasise is that despite the important transformations in international law from 1648 to the present, it is marked by a genetic pattern, which is its insertion in the regulatory logic of modernity.

I intend to develop this thesis in three stages. In the first I shall look at the similarities and differences between the political and institutional order that was instituted at Westphalia and the current political and institutional context of international law. Secondly, I shall look at the fundamental lines of international law that result from the Westphalian order, and contrast them with the most important signs of change in the agenda of international law in our days. Thirdly, I shall test the real depth of these transformations, in particular questioning those arguments that claim that there is a paradigmatic shift which is leaving behind us the “old” international law rooted in Westphalia.

## 1. Symmetries and parallelisms

Richard Falk has noted that the current change in world order is symmetric to that which is symbolized by Westphalia. “The seventeenth century completed a long process of historical movement from nonterritorial central guidance toward territorial decentralisation, whereas the contemporary transition process seems headed back toward nonterritorial central guidance” (1989: 5). In other words, modernity brought with it the collapse of a unipolar order – which was ultimately guaranteed by the spiritual unity of Christianity and by papal authority– and its substitution by a multipolar order in which a multiplicity of nation-states came to constitute the basic structure of international governance. The symmetry which is referred to allegedly consists in the fact that in present times we are observing a crisis of that fragmented political and institutional landscape and the implantation of new forms of transnational authority and decision-making. Is this in fact the case?

Westphalia was the visible mark of a gradual process of transition between a medieval “cosmopolitan patchwork of overlapping loyalties and allegiances, geographically interwoven jurisdictions and political enclaves” and “a system of territorial bounded sovereign states, each equipped with its own centralised administration and possessing a virtual monopoly on the legitimate use of violence” (Camilleri and Falk, 1992: 12-14). In this sense the new scenario crystallised at Westphalia brought a principle of decentralisation to the international landscape, with its internal and external sides. In both sides, the fundamental shift was a consolidation of what Benedict Anderson (1983) has called *imagined communities*.

First of all, *an internal imagined community*. In fact, Westphalia was, above all, the basis for a process of construction of national communities, a concept that brings together the myth of an horizontal organization of social relations with an inter-temporal connection of its members, a synchronic and diachronic integration. This internal side of the process has been structured around the differentiation between public and private sphere and it has been mainly expressed through the progressive monopolization of the legitimate use of force by central authorities (the “king’s peace” stands in absolute contrast to the traditional generalized freedom of people to use weapons and physical violence in the settlement of their private disputes).

This domestic aspect of the Westphalia scenario had an important functional character. In effect, the creation of national communities which were spatially and culturally separated, provided units of the right dimension, between imperial vastness and the isolation of cities, for the development of capitalism. On the other hand, the newly autonomous nature of public authority in relation to the private sphere was at the root of an understanding of sovereignty as being territorially expansive. Private property lost the limitations which existed upon its use in medieval codes and clearly became the power to exclude others from the use of a resource. To crown this process, “the state became the royal estate” (Camilleri and Falk, 1992: 15), in which the king exercised his personal and territorial jurisdiction, which could increase through conquest or colonization.

The *external aspect* of the legacy of Westphalia is the other side of the coin of the national imagined community. Sovereignty, conceived by Bodin as a *summa in cives ac subditos legibusque potestas*, brought with it the idea of the inexistence of any source of power superior to that of the state and its territory. In other words, the establishment of the sovereign state as the political face of the national community was based upon this distinction between internal and external: monopolization of force by the state within its territory, legitimation of the use of force between States; order and contractual relations within a State, anarchy and war of all against all on the exterior. In order for the national community to be an imagined community, international community was, by definition, unimaginable. This external and inter-state component of the Westphalian order became consolidated as a system through a set of basic rules of operation. Camilleri and Falk (1992: 29) identified three basic principles: “first, a sovereign state could not, without its consent, allow other political entities to make or apply their own rules on its territory; secondly, and as a corollary of the first rule, a sovereign state had the obligation not to intervene in the internal affairs of other states or compromise their territorial integrity; thirdly, states enjoyed by virtue of their sovereignty equal rights and duties regardless of differences in their demographic, economic or strategic circumstances”. Mark Zacher prefers to refer to two main rules of operation of the Westphalian inter-state system: the principle of reciprocal respect for state sovereignty and the high degree of state autonomy in domestic and especially foreign affairs (1992: 61-62). The first principle, Zacher writes, is sustained by five pillars: “(a) the desire of

rulers to prevent incursions on their own powers; (b) the absence of a transnational ideology that seriously competes with states for people's political loyalties; (c) an historical memory (...) of overlapping political authorities and competing political loyalties leading to massive violence and disorder; (d) a common set of values that engenders an element of respect for other states and their rulers; (e) state's provision to their citizens of important values such as protection of life and economic welfare." The principle of state autonomy is based on a cost/benefit ratio for the use of force which is favorable to a periodic resort to war, low levels of environmental externalities and economic interdependence, low information flows and a high degree of cultural and political heterogeneity.

This billiard-ball system gradually transformed into an international society of sovereign States, by virtue of diplomatic practice (Lyons and Mastanduno, 1995: 6), and by virtue of the consistent application of some clusters of rules, either those that specify the minimum conditions for states to organize their mutual affairs in the international order, or even those that shape the form of cooperation among states beyond mere coexistence (Held, 1995: 75-76). But despite these adjustments the legacy of Westphalia has essentially been "a historically specific form of political space: distinct, disjoint and mutually exclusive territorial formations" (Ruggie, 1998: 172). Westphalian state-centricity can be summarized in the three basic points listed by René-Jean Dupuy: (1) *dispersion of power*: there is no general common interest beside that of the national community; only the interest of each territorially differentiated state matters; (2) *the inconditionality of power*: the power of each state tends to be absolute, territorial sovereignty is absolute and all international commitments are mere self-commitments; (3) *the violence of power*: state monopoly of the legitimate use of force has an external aspect, given that each state may, at its own discretion, decide upon the opportunity and the legitimacy of the resort to force in defence of its national interest (Dupuy, 1986: 43). In this scenario in which the world is reduced to the sum of sovereign states, all Law is state law, and the state is the natural space-time of law. As Boaventura de Sousa Santos (1995: 56) concludes, "in order to become scientific, modern law had also to become statist, since the triumph of order over chaos was to be guaranteed by the state, at least as long as science could not guarantee it."

So is Richard Falk right in claiming a symmetry between the political and institutional context created at Westphalia and the current map of political globalization? The answer is both yes and no.

There is, in fact, a reversal of that model in that we are facing a very strong dynamic toward a nonterritorial political guidance of global challenges. This guidance is itself contradictory, since it is simultaneously made of unregulated management of transnational markets and of new statist forms of governance (e.g. the central importance of the composition of the Security Council within the context of the UN reform). But, behind this composite nature of today's global political framework, there is an obvious line of continuity that brings together the two main features of political globalization-from-above: (1) "a significant, although uneven, loss of effective control by territorial states over the evolution of economic policy, including their own"; and (2) "an economistic thrust in global policy formation that makes the goals of maximising growth and profits almost unconditional, thereby temporarily consigning to the margins of the political process concerns about the ideological character of a political system and about adverse human and environment effects." (Falk, 1995: 174). In this sense the symmetry in relation to Westphalia consists in the decline of absolute state centrism and its inherent tendency towards fragmentation, in favour of postmodern hyperspace, that is, the internalization of relationships that previously took place among distinct national capitals within new global institutions (Ruggie, 1998: 177), either informal (e.g. G8) or even "invisible" (e.g. *lex mercatoria*).

But beyond this symmetry there are fundamental parallels at the level of the risks and challenges of the political order of Westphalia and the current global political order. *Risk parallels*, firstly: if the end of Christian spiritual unity and absolute statecentrism, which are associated to Westphalia, carried with them the seed of international unsociability, so also the new path, that of globalization, carries with it the danger of enshrining minimalist neoliberal codes, which in turn lead to a general (and no longer simply international) unsociability. This parallel risk provides a *parallel challenge* for International law. The *founding fathers* of International Law were wise enough to incorporate the novelty of a plurality of values and of political and institutional decentralization, without permitting it to lapse into pure relativism. This was the meaning of the tension between the *totus orbis* and the *ius inter omnes gentes*, in Francisco de Vitoria, of the dialectic between the *ius gentium inter gentes*

and the *bonum commune generis humanis*, in Francisco Suarez, or the balances between positive and natural law in Grotius or Vattel. Given the risks of negative utopianism that political globalization carries with it today, International Law is once again called upon to incorporate the new while limiting its potential for perversion. This is the theme of my second topic.

## 2. Indicators and forerunners

Emile Durkheim believed that Law could be seen as a rigorous indicator of the varieties of social solidarity. In his view, “repressive law”, consisting in the punishment of the transgression of norms based upon collective conscience, is an indicator of mechanical solidarity, where as “restitutive law” presupposes individualization and contractualization, thus functioning as an indicator of organic solidarity. Furthermore, in Durkheim the modern idea of progress is associated to a belief in the superiority of organic solidarity (and restitutive law) over mechanical solidarity (and repressive law), just as for Tönnies the contractual construction of society (*gesellschaft*) is more perfect than the relations of proximity in the community (*gemeinschaft*).

Now if we transpose Durkheim’s ideas onto our reading of current international sociability, it is possible to identify two fundamental changes. Firstly, by studying the contents and the sense of International law over the 350 years since Westphalia, we can observe a reverse trend: from the organic solidarities of differentiated societies towards the progressive condensation of a new collective (global) conscience, and a new communitarian formula for transnational social relations. Secondly, in this process of deepening the communitarian aspects of transnational social relations, International Law ceases to be purely an *ex-post* indicator of forms of sociability and becomes an instrument of intervention in the configuration of that sociability. In other words, post-Westphalian International Law is no longer simply a ratifying echo of the dominant positions in the terrain of inter-state relations, but rather a rhetorical strategy which anticipates a social and political order that is alternative to the present one, founded upon the values of solidarity, shared responsibility and dignity for all.

The nature of International Law most suited to the Westphalian order was summarized by Oppenheim (1905): “a law between states, only and

exclusively." But, apart from this emphasis on statehood as the only condition for legal personality in International Law, we should stress some other topics that are characteristic of the Westphalian model of International Law: (1) the contents of international norms was supposed to be axiologically neutral, that is, **no hierarchical difference** was made between international norms, whatever their role or importance for inter-state sociability; international law was indeed understood as a **contractual product**, a *bric-a-brac* (Combacau, 1986: 86), bilateral-minded, a perfect reproduction of the ideology of legal equality; (2) closely connected to this last note, one should stress the gradual importance of **positivism** as the doctrinal discourse on international law: in fact, International Law was experienced as the body of international norms effectively applied, *de lex lata*, and not a group of moral principles or norms *de lege ferenda* (Carrillo Salcedo, 1991: 23); (3) International Law was **produced on a voluntaristic basis** given that in the context of the principle of decentralization that was established at Westphalia, states view themselves as *communitates superiores non recognoscentes*; therefore, the creation and application of international legal norms, and the solutions that they provided for conflicts were considered to be an expression of the will of states; (4) in the final analysis **force was the foundation for legitimacy**; more than any other political or ethical criteria it was the exercise of power that legitimated the position of each state in its relation with others; (5) for this reason, Westphalian International Law, despite the importance it attributed to the legal consequences of the principle of sovereign equality (*pacta sunt servanda*, non intervention in the internal affairs of other States, respect for the territorial limits of other states), allowed for the **resort to war as a right at the discretion of sovereign states**; the limits imposed by the natural law tradition of just war (*iusta causa bellum*) gave way to the sovereign possibility of the resort to war (*jus ad bellum*).

Clearly, contemporary International Law cannot be described by this set of characteristics. If it is true that, as Martti Koskeniemi writes (1989: 2), "the modern lawyer needs to show that the law is simultaneously normative and concrete – that it binds a state regardless of that state's behaviour, will or interest but that its content can nevertheless be verified by reference to actual state behaviour, will or interest" – then, it is quite clear that contemporary International Law has gained a more accurate

sense of utopia, setting aside the former exclusivity of its apologetic function. Using Koskenniemi's argument, there are obvious signs in contemporary International Law that the descending and ascending patterns of justification stay in new forms of equilibrium, quite different from those created in Westphalia. "The descending pattern privileges normativity over concreteness while the ascending pattern does the reverse. Under the descending pattern, law becomes effectively constraining. Justification is not received from mere factual power but from normative 'ideas' called rules. Under the ascending pattern, the justifiability of rules is derived from the facts of state behaviour, will or interest" (*Ibid.*:41).

What are those signs? What do they signal?

In my view, the growing strength of the normative component of contemporary International Law, its greater critical distance in relation to political reality, occurs by reference to an idea/value: that of the intensification of an international community. This communitarian project has two facets: a world community of States and a transnational community of people. It is as a result of this double horizon that we can identify various normative transformations in relation to the old International Law of Westphalia:

- (1) **The acceptance of non-State actors as endowed with international legal personality.** Here, naturally, it is relevant to make a special reference to the developments that have taken place in the field of international protection of human rights. The normative and institutional internationalization of a human rights regime basically means the end of the exclusive monopoly of States in the regulation of the legal status of individuals, established since Westphalia. This armour of States is further penetrated by the consolidation of a general international accountability of States in relation to individuals under their jurisdiction.
- (2) **The reconversion of sovereignty as a programmatic basis for equality between States.** Third World countries have denounced the hypocrisy of westphalian sovereign equality, and they have countered the fiction of reciprocity and non-discrimination with the international legal consolidation of the principle of positive discrimination. During the 1970s and 1980s International Law opened itself, especially in the regulation of international economic

relations, to the material defence of sovereign equality (with the rule of permanent sovereignty over natural resources or the Generalized System of Preferences, for example).

(3) **The substitution of a non-differentiating neutrality in favour of a hierarchical differentiation of norms and regimes.** This changing process is visible both in the sources of International Law and in the internal structure of this normative body. Sources, first: the state centric paradigm, expressed by the canon of state consent as the only basis of legal binding, is nowadays questioned by the **emergence of general consensus** as the foundation of the law of a universal community. Multilateral and non-reciprocal law-making treaties, resolutions of international organizations, and the profound change in the creation of customary international rules (with the belief in the legal character of the behaviour anticipating itself to its repeated practice) are vehicles of this primacy of consensus and of normative ideas over factual power. Secondly, the structure of International Law: the primacy of the interest of the international community as a whole takes shape in the affirmation of a **universal public order**, which places in transposable barriers upon the legal freedom of states. This primacy of public order is expressed at three complementary levels: (a) the differentiation between ordinary obligations of states and obligations towards the international community as a whole (*erga omnes*); (b) the recognition of binding norms of general International Law (*ius cogens*), which are unalterable in the exercise of *treaty making powers* by states; and (c) in the differentiation of regimes of international responsibility: traditional indifference (responsibility as a state to state relationship, with strictly reparatory consequences irrespective of the relative importance of the damaged values) is being gradually replaced by double regimes, with the establishment of special sanctions for particular damage inflicted upon values that are essential for the international community (e.g. international crimes of states and individual crimes against the peace and security of humanity).

(4) In this field of higher-level-norms there is a special place for the **prohibition of the resort or threat to resort to force in inter-state relations.** Against the westphalian acceptance of war as a normal instrument of the sovereign State, contemporary International Law

has worked towards the illegalisation of the individual use of force. In effect, as from the Charter of the United Nations, the use of force by a State in its relations with others may only be one of two things: either a crime or a marginally accepted exception (basically the case of self-defence).

(5) **The appearance of regimes that are based upon an alternative logic to that of territorial sovereignty over natural resources and spaces.** Westphalian territorialism is based upon a duplicity of legal treatments: the legitimation of the expansion of territorial sovereignty in the central States (conquest, occupation, *debellatio*) and the acceptance of a logic of first come, first served in non-appropriated spaces that are qualified as *res communis*. Environmental externalities and economic interdependence provoked the appearance of other legal regimes that are guided by the principles of equal justice and common management. The most prominent example of this novelty is the common heritage of humankind regime, first proposed by Arvid Pardo in 1967 and now embodied in treaty law, mainly the United Nations Convention on the Law of the Sea of 1982. The common heritage regime is a completely new approach, based on trans-spatial integration and equity, on equitable benefit or burden sharing, on inter-generational equity and on a close articulation between these normative developments and their institutional enforcement.

In sum, International Law has evolved from a passive function of ratification of factual tendencies and equilibria/assymetries freely designed by sovereign states, to a compromise role of anticipating new forms of international sociability that impose limits and positive obligations on those sovereign states.

These deep changes in International Law structure and function must be read cautiously. Indeed, they are not the threshold of a happy-end *a la* Hollywood, nor even a consubstantiation of the modern idea of progress, in which the old is incessantly substituted by the new. Because although it is true that we have come a far distance from Westphalia, it is equally true, in practice, that the advent of a post-westphalian order is frankly still lacking. This is the theme of my next and last topic.

### 3. *Changes and continuities*

The changes that I have referred to have led part of the more important literature on International Law to put two different models face to face: the Westphalia model and the United Nations model (Cassese, 1986: 347). Thus, David Held has stressed that “the shift in the structure of international regulation from the Westphalian to the UN Charter model raised fundamental questions about the nature and form of International Law, questions which point to the possibility of a significant disjuncture between the law of nation-states – of the states system – and of the wider international community” (1995: 85).

The question, therefore, is the following: given that there are significant proximities between the political order of Westphalia and the contemporary global order, with the maintenance in its essence of its main institutional form (the inter-state system), will it not be the case that this circumstance will result in strong limitations upon the changes that are taking place in International Law? A rapid survey of three fields of innovation may permit a response to this question.

(1) The United Nations Charter was the culmination of a movement to outlaw force in international relations. Assuming that peace is a public affair, the Charter is an unprecedented attempt to extend the logic of the social contract to the interstate system, through the construction of what Michael Reisman called the “aggression – self-defence paradigm” (1991: 26). It is built in three parts. Firstly, the outlawing of the use of force: Article 2.4 of the Charter reads: “All members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations”. Secondly, the Charter establishes a collective security system, substituting the anarchic-decentralised model for an institutional-centralised model built around the Security Council. Finally, the Charter expresses the right to self-defence as merely a subsidiary faculty, which is provisional and controlled.

This attempt at an international social contract failed, however. The bipolar international context and the untouched inter-state pattern of the system impeded the centralisation of the use of force in the

Security Council, and this led to successive deterioration in the design of the Charter. This was the case with the defence of the legality of the so-called "indirect aggression" or "preventive self-defence"; it was equally the case with the admission of self-determination as a right whose exercise may impose a non-application of the prohibition of Article 2.4. And it continues to be the case with the argument that the international protection of human rights, especially in cases of extreme humanitarian need, is a requirement of the highest order in contemporary International Law, relegating to a lower level the prohibition of force and therefor legitimating humanitarian interference and, for some, even humanitarian intervention.

This is not the right context for an in-depth analysis of this topic, but it is worth underlining two facts. Firstly, the turbulence installed around Article 2.4 is proof that International Law has ceased to regard as absolute "the territorial integrity or political independence of any state", and accepts the possibility that there are other values that deserve equal or higher legal protection. But, secondly, the instability of the prohibition of the use of force still results from the affirmation of sovereignties. The International Court of Justice clearly confirmed this in its 1996 Advisory Opinion on the admissibility of the threat or use of nuclear weapons. Although it affirmed that such a resort would be contrary to the norms of International Law applicable to armed conflicts, the ICJ said that it could not make a definitive statement "on whether the threat or use of nuclear weapons would be admissible or not in extreme cases of self-defence, in which the very survival of the State were at risk".

(2) The common heritage of humankind regime is an alternative response, of a communitarian nature, to the dominant tendency in State practice for each State to individually extend its territorial sovereignty. The regime of *res communis* has given coverage to a de facto appropriation of sea, and air and outer space, and their respective resources, a coverage later confirmed by international law. The case of the oceans is exemplary: the traditional principle of freedom of the high seas has been denounced as a piece of legal fiction, serving as a cover for the appropriation and dilapidation of living and non-living resources. The dominant response has been

the expansion of the sovereignty of coastal States, each one seeking to impose its exclusive rights over the continental shelf, the exclusive economic zone and obviously over its territorial sea. The common heritage of humankind, as it has been consecrated in the 1982 Convention on the Law of the Sea, establishes, as I have mentioned, a set of alternative normative and institutional norms. Part XI of the Convention substantiates that alternative, handing over the management to an international organization of a supranational character, the International Seabed Authority, which has an organ, the Enterprise, that has a tendential monopoly of the power to directly exploit the seabed resources and to equitably distribute the results for the benefit of all humankind, with special attention being paid to developing countries.

However, it is important to stress that before the Convention became effective, in 1994, industrialised states promoted a series of initiatives that robbed Part XI of its essence. These initiatives included, firstly, the promotion of national legislation for licensing the seabed mineral exploration activities of national companies and, later, by the imposition of an Agreement on Application of Part XI of the Convention, in the form of a UN General Assembly Resolution, which point by point takes apart all of the normative and institutional innovations of the 1982 Convention. In other words, at present, the innovative virtues of the common heritage of mankind regime are profoundly limited and little is left of the regime beyond the generosity of its title.

(3) The approval, in 1948, of the Universal Declaration of Human Rights unleashed an unstoppable process of affirmation of a new constitutional principle of International Law, against the traditional exclusivity of sovereign states. The multiplication of international conventions – of a universal or regional nature, covering general or thematic issues – was accompanied by the perfection of mechanisms for verifying the degree to which these conventions and human rights in general were respected. Such mechanisms showed an increasing capacity to break down the barrier of the exclusive domain of states.

However, the decision to use these innovations is, to a large extent, in the hands of States! States may therefore act as brakes upon the

application of International Law of human rights. As this area of International Law is composed of international conventions, the lack of consent to be bound either by the normative contents or by the procedural and fact-finding mechanisms, allow states to keep themselves out of almost any given area of international protection of human rights (Carrillo Salcedo, 1995: 68-70). On the other hand, any manifestation of agreement by states may always be accompanied by reservations or interpretative declarations which limit the extent to which they are bound. But states do not just act as brakes upon international law of human rights. In its application this normative body depends in the first instance upon the state. In fact, international texts and institutions of protection are nothing other than mechanisms of appeal designed to cover specific imperfections of national mechanisms. To a large extent their efficiency will be that much greater, the greater the proximity of the state to the model of the rule of law.

## CONCLUSIONS

The present phase of the international system was long ago labelled and described as turbulent. James Rosenau used this term as the most appropriate designation for the period of transition from international relations to a post international politics, a period that was marked by a bifurcation between a state-centric system –limited in numbers, solemn, ritualised and opaque – and a multicentric system – with the immediate and informal interaction of an infinite number of actors (1990: 249).

In this period of transition, the political and legal order is registering more sub-paradigmatic adaptations than paradigmatic breaks (Santos, 1995: 92) with the legacy of Westphalia. The signs of normative innovation are only accompanied by social practices and institutional mechanisms that are capable of breaking with the space-time references of Westphalia to a limited extent. It is true that International Law is no longer the same, but the institutional coexists with the relational (Dupuy), the law of cooperation cohabits with the law of coexistence (Friedman), and the law of the United Nations goes hand in hand with the law of Westphalia (Cassese).

This tension is inherent to international law. So inherent that there can be no surprise in the recurring question posed by Sir Robert Jennings: "what is international law and how do we tell it when we see it?"

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