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THE PUBLIC DIMENSION OF CURRENT INTERNATIONAL LAW

Oriol Casanovas

Introduction

The changes which have taken place in the international order over recent decades have led International Law doctrine to abandon approaches which had been developed during the first half of the twentieth century and which, for many authors, are still considered as part of the doctrinal acquis of the study of International Law.

The key issue of the debate revolves around whether International Law (*droit international public* in french)should be understood as having a normative structure which allows us to consider it as similar to private law or, in contrast, it has features pertaining to that which is considered to be public law. This is, beyond any shadow of a doubt, an analysis of International Law approaches, and the objective is not to develop essentialist arguments over whether the ontology of International Law should conform it either to private or public law. As it is well known, Ulpain was who first developed the distinction between public and private law in terms of two counterpoised positions, arguing, '*due sunt positiones, publicum et privatum – Publicum jus est quod ad statum rei Romanae spectat; privatum quod ad singulorum utilitatem pertinet.'* (*Dig.*, 1,1,1,2).

International Law is generally conceived explicitly and, above all, implicitly, as public law. This is due to its roots in *jus publicum europeum,* its role in regulating relations between States and by the way it is contrasted with international private law. During the first half of the twentieth century, the idea was developed that International Law, as a normative whole, resembled private law, this being due to the more structural approach of its norms. This similarity was based on the fact that International Law is considered a co-ordinated legal order between sovereign States, establishing the rights and duties of equal subjects through a network of obligations created with the consent of these subjects, through a system of norms protecting the interests of these States. Examples of doctrinal manifestations in this approach, founded in the doctrine of International Law as an international coordination law, are seen in Lauterpacht's statement that International Law constituted a 'a higher private law'[1] or Rundstein's

[1] Hersch Lauterpacht, *Private Law Sources and Analogies of International Law*, London; Longmann, Green and Co., 1927, reprinted Archon Books, S.L., 1970, p. 81.

paradoxical argument that International Law would be 'more private than private law.'[2] Within the Italian doctrine, in the debate over the international personality of intergovernmental international organisations, Arangio Ruiz argues that institutions created by States fall within international law not as organs of an international legal order, but rather in terms of private persons in domestic law. Consequently, international treaties that create these institutions have the same effects than contracts of private law in the domestic order.[3] Nevertheless, this characterisation of international law as a form of private law was quickly rejected due to the fact that a hypothetical order which exclusively governed relations between private persons would be an order without creative capacity, being 'not an order but rather a miscarriage of order, incapable of evolving without destroying itself.'[4]

Within International Law there are frequent dualistic distinctions: substantive law and procedural law; peremptory norms and voluntary norms; primary and secondary norms; obligations of conduct and obligations of result, etc. This notwithstanding, the predominant doctrinal thesis is that the distinction between public and private law is not applicable within international law.[5]

These doctrinal approaches have been surpassed by recent developments in international law that have evidenced the protection of rights which are global in nature within the international legal framework. Judge Weeramantry, with reference to the Gabcíkovo-Nagymaros case, weighed up the application of principles pertaining to the regulation of rights and obligations *inter partes,* such as *estoppel,* when dealing with issues which have an *erga omnes* dimension, positing that 'We have entered an era of international law in which international law subserves not only the interests of individual states, but looks beyond them and their parochial concerns to the greater interests of humanity and planetary welfare.'[6]

[2] Simon Rundstein "L'arbitrage International en matière privée", *Recueil des Cours*, Vol. 23, 1928-III, p. 338.

[3] G. Aranzio-Ruiz: "Rapporti contratuali fra Stati e organizzazione internazionale. Per una tesis dualistica delle Unioni di Stato", *Archivio giuridico*, Modena, 1950, pp. 7-158; *Gli enti sogetti dell'ordinamiento internazionale,* Milano, Giuffrè, 1951.

[4] Luigi Marmo, *Il diritto internazionale e la distinzione tra diritto pubblico e privato*, Milano; Giuffrè, 1958, p. 41.

[5] Stefan Talmon, "Jus Cogens after Germany v. Italy: Substantive and Procedural Rules Distinguished" *Leiden Journal of International Law*, vol. 25, 2012, p. 984.

[6] *Gabcíkovo-Nagymaros Project (Hungary/Slovakia),* Judgment of 25 September 1997, *ICJ Recueil 1997*, p. 118.

Constitutionalism

Support for the public nature of international law is seen in the doctrinal approach known as *constitutionalism*. The roots of this analytical perspective go back a long way, such as the contributions of Alfred Verdross, who in 1926 presented the *Constitution of the International Legal Community*[7] or Herman Mosler, who interpreted international society as a legal community.[8] From a more moderate perspective, many authors argue that although there is no formal constitution for the international community, there is a material constitution within international order.[9]

Modern constitutionalism is more ambitious in theoretical terms and responds to developments which have taken pace in the international order in recent times. It is certainly true that, as Anne Peters, one of its most remarkable representatives argues, 'a coherent approach towards international constitutionalism does still not exist.'[10] However, despite the numerous meanings assigned to the notion of a constitution, Peters contends that 'global (or international) constitutional law is the bulk of the most important norms which regulate political activity and relationships in the global community (consisting of states and other subjects of international law). It is a subset of international rules and principles which are so important that they deserve the label "constitution".'[11]

Constitutionalism is based on a set of premises which justify the way in which it analyses the current international legal order:

a) Firstly, constitutionalism affirms the existence of an international community which is based on fundamental values such as those of the United Nations Charter and the Universal Declaration of Human Rights, not on declarations arising from theoretical constructs or formulas found in official documents. The universality of this international community is not a social fact but rather it is deduced that 'it is necessary to be

[7] A. Verdross: *Die Verfassung der Völkerrechtsgemeinschaft*, Vienna: Springer, 1926.

[8] H. Mosler: *The International Society as a legal community*, Alphen aan der Rijn: Sijthoff, Noordhoff, 1980.

[9] C.R. Fernández Liesa & A. Alcoceba Gallego, "La idea de Constitución y el fenómeno jurídico internacional", *La Constitución a examen, Un estudio académico 25 años después*, G. Peces-Barba Martínez & M.A. Ramiro Avilés (coord.), Madrid; Marcial Pons, 2004, pp. 748-751.

[10] Anne Peters, "There is Nothing More Practical than a Good Theory: An Overview of Contemporary Approaches to International Law". *German Yearbook of International Law*, vol. 44, 2001, p. 35.

[11] Anne Peters, "Constitucionalismo compensatorio: las funciones y el potencial de las normas y estructuras internacionales*", La constitucionalización de la Comunidad internacional*, A. Peters; M.J. Aznar & I. Gutiérrez (eds.), Valencia: Tirant lo Blanch, 2010, pp. 212-213.

prepared to grant to people from other States and other cultures the same legal goods which each considers they have the right to demand for themselves.'[12]

b) This international community is governed by a fundamental legal order – a constitution– which gives unity to the set of norms which make up international law (monism).

c) The central question surrounding constitutionalism revolves around the very desire of international law and has come to replace the prior existential question of whether in fact international law exists. In specific terms, this question asks which legal goods international law aims to guarantee or protect in order to promote universal material and immaterial welfare in a way leading to an ideal project.[13] The communitarian dimension (as opposed to that which is established within a 'society') is seen as a closer and more interdependent relationship, in contrast to the 'liberal' concept. State sovereignty is substituted by the rule of law. The constitution of an international order is partial and not codified, but a constitution can develop gradually, and other important sectoral elements of the current international legal order are already codified.[14] The nature of an international constitution derives from the special characteristics of some of the most important and most fundamental international norms which can be grouped together under the heading 'international constitution'. Constitutionalisation is conceived essentially as a process and the aim of the doctrine is to 'make the invisible constitution of the international community visible.'[15] Within the general framework of the current internationalist doctrine, constitutionalism is presented as a theoretical response to the phenomenon of the 'fragmentation' of international law.

The constitutionalist approach of International Law focuses on various issues which highlight the limits of the voluntarist concept of international order that stresses State sovereignty:

a) The hierarchy of international norms as a consequence of the acknowledgement of the existence of the norms of *jus coges* and of *erga omnes* obligations.

b) The increasingly less frequent occurrence of consent in the creation of international norms, as underlined by Christian Tomuschat, through binding resolutions of the

[12] Christian Tomuschat, "La Comunidad internacional", *Ibid.*, p. 118.

[13] Bardo Fassbender, "La protección de los derechos humanos como contenido central del bien común internacional", *Ibid.*, p. 124.

[14] Christian Tomuschat, *Op. Cit.*, p. 101.

[15] Jan Klabbers, "Setting the Scene", J. Klebbers, A. Peters & G. Ulfstein, *The Constitutionalization of International Law*, Oxford: Oxford University Press, 2009, p. 4.

Security Council and majority decision-making procedures within international organisations.[16]

c) The trend of horizontal spreading effects of international law with respect to private actors, as seen in human rights issues and the conduct of actors such as transnational companies and private security firms, etc.

d) The effects on third parties of international treaties (objective regimes, multilateral normative treaties, etc.).

Constitutionalism might appear to be a theory which depicts a fictitious unity around international law, resting on the assumption of the existence of universal values and thereby ignoring the real diversity that exists within an international community characterised by pluralism, a fragmentation of the international order in certain sectors which accentuates their autonomy, and the clashes of interest which occur in international relations. All this, of course, deserves the utmost attention, but it should not be forgotten that constitutionalism is not conceived as a hierarchical normative order but rather as a process through which the legal norms of the international order are partially systemised, thereby allowing us to overcome the anarchic vision of international law as a structure of coordination between sovereign States.

Bearing in mind the sectoral nature of norms and the disaggregation of national and international public authority, rather than positing the existence of a constitution for the international order, we could ask whether it wouldn't be more appropriate to examine the existence of multiple national and international constitutions which mutually complement each other, even though multilevel constitutionalism may seem to be a contradiction in terms. In any case, it is a theoretical question which is already hotly debated in the heart of the constitutionalist stream, with some authors defending a pluralist constitutionalism which aims to integrate the elements of diversity, fragmentation and contradiction which exist in the international community.[17]

The formation of global administrative law

At the New York University Law School, Benedict Kingsbury leads an innovative research project which focuses on the theoretical approach applied to global administrative law. This is a new approach which is mindful the most recent

[16] Christian Tomuschat, "Obligations Arising for States without or against their Will", *Recueil des Cours*, vol. 241 (1993-IV), pp. 195 ff.

[17] Ángel J. Rodrigo Hernández, "El pluralismo del constitucionalismo internacional", *Anuario Español de Derecho Internacional*, 2013, vol. 29, pp. 61-109.

developments in the international order and it differs from other conceptions which had previously been developed under the heading of international administrative law, such as the study of rules which regulate relations between international government representatives and international organizations[18] or the study of the effects on the domestic legal order of the administrative acts of foreign States.[19]

According to its proponents, this new global administrative law is in its infancy and covers 'the mechanisms, principles, practices and supporting social understandings that promote or otherwise affect the accountability of global administrative bodies, in particular by ensuring they meet adequate standards of transparency, participation, reasoned decision and legality, and by providing effective review of the rules and decisions they make. Global administrative bodies include formal intergovernmental regulatory bodies, informal intergovernmental regulatory networks and coordination agreements, national regulatory bodies operating with reference to an international intergovernmental regime, hybrid public-private regulatory bodies, and some private regulatory bodies exercising transnational governance functions of a particular public significance.' [20]

This global administration which is developing includes a diverse and varied range of subjects who exercise normative and supervisory functions within the international order. In this respect we firstly see States as subjects, but we also observe intergovernmental international organisations, acting through their principal and subsidiary organs (the Security Council and its commissions; United Nations High Commissioner for Refugees; World Health Organisation; Montreal Protocol, etc.). Normative supervisory functions are also exercised through informal cooperation forums, such as the Basel Committee on Banking Supervision, through which representatives from various States participate in banking supervision activities. There are international standards which regulate the activities of State administrations, these deriving from international agreements and the decisions of bodies established through international agreements: Committee on Sanitary and Phytosanitary Measures, Committee on Technical Obstacles to Trade, Council on Trade in Services, etc.[21] And in the exercise of these functions we also see hybrid public-private bodies (Commission on Codex Alimentarius) or private bodies, such as the International Standards

[18] *International Administration: Law and Management Practices in International Organization*, Dordrecht.

[19] Negulesco, Paul, "Principes du droit international administratif", *Recueil des Cours*, vol. 51 (1935-I), pp. 583-690.

[20] Benedict Kingsbury, Nico Krisch & Richard Stewart, *The Emergence of Global Administrative Law*, IILJ Working Paper 2004/1, p. 5 and "The Emergence of Global Administrative Law", *Law & Contemporary Problems* , 68, 2005, p. 15.

[21] Sabino Casesse, *Shrimps, Turtles and Procedure: Global Standards for National Administrations*, IILJ Working Paper 2004/4.

Organisation (ISO) or the International Olympic Committee, whose regulatory activity has been in the public eye in the case of performance-enhancing drugs.

According to advocates of global administrative law, the existence of a 'global administrative space' must be acknowledged, with this being a form of *tertium genus* distinct from international relations governed by international law and domestic administrative law, although it includes elements from both. In presenting global regulation in terms of administrative regulation, proponents of global administrative law argue that its nature and scope are defined more clearly than through the vaguer and more theoretical approach of *governance*.[22] However, if we draw comparisons with the traditional normative approach, global administrative law also undergoes a degree of vagueness: instead of treaties and international custom, global administrative law refers to standards; instead of the validity of rules and acts, it focuses on legitimacy; and rather than invoking responsibility in the case of acts which violate norms, it resorts to notions of accountability or review.

Rather than being an approach to the international order, the theoretical perspective of global administrative law is a research programme on normative tendencies and developments which have occurred in recent years. From a theoretical point of view, we have to ask whether it is possible for administrative law to exist within the international order without constitutional law. By focusing on the regulatory power of bodies and on the possibility that acts of application be subjected to supervisory or review processes, global administrative law would seem to ignore the public service function that is considered fundamental in the European administrative law doctrine. In practice, the global administrative law proposal is a Western approach, as it implies the existence of a liberal political framework and does not consider alternative models of political order, such as those that exist in Asian and African countries. Advocates of global administrative law acknowledge that these criticisms require the approach to engage in more thorough debate and to further develop its research programme.

Post-national pluralism

Within the general framework of what has become known as the 'deformalisation' of international law,[23] that is, the abandonment of the process which establishes the criteria for identifying and creating international norms traditionally admitted by jurisprudence and the legal doctrine, Nico Krisch, one of the proponents of the global

[22] Benedict Kingsbury *et al.*, *Op. cit.*, pp. 13-14.

[23] Jean d'Aspremont, "The Politics of Deformalization in International Law", *Goettingen Journal of International Law*, Vol. 3 (2011), 2, pp. 503-550.

administrative law approach, has formulated an even more radical analyses which flows from a severe critique of the constitutionalist doctrine.[24] The key premise of his position is that we currently inhabit a *post-national* world.

International and domestic law are not separate spheres based on the sovereignty of the nation-state. International society is a fragmented society in which there is no general legal order, rather there are just distinct levels of law and of heterogeneous polities. Conflicts between one level and another are not resolved through an ordered system of solutions but rather by means of processes of convergence or mutual accord, or they simply remain unresolved.

For Nico Krisch constitutionalism means a transfer of State constitutionalism, or even democracy, to the global level (regional or international). Krisch stresses that his critique focuses on *foundational* constitutionalism, that is, constitutionalism which equalizes with a monist legal system. However, it must be considered that even pluralistic modes of constitutionalism are hierarchical. Post-national pluralism, in contrast, adapts to new circumstances which are faster-changing and less formalised than constitutionalism. Furthermore, for Krisch it provides greater voice opportunities and facilitates critiques, as, unlike constitutionalism, it is not a theoretical expression of power. To summarise, we can say that post-national pluralism provides us with a more flexible framework of checks and balances.

Many conflicts require the establishment of a level of authority (local, regional or State) to decide over a certain issue. Post-national pluralism contemplates that decision-making bodies must be aware of the resistance that their decisions may encounter. For example, the panels of the WTO aim to adopt decisions more through achieving a convergence of the positions in conflict than through an application of norms.

The flexibility and autonomy employed by distinct legal orders can be seen in three cases which serve as references for post-national pluralism.

1) Although a high number of European Court of Human Rights rulings have been applied domestically, they are not automatically adopted, and the judgements of constitutional courts have encountered greater resistance when the European Court of Human Rights has opposed them. Of the thirty-two European constitutional courts, twenty-five do not consider themselves to be in the obligation to enforce the rulings of the European Court of Human Rights.[25]

[24] Nico Krisch, *Beyond Constitutionalism: The Pluralist Structure of Postnational Law*, Oxford; Oxford University Press, 2010.

[25] *Ibid.*, p. 127

2) The United Nations Security Council, in response to the terrorist attacks of 11 September, adopted resolutions which established sanctions and which, theoretically, had legal primacy over other international obligations and internal norms, according to articles 25 and 103 of the Charter. The sanctions gave rise to reactions such as that of the European Court of Justice in the *Kadi* case.[26] More recently and along similar lines, in the *Nada v. Switzerland* case of 12 September 2012 the European Court of Human Rights declared its decision on the rights of the State of Switzerland with regard to complying with the guarantees recognised by the European Convention on Human Rights, stating that the application of sanctions resulting from Security Council resolutions did not justify non-compliance with the Convention's guarantees.[27] The reaction of other States led to the creation of an ombudsman (2009) to exclude sanctioned parties and individuals from the list at the request of the State.[28]

3) In the ambit of the regularization of genetically modified organisms (GMOs) there are two approaches: the United States follows a more liberal approach, whilst the European Union adopts a more rigid position. This gives rise to tensions which are manifested at different levels: international (WTO, Cartagena Protocol on Biosafety, the Codex Alimentarius Commission); European (European Food Safety Authority, the European Commission and the Council of the European Union); and within EU member States. In principle the inconclusive solution from the reports of the WTO panel went against the European Union.[29] However, Krisch considers this to be a desirable normative solution, as it leaves aside questions of principle and hierarchy, leaving space for 'pragmatic solutions.'[30]

Post-national pluralism has been criticised both from theoretical and political positions. It has been argued that this approach is not so different from other approaches, such as the doctrine of governance through intergovernmental networks, as defended by Neil Walker and other authors. In a somewhat exaggerated manner, it has been said that in practice 'the difference between legal pluralism and constitutional pluralism can be a difference in name only.'[31]

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[26] Asunto *Kadi*, TPI, T. 315/01, sentence of 21 September 2005. *Cf.* Juan Santos Vara, "El control judicial de las sanciones contra Al-Qaeda y los Talibanes en la Unión Europea. ¿un desafío a los poderes del Consejo de Seguridad?", *Revista de Derecho Comunitario Europeo*, Año 13, N. 32, 2009, pp. 91-120.

[27] *Nada* v. *Switzerland* [GC] nº. 105, 93/08, 12 September 2012, Nº 155.

[28] Nico Krisch: *Op. cit.*, p. 159.

[29] WTO, *European Communities - Measures affecting the approval and marketing of Biotech Products*, WT/DS 291/R; WT/DS 292/R; WT/DS 293/R, 25 September 2006.

[30] Nico Krisch: *Op. cit.*, p. 221.

[31] Gregory Shaffer, *European Journal of International Law*, 2012, Num. 2, p. 574.

From a political perspective, the response to Krisch is that in not recognising the supremacy of any level, post-constitutionalism promotes 'instability and chaos.'[32] Krisch counters this accusation by arguing that pluralism oscillates between hierarchy and a network, but that it allows for the solution of conflicts through pragmatic means without the need to make commitments with regard to contradictory normative pretensions.[33] In comparison to constitutionalism, which implies a hierarchical normative structure, pluralism is criticised in terms of pluralist levels being more open to manipulation and abuse by the powerful.[34] In response, Krisch contends that a more flexible system allows the less powerful to make themselves heard and facilitates collective action and change.

Shaffer argues that the current international order is not post-national but rather transnational, 'involving multiple States and bodies playing a central role in the creation, application and critique of transnational legal regulation.'[35] The author's critique alludes to his personal experience, as he writes his review essay from the Kashmir, where the conflict of interests between India, Pakistan and China is highly notable, this confirming his thesis that the nation-State continues to play a crucial role in the international order.[36]

Other approaches

Owing to its breadth and spread within currents of thought on the renewal of international law, we must highlight the approach of authors who, due to the phenomenon of globalisation, draw attention to the emergence of a new global law. A pessimistic diagnosis of current international law leads to grave declarations such as 'international law is in its death throes'[37] and, from this perspective, global law is presented as an alternative through which the crisis of international law can be overcome. However, rather than an alternative to the current international order, global law is a reflection of the changes seen in the norms and structure of the international community which 'highlight the public dimension of international law.'[38] This is seen in a new international law with norms that are increasingly oriented towards the

[32] Jeffrey L. Dunoff, *American Journal of International Law*, Vol. 107, 2013, p. 485.

[33] Nico Krisch: *Op. cit.*, pp. 240-241.

[34] Jeffrey L. Dunoff, *Op. cit.*, p. 485.

[35] Gregory Shaffer, *Op. cit.*, p. 579.

[36] *Ibid.*, p. 582.

[37] Rafael Domingo*, ¿Qué es el Derecho global?*, 2ª ed., Pamplona, Thomson-Aranzadi, 2008, p. 105.

[38] Giuliana Ziccardi Capaldo, *Diritto globale: il nuovo diritto internazionale*, Milano, Giuffrè. 2010, p. XIX.

organisation of a complex universal society (the global community) and towards the protection of fundamental common values and goods for all of humanity (such as peace and global security, the fundamental rights of individuals and peoples, the collective management of common goods, etc.), with the inclusion of objective mechanisms and procedures to guarantee these values and goods.[39]

A research project based at the University of Heidelberg, led by Armin von Bogdandy, advances a conception of international law, especially the law of international organisations, as International Law, as it focuses on the way in which international public activity is carried out.[40] This approach considers that 'any kind of governance activity by international institutions, be it administrative or intergovernmental, should be considered as an exercise of international public authority if it determines individuals, private associations, enterprises, States or other public institutions.'[41] The Heidelberg project is presented as a position which synthesises the doctrine of constitutionalism of international law and the perspective of global administrative law.

The public law dimension of international law is diluted in other approaches which are currently hotly debated and which lie at the crossroads of International Relations theory, economics and the pressure of judges. The doctrine of global public goods aspires to provide an interdisciplinary analysis of the debate on global governance which allows for a better understanding of the relations between law and other social sciences.[42] The notion of public goods which is adopted is not a legal but rather an economic one, as it refers to goods which can be enjoyed by all without rivalry or exclusion. The first attribute (non-rivalry) means that someone may use the good without diminishing the use that others can make of it. The second characteristic (non-excludability) means that nobody can be denied the use of the good regardless of whether they have contributed to its production or not. The notion of public goods corresponds to an ideal type and it cannot be argued that goods with the aforementioned features exist in their purest form. Some concepts of international law

[39] Global law is not only made up of 'on the one hand, international norms and, on the other, constitutional principles and norms of a constitutional transcendence which reflect the shared values of the international community as a whole,' which is close to the constitutionalist focus. A. Cebada Romero, "El Derecho internacional global: una retórica útil para una transformación necesaria*", R.E.D.I.*, vol. LXV (2013), p. 17.

[40] Armin von Bogdandy, Philipp Dann & Matthias Goldmann, "Developing the Publicness of Public International Law; Towards a Legal Framework for Global Governance Activities", *German Law Journal*, 2008, pp. 1375-1400; in Spanish, "El Derecho internacional como Derecho Público: Prolegómeno de un Derecho de los mercados financieros", translation by Mariela Morales Antoniazzi. *Estados y organizaciones internacionales ante las nuevas crisis globales*, XXIII AEPDIRI Workshops, La Rioja (2009), coord. José Martín y Pérez de Nanclares, Madrid; Iustel, 2010, pp. 57-79.

[41] *Ibid.*, p. 60.

[42] Mancur Olson, *The Logic of Collective Action. Public Goods and the Theory of Groups*. Cambridge *et al.*: Harvard University Press, 1965.

have certain parallels with global public goods. If *erga omnes* obligations refer to the benefit of a global public good or prohibits a global public 'bad' from being produced, the obligation protects a 'collective' or 'common' interest and must be observed by the international community as a whole. Other areas, such as climate change or biodiversity construct a common concern of States, as benefits of a non-rivalry and non-excludability nature are derived from these spheres. In contrast, spaces beyond State jurisdiction, such as sea-bed and the Moon, constitute a common heritage of humanity, the aim being to guarantee that the benefits of these resources are distributed fairly.[43]

The theoretical debate over global public goods revolves around auxiliary concepts which frame the analysis of international issues. The first of these theoretical frameworks is that of *aggregate effort problems*. The majority of discussions presuppose that the set of public goods depends on the aggregated efforts of all the participating actors. For example, any reduction in climate change effects is a result of the the way in which all States have reduced their total greenhouse gas producing emissions. There are also *weakest-link problems*, that is, the negative effects which arise when one actor compromises collective efforts to produce a certain good. This comes about either when the State which breaks the production chain for the good does not have the means required to act in the same way as others or because it expects to gain some type of advantage from its dissident behaviour. An example of this is seen where attempts to bring the authors of international crimes to justice are thwarted because a single State grants refuge to the perpetrators of the crimes. Finally, there are *single-best-effort-problems*. In these cases, the resolution of a problem does not depend on aggregated efforts of all actors but rather on a single or reduced number of actors whose actions provide a particular public good. An example of this would be a single State pulverising an asteroid whose trajectory were a threat to the acting State or others, or actions supporting the efficiency of international law through one State filing a lawsuit at an international court which prevents another State from failing to comply with its obligations.

In some cases these recent doctrinal approaches have a normative focus, such as in the case of constitutionalism. In other cases they have a focus which is closer to International Relations theory or political science. The approaches which are most distant from the normative perspective provide interesting analyses in what is traditionally known to as the material sources of International Law. All these doctrines highlight the public dimension of international order in its widest sense and in general they fall within a perspective which points towards an international order in evolution.

[43] *Cf.* Symposium coordinated by Fabrizio Cafaggi and David D. Caron, "Global Public Goods and Plurality of Legal Orders", *European Journal of International Law*, vol. 23 (2012), Nº 3, pp. 643-791. This approach has also been adopted by Nico Krisch, "The Decay of Consent: International Law in an Age of Global Public Goods*", A.J.I.L.*, vol. 108, 2014, Nº 1, pp. 1-40.

As one commentator has put it, these approaches are 'projects to reform the order, in part to imagine it, and to redescribe it.'[44]

Public interest norms and general international regimes

The formation of public interest norms plays a fundamental role in the public character of international law. The definition of these norms came from an approach developed by Jost Delbrück, who advances: 'there are international legal norms which are designed to protect the *public interest* of the international community and which, therefore, are binding upon all states because these norms are 'necessary' – not in an empirical, but in a normative sense as they are based on a universally shared value judgement.'[45] Santiago Torres Bernárdez indicates that public interest norms reflect 'the current interests and preoccupations of the international community as a whole.'[46]

Fifty years ago Wolfgang G. Friedmann referred to the dual structure of the international legal order, which comprised an international law of coexistence that regulated interstate diplomatic relations and an international law of cooperation 'which is expressed in the growing structure of international organisation and the pursuit of common human interests.'[47] Since then the structure of cooperation has gone beyond the institutional phase of intergovernmental institutions and has evolved in terms of greater normative complexity towards the formation of general regimes for the protection of the interests of the international community.

In a specific sense general international regimes can be understood as the set of principles, norms and modalities of application that regulate the general interests of the international community. The notion of a general international regime should not be understood as the equivalent of a branch or sector of International Law, nor as a set of norms which regulate a certain issue area. Rather it refers to the set of norms which establish rights and obligations which are not subject to reciprocity and which protect the general interests of the international community although, logically, these norms are seen in the particular ambits in which the aforementioned general interests are present.

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[44] David Kennedy, "The Mystery of Global Governance", Ruling the World?, Jeffrey L. Dunoff; Joel P. Tratchtman (eds.), *Constitutionalism, International Law and Global Governance*, Cambridge University Press, 2009, p. 43.

[45] Just Delbrück, *New Trends in International Law-Making: International "Legislation" in the Public Interest*, Berlin: Duncker & Humblot, 1997, p. 18.

[46] Santiago Torres Bernárdez, *Annuaire IDI*, 2005, vol. 71(I), (session de Cracovie), p. 286.

[47] Wolfgang G. Friedmann, *The Changing Structure of International Law*, London; Stevens, 1964, p. XIII.

General international regimes are seen in the principles and norms of the international legal order which regulate the following:

a) Spaces which are beyond national jurisdiction, such as the high seas, Antarctica, outer space, or that which relates to the regulation of resources in terms of general common interests, such as the regime of high seas fisheries or of the sea bed and ocean floor. The general interest is perceived as a rational exploitation through allocations which limit the freedom of States.[48]

b) The protection of general interests is clearly seen in the set of international norms to protect the environment, the preservation of which is essential not only for the States of the world but also for all people and for future generations.[49]

c) The maintenance of international peace and security constitutes a general interest which exceeds the particular interest of individual States. Although peace was not originally considered as a general interest, as it was understood in terms of the security of individual States, the evolution of the international legal order has given rise to a wider notion of what constitute threats to peace and an extension of the powers of the United Nations Security Council.[50] It has thus been commented that we are witnessing the emergence of international public policy.[51] Within this sphere, areas such as disarmament, arms control, nuclear proliferation and the financing of terrorist activities have all taken on a clear communitarian relevance.

d) The protection of persons has an increasingly important role, both through customary law and through the establishment of universal and regional mechanisms which protect human rights and which create objective systems that guarantee the protection of individuals regardless of their nationality. Within the norms which aim to protect the person we must include the norms of international humanitarian law.[52]

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[48] *Cf.* Julio Jorge Urbina & Mª Teresa Ponte Iglesias (coord.), *Protección de intereses colectivos en el Derecho del mar y cooperación internacional*, Madrid: Iustel, 2012.

[49] *Cf.* Ángel J. Rodrigo, "Nuevas técnicas jurídicas para la aplicación de los tratados internacionales de medio ambiente", *Cursos de Derecho internacional y Relaciones internacionales de Vitoria Gasteiz 2001*, Bilbao, 2002, pp. 155-243.

[50] *Cf.* Stefan Talmon, "The Security Council as World Legislature", *A.J.I.L.*, vol. 99, 2005, p. 99.

[51] Vera Gowlland-Debbas, "The Security Council and Issues of Responsibility under International Law", *Recueil des Cours*, Vol. 353, 2011, pp. 213-215.

[52] *Cf.* Linos-Alexandre Sicilianos, "L'influence des droits de l'homme sur la structure du droit international", *Revue générale de droit international*, 2012, pp. 5-30 and 241-274, and Oriol Casanovas, "El Derecho internacional humanitario y el Derecho internacional de los derechos humanos como regímenes internacionales", *Estudios de Derecho internacional y Derecho europeo en homenaje al Profesor Manuel Pérez González*, Tomo I, Valencia: Ed. Tirant lo Blanch, 2012, pp. 345-359.

e) The law of international trade represents an ambit which, in principle, is governed by reciprocity (it is a *club good* according to the models of public goods theory). Nevertheless, it is a sector in which the reciprocity of rights and obligations is more illusory than real. The differences between industrialised, emerging and developing countries represent an obstacle to the system of equal rights and obligations and the functioning of retaliatory measures where these have not been complied with, though these are covered in the WTO through its dispute settlement mechanism (articles 21-23). The WTO mechanism does not pursue a solution based on reciprocity but rather facilitates that the special groups of the WTO Dispute Settlement Body arrive at a 'mutually satisfactory solution' (article 11 of the Understanding on Rules and Procedures Governing the Settlement of Disputes). The dispute settlement system is increasingly faced with issues that affect the environment, the lives and health of persons and animals, the preservation of plants or even public order and morality; in short, it has to deal with 'what must be classified as the general interest of international society.'[53] In the framework of the WTO's founding agreement, the right to development as a human right and a right of peoples, as well as the recognition of sustainable development, is a reflection of the increasing consensus on leaving behind a concept of economic development based purely on growth and it supports the aim of a form of development which incorporates public goods such as the protection of human rights and respect for the environment.[54]

In general international regimes, together with customary norms and conventional norms of a multilateral nature, as well as general principles and general modalities of application, there are also sets of norms created by international treaties which regulate certain aspects of the general regime through specific, sectoral norms or which develop the application of the regime at the regional level. These more specific international regimes reinforce, develop and occasionally come before and set the direction of a general international regime. By way of example, in the field of human rights, together with general customary norms and multilateral treaties which have attained universal participation, there are numerous multilateral treaties which regulate specific issues – sexual discrimination, rights of the child, prohibition of torture, etc. – as well as international multilateral treaties which protect human rights in the regional ambit (Europe, America etc.). All of these sets of norms do not only protect specific interests or even the interests of the States which have created them or the persons whose rights they recognise, rather they also protect the general interests of the international community through specific regulation. In these cases the establishment of

[53] Carmen López-Jurado Romero de la Cruz, "La solución de diferencias en la OMC", *Derecho Internacional Económico*, Luis M. Hinojosa & Javier Roldán Barbero (coord.), Madrid; Marcial Pons, 2010, p. 205.

[54] E.U. Petersmann, *International Economic Law in the 21st Century. Constitutional Pluralism and Multilateral Governance of Interdependent Public Goods*, Oxford: Hart, 2012.

international treaties with more specific norms has the aim of promoting a global interest.[55]

Public interest norms reveal the weaknesses of the mechanisms of application because their development has not been accompanied by the creation of such parallel mechanisms. This is highlighted by the requirement of State consent for the settlement of international disputes or the weak regulation which the International Law Commission has provided in cases of grave violations of imperative norms of general international law within the Articles on the responsibility of the State for international criminal acts (articles 40 and 41). To compensate for these differences, Karel Wellens proposes the customary development of universal jurisdiction and the possibility of adopting counter-measures to punish the most serious violations. These measures would not mean reinforcing State sovereignty but rather ensure the responsibility of States to protect the public interest of the international community.[56]

Conclusion

Looking at the normative functions of the international legal order through an approach which is neither essentialist nor purely sociological, we must distinguish between international norms which govern relations between equal sovereign States based on reciprocity on the one hand, and, on the other hand, public interest norms which govern the interests of the international community (States, private actors, non-governmental organisations, transnational corporations). The first of the above-mentioned norms have a meaning comparable to that of the norms of private law in the domestic order, as they have been established *ad singulorum utilitatem*. The second type of norm is comparable to the norms of public law in the domestic order in that they protect the general interests of the community.

In the evolution of the international legal order, the law of sovereign States has survived within the current order and coexists with the public interest norms which protect the interests of the international community. Within this evolution there have been many advances but it must be borne in mind that the law of sovereign States 'reappears with more strength in a period in which it has essentially exhausted its impetus as the promoter of the community arising from the experiences of World War

[55] Jean d'Aspermont, *Contemporary International Rulemaking and Public Character of International Law*. International Law and Justice, Working Papers, Institute for International Law and Justice, New York, Working Paper 2006/12, p. 21.

[56] Karel Wellens, *Public Interest Rules of International Law. Towards Effective Implementation*, Teruo Komori & Karel Wellens (eds.), Farnham, Surrey: Ashgate, 2009, p. 46.

II and decolonisation.'[57] The challenges which the international community currently faces, such as globalisation, the regulation of financial relations and terrorism, point to the need for the establishment of new measures to protect general interests.

[57] Bardo Fassbender, "La protección de los derechos humanos como contenido del bien común internacional", in *La constitucionalización de la Comunidad internacional*, Anne Peters, Mariano J. Aznar, Ignacio Gutiérrez, (eds.), Valencia: Tirant lo Blanch, 2010, p 171.

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