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The Netherlands

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ISBN 90-411-0419-4

Composé par/Set by Texto, 59800 Lille (France)
Printed in the Netherlands by Alfa Base, Alphen aan den Rijn

ACADÉMIE DE DROIT INTERNATIONAL

FONDÉE EN 1923 AVEC LE CONCOURS DE LA
DOTATION CARNEGIE POUR LA PAIX INTERNATIONALE

RECUEIL DES COURS

COLLECTED COURSES OF THE HAGUE ACADEMY OF INTERNATIONAL LAW

1994

VI

Tome 250 de la collection

1997

MARTINUS NIJHOFF PUBLISHERS
The Hague/Boston/London

FROM BILATERALISM TO COMMUNITY INTEREST IN INTERNATIONAL LAW

by

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"Human Rights", in Ch. Tomuschat (ed.), *The United Nations at Age Fifty: A Legal Perspective*, The Hague *et al.*, Kluwer, 1995, pp. 263-280.
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CHAPTER I

BILATERALISM AND COMMUNITY INTEREST CONFRONTED

1. Introduction. The Traditional Patterns of Bilateralist International Law and Their Gradual Change Towards Greater Solidarity

1. Let me begin with a quotation from *Eunomia*, the recent fascinating book by Philip Allott. Professor Allott captures what I consider to constitute the very essence of traditional international law by describing it as "the minimal law necessary to enable state-societies to act as closed systems internally and to act as territory-owners in relation to each other"[1]. Thus, traditional international law was left entirely in the hands of sovereign States, predicated on their bilateral legal relations, on the intrinsically bilateral character of legal accountability; in short, again in the words of Professor Allott, founded on a "delict-property-contract ethos"[2]. As to the substance built upon such a bilateralist grounding, international law had, in the course of centuries, developed into a system of rules delimiting the spheres of sovereignty of States in space and time, as well as with regard to persons and certain jurisdictional matters respectively. In essence, these rules obliged States to abstain from interfering in the areas so demarcated. In addition, international law provided a reciprocity-based framework for diplomatic and consular relations, for legal transactions in the form of treaties, and for the protection of foreigners, further, a set of procedures for the settlement of disputes as well as a humanitarian minimum standard to be respected when sovereign States opted to resort to war.

Contemporary international law has moved far beyond such minimal law, with regard to quantity as well as quality. Indeed, it is the very purpose of the present course to trace some of the new direc-

My thanks go to Andreas L. Paulus and Constanze Schulte for their valuable assistance in the drafting of the first version of the present text.

1. P. Allott, *Eunomia. New Order for a New World,* Oxford, New York, Oxford University Press, 1990, p. 324.
2. *Ibid.*, p. 335.

subjective right on the other admits of no exception; as distinct from what is said to be the situation in municipal law, there are certainly no obligations incumbent on a subject which are not matched by an international subjective right of another subject or subjects, or even . . . of the totality of the other subjects of the law of nations"[9].

Please note the apodictic character of this statement, phrased in the present tense and excluding any possibility of new developments. It is surprising indeed that such a rigidly traditionalist view was put forward by the scholar responsible for the embracing of the concept of "international crimes of State" by the International Law Commission, certainly one of the most pronounced doctrinal attempts at overcoming bilateralism in favour of embodying community interest in international law[10].

4. Moving from the level of theory to that of the concrete substance of international law, the bilateralism inherent in its traditional structures and processes is being secured, first of all, by a thorough and pervasive emphasis on consent which we will encounter continuously, at times in retreat, at times still triumphant, throughout the present lectures. A further weapon of bilateralism is to be seen in a rather sweeping and frightfully ambiguous prohibition of intervention designed to protect not only a State's internal but also its external affairs against interference by third parties[11].

From the viewpoint of legal policy, such structures, according to which both treaty and customary international law traditionally posit relations confined to pairs of States, display both advantages and disadvantages. To begin with some positive aspects, there is no doubt that bilateralism conforms to, and protects, the principle of State sovereignty. Undoubtedly, bilateralism also contributes to an "orderly" external appearance of the law because it facilitates a precise identification of who has a right or claim against whom, and who may enforce it. Further, the effectiveness of most rules of bilateralist international law will be supported by the mechanisms of the

9. R. Ago (*op. cit. supra* footnote 8), pp. 192-193. The International Law Commission seems to have shared this view; cf. its commentary on Draft Article 3 of Part 1 of its project on State Responsibility, *Yearbook of the International Law Commission*, 1978, Vol. 2, p. 182.

10. See *infra*, paras. 61 ff.

11. W. Riphagen, Preliminary Report on State Responsibility, *Yearbook of the International Law Commission*, 1980, Vol. 2, Part 1, p. 119.

principle of reciprocity[12]. On the negative side, however, such a rigid "every-man-for-himself" doctrine, as Professor Prosper Weil has called bilateralism in his well-known article on "relative normativity" in international law[13] (without any critical undertone, that is), forms a severe obstacle standing in the way of stronger solidarity in international relations. Furthermore, bilateralism unveils, and even endorses, the crucial dependence of the enforceability of a State's international legal rights upon a favourable distribution of factual power.

5. At the level of international morality, the value-poverty of bilateralist international law appears even more glaring. It was Professor Allott again who has highlighted the morally uncommitted nature of the very international law that Professor Prosper Weil and others feel nostalgic about, by pointing out that this traditional law left it to Governments

"to will and act internationally in ways that they would be morally restrained from willing and acting internally, murdering human beings by the million in wars, tolerating oppression and starvation and disease and poverty, human cruelty and suffering, human misery and human indignity, of kinds, and on a scale, that they could not tolerate within their internal societies"[14].

(b) *The emergence of community interest*

6. The antithesis of the bilateralism thus described consists of the assertion of community interest in the development of international law in a different direction, as it were. A first, very tentative, definition of "community interest" could perceive it as a consensus according to which respect for certain fundamental values is not to be left to the free disposition of States individually or *inter se* but is recognized and sanctioned by international law as a matter of concern to all States[15].

12. Cf. B. Simma, "Reciprocity", in R. Bernhardt *et al.* (eds.), *Encyclopedia of Public International Law*, Amsterdam *et al.*, North-Holland, Instalment 7, 1984, pp. 400 ff. (with further references).

13. Cf. *supra* footnote 4.

14. P. Allott, *Eunomia* (*supra* footnote 1), p. 248.

15. For a particularly influential propagation of this idea cf. P. C. Jessup, *A Modern Law of Nations*, New York, Macmillan, 1949, p. 2 and *passim*. On Jessup's role in the further development of the concept see O. Schachter, "Philip Jessup's Life and Ideas", *American Journal of International Law*, 80 (1986), pp. 892 f.