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Reconstructing International Law starting from Regional Organizations

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Your chair at the Collège de France is titled “International Law of Institutions”. How is your course this year, “Diligence and Negligence in International Law”, different from a general course on international law and how does it relate to the title of your chair?

My first course at the Collège de France develops and deepens an argument pertaining to obligations of (due) diligence and responsibilities for (undue) negligence that I first presented as a special course at The Hague Academy of International Law in January 2020 (following an invitation received in 2016).¹ I expected to give this course at the Collège in April 2020, but it had to be postponed for a year due to the pandemic.

This course addresses a topic of general international law, but provides a very good illustration of some of the international institutional issues I plan to address in the context of my chair. As I explained in my Inaugural Lecture, the chair’s project is to approach international law both as the law of the institutions it rules and as the law of the institutions that make it.² This is exactly what is achieved by studying due diligence as a standard that qualifies the content of various obligations of conduct under international law, on the one hand, and as a standard for assessing compliance with these obligations within the international responsibility law regime, on the other. Indeed, one of the reasons for the emergence of so-called due diligence obligations or, at least, the increased reliance on the standard of due diligence in recent international law practice, is the current state of the international institutional order. What this renaissance of

1. See, S. Besson, *La due diligence en droit international*, Recueil des cours de l’Académie de droit international de La Haye, Tome 409 (pp. 153-398), Brill/Nijhoff: Leiden/Boston 2020 (245 p.). An English version, revised and completed, will be published as *Due Diligence in International Law*, Brill/Nijhoff: Leiden/Boston 2022 (forthcoming).

2. See, S. Besson, *Reconstruire l’ordre institutionnel international*, Leçons inaugurales du Collège de France, Collège de France/Fayard: Paris 2021 (75 p.) (forthcoming).

due diligence reveals in particular is the need to ensure that the behavior of public and private international institutions (other than States), such as international organizations or multinational corporations, is more diligent. At least, it demonstrates the necessity of holding States themselves accountable for their own undue negligence in preventing, protecting against or remedying the (risks of) harm caused by these public and private institutions that are not yet sufficiently regulated by international law and whose direct obligations and responsibilities under international law are still rare.

For instance, there is a growing interest in the due diligence of States, and even of multinational corporations themselves, with regard to the extraterritorial protection of human rights or the environment in the context of business operations. One may also observe a keen interest in the due diligence of international organizations with respect to the risks of human rights violations by private military groups over which these organizations exercise a degree of control, or even by their own member States where the latter provide them with armed forces. Conversely, and in addition, but in particular where it proves impossible to hold such organizations directly responsible for breaches of their own obligations of diligence (which they often do not yet bear), member States of such organizations are held responsible for their negligence when they failed to take all available reasonable measures in order to prevent and protect against the (risks of) harm caused by such organizations.

In fact, the institutional dimension of this renewed interest for due diligence in international law is also reflected in the sources through which these new obligations of diligent conduct or, at least, these new due diligence “policies” or “practices” develop, particularly as they relate to the behavior of international organizations and multinational corporations. Indeed, those sources are not primarily inter-State treaties, even if one may notice references to due diligence in some of the most recent treaties. Above all, they are the various norms adopted by institutions other than States, to the extent that such norms alone may aim to bind those institutions. These include the unilateral acts of international organizations such as the United Nations, the European Union or the World Bank, or even self-regulation by multinational corporations and the soft law relating to the so-called “human rights’ due diligence” of these corporations.

The renaissance of the due diligence standard in contemporary international law, but also the weaknesses that characterize its recent practice, are a perfect illustration of the malaise surrounding the relationship between international law and the institutions that are ruled by it and that adopt it in return. It was therefore difficult to find a better introduction to the international law of institutions and to my new chair’s research project.

The increasing relevance of international non-State actors, whether regional organizations, NGOs or multinational corporations, could lead, at first glance, to a weakening of the role of public international law (whose traditional subjects are now part of the minority) in the effort to police behavior and give rise to a fairer world. For example, in recent years, legislators have turned to private law concepts (e.g., duty of care, “devoir de vigilance”) in their attempts to make corporations accountable. Do you share this fear, or do you think, on the contrary, that this trend will be corrected by a correlative increase in the number of subjects governed by international law?

This is a broad question (which, in fact, combines two questions: the increase in the number of subjects of international law and, in this context, the increasing role of private subjects). The best way to respond, it seems to me, is not to address these issues in terms of “subjects”, “participants” or “actors” anymore (and especially not by qualifying them further with adjectives such as “classic” or “traditional” which generally bring very little to the discussion), but instead to refer, when applicable, to “institutions” of international law, as I do in the context of my chair at the Collège de France.

It is indeed the representation of the same peoples (and ultimate subjects of international law) by these multiple institutions that will be the main focus of the chair’s research and teaching program in the coming years. It will examine the way in which that relationship of representation should be reflected in the sources of international law and regimes of international responsibility applicable in case of breach of that law. If it has not yet been sufficiently the case, it is precisely because thinking of these issues in terms of equal “actors”, “participants” or “subjects” juxtaposed on one another has tended to flatten everything (with the only criterion for distinction then amounting to the opposition between States, also deemed to be actors, on the one hand, and these “non-State” actors, on the other).³

Understanding how the peoples of this world are represented by various institutions of international law should in turn enable us to envisage a system of multiple representation built around the institutional continuity between States and international organizations (regional or universal), on the one hand, and between the latter and various other public institutions (such as cities) or private institutions (such as non-governmental organizations, or even multinational corporations), on the other.⁴ International representation can and should indeed be conceived as both public and private, and public and private representation may be approached as complementary. Of course, their internal organization should be reformed so as to be democratic, and their relationship should be carefully articulated by ensuring the priority of public institutions.

3. See, S. Besson, *Reconstruire l'ordre institutionnel international*, *op. cit.*

4. See, S. Besson, “Du droit de civilisation européen au droit international des civilisations : vers une institutionnalisation internationale des régions”, (2021) 3 *Swiss Review of International and European Law* (forthcoming).

Therefore, to answer your question more directly: ordered and systematized in this way, the multiplicity of international representative institutions does not imply a weakening of international law, but on the contrary a strengthening of the legitimacy of its law-making processes and, ultimately, of international law itself. This is what we have tried to explain in a forthcoming article, co-written with José Luis Martí, which addresses international democratic representation by so-called global cities. We argue that those cities could complement States as representatives of the same peoples in international law-making processes to the extent that they are able to compensate some of the latter’s democratic deficits (and vice-versa, of course).⁵

It goes without saying, it will still be necessary to work our way around and, above all, to understand the institution that (for now) constitutes the centerpiece of this system of multiple representation: the State.⁶ This will also require a better conception of the implications of the public/private divide in international law. Herein lies the preliminary answer to your second sub-question. Private self-regulation, soft law and even, in some cases, domestic private law have recently become some of the preferred sources of the various incarnations of the standard of due diligence in international law, albeit with mixed results. As I explained in answer to your first question, this is because international private law, and in particular a potential international corporate law, is not yet sufficiently developed. It is now up to us and our public international representatives, States and international organizations, to confront this issue.

You have just created, within the International Law Association (ILA), a study group focusing on the relationship between regional organizations and international law. What are the specific features of regional organizations, whose number is constantly increasing, that led you to believe that this interaction raises new issues that have not been sufficiently studied yet?

This newly created ILA study group (which I co-chair with Eva Kassoti of the Asser Institute in The Hague) focuses on the international law of regional international organizations (RIOs) and aims to clarify, through a comparative approach, the internal and external practices of international law specific to these international institutions.

The group brings together some twenty specialists of the law of international organizations, as well as of RIOs from all regions in the world. These are experts coming from both academia and practice. To my knowledge, and although political scientists and international relations experts have long been interested in regionalization, this is the first time that such a project pertaining to the compa-

5. See, S. Besson and J. L. Martí, “Cities as Democratic Representatives in International Law-Making”, in H. Aust and J. Nijman (eds.), *Research Handbook on International Law and Cities*, Elgar: London 2021 (forthcoming). See, more generally, S. Besson and J. L. Martí, “The Legitimate Actors of International Law-Making – Towards a Theory of International Democratic Representation”, (2018) 9:3 *Jurisprudence* 504-540.

6. See, S. Besson, *Reconstruire l'ordre institutionnel international*, *op. cit.*

rative international law of regional organizations and their practices of international law is undertaken, especially on such a global scale. The platform provided by the ILA is unique in this respect. Depending on our findings, our group's reports and recommendations may lead to the creation of a permanent ILA committee, which could articulate various guidelines and principles in the area. We will hold some of our meetings at the Collège de France, and various academic publications are already scheduled.

Such an exercise in the comparative international law of RIOs is necessary today, as the number of these organizations has increased all around the world. Some of these organizations even hold general powers and are active in all areas of international law. Unsurprisingly, therefore, these RIOs have gained in influence over their member States and even over the universal international organizations (UIOs) with which they interact (whether or not they are members thereof). As an example of the influence of these regional organizations on international law, one should mention the development of their internal (in fact, international) law and its influence on their member States and their respective practice of international law, on the one hand. On the other, many RIOs have launched their own practices of international law, both within their internal legal order (where they have one) and in their impact on the development of international law in certain regimes, or even on general international law. Indeed, some of these RIOs have grown an autonomous legal order and decide on the conditions of the status, rank and effects of international law within that order. Some of them have also developed their own practices in their relations with third States or other RIOs or UIOs, such as the United Nations, in the field of general international law, in particular with regard to sources (esp. treaties and custom), immunities and international responsibility.

Curiously, however, the influence of RIOs on international law and what it tells us about the possibilities and limits of contemporary international law remain under-researched, with the exception of the influence of the European Union and of a few other economic or security RIOs (to date, the regionalization of international law has generally been considered mainly from these two angles).

A possible reason for this relative lack of interest on the part of international lawyers (there are a few exceptions, of course, notably within French-speaking scholarship) is that RIOs are difficult to define. They are indeed extremely varied, not only with respect to their internal organization (whether they aim at political, or simply economic integration, or at mere cooperation without integration), but also with respect to their international relations. This may explain why they are usually defined in a purely negative manner as non-universal, and opposed to UIOs. Moreover, as pointed out by Catherine Brölmann,⁷

7. See, C. Brölmann, "Review of L. Boisson de Chazournes (2017) *Interactions between regional and universal organisations: a legal perspective*", (2020) 114:2 *American Journal of International Law* 335-350.

RIOs elude, in particular because of their territorially delineated powers, the territory-function dichotomy model of public institutions still prevalent in international law, i.e., the idea that those institutions are either States with territorial jurisdiction, or (universal) international organizations with functionally delineated powers. Matters are further complicated by the fact that "regions", and their different institutional forms (organizations, groups, courts, codification committees, treaty systems, etc.), are melting pots of identities and solidarities of various natures that often go beyond a merely geographical or territorial bond, a dimension to which, therefore, they cannot and should not be reduced. Not to forget the more general difficulty of defining what an "international organization" is, being an institution whose characteristics are still widely disputed in international law.

The development of RIOs on a global scale (although there are still significant discrepancies in density from one region to another) and the growing influence of non-European (including non-democratic) RIOs in international law are all the more interesting for us Europeans. They allow us indeed to self-critically examine what has been our institutional advantage from the standpoint of international law in a different light, and should lead us to address anew the question of its legitimacy.

The roots of European regional organization and of the resulting European institutional advantage among RIOs are, of course, historical. In short, it goes back to the European origins of international law (*jus publicum europaeum*) and then to the legal and institutional place taken by the European region in the international legal and institutional order Europeans instituted during the late 19th and early 20th centuries. In fact, as soon as international law extended outside of European borders, first with a "civilizing" mission and later on for purposes of "development", one rapidly witnessed the emergence of competing claims by States in other regions of the world to assert their own regional (practice of) international law and create their own regional organizational structures. This was the case first in Latin America, then in Africa, in the Arab world and, finally, in Asia.

What this means is that RIOs may also be of great interest to those concerned by a better institutionalization of the equal representation of all peoples in the world and of their legal cultures. This is all the more important in this period characterized by the civilizational backlash against international law, together with the assertion of new forms of (universalizing) imperialism by certain "civilization-States" outside of Europe and, more generally, of the West. A better understanding of the potential of RIOs in this context and especially of their role in international law-making could therefore increase the legitimacy of international law and enable the emergence of a more truly common international law. It is time for all regions and legal cultures to contribute to this on an equal footing and within an institutional framework that guarantees the

equality of individuals and peoples from all these regions. This will require in particular a better articulation of the relations between RIOs and States, on the one hand, and between RIOs and UIOs, and in particular between RIOs within the United Nations, on the other.

The idea of a “world of regions” has, of course, a long pedigree in international relations, but it is an idea that is worth revisiting in the new multilateral context that characterizes the early 21st century. Instead of fearing the regionalization of international law on the grounds of a possible fragmentation of a body of law that pretends to be universal *per se*, as it used to be the case in the immediate post-war period, it would be more appropriate to think of the growing role of regional international institutions and law as a virtue and to work together, through inter-regional cooperation and comparisons, towards building an international law that could truly claim to be universal.

Your project within the International Law Association seems to rely on the idea that the EU should first and foremost be thought of as a regional organization. However, the structural originality of the EU could also lead one to believe that it is a federal State under construction, all the more so as the EU itself seems to claim, through its behavior, its specificity and its autonomy, more than any other international organization. To what extent, then, can it be said that the EU – as a model of integration – is an exception and remains a challenge to traditional concepts of international law?

The question of the *sui generis*, or third kind, nature of the European Union (EU) as an institution, according to which the EU is neither a State (including a federal one) nor an international organization (including a supranational one) (contrary to the institutional dichotomy prevalent in the contemporary international law of public institutions), has long fascinated European and international lawyers alike. The debate has been fueled by the case law of the Court of Justice of the EU (CJEU), to the extent that it regularly characterizes the EU legal order as an autonomous legal order, and even as a new legal order (of international law), even if it has since then rejected that order’s classification as a State legal order.

Considering that the EU’s institutional specificity is also reflected in the particularities of its so-called “external relations” and, therefore, in its relations to international law (especially with regard to sources or immunities, where its practice of general, and even special, international law, emulates that of States or, if one adopts the alternative perspective, is at the vanguard of that of supranational organizations, of which the EU is often the only example actually), the question of a third kind of public international institution is also, obviously, a key part of the mandate of our ILA study group on the international law of RIOs.

The specificities of the EU’s practice of international law are striking in more than one respect. They result both from its internal organization and how it organizes

its relations with its Member States, on the one hand, and from the way it articulates its external relations, on the other. Thus, the EU is one of the few, if not the only RIO that has grown a legal order that it considers to be “autonomous”, the only one with individual subjects (its “citizens”) and the only RIO with a full democratic organization (and esp. a real Parliament with legislative powers). In terms of its external relations, the EU is also one of the few RIOs to have received or acquired very extensive external powers, including normative ones and the power to enter into international legal instruments. This is obviously one of the consequences of the quasi-general nature of its internal powers. The EU Treaties themselves expressly refer to the respect of international law as a value and aim. They also repeatedly stress the importance of the relationship between the EU and other international organizations, including the United Nations. Not to forget, of course, the application, since the merging of the three EU pillars by the Treaty of Lisbon, of the EU institutional framework and law-making procedures to the approval of certain treaties and other external decisions, including the extension of the powers of the European Parliament in this area.

As a matter of fact, it is precisely our interest (as researchers and teachers) in the specificities of the EU’s external relations and its unprecedented practice of international law that have led us, Eva Kassoti and myself, to propose the creation of an ILA study group on the international law of RIOs. The reasons we decided, however, to broaden the scope of our inquiry to other RIOs pertain to the universality of international law and to the benefits of comparison for the study of the external relations of both the EU and other RIOs. This comparison is actually already at work in practice, even if it mostly goes one way only, since the EU and its practice of international law are often taken as models when setting up or reforming RIOs elsewhere in the world. The same trend can be detected in legal scholarship, both among legal scholars and in other disciplines relating to international relations: the EU has long been treated as the example *par excellence* of successful international integration of States at a regional level. If you look closely at the mandate of our study group, however, you on notice that all references to the EU are intentionally being juxtaposed on the term “RIOs”, rather than included in the latter’s scope, therefore entertaining the possibility of a fundamental institutional distinction between the EU and RIOs.⁸

At the same time, and in any case, there are various signs in the recent external relations practice of the EU that clearly reveal its regional dimension. For instance, one could mention the increasing references to the EU’s territory or its territorial “jurisdiction” in the recent case law of the CJEU. How else is one to understand what is meant by the “extraterritorial”, albeit quite rare, extension of the scope of norms and duties under EU law (and I

8. See, the list of ILA study groups: <<https://www.ila-hq.org/index.php/study-groups#>>.

do not refer here to its mere global economic and political influence akin to the “Brussels Effect” described in Anu Bradford’s book,⁹ or its other types of unilateral external repercussions depicted in the recent book by Joanne Scott and Marise Cremona?¹⁰ This sense of political and legal boundaries of the EU is most welcome, as one should fear the alternative entertained by some and especially the related emergence of a form of European imperialism in international law. All the more so since, as you know, the adoption of EU and international law pertaining to the EU’s external relations is not entirely subject to the democratic control of the European Parliament. On the contrary, parts of it, such as “restrictive measures”, for instance, are still ruled by the early 1990s’ second pillar’s intergovernmental logic. This, by the way, is alarming in light of the growing disconnection one may observe between the European policy (both internal and external) conducted by the EU Member States’ governments at the European Council or at the Council, on the one hand, and their national parliaments and, of course, their peoples, on the other.

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Independently of the position of the EU and its Member States on the question of the EU’s international autonomy (and their respective perspectives on this subject differ greatly, actually), what the recent proliferation of RIOs shows is that the EU’s unique position in international law, especially in its relations with third States and UIOs, is at stake.

It needs revisiting in relation to other RIOs. And rightly so, in light of the historical advantage European States have enjoyed in international law thanks to their higher degree of regional organization. This may signal a day of reckoning after years of unreflected regional exceptionalism with respect to international law in Europe. In the future, it will be interesting to explore how the international representation of the other peoples of the world by one or more RIO can contribute to enhancing the democratic legitimacy of international law-making, but also that of UIOs, such as the United Nations, whose internal organization should accommodate those RIOs to a greater extent than it already does.

Part of the future of international law will be played out at the regional level. And the EU will certainly be vested with an even more critical role therein than what has been the case so far. Still, the EU will also have to learn how to play that role in a newly regionalized architecture of international law. Its institutional future itself could be at stake. It is therefore of utmost importance to prepare for it now, in particular by striving to strengthen the democratic legitimacy of the EU’s external relations, including that of the EU institutions in charge thereof and of their practice of international law.

Interview by James Corne, Hugo Pascal and Vasile Rotaru

9. See, A. Bradford, *The Brussels Effect: How the European Union Rules the World*, Oxford University Press: Oxford 2020 (424 p.). See also, A. Bradford, “The European Union in a globalized world: The Brussels effect”, this Journal, p. 75 *et seq.*

10. See, M. Cremona and J. Scott, *EU Law Beyond EU Borders: The Extraterritorial Reach of EU Law*, Oxford University Press: Oxford 2019 (264 p.).