Contribution of the Reims School to the Debate on the Critical Analysis of International Law: Assessment and Limits

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Abstract

The changes which have occurred in the world and the failure of the mechanism of collective security oblige lawyers to open a new critical approach to international law. In this context, it is important to come back to the French movement known as Critique du droit, *and more especially to the work produced in the Reims Colloquia under Professor Chaumont's authority. This theoretical contribution points out the link between the norms of law and the concrete conditions of their formation. It considers the compulsory nature of norms as a result of a compromise between several contradictions, and by doing so, it opens a new window on the understanding of law. But, today, this theory has to be completed by a deeper analysis of the concept of sovereignty. The consequence of this core concept is the contractual nature of most norms of international law. It is quite impossible to build a universal international law, the emergence of general imperative norms being hitherto too weak. International law, dominated by sovereignty, is inadequate to protect world society.*

International law theories have failed to keep pace with the considerable upheavals that have occurred since the end of the Cold War, notably the failure of the mechanism of collective security, the confusion in the roles of international institutions in internal or international conflicts, and the recent evolutions in international criminal law. In such a context, it is a rather stimulating exercise to come back to the question of the critical analysis of international law. In order to do this we need to consider a French doctrine which was very active in the past (notably in the 1970s) and was

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known as 'the Reims doctrine'. It formed part of a more general movement known as '*Critique du droit* 'the emblematic work of which was *Introduction critique au droit* by Michel Miaille.[1] A long series of meetings on international law were held at Reims University under the direction of Professor Charles Chaumont.[2] Being very critical of the construction of international law as it was at that time, the group put law at the very centre of the struggle for emancipation and action by the peoples then affected by the decolonization movement. Inevitably the work had a special influence on those whose future was dependent on the outcome of these struggles.

The discussions in the Reims Colloquia avoided any dogmatism or confinement to a doctrinal framework, and the participants were respectful of all the opinions expressed. The central question was 'what is law?' and, more specifically, 'international law?'. If international law is characterized by compulsory norms, what is the basis for their compulsory nature? The participants agreed that a purely positivist approach was insufficient.

Even though the doctrine is no longer active, it is useful as a first step to return to the debate surrounding these issues. The obvious question is why the work stopped despite the fact that most of the members of the 'Reims school of international law' are still alive (with the exception of its most famous member, Charles Chaumont himself).

Once this question has been considered, we then have to address a further issue. This is whether we can apply the theory today to the present international society which emerged from the end of communism and which is radically different from the previous one. Is now not a good moment to reactivate a critical approach to international law? The best of the work done in Reims can be very useful in considering the present international situation since it refused to isolate theory from concrete realities. In this way we are left with considerable scope for creativity and an opportunity to use the former contributions as a springboard for further analysis.

1 The Theoretical Contribution of the French Reims Doctrine

At the core of this theory was a refusal to accept the certainties of positivist doctrine and its attempt to explain the nature of law through the authority of institutions. The

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[1]   M. Miaille, Introduction critique au droit (1977).

[2]   The colloquia were published by Reims University: 'Les méthodes d'analyse en droit international', 1ère rencontre de Reims, 1973', in ARES (ed.), *Annales de la Faculté de Droit et des Sciences Économiques de Reims* (1974); '*À la recherche du fondement du caractère obligatoire du droit international*' et '*La notion de peuple en droit international*': Centre d'études des Relations Internationales, *Second and Third Colloquia of Reims (1974 and 1975)*, (2nd ed., 1980); '*La relation du droit international avec la structure économique et sociale*': Centre d'études des Relations Internationales, *Fourth Colloquium of Reims, 1977* (1978); '*Discours juridique et pouvoir dans les relations internationales: l'exemple des sujets de droit:* Centre d'études des Relations Internationales, *Fifth Colloquium of Reims, 1980* (1981); '*Discours juridique sur l'agression et réalité contemporaine*': Centre d'études des Relations Internationales, *Sixth Colloquium of Reims, 1982* (1983); '*Le discours juridique sur le non-intervention et la pratique internationale*': Centre d'études des Relations Internationales, *Seventh Colloquium of Reims, 1986* (1987); '*Les rapports entre l'objet et la méthode*': Centre d'études des Relations Internationales, *Eighth Colloquium of Reims, 1989* (1990).

formalism of the prevailing doctrine prevents us seeing what lies behind the legal mechanisms. However, positivism was considered at the moment of its birth as a sign of the progress of rationalist thought against a natural law dominated by theology. This is in reality a reductive approach to the science of law because it avoids the essential question of what the foundations of the legal norm are. Positivism sees the field of law as a closed space and is reluctant to explore society, its contradictions, and the role of social forces in producing the norm. In contrast, French critical doctrine refused to stay inside a zone which was arbitrarily qualified as law by solely institutional references. It considered that it is impossible to create and analyse norms without reference to the concrete conditions of their formation as well as the structure of the international institutions and international relations. As Ernst-Wolfgang Böchenförde said, '*Le fondement du droit fait aussi partie du droit*'.[3]

Then came the question whether the doctrine belongs to Marxism. Most of the commentaries in the international law textbooks classify it as belonging to Marxist theory. This is an overly simplistic analysis. Being anti-dogmatic, the Reims doctrine borrows some elements from Marxism, such as the dialectical approach. However, the dialectical method in philosophy was created by the Greeks and used subsequently by Marxists in a new manner. In the same way, the Reims group placed the questions of freedom and equality at the very centre of international law. This was accompanied by an understanding of the need to introduce a rule into international law which allowed emancipation for oppressed peoples. It is true that these questions were also part of Marxist doctrine. However, the mere existence of shared elements cannot be considered as evidence of complete support for that theory nor for the political project which sprang from it.

From a theoretical viewpoint, the Reims doctrine is better characterized as realist. It refused to produce a metaphysical conception of law. It is true that other, often famous, scholars (Quadri or Jenks) were also realist, to the extent that they considered legal obligations as coming from the will of the social body. For a true critical doctrine, this is not enough, since 'the will of the social body' is a term which needs to be clarified and which probably remains fictional. For the Reims doctrine, realism means that the rule proceeds from the social realities and the mutations which are produced by the movement of contradictions. Since contradictions are an essential constituent of life, in both material and social terms, law follows this movement and rules of law are developed to accompany it. Some norms are considered revolutionary when they appear because they reflect a radical change in the social or political forces. The right of self-determination for colonized peoples is a good example since it was revolutionary when it appeared in the 1960s. However, the new norm can itself become conservative. This is the case with respect to the right of self-determination exercised for the benefit of a people. If some elements of this people later themselves request the application of the same right and then are met with a refusal, the norm which is primarily used as a tool for revolution has become a conservative rule. This

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[3]   'The foundations of law are also part of law': E.-W. Böchenförd, *Le droit, l'État et la Constitution démocratique* (2000), at 206.

was the case for Biafra, deprived of freedom in the name of the struggle for the independence of Nigeria. Thus norms are ambivalent, and we need to analyse reality to understand the norms and this ambivalence.

The main contribution to a renewal of international law by the Reims School was without doubt its analysis of the compulsory nature of norms. Considering the divergence of individual and collective interests in society, the norm provides a compromise solution between several contradictions. However, it does not mean that conflicts disappear. This is why we cannot analyse norms without due consideration of their content. Some norms represent a true compromise between the contradictions, but others are merely camouflage. So, law as '*devoir-être*' or '*sollen*' is the reflection of realities ('*être*' or '*sein*'). When we consider these contradictions, we have to develop a vision as a whole where concrete realities have to be combined with values or ideologies. These abstractions play a role in the social movement. At this point, Marxist doctrine has to be renewed. Its exclusive concern with economic and material forces as the basis (infrastructure) of politics and law (considered as superstructure) is insufficient. It is true that norms are produced through social contradictions. However, ideological viewpoints and social or religious values also play a role in the confrontation of the contradictions which give rise to the norms. This point can be illustrated by examples.

When the process of decolonization started in the 1960s, the balance of economic and military power was not in favour of any of the dominated peoples. The French army should logically have won the Indochinese and Algerian wars, as should the Portuguese army (which was helped by the USA) the colonial wars in the Portuguese colonies. This did not happen because the ideology of freedom and the awareness of the injustice of the colonial exploitation had a significant role in determining the result of the struggle. These values themselves formed part of the contradictions. With respect to the resolutions of the Security Council, their effectiveness is not the result of their mandatory force under Article 25 of the UN Charter, but depends on the extent of the contradictions. On one hand, Article 25 says that the states commit themselves to respect the resolutions; on the other, many resolutions are not enforced. This is the case for the majority of the resolutions concerning the Israeli occupation and continuous colonization of the Palestinian Territories. It is clear that this situation is the result of a balance of power in favour of Israel which benefits from the help and complicity of most of the great Powers. Another example which is very illustrative is the fact that Article 26 of the Charter has disappeared into oblivion.[4] Article 26 requires the Security Council to prepare plans for disarmament.[5] The Security Council has never demonstrated any concern for fulfilling this obligation and this Article has

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[4] See Chemillier-Gendreau, 'La désuétude de l'article 26 de la Charte des Nations Unies, expression de l'échec du système onusien', in L. Boisson de Chazournes and M. Kohen (eds), '*International law and the Quest for its Implementation*', *Liber Amicorum Vera Gowlland Debbas* (2010), at 59 ff.

[5] Art. 26: 'In order to promote the establishment and maintenance of international peace and security with the least diversion for armaments of the world's human and economic resources, the Security Council shall be responsible for formulating, with the assistance of the Military Staff Committee referred to in Article 47, plans to be submitted to the Members of the United Nations for the establishment of a system for the regulation of armaments.'

consequently fallen into disuse. In the conflict between the desire for peace and economic military interests it is the military interests which prevail.

A final example can underline the very narrow link between the compulsory force of a legal norm and the tensions between various forces. In the 1970s, under the influence of recently decolonized Third World countries, the United Nations General Assembly voted through a significant number of resolutions changing the status of international economic rules. The main point was the new concept of permanent sovereignty over natural resources. A significant body of legislation was adopted during that period, but this had very little concrete impact. The contradictions between the interests of new states (independent but very poor) and powerful states favoured the latter and failed to create the opportunity for a new efficient economic order.

By refusing to consider norms as having a religious or natural origin whilst at the same time considering the only formal principle of authority, namely that the norm is a compulsory norm because the power decides so, critical doctrine opened a new window on the understanding of law. In addition, Charles Chaumont introduced a new distinction between primitive and consecutive contradictions by considering the world in its contradictions as comprising both material concerns and ideological values. Initially, the contradictions are such that some terms are stronger than others. In that situation, the legislator (or the contracting parties if we are in the field of contracts) can give legal form to the result of the contradictions. This leads to a convergence between material law and formal law. An example of this is provided by the phenomenon of social struggle. When this struggle is violent, the working classes are able to obtain significant progress in labour law by resorting to demonstrations or other such actions. However, since life is in perpetual movement, the contradictions may move following the adoption of the norm. If this displacement is not important enough to change the balance of power, the norm will stay in force. However, if the social situation is dominated by strong changes, the norm will fall into disuse. A new crisis will appear and sooner or later the law will have to be changed. Environmental law is a good example of this. Many activities were authorized by international law some decades ago. The contradictions between economic interests and the desire to obtain the best agricultural or mining productivity on the one hand and environmental protection on the other were not strong enough to bring about new norms. Little by little, the contradiction changes the balance of power, and fear of the negative consequences for the future of the environment as a result of human activities begins to outweigh the protection of economic interests. As a result, new norms appear.

These considerations opened the road to a new distinction between '*droit exécutoire*' and '*droit proclamatoire*'. That creates an opportunity to analyse the role of law and the role of legal institutions in all the contradictions. When a contradiction is clearly in favour of one force, then the legal institutions (legislator or judges) are able to formulate the norm and it then becomes law. Once the norm comes into force, it becomes what we refer to as '*droit exécutoire*' ('enforceable law'). Indeed, in such cases, the norm is the exact reflection of the balance between the different terms of the contradictions. For example, the norm of freedom of the high seas was established after a period in which the great maritime powers' divergent interests were strongly opposed. Some

of these powers (The Netherlands) supported the principle of freedom, whilst others (Great Britain) preferred to defend an alternative solution, which was to demarcate offshore areas according to the power of the different states and then to place those areas under the control of the state concerned (the well-known opposition between the *mare clausum* and the *mare liberum*). The international community finally came to the conclusion that the interests of all the parties were better served by the principle of freedom of navigation and offshore exploitation. This therefore became a customary rule before it was codified within international conventions, and, on the whole, the rule is respected. Consequently, we can refer to it as a '*droit exécutoire*'.

Nevertheless, in two situations there can be a difference between the norm as it is expressed and the reality of social situations. As a result, the norm, even though it is proclaimed, is never applied; it is merely a '*droit proclamatoire*' ('proclamatory law'). The first situation is where the norm lags behind social change; the second is where the norm is ahead of social change. In the first case, the enacted norm is still in force even though the way that the contradictory forces that gave birth to it now interact has considerably changed. The norm then loses its effectiveness. The mechanism for the maintenance of international peace in Article 43 of the United Nations Charter, which is specific to the Security Council, provides a good example. During World War II, the USSR and the Western Allies – the United States, Great Britain, France, and China (at the time, nationalist China led the Second World War operations in the Far East) – were united in their fight against the Axis powers (Germany, Italy, Japan). This union hid all the other contradictions. At the time the Charter was drafted, the world had just got over a violent contradiction between those countries that supported democracy and Human Rights and those that followed the lead of fascist and Nazi systems. Whilst it was expressed within the war, the contradiction was overtaken by the victory of 1945. However, at that precise moment, it produced law, in the form of the United Nations Charter. Yet this victory was achieved at the price of camouflaging, or rather choosing temporarily to overlook, other contradictions. This was the case with respect to the opposition between the Western societies, based on free market economy and political liberalism, and Soviet society, based on a planned economy and a one-party system. This was also true for the contradiction between the northern developed economies and the extremely poor societies to the south. These contradictions were to re-emerge with force as soon as the Charter was signed. Now, the legal mechanism that was intended to maintain peace depended on the continuation after the war of the union which had been created during it. Article 43 of the Charter consequently assumes that the member countries would agree to provide the Security Council with the necessary forces for the exercise of its peace-protecting function. The development of the East–West opposition after 1945, known as the Cold War, was to make the application of Article 43 impossible and ruin the ambitious UN project. Article 43, even though it formally remains in force, is in reality reduced to a mere '*droit proclamatoire*'. This reinforces the idea that the effectiveness of law yields in the face of evolving contradictions.

However, the relationship between the way a contradiction evolves and the norm can also work in the opposite direction. It sometimes happens that the social

contradictions are perceptible enough to allow the expression of a new norm, even though the result has not been clear enough for that norm to become enforceable. In such cases the norm is then ahead of the social situation. This was the case for the body of international norms that were established in the 1970s, generally by the United Nations General Assembly, for a 'new international economic order'. The contradiction concerning the difference in level of economic development between 'northern' and 'southern' countries was sufficiently marked to necessitate the adoption of new legal rules meant to modify the economic order. However, these rules were introduced through resolutions of the General Assembly, which is the only organ of the United Nations which operates at a universal level, yet has the least power of enforcement. The contradictions were marked enough to get to this level of expression (soft law), but the balance of powers was not such as to enable economic change towards more justice between peoples. As a consequence, it was impossible to raise those norms to the status of compulsory rules. Many other factors had to come into play to start a movement towards development in certain countries, particularly in Asia.

Hence it is possible to conclude that law and proclaimed norms operate within the framework of social contradictions. Even if they are not directly applied, the existence of proclaimed norms plays a role in social movement and permits certain contradictions to be overcome more quickly. This analysis helps us to understand that a norm is not necessarily compulsory. Whether or not it can be characterized as such depends on the state of contradictions at that point in time.

2 The Limits of the Reims Theory and the Blind Point of Sovereignty

Despite its rigour and the fact that its theories find support in the experience provided by many situations in practice, the critical theory of law through the analysis of contradictions has rarely been taken up by scholars in international law. Many explanations can probably be provided for this. I would like to place emphasis on one particular point which, in my view, explains the limits of the theory and its inability to provide reasons for the current weakness of international law. This is that the theory fails to deal sufficiently with the problem of sovereignty.

Of course, it is necessary to give reasons to support any reference to the weaknesses of international law. It does not imply any assessment of the law and of its impact in terms of social effects. That would amount to attributing certain aims to the law and would entangle us in a complex debate based on value judgements. Let us instead restrict ourselves to saying that the law governs the relations between individuals and groups within a given society (without considering in what way the law actually governs such relations). In such cases, it is possible to criticize a system of law that fails to ensure the legal settlement of conflicting social relations in the social field which it is supposed to cover. This will happen when the way the law is organized is so defective that a certain number of situations cannot be resolved on a legal basis. This is the case with respect to international law.

The great majority of the norms that govern international society have a contractual basis. For this reason, and because of privity of contract, such norms bind only the states which have subscribed to them (leaving aside the reservations often formulated by the very states that have agreed to be contractually bound). As for the other states, they are subjected to no binding obligation on the subject concerned. In this way, bans on armaments are binding only on certain states and therefore remain highly inefficient. The emergence of general imperative law has not yet filled this gap. In addition, the jurisdiction of international courts is limited by it being subject to the prior agreement of the states concerned. Consequently, many conflicts cannot be solved through the law. Moreover, the inefficiency also concerns the deciding organs. The Security Council intervenes effectively in very few conflicts, either because its intervention is prevented by the veto of one of the permanent members, or because its decisions are not respected by the states.

In fact, these weaknesses of international law have the same cause, namely the fact that the states retain the possibility of avoiding the law by invoking their sovereignty. Sovereignty enables a state not to sign a convention, to refuse the jurisdiction of the international courts, and to ignore the Security Council's decisions.

None of the Reims colloquia was dedicated to the question of sovereignty, though Charles Chaumont considered it to be central to the theory of international law.[6] For him, sovereignty was linked to the question of will, and the source of international law was the will of states. However, he also saw a connection between sovereignty and the concept of people: '[a]s long as peoples exist with their uniqueness, sovereignty has a meaning'.[7] However, he admitted that there were contradictions inherent in the idea of sovereignty. Hence, he wrote that '[f]or example, the same word expresses the exercise of colonial power over a colonized people and the purpose of that people's revolt'.[8] Today, it has to be admitted that this part of the critical analysis was inadequate, and that since the contradictions within international society have evolved considerably a profound adjustment of the critical theory is necessary.

Although the critical theory has succeeded in drawing a distinction between 'conservation sovereignty' and 'conquest sovereignty', it has largely ignored other concepts, most notably the ideas of peoples and of nation. Such concepts, which are ill-defined and full of contradictions, have not been taken into account in the analysis, even though they underlie sovereignty. It must be remembered that the context was favourable to this type of omission. The main issue for international law in the 1970s was the acquisition of sovereignty by peoples fighting for their national liberation. The question, at the time, concerned the granting of sovereignty. The 'sovereignty – people – nation' combination was considered essential to ensure the progress of international law towards emancipation.

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[6] 'Cours général de droit international public', *RCADI* (Collected Courses of the Hague Academy of International Law) (1970-1), ch VI, at 384, and '*Recherche du contenu irréductible du concept de souveraineté internationale de l'État*', *Hommage d'une génération d ejuristes au Président Basdevant* (1960), at 1–38 and 114–151.

[7] Cours, *supra* note 6, at 385.

[8] *Ibid.*, at 387.

The contradiction inherent in the concept of nation was not unknown. On the one hand, this notion refers to the unity of a group that is distinct from others by its history and the preservation of which is considered a positive value. On the other hand it refers to the tension concerning the group's identity that leads it to fight against other groups, sometimes with incredible violence, which can be considered only as a very negative counter-value. It seemed at that time that the positive aspect of the ideology of the nation which had triumphed during World War II with the French Resistance was still in operation. The colonized peoples' struggles for emancipation were defined, without any real critical reflection, as fights for 'national liberation'. Even though this sociological notion is very much linked to the particular context of European history and vocabulary, it was transposed to human groups that were structured on very different models, particularly on multi-facetted ethnic divisions.

What happened is well known. The combination of sovereignty granted within borders that were drawn up by the colonizer and the fiction which stated that the group settled in this framework was a nation led the new state powers to exalt national ideology. On the whole this was done for the benefit of the dominant ethnic group (most often that of the leader), and sometimes involved the rejection of the people's diversity (as witnessed in the sad case of the exaltation of 'Ivoriness' in the Ivory Coast). It is not certain that this period of blindness about nation and nationalism is over, although it is becoming increasingly clear that the concept is sociologically blurred and politically dangerous. As a response to political crises and economic injustice, nationalisms are glorified and lead to violence and war. Tensions are created around the natives of the country, those who were born there and their parents, and those who fought to defend their territory. Land and death are in this way exalted as the source of the tie. The martyrdom of the ancestors creates a blood debt which connects the descendants 'to death'. As it is a morbid connection, the nation leads to more deaths through more massacres. The concept is, along with religion, at the origin of the most serious acts of violence in humanity.[9] The criticism of the concept of nation must be pursued, as the world economic and sovereignty crises are leading to the development of increasingly dangerous nationalist movements.

It is far from certain that the concept of people is more rigorous. Even though the concept is considered to have a legal content, especially with respect to the norm of 'the right of peoples to self-determination', the concept of people itself is not defined. That is not surprising, as the word 'people' refers to a human group which is subject to a marked contradiction. On the one hand, the term 'people' covers the idea of a group possessing the same history, but this is not very far from the concept of nation. On the other hand, a people corresponds to those who are there, whatever their origin, represented by a given state and sharing the exercise of sovereignty inside that state. However, when it came to fighting against colonialism, the United Nations and the emancipation ideology resolved the question of the definition of people on a contingent basis, by considering as a 'people' the group that had been subjected to colonial

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[9]   E.H. Kantorowicz, *Mourir pour la patrie et autres textes* (2004), and I. Zertal, *La nation et la mort. La Shoah dans le discours et la politique d'Israël* (2004).

domination. Nevertheless, the imprecision remained, to such an extent that Charles Chaumont, in an article published in 1976, stated that a people is identifiable when it contains individuals who are ready to risk death to obtain the group's independence.[10] Although probably sufficient at the time of the anti-colonial struggles, this criterion no longer has relevance today.

Modern democracies use national sovereignty or sovereignty of the people, depending on the historical period and the political tendencies at the time. However, since nation and people are difficult concepts to define, they are not legitimized through this process. The fact that the struggles have changed nature, at the end of classical colonialism and after the fall of the Soviet Union, gives us a new perspective. The current development of financial and military capitalism has accelerated the phenomenon of globalization. Visible resistance is weak and inefficient. A morbid and dangerous resistance has developed through networks defined as 'Islamist' that use suicide attacks on a very large scale. If we apply Charles Chaumont's standard here, does this mean that we should consider a group of individuals as a people just because many of them are ready to give their lives for a rather vague cause? It is obvious that we have to take this analysis further. Our analysis must be based on the contradictions of life itself, and not on death which puts an end to every contradiction. The fact of giving one's life therefore cannot in any way be used to define a people. As for a nation that is founded on the memory and exaltation of death for one's country, this only leads to other deaths through the vain search for the group's integrity. Consequently, the concept of people is variable and changing, and this point did not escape the critical theory. Human societies are distinct, but these distinctions are in no way permanent. Is it possible to find a way of defining the concept of a people through that people's will? On this point also, we need to look beyond the Reims doctrine. The people's will is a formal concept which can only be understood by using an institutional reference point. It erases the contradictions and hides them behind a façade of unanimity. Only the people's action, what Hannah Arendt called 'political action' (*l'agir politique*'[11]), can be used to rate a group's actual existence. In contrast to death as an aim defining the group, political action is a criterion of life.

For all that, has a criterion for attributing sovereignty been found? On this point, I think that, more than 30 years after the adventure of the Reims colloquia, the question has no relevance and that the critical theory stopped short of a criticism of sovereignty. We may have thought that giving sovereignty to a people would lead it to true independence and to possible development, but all illusions to this effect have evaporated and the examination of contradictions relating to sovereignty has proved manifestly insufficient. We must now analyse the content of sovereignty. Such analysis reveals that in many African states sovereignty is exercised in the ministries of the former colonial power. Some countries, such as Somalia and Guinea-Bissau, have sunk into chaos. The number of drug trafficking states is constantly increasing in all the regions of the world. Most importantly, nowhere does sovereignty still

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[10]   Chaumont, 'Le droit des peuples à témoigner d'eux-mêmes', *Annuaire du Tiers-Monde* (1976) 15.
[11]   Arendt, 'L'action', in H. Arendt, *Condition de l'homme moderne*,(1983), at 41.

correspond to its concept, nowhere does it represent the unique source of power, nor the guarantee of a people's independence. This is because the only societies remaining are interdependent. A number of scholars have analysed this evolution.[12] Undoubtedly, sovereignty has not disappeared as a formal concept. However, the functions that enabled the sovereign to promote social justice within a people are now limited, and sometimes even completely effaced, by the constraints of globalization, whilst regalian functions themselves (in the legal system, the administration of prisons, the police, and even the army) are subjected to a marked process of privatization. Sovereigns still retain a certain level of power to suppress protest movements, but they have lost the ability to satisfy the demands expressed through those movements. To sum up, the only feature of the Utopia of sovereignty as a group's independence that remains is the continued existence of certain powers of repression that are used more frequently when the sovereign is weak. For all individuals today, freedom and development depend on the guarantees that are established at a higher level.

3 Which Method and Which Aims for a Critical Theory?

Two methods appear more useful than ever. One of them consists in a renewal of the dialectical analysis by trying to identify what contradictions are currently at work. This would enable us to understand the system and to suggest possible reforms. The other method leads to abandoning the concepts that no longer reflect reality and therefore maintain dangerous illusions.

As a first step, these principles should lead to a criticism of the United Nations' founding principle, namely that '[t]he Organization is based on the principle of the sovereign equality of all its Members'.[13] There is a flagrant contradiction here with Article 27 which sets out the powers of the Security Council's permanent members and openly breaks the equality in law between the Members. Far from addressing the question of inequality in law by removing this category, the planned reforms simply envisage an enlargement which will modify the terms of the inequality without suppressing it.

The search for the principal contradictions within the international system quickly reveals the impossibility of wanting to maintain the principle of sovereignty on the one hand and, on the other, to develop a universal international law. We can analyse this contradiction, whilst also at the same time reflecting on *how* to analyse it. It is inherent in the concept of sovereignty that it is not subject to conditions. The law is made by the sovereign (irrespective of which organs contribute to the process in any particular system), but exceptions to the law can also be declared by him.[14] This is

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[12] Among many others see J.A. Camillieri and J. Falk, *The End of Sovereignty? The Politics of a Shrinking and Fragmenting World* (1992); G. Mairet, *'Le principe de souveraineté. Histoire et fondements du pouvoir moderne* (1997).

[13] Art. 2(1) of the Charter.

[14] Jacques Derrida in 'Voyous', Paris, Galilée, 2003, last part 'Le "monde" des Lumières à venir (exception, calcul et souveraineté)', at 167.

evidently not compatible with a legal system which is superior to sovereignties. For a long time, international law, even in its monistic phase, accepted the fact that norms were only acquired through the convergent wills of the sovereigns. It appears today that this situation is wholly inadequate to protect world society, or, in other words, humanity. Sovereigns resist the universal extension of conventions despite the fact that such conventions, such as the conventions for the protection of the environment, the banning of certain arms, the protection of migrants, or the Statute of the International Criminal Court, strive for the protection of humanity. Even when they have signed and ratified those conventions, sovereigns claim to be able to suspend their obligations in circumstances that they call 'exceptional'. This is what the American Government did with the creation of the Guantanamo prison and procedures applied there, and international law was unable to do anything to oppose the American action.

There is an obvious imbalance between the considerable development of the formulation of international law and the poor quality or ineffectiveness of the procedures for its application. International law will remain weak as long as this contradiction is not resolved. There are numerous possible ways to overcome these difficulties. Anne Peters suggests one when she states that sovereignty should be 'justified' and that it involves responsibility. It is indeed true that the progress of the International Law Commission on the international responsibility of states appears derisory given that it is impossible to implement its proposals. However, Anne Peters's ideas represent a change of concept in themselves, since a 'justified' sovereignty is no longer sovereignty, as it is not absolute. Moreover, an efficient rule of state responsibility implies a compulsory and non-optional submission to judges, which is another distorting restriction on sovereignty. I approve of the way forward which is identified here, but I think that it is possible to go further and abandon a concept that now only adds ambiguity. Would it be so difficult to live in a world without sovereignty?

Misunderstandings arise from the confusion between the state – which is a form of political community that is necessary for the expression of differentiation between groups – and sovereignty that has become its mark, its standard, and finally its criterion. However, sovereignty no longer represents absolute power, and where it still does it involves dangerous risks for humanity. Also commercial exchanges, financial and technological interdependence, together with the intermingling of populations present us with challenges where the solutions are no longer provided by states. In view of these points, do we not need to rethink the world's architecture? The European Union has shown a promising way forward, which has unfortunately been overshadowed recently by a severe and regrettable crisis. It has invented the idea of a new political community which superimposes itself on the existing structures without erasing them. It has invented the concept of an efficient law that does not have its source in sovereignty. Most importantly, it has ensured peace between its members, which is an incomparable and underrated benefit.

A critical theory that was not only based on negative criticism of mistakes and limits, but took part in the invention of a new world, could easily be inspired by the European model. We no longer simply belong to the very exclusive community of the

nation (which leads to the repressive measures against aliens). We belong to many different political communities. Each has its own particular level of competence and must be given the necessary powers for it to be exercised. However, it is certain that the universal echelon of power now needs to be rethought, obviously not as a world government, but as the place for the universal expression of rights and duties for all, and for the adoption of the norms that guarantee the right to exist for partial political communities. If the community of international lawyers agreed with this necessity, it would help citizens to work towards it, and the task of imagining and creating a new political and legal world architecture could begin.