

EMPIRES AND STATES AND THE NEW INTERNATIONAL RELATIONS

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Abstract

In the second half of the last century, even if the world appeared to be divided into two blocks, the very idea of Empires seemed to come out of the political scenario and the panorama of international law scholars. The return to a community of states placed in conditions of equality according to the scheme inherited from Westphalia was taken for granted. In reality, careful scholars such as Carl Schmitt, while predicting the end of the “disturbing dualism” created after the end of the Second World War, imagined a world with political formations which corresponded to “large spaces”; a reality that became evident subsequent the events following the fall of the Berlin Wall. In this new scenario, which has its roots in international law based on the recognition of *de facto* power, the idea of Empire as a polity has re-emerged, based on very specific historical connotations, and has drawn an institutional set-up that conditions current international relations.

Keywords

Empire. State. Westphalia. *Jus publicum europaeum*. International Law. International relations

Summary

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“Not states but empires are the true ‘creators’ of international law.”

Carl Schmitt, *Völkerrechtliche Großraumordnung mit Interventionsverbot für raumfremde Mächte. Ein Beitrag zum Reichsbegriff im Völkerrecht (Text der 4. Aufl., 1941)*, in *Staat, Großraum, Nomos. Arbeiten aus den Jahren 1916 – 1969*, Berlin, Duncker & Humblot, 1995, 335.

“The history of most civilizations is a succession of rise and fall of empires.”

Henry Kissinger, *World Order*, 2014, 1.

1. THE PLURALISM OF GREATER SPACES AND THE FORMS OF POLITICS: EMPIRES AND STATES.

In a famous essay, written in the early years of the Cold War, Carl Schmitt predicted the end of the “concrete political reality” that it had created, namely that of a “disturbing duality”, and posed the political question, observing that “we should ask ourselves where the dissolution of the dualistic tension would lead”².

The question arose from the all-American idea, which emerged already at the beginning of the 1930s, according to which, thanks to technological progress, which makes “every powerful person more and more powerful”³, “today the earth is no bigger than the United States of

² C. Schmitt, *Die Einheit der Welt* (1952), in *Staat, Großraum, Nomos. Arbeiten aus den Jahren 1916 – 1969*, Herausgegeben, mit einem Vorwort und mit Anmerkungen versehen von Günter Maschke, Berlin, Duncker & Humblot, 1995, 496 ff. (501).

³ Observe C. Schmitt (502): “The desire for a global and well-functioning unity of the world corresponds to the prevailing industrial-technical world view today. Technical development inexorably leads to new forms of organization and centralization. So, if technology, and not politics, is really the destiny of humanity, the problem of unity can be considered already solved”.

America were, at the outbreak of the Civil War, in 1861, which at that time were already too small for the conflict between the Northern and Southern States”; with the consequence of considering “the earth today too small for two systems opposed”⁴.

Rightly, Schmitt rejects this idea of the unity of the world under a single political power on a philosophical and spiritual level and precisely recalls the American pragmatism, “consciously pluralist”, which had rejected the antiquated idea of unity of the world and saw true modern philosophy in the “multiplicity of possible visions of the world”⁵.

For those who, like Schmitt, believed in the irrepressibility of the “political sphere” from the human condition, i.e. of the “friend-enemy” dialectic, the reply to the vision of world unity, advocated by American politics, could not be limited to a philosophical critique, but he also faced the condition of the world with realism, affirming that “the earth will always be bigger than the United States of America. (...) it will always represent much more than the sum of the points of view and horizons underpinning the alternative of the current global dualism”⁶.

But in Schmitt there is also a capacity for vision not common to social scientists and this is what makes him a Thinker, not only up to date, but in some ways prophetic. Thus, in a few lines he leaves us a description of the current world. He states: *“This is not the place to examine the many different*

⁴ This is the pan-interventionist position expressed by the American foreign minister, Harry L. Stimson, in 1932 and with which C. Schmitt had already dealt with in another highly important essay (*Mutamenti di sistema del diritto internazionale* (1943), trad. it., in *Stato, Grande spazio, Nomos*, cit., 215 ff. and 244), taken up and clarified in a subsequent speech of 1941.

⁵ C. Schmitt continues, “Over the course of thirty years, therefore within a single generation, the richest country in the world and with the strongest war potential on the planet has gone from pluralism to unity” (*Die Einheit der Welt*, cit., 504).

⁶ C. Schmitt, *Die Einheit der Welt*, cit., 505.

*possibilities conceivable in theory and feasible in practice. A political discussion would ensue on various issues, such as the status and importance of China, or India, or Europe, or the British Commonwealth, the Spanish-Lusitanian world or the Arab bloc, and perhaps of other unexpected steps in the direction of a plurality of large spaces*⁷.

This, with the addition of the United States and Russia, is precisely the “multipolar” world of today; and considering the words written by Schmitt in 1952, it took about sixty years for it to be fully visible. A set of large spaces, governed in various ways, but all with imperial pretensions, or at least of world power.

To clearly see this reality many events were necessary, which occurred when Plettenberg’s Constitutionalist had disappeared even if only for a few years, starting with the fall of the Berlin Wall (November 9, 1989), the dissolution of Yugoslavia (1990) and that of the Soviet Union (December 1991); then passing through the two Gulf wars, the first in 1991 and the second in 2003, interspersed with the attack on the “Twin Towers” (September 11, 2001) and the occupation of Afghanistan by the American and Western sides (October 2001), moreover where the Soviets had previously fought for a decade (1979-1989). These events, just to recall the main global instabilities, were also followed by the formation of Isis which crept between the civil war in Syria, daughter of the Arab Spring, and the occupation of Iraq, also giving rise, for a period, to the Islamic State (Daesh) and the Caliphate (2014).

In the same period of time, almost like a law of retaliation, international trade is reorganized and starting from 1995 involves a series of realities considered emerging, such as South Africa, India and Brazil (1995), while

⁷ C. Schmitt, *Die Einheit der Welt*, cit., 505.

China will be admitted a few years later (2001) and, finally, the Russian Federation also enters world trade (2012).

International trade, in itself, does not naturally stabilize the world, on the contrary it almost seems to excite its contrasts to a breaking point; and the Russian-Ukrainian conflict seems to be an example of this tension deriving from globalization, in which, in the end, all the entities of world power remain involved at the same time.

It is evident that globalization is not connected at all to a system of civil constitutions, as Teubner thinks⁸, but is the consequence of an already harsh economic competition, which is exacerbated even more by the use of ever more penetrating technologies compared to the human condition. All economic growth in the world has always been marked by technological development and, in the era of globalization, the penetration of large economic trusts is a consequence of the highest technology: from space research to the internet; from the transport and logistics system to energy; from the environment to food; from medicine to social relations.

At the same time, both the impressive technological development and the dominance exercised by the multinational companies, even in the formation of collective and individual needs, presuppose not only huge financial resources, but above all a great political power that only a few entities in the world are able to impersonate and which, from the point of view of political science, qualify with that particular ‘polity’ defined as “Empire”⁹.

⁸ See G. Teubner, *La cultura del diritto nell'epoca della globalizzazione. L'emergere delle costituzioni civili*, Roma, 2005.

⁹ In this regard, see the contribution of M. Hardt – A. Negri, *Impero. Il nuovo ordine della globalizzazione*, Milan, 2001; useful indications also in M.R. Ferrarese, *Prima lezione di diritto globale*, Bari, 2012, 13 ff.

Empires, however, have not supplanted that particular political form, born between the 16th and 17th centuries, which are the States, but have led to an overlapping of structures by which Empires and States move within the same international space, with a lot of overlapping and taking into account mutual interdependencies. Furthermore, empires and states were formed and related by virtue of the complex historical events that initially move in the wake of the development of the mercantile economy and the overcoming of universal authorities, and which found their balance in the formation of the *Jus publicum europaeum* and subsequently they determined the rupture of this, even in the continuity of certain forms and principles that are transshipped in the modern international community and in modern international law¹⁰.

As a first approximation, and before delving into the theme, it can be observed that the empires of the present are more similar to the past, while the current states now appear something profoundly different from what they were after the conclusion of the war of the thirty years with the Peace of *Westphalia* (1648)¹¹.

2. THE AFFIRMATION OF THE STATE FORM AND THE PEACE OF WESTPHALIA.

As is well known, the very last event mentioned, the Peace of Westphalia, definitively closed every imperial recomposition of Europe, because, in the

¹⁰ See H. Kissinger, *Ordine mondiale*, it. transl., Milano, 2015.

¹¹ On the Thirty Years War and the Peace of Westphalia see T. Helfferich (ed.), *The Thirty Years War: A Documentary History*, Indianapolis, 2009; P.H. Wilson, *The Thirty Years War: Europe's Tragedy*, Cambridge (MA), 2009.

bloody struggles that had been fought to the point of exhaustion, no entity had managed to prevail and to reunite the 'Empire crossed by the religious division determined by the reform'¹².

The title of Emperor, which from Charlemagne onwards had served to govern the European continent, formally survived until 1806¹³, but in reality, between Osnabrück and Münster, a new order had been established with a political form, different from the empire. For this reason, the Peace of Westphalia is to be considered a turning point in the history of the science of constitutional law and politics. It was sanctioned that the State and only the State would be the basis of the new European order, the *Jus publicum europaeum*, and the will of God would no longer govern the legitimacy of power.

The State was born as an alternative political formula to the Empire. In fact, after eight centuries of existence, the Empire came to shatter due to the innumerable wars of which those of religion were decisive in determining its collapse.

Obviously, the Peace of Westphalia in fact follows the formation of the state and does not precede it. At the time of the signing of the three treaties that make it up, the great European monarchies had already given

¹² Even before the Peace of Westphalia, in the Book according to J. Bodin (*Les Six Livres de la République* (1576), transl. it., *I sei Libri dello Stato*, Turin, 1964, II 644) he offers us this cross-section of time: "It can be said simply that, when the Empire is entirely divided into factions and warring parties, and the princes take the field against each other (which happens quite often then), the municipal State of the cities and the subaltern jurisdiction of princes gives rise to many small aristocracies and particular monarchies, and each member of the Empire becomes a sovereign state in itself".

¹³ The empire continued to exist, at least formally, for another century and a half until the Treaty of Pressburg (December 1805), between Napoleon and Francis II, decreed its downsizing, at the behest of the French, and finally (from 6 August 1806) with the renunciation of the title by the Austrian emperor.

life to state formations for several centuries, France, Spain, and England. The permanence of a certain fragmentation in Germany and Italy, where there were also attempts at state unification, was due to the presence of the two universal authorities, the Pope and the Emperor, who disputed over ultimate power before men and before God.

In fact, the State was born, after so many attempts and intermediate forms, as a fact that takes the form of the use of force and the violation of the juridical order and is accompanied by the principle of effectiveness¹⁴. The conquest of neighboring lands, more properly what Carl Schmitt calls the appropriation of land, with the supplanting of legitimate titles represented the way in which territorial aggregates assumed the character of the State¹⁵. Italy, at the time of the decline of the two universal authorities, the papacy and the empire, offered many examples of this first tradition, and it is not by chance that we find in Machiavelli the modern use of the word “State” as a political form, in *incipit* of the *Principe*, which can be a republic or a monarchy¹⁶.

The concentration of lands under a single lord, according to the dictates of the patrimonial monarchy, was the method of state formation practiced by the great continental monarchies. In this sense, two paths have been followed: on the one hand, the one that obeyed the dictates of the dynastic principle, of the succession of titles through women and through marriages, to which palace intrigues were not free; on the other hand, through wars for the conquest of contiguous and continuous territories

¹⁴ On the point v. the reconstruction of M. Weber, *Sociologia del diritto*, in *Economia e Società*, vol. 3, it. transl., Torino, 1980.

¹⁵ The cited 1950 essay by Carl Schmitt (*Nehmen / Teilen / Weilen*), very important for the relationship between economy and power, has been translated with the title *Appropriazione – divisione – produzione*, in *Le categorie del politico*, Bologna, 1972, 295 ff.

¹⁶ More exactly, so says the *Principe* (1513) “Tutti li stati, tutti e’ dominii che hanno avuto et hanno imperio sopra li uomini, sono stati e sono o repubbliche o principati”.

and populations, to expand power. It will then be the merit of these Lords who obtained the possession of lands and titles under a crown, posing as sovereigns, to get rid, within their borders, of the residues of feudal rights and the constitutional prerogatives of free cities, to make their power absolute and incontestable¹⁷.

It is no coincidence that the conceptual elaboration that crystallizes this political orientation revolves around the notion of “sovereignty” and is due above all to the Frenchman Jean Bodin, who saw in this element and in its monarchic absolutization, as opposed to the dispersion of power from democracy, the cohesive and unifying force of the political community and considered this element, perpetual and unlimited, necessary for having a State¹⁸.

¹⁷ From this point of view, the most fitting example is given by the French experience of Louis XIV (P.R. Campbell, *Louis XIV and France of his time*, Bologna, 1997), even if an even earlier example is given by the English monarchy of the Tudors, which limited the prerogatives of the barons and strengthened the court and the central administration of the State often also entering into conflict with the ancient Parliament (see D. Lendsay Keir, *The Constitutional History of Modern Britain since 1485*, London, sixth Ed., 1961, 94 ff.; C. Ogilvie, *The King’s Government and the Common Law 1471-1641*, Oxford, 1958, 73 ff.).

¹⁸ Obviously, the formulation of “sovereignty” in J. Bodin, *Sei libri dello Stato*, cit., I, 345 ff., makes use of all the ancient and medieval elaborations. On several occasions Bodin, for whom “the state is the just government of several families and of what is common to them, with sovereign power” (I, 179)”, opposes monarchy and democracy and gives them a singular configuration when describing the monarchical regime (the so-called “royal monarchy”) as obedience of the monarch to the laws of nature, the same that the monarch demands from their subjects in their regard, “leaving to each the personal freedom given to him by nature and the property of what he belongs” (II, 579) and, then, argues that, by putting together monarchy and democratic government, a “union would be created which results in the most stable form of monarchy” (II, 660-61). In this context, moreover, the State General would also find a place as merely consultative bodies, as well as corporations, communities, forms of intermediate association between the State and the subjects (II, 284-286). In conclusion, however, Bodin, in comparing the

The supporters of (absolute) sovereignty, however, trace the characteristics of this right from the position of the emperor (*rex in regno suo superiorem non recognoscens imperator est*), that is, once the unity of the medieval world was broken (*universitas humanitatis*) and when the emperor ceased to be the universal lord (*dominus mundi*), the king would have the same fullness of powers (*plenitudo potestatis*) within his kingdom¹⁹. Hence also the revival of the principles of Roman law, which conferred on the emperor the status of source of law (“Quod principi placuit legis habet vigorem”, *Inst.* 1, 2, 6) and considered him *legibus solutus*, not obliged to respect the laws (*Dig.* 1, 3, 31)²⁰.

three forms of government, affirms that “pure absolute monarchy is the safest state and, without comparison, the best of all” (VI, 483); and of democracy, animated by the egalitarian principle, he writes that “there is no greater hatred nor are there more radical enmities than those created between equals” (VI, 463).

¹⁹ On this point the valuable work by E. Cortese, *Il problema della sovranità nel pensiero giuridico medioevale*, Rome, 1966; as well as H. J. Berman, *Diritto e rivoluzione*, vol. I, it. transl., Bologna, 1998, dedicated to the origin of European law in the 11th and 12th centuries.

²⁰ Obviously, in the Roman world the *lex de imperio* constituted the exhumation of the powers of the ancient Roman kings voted by the people (*lex curiata*), which had always been the ultimate repository of all power, and it is for this reason that the absolute power of the empire was opposed, in the same Justinian compilation, that of a power ordered according to law and of an emperor who recognized himself subordinate to law according to the words of the constitution *digna vox* (*Cod.* 1, 14, 4). In the Middle Ages, therefore, two different tendencies manifested themselves: the first (expressed by Azzzone) according to which the Roman emperor, although *legibus solutus*, was bound to respect the laws (*Summa ad Inst.*, proemium, § 1), because he should have always kept in mind (§ 17) that he had obtained the election by *fortune* and the authority (*authoritas*) from the spontaneous concession of the *populus*, with the so-called *lex regia de imperio*, bearing in mind that the people, with the concession (*translatio*) of the powers of government to the *princeps*, had not completely abdicated the exercise of his original power (*Summa ad Cod.* 1, 14, § 8); the second (following the teaching of Irnerio and his pupils) for which, however, the emperor claimed *omnis iurisdictio et omnis districtus*, every power and for every territory, including tax rights, the appointments of all offices and public functions and the

With the Peace of Westphalia, which would define the (new) legitimate titles for the exercise of state power, this concept of political sovereignty would apply not only within the state, but also in external relations between states, since their reciprocal recognition on political, and no longer religious, bases implied respect for reciprocal sovereignty and with this same the realization of peace between states, linked to non-interference in internal affairs. This created the premises for the formation of a community of states founded on the principle of equilibrium, in which it was necessary to ensure that juridically equal subjects maintained their condition without the prevalence of domination or hegemony of one over the others. Even the principle that States - according to the convictions of Hugo Grotius - were capable of waging war and stipulating peace²¹, was tempered by the rule according to which peace took precedence over conflict and this had to be dominated along with the joint action of the states in order to protect collective security and to preserve or restore balance.

Clearly, war remains the final way of resolving conflicts, and wars in the following centuries have also occurred for territorial conquests and reorganization of borders, but the goal of European relations was nonetheless the return to a state of peace and the achievement of a new balance and, to this end, the balance could be said to have been achieved

assignment of vacant fiefdoms. In this context, the term *Iurisditio* was attributed the meaning of supreme power of the empire, also over the cities and monarchies subject to it (these are the principles expressed in the *Constitutio de regalibus* and in the *Constitutio de pacis*, published by Federico Barbarossa in 1158 in Roncaglia, see P. Grillo, *Le guerre del Barbarossa. I comuni contro l'imperatore*, Bari, Laterza, 2014).

²¹ The elaboration of U. Grotius, *De jure belli ac pacis* (1625), provided the scientific basis of the peace of Westphalia (see the Latin edition edited by P.C. Mollhuysen, published in Lugduni Batavorum, by A. W. Sijthoff, 1919; as well as U Grotius, *The Law of War and Peace*, Prolegomena and First Book, edited by Fausto Arici and Franco Todescan, introduction by Guido Fassò, Padua, Cedam, 2010).

not simply with the cessation of hostilities, but with the reconciliation that was achieved with the readmission of the defeated into the European public order. This principle, which remained the cornerstone of the European system and then of international law, applied even when Napoleonic France was defeated, was readmitted in a particular form at the Congress of Vienna; the only exception that European history has known, and from which the drama of the Second World War derived, is that of Germany which in the Treaty of Versailles of 1919 was punished with the deprivation of international subjectivity²².

With the treaties of the peace of Westphalia, therefore, we witness the reciprocal recognition of the States and the establishment of the dynastic principle, which was the means to pacify the continent, since it was possible to admit, alongside States of Catholic princes, the existence of States with Protestant princes, based on the reinterpretation of the principle “*cuius regio eius religio*” with elements of tolerance.

The peace of Westphalia, therefore, shatters both the imperial idea and that of a religious authority that decides on temporal power and writes a new world order (actually, a European one) based on the secularization of political power, and on the legitimacy of the absolute monarchy, registering, in this context, the success of the State form.

In order to achieve this, it was necessary to define a community of states based on the territorialization of political power and non-interference in domestic affairs, as well as in relations between subjects and sovereigns.

It was the elaboration of Thomas Hobbes’ Leviathan, just three years after the signing of the peace treaties (1651), which would then give the State the legitimacy of this internal absolute power with its contractualistic conception, in which the transfer of rights by the individuals had to be

²² See. H. Kissinger, *Ordine Mondiale*, cit.

almost total, with the sole exclusion of the right to life, so that the formation of absolute power could ensure coexistence and peace against the antisocial passions of individual men in the state of nature. Indeed, the justification of absolute power was the realization of peaceful coexistence between individuals and the preservation of the human group subjected to the authority of the State²³.

3. THE STATE, THE MONOPOLY OF FORCE AND LAW.

The teaching of history leads us to consider that the basis of the State has been coercion, with the use or threat of force, and not the law, and this is still valid today, although by now we speak of the legal use of force²⁴.

The concentration of power becomes the most proper element of the state. The state identifies itself with the political process of unification of power.

²³ See T. Hobbes, *Leviatano* (1651), trad. it., Bari, Laterza, 2008.

²⁴ See for a classic treatment R. Carré de Malberg, *Contribution a la Théorie Générale de l'État*, Paris, Librairie de la Société du Recueil Sirey, 1920, I, 69 ff.; G. Jellinek, *Allgemeine Staatslehre*, 3. Aufl., Berlin, Springer, 1922, 145 ff. and 192 ff.; C. Schmitt, *Teologia politica: quattro capitoli sulla dottrina della sovranità* (1934), in *Le categorie del politico*, cit., 29 ss.; Id., *Staat als ein konkreter, an eine geschichtliche Epoche gebundener Begriff* (1941), in *Verfassungsrechtliche Aufsätze aus den Jahren 1924-1954*, Berlin, Duncker & Humblot, 1958, 375 ff. where he brings the notion of State back to the “concept of dominant ordering of political unity” starting from the second half of the 16th century and up to the 20th century; also H. Kelsen, *Allgemeine Staatslehre*, Berlin, Springer, 1925, 7 ff. and 16 ff., particularly insists on the theme of coercion, translating it into a character of both state and international “law” (see *Diritto e pace nelle relazioni internazionali* (1941), it. transl., Milan Giuffrè, 2009).

In this sense, the state is not founded on the identity of a community, as is commonly believed, and another two centuries would have passed since Westphalia for the principle of nationality to become the principle of legitimation of the state²⁵, expressed by the sovereignty of the nation, according to the Declaration of the rights of man and of the citizen of 1789²⁶.

Even when *the right to self-determination of peoples*²⁷ were to become in the international legal system the criterion of the liberation of the colonies,

²⁵ Among the first in Italian doctrine G. D. Romagnosi, *La scienza delle Costituzioni* (1815-1847), later in Id., *Opere*, eighth volume, Palermo, Salvatore Di Marzo publisher, 1861, 142; v. also C. Esposito, *Lo Stato e la nazione italiana*, in *Arch. Dir. Pubbl.*, 1937, 409 ff.; and again G. Lombardi, *Principio di nazionalità e fondamento della legittimità dello Stato*, in *Nazionalità, popoli e autonomie nelle tradizioni d'Italia e Spagna*, Atti del Convegno per il XXX anniversario dello Statuto della Regione autonoma della Sardegna, Alghero 29-31 Marzo 1978, Turin, Giappichelli, 1979, 44-56.

²⁶ See Art. 3 - Le prince de toute souveraineté réside essentiellement dans la nation. Nul corps, nul individu ne peut exercer d'autorité qui n'en émane expressément. See also art. 3 of the French Constitution (1958) (National sovereignty belongs to the people who exercise it through their representatives and by referendum. // No fraction of the people nor any individual can assume the exercise of it.) and the preamble of the 1946 Constitution (The French Republic, faithful to its traditions, complies with the rules of public international law. It will not undertake any war with a view to conquests, and will never employ its forces against the freedom of any people. // Subject to reciprocity, France allows the limitations of sovereignty necessary for the organization and defense of peace.), v. É. Maulin, *La théorie de l'État de Carré de Malberg*, Paris, Presses Universitaires de France (PUF), 2003, 89-138; and for the international implications J. Combacau, *Pas une puissance, une liberté: la souveraineté internationale de l'État*, in *Pouvoir* 1997, 48 ss.

²⁷ On the matter see G. Arangio Ruiz, "*Autodeterminazione (diritto dei popoli alla)*", in *Encicl. Giur. Treccani*, vol. IV, Roma, 1988, *ad vocem*; F. Lattanzi, "*Autodeterminazione dei popoli?*", in *Digesto disc. pubbl.*, vol. II, Torino, 1987, 4 ff.; G. Palmisano, *Nazione Unite e autodeterminazione interna*, Giuffrè, Milano, 1997, *passim*; D.E. Tosi, *Secessione e costituzione tra prassi e teoria*, Napoli, Jovene, 2007, 251 ff.; for a synthetic picture of the classics on the principle under comment see v. R. McCorquodale (Ed.), *Self-Determination in International Law*, Aldershot and Burlington, Vt, Ashgate/Dartmouth, 2000; as well as H. Ambruster,

vis-à-vis the European states, with questionable processes of formation of the States (*state-building*) and of the Nations (*nation-building*)²⁸, the formation of the State gives rise, not so much to the constraints of existence or of the interests of a human group, but essentially to the relationship of the subjection of individuals to power and to the realization of the monopoly of force, this being the material capacity to do, and not the faculty to perform actions. Still today, these aspects identify the political unification brought about by the State form.

Even the reference, for the state experience, of the ancient forms of government is not relevant in any way with respect to the essential concept of “State”. In fact, the fact that the State can be attributed, as in the government of the ancient Greek cities, both a monarchical, aristocratic or democratic form of government, depending on the choices made on the internal organization of power, does not change the substance of the phenomenon state, since what matters is always the capacity for political unification of the will of the state that the different forms of government are able to achieve.

Obviously, from many points of view, the forms of government, that political theory has thought of and which history has brought about, are different from each other and also in a considerable way, yet the fact remains that both the decision of the monarch, as well as the deliberation of a council of notables or of a popular assembly have a meaning for the State not only insofar as they represent an act of will, and as such arbitrary

“*Selbstbestimmungsrecht*”, in *Wörterbuch des Völkerrechts*, von K. Strupp, 2. Aufl. von H.J. Schlochauer, Bd. 3, De Gruyter, Berlin 1962, 250 ff.

²⁸ See R. Grotenhuis, *Nation-Building as Necessary Effort in Fragile States*, Amsterdam, Amsterdam U P, 2016; S. Rokkan & D. W. Urwin (Eds.), *Economy, territory, identity: Politics of West European peripheries*, London, SAGE, 1983; E. S. Wellhofer, *Core and Periphery: Territorial Dimensions in Politics*, in *Urban Studies*, 1989, 26(3), 340-355, for whom the idea of a “*nation-building in the European style was a luxury when not a catastrophe*”.

and absolute, but for the political effect they have, i.e. if this act of will arbitrary and absolute is imputable to the State, its observance is obligatory and, where appropriate, its observance can be coercively enforced.

This state will, whatever the form in which it is constructed, may not be a violent form, but it is, in any case, a coercive form, and force is in any case and always the guarantee of its execution, even when the character of the law, that is, of an act of the juridical order, is attributed to this will²⁹.

It should be noted at this point that the encounter between the State and the law for which it is stated that the State has “a legal system”, takes place slowly and only through a continuous series of breaks from the previous system, giving rise to conflict between the law and the right, which is more evident in the *civil-law* tradition, but which has ended up infecting the *common-law* tradition as well³⁰. This process of acquiring the right is now considered a consolidated fact carried out by the State. Just as already with force, the monopoly of law, in the proper sense that only the State holds the legal use of force and, at the same time, the determination of the validity of the law, and it is in this way that physical power and juridical power end up overlapping³¹.

²⁹ See H. Kelsen, *Lineamenti di dottrina pura del diritto* (1934), trad. it., Turin, Einaudi, 1972.

³⁰ See M. Weber, *Sociologia del diritto*, cit., 153 ff.

³¹ V. Crisafulli, *Lezioni di diritto costituzionale*, vol. I, Padua, Cedam, 1970, which referring to the classical theory of the State underlines how the order of this is “impenetrable”, with the consequence that in cases in which the internal law of the State is measured against the international agreements assumed by it, a legal obligation is left to the State international law (*pacta servanda sunt*), for which the State, precisely because of the impenetrability of the legal system, must adapt its legal system to the obligations assumed by the State internationally (on the “adaptation” of domestic law to international law see A. D’Atena, *L’adattamento dell’ordinamento interno al diritto internazionale*, in *Lezioni di Diritto costituzionale*, 4. ed., Turin, Giappichelli 2018, 179 ff.; the German doctrine, in this regard speaks of the “transformation” of international law into domestic law, see for all, H.

4. FROM THE RUPTURE OF THE *JUS PUBLICUM EUROPAEUM* TO INTERNATIONAL LAW AND COSMOPOLITAN LAW.

The affirmation of the state as a transcendent political form of general scope leads us to think that the whole world is divided into states, all in equal positions, endowed with the *ius belli* and participating in the international community.

Actually, a more in-depth analysis easily highlights that the State is a historical category, typical of the Western world, more specifically European, which was originally considered to be enclosed in the *societas christianorum*, regulated by the *jus publicum europaeum*. The principles of the treaties of Westphalia gave life to a European community of a new type compared to the Empire, characterized by the coexistence of Catholic and Protestant sovereigns, with mutual legitimacy, attested by the exchange of ambassadors and by the organization of conferences; characterized by participation on a level of equality of all the states admitted, safeguarding a balance that prevented each participant from assuming a hegemonic position, and by the principle of non-interference in internal affairs, in the relations between the sovereign and his subjects.

These rules, which characterized the *jus publicum europaeum*, however, excluded all the other political identities already well known in the world, both in the West and in the East of Europe. This circumstance allowed European states to treat other political entities and non-European peoples

Kelsen, *La transformation du droit international en droit interne*, in *Revue générale de droit international public*, 1936, 5-49.).

as not worthy of the same respect that was due to European states and Christians. Armed Europeans were thus able to carry out campaigns of conquest³².

Although, for the first time, the question arose with the lands conquered by Spain, it was in particular England and France that moved to occupy land, on the assumption that certain territories were *terra nullius*³³. These powers have long practiced a form of world occupation policy, transferring the imperial idea outside Europe, as in the case of Latin America, Australia, and New Zealand, and Nouvelle France. Furthermore, there have been cases in which the great European powers have taken to governing territories and human groups foreign to their nationality, as in the case of India, Indochina, and other Asian and African possessions.

All this happened because the European states found the tools to seek forms of domination over each other outside the continent, and it was precisely the construction of empires that was the great project of the great powers that had prompted them to action since the discovery of the Americas.

³² On the matter C. Schmitt, *Il nomos della Terra. Nel diritto internazionale dello "jus publicum europaeum"* (1950), it. transl., Milan, Adelphi, 1991.

³³From this event a long disquisition arose on the subjectivity and rights of the Indians and on the legitimacy of the conquest, see F. De Vitoria, *Relectio de Indis. La Questione degli Indios*, critical text of L. Pereña, it. transl., Bari, Levante Editori, 1996), with respect to the dominant thesis that those lands were to be considered as *terrae nullius* and as such freely occupied and in defiance of the indigenous populations. On the thought of Francisco De Vitoria, see G. Barberini, *Principi di diritto internazionale nella teologia cattolica*, in *Stato, Chiese e pluralismo confessionale*, 2012, 1 ff.; C. Brandão, *Introdução ao estudo dos direitos humanos*, in C. Brandão (Coord.), *Direitos Humanos e Fundamentais em perspectiva*, São Paulo 2014, 1-14; A.M. Palamidessi, *Alle origini del diritto internazionale. Il contributo di Vitoria e Suárez alla moderna dottrina internazionalistica*, Rome, Aracne, 2010, 94-112.

Moreover, the dominion of the seas had become an open game, also thanks to the elaboration of Grotius³⁴ on the absolute freedom of the seas, made in favor of Dutch trade, as opposed to the terrestrial self-limitation, whereby the companies and companies for the dominion of the colonies, the slave trade, and piracy or privateering appeared completely legitimate, even if they created friction precisely on the cardinal principle of international relations given by the agreement and arbitration for the resolution of conflicts³⁵.

Ultimately, all the events mentioned involved the overcoming of the boundaries of the European Christian Society and its public law, when France in 1779 recognized the sovereignty of the United States of America, after the Declaration of Independence of July 4, 1776, with the contrary opinion of England, which claimed to evaluate the United States as a rebel colony and as such without legitimacy according to European public law; France, in this regard, will affirm conclusively that the independence of the United States “*était prononcée et établie par le fait*” (it was pronounced and established by the fact) regardless of the constitutional form (legal or illegal) with which it said independence it had been accomplished³⁶.

From that act onwards, we witness the passage from a European Community to an International Community, and the new international scenario, thanks to a reduction of legitimacy to a *de facto* situation and to

³⁴ See U. Grozio, *Mare liberum. Dissertazione sulla libertà del mare o del diritto che hanno gli olandesi al commercio con le Indie* (1609), it. transl., Naples, Liguori, 2007.

³⁵ On the difference between “land” and “sea” see C. Schmitt, *Terra e mare. Una considerazione sulla storia del mondo* (1942), it. transl., Milan, Giuffrè, 1986.

³⁶ In the exchange of notes between the two powers, already in 1778 France justified its act by stating that the United States was “in full possession of the independence, pronounced by their act of July 4, 1776” (see R. Quadri, *Stato (diritto internazionale)*, in *N.D.I.*, XII, 1, UTET, Turin, 1941, para. 1).

calculations of power, had the capacity to also incorporate the rest of the world, the non-European one, under the aegis of an international law which inherited the principles of European public law³⁷.

Certainly, the development of international law still had to face the drama of the two world wars in order to redefine itself as the law of civilized nations³⁸, outlaw war as an internationally licit behavior³⁹, reorder the sea, discover multilateralism and succeed in stipulating agreements on international trade and set up the first international economic and monetary institutions⁴⁰. The Fourteen Points of President Woodrow Wilson (1918) at the end of the First World War and the Four Freedoms of the Charter of Atlanta (1941) enunciated by President Franklin D. Roosevelt and signed by Winston Churchill contributed to all this. Due to these acts, world order was designed. The first point included the renunciation of territorial expansion, the principle of internal and external

³⁷ This was also quite simple given that the principles of Westphalia had a procedural rather than a value-based nature and could easily be adapted to all relationships between entities endowed with political power. In fact, these were rules that ensured a strong fluidity in relations between states, combined with pragmatism, for which it had an ecumenical character in itself (see H. Kissinger, *Ordine mondiale* (2014), trad. it., Mondadori, Milan, 2015, 78).

³⁸ See the art. 3, letter. c, of the Statute of the International Court of Justice (1945) which refers to “the general principles of law recognized by civilized nations”, as the source of the law that the Court applies, together with international Conventions and “international custom attesting a practice accepted as a law”.

³⁹ The reference is to the Treaty of Paris of August 27, 1928 (which entered into force on July 24, 1929), also known as the Briand-Kellogg Pact (General Treaty on the renunciation of war as an instrument of national policy), which banned war as an instrument of international conflicts (see O. A. Hathaway – S. J. Shapiro, *Gli internazionalisti. Come il progetto di bandire la guerra ha cambiato il mondo* (2017), it. transl., Vicenza, Neri Pozza Editore, 2018).

⁴⁰ Let it be allowed to defer to S. Mangiameli, *Stato, integrazione europea e globalizzazione. Le nuove sfide del costituzionalismo*, in *Diritto e Società*, 2020, 1 ff.

self-determination was brought back, the safeguarding of peace and the renunciation of the use of force were pursued, and the foundations of a general security system based on cooperation were set⁴¹.

Thus, that was how, after the Second World War, the elements of cosmopolitan law introduced between the two wars were consolidated and a connection was found between the Nations, after the failure of the Society (1919), giving life to the United Nations Organization (1945), which was to implement the principles that formed the new world order. The use of force and war were banned in inter-state relations by the UN Charter (Art. 2, para. 4., “All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the Purposes of the United Nations”) and in any case subjected to strict control and, above all, to a form of collective and general management (preamble, sixth recital and Title VII of the Charter).

Shortly thereafter, human rights were also codified, thanks to the Universal Declaration of Human Rights (1948), which relocates the principles of the French revolution to the world order (art. 1, “All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and must act towards one another in a spirit of brotherhood”), but also the first principles of the European legal tradition (the English Bill of Rights) and those of the American tradition (in particular, the Declaration of Independence of the United States of America), including the right to democracy and self-government (Article 21)⁴².

⁴¹ H. Kissinger, *Ordine mondiale*, cit., 87 ff.

⁴² See also the UN Convention - International Covenant on Civil and Political Rights, art. 25 «Every citizen has the right, and must have the possibility, without any of the discriminations mentioned in article 2 and without unreasonable restrictions: a) to

All this has not prevented humanity from avoiding the tragedies of war so far, but it has allowed considerations and evaluations of the behavior of states and their governments, in juridical terms, starting from the way in which they have treated human beings.

With the end of the Second World War, in fact, the state-centric conception of international law and the dogmatic and absolute vision of the sovereignty of states, linked to mere effectiveness, appears insufficient to legitimize the exercise of internal power from the point of view of the international Community; and this was the vehicle for introducing forms of constitutionalization into international processes, for which “the individual, and not the State, must be - from now on - the subject and the central moral unit of international law”⁴³.

participate in the direction of public affairs, personally or through freely chosen representatives; b) to vote and to be elected, in the course of truthful, periodic elections, carried out by universal and equal suffrage, and by secret ballot, which guarantees the free expression of the electors’ will; c) to have access, under general conditions of equality, to the public employment of their own country» (Covenant adopted by the General Assembly on 16 December 1966; entered into force on 23 March 1976; States party as at 2000: 147).

⁴³ See J. Klabners – A. Peters – G. Ulfstein, *The Constitutionalization of International Law*, Oxford, Oxford UP, 2009; U. Haltern, *Internationales Verfassungsrecht? Anmerkungen zu einer kopernikanischen Wende*, in *AöR*, 2003, 541. On the constitutionalism of the international law, see V. M. Kumm, *The Legitimacy of International Law: A Constitutionalist Framework of Analysis*, in *The European Journal of International Law*, 2004 Vol. 15, no.5, 907-931; A. von Bogdandy, *Constitutionalism in International Law: Comment on a Proposal from Germany*, in *Harvard International Law Journal*, 2006, Vol. 47 No. 1, 223-242; M. Knauff, *Konstitutionalisierung im inner- und überstaatlichen Recht – Konvergenz oder Divergenz?*, in *ZaöRV*, 2008, 68, 453-490; A. Stone Sweet, *Constitutionalism, Legal Pluralism, and International Regimes*, in *Indiana Journal of Global Legal Studies*, 2009, Vol. 16 #2, 621-645; J. Haberman, *Die Krise der Europäischen Union im Lichte einer Konstitutionalisierung des Völkerrechts – Ein Essay zur Verfassung Europas*, in *ZaöRV* 72 (2012), 1-44; G. Ziccardi Capaldo, *From International Constitutionalism to Global Constitutionalism: Vision and Modernity of the Thought of Rolando*

Thus, an attempt is made to identify norms (rules and principles) of potential constitutional quality, created both by States and also by other actors, which should be placed in a position of superiority with respect to ordinary international norms. However, it is not clear whether these legal norms obtain specific recognition within the legal system, or whether they give rise to a set of material principles, and whether their “constitutional” character is due to their enforcement by jurisdiction⁴⁴.

On the one hand, these forms of constitutionalisation, in the context of international law, are responsible for the connection between the recognition of rights for individuals and the production of legislation, which is beginning to be governed by a principle of the prevalence of rights (guaranteed by international charters) on the system of internal sources. In this context, moreover, what are defined as “international forms of constitutional aid”⁴⁵ are gaining ground, thanks to which the international community, through multilateral pressures, gradually manages to ensure, in crisis situations, democratic development and the recognition of fundamental rights within states⁴⁶.

Quadri, in G. Ziccardi Capaldo (ed.), *The Global Community. Yearbook for International Law and Jurisprudence*, 2014-II, 230-255.

⁴⁴ See A. Peters, K. Armingeon, *Introduction-Global Constitutionalism from an Interdisciplinary Perspective*, in *Indiana Journal of Global Legal Studies*, 2009, Vol. 16 #2, 385-395; A. Peters, *The Merits of Global Constitutionalism*, in *Indiana Journal of Global Legal Studies*, 2009, Vol. 16 #2, 397-411; Id., *Foreign Relations Law and Global Constitutionalism*, in *American Journal of International Law*, 2017, 331-335.

⁴⁵ See J.A. Frowein, *Konstitutionalisierung des Völkerrechts*, in K. Dicke, W. Hummer, D. Girsberger, K. Boele-Woelki, C. Engel, Jochen A. Frowein (Hrsg.), *Völkerrecht und internationales Privatrecht in einem sich globalisierenden internationalen System: Auswirkungen der Entstaatlichung transnationaler Rechtsbeziehungen*, Heidelberg 2000, 427-447.

⁴⁶ The particular (European) form of constitutional aid represented by the Lomé Convention must also be included in this context, according to which the countries of Africa, the Caribbean, and the Pacific (a total of 78 states) maintain stable relations with

On the other hand, constitutionalism has valued the role of the International Court of Justice (1945), which, from this point of view and with all the imperfections typical of international judges, has represented almost a necessary consequence of this new way of looking at international relations international, which was further strengthened with the establishment of the International Criminal Court, the statute of which was formulated in 1998 in the form of an open universal treaty and which entered into force in 2002⁴⁷.

5. THE CONDITION OF THE INTERNATIONAL COMMUNITY AND THE SPATIAL AND TEMPORAL LIMITS OF THE CONCEPT OF STATE: THE NEW CHALLENGES.

At this point, the characteristics of the international community and of the State must be considered in a defined spatial and temporal context, so that the two concepts have meaning and significance. The modern State of

the European Union and have established a close, deep and complex partnership. Cooperation, in particular, is structured around two main poles: economic and trade cooperation and development cooperation. But what is most important is that in its most recent form, the latest Lomé convention, that of Lomé IV, signed in 1989 for a duration of 10 years, introduced, among the many innovations, the promotion of human rights and respect for democracy, as key elements of the partnership, while new objectives have been included in the cooperation, such as the enhancement of the role of women and environmental protection. Another important innovation was the c.d. decentralized cooperation, expressed by the participants in the development process of other actors, such as civil society for example.

⁴⁷ A. von Bogdandy, I. Venzke, *Zur Herrschaft internationaler Gerichte: Eine Untersuchung internationaler öffentlicher Gewalt und ihrer demokratischen Rechtfertigung*, in *ZaöRV*, 2010, 1-49.

European origin is the formation to which we must refer; it begins to exist effectively through the construction of defined “borders”, which are traced with aggregations of smaller and legitimized political units with the mutual recognition of the States in the international community.

In the contemporary world, we witness the preservation of the original characteristics, but we also measure its spatial and temporal insufficiency, the sovereign domain has opened up to the tensions of international trade and seems to give ground in favor of economic and financial powers. Even the international community appears to be in crisis and de facto disarmed since international law seems to be overridden by trust regulations.

Furthermore, the state-building and nation-building processes show that there are different degrees of statehood, that there are strong states and weak states, and history also shows attempts by states that have failed.

At present, the very future of the national State appears problematic compared to the new questions concerning size, space, and territoriality⁴⁸. Both supra-state and infra-state institutional and organizational structures appear increasingly relevant to explain collective processes and outcomes in today’s world. In fact, the former tends to govern the interdependencies and complexities between states created by the processes of internationalization of the economy, while the latter, in a context in which state protectionism has disappeared in the economy and the power of redistribution of the States appears to be severely limited, constitutes the closest political authority to which to address the demand for public goods and services⁴⁹.

⁴⁸ See in this regard the excellent contribution of M. Michetti, *Organizzazione del potere e territorio. Legittimità dello Stato e livelli di governo*, Turin, Giappichelli, 2021.

⁴⁹ S. Mangiameli, *Stato, integrazione europea e globalizzazione. Le nuove sfide del costituzionalismo*, cit., 4 ff. e 8 ff.

It should be added that technological development, on the one hand, has accelerated the growth of factors of interdependence and, on the other, has given rise to unprecedented forms of confrontation between states.

These processes have for some time now and visibly characterized the affairs of states and, by determining aggregative tendencies in the world scenario, they contribute to reaching the size of an Empire. There are quite a few plans to order the *Grossraum*, not only through direct annexation, but also with other forms of control over existing political units, giving rise to the phenomenon of world powers in the twenty-first century⁵⁰.

With respect to the hypothesis of the centrality of the State, which relates to and in an international community founded on international custom and on the principles of equal sovereignty, territorial integrity, non-intervention, and full domestic jurisdiction, more and more attention has, for some time, been given to the political alternative forms that have a direct impact on the State and the International Community.

On the one hand, the approaches centered on society are located within the state system, which attempts to reduce the public role with respect to private power for public policies and which place public intervention in an equal position, if not of subordination position, with the private one, for which there would be a relationship between them based on interdependence, negotiation, and trust⁵¹.

⁵⁰ Contribution to the problem indicated remains essential of C. Schmitt, *Völkerrechtliche Großraumordnung mit Interventions verbot für raumfremde Mächte. Ein Beitrag zum Reichsbegriff im Völkerrecht (Text der 4. Aufl., 1941)*, in *Staat, Großraum, Nomos. Arbeiten aus den Jahren 1916 – 1969*, cit., 269-371.

⁵¹ See J. Sabin, *Society-Centered Approaches to Political Science Research in the Northwest Territories*, paper, May 2011 (<https://www.semanticscholar.org/paper/Society-Centered-Approaches-to-Political-Science-in->

On the other hand, in the supranational sphere, the ideas of the prevalence of forces (transnational non-governmental organizations, trusts of various kinds, sovereign wealth funds, etc.) are gaining ground, capable of acquiring their own order, which would bypass the law of States and the international order, produced by themselves and capable of demanding obedience in the same way as state provisions. In this regard, “*Global law without a State*”⁵² has been mentioned.

The tensions generated by the processes of the internationalization of the economy (globalization) are thus connected to the theme of “sovereignty”, and these tensions would disregard the reciprocal relations between State and international law, depending on the complex relationship between the different “worlds” that have constituted in societies and to which an institutional, but not a political, character is attributed⁵³.

In this way, the value of the institutions of international politics and those of state politics would now be problematic, not only because the trusts that determine the economic and financial drives can be more powerful than many state governments and pervasive from a territorial and cultural point of view, capable of influencing public opinion and exercising a power of surveillance over individuals, for which the issue of constitutional and human rights tends to become politically silent, above

Sabin/4702605333e45e1b5a8dbdd7e6c12df12dbac899); H. Lacher, *Putting the state in its place: the critique of state-centrism and its limits*, in *Review of International Studies*, 2003, 521–541; S. D. Stryker, *The Rationalization of the Political Field: Beyond the State- and Society-Centered Theories of Policy Change*, in Center for Culture, Organizations and Politics (CCOP), UC Berkeley, 1999; J. Gilbert and C. Howe, *Beyond “State vs. Society”: Theories of the State and New Deal Agricultural Policies*, in *American Sociological Review*, 1991, 204-220.

⁵² See G. Teubner, *Constitutional Fragments. Societal Constitutionalism and Globalization*, Oxford 2012.

⁵³ See G. Teubner, *Das Projekt der Verfassungssoziologie: Irritationen des nationalstaatlichen Konstitutionalismus*, in *Zeitschrift für Rechtssoziologie*, 2012.

all because it is not at all true that we would limit ourselves to the social and institutional profile, without political implications. In fact, *trusts*, when they are not the direct emanation of political power, as in the case of “sovereign wealth funds”, always owe their global strength to a strong political support that can only derive from States of imperial size⁵⁴.

The State had become a powerful and autonomous actor because the scale of politics required a unitary institutional and organizational structure for the different strategies and decisions, especially in the field of international or transnational relations, where the State became the only actor with the power to declare war and to make peace.

That same scale of politics has undergone great changes in the most recent period, essentially due to the internationalization of the economy and new technologies (above all in transport, telecommunications, and the energy field), and thus we are witnessing a return to the role of larger political unities⁵⁵ and the state form, as has been observed for some time, has become just one of the possible institutional formulas in the complex societies of the contemporary world, even one of the least attractive in certain cases, both due to financial fragility, which makes rights uncertain, and for the political limits of the State, which does not appear able to support the weight of democracy and tends to its substantial reduction⁵⁶.

⁵⁴ See, despite following Teubner’s approach, M. Hardt - T. Negri, *Impero*, cit., 79 ff., which offer a critical overview of international economic power; a reading anchored to the economic dimension also in R. W. Cox, *Production, Power and World Order: Social Forces in the Making of History*, New York, Columbia University Press, 1987; S. Strange, *International Economics and International Relations: A Case of Mutual Neglect*, in *International Affairs*, 1970, 304-315.

⁵⁵ See, in this regard, S. Sassen, *Territory, Authority, Rights. From Medieval to Global Assemblages*, Princeton and Oxford, Princeton U P, 2008.

⁵⁶ See C. Crouch, *Postdemocrazia*, trad. it., Roma-Bari, Laterza, 2005; nonché Id., *Combattere la postdemocrazia*, Bari, Laterza, 2020, where he reiterates that neoliberals want

Even the *ius belli*, the ownership of which would characterize all States, has structurally changed its physiognomy. In fact, only a few States are actually capable of waging war, using advanced war technologies, and of exercising military deterrence; and exactly only those that have a very high industrial and technological capacity and are the States that set themselves up as world powers. The other States, on the other hand, have to make up for it through a policy of alliances in order to preserve their independence, but in fact, they have renounced the *ius belli* and have fallen within the “protection and obedience” relationship⁵⁷.

It is true that in the contemporary era, due to the various modifications of the international community, war is not easy to wage, as there is a possibility of judging the use of force, and this has brought back the notion of “just war”, but the meaning of the expression would no longer be comparable with the original one. In fact, the idea of the “just war”⁵⁸ is reconsidered as a framework of legitimacy on the use of force in international disputes, as well as the distinction between a war of aggression and defense and also of preventive war, although these last two adjectives have profoundly different implications, they have a political function and reveal a real transfer of the *ius belli* only to certain States which also have the power to impose a state of war on their allies. Several

“institutions formally adequate to perform their basic function, but emptied of democratic energy” (154).

⁵⁷ M. Foucault, *Sicurezza, territorio, popolazione. Corso al Collège de France* (1977-1978), it. transl., Milan, Feltrinelli, 2005, 131 ff.; obviously, the theme of protection-obedience is the cornerstone of the thought of T. Hobbes, *Leviatano* (1651), cit.; as well as Id., *De Cive* (1642), XIII, VI, it. transl., Turin, Utet, 1948, 273; important considerations also in C. Schmitt, *Scritti su Thomas Hobbes*, it. transl., Milan, Giuffrè, 1986.

⁵⁸ See H. Kelsen, *Diritto e pace nelle relazioni internazionali* (1941), it. transl., Milan, Giuffrè, 2009, 37-55. In American doctrine, the classic of M. Walzer, *Guerre giuste e ingiuste. Un discorso morale con esemplificazioni storiche* (1977), it. transl., Naples, Liguori, 1990; as well as J. Rawls, *Il diritto dei popoli* (1999), it. transl., Turin, Einaudi, 2001.

recent military missions, such as the Gulf wars to destroy weapons of mass destruction, *enduring freedom* in Afghanistan to fight terrorism, and the Russo-Ukrainian war itself, to the denazification of Ukraine with a “special military operation”, are examples, both of the application of a cause of the justification to the war, and of the real ownership of the *ius belli* only in the hands of some States which can physically undertake a war even if the outcomes may be uncertain, and there is only some possibility of victory.

From the point of view of the principle of Grotius’ *Jus belli ac pacis*, therefore, today very little remains in the international community and this reveals, instead, a fragility of many States, in the face of a few large States that also act for them. This shows that “new forms and new dimensions of political grouping are emerging in the international community, destroying previous political structures”⁵⁹.

But that’s not all. In fact, the rules of international trade, with the *lex mercatoria*, would have led to an expropriation of the legislative power of the States, limited public policies, and rendered the State helpless with respect to its own market. These rules have been functional in allowing deep penetration into the territorial communities by the internationalized political and economic forces and in fueling imperial aims, determining in the international community, at the same time, a loss of meaning of borders as a demarcation of sovereign power and regionalization of international relations⁶⁰; and, however contradictory this process may

⁵⁹ C. Schmitt, *Il concetto di politico* (1927), in *Stato, grande spazio, Nomos*, cit., 52 ff.

⁶⁰ See Z. Bauman, *Dentro la globalizzazione: Le conseguenze sulle persone* (1998), it. transl., Bari-Rome, Laterza, 2001; U. Beck, *Che cos’è la globalizzazione*, it. transl., Rome, Carocci, 1999; K. Jowitt, *The New World Disorder: The Leninist Extinction*, Berkeley, University of California Press, 1992.

appear, it is instead in perfect harmony with the political form of the Empire⁶¹.

It should be added here that, after the end of the Cold War, not only has there not been an end to international confrontation, but rather we have witnessed the formation of new global frontiers over time, as is made clear by the events of 11 September 2001 which raised the level of global confrontation, questioning the global primacy of the United States⁶². In fact, terrorism showed the possibility of territorial political constructions through the force capable of countering the West and, at the same time, it determined the conviction in the West to further push the capabilities of its empire, internally and externally, in the name of security. The new world order after 9/11 would be characterized by the need for global domination by the great world powers⁶³.

Subsequently, when the economic-financial crisis that exploded in the United States in September 2008 highlighted how devastating the condition of interdependence between States created by globalization could be, allowing economic phenomena of political importance to spread, without encountering obstacles, beyond the borders of the States themselves, world competition between the great world powers became

⁶¹ See L. Panitch - S. Gindin, *Global Capitalism and American Empire*, in *The New Imperial Challenge*, vol. 40, Socialist Register, London, Merlin Press, 2004, 1-42.

⁶² See M. A. Okur, *Rethinking Empire After 9/11: Towards A New Ontological Image of World Order*, in *Perceptions*, Winter 2007, 61 ss.

⁶³ Pregnant in this sense is the article by M. Ignatieff, *The American Empire; The Burden*, in *The New York Times Magazine*, Jan. 5, 2003; on this v. R. Rao, *The Empire Writes Back (to Michael Ignatieff)*, in *Millennium: Journal of International Studies*, 2004, 145-166; V. R. W. Cox, "Beyond Empire and Terror: Critical Reflections on the Political Economy of World Order", in *New Political Economy*, 2004, p.307 ss.; sul punto anche L. Caracciolo, *Ripensare il mondo. Le provvisorie lezioni dell'11 settembre*, in *Encicl. Treccani*, Libro dell'anno 2001.

even more bitter⁶⁴. Equally clear was the Covid-19 pandemic. In fact, as already experienced previously with terrorism, also the case of the pandemic and of global problems - such as climate change, the depletion of natural resources, the lack of food, and the degradation of the human condition for large parts of the humanity – they transcend borders and invest States asymmetrically, increasing global gaps⁶⁵.

All this has shown that the limits of international politics, carried out by States under the aegis of international law, have led to fractures in global political and economic processes and have been progressively and increasingly unable to contain the use of force in international controversies – as recent military events have also shown – questioning the meaning of peace and the very notion of international security⁶⁶.

These are the factors of the new global fractures within which the unprecedented contemporary empires move, which seem to obscure the international community and make state sovereignty and international law insignificant. Here lies the crux of the new world order that can ensure

⁶⁴ On this topic see S. Mangiameli, *Crisi economica e distribuzione territoriale del potere politico*, in *AIC Rivista on-line* N° 4/2013 (18.10.2013).

⁶⁵ See K. Schwab – T. Malleret, *Covid-19: The Great Reset*, Geneva, World Economic Forum, 2020.

⁶⁶ See B. Buzan, L. Hansen, *The Evolution of International Security Studies*. Cambridge, Cambridge University Press, 2009; Nayef R.F. Al-Rodhan, *The Five Dimensions of Global Security. Proposal for a Multi-sum Security Principle*, Berlin, LIT Verlag, 2007; G. Arcudi, *La sécurité entre permanence et changement*, in *Relations internationales*, 2006, 97-109; M. Sheehan, *International Security: An Analytical Survey*. London, Lynne Rienner Publishers, 2005; E. Kolodziej, *Security and International Relations*. Cambridge, Cambridge University Press, 2005.

peaceful coexistence between peoples and real collaboration between States⁶⁷.

6. THE CHARACTERISTICS OF THE EMPIRE AS A POLITICAL SYSTEM OF GOVERNMENT: THE PRINCIPLE OF NON-INTERFERENCE AND THE *MONROE DOCTRINE*.

From the point of view of juridical reality, the topics dealt with would allow us to affirm that it would be the condition of the present world, which would push for an international organizational structure based on a certain number of large-scale political units, which would make the State - in its average measure - problematic and to lead us to consider that particular political form which is the Empire and that we are quite far from the idea of an international order of sovereign States placed in a position of juridical equality within an international community, governed by its own law, formed by customs and treaties (according to the principles handed down by the Westphalian model), as well as by that of universal federalism, governed by cosmopolitan law, indicated by Immanuel Kant as the system capable of ensuring perpetual peace⁶⁸.

⁶⁷ Although the future path of the international community is uncertain, both due to the great problems that hang over states and empires, such as climate change, energy, food and the preservation of humanity itself, and both due to the challenges that the world community of scientists continually refers to those who govern Empires and States, such as the conquest of space, advanced medicine, product innovation, artificial intelligence, etc., it still appears desirable that the current contradictory multipolarity (of which H. Kissinger speaks, *Ordine mondiale*, cit., 363 ff.) find a peaceful and collaborative solution on the basis of a new basis of legitimacy, knowing that international balance is not the natural result of current trends, but that reconciliation is the goal to strive for in the management of international relations.

⁶⁸ I. Kant, *Zum ewigen Frieden. Ein philosophischer Entwurf* (1795/6), Kommentar von Oliver Eberl und Peter Niesen, Berlin 2011; per i quali v. anche M. Koskenniemi,

The current scene, which we can define at least in part as post-global, is not at all characterized by the unity of the world hoped for after the fall of the Berlin Wall and the end of the Soviet world, yet would rather be based on a plurality of political units, but of large dimensions, a measure to which few States are able to respond to, and, in that case, they are States that in fact have an imperial dimension⁶⁹.

The problem is not only dimensional, or of the population that a vast territory encloses, but of the “representation of the terrestrial space which dominates the current development of world politics”⁷⁰ which determines the organization of the world and which is also influenced by further factors which tend to an institutional arrangement different from the state one, such as the determination of political influences that connect these imposing States with other more or less large States. It was precisely the political influence exercised, by means of technology, the economy, and more properly the civil and military organizational structure, that opened up the large State to the prospect of an imperial ascent. The first element of the imperial presence, therefore, becomes the ability to prevent the presence of any other political power that can exercise the same influence

Constitutionalism as Mindset: Reflections on Kantian Themes About International Law and Globalization, in *Theoretical Inquiries in Law*, 2007, 8.1, 9-36. Per un approccio cosmopolita v.D. Held, *Democrazia e ordine globale* (1995), trad. it., Trieste, Asterios Editore, 1999; nonché D. Archibugi, *The global Commonwealth of Citizens: Toward Cosmopolitan Democracy*, Princeton, Princeton U P, 2008; A. S. Sieff, *Between Global Citizenship and Empire: Toward A Political Conception of International Order*, in *Journal of Politics & Society*, 2014, 58-103.

⁶⁹ At this point we return to the picture drawn by C. Schmitt in his writings, collected in the volume *Staat, Großraum, Nomos*, cit.

⁷⁰ C. Schmitt, *Völkerrechtliche Großraumordnung mit Interventions verbot für raumfremde Mächte*, cit., 274.

for a space that, although not belonging to the large State, but to other States, is under its hegemony⁷¹.

⁷¹ The theme of hegemony in international law can be considered one of the most important and traditional. The Peace of Westphalia presupposed a community of equals and without any hegemony by one state over the others. In reality, hegemony is a constant in international relations that has conditioned the very life of the international community, and draws its cue from the substantial inequality of states and from borders, the different worlds, which unite and distinguish states. The first significant contribution belongs to H. Triepel, *Hegemonie. Ein Buch von führenden Staaten*, Stuttgart, Kohlhammer, 1938, there is also an Italian translation of the volume (H. Triepel, *L'egemonia*, Florence, Sansoni, 1949). Triepel's volume has a theoretical and historical perspective from the point of view of the State in the different eras, only in the last part, with reference to the federal hegemonies of the modern era, does it provide useful indications on the relations between States. For the most recent treatments on the subject of hegemony in international law see R. Knox, *Hegemony*, in D'Aspremont, J., Sing, S., G.C. McBain (Eds.), *Concepts for International Law: Contributions to Disciplinary Thought*, Cheltenham-Northampton (MA), Edward Elgar Publishing, 2019; A. Zidar, *The World Community between Hegemony and Constitutionalism*, Chicago, Eleven International Publishing, 2019; P. Anderson, P., *The H-Word: The Peripeteia of Hegemony*, London-New York, Verso, 2017; D. Thürer, *Hegemony*, in R. Wolfrum (Ed.), *Max Planck Encyclopedia of Public International Law*, vol. IV, Oxford, Oxford U P, 2012; I. Clark, *Hegemony in International Society*, Oxford, Oxford U P, 2011; N. Krisch, *International Law in Times of Hegemony: Unequal Power and the Shaping of the International Legal Order*, in *EJIL*, 16, 2005, 369-408; A. Paulus, *Jus cogens in a Time of Hegemony and Fragmentation – An Attempt at a Reappraisal*, in *Nordic Journal of International Law*, 74, 2005, 297–334; M. Koskeniemi, *International Law and Hegemony: A Reconfiguration*, in *Cambridge Review of International Affairs*, 17, 2004 197-218; A. Paulus, *The War against Iraq and the Future of International Law: Hegemony or Pluralism?*, in *Michigan Journal of International Law*, 25, 2004, 691-733; M. Byers – G. Nolte (Eds.), *United States Hegemony and the Foundations of International Law*, Cambridge, Cambridge U P, 2003; R. Foot, N. S. MacFarlane, M. Mastanduno (Eds.), *US Hegemony and International Organizations*, Oxford, Oxford U P, 2003; J. Butler, E. Laclau, S. Žižek, *Contingency, Hegemony, Universality: Contemporary Dialogues on the Left*, London-New York (NY), Verso, 2000; R. Hirschl, *The Struggle for Hegemony: Understanding Judicial Empowerment through Constitutionalisation in Culturally Divided Polities*, in *Stanford Journal of International Law*, 36, 2000, 73-118; K. Ginther, 'Hegemony', in Bernhardt, R. (Ed.), *Encyclopedia of Public International Law*, 1995,

This helps us understand that the imperial space goes beyond the territory of the State and is even larger than the territory of the large State. This is what Carl Schmitt defines as *Großraum* (large space)⁷² in which it is the *de facto* prevalence of a State that determines the condition of influence, even if there may also be regional and neighborhood agreements between States which, to some extent, institutionalize this dominant influence.

When the English, renouncing their possessions on the continent, followed what can be called their natural vocation, i.e., to be a marine power, they built an empire not based on territorial contiguity, and founded on the principle of freedom of the seas (and freedom of trade). The “naval lines” therefore became a prerogative to which the British would continually appeal and which they maintained at least until the First World War. Suffice it to say that at the table of the Holy Alliance this was Castlereagh’s priority, along with the integrity of Sicily and Holland⁷³. This principle with which the British wanted to show their superiority over the seas would have led to a harsh confrontation, even through racing and piracy, with the other European powers, Spain and France in particular. However, the occupation and taking possession of new lands were also granted to all the powers that wanted to sail the open sea. Consequently, the principle of naval lines, dear to the English, cannot be considered as a juridical principle of governance of large spaces and did not alter European public law, but on the contrary to some extent became part of

vol. II; Keohane, R.O., *After Hegemony: Cooperation and Discord in the World Political Economy*, Princeton (NJ) Princeton University Press, 1984.

⁷² C. Schmitt, *Völkerrechtliche Großraumordnung mit Interventions verbot für raumfremde Mächte*, cit., 274 ff.

⁷³ See the late rebuilding of Castlereagh’s positions in H. Kissinger, *La diplomazia della Restaurazione* (1959), it. transl., Milan, Garzanti, 1973.

it, and the limited technology of the time also contributed to this in the naval field⁷⁴.

The first important example of the creation of juridical principles of governance of a large space, in the modern era, however, was the “Monroe Doctrine”, at least in its original formulation, based on the declarations made by this US president in 1823 in his speech to Congress⁷⁵, when the principle was affirmed, according to which the rights and interests of the United States would have been involved, if the “American continents” had been the object of future colonization by the European powers, in an attempt to modify “the free and independent condition they have assumed”⁷⁶.

Furthermore, a sort of neutrality was declared regarding European war events and attempts to reorganize Europe after the Napoleonic wind (“In the wars of the European powers in matters relating to themselves we have never taken part, nor is it in accordance with our policy to do so”⁷⁷).

But, in declaring this, proclaiming a form of American isolationism, with respect to European wars, in the name of safeguarding his own security, Monroe added that “with the movements in this hemisphere we are necessarily more immediately connected and for reasons which must be obvious to all the enlightened and impartial observers”, thus defining a politically different space from old Europe (which was the so-called

⁷⁴ In this sense C. Schmitt, *Völkerrechtliche Großraumordnung mit Interventions verbot für raumfremde Mächte*, cit., 299 ss.; Id., *Mutamenti di struttura del diritto internazionale*, cit., 217 ff.

⁷⁵ See *President James Monroe's seventh annual message to Congress on December 2, 1823*. To read the message, simply access the US National Archives website

<https://www.archives.gov/milestone-documents/monroe-doctrine>

⁷⁶ Among the first to consider the importance of the “Monroe doctrine”, see Santi Romano, *Corso di diritto internazionale*, 4th ed., Cedam, Padua, 1939, 79 s., who explains its origin and considers it a form of “non-judicial union”.

⁷⁷ *President James Monroe's seventh annual message to Congress on December 2, 1823*.

unstable “quarter of the globe”); and if European international law was still valid in this, the one that - among other things - had allowed the colonization, a different international law had to be valid in the “western hemisphere”, in which, under the care of the United States, other principles of government should have prevailed rather than those of the European powers. In fact, starting from the observation that “the political system of the allied powers is substantially different ... from the American one”, the defense of its own form of government was announced, “obtained with the loss of so much blood and treasure, and gained from the wisdom of their most enlightened citizens, and under whom we have enjoyed unprecedented happiness, this whole nation is devoted.” Finally, it was added that any attempt by the European powers to extend their political system (the monarchy) “to any part of this hemisphere” would be considered dangerous for the peace and security of the United States. In fact, a warning was issued to the “allied powers”, which would not have been possible to extend “their political system to any part of both continents without endangering the peace and happiness (of the United States)” and added, with reference to “our southern brothers”, that these “if left to themselves”, would not have adopted the European political system on their own initiative. Consequently, any attempt at interposition in any form on the European side would have been impossible to observe with indifference⁷⁸.

Lastly, Monroe observed: “with the Governments who have declared their independence and maintained it, and whose independence we have, on great consideration and on just principles, acknowledged, we could not view any interposition for the purpose of oppressing them, or controlling in any other manner their destiny, by any European power in any other

⁷⁸ *President James Monroe's seventh annual message to Congress on December 2, 1823.*

light than as the manifestation of an unfriendly disposition toward the United States”⁷⁹.

Monroe’s doctrine has had many interpretations and over time has taken on other meanings different from the original ones, although its expression in an imperial and imperialist sense has always been present from the beginning⁸⁰. In any case, it is thanks to this that European public law is definitively overcome, to leave room for a real general international law, with the entry of the great eastern spaces for Europeans and western spaces for Americans, i.e., Asia. This was also thanks to the principle expressed in the text of President Monroe’s speech that the “de facto government” would be considered “like the legitimate government”, thus definitively departing from the criterion of legitimation established in European public law⁸¹.

⁷⁹ *President James Monroe’s seventh annual message to Congress on December 2, 1823* (“[But] with Governments having declared their independence and maintaining it, and whose independence we have, with great consideration and on just principles, recognized, we could see no interposition for the purpose of oppressing them, or otherwise checking their fate, by any European power in a light other than the manifestation of a hostile disposition towards the United States”), which he added immediately after: “In the war between those new Governments and Spain we declared our neutrality at the time of their recognition, and to this we have adhered, and shall continue to adhere, provided no change shall occur which, in the judgment of the competent authorities of this Government, shall make a corresponding change on the part of the United States indispensable to their security.” (“In the war between these new governments and Spain we declared our neutrality at the time of their recognition, and to this we have adhered and will continue to adhere, provided that no change occurs which, in the opinion of the competent authorities of this government, will make a corresponding change by the United States indispensable to their security”).

⁸⁰ See M. T. Gilderhus, *The Monroe Doctrine: Meanings and Implications*, in *Presidential Studies Quarterly*, 2006, Vol. 36, No. 1, 5-16.

⁸¹ Indeed, even in European public law the criterion of legitimation, which arose with the Peace of Westphalia and was still kept alive by the Congress of Vienna (1814), despite the

However, it is necessary to proceed carefully to reveal the meanings inherent in the doctrine from the point of view of international law and the construction of the notion of empire.

In the first place, the imperial character of the doctrine derives from the “principle of non-intervention” by foreign powers in a space that is defined as the “Western Hemisphere” and which is acquired under the control of US power; and, if we take into account that in 1823 the United States still had a rather small territorial dimension with a strong presence in the northern continent of Spain and France, as well as of England in the north, we understand how the affirmation of the principle in question could represent, not only the upheaval of the colonial policy of the European powers, but above all a rewriting of the rules of the international order, around a new notion of “spatial domain” completely different from the territorial domain of the State, on which the old European public law was based; so much so that the same statute of the League of Nations in art. 21 reserved the “Monroe Doctrine precedence over its own norms”⁸². In this sense, this new vision of “spatial domination” became (and would become more and more over time) the idea that the United States would take on in relation to the rest of the world, thus attributing itself to a global political task⁸³.

Napoleonic shock that had brought out the principle of nationality, was definitively overturned with the proclamation of the Germanic Empire (*Reich*), at the end of the Franco-Prussian war (1870-71), thanks to which, instead of (dynastic) legitimacy, the “calculation of power” is placed as the de facto foundation of international relations (see . on the point H. Kissinger, *Ordine mondiale*, cit., 77 ss.).

⁸² On Monroe’s doctrine and the significance, it has for overcoming the *Jus publicum europaeum*, as well as for having opened up the theme of “large spaces”, see C. Schmitt, *Völkerrechtliche Großraumordnung mit Interventions verbot für raumfremde Mächte*, cit., 215 ff.

⁸³ It is a task that led the United States to marry imperialism with the Monroe Doctrine, the first acts of which were the support of Benito Juarez against Emperor Maximilian of Austria in 1865 and the occupation of Cuba in 1890; from that moment, we witness the

Secondly, by contesting the European form of government and introducing a criterion of legitimacy different from the monarchical-dynastic principle, and exactly the republican-democratic one, the doctrine reinforced the prohibition of interposition or interference by the European powers and constituted a “preclusion” new for these.

It does not escape that in this way the United States assumed the dominant position with a revolutionary character, that is, they questioned the *status quo* on which the old European order was based, but at the same time also the internal order of the European States, still on the ridge of the monarchy, while the legitimizing power that had to be recognized to the people clearly emerged, understood concretely and not as an abstract entity⁸⁴.

7. *FOLLOWS*: THE IMPERIAL POLITICAL IDEA; THE RIGHT TO INTERVENE.

extension of the Monroe doctrine for the control of the Latin American states and, after the world conflicts, for the control of the whole world, to the point of representing a constant in foreign policy. V. H. Kissinger, *Ordine mondiale*, cit., 234 ff., which titles the entire chapter VII “Acting for all humanity: the United States and their concept of order”. But also M. Hardt – T. Negri, *Impero*, cit., the chapter on “The network of powers: American sovereignty and the new empire”, 155 ff.

⁸⁴ It will be the famous words of President Abraham Lincoln, pronounced in the Gettysburg speech of December 19, 1863, on the sidelines of a bloody battle between the Union and Confederate armies, to represent the great novelty created in the world by the presence of the United States of America with references to the principles of the declaration of independence of 1776: freedom and a democratic government, for which the Gettysburg Address was to serve to encourage the people to fight, so that “*this nation, under God, shall have a new birth of freedom—and that government of the people, by the people, for the people, shall not perish from the earth*”.

What characterizes empire is, in this sense, the ability of a power to bring a political idea to the international scene that radiates beyond its specific borders and for which it is able to spend its strength, giving it a character of legitimacy and by not allowing foreign powers to question it or to implement limiting interventions⁸⁵.

There is little point in quibbling about the nature of each and every political idea placed at the foundation of the imperial construction, as this can have different and differentiated content: from the principle of nationality⁸⁶ to the (export of) democracy⁸⁷, to free trade⁸⁸ and, in particular, the protection of human rights⁸⁹, etc.; we are in the presence of

⁸⁵ See C. Schmitt, *Völkerrechtliche Großraumordnung mit Interventions verbot für raumfremde Mächte*, cit., 275 ff. In the same sense, see M. Hardt – T. Negri, *Impero*, cit., 30 ff.

⁸⁶ Here also lies the issue of territorial integrity and the question of the protection of minorities, which affects the international subjectivity of the State (C. Schmitt, *Völkerrechtliche Großraumordnung mit Interventions verbot für raumfremde Mächte*, cit. 307 ff.). Also H. Kelsen, *Diritto e pace nelle relazioni internazionali*, cit., 150, addresses the issue and believes that the problem of nationality must be resolved in the light of “the right to self-determination of peoples in the most extensive and honest way possible” and, “where minorities are unavoidable, they should be organized as entities endowed with constitutional rights”.

⁸⁷ See F. Fukuyama, *Esportare la democrazia. State-building e ordine mondiale nel XXI secolo* (2004), it. transl., Turin, Lindau, 2005.

⁸⁸ Theorized in the 14 points of President Woodrow Wilson in his speech to Congress on January 8, 1918 and taken up by President Franklin Delano Roosevelt in the Atlantic Charter, signed together with British Prime Minister Winston Churchill, August 14, 1941 (on the foreign policy of the two US presidents see H. Kissinger, *Ordine mondiale*, cit., 255 ff. and 267 ff.).

⁸⁹ On the subject of human rights, the literature is extremely vast (see however the recent volume by A.C. Amato Mangiameli, *I diritti umani tra teorie e prassi*, Turin, Giappichelli 2022). Here it is necessary to underline that liberal doctrine considers human rights as the “sword of the empire” (see (v. A. Bartholomew – J. Breakspear, *Human Rights as Swords of*

ideas that fulfill the same political function and that may be able to inspire action against the adversaries of the Empire, as well as ensure peace and solidarity among the “peoples” of the Empire. What makes all “imperial political ideas” assimilable would be the ability to capture a vision of the world and to express universal values that can be spiritually nourished by human groups living inside and outside the Empire, by comparing and/or with peaceful coexistence⁹⁰.

The implications of this approach are considerable, especially with reference to the use of force and the concept of war. In fact, the imperial political idea is by definition “just” and ethically relevant as is its defense internally and externally. Anyone who does not realize the ethical value of the political idea that conforms the Empire is either insane, or else a criminal to be entrusted to police action and, if the political idea of the empire is opposed by an opposing military power, the war for the defense of the political idea of the empire shall be defined as a “just war”⁹¹.

Empire, in *Socialist Register* 2004, 125-145), or as a result of neoliberal thought (see further indications in J. Pitts, *Political Theory of Empire and Imperialism*, in *Annual Review of Political Science*, 2010, 13, 211-235).

⁹⁰ Ideas, in this sense, also in M. Hardt – T. Negri, *Impero*, cit., 30 ff.

⁹¹ International police law and “just war” become the reference points of imperial action. The first was theorized by President Theodor Roosevelt in his annual speech to Congress for 1904 (December 6), in which he stated that, not only were the nations of the Western Hemisphere not open to colonization by European powers, but that the United States had a responsibility to preserve order and protect life and property in those countries. Hence the so-called “Roosevelt Corollary” (or extension) to the Monroe Doctrine, which upheld the right of the United States to exercise “international police power” to curb such “chronic wrongdoing” (<https://www.archives.gov/milestone-documents/roosevelt-corollary>). For the theme of “just war”, see the authors cited above in footnote 55, to which M. Hardt - T. Negri, *Impero*, cit., 29, who speak of the “reborn interest in comparisons with the concept of bellum Justum or ‘just war’ ... reappeared at the center of discussions policies, especially at the beginning of the Gulf War” and specify that “a just war is no longer, in any way, an act of defense or resistance”, but “has become a self-justifying act”.

The empire, therefore, for its legitimacy needs to resurrect the notion of “just war” that had been sidelined by the Peace of Westphalia and the end of the wars of religion. To do this, he must stigmatize, any form of danger to the territorial integrity or political independence of the Empire not so much on a legal level, as on a moral one, and be ready to fight not only within it, or on its borders, but also in every part of the world; and when this happens it means that the Empire has taken the path of new imperialism. Indeed, in a dynamic sense, the political idea of empire and the construction of this political form is not limited to the dimension of external non-interference (static aspect), but necessarily develops the need for a global confrontation, and the concept of “just war” is the means by which one moves from the static side of the empire to the dynamic one.

From this point of view, Monroe’s doctrine is the perfect example, which other contemporary empires are also conforming to, such as China with Taiwan and Russia with Ukraine⁹². In fact, having overcome the first configuration, as a reality characterized by self-isolation, neutrality, and the claim of non-interference, the Empire consciously moves on to the principle of realizing its own political idea, and starting from the principle of “self-defense”, theorizes a real and proper “right to intervene”,

⁹² Hence also the particular position expressed by H. Kissinger (*To settle the Ukraine crisis, start at the end*, in *Washington Post*, March 5, 2014) on relations between Europe, Ukraine and Russia, in the aftermath of the Russian annexation of Crimea, aimed at attributing a role to Ukraine as an intermediate state between the European Union and Russia, with the task of relating the two major entities and with the aim of attracting Russia into the European orbit. In his recent interview on the Russian-Ukrainian conflict (*Henry Kissinger Is Worried About ‘Disequilibrium’*, in *Wall Street Journal*, 08.16.2022), however, he considers the need to defend Ukraine as if it were already part of the EU and NATO. Nonetheless, in the vision of the great diplomat there is always the ambition to recover the relationship with Russia, see the judgments expressed on the occasion of the presentation in London of his book «Leadership», reported by *Corriere della Sera* (28 June 2022, 13), for which it would be necessary to “reintegrate Moscow into the European system”.

understood also as a task vis-à-vis the other subjects of the international community to bring to fruition the universal values of which the Empire is the bearer. This, however, transforms the Empire into a gendarme of those values and leads imperial military actions back into a general police system, also invalidating the very concept of war inherited from Westphalia. In fact, when the universal value of the Empire must be defended, not only is the “war just”, but above all the adversary is deprived of the dignity of the enemy combatant, to be considered as an outlaw State⁹³, a criminal, and war becomes, therefore itself, always a police operation⁹⁴.

8. THE PECULIARITY OF THE CONSTITUENT ELEMENTS OF THE EMPIRE: TERRITORIAL, PERSONAL AND GOVERNMENTAL RELATIONSHIPS.

If we take this profile into account, we can easily understand that the empire does indeed imply a territorial, personal and governmental relationship like the State, but this relationship with the elements considered appears to differ in several points from the one established with the theory of the State.

⁹³ Concept expressed by J. Rawls, *Il diritto dei popoli*, cit., 83, which differentiates them from “reasonable liberal peoples”, from “decent peoples” and from “societies disadvantaged by unfavorable conditions” and which theorizes, with reference to human rights, as “the political (moral) force of these rights extends to all societies ... including outlawed states. An outlawed state that violates these rights must be condemned and in the most serious cases may suffer vigorous sanctions, up to direct military intervention” (107).

⁹⁴ See the significant pages of C. Schmitt, *Il concetto discriminatorio di guerra* (1938), it. transl., Bari, Laterza, 2008.

a) First of all, while in the state sphere the territory is determined by certain boundaries in which power is exercised over the individuals who reside there, in the case of the empire the territory transcends geographical boundaries and extends in “space” along linear boundaries, as was the case of the 20th meridian west which determined the western hemisphere beyond which the European powers could no longer carry out their politics freely and that of the equator which defined the lines of friendship to indicate an unpacified space where they could carry out ruthless struggles for dominance, without affecting the European peace. To the linear borders, however, we must now also add the power of the empire for spatially distinct frontiers⁹⁵; moreover, the territory of the empire is not only relevant for the dominion over the men who reside there but is itself the object of dominion and control, deriving from the claim of non-interference⁹⁶.

The dominion and control over the territory, therefore, in the case of the empire have a mobile character and, if in principle this was formed on the basis of territorial continuity, according to the ancient logic that had led to the formation of the great monarchical continents, now the new technologies of transport, navigation, and aerospace overcome the drawbacks that even the old British Empire had encountered, considering

⁹⁵ Observes C. Schmitt, *Völkerrechtliche Großraumordnung mit Interventions verbot für raumfremde Mächte*, cit., 337, “the ‘empire’ is not simply an expanded state, just as the large space is not just a small expanded space. Nor is empire identified with the great space, thus rising above both the state spatially characterized by the exclusivity of its state territory, and the national soil of a single people.

⁹⁶ On the different theories of the territory in relation to the State see M. Michetti, *Organizzazione del potere e territorio*, cit., 1 ff.

that now also the naval, air and space lines can become the object of domination, control, and contention⁹⁷.

It is the idea of space that has established itself over time that leads us towards a more complex domain that does not know the constraints of general international law. In fact, in the name of its political idea, the empire feels entitled to any form of intervention necessary for its security in every part of the earth, in every sea and in the airspace and, to this end, advanced technologies and sophisticated armaments allow a control as extensive as a millimeter, with the constant danger of total war⁹⁸.

⁹⁷ C. Schmitt already speaks clearly about it, *Völkerrechtliche Großraumordnung mit Interventionsverbot für raumfremde Mächte*, cit., 328 ff.; but all the authors who deal with globalization, from U. Beck (*Che cos'è la globalizzazione*, it. transl., Rome, Carocci, 1999, 24) down, underline how with globalization national states are conditioned and connected transversally, by their chances of power, by their orientations, by identities and networks. Above all, the specificity of the globalization process would consist in the empirically detectable extension, density and stability of the networks of regional-global reciprocal relationships and their mass media definition, as well as of social spaces and their image flows at the cultural, political, financial, military and economic (see also Z. Bauman, *Dentro la globalizzazione*, cit., 73-74; J. Stiglitz, *Ridefinire il ruolo dello Stato. Cosa deve fare? Come deve agire? Come dovrebbero essere prese le decisioni?*, in *Global & Local Economic Review*, 2001, 11-49; as well as the small volume that collects various writings, Id., *Globalizzazione*, Roma, Donzelli, 2011; J. Butler - G. C. Spivak, *Who sings the Nation-State? Language, Politics, Belonging*, Calcutta, Seagull Books, 2007). In his volume, H. Kissinger, *Ordine mondiale*, cit., 327 ss., dedicates an entire chapter to the theme "Technology, balance and human awareness", where he also addresses the issue of a foreign policy in the digital age.

⁹⁸ Significant are the critical considerations of C. Schmitt, *Il concetto discriminatorio di guerra*, cit., 4 ff., on the theme of total war, connected with that of just war. Consequently, total-just war derives from a moral claim that those who govern the empire raise and which very often transfer to international institutions (cf. art. 42 of the UN Charter), under the aegis of collective security (see (v. M. Koskeniemi, *The Place of Law in Collective Security*, in *Michigan Journal of International Law*, 1996, 455-490; Charles A. Kupchan, and Clifford A. Kupchan, *The Promise of Collective Security*, in *International Security*, 1995, 20, 52-61; A. Hurrell, *Collective Security and International Order Revisited*, in *International Relations*, 1992, 37

b) The belonging of a people to a State implies the principle of international law, related to the concept of the people, of the “right of self-determination”. In the case of the empire, a people are needed who maintain their own identity, but at the same time support the imperial idea and the non-interference of foreign powers and who therefore exercise vigilance over a larger population, over other peoples⁹⁹. The empire is a political system that does not aim at the assimilation of the different populations and allows the different ethnic groups to maintain their respective popular traditions. It acts only as a protector of the single political realities thus conquering the central role in the context of the complex international system to which it gives life¹⁰⁰.

c) The sovereignty of every State consists of an absolute power of political command over a human group located within certain borders, and in international law sovereignty is embodied in the impenetrability of the state juridical order. Sovereignty ensures the participation of the State in the international community in which, under conditions of equality, it enjoys freedom supported by law¹⁰¹.

ss.; see also L. W. Mwangabi, *The Theory of Collective Security and its Limitation in Explaining International Organization: A Critical Analysis*, November 7, 2010. Available at SSRN: <https://ssrn.com/abstract=2948271>; A. Orakhelashvili, *Essence and Definition of Collective Security*, in *Collective Security*, Oxford, Oxford U P, 2011, 4-24; J. C. Ebegbulem, *The Failure of Collective Security in the Post World Wars I and II International System*, in *Transcience*, 2011, 2, 23-29).

⁹⁹ See C. Schmitt, *Völkerrechtliche Großraumordnung mit Interventions verbot für raumfremde Mächte*, cit., 335 ss.

¹⁰⁰ See C. Schmitt, *Völkerrechtliche Großraumordnung mit Interventions verbot für raumfremde Mächte*, cit., 332.

¹⁰¹ On this point the internationalist doctrine expresses itself in agreement, cf. R. Quadri, *Stato (diritto internazionale)*, cit., 819 (which refers to the “generic right of freedom [of the State] which assumes two fundamental directions. Sometimes it manifests itself as the exclusive right to carry out certain activities in relation to which every impediment by the

When state sovereignty comes into contact with imperial power, it loses its absolute character, and limitations of sovereign autonomy are determined, visible in the domestic and international arena. It can be said that sovereignty, in contact with imperial power, tends to become “porous”, because it must offer space for this power to penetrate and become a determinant of political action¹⁰².

The sovereignty of the empire, on the other hand, appears discontinuous and marginal; it operates in any case as a power of last resort and absolute. The territorial and/or spatial dominion of the empire can closely resemble the sovereignty of the past, and in reality, in the contemporary dimension, it very often presents itself as a jurisdiction that is not full, but rather in competition with other present political authorities, so that these too exercise their jurisdiction within the confines of its competence and may request forms of collaboration¹⁰³.

However, in the event of a conflict, the relationship between the jurisdictions is systematically resolved in favor of the imperial power, which, if necessary, becomes a hierarchically superior power, and control over the other political authorities is transformed in this case into a real

other States has the characteristics of an offence. At other times, however, it is carried out concurrently with the rights of the other subjects. As a general principle it can be said that international law attributes to the State the right to carry out all the activities in relation to which there is no international juridical limit. In the case of concurrent freedom, the juridical limit is given by the equal freedom of the other subjects”), R. Ago, *Lessons of international law*, Milan, Giuffrè, 1945, 82 ss., for which the word sovereignty expresses a specific characteristic of the State in the internal legal system, while in the international sphere it can refer to the concepts of “originality”, “independence”, “equality”, “freedom” and “autonomy”.

¹⁰² See J. M. Colomer, *Empires Versus States*, in *Oxford Research Encyclopedia of Politics*, Online Publication Date: Jun 2017.

¹⁰³ Useful indications, in this regard, in M. Hardt - T. Negri, *Impero*, cit., 175 ff., which devote an entire chapter to the sovereignty of the empire.

claim to obedience and their collaboration plays the role of a coercive collaboration.

By acting in this way, the empire has no interest in replacing the other political authorities present within it and, therefore, does not determine political unification, but simply claims, if necessary, to prevail and to keep this (hierarchical) condition permanent and visible. This actually happens in two different and competing ways: the first is determined by the greater economic capacity that the empire necessarily tends to accumulate; just think of the circumstance that the imperial currency does not take the place of local currencies, but tends to become the reference and exchange currency¹⁰⁴. The second is that of the police and military capacity of the empire which, here too, does not replace the police and army of the states, but dominates and commands and, if necessary, intervenes within them to resolve conflicts and ensure peace; but also, externally the empire possesses a dominant position in the international community, capable of maintaining international confrontation, including all power relations¹⁰⁵.

¹⁰⁴ See J. Pitts, *Political Theory of Empire and Imperialism*, in *Annual Review of Political Science*, 2010, 13, 211-235; J. L. Cohen, *Whose Sovereignty? Empire Versus International Law*, in *Ethics & International Affairs*, 2004, 18, 1-24.

¹⁰⁵ This at least up to a certain point, which is certainly higher than that of any State, but not so high as to be omnipotent, see, in this regard, the considerations of Michael Ignatieff, *The American Empire; The Burden*, cit., which, reflecting on the theme of empire after 9/11, observed how “The secretary of defense may be right when he warns the North Koreans that America is capable of fighting on two fronts – in Korea and Iraq – simultaneously, but Americans at home cannot be overjoyed at such a prospect, and if two fronts are possible at once, a much larger number of fronts is not. If conflict in Iraq, North Korea or both becomes a possibility, Al Qaeda can be counted on to seek to strike a busy and overextended empire in the back. What this suggests is not just that overwhelming power never confers the security it promises but also that even the overwhelmingly powerful need friends and allies”.

The Empire, in international relations, tends to attenuate the principle of self-limitation on which mutual recognition in the international community is based, it hardly assumes the character of a “static” power, which safeguards the *status quo*, unless it is in open decline, it makes every situation of international conflict a state of exception which may require its intervention, and, above all, it always maintains freedom of action for itself¹⁰⁶.

9. THE DEFINITION OF EMPIRE.

From this general framework, one can derive a definition of the notion of empire as a political form, for which this is conceived, unlike the state, as a system of the political government of very large dimensions with a government formed on mobile borders, with more institutional levels and overlapping jurisdictions¹⁰⁷.

In addition to the size of the territory and the population, what characterizes an empire is the absence of fixed and permanent borders, or areas of influence that are also fixed and permanent, so that the imperial dimension can expand, but also shrink. Consequently, the territory cannot be considered a defining element of the empire and it can be said that the concept of “frontier” is more suited to an empire than that of “border”¹⁰⁸.

¹⁰⁶ It is the assumption that can be reached by following the lesson of H. Kissinger, *La diplomazia della Restaurazione*, cit., *passim*.

¹⁰⁷ See J. M. Colomer, *Empires Versus States*, cit., 6 ff.

¹⁰⁸ On the difference between “border” and “frontier” in the doctrine of public law, see G. Lombardi, *Spazio e frontiera tra eguaglianza e privilegio: problemi costituzionali fra storia e diritto*, In *Scritti in onore di Vezio Crisafulli*, Padua, Cedam, 1985, vol. II, 477-495, now in Id., *Scritti scelti*, E. Palici di Suni e S. Sicardi (Eds.), Naples, ESI, 2011, 539 ff.

Furthermore, an empire is made up of a combination of different groups and multiple territorial entities, asymmetrically connected with the center; that is, the units that make up the Empire are connected with the center according to different institutional formulas, ranging from the federation to the alliance, and from the commercial agreement to the secret agreement.

Finally, a further element that characterizes the Empire is given by an assortment of multilevel jurisdictions that often overlap. Within an Empire there is generally no authority that legislates with exclusive powers and the central authority, except when it does not need to act directly, can govern indirectly through the local powers, which develop an autonomous government on important matters.

We can say that in this form the distribution of power is widespread. However, in the empire, there is a center of power that oversees and controls the different forms of power. The “center of the empire” is sufficiently autonomous in relation to the states and is also able to act as a political entity in the international community, to activate its regulation, and enforce it even with force. Obviously, the Empire is not founded so much on force itself, but rather on the representation of force closely linked to the realization of the political idea on which it is based and which conforms to its order.

In the Empire, there are also “peripheries” that are subjected to continuous control, with the direct presence of the imperial armed forces, justified thanks to strategic alliances, or with the same tools with which surveillance is exercised against opposing states. The economic and financial support of these or of the political forces that exercise political power on behalf of the Empire in the suburbs is also useful for the control of the suburbs.

If we want to clarify this statement, the character of imperial power - which is, as power, a right of command and coercion which is addressed

to men and to the aggregations and formations living within the Empire - must present itself as inclusive, but not unifying of diversities, allowing each unit, according to its form (i.e., city, province, region, state, federation, etc.), to be able to maintain its own characteristics. Furthermore, imperial power must be such as to produce consensus, to have the ability to direct other political authorities and public opinion, and to determine a form of preventive deterrence. All in order to avoid conflicts and ensure the maintenance of imperial peace.

Unlike the State, which tends towards the unity of the Republic (*una et indivisibilis Respublica*), the Empire is oriented towards a composite Republic (*composita Respublica*), made up of pre-existing units throughout the territory and organized with different institutional formulas; therefore, it is better able than the State to accommodate the differences between populations.

When it acts diplomatically, in addition to not concentrating power around a single center, he takes into account the different political entities and their power and constantly tries to maintain a balance between the different parts and the whole; and again, instead of thinking of itself as the supreme authority and as the sole source of the law, the Empire constitutes a regime based on the division of power, on negotiations and on jurisprudence (which constitutes an accommodation of law to chance); finally, the Empire, instead of using its power to create a political monopoly, exclusive jurisdiction, and a uniform administration, is characterized as a form of government that requires collaboration and considers (inter-)dependence between the parties¹⁰⁹.

¹⁰⁹ All these aspects can be said to depend on the connection between “Ordnung” and “Ortung”, i.e., between the concrete order and the localization (C. Schmitt, *Il Nomos della terra*, cit., 19-29). In a vision updated by the full unfolding of the internationalization of the economy, we can refer to the concept of “glocalization”, a term introduced in the debate on globalization by the sociologist Roland Robertson (*Globalizzazione: teoria sociale e*

History teaches that the Empire was formed on many occasions for defense, that is, to guarantee cooperation between people who must unite to fight a common enemy and this constitutes a trait in common with the Federations; but the wars fought by the Empire are not always useful to all its components¹¹⁰.

Lastly, the Empire has in common with the State (since they are both political forms), the fact that it can be ordered internally in a democratic or autocratic way, as well as according to a mixed regime, and from this point of view it is not at all refractory to the principles of constitutionalism, freedom, and recognition of rights¹¹¹.

cultura globale (1992), trad. it., Trieste, Asterios Editore, 1999) and taken up by Zygmunt Bauman (*Globalizzazione e glocalizzazione*, Rome, Armando editore, 2005; Id., *On Glocalization: or Globalization for some, Localization for some Others*, in *Thesis Eleven*, 1998, 54 (1), 37-49).

¹¹⁰ Indeed, the Empire and the Federation have many common elements that characterize them. Both of these political forms are based on multiple levels of government (*multilevel government*), ordered on different territorial scales and with some overlapping; they are based on the principle of the distinction of powers and, at the same time, on the vertical collaboration between the center and the periphery, as well as on the horizontal collaboration between the various political units. However, the Empire is a political formula which differs from a Federation, because the latter repeats the characteristics of the State, such as certain and recognized borders, and is based on the juridical equality of the member States; while the Empire has no fixed borders, it has different connections with the political-territorial entities it includes and is characterized by institutional asymmetries concerning the territory and the economy, as well as the powers granted to the various units. H. Kelsen, *Diritto e pace nelle relazioni internazionali*, cit., 117 ss., contrasts the federal state, as a form of (unitary) state, and the Confederation as a formation of international law. Kelsen's thesis, however, has its own peculiarity which can also be explained by the experience of Austrian federalism, but above all by its conception of law, expressed in *Il problema della sovranità e la teoria del diritto internazionale. Contributo per una dottrina pura del diritto* (1920), it. transl., Milan, Giuffrè, 1989, and subsequently in *La pace attraverso il diritto* (1944), it. transl., Turin, Giappichelli, 1990.

¹¹¹ See in this sense J. M. Colomer, *Empires Versus States*, cit., 2 ff.

An Empire in the modern sense, therefore, can be a democratic “community of law”, it can include the network of cities, the regions with their autonomy and the States, both large and small, ensuring a non-competitive position for each and, due to the interdependence caused by the internationalization of the economy, which cannot be satisfied by a unitary actor, concluded in itself and of limited dimensions, the Empire represents a political form, capable of favoring transnational cooperation and peaceful coexistence. This conclusion - as can be easily understood - fits the case of the European Union very well¹¹², even if it seems to suffer many difficulties due to the political shortcomings of the European Treaties and the vicissitudes of the economic crisis, the pandemic and now the Russo-Ukrainian war¹¹³.

¹¹² The expression “community of law” referring to the European Union is due to the Court of Justice of the EU (judgment of 23 April 1986, case 294/83, *Les Verts/Parliament*, in ECR, 1986; also an opinion of 14 December 1991, in Coll., 1991, I-6079, point 19). On the configuration of the European Union as an “Empire”, see U. Beck – E. Grande, *L'Europa cosmopolita. Società e politica nella seconda modernità* (2004), it. transl., Rome, Carocci, 2006; as well as J. Zielonka, *Europe as Empire. The Nature of the Enlarged European Union*, Oxford, Oxford U P, 2006. The asymmetrical nature of the European system, which makes it look like an empire, deserves independent study, in relation to the formation of a true European center which could only exist with a federalization process of the European Union. Indeed, the European reality shows how the process of European integration is always poised between constitutionalisation and a return to international law (it is permissible to postpone to S. Mangiameli, *Il sistema europeo: dal diritto internazionale al diritto costituzionale e ritorno?*, in *Diritto e Società*, 2016, 1, 11-58).

¹¹³ See A. Wirsching, *Demokratie und Globalisierung. Europa seit 1989*, München, Beck, 2015; nonché, S. Mangiameli, *The Constitutional Sovereignty of Member States and European Constraints: The Difficult Path to Political Integration*, in Id. (Ed.), *The Consequences of the Crisis on European Integration and on Member States. The European Governance between Lisbon and Fiscal Compact*, Heidelberg, Springer, 2017, 189 ss.; Id., *Covid-19 and European Union. The answer to the health crisis as a way for resuming the process of European Integration*, in IPOF, 2021, 1, 17-48.

10. FORM STATE AND ACTUALITY OF THE EMPIRE AS A POLITY.

With the end of the great continental empires, the conclusion of colonialism, and the formation of states, in the first and in the second post-war period, the very notion of “Empire” seems to get out of the reflection of scholars of political and constitutional forms, to enter the oblivion of thought politic.

The prevalence of the state form, on the one hand, and the presence of an international community made up only of states, with some limited exceptions, led one to suppose the very extinction of the imperial idea and the return to the classical model of international law. On the other hand, the processes of globalization underway, including the various fractures that characterize them, show how the very idea of “Empire” can be considered fully current¹¹⁴.

Carl Schmitt’s prophecy, referred to at the beginning, has been fully fulfilled and today we can count on an international community made up of States in the most traditional sense of the term, whose sovereignty, however, is conditioned by global complexity and interdependence, and large States of imperial dimension that acquire this awareness and require to exercise greater influence in the choices of the world; next to these states there are real empires which exercise their sovereignty over the other subjects of the international community, act in opposition and condition the global world.

¹¹⁴ See in this regard the contributions which all appeared in *Ethics & International Affairs*, 2003, 17 (2), sotto il titolo *The Revival of Empire*, 34, dovuti a J. Purdy, *Liberal Empire: Assessing the Arguments*, 35 ff.; P. B. Mehta, *Empire and Moral Identity*, 49 ss.; J. B. Elshtain, *International Justice as Equal Regard and the Use of Force*, 63 ff.; R. H. Wade, *The Invisible Hand of the American Empire*, 77 ss.; D. S. Grewal, *Network Power and Globalization*, 89 ff.

Thus, we are witnessing a composite international order which requires constant and exhaustive reflection on the two legal orders which are difficult to compare and place side by side: the Empire and the State. Both entities represent two conceptual categories that refer to the past, at least to that of medieval and modern history, not to mention the most ancient empires; both constitute two systems of government, albeit different ones; both express a strong topicality, due to the processes of internationalization of the economy; hence, therefore, the interest of the reflection.

Contemporary public lawyers, especially the continental ones, have strongly “state-centric” scientific training. This approach, if it ever was, is certainly not more adequate, just think of the production and application of legal rules, only minimally attributable to the sources of state law; but tradition, the limits of politics, the fragility of society, and the model of cultural formation, however inclusive they may be of themes such as the internationalization of the economy (with the *lex mercatoria*, ICT, globalization, etc.) and how European integration itself (born from the ordoliberal theory) continues to push scholars towards the state dimension. State law (*Staatsrecht*) is their discipline. This discipline is closed in on itself and does not consider the interdependencies in which the state lives today, or - if it does consider them - it sees them as a form of exception to the central paradigm which remains the state one.

Furthermore, the myopia of contemporary politics very often believes that taking refuge in the myth of “sovereignty” could be a way to guarantee rights (especially social ones), according to the tendency of left-wing sovereignty, and to restore order also to the international Community, according to the trend of right-wing sovereignty.

In reality, this is leading to a considerable delay in understanding the juridical-institutional phenomena that pervade our societies every day, and very often culminate in answers to problems that have no chance of

success. Thus, the very idea that interdependencies can be tackled with a revival of the idea of the nation or of national sovereignty and with the slogans that the Government must think first of all of its own citizens, evokes an idea of the border and of the foreigner of other times.

The rethinking of the state, moreover, has been a necessity for some time now; already in the 80s of the last Century the social sciences were hoping for a “return to the state”, that is, they wondered how to relaunch the state form, as well as internally, also in the international context; and still recently the pandemic crisis and the Russian-Ukrainian conflict have made us think of a return to the state with a re-expansion of the national public and economic sphere¹¹⁵.

Indeed, as it is logical to think, the crisis of the State was also the mirror of a crisis of the international community, which entered into tension precisely with the structure determined by the end of the Second World War and the formation of the blocs under the aegis of the “cold war”, based on the contrast between the capitalist economy and the planned and socialist economy, and on the distinction between liberal democracy and popular democracy. Even if there was a further position on the international scene, that of the “non-aligned countries” and of the various political movements pursuing the so-called “third way”.

This was at least until the fall of the Berlin wall (November 9, 1989), to which the progressive dissolution of the blocks is linked and the accentuation during the 90s of a global model, which also imposed the consideration of non-state or non-fully state realities (think of Africa) in the scenario of the international community, and has seen the expansion

¹¹⁵ In this sense S. Cassese, *Territori e potere. Un nuovo ruolo per gli Stati?*, Bologna, il Mulino, 2016; Id., *La nuova Costituzione economica*, Bari, Laterza, 2021, II ed., 397 ss.; as well as G. Amato, *Bentornato Stato, ma*, Bologna, il Mulino, 2022.

of international trade, giving rise to the phenomenon of the emerging economies of the BRICS countries.

Today, after the events linked to the attack on the twin towers (September 11, 2001), such as the western initiative against Iran, Iraq, and Afghanistan, the al-Qaeda caliphate and the attempt to form an Islamic State, and the subsequent events related to the economic and financial crisis of the derivative financial instruments produced by American investment banks, the explosion of the pandemic from China, the end of the Western presence in Afghanistan and, recently, the Russo-Ukrainian war, witnesses in the globalized world fractures that call into question the precarious international balance that arose after the end of the Soviet bloc and that outline new confrontations in the international community which primarily concern precisely those units for which the word “Empire” can be used¹¹⁶. These realities are by now a characterizing force of the international community and conditioning the formation and application of international law, and they force the national governments of states to resolve unprecedented conflicts and problems of their communities.

Surely, many shadows of a political and economic nature are projected every day, not only on international security but also on fundamental issues of an economic and social nature that concern individuals, such as energy, the environment, food, health, and materials first, and last but not least, on human rights themselves, not to mention the “fears” deriving from international conditions, such as migration, viruses and the penetration of privacy that feed social inequality, fear of others and private insecurity¹¹⁷.

¹¹⁶ This is the culmination of the volume of H. Kissinger, *Ordine mondiale*, cit. 359 ff.

¹¹⁷ See Z. Bauman, *Danni collaterali. Diseguaglianze sociali nell'età globale* (2011), it. transl., Bari, Laterza, 2013; see also D. Quammen, *Spillover. L'evoluzione delle pandemie* (2012), it. transl.,

When a conflict is generated because of these problems, the imperial forces are directly involved and any political “imbalance” should be resolved through the search for a new balance, according to an ancient scheme that seeks to replace the conflict (war) within international relations.

In this regard, it is interesting to observe how the presence of conflicts, including armed conflicts, has not interrupted or completely blocked the processes of the internationalization of the economy, but the fractures not healed by contemporary international relations seem to consolidate the trend towards the formation of real geopolitical platforms or regional blocs which determine, if not actual political borders, at least “frontiers”, also of an ideological and cultural nature.

11. THE ROLE OF STATES AND THE “NEW RELATIONS BETWEEN GREAT WORLD POWERS”.

All this makes it possible to accept the idea that there is a topicality of the Empire, as a formation that determines a peculiar political structure and imposes a different and new way of relating to states and the international community.

Indeed, the history of the international community from Westphalia onwards has always known the tension between states to achieve imperial dimensions and tones.

Milan, Adelphi, 2014; S. Zuboff, *Il capitalismo della sorveglianza. Il futuro dell'umanità nell'era dei nuovi poteri* (2019), it. transl., Rome, Luiss U P, 2019.

Europe, also from this point of view, constitutes a historical example, since the balance of Westphalia was based precisely on the proximity of large states and small states, with the claim of Austria-Hungary itself to retain the title of Sacred German-speaking Roman Empire and, under this aegis, to continue a policy of territorial expansionism; as well as France which claimed and obtained the Spanish lands of the North (Flanders) and South (Perpignan and Rossignol), and like Prussia which obtained from the peace treaties some territorial advantages which it subsequently consolidated with the fusion with Brandenburg and with the realization of the territorial continuity of its possessions.

As for the absentees from the peace negotiations of Westphalia, England, Russia and Poland, the former had long been an empire which would later be perfected with the union of England and Scotland into Great Britain, in 1707; and Russia, with Peter I, in 1721, rose to the rank of Empire after the victory over Sweden; while Poland (*rectius*: the Polish-Lithuanian Commonwealth) failed to reach the Congress of Vienna, due to the third partition (1795) and despite Napoleon's attempt to create the Grand Duchy of Warsaw.

Napoleon's France claimed the imperial title (1804) and in the Treaty of the Peace of Pressburg, signed on December 26, 1805, Austria was forced to relinquish the imperial title of the Holy Roman Empire and, at the same time, recognize Napoleon as emperor.

When we arrive at the Europe of the Congress of Vienna (1815), the imperial formations were fully recognized and had alongside them a complex of States that were such, including Prussia, and which could not aspire to a territorial growth capable of making them compete with the Empires present at the Congress.

In that system, in which Metternich, for Austria, and Castlereagh, for Great Britain, aimed at the construction of a long-term European equilibrium, the function of the States with respect to the Empires was to

prevent direct confrontation of the latter and, therefore, their function was of interposition, so as to avoid that, in case of conflict, we could witness a direct clash between Empires. The “diplomacy of the Restoration”, in this sense, had given Europe a structure defined by the limit that States and Empires together set themselves to safeguard the peace achieved after the Napoleonic upheavals¹¹⁸.

It is no coincidence that when subsequently, through the work of Prussia, the Germanic Empire was born (1871), this condition changed, having dissolved the presence of states in continental Europe, with the consequence that the four continental empires, all bordering them, entered a state of growing tension. Prussia, which had conducted a policy of territorial expansion since the Peace of Westphalia, came to be, with the proclamation of the German Reich, the strongest European power, thanks to the victories obtained on the battlefields¹¹⁹, it gave the European continent a new order, but at the same time, it placed itself at the center of European tensions, with disputes both in the west with France, and in the east with Russia. These disputes were contained as long as German foreign policy was conducted by Chancellor Bismarck, but tensions in European relations became increasingly apparent after his removal, due to the

¹¹⁸ H. Kissinger, *La diplomazia della Restaurazione*, cit., *passim*.

¹¹⁹ First against Denmark (1864-65) and Austria (1866), from which the first German federal formation was born, namely the Norddeutscher Bund, and then against France (1871), thanks to which it obtained Alsace- Lorraine. The Constitution of the Norddeutscher Bund (April 16, 1867) consolidated the federal state form and established the chancellorship form of government with a bicameral parliament with one chamber directly representing the citizens (Bundestag) and the other representing the states through the representatives of the respective national governments (Bundesrat). This federal and governmental structure was confirmed in the Reich Constitution (April 16, 1971), with the entry into the Federation of southern German states, with the exception of Austria.

conflict with Kaiser Wilhelm II (1890). The latter first wanted to compete on the sea with the English power, building a large German fleet, and subsequently aimed at an extension of the empire through war. In just five years (1914-1919) the catastrophe of the First World War marked the end of three Empires, and the definitive acquisition of Alsace-Lorraine by France, which in the meantime had become (again) a Republic.

Is there a parallel between that European reality and today's global world?

If we assume the criterion expressed by Henry L. Stimson, in 1941, and we believe that the world has become less extensive and dispersed than in the past, and closer and interdependent, we could answer in the affirmative.

Even the global world today is made up of states and empires and it is the latter that guide international political choices and, very often, national ones as well. However, States can still interpose themselves between empires and function in the international order, as much from conflicting and confrontational components, generating tensions of power and dangers of war, and undermining the balance and functioning of the international order itself; as by means of possible compromises between Empires, giving rise to periods of balance and peace and security, increasing flexible international relations, the legitimacy of mutual recognition between Empires and their cooperation.

A sure symptom of disequilibrium of the multipolar order and tendencies occurs when the actions of States and the behavior of Empires themselves determine a direct confrontation since this means that the world evolves towards regional blocs or rigid geopolitical platforms, which concentrate power, reduce the ranks of international actors and accentuate the desire and the dangers of mutual oppression also through the exhausting use of military operations¹²⁰.

¹²⁰ H. Kissinger, *Ordine mondiale*, cit., 369.

The regional conflicts of the last decade, including the Russo-Ukrainian war, seem a clear symptom of this critical condition of international relations.

The greatest danger, in the present conditions, is that crises of this kind, also due to the technological level reached, could end up involving all of humanity with catastrophic effects for winners and losers, or, worse still, such as to have no winners.

Beyond the aim of the peaceful coexistence of the international community, it should be noted that contemporary states cannot endure an armed front for long, even if limited, and the need to alternate periods of war with periods of truce is a requirement of survival. Even the most powerful empires, for which at times there may be several simultaneous armed conflicts, can suffer from the same condition of insufficiency and be driven to prefer a truce and peace negotiations rather than continuing military operations.

This factual circumstance, however, does not in itself lead to avoiding the danger of a “total global war” - such as the one to which Carl Schmitt alluded - especially if this can be based on the absolutization of a political idea or an identity, with its values, which make coexistence incompatible and contradictory.

The only way, to try to avoid a fatal outcome and to maintain peaceful international coexistence, seems to pass through the relativization of every position, without attempts to convert worlds that have different inspirations and without violating the “vital interests” of each entity of the international community”¹²¹.

¹²¹ In this sense, the proposal by H. Kelsen, *Diritto e pace nelle relazioni internazionali*, cit. 150, is that of a progressive juridification of international relations through agreements

Consequently, paradoxically, we should accept, as a fact, that even human rights and democracy are understood differently by states that have signed up to the same international charters and all sit together in the UN Assembly.

To keep international relations active, at this point, consensus on common problems that only the international community, as a whole, can tackle, such as the environment, energy, food, health, territorial differences and migrations, etc.; just as it is up to the international community to take care of all those interdependencies that derive from the development of science and technology since it is by no means indifferent to the use of these by each member of the international community itself; in this regard, it is sufficient to think of GMOs, vaccines, nuclear energy, ICT, communication routes, space, etc., to understand the importance of international collaboration; and finally, the task of promoting the conservation of the planet, the task of safeguarding natural resources, and the mission of enhancing the cultures and traditions of the peoples of the earth must be acknowledged by the international community.

In order to fulfill these tasks and avoid tensions and conflicts between States and Empires, it is necessary that the concrete functions of the international community are accepted as limits by each Entity, large or small, of this, and that the relations between these are determined by a complexity of procedural rules that guarantee the same neutrality and the same openness to all participants, as the *Jus publicum europaeum* assured them, at the time of the peace of Westphalia, to the European states.

which, in case of dispute, can give rise to a resolution of conflicts “according to law” before an “international court with compulsory jurisdiction”.

In the Agreements between the United States and China (2013) there is also a solemn commitment to build “a new type of relationship between great powers”¹²². The expression is somewhat suggestive, but its content is not fully defined and, in any case, it is not extended to the other great powers and is still devoid of legal obligation.

Furthermore, it is possible that even these “new relationships” like those originating in Westphalia, neglect the theme of the legitimacy of power, for which, “to achieve an authentic world order, its components, while maintaining their own values, must acquire a second culture that is global, structural and legal: a concept of order that transcends the perspectives and ideals of any region or nation”¹²³.

If this is the landing point of the current international scenario, then, it must be concluded that the best is given by a competition, made up of States and Empires together, which is maintained within acceptable conditions so as to make the balance of power always calculable in the reason for peace; but, if this is true, not only the economic relations of globalization, i.e. the financial markets and exchanges, but also the breadth and quality of the legitimacy which every member of the international

¹²² Presented for the first time the concept of “new type of relations” during the second “Strategic and Economic Dialogue” between China and the United States in May 2010, it was reiterated two years later by Xi Jinping, in his visit to the United States as vice president. The invitation to shape the new model of relations between great powers was intended to underline that, although this type of diplomacy was unprecedented, it would certainly become a point of reference for the future (P. Mattis, *Out with the New, In with the Old: Interpreting China’s New Type of International Relations*, in *China Brief*, Volume XIII, Issue 9, April 25, 2013). In the meeting between Xi Jinping and Obama in June 2013, the Chinese President defined the new model of relations in three cardinal principles of relations between the two states: avoiding the use of conflict, mutual respect and win-win cooperation (Ren Xiao, *Modeling a “New Type of Great Power Relations”: A Chinese Viewpoint*, in *The Asian Forum*, October 4, 2013).

¹²³ H. Kissinger, *Ordine mondiale*, cit., 371.

community boasts and which gives rise to the balance of power of the Community itself, becomes an element of international competition¹²⁴.

¹²⁴ Thus, on the one hand, it is a question of establishing a formal system of relationships, free from any value judgment and connected to a shared procedural system, which in short follows the features of the Westphalian system, adapted to a world that is no longer that of the 'Europe of the seventeenth century. In this way, what should be ensured would essentially be a truly multipolar system of international relations, based on the balance of powers and on the concert of powers that it would be up to states and empires together to manage and guarantee. On the other hand, competition should continue precisely on this front. In this sense, international relations should be based on Entities that have innovated on the ways of exercising power. The issue does not simply concern the efficiency of the government structure of each country, but rather the political values that come true and which determine, in addition to the attractiveness of the model, the legitimacy and quality of international relations. In this sense, for example, it can be concluded that in a peaceful Community there remains a clear distinction between systems that give rise to the development of the rights of freedom and to a real and widespread democracy, and systems that are inspired by authoritarian values of command and check (see J. Micklethwait – A. Wooldridge, *The Fourth Revolution. The Global Race to Reinvent the State*, New York, Penguin Press, 2014; J. Micklethwait and A. Wooldridge, *The Virus Should Wake Up the West*, Bloomberg, 13 April 2020, <https://www.bloomberg.com/opinion/articles/2020-04-13/coronavirus-pandemic-is-wake-up-call-to-reinvent-the-state>); K. Schwab – T. Malleret, *Covid-19: The Great Reset*, cit., 89 ss; G. Amato, *Bentornato Stato*, ma, cit., 93 ff.).