Introduction

When the University of "Roma Sapienza" was still called the University of Rome and its Law School was the only one in the city, Gaetano Morelli lectured on international law for five academic years, until he became a judge of the International Court of Justice in 1961. Professor Morelli's lectures at the law school were not well attended. As one of the students who followed his lectures I can offer an explanation for this. He spoke very coherently and precisely, always selecting the appropriate words. He had a remarkable memory: although he did not use any notes, he sounded as if he was reading from a book. In fact, what he was saying closely followed his own textbook.[1] He did not enliven his subject by illustrating it with some examples drawn from cases or State practice. To sum up, although he was an admirable speaker, I have come across more fascinating lecturers. I say this in the knowledge that Morelli's lecturing skills are clearly not the reason why the present series is named after him.

As Professor Cannizzaro explains in his preface, the name of Gaetano Morelli was chosen as the most significant representative of a tradition of studies in international law which became known as "the Italian conception" or more modestly as "the Roman school".

One of the main features of this legal tradition was a reaction against the use of natural law concepts in the analysis of issues of International Law. This was the essence of Dionisio Anzilotti's positivism. Another feature was the separation of the analysis of legal problems from political and social elements and moral considerations. This

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[1] Morelli, *Nozioni di diritto internazionale*. The seventh and last edition of this textbook was published in 1967.

is reflected in the scholarly work of the generation which was writing during the Fascist period. It is for instance remarkable that, when giving his inaugural lecture at the University of Naples in 1935 on the development of international law in relation to new circumstances,[2] Professor Morelli did not make a single reference to any of the policies of the Italian Government of the time.

More than any other scholar belonging to the Roman school, Morelli attempted to build a coherent and comprehensive system covering the general part of international law. He strived to reach rigorous, even if sometimes rather abstract, conclusions. When discussing what seemed to be new issues with Professor Morelli, one had the impression that he could always find in his system a category that allowed him to situate the issue and reach a solution.

As a judge, he pursued in his individual opinions the same aim of providing logically stringent solutions. In the joined cases between Ethiopia and South Africa and Liberia and South Africa he defended the idea that the *jus standi* in relation to the obligations under the Mandate could operate only in a bilateral dimension and that a State could invoke a right only if the Mandate protected one of its specific interests. Judge Morelli dissented from the 1962 judgment on jurisdiction because in his view there was no dispute between the parties before the filing of the application.[3] He was then part of the majority in the controversial 1966 judgment. In his separate opinion to the latter judgment he maintained that, in the case of the Mandate, "collective interests are not protected by the provisions in question by means of rights conferred on the different States concerned, so that each of those States could individually require the prescribed conduct".[4] Thus, "no State member derives any right in its individual capacity from the provisions of the mandate concerning the administration of the territory" of South-West Africa (Namibia).[5]

In 1968, Morelli, writing on the provisions on *jus cogens* outlined in the ILC draft articles on the law of treaties, observed that there exist

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2 With the omission of a few introductory words, this lecture was published as an article: Morelli, *L'ordinamento internazionale di fronte alle nuove situazioni di fatto*.

3 *South West Africa Cases (Ethiopia* v. *South Africa; Liberia* v. *South Africa)*, Preliminary Objections, Judgment, 21 December 1962, ICJ Reports (1962) 319, at 564-574.

4 *South West Africa*, Second Phase, Judgment, 18 July 1966, ICJ Reports (1966) 6, at 64.

5 Ibid., at 65.

rules of international law which protect interests that are general or collective because they simultaneously belong to all States or to all States members of a group and not to each State individually considered (these words are a translation from an article that he published in the *Rivista di diritto internazionale* in 1968: "norme… le quali provvedono alla tutela di interessi che possono dirsi generali o collettivi in quanto sono simultaneamente propri di tutti gli Stati o di tutti gli Stati componenti una data collettività e non già di ciascuno di essi singolarmente considerato").[6] The obligations under these rules were going to be defined as obligations *erga omnes* by the International Court of Justice in the famous passage in the Barcelona Traction judgment of 1970.[7] The purpose of Morelli's reference to rules protecting collective or general interests was to point out that those rules do not necessarily imply that a treaty conflicting with them is invalid, but only that the treaty is unlawful.

Rules protecting collective interests can be established either through a customary rule or through a treaty. In his article on *jus cogens* Morelli did not refer to his separate opinion in the South-West Africa cases, nor did he say whether a State party to a treaty protecting a general or collective interest could demand the respect of the relevant obligations under the treaty. However, there are some indications that he accepted the idea that any State party to a treaty protecting a general or collective interest could make a claim when the obligation is infringed. He wrote that, when a rule protects a general or a collective interest, the obligation to observe a certain conduct binds each State towards all the others, who have a corresponding right ("Così l'obbligo al previsto comportamento è un obbligo imposto a ciascuno Stato verso tutti gli altri, a ciascuno dei quali è attribuito il diritto soggettivo corrispondente").[8] The issue of *jus standi* is important, because if no State was individually entitled to invoke the respect of an obligation protecting a collective interest, the issue of compliance would often become merely theoretical.

Morelli also accepted the idea that certain rules of international law could entail the invalidity of a conflicting treaty and that, when

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6 Morelli, *A proposito di norme internazionali cogenti*, 115.

7 *Barcelona Traction, Light and Power Company, Limited*, Judgment, 5 February 1970, ICJ Reports (1970) 3, at 32, para. 33.

8 Morelli, *A proposito di norme internazionali cogenti*, 115.

this occurs, general interests covered by those rules would be more intensively protected. However, he did not find any of the examples of rules of *jus cogens* given by the ILC persuasive: neither the rule prohibiting the use of force nor the rules imposing the obligation to cooperate for the repression of certain international crimes.[9] Whether these are rules of *jus cogens* is a question that could not be resolved with reference to State practice in 1968, and in any case Morelli did not attempt to do so. Whether it could be done today relying on State practice is an open question.

Giorgio Gaja

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[9] Ibid., 117.