PUBLIC INTERNATIONAL LAW-AR

UNIT 2. THE PROCESS OF CREATION OF INTERNATIONAL LAW

1. The formal sources and other processes in the creation of International Law.
2. The international custom: concepts, elements, and classes.
3. The general principles of law recognized by the civilized nations.
4. Unilateral acts of States, acquiescence, and estoppel.
5. The codification and progressive development of International Law.

THE FORMAL SOURCES AND OTHER PROCESSES IN THE CREATION OF INTERNATIONAL LAW

A. Formal sources
B. Other processes in the creation of International Law

A. FORMAL SOURCES OF INTERNATIONAL LAW

- "*Sources of law*": is an ambiguous expression that encompasses different meanings. In a juridic context, procedures for the creation of norms or rules in a legal system.
- Public International Law: system of rules that applies to the subjects of the international community (origen of rules: consent). Own sources, but no rule refers to "sources of IL", even though traditionally Article 38 ICJ Statute is used as the definition (Basic consensus of the States on those, although it does not exhaust the catalogue other processes that have expanded with the evolution of IL).

  1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:

  *-**international conventions**, whether general or particular, establishing rules expressly recognized by the contesting states;*

  *-**international custom**, as evidence of a general practice accepted as law;*

  *-**the general principles of law** recognized by civilized nations;*

  *-subject to the provisions of Article 59, **judicial decisions and the teachings of the most highly qualified publicists** of the various nations, as subsidiary means for the determination of rules of law.*

  *2. This provision shall not prejudice the power of the Court to decide a case **ex aequo et bono,** if the parties agree thereto.*

- Art. 38 does not establish any hierarchy among the different sources, but there is a certain material hierarchy:
  - *ius cogens* norms prevail over any other norms of international law, whatever their origin (treaty, custom, PGD).
  - the obligations imposed by the UN Charter *(art. 103 UN Charter In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail)*
- In case of conflict between norms, we can resource to the application of technical-legal criteria:
  - *Lex specialis derogat generalis.*
  - *Lex posterior derogat anteriori/lex posterior derogate prius.*
  - *Lex posterior generalis non derogate priori speciali.*
- *"To decide in accordance with international law"* dispute resolution will be carried out, therefore:
  - Applying:
    - Classical formal sources: -treaties (unit 3); -customs; -General principles of law.
    - Auxiliary means of determining IL: Jurisprudence and doctrine. They do not create law, but help to determine its existence.

- International jurisprudence: it is composed of the decisions of international tribunals:
  - Contentious: courts of law (judgments, rulings, etc.) and arbitral tribunals (arbitral award).
  - Consultative: Advisory opinions

  We must take into account the scope of its function:
  - According to the ICJ: the Court enunciates existing law, but does not legislate.
  - Res judicata effect (art. 59 ICJ Statute). Self-binding of tribunals to their previous decisions.
- Scientific doctrine: Can be:
  - Individual: publications of IL professors.
  - Collective: of scientific institutes (IDI; IIA, IHLADI).
  - Special case: ILC (between collective doctrine and preparatory works).

  Their value has been changing with the evolution of IL (16th to 19th c.: few norms → many doctrinal citations in judgments); in s. XX-XXI: many rules → judgments hardly cite doctrine).

➢ *"to decide a case ex aequo et bono"*: Dispute resolution "according to equity"

- Equity is an abstract representation of justice (what the Judge believes to be just in a particular case, disregarding what the legal rules determine).

- Types of equity:
  - Equity *infra legem*: a norm admits various interpretations and judges choose the one they consider the fairest applied to the concrete case. For this application, the authorization of the parties is not required and, therefore, we do not find ourselves in the case provided for in Art. 38.2 ICJ Statute.
  - *Equity contra legem*: what the judges consider fairer in a particular case is contrary to a rule in force.
    Art. 38.2: only possible if the parties authorize the ICJ: this has never occurred in practice.

B. OTHER PROCESSES OF CREATION OF INTERNATIONAL LAW

- Evolution of sources with evolution of International Community.
- The ICJ's jurisprudence shows that a significant number of cases have been resolved, not by applying the formal sources, but through other processes for the creation of the IL:
  - Unilateral acts of the State.
  - Resolutions of the IOs. In relation with their respective constitute treaty (*example*: European Union).
  - Soft law procedures: They are normative procedures that lack binding effect.
    - They regulate a "soft" commitment to which the State should adjust their conduct.
      - *Examples*: gentlemen's agreements, IO recommendations, declarations of international organizations and conferences, action programs, codes of conduct, strategies, guidelines, etc.
    - But today's "soft law" can be tomorrow's "hard law" (binding law): generation of an international practice that gives birth to an international customary norm.

THE INTERNATIONAL CUSTOM: CONCEPT, ELEMENTS AND CLASSES

A. Concept
B. Elements of international custom
B.1.- The material element: practice
B.2.- The subjective element: opinio iuris
C. Types of international custom
D. The Treaty-custom interaction

A. CONCEPT

- Traditional source of IL *"evidence of a general practice accepted as law".* By their very nature, the rules pertaining to international custom are generally relatively elementary ground rules expressing principles of conduct capable of being stated in a simple form, but the importance should not be minimized.
  - Lost of importance due to numerous factors: technological areas, multiplicity of IOs as fora of cooperation. But still: importance and revival in transformation of IL.
  - Difficulty in identification and determination: ILC topic under consideration (2012) "Identification of customary international law".
- Constant and uniform behavior, repeated over time and accompanied by the conviction of its legal enforceability adopted in a given case or situation by the subjects of international law.
- International custom is composed of two elements:
  - the material or practical element
  - the subjective element (*opinio iuris sive necessitatis*).
- Necessity of both elements but they do not usually appear at the same time. It is normal for the practice to occur first. But they support each other by acting as communicating vessels.

B. ELEMENT OF THE INTERNATIONAL custom

B.1. THE MATERIAL ELEMENT: THE PRACTICE (USUS)

- Synonymous with usage, repetition of acts, also called "precedents". Any type of conduct (action or omission) attributable to the subjects of international law (not only States) that are relevant as an expression of conduct in the field of international relations.
- When it does appear?
  - May originate from any organ and manifest themselves in any form that is relevant: official declarations, conclusion of agreements, endorsement of resolutions of international organizations, positions formulated at international conferences....
- Must present certain characteristics (outlined by international jurisprudence-flexibility of its determination):
  - Continuity over time, certain duration (nowadays: reduce in times acceleration of globalized world). Mean to prove the generality, frequency and uniformity.
  - Frequency of its manifestations,
  - uniformity of its content, and
  - Generality of its observance. The relevant practice is that of the "particularly interested" States, that is to say, that of the States which are in a position to contribute most significantly to the formation of a customary rule.

B.2. THE SUBJECTIVE ELEMENT: THE OPINIO IURIS

- Conviction on the part of its authors that the practice followed responds to a legal requirement.
- The ICJ clarification: 1969 Judgment concerning the Continental Shelf of the North Sea (FRGermany v. Denmark-The Netherlands).

> *in order to achieve this result, two conditions must be fulfilled. Not only must the acts concerned amount to a settled practice, but they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it. The need for such a belief, i.e., the existence of a subjective element, is implicit in the very notion of the opinio juris sive necessitatis. The States concerned must therefore feel that they are conforming to what amounts to a legal obligation. The frequency, or even habitual character of the acts is not in itself enough. There are many international acts, e.g., in the field of ceremonial and protocol, which are performed almost invariably, but which are motivated only by considerations of courtesy, convenience or tradition, and not by any sense of legal duty".*

- Its presence must be proved in each case in order to confirm the existence of such a rule: even if the Parties agree on the content of the customary rule, it is necessary to prove its presence in each case.

- This proof is facilitated by a very wide practice, so that the way in which the practice has been configured constitutes the main element in determining in each case whether or not there is a binding conviction.

C. TYPES OF INTERNATIONAL CUSTOM

- Different classifications (nature of the practice: positive/negative custom—extension of the application: general/particular custom).
  - General custom: The international society as a whole is bound by them.
    - Characteristics of general custom: distinguish two different aspects or moments:
      - the process of formation of the customary rule: the formation requires the existence of widespread precedents and a deep conviction of its binding force, including the States particularly concerned (not necessary of all of the States of the IC).
      - the binding effect of the rule once it has been formed: Once validly formed, is binding on all States, even those that have not actually contributed to its formation through concrete participation or has specifically accepted it. In the Judgment of 20 February 1969 concerning the North Sea Continental Shelf,
    - Exception: the doctrine of the "**persistent objector**": a State may be able to prevent a custom in the making from becoming binding on it by virtue of to become binding on it by behaving like a "persistent objector", i.e., by clearly and repeatedly expressing its rejection of such a customary rule during the process of its formation.

      ICJ 1950 Anglo-Norwegian fisheries case

- The State that wishes to exempt itself must prove that it has indeed behaved as a persistent objector (proving that it has opposed it from the beginning of the practice and during the whole process of its formation).ç
- Limitation: *ius cogens* rules.

- Particular (regional/local) custom: International custom may also be formed in a smaller geographical area, in which case one speaks of particular customs, with a smaller geographical space.
  - Same basic guidelines:
    - Requires the confluence of the material element (the practice) and the spiritual element (opinio juris).
    - However, the formation and application obeys specific processes: in general, require a more singularized presence of precedents and opinio juris on the part of the States involved.
      - the absence of effective participation in the process of formation, the lack of precedents from a given State, and especially the lack of assent or objection by it to the validity of the custom in question will prevent, if not its emergence among the States that have actually supported it, at least its enforceability against the State that has not admitted it or that has repudiated it.

- the State which invokes the existence of a regional or local custom must bear the burden of proof of the existence and of its binding nature to the other party involved.
- The consent of the obligated State thus appears as a fundamental element for the formation and application of international custom of a particular regional or local character.

D. THE TREATY-INTERNATIONAL CUSTOM INTERACTION

- Interaction and synergies with all sources (normative synergies):
  - Resolutions of international organizations and the formation of international custom.
    ICJ 1996 Opinion on the Legality of the Threat or Use of Nuclear Weapons.
  - Custom and general principles of international law: form a conglomerate that is difficult to dissociate.
- Interaction between treaty and custom: Effects of treaties in international custom:
  - declaratory effect of a treaty: merely puts in writing existing customary rules.
    - *Example: Part of the rules of the VCLT.*
  - crystallizing effect of a pre-existing customary rule: an emerging customary norm receives the impetus of a treaty that reflects it.
    - *Example: EEZ in the Law of the Sea Treaty of 1982.*
  - generative effect, i.e., as an initial link of a new customary rule that will take shape over time by accumulating precedents and consolidating the opinio iuris.

THE GENERAL PRINCIPLES OF LAW RECOGNIZED BY CIVILIZED NATIONS

- Doctrinal controversies but are unanimously recognized as a source of international law by State practice and international jurisprudence. ILC topic under consideration.
- Two distinct categories:
  - Common principles of the domestic legal systems of the States that constitute the IC (anachronistic expression “civilized nations”): "legal principles recognized, enunciated and positivized in the domestic law of States and common to the various legal systems applicable mutatis mutandis to international law.
    - Principles deriving from domestic public law: The so-called "principle of jurisdiction of jurisdiction",; the procedural principle of equality between the parties; the principle of the relative authority of res judicata of the judgments of the courts and the "principle of implied powers",
    - Principles of private domestic law: the principle of good faith, the principle of the prohibition of abuse of rights, the principle that no one may be a judge in his own cause, the principle *inadimpleti non est adimplendum* and the principle of liability.
  - Specific principles of International Law: such principles do not derive from the internal law of States, but are shaped in foro externo, i.e., in the sphere of the relations of States with other subjects of international law. This specific principles of international law are deduced from international norms and form the backbone of the *corpus iuris*.

- Some of these principles: "structural principles" of international law, not only because they embody fundamental, essential or cardinal values of the contemporary international community, but because they reflect the backbone of the configuration of this Community.
  - *Example*: Resolution 2625 (XXV) of 24 October 1970 containing the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations".
- The principle of independence of States.
- The principle of sovereign equality,
- The principle of State identity and continuity,
- The principle of the primacy of international law over domestic law,
- The principle of the exhaustion of local remedies as a condition for the exercise of diplomatic protection of nationals,
- The principle of the freedom of maritime communications,
- The principle of the prohibition of recourse to force,
- The principle of self-defence,
- The principle of self-determination of peoples, and
- The general principles of humanitarian law of war.

UNILATERAL ACTS OF STATES, ACQUIESCENCE AND ESTOPPEL

- The unilateral conduct of States has traditionally been recognized as a source of possible international obligations. Principle of good faith.
  - Jurisdictional precedent: PCIJ Judgment 5 April 1933 in the case concerning the legal status of Greenland: The Court considered that the oral statement made by the Norwegian Minister for Foreign Affairs, Mr. Ihlen, stating that his country would "make no difficulties" to the establishment of Denmark's sovereignty over East Greenland "was unconditional and final" and obliged Norway "not to dispute Danish sovereignty over the whole of Greenland.
  - ICJ Judgment of 20 December 1974, concerning the case of the French nuclear tests in the South Pacific.
  - Codification of principles: International Law Commission of the United Nations 2006 the "Guiding Principles on Unilateral declarations of States capable of creating legal obligations".
- Broad typology of acts of this nature: acceptance, promise, renunciation, protest, acquiescence, recognition...
- Problems posed by these unilateral acts: Distinction between:
  - Aspects relating to their binding nature for the author State: The ICJ's judgment in the nuclear tests case examines the conditions which are necessary for the legal binding of the State which is the author of the unilateral act or declaration:

- Capacity of the person making the declaration to bind the State at the international level,
- the publicity of the act or declaration issued (no specific form needed).
- the intention to be bound expressed with sufficient clarity.
- it is not necessary for there to be any counterpart, acceptance, reply or reaction on the part of the other States

- In cases in which the above conditions are not met, the State that is the author of the unilateral act or declaration is not directly bound by it, **but possibility of situation of estoppel (**doctrine of "*actos propios*" in Spanish law), whereby no one may contradict his or her own conduct when this results in an unjust prejudice to third parties (contra factum proprium quis venire non posset).
  - In such cases, the unilateral act of the State does not produce binding effects *per se*, but depends on the possible detrimental impact that an act inconsistent with what it has declared might have on third in good faith.
  - ICJ Judgment concerning the delimitation of the continental shelf of the North Sea in 1969: essential elements form of several steps:
    - a unilateral conduct of a State which, without expressing a perfect and complete obligation, contains declarations sufficiently clear to generate the credibility of other States and raise their expectations

- a reaction of one or more other States which modify their positions on the basis of these declarations in good faith and for which a specific prejudice would result if the first State did not maintain the position unilaterally adopted;

- Aspects relating to their possible effects on third States: Unilateral acts and declarations of States may also produce binding legal effects for third States if that is the intention of the author State and provided that the third States consent to be bound by such a unilateral act or declaration by an act of **acceptance, approval or acquiescence (tacit acceptance)**.
  - The difficult questions that arise in cases of acquiescence: elements on which the binding nature of the unilateral act on third States could be based:
    - the will of the author State to create such an obligation,
    - the notoriety of the unilateral act,
    - and the fact that the affected State has not expressed its disagreement or protest within a reasonable period of time,
    - or that the State in question has recognized the situation created or has benefited from it by taking advantage of the advantages granted.

THE CODIFICATION AND PROGRESSIVE DEVELOPMENT OF INTERNATIONAL LAW

- Rousseau: codification is "the conversion of the customary rules in force into a body of written rules, systematically grouped together".
- Process of positivization of the customary law and at the same time a process of rationalization and systematization of its rules, which contributes to increase the legal security and certainty of international law.
- Absence of an international legislator:
  - Task is done mainly through the conclusion of codification treaties.
    - *Examples:* Congress of Vienna (1814-1815), which codified the rules on navigation on international rivers, the prohibition of slavery and the rank of diplomatic representatives, and the Hague Peace Conferences of 1899 and 1907, which codified the international law of armed conflict.
  - Work by international non-governmental organizations in certain specific areas: the International Committee of the Red Cross carried out codification work that resulted in the four Geneva Conventions of 1948 on international humanitarian law, which were supplemented by the Geneva Protocols of 10 June 1977, all of which are currently in force.
  - Codification by universal IOs:
    - The League of Nations contribution: 1930 Geneva Codification Conference, which ended up with rather negative results, since out of the three chapters addressed (breadth of the territorial sea, liability for treatment of aliens and nationality), only one convention could be adopted in the latter area.

- UN Contribution:
  - Article 13.1(a) Charter: GA responsibility to "promote studies and make recommendations "for the purpose of encouraging the progressive development of international law and its codification". progressive development of international law and its codification.
  - By resolution 1744 (II) of 1947, the General Assembly adopted the Statute of the International Law Commission (ILC), as the body specifically entrusted with this mission.
    - Triple objective: to specify the rules, to adapt them to the present needs of the international community and to create complementary rules that will give the international community a better understanding of the rules.
    - Composition of ILC: representatives of the major civilizations and legal systems of the world shall be represented. Since GA Resolution 36/39, November 18, 1981, 34 members (distribution of seats) 8 from Africa, 7 from Asia, 3 from Eastern Europe, 6 from Latin AmericaAsia, 3 from Eastern Europe, 6 from Latin America, 8 from Western Europe and others, and 2 rotating members.
      - ✓ five-year term of office and are elected on a rotating basis.
      - ✓ independent experts and not as representatives of the governments of which they are nationals.

- Steps of the codification process:
  - ✓ Choice of the topic by the General Assembly or by the ILC itself.
  - ✓ Appointment of a rapporteur or "Special Rapporteur".
  - ✓ Presentation of successive reports on the topic that are debated by the Commission until a preliminary draft of articles, with commentaries, is approved.
  - ✓ Approved preliminary draft of articles, with their respective comments, will be communicated to the governments.
  - ✓ Taking into account their observations, the Commission prepares a final draft of the articles, which it submits to the GA, with one of the following recommendations (not limited by the ILC proposal):
    a. to take no action;
    b. to take note of the report or to adopt it by resolution;
    c. to recommend the draft to Member States for the purpose of concluding a convention; or
    d. to convene a conference for the purpose of concluding a convention.

❖ The ILC shares the codification function with other UN bodies and institutions, such as the VI Committee of the General Assembly (Legal Committee), the Commission on Human Rights (CHR), and the United Nations Commission on International Trade Law (UNCITRAL).

- In a number of cases, intergovernmental bodies created on an ad hoc basis to prepare the codification work in particular sectors, such as outer space law (Space Committee), the regime of the seabed (Seabed Committee), the principles governing friendly relations and cooperation among States (Committee on the Principles of the Charter), or the reform of the Charter and the strengthening of the role of the Organization (Committee of the same name).
- In the field of the Law of the Sea, the UN entrusted the renewal of the codification work to the Third United Nations Conference on the Law of the Sea.
- Some specialized agencies of the United Nations system (ILO, UNESCO, etc.) have also carried out relevant codification work in the thematic areas in which they are involved.