



UNIT 1. INTERNATIONAL COMMUNITY AND INTERNATIONAL LAW

1. The International Community: historical evolution and current configuration.
2. The impact of the structure of the International Community on the international legal order.
3. Concept and characteristics of International Public Law.

THE INTERNATIONAL
COMMUNITY: HISTORICAL
EVOLUTION AND
CURRENT
CONFIGURATION

- A. Formation of international society
 - A.1.- *The origins of international society: the Peace of Westphalia of 1648*
 - A.2.- *International society between the two world wars: the League of Nations*
- B. The international society after the Second World War
 - B.1.- *The East-West confrontation: cold war, coexistence and distension*
 - B.2.- *The North-South confrontation: political and economic aspects*
- C. The international community in the era of globalization

- Public international law: system of rules that applies to the subjects of the international community.
- Public international law constitutes a "different product" that goes beyond the typical schemes of domestic law because of the characteristics of the international social environment. We all live in national systems (laws for individuals, centralized institutions, system of enforcement). What are those characteristics?
 - Interstate vs. statehood. "Fictitious person phenomenon".
 - Structure of juxtaposition (not superposition) between sovereign states. Horizontal relationships and lack of centralized global governance.
 - Creators and addressees of norms: functional splitting.
- Non-authoritarian, self-managed order in which hierarchization gives way to coordination.
- Need to know the international social environment for its definition, and therefore: historical configuration. *Ubi societas, ibi ius + sicut societas, sic ius*
- Usually, we distinguish stages in its evolution:
 - XVI-XVII centuries (1648) to end of WW1 (1919)
 - Between WWs (1919-1938)
 - End of WW2 (1945) - End of Cold War (1989)
 - The present period

A. FORMATION OF INTERNATIONAL SOCIETY

A.1. ORIGINS OF INTERNATIONAL SOCIETY: THE PEACE OF WESTPHALIA 1648 TILL THE END OF FIRST WORLD WAR

- The premise for the existence of the public international law is the existence of at least two independent political entities: never during Roman Empire model.
- Remote origins: medieval period of relations between feudal political entities characterized by common Christian faith and subordinated to the supreme spiritual authority of the Pope: *res publica christiana*.
- Subsequently: two-headed system (empire and papacy) relations between the three centers of temporal power (Sacred Roman Germanic Empire of Charlemagne, Eastern Roman Empire of Byzantium and Islamic Caliphate of Bagdad).
- Near origins (XVI-XVII centuries): Europe plurality of national states independent of the Papacy and the Empire. Thirty Years' War: Peace Treaties of Westphalia (Münster and Osnabrück) 1648 gave rise to the "order of Westphalia".
 - System formed by national states (modern nation-states) independent of the Church and with "*ius foederationis*".
 - States recognize each other as sovereign within precise borders. Distribution of power in Europe.

- Legal rights and obligations in the international sphere.
- International law:
 - Eurocentric (gap between European and non-European states after industrial revolution).
 - Imperialist-colonialist law: limitation attempts. Calvo Doctrine, Drago clause (Hague Conventions 1899-1907), Monroe Doctrine USA.
- Transformation of international society:
 - WW1 (1914-1918): passing of the European age (rise of USA, USSR, end of colonialism expansion).
 - Soviet revolution (1917): Opposing economic and ideological roots of other states.
 - Self-determination of peoples
 - Substantive equality of states
 - International socialism
 - Partial rejection of international law

A.2. INTERNATIONAL SOCIETY BETWEEN THE TWO WORLD WARS (1919-1938)

- End of the WW1: Versailles Peace Treaty 1919
 - Creation of League of Nations (1919).
 - First example of international organization (IO) with universal vocation and general powers.
 - General prohibition on wars initiated before a cooling-off period of three months (arbitral award or judgment).
 - Objective: develop cooperation between nations; guarantee international peace and security.
 - Limited powers BUT positive actions for the development of international law:
 - ❖ Creation of the Permanent Court of International Justice (PCIJ) 1920. Conflict resolution between states.
 - ❖ Fostered institutionalized cooperation in economic, financial, transport and communications, public health, and social and labor fields.
 - ❖ Establishment of the "mandate system": colonies of the countries defeated in WW1.
 - ❖ Institutional model that would inspire other international organizations - with a body of officials independent of states.

- But: premature collapse and relatively small legacy.
 - It did not become strong enough to fulfill its essential objectives: peacekeeping (Manchuria Invasion, Italy-Abyssinia War; Sudetenland-Germany).
 - It never had a universal membership: USA never participated due to lack of Senate ratification; USSR expulsion; Japan and Italy withdrew;
 - Nazi invasion of Holland meant its end.

B. INTERNATIONAL SOCIETY AFTER SECOND WORLD WAR

- End of the 2nd World War: New world organization
 - San Francisco Charter (26/6/1945) UN with a fundamental and ambitious purpose: to preserve peace among nations.



"We the peoples of the United Nations, determined: To preserve (...) To reaffirm (...) To create (...) To promote (...) To promote (...) To practice (...) To unite (...) To employ (...) To practice (...) To unite (...) To employ (...) We have decided to unite our efforts to achieve these goals".

- However, it has not been possible:
 - Confrontations for reasons of world hegemony: East-West confrontation (Cold War-1946).
 - Confrontations for reasons of disparities in development between peoples: North-South confrontation.

B.1. THE EAST-WEST CONFRONTATION: COLD WAR- CONFRONTATION-DISTENSION

- Cold War: After creation of the UN, ideological confrontation between the superpowers USA – USSR (+ socialist East European countries).
 - Imminent danger of total war due to grouping in communist and capitalist "blocs" (NATO and Warsaw Pact).
 - There were "minor" military confrontations (such as Korea 1950). - But no direct confrontation due to "strategic balance of terror".
- Peaceful coexistence: doctrine proclaimed by Khrushchev in 1956 and assumed by the UN in GA Res. 2625 (XXV), of 24 October 1970: Declaration on the principles of international law (IL) concerning friendly relations and cooperation in accordance with the principles of the charter.
 - Refraining from the threat or use of force
 - Peaceful settlement of disputes
 - Non-intervention in internal affairs
 - Co-operation among states
 - Equal rights and self-determination of peoples
 - Sovereign equality
 - Fulfilment in good faith of obligations under international law

- Eased tensions between superpowers: Distension
 - 1970s: - admission of the two Germanys to the UN in 1972
 - 1974: - US-USSR strategic arms limitation agreements (SALT I)
 - Final Act of the CSCE 1975: new declaration of principles.
 - *I. Sovereign equality, respect for the rights inherent in sovereignty*
 - *II. Refraining from the threat or use of force*
 - *III. Inviolability of frontiers*
 - *IV. Territorial integrity of states*
 - *V. Peaceful settlement of disputes*
 - *VI. Non-intervention in internal affairs*
 - *VII. Respect for human rights and fundamental freedoms, including the freedom of thought, conscience, religion or belief*
 - *VIII. Equal rights and self-determination of peoples*
 - *IX. Co-operation among states*
 - *X. Fulfilment in good faith of obligations under international law*
 - Fragility "détente".
 - Soviet invasion of Afghanistan 1979 and termination of SALT II negotiations.
 - Ronald Reagan US President in 1982 and anti-communist intransigence.
- End of Cold war: Berlin Wall.
 - Perestroika
 - Globalization...

B.2. THE NORTH-SOUTH CONFRONTATION: POLITICAL AND ECONOMIC ASPECTS

- The East-West conflict is part of a larger conflict: North-South.
- We can distinguish:
 - Political aspects
 - Economic aspects
- Political aspects: THE MOVEMENT OF NON-ALIGNED COUNTRIES
 - 1950s: Third World leaders in favor of "positive neutralism" → "non-alignment".
 - 1961: Criteria for admission as a member state of the Non-Aligned Movement (not perfect in application):
 - Exercise of an independent policy, based on peaceful coexistence.
 - Support for national liberation movements → decolonization boom.
 - Non-membership of collective military pacts (neither NATO nor Warsaw Pact).
 - No bilateral alliances with the great powers.
 - Not having foreign military bases in national territory.
 - Persists today despite overcoming the East-West conflict.
 - Preliminary meetings to unify positions before the beginning of the UNGA session.

- Economic aspects: the call for a "new international economic order" (NIEO)
 - Action within the UN framework (failed due to lack of support from rich countries):
 - Background:
 - ❖ GA Res. 1710 (XVI) of 19-12-1961: United Nations Development Decade. A Programme for international economic co-operation.
 - ❖ GA Res. 1785 (XVII) of 8-12-1962: convenes United Nations Conference on Trade and Development (UNCTAD).
 - Numerical majority of developing countries → G-77 is born.
 - ❖ GA Res. 2626 (XXV) of 24-10-1970: International Development Strategy for the Second UN Development Decade.
 - The establishment of the **NIEO**?
 - ❖ Late 1973: oil crisis triggered by OPEC.
 - Developing state power: producers of natural resources needed by rich countries.
 - ❖ Special session GA spring 1974. Group of 77 born in UNCTAD (today, more than 140 states) passed two consensual resolutions:
 - GA Res. 3201 (S-VI) of 1-5-1974: Declaration on the Establishment of a NEIO
 - GA Res. 3202 (S-VI) of 1-5-1974: Programme of Action on the Establishment of a NIEO.

- New principles (not all enshrined in practice):
 - i. Permanent sovereignty of states and peoples over natural resources and all economic activities, including the right to nationalize.*
 - ii. Control of the activity of transnational corporations.*
 - iii. The establishment of a fair trade in the prices of international commercial transactions.*
 - iv. Preferential and non-reciprocal treatment in favor of developing countries.*
 - v. The transfer of technology to developing countries*
- AG 3281 (XXIX) of 12-12-1974: Charter of Economic Rights and Duties of the States.
 - ✓ Adopted by majority with opposition from developed capitalist countries.
 - ✓ Initiates North-South schism over the establishment of the NIEO.
- Subsequent developments: From North-South dialogue to "dialogue of the deaf".
 - Abandonment of the UN forum.
 - ❖ in GA, numerical majority developing countries → adopt "resolutions".
 - ❖ "resolutions" are not legally binding
 - ❖ developed countries do not make development commitments to developing countries.

- Convene international diplomatic conferences.
 - ❖ Can adopt "international treaties" - treaties are binding on ratifying states.
 - ❖ Developed countries usually either do not attend or do not ratify treaties adopted without their consent (= by majority) → nothing accomplished.
- "G7": capitalist developed countries promote their economic cooperation through meetings of the "Big Seven".
 - ❖ USA, Canada, West Germany, France, UK, Italy, and Japan (+ EU observer).
 - ❖ in 90s, Russia admitted (for political, not economic reasons) → "G8".
 - ❖ From the economic board to the political board.
- "Smoothing" or "make-up" of the board?
 - ❖ After the G7 meetings, the "G20" has been convened since 2000.
 - ❖ According to the G20 website: *"Currently the G20, is composed of developed countries and emerging or developing countries. This composition responds to two phenomena that are transforming current international relations: 1) the growing influence of emerging countries in global political and economic issues and; 2) the growing influence of emerging countries in global political and economic issues and; 3) the growing influence of emerging countries in global political and economic issues and; 4) the growing influence of emerging countries in global; 5) the need to find innovative forms of cooperation to face the new global financial challenges that require a collective response".*

- ❖ The G20 members are: Argentina, Australia, Brazil, Canada, China, France, Germany, Japan, India, Indonesia, Italy, Mexico, Russia, South Africa, Saudi Arabia, South Korea, Turkey, United Kingdom, United States, and the European Union. Spain is also invited as a permanent guest.
- ❖ Each year, the Presidency invites guest countries, which take full part in the G20 exercise. Several international and regional organizations also participate, granting the forum an even broader representation.

C. INTERNATIONAL SOCIETY IN THE ERA OF GLOBALIZATION

➤ THE END OF BIPOLARISM (1988-1991):

- Rapprochement of superpower leaders: Gorbachev (perestroika) and 2nd Reagan term.
- First consequences:
 - solution of “deadlocked” conflicts (Cambodia, Afghanistan, and Namibia).
 - 1988 Intermediate-Range Nuclear Forces Agreement: dismantling of medium-range nuclear missiles installed in Europe.
 - 1989: Fall of the Berlin Wall and reunification of Germany.
 - ❖ Consequences:
 - 1990 CSCE: Joint Declaration of 22 States.
 - Charter of Paris for a new Europe, guidelines for "a new era of democracy, peace and security".
 - 1991: Russia leaves the USSR, which immediately dissolves.
- End of the East-West conflict allows the UN to be "resurrected":
 - Kuwait crisis 1990: appearance of the Security Council
- Bipolar confrontation disappears BUT "new" wars appear.

➤ THE TRANSITION TO GLOBALIZATION

- Since the Charter of Paris: monopoly of the market economy on a world scale: appearance and consolidation of private companies in Russia, China, Cuba, etc.

- 1995: WTO replaces the GATT.
 - trade liberalization → economic globalization.
 - China's accession to the WTO.
 - Problems: "delocalization" → emergence of "emerging economies".
- Political-military dimension:
 - absolute USA predominance (global mediator).
 - ❖ USA foreign policy swings with each administration.
 - Bush, Jr.: 9/11 and imperialist unilateralism
 - ✓ Iraq war without prior authorization Security Council.
 - Obama: return to restricted multilateralism.
 - ✓ USA acts in accordance with the Security Council (yes in Libya; no in Syria)
 - ✓ USA promotes the G-20 especially in face of 2008 global financial crisis.
 - Trump: rejection of multilateralism
 - ✓ Abandonment of Paris Agreement
 - ✓ Economic wars.
 - Biden?
 - Afghanistan 2021 Crisis.
- Ukraine War. IS THIS THE END OF MULTILATERALISM AS WE KNOW IT?

STRUCTURE OF THE INTERNATIONAL COMMUNITY

A. Subjects and actors in presence

B. Domination relations, reciprocity relations and cooperation relations

B.1.- Domination relations: the law of power

B.2.- Reciprocity relations: the law of agreement

B.3.- Relations of cooperation: the law of solidarity

C. Transition from the “relational” society to the “institutional” society

A. SUBJECTS AND ACTORS

➤ *Ubi societas, ibi ius:*

- Plurality of "actors" in international relations, BUT limited number of "subjects":
 - States,
 - IOs,
 - and individuals.
- Societal and community elements in international relations. Aspiration to achieve an "international community".

B. DOMINATION RELATIONS, RECIPROCITY RELATIONS AND COOPERATION RELATIONS

- *Classification of international relations (Schwarzenberger):*
 - Relations of domination: "law of power".
 - Relations of reciprocity: "law of agreement or treaty".
 - Relationships of cooperation: "law of solidarity".

C. TRANSITION FROM THE “RELATIONAL” SOCIETY TO “INSTITUTIONAL” SOCIETY

- *The transition from "relational" society to "institutional" society.*
 - Coexistence of two sociological models in international relations:
 - “Relational” (universal) society: juxtaposition of 200 sovereign states.
 - ❖ inorganic, decentralized, and anarchic structure.
 - ❖ "functional splitting" of states:
 - Legislative function
 - Judicial function
 - Executive function
 - ❖ Law of coordination - characteristics:
 - Consensualist voluntarism.
 - Particularistic relativism
 - Formal positivism
 - “Institutional” (particular) society: emergence IOs (each with its own organizational structure, its own centralized authority and its own division of functions).
 - ❖ "Relatively" organized structure, centralized, and with division of functions.
 - ❖ Law of subordination - characteristics:
 - existence of peremptory norms (*ius cogens*).

- universal validity (=erga omnes) of certain obligations.
 - promotes fundamental interests of the international community.
- Reciprocal influence of both structural models
 - UN encompasses both structures
 - has 194 state members.
 - UN "family" or "system": UN system agencies+ regional agreements.
- International law in the globalization era - "Global society":
 - Universal society + global problems
 - Despite economic globalization, the state persists as a major player in international relations.
 - ❖ Appearance of "rogue" and "failed" states.
 - ❖ Persistence of international organizations with a crisis of effectiveness - crisis of multilateralism?
 - Despite economic globalization, increase in regionalism through integrating international organizations (e.g., European Union).
 - Debate between universality and fragmentation of international law:
 - Risks of fragmentation of international law due to:
 - ❖ Increased international problems → increase in international law rules → sectorialization of international law.
 - ❖ Complexity of matters to be regulated → emergence of special regimes.

- ❖ Increase in regional treaties.
- ❖ Proliferation of specialized international tribunals.
- Permanence of the universality of international law due to:
 - ❖ Unique criteria for the interpretation and application of international norms.
 - ❖ Existence of peremptory norms (*ius cogens* international).
 - ❖ Existence of an incipient normative hierarchy.
 - ❖ Existence of norms that regulate successive treaties on the same subject matter.
- Increase in "humanizing" norms: human rights, international criminal justice, and humanitarian emergencies.

INTERNATIONAL LEGAL ORDER

A. Concept, legality, and specificity of international law

B. Characteristics

B.1.- Validity of principle of effectiveness

B.2.- Consensualist nature

*B.3.- Existence of mandatory rules: *ius cogens**

i. Consecration and characters

ii. Determination of *ius cogens* norms

A. CONCEPT, LEGATITY, AND SPECIFICITY OF INTERNATIONAL LAW

- First stages of international community (classical international law): laissez-faire approach.
 - Freedom, equality, and effectiveness.
- Adoption of UN Charter 1945: fundamental principles
 - Self determination of peoples; peaceful settlement of disputes; prohibition of the threat or use of force.
- Revision of UN Charter principles: Standards of GA Res. 2625 (XXV) of 24 October, 1970: Declaration on the principles of IL concerning friendly relations and cooperation in accordance with the principles of the charter.
- Synthesis of the delimitation criteria:
 - subjective: nature of the subjects.
 - formal: nature of the applicable sources or rules.
 - material: nature of the content of the regulated relationships.
- Definition: the set of rules forming the legal order of the international community.

B. CHARACTERISTICS

B.1. VALIDITY OF PRINCIPLE OF EFFECTIVENESS

- “*Ex facto oritur ius*” (from the facts law is born).
 - the tension between facts and law is solved by adjusting law to the facts.
- Functions of the principle of effectiveness in public international law:
 - Constitutive function: international law recognizes “a posteriori” a factual situation whose initial legal regularity is doubtful (conservative character of the law).
 - *Examples*: existence of a state, mode of acquiring sovereignty over *terra nullius*, application of humanitarian international law.
 - Modifying function: consolidates the transformations of the law in force (revisionist character of the law in collaboration with custom).
 - *Examples*: emergence of new marine areas subject to the sovereignty or jurisdiction of the coastal state (continental plaque or exclusive economic zone).
 - Adjudicative function: criteria for resolving conflicts between legal titles of different states (the more effective title prevails).
 - *Examples*: disputes on nationality of the person (Nottebhom case); on border issues (Burkina Fasso v. Mali).
- Limits to the principle of effectiveness in public international law.
 - Doctrinal relativism: effectiveness and recognition.

- As a general rule, *ex in iuria non oritur ius* - BUT international law does not sanction all acts contrary to it.
 - ❖ Each state may or may not "recognize" a situation as legally legitimate: it will be lawful (relativism) for the one who recognizes it. Exercise of an independent policy based on peaceful coexistence.
 - ❖ *Erga omnes* is an unlawful situation.
- Judicial radicalism: the ICJ 1971 Namibia Advisory Opinion (Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276) 1970:
- ❖ reaffirms the principle *ex in iuria non oritur ius*.
 - State author (= South Africa) has the obligation to put an end to unlawful situation.
 - Other states (UN members and non-members): obligation not to recognize it.
 - Time does not remedy illegal situation: (ICJ 2004 Opinion on the Construction of a Wall in Occupied Palestinian Territories).

B.2. CONSENSUALIST NATURE

- Public international law is a "consensualist" legal system.
 - International norms are born:
 - from the consent of each state (= sovereign will). The consent of the state is a fundamental element in the formation of fundamental norms and obligations of particular effectiveness:
 - ❖ In the conclusion and application of treaties;
 - ❖ In the genesis of IL. customs of particular effectiveness (local or regional).
 - ❖ In the binding nature of unilateral acts.
 - From the common consensus of the states composing the international community.
 - ❖ The common consensus of the states is a fundamental element in the formation of universally effective rules.
 - The consent of each state cannot create universal rules (voluntarist relativism).
 - The generalized consensus of the state can create universal norms.
 - ✓ Treaties that are binding not only on the state parties, but for all.
 - ✓ Treaties that establish an objective territorial regime (e.g., a boundary)
 - ✓ General normative treaties recognized by the international community as a whole (e.g., Antarctic treaties, outer space treaties, etc.)

- Universally effective custom (arising from the generalized practice of the states, but not every state).
- General principles of law: obligatory for all (ICJ 1951 Opinion on Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide).
- Consequences of consensualist character:
 - the important thing is the consent of the state and not the forms of manifesting it: non-formalist character of international law.
 - only the consensus of the international community overcomes the voluntarist relativism: foundations of the existence of a universal international norms (*auctoritas totius orbis*).

B.3. EXISTENCE OF MANDATORY RULES: IUS COGENS

- All legal systems have:
 - Dispositive rules (they admit agreement to the contrary)
 - Examples: apartment lease agreement.
 - Imperative rules (do not admit contrary agreement)
 - Example: criminal law.
- In public international law: voluntarist positivism denied its existence, but *jus cogens* norms recognized in Arts. 53 and 64 Vienna Convention on the Law of Treaties (VCLT) and UN Charter.
- International *ius cogens* characteristics:
 - Imperativity: its compliance does not admit exceptions.
 - Generality: genesis by consensus IC but universal efficacy (= general international law).
 - Mutability: it can appear, be modified, or disappear.
 - Hierarchy: superior "material" hierarchy.
 - Jurisdictionability: Art. 66 a) VCLT.
- The determination of the rules of international *ius cogens*
 - Uncodified subject matter → to be determined by states practice and international jurisprudence.

- Recognized examples
 - prohibition of use of force (of aggression).
 - principle of self-determination of colonial peoples.
 - human rights norms (prohibition of slavery, torture, etc.).
 - prohibition of international crimes of the individual (genocide, crimes against humanity and war crimes).
 - some norms of environmental international law.
- [Topic under consideration](#) in International Law Commission: “*peremptory norms of general international law (jus cogens)*”.



Esta obra está protegida con una [Licencia Creative Commons Atribución-NoComercial-SinDerivar 4.0 Internacional](#).