



The Law of the International Community: Subjects and Sources of International Law

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1- General Characteristics of the International Legal System

What is international law?

- International (public) law as «the law of nations»
- Different discipline from **private international law**, that is a branch of domestic law dealing with those cases, within particular legal systems, in which foreign elements obtrude, raising questions as to the application of foreign law or the role of foreign courts.

see PCIJ *Case of Serbian Loans* (1929), p. 41:

“Any contract which is **not** a contract between States **in their capacity as subjects of international law** is based on the municipal law of some country. The question as to which this law is forms the subject of that branch of law which is at the present day usually described as **private international law or the doctrine of the conflict of laws**. The rules thereof may be common to several States and may even be established by international conventions or customs, and in the latter case may possess the character of true international law governing the relations between States. But apart from this, it has to be considered that **these rules form part of municipal law**.”

- Rules of **international law** must also be distinguished from what is called international **comity** (practices implemented solely through courtesy, that are not regarded as legally binding)

see ICJ *North Sea Continental Shelf Cases* (1969), paras. 21-

«Does the equidistance-special circumstances principle constitute a **mandatory rule**, either on a conventional or on a customary international law basis, in such a way to govern any delimitation of the North Sea continental shelf areas between the Federal Republic and the Kingdoms of Denmark and the Netherlands respectively?»

Shorter would be to ask «whether, in any delimitation of these areas, the Federal Republic is **under a legal obligation to accept** the application of the equidistance-special circumstances principle».

«It has never been doubted that the equidistance method of delimitation is a **very convenient** one, the use of which is indicated in a considerable number of cases».

«It would probably be true to say that no other method of delimitation has the same combination of practical convenience and certainty of application. Yet these factors do not suffice of themselves to convert what is a **method** into a **rule of law**, making the acceptance of the results of using that method **obligatory** in all cases in which the parties do not **agree otherwise**.»

«Juridically, if there is such a rule, it must draw its legal force from **other factors** than the existence of these advantages, important though they may be.»

- International law must also be distinguished from **international relations** (politics), meaning that international law is more specific.

It is true, though, that:

«Law and politics cannot be divorced. They are not identical, but they do interact on several levels. They are engaged in a crucial symbiotic relationship. It does neither discipline a service to minimise the significance of the other»

see M.N. Shaw, *International Law*, Sixth Edition, Cambridge, 2008, p. 68.

Ubi societas, ibi jus

International law as we know it today (with no overpowering presence of poles of authority imposing themselves on States) **is the law of the international society (community)**, formed by two categories of subjects:

- States** (basic, fundamental subjects)
- Inter-governmental international organizations** (functional subjects)

It performs the **three main functions** typical of any legal system:

- law making
- law determination
- law enforcement

Main features of the International Community

The International Community is **horizontal**, its basic subjects, **States**, are governmental structures, **political and military «powers»**, they have not delegated the performance of the functions of the international legal system to structured central organs (if not, to a very small extent, to some international organizations)

see A. Cassese, *International Law*, Oxford, 2001:

«National legal systems are highly developed. (...) Sophisticated organizational rules (...) resulted from the emergence within the State community of a group of individuals who succeeded in wielding effective power (...) the central organs acting on behalf of the whole community are responsible for the three main functions typical of any legal system : law making, law determination and law enforcement.»

«By contrast, in the international community no State or group of States has managed to hold the lasting power required to impose its will on the whole world community. Power is fragmented and dispersed. True, political and military alliances have occasionally been set up or a strong convergence of interests between two or more members of the community has evolved. However, these have **not hardened into a permanent power structure**. The **relations** between the States comprising the international community **remain largely horizontal**. No vertical structure has as yet crystallized, as is instead the rule within the domestic systems of States.»

Historical evolution of the modern International Community

- **Birth:** After the Peace of Westfalia, concluding the Thirty Years War (1648)

Münster and Osnabrück Treaties testified to the rapid decline of the Church and to the *de facto* disintegration of the Empire, recording the birth of an international system based on a plurality of independent States, that recognize no superior authority over them.

- **Massive enlargement:** with the end of colonialism

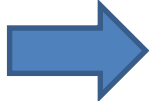
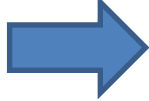
The International Community doubles twice the number of its subjects (now more or less 200 subjects)

How does international law work?

In absence of a vertical structure, who performs the functions of the international legal order?

States do.

- Uti singuli**, they are the subjects of the legal order, rules are directed to them
- Uti universi**, they perform the functions of the legal order

Law making: «spontaneously»  Custom
voluntarily  Treaties

Law determination: diplomatic and arbitral
means for the settlement of disputes

Law enforcement: Countermeasures by the
injured State

Is international law really law?

YES!

- Centered on the principle of **effectivity**: rules are necessarily «alive» (general rules are of customary nature)
- In disputes, **States do not deny** the existence of the rules, they deny to have violated them or they put into question their interpretation. No State has sought to maintain that it is free to object to the international legal system as a whole

L. Henkin, *How Nations Behave*, New York, 1979:

«Almost all nations observe almost all principles of international law and almost all of their obligations almost all of the time»