Global Governance
International Law and Contemporary Challenges

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

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5 – Sources: Treaties

Treaties: definitions

«**Merger of the wills** of two or more international subjects for the purpose of regulating their interests by international rules» (Cassese)

“"Treaty" means an international **agreement concluded between States** in written form and **governed by international law**, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation”

(1969 Vienna Convention on the law of treaties, VCLT, art. 2.1(a))

Voluntary regulation of interests through the conclusion of an **agreement** giving rise to **rights and obligations** among the Parties.

A lot of possible denominations: treaty, agreement, convention, protocol, act, charter, covenant, pact…

Treaties: founded on general international law. Basic rules

The obligatory nature of treaties is founded upon the customary international law principle that agreements are binding:

- **pacta sunt servanda**

If there has been a fundamental change of circumstances since an agreement was concluded, a Party to that agreement may withdraw from or terminate it (suspension also possible)

- pacta sunt servanda**, rebus sic stantibus**

"A fundamental change of circumstances which has occurred with regard to those existing at the time of the conclusion of a treaty, and which was not foreseen by the parties, may not be invoked as a ground for terminating or withdrawing from the treaty unless:

(a) The existence of those circumstances constituted an essential basis of the consent of the parties to be bound by the treaty; and

(b) The effect of the change is radically to transform the extent of obligations still to be performed under the treaty." (VCLT, art. 62.1)

Treaties do not bind other subjects, different from the Parties, nor they confer rights upon them

- **pacta tertiis nec nocent, nec prosunt**

A specific, important application of the so-called «rebus sic stantibus clause»

Succession of States to treaties

- When the **territorial dimension of a State changes** (absorption/secession), but not its subjectivity → "**mobility of the borders**" of the treaties

- When **the subject is changed** (replacement of one State by another in the responsibility for the international relations of territory) – merger/dissolution, new State-organization substituting the old one in a given territory

- for **political treaties: termination** (also called "personal" treaties, they establish rights or obligations deemed to be particularly linked to the regime in power and to its political orientation)

- for **territorial, "localised" treaties: succession** (examples: demilitarised zones, rights of transit, port facilities and other servitudes)

Conclusion of treaties

General international law does not impose specific procedures (or the written form)
Practice shows two principal ways of concluding treaties:

-Conclusion «**in a solemn form**»:

- **negotiations** («full powers» to plenipotentiaries) → text of the treaty
- **signature** (recognition of the text that has been negotiated, orientation to future ratification
- **ratification** (expression of the intent to be legally bound by the treaty)
- **exchange** or **deposit** of the instrument of ratification

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Entry into force – binding effect

- Conclusion «**in simplified form**» (so called «executive agreements»):

- negotiations
- signature (which expresses the consent to be bound)

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Entry into force – binding effect

Conclusion of treaties: the Italian Constitution

Each State has its own domestic rules regulating the competences of its organs in concluding treaties. The **Governments** are normally **in charge of conducting international negotiations**.

In Italy, the Constitution says

- **ratification** is an act of the **President**
- the **previous authorization of the Parliament** is required for the conclusion of important treaties

HENCE: it should be not possible to conclude important treaties in a simplified form, but it has happened in the past (adhesion to the United Nations)

- **manifest violation of a rule of internal law of fundamental importance regarding competence to conclude treaties** is a cause of **invalidity** of treaties (art. 46 VCLT) **– THE ONLY CASE OF RELEVANCE OF DOMESTIC RULES IN THE INTERNATIONAL LEGAL ORDER**

In the case of the Italian adhesion to the UN, Parliament has proved its approval of the adhesion when it voted laws descending from the Italian participation to the UN

Jus cogens in the VCLT

For a long time, the only **specific reference to jus cogens** in international documents was in articles 53 and 64 of the VCLT (now also the Draft articles on the responsibility of States for wrongful acts drafted by the International Law Commission and some decisions of the ICJ)

Treaties conflicting with a peremptory norm of general international law («jus cogens») are invalid, and exclusively for this cause of invalidity the VCLT sets a **complete compromissory clause** founding the competence of the ICJ to settle disputes among Parties on this issue

Reservations: definition and purpose

Definition: Unilateral statements made by States ratifying a multilateral treaty intended to either:

a)exclude the application of one or more provisions

b)place a certain interpretation on them

A real reservation is a ***conditio sine qua non*** for the State to ratify the treaty (different from «simple» interpretative declarations)

In the past they had to be negotiated, nowadays they can be formulated when ratifying, if the reservation is not prohibited by the treaty

Reservations **facilitate widespread adhesion** to multilateral treaties because they allow States to join regimes without accepting some specific rules that are problematic for domestic political or technical reasons

tools for flexibility

Reservations: limits under general international law

1951 ICJ Opinion about formulation of reservations upon ratification of the 1948 Genocide Convention and 1969 VCLT, art. 19:

Unless the Parties have agreed otherwise, reservations to treaties are permissible as long as they are **consistent with the object and purpose of the treaty concerned**.

But who checks this consistency? The depositary does not have this competence.

Parties will express themselves, **objecting** to the reservation if they believe it is incompatible with the object and purpose of the treaty.

In the mutual relations between reservating States and objecting States, the treaty cannot enter into force (there is no agreement, by definition; exceptional **sui generis** practice for human rights treaties)

«Codification» of general international law by treaty

International law Commission, organ of UNGA working for the «codification and progressive development» of international law

«**Codification conventions**» are multilateral treaties concluded with the **intent** of «just writing down» existing customs in a certain domain, without setting innovative rules by treaty

Not always, though, the «mere codification» intent is thoroughly respected during negotiations and anyway the concluded treaty could only be the **photograph of a fixed stage** in the life of a customary (living) rule

Though codification conventions can be useful elements in the reconstruction of the contents of a customary rule, the **practice and *opinio* of States must be checked** and *per se* the «codification convention» binds only the Parties to it, just like all treaties

Pacta tertiis nec nocent nec prosunt

It follows that to modify a previous treaty it is necessary to conclude a new treaty on the same object **among all the States Parties to the previous treaty**

It suffices that one State does not ratify the modifying treaty to necessarily maintain into effect the two different treaty regimes (the oldest one is applicable in the relations with the State that has not ratified the second one)

Usually, **conventional «systems»** are **composed by a treaty and several (additional) protocols** to the treaty, concluded at different times after the «source» treaty and complementing it only in the relations among those States that have ratified also the Protocol (e.g.: Barcellona Convention system, European Convention on Human Rights and Fundamental Freedoms system)