Global Governance
International Law and Contemporary Challenges

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

Federica Mucci

6 – Other sources; implementation of international rules within national systems

«General principles of law recognised by civilized nations» (a subsidiary source?)

Origins of the name: **art. 38.3 of the Statute of the PCIJ**, drafted in 1921 by an «advisory committee of jurists»

General principles common to the domestic legal systems of most countries, applied by international courts adjudicating disputes between States when no treaty or customary rule regulated the matter submitted to arbitration

BE CAREFUL: for the international rule to be formed, **also *opinio juris* at the international level** must exist

Examples: *nemo iudex in re sua*, *inadimplenti non est adimplendum*

«General principles of law recognised by civilized nations»

Rarely invoked in the past, dormant for a long time and revitalized when it has appeared that new areas of international law contained conspicuous gaps.

Applied in particular to:

- **international administrative law** (governing the relations between international organizations and their staff)

- **international criminal law** (*ad hoc* international criminal tribunals for ex Jugoslavia and Rwanda have frequently resorted to general principles of criminal law recognized in the principal legal systems of the world. Also the Rome Statute of the International Criminal Court envisages the possibility that the Court might resort to such a subsidiary source.

Norm-setting processes created by means of treaties

(Outside any organizational structure: treaty clauses on reciprocity)

Normally, within the framework of an **intergovernmental organization empowered to adopt binding legal standards** (feature of modern international law)

Major examples:

- **UN Security Council** (Resolutions)
- **European Union** (regulations, directives, decisions)
- **ICAO** (Procedures for Air Navigation Services and Annexes to the Chicago Convention)

Binding only the member States of the Organization

Soft Law

Not binding resolutions, usually adopted by the assembleary organs of international organizations (UN General Assembly, UNESCO General Conference…)

Usually named «**recommendations**» or «**declarations of principles**»

Very important example: UN Universal Declaration of Human Rights (1948)

It doesn't matter if they are repeatedly adopted in the same subject-matter: **repetition does not change their not-binding nature**

May be regarded as declaratory or indicative of a customary rule or helping to form such a rule, if *diuturnitas* and *opinio juris* have formed on a certain subject

Example: The 2003 UNESCO Declaration concerning the Intentional Destruction of Cultural Heritage, adopted by the General Conference «**Mindful of the development of rules of customary international law** as also affirmed by the relevant case-law, related to the protection of cultural heritage in peacetime, as well as in the event of armed conflict»

Implementation of international rules within national systems

Two principal theorical constructs:

- so-called **monistic view**, advocating the supremacy either of domestic law or of international law (international and domestic sources can be hierarchically ordered because they do not pertain to distinct legal orders)

- **Dualistic doctrine** (shared by the Italian Constitutional Court) suggesting the existence of **two distinct sets of legal orders**: international law, on one side, and municipal legal systems on the other

Implementation of international rules within national systems

International law provides that **States cannot invoke the legal procedures of their municipal system as a justification** for not complying with international rules (see Article 27 VCLT)

Though national implementation of international rules is of crucial importance because most international rules, to become operative, need to be applied by State officials or individuals within domestic legal systems, **international law does not contain any regulation on implementation**

Implementation of international rules within national systems

Each State is free to choose its own mechanism for implementing international rules (but not for **EU regulations, which are directly applicable** by provision of the EU Treaty **and**, as all binding acts of the EU, **prevail on conflicting domestic provisions** – Italian Constitutional Court: they do not prevail on fundamental constitutional principles)

A survey of national legal systems shows that **two basic modalities prevail**:

- **Automatic standing incorporation**: it occurs when the law (in Italy **art. 10 of the Constitution referring to international customs, so introduced in the national legal system at the Constitutional rank**) enjoins that all State officials as well as all nationals and other individuals living on the territory of the State are bound to apply certain present or future rules of international law. The internal rule provides in a permanent way for the automatic incorporation into national law, without there being any need for the passing of an *ad hoc* national statute.

- **Legislative *ad hoc* incorporation**: international rules become applicable within the legal system of the State only if and when the relevant parliamentary authorities pass specific implementing legislation
    - Translating the various treaty provisions into national legislation (**statutory ad hoc incorporation** of international rules, necessary for non self-executing international rules)
    - Enjoining the automatic applicability of the treaty within the national legal system, without reformulating that rule *ad hoc* (**automatic ad hoc incorporation** of international law)