



UNIVERSITÀ
DI SIENA 1240

FUNDAMENTALS OF INTERNATIONAL LAW

Master's Degree Course in International Sciences (LM-52)

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Topic Three

Sources of International Law (I)

Sources in Domestic Law

- Means by which legal rules are created
- Common law systems (e.g. UK): primacy of jurisprudential precedents
- Civil law systems (e.g. Italy): primacy codes and statutes
- Balance between stableness and evolution



The UN General Assembly as a Universal Legislative Body?

- No legal bindingness of resolutions (hortatory effect)
- But great influence on the international law-making:
 - Resolutions preceding conventions on the same subject matters (e.g. on human rights law)
 - Role of the International Law Commission for the codification and progressive development of IL

Statute ICJ, Article 38

“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”.



Statute ICJ, Article 38

- List of sources of IL
 1. International conventions
 2. International custom
 3. General principles of law
 4. Judicial decisions and teachings (subsidiary means)
- Positivist approach: conventions are listed before other sources and a voluntarist element is implied (“expressly recognized”, “accepted”, etc.)



International Agreements: Basic Features

- *Pacta sunt servanda* as ground rule of conventions → second degree sources
- Expression of consent by two or more subjects of IL over the legally binding regulation of a particular matter
- Bilateral or multilateral; closed or open
- Impose rights and obligations on the parties
- *Pacta tertiis nec nocent nec prosunt*



International Agreements: Historic Development

- Few and mainly bilateral treaties until the beginning of the XX century
- Outbreak in the second half of the XX century: social homogeneity of international society breaks
- Constituent treaties of IOs (e.g., the World Bank in 1944)
- Codification conventions (e.g., the Vienna Convention on law of treaties in 1969)
- Treaties protecting collective interests (e.g., human rights treaties)





WE THE PEOPLES OF THE UNITED NATIONS

determined

to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind, and

to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small, and

to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained, and

to promote social progress and better standards of life in larger freedom,

and for these ends

to practice tolerance and live together in peace with one another as good neighbors, and

to unite our strength to maintain international peace and security, and

to ensure, by the acceptance of principles and the institution of methods, that armed force shall not be used, save in the common interest, and

to employ international machinery for the promotion of the economic and social advancement of all peoples,

*have resolved to combine our efforts
to accomplish these aims.*

accordingly, our respective Governments, through representatives assembled in the city of San Francisco, who have exhibited their full powers found to be in good and due form, have agreed to the present Charter of the United Nations and do hereby establish an international organization to be known as the United Nations.

U N I T E D N A T I O N S

PREAMBLE TO THE CHARTER OF THE UNITED NATIONS

ISSUED BY U. N. DEPARTMENT OF PUBLIC INFORMATION

No. 31363

MULTILATERAL

United Nations Convention on the Law of the Sea (with annexes, final act and procès-verbaux of rectification of the final act dated 3 March 1986 and 26 July 1993). Concluded at Montego Bay on 10 December 1982

Authentic texts: Arabic, Chinese, English, French, Russian and Spanish.

Registered ex officio on 16 November 1994.

MULTILATÉRAL

Convention des Nations Unies sur le droit de la mer (avec annexes, acte final et procès-verbaux de rectification de l'acte final en date des 3 mars 1986 et 26 juillet 1993). Conclue à Montego Bay le 10 décembre 1982

Textes authentiques : arabe, chinois, anglais, français, russe et espagnol.

Enregistrée d'office le 16 novembre 1994.

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International Agreements: Formation

- *Solemn* procedure of formation (in the simplified procedure there is no ratification)
- Four phases:
 1. Negotiations
 2. Signature
 3. **Ratification** (or approval, accession, acceptance, etc.)
 4. Exchange or deposit of ratifications
- In Italy, the President of the Republic ratifies international conventions (with the authorization by the Parliament for some categories and the signature by proponent ministers)
- Minimum number of ratification or achievement of certain conditions for some treaties



International Agreements: Entry Into Force

- A treaty becomes a source of IL only when it enters into force and until it remains in force
- Adoption and signature of the text \neq entry into force
- Principle of good faith before the entry into force
- Minimum number or ratification or achievement of certain conditions for some treaties
- Codification conventions



International Agreements: Reservations

- Unilateral statement by a State to *exclude* or to *modify* the legal effect of certain provisions of the treaty in their application to that State
- Different functions: modification; exclusion; interpretation
- Compatibility with the object and purpose of the treaty
- *Utile per inutile non vitiatur*



International Agreements: Invalidity

- Lack of consent (essential error; fraud; corruption; coercion on the state representatives and on the state itself?)
- Contrast with *ius cogens*
- Manifest violation of internal constitutional rules on the conclusion of treaties
- *Ex tunc* effect



International Agreements: Extinction

- Uncontroversial grounds: termination; resolutive condition; withdrawal or denunciation; material breach; supervening impossibility of performance; total or partial abrogation through subsequent agreement
- Controversial ground: fundamental change of circumstances (*rebus sic stantibus*)
- Restrictive approach by the VCLT (Art. 62)
- Sunset clauses
- *Ex nunc* effect



International Agreements: Interpretation

- Arts 31-33 VCLT
- Objectivistic method (\neq subjectivistic method)
- Balance between literal or textual approach and purposive or teleological approach
- Contextual approach

