



UNIVERSITÀ
DI SIENA 1240

FUNDAMENTALS OF INTERNATIONAL LAW

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

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Topic One

Origin and Basic Features of International Law

What is Public International Law?

- Legal order regulating relations between states – “common language”
«*In a society of states much divided by ideologies, by religion, by poverty and wealth, by power and weakness, by size, by history, and by geography, it is well never to lose sight of the fact that the one vocabulary of ideas that they have in common is PIL*»
R. JENNINGS, “Sir Gerald Fitzmaurice”, in *BYIL*, 1984, p. 61
- Inter-state nature
- Above domestic legal systems, but strictly related to them
- Different from private international law and other branches of domestic law dealing with international matters



Compliance with Rules of International Law

- Constraints to the exercise of internal sovereignty of states
- Imposing legal obligations, but also conferring rights
- Classical bilateral model of interstate relations
- Silent daily compliance, but greater focus on the «duty-side» than on the «rights-side»



International Law and Domestic Legal Systems

- Three basic functions in common:
 - a) law-making;
 - b) law-assessment;
 - c) law-enforcement

BUT

- One fundamental distinctive feature: **horizontal structure**
- Sovereign equality of states
- Decentralized legal order
- Low level of institutionalization



Impact on the Basic Functions and Substantive Elements of International Law

- Consensual (or voluntary) mode of law making
- Consensual (or voluntary) nature of dispute settlement
- Resort to self-help in the ultimate law-enforcement function
- Absolute political independence between states
- Principle of non-intervention in the internal affairs of other states



Rebuttable Critiques

Is International Law really a law?

Of course it is! Though with **peculiar features**

1. Legality \neq effectiveness
2. Erroneous identification of IL with the goal of peace and justice set out in the UN Charter
3. State-based conception of law



The Historical and Ideological Evolution of International Law

- Peace of Westphalia (1648)
- Creation of an international community of sovereign states → formal equality
- Various attempts to revert the horizontal structure of international law
- Naturalism / (legal) positivism / soft positivism



The Development of International Law

- Increasing limits to state sovereignty
- Retention of basic prerogatives by states
- Two perspectives of development:
 - Organizational side: *emergence of international organizations*
 - Substantive side:
 - ✓ *Content* (enlargement to new sectors)
 - ✓ *Nature and function* (emergence of new categories of international rules of solidarity nature)
 - ✓ *Subjects* (increase in the number)



The Pendulum between Internationalism and Nationalism

- Apex of the internationalistic trend of international law at the end of the Cold War
- Several factors marked a trend reversal in the mid-1990s and early 2000s (interventionist policies, geopolitical instability, terrorism and extremisms, political setbacks, economic crises, etc.)
- International law in the limelight but also under threat



International Law as a Social Phenomenon

- Expression of the social and political process of origin
- Health of a legal order directly proportional to the health of society
- International law not only as a normative phenomenon (positivist approach), but as a mirror of society

«On doit nécessairement reconnaître que les défauts du droit international et la manque de précision de ses règles ne sont que la conséquence inévitable des imperfections et de l'instabilité qui caractérisent l'ordre intérieur ayant prévalu jusqu'à ce jour dans tous les Etats»

F. MARTENS, *Traité de droit international*, 1883-1887, p. 287

