**International Law (Prof. Antonio Bultrini) – Academic year 2019/2020**

**Complementary elements**

***IMPORTANT NOTE*:** complementary elements update or complete/modify the textbook's contents and are an integral part of the programme for the exam.

***DISCLAIMER***: the following complementary elements have been edited by Professor Bultrini and have not been submitted to or approved by the author of the textbook, Professor Malcolm N. Shaw. Therefore, apart from those including factual elements, they express solely Professor Bultrini’s views.

1. Taiwan and Kosovo

The textbook refers to the “(t)otal lack of recognition of Taiwan as a separate independent state” as reinforcing the fact that Taiwan would hardly be recognized the status of statehood it allegedly would never have sought. However, Taiwan (which has its own Ministry of Foreign Affairs: <http://www.mofa.gov.tw/en/default.html> ) has in fact sought recognition and has so far been recognized by **14 States plus the Holy See** (although none of the main international powers are amongst them). Furthermore and above all, Taiwan regularly negotiates and concludes bilateral treaties in an autonomous manner. A major example of this is the 2013 Taiwan-Japan Fisheries Agreement. Therefore, irrespective of China’s position and of the so-called “one-China policy” (a 1992 agreement where both sides agreed there was only one China but the divergent interpretation of which leads China to demand that third-States do not recognise Taiwan), in substance Taiwan does appear to fulfil all four basic requirements for statehood.

At this moment, Kosovo is recognised as a State by 114 States (see <http://www.mfa-ks.net/en/politika/483/njohjet-ndrkombtare-t-republiks-s-kosovs/483> ). Among European Union member States, Cyprus, Greece, Romania, Slovakia and Spain do not yet recognise Kosovo as a State.

1. “Persistent objector rule”

The textbook defines the “persistent objector” doctrine in that a State «opposing the existence of a custom from its inception would not be bound by it». However, in these terms this doctrine, which reflects a contractual idea of customary norms, is controversial. In particular, it has not been reiterated in any of the more recent judgments of the International Court of Justice**.** On the other hand, some States still support the doctrine (e.g. the United States, the United Kingdom, Turkey) and the International Law Commission, in its draft conclusions on identification of customary international law, takes account of it.

Having said that, the current legal dynamics save in any case the possibility that the relevant States’ acquiescence vis-à-vis the position of a possible objector would lead to a derogation being granted to the latter. The derogation’s scope would however be relative, in that it would only apply to the relations between the objecting State and the acquiescent States (of course, subject to compliance with peremptory norms). Another possible development resulting from a persistent objection could be to initiate a practice that, if it became general and was adequately supported by *opinio iuris*, might produce a modification of the norm or the formation of a new norm. Of course, pursuant to the basic mechanism of formation of customary norms, this development would require that an appropriate “critical mass” in favour of the objector State’s position be achieved.

In any event, it is important to note that the inclusion, by the International Law Commission, of the persistent objector doctrine in the above-mentioned draft conclusions, «is without prejudice to any issues of jus cogens» (see the commentary to conclusion 15, para. 10)**.**

1. Local customs

Part of the doctrine is of the view that local customs (such as that between Portugal and India referred to in the textbook) could be considered as a tacit agreement, rather than as a custom in the strict sense of the term. However, the international jurisprudence prefers the “local/particular custom” concept. An alternative term, somehow reflecting both ideas, could be “local/particular customary arrangement”.

1. Agreements between governments and insurgents qualifying as “treaties”

In short, agreements concluded between governments and insurgent movements qualify as “treaties”, within the meaning of international law, in the following three cases:

1. ceasefire agreements (*unless they are meant to be regulated by domestic law and the domestic legal system in question is still in operation*);
2. humanitarian agreements or agreements on the conduct of hostilities (*unless they are meant to be regulated by domestic law and the domestic legal system in question is still in operation*);
3. agreements between governments and insurgent movements to which third States or international organizations are also parties (*unless the agreement is regulated by national law, in which case only the part of the agreement relating to the third States’ or international organizations’ participation qualifies as a treaty*).
4. “Codification light”

A recent but very important phenomenon is the tendency, including by the International Law Commission (see pp. 84-86 of the textbook), to codify international rules by adopting non-binding instruments rather than by means of classical codification treaties. Non-binding codification instruments, therefore, formally fall under the “soft law” category but they pursue the aim to codify/determine international law in the same way as a codification treaty. Even though such instruments of “light codification” are not as such binding, they may – and do the more and more – lead to reflecting customary law by offering States’ a “handy” and flexible reference-document: if States’ practice and *opinio iuris* develop in the same direction, following the typical mechanism leading to the formation of customary rules, even a formally non-binding codification instrument may become very «influential as a reflection of customary international law» (see Santiago Villalpando, *Codification Light: A New Trend in the Codification of International Law at the United Nations*, in *Anuário Brasileiro de Direito Internacional*, 2013, pp. 117 ff., 149).

1. Definition of “Multinational/transnational corporations”

According to the “Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights”, approved on August 13, 2003, by the United Nations Sub-Commission on the Promotion and Protection of Human Rights (Resolution 2003/16), «(t)he term “transnational corporation” refers to an economic entity operating in more than one country or a cluster of economic entities operating in two or more countries - whatever their legal form, whether in their home country or country of activity, and whether taken individually or collectively» (para. 20).

1. Act of State/non-justiciability (in Chapter 4)

An additional example of the application of the doctrine of the act of state is represented by the judgment of the Italian Court of Cassation of 8 February 2002 No. 8157, concerning Italy’s involvement in 1999 NATO’s bombing campaign on Serbia, in respect of which the European Court of Human Rights ruled out a breach of the European Convention of Human Rights (*Marković and Others vs. Italy*, judgment of 14 December 2006).

1. State jurisdictional immunities

6.a) By judgment No. 238 of 2014, the Italian Constitutional Court held that Italy’s implementation of the International Court of Justice judgment in the *Germany v. Italy* case (p. 537 of the textbook) would violate a number of fundamental principles enshrined in the Italian Constitution, in that the granting of immunity to the German State with regard to acts amounting to war crimes and crimes against humanity, in the absence of any alternative remedy, would infringe particularly the right of access to a court for the persons affected by the acts in question. One of the key features of the Italian Constitutional Court’s reasoning was that military acts amounting to war crimes and crimes against humanity could not be qualified as legitimate sovereign activities.

6.b) In similar circumstances as those in the *NML Capital v. Republic of Argentina* case (p. 542 of the textbook), the US Supreme Court took a different approach from the UK Supreme Court and on 16 June 2014 the former court allowed bondholders, including NML Capital, to issue subpoenas to banks with a view to tracing Argentina’s assets abroad. This confirms that State practice varies in respect of the crucial distinction between sovereign and non-sovereign/commercial State acts for the purpose of deciding whether or not State jurisdictional immunity applies.

1. Functional immunity (cf. pp. 554-559 of the textbook)

9.a) Even though practice is not very consistent and grey areas still subsist, a government official performing official acts involving another State is granted functional jurisdictional immunities vis-à-vis the latter’s courts, that would continue also after the end of the governmental functions. All government officials enjoy at least this basic form of functional immunity, whereas specific categories of government officials, i.e. diplomats, consular officials, heads of state and government and ministers of foreign affairs, benefit also from various other privileges and immunities (see pp. 535-538 and 545-563 of the textbook), in addition to the said basic functional immunity.

However, two exceptions seem to have developed, whereby basic functional immunity (at least as far as criminal jurisdiction is concerned) would not be recognized to a foreign government official in case of:

i) *clandestine* activities *abroad* (in particular in the territorial State);

ii) international crimes.

9.b) The trend, concerning heads of state and government and ministries of foreign affairs, appears to go in the sense that they could be prosecuted, *after the person concerned ceased to hold the office*, also for international crimes committed during the period of office. Therefore, at least as far as international crimes (including torture) are concerned, the question of prosecution (including by courts of other countries) of such senior government figures seems to be less open than the textbook suggests.

1. Hong Kong (see p. 763 of the textbook)

The case of Hong Kong is one of the most interesting in this area. Pursuant to Article XIII of Annex I to the 1984 Agreement between China and Britain, on the basis of which Hong Kong was returned to China in 1997, both States notified the Secretary General of the United Nations that the two United Nations human rights covenants were to continue in force notwithstanding the fact that in 1997 China had not ratified any of them. In the meantime China has become a party to the UN Covenant on Social, Economic and Cultural Rights but it has not yet ratified the UN Covenant on Civil and Political Rights. The Hong Kong Special Administrative Region of the People’s Republic of China has nevertheless been regularly reporting to the control mechanism of the latter treaty on its implementation in the territory of Hong Kong (see: <http://tbinternet.ohchr.org/_layouts/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=8&DocTypeID=45&DocTypeID=29> ).

1. State succession and nationality

The sentence, in the middle paragraph at p. 759 of the textbook, “There may indeed be a principle … taken over by the successor State”, should logically be completed as follows:

«There may indeed be a principle in international law to the effect that the successor state should provide for the possibility of nationals of the predecessor state living in or having a substantial connection with the territory taken over by the successor state *to obtain the successor State’s nationality*» (*italics added*).

1. Bays

Note that waters enclosed within the 24 nautical miles limit laid down in Article 10 paragraphs 4 and 5 of the United Nations Convention on the Law of the Sea, as well as waters enclosed in historic bays, are considered as internal waters. As a consequence, the waters beyond these limits will be part of the territorial sea (up to 12 nautical miles, of course).

1. Duty to render assistance

The obligation to rescue persons in distress in the high seas, laid down in Article 98 of UNCLOS (“United Nations Convention on the Law of the Sea”), now reflects a customary rule. Note that according to Article 58 para. 2 of UNCLOS, «Articles 88 to 115 and other pertinent rules of international law apply to the exclusive economic zone in so far as they are not incompatible (…)».

1. Measures to avoid pollution arising from maritime casualties

Article 221 of UNCLOS seems to be entering into a customary rule.

1. Objective legal regimes (*see also point 22 below*)

Objective legal regimes constitute one of the important exceptions to the rule according to which treaties do not bind third States. However, the following requirements must be fulfilled for a treaty to give rise to an objective legal regime:

* the treaty aims at the collective management of areas or spaces that are not subject to State sovereignty (e.g. the Antarctic);
* all the key/authoritative States concerned are parties to the treaty and are capable to impose the conventional regime upon third States.
1. Difference between reprisals and countermeasures

The termination by a State of a treaty which has been seriously violated by another State party constitutes a countermeasure, i.e. an act which would be in itself illegal and has been adopted by one State in retaliation for the commission of an earlier illegal act by another State (textbook, p. 601). Therefore, reprisals short of force are now termed “countermeasures” whereas reprisals *stricto sensu*, i.e. involving armed force during peacetime, are unlawful (*ibidem*). Consequently, the second sentence of the paragraph “Material breach” at p. 717 of the textbook (and also, *mutatis mutandis*, p. 859) should be read in the sense that the above-mentioned situation (termination of a treaty as a retaliation/reaction to a serious breach of that treaty) is strictly speaking a countermeasure and not “a reprisal or countermeasure”.

1. Liability of member States of international organizations

Liability of member States of international organizations exists in particular in the following cases (these complete the situations referred to at pp. 1004-1006 of the textbook):

1. if the organization does not have legal personality (in this case responsibility lies only with member States);
2. the constituent instrument of the organisation or another treaty expressly provide for joint and several liability of member States (see e.g. Article VI of the Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies, p. 406 of the textbook);
3. individual State responsibility at the level of a regional institutional system (typically the European Union or the system of the European Convention of Human Rights) in case the member State of the regional system is deemed to have violated fundamental principles of the regional system when implementing obligations resulting in particular from its United Nations membership (in this regard see especially the *Kadi* case-law of the Court of Justice of the European Union and the European Court of Human Rights’ *Al-Dulimi and Montana Management Inc. v. Switzerland* judgment of 21st June 2016, paras. 137-149; p. 957 of the textbook, footnotes nos. 232-233);
4. when the member State acts together an international organization in the commission of an unlawful act (*shared responsibility*): this also concerns those situations where the member State retains *effective control* over the national contingent that is put at the disposal of the international organization, as was the case of the Dutch contingent operating within the UN-led peacekeeping mission in Bosnia during the Srebrenica events of July 1995, according to the important judgment by the Dutch Supreme Court of 6 September 2013 (*Nuhanović and Others v. the Dutch State*; see also p. 596 of the textbook).
5. Inquiry

Inquiry could also be construed as a complementary means for the settlement of disputes, which may serve both the political-diplomatic and the binding methods of dispute settlement. However, it may also play a specific function of its own: by aiming specifically to establish the relevant facts, irrespective of any possible subsequent dispute settlement process, and by clarifying the factual circumstances of a given event, it contributes to a more balanced/accurate assessment of the facts in the context of general political or reconciliation processes. As an example see the EU-mandated fact-finding mission on the war between Georgia and the Russian Federation in August 2008, which mission resulted in a comprehensive report submitted in September 2009 (<http://news.bbc.co.uk/2/shared/bsp/hi/pdfs/30_09_09_iiffmgc_report.pdf> ).

1. Arbitration on the South China Sea dispute

A summary of the 29 October 2015 award on jurisdiction and admissibility by the arbitration Tribunal in the case Philippines vs China (“The South China Sea Arbitration”) can be found at: <http://www.pcacases.com/web/sendAttach/1506>

A summary of the 12 July 2016 award on the merits can be found at: <https://pcacases.com/web/sendAttach/1801>

*Note that by a declaration dated 25 August 2006 China activated all the exceptions laid down in Article 298 para. 1 of the United Nations Convention on the Law of the Sea (these exceptions are mentioned at page 475, footnote no. 443, of the textbook).*

1. Settlement of disputes involving international organizations

Since international organizations may not appear before the International Court of Justice, in a number of cases the instrument of binding advisory opinions is resorted to: see e.g. Article 66 para. 2 of the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations. Furthermore, arbitration is generally available as a means to settle disputes involving International Organizations.

1. Aggression/armed attack

The definition of aggression (see p. 950 of the textbook) is also relevant for construing the notion of an “armed attack”, legitimizing the exercise of the right to self-defense. In fact, from a substantial point of view the two concepts tend to coincide and the difference between them relates to the formal function they are meant to play (“armed attack” with regard to self-defense, “aggression” in respect of the exercise of Chapter VII powers by the Security Council and in the field of responsibility for breaches of *erga omnes* obligations).

1. Objective scope of the exercise by the Security Council of its powers under Chapter VII of the United Nations Charter

The Security Council’s competences under Chapter VII of the United Nations Charter is another important case in which a treaty system impacts also on non-Parties (see Article 75 of the Vienna Convention on the Law of the Treaties).

1. Legal arguments invoked by the United States and the United Kingdom for justifying their unilateral invasion of Iraq in 2003

As the textbook explains (see the details at p. 961 and following), the United States and the United Kingdom essentially relied on an allegedly implied authorization by the Security Council. The textbook states that «whether this amounts to a justification in international law for the US and the UK to use force in the face of the opposition of other Security Council members remains controversial». The “implied authorization” argument is actually more than controversial, as it would amount to granting States “carte blanche” (a free hand) on deciding - in an arbitrary/unilateral manner - when to use force and for which purpose, outside any control by the Security Council, as it happened precisely in the case of Iraq’s invasion in 2003. As a matter of fact, many scholars, including from the UK, tend to reject this argument (see for example Lord Steyn, *The Legality of the Invasion of Iraq*, in *European Human Rights Law Review*, 2010, pp. 1-7). In this regard see also the “Report of the Iraq Inquiry” published on 6 July 2016, at <http://www.iraqinquiry.org.uk/>, in particular paras. 431-495 and 810 of the Executive Summary.

Also note that the US, UK and French intervention in the North of Iraq in 1991, as well as the subsequent setting up of no-fly zones, could be construed as a “humanitarian intervention” (on which see pp. 880-884 of the textbook), rather than as pursuing an “implied authorization”, taking account of the nature of the justifications put forward especially by the UK and France (cf. for example *Humanitarian Intervention. Ethical, Legal and Political Dilemmas*, J.L. Holzgrefe and R.O.Keohane Editors, Cambridge, 2003, p. 183 and following).

1. Srebrenica

The statement at p. 915 of the textbook, according to which «Srebrenica was then captured by Bosnian Serb forces in July 1995, involving major human rights abuses against the population», should be understood in much more dramatic terms, since acts of genocide were actually committed in Srebrenica, as was later established, inter alia, by the International Court of Justice in the *Bosnia and Herzegovina v. Serbia and Montenegro* judgment of 26 February 2007 (paras. 278-297).

1. Notion of “sanctions”

Strictly speaking, the term “sanctions” refers to sanctioning measures adopted by an international organisation *vis-à-vis its member States*.

1. Western Sahara/European Court of Justice

As reported in footnote 211 at p. 185 of the textbook, in its decision of 21December 2016 the European Court of Justice «quashed the decision of the General Court and denied legal standing to Polisario». However, it is worth noting that in the latter decision the European Court of Justice also established that the EU-Morocco Association and Free Trade Agreements could not be applied to Western Sahara, given that the People of Western Sahara, holding a right to self-determination, was a third party in respect of the EU-Morocco agreements and that it had not expressed its consent to their implementation within Western Sahara. The same principle has been recently reaffirmed with regard to the EU-Morocco Fisheries Agreement (European Court of Justice, Judgment of 19 July 2018).

1. Right to external self-determination

It must be underlined that “alien subjugation”, having taken place after the entry into force of the Charter of the United Nations, is one of the non-controversial situations in which a right to external self-determination is granted (cf. p. 203 of the textbook). “Alien domination/subjugation” «covers those situations in which any one Power *dominates* the people of a foreign territory by recourse to force» (Antonio Cassese, *Self-Determination of Peoples*, Cambridge, 1995, p. 99).

1. **Chagos Islands**

**On this issue see now the opinion of the International Court of Justice, delivered on 25 February 2019, a summary of which can be read here:** [**https://www.icj-cij.org/en/case/169**](https://www.icj-cij.org/en/case/169)

1. **Definition of self-executing treaty provisions**

**Treaty provisions can be considered as having a self-executing character if: 1) they are worded in a specific/detailed way that makes them capable, taking also account of the purpose and context, of being applied directly; 2) they were intended to confer enforceable rights and obligations on individuals. National courts play a very important role in this context. Note that in European Union law the question has a special relevance and is dealt following EU law-specific legal principles.**